Commission des droits de la personne et des droits de la jeunesse Québec

Cat. 2.120-2.66.2

THE EXERCISE OF RIGHTS PROTECTED BY THE CHARTER IN SITUATIONS IN WHICH BENEFICIARIES REQUIRE ASSISTANCE FOR THEIR PERSONAL CARE AND HYGIENE

OPINION AND GUIDELINES

M^e Michèle Turenne, legal counsel
Research and planning division

May 2005

This is the unofficial translation of a document adopted at the 504th meeting of the Commission, held on May 13, 2005, under resolution COM-504-5.1.3

Normand Dauphin
Secretary of the Commission

These guidelines replace those adopted by the Commission on April 18, 1996, under the title *La sexualisation de postes dans les centres hospitaliers et les centres d'accueil.*

Text processing:

Chantal Légaré (Research and planning division)

Note
The present edition of this document has been prepared for practical applications, based on the official text, by the Communication Department of the Commission des droits de la personne et des droits de la jeunesse.

TABLE OF CONTENTS

INTRODUCTION

The need to respect the rights of beneficiaries who require assistance for their personal care and hygiene has been a subject of debate for many years. The last document of the Commission des droits de la personne et des droits de la jeunesse[1] dealing with this question was published in 1986.[2] It analyses the various contexts in which an organization may decide to "sexualize" positions, in other words to give preference to either male or female candidates when filling certain vacancies. The document descrybes various situations of this kind and the reasons used to justify gender-specific positions, relating either to physical strength, therapeutic benefits (therapeutic model or image), or the preferences expressed by beneficiaries.

Obviously, this approach raises several major questions concerning various rights protected by the *Charter of human rights and freedoms*.[3] On the one hand, the fundamental rights of users must be protected; on the other, care must be taken not to infringe the right to equality of the employees concerned.

Based on the fact that the right to equality applies in the field of employment, and that any exception must be justified on the grounds given in the *Charter*, the Commission specified, in connection with the assignment of gender-specific positions on the ground of physical strength,[4] that:

> "Physical strength may be required, to varying degrees, for specific positions. In such cases, the employer must:
>
> a) assess the strength required to perform the tasks of a specified position, taking into account the available techniques and equipment, and
>
> b) assess the physical strength of each male and female candidate as compared to the requirements of the position." [Translation]

Later case law supported the position set out in the Commission's guidelines, clearly prohibiting any form of discrimination that involved pre-determining a candidate's physical capacity or ability to perform a job task on the basis of gender.[5]

Concerning the need to make positions gender-specific for therapeutic reasons, in other words on the ground that in some situations[6] the presence of a caregiver of a specific gender may be beneficial to the person receiving care, the Commission proposed that[7]

---

1 Referred to throughout as "the Commission".

2 Commission des droits de la personne, *La sexualisation de postes dans les centres hospitaliers et les centres d'accueil*, 1986, cat. 2.120-2.5.

3 R.S.Q., c. C-12, referred to here as the *Charter*.

4 Document cited above, note 2, p. 7.

5 See in particular: *British Columbia (Public Service Employee Relations Commission)* v. *B.C.G.S.E.U.*, (1999) 3 S.C.R. 3; *Saskatchewan (Human Rights Commission)* v. *Saskatoon (City)*, (1999) 2 S.C.R. 1297.

> "Before making a position gender-specific to implement the therapeutic model or image, the employer must be firmly convinced that:
>
> a) the model is based on serious studies or hypotheses that show, or tend to show, that there is a significant link between the presence of a worker of a given sex and the well-being of the beneficiaries receiving care, and that
>
> b) there is no reasonable way, in the circumstances, to ensure the presence of a worker of the required sex by flexible measures such as occasional or temporary staff re-assignment." [Translation]

Principles similar to those defined by the Commission are generally used by the courts when ruling on the need to make a position gender-specific on therapeutic grounds.[8]

Concerning the existence of gender-specific positions in response to the preferences or choices expressed by beneficiaries, the Commission stated in 1986[9] that:

> "[…] it seems clear that a preference expressed by a beneficiary concerning personal care and hygiene must be respected, as a consequence of the right of every person to respect for private life and the safeguard of dignity (sections 4 and 5 of the *Charter of human rights and freedoms*).
>
> The institution must consult all beneficiaries individually concerning their preferences. With respect to patients who are unable to express their preference or are not lucid, the institution must take into account their verbal and non-verbal reactions and consult their family members.
>
> A position may be made gender-specific only if:
>
> a) the institution has ascertained the preferences of each beneficiary, and concluded that the presence of a worker of a specific sex is required, and if
>
> b) there is no reasonable way, in the circumstances, to ensure the presence of a worker of the required sex by flexible measures such as occasional or temporary staff re-assignment." [Translation]

In the opinion of several of the organizations cited in another Commission document, the consultation report and recommendations *The Exploitation Of The Elderly: Towards a Tightened Safety Net*,[10] the guidelines concerning personal care positions need to be revised.

---

6 Most frequently in the fields of rehabilitation and psychiatry.

7 Document cited above, note 2, p. 8.

8 See: *Syndicat des travailleuses et travailleurs de l'hôpital Louis-H. Lafontaine* c. *Lussier*, D.T.E. 92T-90 (C.S.); *Union des employées et employés de service, section locale 298* c. *Centre hospitalier Douglas*, D.T.E. 93T-760 (T.A.); *Syndicat canadien de la fonction publique, section locale 1535* c. *Centre de jeunesse Mont St-Patrick Inc.*, D.T.E. 97T-297 (T.A.).

9 Document cited above, note 2, p. 7, 8.

10 *Rapport de consultation et recommandations*, 2001, referred to here as "the consultation".

During the consultation, several reports indicated possible infringements of the fundamental rights of users in residential accommodation in connection with the provision of personal care. For example,[11]

> "A failure to respect the wishes of an elderly person with reduced autonomy to receive personal care and hygiene from a worker of the same sex constitutes an encroachment upon the elderly person's dignity and psychological integrity (Ordre régional des infirmières et infirmiers de la Montérégie)." [Translation]
>
> "The RRSSS de la Montérégie considers that failing to meet the need expressed by an elderly person constitutes abuse, since the elderly person is "captive" and cannot complain." [Translation]
>
> "The Fédération de l'Âge d'Or du Québec has stated that "*the right to receive personal care from a person of the same sex*" should be one of the standards of decency imposed by the State on institutions providing care." [Translation]

The Commission considers that, since 1986, the context in which personal care is provided for elderly or reduced-mobility users has changed considerably, and that the range of people affected, among other reasons because of the growing ethnic and cultural diversity of the population, has increased.

With the new focus on ambulatory care, priority is given to maintaining users in their homes, and long-term accommodation is increasingly seen as a last resort. The range of people providing services has also increased. In addition to the care providers working for a specific public institution and providing care within that institution, there are now care providers assigned by CLSCs, care providers hired privately with an allocation made directly to the user, and family-based enterprises[12] that provide the same services in specialized private residential homes or in the user's own home. Each CLSC is responsible for providing home support for all users in its territory. It allocates services or, where applicable, ensures that the required support is provided by other partners in the community.[13]

It is clear that the working environment is less institution-based and that care providers are from a wider range of backgrounds, and therefore that a person living alone and receiving care at home may feel less confident. To this must be added other concerns of a cultural or religious nature.

