T. D. 2/ 87

IN THE MATTER OF THE CANADIAN HUMAN RIGHTS ACT, S. C. 1976- 77, C. 33, as amended;

AND IN THE MATTER OF the Appeal filed under subsection 42.1(2) of the Canadian Human Rights Act by the Canadian Broadcasting Corporation dated December 31st, 1985, against the Human Rights Tribunal Decision pronounced on December 4th, 1985;

BETWEEN:

ROSANN CASHIN Complainant (Respondent)

- and

CANADIAN BROADCASTING CORPORATION Respondent (Appellant)

REVIEW TRIBUNAL: Sidney N. Lederman, Q. C., Chairman, J. Gordon Petrie, Q. C., Member, Muriel K. Roy, Member

DECISION OF REVIEW TRIBUNAL

APPEARANCES: David L. Russell, Q. C., Gerald Flaherty Counsel for the Canadian Broadcasting Corporation

Ronald A. Pink, Kimberley H. W. Turner Counsel for Rosann Cashin

James Hendry Counsel for the Human Rights Commission

DATES OF HEARING: October 28th and 29th, 1986 (Halifax, Nova Scotia)

Decision rendered January 29/ 87 >

INTRODUCTION

Roseann Cashin was prevented from continuing in her position as writer/ broadcaster with the Canadian Broadcasting Corporation (" C. B. C.") in Newfoundland not because her capabilities were brought into question but because of the fact that her husband was a prominent public figure. A Human Rights Tribunal (Susan Ashley) in a Decision dated November 25th, 1985, found that this action by the C. B. C. constituted discrimination on the basis of marital status contrary to sections 7 and 10 of the Canadian Human Rights Act (" C. H. R. A.") without any redeeming justification under section 14 and ordered the C. B. C. to:

(a) Make an offer to reinstate Mrs. Cashin to her former or a similar position as soon as possible;

(b) Pay to Mrs. Cashin a sum for lost wages to be determined by the parties, or if this is not possible to be determined by the Tribunal; and

(c) Pay to Mrs. Cashin the sum of $2,500.00 pursuant to section 41(3)(b) of the C. H. R. A. in respect of hurt feelings or loss of self respect as a result of the discriminatory practice.

This is an appeal from that Decision. The two major points in issue on this appeal are first, the scope of the term "marital status" in section 3(1) in the C. H. R. A. as a prohibited ground of discrimination and secondly, if marital status does encompass the circumstances in this case, whether or not perceived objectivity is a bona fide occupational requirement such that it would excuse discrimination on this basis by the C. B. C.

FACTS

Roseann Cashin married Richard Cashin in 1960. She began work in the media in 1968 and worked at C. B. C. for a short time followed by a stint in private radio before returning to the C. B. C. in 1976. She was employed, as has been the custom for writers/ broadcasters, on the basis of a 13 week contract which was routinely renewed. She held various positions with the C. B. C. such as reporter, writer/ broadcaster, producer and she also worked in an administrative capacity. In early 1980, C. B. C. developed the concept of a "Resources Unit" and Roseann Cashin was part of this group from its inception. Basically, the idea was to combine all of the people covering resource related topics - mining, hydro, fishing, agriculture and oil - into one unit to share expertise and promote within the group understanding of the various issues for the "fish broadcast" program.

Mrs. Cashin's husband, Richard Cashin, became President of the Newfoundland's Fishermen's Food and Allied Workers Union in 1971. Prior to that time, he had been a Member of Parliament for the period 1963 to 1968. He also has held many positions on public and private boards and agencies and has been a prominent spokesperson in Newfoundland on labour, politics and fisheries for years. The Tribunal below summed it up well by stating: "It is probably fair to say that the name Richard Cashin is well known to most Newfoundlanders". In 1981 oil became a key issue in Newfoundland particularly because of the Hibernia discoveries and in July of that year Mr. Cashin was appointed to the Board of Directors of Petro Canada. This was noted in the daily newspaper and was an item on the C. B. C. news.

For the summer of 1981 Mrs. Cashin was assigned responsibility for the program entitled "Regional Roundup". However, in May of that year there was a strike by NABET (National Association of Broadcast, Engineers & Technicians). Mrs. Cashin was a former member of this Union and she refused to cross the picket line although she was the only writer/ broadcaster to do so throughout the entire strike which lasted until September 1981. Although this fact was the subject matter of evidence before the Tribunal below and was mentioned before this Review Tribunal, it was not suggested that Mrs. Cashin's failure to cross the picket line played any role in the decision to remove her from her position. By September of 1981 Mrs. Cashin's 13 week contract had expired. She had a discussion about its renewal with Mr. Don Reynolds who had become producer of the Resources Unit. Mr. Reynolds informed her that he would not be able to renew her contract because of her husband's appointment to the Petro Canada Board in July. The

four producers at C. B. C. radio met the next day and unanimously agreed that she could not continue her work in the Resources Unit and Mr. Reynolds relayed this decision to Mrs. Cashin.

There are a few other factual events which had occurred prior to this decision by the C. B. C. producers, and upon which the C. B. C. relied before Chairman Ashley, to show that their decision in September of 1981 was not a hasty one but was based upon increasing concern about public perception of a lack of objectivity on the part of Mrs. Cashin in reporting stories about fish and oil. There was conflicting evidence on these matters at the original hearing and these events were not pressed in the arguments that were submitted to us. It was acknowledged by all counsel that the C. B. C. was proceeding on a genuine (although counsel for Mrs. Cashin would say misguided) basis in dealing with Mrs. Cashin.

At the time that Mrs. Cashin was told that there was no possibility that she could continue in her position in the Resources Unit because of her husband's profile, she had earned a reputation as a respected broadcaster. In fact, she had won two awards for her resource related journalistic work early in 1981.

MARITAL STATUS

In finding that there was discrimination based upon marital status, Chairman Ashley reviewed the development of the law with respect to an increasing recognition of the individual legal existence of a wife and with respect to the question of spousal identity and its relation to marital status.

