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Public Service
Labour Relations and Employment Board Act — Before a panel of the Board

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BETWEEN

BRENDAN CHEUNG

Grievor

and

TREASURY BOARD
(Correctional Service of Canada)

Employer

Indexed as
Cheung v. Treasury Board (Correctional Service of Canada)

In the matter of an individual grievance referred to adjudication

REASONS FOR DECISION

Before: Margaret T.A. Shannon, panel of the Board

For the Grievor: Rebecca Thompson, counsel

For the Employer: Allison Sephton and Joshua Alcock, counsel

Heard at Edmonton, Alberta,
January 30 and 31 and August 6 and 7, 2014.

I. Individual grievance referred to adjudication

[1] The grievor, Brendan Cheung, alleged that the employer, the Correctional Service of Canada (CSC), discriminated against him in his employment as a primary worker (PW) at the Edmonton Institution for Women (EIW) on the basis of gender, contrary to the *Canadian Human Rights Act* (R.S.C. 1985, c. H-6; *CHRA*) and in violation of article 37 of the agreement between the Treasury Board and the Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - CSN ("the bargaining agent") with an expiry date of May 31, 2010 ("the collective agreement"; Exhibit 4). The grievor alleged that restrictions placed on him in the performance of his duties as a PW at the EIW by paragraphs 10 (a) and (c) of the Commissioner's Directive 577 ("CD 577"; Exhibit 1, tab 4) discriminated against him on the basis of his gender, restricted him in the performance of his duties and excluded him from overtime opportunities based on the ratio of male to female PWs.

[2] As the grievance raised an issue involving the interpretation of the *Canadian Human Rights Act,* R.S. 1985, c. H-6, a Form 24 ("Notice to the Canadian Human Rights Commission" ("the CHRC")) was sent on the grievor's behalf to the CHRC. On March 22, 2012, the CHRC advised the Board in writing that it did not intend to make submissions in this matter.

II. Summary of the evidence

[3] The grievor was among the first group of male correctional officers introduced into the EIW. For the first five years of the EIW's existence, no males were employed there. While everyone had an initial learning curve with respect to having male front-line correctional officers, things have matured, and since then, the grievor has not experienced gender issues with the inmates. He works in the secure unit where, during the day, the ratio of male to female officers is not set. The PWs have individual caseloads with which they deal during the day.

[4] The EIW is set up with 3 secure pods or living units of 19 cells occupied by approximately 24 inmates, and 1 segregation unit. In the pods, the inmates share a common kitchen, toilets and showers. The cells in the segregation unit have toilets behind privacy screens but no showers. Security rounds are conducted every 60 minutes on the living units and every 30 minutes in segregation. Male PWs have no restriction on their duties during the day. Security rounds are conducted with one

other PW, who may be male or female. When a male PW enters the living unit, he announces his presence. At times during the day, the PWs may escort inmates to other units.

[5] However, after 23:00, male PWs must be paired with female officers, who enter the living units and check the cells before the male PW does. Both PWs are required to verify that a live breathing body is in a given cell. Female PWs are required to proceed ahead of male PWs when conducting security rounds on the living units after 23:00. When in the living units after 23:00, male PWs are expected to walk behind their female partners. Male PWs working the segregation unit after 23:00 are able to look into cells without a female PW verifying them first so long as a female PW is able to watch them via video. The grievor testified that the reason for the distinction in how rounds are conducted before and after 23:00 is that male PWs turn into perverts after 22:59, according to the inmates.

[6] This protocol was made into CD 577 (Exhibit 1, tabs 3, 4 and 5) in 2011. Its purpose was to protect the dignity and privacy of women in custody. In the grievor's opinion, its true effect is to render male officers redundant on the overnight shift. On the 23:00 shift, the inmates are generally sleeping. To the grievor's knowledge, there have been no issues related to the conduct of security rounds. The inmates are required to be properly dressed at all times, including after 23:00, so there is no justification for the distinction about how the PWs conduct their security rounds before and after 23:00. In male institutions, female officers can carry out night rounds without being accompanied by a male officer.

[7] If an inmate is in crisis after 23:00, whoever is available deals with the crisis, no matter their gender. The choice of who will assist is based on the PW's rapport with the inmate in crisis. When there is a crisis after 22:00, only correctional officers are available to deal with them. Crises occur on a daily basis due to overcrowding and the increasing number of inmates with mental health issues. Female inmates often prefer to speak to a male correctional officer when in crisis.

[8] All male correctional officers assigned to the EIW must complete a two-week course on dealing with women in a correctional environment, which is not required of female officers assigned to male institutions. The training emphasizes special programs for women.

[9] At the EIW, there are four counts per day; two are “stand-to” counts, in which inmates are required to stand in their cells to be counted. Inmates are to be fully clothed and visible for all counts. The 12:00, 16:00 and 22:00 counts may be conducted by male PWs. The 06:00 count requires a female PW to be present with a male PW. All counts require two PWs to verify each inmate’s presence. The 06:00 count takes longer to complete when it is conducted by a pair of PWs of both genders rather than two female PWs because of the manner in which rounds are conducted during these hours. When two female officers conduct the rounds, there is no delay as both can verify the count at the same time.

[10] According to the grievor, historically, there has been no issue with spontaneous nudity at the EIW. Nudity could result in segregation as a result of deteriorating inmate behaviour. If he encountered nudity, the grievor would direct the inmate to clothe herself and would withdraw unless the inmate was self-harming and intervention was required. In his 11 years at the EIW, the grievor has encountered only 2 or 3 incidents of nudity; none was in the living units.

[11] Inmates know when security rounds are scheduled. The reality of incarceration is that they must be checked on and that someone looks in on them at least 150 times per week. Anyone looking in a window at night might startle an inmate, regardless of the gender of the person looking in the window. Staff members announce themselves when they enter the living unit during the day but not at night. During the night, inmates are able to go to the kitchen, the bathroom or watch television in the common room. They are not confined to their cells. The living units are considered their homes for the duration of their stays.