Several measures have been implemented to meet the needs of users. Since the fall of 2003, all CLSCs must use a *multi-clientele evaluation tool* to establish an *intervention plan* or *individualized service plan* that defines the services required by each user. The plan should, in theory, cover all the care provided, including personal care and hygiene.[14] However, the client base of users not housed in an institution is more likely to change and fluctuate than the client base housed in long-term residential care, and several stakeholders have stated that if the preference of users is unknown or unspecified, they should be as-

---

11 *Id.*, p. 55.

12 See: *Chez soi: le premier choix – La politique de soutien à domicile,* Ministère de la Santé et des Services sociaux, Dépôt légal – Bibliothèque nationale du Québec, 2003, p. 20-21.

13 *Id.*, p. 31-32.

14 *Id.,* p. 19.

signed a care provider of the same sex to provide personal care in order to minimize the risk of infringing their fundamental rights.

For users housed in long-term residential facilities, another document, *Un milieu de vie de qualité pour les personnes hébergées en CHSLD - Orientations ministérielles*,[15] states that:

> "The often complex situations of people admitted to long-term residential accommodation […] require an overall assessment to be made of their needs that takes into account their health problems and the necessary care, and also the various biopsychosocial and cultural factors, including their degree of adaptability and their family and community background […]. This assessment must lead to a set of personalized services, a plan, and an appropriate range of care services [including personal care and hygiene] to deal with the problems and needs identified […]. The assessment must be adapted to changes in the person's situation, must be ongoing, and must always involve all caregivers, whether from the community, social or cultural network." [Translation]

It is clear that, in general, staffing needs in institutions are foreseeable and can be planned in advance, unlike the situation prevailing in the home care sector, especially since the client base is more stable.

In light of all these recent changes of a social and cultural nature, the Commission made the following undertaking as one of the corrective measures announced following the consultation on the situation of the elderly:[16]

> ***In view of certain new facts indicating possible violation of users' dignity in institutions, the Commission des droits de la personne et des droits de la jeunesse will reconsider its position on the gender-based assignment of jobs in health and social services institutions.***[17]

This document is intended to fulfill this undertaking by the Commission.

To do so in light of the current context in the health care field, we will first look at the fundamental rights of users, and then examine how the exercise of those rights could limit the right to equality of employees.

Last, we will define new guidelines for organizations facing this issue.

---

15 Ministère de la Santé et des Services sociaux, Dépôt legal – Bibliothèque nationale du Québec, 2003, p. 14, point 5.2.

16 Document cited above, note 10.

17 *Id.*, Undertaking 2, p. 171.

1 FUNDAMENTAL RIGHTS OF USERS

In the decision *Villa Plaisance*,[18] the fundamental rights invoked in support of a policy on gender-specific positions for the provision of personal care were, specifically, the right to the safeguard of dignity (*Charter*, section 4), the right to personal inviolability (*Charter*, section 1) and the right to respect for private life (*Charter*, section 5). In short, "the rights invoked here […] all involve protection against interference."[19] [Translation]

Some provisions of the *Act respecting health services and social services*[20] that must necessarily be interpreted in a manner consistent with the *Charter*[21] should also be mentioned. They are mainly found in the following sections:

> Section 2: "In order to permit these objectives to be achieved, this Act establishes an organizational structure of human, material and financial resources designed […]
>
> (5) to take account of the distinctive geographical, linguistic, sociocultural, ethnocultural and socioeconomic characteristics of each region;
>
> (8) to foster effective and efficient provision of health services and social services and respect for the rights of the users of such services; […]."
>
> Section 3: "For the application of this Act, the following guidelines shall guide the management and provision of health services and social services:
>
> (1) the person requiring services is the reason for the very existence of those services;
>
> (2) respect for the user and recognition of his rights and freedoms must inspire every act performed in his regard;
>
> (3) the user must be treated, in every intervention, with courtesy, fairness and understanding, and with respect for his dignity, autonomy, needs and safety;
>
> (4) the user must, as far as possible, play an active role in the care and services which concern him;
>
> (5) the user must be encouraged, through the provision of adequate information, to use services in a judicious manner."

---

18 *Commission des droits de la personne* c. *Centre d'accueil Villa Plaisance*, T.D.P.Q., [1996] R.J.Q. 511.

19 *Id.*, p. 10.

20 R.S.Q., c. S-4.2.

21 Charter, section 52: "No provision of any Act, even subsequent to the Charter, may derogate from sections 1 to 38, except so far as provided by those sections, unless such Act expressly states that it applies despite the Charter." See also section 53 of the Charter: "If any doubt arises in the interpretation of a provision of the Act, it shall be resolved in keeping with the intent of the Charter."

> Section 4: "Every person is entitled to be informed of the existence of the health and social services and resources available in his community and of the conditions governing access to such services and resources."
>
> Section 5: "Every person is entitled to receive, with continuity and in a personalized and safe manner, health services and social services which are scientifically, humanly and socially appropriate."
>
> Section 10: "Every user is entitled to participate in any decision affecting his state of health or welfare.
>
> He is entitled, in particular, to participate in the development of his intervention plan or individualized service plan where such plans are required under sections 102 and 103. The same applies to any modification made to such plans."

In connection with the fundamental rights of users, the Human Rights Tribunal, in *Villa Plaisance*,[22] made the following point:

> "Let us state from the outset that if it is relevant to identify the components of each of these rights, it is important not to overestimate the independence of each of the three concepts, especially in connection with decisions made concerning one's own body, as demonstrated by this statement by McLachlin J. in *Rodriguez:*
>
> "Security of the person has an element of personal autonomy, protecting the dignity and privacy of individuals with respect to decisions concerning their own body. It is part of the persona and dignity of the human being that he or she have the autonomy to decide what is best for his or her body." (*Rodriguez* v. *British Columbia (Attorney General)*, [1993] 3 S.C.R. 519, 618.)"."

1.1 Right to the safeguard of dignity

The right to the safeguard of dignity is one of the rights most often cited along with the right to protection against discrimination in international documents.

The Preamble to the *Universal Declaration of Human Rights*[23] contains the following:

> "Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world, [...]."

And Article 1 of the same document states that:

> "All human beings are born free and equal in dignity and rights. [...]."

---

22 Document cited above, note 18, p. 5.

23 United Nations, G.A. Res. 217 (III), UN GAOR, 3d Sess., Supp. No. 13, U.N. Doc. A/810 at 71 (1948).

The Preamble to the *International Covenant on Civil and Political Rights*[24] states as follows:

> "Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,
>
> Recognizing that these rights derive from the inherent dignity of the human person, [...]."

In Canada, the Supreme Court has explored the notion of human dignity in terms of the rights protected under the *Canadian Charter of Rights and Freedoms*, even though it does not explicitly mention the right to dignity.

