REDRESSING GENDER DISCRIMINATION IN EMPLOYMENT: THE CANADIAN EXPERIENCE

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INTRODUCTION

Canadian women continue to share with the world's women a common labour market experience - widespread and substantial economic inequalities. This is true, regardless of their level of income and whether they work in the formal or informal economy and whether they are employed or self-employed.[1] At the same time, Canada, like other countries, continues to reap the benefit of women's work which is of crucial value to the economic performance of the country. Women support themselves, their children, spouses, parents and communities. Women's work plays a key role in the UN world ranking of Canada near the top for highest quality of life and yet such work is rewarded with unequal pay and workplace discrimination.[2]

While there have been substantial improvements in Canadian women's labour force participation rates, with women accounting for nearly half the labour force, this has yet to yield true socio-economic equality and empowerment for women.[3] This is graphically revealed by the steady increase over the past two decades of poverty rates for Canadian women and their children. Almost 52% of families with children headed by sole support mothers were poor in 1970 and that figure has now increased to 56%.[4] A significant wage gap continues to exist.

Women's full integration into the labour market continues to be resisted and surrounded by patriarchal stereotypes, prejudices and culturally-based expectations about gender roles and what constitutes "valuable work" and equitable working conditions. [5] Racism and prejudice against aboriginal women, women of colour, immigrant and refugee women and ablelism against women with disabilities has created a further underclass of disadvantaged women in Canadian society.[6] Further compounding these disadvantages are the challenges women face in continuing to bear the double burden of balancing the demands of their paid work and their "unpaid care work" in sustaining families and communities.[7]

Redressing gender-based labour market discrimination is one of the central discrimination issues facing national, regional and international institutions, legislators, human rights agencies, employers and unions. Engendering a country's labour market requires a multi-faceted approach.[8] International human rights instruments call for governments, employers, unions and civil society to take both legislative and non-legislative pay and employment equity measures to redress this discrimination. The success of these measures can ultimately be measured by one test - have they lead to a measurable and real reduction in the inequalities faced by women.

This paper focusses on the achievement of labour market equality through engendering Canada's labour law system which governs its labour market. This requires enacting and enforcing of laws which work to eliminate workplace inequalities and promote women's equality of opportunity. Effective enforcement means that women workers are empowered and enabled to achieve labour force equality through the rights and protections found in such in such laws.[9]

Canada has taken some significant steps towards engendering its labour law system. This has been done through the development of pro-active, results-based equality approach and the passage of some pro-active specialized pay and employment equity laws.[10] Yet much remains to be done. The progressive laws Canada has are often more positive in principle than in reality with many not effectively enforced and translated into workplace changes.[11] These laws do not apply to everyone, some have been repealed, governments have underfunded the agencies which enforce them, and employers resist their implementation.[12] As well, other laws are not

progressive and in many situations, there is a vacuum with governments failing to take any legal action.[13]

This paper will explore the theme of women workers' rights enforcement and remedies in the context of the Canadian experience with challenging gender-based discrimination through pay and employment equity laws and 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.

Parts I-IV of the paper set the context for the discussion of engendering Canada's labour law system. Part I reveals the patterns of gender discrimination found in Canada's labour market by reviewing five significant trends affecting women's unequal employment situation and highlighting the impact of globalization and state and economic restructuring. Part II sets the international legal framework for Canada's labour law system by reviewing Canada's equity obligations under the various UN and ILO equality instruments and its regional obligations under the North American Agreement on Labour Cooperation ("NAALC") and the Organization of American States Declaration of Human Rights. Part III then sets out the legal framework which Canada has developed to address gender-based employment discrimination. Part IV reviews the substantive, pro-active equality approach which has driven Supreme Court of Canada jurisprudence and influenced the development of Canada's equality laws.

With this context set, Part V and VI reviews and analyzes how Canada's equality laws have been implemented. This is done by reviewing key cases which have been litigated using Canada's general human rights laws, its specialized pay and employment equity laws and its *Charter of Rights and Freedoms* which governs government action.[14] This provides a helpful focus for addressing the challenges of enforcing equity effectively. Finally, Part V of the paper highlights some of the lessons that have been learned and the need for multi-pronged transformative measures.

PART I GENDER DISCRIMINATION IN THE CANADIAN LABOUR MARKET

Gender-based employment discrimination is the result of a complex set of social, economic and political forces and prejudices within the workplace and society as a whole. The strategies required to eliminate such discrimination must address the complexity of the forces and cultures which permit it to flourish in the first place. Equality laws must be based on a specific and clear understanding of the social, economic and political labour market barriers facing women.[15]

Discrimination is often based on an assumption of white, male, able-bodied or heterosexual superiority. It is, therefore, commonly interwoven with discrimination on other factors such as race, ethnicity, indigenous status, disability or sexual orientation. The gender-based pay and employment discrimination suffered by multi-disadvantaged women is often different and is usually more acute. This reality must be considered and addressed in identifying and redressing discrimination remedies.[16]

Five Significant Trends

The labour market for women in Canada has been marked by five significant trends that, while displaying some progress in women's share of both jobs and wages, demonstrate the persistent systemic gaps that exist between men and women across the spectrum of employment rights and benefits. These trends, which also exist world-wide, include women's increased participation in the labour force; women's modest gains in remuneration; the continuing occupational segregation and income gaps between male and female workers; women's continuing struggle to reconcile employment and family responsibilities; and women's concentration in the informal economy. The burden of inequality falls greatest on women workers where poverty, the informal economy, weak employment regulation, racial and disability discrimination and subjection to gender-based violence are most pronounced.[17]

