Update

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CANADIAN COMPLIANCE WITH *BEIJING PLATFORM FOR ACTION* PAY AND EMPLOYMENT EQUITY REQUIREMENTS

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I. BEIJING DECLARATION

INTRODUCTION

The 1995 *Beijing Declaration and Platform for Action* issued by the United Nations' Fourth World Conference on Women and signed by Canada contains many key commitments in a wide range of areas. It is based on the following key principle:

> The advancement of women and the achievement of equality between men and women are a matter of human rights and a condition for social justice and should not be seen in isolation as a women's issue. They are the only way to build a sustainable, just and developed society. Empowerment of women and equality between women and men are prerequisites for achieving political, social, economic, cultural and environmental security among peoples.

The *Platform for Action* reaffirms the fundamental principle set forth in the Vienna Declaration and Programme of Action adopted by the UN World Conference on Human Rights, that the human rights of women and of the girl child are an inalienable, integral and indivisible part of universal human rights.[1] The *Platform* upholds the Convention on the Elimination of All Forms of Discrimination against Women ("CEDAW") and builds upon the Nairobi Forward- looking Strategies for the Advancement of Women, as well as relevant resolutions adopted by the Economic and Social Council and the General Assembly.

The Report further recognized the following:

> the status of women has advanced in some important respects in the past decade but that progress has been uneven, inequalities between women and men have persisted and major obstacles remain, with serious consequences for the well-being of all people,
>
> ....this situation is exacerbated by the increasing poverty that is affecting the lives of the majority of the world's people, in particular women and children, with origins in both the national and international domains.[2]

The Report requires governments to:

> Dedicate ourselves unreservedly to addressing these constraints and obstacles and thus enhancing further the advancement and empowerment of women all over the world, and agree that this requires urgent action in the spirit of determination, hope, cooperation and solidarity, now and to carry us forward into the next century.[3]

The UN Fourth World Conference declared that

- equality in employment for women is not a luxury but a prerequisite for a sustainable world economy;

- women share common concerns that can be addressed only by working together and in partnership with men towards the common goal of gender equality around the world.

- "special attention should be given to the most disadvantaged"[4]

- there must be respect for and value of the full diversity of women's situations and conditions;

- there must be recognition that some women face particular barriers to their empowerment,[5] noting many many women face particular barriers because of various diverse factors in addition to their gender and often these diverse factors isolate or marginalize such women.[6]

The *Beijing* documents requires

- "immediate and concerted action by all to create a peaceful, just and humane world based on human rights and fundamental freedoms"[7]

- "a strong commitment on the part of governments, international organizations and institutions at all levels;

- adequate mobilization of resources at the national and international levels...."

The *Beijing Platform for Action* sets out specifically the many action items for governments, employers, and non-governmental organizations. It notes the importance of the " participation and contribution of all actors of civil society, particularly women's groups and networks and other non-governmental organizations and community-based organizations, with full respect for their autonomy, in cooperation with Governments, for the effective implementation and follow-up of the *Platform for Action.*[8] The Report specifically notes that the growing strength of women's organizations and feminist groups who have become a driving force for change.[9]

The formulation of the *Platform for Action* establishes 12 critical areas of concerns with priority actions items attached to each area of critical concern which are to be carried out over the next five years.[10]

BEIJING +5 REVIEW PROCESS

The *Beijing Declaration* mandates a five-year review process (referred to as "Beijing+5")which is scheduled to take place formally in a special session of the United Nations Assembly from June 5-9, 2000. The purpose of this session is to hear presentations on best practices, obstacles encountered and vision for the future to accelerate compliance with the *Platform for Action.*[11]

Leading up to that session, world governments have been asked to complete a questionnaire indicating the steps that they have taken to comply with the Beijing Declaration. The Canadian questionnaire file with the UN Secretary General can be found on the Status of Women Canada web site.[12]

In order to provide background information for the discussion of Canada's compliance with the Beijing commitments, this paper reviews two key areas of action items under the women and economy critical area of concern in the *Beijing Platform for Action*[13] This area of concern is the "inequality in economic structures and policies, in all forms of productive activities and in access to resources".[14] The report notes that female maintained households are often the poorest because of wage discrimination, occupational segregation patterns in the labour market and other gender based barriers.[15]

The two key areas of action items are:

1. Pay Equity\Equal Pay for Work of Equal Value;
2. Employment Equity\Positive Measures

To provide further background for the discussion of pay and employment equity measures, the paper also refers to two other areas of action items:

3. Gender-Sensitive Policies
4. Labour Protections and Union Organizing
5. Global Restructuring Protections

The paper then reviews some key actions taken by the Government of Canada and the Province of Ontario which were in direct conflict with Canada's international *Beijing* commitments and also an action of the Federal Government in compliance with the *Beijing* committments.

PAY EQUITY\EQUAL PAY FOR WORK OF EQUAL VALUE MEASURES

The Beijing Declaration has strong language dealing with the issue of wage discrimination. World governments are to

> "enact and enforce legislation to guarantee the rights of women and men to equal pay for work"[1617].

