RIGHTS OF WOMEN WORKERS IN NORTH AMERICA

FROM PRINCIPLE TO REALITY: ENFORCING CANADIAN WOMEN'S RIGHT TO ECONOMIC EQUALITY

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TABLE OF CONTENTS

1

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A. INTRODUCTION

Canadian women, who account for nearly half the labour force face very substantial economic inequalities[2]. In addition to performing work that is central to their employer's business, women support themselves, their children, and often their spouses and parents as well as contributing to their communities. Yet, Canadian women performing paid work are still greatly disadvantaged in comparison to men. In 1997, women employed full-year, full-time averaged just 73% of male full-time earnings.[3] Equally significant, women accounted for less than 20% of those in the ten top paying jobs and more than 70% of those in the ten lowest paying jobs.[4]

The issue of gender discrimination in compensation and employment for women is one of the central discrimination issues facing legislators, human rights agencies, employers and unions. Redressing this discrimination requires both pay and employment equity\affirmative action remedies. Pay equity is a legal remedy designed to address one aspect of women's unequal position in the labour force, namely the undervaluing of women's work in predominantly female jobs. It provides that neither women nor men are discriminated against in their pay for doing traditional women's work. Employment equity measures are designed to remove the systemic barriers facing women in their job ghettos thereby increasing women's access to better paid men's work.

While some real progress has been made in Canada on these issues, particularly with the development of Canada's pro-active, results-based equality approach and the passage of some pro-active specialized pay and employment equity laws, much remains to be done most particularly in ensuring the effective enforcement of Canada's equity laws. [5]

Yet Canada's laws are more progressive in principle than in reality. These laws do not apply to everyone, some have been repealed, governments have underfunded the agencies which enforce them and employers have launched vociferous legal attacks against their implementation.[6]

For most women, particularly low-income women, Canada's lofty equity principles have not been translated into workplace changes. As described in this paper, there are equity laws in Canada which, if applied, could provide at least some relief from the pay and employment

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2 Statistics Canada, *Labour Force Annual Averages 1995*, Ottawa: Ministry of Industry, 1996, Table 1.

3 Statistics Canada, *Women in Canada 2000*, Ottawa: Minister of Industry, 2000.Table 6.12, p. 155.

4 Pat and Hugh Armstrong, *The Double Ghetto*, Toronto, 1994, Table 9.

5 Mary Cornish,"Employment and Pay Equity in Canada - Success Brings Both Attacks and New Initiatives" prepared for Conference on Human Resources in the Canada/US Context and in a Changing World: The Impact of NAFTA on Human Resources Canada/United States Law Institute Case Western Reserve University School of Law, April 19-21, 1996. Published in *Canada-United States Law Journal*, v. 22, 1996.

6 Mary Cornish,"Employment and Pay Equity in Canada - Success Brings Both Attacks and New Initiatives", *supra*

discrimination women face. Yet, Canadian women for the most part do not have confidence that human rights agencies are effectively enforcing those rights and that governments are providing the necessary resources to support those enforcement agencies.[7]

The success of a human rights enforcement system can ultimately be measured by one test - does the system lead to measurable and real reduction in the discrimination faced by citizens protected by the law. Effective enforcement means that the persons and groups who are discriminated against are empowered and enabled to achieve their equality rights found in equity laws.

This paper will explore the theme of women workers' rights enforcement and remedies in the context of the Canadian experience with gender-based pay/employment discrimination. Given the multi-faceted nature of this discrimination, it provides a helpful focus for addressing the challenges of enforcing equity effectively and suggesting new approaches.

This paper will first review the general approach of Canadian human rights law to remedying discrimination setting it in the context of Canada's ILO, UN and NAALC equity obligations. We will introduce the reader to the application of the Canadian approach to equality by reviewing the issues of pay and employment equity. This paper will also look at the limitations of current enforcement procedures and suggest new approaches to enforcement to turn equity principles into reality. Finally, this paper will look at the role of trade unions in enforcing women workers' rights and conclude with the general proposal that protection and enforcement of women workers' rights requires the creative collaboration and input of different bodies and organizations.

B. CANADIAN APPROACH TO EQUALITY

Canadian Equity Laws

Canada's equity protections for women arise from both international and domestic standards and laws. As a federal nation, in Canada, these rights are found in both provincial and federal laws, including general human rights laws, laws specific to pay and employment equity, employment standards laws as well as rights to collective bargaining. Canada also has a *Charter of Rights and Freedoms* which allows the Courts to strike down discriminatory laws. Canada is also a signatory to ILO and UN conventions which prohibit discrimination and has obligations as a signatory to NAFTA and NAALC which are further described below.

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[7] Pat Armstrong and Mary Cornish, "Restructuring Pay Equity for A Restructured Work Force: Canadian Perspectives" Presentation to the Conference "Equal Pay in a Deregulated Labour Market" sponsored by the Gender Research Centre, Middlesex University and the Pay Equity Project, June 7-8, 1996. Published in the April, 1997 issue of *Gender, Work & Organization*, published by Blackwells, Oxford, U.K.

Results-Based Systemic Approach

The Supreme Court of Canada, in interpreting human rights legislation, has made a number of rulings that have had a significant impact on the effectiveness of Canadian human rights laws. The first major ruling was that discrimination is primarily systemic and unintentional and includes employment policies and practices which may appear neutral but which disproportionately have an adverse impact on disadvantaged groups such as women.[8] The Court also ruled that human rights laws are special laws which are next in importance to the constitution[9] and must be practically enforceable so that discrimination can be identified and eliminated.[10] Finally, the Court ruled that special measures or an employment equity plan which included hiring goals are reasonable and necessary positive measures to remedy systemic discrimination.[11]

Canada's Supreme Court has ruled that the federal *Canadian Human Rights Act*

> "...is not aimed at determining fault or punishing conduct. It is remedial. Its aim is to identify and eliminate discrimination. If this is to be done, then the remedies must be effective, consistent with the "almost constitutional" nature of the rights protected. ...[The adjudicator must be able] to strike at the heart of the problem, to prevent its reoccurrence, to require that steps be taken to enhance the work environment."[12]

This focus on the systemic and unintentional nature of discrimination and the proactive nature of a results-based response has profoundly influenced the Canadian approach to equity issues. Canadian laws avoid any reference to "intention" and instead are focussed on identifying whether the effect of practices is discriminatory even if such effect is unforeseen. [13]

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8 *See Robichaud v. Canada (Treasury Board)* (1987) 2 S.C.R. 84 at 90 and *Re: Ontario Human Rights Commission v. Simpson Sears Ltd. (O'Malley)*, (1985) 2 S.C.R. p. 547.

9 See *Heerspink* 3 C.H.R.R. D\1163 at D\1166 and *Action Travaille des Femmes v. C.N. R. Co* (1987) 1 S.C.R. 1114.

10 As noted by Mr. Justice Dickson in *Action Travaille des Femmes, Ibid.*

11 See *Action Travaille des Femmes*, Ibid and Mary Cornish and Harriet Simand, "Religious Accommodation in the Workplace", Canadian Labour Law Journal 166 CLLJ, Butterworths, Toronto. See Also Shirish Prindit Chotalia "Human Rights Law in Canada", Toronto: Carswell 1995, at pp Can 6 - Can 8 and Can 50 - Can 54.

12 *Robichaud v. The Queen, supra*, note 2.

13 *Action Travaille des Femmes, supra*, note 23 and see Keene, Judith, *Human Rights in Ontario*, 2nd ed. 1992, Toronto: Carswell, pp.8-10.

Canadian courts and tribunals have for the most part interpreted human rights and the *Charter* equality rights provisions as guaranteeing substantive rather than formal equality.[14] A formal equality approach generally looks at how situations are treated on the surface and provides that all situations which are the same be treated in the same way. A substantive equality approach takes the analysis a step further by asking whether the same treatment produces equal results or unequal results. The difference between these two approaches can be illustrated through the example of wage discrimination analysis. As stated in the article "Human Rights and Administrative Justice Going into the Year 2000"[15],

> "a formal equality approach to wage discrimination would require that all employees, regardless of sex or race or another prohibited ground, be paid the same wages for doing exactly the same work. Under this analysis, equality is achieved when women and men are paid the same wages for doing the same work. A formal equality analysis does not consider whether it is discriminatory for women to be paid less than men for doing different jobs.
>
> A substantive equality approach, on the other hand, looks not only at whether women and men are being treated the same but whether the treatment produces the same or similar results for them. Thus, a substantive equality approach recognizes that an equal result sometimes is produced by the same treatment of different groups, and sometimes requires different treatment of different groups. In the wage discrimination example, then, a substantive equality approach considers whether the different work performed by women and men is of the different value, therefore providing a rational basis for different wages, or whether the work is of similar or equal value, therefore suggesting that the women's wages are discriminatory."

The formal approach to equality rights requires all individuals and groups to become like the dominant norm in order to be treated the same way as the dominant norm. This issue was addressed directly in a recent decision of the Supreme Court of Canada in *British Columbia v. B.C.G.S.E.U. (Re Tawney Meiorin)*[16]. Tawney Meiorin, a woman firefighter who had performed her job satisfactorily for some years was terminated when she could not pass one new aerobic test. Evidence established that the required standard was generally impossible for women to meet. The Court held that the impugned standard was not a *bona fide occupational requirement*

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[14] Although a substantive equality analysis was expressly adopted by the Supreme Court of Canada in 1989 in its first s. 15(1) decision, *Andrews v. Law Society of British Columbia* (1989), D.L.R. (4th) 1 (S.C.C.) in the years that followed, the Court stated different formulations of the s. 15(1) analysis: The Court's recent decision in *Law v. Canada (Minister of Employment & Immigration)* (1999), 170 D.L.R. (4th) 1 (S.C.C.) has now pulled together the threads of its s.15(1) jurisprudence, and articulated a number of general principles to be followed in analysing equality rights guarantees.

[15] Mary Cornish and Karen Schucher, Prepared for the Annual Conference of Ontario Boards and Agencies, November 18-19, 1999.