(i) Women's Increased Participation in the Labour Force

In the past thirty years, Canada has witnessed a dramatic increase in the share of women who are part of the paid labour force. In 2003, 57% of all women aged 15 and over had jobs, up from 42% in 1976.[18] In contrast, the proportion of men who were employed in 2003 (68 %) was well below the figure recorded in 1976 (73%). Women accounted for 47% of the employed work force in 2003, up from 37% in 1976.[19] Equally significant are the relatively large number of employed women who work part-time. In 2003, 28% of the women in the paid work force, worked less than 30 hours per week at their main employment, compared with 11% of employed men.[20] In 2003, around one in five female part-time employees said they worked part-time because of personal or family responsibilities.[21]

(ii) Wage Gap between Men and Women Persists

Despite the increased participation of women in the workforce, women in Canada continue to earn less than men. A substantial earnings gap between the men and women persists and has even widened slightly.[22] In 2000, the average employment income for full-time, full-year female workers was equal to 70.8 percent of average employment income for men versus 70.9 percent in 1995. The wage gap found at all levels of education, has widened for most educated women workers. For university graduates, the wage earnings have fallen from 70.8 percent in 1995 to 67.5 percent in 2000.[23] In 2001, women accounted for 76.5 percent of the share of the lowest-paying occupations and earned less on average than men in every single low-paying occupational group with the exception of babysitters, nannies and parents' helpers.[24]

Visible minority women in Canada, who account for 1.6 million Canadian women, or about 11 per cent of the female population, are amongst the lowest total incomes of all income group[25]. While women who are not members of a visible minority earn almost 30 percent less than visible minority men, visible minority women earn on average $15,653 less than men and $3,000 less than women not members of visible minority groups.[26]

Aboriginal women face particularly stark income realities. In 1996, the average total income for Aboriginal women was $13,300, over $6,000 less than that of their non-visible minority counterparts.[27] As with visible minority and Aboriginal women, women with disabilities are also subject to double jeopardy, with their wage representing only 86 percent of their female

counterparts without a disability and 70.5 percent of men without a disability.[28]

(iii) Ongoing Occupational Segregation of Women and Men

The majority of employed women in Canada continue to work in female-dominated and low paying occupations, although there has been some decline since the 1980's in the proportion of women in those jobs. In 2003, 70 percent of all employed women were working in one of teaching, nursing and related health occupations, clerical or other administrative positions or sales and service occupations.[29] Men account for only 31 percent of workers employed in these occupations. In 2003, 24 percent of all employed women had these types of jobs, compared with 30% in 1987.[30]

Women have increased their share of total employment in managerial positions. In 2003, 35 percent of all those employed in managerial positions were women, up from 29 percent in 1987.[31] However, women tend to be better represented among the lower-level managers, as oppose to those at more senior levels. In 2003, women accounted for only 24 percent of senior managers, compared with 36 percent of managers at other levels.[32] Equally significant is the relatively few women employed in the natural sciences, engineering, and mathematics. In 2003, just 22 percent of professionals in these occupations were women, slightly up from 1987 when women held 17 percent of these positions.[33]

(iv) Continuing struggle to reconcile family and child responsibilities

In Canada, there has been a dramatic increase of women with children entering the workforce. In 2003, 72 percent of all women with children under the age of sixteen living at home were part of the employed work force.[34] In contrast, female lone parents are less likely than mothers in two parent families to be employed. In 2003, 68 percent of female lone parents with children under age 16 living at home were employed, compared with 72 percent of their counterparts in two-parent families.[35] Domestic and child care responsibilities involved in social reproduction continue to be borne overwhelmingly by women in Canada and this impacts on the economic choices that are available to women and the choices women make which lead to "precarious" work.[36]

(v) Increasing Concentration of Women in the Informal Economy

During the nineties, the number of women counted as self-employed in unincorporated businesses increased by 30% and many of these women were doing individual contracted work that is both intermittent and low paid.[37] In 2003, more than 800,000 women, 11 % of all those with jobs, were self-employed, up from 9 % in 1976.[38] Overall, women accounted for 34 percent of all self-employed workers in 2003, up from 31 percent in 1990 and 26 percent in 1976.[39] The number of private sector service workers, at the same time, has increased significantly as did the number of small businesses, many of which do contract work for the state. The shift to the private sector often means a shift out of coverage by equity law and a whole range of other state benefits and protections as well.[40]

Judy Fudge, a well-known Canadian legal scholar, summarizes the increasing inequality facing Canadian women.