There is a line of cases (Human Rights Boards and Courts) which has taken a narrow interpretation of marital status in fact situations somewhat different from the present. (See Blatt v. Catholic Children's Aid Society of Metropolitan Toronto (1980) 1 C. H. R. R. D/ 72, affirmed Ontario Divisional Court (unreported July 1981); Bosi v. Township of Michipicoten and K. P. Zurby (1983) 4 C. H. R. R. D/ 1252; Caldwell v. Stuart et al (1982) 3 C. H. R. R. D/ 165 (B. C. C. A.), affirmed for other reasons by S. C. C., [1984] 2 S. C. R. 603; St. Paul's Roman Catholic Separate School District No. 20 v. Canadian Union of Public Employees Local 2268 and Huber (1982) 3 C. H. R. R. D/ 915); which are counterbalanced by a number of cases suggesting that spousal identity is included in marital status. (Mark v. Porcupine General Hospital and Moyle (1985) 6 C. H. R. R. D/ 2538; Monk v. Hillman (1983) 4 C. H. R. R. D/ 1381; American cases including Kraft v. State of Minnesota (1979) 284 N. W. (2d) 386; Thompson v. Board of Trustees School District (1981) 627 P. (2d) 1229.)

Before examining the pronouncements in these cases and others, we must turn to general principles of interpretation of human rights legislation. For this, there is considerable guidance from the Supreme Court of Canada. In Craton v. Winnipeg School Division No. 1 [1985] 6 C. H. R. R. D/ 3014 the Court was faced with the conflict between Manitoba's Public Schools Act and its Human Rights Act. Mr. Justice McIntyre described the latter as "public and fundamental law of general application" and said at p. D/ 3016:

"Human Rights legislation is of a special nature and declares public policy regarding matters of general concern".

Since Chairman Ashley handed down her decision, the Supreme Court of Canada rendered two significant judgments which touch on this area of the law. In Ontario Human Rights Commission and O'Malley v. Simpson Sears [1985] 2 [S. C. R.] 536 Mr. Justice McIntyre speaking for the Court held that the Ontario Human Rights Code prohibited adverse discrimination by reference to the objectives of the legislation set out in the preamble of the Code. With respect to interpretation principles, he made the following statement at pages 546- 547:

"There [in the preamble] we find enunciated the broad policy of the Code and it is this policy which should have effect. It is not, in my view, a sound approach to say that according to established rules of construction no broader meaning can be given to the Code than the narrowest interpretation of the words employed. The accepted rules of construction are flexible enough to enable the Court to recognize in the construction of a Human Rights Code the special nature and purpose of the enactment ... and give to it an interpretation which will advance its broad purposes. Legislation of this type is of a special nature, not quite constitutional but certainly more than ordinary - and it is for the Courts to seek out its purpose and give it effect."

Mr. Justice McIntyre again wrote for the majority in Bhinder and The Canadian Human Rights Commission v. CNR [1985] 2 S. C. R. 559 and there implied that the federal Human Rights Tribunal was correct in adopting a liberal interpretation of the provisions which prohibit discrimination and a narrow interpretation of the exceptions.

With this approach to interpretation in mind, we now turn to the cases. We do not find cases such as Blatt, supra, which held that a dismissal of a child care worker employed by the Catholic Children's Aid Society because of a common law relationship was not discrimination based on marital status but rather a decision based on sexual morality and St. Paul's Roman Catholic Separate School District No. 20 v. CUPE Local 2268 and Huber, supra, in which the Saskatchewan Queen's Bench held that marital status did not include common law relationships, very instructive in our circumstances. Although, in one sense, they do support a restrictive interpretation of marital status they do not assist in answering the issue of identity because even assuming that marital status could not include common law relationships that does not mean that with respect to those persons who are married, spousal identity should be excluded. The mere exclusion of common law marriage status does not of necessity mean that a person who was legally married and discriminated against because of the activities or occupation of his or her spouse would not be protected. Neither of these decisions dealt with the issue of identity.

Similarly, two other decisions, referred to by counsel for the C. B. C. (Bailey v. Minister of National Revenue (1980), C. H. R. R. D/ 193 and C. H. R. C. v. Canadian Pacific Airlines (1983) 4 C. H. R. R. D/ 1392) concerned circumstances other than spousal identity and the reasoning therein is not very helpful for the present analysis.

Two other cases that were referred to should be considered. The first is Caldwell v. Stuart, supra, a case of a Catholic school teacher who was dismissed from her job upon the School Board's discovery that she had married a divorced non- Catholic. Chairman Ashley focused on a statement by Mr. Justice McIntyre in the Supreme Court of Canada to the effect that absent the religious aspect of the case, if Mrs. Caldwell had been employed in a public school and dismissed for the same reason she would be entitled to claim protection of the British Columbia

Human Rights Code. The Supreme Court of Canada held that the school was special and entitled to require its employees to act in accordance with the church doctrines as a condition of employment. The particular provision in the Code is unique in that it provides that "every person has the right of equality of opportunity based on bona fide qualifications" and goes on to prohibit discrimination unless reasonable cause exists. (Section 8(1).) In Section 8(2), religion and marital status are precluded from the defence of reasonable cause.

In the British Columbia Court of Appeal, Mr. Justice Seaton on behalf of the Court held that the factors outlined in Section 8(2) could never constitute reasonable cause but that marital status meant marital status of itself, and not a cause based on marital status. On the issue of reasonable cause, he remitted the matter back to the Board. Mr. Justice McIntyre, did not decide whether or not the analysis of marital status was correct. He held that the issue was not whether she had been dismissed for reasonable cause because marital status by the wording of Section 8(2) could not constitute it, but whether "by reason of the loss of the bona fide qualification in respect of her occupation she had lost the rights conferred by subsection (1)" (pages 93- 94).