[16] *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees' Union (B.C.G.S.E.U.)* (1999), 176 D.L.R. (4th) 1 (S.C.C.)

in part because the procedures adopted by the researchers who developed the standard simply described the average aerobic capacity of the people presently doing the job, namely men, without determining whether this was the minimum level required in order to perform the job safely.

Positive Duty to Redress Workplace Discrimination

The *Meiorin* decision reinforced the well-established principle in Canadian law that achieving substantive quality demands that employers take positive steps to identify and redress discrimination on an ongoing basis, and not only where a complaint comes forward:

> "Employers designing workplace standards owe an obligation to be aware of both the differences between individuals, and differences that characterize groups of individuals. They must build conceptions of equality into workplace standards. By enacting human rights statutes and providing that they are applicable to the workplace, the legislatures have determined that the standards governing the performance of work should be designed to reflect all members of society, in so far as this is reasonably possible."[17]

This link between affirmative action or employment equity plans and the challenge of negative workplace practices was made by the Supreme Court of Canada in *Action Travaille des Femmes v. Canadian National Railway Company.*[18] The Court held that a remedy for systemic sex discrimination can include positive employment equity measures to eliminate systemic discrimination in the future. In that case, a Tribunal under the *Canadian Human Rights Act* found that women working in non-traditional jobs at CN were subjected to a number of discriminatory practices including sexual harassment.[19] The Court stated that to combat such discrimination it is necessary to establish an affirmative action or employment equity programme which will "create a climate in which both negative practices and negative attitudes can be challenged and discouraged".[20]

The Court based this ruling on the Tribunal's finding:

> "...that systemic discrimination at CN occurred not only in hiring but once women were on the job as well. The evidence revealed that there was a high level of publicly expressed male antipathy towards women which contributed to a high turnover rate amongst women in blue collar jobs. As well, many male workers and supervisors saw any female worker in a non-traditional job as an upsetting phenomenon and as a "job thief". To the extent that promotion was dependent

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17 Ibid.

18 [1987] 1 S.C.R. 1114

19 Ibid, at 1123

20 Ibid. at 1139

> upon the evaluations of male supervisors, women were at a significant disadvantage. Moreover, because women generally had a low level of seniority, they were more likely to be laid off."[21]

The Court analyzed the discrimination facing women workers as follows:

> "I have already stressed that systemic discrimination is often unintentional. It results from the application of established practices and policies that, in effect, have a negative impact upon the hiring and advancement prospects of a particular group. It is compounded by the attitudes of managers and co-workers who accept stereotyped visions of the skills and "proper role" of the affected group, visions which lead to the firmly held conviction that members of that group are incapable of doing a particular job, even when that conclusion is objectively false.
>
> An employment equity programme such as the one ordered by the Tribunal in the present case, is designed to break a continuing cycle of systemic discrimination...
>
> ...such a programme will remedy past acts of discrimination against the group and prevent future acts at one and the same time. That is the very point of affirmative action."[22]

Globalization and Restructuring

These decisions from Canadian courts directing a broad and systemic approach to establishing a culture of equality have come at the same time as the governing political\economic climate seems to have little time for a broad and generous view of human rights obligations. As stated in an article by one of the authors and lawyer Karen Schucher:

> "In almost every venue, both public and private, the emphasis is on restructuring to downsize and cut costs. The Court's directions to "restructure" societal norms and rules to ensure human rights protection, particularly where such "restructuring" may have economic implications, appears to some to be "out of touch". On the other hand, substantive arguments can be made that entrenching substantive human rights protections for Canadians has a myriad of economic, social and political benefits...."[23]

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[21] Ibid, at 1146.

[22] Ibid, at 1142-1143.

[23] Mary Cornish and Karen Schucher, "Human Rights and Administrative Justice Going into the Year 2000". Prepared for the Annual Conference of Ontario Boards and Agencies, November 18-19, 1999.

Although some new employment opportunities have opened up for women as a result of the globalization of the economy, globalization and free trade has also substantially exacerbated the existing inequalities. Lack of employment in the private sector and reduction of jobs in the public sector have disproportionately affected women and racial minorities, among others, who have been driven into the informal economy where jobs are insecure and low-paying. Funding crises in the public sector have reduced women's access to day care, retraining and other employment-enhancing strategies.[24]

Indeed, the restructuring is having a profound and adverse impact on women. 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 developments should not interfere with programmes for providing equal access to jobs. A similar sentiment has been expressed in the Beijing Declaration which notes that equality in employment is not a luxury but a prerequisite for a sustainable world economy.[25]

Canada's International Obligations

...ILO and UN Conventions...

Canada's approach to human rights laws are consistent with Canada's international obligations under ILO Convention 100 on Equal Remuneration, the ILO Discrimination (Employment and Occupation) Convention 111, the UN Convention on the Elimination of all Forms of Discrimination against Women (CEDAW), and the recent Beijing Declaration of the Fourth World UN Conference on Women. These international obligations are centred on the importance of Governments' devising and implementing effective legislation and special positive measures to ensure disadvantaged groups are given access to their equality rights.[26] As stated in the *Beijing Declaration:*

> "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

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[24] Mary Cornish,"Employment and Pay Equity in Canada - Success Brings Both Attacks and New Initiatives" prepared for Conference on Human Resources in the Canada/US Context and in a Changing World: The Impact of NAFTA on Human Resources Canada/United States Law Institute Case Western Reserve University School of Law, April 19-21, 1996. Published in *Canada-United States Law Journal*, v. 22, 1996.

[25] See Report of Fourth World UN Conference, above, note 9, Chpt. I, para. 36 and Chpt II & III, paras. 9, 151-164.

[26] *Setting the Stage for the Next Century*: *The Federal Plan for Gender Equality*: Government of Canada, Status of Women, August 1995, pp.6-7.

> between women and men are prerequisites for achieving political, social, economic, cultural and environmental security among peoples."[27]

As the United Nations *Human Development Report 1995* showed, "human development, if not engendered, is endangered".[28] According to the 1996 version of this report, "Investing in women's capabilities and empowering them to exercise their choices is the surest way to contribute to economic growth and overall development".[29] This investment is measured primarily in terms of women's income, educational attainment and life expectancy.[30] This principle is echoed in the Report of the 1995 Fourth World Conference on Women in Beijing, which set as a strategic goal the promotion of "women's economic rights and independence, including access to employment, appropriate working conditions and control over economic resources".[31] The Beijing Declaration committed signatory governments including Canada, to "enact and enforce legislation to guarantee the rights of women and men to equal pay for equal work or work of equal value".[32]

Canada issued a national plan for the Beijing Conference, *Setting the Stage for the Next Century: The Federal Plan for Gender Equality* which recognizes that Canada's gender equality commitments are "an integral part of its policy toward the human development of its people and the sustainable development of the country" and Objective 2 of the Plan calls for promoting the valuation of women's paid work.[33] This principle flows from Canada's obligations under *Equal Remuneration Convention* (No.100) passed by the International Labour Organization in 1951 and ratified by 110 countries, including Canada in 1972. Convention 100 sets out the principles for equal value, requiring governments to take action that would ensure the application of these equal value principles to the wage gap between women and men.

As well as substantive human rights standards, international conventions also provide for standards for enforcing human rights. In November, 1998, at the third periodic review of Canada's compliance with the *International Covenant on Economic, Social and Cultural Rights*, the United Nations Committee on Economic, Social and Cultural Rights stated:

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27 *Beijing Declaration Report of the Fourth World UN Conference on Women*, (Beijing, 4-15 September, 1995), Chpt III, para. 41

28 United Nations Development Programme *Human Development Report 1996*, New York: Oxford University Press 1996, p.4.

29 *Ibid*., p.6.

30 *Ibid*., p.32.

31 *Fourth World Conference on Women Report*, Beijing, 4-5 September 1995, p.71 (9531259).

32 Ibid., p.71.

33 *Setting the Stage for the Next Century: The Federal Plan for Gender Equality.* Status of Women Canada, August, 1995 at pp. ii - iii and at p. 1

> "[…] enforcement mechanisms provided in human rights legislation need to be reinforced to ensure that all human rights claims not settled through mediation are promptly determined before a competent human rights tribunal, with the provision of legal aid to vulnerable groups."[34]

The United Nations Human Rights Committee made the following observations about Canada's compliance with the *International Covenant on Civil and Political Rights'* requirement that states provide an "effective remedy" for human rights violations:

> "The Committee is concerned with the inadequacy of remedies for violations of articles 2, 3 and 26 of the Covenant. The Committee recommends that the relevant human rights legislation be amended so as to guarantee access to a competent tribunal and to an effective remedy in all cases of discrimination."[35]

...NAALC...

The North American Agreement on Labour Cooperation ("NAALC"), the labour side agreement of NAFTA, establishes objectives, obligations and principles for the signatory parties, Canada, the United States and Mexico. NAALC's Preamble states that the signatories are jointly agreeing to "improve working conditions and living standards...: pursue cooperative labour-related activities on the basis of mutual benefit;...(and) promote compliance and enforcement by each Party of its labour law". "Labour law" is defined to include equity laws. Two of the eleven labour principles contained in the Annex to NAALC relate to pay and employment discrimination.

> Equal wages for women and men by applying the principle of equal pay for equal work in the same establishment.
>
> Elimination of employment discrimination on such grounds as race, religion, age, sex or other grounds, subject to certain reasonable exceptions, such as where applicable, bona fide occupational requirements or qualifications and established practices or rules governing retirement ages, and special measure of protect or assistance for particular groups designed to take into account the effects of discrimination.

NAALC also requires the signatory countries to ensure that the 11 principles of labour law are enforceable:

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[34] *Promoting Equality: A New Vision*, Canadian Human Rights Act Review Panel: June 23, 2000 (Chair G.V. LaForest) [hereafter LaForest Report], chapter 9

[35] Ibid.