Wilson J. in *R.* v. *Morgentaler*,[25] a case that focused on the right to life, liberty and security of the person guaranteed by section 7 of the *Canadian Charter*,[26] made the following comment:

> "The idea of human dignity finds expression in almost every right and freedom guaranteed in the *Charter*. Individuals are afforded the right to choose their own religion and their own philosophy of life, the right to choose with whom they will associate and how they will express themselves, the right to choose where they will live and what occupation they will pursue. These are all examples of the basic theory underlying the *Charter*, namely that the state will respect choices made by individuals and, to the greatest extent possible, will avoid subordinating these choices to any one conception of the good life."[27]

The preamble to the Québec *Charter* contains the following:

> "Whereas all human beings are equal in worth and dignity, and are entitled to equal protection of the law;"

And section 4 specifies that:

> "Every person has a right to the safeguard of his dignity, honour and reputation."

---

24 (1976) 999 U.N.T.S. 171. The Preamble to the *International Covenant on Economic, Social and Cultural Rights*, (1976) 993 U.N.T.S. 3, contains an identical provision.

25 *R.* v. *Morgentaler*, [1988] 1 S.C.R. 30, p. 166.

26 *Canadian Charter of Rights and Freedoms*, enacted as Schedule B to the *Canada Act, 1982 (U.K.)*, 1982, c. 11. Referred to here as the *Canadian Charter*. Section 7: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

27 Document cited above, note 25, p. 166.

In the view of the Supreme Court, as expressed in *Syndicat national des employés de l'hôpital St-Ferdinand*,[28] the Quebec Human Rights Tribunal correctly stated the essence of the right to the safeguard of personal dignity in *Commission des droits de la personne du Québec* c. *Lemay*[29]:

> "Consequently, every human being has intrinsic value which makes him or her worthy of respect. For the same reason, every human being is entitled to recognition of the rights and freedoms of the person and to the fully equal exercise thereof." [Translation]

In *Syndicat national des employés de l'hôpital St-Ferdinand*, the Supreme Court decision continues:

> "Having regard to the manner in which the concept of personal "dignity" has been defined, and to the principles of large and liberal construction that apply to legislation concerning human rights and freedoms, I believe that s. 4 of the *Charter* addresses interferences with the fundamental attributes of a human being which violate the respect to which every person is entitled simply because he or she is a human being and the respect that a person owes to himself or herself.
>
> Moreover, in my opinion, because of the underlying concept of respect, the right to personal dignity, unlike the concept of inviolability, does not require that there be permanent consequences in order for interference with that right to be found. Thus, even a temporary interference with a fundamental attribute of a human being would violate s. 4 of the *Charter*. This interpretation is also based on the nature of the other rights protected by s. 4 – honour and reputation: *noscitur a sociis*. It is not necessarily a requirement, in order for there to be a violation of these guarantees, that there be permanent effects, although the effects may be permanent."[30]

1.2 Right to personal inviolability

The right to personal inviolability is seldom stated explicitly in international instruments. However, it is easy to conclude that it forms an inherent part of the rights to life, liberty and security or security of the person that are universally protected.

Article 3 of the *Universal Declaration of Human Rights* states that:

> "Everyone has the right to life, liberty and security of person."

The *International Covenant on Civil and Political Rights*[31] contains a similar provision:

> Article 9: "1. Everyone has the right to liberty and security of person. […]"

---

28 *Québec (Public Curator)* v. *Syndicat national des employés de l'hôpital St-Ferdinand*, [1996] 3 S.C.R. 211, par. 104.

29 T.D.P.Q. Abitibi, 1995-06-12, j. Sheehan, p. 5.

30 Document cited above, note 28, par. 105, 106.

31 (1976) 999 U.N.T.S. 171, 16 December 1966.

Article 1 of the *American Declaration of the Rights and Duties of Man*[32] ("Every human being has the right to life, liberty and the security of his person.") is rendered as follows in the French version, one of the rare instances where "integrity of the person" is expressly mentioned:

> "[t]out être humain a droit à la vie, à la liberté, à la sécurité et à l'intégrité de sa personne."

The *American Convention on Human Rights*[33] states in Article 5 that:

> "1. Every person has the right to have his physical, mental, and moral integrity respected." […].

In Europe, the European Court of Human Rights[34] has ruled that the concept of "private life" covers the "physical and moral integrity of the person". Private life, in turn, is protected under the European Convention, the first paragraph of Article 8 of which states that:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence."[35] […]."

The European Court points out that the obligations of the State with regard to the protection of private life "may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves."[36]

In cases under the *Canadian Charter*, the Supreme Court has ruled several times that the right to security of the person contained in section 7[37] protects both physical and psychological security.

In *Rodriguez* v. *British Columbia (Attorney General)*, the Supreme Court states that[38]:

> "There is no question, then, that personal autonomy, at least with respect to the right to make choices concerning one's own body, control over one's physical and psychological integrity, and basic human dignity are encompassed within security of the person […]."

---

32 (1949) 43 A.J.I.L. Supp. 133. Doc. O.E.A. O.E.A. / Ser. L/V/11. 23, doc. 21 rev. 6.

33 (1979) 1144 U.N.T.S. 123.

34 *Case of X and Y v. the Netherlands,* March 26, 1985. In French in: Publications de la Cour européenne des droits de l'homme, série A: Arrêts et décisions, vol. 91, Köln, Carl Heymanns Verlag, 1985.

35 *Convention for Protection of Human Rights and Fundamental Freedoms*, as amended by Protocol No. 11, (1955) 213 U.N.T.S. 221.

36 *Case of X and Y*, cited above, note 34, points 22 and 23.

37 Document cited above, note 26.

38 [1993] 3 S.C.R. 519, 588; See also: *R.* v. *Morgentaler*, cited above, note 25, p. 173, (Wilson J.); *Reference re ss. 193 and 195.1(1)(C) of the criminal code (Man.),* [1990] 1 S.C.R. 1123, page1177; *New Brunswick (Minister of Health and Community Services) v. G. (J.),* [1999] 3 S.C.R. 46; *Canadian Foundation for Children, Youth and the Law* v. *Canada (Attorney General)*, [2004] 1 S.C.R. 76.

Under the Québec *Charter*, section 1 of which states that "Every human being has a right to life, and to personal security, inviolability and freedom...", the Human Rights Tribunal, on the basis of the Supreme Court decision *Morgentaler*,[39] explained in the decision *Dufour*[40] that "the right to integrity centres, more specifically, on the need to respect a person's right to make decisions concerning questions closely linked to the person's values and deep-held convictions." [Translation]

1.3 Right to privacy

The right to privacy is enshrined in several international documents.

The *Universal Declaration of Human Rights* specifies that:

> Article 12: "No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks."[41]

The *Canadian Charter* does not specifically define a right to privacy, but the jurisprudence-based interpretation of section 8 ("Everyone has the right to be secure against unreasonable search or seizure") can be seen as extending to cover the right to privacy.[42]

Recently, in *R.* v. *Mann*[43], the Supreme Court specified that:

> "A number of factors are engaged under this head of analysis, including […] the obtrusiveness of the search, the individual's expectation of privacy in the area searched […]."[44]

Sections 5 of the Québec *Charter* states that "Every person has a right to respect for his private life." The Human Rights Tribunal, in *Villa Plaisance*,[45] recalls that:

> "The right to privacy is one facet of the right to respect for one's private life, a right whose fundamental nature is stated in section 5 of the *Charter of human rights and freedoms."* [Translation]

---

39 Document cited above, note 25.

40 *Dufour* c. *Centre hospitalier St-Joseph-de-la-Malbaie*, T.D.P.Q. Charlevoix, 1992-01-29, j. Rivet.