This case is quite unclear as to the proper interpretation of marital status. While Chairman Ashley's perception of it is that Mr. Justice McIntyre, by logical inference must have included the identity of Mrs. Caldwell's spouse in the definition, in that he was a divorced non- Catholic, we doubt whether that is how Mr. Justice McIntyre intended his statement to be interpreted. In our opinion, the comment of Mr. Justice McIntyre goes to the fact that had Mrs. Caldwell been employed in a public school she would have had protection of the Human Rights Code, not necessarily because marital status included spousal identity, but rather because she would not have to overcome the hurdle of religious conformance before the provisions of the Code applied to her situation. He expressly did not deal with the Court of Appeal's analysis because the issue of marital status did not arise in his disposition of the case.

Similarly, we have some doubts about Chairman Ashley's application of the Bain decision. This was the case where the Complainant was denied the benefit of a reduced rate according to Air Canada's "family fare" policy because she was neither married to or involved in a common law relationship with the friend with whom she was travelling. The Tribunal's decision that there was discrimination based on marital status was overturned by the Federal Court of Appeal for the following reason:

"... the denial of an advantage to a single person cannot constitute discrimination based on marital status if that same benefit is equally denied in identical circumstances to married persons." (Page D/ 684)

Chairman Ashley held that according to this test, in the Cashin situation, the opposite is true:

"A married person is treated differently than an unmarried person in the same circumstances would be treated." (Page 24)

In our opinion, all that can be taken from Bain is that there was no discrimination at all. In the Bain case there was no difference in treatment and thus no discrimination on any grounds. The Court, however, implied that there was no discrimination on marital status in particular but the

reasoning doesn't clarify any definition of marital status except that it includes those that are single and those who are married. The test does not, in itself, determine that the cause was based on marital status and that is the very issue in our case, i. e. was Mrs. Cashin treated differently because she was married to a particular person? Mrs. Cashin was obviously treated differently than other single people but also differently than married people whose spouses did not have a high profile.

This interpretation of the Bain case also addresses the C. B. C. 's reliance upon Bain in support of its argument that marital status does not include identity. In our view, this simply didn't arise, given that the Court found that there was no difference in treatment among any passengers who sought to receive a reduced rate if they brought a friend along as a travelling companion.

That leaves us with the only two Canadian decisions which deal specifically with the question of spousal identity as it relates to marital status and they are in direct conflict with each other: Bosi, supra, on the one hand and Mark, supra, on the other. Both decisions are by Boards under the Ontario Human Rights Code.

At the time Bosi, supra, was decided, the Code did not provide a statutory definition of marital status and family status was not yet a prohibited ground. This case involved a wife who was refused employment as the town's accounts clerk because of her marriage to a man who was already employed by the town as a police officer. Chairman Martin Freidland held that marital status did not include the identity of one spouse although he had indicated his awareness of a broader view to the contrary in certain American cases. He felt that to follow the American view would be to go "beyond [marital status'] clear and natural meaning".

There are two factors which may well have coloured his analysis. First, as noted by Chairman Ashley, the Board may have been influenced by the prospective provision in the new Code - not then in force - with respect to the hiring of relatives by an employer. This case would have come under that provision had the circumstances taken place at a later time. That provision, now section 23(d) of the Ontario Human Rights Code, demonstrated an intention on the part of the legislature to avoid interference in some cases where nepotism was either allowed or denied by the employer. The second material factor is that Chairman Freidland went on to consider the matter on the basis that had there, in fact, been discrimination because of marital status, the employer there had a valid, bona fide, occupational qualification and requirement defence in that there was a real chance of a conflict of interest arising because of the nature of the Complainant's duties and the role of her husband in police salary negotiations as well as the fact that she would be handling her husband's own expense claims.

Chairman Ashley distinguished the Bosi case on the basis that the C. H. R. A. does not contain a provision with respect to nepotism similar to Ontario's and that on the Cashin facts no issue as to hiring of relatives arose. While we believe that this is correct we also think that the Bosi decision is singularly unhelpful because it is lacking in any analysis with respect to the identity issue. Chairman Freidland does not elaborate on why a restrictive interpretation represents the "clear and natural" meaning of the term; nor does he explain why the American approach should be rejected.

A statement in Tarnopolsky and Pentney, Discrimination and the Law (1985, DeBoo) at pages 9-11, 9- 12 aptly points out the problems in following the Bosi line of reasoning: "... the restrictive definition of marital status adopted by the Board is unfortunate because it was unnecessary for the result in view of the conclusion of the Board with respect to the b. f. o. r. issue, and because it needlessly limits the scope of the legislation. The "individualization" of the discrimination does not render it less harmful, nor does it render the statutory protection of the Codes inappropriate. In the Bosi case the marital status of the complainant was the primary motivation for the employment decision; surely one need not discriminate against all married (or black, or female) people in order to contravene the Code. Furthermore, if such practices are to be justified, this should be done pursuant to an express statutory defence, or exception, not by narrowly interpreting the term itself."

A decision contrary to Bosi was rendered by Chairman Peter Cumming in Mark v. Porcupine General Hospital and Moyle, supra. The context had changed slightly since Bosi as this decision was rendered under the new Ontario Human Rights Code which had included a definition of marital status as being:

"... the status of being married, single, widowed, divorced or separated and includes the status of living with a person of the opposite sex in a conjugal relationship outside marriage."

In addition, by this time the provision pertaining to nepotism had been included in the Code. In this case, Chairman Cumming held that spousal identity was part and parcel of marital status. The issue involved a woman whose employment was terminated upon the hospital administrator discovering that she was married to a person who worked in the same maintenance and housekeeping department. In finding that spousal identity was included in marital status Chairman Cumming relied on the following factors:

1. He felt that the narrow interpretation given in Blatt, supra, would not be applied today;

2. He specifically rejected the reasoning in Bosi because whether the discrimination arises because of marital status of the Complainant or because of the Complainant's marital status with respect to a particular spouse should not matter. In both cases there was discrimination just as there would be if an employer who otherwise hires black people but holds racially discriminatory views with respect to a particular black person;

3. The marital status of the Complainant, i. e. the state of being married, was an essential element, or proximate operative cause of the refusal of employment and in the Bosi case if the Board felt that she was rejected because of the conflict issue then nonetheless the perceived conflict only arose because of her marital status;

4. In Monk v. Hillman, supra, the Manitoba Board held that "family status" included discrimination on the basis of spousal identity. As well, the American decisions supported an inclusion of spousal identity within marital status;

5. Human Rights legislation should be interpreted liberally and even ordinary rules of statutory interpretation would lead to the conclusion that discrimination on the basis of the activities of a particular spouse was within the prohibited ground.