There remains a persistent segregation of men and women into different occupations and high rates of part-time work for women. Women continue to experience a greater risk of poverty than do men. The incidence of poverty among single-adult households is greatest for women regardless of their age or status as a parent. At the same time, women's wages have polarized, as the labour market became increasingly segmented by age, race, immigration status, and educational attainment. The gap in the living situations and life chances among women who are white, born in Canada, well-educated, able-bodied, and live with another adult and women who are members of visible minorities, recent immigrants, disabled and who lack higher level education, labour market skills, and an adult partners has widened. Women of colour, women who are recent immigrants to Canada, and disabled women are more likely to be persistently poor than are other women.[41]

Impact of Globalization and Economic and State Restructuring

Globalization is fundamentally transforming the structure of countries' economies, labour markets, living standards and prevailing gender orders.[42] On the positive side, it has undoubtedly opened some opportunities for Canadian women to improve their position and enter the "new economy" sectors of the global labour force. Yet, as the above-noted trends indicate, even women who are able to obtain standard employment face discrimination in the type of standard employment they have access to, which is often part-time and insecure, and the terms and conditions of that employment. At the same time, there is an increasing reliance both in Canada and world wide on the informal economy with the shift from the male model of so-called "standard" employment to the female and increasingly racialized model of "precarious" employment. [43] Workers', and particularly women workers' rights stand in the way of global business forces as labour lacks capital's mobility advantage and is subject to the threat of global capital moving to regions with lower standards.[44]

The Canadian state has been a critical component in the rising participation of women in the workforce and their increased wages, with decent and professional jobs for women being primarily found in the public sector. The expansion of the state was not only important for women in terms of protection, support and the prohibition of discrimination; it was also important in terms of jobs.

Since the 1980's, Canadian governments have implemented a constellation of economic and social policies to restructure both the private and public sector. Perhaps the most significant consequence from this restructuring was the downsizing of the public sector including cutbacks in education, health care and other social services and programmes and the downsizing of public sector jobs. Between 1991-1994, employment in the pubic sector declined by 61,004 from 2,702,670 to 2,641,666, and a third of this reduction was in hospitals, where women accounted for more than four out of five of the employees and where many female-dominated groups had decent incomes - incomes above poverty line. Many of these women who lost their jobs continued to do the same work but now in precarious jobs for employers with government contracts.[45]

In the Province of Ontario, starting in the mid-1990's, a right wing conservative government implemented policies of cutting back on public sector employment and reducing taxes. The Government repealed pay equity rights for women in predominantly female workplaces, reduced funding for public sector pay equity adjustments, repealed more accessible union organizing laws and the newly passed *Employment Equity Act.* As a result, efforts by women to improve their pay and working conditions suffered serious setbacks. Reduction of public sector jobs disproportionately affected women and visible minorities, among others, who were driven into the informal economy where jobs are insecure and low-paying. Funding crises in the public sector also reduced women's access to day care, retraining and other employment-enhancing strategies. [46]

The author and Dr. Pat Armstrong summarized the impact of restructuring as follows:

> *In sum, restructuring in Canada is having a profound impact on women's work and women's pay. More women have part-time and short term work. Hours of work have become increasingly polarized, although this is not reflected directly in pay difference because many women are not eligible for overtime rates. More women become unemployed because their jobs disappeared and their unemployment lasts longer than in the past. But it is not the so-called non-standard work that is new to women, although there is more of it. What is new is the shift to the private sector, a shift that not only means less employment for women and less pay but also less protection from legislation and fewer of the benefits that only apply in the public sector.*[47]

Judy Fudge has linked the increasing gender-based inequalities in the labour market to trade liberalization policies.

> *The increased inequality being generated in the Canadian labour market is not surprising; economists predicted that under the trade liberalization high-wage countries like Canada would experience widening wage structures because import competition from low-wage countries would adversely affect the wages of low-skilled workers. Earning inequality has increased in Canada. Although the NAFTA, which displaced lower skilled workers in manufacturing, contributed to the increased polarization in earnings, it is likely that the federal government's tight money policy had a more profound impact on employment...According to Richard Chaykowski and Morely Gunderson (2002, 48), globalization inhibits governments from establishing policies that do not have an economic efficiency rationale, but which may exist for purely equity-oriented purposes or to provide what are perceived to be fundamental rights* [48].

The structural and persistent inequalities reflected in the above-noted five trends combined with the adverse impact of globalization and restructuring permeate the economic, social and political lives of Canadian men and women. Together they constitute powerful barriers to the elimination of women's economic discrimination. Gender inequality is so entrenched in labour markets that progress must be made on many fronts in order for women to be able to break out from the web of inequalities they face. Engendering the labour market requires more than

just enacting better workplace labour laws and enforcement measures, although these are essential steps[49]. For women, securing gender justice in labour markets requires a combination of transformative measures which are aimed at every aspect of women's inequality.[50] However, a review of all the required transformative measures lies outside the scope of this paper which instead addresses the area of pay and employment equity laws.

PART II CANADA'S INTERNATIONAL AND REGIONAL HUMAN RIGHTS OBLIGATIONS

Canada's equity laws and policies have been developed within the overall framework of Canada's international and regional human rights obligations.

Canada's ILO and UN Obligations

Canada is signatory to many ILO and UN conventions which prohibit discrimination and require pro-active gender equality measures.[51] In 1995, 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 international gender equality commitments are "an integral part of its policy toward the human development of its people and the sustainable development of the country".[52] Objective 2 of the Plan calls for promoting the valuation of women's paid work.[53] This principle flows from Canada's obligations under *Equal Remuneration Convention* (No.100)[54] 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. Other objectives of the Plan call for various employment equity measures such as the Special Measures Initiative Program (SMIP) which "aims to increase the participation, development and retention of designated groups, and tools to manage diversity of culture and gender within the federal work force".[55]

Attached as Annex A to this paper is a Checklist for Pay and Employment Equity Measures - International Human Rights Obligations. This checklist itemizes the specific pay and employment equity obligations which flow from international human rights instruments and which therefore must guide national laws and policies in this area. These obligations are summarized below.[56]