> Each party shall ensure that its labour laws and regulations provide for high labour standards, consistent with high quality and productivity workplaces, and shall continue to strive to improve those standards in that light. Article 2
>
> Each party shall ensure that persons with a legally recognized interest under a law in a particular matter have appropriate access to administrative , quasi-judicial, judicial labour tribunals for the enforcement of the party's labour law. Article 4
>
> Each party shall ensure that its administrative, quasi-judicial, judicial and labour tribunals proceedings for the enforcement of its labour laws are fair, equitable and transparent. Article 5

In addition, NAALC recognizes the role of unions and free collective bargaining in establishing and maintaining fair working conditions.

> The protection of the right of organized workers to freely engage in collective bargaining on matters concerning the terms and conditions of employment.

C. UNDERSTANDING SYSTEMIC DISCRIMINATION IN COMPENSATION

The most important first step in addressing an issue is to understand the roots of the problem. While this may seem obvious, many strategies are unsuccessful or provide only a partial solution because of the failure to recognize the various factors contributing to the problem.

Discrimination is the result of complex social interactions and prejudices within the workplace and society as a whole. The strategies required to eliminate particular forms of discrimination must appreciate the complexity of the `social and workplace cultures which permits it to flourish in the first place.

Discrimination is often based on an assumption of white, male, able-bodied or heterosexual superiority and is therefore commonly interwoven with discrimination on the basis of race, disability or sexual orientation. The discrimination suffered by women of colour, lesbian women and women with disabilities may often be different from the sort of discrimination suffered by white, heterosexual, able-bodied women and is usually more acute because these women are harassed for their race, disability or sexual orientation, as well as for their sex.[36] The fact that women workers may have multiple disadvantages must be considered in identifying and redressing discrimination remedies.

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[36] See, for example, Liz Stimpson and Margaret C. Best, Courage Above All: Sexual Assault Against Women with Disabilities (Toronto: Disabled Women's Network - Toronto, Autumn 1991); Glenda Simms, "Double Jeopardy: Minority Women and Violence" (Keynote Address at Alternatives: Directions in the Nineties to End the Abuse of Women, Winnipeg, June 6, 1991); bell hooks, Ain't I a Woman: Black Women and Feminism (Toronto: Between the Lines Press, 1988).

Dr. Pat Armstrong, a Canadian expert on pay discrimination and women's work describes the nature and roots of the problem of pay discrimination for women:

> *A. Because of their gender, women as a group experience significant discrimination in their compensation throughout the economy. This systematic underpayment persists in spite of substantial evidence indicating that women do work that is both valuable and necessary and that women want and need the same kinds of incomes as men.*
>
> *B. A large body of evidence demonstrates that this discrimination in women's compensation arises out of three fundamental features associated with women's work. Each contributes to the systemic gender discrimination in compensation in Ontario and Canada. The three features are:*
>
> *1. Women are segregated from men into different work and different workplaces. The labour force in Canada and Ontario is divided along gender lines across occupations and industries . To a large extent, women and men do different work in different workplaces. There are still "men's jobs" and "women's jobs".;*
>
> *2. The gender segregation of the labour force is accompanied by wage inequality. Female-domination of a job and low pay are linked. In general, women's segregated work is paid less than men's work and the more women concentrated in a job, the less it pays. The data on the labour force as a whole indicates that work mainly done by women is consistently paid less than the work mainly done by men, with little regard to the value of the work to the employer or the consumer.*[37]
>
> *3. Lower pay reflects the systemic undervaluation of women's work relative to that of men's work. Many of the demands, conditions and contributions of women's work are invisible and undervalued both because so many women do these jobs and because female-dominated skills, effort, responsibilities and working conditions are associated with unpaid domestic or volunteer work. Yet such skills are essential to the employer and are acquired over time, through training, even though they are often undervalued relative to those of men. Moreover, many of these women's jobs are highly demanding, but in ways so long associated with women that they are thought to be part of being a women.*

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[37] Bonnie Fox, "The Female Reserve Army of Labour: The Agreement and Some Pertinent Findings", *Atlantis*. 7 (Fall): 45-46

C. *These three factors combine to create pervasive discrimination. The three characteristics of women's work are generally present regardless of the particular nature of women's work, her industrial sector, her own capacities, her employer and the presence or absence of male comparators in her workplace. This systemic discrimination against women in terms of compensation is widely acknowledged in the research literature, and in public policy, not only in Canada but also at the international level.*

D. *The size and persistence of the wage gap clearly indicates that the problem does not stem simply from individual women and their capacities or from the practices of a few employers. Although there are certainly differences in the way individual women are treated by individual employers, women as a group face a common set of practices that disadvantage them in the labour force.*[38]

E. *Characteristics of employees, such as experience, formal education and training - , factors usually considered as a legitimate basis for wage differences, cannot explain much of overall differences in pay between women and men. Nor can the characteristics or demands of the jobs justify much of the wage gap.*

F. *Segregation alone provides part of the explanation for unequal wages. That is, there are only a few women in many male jobs which are compensated at a higher level than women's jobs on the basis of valid and legitimate criteria, such as job demands or differences in education and experience that are required to do the work.*

G. *But the rest of the explanation can be found in the failure to recognize and value the skills, effort, responsibility and working conditions associated with female-dominated jobs. The more female-dominated the industry and occupation, the more likely the discrimination. Indeed, discrimination of this kind is most likely when only women work in an industry and when there are no characteristics of the sort traditionally associated with, and valued in, male work.*

H. *In summary, there is extensive and thorough research indicating that the relationship between low wages and women's work in a segregated market cannot mainly be explained by factors recognized as a legitimate*

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38 Pat Armstrong, *Equal Pay For Work of Equal Value*, Report prepared for the Canadian Human Rights Commission, March, 2000, Ottawa

basis for different wages[39]. Rather, this relationship can primarily be attributed to systemic discrimination....[40]

D. CURRENT PAY EQUITY ENFORCEMENT AND ITS LIMITATIONS

Introduction

The occupational segregation of women's labour both at a systemic level and in an individual workplace identified by Dr. Armstrong, above, has an enormous impact on the possible strategies for identifying and remedying wage discrimination. As reviewed in the article by Mary Cornish and Fay Faraday, "The Future of Pay Equity Enforcement in Canada", [41]and discussed below, this segregation controls what choices women have for accessing remedial legislation and it controls what comparisons they can make to male (i.e.: "equitable") wages.

Where one should go for equity will clearly be driven by the composition of the workforce and the particular establishment in question. A review of laws across Canada reveals that there are basically three adjudicative bodies that are specifically charged with addressing wage discrimination complaints: Pay equity commissions or adjudicators under specialized pay equity statutes; Human rights commissions; and labour or employment standards adjudicators. When considering where to go for equity, it is necessary to be aware that each forum defines fair wages differently.

Forums and Definitions for Pay Equity

... Labour or Employment Standards: Equal Pay for Equal Work ...

The first definition of fair wages is equal pay for equal work. Under this definition, equal pay is achieved if men and women are paid the same and they work in the same establishment; under the same or similar working conditions; and performing the same, similar or substantially similar work. This definition of fair wages is found in several labour standards or employment standards laws across the country; and also in some of the provincial human rights laws, particularly in Newfoundland, PEI, Alberta and British Columbia.

The most "traditional" way to resolve complaints of wage discrimination is to file a complaint under employment or labour standards legislation which will be determined by an employment

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39 See Paula England, *Comparable Work: Theories and Evidence*. New York: Aldine de Gruyter, 1992 for a survey of the evidence on a wide range of theories. See also *1993 PSAC Report* for the Canadian evidence related to these theories.

40 Affidavit of Dr. Pat Armstrong, *CUPE et al v. Attorney-General(Ontario)* sworn the 15th day of April, 2001.

41 Mary Cornish & Fay Faraday, "The Future of Pay Equity Enforcement in Canada", Presentation to Transforming Women's Future: Equality Rights in the New Century A National Forum on Equality Rights Presented by West Coast LEAF, Vancouver, B.C., November 4-7, 1999

standards adjudicator. Employment standards legislation has the advantage of applying to both the public and private sectors. But these statutes have the disadvantage of using the most limited definition of fairness -- equal pay for equal work. To access rights and remedies under these statutes, it is necessary to have men and women performing the same work in the same establishment but being paid at different rates.

Although often overlooked, employment standards applications do have some utility. They can help close gaps within a job classification. And they may be able to help individual employees or groups of employees achieve a limited measure of equality before a full pay equity plan has been negotiated or where there is no access to pay equity legislation. It is worth noting that the existence of the *Pay Equity Act* in Ontario has not removed from adjudicators the jurisdiction to consider complaints under the *Employment Standards Act*.[42]

However, claims are very rarely made under the equal wages section (s. 32) and so labour standards adjudicators have little familiarity with the issue. In one recent case, *Re Hamilton Board of Education*, the adjudicator took 6 years after the hearing to reach a decision in part because he "had inordinate difficulty analysing both the evidence and the issues, going beyond any difficulty which [he had] encountered in any other matter that [he could] recall".[43]

Finally, filing a complaint with the Employment Standards Branch is sometimes enough to convince employers to negotiate seriously and to settle a wage discrimination dispute without a full hearing.

... Pay Equity Commissions & Statutes: Equal Pay for Work of Equal Value ...

The second definition of fair wages is equal pay for work of equal value. This definition focuses on the value of the work, not on the kind of work done. It enables women to make comparisons between male- and female-dominated job classes and does not require that men and women be performing similar types of work. For example, a comparison can be made between the job classes of nurse and police officer. Equal pay for work of equal value provides broader access to equity because it addresses the reality of occupational segregation. The measure of equality is whether the value of the work men and women do is similar or comparable. If so, they should be paid the same.