The CBC argued that the decisions in Mark and Monk were not applicable as authorities for a wide definition of marital status because of the legislative changes in the Ontario Human Rights Code. This is an insufficient response to the decisions for two reasons: first, the added definition of marital status does not do anything except expressly include common law relationships and does not, by definition alone, now require a finding such as in Mark; secondly, we agree with Chairman Ashley that even with the addition of family status as a prohibited ground that does not, of necessity, mandate that the identity of the particular family member be within the prohibited ground.

In choosing between the competing views as to the scope of marital status we return to the direction that the Supreme Court of Canada has given in terms of the manner in which human rights legislation should be interpreted. It is to be liberal enough so that the purpose of prohibiting discrimination is achieved. The policy underlying a prohibition of marital status discrimination should be considered in light of the objectives of the C. R. H. A. to prevent employers from treating people differently because of characteristics specified in the Act and to require employers to consider people on the basis of their individual merits. The policy is clearly violated when a person is denied an equal opportunity because he or she is married. It is equally repugnant whether the employer discriminates against married people as a class or because of the person to whom he or she is married. If the marital status is the proximate cause then it is right that the employer bear the burden of justifying its actions.

Mrs. Cashin's contract was not renewed because of the person to whom she was married. We believe that the logical interpretation of marital status should include discrimination based on the identity of one's spouse and agree with the analysis in the Mark case. The decision in the Monk case with respect to family status is useful by analogy. This interpretation is the only one which meaningfully gives effect to the underlying policy against this ground of discrimination. We therefore find that the Tribunal below was correct in finding that a broad interpretation was appropriate and that Mrs. Cashin's marital status was a proximate, if not the primary, cause for the C. B. C. 's decision refusing to renew Mrs. Cashin's contract. Accordingly, we find no error in Chairman Ashley's conclusion that this amounted to a contravention of section 7 and section 10 of the C. H. R. A.

SEX

Chairman Ashley also dealt with the allegation that the conduct of the C. B. C. constituted discrimination on the basis of sex as well as marital status. She found that there was no evidence to support that allegation and found against the Complainant on that issue. The Complainant did not appeal that finding and it was therefore not raised before us.

BONA FIDE OCCUPATIONAL REQUIREMENT

A) The Test

In the face of the conclusion that there was discrimination by reason of marital status, the onus shifts to the employer to prove that it is excused by reason of a bona fide occupational requirement. The position of the C. B. C. is that it was legitimate for it to be concerned about the possibility that the listening audience might perceive Mrs. Cashin as lacking in objectivity in reporting on resources issues because of the prominent positions held by her husband relating to the very areas of reporting for which Mrs. Cashin was responsible. Accordingly, the C. B. C. claims that perceived objectivity is an essential bona fide occupational requirement (" BFOR") for its journalistic personnel.

The test to be used in applying the BFOR defence as set out in section 14(a) of the C. H. R. A. was enunciated by Mr. Justice McIntyre in Ontario Human Rights Commission and Dunlop et al v. The Borough of Etobicoke (1982) 3 CHRR D/ 781 and this test has been applied consistently in human rights cases. The oft quoted statement of Mr. Justice McIntyre is as follows at p. D/ 783:

"To be a bona fide occupational qualification and requirement a limitation, such as 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."

There are two components to the test: one is subjective and the other is objective.

B) The Application of the Test to Perceived Objectivity

As to the first part of the test, Chairman Ashley had > - 21 "no difficulty in finding that in the subjective sense, the C. B. C. imposed its requirement regarding perceived objectivity, in the words used in Etobicoke, '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'. The witnesses called [by the C. B. C.] were credible and genuine and apparently guided by their desire to have the best possible current affairs programming at the station".

The Complainant had adduced evidence at the original hearing apparently for the purpose of demonstrating a lack of good faith on the part of the C. B. C. in taking its decision with respect to her. The Complainant attempted to show that no effort had been made by the C. B. C. to verify its view with respect to the issue of perceived objectivity; that it failed to inquire into the exact nature and type of stories reported on by Mrs. Cashin; that it did not determine that in fact her husband's role at Petro Canada was not very active; that it failed to elicit the opinion of the public by way of survey or other evidence; and that it chose to ignore Mr. Cashin's willingness to resign his position as director with Petro Canada in order to preserve his wife's position. Although some of these matters were raised before us on appeal, it was quite clear that no serious quarrel was being taken by the Complainant with respect to Chairman Ashley's finding that the

C. B. C. had acted in good faith. We therefore see no need to review this particular finding and indeed there is not sufficient evidence to disturb it in any event.

As Chairman Ashley stated it is the application of the objective test that poses "more difficulty".

Chairman Ashley began her analysis on this issue by examining the requirements and responsibilities of the job of broadcaster in the C. B. C. Reference was made to the C. B. C. policy document entitled "Journalistic policy" which set out the standards and policies to be followed on a broad range of subjects. A number of excerpts are quoted in the decision below which emphasize the necessity that "the role of the C. B. C. reporter is to convey news to the audience with maximum fairness, accuracy and integrity". The Chairman summed up the requirement as contained not only within the C. B. C. 's own policy document but upon hearing certain witnesses that the appropriate responsibility of journalists is to be "fair and balanced in their reporting".