The objective of eliminating occupational segregation and all forms of employment discrimination" also requires governments, employers, employees, trade unions, and women's organizations to:

2. implement and enforce laws and regulations and encourage voluntary codes of conduct that ensure that international labour standards, such as International Labour Organization Convention No. 100 on equal pay and workers' rights, apply equally to female and male workers;

3. Increase efforts to close the wage gap between women's and men's pay, take steps to implement the principle of equal remuneration for equal work of equal value by strengthening legislation, including compliance with international labour laws and standards, and encourage job evaluation schemes with gender-neutral criteria;

4. Establish and\or strengthen mechanisms to adjudicate matters relating to wage discrimination;

5. Review, analyze and, where appropriate reformulate the wage structures in female-dominated professions, such as teaching, nursing and child care, with a view to raising their low status and earnings;[18]

EMPLOYMENT EQUITY \POSITIVE ACTION MEASURES

The *Beijing Declaration* calls for strong positive measures to ensure women's "access to employment" and "appropriate working conditions [19] through steps to "eliminate occupational segregation and all forms of employment discrimination."[20] Governments are required to

4. adopt and implement laws against discrimination based on sex in the labour market, especially considering older women workers, hiring and promotion, the extension of employment benefits and social security and working conditions.

5. enact and enforce equal opportunity laws, take positive actions and ensure compliance by the public and private sectors through various means; [21]

With respect to the elimination of occupational segregation and employment discrimination, governments, employers, employees, trade unions, and women's organizations are required to:

2. enact and enforce laws and introduce implementing measures, including means of redress and access to justice in cases of non-compliance, to prohibit direct and indirect discrimination on grounds of sex, including by reference to marital or family status , in relation to access to employment , conditions of employment, including training, promotion, health and safety as well as termination of employment and social security of workers, including legal protection against sexual and racial harassment;

3. Enact and enforce laws and develop workplace policies against gender discrimination in the labour market, especially considering older women workers, in hiring and promotion, and in the extension of employment benefits and social security, as well as regarding discriminatory working conditions and sexual harassment; mechanisms should be developed for the regular review and monitoring of such laws;

4. Eliminate discriminatory practices by employers on the basis of women's reproductive roles and functions, including refusal of employment and dismissal of workers due to pregnancy and breast-feeding responsibilities;

5. Implement and monitor positive public and private sector employment , equity and positive action programmes to address systemic discrimination against women in the labour force, in particular women with disabilities and women belonging to other disadvantaged groups, with respect to hiring, retention and promotion, and vocational training of women in all sectors;

6. Eliminate occupational segregation, especially by promoting the equal participation of women in highly skilled jobs and senior management positions, and through other measures, such as counselling and placement, that stimulate their on-the -job career development and upward mobility in the labour market, and by stimulating the diversification of occupational choices by both women and men; encourage women to take up non-traditional jobs, especially in science and technology, and encourage men to seek employment in the social sector.

7. Ensure access to and develop special programmes to enable women with disabilities to obtain and retain employment, and ensure access to education and training at all proper levels, in accordance with the Standard Rules on the Equalization of Opportunities for Persons with Disabilities; adjust working conditions, to the extent possible, in order to suit the needs of women with disabilities, who should be assured legal protection against unfounded job loss on account of their disabilities;

8. Facilitate the productive employment of documented migrant women (including women who have been determined refugees according to the 1951 Convention relating to the Status of Refugees through greater recognition of foreign education and credentials and by adopting an integrated approach to labour market training that incorporates language training.[22]

The *Beijing Declaration* also includes action items aimed at addressing women's equality by harmonizing the work and family responsibilities of men and women.[23]

GENDER- SENSITIVE POLICIES

The *Beijing Declaraton and Platform* calls for the mainstreaming of a gender-basis analysis to ensure public policy and legislative action incorporates an analysis of the impact of policies on the advancement of women's equality.

19. It is essential to design, implement and monitor, with the full participation of women, effective, efficient and mutually reinforcing gender-sensitive policies and programmes, including development policies and programmes, at all levels that will foster the empowerment and advancement of women;[24]

WOMEN'S LABOUR PROTECTIONS AND RIGHT TO ORGANIZE

Effective laws protecting the labour rights of women workers including the right to organize are also a key part of the *Beijing Platform* action plan.[25] Governments are required to

> 6. reform laws or enact national policies that support the establishment of labour laws to ensure the protection of all women workers, including safe work practices, the right to organize and access to justice. [26]

Governments, employers, employees, trade unions, and women's organizations are required to:

> 2. Recognize collective bargaining as a right and as an important mechanism for eliminating wage inequality for women and to improve working conditions;[27]

The right to organize and bargain collectively is also crucial to "facilitate women's equal access to resources, employment, markets and trade".[28] Governments are required to

> 2. Safeguard and promote respect for basic workers' rights, including the prohibition of forced labour and child labour., freedom of association and the right to organize and bargain collectively, equal remuneration for men and women for work of equal value and non-discrimination in employment, fully implementing the conventions of the International Labour Organization in the case of Parties to those conventions and taking into account the principles embodied in the case of those countries that are not parties to those conventions in order to achieve truly sustained economic growth and sustainable development. [29]

GLOBAL RESTRUCTURING PROTECTIONS

The *Beijing Platform for Action* notes that the ongoing global economic restructuring has a:

> 19. disproportionately negative impact on women's employment. Women often have no choice but to take employment that lacks long-term job security or involves dangerous working conditions to work in unprotected home based production or be unemployment. Many women enter into the labour market in under remunerated and under valued jobs seeking to improve their household income. Others decide to migrate for same purpose.