The equal pay for work of equal value standard is found in the various provincial pay equity statutes; Section II of the federal *Human Rights Act*'s and *Equal Wage Guidelines*; and the equal wage provision in s. 182 of the *Canada Labour Code.* Where this article uses the term "pay equity", it refers to this definition of equal pay for work of equal value. Women's groups and unions have beeen able to use this legislation to win some significant gains not only in terms of wages but also in terms of establishing the pervasive undervaluing that was accompanied

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42 *Re Hamilton Board of Education* (30 March 1998) unreported adjudicator's decision (R. Blair) at para. 35

43 Ibid. at para. 7

by resistance to women's claims.[44] As of 1991, it was estimated that over 20 cases under the federal legislation resulted in over 20 million dollars in retroactive pay for over 5,000 employees.[45]

Laws such as Ontario's *Pay Equity Act* are seen as particularly effective because of the comprehensiveness of the model which combines legislative, collective bargaining, adjudicative and enforcement mechanisms to arrive at an effective equity result.

The major advantage to specialized pay equity statutes is clearly that they usually impose a pro-active obligation upon employers to achieve pay equity. They require bargaining agents and employers to negotiate and achieve comprehensive pay equity plans and they provide access to a statutory mechanism for enforcing and monitoring pay equity.

For example, Ontario's Pay Equity Commission is entrusted with public education, investigating complaints, assisting the parties to settle disputes and to achieve pay equity plans, making orders, and referring disputes to the Tribunal for formal adjudication. Either a bargaining agent or an employer can also request a formal hearing before the Tribunal.

Proactive pay equity laws have led to significant gains for women in both the public and private sectors. In Ontario, pay equity has been achieved for some but not nearly all women and they are mostly unionized workers. Women in the public sector have been awarded adjustments which at maturity when fully paid out would result in pay adjustments of $1 million annually.

.... Human Rights Legislation ...

The third standard is found in provincial and federal human rights legislation prohibiting discrimination in employment. For example, s. 5(1) of Ontario's *Human Rights Code* provides that "Every person has a right to equal treatment with respect to employment without discrimination because of ... sex ...".

This standard, phrased in various ways, is found is set out in several provincial human rights statutes, specifically Saskatchewan, Manitoba, Ontario, New Brunswick and Nova Scotia. This standard does not prescribe a specific formula for identifying wage discrimination, but clearly it contemplates that sex discrimination in pay is prohibited. As is noted below, this may be a useful tool for those seeking pay equity either in the absence of a pay equity statute or in circumstances where other legislation is too narrow or fails to provide for full pay equity.

In the situation of a female-dominated workplace, these open-ended provisions could also provide the opportunity to argue that freedom from discrimination requires that proxy comparisons be made outside of a predominantly female workplace. In SEIU Local 204's successful *Charter* challenge to the repeal of pay equity legislation, the Ontario Court General

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[44] Mary Cornish, *Equal Pay: Collective Bargaining and the Law*, above, pp 17-23.

[45] Nan Weiner and Morley Gunderson, *Pay Equity, Issues, Options and Experiences*, Toronto Butterworths, 1990, pp.115-116.

Division held that the proxy method of comparing jobs "is an appropriate method of quantifying the extent of gender-based systemic wage discrimination" in the broader public sector[46]. Private sector employees who are excluded from using the proxy method under Ontario's *Pay Equity Act* could try filing a complaint under the *Human Rights Code* and then arguing that the proxy method is the necessary tool to identify and quantify the wage discrimination in the private sector.

There is case law to support the use of general anti-discrimination laws to secure pay equity. The Ontario Divisional Court decision in *Nishimura v. Ontario Human Rights Commission*[47] is on point. Prior to Ontario's *Pay Equity Act*, female advertising employees with the *Toronto Star* filed a wage discrimination complaint under the *Ontario Human Rights Code* alleging that the *Toronto Star* had failed to pay them equal pay for work of equal value. The Commission ruled that it did not have jurisdiction to address equal pay for work of equal value. But the Divisional Court overturned the Commission and held that

* "the allegation of unequal pay for work of equal value can constitute sex discrimination contrary to ... the Code". The wording in the anti-discrimination clause "is very broad and the alleged discrimination fits within the definition of discrimination set forth ... in *Andrews*. It also falls within what is described as structural or systemic discrimination on the principles established in *Simpson Sears, Action Travail* and *Robichaud*."

* the existence of the *Employment Standards Act* and the provincial *Pay Equity Act* which had then been passed, did not remove the complaints from the jurisdiction of the Commission.

* the fact that the *Code* did not contain technical standards for identifying pay equity "does not evidence a lack of legislative intent to have the *Code* apply in situations similar to the present case. The Commission will decide what standards are to apply within its mandate."[48]

Pay equity claims can also be filed with provincial and federal Human Rights Commissions and Tribunals, although this route is rarely used. However, human rights laws have the advantage of applying to both the public and private sector and have no exclusions for smaller workplaces.

LIMITATIONS OF EXISTING LAWS

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46 *SEIU Local 204 v. Ontario (Attorney General)* (1997), 35 O.R. (3d) 508 (Gen. Div.) at 532

47 (1989), 70 O.R. (2d) 347 (Div. Ct.)

48 See also: *Canada Safeway v. Saskatchewan Human Rights Commission* (19 April 1999) (Sask. Q.B.). This case appears to establish that it is possible to pursue a claim for equal pay for work of equal value under a human rights law with a general prohibition against discrimination.

... Complaint-Based Statutes ...

Complaint-based equal value legislation, found in employment standards and human rights statutes, had many problems.[49] The "investigations were generally lengthy, costly and complex, and often created disruptions and ill-will in the workplace".[50] It was in the employer's interest to delay as long as possible or to initiate lengthy cases that depleted the resources of the complainants. Moreover, each case began almost as if it was the first so lengthy and costly cases might repeat the process.

Difficulties with human rights enforcement are well known and exist across Canada. Apart from the backlogs and lengthy delays, some Commissions have authority to decline to deal with a complaint if they think it should be more appropriately dealt with under another law such as a grievance process mandated by labour relations laws. Thus, it may not always be possible for parties to control the process. A party may try to file a complaint only to have the Commission decline to address it.

After many years of implementing the Federal legislation which remains complaint-based, the Canadian Human Rights Commission has repeatedly criticized the ineffectiveness of such an approach arguing it is unsuccessful, slow and costly.[51] Not surprisingly, employers could not be trusted to voluntarily comply with the law when it meant substantially increasing their labour costs. The Canadian Government has appointed a Task Force to inquire into the effectiveness and enforcement of the federal equal value in the *Canadian Human Rights Act* but this Task Force has still not reached the point of commencing its work almost a year after it was announced.

... Pro-Active Pay Equity Statutes ...

There are also a number of limitations to the current effectiveness of pro-active pay equity statutes:

(i) Scope of Coverage

The most serious limitation is the scope of coverage of existing laws. With the exception of Ontario and Quebec, pay equity statutes apply exclusively in the public sector and broader

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49 For a further discussion of the inadequacies of complaint-based legislation see, Pat Armstrong and Mary Cornish, "Restructuring Pay Equity for A Restructured Work Force: Canadian Perspectives" Presentation to the Conference "Equal Pay in a Deregulated Labour Market" sponsored by the Gender Research Centre, Middlesex University and the Pay Equity Project, June 7-8, 1996. Published in the April, 1997 issue of *Gender, Work & Organization*, published by Blackwells, Oxford, U.K.

50 Heather Conway, *Equal Pay for Work of Equal Value Legislation In Canada*, Ottawa: Institute for Research in Public Policy, 1987, p.12.

51 *1995 Annual Report of the Canadian Human Rights Commission*, p. 69. See also Morley Gunderson, *Comparable Worth and Gender Discrimination: An International Perspective,* International Labour Office, Geneva, 1994, p. 111.

public sector. In most Canadian jurisdictions, then, the private sector has no pro-active obligation to achieve pay equity. Even in Ontario, where the private sector is generally covered, private sector workplaces with less than ten employees are excluded from the law's application.

Most pay equity laws, then, still leave many workers with no access to its standard. They are instead forced to rely on complaints-driven mechanisms for achieving equity such as those available under human rights and employment standards legislation.

(ii) Definition of Fair Wages

For workers who are covered by pay equity statutes, one major advantage is that these laws apply the highest definition of fair wages: equal pay for work of equal value. One major disadvantage, though, is that women in a large number of workplaces covered by such statutes cannot produce the appropriate male job comparators to allow them to access fair wages using this definition. Consider the following examples,

* Most of the statutes require a direct comparison between a female job and a male job of comparable value. Given the nature of occupational segregation, even where a workplace has both male and female job classes, they will not necessarily be at the same level and so no comparison can be made under the statute.

  For example, in a nursing home the male job classes of janitor and director will be at the bottom and top of the wage scale but the female job classes such as health care aide and nurse will be in between and will not be able to find a direct comparator.

  Only the federal, Ontario and Quebec statutes, and possibly the Manitoba statute which is ambiguously worded, allow proportional value comparisons or indirect comparisons between general male and female wage lines.

* With the exception of Quebec and Ontario's broader public sector, pay equity can only be achieved where there are both male and female jobs within the same establishment. Again the female dominated workplaces are left with no access.

(iii) Enforcement Difficulties

A further limitation of pay equity laws lies in the difficulty and complexity of their enforcement procedures. For example, in Ontario where the Pay Equity Commission is charged with investigating and assisting to settle a complaint, it can take a very long time to get any form of order and even longer to get a complaint referred to the Tribunal for a final adjudication. Since it is only a Tribunal order which can be enforced as a practical matter, when faced with a reluctant employer, it becomes very difficult to enforce rights in a timely manner. The Ontario Commission has recently indicated that it intends to streamline its procedures for issuing orders to address the issue of delay but at the present time extensive delays remain the reality.

As stated by one of the authors and Dr. Pat Armstrong:

> While many gains were made, the absence of effective monitoring by enforcement agencies, along with the use by some employers of the complexity in the various pieces of proactive legislation, made it possible for some employers to develop plans that offer little or no compensation, especially in areas where unions are either absent or were not effective. However, experience with the legislation and the Pay Equity Commission's Guides and materials has made it clear that the law need not be applied in a complex manner. Women with union representation tended to be more successful than those without and the result was greater wage differences among women as some benefited from the legislation while others did not.