41 Article 17 of the *International Covenant on Civil and Political Rights* also states this principle in similar terms.

42 See: Hunter v. *Southam Inc.*, [1984] 2 S.C.R. 145, 159-160 (Dickson J.); *R.* v. *Pohoretsky*, [1987] 1 S.C.R. 945; *R.* v. *Dyment*, 1988 2 S.C.R. 417; *R.* v. *Borden*, [1994] 3 S.C.R. 145; *Godbout* c. *Longueuil (Ville de)*, J.E. 95-1848 (C.A.), p. 17.

43 2004 SCC 52 par. 53.

44 However, unlike the Québec *Charter*, the *Canadian Charter* covers only the relationship between the State, or its representatives, and citizens, and not between citizens.

45 Document cited above, note 18, p. 9.

In *Godbout*[46], Baudouin J. of the Québec Court of Appeal argues that:

> "The concept of private life seems to me to be more than that. As mentioned by the Human Rights Tribunal in *Dufour* v. *Centre hospitalier St-Joseph de la Malbaie*, [1992] R.J.Q. 825, it is intended to protect everything that forms part of an individual's privacy, in short an irreducible personal sphere protected against any form of indiscretion." [Translation]

In *Bridgestone/Firestone*, Lebel J. of the Québec Court of Appeal made the following statement concerning the right to respect for private life:

> "This right has components such as the right to anonymity and privacy, and to secrecy and confidentiality, and its ultimate function is to preserve each person's right to be autonomous."[47] [Translation]

2 LIMITS ON THE EXERCISE OF FUNDAMENTAL RIGHTS

Like the international covenants,[48] Section 9.1 of the Québec *Charter* provides for limits on the protecttion and respect accorded to fundamental rights:

> "In exercising his fundamental freedoms and rights, a person shall maintain a proper regard for democratic values, public order and the general well-being of the citizens of Québec.
>
> "In this respect, the scope of the freedoms and rights, and limits to their exercise, may be fixed by law."

It should be remembered that Wilson J., in *Edmonton Journal*[49], highlighted the need to use a contextual approach to settle conflicts between protected rights:

> "One virtue of the contextual approach, it seems to me, is that it recognizes that a particular right or freedom may have a different value depending on the context. [...] It seems to be more sensitive to the reality of the dilemma posed by the particular facts and therefore more conducive to finding a fair and just compromise between the two competing values under s. 1.

---

46 *Godbout* c. *Longueuil (Ville de)*, J.E. 95-1848 (C.A.), 17.

47 *Syndicat des travailleurs(euses) de* Bridgestone/*Firestone de Joliette (CSN)* c. *M^e Gilles Trudeau et Bridgestone/Firestone Canada inc.*, [1999] R.J.Q. 2229, 2241 (C.A.).

48 See paragraph 3 of Article 19 of the *International Covenant on Civil and Political Rights*, Rés. 2200 A (XX), which states that: "The exercise of the rights provided for […]carries with it special duties and responsebilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: 1) For respect of the rights or reputations of others; […]."

49 *Edmonton Journal* v. *Alberta (Attorney General)*, [1989] 2 S.C.R. 1326, 1355-1356.

> It is my view that a right or freedom may have different meanings in different contexts. [...] I believe that the importance of the right or freedom must be assessed in context rather than in the abstract and that its purpose must be ascertained in context. [...]."

Similarly, the Human Rights Tribunal, in *Villa Plaisance*,[50] while stressing the constant need to respect the fundamental rights of beneficiaries, defined the principles that could be deduced from *Dagenais*:

> "A hierarchical approach to rights, which places some over others, must be avoided, [...] when interpreting the *Charter* [...].When the protected rights of two individuals come into conflict, [...] *Charter* principles require a balance to be achieved that fully respects the importance of both sets of rights."
>
> This means that the fundamental rights of users, and the right to equal employment of the employees, cannot be subordinated to each other."[51] [Translation]

The Commission considers that employers must take all necessary steps to plan and manage their human resource needs in order to meet the fundamental rights of beneficiaries. However, in pursuing this objective, they may infringe the right of employees to be dealt with on an equal basis, since to accommodate and meet the needs of beneficiaries employers may be tempted to create gender-specific positions, in other words to reserve certain positions for either men or women. Unless it can be justified, the resulting exclusion or preference constitutes discrimination.

The next section will examine the exercise of the right to equality in the field of employment.

3 RIGHT TO EQUALITY

The right to equality is a human right that has been afforded universal protection.

The *Universal Declaration of Human Rights*, cited above, proclaims the necessary recognition of the right to equality in its Preamble and first Article.[52]

The *International Covenant on Civil and Political Rights* reaffirms the same principle, this time explicitly mentioning equality between the sexes:

> Article 3: "The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant."

Similarly, Article 3 of the *International Covenant on Economic, Social and Cultural Rights*[53] reads as follows:

---

50 Document cited above, note 18, p. 12.

51 *Dagenais* v. *Canadian Broadcasting Corporation*, [1994] 3 S.C.R. 835, 877 (Lamer J.).

52 Note 23. Principles also found in Articles 2 and 7 of the Declaration.

53 2200 A (XXI) dated 16 December 1966.

> "The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant."

Article 14 of the European Convention reiterates this idea:

> "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

The right to equality is protected in the *Canadian Charter* by section 15:

> Section 15: "(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
>
> (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."

The same right is included in the Québec *Charter*:

> Section 10: "Every person has a right to full and equal recognition and exercise of his human rights and freedoms, without distinction, exclusion or preference based on race, colour, sex, pregnancy, sexual orientation, civil status, age except as provided by law, religion, political convictions, language, ethnic or national origin, social condition, a handicap or the use of any means to palliate a handicap.
>
> Discrimination exists where such a distinction, exclusion or preference has the effect of nullifying or impairing such right."
>
> Section 16: "No one may practise discrimination in respect of the hiring, apprenticeship, duration of the probationary period, vocational training, promotion, transfer, displacement, laying-off, suspension, dismissal or conditions of employment of a person or in the establishment of categories or classes of employment."

In connection with the right to equality, the Commission made the following comments in *Après 25 ans, la Charte québécoise des droits et libertés*, vol. 2 (Études)[54]:

> "The movement that led to the adoption of the *Charter of human rights and freedoms* was driven by the quest for equality. The influence of this quest in the 25 years that followed the implementation of the *Charter* was considerable, even though it was not always an easy project to define. In absolute terms, the idea of equality is utopic, a fleeting object-

[54] Pierre Bosset and Muriel Garon, 2003, p. 61, 62.