Pay Equity

The principle of *equal pay for work of equal value* or pay equity is a fundamental labour standard of the highest priority, necessary for building a sustainable, just and developed society. It requires that women's jobs where comparable to men's jobs must have equal compensation. Governments must enact pay equity legislation covering both the public and private sector to ensure that the full and practical realization of the right is guaranteed and achieved "without delay" with the necessary mobilization of adequate resources to achieve that goal. Employers working with unions if any, have a proactive obligation to achieve pay equity in their workplaces by establishing a framework to challenge systemic assumptions and practices that lead to the undervaluing and under-compensating of women's work. [57]

Employment Equity

Like pay equity, the principle of employment equity is also a fundamental labour and human rights standard. It must be guaranteed, requiring equality of opportunity and treatment in employment and occupation for all women, including those who are disadvantaged on the basis of race, colour, indigenous status, religion, disability, political opinion, national extraction or social origin. Women's right to free choice of employment, the right to promotion, job security, equal benefits and conditions of service, and the right to receive vocational training and retaining must be ensured. In preventing employment discrimination, the multiple and intersecting forms of discrimination experienced by individuals must be taken into account.

With respect to both pay and employment equity, Governments must enact laws in the public and private sector to ensure the rights are guaranteed and must mobilize the necessary resources to achieve the right for all workers, full-time and part-time. Unions must be afforded an appropriate role in the process. Both pay and employment equity laws must be enforceable before a competent and expert tribunal, and the remedies must be effective and enforced when granted. [58]

Canada's NAALC Obligations

Canada also has equality obligations as a signatory to the NAALC, which is the labour side agreement to NAFTA.[59] NAALC 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:

> *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.*

Canada's Inter-American Obligations

The Inter-American human rights system of the Organization of American States requires member countries to respect the human rights of all persons in their jurisdiction without discrimination.[60] This is achieved through a number of instruments including the American Declaration of the Rights of Man and the American Convention on Human Rights.[61] Canada is bound by the Declaration but has not ratified the Convention. These obligations are enforced by two OAS human rights bodies - the Inter-American Commission on Human Rights (IACHR) and the Inter-American Court on Human Rights.

Article 7 and 8 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, known as the "Protocol of San Salvador" which has been ratified by 13 OAS member states provides specifically for the right to "just, equitable and satisfactory conditions of work" as well as the protection of trade union rights.

The Commission prepares studies and reports, provides advisory services to member states and requires members states to supply information on measures taken in matters of human rights. The Commission is also charged with receiving and taking on petitions and other communications lodged by persons or NGO's alleging a violation of human rights. The Commission also has "rapporteurships" dealing with issues such as rights of women, indigenous peoples and migrant workers. The Court can make binding orders on states that have accepted its jurisdiction.

PART III CANADA'S EQUITY LEGAL FRAMEWORK

As a federal nation, Canada's gender equality employment protections are found in the Federal Constitution, provincial and federal laws, general human rights laws, laws specific to pay and employment equity, employment standards laws as well as in collective bargaining agreements for unionized employees. Canada's move to establish more effective gender equality laws started with the groundbreaking 1970 *Report of the Royal Commission on the Status of Women* and continued with the 1984 *Royal Commission on Equality in Employment*, headed by Justice

Abella which defined systemic discrimination as follows:

> *Systemic discrimination "means practices or attitudes that have, whether by design or impact, the effect of limiting an individual's or a group's right to the opportunities generally available because of attributed rather than actual characteristics.... It is not a question of whether this discrimination is motivated by an intentional desire to obstruct someone's potential, or whether it is the accidental bi-product of innocently motivated practices or systems. If the barrier is affecting some groups in a disproportionately negative way, it is a signal that the practices that lead to this adverse impact may be discriminatory.* [62]

Canada's progressive pay and employment equity laws were enacted at the federal and provincial\territorial levels only after many years of lobbying by civil society coalitions for enforceable legal protections. Organizations such as Ontario's Equal Pay Coalition, a group of trade unions, church and community groups lobbied from 1976-1987 until finally getting the Ontario provincial government to pass the first *Pay Equity Act.* This law covers the public and private sectors and requires employers proactively to prepare pay equity plans to identify wage gaps by comparing men's and women's work using the criteria of skill, effort, responsibility and working conditions. Necessary wage adjustments to close the wage gap are then phased in at 1% of payroll each year. While employers argued that the "market" should be left to "self-regulate", the Coalition persuaded the Government that not many employers would voluntarily increase their labour costs. Laws which depended on individual complaints from vulnerable women had been proven ineffective. Wage discrimination was a systemic problem.[63]

Accordingly, Ontario's new law recognized that effective enforcement required a system of affirmative steps. The hallmark of this new proactive approach is the combining of a human rights and human resource planning process to carry out this significant workplace change more effectively and efficiently, allowing the parties to set priorities and meet legislated time frames and obligations.[64] The comprehensiveness of the model combines legislative, collective bargaining, adjudicative and enforcement mechanisms to arrive at an effective equality result. This model was also used in Ontario's *Employment Equity Act.*

Proactive Canadian laws have generally identified an essential role for unions in the achievement of workplace equality. This role varies from a co-management role in Ontario's *Pay Equity Act* where the unions jointly develop with the employer the equality measures and a consultative or collaborative role in the Federal employment equity law.