The *Platform* requires governments to "Strengthen Women's Economic Capacity[30] by requiring governments to:

> 2. Integrate a gender perspective into all economic restructuring and structural adjustment policies and design programmes for women who are affected by economic restructuring, including structural adjustment programmes, and for women who work in the informal sector. [31]

COMPLIANCE WITH *BEIJING* PAY EQUITY ACTION ITEMS

THE FEDERAL GOVERNMENT

In the twenty-two years since women in the federal sector gained pay equity protection in the *Canadian Human Rights Act,* key public and private sector employers have waged a long struggle to block pay equity complaints filed by their employees' unions. Topping the list of these employers is the Federal Government which in the *PSAC v. Treasury Board* case was found by the Canadian Human Rights Tribunal in July, 1998 to have engaged in widespread gender-based pay discrimination estimated to be valued at $3-4 billion in retroactive pay and interest.[32]

The Federal Government's campaign against its own employees' pay equity rights did not ease up at all after the Government had signed the *Beijing Declaration* in 1995. Even after the Government lost the 1998 ruling, it persisted in appealing that ruling despite the ruling of the Federal Court of Appeal in the *CEP v. Bell Canada* case.

The Federal Court of Appeal in the *Bell* case sent a clear message from the Courts to federal employers that the time for fighting pay equity with technical manoeuverings was over and the time for getting down to resolving and paying women fair wages was long overdue. The Court said that employers should not come to the Courts to get them involved in choosing the proper techniques to implement pay equity. This was to be left the specialized expertise of the Commission and the Tribunal.

It was apparent to many but not apparently to the Federal Government that the government would suffer another legal defeat on appeal. The only thing that was achieved by continuing the application was the continuing waste of taxpayers money as government lawyers fought the Tribunal's pay equity order and the Government's pay equity bill with accumulating interest of $2-million weekly and mounting legal costs was getting even higher.

In late October, 1999, Mr. Justice Evans of the Federal Court Trial Division issued its ruling rejecting all of the legal arguments put forward by the Federal Government and directing the Government to get on with the process of paying out the pay equity adjustments to its employees. After a week of negotiations with the employees' union, the Public Service Alliance of Canada, the Government announced a settlement which would result in a payout of $3.6 billion dollars to the employees including interest of approximately $1 billion. About a week later, the Government announced that it would have approximately a $67 billion surplus over the next five years.

Why didn't the Federal Government accept the courts' directions and its own pay equity law much less the commitments it made in the *Beijing Platform for Action*? It appears the answer lies in sexism and arrogance. The Government didn't see the value of spending public sector money on redressing female wage discrimination. The Government cannot accept that they have been wrong for all these years and that those doing women's work in the Federal public service have been right all these years in refusing to give up on their complaints or to settle for less money than they are worth.

The history of the *Treasury Board* case shows that governments should not underestimate the resolve of those doing women's work. Their unions and Canadian citizens are watching to ensure that pay equity is finally achieved in the federal public service. With an important principle of human

rights at stake, all are standing firm to hold the government accountable to obeying the law. The effect of having the law applied in the federal government will have important benefits for all working women. But twenty-two years is too long for anyone to have to wait for justice,particularly given the Federal Government's international commitments in the *Beijing Platform.*

When announcing the Treasury Board settlement, the Federal Government also announced that it would be conducting a review of the pay equity provisions in the *Canadian Human Rights Act.* This review should lead to the Government amending the *Act* to provide for a pro-active system of pay equity compliance similar to Ontario's *Pay Equity Act* which would help to avoid the lengthy and costly delays of the current complaint-based system. The *Beijing Platform* calls for such pro-active measures.

THE ONTARIO GOVERNMENT

Introduction

At the same time as world countries were committing to the *Beijing Declaration*, Ontario elected a government which was committed to a right wing agenda which included tax cuts and massive public sector restructuring. Instead of strengthening Ontario women's pay equity equality rights as provided for in the *Beijing Platform,* the Ontario Government in 1995 started to dismantle those rights and took aim at the rights of the most disadvantaged women in the public sector.

Global restructuring is having a profound and adverse impact on women throughout the world, including Canada. The ILO's Committee of Experts has expressed grave concern about the tendency of some countries to abandon or drastically reduce programmes intended to reduce inequalities in order to decrease public expenditure in the name of economic efficiency. The Committee has firmly stated that such programmes should not interfere with programmes for providing equal access to jobs. This impact is clearly borne out by the experience in Ontario.

Reduction in Pay Equity Funding

The Ontario Government moved quickly after its election in June, 1995 to finance its tax cut by slashing pay equity funding for public sector employers, drastically reducing services at the pay equity legal clinic, PEALS and under-resourcing the Pay Equity Commission and Pay Equity Hearings Tribunal which are the agencies charged with enforcing Ontario's *Pay Equity Act.*

Schedule J - Repeal of Proxy Pay Equity

Not content with only funding cuts, the Ontario Government's "restructuring" law repealed parts of the *Pay Equity Act* to remove pay equity rights from 100,000 of the lowest-paid, most discriminated against Ontario women working in important public services such as nursing homes, day care centres, and libraries. These women had achieved pay equity using the proxy comparison method.

Proxy Comparison Method

When the proxy comparison method was legislated in 1993, the then Ontario Government said it was necessary to provide a method to redress wage discrimination to women working in predominantly female workplaces who are among the lowest paid workers because of the historical undervaluation of women's work. These employees were unable to establish that they were suffering from compensation discrimination because there were not enough men's jobs in the workplace to make comparisons with men's work possible.

The proxy comparison method requires an organization to compare and adjust its unmatched female job classes with a group of female job classes that have achieved pay equity in another broader public sector organization offering similar services. Employers and unions, if any, proceeded to negotiate proxy pay equity plans which identified the extent of the discrimination facing these women workers through borrowing information from a similar organization in the public sector. For example, a child care agency might achieve pay equity by comparing its female job classes with female job classes in a municipally-operated child care centre where the female job class already has a pay equity adjusted wage.

