

TD 9/ 85

Decision rendered December 4, 1985

IN THE MATTER OF THE CANADIAN HUMAN RIGHTS ACT S. C. 1976- 77, C.- 33 as amended And in the matter of a Hearing Before a Human Rights Tribunal Appointed Under Section 39 of the Canadian Human Rights Act

BETWEEN:

ROSEANN CASHIN, Complainant

-and

CANADIAN BROADCASTING CORPORATION, Respondent

HEARD BEFORE: Susan Ashley

Tribunal Appearances:

Mr. Ronald Pink, Ms. Kimberley Turner Counsel for the Complainant

Mr. David Russell, Mr. Gerald Flaherty, Mr. James Walsh Counsel for the Respondent

M. Rene Duval Counsel for the Canadian Human Rights Commission

This case arises from a complaint by Roseann Cashin against the Canadian Broadcasting Corporation, in which she alleges that she was discriminated against on the basis of sex and marital status contrary to the Canadian Human Rights Act. Her complaint, dated October 15, 1981, filed as Exhibit C- 1, gives the following particulars:

Having worked as a contract employee, writer broadcaster for CBC Radio from 1976 til May 1981, I was informed that my contract would not be renewed because I was married to Richard Cashin, President of the NFFAWU (Newfoundland Fishermen's Food and Allied Workers Union) and appointed a Director of Petro Canada in July 1981 ...

The complaint is brought under sections 7 and 10 of the Act. Section 7 provides that

It is a discriminatory practice, directly or indirectly, (a) to refuse to Employ or continue to employ any individual, or (b) in the course of employment, to differentiate adversely in relation to an employee, on a prohibited ground of discrimination.

Section 10 states that It is a discriminatory practice for an employer, employer organization or organization of employers (a) to establish or pursue a policy or practice, or (b) to enter into an

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

Section 3 of the Act sets out the prohibited grounds of discrimination, which include sex and marital status. The Act has recently been amended to include family status. Neither the term 'marital status' or 'family status' are defined in the Act. The Complainant alleges that she has been discriminated against on the basis of the prohibited grounds of sex and marital status. The burden rests upon her to prove this on the balance of probabilities. If she is successful, the Respondent may be able, as a defence, to show (also on the balance of probabilities) that a 'bona fide occupational requirement' exists which would excuse the prima facie discrimination. Section 14 states as follows:

It is not a discriminatory practice if (a) any refusal, exclusion, expulsion, suspension, limitation, specification or preference in relation to any employment is established by an employer to be based on a bona fide occupational requirement; ...

In this case the Respondent has attempted to show that the possibility that the public might perceive Mrs. Cashin as lacking objectivity in reporting because of the positions of her husband was sufficient cause for section 14 to come into play. They contend that perceived objectivity is a bona fide occupational requirement for journalistic positions within the CBC.

The facts of this case must be dealt with in some detail as there is a significant area of conflict in the interpretation put on the "facts" by the Complainant and the Respondent. However, before discussing the facts it is necessary to outline the organization of current affairs radio programming at CBC and to identify the players in this dispute. The national format for CBC radio is to offer three regular current affairs shows daily, from 6 a. m. to 9 a. m., from noon to 2 p. m., and from 4 p. m. to 6 p. m. These shows are produced locally, and in St. John's they were called the "Morning Show", "Radio Noon" and "On the Go". The "Fishermen's Broadcast" is heard daily from 5: 30 p. m. to 6 p. m. as part of "on the Go". There is also the "Resources unit" which produces spots for all shows, and which has a regular slot of its own at 12: 50 p. m. A weekly wrapup show called "Regional Roundup" is heard on Sundays. Until September 1981, the Producer of the Resources unit and the Fishermen's Broadcast was Kathie Housser. In September 1981 at the time of Mrs. Cashin's non-renewal, Ms. Housser and Don Reynolds had switched positions, so that Mr. Reynolds now produced these shows. Until June 1981 Mr. Dave Candow was Executive Producer. At all relevant times, Mr. Ken Hill was Director of Radio in St. John's.

Mrs. Cashin had been employed by the CBC since 1976, primarily on contract. A copy of her last contract with the CBC was entered as Exhibit C-2, with only those portions relating to the job description as writer/ broadcaster and the term and notice period excerpted. The contract duration was thirteen (13) weeks, and it is clear from the evidence that this is the standard duration of contract for writer/ broadcasters at CBC. Mrs. Cashin is governed by the collective agreement between ACTRA and the CBC. Clause D104(i) of her contract states that

The Corporation shall, in accordance with Clause 605 of this agreement, inform in writing a person contracted as a Contract Researcher or a Writer/ Broadcaster on a contract of twenty- five (25) weeks or less whether or not it intends to re- engage him. In the case of a contract of twenty- six (26) weeks, or more, such notice shall be given during the period between eight (8) and four (4) weeks prior to expiry of the contract. If such notice is not received in the requisite period, and the contract is not renewed, the Contract Researcher or Writer/ Broadcaster shall receive four (4) weeks' additional compensation at the contracted rate in lieu of notice.

Although the clause is a bit unclear, the testimony indicated that a thirty (30) day notice period was required. Ms. Housser's evidence was that these thirteen (13) week contracts were routinely, almost automatically, renewed.

At the time of the non- renewal of her contract, Roseann Cashin was a well- known and well- respected journalist having worked in public and private television and radio broadcasting since 1968. Mrs. Cashin had received at least two awards for her work, and had been at one time President of the Newfoundland Press Gallery. During her years in broadcasting, she has acted as a show host, interviews, City Hall reporter, legislative reporter and producer of documentaries. In her words, she has covered "the whole spectra of news". She has been Employed at CBC Radio in St. John's since 1976 in a variety of positions including writer/ broadcaster (on all the news shows), in administration, and as a producer. There is no dispute in the evidence by any of the witnesses that Mrs. Cashin was anything but a qualified, professional and hard- working journalist.

In early 1980 the Resources Unit at CBC Radio was born. The aim was to pool the knowledge and expertise of reporters covering the resource sector fisheries, hydro, forestry, oil, mining - in one unit, and to have stories from the Resources Unit fed into the regular news programming. Mrs. Cashin became part of the Resources Unit at its inception, and it is this position that was not reoffered to her in the fall of 1981.

During all of the period in question, Roseann Cashin was married to Richard Cashin, a man who, from all accounts, is and has been a very prominent figure in Newfoundland life. The Cashins have been married since 1960. Mr. Cashin served as a Member of Parliament from 1963 to 1968, but is best known as founding President of the Newfoundland Fishermen's Food and Allied Workers Union. The evidence shows that he has had a high profile as spokesperson on the fishery and an labour and political matters in Newfoundland for many years. He has held positions on many private and government boards and agencies. It is probably fair to say that the name Richard Cashin is well known to most Newfoundlanders. In July, 1981, at the time when the offshore oil discovery in Newfoundland had become a very important issue in the province, Mr. Cashin was appointed to the Board of Petro Canada. In late August 1981, CBC Radio decided not to renew Mrs. Cashin's contract as a writer/ broadcaster in the Resources Unit.

Several incidents relating to problems in the Resources Unit have been raised as having a bearing on the non- renewal of Roseann Cashin's contract.

An attempt had been made to move Mrs. Cashin from the Resources Unit as early as March 1981, prior to her husband's Petro Canada appointment. The Respondent felt she could not be

used to her potential in the Unit because of her husband's position. Mr. David Candow, who was at the time Executive Producer for current affairs for CBC Radio in St. John's, approached Mrs. Cashin in March 1981 about the possibility of her moving out of the Resources Unit, and switching positions with the person doing the consumer reporting on "Radio Noon". In Mrs. Cashin's view, this was not a firm job offer or a directive from Mr. Candow, but rather a suggested way of allowing both people to move into a new area. She noted, and the evidence supports her view, that the practice at CBC was to move people fairly frequently from show to show to keep ideas fresh, etc. The evidence shows her perception of the suggested switch (at page 79):

(Mr. PinK) Q did Mr. Candow ever suggest to you... that a reason for him requesting you to consider this change was any conflict or apparent conflict as a result of your husband's role in the community?