[12] The grievor was confused when CD 577 was introduced. Nothing had changed in his workplace other than that it was evolving and that more men were being added to the EIW’s ranks. Historically, there were 8 to 10 male PWs. Now males comprise 25% of EIW correctional officers, which creates rostering problems when ensuring the correct male-to-female ratio on the overnight shift.

[13] CD 577 and the policy on security rounds question the grievor’s integrity and professionalism, according to him. There has never been a harassment complaint laid by inmates related to the conduct of security rounds at the EIW. Comments made about the reason for the change in security patrols after 23:00 are offensive. Male PWs do not become perverts and according to the grievor “they do not get horny after 23:00

hours." CD 577 has created dissension among co-workers and has increased the workload of the female PWs. Males are passed over for overtime in order to ensure that staffing ratios are gender appropriate. CD 577 sends the message that male PWs cannot be trusted with other male PWs after 23:00 and that they must be supervised by a female PW on the overnight shift.

[14] James Lakinn is also a PW at the EIW. He remembered that a gender protocol existed when he went to the EIW in 2003 and that it went through periodic changes. In 2011, an addendum was made to CD 577, which directed male staff to follow behind female staff when in the living units. He agreed with the grievor that that direction undermines his role as a correctional officer. It infringes on his human rights. He remembered discussing his feelings with his fellow officers; specifically that he felt "disempowered" doing his job. He was hired to represent the public and to empower women and assist in their rehabilitation. CD 577 makes him feel like a second-class citizen.

[15] Monica Hansen-Harper has been employed as a PW at the EIW since September 2003. Prior to working at EIW, she was employed at the Edmonton Institution, a maximum-security institute for men. She sees the impact of CD 577 as putting more onus on female officers to take full responsibility for the EIW's security. She feels like she is supervising her male co-workers. Female correctional officers are already responsible for duties such as conducting strip searches and pat-downs and recording interventions on video, etc. The impact of CD 577 is to separate the female officers from the male officers. There is always contention over rosters and post assignments. Male officers are not equal to female officers in a female institution. There is a greater demand on a female officer's time on the overnight shift as she is required to verify all cells before a male officer is allowed to look in them. Rounds take longer when she is paired with a male partner. Staffing is at a minimum on the overnight shift, and time management is essential.

[16] Ms. Hansen-Harper has no issues with being partnered with a male correctional officer. She has never experienced a situation in which a male officer was being inappropriate with an inmate.

[17] According to Melanie Greenfield, the president of the bargaining unit local, female officers are required, in addition to strip searches and pat-downs, to carry out vehicle-area searches and counts and cell searches on the overnight shifts. They are

more likely to be placed on cell control in maximum security, assigned to modified suicide watches; they conduct more rounds and respond to more incidents on the overnight shift. Male officers are not allowed to carry out strip searches or to decontaminate an inmate after pepper spray is used. As a female officer, she is irritated that she bears the burden of the work on the overnight shift because of her gender.

[18] Wayne Weum has worked as a correctional officer for the past 12 years in male institutions. His duties include security patrols; searching the premises, people and cells; dynamic security; situation management and conflict resolution; meeting inmates' needs; conducting escorts; conducting counts; and writing reports. He works within the master control and communications post, is a member of the emergency response team, and has been an instructor. Typically, he has no restrictions on his duties. He is able to fill and is expected to fill any of the posts in an institution, without restriction. He may carry out his rounds alone, although most are carried out with a partner, who could be a female officer. The only restriction placed on female officers in a male institution is that they are not allowed to perform strip searches, although they can act as witnesses to strip searches. Female correctional officers are not required to be accompanied by male officers when conducting rounds and counts.

[19] Conner Bryant began his career with the employer in 2005 as a female officer at the EIW. In 2008, he transferred to the Grand Valley Institution for Women in Ontario. While there, he went through gender reassignment. In 2011, he had his gender legally changed. In 2013, he returned to the EIW as a male officer. While still a female, he was part of the emergency response team at both the EIW and at Grand Valley. As he began his transition from female to male, he had to resign from the emergency response team and had his duties cut in half. He could not carry out high watches of inmates in crisis, strip searches or the overnight shift without a female officer accompanying him.

[20] Mr. Bryant and the grievor have spoken of gender issues in the workplace. They have discussed their frustration about being allowed to carry out only part of their jobs because they are males.

[21] Kelley Blanchette is Director General of the employer's Women Offender Sector, which is responsible for developing policies and programs for women offenders. In so doing, the employees of this sector must consider gender and infrastructure at institutions and in the community, including resources available when releasing an

inmate. She was previously Director, Correctional Research, including the employer's Women Offender Portfolio. She holds a doctorate degree with a focus on women in corrections. She has participated in the National Institute of Corrections, which is a think tank at which gender-informed recommendations are made for women in corrections. She has co-authored six books on women in corrections addressing the treatment of women in correctional institutions and effective correctional practices for women. She has authored 17 government reports on the topic. Based on this, Ms. Blanchette was qualified as an expert witness in correctional practices for women.

[22] Women constitute 5% of all offenders. Approximately 600 women are incarcerated in federal institutions in Canada. Most come into institutions as first-time offenders. In 2010, 85% of incarcerated women had experienced physical abuse, primarily at the hands either of men they were in a relationship with or of men in positions of authority. Of those abused women, 68% had suffered sexual abuse. Many were abused at night by people in authority.

[23] A significant number of incarcerated women have mental health issues, addiction problems, or both. Female mental-health issues differ from those of males. There is a higher prevalence of mental health issues among the female inmate population. Females tend to suffer from depression, anxiety and borderline personality disorders, while males tend to suffer from antisocial personality disorders. While females account for only 5% of the incarcerated population, they account for 33% of the self-injury incidents in institutions. There is a link between a history of abuse and mental illness and self-harm. Self-harm is seen as a coping mechanism.

[24] The foundation of corrections for women is to work on the inmates' self-esteem. Women respond to incarceration differently than men do. Their needs are different. They need a level of trust for authority. Women-centred programing was developed from the ground up for women. Women-centred programs are not merely adaptations of the programs developed for the male inmate population. To be successful, the women must feel sale and supported.