The Equal Pay Coalition was one of the first organizations where trade unions and community groups came together to lobby for change united by a desire to achieve gender pay equity. After obtaining the pay equity law, the Coalition helped people to bring forward pay equity cases, lobbied for amendments, and worked to push the enforcement body, the Pay Equity Commission, to carry out its job effectively. Ontario's Alliance for Employment Equity was a similar organization which lobbied for and obtained the Ontario *Employment Equity Act.* A federal *Employment Equity Act* under a Liberal government was strengthened at the same time in 1995 when Ontario's law was repealed. [65] This law mandates federal sector employers to take pro-active employment equity measures. It also applies to provincially regulated

employers who are part of the Federal Contractors Programme.[66]

Effective in 1985, section 15 of the *Canadian Charter of Rights and Freedoms*, part of Canada's repatriated Constitution, gave the Courts power to strike down laws which discriminated on the basis of sex, race, disability, religion, national or ethnic origin, colour, mental or physical disability, age and/or any other analogous ground. Provincial and federal human rights laws give human rights commissions and adjudicative tribunals under those laws the power to redress discriminatory actions by public and private sector employers and service providers. Many Canadian collective agreements contain anti-discrimination provisions which are enforced through a grievance procedure and arbitration. Many collective bargaining laws also provide that arbitrators have the power to apply and/or enforce public anti-discrimination laws. While a number of provinces have a specialized pay equity law which mandates specialized pay equity requirements enforced by a tribunal. Some provinces only have pay equity provisions in their employment standards laws or, like the Federal government have such provisions as part of their general human rights law.

PART IV THE CANADIAN APPROACH TO GENDER EQUALITY

Systemic Approach to Discrimination

The Supreme Court of Canada, in interpreting human rights legislation, made a number of rulings in the 1980s that have had a significant impact on the effectiveness of Canadian human rights laws. The first major ruling in the *Robichaud* v. *Canada Treasury Board*[67] case held, following the Abella report 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. This case was brought by an individual woman who had been sexually harassed by her supervisor and sought to hold her employer liable for the supervisor's conduct. The Supreme Court of Canada here first articulated the concept of a positive obligation on the employer to establish and to maintain a workplace free of discrimination. The Court also ruled that human rights laws are special laws which are next in importance to the constitution and must be practically enforceable so that discrimination can be identified and eliminated. In *Robichaud,* the Court held 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.*[68]

The Court also ruled in *Action Travail des Femmes v. Canadian National Railway*[69] that special measures or an employment equity plan which included hiring goals are reasonable and necessary positive measures to remedy systemic discrimination. 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 are focused

on identifying whether the effect of practices is discriminatory even if such effect is unforeseen.[70]

Pro-active Requirement for Substantive Equality

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. A substantive equality analysis was expressly adopted by the Supreme Court of Canada in 1989 in its first section 15 decision, *Andrews v. Law Society of British Columbia*[71]. The Court's 1999 decision in *Law v. Canada (Minister of Employment & Immigration)*[72] pulled together the threads of its s.15(1) jurisprudence. Canadian legislation avoids any reference to "intention" and focuses on identifying whether the effect of practices is discriminatory even if such effect is unforeseen.[73]

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. 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. A substantive equality approach takes the analysis a step further by looking at the issue systemically and 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. 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.

Canadian human rights laws have given adjudicators the power to order systemic remedies. Systemic remedies, in contrast with individual remedies which attempt to compensate aggrieved individuals, turn their focus to the source of discrimination, that is, the institution or system that has caused the discrimination to occur.[74]

Intersectional Approach to Discrimination

Finally, those who suffer from multiple disadvantages sought to require the Courts to recognize the different nature of their discrimination. [75] Madam Justice L'Heureux-Dube recognized this reality in *Canada (A.G.)* v. *Mossop*[76].

...categories of discrimination may overlap and...individuals may suffer historical

> *exclusion on the basis of both race and gender, age and physical handicap, or some other combination. The situation of individuals who confront multiple grounds of disadvantage is particularly complex. Categorizing such discrimination as primarily racially oriented, or primarily gender-oriented, misconceives the reality of discrimination as it is experienced by individuals.*[77]

Human Rights Tribunals have begun to recognize that the single-ground approach is insufficient in certain cases. Gender discrimination is experienced differently by, for instance, women of colour. Based on decisions which have been achieved through litigation, the Ontario Human Rights Commission document, *An Inter-sectional Approach to Discrimination: A Discussion Paper* reviews this multi-faceted analysis.[78]

PART V ESTABLISHING PAY AND EMPLOYMENT EQUITY RIGHTS THROUGH HUMAN RIGHTS LAWS

Employment Equity

Rulings issued under Canada's general human rights laws have established important employment equity protections for women.

Action Travail des Femmes

The first case to link challenging negative workplace practices faced by women with employment equity or affirmative action plans was the 1987 Supreme Court of Canada case, *Action Travail des Femmes.* Women workers supported by a Montreal women's NGO complained under the federal *Canadian Human Rights Act* that they were systematically discriminated against in gaining access to male "standard" employment - technical trades in the railway yard. The Tribunal hearing the case found that women working in non-traditional jobs at CN were subjected to a number of discriminatory practices including sexual harassment. The Tribunal ruled that employment equity measures were necessary including a Temporary Measures order. This order required the railway company to hire one woman in every four new hires into certain jobs where the evidence showed that they had been improperly excluded for many years by systemic discriminatory employment practices. The employer appealed and the Supreme Court of Canada unanimously ruled that ending women's discrimination could require an employment equity program of positive measures to "create a climate in which both negative practices and negative attitudes can be challenged and discouraged" in order to "break a continuing cycle of systemic discrimination".[79] In other words, the order provided a remedy not only for the individual women who complained but also to end discrimination for future women workers. 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*

> *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.*[80]

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.*[81]

Affirmative action or employment equity programs as described above acknowledge that existing social and legal arrangements have actively benefitted certain groups and disadvantaged others and special measures re necessary.