The C. B. C. argued that in addition to their written standards there is a further requirement that the journalist be perceived by the public as being objective, even though no reference is made to such a requirement in the C. B. C. 's Journalistic Policy.

The policy statement, however, does mention that in order to maintain their credibility, broadcasters must avoid publicly identifying themselves in any way with partisan statements or actions on controversial matters.

Chairman Ashley accepted the evidence that a journalist should be judged by his or her work rather than by his or her outside relationships. She felt that so long as a reporter was truly objective in her reporting then that would be obvious to the listening audience who would therefore have a perception consistent with the nature of the reporting. She put it this way at page 40: "... I do not accept that objectivity and perception of objectivity are two entirely different things. If a reporter is objective, or fair and balanced, in his or her reporting, this will be evident to the audience. To that extent, a perception of objectivity depends upon the existence of objectivity itself. If a reporter makes some error in judgment in reporting, that too will be seen or heard by the audience, so that the perception as well as the reality that objectivity exists will be changed. However, this case deals with the question in terms of a reporter who is objective and a person who might see her as lacking objectivity not because of any factor related to her reporting but because of some activity of her husband. ...[I] f the reporter meets the standards set in the Journalistic Policy, if she has an established reputation as a credible journalist, if the reporter is not herself actually identified by her own actions with her spouse's position, and if the work has not suffered from the personal involvement, it is unlikely that the employer will be able to establish that the perception of objectivity is threatened. ..."

It appears that in other situations Courts have separated out and made a clear distinction between actual and apparent impartiality. The Supreme Court of Canada in Fraser v. Public Service Staff Relations Board (December 10th, 1985) made this distinction in the context of a public servant who was disciplined for making strong and sustained public criticism of government policies. Mr. Fraser was a unit supervisor employed by Revenue Canada and he publicly criticized the federal government policies concerning metrification and the constitutional entrenchment of the

Charter of Rights. Despite warnings and suspensions, Mr. Fraser was finally discharged when his criticism continued. By way of defence Mr. Fraser put forth the argument that any criticism made of government policy was unrelated to the policies of his department and therefore was not job related. Chief Justice Dickson disagreed. At page 17 he stated:

"A job in the public service has two dimensions, one relating to the employee's tasks and how he or she performs them, the other relating to the perception of a job held by the public. In my opinion, the Adjudicator appreciated these two dimensions.

... This analysis and conclusion, namely that Mr. Fraser's criticisms were job related, is, in my view, correct in law. I say this because of the importance and necessity of an impartial and effective public service."

We are cognizant of the fact that Mr. Fraser, unlike Mrs. Cashin, put himself in a compromising position by reason of his own conduct. However, the Court did recognize the distinction between actual and apparent impartiality and pointed out that apparent or perceived impartiality is extremely important in terms of the role performed by federal civil servants.

Another area in which there is concern about appearances is in respect of impartiality of judges, tribunals and municipal councillors. There has become recognized the overriding necessity for impartiality on the part of such individuals in appearance as well as in fact when they are performing judicial or quasi- judicial functions. A standard of perceived objectivity is required such that personal associations could be regarded as a disqualification provided that it gives rise to a real likelihood of bias. For example, in Derreck v. Corporation of the Town of Strathroy (1985) 8 O. A. C. 206, the Ontario Divisional Court considered the issue in the context of a relationship between father and daughter. There, a town council held a hearing concerning the proposed dismissal of its chief administrative officer/ clerk. One of the issues was the clerk's discharge of a town employee, who was also the daughter of a town councillor, who participated in the hearing. As to whether the relationship posed a problem for the town councillor, the Court stated as follows at page 211:

"With respect to Councillor McLeod, there was a reasonable apprehension of bias. Although he made it clear that he had not taken part in the original hiring or laying off of his daughter, Mrs. Walsh, and that he did not discuss the matter with her, a relationship as close as this gives rise to a reasonable apprehension of bias." (emphasis added)

The question in the instant case is as to whether C. B. C. journalists, reporters and broadcasters must meet a similar standard of appearance of objectivity. A number of witnesses touched on this subject. One was Professor Jonathan Baggaley, an associate professor of educational technology at Concordia University. Chairman Ashley described him as,

"... a specialist in the field of media communications and was qualified as an expert. He has personally conducted a significant number of research studies on media- related topics and has a wide knowledge of research done by other people in his area of specialty."

He has had particular experience with the media and Newfoundland audiences. For example, he conducted a study on behalf of the Canadian Cancer Society in Newfoundland on the mass audiences reactions to information on the media and thus, in that context, studied both the rural and urban population of Newfoundland and compared them with the comparable audiences in Quebec and what was known about audience reactions in the world. Although he has not conducted any specific studies relating to the question of whether perception of objectivity of a reporter or journalist is impaired by reason of his, or her marital relationship to a public or high profile figure, he has written books and papers on perceived credibility of media performers generally and has conducted surveys on how the audience would perceive a person in the media. He testified that 83% of audiences watching news and information programs listen to them in order to get information that they can trust and therefore audiences deem objectivity to be very important.

He felt that the problem of perceived objectivity is intensified in a local community more than in a larger population and this is particularly so in Newfoundland where he had conducted studies on other subject matter.

Donna Logan who is presently the program director of information for AM and FM radio and is in charge of all news and current affairs for C. B. C. radio in Canada, is responsible for standards, policies and the hiring of C. B. C. personnel in Canada. She testified that there is a difference between a reporter and a columnist and that a columnist writes his own opinion while a reporter is not supposed to have an opinion but is to present the news accurately. She testified that perceived objectivity is one of her main concerns as the C. B. C. 's credibility is affected fully by audience perception.

Colin Jamieson who was in charge of a radio station in St. John's, Newfoundland, testified that believability of news is extremely important. He indicated that if there was a problem with perceived objectivity, he would try to assign that individual reporter to another area. When he hires a writer/ broadcaster he is concerned as to what the public perception of that individual is.