(Mrs. Cashin) A. No. He said it was an expansion of both our horizons - both for Ann and for me - and it might be a good change for both of us.

After giving the matter some thought and discussing it with her husband and with the consumer reporter with whom she would be switching (who preferred to stay where she was), Mrs. Cashin decided not to move to the consumer position. When she advised Mr. Candow, he accepted her decision and gave her a summer assignment to be responsible for the "Regional Roundup" show.

The relevance of this incident to the case becomes apparent when seen from the Respondent's perspective. Mr. Candow's evidence indicates that while he did think that a switch between the resources and consumer jobs would be a good thing, he also had concerns about Mrs. Cashin's role in the Resources Unit. In his view, Mrs. Cashin was unable to do 'fish' stories, because of her husband's high profile in the fishery. With the development of the offshore and the consequent intertwining of fish and oil related stories, Mr. Candow thought that her connection with Richard Cashin would therefore exclude her from covering stories not only related to fish but also stories where the fishery aspect was implicated in consideration of an oil story, or vice versa. Thus, he felt that the limitations on the stories she could do were hampering her effectiveness in the Resources Unit, and that the Unit would be better served by someone who was not subject to these restrictions. In his testimony (at page 1114):

(Mr. Russell) Q. At this time (March 1981) would you have had any problems with Mrs. Cashin doing this because of the scope?

(Mr. Candow) A. Yes, she couldn't do fish stories. She couldn't do controversy between fish and oil. Her credibility would have been lacking if she starts to get involved in anything that has to do with the fisheries.

Mr. Candow also became aware that Ann Budgell who was at that time employed in the Fishermen's Broadcast, had expressed concern to Kathie Housser about the presence of Roseam Cashin in the Unit - She had told Ms. Housser, the Producer, that she felt uncomfortable at the daily joint production meetings between the Fishermen's Broadcast and the Resources Unit when

Roseann Cashin was present, in that she didn't feel she could speak openly about Richard Cashin in the presence of his wife. In her words (at page 1395):

I said I would like the meetings to stop. The reason why, because I said I didn't want to discuss things involving Richard Cashin in front of Roseann Cashin... I wanted to be able to feel free to make comments... and I felt I couldn't about Richard Cashin if Roseann was there.

(Mr. Pink) Q. Was that the only reason that you requested the meetings be stopped, or were there other reasons?

Ms. Budgell) A. Well, I did think that it was a waste of time, of my time to have to sit there while the resource department was discussing what they had to do that day...- it had absolutely no relation to what I was doing, and I thought that these were two good reasons why we shouldn't have joint meetings, and Kathie agreed with me.

Ms. Budgell goes on to say that Kathie Housser got a "little bit nervous" about the request, feeling that there might have been dissension in the ranks. However, Ms. Budgell indicated clearly in her evidence that this was not the case. In her words, at page 1396, "I didn't think it was a serious matter at the time. She (Housser) granted my request, and that was it, as far as I'm concerned."

Another incident related to an anecdote that had been told at a production meeting, which found its way to Richard Cashin, to an official who worked closely with him, and back to Ann Budgell. This caused fear that Roseann Cashin might be acting as an unintentional conduit from the CBC to her husband.

It appears that these two incidents resulted in the practice of holding joint production meetings to be discontinued, and were a factor in Mr. Candow's raising the possibility of moving Roseann Cashin out of the Resources Unit.

The discussion about the possible job switch took place in March 1981. It is clear from Mr. Candow's evidence that even before Mr. Cashin's appointment to the Board of Petro Canada, he felt that Mrs. Cashin's ability to do certain stories in the Resources Unit was hampered because of her husband's high profile in the fishing sector. The CBC felt that, with the growing excitement about Hibernia, there would be an increasing number of stories with aspects intertwining oil and the fishery, and because of the relationship between Richard and Roseann Cashin, she would not be able to cover these stories either. This situation was further aggravated, to an unacceptable degree, after the Petro Canada appointment, in that in their view, Mrs. Cashin would then be prevented from doing both fish and oil stories.

The suggestion that Roseann Cashin switch jobs with the consumer reporter was, according to Mr. Candow, an attempt to accommodate Mrs. Cashin by taking her out of the situation where a possible conflict might occur. I am satisfied, however, from both the evidence of Mrs. Cashin and Mr. Candow that this was not a firm offer but a suggestion. I am also satisfied that the suggestion was not put to Mrs. Cashin in such a way that she was aware of the concern that existed in the minds of Mr. Candow and Ms. Housser about her ability to continue in the

Resources Unit. I interpret this, however, as a genuine attempt by Mr. Candow to smooth the waters without making the situation even worse.

Mr. Candow's perception that Mrs. Cashin was never at any time permitted to do 'fish' stories because of her husband's position is important, as there is other evidence which suggests that the real reason why she and other resources broadcasters did not do 'fish' stories was that these were done almost exclusively by the Fishermen's Broadcast staff.

There is a dispute in the evidence about the division of labour between the Resources Unit and the Fishermen's Broadcast. As mentioned earlier, the Resources Unit was set up to develop and bring together in one unit specialists in resources, and to produce segments for use in regular current affairs shows. This was a new concept that was only introduced in 1980. The Fishermen's Broadcast, on the other hand, was an institution at CBC Radio in St. John's, having been set up in the early fifties. The show had a permanent staff rather than short-term contract employees, and was heard at a regular time each day. In Mrs. Cashin's evidence, the Broadcast was responsible for all 'fish' stories. She felt that the reason she was not assigned to these stories had nothing to do with her husband, but was because these stories were routinely done by the staff of the Fishermen's Broadcast (at page 56):

(Mr. Pink) Q. Have you ever been requested to do any fisheries broadcasting?

(Mrs. Cashin) A. I hadn't been requested because I wasn't part of the fish broadcast. The 'fish' had been kind of ghettoized in CBC Radio. The Fishermen's Broadcast as an institution had done all that stuff for years as they had expertise in the area and they were the people who generally did all the fish work.

This view was confirmed by Ann Budgell who had worked in both the Resources Unit and on the Fishermen's Broadcast. Her testimony is as follows (at page 1390):

(Mr. Pink) Q. Now, we've heard evidence that Mrs. Cashin was, in my words, cut off from doing, prohibited from doing, fish stories. What can you say about the practice within CBC in St. John's in using non-fish people doing fish stories?

(Ms. Budgell) A. There had been a Fishermen's Broadcast for years. It was first set up in 1951, and as long as I worked at CBC the other reporters didn't do fish stories, because there was a special department to do that. They were the experts, and they did the fish stories.

Q. when you were an announcer, writer/ broadcaster, were you permitted to do fish stories?

A. No one would have stopped me from doing fish stories. It wasn't like that, but I did not feel it was part of my job, to come up with ideas for fish stories or to do fish stories. We had plenty of work to do with the other resource industries.

at page 1392: Q. Was Mrs. Cashin... any more cut off, as it were, from fish stories than anybody else was at the station?

A. As I have already explained, the fisheries broadcast people - that was their domain. They did the fisheries stories. There were plenty of writer/ broadcasters in the station who didn't do fish stories, not only Roseann Cashin.

During the course of events surrounding Mrs. Cashin's non-renewal a strike of NABET technicians occurred at CBC Radio. Mrs. Cashin, although not a member of that union, did not cross the picket line. She was the only writer/ broadcaster at CBC Radio who did not cross the line at any time during the strike. The strike began in May 1981, shortly after Mrs. Cashin had been given her summer assignment. It ended in early September, at which time Mrs. Cashin returned to work to determine her status, since her last 13 week contract, which ran from May 25 - August 23, 1981, had lapsed. It was not suggested in this hearing that Mrs. Cashin's contract was not renewed because of her failure to cross the picket line. The events that occurred when she returned to work are the crux of this complaint.