[25] CD 577 was developed to formalize the CSC's "National Operational Protocol" on the recommendation of the Canadian Human Rights Commission (CHRC). The purpose of CD 577 is to protect the privacy and dignity of inmates and to mitigate the risk of exposure to incidents in which the inmate would feel vulnerable. Male correctional officers in a female institution are pro-social male role models. They assist

with reintegrating the inmates, and they normalize the environment in which they live. The issue is ensuring that the inmates are comfortable in the place where they will live for years, not about a fear that male correctional officers will further abuse female inmates. Paragraphs 10(a) and 10(c) of CD 577 (Exhibit 1, tab 4) are the small things that the employer put in place to make sure that the female inmates felt safe. The employer is not sending out a mixed message that men can be trusted during the day but not at night; it is trying to build trust and make the inmates feel safe. There is no equivalent to CD 577 in male institutions as it is less likely that male inmates have been abused by women.

[26] Clovis Lapointe is Assistant Warden Operations (AWO) at the EIW. He is responsible for staffing, forecasting staffing needs, scheduling overtime and managing the salary budget. Currently at the EIW, there are 22 male officers and 149 female officers. CD 577 requires specific gender compliance on the overnight shift, which can be met with a ratio of four male to three female officers on duty. On the segregation unit, two male officers can make the rounds if they can be viewed by a female officer in the main control and communications post via video.

[27] Mr. Lapointe was the AWO when CD 577 was introduced. Over time, its wording has been modified, but when the version in Exhibit 1, tab 4, was introduced, paragraph 10(a) was not new; pairing male and female correctional officers on the overnight shift existed when Mr. Lapointe arrived at the EIW in February 2011. Paragraph 10(c) was new. Only the grievor reacted to the introduction of paragraph 10(c), which requires a male correctional officer to walk behind a female officer to avoid exposure to nudity or other situations in which an inmate's privacy and dignity could be compromised. He received no complaints about the introduction of CD 577 but heard rumours of a petition against it, which he did not recall receiving or seeing.

[28] Paragraphs 10(a) and 10(c) of CD 577 put the existing national operating protocol into a commissioner's directive. Its purpose was to protect the dignity and privacy of female inmates during vulnerable hours and to protect male staff from being placed in vulnerable or embarrassing situations. Vulnerable hours are considered the curfew hours, when inmates are normally sleeping and are not aware if they are exposed.

[29] Paragraphs 10(a) and 10(c) of CD 577 do not remove any of the correctional officers' duties on the overnight shifts. It has not affected their ability to conduct their

duties; it merely changes how they conduct them. The employer is mimicking society's norms, in which females would not have males looking into their rooms every couple of hours while they sleep. CD 577 does not affect the EIW's overnight operations. It has no impact on correctional officers' ability to operate; nor does it add additional time to conducting rounds of the living units. Each round takes between 2.5 and 3 minutes.

[30] Lee Redpath is Acting Director General of the Women Offender Sector. She is responsible for policies specific to female offenders and for use-of-force reviews on female inmates. She works with wardens to ensure the employer's policies are implemented and applied consistently at female institutions. Female inmate programs are gender specific and evaluate the inmates' paths to crime, histories of abuse and victimization, trauma, experiences as single parents, and other history. Before 1990, there were no specific programs for female inmates, merely adaptations of male programs. Following the *Commission of Inquiry into Certain Events at the Prison For Women in Kingston* and the *Creating Choices* report (Exhibit 2, tab 1), it became evident that programs specific to women were required. The employer took the *Creating Choices* report and put it into practice by developing a program specifically for female offenders (Exhibit 10). The intention was to create a safe and respectful environment in which female inmates could have healthy, positive relationships with authority and men. The *Creating Choices* task force felt that male correctional officers would be counter-productive to achieving these goals. The CSC believes that male correctional officers have a role to play in corrections for female inmates as positive role models. Policies and practices were developed and put in place to mitigate the risks posed to inmates and to male correctional officers in female institutions.

[31] Justice Arbour's inquiry into the April 1994 incidents at the Prison For Women in Kingston (Exhibit 2, tab 2) spoke to stakeholders and staff about the presence of male correctional officers in a female institution. The majority of stakeholders disagreed, and continue to disagree, with the CSC's approach and believe that no men should work in a female institution. Justice Arbour looked into the question of male correctional officers in female institutions from the point of view of how the CSC could mitigate the real and perceived threats. She determined that it was not necessary to change policies but rather to put in place an independent monitoring system and to allow women to choose to be sent to a male-free institution (see Exhibit 2, tab 2, page 133).

[32] Justice Arbour's report also recommended that a series of monitoring reports be written (Exhibit 2, tabs 3 and 4). The CSC took the reports seriously and understood the recommendations against the presence of male correctional officers in female institutions. However, the CSC maintained its stand that the presence of male correctional officers has a positive effect on female institutions. Through proper recruiting, training and mitigation strategies, any risks are manageable. Policies were developed to respect the privacy and dignity of inmates and to prevent male staff from being put in vulnerable situations. The stakeholders needed to know that the CSC would not put male staff in situations in which something might happen. Only those male officers who request assignment to a female institution are recruited. They undergo female-centred training and patrol female institutions in pairs. The national cross-gender protocol, which requires male officers to be paired with female officers on overnight shifts, was put in place in answer to the concerns expressed by Justice Arbour. The protocol became a commissioner's directive following the CHRC's recommendations (Exhibit 2, tab 5, page 44).

[33] Before implementing CD 577, the employer consulted with the bargaining agent, which did not support cross-gender staffing on the living units. There were no issues identified with pairing correctional officers. The bargaining agent did raise concerns with the original wording of paragraph 10(c), which it said was offensive (see Exhibit 1, tab 5, page 3). The employer removed the offensive language (see Exhibit 1, tab 4, page 3).

[34] Paragraph 10(a) of CD 577 is intended to prevent male correctional officers from seeing an inmate out of her room in a state of undress or to see her in a situation in which her dignity might be compromised. It is intended to protect both the inmate and the officer and was initiated in response to scrutiny by outside agencies, such as the Elizabeth Fry Society, which disagreed with the CSC's use of male correctional officers in female correctional facilities.