Schedule J

Schedule J of the *Savings and Restructuring Act, 1996*

a. caps an employer's obligation to honour pay equity adjustments ordered in the proxy pay equity plan. The employer is only required to devote an amount equal to 3% of its 1993 annual payroll towards closing the wage gap identified in the proxy pay equity plans. This amount was to be paid out by September 30, 1996.
b. releases employers from the obligation to make pay equity adjustments retroactive to January 1, 1994.
c. authorizes employers not to honour the schedule of compensation adjustments for achieving pay equity set out in the plan or any other document (such as a collective agreement) rendering negotiated pay equity plans legally unenforceable; and
d. abolishes the proxy method of comparison as of January 1, 1997.

***SEIU v. Attorney General of Ontario* Decision**

Thanks to a successful *Charter* challenge by SEIU Local 204, the Ontario Government was forced to backdown when Justice O'Leary ruled in September, 1997 that *Schedule J* was unconstitutional. The Government promised to comply with the ruling and then delayed for over 18 months before providing one-time funding for the retroactive adjustments owing to these women from 1994-1998.

Ontario women won an important victory with the decision in *Service Employees International Union, Local 204 et al v. Attorney General of Ontario*. ("*SEIU 204")* [33] Ultimately it took the Courts and the *Charter of Rights and Freedoms* to stop at least for a time the Ontario Government's assault on women's and workers' rights.

The Ontario Court of Justice (General Division) in *SEIU 204* decided that *Schedule J* violated section 15 of the *Charter of Rights and Freedoms* because it discriminated against public sector women in predominantly female workplaces. This decision means that governments cannot just repeal government laws and cut back on citizen's equality rights without being subject to the

scrutiny of the *Charter* especially where the result is one portion of the disadvantaged group for whom the *Act* is intended will then be getting a lesser benefit than others"

Mr. Justice O'Leary ruled that *Schedule J*

> "discriminates against proxy sector women by denying them the opportunity of quantifying and correcting the systemic gender-based wage inequity from which they suffer, a benefit the *Act* grants to other women working in the broader public sector."

> "since it was the 1996 *Schedule J* amendment that created the discrimination, I declare that Schedule J of the of the *Savings and Restructuring Act, 1996* amending the *Pay Equity Act*...is unconstitutional and of no force and effect".[34]

Schedule J had denied to proxy pay equity recipients approximately 78% of the pay equity adjustment which had been identified as owing in order to redress the gender-based wage gap in the proxy sector. The 3% payroll cap in *Schedule J* resulted in a payout across the proxy sector of only 22% of the required monies needed to close the discriminatory wage gap. At the same time, the Court found that the *Pay Equity Act* provided a mechanism for other public sector women to redress 100% of the wage gap.

The Court found that these proxy recipients

> suffered most from systemic wage discrimination because they perform traditional women's work in female dominated sectors of the broader public sector with no male comparators in their place of employment.

In reaching it decision, the Court essentially adopted the applicants' arguments while finding the Government's arguments to be "faulty" and rejecting the Government's entire justification of *Schedule J.* The Court found that the Government argument that the proxy method was a flawed tool to identify gender-based wage inequity was "false". Instead, the Court accepted the evidence of the Union's renowned expert witness in pay equity, Dr. Pat Armstrong and found that the

> "proxy method was and is an appropriate pay equity tool in keeping with the intent of the *Pay Equity Act* to relieve women, including those working in female-segregated workplaces in the broader public sector, from systemic gender-based wage discrimination."

The Court held that the Government passed *Schedule J* "essentially for fiscal reasons" as it was a program with substantially expanding costs. However, the Court concluded that the Government's reasons for enacting *Schedule J* did not warrant overriding a constitutionally protected right of public sector women in the public sector to equality under section 15 of the *Charter.*

> "This decision means that the Government cannot just repeal government laws and cut back on citizen's equality rights without being subject to the scrutiny of the *Charter* especially where the result is one portion of the disadvantaged group for whom the *Act* is intended will then be getting a lesser benefit than others.

As a result of the ruling, the capping of women's proxy pay equity adjustments at 3% of their employer's 1993 payroll is no longer in effect. The original *Pay Equity Act* proxy law has been restored and the proxy pay equity plans negotiated under the original *Act* and voided by *Schedule J* are now valid again. Overall, approximately 4,350 public sector employers in the predominantly female public sector workplaces must now go back and pay out the proper pay equity adjustments to their employees as provided by the proxy pay equity plan they agreed to initially.

Impact of the *SEIU 204* Ruling

This decision means that approximately $418 milllion dollars in proxy pay equity adjustments awarded to 100,000 public sector women but taken away by the Tories' 3% cap on adjustments in *Schedule J* must now be restored to them. The individual impact of the decision will vary depending on the pay equity adjustment which was identified in the original pay equity plan. For example:

a. The applicant Kara Valian, a Homemaker with the Brantford Red Cross was awarded $6.30 per hour as a pay equity adjustment. *Schedule J*'s 3% cap resulted in her receiving only $0.51 per hour. This decision means that she must now receive the remaining adjustment of $5.79 per hour phased in at 1% of her employer's previous annual payroll. This is expected to take many many years as the original *Act,* in light of the extent of the wage gap in this sector and the number of potential recipients, allowed for a very gradual phase-in period for proxy recipients.

b. The applicant, Carlene Chambers, Health Care Aide with a Toronto nursing home, was awarded a pay equity adjustment of $1.50 per hour under the original proxy pay equity plan negotiated by SEIU Local 204 with her employer. The 3% resulted in her receiving only $0.35 per hour. Accordingly, this decision means that she must now receive the remaining $1.15 per hour to close her wage gap phased in at 1% of payroll.