> tive, that can be voiced in many different ways, meeting the expectations of some just as it disappoints others. This utopic idea was found in various guises at both the theoretical and practical levels." (p. 61) [Translation]
>
> "[…] a large number of questions were raised: should equality be absolute or relative? Should equality be sought between individuals, or between groups of individuals? Which individuals and which groups should be targeted? [...]" (p. 62) [Translation]

A discriminatory act that infringes on the right to equality can be based on the characteristic of an individual, or just as easily on the characteristic of an identifiable group or category of individuals.

In *B.* v. *Ontario (Human Rights Commission,)*[55] the Supreme Court addressed this issue:

> "By using the words "every person" the statute is clearly aimed at protecting individuals as opposed to groups against discrimination. Although it is equally clear that, in order to come under the protection of s. 5(1), the discrimination must be based on one of the listed grounds, this does not mean that the discriminatory action must be directed against an identifiable group subsumed within the enumerated ground […]"[56]
>
> "[…] While a category of persons is often identifiable given the existence of historically disadvantaged groups in Canadian society, it is not a necessary requirement to a finding of discrimination."[57]

4 GENDER-SPECIFIC POSITIONS

The creation of gender-specific positions leads to a distinction, exclusion or preference concerning candidates for the positions, based on a ground on which discrimination is prohibited under section 10 of the Québec *Charter*, namely sex.

When the principles applied by the courts[58] are applied, it is clear that this practice is discriminatory *prima faciae*, because it prevents the full and equal recognition and exercise of the right to non-discrimination in employment, in contravention of sections 10 and 16 of the *Charter*.

In *Brossard*[59] the Supreme Court specifies that:

> "Such an exclusion will only constitute discrimination under s. 10 if, pursuant to the second paragraph of that provision, the exclusion has the effect of nullifying or impairing

---

55 [2002] 3 S.C.R. 403.

56 *Id.*, par. 40.

57 *Id.*, par. 47.

58 See in particular, *Ontario Human Rights Commission* v. *Etobicoke* [1982] 1 S.C.R. 202; *Brossard (Town)* v. *Québec (Commission des droits de la personne)* [1988] 2 S.C.R. 279.

59 *Brossard*, cited above, par. 43.

> the candidates' right to full and equal recognition and exercise of their human rights and freedoms. Line Laurin and other candidates excluded by the hiring policy plainly do not enjoy full and equal recognition and exercise of their right to non-discrimination in employment established by s. 16. The respondent's hiring practice is therefore discriminatory under s. 10."

In *Etobicoke* the Supreme Court specified that "Once a complainant has established […] a *prima facie* case of discrimination […] he is entitled to relief in the absence of justification by the employer."[60]

Possible exceptions to the right to non-discrimination in employment, however, are listed in section 20 of the Québec *Charter*:

> "A distinction, exclusion or preference based on the aptitudes or qualifications required for an employment, or justified by the charitable, philanthropic, religious, political or educational nature of a non-profit institution or of an institution devoted exclusively to the well-being of an ethnic group, is deemed non-discriminatory."

These exceptions to the anti-discrimination rule enacted by the *Charter* fall into two groups, as noted in the majority decision of the Supreme Court in *Brossard*[61]:

> "The first and second branches of s. 20 represent distinct exceptions to the anti-discrimination norm founded on differing legislative objectives. It is wrong, in my view, to suggest that there is a connection between them, even for the purposes of interpreting their respective terms. As we shall see, the two exceptions are deserving of different methods of statutory interpretation because of these different legislative objectives."

First, we will look at the exceptions based on "aptitudes or qualifications required for an employment", and then at the exceptions justified by the "charitable, philanthropic, religious, political or educational nature of a non-profit institution or of an institution devoted exclusively to the well-being of an ethnic group."

4.1 Distinction, exclusion or preference based [solely] on the aptitudes or qualifications required for an employment

In *Brossard*, the Supreme Court specifies that "the "aptitudes or qualifications" must necessarily relate to one of the enumerated grounds in s. 10 to be relevant for the purposes of the first branch of s. 20."[62]

The creation of gender-specific positions means that the sex of applicants, one of the grounds of discrimination prohibited by section 10 of the *Charter*, is considered as a criterion for the positions.

---

60 *Etobicoke*, cited above, p. 208.

61 Document cited above, note 58, par. 49.

62 *Id.*, par. 59.

As pointed out by the Superior Court in *Etobicoke*,[63] "The only justification which can avail the employer in the case at bar, is the proof, the burden of which lies upon him, that [the practice in question] is a *bona fide* occupational qualification and requirement for the employment concerned", this defence being an exception to the general rule prohibiting discrimination.

In *Zurich Insurance*,[64] the Supreme Court explains that permitted forms of discrimination concerning an aptitude or quality required for a position must be reasonable, and that "This requirement of reasonableness has two aspects. First, any discriminatory practice or rule must have a substantial connection to the operation of the employer's business and second, it must not discriminate more than is necessary."

In other words, it must be shown, first, that the employment practice or policy is rational and, second, that it is proportional.[65]

In *Etobicoke*[66], the Supreme Court stresses that "It would be unwise to attempt to lay down any fixed rule concerning the nature and sufficiency of the evidence required […]."

In *Villa Plaisance*, the Human Rights Tribunal points out, on the basis of the Supreme Court decisions mentioned above, that for section 20 to apply, "it is not sufficient for the employer to invoke the need to recognize the fundamental rights of users."[67] [Translation] The test of rationality is explained by the Tribunal as follows:

> "To establish the rationality of the measure […] the defendant must show that it targets a legitimate objective that is reasonably necessary to meet a real and practical need in the work environment. In addition, the employer must prove the rational link between the objective targeted and the measure chosen in response. This means that the employer must demonstrate by real, verifiable and precise facts, how the measure is effectively implemented, in other words how the tasks carried out by workers to assist users are actually and regularly assigned on the basis of gender as required to respect the fundamental rights of each user."[68] [Translation]

Concerning the criterion of proportionality, a rule was formulated by Wilson J. in *Central Alberta Dairy Pool*[69]:

---

63 Document cited above, note 58.

64 *Zurich Insurance Co.* v. *Ontario (Human Rights Commission)* [1992] 2 S.C.R. 321, 341. See also: *British Columbia (Public Service Employee Relations Commission)*, cited above, note 5.

65 *Brossard*, *Etobicoke*, cited above, note 58; *British Columbia (Public Service Employee Relations Commission)*, cited above, note 5.

66 Document cited above, note 58, p. 212.

67 Document cited above, note 18, p. 12.

68 *Id.*

69 *Central Alberta Dairy Pool* [1990] 2 S.C.R. 489, 518.

> "If a reasonable alternative exists to burdening members of a group with a given rule, that rule will not be bona fide." […]."

In *British Columbia (Public Service Employee Relations Commission)*,[70] the Supreme Court explains that:

> "[…] Employers, courts and tribunals should be innovative yet practical when considering how this may best be done in particular circumstances.
>
> Some of the important questions that may be asked in the course of the analysis include:
>
> (a) Has the employer investigated alternative approaches that do not have a discriminatory effect […]?
>
> (b) If alternative standards were investigated and found to be capable of fulfilling the employer's purpose, why were they not implemented?
>
> (c) Is it necessary to have all employees meet the single standard for the employer to accomplish its legitimate purpose […]?
>
> (d) Is there a way to do the job that is less discriminatory while still accomplishing the employer's legitimate purpose? […]
>
> (f) Have other parties who are obliged to assist in the search for possible accommodation fulfilled their roles?

