BCGSEU v PSERC

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Court File No. 26274

IN THE SUPREME COURT OF CANADA

BETWEEN:

British Columbia Government and Service Employees' Union

Appellant (Applicant)

- and -

the Government of the Province of British Columbia
as represented by the Public Service Employee Relations Commission

Respondent (Respondent)

- and -

WOMEN'S LEGAL EDUCATION AND ACTION FUND
the DISABLED WOMEN'S NETWORK OF CANADA
and the CANADIAN LABOUR CONGRESS

Intervener

INTERVENER'S FACTUM

PART I - THE FACTS

1. The DisAbled Women's Network Canada, the Canadian Labour Congress and the Women's Legal Education and Action Fund (the "Coalition") adopt the facts as set out in the Appellant's factum and add the following relevant facts.

2. Ms Meiorin (the "Grievor") was an experienced forest firefighter in her third season, whose employment was terminated following the introduction of what the BC Forest Service (the "BCFS") called the "Bona Fide Occupational Fitness Test". She successfully passed three of the four components of the fitness test for Initial Attack Crews but failed the running component by 49 seconds.

Appellant's Record, Vol. 2, pp.230, 231-32, 254

3. The arbitrator reinstated the Grievor and found that she was a "very good employee" who performed her job "safely and efficiently" and that her supervisor did not want to lose her from the crew. The arbitrator specifically found that he was "not persuaded the inability of Ms. Meiorin to run 2.5 km in less than 11 minutes 49 seconds would pose a serious safety risk to herself, fellow employees or the public at large".

Appellant's Record, Vol. 2, pp.239, 272, 300

4. The aerobic capacity standard was developed primarily on the basis of a male population of firefighters and has never been validated against the actual job performance of female firefighters. The test groups were as follows: 31 male firefighters and 15 inexperienced female students (1992); 77 male and 2 female firefighters (1994); and 17 inexperienced female students (1995).

Appellant's Record, Vol. 1, pp.75, 101, Vol. 2, 206, 268
Respondent's New Evidence Motion Book, Tab A, p.2

PART II - POINTS IN ISSUE

5. The issues in this appeal are whether the aerobic capacity standard for Initial Attack Crews as formulated discriminates against women and if so, what the appropriate remedy may be.

PART III - ARGUMENT

6. The Coalition has three submissions:

(a) systemic discrimination can only be addressed by scrutinizing the underlying norms that shape workplace rules;

(b) a unified justificatory framework that incorporates the bona fide occupational requirement ("BFOR") and duty to accommodate to the point of undue hardship defences should be applied to both direct and adverse effect discrimination; and

(c) the aerobic capacity standard as formulated is discriminatory and has not been justified by the employer.

7. This case ultimately raises issues about whether the arbitrator properly interpreted human rights legislation in terms of the relationship between the justification of rules and the duty to accommodate. The required deference to an arbitrator's findings of fact does not include deference to an arbitrator's legal characterization of those facts where the legal issue relates to an external statute.

8. The arbitrator did not substantially address the issue of whether or not the aerobic capacity standard was justified by the employer as he found it amounted to adverse effect discrimination, and he focused on the possibility of individual accommodation. In deciding that individual accommodation was possible, the arbitrator specifically rejected the argument that the Grievor posed a safety risk. When read as a whole, however, his factual findings establish that the aerobic capacity standard were not necessary to the safe and efficient performance of the Grievor's forest firefighting duties. His findings ultimately support a conclusion that the standards were not justified.

A. REQUIREMENT TO SCRUTINIZE UNDERLYING NORMS

9. Eradicating discrimination in the workplace is of primary importance in achieving equality for Canadian women. This Court has held that all Canadians benefit from measures which enhance the broad societal goal of equal dignity for all.

C.S.R. de Chambly v. *Bergevin*, [1994] 2 S.C.R. 525 at 544 (hereinafter "*Chambly*"), IA Tab 10

Vriend v. A.G. (Alberta), [1998] 1 S.C.R. 493 at 535-536, IA Tab 22,

10. Despite the dramatic growth in the participation of women in the paid workforce, there are still substantial limitations to full participation. Women are segregated into specific industrial sectors and into female-majority jobs within these sectors. Barriers continue to operate to limit women's access to "non-traditional" jobs and workplaces. In particular, firefighting has been and continues to be largely a male-dominated field of work.

11. This Court has found that the markedly low rate of participation in "non-traditional" jobs is not simply fortuitous and that systemic discrimination prevents and discourages women from full

participation in the Canadian workforce. Systemic discrimination consists of a web of direct and indirect barriers embedded in the accepted norms shaping employment rules, policies and practices that have the cumulative effect of excluding members of disadvantaged groups from equal access to and treatment in employment.