Economic Restructuring and Ontario's Bill 136 *Pay Equity Act* Amendments

As part of the Ontario Government's restructuring of the public sector, it introduced *Bill 136,* the *Public Sector Transition Stability Act,* which included amendments to the *Pay Equity Act.* These amendments had the effect of seriously setting back the quest of Ontario women for freedom from pay discrimination by allowing new restructured successor employers employers to pay discriminatory wages. Further these amendments were not necessary since the *Pay Equity Act* already contains appropriate measures to protect women's pay equity interests during the restructuring process currently underway in Ontario's public sector.

Ontario's Equal Pay Coalition launched a lobby campaign and wrote jointly with the Ontario Federation of Labour to the Premier of Ontario asking that the Bill 136 pay equity amendments be withdrawn since they would seriously harm Ontario women and remove the current *Pay Equity Act* protections women have as they faced the massive Ontario public sector restructuring process. The Coalition argued that the amendments if passed would provide lesser and discriminatory working conditions to public sector women and therefore be subject to challenge under the *Charter* using the Court's *SEIU Local 204* decision. As a result of this lobbying, the Government backed off a number of these amendments as noted below when they brought in the second reading version of *Bill 136.*

"No Reduction Protection"

Section 14.1 was passed in 1993 to require successor or merged employers to be bound by their predecessors pay equity plans and that new employers were not allowed to take away the pay equity adjustments won by women under their original pay equity plans. This "no reduction" protection has now been removed by *Bill 136* for both public and private sector employers and this was not changed after lobbying.

After lobbying, the first reading provisions which addressed the transfer of pay equity plans upon the sale of a business have been retained in *Bill 136* but have been modified in a way which may permit a broader scope of negotiation following the sale of business. These provisions repeal the guarantee that pay equity adjustments following a sale of business would not be lower than they were before the sale.

Enforced Proactive Employer Obligations

The current proactive measures of *Pay Equity Act* were specifically designed to require both public and private sector employers to take steps to identify and eliminate pay discrimination in their workplaces.These proactive obligations were enacted because the Legislature recognized that complaint-based systems would not protect the rights of vulnerable employees and employers, left to their own devices, would not protect women's interests. Enforced proactive obligations also ensure that all employers have a level playing field for wages by requiring nearly all employers to have fully pay equity adjusted wages by January 1,1998, the same date when Bill 136 is scheduled to take effect. In otherwords, women are protected from non-compliant restructuring employers.

Instead of leaving this law, the initial *Bill 136* provisions rewarded non-compliant employers who have evaded or avoided the law by immunizing them from pay equity liability back to 1990 unless and until a complaint is made. This would have resulted in a grave injustice to the many women employed by these bad bosses, particularly by non-unionized women, many of whom are Aboriginal women, racial minorities and persons or women with disabilities who are most likely to be employed by non-compliant employers.

After lobbying, the first reading provisions which limited public sector employers' retroactive liability for pay equity adjustments were removed and as a result, the pro-active obligation to achieve pay equity remains in the *Act* and liability will <u>not</u> be restricted to the date of a complaint. The original compliance dates continue to apply.

Protection for Home Day Care Workers

Current decisions under the *Pay Equity Act* have decided that private home day care workers employed by municipalities and public sector agencies are "employees" and entitled to pay equity protection. *Bill 136* in its original form was particularly mean-spirited in its move to take away altogether the rights to pay equity of approximately 2500 low-paid private home day care providers working for public sector agencies and municipalities who are paid about $2.00 per hour per child. After lobbying by the Equal Pay Coalition and others, the Government removed this provision from *Bill 136.*

Economic restructuring is affecting every Ontario workplace. Women are particularly vulnerable to economic injustice. Ontario women need their government to maintain it's responsibility for ensuring, regulating and protecting pay equity in Ontario workplaces. Pay equity must not be seen as an economic inconvenience or a barrier to corporate growth. Creating healthy, vibrant economy in this province, requires strong enforcement of proactive pay equity strategies.

Ontario Pay Equity Funding

Even though the Government was told by the Courts to reinstate the pay equity entitlements of those women in predominantly female workplace, they are currently refusing to properly fund the pay equity adjustments.

Prior to the June 1998 provincial election, the Government decided to stop paying for the further proxy pay equity adjustments as of January 1, 1999 in order to assist in funding a further promised 20% tax cut. According to an internal Health Ministry document, the Government will stop funding the necessary yearly pay equity adjustments owing to these 100,000 women over the next 15 years to complete the phase-in of their move to non-discriminatory wages. This document also says that pay equity funding monies will be "redistributed" in the 1999-2000 year so that other public sector employers such as school boards, hospitals and municipalities will have pay equity monies taken from them in order to finance the retroactive payments to the 100,000 women.

Again robbing Penny to pay Patricia- the Government solution. And another *Charter* violation.This policy must end. Otherwise the Government will waste more taxpayer's money defending itself against another *Charter* challenge.