In *Villa Plaisance*,[71] the Human Rights Tribunal, with regard to gender-specific positions, specifies that

> "[…] the employer must show that the policy of exclusion does not amount to […] an excessive approach […]. The criterion applicable here must be more than mere administrative convenience; on principle, there is a requirement to look seriously at alternative measures that would make it possible not only not to exclude [some employees on the basis of their sex] but also to respect the [fundamental] rights of users […]." [Translation]

In addition, the Tribunal suggests that a survey of beneficiaries to justify gender-specific positions should be conducted beforehand, in an objective manner.[72]

In light of the above analysis, the Commission considers that a decision to create gender-based positions based on the first branch of section 20 of the Québec *Charter*, in other words the qualities or aptitudes required for the position, must be an exceptional measure that is necessary and justified on the basis of the criteria of rationality and proportionality established by the jurisprudence.

The following paragraphs contain some examples.

---

70 Document cited above, note 5, par. 64-65.

71 Document cited above, note 18, p. 12.

72 *Id.*, p. 16.

In the arbitration award *Syndicat des employés d'hôpitaux d'Arthabaska* c. *Hôtel-Dieu d'Arthabaska*,[73] the proof included testimony from many different people reporting complaints from women who had given birth in the hospital who did not want to receive personal care from male employees. The arbitrator, starting from the observation that the beneficiaries were entitled to demand that personal care be provided by a worker of a specific sex, and the fact that it would be impossible for the employer to respond to the demands in the future through the application of other measures, such as staff mobility, concluded that it was necessary to fill the positions on the basis of the workers' sex.

In a decision of the Canadian Human Rights Tribunal, *Stanley* v. *Royal Canadian Mounted Police (RCMP)*,[74] the testimony presented by expects[75] led to the conclusion that, in the absence of viable alternatives for protecting the intimacy and privacy of men in their cells (for example, during unscheduled inspections), the establishment of a same-sex policy for prison guard positions in favour of male workers was a necessity. However, the Tribunal stressed, in its decision, that each case must be considered individually:

> "A decision supporting a same-sex guarding policy in one institution does not therefore mean that a same-sex guarding policy will be justified in another. Each institution must be examined in light of its own special circumstances."[76]

4.2 "Distinction, exclusion or preference […] justified by the charitable, philanthropic, religious, political or educational nature of a non-profit institution or of an institution devoted exclusively to the well-being of an ethnic group"

As mentioned above, the use of discrimination to exclude people of a given sex from a position could be based, not just on the aptitudes or qualities required for the position, but also on one of the other grounds listed in the second branch of section 20 of the Québec *Charter*,[77] because of the "charitable, philanthropic, religious, political or educational nature of a non-profit institution or of an institution devoted exclusively to the well-being of an ethnic group."

In the opinion of the Supreme Court, in *Brossard*,

---

73 T.A. 93-02601, 1993-03-31, AZ-93145119, D.T.E. 93T-836, A.A.S. 93A-125, M[e] André Truchon, arbitrator (37 p.).

74 (1987) 8 C.H.R.R. D/3799, D/3830-3823 (T.C.D.P.).

75 The testimony demonstrated the harmful effects of infringements of the prisoners' privacy.

76 *RCMP*, cited above, note 74, par. 30246.

77 In addition, section 349 of the *Act respecting health services and social services* states that: "Each regional board must, in concert with the bodies representing the cultural communities and the institutions of its region, facilitate accessibility to health and social services in a manner which is respectful of the characteristics of those cultural communities."

> "To say that the very nature of the second branch of s. 20 lends itself to one of either a restrictive or liberal interpretation oversimplifies the provision and is not, in my view, particularly helpful in discovering its meaning."[78]

However, the Supreme Court specifies that the exception provided for in the second branch of section 20 has a limited scope. It can apply to two categories of institutions:

> "First, the group must constitute a "non-profit institution"[79] or "an institution devoted exclusively to the well-being of an ethnic group."[80]

Concerning the categories or groups of persons who can avail themselves of this branch of section 20, the Supreme Court explains:

> "The better view is that […] the second branch of s. 20 has a dual purpose: when it applies, it at once confers rights upon some persons and imposes a limitation on the rights of others. That it limits an individual's right to be free from discrimination is plain. It is also designed, however, to allow certain non-profit institutions to create distinctions, exclusions or preferences which would otherwise violate the *Charter* if those distinctions, exclusions or preferences are justified by the charitable, philanthropic, religious, political or educational nature of the institution in question. In this sense, s. 20 confers rights upon certain groups. In my view, this branch of s. 20 was designed to promote the fundamental right of individuals to freely associate in groups for the purpose of expressing particular views or engaging in particular pursuits. Its effect is to establish the primacy of the rights of the group over the rights of the individual in specified circumstances. […]"[81]
>
> "[…] Section 20 has, however, a limited legislative purpose: it is intended as an answer for "distinctions, exclusions or preferences" which would otherwise be discriminatory under s. 10. It is logical that s. 20 protection only be extended to groups for which the mere fact of associating results in discrimination founded on a s. 10 ground. The institution must have, as a primary purpose, the promotion of the interests and welfare of an identifiable group of persons characterized by a common ground under s. 10: race, colour, sex, pregnancy, sexual orientation, civil status, age, religion, political convictions, language, ethnic or national origin, social condition, or handicap, to cite the enumerated grounds of the amended provision. The institution itself may fall into one or another of the s. 20 types but there must always be a congruence between a primary group purpose and the s. 10 ground of discrimination practised."[82] (Emphasis added)

---

78 *Brossard*, cited above, note 58, par. 97.

79 *Id.*, par. 117.

80 *Id.*, par. 125.

81 *Id.*, par. 100.

82 *Brossard*, cited above, note 58, par. 130.

In light of *Brossard*, two questions concerning the second branch of the provisions must be asked with respect to the institutions that wish to create gender-specific positions.

First, it is important to know whether the employer who wishes to make a distinction otherwise prohibited by the *Charter* is either a "non-profit institution" or "an institution devoted exclusively to the well-being of an ethnic group" that can be described as having a charitable, philanthropic, religious, political or educational nature.[83]

Second, assuming that the institution can invoke the second branch of section 20, is its gender-specific policy for certain positions connected to the overall objectives of the institution?

The Supreme Court discusses the applicability of the second branch of section 20 as follows:

> "A Catholic school might invoke the second branch of s. 20 to justify a preference given to Catholics in its hiring policy for teachers. The school constitutes a "non-profit institution" of a "religious" or "educational nature". The section 20 protection is extended to the school in order to allow Catholics to freely associate to promote Catholic values and beliefs. The school would still be required to show that the preference was justified by its "religious" or "educational" nature."[84]

However, the Supreme Court explains that "It is possible to overstate the connection between the brand of s. 10 discrimination practised by group (i.e., political, religious, sexual orientation, etc.) and the factor which binds members of the group together […]," since "[…] If this were the case, the words "charitable", "philanthropic" and "educational" would have no meaning because they cannot be directly linked to a prohibited ground of discrimination enumerated in s. 10."[85]

The Supreme Court also contends that "there need not be a direct relationship between the brand of discrimination and the factor which binds members of the institution together [...]."[86] However, "there must always be a connection between the brand of discrimination practised and the nature of the institution."[87]

The Supreme Court illustrates this approach by recalling *Décision C.D.P.—311*.[88] This decision by the Commission des droits de la personne concerned a case in which a non-profit institution devoted to the promotion of women's rights did not allow the complainant to purchase a ticket to a cultural event organized to celebrate International Women's Day because he was a man. The Commission explains on page 465 that:

---

83 *Id.*, par. 117.