> *Canadian National Railway v. Canadian Human Rights Commission*, [1987] 2 S.C.R 1114 at 1124, 1138-39 (hereinafter "*Action Travail*"), IA Tab 8

12. Systemic discrimination can only be addressed by scrutinizing the dominant norms that have shaped and defined the workplace. Such norms have been distorted by those who have traditionally been employed in a particular job and have been in a position to determine what are the requirements of the job.

13. One example of a barrier faced by women in "non-traditional" occupations is pre-employment or job testing developed on the basis of men's physical abilities and then applied to women. The scientific field of pre-employment testing is not neutral and has often been modelled on the male physical attributes assumed to be required in jobs traditionally occupied by men.

> Karen Messing, *One-Eyed Science: Occupational Health and Women Workers* (Temple University Press, 1998) at 30-39, IA Tab 25

14. The very concept of "merit" and"ability" to do a job is not neutral. By definition, "merit" and "ability" to do a given job encompass the existing way of working. In a formal equality approach, the analysis stops at the point of "fitting" into the existing model. However, substantive equality requires that the norms underlying a specific definition of ability be challenged:

> It is not enough simply to have an official policy that all are welcome. The more pervasive question is whether people are, nonetheless, expected to act like men, like whites, like heterosexuals, like middle class, and/or like able bodied people. If people are expected to act as something they are not, they are either doomed to failure or robbed of part of their identity.

> D. Pothier, "Miles To Go: Some Personal Reflections on the Social Construction of Disability" (1992) 14 Dal. L.J. 526 at 534, IA Tab 26

15. The challenge of scrutinizing these underlying norms is particularly striking in jobs where the impugned rules focus on physical capacity and where there are implications for public safety. Over time, anti-discrimination law has evolved so that we are now able to successfully analyze and address the content of workplace requirements in high risk positions, including police officers, pilots and military personnel. In each of these cases, pre-employment and job testing standards that created barriers for women and many ethnic groups, that once appeared essential and neutral given the risks associated with the job, did not hold up to close scrutiny. Workplace standards that had the adverse effect of excluding a disproportionate number of women compared to men were replaced by more inclusive requirements that take into account the physiological differences between men and women, as well as the ability to do the job.

Gauthier v. Canada (*Can. Armed Forces*) (1989), 10 C.H.R.R. d/6014 (Trib.), IA Tab 15
Boyd v. Ozark Air Lines Inc., 419 F.Supp 1061 (1976) (United States District Court, E.D. Missouri), IA Tab 4
Colfer v. Ottawa Police Commissioner (January 12, 1979) (Cumming) (Ontario Board of Inquiry) [unreported] (hereinafter "*Colfer*"), IA Tab 11

B. A UNIFIED FRAMEWORK FOR ASSESSING WHETHER DISCRIMINATION IS JUSTIFIED

(a) Purposive approach to human rights legislation

16. Human rights legislation should be given a broad and purposive interpretation that accords rights their full recognition and effect. Narrow restrictive interpretations which would defeat the purpose of the legislation, that is the elimination of discrimination, are not acceptable.

Action Travail, *supra* at 1134, IA Tab 8
*Ontario Human Rights Commission and O'Malley v. Simpsons Sear*s Ltd., [1985] 2 S.C.R. 536 at 546-7 (hereinafter *"O'Malley")*, IA Tab 19

17. The purpose of human rights legislation is to remedy systemic discrimination and achieve substantive equality. As a consequence, legal analysis pursuant to these statutes should focus on the effects of discriminatory practices. Human rights law must be consistent with equality rights jurisprudence under s.15 of the *Charter*.

O'Malley, supra at 547, IA Tab 19
Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143 at 175, Tab 2

18. The corollary to this broad purposive approach is that exceptions that justify discrimination should be narrowly interpreted.

Bhinder v. Canadian National Railway, [1985] 2 S.C.R. 561 at 567- 569, 589 (hereinafter "*Bhinder"*) IA Tab 3
Brossard v. Quebec (Commission des droits de la personne), [1988] 2 S.C.R. 279 at 307 (hereinafter "*Brossard"*), IA Tab 6
Zurich Insurance Co. v. Ontario (Human Rights Commission), [1992] 2 S.C.R. 321 at 339 (hereinafter "*Zurich"*), IA Tab 23

19. An integral aspect of a purposive analysis is to look at the context by examining the underlying norms that inform discriminatory rules, policies, practices and structures. These norms should never be considered justified in an *a priori* manner and it should never be assumed that the scientific label affords neutrality. Nor should rules or standards be beyond scrutiny simply because the employer paid an "expert" consultant to do what is labelled a "bona fide" study.