During the time when Mrs. Cashin was respecting the picket line, specifically in July 1981, Richard Cashin was appointed to the Board of Petro Canada. The evidence shows that his appointment was marked by a short notice in the daily newspaper in St. John's, and that it was reported as an item on the CBC news. Mr. Cashin stated in evidence that as a Board member, he attended occasional meetings and never spoke on behalf of the Company.

Mr. Steven Millan, a Vice-President of Petro Canada, gave evidence for the Complainant. He is responsible for the Company's operations in Atlantic Canada. He stated that the Board met regularly in different areas of the country, that Board members such as Mr. Cashin would not speak on behalf of the company and that they have no role in the day-to-day administration of the Company.

When the NABET strike was over, Mrs. Cashin returned to work, and reported to Mr. Don Reynolds, the new producer of the Resources Unit. Mr. Reynolds indicated that he would not be able to renew her contract because of Richard Cashin's appointment to the Board of Petro Canada. In his evidence (at page 782):

(Mr. Russell) Q. You were advised, or made aware, of the Petro Can appointment of her husband?

(Mr. Reynolds) A. Right. Q. Did that cause you any problems? A. I thought it was going to cause problems with how the resource unit would operate. I thought that Roseann could no longer do any oil related stories, that that was going to cause us a big problem, because what was left was basically mining and forestry and hydro, and those were small potatoes compared to the oil industry, which was happening at the time in Newfoundland. It was a big story.

Q. Why would she not be able to be used to cover the oil type stories?

A. Well, to my mind, I knew that her husband had been appointed a director of Petro Canada, and that Petro Canada was involved in the offshore development and, to my mind, there was a problem with perceived objectivity with those who knew, and those who didn't know it was my

job to sort of be responsible and make sure that the items that went on the air were credible and were seen to be credible.

Mr. Reynolds testified that Mrs. Cashin met with him after the strike, and the following exchange took place (at page 785):

(Mr. Reynolds) We went in to what was formerly Dave Candow's office, and she said, "Hi. Do I still have a job?" I said, "Roseann, I have sane problems with the fact that over the summer Richard was appointed director of Petro Canada, and the fact that your usefulness to a resource unit was largely diminished in that I thought it was a wasted position that I would have", and I didn't think I'd be renewing her contract, that the producers were meeting the next morning in Ken Hill's office because I was going to arrange the meeting and that we would discuss it, and I would get back to her.

He testified that the producers meeting with himself, Ken Hill (Director of Radio), Kathie Houser and others was held shortly thereafter and that his decision was confirmed unanimously. Mrs. Cashin then met with Mr. Hill, who had the ultimate responsibility for radio programming at CBC St. John's. Mrs. Cashin's testimony indicates that at this meeting, she told Mr. Hill that if the Petro Canada appointment stood between her and her job, her husband would resign from the Board. Her evidence of the meeting is as follows (at page 99):

(Mrs. Cashin) A. Well, he talked about my husband's profile a great deal and how high it was and indicated that I was too hot for all Current Affairs because of the new situation...

Q. Now, Mrs. Cashin, you said that he said that you were "too hot". Were those his actual words.

A. Yes. Q. Can you tell us, Mrs. Cashin, what Mr. Hill's reaction was to the role which your husband played in the Fishermen's Union vis- a- vis your future employment?

A. Well, when he said that there was no point of him resigning from Petro Canada, he just said, "Well, the fishermen's Union is enough" - I mean you know he indicated that that made his profile high in any case. I guess that was the only reason because I did offer the Petro Canada resignation to him.

Although Mr. Hill did not recall the specific details of their meeting, I am satisfied that the above exchange represents it adequately. It was made clear to Mrs. Cashin that there was no possibility that she could continue in her position in the Resources Unit because of her husband's profile.

Discrimination on the basis of marital status

The law in relation to the rights of individuals within a marriage has developed steadily over the last hundred or so years. The traditional common law position as stated by Blackstone in his Commentaries has been quoted often:

By marriage the husband and wife are one person in law, that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated with that of the husband, under whose wing, protection and cover she performs everything.

Equity had various ways of alleviating the more blatant injustices which this doctrine, known as coverture, created. In 1882, the passage in England of the Married Women's Property Act led the way for similar legislation in Canada which gradually permitted a married woman to claim a distinct and independent legal identity, apart from that of her husband. Various statutes enacted over the past century allowed married women to acquire and dispose of property and to render others liable in tort and contract, and relieved husbands of liability for the torts and contracts of their wives. Although interspousal immunity in tort and contract still exists in some Canadian jurisdictions, it has been abolished in many others.

The continuing legislative push for recognition of the independent identity of both partners in a marriage is apparent in the now well-established matrimonial property regimes in place at the provincial level, and in the recent changes to the Criminal Code which recognize that sexual assault can occur between husband and wife. These are just two examples of legislative changes which recognize the independent legal rights of husband and wives. Stereotypical views of the "proper" role of a wife are becoming less acceptable. Human rights legislation at the federal and provincial level gives further protection by prohibiting discrimination on the basis of marital status.

The term "marital status" is not defined in the Canadian Human Rights Act. There are at least three possible elements that could be included in a definition. The legislation is clear that discrimination against an individual because he or she is married or single, is discrimination based on marital status. There is also a line of cases which explores the question of whether those living in a common law relationship have a "marital status" that is capable of protection by human rights legislation. Although there are cases which fall on either side of this question, there is a growing trend towards recognition that common law relationships should be subject to the same protection as legal marriages. I point to amendments to human rights act which specifically include common law relationships (such as in Ontario, Saskatchewan and Manitoba) and the recent amendment to the Canadian Human Rights Act to include "family status". While the interim policy of the Commission (in a public document dated January, 1985) is to interpret "family status" as protecting common law relationships, it is still arguable that such relationships would be included under the bare "marital status" provision. (for example, see *Bailey et al v. Minister of National Revenue* (1980) 1 CHRR D/ 192).

The question in this case is whether an individual has a remedy under the Canadian Human Rights Act where he or she is discriminated against because of marriage to a specific person. No cases have been decided on this point under the Act. Since this complaint is brought under the marital status rather than the family status provision, it is not necessary to deal with the issue of whether the spousal identity question is covered under the rubric of family status.

Of the cases referred to me by Counsel, few deal with the spousal identity issue. The two cases most directly on point, *Cindy Bosi v. Township of Michipicoten 1* and *Mark v. Porcupine General Hospital and Moyle 2* were decided under the (old) Ontario Human Rights Code 3 and

the (new) Ontario Human Rights Code 4 respectively, in 1983 and 1984. The relevant provisions of the new Ontario Code are as follows:

s. 4(1) Every person has a right to equal treatment with respect to employment without discrimination because of ... marital status.

s. 9 In Part I and in this Part (g) marital status means 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.

s. 23 The right under section 4 to equal treatment with respect to employment is not infringed where (b) the discrimination in employment is for reasons of... marital status if the... marital status of the applicant is a reasonable and bona fide qualification because of the nature of the Employment; (or) (d) an employer grants or withholds employment or advancement in employment to a person who is the spouse, child, parent of the employer or an employee.

It is important to understand both the history of this legislation and the differences between it and the Canadian Human Rights Act. The provisions of the Ontario Code were enacted in 1981 to replace then-existing human rights legislation. Under the "old" Code there was no definition of marital status, nor was there an equivalent section 23(d) dealing with nepotism. The definition in section 9(g) of the new Code is a legislative response to a narrow interpretation of marital status which excluded common law relationships. 5 It is worth noting that human rights tribunals in other jurisdictions have interpreted a similarly undefined "marital status" provision more broadly in order to accommodate common law relationships. 6 In comparison with the present Ontario legislation, the Canadian Human Rights Act contains no definition of marital status, nor does it include a provision equivalent to section 23(d). Based on the Ontario Code, Boards of Inquiry have dealt with two situations in which the issue of spousal identity vis- a- vis marital status has arisen.