While the *SEIU 204* decision did not directly challenge the Government's funding policy, Mr. Justice O'Leary found that public sector agencies using the proxy method can't close the wage gap without government funding given the fact that most agencies are almost exclusively funded by the Government. Employers denied proper funding will likely have to choose between flouting the law or cutting services and laying off staff. While the Ontario Government got elected in 1999 with promises of increased health care and education services, this further pay equity funding cut will likely ensure the opposite. And the Government does not even listen to its own advisors on this issue. KPMG, a firm the Tories hired to consult pay equity stakeholders last year advised against such a redistribution strategy The Ontario Government has refused to release KPMG's damaging study.

The Ontario Government is also continuing its Home Care competition policy which effectively ensures that only service providers with discriminatory wages will have low enough wages to win home care contracts in the future. As a result, nurses employed by not-for-profit home care agencies such as the Victorian Order of Nurses who have won non-discriminatory wages under the pay equity law are now losing their jobs or are being forced to work for the competition at unfair wages. Constant turnover and deterioration in care are also the inevitable result of this policy.

The Ontario Government is also under-resourcing the Pay Equity Commission and Pay Euity Hearings Tribunal which are charged with implementing the *Pay Equity Act.* Such under-

resourcing means that there are not enough enforcement staff to assist the many Ontario women who have yet to see discrimination removed from their pay cheques.

There is still much left to be done to ensure all Ontario women are guaranteed the right to work for non-discriminatory wages. The Ontario Court upheld women's rights to be paid fairly. This decision must be fully implemented which means full pay equity funding.

COMPLIANCE WITH THE *BEIJING* EMPLOYMENT EQUITY ACTION ITEMS

FEDERAL GOVERNMENT

The New Federal *Employment Equity Act*

After many years of lobbying by advocacy groups and the Canadian Labour Congress, the Federal Government finally passed a revised proactive *Employment Equity Act* in 1996. Although weaker than Ontario's former *Employment Equity Act*, the new Federal law was passed in December, 1995 and proclaimed on October 23, 1996.

Although the new law still has many weaknesses, passing this law was an important step in complying with the *Beijing Platform* employment equity\positive action measures. The *Act* provides for affirmative measures to be taken to rectify the discrimination in employment facing four designated groups, namely women, persons with disabilities, members of visible minorities and aboriginal peoples.

The designated groups had not made significant progress under the original 1986 *Employment Equity Act* which had no enforcement process. Reports filed by employers showed that in the seven years since the 1986 *Act* was passed show that the four designated groups remain under-represented in most occupational categories and industrial sectors everywhere in Canada. A number of particular areas of concern were identified in the reports filed by Federal Employers:

- Severe under-representation of Aboriginal peoples.
- Severe under-representation of person with disabilities.
- Women and members of visible minorities under-represented in all sectors covered under the *Act* except in banking.
- Members of designated groups tend to be concentrated in lower paying jobs.
- Almost two-thirds of women were employed in clerical work.
- Women's full-time average salary was only 74% of that of men.
- Most Aboriginal women worked in clerical occupations.
- Both Aboriginal men and women earned substantially less than other employees.
- High termination rate of Aboriginal peoples has prevented meaningful progress for this group.
- Very few persons with disabilities were hired between 1987 and 1993.

The 1995 *Act* was strengthened to require employers to make reasonable progress towards achieving a representative workforce by designing and implementing employment equity plans in consultation with their employees and any bargaining agent. The *Act:*

- **U** continues to cover private sector employers under federal jurisdiction and Crown corporations with 100 employees or more and expands coverage to the federal public service; the Canadian Forces and members of the Royal Canadian Mounted Police will be covered upon order of the Governor in Council

- **U** clarifies employer obligations and gives the Canadian Human Rights Commission ("CHRC") the mandate to monitor and verify compliance through employer audits

- **U** gives the CHRC authority to conduct employer audits one year after the new *Act* comes into force

The *Act's* Purpose

The *Act* recognizes that many workplace practices, some of which are contained in collective agreements, have resulted in systemic discrimination by raising barriers to the representation of designated groups at all levels of the workforce. As a result, the *Act* states its purpose is as follows:

> "to achieve equality in the workplace so that no person shall be denied employment opportunities or benefits for reasons unrelated to ability and, in the fulfilment of that goal, to correct the conditions of disadvantage in employment experienced by women, aboriginal peoples, persons with disabilities and members of visible minorities by giving effect to the principle that employment equity means more than treating persons in the same way but also requires special measures and the accommodation of difference." s.2

Summary of Obligations

The new *Act* sets out the core employer obligations for the implementation of employment equity in federally regulated workplaces and in the Federal public service. Such employers, in collaboration with employees and unions where they exist, will now be required to

- **#** conduct a workforce analysis to identify under-representation of designated groups;
- **#** review employment systems, policies and practices to identify employment barriers against the designated groups;
- **#** prepare short and long term plans with measures to
  -remove employment barriers;
  -implement positive policies and practices,
  -make reasonable accommodations;
  -set numerical goals and timetables for hiring and promotion to correct underrepresentation.
- **#** prepare longer-term goals (covering more than 3 years) and strategies for increasing the representation of designated groups.

The plans are to be enforced by the Canadian Human Rights Commission which has the power to audit and monitor compliance and the Employment Equity Review Tribunal which can order action by the employer.