National Capital Alliance on Race Relations v. Canada (Health & Welfare)

In this 1997 *NCARR* decision, a Canadian Human Rights Tribunal followed *Action Travail* to impose an extensive remedial employment equity program on Health Canada, a federal government department. The NCARR order included permanent measures, such as management training in equity issues and bias-free interviewing techniques, as well as temporary or special measures that included five years of accelerated targets for the promotion of visible minorities into the senior positions from which they had been blocked by discriminatory practices. The terms of the Tribunal's order are set out in full as Annex "B" to this paper–a useful illustration of the orders which can be achieved through litigation under a general human rights law.

British Columbia (Public Service Employee Relations Commission) v. BC Government and Service Employees Union

The Supreme Court of Canada's 1999 landmark decision in the above-noted case took the principle of substantive equality a step further by establishing important new principles for employers and unions to use in fighting discrimination in workplace standards and addressing duty to accommodate issues.[82] 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* 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.

In striking down an employee fitness test for firefighters on the basis that it discriminated against women and was not a *bona fide* occupational requirement, the Court established a new three-part test for determining whether workplace rules, standards and practices which have a discriminatory effect can be defended on the ground that they are *bona fide* occupational requirements.

> *An employer may justify the impugned standard by establishing on the balance of probabilities:*
>
> 1. *That the employer adopted the standard for a purpose rationally connected to the performance of the job;*
> 2. *That the employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work-related purpose; and*
> 3. *That the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer.*[83]

In elaborating what was required by the third step in this test, the Court reinforced the employer's positive obligation to try to eradicate discrimination.

> *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. ... The standard itself is required to provide for individual accommodation, if reasonably possible.*[84]

This case resulted in a new point of departure for courts, human rights adjudicators and labour arbitrators to impose on employers the significant pro-active responsibility of developing workplace conditions which were inclusive of women and their distinctive requirements.

McKinnon and Ontario Human Rights Commission v. Ontario (Ministry of Correctional Services)

The most significant use of human rights laws to address the issue of racism in employment is the 1998 *McKinnon* case which dealt with the ongoing racial harassment and discrimination of a correctional services worker. In ordering innovative systemic remedies, the Board of Inquiry under Ontario's *Human Rights Code* considered factors such as: the promptness of the

institutional response to the complaint; the seriousness with which the complaint was treated; procedures in place at the time to deal with discrimination and harassment; resources made available to deal with the complaint; whether the institution took the complaint seriously, then provided a healthy work environment for the complainant; and the degree to which action taken was communicated by the complainant. Considering these factors allows human rights tribunals to better assess the deficiencies in the way the place of employment handles systemic discrimination, and can therefore target necessary areas for change.

Human Rights adjudicators have ordered many diverse remedies to address systemic employment discrimination. They have also ordered that third parties monitor the implementation of systemic remedies, in order to ensure compliance and effectiveness. While Human Rights Commissions have typically played this role, as Commission resources are increasingly lowered other third parties may take on the role of monitoring implementation of systemic remedies. Annex "C" to this paper sets out numerous examples of these orders.

Pay Equity

Canada has been the leader in passing pro-active pay equity laws. The first major law covering the public and private sector was Ontario's 1988 *Pay Equity Act*. The health care sector in Ontario was the focus of many of the leading Tribunal and Court decisions and settlements under that law. This was primarily because public sector unions representing health care workers were active members of the Equal Pay Coalition and took an assertive role in carrying out their legal obligations under the *Act* to negotiate in good faith pay equity plans for their members.[85]

The Ontario Nurses Association fought several lengthy battles to achieve a pay equity implementation process and gender neutral evaluation process that will make visible and value the skill, effort, responsibilities and working conditions of those involved in caring and health care work. As a female-dominated public sector union, ONA brought to this struggle its expertise in pay equity, and its willingness to invest time and money in bringing cases before the Tribunal. The public health unit of nurses represented by the Ontario Nurses Association at the Regional Municipality of Haldimand Norfolk was the subject of over 6 major decisions by the Pay Equity Hearings Tribunal concerning a number of important issues in the early years of the legislation. The Ontario Public Service Employees Union, the Canadian Union of Public Employees and the Service Employees International Union also made significant efforts to pursue the pay equity rights of their members.

Cybermedix Health Services Ltd.

This first case in 1989 involved a public health laboratory and was brought by the bargaining agent, the Ontario Public Service Employees Union. It established early on that employers were required to provide bargaining agents with all the necessary compensation and job information necessary for the union to negotiate as an equal with the employer to identify and redress compensation discrimination in a workplace.