E. NEW PAY EQUITY ENFORCEMENT APPROACHES

As noted above, there are a number of difficulties in enforcing pay equity rights given the lack of coverage under existing statutes, unduly narrow definitions of equality or difficulties in enforcement procedures. Apart from the general recommendations set out in this paper for improving the human rights agencies' enforcement process, there are a number of other strategies which could be used by workers to achieve equitable wages:

* grievances under anti-discrimination provisions of collective agreements
* labour relations board complaints; and
* *Charter* litigation

Collective Agreement Grievances

Systemic wage discrimination grievances can be filed under the anti-discrimination clauses in collective agreements by arguing that the wage schedule is discriminatory, to the extent that it fails to provide equal pay for work of equal value. Arbitrators under many Canadian labour laws are able to interpret and apply human rights statutes and pay equity statutes. Ontario's *Labour Relations Act, 1995* expressly states that an arbitrator has the power to interpret and apply human rights and other employment related statutes.[52] The *Canada Labour Code* gives arbitrators even broader authority. [53]

The definition of equal pay for work of equal value should apply as this is what is necessary to bring the wages in line with the applicable human rights law or pay equity law in the jurisdiction. One of the first issues which will arise in bringing a pay equity grievance under an anti-discrimination provision is the test the arbitrator should employ to determine whether pay equity

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[52] 48. (12) An arbitrator or the chair of an arbitration board, as the case may be, has power,
(j) to interpret and apply human rights and other employment related statutes, despite any conflict between those statutes and the terms of the collective agreement.

[53] Section 60(1)(a.1) gives arbitrators the power to interpret, apply and give relief in accordance with a statute relating to employment matters, whether or not there is a conflict between the statute and the collective agreement.

exists. A measuring tool is needed in order to assess whether systemic compensation discrimination exist. Under Ontario's *Pay Equity Act* that tool involves three steps;

1. Assess comparable male and female jobs and if there is a variance, adjust female job rate to male job rate.

2. If no comparable job but there are some male job classes, use the proportional value comparison method and establish a wage line to determine the pattern of payment for male and female wages. Then adjust female wage line upward to male wage line; and

3. If no male jobs in workplace then proxy comparison method is used. This provides that female job classes can borrow a comparator from a comparable work place to identify the discrimination in the all-female workplace.

An arbitrator could also be asked to adopt these methods in order to identify discrimination in a collective agreement wage schedule. Another issue which will likely arise is the scope of the arbitrator's power to issue a remedy for a systemic discrimination complaint. Since arbitrators do not have the jurisdiction to amend the collective agreement, employers may argue they can only issue a declaration that there has been a violation of the collective agreement due to discrimination. However, there is a good argument arbitrators can order a non-discriminatory wage schedule which would involve increases to the female job classes to eliminate wage discrimination.

Labour Relations Board Complaints

Labour Relations Boards have not been used as a forum to deal with pay equity complaints. The exception is under the Manitoba *Pay Equity Act* which allows some pay equity disputes to be referred to the labour relations board in that province. However, the traditional forms of labour relations complaints may provide an alternate avenue of pay equity redress as outlined below.

... Bad Faith Bargaining Complaint ...

There is no legal mechanism to force employers to agree in bargaining to do something which they are not required to do, for example, to bring the pay equity process into the collective agreement. However, the employer's duty to bargain in good faith includes a duty not to make illegal demands. This is underscored in s. 54 of Ontario's *Labour Relations Act, 1995* which explicitly states that

> "A collective agreement must not discriminate against any person if the discrimination is contrary to the *Human Rights Code* or the *Canadian Charter of Rights and Freedoms*."

Thus, unions can argue that an employer cannot propose a collective agreement provision, i.e. a wage schedule or benefits provision which does not achieve equal pay for work of equal value which is discriminatory. As a corollary, the duty to bargain in good faith could be interpreted to include a duty not to resist union proposals which seek to implement pay equity.

The good faith bargaining duty provides a means for unions to address during bargaining collective agreement provisions which they believe to be discriminatory. For example, a union may put forward a bargaining proposal to remove or amend a collective agreement provision on the grounds that it is discriminatory and therefore illegal. If the employer will not agree to the proposal, or will agree to it only in exchange for something else, the union may consider bringing a bad faith bargaining complaint.

Unions should not have to compromise on other issues in order to obtain agreement to proposals which seek to bring the collective agreement in line with human rights obligations. Through the process of a bad faith bargaining complaint, the labour board would have to determine whether or not the proposal at issue is one that is required by law or whether it is one of a number of possible legal alternatives. If a union's proposal were the only legal alternative, an employer's resistance to it should constitute bad faith bargaining. If the union proposal is not the only legal alternative, the employer would likely be able to resist it in favour or another method of responding to the collective agreement discrimination.

... Other Unfair Labour Practice Complaints ...

If an employer lays off or contracts out women's jobs because they have been awarded pay equity adjustments, arguably this can be characterized as an unfair labour practice. Such lay offs or contracting out by the employer could also constitute intimidation, coercion or a reprisal for attempting to exercise rights central to labour relations or such conduct could interfere with the union's representation of its members in relation to the right to receive non-discriminatory wages. Evidence that the lay offs or contracting out were motivated by anti-pay equity animus would be important. Under the *Canada Labour Code*, the labour board has the power to issue substantive interim orders which may be useful in blocking the lay offs or contracting out pending a resolution of the dispute.

While Labour boards often now lack expertise in discrimination matters and accordingly there may be a risk of setting negative precedents, at the same time, labour board applications are the fastest way to get a remedy and the remedies can be powerful.

Even where a party is covered by a provincial pay equity law, they may not want to proceed under that law because of the delays inherent in the process and the difficulty of getting orders when the case is before the commission's review officers. By contrast, complaints of bad faith bargaining or unfair labour practices can come on much more quickly before the labour board than would complaints regarding reprisal under the pay equity legislation.

***Charter* Litigation**

While acknowledging that *Charter* litigation is expensive and brings with it its own uncertainties, Canada's *Charter* could be used in two respects; firstly, gain access to pay equity for some groups of workers; and secondly, to protect gains which have been made under existing pay equity legislation.

... Gaining Access to Pay Equity ...

The *Charter* can be useful in promoting pay equity if it is possible to find that an employer is "government" and therefore subject to the *Charter*. If bound by the *Charter*, the employer must pay wages that are non-discriminatory or risk being in contravention of the *Charter*'s s. 15 equality guarantee.

... Protecting Pay Equity Gains ...

In Ontario, a number of unions have been able to use the *Pay Equity Act* to secure pay increases for their female employees in the broader public sector. Now, broader public sector employers in the health care sector are arguing that pay equity is putting them at a competitive disadvantage and that if their pay equity obligations are not removed, they will be forced to go out of business. These are workplaces which receive virtually all of their funding from government and they cannot make the pay equity adjustments without further funding.

The *Charter* argument could be applied in two ways.

First, it could be argued that the government is really the "employer" and that the government's failure to properly fund pay equity is a violation of s. 15. There are difficulties making this argument in Ontario because of specific amendments to the Ontario *Pay Equity Act*. In 1992, the Pay Equity Hearings Tribunal considered the degree of control that the Ministry of Community and Social Services exerted over the Kingston Children's Aid Society through regulating standards, reviewing and monitoring services provided, conducting audits, and, particularly, funding.

Because the Ministry decisions had a substantial and direct impact on the compensation practices at the children's aid society, the Ministry was found to be the employer for pay equity purposes and a small broader public sector workplace without appropriate male comparators was able to seek pay equity using male comparators at the Ministry itself: see *Kingston Children's Aid Society.*[54] In response to this ruling, the Ontario government amended the *Pay Equity Act* to explicitly provide in s. 1.1 that "For the purposes of this Act, the Crown is not the employer of a person unless the person is considered to be a civil servant, a public servant or a Crown employee under the *Public Service Act*."

Nevertheless, the argument could still be used elsewhere in Canada where broader public sector employers are unwilling or unable to distribute pay equity adjustments.

Second, a *Charter* challenge could be directed at the legislation and procedures which govern the allocation of services in the health care sector. For example, in Ontario, the Harris government has decided to privatize home care for people discharged from hospital. The government has established a number of regional Community Care Access Centres which act as brokers in awarding home care contracts. The government gives the money for publicly funded home care to the Access Centres. Home care agencies then submit bids in a system of competitive tendering and the Access Centres award the contracts.

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54 [1992] 3 P.E.R. 116 (PEHT)

Obviously lowest cost becomes a determining factor. Under this scheme, the non-profit broader public sector agencies such as the VON and Red Cross which have to date been providing the services and which have proxy pay equity plans for their employees must compete against for-profit private sector employers who, being private sector employers with predominantly female workforces, do not have the same pay equity obligations. To the extent that this system operates to disproportionately impose downward pressure on women's wages and conditions of employment it could be argued that it violates s. 15 of the *Charter*.

Finally, the *Charter* is currently being used to protect the gains made in a previous *Charter* challenge in *SEIU Local 204 v. Attorney-General (Ont.), supra*. On April 17, 2001, five unions and four individual women launched a legal challenge, *CUPE et al v. Attorney-General(Ont)* under the Charter alleging that the Ontario Government's failure to fund the pay equity adjustments owing to over 100,000 women workers in predominantly female public sector workplaces was discriminatory and violated section 15 of the *Charter*. The action alleges that the Government is knowingly perpetuating sex discrimination and the undervaluation of women's work when it funds public services at discriminatory wages contrary to s.15 of the Charter." The action in the Ontario Superior Court of Justice seeks an order that the Government must fund over $140 million in pay equity adjustments owing under the *Pay Equity Act* from 1999 to date and continue funding until pay equity is achieved which is expected to take at least 10 more years. These women have received only one third of their pay equity adjustment to date while other public sector women were funded to achieve full pay equity in 1998.

In 1997, Mr. Justice O'Leary in striking down the Government's 1995 attempt to remove the pay equity rights of these women workers, explicitly recognized the need for funding in order to implement pay equity in government funded agencies. These organizations he said "..depend on government funding for their very existence. Any increase in pay must be paid for by the government."