Eldridge v. *British Columbia (A.G.),* [1997] 3 S.C.R. 624 at 678-679, IA Tab 14
Edwards v. A.G. (Canada) (Persons Case), [1930] 1 D.L.R. 98 (J.C.P.C.), IA Tab 13
Brooks v. *Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219 at 1241- 1250, IA Tab 5

20. A purposive approach to accommodation leads to the removal of barriers to substantive equality. The formal equality approach has been thoroughly rejected by this Court. A fully-developed duty to accommodate will question the social norms themselves instead of simply making manageable concessions to those who are "different".

Eldridge, supra at 677-679, IA Tab 14
Eaton v. Brandt County Board of Education, [1997] 1 S.C.R. 241 at 272-273, IA Tab 12
S. Day and G. Brodsky, "The Duty to Accommodate: Who Will Benefit?" (1996), 75 Can. Bar Review 433 at 435, IA Tab 24

(b) Evolution of the law to date

21. The jurisprudence on the justification of discrimination under human rights legislation is relatively new and has been considered in only limited fact situations. The case at bar provides an opportunity to clarify

the availability of the defences of BFOR and accommodation to the point of undue hardship. Given the early stage of evolution of the law in this area, it is important to avoid rigid categorizations so that legal analysis can address all forms of discrimination.

Day and Brodsky, *supra* at 460-61, IA Tab 24

22. The evolution of this jurisprudence to date has focused on a narrow range of manifestations of adverse effect discrimination. Cases considered by this Court have been limited to rules that operate as a full exclusion on the basis of religion and creed. The framework developed in these cases is inadequate to address other forms of adverse effect discrimination.

O'Malley, *supra*, IA Tab 19
Bhinder, supra, IA Tab 3
Alberta Human Rights Commission v. Central Alberta Dairy Pool, [1990] 2 S.C.R. 489, Intervenor's Authorities (hereinafter "IA"),Tab 1
Central Okanagan School District v. Renaud, [1992] 2 S.C.R. 970, IA Tab 9
Chambly, supra, IA Tab 10

23. It is submitted that a case involving a disproportionate impact on the basis of sex requires a re-evaluation of the approach taken by this Court to date. This is true because the impact of the standard is not limited to a single individual or a small minority. The central rationale in *O'Malley* and subsequent adverse effect cases is that the rule can stand because it has a limited impact, rather than a widespread one.

O'Malley, *supra* at 555, IA Tab 19

24. Similarly, most of the direct discrimination cases considered by this Court to date have focussed on the dichotomy between a general rule that is universally applicable and the alternative of individual assessment. This dichotomy is not determinative in all cases. For example, in *Brossard* this Court recognizes these limitations and begins to broaden its approach and develop a more nuanced framework for reviewing discriminatory rules that includes the tailoring of rules and the development of less discriminatory alternatives.

Ontario Human Rights Commission v. Etobicoke [1982] 1 S.C.R. 202 (hereinafter "*Etobicoke"*), IA Tab 18
Saskatchewan Human Rights v. *Saskatoon*, [1989] 2 S.C.R. 1297 (hereinafter "*Saskatoon"*), IA Tab 21

Large v. *Stratford(City)*, [1995] 3 S.C.R. 733 (hereinafter *"Large"*), IA Tab 17
Brossard, supra.at 315-317, IA Tab 6,

(c) Same Justificatory Framework for Direct and Adverse Effects Discrimination

25. Most existing caselaw, following *Alberta Dairy Pool*, suggests that there are two separate and distinct tests to be considered in determining if discrimination is justified: direct discrimination is justified by establishing a BFOR, while adverse effect discrimination is justified under the duty to accommodate test. The Coalition respectfully submits that the bifurcation of direct and indirect discrimination is problematic. This bifurcation plays an important conceptual role in identifying the forms of discrimination. Beyond that, however, this bifurcation is not only unhelpful but also can impede the analysis required to justify a discriminatory rule or remedy.

26. The characterization of a discriminatory practice as direct or indirect is inherently manipulable and the bifurcated tests which depend on how the discrimination is characterized has been problematic in practice.