[35] Without the limitations in CD 577, the CSC could not defend itself against accusations by stakeholders who do not believe that men have a front-line role in corrections for women. The CSC sought to balance opportunity for male correctional officers with mitigation. The male officers at the EIW chose to work there. The employer's role is to ensure that they are not compromised unnecessarily. There are rules about how female inmates are to be dressed during the overnight shift, and there

are penalties for repeated violations of those rules. The employer wanted to protect male correctional officers and prevent them from being put in situations in which they would be vulnerable.

[36] The purpose of the training provided to male correctional officers is to help them gain a better understanding of women in the hope that they will understand the inmates. The training addresses sexuality and the role of women while incarcerated. Screening is conducted through the use of situational questions to gauge the officer's response. Through the training, the employer tries to determine how male correctional officers would deal with a female inmate in crisis. Scales are used to assess how open and adaptable the correctional officer is.

[37] The frustrations expressed by male correctional officers reported in the final report of the "*Cross Gender Monitoring Project*" (Exhibit 11, page 5) that their perception is that they are being viewed as potential harassers and rapists, regardless of who they are, cannot be ignored. The employer stresses at the training that that is not its view. If it felt that female inmates needed protection from male correctional officers, there would be no male correctional officers in women's institutions. However, the perceived threat must be mitigated, hence the existence of CD 577.

III. <u>Summary of the arguments</u>

A. <u>For the grievor</u>

[38] Article 37 of the collective agreement (Exhibit 4) and section 15 of the *CHRA* both prohibit discrimination on the grounds of gender. Amendments in 2011 to CD 577 in paragraphs 10(a) and 10(c) discriminate against male PWs. The employer cannot justify implementing those paragraphs as a bona fide occupational requirement (BFOR). The grievor seeks a declaration that these provisions are discriminatory and an order directing that they be removed from CD 577. An adjudicator appointed under the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2; *PSLRA*) has the authority under the *CHRA* to provide the grievor with declarative relief.

[39] Witnesses for the grievor described the EIW's operations and how CD 577 impacted them. The distinction between security rounds and counts on the living units before 23:00 and those after 23:00 portray males as aggressors who are not trustworthy. Male PWs turn into molesters and rapists at 23:00 from whom the

inmates must be protected. The grievor testified that he feels like a second-class citizen who is not equal to female officers.

[40] CD 577 has a divisive effect on the workplace (see Exhibit 11). A disproportionate amount of the workload on the overnight shift must be carried out by the female correctional officers on that shift. In addition, the female officers must supervise their male counterparts when doing rounds.

[41] The employer argued that CD 577 is intended to protect male officers from allegations of inappropriate behaviour. No evidence of any complaints was led. Any vulnerable situations in which male officers found themselves resulted from the inmates voluntary violating institutional policies (see Exhibit 7). The restrictions placed on male correctional officers at the EIW are overbroad, perpetuate male stereotypes and harm the aims of having male correctional officers in a women's institution.

[42] In *R. v. Kapp*, 2008 SCC 41, the Supreme Court of Canada set out a two-part test to determine if legislation or policies are discriminatory, as follows: Was a distinction made based on a prohibited ground? Did it create a disadvantage? Clearly, in the grievor's case, a distinction based on gender was made, which created a disadvantage by restricting his ability to fulfill the full range of his duties as a correctional officer. The employer argued that it modified his duties and that it did not restrict them. The fact remains that female officers bear the burden of the work on the overnight shift. The male officers tag along. The female officers check all the cells, while the male officers' role is to verify the count. Female officers work extra shifts, such as suicide watches on the secure units, which the grievor cannot work. Shifts have staffing quotas to ensure compliance with CD 577.

[43] Using *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, when a male officer is told to follow behind a female officer, the male officer's dignity is significantly affronted. The spirit and effect of the restriction is the same whether or not CD 577 directs the male officer to walk behind the female officer or whether it states that female officers will proceed first down the range.

[44] Male correctional officers are a disadvantaged group within female correctional facilities. Their roles are restricted. They are painted as predators, without justification. The employer's limitations perpetuate the perception that males cannot be trusted to perform correctional officer duties in female institutions. The

implementation of paragraph 10(c) of CD 577 was an overreaction to a non-issue following a comment made by one inmate committee. The employer admitted that the paragraph in the 2011 version of CD 577 was poorly worded, which prompted its amendment.

[45] The employer has given no consideration to the rights of male correctional officers. It has been concerned only with the rights of female inmates. When a conflict arises between the two, the employer should strike a balance between the two or at the least only minimally impact one in favour of the other. The proportionality in this case has not been maintained. The impact on male correctional officers' rights should not to be compared to the rights of female inmates but to those of female correctional officers. Privacy is not a protected ground under the *CHRA*, but gender is. The employer failed to recognize that loss of privacy is an inherent part of incarceration. One cannot lose sight of the fact that these women are federally convicted inmates. The employer has a misplaced paternalistic overview that the privacy rights of female inmates need to be protected due to the fact that they are vulnerable. This need to protect inmate privacy is contradicted by policies for the segregation unit, where general rounds may be conducted by males so long as they are watched by a female correctional officer via video. The inmates in the segregation unit are the most vulnerable. They have been placed there because there are in crisis or are unable to cope with incarceration.

[46] Placing restrictions on male correctional officers based on the time of day is arbitrary. Removing paragraphs 10(a) and 10(c) of CD 577 would not cause the employer undue hardship and would allow male officers equal opportunities.

[47] To determine whether the employer has established that these restrictions are a BFOR, the three-part test set out as follows in *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3 (commonly referred to as the "*Meiorin*" decision) must be considered:

1. Has the employer adopted the standard for a purpose rationally connected to the performance of the job?

2. Did the employer act in an honest and good-faith belief that it was necessary to the fulfillment of that legitimate work-related purpose?

3. Is the standard reasonably necessary to the accomplishment of that legitimate work-related purpose?

[48] According to the Supreme Court in *Meiorin*, the employer must prove that the standard is reasonably necessary and that it is impossible to accommodate individual employees sharing the grievor's characteristics without imposing undue hardship upon the employer.