F. EMPLOYMENT EQUITY/AFFIRMATIVE ACTION MEASURES

Introduction

Canadian pay equity legislation is based on the assumption that the labour force is segregated in ways that serve to systematically undervalue women's work and that neither the market nor employers would correct this inequity. It was designed to alter the value attached to such work by forcing employers, working with unions when they were present, to examine their pay practices and "to ensure the comparison system remedies the historical undervaluation of women's work". It is not intended to change what men and women do in the labour force but rather to recognize and pay for the value of the work that was done by women. While it addressed the systemic discrimination expressed in the wage rates women shared, it did nothing about the discrimination individual women faced in seeking other, usually more highly

paid work. Employment equity, that is Canadian legislation requiring positive measures to ensure equality, is intended to do just that. [55]

In Canada, various human rights legislation at the federal and provincial\territorial level prohibits sex discrimination in employment. But, like the earlier wage legislation, human rights legislation was complaint-based, it led to lengthy and costly cases, and often put the complainant at risk.[56] And like the early equal work legislation, it did little to alter systemic discrimination. A 1984 Royal Commission on Equality in Employment established the continuing inequalities in the workplace and recommended employment equity legislation. Such a strategy was

> "designed to obliterate the present and the residual effects of discrimination and to open equitably the competition for employment opportunities to those arbitrarily excluded. It requires a special blend of what is necessary, what is fair and what is workable." [57]

Only two governments introduced proactive employment equity laws to protect the designated groups, namely women, persons with disabilities, racial minorities and aboriginal peoples. Ontario's now repealed *Employment Equity Act, 1993*,[58] was direct legislative authority for the need to use systemic measures to combat workplace barriers like sexual harassment. This *Act* recognize the systemic discrimination faced by women, aboriginal peoples, racial minorities and workers with disabilities and implements Ontario-wide the type of systemic remedies without the necessity of proving discrimination in each case.[59]

The federal government was the first to enact such legislation. The 1986 *Employment Equity Act* required employers with a hundred or more employees "in connection with a federal work, undertaking or business" to prepare employment equity plans based on an audit of their current workforce and of the available workforce. [60] A report had to be filed every year, indicating not only absolute numbers but also salaries, hirings, promotions and terminations of designated

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55 Mary Cornish, Karen Schucher, Amanda Pask, *Canadian Labour Congress Trade Union Guide to the Federal Employment Equity Act*, September, 1998. Mary Cornish,"Employment and Pay Equity in Canada - Success Brings Both Attacks and New Initiatives", above, Pat Armstrong and Mary Cornish, "Restructuring Pay Equity for A Restructured Work Force: Canadian Perspectives", *supra*.

56. Mary Cornish, *Achieving Equality, Report of the Ontario Human Rights Code Review Task Force,* Ontario Ministry of Citizenship, 1992.

57 Judge Rosalie Silberman Abella, Commissioner, *Equality in Employment: A Royal Commission Report.* Vol. 1-2, Ottawa: Ministry of Supply and Services Canada, 1984.

58 S.O. 1993, c.35.

59 Ibid, Preamble and Part III.

60 Canada, *Employment Equity Act*, R.C.S. 1985, c.23, proclaimed in force December 12, 1988; as amended by S.C. 1993, c.28, Schedule 111, s.46, assented to June 10, 1993 p.14,175. This Act will remain in force until the new *Employment Equity Act* , S.C. 1995, c.44 is proclaimed.

group members. There was a penalty for failing to file but not for failing to achieve equity and there was no general complaint mechanism or standard for progress.

Ontario enacted much stronger legislation in 1994 with the *Employment Equity Act, 1993*, becoming the first province to extend employment equity to provincially-regulated private sector employers.[61] The law was particularly important in Ontario, given that estimates indicated over 80 percent of new entrants to the workforce will come from the four designated groups by the year 2001.[62] Ontario's law gave unions the right to jointly negotiate employment equity plans with the employer. An independent Employment Equity Tribunal was given the power to review and assess the results of the employment equity plan and to order action if employers had not taken the appropriate steps for ensuring a more representative workforce.[63]

In December, 1995, just as Ontario's *Employment Equity Act, 1993* was being repealed by a new Conservative Government, the federal legislation 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 new federal *Employment Equity Act's* purpose is clear:

> 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.

Although somewhat weaker than Ontario's former legislation, federal employers under the new law, 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 in order to identify employment barriers against the designated groups; prepare a short and long term plans with measures to remove employment barriers; positive policies and practices, and reasonable accommodation; numerical goals and timetables for hiring and promotion, to correct under-representation. 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.

To change the culture of the workplace, employment equity measures and training strategies are needed. In order to deal with an incident, effective complaints and counselling procedures

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61 Edward B. Harvey and John H. Blakely, "Employment Equity in Canada", *Policy Options*, March, 1993.

62 Ontario Pay and Employment Equity Guide, CCH Canadian Limited, Toronto, 1994, para. 60,027.

63 Mary Cornish, *Trade Union Guide to Carrying Out Joint Responsibilities Under the Employment Equity Act, 1993 and its Regulations*. Ontario Federation of Labour, 1994.

must be in place. Employers, working with unions, must be required to implement a three track remedial strategy:

1. Systemic changes to the work environment itself. This places a positive onus upon employers working with unions to audit their workplaces to identify discriminatory practices and create the workplace conditions which ensure women are safe from discrimination rather than attempting to deal only reactively by compensating women for harm suffered.

2. Prevention strategies through communication and training. This will break the silence of those subjected to discrimination and bring the issues out in the open without the stigma of labelling the complainants. It will also make reporting easier.

3. Establishment of proper complaint procedures. This allows those who have been discriminated against to come forward and receive redress.

Employers who can show they are implementing employment equity measures will be able to satisfy Canadian contract compliance laws. In 1985, the federal Government implemented the Federal Contractors Program which required employers with 100 or more employees wishing to enter into contracts of $200,000.00 or more to show that they are taking appropriate measures to maintain a fair and representative workforce. Federal contractors will now have to establish compliance with the new federal employment equity legislation. Various provinces also have contract compliance laws as part of their human rights legislation. For example, in Ontario, it is deemed to be a condition of every contract, loan or grant entered into with the provincial government that there will be no discrimination by the contractor, borrower or grant recipient. The penalty for non-compliance is the cancellation of the contract, loan or grant. [64]

G. A NEW MODEL FOR HUMAN RIGHTS ENFORCEMENT

Urgent Need for Reform

A major barrier facing Canadian women workers in achieving economic equality is the human rights enforcement system . Although Canada and Canadian human rights law has changed substantially over the last twenty years to a point where a substantive, pro-active approach to eradicating systemic discrimination is well-established, the general Canadian human rights enforcement system (apart from specialized pay and employment equity laws) has not changed to reflect this new approach and remains mired in difficulties.

The need for reform of the general human rights law enforcement system is well-established and is detailed in a number of reports on provincial and the federal human rights enforcement

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[64] *Human Rights Code*, R.S.O 1990, c.H.19, as amended by 1993, c.27;1993, c.35., 1994,c.10, and 1994, c.66. For a discussion of the contract compliance, see Judith Keene, *Human Rights in Ontario*, 2nd ed. Toronto: Carswell 1992.

agencies. [65] One of the authors of this paper was the Chair of the Ontario Human Rights Code Review Task Force and its 1992 Cornish Report, *Achieving Equality* sits on the shelf with many others calling for substantial change in the human rights system, including the 2000 report, *Promoting Equality: A New Vision*, prepared by the *Canadian Human Rights Act* Review Panel chaired by the former Supreme Court Justice, G.V. LaForest. These reports detail how persons and groups who experience discrimination are regularly denied proper justice in the human rights enforcement system. The groups who experience discrimination and their advocates have documented their frustration, anger and impatience with the current procedures. Despite recommendations outlined in the Cornish Report and LaForest Report, the government has failed to take any proactive steps to implement them.

Canada's current human rights enforcement system is failing to substantially reduce the discrimination facing women workers. Reform of the system across the country is long overdue and changes are needed urgently to make sure that the lofty principles which are set out in laws and decisions can be translated into real changes for women workers.

Individual Complaints Process

Enforcement of human rights in Canada is processed through an individual complaints system whereby all complaints are subject to a screening process by a government funded human rights agency or commission. The agency or commission determines whether the complainant will have access to a hearing of the complaint.

Several problems have been identified with the complaints system which are only briefly summarized below:

- Resources are concentrated on the complaints process and investigation. The Auditor General reviewed the federal individual complaints system in 1997-98 and concluded that "…the approach that has evolved is cumbersome, time-consuming and expensive." Human rights commissions are viewed as more concerned with weeding out complaints at the expense of pursuing legitimate complaints.

- There is a perception that meritorious complaints are dismissed because of lack of resources. The Auditor General found that from approximately 6550 complaints filed with the Canadian Human Rights Commission between 1988 and 1998, 67% were dismissed at the screening stage and only 6% were sent to Tribunal for a hearing. This problem has resulted in stakeholders demanding direct access to the hearing Tribunal.

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[65] *Achieving Equality: A Report on Human Rights Reform*, Ontario Human Rights Code Review Task Force: June 26, 1992 (Chair: M. Cornish) [hereafter "Cornish Taskforce Report"]; *Promoting Equality: A New Vision*, Canadian Human Rights Act Review Panel: June 23, 2000 (Chair: G.V. LaForest) [hereafter "LaForest Report"]

- There are long delays before a decision is made about a complaint – anywhere from two to five years. Many of the time delays are within the Commission's control or the Commission is unable to enforce deadlines. For example, the Commission has no power to ensure that the Respondent to the complaint file a response according to any deadline. The delays are also the result of large backlogs.

- Complainants lack control of their complaints since the Commission will investigate the complaint without always disclosing documents and communications in the course of investigation. Complainants are often left in the dark about the progress of the complaint, leaving them to feel disempowered.

Direct Access Enforcement of Workers' Rights

Recommendations have been made to reform the current human rights enforcement process from a complaints system administered by agencies or commissions to a direct access system which would empower individuals to take a complaint directly to the Tribunal (with public legal assistance).[66] The direct access system is an alternative way to address the shortcomings of the current enforcement procedures outlined above.

