Twenty Questions about Employment Testing Fairness and Bias in Canada[1]

Nicolas Roulin
Saint Mary's University

Silvia Bonaccio
University of Ottawa

Deborah M. Powell
University of Guelph

Scott A. Cassidy
University of Prince Edward Island

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The history of employment testing in Canada can be traced back to 1928, when the Sun Life Assurance Company appointed Gerald Cosgrave, a psychologist, to the role of personnel supervisor—a role in which he applied his training to the adoption and development of standardized selection tests (Bonaccio et al., 2015; Kelloway et al., 2011). Just over a decade later, Cosgrave's work in this area would come to play a leading role in the military application of employment testing in Canada. In 1939, as the threat of war in Europe grew, Canadian psychologists formed the Canadian Psychological Association (CPA)—a Canadian organization meant to organize the professional psychological resources in Canada, and aid in the country's contribution to what would become the Second World War.

The Canadian Psychological Association (CPA) was the first specifically Canadian organization of its kind. Prior to 1939, Canadian psychologists simply belonged to the American Psychological Association instead. Emerging in a time of war, the CPA's early goals included pilot selection for the Royal Canadian Air Force, which was conducted under the leadership of Cosgrave (Feitosa & Sim, 2020), as well as the development of a test for the selection and placement of soldiers and officers in the Army (McMillan, 2009). Given this formative context, it should come as little surprise that the military has left a lasting impact on the practice of personnel psychology within Canada, especially in the areas of assessment and selection (Feitosa & Sim, 2020).

Over 40 years after Word War II ended, another significant event helped shape the history of Canadian employment testing. In 1984, the landmark report *Equality in Employment: A Royal Commission Report* (Abella, 1984)—often referred to as the Abella Commission—was published. This report created a Canadian reference to the concept of employment equity, and later gave rise to the *Employment Equity Act*, a federal policy developed to address inequality in

employment on the basis of sex, visible minority status, disability, and Aboriginal identity. The designation of these four demographic groups informs the use of employment testing and other personnel practices in Canada, especially for federally-regulated employers.

Following the 1984 Abella report, several key legal decisions were made, which continue to influence Canadian employment testing to this day (Agócs, 2014). Throughout this chapter, we will refer to several of these key cases. As reflected and noted in subsequent sections, employment testing is relatively common in Canada, especially in the public service and in military occupations (although it is often used in the private sector as well).

1. What are the major developments in Canada's history that shaped its current perspectives about fairness and bias?

Canada is a parliamentary democracy, a constitutional monarchy, and it is part of the Commonwealth Realm. The country is composed of 10 provinces and three territories. These 13 Provincial and Territorial jurisdictions, in conjunction with the Federal jurisdiction, form a key structure of the employment law in this country. Jurisdictional delineations will be a recurring theme in this chapter.

The most recent national census in Canada was conducted in 2021 (Statistics Canada, 2022a). The population of Canada is about 37 million people, and 69.8% of the population self-identified as White. Racialized groups are highly represented in Canada, including census respondents who self-identified as South Asian (representing 7.1% of the total population), Chinese (4.7%), Black (4.3%), Filipino (2.6%), Arab (1.9%), Latin American (1.6%), Southeast Asian (1.1%), West Asian (1%), Korean (0.6%), and Japanese (0.3%). Moreover, 6.1% of the Canadian population reported Indigenous ancestry (Statistics Canada, 2022b). Canada is also an officially bilingual country: English and French are official languages. In the 2021 census, about

54% of Canadians listed English as a mother tongue, whereas 19% listed French. There are also 11 Indigenous language groups (composed of many languages and dialects), some of which have official status in the three territories. Indigenous peoples are the original inhabitants of the lands that form Canada today, making Canada a country whose population has been shaped by immigration (Wikipedia, 2022). Canada's English and French languages are a result of the early exploration and settlement by England and France. Immigration to Canada has been shaped by geopolitical events (e.g., immigration from Southern Europe after World War II, or from Eastern Europe after the dismantling of the Soviet Union), and international refugee crises (e.g., an increase in immigration from Vietnam, Laos, and Cambodia in the late 1970s; Statistics Canada, 2018). Immigration continues to be the primary contributor to population growth in Canada, and Statistics Canada (2022c) estimates that by 2041, between 29% and 34% of the population of Canada could be comprised of immigrants.

A key aspect of Canadian legislation informing perspectives on bias and fairness is the Constitution Act of 1982, which contains the *Canadian Charter of Rights and Freedoms.* The Charter is often referred to as the "cornerstone" of equity legislation in Canada. Among many fundamental rights, it guarantees equality rights and the freedom of association to all Canadians (which affords the right to collective bargaining and unionization). Question 3 expands on this.