The *Act* sets out the general principles and legislative requirements for achieving employment equity. The *Regulations* set out the day-to-day rules and procedures for how employment equity will be achieved. Human Resources Development Canada and the Canadian Human Rights Commission are also developing Guidelines for the implementation of the *Act* and *Regulations.*[35]

Non-governmental organizations, including unions are seeking to use the the *Employment Equity Act* to enforce women's equality rights in the federal sector. See *Canadian Labour Congress Trade Union Guide to the Employment Equity Act.*[36]

THE ONTARIO GOVERNMENT

Repeal of Ontario's *Employment Equity Act*

Just as the Federal Government was passing the new pro-active *Employment Equity Act,* the Ontario Government in 1995 was repealing its pro-active employment equity legislation namely the *Employment Equity Act, 1993*. This statute placed a positive obligation on public and private sector employers to take certain steps designed to redress a number of key areas of inequality in employment experienced by four designated disadvantaged groups: aboriginal people, disabled people, racial minorities and women. The passage of this legislation was the culmination of long-standing efforts by a number of interested and affected groups, including the Alliance for Employment Equity and the Ontario Federation of Labour

Opposition to employment equity was a key element of the Progressive Conservative Party election platform in Ontario in 1995. The repeal of the *Employment Equity Act* was among the first legislative acts taken by the new Ontario government. This law took the form of *Bill 8*, the *Job Quotas Repeal Act*, which was passed in November, 1995, just a month after the *Beijing Declaration and Platform for Action* was signed.

A number of individual applicants in the case *Ferrell et al* case subsequently launched a *Charter* challenge to *Bill 8* alleging that the repeal violated section 15(1) of the *Charter*. These applicants also tried to get an order staying the repeal until the challenge on the merits could be heard and decided. Mr. Justice MacPherson J. denied the stay in December, 1995.[37] The matter later was heard on the merits before Mr. Justice Dilks who issued a ruling on July 9,1997 dismissing the application. The Court ruled that there was no section 15(1) violation because *Bill 8* had no substantive element which could be subject to the *Charter,* drew no legislative distinctions and had simply restored the situation which existed prior to the *Employment Equity Act, 1993.*

The applicants appealed and the appeal was heard by the Ontario Court of Appeal on April 6-7,1998. The Ontario Federation of Labour, the Legal Education and Action Fund and the African Canadian Legal Clinic were granted intervenor status. The Ontario Court of Appeal denied the appeal and the applicants are currently seeking leave to appeal to the Supreme Court of Canada.

Impact of the *Ferrell* Decision

This case raises a fundamental issue of *Charter* application which goes far beyond its particular facts and circumstances. Unless overturned by the Supreme Court of Canada, the Court of

Appeal ruling will be used by Governments to justify repealing socially-beneficial legislation enacted by a previous government.

The strong influence of the *Ferrell* case has already been seen.

- The stay decision featured prominently in the decision rejecting the *Charter* challenge to the Ontario government's repeal of the *Agricultural Labour Relation Act*, legislation which extended collective bargaining rights to agricultural workers.

- Likewise, Mr. Justice O'Leary in the successful *SEIU 204* decision made reference to the notion that a complete repeal of legislation may not offend the *Charter.*

CONCLUSION

With the exception of the passage by the Federal Government of the *Employment Equity Act,* the other government actions noted in this paper had the effect of setting back the quest on women for equality rather than being a positive step to implement Canada' s international commitments. While non-governmental organizations such as the Alliance for Employment Equity, the Equal Pay Coalition, the Ontario Federation of Labour and the Canadian Labour Congress played key roles in fighting these government actions, much remains to be done in forcing these governments to live up to their international obligations in the *Beijing Declaration and Platform for Action* and in other international covenants. However, laws such as Ontario's *Pay Equity Act* with its proxy comparison provisions and the federal *Employment Equity Act* are good examples of the types of best practices which can be used to accelerate implementation of the pay and employment equity commitments of the *Beijing Declaration and Platform for Action.*

ENDNOTES

1. Fourth World Conference on Women Report, *Beijing Platform for Action* para. 2 October, 1995.
2. Above, Beijing Declaration, para. 5-7.
3. Above, Beijing Declaration, para. 5-7.
4. para. 45, Beijing Platform for Action
5. above, para. 3,

6. above, para. 33

7. above, para. 4

8. above, para.20

9. para 26 Beijing Platform for Action

10. Above, para. 7

11. Proceedings of the Commission on the Status of Women, 43rd Session, March 1, 12, 1999, Follow up to and implementation of the Beijing Declaration and Platform for Action. paras. 1-20

12. www.gc.ca

13. above, para. 44.

14. above, para. 44.

15. at para. 22, Beijing Platform for Action

16. which includes "access to employment, appropriate working conditions and control over economic resources", *Beijing Declaration.*

17. above, para. 165, Strategic Objective F.1 of Promoting Women's Economic Rights and Independence

18. para. 178, *Beijing Declaration* ,Platform Strategic Objective - F.5

19. above, Strategic Objective F.1 - Promote Women's Economic Rights and Independence, including access to employment, appropriate working conditions and control over economic resources.

20. above, Strategic Objective F.5, *Beijing Declaration.*

21. above, para. 165, *Beijing Declaration*

22. above, para. 178, *Beijing Declaration*

23. above, Strategic Objective - F.6, Beijing Declaration to "Promote harmonization of work and family responsibilities for women and men". and in particular
Para. 179 Action by Government

2. Adopt policies to ensure the appropriate protection of labour laws and social

security benefits for part-time, temporary, seasonal and home-based workers; promote career development based on work conditions that harmonize work and family responsibilities;

3. Ensure that full and part-time work can be freely chosen by women and men on an equal basis, and consider appropriate protection for atypical workers in terms of access to employment, working conditions and social security;

4. Ensure, through legislation, incentives, and\or encouragement, opportunities for women and men to take job-protected parental leave and to have parental benefits; promote the equal sharing of responsibilies for the family by men and women, including through appropriate legislation, incentives, and \or encouragement , and also promote the facilitation of breast-feeding for working mothers;

5. Improve the development of, and access to, technologies that facilitate occupational as well as domestic work, encourage self-support, generate income, transform gender-prescribed roles within the productive process and enable women to move out of low-paying jobs.