By removing the complaints investigation stage from the Commission in the processing of complaints and allowing claimants direct access to a hearing of their claim, we envision a role for the Commission where it will have more time and resources to pursue proactive protection of human rights and enforce remedial orders issued by Tribunals.

Cornish Task Force Model - *Achieving Equality*

The pro-active and systemic enforcement model proposed in *Achieving Equality* outlined below flows from the new understanding of how to achieve equality. The enforcement system proposed by the Cornish Taskforce Report is built around four cornerstones for achieving equality:

- a consumer perspective which empowers and supports those who experience discrimination so that they may have direct input to the methods used in achieving equality;

- a community-driven focus which empowers the regions of Canada and their many communities to play a major role in ensuring a strong and responsive human rights system;

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[66] LaForest Report and Cornish Taskforce Report

- promotion of a compliance culture throughout all federal institutions requiring equality providers to adopt proactive measures and policies to remove the burden on individuals to file complaints;

- an effective but accessible claim resolution process using mediation or adjudication where compliance is not forthcoming.

Cornish has also proposed a new enforcement model for the review conducted recently of the *Canadian Human Rights Act* based on the *Achieving Equality* model. The new proposed human rights enforcement system has four key components:

- A revitalized Human Rights Commission (Human Rights Canada) which will play a strategic, proactive role to overcome systemic discrimination;

- An Equality Rights Tribunal to provide timely access to trained, full-time human rights adjudicators;

- An independent, community-based Equality Services Board which will assist people with human rights claims;

- An Equality Rights Appointments Committee to recommend candidates to the Government for key positions in the new system.

The proposed new human rights system will have:

- empowerment of the claimant community who now have direct access to a hearing of their claims; can direct their claim presentation and determine the approach of dispute resolution through mediation and\or adjudication;

- a revitalized Rights Commission to be known as for eg. "Human Rights Canada" which would take on a strong role in acting against discrimination and in favour of equality by taking strong proactive systemic initiatives;

- an expert Tribunal, known as the Equality Rights Tribunal, encompassing human rights (including pay equity and employment equity) and offering either mediation and\or adjudication services as equally respected ways of resolving claims disputes;

- an Equality Services Board representing the claimant community in all the regions of the governing jurisdiction and providing consumer-oriented and community-driven advocacy services to claimants through

    - establishing Equality Rights Centre(s) in each province staffed primarily by lay advocates to represent claimants;

    - the development of specialized units of expertise in grounds and areas covered by the particular legislation; and

- strategic partnerships with equality seeking groups.

- establishment of a Significant Case Fund to assist equality seeking groups to bring forward test cases to achieve broad-based systemic change.

- a new independent status for human rights bodies including the naming of an Equality Rights Appointments Committee composed of respected human rights leaders who would recommend to the government candidates for the senior appointments in the new system.

- the new Human Rights Canada, unlike its predecessors, will leave behind the burden of investigation, settlement, screening and carriage of all the claims filed and focus on its existing mandate to achieve equality through systemic change.

- establishment of links with those responsible for ensuring equality including employers and accommodation and service providers through a Commissioner for Compliance Services who would provide assistance on techniques and practices for implementing equality;

- where necessary, providing human rights adjudicators with powers to fashion strong proactive remedies and enforce them effectively;

- provisions ensuring non-compliance is met with serious sanctions;

- amendment of the existing human rights laws' purpose clause to incorporate an understanding of systemic discrimination and the importance of positive measures;

- measures requiring that the Government assume a leadership role in advancing equality rights; and

- provision for Human Rights Canada to plan and implement strategic education initiatives and training as a key enforcement strategy to ensure, advance and maintain a culture of equality.

Proposed Guiding Principles

The proposed enforcement system is guided by the following principles which have been used to assess the strengths and weaknesses of different models of enforcement;

- The system should be geared to promote equality and overcome discrimination for disempowered groups.

- The system should be capable of achieving significant results to overcome the systemic discrimination which has been practised against certain individuals and groups in Canada because of their race, ancestry, place of origin, colour, ethnic

origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, family status and handicap.

- The system should be timely, accessible, equitable, effective and empowering to persons and groups who experience discrimination.
- The system should incorporate a focus on discrimination faced by groups and a procedure that makes enforcement accessible to them.
- The system should be accountable to people who experience discrimination. Regular monitoring and accountability mechanisms should be built into the system.
- The system should fairly consider the legitimate interests of those responsible for ensuring equality.
- The system should assist equality seeking groups to develop resources, expertise, and confidence to claim their rights.
- Claimants should have control over their cases.
- The system should provide quick access to a hearing.
- The system should have remedies which are monitored and enforced.
- The system should provide options and assist to the claimant to deal effectively with the many different kinds of discrimination (the different grounds of discrimination covered by the *CHRA*, as well as multiple discrimination; the different settings covered by the *CHRA*; individual and systemic cases).
- Resources should be provided to assist people in obtaining their rights under the *CHRA*.
- The independence, expertise, credibility, representativeness and effectiveness of any agency should be ensured.
- The system should be based on, and should promote, the indivisibility of human rights and solidarity. It should promote unified, strategic planning and leadership by equality seeking groups to monitor and advance human rights in Canada as a whole.

H. ROLE OF UNIONS IN THE ENFORCEMENT OF WOMEN WORKERS' RIGHTS

Government cutbacks and the trend towards "flexible" workplaces have rolled back the legislative "teeth" of rights enforcement. For example, human rights agencies are under-staffed

with huge backlogs and are unable to enforce their broad powers. In Ontario, employment standards legislation has been gutted to allow for a sixty-hour work week and employment equity legislation has been repealed.

To ensure that women workers' rights are not eroded by the government of the day, collective action in the labour force is one method to ensure that rights gained are maintained and enforced. Proactive Canadian equity legislation has generally identified an essential role to be played by trade unions in the achievement of equity in the workplace. This role varies from a co-management role in Ontario's *Pay Equity Act* where the unions jointly develops with the employer the equality measures and a consultative or collaborative role under the Federal *Employment Equity Act.*[67]

While employers and governments often speak of the importance of labour being cooperative and not adversarial and seeing themselves as in partnership with the employer, they often forget the importance of ensuring such a partnership when it comes to identifying and eliminating discrimination. Co-management or co-operation with the bargaining agent is often inconsistent with the Canadian style of management which is still struggling with a top-down decision-making process rather than a collaborative industrial relations system. The private enterprise model of North America still seems rooted in competition and conflict where an imbalance of power in favour of the employer is seen as essential. Industrial democracy and equality have often been seen as incompatible with such a model.

On the other hand, some more sophisticated Canadian employers see that sharing power with their employees and\or their representatives pays off in terms of higher productivity, better quality of work, and larger profits in the end. Giving workers more freedom, responsibility and "equity" leads to more productive and energetic workers dedicated to the advancement of the enterprise's interests. They see that in those circumstances, global competitiveness cannot be far behind.

Unfortunately a number of Canadian human rights agencies have also adopted a fairly adversarial approach towards unions seeing them as agents of discrimination rather than agents of change. While there is no doubt that Canada's unions, many of which are male-dominated, have engaged in discriminatory practices, unions have also been in the forefront for years of lobbying for progressive equity laws and negotiating for collective agreements which protect women workers.

Specifically, collective bargaining and the laws which encourage and promote collective bargaining have played an important role in pay equity enforcement. Compared to non-organized workers, women union members have more job protection, earn more money, have a smaller wage gap from men, have better benefits, healthier and safer workplaces, more training and an advocate for change and protections.[68] This approach is in line with

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[67] Mary Cornish, Karen Schucher, Amanda Pask, *Canadian Labour Congress Trade Union Guide to the Federal Employment Equity Act,* September, 1998.

[68] Mary Cornish and Lynn Spink, *Organizing Unions*, Toronto, Second Story Press 1994, Chapter 1.

international standards which stress the importance of collective bargaining. The ILO Committee of Experts, who are responsible for enforcing these international standards have strongly endorsed the importance of reconciling and integrating labour and equality rights laws, labour legislation and standards arrived at through collective bargaining between employers and unions and general anti-discrimination laws applied by specialized bodies and courts.[69]

The effective protection of women workers' rights requires protection of trade union rights and the corresponding right of workers' to collectively bargain terms and conditions of employment. In terms of enforcement and compliance, the dispute resolution processes in collective agreements serve as an effective and efficient tool in making women workers' rights a reality.[70]

In addition, we propose that human rights commissions should work together with trade unions when fashioning remedies (for example, as it relates to monitoring or audits of workplaces). Unions have pursued a number of different collective bargaining tools to reduce the wage gap, including bargaining for equalization of entry level rates for comparable male and female work, equalization of specific comparison groups, equalization of increment steps for male and female work, across the board wage settlements based on the same measure (rather than percentage increases), and bottom-end loading to add extra increases for lower paid workers. [71] Legislation on equal pay helped unions push these claims.

Women's participation in both the membership of unions and leadership is growing. Women now represent 45% of all union membership.[72] As a result, unions are adopting gender equality issues as workers' issues. For example, unions are initiating pay equity challenges.[73] Non-unionized individual employees often do not have resources to challenge employers or governments. Furthermore, non-unionized employees do not have access to certain avenues such as the arbitration process and are forced to rely on very slow and limited forums of human rights tribunals and courts. In Ontario, for example, the unions such as the Ontario Nurses' Association, the Service Employees International Union, Local 204, and the Canadian Union

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69 See also the Beijing Declaration Report of the Fourth World UN Conference on Women, above, note 9; Article 178, where signatory governments, including Canada recognized "collective bargaining as a right and as an important mechanism for eliminating wage inequality for women...".

70 Penni Richmond, Kate Hughes, Karen Schucher, "The Role of Unions in Furthering Women's Equality", prepared for the LEAF National Forum on Equality Rights, Transforming Women's Future: Equality Rights in the New Century, 4-7 November 1999, Vancouver, B.C.