The first of these cases was *Bosi*, in which Ms. Bosi was refused employment as an account clerk with the township because her husband was already employed by the township as a police officer. Her complaint was laid under the provisions of the old Code. The Board of Inquiry (M. L. Friedland) considered the possibility of interpreting marital status so as to include a spouse's identity, and acknowledged American case law supporting such an interpretation. He appears, however, to have based his decision to interpret marital status to mean only an inquiry as to whether or not an individual is married, on the provisions of section 23(d) of the new Code. He saw this as a clear statement of public policy regarding non- interference in the issue of nepotism and therefore a reason not to extend marital status under the Code beyond "its clear and natural meaning". Mrs. Cashin's complaint is not one involving nepotism, nor does the federal Act contain a provision similar to section 23(d). On this issue alone *Bosi* can be distinguished.

The second case, *Mark v. Porcupine General Hospital and Moyle*, dealt with a situation where the Complainant, Ms. Mark, was hired as a housekeeper by the hospital and was subsequently let go because her spouse was employed on the hospital's maintenance staff. The complaint was laid under the provisions of the new Ontario Code. In a decision which canvassed previous case law on the subject of marital status, the Chair, Mr. Cumming, disagreed with Mr. Friedland's

decision in *Bosi*, and found that when the status of being married is an essential element or a proximate cause of the loss or refusal of employment, discrimination on the basis of marital status has occurred. The fact that the discrimination results specifically from marriage to a particular person, rather than because of the fact that one is merely married, is not a useful or logical way to distinguish permissible from prohibited discrimination. In Mr. Cumming's words:

It seems to me the fact that the discrimination arises because of the "Marital status" of a complainant with respect to a particular person, rather than simply because of the marital status of the complainant, should not matter. If, hypothetically, an Employer refuses a black person employment because the employer has racially discriminatory views toward the particular individual, but allows some other persons who are black to work for him, there would be a breach under the old or the new Code. Similarly, if an Employer discriminates against a person on the basis of her being married to a particular person, even though he does not discriminate against married persons generally, the particular aggrieved person would, in my opinion, be unlawfully discriminated against. The "marital status" (that is, the status of 'being married') of the complainant is an essential element, or proximate operative cause, of the refusal of employment.

Mr. Cumming's approach in the *Mark* case is completely transferrable to Mrs. Cashin's case, as it is agreed by all parties that the reason for the non-renewal of her contract was her marriage to Richard Cashin.

I should note that Mr. Cumming drew support for his interpretation of marital status from *Monk v. C. D. E. Holding et al* 7, in which "family status" was found to include the specific question of spousal identity, and from American cases giving a similarly broad interpretation to marital status. 8 There have also been a number of cases decided under the Quebec human rights legislation (in which the prohibited ground of discrimination is "civil status" - a term which appears to cover both marital and family status) where discrimination was found to exist when an employer was either dismissed or refused employment because of a relationship to another particular family member. 9 Care must be taken not to make analogies too freely between decisions based on family status or civil status and those based on marital status. Though these decisions are instructive I do not consider them to be authorities in themselves for adopting the broad interpretation of marital status requested by the Complainant. Nevertheless, there is a great deal of common sense in the view that if discrimination on the basis of being a spouse or a parent is prohibited, then discrimination based on particularizing that status with respect to the specific person to whom one is a parent or a spouse is equally unacceptable. The statutory language should be interpreted by looking not only at the specific words but on the intent of the legislation and on a sensitive and flexible understanding of the reality and subtlety of discrimination.

The Respondent, however, suggests in their argument that marital status can only be interpreted broadly enough to include spousal identity by piggybacking on recent developments in the area of "family status", developments which occurred after this complaint had been laid (in their argument at page 1554). Family status, they argue, necessarily includes identity, while marital status does not. I don't agree that the situation is so clear-cut. The interim policy of the Commission regarding the interpretation of family status (referred to earlier) indicates that it is meant to specifically include common law relationships, as well as other relationships by blood,

adoption or marriage. Thus policy stating that only childless people might be employed would be discriminatory on the basis of family status. It is my own view that the new protection for family status merely extends the range of relationships to be protected, by including the status of being in a common law relationship, being a parent, uncle, etc. In my view the more specific question relating to discrimination on the basis of the identity of the particular person to whom one is connected by blood, adoption, marriage or common law relationship is as unclear as under the marital status provision.

Caldwell v. St. Thomas Aquinas School et al 10 has been cited before me. The facts, briefly, were that the contract of Ms. Caldwell, a Catholic teacher at a Catholic school, was not renewed when she married a divorced non-Catholic. The Board of Inquiry, after finding that the only reason for the failure to renew the contract was the Complainant's marriage to a divorced person (i. e. a particular individual), concluded that both religion and marital status could be bona fide employment qualifications under the British Columbia Code. The Board further decided that in this case conformity with the Church's marriage rules for Catholics was a bona fide qualification. The Board appears to have accepted, without a great deal of discussion, that there had been discrimination on the basis of marital status.

On appeal to the British Columbia Supreme Court, the Board's decision was overturned and the Court, after finding that the Complainant was not rehired because of her marital status and her religion, ruled that neither of these grounds could be bona fide qualifications for Employment. (Again, discrimination on the basis of marital status was considered to be present.)

On further appeal to the British Columbia Court of Appeal 11, the Supreme Court decision was overruled. A majority of the Court (3 out of 5) agreed that, given the language of the British Columbia Human Rights Code, the prohibited grounds of discrimination, including marital status and religion, were protected in that they could never be bona fide qualifications for employment, or reasonable causes for discrimination. They then went, on, however, to define marital status and religion so narrowly so as to mean marital status or religion in and of itself and to exclude a cause based on one's marital status or religion. (Section 8(1) of the Code prohibits discrimination in employment unless reasonable cause exists, and 8(2) provides that neither religion nor marital status shall constitute reasonable cause for discrimination.)

On a final appeal to the Supreme Court of Canada 12, the Court of Appeal's decision was upheld. In his reasons for judgement Mr. Justice McIntyre found that the prohibited grounds of discrimination in the British Columbia Code could be bona fide qualifications for employment, and that in this case the requirement of religious conformity with the Church's marriage laws by Catholic teachers was such a bona fide qualification. While he did not reject the Court of Appeal's distinction between religion (or marital status) and a cause based on religion, he did not find the test applicable to the case at bar.

Though the judgement does not deal with the issue of marital status, McIntyre J. appears to accept the fact that if there had been no issue of religious education in the case, and the only reason for Ms. Caldwell's dismissal had been her marriage to a divorced man, she would have been fully protected by the Code, that is, she would have been discriminated against on the basis of her marital status. In the course of his judgement he states:

I am in complete agreement with the proposition that if Ms. Caldwell had been employed in a secular or public school and had been dismissed because of her marriage, she would have the full protection of s. 8 and be entitled to reinstatement.

It seems logical to assume that "her marriage" here, means her marriage to a particular individual, a divorced non-Catholic, thus including spousal identity in the definition of marital status.

However, I would not go so far as to hang my hat on these words alone. I do not find the Caldwell case particularly helpful in determining the proper definition of the term "marital status" as it relates to Mrs. Cashin's complaint. Caldwell really focussed on the issue of religious discrimination and the analysis at the various levels are mainly concerned not with the question of marital status but with the question of the bona fide qualification. It is important to explain Caldwell, however, because the Court of Appeal pronouncements on marital status and the silence of the Supreme Court of Canada on the issue appear to have further muddied, rather than clarified, the issue.

Another case cited to me was *Bain v. Air Canada*.¹³ In that case, the Federal Court of Appeal found that Air Canada's family fares did not discriminate against unmarried individuals on the basis of marital status, since neither persons who were married nor persons who were single could get a reduced fare when travelling with a friend. The court stated, per Pratte, J. at D/ 684:

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.