2. Fairness to whom? Which groups are protected?

The specific groups that are protected against discrimination in Canada vary depending on which jurisdiction governs a particular employer type. Canadian employers fall under federal jurisdiction (i.e., under the Canadian Human Rights Act) *or* under provincial/territorial jurisdiction (i.e., under their respective provincial or territorial Human Rights legislation) depending on the employer's industry or sector. For federally-regulated employers, protected

groups (i.e., prohibited grounds of discrimination) include race, national or ethnic origin, color, religion, age, sex (including pregnancy and childbirth), sexual orientation, gender identity or expression, marital status, family status, genetic characteristics, mental or physical disability (including previous or present drug or alcohol dependence), and pardoned conviction. For provincially-regulated employers, all jurisdictions across the country prohibit discrimination on the grounds of disability, sex, race, colour, ethnic origin, age, creed or religion, marital status, family status, sexual orientation, gender identity, gender expression, and genetic characteristics. However, additional prohibited grounds vary by jurisdiction. For example, political opinions or beliefs, social condition, citizenship, income source or public assistance, and ancestry are protected in some but not all provincial/territorial jurisdictions. Other prohibited grounds are unique, such as language in Québec (see Catano et al., 2021 for an overview).

3. What are the regulatory authorities?

Key to the Canadian regulatory context is Section 15 of the *Canadian Charter of Rights and Freedoms*, which lays out the foundations of equality rights, stating that "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." Importantly, in making this statement, Section 15 does *not* preclude laws, programs, or activities that aim to ameliorate the conditions of disadvantaged individuals or groups.

In addition, the *Canadian Human Rights Act* (and the provincial/territorial Human Rights equivalent acts) specifies the prohibited grounds of discrimination for federally (provincially) regulated organizations. Discrimination complaints related to *Canadian Human Rights Act* are filed with, and then investigated by the Canadian Human Rights Commission, which results in a

recommendation to either dismiss the complaint, or refer it to the Canadian Human Rights Tribunal (which is independent from the Commission). Complaints at the provincial or territorial level are handled differently, depending on the model applied locally (Osborne-Brown, 2014). Most provinces and territories have a commission/tribunal model, where a Human Rights Commission first screens cases before they eventually go to a tribunal. Some provinces use a "direct access" model instead, in which complaints go directly to a Human Rights Tribunal. Finally, others use a "commission only" approach, which does not include a tribunal. Instead, complaints are investigated by the provincial Human Rights Commission before potentially being heard by the Court of King's Bench. It is also important to note that the process may differ for unionized employees, where complaints are often managed via grievance arbitration instead of through a Human Rights Commission or Tribunal (although the exact process can vary depending on the specific collective agreement).

The *Employment Equity Act* (which is enforced alongside the broader *Human Rights Act*), requires all federally-regulated employers with 100 or more employees, as well as non-federally regulated organizations doing more than $1 million in business with the federal government (through the Federal Contractors Program), to create, operate, and report on an employment equity program. This Act focuses specifically on four *designated groups*: women, visible minorities, Aboriginal (i.e., Indigenous) peoples, and persons with disabilities. Employers are required to maintain representation of these groups that is equivalent to the Canadian workforce. Employers must collect and report information about representation and specify how underrepresentation will be corrected through the elimination of employment barriers, as well as through the hiring, training, promotion, and retention of persons from these groups. The Act also

enables the Canadian Human Rights Commission to perform audits and administer sanctions. Some provinces have similar employment equity legislations.

Finally, other pieces of legalisation might be relevant for specific situations, or may protect specific groups. For instance, the *Personal Information Protection and Electronic Documents Act* (PIPEDA) sets rules regarding how federally-regulated organizations can collect, store, use, disclose, or destroy personal information in the course of commercial activities (including for employee selection) across Canada. In addition, the newly introduced *Accessible Canada Act*, which aims to realize a barrier-free Canada by 2040, requires federally-regulated organizations to prepare and publish accessibility plans. Relevant provincial-level legislation, such as the *Accessibility for Ontarians with Disabilities Act*, also exist.

4. Which employers are covered? How about certification, licensure, and other third-party testing?

All organizations are covered under either federal or provincial/territorial jurisdiction (including employment agencies, which cannot discriminate at the request of a client). The federal government, as well as each Canadian province and territory, has Human Rights Acts or Codes, as well as a system of investigation/enforcement (as described in Question 2). These Human Rights Commissions have a broad responsibility to deal with discrimination in areas such as education and employment—including in employment testing (Catano et al., 2021).