Power v. Wabush Mines (1997), 153 D.L.R. (4th) 739 (Nfld. C.A.), IA Tab 20
Canada (Human Rights Commission) v. Toronto Dominion Bank, [1998] F.C.J. No. 1036 (F.C.A.), IA Tab 7
Kenneth Watkin, "The Justification of Discrimination Under Canadian Human Rights Legislation and the Charter: Why So Many Tests?" 2 N.J.C.L. 63 (1992) 87, IA Tab 28
Day & Brodsky, *supra*, IA Tab 24

27. The form in which an exclusionary rule is framed should not dictate substantive results. It should not be possible to do indirectly what cannot be done directly.

Chambly, *supra* at 542, IA Tab 10

28. Generally-speaking, human rights legislation does not distinguish between direct and indirect discrimination. The separate tests have been developed in large measure through caselaw. They are not determined by the statutes themselves. The majority of human rights codes which expressly provide for the duty to accommodate, make it applicable in instances of direct and indirect discrimination. Nor

do these statutes stipulate that a higher degree of justification or scrutiny is to be applied to some forms of discrimination.

Zurich, supra at 340, IA Tab 23
Renaud, supra at 986, IA Tab 9
Manitoba Human Rights Code, S.M. 1987-88, c. 45, s.12, IA Tab 29
Ontario Human Rights Code, R.S.O. 1990, c. H-19, s.24, IA Tab 30

(d) Employer Must Show that Discrimination is Unavoidable

29. *O'Malley* has been a key case in the evolution of discrimination law and its legacy should be the expansion of the discrimination analysis, not the creation of rigid categories. The problems of a bifurcated treatment of discrimination were not anticipated at the time of *O'Malley*, given the rule under consideration. The issue of justification was not fully addressed in *O'Malley* and subsequent religious minority cases because the rational connection of the business or school operating on certain days was so obvious as to not require any proof of justification. However, the assumption that a rule or requirement that has an adverse impact does not require justification needs to be revisited.

10 *O'Malley, supra* at 555, IA Tab 19

30. In all cases, once a prima facie case of discrimination has been established, there must be an onus on the employer to justify the impugned requirement as a rule of general application. In order to accomplish the purpose of human rights legislation, all discriminatory requirements need to be justified. Even where the justification appears obvious, this is still an important step in the analysis.

Alberta Dairy Pool, supra at 514, IA Tab 1

31. Our proposed unified justificatory framework combines elements considered under the existing BFOR and duty to accommodate defences and applies them to every type of discriminatory rule. This
20 is a natural evolution of the approach taken by this Court to date. For example, the reasoning of this Court in cases such as *Brossard* and Mr. Justice Sopinka's analysis in *Alberta Dairy Pool* reflect the recognition that this area of law demands a more complex and flexible approach to fit all types and cases of discrimination.

32. The legal tests for justification and duty to accommodate are inherently linked, not separate. A narrow reading of the majority ruling in *Alberta Dairy Pool* suggests that the duty to accommodate should be considered only in cases of indirect discrimination. However, the caselaw does not reflect a consistent application of this rigid distinction. There is strong support for the principle that a

discriminatory rule can only be reasonable and necessary in the circumstances if accommodation cannot be accomplished without undue hardship.

Alberta Dairy Pool, supra per Sopinka, J. at 522, IA Tab 1
Renaud, supra at 981, IA Tab 9
Large, supra per L'Heureux-Dube J. at 761
Bhinder, supra per Dickson, C.J. dissenting at 570-2, IA Tab 3
Day and Brodsky, *supra*, IA Tab 24
Watkin, *supra*, IA Tab 28

10 33. One of the advantages of dealing with the duty to accommodate in the context of the initial justificatory analysis is that it draws attention to the possibility of accommodation through general policy change rather than as an ad hoc accommodation of individual employees via exceptions to general rules. Although creating individual exceptions to general rules will sometimes be an appropriate response, the option of creating exceptions arises only after it is established that the general requirement has been justified as a general rule. It also directs the employer to take into account group differences in the formulation of workplace standards and rules and the development of reasonable alternatives to rules that have a discriminatory impact.

Alberta Dairy Pool, supra per Sopinka J. at 529, IA Tab 1

20 34. The Respondent urges this Court to adopt an approach "consistent with the American jurisprudence", including a test that would shift the burden away from the employer and reduces the standard of scrutiny merely to "business justication". The Coalition submits that such an approach is not only inconsistent with the purposive and effects based approach to discrimination firmly adopted by this Court but that such tests have been rejected by this Court.

Respondent's Factum, para. 98
Renaud, supra at 983, 992, I Tab 9
Etobicoke, supra at 208-212, IA Tab 18

30 35. The focus of this unified justificatory framework should be on whether the employer has demonstrated that it could not avoid the discriminatory effect on the individual or group. This obligation

flows directly from the purpose of human rights legislation, that is the elimination of discrimination and achievement of substantive equality.