84 *Brossard,* cited above, note 58, par. 118.

85 *Id.*, par. 127.

86 *Id.*, par. 129.

87 *Id.*, par. 130.

88 [1986] D.L.Q. 462, cited in *Brossard*, par. 129.

> "The non-profit institution relying on the application of section 20 must be able to justify, objectively, that the distinction, exclusion or preference is made in pursuit of the objectives defined in its charter. There must be a rational and logical link between the difference in treatment and the specific character of the organization or event. Each case must be examined on its merits." [Translation]

The case *Trinity Western University* v. *British Columbia College of Teachers* is also interesting.[89]

In this decision, the Supreme Court decided that Trinity Western University ("TWU"), a private Christian institution in British Columbia, was entitled to base its program on its Christian world view, which considered homosexuality as a sin. The members of the TWU community were required to sign a document in which they agreed to refrain from homosexual activities. The consequence of this directive, according to the appellants, was to prevent homosexuals from becoming teachers. In the opinion of the Supreme Court, given the lack of tangible proof that the training provided led to discrimination, by teachers trained at TWU, in the British Columbia public school system, the freedom of individuals to hold certain religious beliefs during while attending TWU should be respected. It is important to note that TWU is a private institution that is not totally subject to the British Columbian human rights legislation, and to which the *Canadian Charter of Rights and Freedoms* does not apply. However, the Supreme Court based its decision on previously established principles concerning freedom of religion and conflicting rights.

On the other hand, as underlined by the Supreme Court in *Brossard*, "A university, for example, which one would ordinarily think of as a non-profit institution of an educational nature, cannot cite the second branch of s. 20 to justify discriminatory distinctions, exclusions or preferences unless the university has a primary purpose such as the ones described above."[90] (Emphasis added)

In keeping with *Brossard,* the criteria of the second branch of section 20 were considered not to have been met in the case *Collège Notre-Dame*:

> "In this particular case, I would hesitate to conclude that the college's particular physical education program allows it to invoke the exception provided by the second branch of section 20."[91] [Translation]
>
> […]
>
> "The college remains governed by the Government's basic regulations and, unlike some schools that apply for a derogation to provide intensive physical education, dance or music courses, no derogation exists in the case of the college. Its primary purpose remains the academic instruction of its students. It does not offer an intensive sports program, and is not a specialized sports school whose primary objective is to train elite athletes.

---

89 [2001] 1 S.C.R. 772.

90 *Brossard*, cited above, note 58, par. 134. cited in *Commission des droits de la personne* c. *Collège Notre-Dame du Sacré-Cœur*, (C.A.), 5 December 2001, par. 27.

91 *Collège Notre-Dame du Sacré-Cœur*, cited above, par. 28.

> The college therefore does not have a specific vocation linked to one of the grounds of discrimination listed in section 10.
>
> Regardless of this fact, to benefit from the second branch of section 20, the college would still have to show that its discriminatory admission policy was justified in the circumstances […]."[92] (emphasis added) [Translation]

To conclude concerning the application of the second branch of section 20, the majority decision of the Supreme Court in *Brossard* states that: "[…] as a general rule, the distinction, exclusion or preference practised by the non-profit institution to which the second branch applies must be justified in an objective sense by the particular nature of the institution in question."[93]

This means that a non-profit institution of a charitable, philanthropic, religious, political or education nature whose objectives include promoting the interests or well-being of an identifiable group of people sharing one of the characteristics mentioned in section 10 of the *Charter*[94] could avail itself of the second branch of section 20 of the *Charter* to create gender-specific positions for the provision of personal care to its clients.[95] The same would apply to an institution devoted exclusively to the well-being of a specific ethnic group that was also of a charitable, philanthropic, religious, political or educational nature.

Where applicable, these institutions could justify their decision to create gender-specific positions without having to prove that they have surveyed the wishes of their beneficiaries in connection with their particular nature, provided it is possible to establish a link between the objectives pursued and the measure restricting the employees' equality rights. Obviously, as already pointed out by the Commission, "since this constitutes an exception to the principle of equality in employment, the employer is responsible for assessing the situation before concluding that it is necessary to create gender-specific positions […]"[96] in pursuit of the objective of respecting the rights of the beneficiaries. An employer who wishes rely on this ultimate measure will always have to prove that it has assessed and rejected all other achievable measures and all possible alternatives that would allow the rights of the beneficiaries to be respected without infringing on the right to equality in employment.

---

92 *Collège Notre-Dame du Sacré-Cœur*, cited above, note 90, par. 32-33-34.

93 *Brossard*, cited above, note 58, par. 138.

94 *Brossard*, cited above, note 58, par. 130.

95 In connection with gender-specific positions, for example, an institution could invoke religious or ethnic grounds.

96 Document cited above, note 2, p. 7.

CONCLUSION

The Commission considers, like the Human Rights Tribunal in *Villa Plaisance,* that it is important to ensure respect for the fundamental rights of users: the right to the safeguard of dignity (*Charter*, section 4), the right to personal inviolability (*Charter*, section 1) and the right to respect for private life (*Charter*, section 5), while taking into account the equality rights of employees (*Charter*, sections 10 and 16).

The current context has introduced new parameters that were not examined in the 1986 opinion[97] concerning this issue. The new guidelines must reflect contemporary realities.

For example, in the former guidelines, the Commission suggested that one of the conditions to be met before applying a policy of gender-specific positions, a measure that restricts the right of equality in employment, was that "the institution must have surveyed the preferences of each beneficiary and concludeed that the presence of person of a specific sex was required […]." (emphasis added) [Translation]

The Commission still considers that a decision to introduce a gender-specific policy must not be made in the abstract. However, with the shift to ambulatory care and intermittent support services provided in the home, it is not always possible to be aware of beneficiaries' choices in advance, or to ensure respect for their fundamental rights.

In addition, several stakeholders have suggested that a worker of the same sex as the beneficiary should be assigned to provide personal care when circumstances make it impossible to ascertain the beneficiary's wishes. Nevertheless, the creation of gender-specific positions to respect the rights of beneficiaries must remain the final resort.

Exceptions to the right not to be subject to discrimination in the field of employment are already specified in section 20 of the Québec *Charter*. These exceptions to the anti-discrimination rule fall into two groups.

For the application of the first branch of section 20 of the *Charter*, based on a "distinction, exclusion or preference based [solely] on the aptitudes or qualifications required for an employment", several avenues are possible, provided they respect the criteria of rationality and proportionality in the approach applied, in accordance with the established jurisprudence.