This test is relevant to Mrs. Cashin's case because it seems on the evidence that Mrs. Cashin was treated differently than a single person in her situation would have been treated. The evidence indicates that the problem was the fact that Roseann Cashin was married to Richard Cashin. If she has been associated with him in some other relationship than as spouse, or if they were divorced, presumably there would be no problem. The evidence shows the following exchange (at page 874):

(Mr. Pink) Q.. let's just say that she changes her name and her voice is pitched in a different fashion, do you still have a problem?

(Mr. Reynolds) A. If she is still married to Richard Cashin, I have a problem.

According to the test in *Bain*, it is exactly this type of situation where discrimination based on marital status can be said to exist. A married person is treated differently than an unmarried person in the same circumstances would be treated.

I agree that to include spousal identity within the term marital status gives a broad rather than a narrow interpretation to the term. To my mind, there are clear indications in the Act itself that a broad and flexible approach is needed and was intended by the drafters. Section 2 of the Act is instructive where it states that

The purpose of this Act is to extend the present laws in Canada to give effect... to the principle that every individual should have an equal opportunity with other individuals to make for himself or herself the life that he or she is able and wishes to have, consistent with his or her duties as a member of society, without being hindered in or prevented from doing so by discriminatory practices...

Despite this clear and broad statement of purpose in the Act, it makes good sense from the point of view of statutory interpretation generally to interpret human rights provisions generously. The Interpretation Act 14 recognizes this by requiring that remedial statutes be given

such fair, large and liberal construction and interpretation as best ensures the attainment of their objects.

These two statements in the Canadian Human Rights Act and the Interpretation Act are cited with a great regularity in cases arising under the federal Act, as authority for adopting a broad and flexible interpretation. In another example, in describing the Ontario Code which is similar in purpose to our Act, it was said that the human rights code was

a special type of "social purpose" statute for which the principle of restrictive interpretation is inappropriate. (O'Malley v. Simpsons Sears Ltd. (1981) 2 CHRR D/ 267 at 268: Ratushny; judgement pending from the Supreme Court of Canada)

I point also to the recent decision of the Supreme Court of Canada in Craton v. Winnipeg School Division No. 1 rendered on September 19, 1985 (unreported). Although this case does not deal specifically with the question of whether human rights legislation should be interpreted broadly or narrowly, Mr. Justice McIntyre for the court described such legislation as "public and fundamental law of general application". He went on to say that

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

It is my view that it would be inconsistent to describe human rights legislation in such terms and then to say that such legislation demands or deserves narrow interpretation, particularly in light of section 2 of the Canadian Human Rights Act and section 11 of the Interpretation Act.

The development of the law in relation to the role and legal status of married persons is clearly and unequivocally pointed in the direction of separating the social and legal identities of partners to a marriage. To give a narrow interpretation to marital status at this stage would be to take an unnecessary backward step. I find it inconceivable to suggest that an Employer should be able to make decisions about an Employee's status on the basis of the position of that person's spouse. The logical effect of this would be to consider a married person not as an individual but as part of a unit consisting of both spouses. While considering spouses as a unit may be acceptable for some purposes (arguably by some, for taxation purposes as is now the case, to a limited extent), it would be clearly inappropriate to do so at the Employment level. The inconsistencies are obvious. Would an Employer be prohibited from asking a prospective Employee, at the hiring level, whether or not she were married, and then be permitted to fire her because of some feature

or characteristic of her spouse's life? Surely the consistent and logical interpretation is to say that one's marital status is a particular characteristic, relating to particular people. If a decision is made by an Employer not to hire or to terminate an employee because of something to do with her spouse, surely it is then open to the employer to make the argument under section 14 that a bona fide occupational requirement exists. It is difficult to conceive of the need for a section 14 justification for prima facie discrimination, if only a narrow view of marital status is taken.

The words "marital status" are clearly capable of the interpretation I suggest without stretching the limits of either logic or common sense. In my view, the case law can be seen as supporting an interpretation of marital status to include spousal identity. Mark (although not decided under the federal Act) and Bain give useful analyses which are applicable to this case. Monk, although decided on a "family status" provision, is persuasive, particularly in light of my interpretation of the meaning of "family status".

Moreover, Mrs. Cashin is clearly unable "to make for... herself the life that... she is able or wishes to have" (section 2 of the Act), that is, to work in the Resources Unit at the CBC, because of her marital status. If she were not married to Richard Cashin, she would have a different marital status, that is, she would be single. At the very least, the fact of being married is the proximate cause of the non-renewal of her contract.

For these reasons, I find a prima facie case of discrimination on the basis of marital status, contrary to section 7 and 10 of the Canadian Human Rights Act, against Roseann Cashin.

Discrimination on the basis of sex

The complaint raises discrimination on the basis of sex as well as marital status. The alleged sex discrimination has two aspects. First, the Complainant alleges that she was treated differently from certain well-known political reporters or commentators (male) who had spouses working in the area in which they were reporting. Several examples were given in the evidence by other people of male CBC and other network reporters with "political" spouses or partners. It is argued by the Complainant that, by failing to place similar restrictions on these male reporters as were placed on Mrs. Cashin (in effect, by failing to discriminate against these male reporters on the basis of marital status), the CBC is discriminating against Mrs. Cashin because she is a woman.

The only such male journalist who appeared before the Tribunal was Mr. Charles Lynch, a well-respected political commentator with many years of broadcasting experience. Mr. Lynch testified that he cohabits with a female Member of Parliament and has continued to carry on his career without having the personal involvement hamper his effectiveness. Mr. Lynch is a commentator who works in private radio rather than a reporter in the public media, so that his personal experience vis- a- vis his professional life is not analogous to Roseann Cashin's. The evidence before the Tribunal relating to other male journalists is anecdotal and not reliable. The individuals in question did not appear, and I am not prepared to give any weight to that evidence as it amounts, at best, to gossip. There is no evidence as to when these relationships began or ended, or what restrictions were placed on the individuals because of the profile or position of their partners.

It is also alleged that a statement made by Ken Hill to Mrs. Cashin at their interview after she had been told that her contract would not be renewed, amounted to sex discrimination. It appears (and it is not disputed) that Mr. Hill asked Mrs. Cashin whether she would suffer financially from losing her position at the CBC.

There is no evidence that CBC intentionally dealt with Roseann Cashin in any way differently from the way they would treat a man in a similar position. Nor is there any evidence that the Respondent's conduct has resulted in discrimination of her on the basis of her sex, even unintentionally. I find that there has been no discrimination against Roseann Cashin on the basis of sex.

Bona fide occupational requirement

The legal test to establish a bona fide occupational requirement has been established by the Supreme Court of Canada, in *Ontario Human Rights Commission et al v. Borough of Etobicoke* (1982), 132 D. L. R. (3d) 14 (S. C. C.). This test has recently been the subject of comment by the Federal Court of Appeal in *Air Canada v. Carson et al* (file #A- 1596- 83, judgement rendered February 15, 1985). Both of these cases dealt with age as a prohibited factor, with the Etobicoke case dealing with it in the context of the retirement age of firefighters and Carson dealing (simply stated) with the Air Canada's policy that new pilots not be hired after the age of 27.

Etobicoke gives a clear statement of the elements of the BFOR defence, and sets up the subjective and the objective elements to the test, at page 19 ff:

To be a bona fide occupational qualification and requirement a 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 Etobicoke case also deals with the question of sufficiency of evidence, and concludes that mere "impressionistic" evidence is insufficient to establish the defence.

Carson takes the Etobicoke case a bit further, and attempts to bring to the Etobicoke test a more clear definition. McGuigan, J, at page 17 of the decision, discusses the Review Tribunal's interpretation of adoption of the American test concerning the BFOR defence:

According to the American test the first prong in the employer's burden of proof is to show that the BFOR it invokes is reasonably necessary to the essence of its business... The second prong is for the employer to show that it has reasonable cause for believing that all or substantially all persons within that class would be unable to perform the duties of the position safely and effectively...