> *O'Malley, supra* at 546-7, IA Tab 19
> Day and Brodsky, *supra*, IA Tab 24
> *Zurich, supra* at 341, IA Tab 23

36. This approach is entirely consistent with the existing BFOR and duty to accommodate to the point of undue hardship analyses which are founded on this central issue of whether or not the discrimination is avoidable. The analytic framework developed to date encompasses a number of questions. This list, while not definitive or exhaustive, includes:

(i) is the rule reasonably necessary?

(ii) is the rule sufficiently tailored to achieve its purpose?

(iii) is there a practical/reasonable alternative rule that would have a less discriminatory impact?

(iv) have attempts to accommodate the employee been made to the point of undue hardship?

This approach is not unlike the analysis the Court has adopted to define reasonable limits to *Charter* rights under s.1.

(e) Substantive Equality Requires Systemic Remedies

37. Accommodation should be interpreted broadly as a means of achieving a fully accessible and fair workplace. In some cases this is accomplished by creating more inclusive requirements and in other cases through the adoption of exceptions to the general requirement.

> The case law of this Court has approached the issue of accommodation in a more purposive manner, attempting to provide equal access to the workforce to people who would otherwise encounter serious barriers to entry.
>
> *Renaud, supra* at 983, IA Tab 9

38. The bifurcation of direct and indirect discrimination should not determine the remedies available to a complainant. Adjudicators and courts should have the ability to fashion effective remedies that can

address the full effects of the discriminatory rule or practice. Systemic remedies are required to achieve substantive equality.

39. Accomodation in a unified framework is not limited to adjusting the rule, practice or requirement to meet the specific needs of the individual complainant. Rather, accommodation should be seen as extending to striking down the rule itself. This interpretation is in keeping with the purpose of human rights legislation which is to "remove" and "prevent" discrimination and with the broad remedial powers incorporated into human rights legislation.

Action Travail, *supra* at 1134, IA Tab 8
O'Malley, *supra* at 546-7, IA Tab 19
Human Rights Code, R.S.B.C. 1996, c. 210, s.37, IA Tab 31

40. In the landmark case of *Griggs* v. *Duke Power*, that has been cited with approval by this Court, the United States Supreme Court's analysis led to rejection of the standard and test not simply the accommodation of the individual adversely affected by the test. Similarly in *Colfer*, the adjudicator struck down the minimum height and weight requirements for police officers; he did not simply create an exception for Ms.Colfer. These remedies would not be possible on a rigid application of the bifurcation set out in the majority ruling in *Alberta Dairy Pool.*

Griggs v. Duke Power Co., 28 L Ed 2d 158 (1971) U.S.C.C., IA Tab 16
Colfer, supra at 86, IA Tab 11
O'Malley at 549-550, IA Tab 19

41. It is submitted that where an employer cannot show that the discriminatory rule was unavoidable, the rule is struck down. This remedy should be available whether the discriminatory rule results in direct or indirect discrimination. *O'Malley* left open the possibility that the duty to accommodate could require that a rule be struck down although this was not the automatic outcome as in a case of direct discrimination. Madam Justice Wilson stated in *Alberta Diary Pool* that if "reasonable alternatives exist to burdening the members of a group with a given rule, the rule will not be bona fide". Applying that reasoning, the rule should not be allowed to stand.

Alberta Dairy Pool, *supra* at 514, 527, IA Tab 1
O'Malley at 555, IA Tab 19

42. If the proposed accommodation would result in a full exemption to the rule in a way that undermines the rationale of the general rule, then the justifiability of the rule should be reconsidered. The majority in *Alberta Dairy Pool* held that a requirement must rely for its justification on the validity of its application to all members of the group. While this point was made in relation to direct discrimination, it is equally applicable in cases of adverse effect discrimination.

Alberta Dairy, supra at 514, IA Tab 1

43. Reasonable accommodation is an integral aspect of equality. Therefore, even in situations where a rule is justified as a general rule there is a duty to take reasonable steps to accommodate up to the point of undue hardship, in order to avoid the consequences of adverse effect discrimination.

Renaud, supra at 986, IA Tab 9
Chambly, supra at 543, IA Tab 10

44. Even where the rule is justified as a general rule, the employer has a duty to accommodate by adjusting the workplace or rule. For example in the employment context, accommodation can take other forms including altering work schedules, changing job duties, altering the worksite, varying tests or providing special equipment. These individual accommodations also further substantive equality by recognizing and addressing the diverse needs of employees without requiring a change in the rule itself. However, it is important to underscore that this stage of analysis is only reached in cases where the rule has been fully justified as a rule of general application.