Para. 180 By Governments, the private sector, and non-governmental organizations, trade unions and the United Nations, as appropriate:

7. Adopt appropriate measures involving relevant governmental bodies and employer's and employees associations so that women and men are able to take temporary leave from employment, have transferable employm;ent and retirement benefits and make arrangements to modify work hours without sacrificing their prospects for development and advancement at work and in their careers;

8. Design and provide educational programmes through innovative media campaigns and school and community education programmes to raise awareness on gender equality and non-stereotyped gender roles of women and men within the family; provide support services and facilities , such as on-site child care at workplaces and flexible working arrangements;

9. Enact and enforce laws against sexual and other forms of harassment in all workplaces;

24. *Beijing Declaration,* above, at para. 19

25. above, see Strategic Objective F.1 Promote Women's Economic Rights and Independence, including access to employment, appropriate working conditions and control over economic resources, *Beijing Declaration.*

26. above, para. 165, *Beijing Declaration*

27. above, para. 178, *Beijing Declaration*

28. above, Strategic Objective F.2 *Beijing Declaration.*

29. above, para. 166, *Beijing Declaration.*

30. above, Strategic Objective F.4, *Beijing Declaration*

31. above, para. 175, *Beijing Declaration*

32. Canadian Human Rights Tribunal (Gillis, Fetterly, Cowan-McGuigan) dated June 19,1998 and released July 29, 1998 “PSAC decision.

33. *“SEIU 204" v. Attorney General of Ontario* (1997) 35 O.R. (3d) 508 (Gen. Div.)

34. above, at p. 536

35. see *Employment Equity Act,*

The *Act*

The new *Act* clarifies existing core employment equity obligations, set out in general terms in the Act of 1986, and gives new regulation-making authority to clarify how employers are to meet these obligations.

The *Act* is divided into four sections:

Part I Sets out the obligations of an employer and outlines reporting requirements. Employers must identify employment barriers against and determine the degree of underrepresentation of, certain groups and prepare, implement, review and revise plans to promote employment equity.

Part II Sets out mechanisms for enforcing employer obligations under the *Act*.

Part III Provides for the assessment of monetary penalties.

Part IV Establishes regulation-making authority and provides for other general matters.

Highlights of New *Act*

Coverage

The Bill covers not only the same employers covered by the 1986 *Act* but also the public service (federal departments and agencies) and subject to order of the Governor-in-Council, the Canadian Forces and uniformed members of the Royal Canadian Mounted Police.

Self-Identification

States the principle of self-identification for the four designated groups and provides, in the legislation, definitions of terms.

Consultation Only

Clarifies that consultation means that employers are required to invite employee representatives and bargaining agents to provide their views and collaboration in the preparation, implementation and revision of an employment equity plan and places a duty on bargaining agents to participate in this process. Unlike Ontario’s former Act, the employer has no duty to carry out the responsibilities jointly.

Setting Numerical Goals

The employer must consider:

the extent of underrepresentation of the designated groups within their workforces;

the availability of qualified designated group members; and

factors influencing the rate at which employment opportunities arise, specifically anticipated growth or reduction of employer's workforce and anticipated turnover.

An employer will not be required to set a numerical goal which

causes employer undue hardship;

causes employer to create new positions;

- # imposes quotas; or
- # violates the merit principle, in the case of public sector employers.

Reasonable Efforts and Progress

- # The plan must indicate reasonable progress toward achieving a representative workforce.
- # The employer must make all reasonable efforts to implement the plan.

Plans must be Updated

- # Plans must be reviewed and revised where necessary, including updating numerical goals.

New Mandate for Canadian Human Rights Commission ("CHRC):

- # verify that employers are carrying out their obligations; and
- # design policies and negotiate compliance utilizing mandatory orders if necessary.
- # new on-site audit power to be carried out by CHRC Employment Equity Compliance Review Officers.
- # has access to all relevant information;
- # identifies any aspect of non-compliance; and negotiates a formal undertaking (mutual agreement on what will be done to comply fully).
- # If there is no agreement, the CHRC may issue a direction containing specific measures required.

New Role for Employment Equity Review Tribunal

- # The Canadian Human Rights Tribunal (to be named the Employment Equity Review Tribunal when hearing employment equity cases) will ensure final enforcement, when needed, in both the private and public sectors.
- # If an employer does not agree with a direction from the CHRC, then an appeal can be made to the Tribunal.
- # If the employer does not implement a direction, then the CHRC may apply to the Tribunal to have the direction enforced.
- # The Tribunal may make any order necessary for an employer to comply with employer obligations.
- # A Tribunal order is final (may be registered in Federal Court).

The Regulations

The *Act* provides for regulations on numerous matters. s.41 *Act* . There has only been one Regulation enacted to date, namely the *Employment Equity Regulations* P.C. 1996-1590 23 October, 1996 - this Regulation also re-enacts certain former Regulations under the previous federal *Employment Equity Act.*

36. co-authored by Mary Cornish, Karen Schucher and Amanda Pask and published by the Canadian Labour Congress, Ottawa, Canada.

37. Court file No. Re 6078/95