If a third-party is retained for employment testing, the employer is ultimately responsible for providing validity evidence if the test is challenged on grounds of discrimination. For example, in *Action Travail des Femmes v. CN (1987)*, charges of unfair testing were heard by the Canadian Human Rights Tribunal. In this decision, the Canadian National (CN) Railway Company was ordered to stop using the Bennett Mechanical Comprehension Test because it was

found to have adverse impact against women, and CN had not obtained validation evidence prior to using the test. In this case, the burden of proof to provide evidence that the test was job-related was placed on the employer using the test (i.e., CN) *not* on the third-party testing company itself (Catano et al., 2021).

Licensing boards that set the requirements and standards for entry into an occupation or profession (e.g., requirements for education and supervised experience; examinations and passing scores) are also subject to the same laws. If an organization uses a test as a standard for "membership" in a profession, then this test effectively determines occupational membership. Therefore, the licensing board could be found to have discriminated "with respect to employment" if the test results in adverse impact, even if there is no actual employment relationship between a complainant and the licensing body (Cornish et al., 2000). Given Canada's high rate of immigration, one recurring concern is registration or licensure for foreign-trained professionals. Professional governing bodies may require additional information or testing for graduates of foreign universities (Schwartz & Valel, 2011).

5. Are there professional guidelines that address fairness and bias?

Many of the professional guidelines that guide Canadian employment testing come from U.S. sources. For example, one of the most fulsome sets of guidelines can be found in Chapter 3 of the American Educational Research Association, American Psychological Association, and National Council on Measurement in Education (AERA, APA, & NCME, 2014)'s *Standards for Educational and Psychological Testing*. Although the Canadian Psychological Association (CPA) published its own standards (the *Guidelines for Educational and Psychological Testing* [CPA, 1987]), CPA now recommends readers to refer to the AERA et al. *Standards* and considers its 1987 standards to be out-of-date. In a similar vein, the Society for Industrial and

Organizational Psychology's (SIOP) *Principles for the Validation and Use of Personnel Selection Procedures* (SIOP, 2018) serves as a companion document to the AERA et al. *Standards*, albeit one more specifically geared to employment testing. Although a U.S. document, SIOP's *Principles* are also used in Canada.

A further emphasis on reducing barriers to access in Canadian employment testing specifically can be found in the Canadian Public Service Commission's (2007) *Testing in the Public Service of Canada*, which outlines standards for the development and use of tests for federal government workers. This document emphasizes the requirement that employment tests not create systemic barriers to underrepresented groups, and that they be designed and implemented without bias so that the test effectively assess job performance and identifies which individuals meet the employer's operational requirements objectively. It also adheres closely to the AERA et al. *Standards* described above (Catano et al., 2021).

There are also professional guidelines concerning test fairness and bias in licensure and certification. For example, Standard 20 of the National Commission for Certifying Agencies (NCCA; Institute of Credentialing Excellence, 2021, pp. 27-28) standards states that: "When the program translates or otherwise adapts examination content for use by subgroups of the target population, they must demonstrate that results obtained from adapted and source (original) versions are comparable." Although the phrasing of this standard appears on the surface primarily targeted at the translation of multi-lingual examinations (for example, pan-Canadian credentialing examinations, which are often offered in both English and French), its lessons also speak more broadly to the responsibility of certification bodies to ensure that identified sub-groups of their candidate populations are not systematically disadvantaged by testing biases. Namely, certification bodies should conduct quality control analyses on their test items and

examination forms (e.g., differential item functioning analyses, which are described in detail in Chapter 2) to ensure that sub-groups are not adversely impacted by testing bias. Both Canadian and U.S. certification bodies often refer to the NCCA standards (although with smaller candidate pools/datasets in Canada, which limits the ability to perform the aforementioned analyses).