C. THE AEROBIC CAPACITY STANDARD AS FORMULATED IS DISCRIMINATORY AND HAS NOT BEEN JUSTIFIED

(a) Requirement in this case amounts to effects-based discrimination

45. It is submitted that the arbitrator's finding is correct that the aerobic standard as presently formulated discriminates against women contrary to the British Columbia *Human Rights Code*.

46. The Court of Appeal failed to analyze the aerobic capacity standard in terms of its adverse impact on women. It simply adopted the Respondent's argument that there is no discrimination where there is individual testing. The Court's decision is however premised on an incomplete understanding of adverse effect discrimination and skips an important step of the analysis.

47. The purpose of human rights legislation is to strike at the entire spectrum of disparate treatment. The fact of discrimination is not diluted because the disparate impact adversely affects only a portion of the protected class. It has the same impact of excluding qualified individuals from jobs based on group characteristics rather than on their individual ability to do the job. The differential effects of this form of adverse effects discrimination may, however, make it more complex for an adjudicator to make a prima facie determination of discrimination and to develop appropriate remedies.

D. Pothier, "M'Aider, Mayday: Section 15 of the *Charter* in Distress" 6 N.J.C.L. 295 (1996) at 322-323, IA Tab 27

48. There is no disagreement on the evidence that the requirement of 50 VO_2 max adversely affects the majority of women. Indeed, both the Appellant and the Respondent agree that as a result of physiological differences between men and women that women have a lower aerobic capacity. The prima facie case of adverse effect discrimination has been made out.

Award, **Appellant's Record**, Vol. 2, pp.288, 297-298

49. Despite an attempt developing a non-discriminatory standard, the Respondent has missed the mark by failing to scrutinize the underlying norms that result in this discriminatory standard. As with the height and weight requirements, the aerobic standard in this case was developed according to a male employee construct and is not a "neutral" standard. The Respondent has commissioned studies to assess the fitness standards, but each was biased in favour of experienced male firefighters. The aerobic capacity standard was developed primarily on the basis of a male population of firefighters and then applied to women.

50. These studies have never been validated against the job performance evaluation of female fire-fighters nor have they assessed female fire-fighters who did poorly on the aerobic test with their actual

job performance. For example, the 1994 report studying predominately male subjects (75 men; two women) itself acknowledges the limitation of its male construct when it recommends that a further study be initiated by the Respondent relating to female personnel. Despite full awareness of the disproportionate impact of the aerobic standard on women, the Respondents have not carried out this further study involving the actual performance of female firefighters. This was again acknowledged in the 1995 Report that only assessed potential female applicants.

Appellant's Record, Vol. 1, pp.75, 101, Vol. 2, 209, 268
Respondent's New Evidence Motion Book, Tab A, p.2

(b) Individual testing does not save a discriminatory standard

51. It is submitted that the British Columbia Court of Appeal erred in finding that if individual testing is carried out there is no discrimination. The mere existence of individual testing is not determinative of whether a discriminatory work requirement exists or is avoidable.

Appellant's Record, Vol. 2, p.309

52. The real issue in this case is not the individual nature of the testing but the fact that the standard has a disparate impact on women and cannot be justified as necessary or unavoidable. If the standard is not justified then individual testing will not fix it. This Court's decisions in *Saskatoon Firefighters* and *Large* dealt with whether individual testing was a reasonable alternative to a general rule, not whether the standard underlying a test is itself discriminatory.

Saskatoon, supra, IA Tab 21
Large, supra, IA Tab 17

53. Moreover, the 50 $V0_2$ max standard and the eleven minute run do not actually test the Grievor's individual merit nor her capacity to be a firefighter. The individual testing under review in this case can be wholly distinguished from the concept of individual merit referred to in *Andrews* because the test is not sufficiently related to the job.

54. The portion of the fitness test that the Grievor failed was a proxy test, that is the run is an indicator of VO_2 max, which in turn is a proxy for fitness. Unlike the "Pump/Hose" test, the running test is not job specific. Proxy tests to measure capacity/ability will require the strictest standard of scrutiny because they do not directly test job performance.