ONA v. Haldimand Norfolk (No.6)
CUPE v. Riverdale Hospital (No.1)

These 1990 and 1991 decisions followed on the *Cybermedix* decision and required employers to negotiate in good faith and endeavour to agree on a pay equity plan for the employees in the bargaining unit. The *Haldimand-Norfolk* decision sets out important criteria which continue to guide the "good faith" bargaining of workplace parties in Ontario ruling that all information must be disclosed which will foster rational and informed discussion on the issues necessary to prepare a pay equity plan. This included job class and compensation data and information concerning annual payroll, historical gender predominance of job classes and the employer's proposed gender neutral comparison systems in order to assess the suitability of the proposed systems.[86]

ONA v. Haldimand Norfolk (No.3)

In this third *Haldimand-Norfolk* decision, the Tribunal ruled that nurses at a public health unit funded by the municipal government could look to that government as their "pay equity employer" in order to find male comparators, such as the municipally employed police which were missing from their predominantly female workplace. The Tribunal held that the pay equity employer may be different from the collective bargaining employer and that the criteria to be applied in determining the "employer" for the purposes of the *Pay Equity Act* was different from the tests to applied in other situations: The Tribunal set the following criteria: Who has overall financial responsibility; Who has the responsibility for compensation practices; What is the nature of the business, enterprise or service; and finally What is most consistent with the purpose of the *Act* to redress systemic discrimination in compensation? This decision was upheld by the Courts and had a major impact on the ability of those in predominantly female public workplaces who could not find comparators under the job-to-job comparison method found in the original *Pay Equity Act.* It led to subsequent decisions dealing with public libraries and children's aid societies where those workers were also permitted to look to their funding agency as their employer, a local municipal government and the Ontario government respectively in order to obtain pay equity. This route was subsequently ended as far as making the government the pay equity employer with the amendments in 1992 to the *Act* which brought in the proportional value and proxy mechanisms for pay equity comparisons in predominantly female workplaces without the necessity of defining a new pay equity employer[87].

ONA v. Haldimand-Norfolk (No.6)
ONA v. Women's College Hospital (No. 4)

These two 1991 and 1992 cases set out the criteria to govern the development of a "gender neutral comparison system" in order to make visible and positively value women's work. In these cases, the Tribunal found that health care work is of the sort most characteristic of women's work involving caring, counseling, and other skills often associated with skills learned in the home, by women and from women and thus of little market value when performed by women. In the two cases, the Tribunal revealed the gender bias inherent in two major and commonly used job evaluation schemes. These new criteria were to be used to disrupt the traditional hierarchies and wage relationships which had systemically discriminated against women's work and replicated the existing male-dominated compensation structures.

OPSEU v. Management Board Secretariat (No.6).

This 1998 Tribunal decision dealt with a complaint by government nurses employed by a government psychiatric facility who challenged the validity of the Government/OPSEU Plan but this complaint was dismissed by the Tribunal in a ruling. In this ruling, the Tribunal upheld the use of the "policy-capturing" methodology which involved developing a statistical model of specific job content divided into factors and then using modeling to determine and remove gender effect from that model. It was found to be a reasonable model based on the large size and variation of the job classes in the province-wide unit and the brief time for negotiating the plan. [88]

Nishimura v. Ontario Human Rights Commission

Efforts were also made to use general human rights laws to secure relief from gender-based pay discrimination. The 1989 Ontario Divisional Court decision in *Nishimura* established this route. Prior to the enactment of the *Pay Equity Act*, female advertising employees with the *Toronto Star* filed a wage discrimination complaint with the provincial human rights Commission. The Ontario *Code* has a general prohibition against discrimination. The female employees in this case were specifically seeking equal pay for work of equal value. The Divisional Court 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 Court further held that the existence of the employment standards act and the provincial pay equity act did not remove the complaints from the jurisdiction of the Commission. The fact that the *Human Rights 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 decides what standards are to apply within its mandate." [89]

PART VI USING THE *CHARTER* TO ADVANCE WOMEN'S PAY AND EMPLOYMENT EQUITY RIGHTS

The section 15 equality provisions of Canada's *Charter of Rights and Freedoms* have also played an important role in the process of expanding and enforcing the equality rights of working women. The *Charter* has been used to require governments to comply with their section 15 pay and employment equity obligations in their various roles - as employer, as legislator, and as policy maker.

Employment Equity

Eldridge v. British Columbia (Attorney General)

This 1997 Supreme Court of Canada decision broadened the range of employers subject to the *Charter's* employment equity obligations. It held that where a private entity, such as a hospital

is acting in furtherance of or acting to implement a specific government program or policy, (such as the public health care system) it will be considered "government" for the purposes of the *Charter*.[90] In that case a hospital was required under section 15 to provide hearing interpretation services to a hearing impaired patient

Perera v. Canada
Delisle v. Canada

The 1999 *Perera* ruling of the Federal Court of Appeal held that government agencies could be held accountable under s. 15 of the *Charter* for systemic discrimination in employment. Federal government agency employees claimed that with respect to matters such as promotions, work assignments and performance appraisal reviews they had been subject to systemic and individual discrimination on the basis of race, national and ethnic origin and colour contrary to the *Charter*. They sought systemic employment equity remedies including hiring programmes under s. 24(1) of the *Charter*. The federal employer brought a motion to strike the statement of claim as disclosing no reasonable cause of action. The Federal Court of Appeal ruled the statement of claim could stand. Referring to the systemic remedies that Canadian Human Rights Tribunals had awarded in *Action Travail* and *Robichaud*, it held that courts must have the same power under section 24 to impose similar remedies when they deem it appropriate." In the 1999 *Delisle* case, the Supreme Court of Canada also held that the Court had the same power under section 24(1) as a human rights tribunal would have to order systemic employment remedies to counter systemic discrimination.[91]

Ferrel v. Ontario (Attorney General)

The 1995 repeal of Ontario's *Employment Equity Act* led four individuals in the Ferrel case to unsuccessfully challenge the repeal as being contrary to s. 15(1) of the *Charter*. The Courts found that the government was entitled to repeal the law as the act of repealing was not government "action" to which the *Charter* applied. This decision has been widely criticized by equality-seeking groups. Leave to appeal the 1998 Court of Appeal decision to the Supreme Court of Canada was refused.