6. Is intent a requirement to show discrimination?

The *Canadian Human Rights Act* defines a practice as "discriminatory" when that practice directly or indirectly results in the refusal to employ (or continue to employ) any individual based on a prohibited ground of discrimination. Importantly, intent is *not* a requirement to establish that an action constitutes discrimination. Instead, what matters is the result (or the effect) of the action that is purported to be discriminatory (England et al., 2005). As such, any employment rule, practice, or policy that negatively affects members of a protected group no matter how well-intentioned the employer was constitutes discrimination (Catano et al., 2021). We can find an illustrative example in the case of Tawney Meiorin, a firefighter employed by the British Columbia Ministry of Forests. Although Ms. Meiorin had performed satisfactorily in her role for three years, her employment was terminated after she failed a newly instated physical ability (aerobic) test. Ms. Meiorin filed a complaint of discrimination, alleging that the aerobic test adversely impacted her as a biological female. Although the B.C. Court of Appeals initially ruled in favour of the employer, the Supreme Court of Canada later overturned this decision, after considering evidence that the standard enforced by the test did not provide meaningful information regarding whether Ms. Meiorin met the minimum qualification required to perform her job safely and efficiently and thus, the test was not sufficiently job-related (*British Columbia [Public Service Employee Relations Commission] v. BCGSEU, 1999*).

As part of the decision ruling in the *Meiorin* case, the Supreme Court of Canada emphasized that the distinction between intentional (direct) and unintentional (indirect, or adverse effect) discrimination is "malleable" and "unrealistic" and that maintaining this distinction does not serve the purpose of contemporary Human Rights legislation (Smith, 2010). Therefore, while it is still conceptually important to differentiate direct (i.e., intentional) from indirect (e.g., unintentional or adverse effect) forms of discrimination, this distinction is no longer part of a Human Rights analysis in Canada. Both the *Meiorin* and other cases (e.g., *Travail des Femmes v. CN*; see Question 4) highlight that job-relatedness is more important than intention, when reviewing discrimination complaints (Kerr, 1990; Smith, 2010).

7. How is disparate impact shown?

Federal Human Rights legislation as well as provincial/territorial Acts generally use terms like "exclusion" or "preference" for specific groups, instead of "adverse impact" or "adverse treatment" (Kerr, 1990). Analyses based the 4/5th rule might be valuable information to present in a Canadian court or tribunal; and courts *have* used cases from the U.S. incorporating the 4/5th rule to propose a similar standard in Canada (Shen et al., 2017). However, this kind of analysis is generally *not* used determinatively. Instead, such analyses are usually situation-specific, and depend on job type as well as the particular concerns raised (Catano et al., 2021).

We can find an example of this in *SGEU v. Saskatchewan - Environment* (2019). In this case, the Court referred to the "80% rule" when examining sex and age bias for a specific fitness test used to select forest firefighters. However, despite evidence provided by the employer that the test met the 80% rule (i.e., it had an 82.5% pass rate for women and older men), the Saskatchewan Court of Appeal still sided with the employees and the union. The judge noted that "no evidence presented that showed women or older men had not been able to do the work […],

and yet, with the use of a cut score […], they could find themselves in the 20% category of those who could not pass the fitness test."

Although empirical and statistical evidence (e.g., from local validation studies) may be useful (e.g., Kerr, 1990; Shen et al. 2017), Canadian Courts and Tribunals often lack the sophistication to make full use of such detailed and complex technical information (compared to their U.S. counterparts for example, because there have been fewer cases taken to Court in Canada). Canadian tribunals also typically give more weight to any available personal testimony than to statistical evidence demonstrating lower representation for protected groups (England et al., 2005). In some cases (e.g., *Canada - Attorney General v. Walden, 2010*), the Court considered statistical evidence, but labelled it as not sufficient by itself to prove discrimination. In other cases (e.g., *Travail des Femmes v. CN*; mentioned in Question 4), the Court considered employment statistics, such as the small proportion of female vs. male employees in the organization; but did not examine whether such differences were statistically significant.

8. Who has the burden of proof? Employer or plaintiff?

A complaint about alleged test bias would go through the Human Rights Commission for the appropriate jurisdiction. First, the party making the complaint (the "complainant") submits their claim to the relevant Human Rights Commission, where is it reviewed and either accepted or rejected. If accepted, the "respondent" (the organization using the test) has a chance to respond. The complainant then replies and can rebut facts shared by the respondent. If discrimination has been found, the burden is on the employer to show that the test is valid (Kerr, 1990). Most Human Rights Acts in Canada allow an employer to defend a discriminatory policy or practice as a *Bona Fide Occupational Requirement* (BFOR). Since the *Meiorin* case (see Question 6), tribunals use a three-step test for determining whether a *prima facie* discriminatory

standard is a BFOR: (i) the employer adopted the standard for a purpose rationally connected to job performance; (ii) the employer adopted the standard in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work-related purpose; and, (iii) the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To meet the third step, employers must demonstrate that it is impossible to accommodate individual employees sharing the characteristics of the complainant without imposing undue hardship upon the employer (Catano et al., 2021).