Professor Anthony Westell, a professor at Carlton University School of Journalism, stated that he would not let a journalist report on an area that involved his spouse. If a person was married to a high profile person he would let that person work as a columnist by telling the public of the conflict of interest. This is a totally different question than putting a person on the air as a current affairs broadcaster. He indicated that there was a difference between a reporter and a commentator or columnist and for a reporter it was all the more important that he or she be perceived as being fair and at least be in a position to do a balanced story.

David Candow, the executive producer at the C. B. C., gave evidence and pointed out the importance of perceived objectivity and its relevance to the question of objectivity. This was highlighted by the evidence of Donna Logan who indicated that the C. B. C. is the only station that goes so far as to publish its guidelines on objectivity. Since the C. B. C. is responsible to Parliament and through it to the people of the country, the C. B. C. generally has a concern with its unique role in the Canadian broadcasting milieu. Its mandate is to carry out public broadcasting. In doing so, it must be credible and its credibility and objectivity are very much affected by public perception.

On the basis of this evidence, we cannot agree with Chairman Ashley that perception of objectivity is subsumed in a broadcaster demonstrating actual objectivity. The two do not necessarily go hand in hand. Whether it be public servants as in the Fraser case or municipal councillors as in the Derreck case or whether it be broadcasters with the C. B. C., the standards that are required in order for them to maintain their integrity with their ultimate constituency is that they not only be objective but that they appear to be so. We therefore must conclude that perception of objectivity is a job related quality and one that is reasonably imposed by the C. B. C. C) The Measurement of Perceived Objectivity Chairman Ashley was concerned that perceived objectivity is not susceptible to measurement and accordingly there is no objective way for an employer to determine audience perception. Chairman Ashley considered the traditional ways of gauging audience reaction such as "call sheets" which make note of any comments sent in by listeners. Usually it is those with negative comments, rather than positive, who bother to contact the station. The Chairman pointed out that no calls of any nature relating to Roseann Cashin had been made. She also referred to the ratings as indicating a basis for determining the extent of the audience listening to particular shows but there was no evidence of ratings that may have shed some light on the public's perception of Mrs. Cashin. Chairman Ashley at pages 39- 40 of her decision concluded as follows:

"The difficulty in measuring perceived objectivity is important. If call sheets, interviewee reaction, or ratings do not indicate that the broadcaster is or may be lacking in objectivity, then how is the employer to make the judgment call that the person's objectivity may be questioned? In this case, the CBC decided that Mrs. Cashin might be perceived by the audience as lacking objectivity on the basis, not of any evidence, but rather of a "gut reaction". The Supreme Court of Canada in Etobicoke has stated that mere "impressionistic" evidence is insufficient to establish a valid BFOR. I am not satisfied in this case that any other than impressionistic evidence existed. The Producers became aware of Mr. Cashin's appointment to Petro Canada and, without making any inquiries as to the nature, term or conditions of his appointment or indeed without speaking to him at all, without speaking to Mrs. Cashin about her role in light of the appointment, without seeking direction from CBC management about the policy in handling such a situation, the assumption was made, because of the relationship of husband and wife which existed between Richard and Roseann Cashin, not that her objectivity would be jeopardized but that the public would be jeopardize might perceive it to be so."

A careful reading of Mr. Justice McIntyre's remarks in the Etobicoke case does not lead one to the conclusion that in all cases impressionistic evidence is to be rejected out of hand. Among other things the Court considered the nature and sufficiency of the evidence required to justify a mandatory retirement for firefighters at age 60. At page D/ 784 Mr. Justice McIntyre stated:

"I am by no means entirely certain what may be characterized as scientific evidence. I am far from saying that in all cases some scientific evidence will be necessary. It seems to me however, that in cases such as this, statistical and medical evidence, based upon observation and research on the question of aging, if not in all cases absolutely necessary, will certainly be more persuasive than testimony of persons, albeit with great experience in firefighting to the effect that firefighting is a young man's game." (emphasis added)

The Court concluded that in terms of dealing with the effects of the aging process there was no reason why appropriate medical evidence couldn't be adduced since there had been a body of substantial and continuing research relating to the subject.

In the instant case, expert evidence was tendered by the C. B. C. with respect to the existing studies on perceived objectivity. In any event, evidence pertaining to physical and mental deterioration resulting from the aging process by its nature, would be more scientific than evidence relating to possible perceptions of the listening audience. We therefore believe that the Tribunal Chairman was in error in characterizing the evidence as being nothing more than impressionistic. The only further evidence that could be presented would be by way of an experiment which would necessitate putting the broadcaster on the air for a period of time and to attempt to survey the listening audience as to how it perceived the objectivity of that individual. The C. B. C. has quite rightly pointed out that to do so would be to experiment with its own credibility in that it would have to take the chance of adverse audience reaction while such a study was being conducted.

Moreover, it is worth taking note of Chief Justice Dickson's remarks in the Fraser case with respect to the nature of measuring appearances. There, the argument was also raised that no evidence had been adduced before the Adjudicator to demonstrate that Mr. Fraser's effectiveness as a public servant was impaired by his public statements because there was no evidence to that effect. Chief Justice Dickson dealt with this question in the following manner at page 21:

"It is true the Adjudicator found Mr. Fraser's effectiveness as a public servant was impaired. It is also true there was no direct evidence to this effect before the Adjudicator. There was not, for example, testimony from so- called 'clients' of the Department of Revenue Canada (i. e. persons subject to a tax audit) establishing that in their eyes Mr. Fraser's conduct placed his impartiality and judiciousness in doubt. In spite of this, the Adjudicator concluded that Mr. Fraser's activities were job- related in that they led to 'impairment' of his ability to do his job properly.

Indeed he found impairment in two senses: first, impairment to perform effectively the specific job because of the inferred effect on clients; secondly, and in a wider sense, impairment to be a public servant because of the special and important characteristics of that occupation.