It would be hard to find fault with this description of the Review Tribunal's responsibility:

The correct legal test of a bona fide occupational requirement as stated in the Etobicoke case, is whether the requirement is reasonably necessary to the performance of the job. This means the Tribunal must examine both the necessity of the rule and the reasonableness of the rule in the light of that necessity.

It will not, however, escape notice that this amplification of the Etobicoke rule might also be described as a more summary version of the American rule. In any event, the approach it describes is in my view good law in Canada...

The Respondent led evidence to show that they were justified in not renewing Mrs. Cashin's contract as a writer/ broadcaster in the Resources Unit at CBC because she did not meet their occupational requirement that broadcasters be perceived to be objective.

Applying the Etobicoke and Carson tests to Mrs. Cashin's case, I have no difficulty in finding that in the subjective sense, the Respondent imposed their 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 Respondent from the CBC were credible and genuine, and apparently guided by their desire to have the best possible current affairs programming at the station.

It is the objective element of the test that causes more difficulty. Using the above-captioned quote from Carson per McGuigan, J., I must examine the necessity for the rule, as well as its reasonableness. The Respondent must establish, on a balance of probabilities, that perceived objectivity is a valid BFOR, and that Mrs. Cashin was perceived as lacking objectivity because of the position or public profile of her husband. "Objectivity" is difficult to measure; a "perception" which may exist in the minds of an unknown public, whether for good reason or not, is an even more ephemeral concept.

In trying to determine whether the perception of objectivity is a valid BFOR, we must first examine the requirements and responsibilities of the job of broadcaster in the CBC. Not only must the BFOR be a reasonable requirement, but it must be reasonably necessary to the job.

The Respondent called several witnesses who testified as to the standards to be met by CBC broadcasters. There is a disagreement between the Complainant and the Respondent as to what the test should be: the Complainant argues for the "fair and balanced" test while the Respondent puts forward "perceived objectivity" as the appropriate standard. The Respondent led evidence from Kathie Housser, Don Reynolds and Dave Candow, all of whom were Producers at CBC Radio St. John's, from Donna Logan, the Program Director of Information for CBC Radio and from Jonathan Baggaley, a Professor of Psychology with a speciality in media communications. The Complainant called Professor Anthony Westell, Colin Jamieson, Charles Lynch and William Rowe on the subject of industry standards concerning objectivity.

The CBC policy document entitled "Journalistic Policy" (Exhibit R- 5) sets out the standards and policies to be adhered to on a broad range of subjects. The manual in several places deals with the responsibility of journalists in terms of conflict of interest, fairness, etc. Since this document represents the written policy of the CBC, it is relevant to the BFOR argument. In the forward to the document written by the then President, A. W. Johnson, it states that

there has never been a greater need for truly effective media and for public confidence in the media. The matter of trust is of crucial importance because an increasingly sophisticated public seeking ways to cope in an increasingly complex world places heavy demands upon the media, while simultaneously expecting high standards of performance... In these circumstances the media have an obligation to be fair, accurate, thorough, comprehensive and balanced in their presentation of information. This is unmistakably true of a public broadcasting agency, which is accountable through its Board of Directors both to the people and to Parliament.

It goes on at page 8 to say that: There are two kinds of balance and fairness in the handling of information programming, one provided by journalists and the other provided by the CBC as a journalistic organization. Journalists will have opinions and biases of their own and their attitudes will naturally be affected by their geographic and cultural roots. But professional standards should prevent these attitudes from leading them into bias and prejudice. For journalists to be professional, in this sense, is not to be without opinions but to be self-aware, and self-correcting, so that their reporting is done in a judicious and fair manner.

The manual states that programs must reflect journalistic principles, and sets out these principles as being accuracy, integrity, fairness and thoroughness (at page 6- 7). It says that

Application of these principles will achieve the optimum objectivity and balance which must characterize CBC's information programs. (my emphasis)

In the section entitled 'On- Air Personnel' (at page 16), the document states that

In order to maintain their credibility, they [on air personnel] must avoid publicly identifying themselves in any way with partisan statements or actions on controversial matters.

The role of the CBC reporter is to convey news to the audience, with maximum fairness, accuracy and integrity.

And further (at page 90): It is evident, however, that in the very mirroring of reality, attitudes can be influenced, perhaps in the long run shaped. This is why the Corporation, in the reporting of news, insists that journalistic choices be based on the most rigorous standards of accuracy, fairness, balance and impartiality, all of which are the essential ingredients of objectivity. (my emphasis)

There are other sections in the document which deal with political activity (at page 93), hiring of political figures on CBC programmes (at page 96), and commercials - including the use of the same personalities in both programming and commercials (at page 103).

All of the Respondent's witnesses from CBC St. John's (Ms. Housser, Mr. Reynolds, Mr. Candow, Mr. Hill) agree that Mrs. Cashin's reporting on the Resources Unit met all of the tests, whether the test is described as "fair and balanced", "fair and accurate" or by the words used in the Policy Manual. Up until the time that she actually ceased working at CBC at the time of the strike in May 1981, they had received no negative comments about her reporting. On the contrary, she had received two awards for her reporting. However, the Respondent says that the reason why there was never any problem with her in terms of fairness and balance was that they kept her away from any type of reporting which would compromise these factors, by prohibiting her from covering 'fish' stories.

Mr. Reynolds said (at page 767) that it was a "given" that she would not cover 'fish' stories. Ms. Housser said (at page 628) that "it was so clearly understood that it was never mentioned". However, Mr. Candow did admit in cross-examination that 'fish' stories were done by the Fishermen's Broadcast staff and only very rarely by 'non-fish' people. Ms. Budgell's evidence is clear that it was not the fact that Roseann Cashin was connected to Richard Cashin that prevented her from covering the fishery, but the fact that this was the exclusive domain of the Fishermen's Broadcast. In any case, all agree that actual objectivity or fairness is not the issue.

The Respondent goes further. Despite the fact that Mrs. Cashin had a reputation as a responsible and fair journalist, apparently meeting the standards set out in the 'Journalistic Policy', they allege that there is a further requirement that she be perceived by the public as being objective. Mr. Reynolds described Mrs. Cashin's "perceived objectivity" problem as follows. (At page 883-4):

Mr. Russell) Q. In Mrs. Cashin's situation then, your evidence was, I believe, that she was objective in the sense that that was not a problem on the stories she would be able to do.

Mr. Reynolds) A. No, not a problem. Q. But perceived objectivity was a problem?.. In what sense?

A. In the sense that when she would do a story which had in the resources unit, either fish or oil overtones, then the perception on the part of the listener would be that it may not be entirely the way it should be, or the way the story would have unfolded, had she not had some connection with Richard Cashin of the Fishermen's Union or Petro Can, and that in their minds would have clouded her objectivity.

In Mr. Candow's words (at page 993), they must know that the "person won't get in the way of the story". However, this concern relates as much to "actual" objectivity as to "perceived" objectivity.

Ms. Donna Logan, the national Program Director of Information for CBC Radio, gave evidence for the Respondent. Ms. Logan is personally involved in setting and implementing policy and standards at CBC radio on a national level, and was one of the drafters of the 'Journalistic Policy'. She gives a clear statement of the distinction she sees between objectivity and perceived objectivity. (at page 1305):

(Ms. Logan) ... Objectivity is something that we have much more control over because it is the actual ability of the person to do the most fair, accurate and complete job that is humanly possible, and that is something that we watch and monitor very carefully, within. Perceived objectivity arises when you are dealing with the audience... it's very difficult to control, because perceptions of the audience may not be real.

We heard evidence for the Respondent from Professor Jonathan Baggaley, an Associate Professor of Educational Technology at Concordia University. Professor Baggaley is 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. Professor Baggaley himself has had no direct journalistic experience. While he has conducted no studies on the specific question that we are dealing with,

i. e. the question of audience reaction to the objectivity of reporters, he has studied, for example, the effect of production factors on audience reactions. Professor Baggaley described audiences in the following way, at page 1015:

(Professor Baggaley) ... there [is] an unfortunate gulf between the media practitioners and the audience. There is a lack of communication between them because the audience is only too ready to impute bias and partiality to the media. The media, on the other hand, sometimes in a paranoid fashion, can impute bias to the audience. And, when they impute bias to the audience unfortunately they are usually right, because this is what sixty years of research shows. The audience is a very biased animal, often without any business to be... often forming conclusions on very tenuous bases. But, my research and other people have concluded that the audience is not very good at all, if able at all, to form its evidence about objectivity and professionalism on truly professional bases.