[49] The grievor believes that the employer acted in good faith. This is a case of adverse-effect discrimination. By accommodating the needs of one group, the employer discriminated against the grievor. However, the grievor struggled to agree that there is a rational connection between how he is to perform his duties under CD 577 and the business of corrections for women. The employer rejected recommendations to exclude males from female institutions because they are believed to be a positive role model within these institutions. Yet, under CD 577, the employer promotes the stereotype that male correctional officers are predators and cannot be trusted to patrol those institutions unsupervised at night.

[50] Paragraphs 10(a) and (c) of CD 577 minimize female inmates by imposing paternalistic standards. Rather than reinforce that there are consequences for their choices, they must be protected against the consequences. By having males supervised on night rounds, the employer minimizes the consequences to inmates of failing to adhere to the rules concerning appropriate dress in institutions.

[51] The employer's policy goes far beyond a minimal impairment of the grievor's gender equality rights. It has not demonstrated that it tried to accommodate his rights to the point of undue hardship. The ameliorative purpose of the policy must be balanced against the grievor's statutory rights. The only indication that the employer offered of undue hardship was that removing the provisions from CD 577 would be hard to explain to stakeholders.

[52] The *CHRA* states that undue hardship must be analyzed only in terms of safety, health and cost. More male correctional officers on the overnight shifts would reduce the cost of overtime for female officers. There would be less burnout among female officers. Male officers would not be upset and humiliated, which would result in improved morale and better ongoing mental health for correctional officers. As to the question of safety, the employer presented no evidence that danger is affected by the

number of male officers in the EIW.

B. <u>For the employer</u>

[53] The grievor has not established a *prima facie* case of discrimination. A mere difference in treatment because paragraphs 10(a) and (c) of CD 577 draw a distinction on the basis of gender does not equate to discrimination. (See *McGill University Health Centre (Montreal General Hospital) v. Syndicat des employés de l'Hôpital général de Montréal,* 2007 SCC 4, at para 48 to 50; *Kapp*, at para 17; *Ontario (Disability Support Program) v. Tranchemontagne,* 2010 ONCA 593, at para 93 to 94; *Preiss v. BC (Ministry of Attorney General),* 2006 BCHRT 587, at para 216; and *Andrews v. Law Society of British Columbia,* [1989] 1 S.C.R. 143).

[54] It is necessary to establish discrimination in a positive sense (see *Tranchemontagne*, at para 77 to 79; and *Preiss*, at para 233 and 234). Prejudice and stereotyping are part of the *prima facie* test. There is no freestanding requirement to prove prejudice or stereotyping. They are incorporated into the analysis of whether a *prima facie* case has been established. The question is whether the impugned sections of CD 577 truly create a disadvantage and whether they played a role in creating the disadvantage (see *Tranchemontagne*, at para 82, 84, 102 to 104, 109 and 119; and *Kapp*, at para 17 and 18).

[55] The onus was on the grievor to prove discrimination. Only once he established a *prima facie* case of discrimination would the burden shift to the employer to prove the existence of a BFOR for the discrimination. Even if the grievor established a *prima facie* case of discrimination on the basis of gender in this case, the employer established a BFOR for the discrimination. The legal test set out by the grievor is correct, which was that he must prove that he is a member of a protected group, that he has been adversely treated and that there is a nexus between the two.

[56] The decision in *Law* directs decision makers to consider contextual factors when determining the existence of a *prima facie* case. *Law* sets out an analytical framework for determining substantive discrimination based on competing policies (see *Preiss*, at para 229 to 234; *Kapp*, at para 23 and 24; *Tranchemontagne*, at para 123; and *Law*, at para 88). The framework involves determining whether a pre-existing disadvantage, stereotyping, prejudice or vulnerability is experienced by the individual or group at issue; a correspondence, or lack thereof, between the grounds on which the

claim is based and the actual need, capacity or circumstances of the claimant; the ameliorative purpose or effect of the impugned policy upon a more disadvantaged person or group in society; and the nature and scope of the interest affected by the impugned policy. At the most, the grievor might have established only the first of these four elements, which is that he is a member of a group that might have experienced a pre-existing disadvantage, stereotyping, prejudice or vulnerability. He has not provided any evidence relative to the other three elements of the analysis. He has also not proven a pre-existing disadvantage or stereotype exists based on his gender. Consequently, he has not established a *prima facie* case of discrimination.

[57] Even if the grievor has established one, the employer met the test in *Meiorin* to establish a BFOR. A formal distinction has been established within CD 577 that, if anything, disadvantages female correctional officers, not male correctional officers. As a male correctional officer, the grievor cannot rely on a disadvantage experienced by someone outside the group for which the claim of discrimination was made. There is no proof of infringement on his human dignity. Embarrassment does not equate to the diminishment of his identity as a male. His primary claim is for loss of dignity. When assessing the impact of CD 577 on the grievor's dignity, it must be assessed from his perspective, looking at it objectively and subjectively. Would a reasonable person in similar circumstances who takes into account contextual factors conclude that the grievor's dignity has been impaired? (See *Law*, at para 88, and *Preiss*, at para 220.) The grievor has not considered female offenders' real and substantial right to privacy and dignity.

[58] The grievor has offered no evidence to suggest that he has been subject to a pre-existing disadvantage, which, according to *Law*, at para 63, and *Preiss*, at para 257, is the most compelling factor to be considered. Males constitute approximately 77% of the correctional officers and 25% of the PWs employed by the CSC. The grievor's contention that CD 577 demeans male correctional officers by perpetuating stereotypes indicates that he misunderstands the reason for the policy. It is undeniable that the employer's actions were exactly the opposite to those described by the grievor. The employer has sought to offer employment opportunities to male correctional officers within the realm of female corrections when they are denied these opportunities in six provinces and against the recommendations of the various reports and stakeholders.