71 Mary Cornish, *Equal Pay: Collective Bargaining and the Law*, above, note 26 , pp. 23-30.

72 Penni Richmond, Kate Hughes, Karen Schucher, "The Role of Unions in Furthering Women's Equality", *supra*

73 *Public Service Alliance of Canada v. Canada (Treasury Board)* (unreported case [1999] F.C.J. No. 1531 of Evan J. dated October 19, 1999)

of Public Employees carried the burden of developing the case law in the area of pay equity. Non-unionized workplaces benefitted from these union initiated cases.[74]

In a workplace where wage discrimination is a major issue, the union can identify possible strategies including negotiating pay equity through the collective bargaining process or pursuing a complaint under the human rights legislation. Collective bargaining is a powerful tool. The employer must negotiate terms and conditions of employment for all employees with the union which includes an effective dispute resolution process through arbitration.

The following are examples as it relates to the specific areas of pay equity and employment equity. Unions not only incorporate legislated standards for equality rights and benefits, but unions may build upon and expand upon these rights and benefits not otherwise available to non-unionized workers.

- Women in unions receive better wages than non-unionized workers. The average hourly wage of women in unionized jobs in 1999 was more than $5.00 (or 31%) higher than the average wage of women non-unionized jobs.[75]

- 27.6% of workers covered by major collective agreements contain a provision calling for equal pay for work of equal value. Unions have negotiated formal job evaluation plans and elimination of pay grades occupied by lower paid women.[76]

- Non-discrimination clauses are found in 60.5% of major collective agreements. In the absence of employment equity legislation at the provincial level, unions can negotiate equity plans.

The union's role is to be a "watchdog" to ensure that the employer complies with its obligations to deal with discrimination in the workplace. The Union may seek to enforce the employer's obligations through the following avenues:

- Negotiating a collective agreement on behalf of employees in a workplace. The collective agreement governs the employment rights and benefits for all employees in a defined bargaining unit. Collective bargaining provides employees with job security while negotiating terms and conditions of employment and bargaining power with tools such as strikes and picketing.

- Enforcing the collective agreement to ensure that pay equity and employment equity are upheld in the workplace.[77] The dispute resolution mechanisms in the

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74 Ibid.

75 Jackson and Schellenberg, at 10

76 Ibid. at 18-19

77 The Supreme Court of Canada has held that a union's failure to seek or agree to anti-discrimination remedies in the workplace will make the union liable: *Central Okanagan School District v. Renaud* (198) 95 D.L.R. (4th) 577 (S.C.C.)

collective agreement, i.e. the grievance arbitration process, is faster and less informal than court proceedings or the human rights procedure. The union has input in who will be the decision-maker and arbitrators have broad remedial powers to order both individual and systemic remedies. The arbitrator has the power to interpret the collective agreement as well as apply employment related legislation, such as human rights legislation and minimum standards statutes.

- Pursuing statutory employment rights. Unions can enforce human rights, pay equity, and employment equity legislation by bringing their own complaint or application or provide support and representation for individual members who bring a complaint or application. This support includes access to legal services which would otherwise be too expensive for individuals. In jurisdictions with pay equity legislation, unions may be directly involved in negotiating pay equity agreements and taking complaints to the enforcement tribunals where it believes that the employer is not meeting its obligations.

- Challenging government's attempt to rollback women workers' rights. Unions will often have greater resources than non-unionized employees to fight regressive legislative changes to workplace rights. For example, in Canada, unions have used the *Canadian Charter of Rights and Freedoms* to challenge government attempts to revoke rights and benefits gained. The Service Employees International Union, Local 204 successfully challenged under the equality sections of the *Charter* the Ontario government's decision to repeal provisions in the *Pay Equity Act* which provided for a proxy method of pay equity comparison.[78]

- Holding policy makers accountable. Unions have been involved in lobbying government to legislate rights and benefits in the workplace.

V. CONCLUSION

Many Canadian workers still face pay and employment discrimination because they have not been able to effectively use existing legislative protections.

To the extent that Canada's equity laws are successfully enforced, unfortunately their success or anticipated success will be or has been the source of their demise or limitation. For example, to the extent that pay equity laws are effective in increasing the compensation of "women's work" to comparable "men's work", it is at the same time increasing the labour costs of employers. Seen in isolation, this can put such laws in direct conflict with the deficit-cutting

[78] *SEIU Local 204 v. A.G. (Ont.)* (1997), 35 O.R. (3d) 508 (Gen. Div.). Another example of using the *Charter* to challenge regressive government action is *Ferrell v. A.G. (Ont.)* (1997), 149 D.L.R. (4th) 335 (Gen. Div.) when the government repealed the *Employment Equity Act* in Ontario. This challenge was unsuccessful.

agendas of certain conservative governments and the cost-cutting drive of certain businesses. On other hand, given that women workers are the workforce of the future, full and equal integration of those workers into the economy is essential for economic prosperity.

Overall, the women who have the greatest difficulty in accessing equity rights under the existing laws are primarily non-unionized women; women working in the private sector; and women working in predominantly female workplaces. Pro-active measures are necessary to ensure legislative rights to equity reach these women and enforcement mechanisms are accessible to translate these rights into reality.

The challenge will to be harness the equity agenda so that women will be given access to economic justice and governments and businesses will reap the benefits of a diverse workforce.

SOURCES

Mary Cornish, William Kaplan and Paula Rusak, "Mediating Human Rights, Sexual and Other Harassment Claims: Some Practical Suggestions:, prepared for the CBAO -CLE on "Human Rights in the Unionized Workplace: Evolving Rights, Responsibilities and Remedies, April 23, 2001, Toronto.

Mary Cornish and Fay Faraday, "Equality Rights versus Deficit Reduction - *SEIU Local 204 v. Attorney General (Ont)",* presentation to the Law Society of Upper Canada "Women and Law in the New Millennium speaker series, March 13, 2000.

Mary Cornish and Karen Schucher, Guide to Bargaining for Equity, prepared for the Elementary Teachers Federation on Ontario Women's Collective Bargaining Conference, February 25-26, 2000.

Mary Cornish "Achieving Equality: A Proposal for a New Canadian Human Rights Enforcement System". Presentation to Transforming Women's Future: Equality Rights in the New Century A National Forum on Equality Rights Presented by West Coast LEAF, Vancouver, British Columbia, November 4-7, 1999 and Submission to Canadian Human Rights Act Review Panel.

Mary Cornish and Fay Faraday, "The Future of Pay Equity Enforcement in Canada, Presentation to Transforming Women's Future: Equality Rights in the New Century A National Forum on Equality Rights Presented by West Coast LEAF, Vancouver, British Columbia, November 4-7, 1999

Mary Cornish and Fay Faraday, "Strategies for Achieving Employment Equity" Presentation to Transforming Women's Future: Equality Rights in the New Century A National Forum on Equality Rights Presented by West Coast LEAF, Vancouver, British Columbia, November 4-7, 1999

Mary Cornish and Karen Schucher, “Human Rights and Administrative Justice Going into the Year 2000". Prepared for the Annual Conference of Ontario Boards and Agencies, November 18-19, 1999.

Mary Cornish “Canadian Compliance with Beijing Platform for Action Pay and Employment Equity Requirements”, Presented to International Seminar on Women’s Rights organized by Human Rights International Alliance London, United Kingdom, September 17-18, 1999
Mary Cornish and Fay Faraday, “Where Do We Go for Equity? Strategies for Achieving Pay Equity and Employment Equity”. Prepared for the Canadian Association of Labour Lawyers 8th Annual Conference, 29 Apr.-May 2, 1999 in Toronto.

Dr. Pat Armstrong and Mary Cornish, Report for Jjämställdhetslagsutredningen (the Swedish Government’s *Equal Opportunities Act* Committee) on “Equal Pay for Work of Equal Value in Canada - The Federal, Ontario and Quebec Experience. June 9, 1999.

Mary Cornish, Karen Schucher, Amanda Pask, *Canadian Labour Congress Trade Union Guide to the Federal Employment Equity Act*, September, 1998.

Mary Cornish “Summary of Recent Federal Pay Equity Rulings: *CEP et al v. Bell Canada and PSAC v. Treasury Board* paper presented at Seminar entitled ”A Tactical Briefing - Federal Pay Equity -A Practical Guide to the Shifting Landscape”, Ottawa, Ontario, December 8, 1998.

Mary Cornish,“Employment and Pay Equity in Canada - Success Brings Both Attacks and New Initiatives” prepared for Conference on Human Resources in the Canada/US Context and in a Changing World: The Impact of NAFTA on Human Resources Canada/United States Law Institute Case Western Reserve University School of Law, April 19-21, 1996. Published in *Canada-United States Law Journal*, v. 22, 1996.

Mary Cornish and Suzanne Lopez, "Changing the Workplace Culture Through Effective Harassment Remedies" *Canadian Labour and Employment Law Journal*, 3 CLELJ 95.

Pat Armstrong and Mary Cornish, “Restructuring Pay Equity for A Restructured Work Force: Canadian Perspectives” Presentation to the Conference “Equal Pay in a Deregulated Labour Market” sponsored by the Gender Research Centre, Middlesex University and the Pay Equity Project, June 7-8, 1996. Published in the April, 1997 issue of *Gender, Work & Organization*, published by Blackwells, Oxford, U.K.

Mary Cornish, *Trade Union Guide to the Employment Equity Act, 1993* prepared for the Ontario Federation of Labour, 1994.

Mary Cornish and Lynn Spink, *Organizing Unions* - Second Story Press, Toronto, January, 1994.

"Towards Service Equity" - A Report of the Service Equity Committee of the Society of Ontario Adjudicator’s and Regulators, October, 1994.

"Achieving Equality - A Report on Human Rights Reform", Report of the Ontario Human Rights Code Review Task Force, June 1992.

Mary Cornish and Dr. Pat Armstrong, "Equal Pay and Job Evaluation: The Ontario Experience" presentation to the ETUC/TUC Seminar on Equal Pay, Job Evaluation and Job Classification, Oxford, July, 1992.