The Complainant brought forward her own witnesses on the question of perceived objectivity, who gave their view of the appropriate test to be used. Professor Anthony Westell, a Professor at Carleton University's School of Journalism was qualified as an expert in the field of journalism. In his view, the appropriate test was no longer "objectivity", but whether journalists were "fair and balanced" in their reporting (at page 445- 6) .

Mr. Charles Lynch testified as to his own personal situation, as a political broadcaster who is involved in a personal relationship with a politician. Although his situation is somewhat different from Mrs. Cashin's, his view is that one should "judge by the work" (at page 590) rather than by the relationship. In other words, a journalist with a solid reputation should not be treated any differently because of a personal involvement, so long as the work does not suffer or is not influenced by the personal relationship.

There are problems with accepting "perceived objectivity" as a BFOR. One such problem is that "perceived objectivity" is almost impossible to measure. If there is no objective way for an employer to determine audience perception, it is impossible for that same employer to judge whether the perception is positive or negative. None of the common ways used to gauge audience reaction appear to be successful or adequate ways of measuring the audience's

perception of a reporter's objectivity. We heard in the evidence that "call sheets" are used in all CBC stations to keep track of any comments that are received from listeners or viewers. The CBC witnesses indicated that callers are much more likely to register negative comments than positive ones and that most calls are requests for information. Mr. Candow indicated that there had never been any calls of any nature relating to Roseann Cashin.

Another way of measuring audience reaction to various programs or personalities is through the ratings (known as BBM's, for the Bureau of Broadcast Measurement). We heard evidence that CBC in Newfoundland captured a very large percentage of the listeners' market, although ratings are much less important to public radio than to private. There was no evidence that the ratings bore any relation to Mrs. Cashin, one way or the other.

The reaction of interviewees may be a measure of a public perception of a reporter's objectivity. The Complainant led evidence from Mr. William Rowe, a novelist, broadcaster and public figure in Newfoundland, and a former provincial political party leader. Mr. Rowe had been interviewed by Mrs. Cashin during his political life and was aware of her marriage to Richard Cashin. He testified that there was never any conflict, in his mind as an interviewee, between Mrs. Cashin's role as a broadcaster and her role as wife of Richard Cashin. He gave her full marks for objectivity and fairness of treatment. There is no evidence that there was ever any question by anyone who was interviewed by Mrs. Cashin of any lack of objectivity or fairness because of her personal status.

The manual speaks frequently of situations to be avoided by broadcasters which might affect their credibility or objectivity, clearly recognizing that objectivity is a factor of special importance not only to the reputation of the reporter but also to the reputation of the Corporation. (They include a specific section on "Balance" in the policy.) But the official statement of CBC policy makes no specific reference to perceived objectivity. They do, however, require "rigorous standards of accuracy, fairness, balance and impartiality".

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 judgement 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 might perceive it to be so.

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 judgement 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.

As a hypothetical, if Roseann Cashin were simultaneously President of the Fishermen's Union and on staff of the Fishermen's Broadcast at CBC, there would be an obvious conflict relating to her own activities that might actually affect her objectivity. This situation is covered specifically in the manual (page 16, re On- Air Personnel).

However, would the CBC be justified in not renewing her contract if Mrs. Cashin were a reporter in the Fishermen's Broadcast and Mr. Cashin were President of the NFFAWU. There are several factors which must be weighed when answering this question. One factor is whether CBC's document relating to journalistic standards covers the situation. As stated earlier, the policy does not refer to activities of spouses. However, on- air personnel must "avoid publicly identifying themselves in any way with partisan statements on controversial matters. (page 16). The response of the Corporation might depend on whether Mrs. Cashin appeared publicly with her husband on fishery matters (for example, appeared on platforms with him during speaking engagements, etc.) or whether she herself had no public identification with the fishery. Another important factor is whether the broadcaster had a previous reputation as a respected journalist. If such a reputation exists, it is less likely that the personal involvement would affect their perceived credibility. The third factor is evidence in the work or in the public reaction to the work that objectivity is being questioned. Thus, if 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. Similar considerations must be taken into account in the present factual situation.

In this case, there was no evidence that Mrs. Cashin has done anything to associate herself with her husband's position as President of the Union or as a Director of Petro Canada. (On the contrary, it is my impression of Mrs. Cashin that she has taken pains to establish her own career and identity separate from that of her husband.) There was evidence that Mrs. Cashin had established a solid reputation as a journalist in Newfoundland over a decade winning awards for her reporting on mining stories and being President of the Press Gallery. There was no evidence at all that her objectivity had ever been questioned by anyone - the CBC, the public, or interviewees. Nor is there any evidence that a perception existed among the public that she was "too hot" (to use the words attributed to Mr. Hill) for current affairs programming because of her husband's position.

I am not satisfied that a "perception of objectivity" is, of itself, a reasonably necessary requirement of a broadcaster's job. A perception that a reporter lacks objectivity, if it exists, may be based on factors which have no bearing on the reporter's actual objectivity. For example, we heard evidence that production factors can make a person look dishonest or shifty (Baggaley,

page 1022) - An audience's perception of a reporter's lack of objectivity might also be based on prejudiced attitudes or stereotyped 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.

If it can be said that a perception of lack of objectivity exists without basis, and that the reporter's work has not fallen from its usual high standard, how can it be said that perception is reasonably necessary to the performance of the job if the job performance remains of high standard. Quite simply, the requirement does not relate to the work, if the work is objective, fair, accurate and balanced. This leads me to the conclusion that the perceived objectivity requirement has not met the objective requirement of the BFor test.

There may be other factors which could be defined as valid BFOR's to a broadcaster's job, and in my view, objectivity or fair and balanced reporting are examples. The Journalistic Policy talks in various places of being "fair, accurate, thorough, comprehensive and balanced" (page 1), of the journalistic principles as being accuracy, integrity, fairness and thoroughness (pages 6-7), of reporting in a "fair and judicious manner" (page 8), and of conveying news "with maximum fairness, accuracy and integrity" (page 16). I have heard no evidence that Mrs. Cashin has failed to meet the policies set out by the CBC themselves in their official policy document outlining journalistic standards.

I find that the Respondent has failed to establish the existence of a BFOR under section 14.

Remedy

The Complainant has asked for a declaration that the CBC discriminated against the complainant on the basis of marital status, an order that the complainant be re-hired in her former or a similar position, an award for lost wages, an award of general damages, and costs.

The authority of the Tribunal to award damages is contained in section 41:

s. 41(2) If, at the conclusion of its inquiry, a Tribunal finds that the complaint to which the inquiry relates is substantiated, subject to subsection (4) and section 42, it may make an order against the person found to be engaging or to have engaged in the discriminatory practice and include in such order any of the following terms that it considers appropriate:

(b) that such person make available to the victim of the discriminatory practice on the first reasonable occasion such rights, opportunities or privileges as, in the opinion of the Tribunal, are being or were denied the victim as a result of the practice;

(c) that such person compensate the victim, as the Tribunal may consider proper, for any or all of the wages that the victim was deprived of and any expenses incurred by the victim as a result of the discriminatory practice;

(d) that such person compensate the victim, as the Tribunal may consider proper, for any or all additional cost of obtaining alternative goods, services, facilities or accommodation and any expenses incurred by the victim as a result of the discriminatory practice.

(3) In addition to any order that the Tribunal may make pursuant to subsection (2), if the Tribunal finds that

(a) a person is engaging or has engaged in a discriminatory practice wilfully or recklessly, or

(b) the victim of the discriminatory practice has suffered in respect of feelings or self-respect as a result of the practice, the Tribunal may order the person to pay such compensation to the victim, not exceeding five thousand dollars, as the Tribunal may determine.