(c) Discriminatory standard not justified

55. Proof of justification of a discriminatory rule must be held to a high threshold. This Court has held that impressionistic evidence will not be sufficient. Claiming "safety" reasons without calling the necessary evidence subverts the very purpose of human rights legislation. Adjudicators must turn their minds to the question of whether the requirement "is actually warranted in light of its potentially discriminatory nature". Unwarranted requirements will not meet the justificatory test and the burden is on the employer to adduce the evidence, not merely raise the spectre of "safety".

> *Etobicoke, supra* at 210, IA Tab 18
> *Large, supra* per L'Heureux Dube, J. at 758, IA Tab 17
> *Zurich, supra* per L'Heureux Dube, J. at 366-369; per McLachlin, J. at 389, dissenting, IA Tab 23

56. In this case, the aerobic capacity standard of 50 $V0_2$ max and the 2.5 km run in eleven minutes do not withstand scrutiny. The employer must prove that the requirement is: necessary, sufficiently tailored to job performance, there are no reasonable alternatives, and that accommodation would create undue hardship. The requirement should be struck down as the Respondent has not met any of the elements of this unified justificatory analysis.

57. The arbitrator, while looking at the issue from the point of view of accommodation and not expressly addressing the issue of necessity, correctly identified that the onus is on the Respondent to justify its standard that creates a bar to women's employment. In this case it failed to do so.

> *Award*, **Appellant's Record,** Vol. 2, pp.299-300

58. Close scrutiny of the elements of justification is especially important in cases dealing with tests of capacity and ability as they are often imbued with subtle biases that have created group-based patterns of exclusion. Proxy tests require the strictest standard of scrutiny and should not be used where they

produce "false negatives." For example, here the ultimate determinator of whether the Grievor could do the job was her good performance evaluation in the actual job in question. The arbitrator's factual findings that she performed the job safely and efficiently undermine the allegation that passing the proxy running test is "necessary" to do the job safely. The Grievor's job performance over several seasons proves that the 50 $V0_2$ max aerobic standard cannot be the minimum standard. Her performance is not an anomaly but an indication that the test is overly exclusionary and creates false negatives.

Appellant's Record, Vo. 2, pp.254, 231-2
Messing, *supra* at 30-33, IA Tab 25

59. There is no dispute that one must be physically fit to carry out wildland forestfighting duties. However, the Respondent has not shown that it is necessary to be able to run 2.5 kilometres in eleven minutes in order to perform these duties. While finding that the running test was a valid measure of aerobic capacity and was reasonably related to the work in question, the arbitrator did not hold that the particular aerobic capacity standard, or the eleven minute run, was necessary for the safe and efficient performance of the work.

60. While some type of fitness requirement is justified, this particular standard is overly exclusionary as it eliminates fit women who have proven they can do the job. As the reports commissioned by the Respondent indicated, to be an appropriate "cut score" it should not eliminate those who can actually perform the job. The Grievor could, and did, perform the job. Thus, the cut off score of 50 VO_2 max is not sufficiently tailored to achieve its purpose.

Report of Wenger, **Appellant's Record**, Vol. 2, p.200

61. Moreover, the safety and productivity concerns arising out of this particular cut score are highly speculative. The arbitrator was correct in holding that more than "impressionistic evidence" is required to establish a BFOR defence based on safety and that there was no cogent evidence of safety risks presented by the Respondent. The arbitrator specifically found that the Grievor performed her job safely and efficiently and that her supervisor considered her to be a capable employee whom he did not

want to lose. By implication, he found that the standard was not necessary for this job and that the job could be performed safely and effectively without meeting the requirement of the eleven minute run.

Award, **Appellant's Record**, Vol. 2, pp.299-300

(d) Alternatives to the aerobic capacity standard and the 11 minute run

62. A discriminatory rule is not justified where there are practical and reasonable alternatives to it. In this case, the Respondent only considered alternative ways to test the 50 VO_2 standard (such as testing in a lab instead of the proxy run test) and did not consider an alternative standard to measure fitness to be a firefighter.

Appellant's Record, Vol. 1, p.176

63. The Coalition acknowledges the employer's need to have a fitness standard for wildland firefighters. However, this standard must be set on a principled basis in conformity with human rights legislation. On the evidence there are several alternatives to the 50 VO_2 max standard available.

64. The arbitrator highlighted the fact that the Grievor was fit and had passed three of the four tests set. A composite test where an average cut off score must be obtained from a number of fitness tests, may also be a reasonable alternative in these circumstances and was not considered by the Respondent.

Appellant's Record, Vol. 2, pp.230, 239, 272, 300

65. The Appellant has recommended a cut-off score of 45.5 $V0_2$. This standard might be justified in at least two ways. It is based on the margin of error inherent in the existing standard and it is related to the actual, demonstrated job performance of a female firefighter.