In *Villa Plaisance*, the Human Rights Tribunal suggests that the clientele should be surveyed before a final decision is made. Other authorities have ruled that the employer's defence can be based on expert testimony (*Stanley* v. *Royal Canadian Mounted Police*), or complaints from former beneficiaries where client turnover is high (*Syndicat des employés d'hôpitaux d'Arthabaska* c. *Hôtel-Dieu d'Arthabaska*).

If an institution serves a specific clientele and meets the criteria of the second branch of section 20 of the Québec *Charter*, by making a "distinction, exclusion or preference […] justified by the charitable, philanthropic, religious, political or educational nature of a non-profit institution or of an institution devoted exclusively to the well-being of an ethnic group", it must still show that gender-specific positions

---

[97] Document cited above, note 2.

are necessary "to promote the fundamental right of individuals to freely associate in groups for the purpose of expressing particular views or engaging in particular pursuits […]."[98]

This means that a non-profit institution of a charitable, philanthropic, religious, political or educational nature whose objectives including promoting the interests or well-being of an identifiable group of people sharing one of the characteristics listed in section 10 of the Québec *Charter*[99] could rely on the second branch of section 20 of the *Charter* to create gender-specific positions for the provision of personal care to its clientele.[100] The same applies to institutions devoted exclusively to the well-being of a specific ethnic group that are also of a charitable, philanthropic, religious, political or education nature.

Where applicable, these institutions could justify their decision to create gender-specific positions without having to prove that they have surveyed the wishes of their beneficiaries in connection with their particular nature, provided it is possible to establish a link between the objectives pursued and the measure restricting the employees' equality rights. Obviously, as already pointed out by the Commission, "since this constitutes an exception to the principle of equality in employment, the employer is responsible for assessing the situation before concluding that it is necessary to create gender-specific positions […]"[101] in pursuit of the objective of respecting the rights of the beneficiaries. An employer who wishes rely on this ultimate measure will always have to prove that it has assessed and rejected all other achievable measures and all possible alternatives that would allow the rights of the beneficiaries to be respected without infringing on the right to equality in employment.

---

98 *Brossard*, cited above, note 58, par. 100.

99 *Brossard*, cited above, note 58, par. 130.

100 In connection with gender-specific positions, for example, an institution could invoke religious or ethnic grounds.

101 Document cited above, note 2, p. 7.

APPENDIX

THE EXERCISE OF RIGHTS PROTECTED BY THE CHARTER IN SITUATIONS IN WHICH BENEFICIARIES REQUIRE ASSISTANCE FOR THEIR PERSONAL CARE: GUIDELINES

The Commission still believes, as stated in its 1986 guidelines, that "the beneficiaries' situation of dependency and weakness must not be under-estimated [...]. There is a clear need to consider the everyday, intimate aspect of the personal care provided."[1] However, concerning the creation of gender-specific positions for the provision of personal care, the Commission stated: "since this constitutes an exception to the principle of equality in employment, the employer is responsible for assessing the situation before concluding that it is necessary to create gender-specific positions."[2]

While retaining this underlying approach and stressing that each case must be assessed on an individual basis, the Commission has examined the current situation of the elderly and people with reduced autonomy, along with recent case law, in order to propose the following new guidelines:

1. In managing their human resources, especially when filling positions and assigning staff, employers must take steps to respect the choices made by beneficiaries concerning their personal care, in order not to infringe upon their fundamental rights: the right to safeguard of dignity (*Charter*, section 4), the right to personal inviolability (*Charter*, section 1) and the right to respect for private life (*Charter*, section 5).

2. Every institution must comply with section 233 of the *Act respecting health services and social services* which reads as follows:

   > "Every institution must adopt a code of ethics which shall set out the rights of the users and the practices and conduct expected, with respect to the users, from the employees, the trainees, including medical residents, and the professionals practising in a centre operated by the institution.
   >
   > The institution must give a copy of the code of ethics to every user who is an in-patient or who makes a request therefor."

3. Whether or not an institution has created gender-specific positions, it is recommended, in order to limit possible infringements of the fundamental rights of beneficiaries who have not had an opportunity to express their wishes, that a person of the same sex be assigned to provide personal care when the availability of staff on the premises so permits.

4. A decision to apply a policy on gender-specific positions must meet the criteria of either the first or the second branch of section 20 of the Québec *Charter*.

---

1 Commission des droits de la personne, *La sexualisation de postes dans les centres hospitaliers et les centres d'accueil*, 1986, cat. 2.120-2.5, p. 5.

2 *Id.*, p. 7.

a) To meet the criteria of the first branch of section 20, in other words to create gender-specific positions based solely on the "aptitudes or qualifications required for an employment", the employer must rely on criteria relating to the choices or preferences of the beneficiaries (survey, complaints received, expert testimony, etc.), to the duties of the position, to the working environment, to staff mobility or flexibility, etc.

   The criteria of rationality and proportionality in the approach selected, as defined by the courts for the application of the first branch of section 20, must be respected. Any restriction must represent the final resort in order to safeguard the fundamental rights of the beneficiaries.

b) To meet the criteria of the second branch of section 20, in other words the creation of gender-specific positions based on the "charitable, philanthropic, religious, political or educational nature of a non-profit institution or of an institution devoted exclusively to the well-being of an ethnic group", the employer must realize that "there must always be a connection between the brand of discrimination practised and the nature of the institution."[3]

   In other words,

   "The distinction, exclusion or preference practised by the non-profit institution to which the second branch applies must be justified in an objective sense by the particular nature of the institution in question."[4]

For example, a non-profit institution of a charitable, philanthropic, religious, political or educational nature whose objectives include promoting the interests or well-being of an identifiable group of people sharing one of the characteristics mentioned in section 10 of the *Charter*[5] could avail itself of the second branch of section 20 of the *Charter* to create gender-specific positions for the provision of personal care to its clients.[6] The same would apply to an institution devoted exclusively to the well-being of a specific ethnic group that was also of a charitable, philanthropic, religious, political or educational nature.

Where applicable, these institutions could justify their decision to create gender-specific positions without having to prove that they have surveyed the wishes of their beneficiaries in connection with their particular nature, provided it is possible to establish a link between the objectives pursued and the measure restricting the employees' equality rights. Obviously, as already pointed out by the Commission, "since this constitutes an exception to the principle of equality in employment, the employer is responsible for assessing the situation before concluding that it is necessary to create gender-specific positions […]"[7] in pursuit of the objective of respecting the rights of the beneficiaries. An employer who

---

3 *Brossard (Town)* v. *Québec (Commission des droits de la personne)* [1988] 2 S.C.R. 279, par. 130.

4 *Brossard*, cited above, par. 138. *Commission des droits de la personne* c. *Collège Notre-Dame du Sacré-Cœur*, (C.A.), 5 December 2001, par. 33.

5 *Brossard*, cited above, note 3, par. 130.

6 In connection with gender-specific positions, for example, an institution could invoke religious or ethnic grounds.

7 Document cited above, note 1, p. 7.

wishes to rely on this ultimate measure will always have to prove that it has assessed and rejected all other achievable measures and all possible alternatives that would allow the rights of the beneficiaries to be respected without infringing on the right to equality in employment.