9. When is evidence of validity required?

Canada is similar to the U.S., in that there is only a burden of proof for selection validation when a claim of discrimination against one or more protected groups is made. The process of establishing a standard for selection as a BFOR is outlined in Question 8. Like the U.S., Canadian employers could (in theory) use a random selection procedure, with no validity, as long as that procedure does not adversely impact the members of protected groups. Human Rights Tribunals and Courts may accept different forms of evidence from employers in defense of their employment practices. Empirical and statistical evidence generated by I-O psychologists (e.g., local validation studies) may be useful in defending employment practices. However, as mentioned in Question 7, Canadian Courts and Tribunals may require an I-O psychologist or other expert to provide explanations to make full use of such detailed and complex technical information (Myors et al., 2008).

The *Public Service Employment Act* designates the Public Service Commission of Canada (PSC) as the central staffing agency for the federal government. This Act gives public service job candidates the right to request an investigation if they believe that their qualifications were not properly assessed. The PSC (2007) published a comprehensive document on *Testing in*

the Public Service of Canada that outlines the standards for the development and use of tests for appointment purposes. Finally, large organizations that recruit across Canada (e.g., Canadian Armed Forces) should demonstrate validity evidence in both English and French (Kerr, 1990).

10. What forms of validity evidence are available, required, or used?

The Canadian Human Rights Commission does not specify any particular validation strategy as most appropriate. However, it emphasizes the importance of job-relatedness. This emphasis was demonstrated in *Action Travail des Femmes v. CN* (see Question 4), in which the Canadian National Railway Company (CN) was ordered to cease using the Bennett Mechanical Comprehension Test, because CN could not prove its job-relatedness. As noted by Cronshaw (1986, p. 185) prior to the "CN decision, use of psychological tests for selection came under little critical scrutiny." In the *Meiorin* case (see Question 6), the development of a physical test performance minimum standard was primarily descriptive, based on measuring the average performance levels of the test subjects and converting these data into minimum performance standards. If organizations are going to use "minimum performance standards" on selection tests, there must be strong evidence to justify those standards and linking them to job performance.

Validity generalization has also been accepted as evidence. In the context of selecting for collections enforcement clerks, a cognitive ability paper-and-pencil test (the "GIT 320") was deemed to be improperly validated, have an unjustifiably high cutoff score, and be sex biased (Catano et al., 2021). Expert witnesses, including several personnel psychologists, testified on the technical merits of the test. The appeal board of the Public Service Commission concluded that the GIT 320 had been validated via validity generalization and the allegation was dismissed.

11. Is proportional representation ("quotas") or score adjustment for minority preference required or permitted?

Human Rights Employment "quotas" are not explicitly required under the *Employment Equity Act*. In fact, quotas (defined as "a requirement to hire or promote a fixed and arbitrary number of persons during a given period"; Employment Equity Act, 1995) are described as a *limitation* not a requirement. Indeed, the Act stipulates that neither the Human Rights Commission nor Tribunal can impose a quota on an employer. This means that Canadian employers, even those who fall under the purview of the *Employment Equity Act,* are not (and cannot be) required to establish specific "diversity quotas" *per se*. However, the Act *does* require employers who detect underrepresentation to set short-term numeric goals for hiring and promoting persons in the four designated groups, in order to increase their representation (see Question 3). Representation within the organization needs to be increased in accordance with the availability of qualified individuals from each designated group within the employer's industry, as well as the broader Canadian workforce. Employers must implement equity measures that serve this end insofar as doing so does not exert undue hardship, require the hiring or promotion of unqualified persons or is not based on merit, or necessitate the creation of new positions within the organization. Thus, the distinction between ensuring proportional representation and implementing explicit quotas is somewhat nuanced, and hinges on the specific way in which quotas are defined under the *Employment Equity Act*.

12. What are the consequences of violating the laws?

If a test is deemed to discriminate against individuals based on any protected ground, then a Human Rights Tribunal can order the organization to stop using that test. In *Action Travail des Femmes v. CN* (see Question 4), CN was ordered to stop using the Bennett

Mechanical Comprehension Test (Kerr, 1990). Similarly, in the *Meiorin* case (see Question 6), the employer was instructed to stop using an aerobic test to either select or dismiss employees. In addition, Courts and Tribunals can impose a series of remedies that include compensatory damages, punitive awards, damages for loss of income, reinstatement, and systematic remedies (Osborne-Brown, 2014). In Canada, compensatory or punitive damages have been associated with historically low caps. For instance, under the *Canadian Human Rights Act*, damages were initially limited to CAD $5,000; but that cap was raised to $20,000 in 1998. However, these caps vary regionally, based on provincial and territorial legislation. Some provinces have abolished the caps altogether, which has led to much higher compensation in some cases (e.g., almost $500,000 in *Walsh v. Mobile Oil Canada*, 2012). Finally, the revised *Employment Equity Act* of 1996 empowered the Canadian Human Rights Commission to audit all federally-regulated employers to determine whether they are complying with the legislation; and to require action when they fail to do so. The Commission can impose sanctions and fines, or cancel federal contracts, if an organization fails to comply (Catano et al., 2021).