I do not think the Adjudicator erred on either count. As to impairment to perform the specific job, I think the general rule should be that direct evidence of impairment is required. However, this rule is not absolute. When, as here, the nature of the public servant's occupation is both important and sensitive and when, as here, the substance, form and context of the public servant's criticism is extreme, then an inference of impairment can be drawn. In this case the inference drawn by the Adjudicator, namely that Mr. Fraser's conduct could or would give rise to public concern, unease and distrust of his ability to perform his employment duties, was not an unreasonable one for him to make.

Turning to impairment in the wider sense, I am of opinion that direct evidence is not necessarily required. The traditions and contemporary standards of the public service can be matters of direct evidence. But they can also be matters of study, of written and oral argument, of general knowledge on the part of experienced public sector adjudicators, and ultimately, of reasonable

inference by those adjudicators. It is open to an adjudicator to infer impairment on the whole of the evidence if there is evidence of a pattern of behaviour which an adjudicator could reasonably conclude would impair the usefulness of the public servant."

And at page 24, Chief Justice Dickson stated: "Though no direct evidence of the fact of impairment of capacity is required, here the evidence clearly established circumstances from which the inference of impairment is clearly irresistible."

In the instant case, when one considers the very high profile and public image of Richard Cashin in Newfoundland particularly in relation to two of the most important resources of that province and the fact that his wife is a C. B. C. broadcaster reporting on that very subject matter and when one considers the evidence of Professor Baggaley and the media witnesses one can infer that a perception of a lack of objectivity could reasonably occur within the listening audience. Such an inference can legitimately be drawn even in the absence of direct evidence of actual listeners which could only be acquired some time after the fact in any event. We are therefore of the view that perception of objectivity is a valid BFOR both in the general sense and when applied to the particular circumstances of the Complainant.

D) The Nature of the Perception

By saying this, we are not suggesting that speculation based upon any kind of audience perception of a reporter could fit within this BFOR We agree with Chairman Ashley when she stated at page 42:

"An audience's perception of a reporters lack of objectivity might also be based on prejudiced attitudes or stereo- typed ideas about a particular class of people. For example, if it could be proved that audiences in Newfoundland perceived female reporters to be dishonest or lacking in objectivity, I am not convinced that that would be sufficient justification for failing to hire female reporters, in the absence of evidence that female reporters were in fact dishonest or lacking in objectivity."

This kind of perception would be irrational and unreasonable in the extreme and the C. B. C. should not pander to it. It is therefore not every person's perception or preference that is to be accommodated by the C. B. C. It must be of a quality which is necessary for the C. B. C. to maintain the high standards that it has quite properly set for its broadcasters. So long as the apprehension of bias arising in the circumstances is understandable in the minds of right thinking individuals, then the C. B. C. 's concern for it is justifiable.

E) Application of the BFOR to the Complainant

The law in respect of the BFOR defence appears deceptively simple. The test in Etobicoke is clear and in some cases it will be easy to prove that a particular practice reflects requirements which are reasonably related to the job. Cases involving safety issues are a good illustration of this. The facts in this case however presented difficulty because the C. B. C. requirement of perceived objectivity is not a rule comparable to the requirement for example that all employees must wear hardhats on a construction site. While on one level it can be seen that the requirement

of perceived objectivity is one which is demanded of all C. B. C. employees, however on another level the requirement can only be appraised in light of the particular circumstances of the individual employee. There are various scenarios one can imagine as giving rise to an issue of perception of lack of objectivity in a reporter's work and obviously, the requirement will not only surface in cases involving the activities of a spouse. The problem in the context of the BFOR defence is that one cannot predict the effective application of the requirement in all cases.

The distinction between a general requirement that can be applied to all employees in a tangible and uniform manner, and a requirement that only has meaning and relevance when placed in a specific individual context is important in view of the recent decision of the Supreme Court of Canada in Bhinder v. Canadian National Railway Company, supra, which was released after Chairman Ashley had handed down her decision.

It will be recalled that counsel for Mrs. Cashin argued that the objective branch of the BFOR test, as interpreted by Etobicoke, and considered by Air Canada, v. Carson et at (1985) 6 C. H. R. R. D/ 2848, had two elements:

1. That the requirement be reasonably related to the job and;

2. That the requirement be reasonable or bona fide in the particular case of the Complainant.

It appears that Chairman Ashley accepted this approach where she stated at page 31 of her decision:

"The respondent must establish on a balance of probabilities that perceived objectivity is a valid b. f. o. r. and that Mrs. Cashin was perceived as lacking objectivity because of the position or public profile of her husband."

Because of Chairman Ashley's disposition of the first point that perceived objectivity generally was not a valid BFOR it became unnecessary for her to apply the second aspect of the test which would require an examination of the BFOR in the context of the particular individual.

The consideration of the BFOR in individual circumstances has been rejected by the majority of the Supreme Court of Canada in Bhinder, supra. Accordingly, it would bring into question the test that was enunciated by Chairman Ashley.

In Bhinder, the employer, CN Railways, imposed the requirement that all employees on a particular job site had to wear hardhats. The Complainant was a Sikh and his religion forbade the wearing of anything other than a turban. The Court found that there was an adverse impact on Sikhs and that this type of discrimination was caught by the prohibitive portions of the C. H. R. A. CN argued that it was justifiable in the interests of safety. The Court agreed and rejected the Tribunal's decision below that under section 14(a) of the C. H. R. A. there was a need for the requirement to be justified in the particular case of an individual employee and that CN had a duty to accommodate Bhinder in light of his religious beliefs. The decision of the majority was delivered by McIntyre, J. (concurred in by Wilson and Beetz, JJ.) (Dickson, C. J. C. and Lamer, J. dissenting) who stated at page D/ 3096:

"Where a bona fide occupational requirement is established by an employer there is little difficulty with the application of s. 14(a). Here, however, we are faced with a finding - at least so far as one employee goes - that a working condition is not a bona fide occupational requirement. We must consider then whether such an individual application of a bona fide occupational requirement is permissible or possible. The words of the statute speak of an 'occupational requirement'. This must refer to a requirement for the occupation, not a requirement limited to an individual. It must apply to all members of the employee group concerned because it is a requirement of general application concerning the safety of employees. The employee must meet the requirement in order to hold the employment. It is, by its nature, not susceptible to individual application. The tribunal sought to show that the requirement must be reasonable, and no objection would be taken to that, but it went on to conclude that no requirement which had the effect of discrimination on the basis of religion could be reasonable. This, in effect, was to say that the hard hat rule could not be a bona fide occupational requirement because it discriminated. This, in my view, is not an acceptable conclusion. A condition of employment does not lose its character as a bona fide occupational requirement because it may be discriminatory. Rather, if a working condition is established as a bona fide occupational requirement, the consequential discrimination, if any, is permitted - or, probably more accurately - is not considered under s. 14(a) as being discriminatory.