[59] CD 577 was implemented to protect the privacy and dignity of female inmates. It also recognizes the unique characteristics of female inmates and the likelihood that they have been sexually abused by men at night and that women feel most vulnerable at night. The policy attempts to achieve the CSC's goals while recognizing the vulnerability of female inmates. The directions on how the security rounds are to be completed on the overnight shift is a minimal impairment on essential staff. CD 577 takes into account the needs of male correctional officers. They are allowed to perform their duties on any shift; there are merely specific directions on how their duties are to be conducted on the overnight shift, which is a very narrow limitation. There is no evidence of any infringement on the grievor's ability to work. The employer weighed competing claims of dignity and determined which interest was the most profound. The grievor has proven no impact on employment, only hurt feelings, which is insufficient to support his claim.

[60] Female offenders are a uniquely disadvantaged group (see Exhibit 2, tab 10, pages 21, 25, 31, 34, 35, 36, 38, 39, 49 and 51). The point is the impact the presence of male correctional officers has on the safety and security of female offenders. The same abuse statistics are not found in male institutions. Risks do not manifest themselves in the same way in female institutions as they do in male institutions. The focus in female institutions is on the offender. Inmates' rights do not fall by the wayside merely because they are incarcerated (see *Stanley v. Canada (Royal Canadian Mounted Police)*, [1987] D.C.P.D. No. 3 (QL), at 33). CD 577 is directly connected to the employer's objectives and results in only a minimal intrusion on the grievor's employment. There is no evidence that the inmates at the EIW have been told that male PWs cannot be trusted. There is no requirement that female officers supervise their male counterparts. The minimal impairment on male correctional officers' ability to perform their duties on the overnight shift at the EIW is of significant importance to female inmates and the CSC's obligations to them and to the public.

IV. Reasons

[61] The grievor argued that male correctional officers are disadvantaged historically in corrections for women. According to him, the message being sent by the employer, by virtue of CD 577, is that, despite training, male officers cannot be trusted unescorted in the EIW living units at night.

[62] I cannot accept this argument and indeed find that CD 577 is evidence of

precisely the opposite opinion on the part of the employer. Despite many recommendations from various stakeholder groups, the employer nonetheless employs male officers in female institutions. The evidence disclosed that males constitute approximately 25% of PWs working in EIW. Further the evidence disclosed that the reasons underlying CD 577 had nothing to do with any mistrust of male CXs, but was instead based on research on how best to deal with female inmates. There is nothing before me other than anecdotal references to comments by inmates and staff members about the witching hour to indicate that the employer holds a belief that male correctional officers are unable to perform their duties as correctional officers in female institutions by virtue of their gender. Furthermore, there is no evidence before me of stereotyping or of a pre-existing disadvantage faced by male PWs to support the grievor's claim. On that basis alone, the grievor has failed to meet the test set out in *Kapp* and *Law*.

[63] I have read attentively the jurisprudence cited to me by the parties and have, from them, found that they establish several principles that can be summarized as follows:

a) The jurisprudence has established a two-part test for establishing a prima facie case of discrimination: (1) Does the law create a distinction based on an enumerated or analogous ground? (2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping?

b) It is trite law to say that there is a difference between discrimination and a distinction. It has often been pointed out by the courts that not every distinction is discriminatory. This is because the purpose of equality provisions is substantive equality as opposed to formal equality. As McIntyre J. declared in *Andrews*, a law will not "necessarily be bad because it makes distinctions" and "identical treatment may frequently produce serious inequality".

c) The focus of equality provisions is on preventing distinctions based on enumerated or analogous grounds that have the effect of perpetuating disadvantage or prejudice or imposing disadvantage on the basis of stereotyping.

d) A distinction based on an enumerated or analogous ground will not constitute discrimination under the *CHRA* if it is based on a *bona fide* occupational requirement as defined in the *Act*.

e) It is not enough to impugn an employer's conduct on the basis that what was done had a negative impact on an individual in a protected group. Such membership alone does not, without more, guarantee access to a human rights remedy. The case law discloses that it is the link between that group membership and the arbitrariness of the disadvantaging criterion or conduct, either on its face or in its impact, which triggers the possibility of a remedy. It is the claimant who bears this threshold burden. If such a link is made, a *prima facie* case of discrimination has been shown. It is at this stage that the onus shifts to the employer to justify the *prima facie* discriminatory conduct. If the conduct is justified, there is no discrimination.

[64] The grievor argued that the impugned policy is a direct affront to his dignity. To the extent that paragraph 10(c) of CD 577, in its original format, required male correctional officers to walk behind female correctional officers when conducting security rounds on the overnight shift was offensive in the view of male officers, the employer has remedied it by redrafting the paragraph.

[65] The grievor has not established how this direction on completing the duties regularly assigned to correctional officers, both male and female, has a clear and significant harmful effect on his employment opportunities and not merely an incidental or minimal impact on these opportunities. Furthermore, he has not established that the employer's policy in any way impugns his abilities as a male officer to fulfill the obligations of his job. As stated as follows at page 41 of *Stanley*:

> *. . . Any job requirement or policy that has the effect of barring females* [or males in the case before me] *from a particular form of employment must be said to have a clear and significant harmful effect on the interest in equality of opportunity.*
>
> *It is important to note, however, that the policy impugned here is not based, as have been the great majority of hiring policies that have discriminated against females, on a stereotypical view of the roles or relative abilities of males and females. The basis upon which the R.C.M.P. is defending its policy has nothing to do with the ability of females to guard male prisoners. Absent here therefore is any assault*

> *on the dignity of a person that inevitably flows from a policy that is based on assumptions about the relative worth or abilities of members a particular group.*

[66] There can be no question but that CD577 does create a distinction based on analogous grounds and neither party argued that it did not. Clearly, sections 10(a) and 10(c) of CD 577 create a distinction in the manner in which male and female correctional officers carry out their duties on the night shift in female institutions. It also, as a result of its policy objective, results in the possibility that there are less overtime opportunities for males working in the EIW.

[67] On the second part of the test, the grievor argued very specifically that male correctional officers are a historically disadvantaged group within female correctional facilities and pointed to the provisions in question as provisions which perpetuate a stereotype of males as predatory sexual offenders. According to him, the message being sent by the employer by virtue of CD577 is that despite training, male officers cannot be trusted unescorted in the EIW living units at night.