It is my view that section 41(2)(b) gives a Tribunal the authority to order the Respondent to rehire a complainant where discrimination has been proved, in the same or a similar position. In cross-examination, Mrs. Cashin noted that she is on the Board of Directors of a private radio station in St. John's. Clearly this would be a conflict of interest if she were to be rehired at CBC. In any case, she should be given the opportunity to be rehired by the CBC, and at that point decide whether she should accept the position and relinquish her board position. I order that the Respondent rehire the Complainant in her former position or in a similar position at the earliest possible opportunity.

The Complainant seeks an award for lost wages and a Tribunal is empowered to make such an order under s. 41(2)(c). It is appropriate in this case that Mrs. Cashin be compensated for lost wages for some period of time between the date she was told she would not be rehired and the time she was able to find a new job, taking the responsibility to mitigate damages into account. I have not heard sufficient evidence on Mrs. Cashin's attempts to mitigate her damages or her attempts to find other employment, to allow me to make a judgement as to the amount of lost wages to be awarded. If the parties are unable to reach agreement on the amount of lost wages to be compensated, I am prepared to hear further evidence on this matter. The Complainant seeks costs in this action under s. 41(2)(c) and or (d) and I am satisfied that a Tribunal has authority to make such an order in suitable cases. Such a request was made and denied by the Tribunal in *Potapszyk v. MacBain* (1984), 5 C. H. R. R. D/ 2284, because the Tribunal felt that the Complainant in that case could have been adequately represented by the Commission's counsel in their "public interest" role. They did not feel that two counsel were necessary to carry the case and denied the request to pay for the Complainant's counsel, even though the complaint was substantiated by the Tribunal.

The present case can be distinguished in very significant ways that made it impossible for Mrs. Cashin to be represented by Commission counsel.

Her initial complaint to the Commission was investigated at the regional level and determined to be unsubstantiated. Mrs. Cashin challenged this finding in the Federal Court of Appeal on the basis of a denial of natural justice. The Federal Court ordered the Commission to appoint a Tribunal to decide the complaint. The Commission did not take an active part in the proceedings

before the Tribunal. They asked no questions and took no position in the hearing other than to give the Commission's view on the marital status issue during the final argument.

The Tribunal in *MacBain* said as follows: In the usual case the interest of the Commission and the Complainant are the same. That was the situation here as there was essentially no conflict taken by the Commission and the Complainant... The structure of the Act permits an individual who has a complaint to have it prosecuted by competent counsel for the Commission without incurring personal expense.

This is not a case, as in *MacBain*, where the Complainant chose to retain her own counsel despite the fact that Commission counsel was available to her. Since the Federal Court ordered the Commission to take action that it was not prepared to take on its own initiative, the positions taken by the Complainant and the Commission in this case have been quite different.

In the normal course of events, the Complainant would not incur legal costs since her case would be carried by the Commission. The Act clearly anticipates this in s. 40(2). A Respondent would not normally be required to pay a complainant's legal costs where the complaint has been substantiated since they would be borne by the Commission.

The Tribunal's jurisdiction to award costs is limited to "expenses incurred by the victim as a result of the discriminatory practice", as well as to an award against "the person found to be engaging or to have engaged in the discriminatory practice". I am convinced that the words used in s. 40(2) are broad enough to cover an award of legal costs, but it does not seem appropriate that these costs should be borne by the Respondent in this case. While I have no jurisdiction to order that Mrs. Cashin's legal costs be borne by the Commission, this clearly seems the appropriate solution and I would urge it upon the Commission. I make no award against the Respondent for costs.

The Complainant also seeks damages under 41(3)(b). A Tribunal is limited to an award of \$5000 under this section, for suffering in respect of "feelings or self-respect" as a result of the discriminatory practice. There was not a great deal of evidence on this, although the direct evidence gives the following exchange at page 107:

(Mr. Pink) Q. After you've had time to sit back and reflect upon your situation, Mrs. Cashin, what can you say about how you felt the employer dealt with you?

(Mrs. Cashin) A. Well, I told him when I was in the meeting I felt it was dehumanizing. I felt like a chattel, for one thing. I felt that I had my career and my husband has his. I have worked very hard and I had established a base in this community. I believe I had established a perception of myself as an objective broadcaster quite independent of anything else and I thought it was quite unfair. I was miserable after.

I am satisfied that Mrs. Cashin has suffered because of the discriminatory practice of the Corporation in terms of her feelings and self-respect and I award the amount of two thousand five hundred dollars (\$2500) under section 41(3)(b), taking into account that the discriminatory conduct was, in my view, neither wilful nor reckless.

Jurisdiction

Although no objections to the jurisdiction of the Tribunal were raised during the hearing, the recent decision of the Federal Court of Appeal in *MacBain v. The Canadian Human Rights Commission et al* (A- 996- 84) released on October 7, 1985 raises questions about the manner of appointment and hence the jurisdiction of Tribunals appointed under the Act. The Court determined that the Tribunal in that case was improperly appointed as the statutory scheme allowed the Commission to investigate and substantiate the complaint, to appoint the Tribunal, and to "prosecute" the case. The question of the implication of the *MacBain* decision on other Tribunals appointed under the Act is now before the same court in a Reference in the Matter of a Complaint by Local 916 of the Energy and Chemical Workers' Union and Atomic Energy of Canada (Candu Operations) (# A- 796- 85)

The present case can be distinguished from *MacBain* on specific points. Although Mrs. Cashin's complaint was investigated by the Commission, the Commission did not substantiate the complaint, nor did they "prosecute" the case. The Tribunal was appointed only on direction of the Federal Court of Appeal. Subject to a decision from the Court in the AECL reference on the jurisdiction of other Tribunals in light of the *MacBain* case, it is my view that the jurisdiction of this Tribunal is not affected by *MacBain* as the conduct of the Commission in this case is sufficiently different to distinguish the two situations.

Conclusion

The Tribunal finds that the Respondent, the Canadian Broadcasting Corporation, discriminated against Roseann Cashin on the basis of marital status contrary to section 7 and 10 of the Canadian Human Rights Act, and orders that the Respondent

- (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 two thousand five hundred dollars (\$ 2500) under section 41(3)(b) in respect of feelings or self- respect as a result of the discriminatory practice.

I dismiss the complaint relating to discrimination on the basis of sex. I wish to thank the parties for their patience in awaiting this decision, and to apologize for its length.

Dated at Halifax, Nova Scotia, this 25th day of November, 1985.

Susan M. Ashley Chair

Footnotes:

1. (1983) 4 CHRR D/ 1250
2. (1985) 6 CHRR D/ 2538
3. R. S. O. 1980 c. 340
4. S. O. 1981 c. 53
- 5 Blatz v. Catholic Children's Aid Society (1980) 1 CHRR D/ 72 (Ontario Board of Inquiry)
6 ?
7. (1933) 4 CHRR D/ 280 (Manitoba Board of Adjudication: Teskey) 8. See Kraft Inc. v. State of
Minnesota (1979) 284 N. W. (2d) 386 (S. C. Minn) Thompson v. Board of Trustees School
District (1981) 627 P. 2d 1229 (S. C. Montana)
9. See Pelletier c. Hopital Laval (C. P. Quebec 200094- 1, 1979, unreported) Ville de Brossard c.
Commission des droits de la Personne du Quebec Les Biscuits Associes du Canada Limitee et
Martel 1979 C. S. 532, referred to in Tarnopolsky, "Discrimination and the Law", Richard de
Boo, Don Mills, 1982
10. (1980) 1 CHRR D/ 29 (B. C. S. C.)
11. (1982), 3 CHRR D/ 165
12. decision rendered December 20, 1984
13. (1982) 3 CHRR D/ 682 (Fed. C. A.)
14. R. S. C. 1970, C I- 23, s. 11