13. Are particular selection methods limited or banned as a result of legislation or court rulings?

Some inquiries and selection methods are banned altogether. For example, employers may not inquire (e.g., through interview questions or in application forms) about any prohibited ground of discrimination in a given jurisdiction (e.g., asking about an applicant's sex, race, gender identity and expression, disability, marital status; see Question 2). Employers should also avoid asking questions to specific groups of applicants (e.g., only asking female applicants about the ability to work nights and weekends, only asking questions related to the physical demands of a job to applicants with a visible disability). Bill S-201, enacted in 2017, prohibits conducting

genetic testing (or sharing the results of such tests) and modified the *Canadian Human Rights Act* to explicitly include genetic characteristics as a prohibited ground of discrimination. Similar bills at the provincial/territorial-level have been introduced (e.g., Bill 40 in Ontario, in 2018).

Other inquiries and selection methods may be permitted but only under certain circumstances. For example, testing applicants for language proficiency (in French and/or English) is permitted, but only when language proficiency is job-relevant. Similarly, medical and physical fitness tests are only permitted when the employer has evidence that health/fitness is job-relevant. When used, this testing should be one of the final steps in the selection process; and employment offers can be made conditional on passing the test(s). The *Meiorin* decision provides the regulatory framework for establishing whether the results of a physical fitness test constitute a BFOR (and are thus sufficiently job-relevant to use).

Drug or alcohol testing is also limited. In many jurisdictions, this form of testing is considered akin to a medical examination. It can only occur after a conditional employment offer has been made, and often for safety-sensitive positions (Catano et al., 2021). For federally-regulated employers, such testing must also adhere to the Canadian Human Rights Commission's Policy on Alcohol and Drug Testing (2009, p.6), which states that it *"is permitted only in limited circumstances, such as when the individual has disclosed an existing or recent history or drug or alcohol abuse, or where a pre-employment medical exam provides the physician with cause to believe that an individual may be abusing drugs or alcohol and therefore may become impaired on the job. In addition, commercial bus and truck operations can subject their drivers to preemployment testing."* Positive test results mean a duty to accommodate. There are also jurisdictional differences between provinces/territories in Tribunals' ruling (and thus precedents

for) such testing. For example, the Alberta Court of Appeal ruled that *casual* recreational drug use does not constitute addiction and is thus not protected (Catano et al., 2021).

Two provinces (Ontario and New Brunswick) have also enacted legislation to prohibit the use of polygraphs in the employment process. However, polygraph tests *are* permitted for pre-employment screening in some federally-regulated organizations that require the highest level of security clearance, such as the Royal Canadian Mounted Police (Catano et al., 2021).

14. What forms of bias are considered? Predictive and/or measurement bias?

The specific terms "predictive" and "measurement" bias are largely absent in Canadian employment law; and a more general focus is placed on the outcome(s) of selection procedures, rather than on any systematic measurement error in their scores. This distinction can be evidenced in the corrective actions often taken to improve employment equity or to balance concerns of validity and diversity (e.g., banding, alternative application streams for underrepresented groups; see below). By and large, such measures target the outcomes of hiring decisions, rather than directly attempting to quantify and adjust applicant scores to compensate for an employment test's measurement error.

We can also see this distinction made in the *Meiorin* case, where the assessment in question did not directly assess performance; but rather, aerobic capacity (which was ostensibly a requirement for performing the firefighting job). This test was *not* challenged on the basis of any measurement error; but rather, because it resulted in an employment outcome that was biased against Ms. Meiorin as a female. As noted in Question 8, even if a hiring policy or practice results in biased outcomes, the employer may potentially defend its use as a BFOR. But the practice must have been adopted in good faith for a purpose rationally connected to the job (and must be testing a function necessary to perform the job in question at a minimally-competent and

safe level). The phrasing "rationally connected to" is important in this context. In *Meiorin*, the Supreme Court of Canada ultimately ruled in favour of Ms. Meiorin because the employer was unable to provide evidence that the aerobic capacity being tested was necessary to perform her specific job at a minimally-competent and safe level (and thus, did not constitute a BFOR). Moreover, outcomes that differ between protected groups may be considered permissible if the tests that produced those results are sufficiently job-related and the employer cannot accommodate a complainant's specific characteristics without experiencing undue hardship.