[68] In *R. v. Turpin*, [1989] 1 S.C.R. 1296, the Supreme Court of Canada defined the overall purpose of section 15 of the *Charter*, which provision is the equality provision, as being the remedying or preventing of discrimination against groups suffering social, political and legal disadvantage in Canadian society. As stated by the British Columbia Human Rights Tribunal in *Nixon v. Vancouver Rape Relief Society (c.o.b. Rape Relief and Women's Shelter)*, 2002 BCHRT 1 at para 96:

> *Unquestionably, human rights legislation and s. 15 of the Charter are to be construed consistently. A review of the cases indicates that the definition of discrimination developed under both the Charter and human rights codes have been used interchangeably. (*Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143; 10 C.H.R.R. D/5719,* Dickason v. University of Alberta*, [1992] 2 S.C.R. 1103; 17 C.H.R.R. D/87) In* Vriend v. Alberta*, [1998] 1 S.C.R. 493, Cory J., for the majority, said that human rights legislation, like all other pieces of Canadian legislation, must conform to the requirements of the Charter (para. 106). As well, equality principles developed and applied in the human rights context are applied in Charter cases (*Andrews*, supra at para. 38). Any other result would be surprising given the paramount authority of the Charter in Canadian law and the almost precise identity between the prohibited grounds for discrimination in human rights legislation and those in the Charter.*

[69] Thus, deciding whether a group is protected by the equality provisions of the *CHRA* involves "a search for indicia of discrimination such as stereotyping, historical disadvantage or vulnerability to political or social prejudice". This definition has been stated and applied in many subsequent Supreme Court of Canada and lower court cases. The grievor has provided me with only the assertion that he, as a male correctional officer in a female facility, is a member of a protected group that has historically been disadvantaged but has provided no evidence at all of any historical disadvantage or vulnerability to political or social prejudice with respect to such individuals. I therefore find that the grievor has failed to prove that, as a male correctional officer working in a female correctional facility, he is a member of a protected group under the terms of the *CHRA*.

[70] Even if I were to accept that the grievor, as a male correctional officer working in a female facility, is a member of a protected group, I am in any event unable to find any arbitrariness to the "disadvantaging criterion" found in CD577. According to the above-outlined principles, membership in a protected group and negative impact do not, without more, constitute a human rights violation and there must also be a link proven between the group membership and the arbitrariness of the disadvantage criterion or conduct.

[71] The employer's evidence and exhibits disclosed that far from being arbitrary, CD 577 was based on voluminous research, testimony and experience with respect to the attributes and needs of female offenders and was not, as it argued, based on any assumptions or stereotypes concerning male officers as either untrustworthy or aggressive. Although the grievor claims that the policy paints male officers as molesters and rapists, I find this to be an exaggeration which entirely discounts the social reality that people experience discomfort when being viewed nude by a person of the opposite sex. CD 577 simply recognizes this fact and attempts to minimize, for both male officers and female offenders, situations that could cause a female inmate an undue interference with her privacy. The focus of CD 577 is on the privacy and dignity of inmates and does not portray male officers in a negative light.

[72] Section 16 of the *CHRA* provides as follows:

> *16. (1) It is not a discriminatory practice for a person to adopt or carry out a special program, plan or arrangement designed to prevent disadvantages that are likely to be suffered by, or to eliminate or reduce disadvantages that are*

> *suffered by, any group of individuals when those disadvantages would be based on or related to the prohibited grounds of discrimination, by improving opportunities respecting good, services, facilities, accommodation or employment in relation to that group.*

[73] Although neither party directly argued that the above provision applies to the current facts, I find that I cannot ignore this provision, which I find applies. The employer has provided ample evidence that CD 577 is part of a special program designed by the employer to attempt to overcome specific disadvantages suffered by incarcerated women on the basis of their gender in an attempt to safeguard their dignity at night and increase their opportunities for rehabilitation. In the case before me, the grievor claims discrimination on the basis of sex. The source of that discrimination, the very essence of his complaint, is a program that, the employer has argued, is necessary with respect to its core mandate of housing and rehabilitating female inmates.

[74] I find that the employer has established that CD 577 is part of a larger program that it has, as a result of much study and experience, instituted in federal correctional facilities for women in order to advance the interests of female inmates, a large percentage of whom have suffered physical or sexual abuse, have addiction problems or who suffer from mental health issues. I find that female inmates are a particularly vulnerable and historically disadvantaged group and that fulfillment of the employer's responsibility to them was the source of CD577.

[75] I therefore find that the grievor has failed to establish a *prima facie* case of discrimination. As argued by counsel for the employer, simple hurt feelings do not constitute an affront to one's dignity sufficient to establish a *prima facie* case of discrimination. Nor does the impact of CD 577 on female correctional officers at the EIW factor into whether the grievor has been discriminated against on the basis of his gender. A reasonable person may question the need for paragraphs 10(a) and (c) but would no doubt think them unnecessary, not discriminatory. However, even if I am wrong about my determinations above, I also find that the employer has successfully convinced me of the existence of a BFOR for the discrimination. This Board has had occasion to consider this issue on several occasions, one of which was in the case of *Sioui v. Deputy Head (Correctional Service of Canada)*, 2009 PSLRB 44, in which the Vice-Chairperson wrote:

> *75. The application of the obligation to accommodate was interpreted in* British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees' Union (BCGSEU), *[1999] 3 S.C.R. 3 (Meiorin), at para 54. To summarize, when an employer applies an employment standard, it must justify that standard by showing that (1) it is rationally connected to job performance, (2) the standard was adopted because it was necessary to fulfill a legitimate work-related purpose and (3) the standard is reasonably necessary for accomplishing that job. The employer must be able to demonstrate that it is impossible to accommodate employees with the same characteristics without suffering undue hardship.*
>
> *76. The criteria developed in* Meiorin *have provided a framework for assessing the legitimate purpose of an employment standard and the intent of the employer when the standard was adopted in order to determine its validity. In addition to those criteria, there is a test — reasonableness — used to assess whether the standard was necessary in the context of the job in question. The courts have also ruled that the criteria must be applied with common sense and flexibility:* Meiorin, *at paragraph 63;* Commission scolaire régionale de Chambly v. Bergevin, *[1994] 2 S.C.R. 525, at 546;* Central Alberta Dairy Pool v. Alberta (Human Rights Commission), *[1990] 2 S.C.R. 489, at 520-521; and* McGill University Health Centre (Montreal General Hospital), *at para 15.*