It was said in Etobicoke that the rule under the Ontario Human Rights Code was non-discrimination, while the exception was discrimination.

This is equally true of the Canadian Human Rights Act. The tribunal was of the opinion that a liberal interpretation should be applied to the provisions prohibiting discrimination and a narrow interpretation to the exceptions.

Accepting this as correct, it is nevertheless to be observed that where s. 14(a) applies, the subsection in the clearest and most precise terms says that where the bona fide occupational requirement is established, it is not a discriminatory practice. To conclude then that an otherwise established bona fide occupational requirement could have no application to one employee, because of the special characteristics of that employee, is not to give s. 14(a) a narrow interpretation; it is simply to ignore its plain language. To apply a bona fide occupational requirement to each individual, is to rob it of its character as an occupational requirement and render meaningless the clear provisions of s. 14(a). In my view, it was error in law for the tribunal, having found that the bona fide occupational requirement existed, to exempt the appellant from its scope."

This approach to the BFOR certainly limits the nature of the test. The only question for the Tribunal is whether the circumstances give rise to a valid BFOR. The second aspect of the test that had been considered by Chairman Ashley, namely in this case, whether Mrs. Cashin herself was perceived by the listening audience as lacking objectivity, could be said, to be irrelevant. Had Chairman Ashley found that perceived objectivity is a valid BFOR, then on a strict interpretation of Bhinder, one would not get into the inquiry of whether it should be applied in the particular circumstances relating to this individual employee. In other words, the issue is whether the necessity for perceived objectivity in a reporter is reasonably related to the job itself and not the employee in particular. It seems, therefore, that if one concludes that there is a valid

BFOR no further inquiry into the individual circumstances is necessary. Chairman Ashley did consider the individual employee even though she held that the requirement was not necessary on a general level if actual objectivity existed. The problem with Bhinder is that while it clearly makes sense to only consider the job itself and not the individual employee when the BFOR that is imposed is one that is applied across the board such as age restrictions or safety equipment requirements, one has considerable difficulty with the Supreme Court of Canada test when the BFOR only can be judged in the context of the particular individual. That seems to be the case with requirements such as actual objectivity and perceived objectivity.

Upon an examination of the particular circumstances here, we have concluded that the C. B. C. may be justified in having concern about its audience's perception of Mrs. Cashin's objectivity when reporting fish and oil stories.

Professor Baggaley testified that prior information that the audience has about a reporter can colour the image of that person. If that information is that the woman who happens to be reporting on a resource area has a husband who is well known in the same area and if the audience knows of the marital relationship between the two, Professor Baggaley gave the following opinion:

"I believe there is two conditions for perceived partiality. I believe both of them relate to individual viewers or listeners. If the individual listener knows, first of all, that the two people are married that is a possible source of suspicion, but it is important to qualify that condition by a second one which is that if the audience, if the reporter is speaking in the same area as the person to which the reporter is known to be married or closely associated, if it's the same area I believe that would inescapably set suspicions of partiality into operation in the audience's mind. I don't believe that there would be any problem with the reporter reporting in another area. I also don't believe that it is necessary for that reporter to be lacking in objectivity. I think a reporter can fall over backwards to be objective, totally objective, to the satisfaction of him or herself, to the satisfaction of all colleagues, and all others who have the professional ability to recognize professionalism. My point is the general public does not have that expertise. That, in itself, is corroborated by sociological research. The general public resorts to this unfortunate and ill-informed set of bases on which to infer credibility, and it comes up with suspicion, as any person in the media knows."

He went on to express an opinion that in a situation where the wife is covering an oil story and the audience knows that her husband happens to be a director of an oil company, the audience would be suspicious. That is so, he testified, even if they knew that the husband was only a director with a limited role in the management of the company. Moreover, if the person on the air in such a situation is perceived as lacking objectivity then that will affect the radio station's image of objectivity generally.

In addition to the evidence before the Tribunal, it is not unreasonable to infer from all the circumstances that a perception problem could arise in this situation.

CONCLUSION

We therefore disagree with Chairman Ashley's conclusion that the C. B. C. has failed to establish the existence of a BFOR under section 14 and therefore we must allow the appeal.

We cannot let this matter pass without stating that in view of Mrs. Cashin's acknowledged journalist abilities the C. B. C. would be well advised to offer her a commensurate position in an area of broadcasting which would not offend its policies. There was some conflict in the evidence as to whether such an offer had in fact been made at the time of her removal from her position with the Resources Unit. Whether that was in fact the case or not, we recommend that the C. B. C. consider making an appropriate offer to the Complainant at this time. Counsel for Mrs. Cashin had asked that the C. B. C. be responsible for her costs on both the appeal and the proceedings below, regardless of the result of the appeal. Although we are aware that carrying forth such proceedings is financially onerous, particularly when the individual finds it necessary to retain separate counsel, we see no basis, assuming we have the power, for making an order against the C. B. C. when it has been exonerated. In any event, Chairman Ashley did not order costs against the C. B. C. and no cross- appeal was taken on that issue.

DATED this 23nd day of January, 1987.

Sidney N. Lederman, Q. C.

J. Gordon Petrie, Q. C.

Muriel K. Roy