15. What tools (statistical significance, effect size) are used to examine bias?

Theoretically, Canada does not differ considerably from the U.S. in this regard, as the Canadian Psychological Association currently recommends following the AERA/APANCME's *Standards for Educational and Psychological Testing* (see Question 5). That said, Kerr (1990) argued that Canadian Courts have historically used less sophisticated statistical evidence or arguments than U.S. Courts, largely because fewer cases have been brought to Court. This does not mean, however, that the use of statistical evidence is absent in Canadian cases. For example, in *Blake v. The Ministry of Correctional Services and Mimico Correctional Institute* (1984), the complainant presented considerable statistical information, including a regression analysis, which was accepted as evidence that differences in male versus female interview rates were statistically significant (Vining et al., 1986).

16. What is evaluated for bias? Individual components of a system or the overall selection system?

Both individual employment tests as well as overall selection systems have been the objects of key judicial decisions in Canada. In the *Meiorin* case (discussed in Questions 6 and 14), one specific physical fitness test was the key focus of the ruling. The *Meiorin* case is

foundational in evaluating the potential for discrimination in selection contexts. For example, in *Toronto District School Board v C.U.P.E., Loc. 4400* (2022), a weightlifting test was scrutinized under the *Meiorin* test. In *British Columbia (Superintendent of Motor Vehicles) v British Columbia (Council of Human Rights)*—also known as the *Grismer* case—the Court judged that a vision test was not a "sufficient assessment" of driving abilities necessary for employment, and the employer did not provide "individual assessment" as an accommodation for individuals with a disability (homonymous hemianopsia).

At the same time, other rulings have focused on broader selection systems, and on patterns of discriminatory behavior. For example, *Action Travail des Femmes v CN* (see Question 4) focused on allegations of systemic discrimination against female applicants and employees. The Human Rights Tribunal identified *patterns* of systemic discrimination at the Canadian National Railway Company (CN), noting that many managers held and routinely expressed stereotypical beliefs that impacted women's hiring and placement, noting that "the evidence indicated clearly that the recruitment, hiring and promotion policies at CN prevented and discouraged women from working on blue-collar jobs." Similarly, in *Gaz Métropolitain, Inc. v. Commission des Droits de la Personne et des Droits de la Jeunesse* (2011), the judge concluded that women were significantly underrepresented in the job, but that the overall selection process must be examined to determine whether this was the result of systemic discrimination. The judge considered the entire hiring process, including the absence of a job description, the content of recruitment messages, the content of an information session during which comments were made that would have likely discouraged female applicants, the nature and content of a pre-screening interview, and the use of the Bennett Mechanical Test. and a physical aptitude test.

17. Do the same issues apply to multiple hurdle systems as to the use of compensatory composites?

The same principles are adopted for multiple hurdle systems and for compensatory systems. Generally, each component of a multiple hurdle system has been evaluated separately (as demonstrated in the Canadian National Railway Company (CN) decision; see Question 4). Indeed, in their rulings, judges have historically evaluated the evidence provided for the possibility of discrimination in each component of the selection system; and have often even considered recruitment practices (as demonstrated in the Gaz Métropolitain decision; see Question 16).

18. Is balancing concerns for validity and diversity an issue? What methods are used?

Understanding that validity refers to the *interpretation* of score whereas fairness refers to the act of *using those scores in an unbiased manner* allows employers to balance both needs using a few different approaches. One approach, banding, involves grouping applicants into performance bands. That is, an employer could pool ranked applicants into bands that include all scores that fall within the measurement error of the test (Cascio et al., 1991), considering those scores plausibly identical at the true score level. The employer could then choose an applicant within the top-performing band who met some other point of interest, such as being a member of an underrepresented group. Although banding has been tied to concerns about "reverse discrimination" (e.g., Henle, 2004), it is acceptable in Canada. This is because "reverse discrimination" is not applicable in a Canadian legislative context (*Canadian Charter of Rights and Freedoms*, 1982, sec 15(2)), as discrimination in Canadian law (as in the U.S.) is *not* tied to majority versus minority group status. Moreover, section 15 of the *Canadian Charter of Rights and Freedoms* does not preclude employers from implementing programs that aim to ameliorate

the conditions of historically disadvantaged groups (see Question 3). Indeed, for federally-regulated employers and federal contractors (see Question 3), data on protected characteristics must be collected; and, in cases where two or more candidates are equally qualified, the candidate from a protected group (or groups) should be favored. This approach underscores that it is not sufficient to eliminate present discrimination. It is also important to engage in remediation to address past discrimination (Agócs, 2014).