Appellant's Factum, pp.37-38

66. Another alternative is formulating the aerobic capacity standard in relation to "superior" or "excellent" fitness ratings as defined by accepted general male and female fitness standards.

Appellant's Factum, pp.2, 38

67. The arbitrator found that the Grievor could be individually accommodated at her level of fitness without undue hardship. Although our submission is that the arbitrator was asking the wrong questions, his analysis leads to the conclusion that the rule is not justified. The finding that the Grievor can be exempted from the aerobic capacity standard as formulated is inconsistent with a finding that the rule is reasonably necessary. The fact that Ms Meiorin successfully performed the job safely and efficiently for 2.5 years further supports the argument that accommodation of women's physiological differences in the fitness standard itself is possible. Her ability to do the job cannot simply be dismissed as a statistical oddity.

68. The Respondent raises the spectre of "lowering" the standard. There is nothing wrong with lowering a standard which is set too high, has little predictablity or relevance and has a resultant discriminatory impact. The Supreme Court of the United States had no trouble in "lowering" the standard in *Griggs* to combat adverse effect discrimination and there was no difficulty in changing the standard for police in *Colfer*. The issue is better characterized as the development of a more inclusive standard, which ensures basic qualification for the job while also taking into account women's physiology, rather than "lowering" the standards.

Griggs, supra, IA Tab 16
Colfer, supra, IA Tab 11

69. The Respondent recognizes the validity of modifying tests based on gender. The Respondent uses a step test for some of its firefighters, for example their District Unit Crews and Native Crews. This step test recognizes physiological differences between men and women by altering the test based on gender; different step heights for men and women to account for gender based physical differences. This is not a "lowering" of the standard but a modification to make fitness tests more inclusive.

Initial Attack and Unit Crew Physical Fitness Standards, **Appellant's Record,** Vol. 1, p.226
Award, **Appellant's Record,** Vol. 1, p.268

(e) Allowing the rule to stand does not meet the purpose of human rights law

70. It is submitted that, as the discrimination has not been justified, the appropriate remedy is for the Respondent to cease applying the 50 $V0_2$ max aerobic standard and the running test. If this 50 VO_2 standard or the eleven minute run are allowed to stand, despite being found to be both discriminatory and unjustified, fit women who could do the job safely and efficiently will be denied access to the work. This undermines the goal of eradicating discrimination and will continue the barriers to full and equal participation in the workforce by women.

71. It is submitted that the failure of the arbitrator to strike down the rule arises from the bifurcated analysis of direct and indirect discrimination. He, however, made the factual findings that the requirement was not necessary. Moreover, if in effect the "accommodation" is changing the standard for the Grievor to 45.5 $V0_2$ max than this is no different then the striking down of the 50 $V0_2$ max standard.

Award, **Appellant's Record,** Vol. 2, p.300

72. In *Zurich*, this Court held that to "allow **statistically supportable** discrimination would undermine the intent of human rights legislation" (*emphasis added*). In that case, as in the majority of other cases, the central issue was whether a more inclusive, non-discriminatory, reasonable and practical alternative exists to replace the impugned rule. Here, there are a number of alternatives that would fulfil both the employer's safety and efficiency requirements and their obligations under the *Human Rights Code*.

Zurich, supra at 349, IA Tab 23

73. The Grievor has proven she is fit and capable of performing the tasks of the Initial Attack Crew. She does not need individual accommodation to successfully do this job. In fact, there may be other women, equally fit, who could also safely and competently perform the job. Accommodating an individual will not address the systemic barriers for other women and will not achieve equality. What is needed is striking down the discriminatory standard as it is not necessary for the safe performance of the job and there are reasonable alternatives to have applicants demonstrate the necessary level of fitness.

Only this systemic remedy is consistent with a purposive approach to accomodation that is essential to achieving substantive equality.

PART IV - NATURE OF THE ORDER SOUGHT

74. The Coalition respectfully requests that this Honourable Court:

(a) allow the Appeal;

(b) order the Government of British Columbia to cease using the aerobic capacity standards for wildland firefighters; and

(c) restore the arbitrator's decision to reinstate the Grievor.

All of which is respectfully submitted this 28th day of October, 1998, on behalf of the Coalition, the DisAbled Women's Network Canada, the Canadian Labour Congress, and the Women's Legal Education and Action Fund.

Kate A. Hughes **Melina Buckley**

PART V - TABLE OF AUTHORITIES

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B. <u>ARTICLES, REPORTS, BOOKS</u>

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C. STATUTES