[76] In assessing whether or not CD 577 and its provisions constitute a BFOR, I must, in addition to the jurisprudence, consider s. 15(2) of the *CHRA* which provides as follows:

> *(2) For any practice mentioned in paragraph (1)(a) to be considered to be based on a bona fide occupational requirement and for any practice mentioned in paragraph (1)(g) to be considered to have a bona fide justification, it must be established that accommodation of the needs of an individual or a class of individuals affected would impose undue hardship on the person who would have to accommodate those needs, considering health, safety and cost.*

[77] As stated in *McGill*, at para 48 to 50, *Kapp*, at para 17, *Tranchemontagne*, at para 93 and 94, *Preiss*, at para 216, and *Andrews*, a mere difference in treatment does not equate to discrimination. While paragraphs 10(a) and (c) of CD 577, which draw a distinction based on the gender of correctional officers performing duties on a particular shift, this fact alone does not establish a *prima facie* case of discrimination.

However, even if I accept the grievor's argument that CD 577 is an affront to his dignity and perpetuates negative male stereotypes and that as a male correctional officer he is among a uniquely disadvantaged group, I believe that the employer has met the *Meiorin* test and has established a BFOR. The three-part test, as the parties agreed, requires that I assess the impugned policy by answering the following questions:

1. Has the employer adopted the standard for a purpose rationally connected to the performance of the job?
2. Did the employer act in an honest and good-faith belief that it was necessary to the fulfillment of that legitimate work-related purpose?
3. Is the standard reasonably necessary to the accomplishment of that legitimate work-related purpose?

[78] I am confident in my finding that the employer adopted a standard directing the performance of assigned duties on a particular shift that impacts both male and female correctional officers and that this standard is directly related to members of either gender performing the PW job. Both genders are directed on how rounds are to be conducted when paired with a correctional officer of the opposite sex on the overnight shift. It does not perpetuate, as the grievor argued, any anti-male stereotype and is clearly aimed at preserving the privacy and dignity of female offenders who, as the employer argued, are particularly vulnerable while sleeping.

[79] I accept the evidence put forward by Ms. Blanchette that female inmates feel particularly vulnerable and powerless at night, having frequently been the victims of abuse during the overnight hours. Making the female inmates feel secure is an important part of correctional philosophies for women. Surely, a minor amendment to how correctional officers perform their duties during overnight hours is an acceptable impairment on their employment. The employer has not inferred in any way that male officers are perverts or that they cannot be trusted unescorted at night. To the contrary, the purpose of having male officers on the overnight shift is to demonstrate to female inmates that males can be trusted. Further, there is clearly no requirement that female correctional officers supervise the male officers while on the overnight shift. All officers are of the same classification group and level. There is no hierarchy, as one would normally see in an employee-supervisor relationship.

[80] Given the employer's interests in offering employment opportunities to male correctional officers in female correctional facilities, and given the opposition of the various stakeholders and the concerns outlined in the various reports included in exhibit 2, it would have been easier for the employer to revert to having only female correctional officers staffing federal women's institutions. Rather than that, the employer acting honestly and in good faith developed a policy that is rationally connected to the performance of a correctional officer's job for legitimate business purposes.

[81] The final question is whether the standard was reasonably necessary to the accomplishment of that legitimate work-related purpose. Section 10 of CD 577 cannot be read in isolation. The overall purpose and objectives of CD 577 are found at paragraphs 1 and 2 as follows:

> ***POLICY OBJECTIVES***
>
> 1. *To ensure that the dignity and privacy of incarcerated women . . . are respected to the fullest extent possible consistent with safety and security.*
> 2. *To ensure the presence of men in the workplace does not expose staff or inmates to vulnerable situations.*

[82] The grievor argued that the loss of privacy is an inherent part of being incarcerated. He also argued that inmates are fully aware of when rounds are conducted and that if they choose to ignore the rules concerning dress and choose to present themselves to male correctional officers in a state of undress, there are consequences, according to him. The employer's paternalistic approach to corrections ignores this responsibility and promotes inmates' rights over those of its employees. While there may be some merit to this argument, there is greater merit in the employer's argument that successful correctional programs for women involve making them feel secure with men in a position of authority and protecting these men while the inmates learn to recognize the pro-social aspect of men in corrections.

[83] In assessing conflicting interests, I must evaluate, among other things, the ameliorative effects of the impugned policy on a more disadvantaged group (see *Law*, at para 72). A policy that improves the positions of groups that have suffered disadvantages by exclusion from mainstream society while having a minimal impact on another group is not a violation of section 15 of the *CHRA*. All the literature provided

as exhibits and the evidence of the witnesses supports the employer's contention that female inmates are among the marginalized elements of our society. A marginal impairment of the grievor's rights to perform his duties on an evening shift that may on occasion preclude him from the opportunity to work overtime cannot be put on equal grounds with the employer's obligations to the Canadian public to ensure that its correctional facilities provide a safe and secure place in which to house and rehabilitate female offenders.

[84] The grievor has provided no evidence of the extent to which he was denied the opportunity to work overtime, if any; nor did he provide any evidence that he was ready and willing to perform overtime had it been offered. The extent of the contested limitations is consistent with limitations placed on female officers working in male institutions, although it is not identical. Clearly, the employer deems it necessary to limit the roles of correctional officers in situations of cross-gender staffing in order to protect institutions and inmates, which is a legitimate business interest and part of the mandate assigned to the CSC by the government and people of Canada. I do not disagree. The safety and security of inmates, institutions and the public and successfully rehabilitating inmates outweighs the impact of this minor infringement on how the grievor must conduct his duties on the overnight shift at the EIW.

[85] For all of the above reasons, I make the following order:

(The Order appears on the next page)

V. <u>Order</u>

[86] The grievance is dismissed.

November 10, 2014.

Margaret T.A. Shannon,
adjudicator