Banding is not the only strategy for balancing validity and diversity in selection. For instance, some medical and law schools in Canada have attempted to strike this balance by recognizing that the systematic barriers that underrepresented groups face likely cause some degree of measurement error in Medical College Admission Test (MCAT) scores (e.g., Davis et al., 2013). To remediate this, certain schools offer one or more alternative application stream(s) to members of underrepresented groups, where applicants can share their lived experiences and history overcoming barriers (e.g., Joy, 2022). These applications are usually reviewed by a committee that includes members who have lived experience or expertise with the barrier(s) presented, and often results in the committee reconsidering the weights used for different components of the applicant's package (e.g., MCAT score, 'biosketch'), to encourage flexibility in the extent to which examination performance determines the applicant's success.

Pareto-optimization (described in Chapter 2) is a third approach to help balance validity and diversity concerns. To the best of our knowledge, Pareto-optimization has not been challenged in Canadian courts to date. It currently represents a viable approach lauded by scholars (Rupp et al., 2020), if not one with established legal precedent in Canada.

19. How are fairness and bias issues applied to emerging new predictors making use of artificial intelligence and/or machine learning?

At the time of writing this chapter, no legislation is in place to regulate the use of artificial intelligence (AI) or machine learning as predictors but Bill C-27, which includes the *Artificial Intelligence and Data Act,* is being considered by Parliament. This new Act focuses extensively on the concept of "biased output"; situations where decisions, recommendations, or predictions made by an AI system can adversely differentiate (directly or indirectly and without justification), individuals based on prohibited grounds of discrimination (see Question 2). The Act considers individuals or organization using AI systems, and developers or providers of such systems. Both users and developers are required to identify, assess, and mitigate any risks of harming individuals, or potential biased outputs that could result from the AI system. Both parties must also provide plain-language descriptions of how the system works; what content, decisions, and recommendations will be generated; and, what mitigation measures are proposed in case of harm or bias. Finally, the Canadian government (via the Minister of Innovation, Science, and Industry) can also require an independent audit of the AI system if there are reasonable grounds to believe it can result in harm or biased output. It can then impose the implementation of remediation measures (from the audit report), or require the organization stop using the AI system (or, for developers, cease making the system available).

20. How have laws and the legal environment affected the practice of industrial, work, and organizational psychology?

The technical terms relevant to testing (e.g., validity, bias, fairness) are defined in the *Standards for Educational and Psychological Testing* (AERA et al., 2014), and would be well-known to anyone with I-O Psychology training. Yet, these terms would be less familiar to other professionals and decision bodies involved in discrimination cases (e.g., investigators, tribunal, mediators). As such, the practice of I-O psychology in Canada as it relates to employment testing

is partly an educational role, including informing organizations how to assess selection tests for validity, and serving as expert witnesses in Human Rights Tribunals by clarifying technical terms, and assessing employment practices (Kerr, 1990).

Importantly, many different groups are classified under the broader term "visible minority" (see Question 3). The visible minority designation can make adverse impact analyses difficult, because a test could result in different types or magnitudes of impact for the members of specific groups (and might not impact *all* visible minorities in a similar way). Moreover, given the high immigration rate in Canada (see Question 1) and the difficulty of recognizing foreign credentials (see Question 4), the protected ground of "ethnic origin" is worth noting. In *Bitonti v British Columbia (Minister of Health)*, the Council of Human Rights determined that "place of training" (not a protected ground) was highly correlated with "place of origin" (a protected ground; Schwartz & Valel, 2011). As such, excluding an employee based on place of training was found to be discriminatory. However, one key role of occupational regulatory bodies is to protect the public by establishing licensing requirements that ensure the safe and competent delivery of services. Therefore, it is a legitimate concern, from the point of view of the public and the regulatory bodies that protect the public, that additional requirements may need to be placed on foreign-trained professionals, to ensure that all licensed practitioners are fully competent to deliver services to Canadians. Because immigration continues to grow in Canada, I-O psychologists may be increasingly involved in the construction and maintenance of tests to assess skills and competencies that are necessary for safe practice in these occupations.

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