Pay Equity

The use of the *Charter* to redress inequities has resulted in significant wage gains for women as well as a major setback.

SEIU Local 204 v. Attorney-General (Ont.)

The Service Employees International Union, Local 204 in 1996 in defence of its Ontario predominantly female nursing home membership and other public sector women brought a challenge under section 15 of the *Charter* alleging that the Ontario Government's 1996 repeal of the proxy comparison method was gender discrimination. The new Conservative Government in June, 1995 immediately cut pay equity funding for public sector pay equity adjustments. Then through *Schedule J* to the *Savings and Restructuring Act, 1996,* it repealed the proxy comparison method in the *Pay Equity Act* alleging it was too costly and unworkable

and capped the adjustments owing at 3% of the previous years' payroll. The proxy adjustments would have resulted in an annual wage bill at the maturity of all the proxy pay equity plans of $484 million annually.[92] As of 1996, the unions had already negotiated proxy pay equity plans and employees had started to receive their annual pay equity adjustments which were owing annually starting in January 1, 1994. These plans covered approximately 100,000 women doing work in predominantly female workplaces such as nursing homes, daycare centers, social service and community agencies.

In September, 1997, the Court ordered the reinstatement of the proxy method provisions in the *Pay Equity Act.* The Ontario Superior Court of Justice struck down *Schedule J* of the *Savings and Restructuring Act, 1996*, since it "created discrimination" in violation of section 15 by repealing the pay equity rights of those who worked in over 4,000 government-funded workplaces. By the government's own estimate, the 3 per cent cap on payment provided for in *Schedule J* represented approximately $112 million or $362 million per year less than the amount all the proxy recipients in the sector should have received at maturity date if *Schedule J* had not been enacted. In other words, the women would only have had their wage gap reduced by 22% and 78% would remain unaddressed. The Court found that this action created discrimination and rejected the Government's argument that the proxy comparison method was faulty and failed to achieve pay equity. Although the *SEIU Local 204* challenge did not specifically put at the issue the requirement of the Government to fund public sector pay equity adjustments, the Court noted in its ruling that these broader public sector community agencies would likely go into bankruptcy if they did not receive government funding for the pay equity adjustments owing.

The *SEIU Local 204* Court ruling was not appealed by the Government and in 1999, approximately $230 million of further public funding was paid out to the 100,000 women in order to bring their pay equity adjustments up to December, 1998. However, at this point, the Government in violation of the intent of the *SEIU Local 204* ruling, and despite a budget surplus, decided to end designated funding of the proxy pay equity adjustments. This left these small public agencies without the necessary funds to pay out the adjustments required by the *Act.*

CUPE et al v. Attorney-General (Ont)

In April, 2001 a coalition of Unions, brought a further *Charter* challenge against the Ontario Government alleging that the above-noted discontinuance of designated pay equity funding was gender discrimination contrary to section 15. The case claimed that the government was perpetuating wage-based gender-discrimination by failing to fund the on-going pay equality adjustments owing to these workers to redress the pay discrimination identified in their wages by the pay equity plans required under the *Act.* After two years of pre-trial proceedings, the Government finally disclosed the documentary basis for its decision and at that point the parties agreed to a mediation process which resulted in a landmark settlement. This settlement, announced in June, 2003 provided that the Ontario Government would pay out $414 million in pay equity funding over a three year period to 2006. This settlement is being paid out to the 100,000 women in over 2500 predominantly female public sector workplaces in Ontario which used the proxy comparison method. [93]

Newfoundland Association of Public & Private Employees v. Newfoundland Treasury Board and Minister of Justice

In October, 2004, the Supreme Court of Canada released its decision dismissing the appeal in the above case. This decision addresses the extent to which governments can rely on a financial crisis to justify limiting *Charter* rights. In 1988, the Newfoundland Government negotiated a pay equity agreement with some of its public sector employees. The wage gap and pay equity adjustments owing were identified in 1991; the payments were retroactive to 1988. In 1991, just weeks after finalizing the amount owing, the Government passed the *Public Sector Restraint Act* which froze public sector wages, eliminated the Government's obligation to make pay equity payments for 1988-1991, and delayed the time frame for making pay equity adjustments.

The Union filed a grievance arguing that the *Act* violated the pay equity agreement and the *Charter*. The Grievance Arbitration Board found that the legislation violated equality rights under s. 15 of the *Charter* and that the violation was not justified under s.1. Both the Newfoundland Supreme Court and the Newfoundland Court of Appeal ruled that the *Act* violated s. 15 of the *Charter* but that the violation was justified under s. 1. The Newfoundland Court of Appeal called on the Supreme Court to rewrite its entire approach to s. 1 to give greater deference to governments in making choices that violate *Charter* rights. NAPE appealed to the Supreme Court of Canada. In a unanimous decision, the Supreme Court of Canada dismissed the Union's appeal. While the Court found that the provincial legislation violated women's equality rights, it concluded that the violation was justified in light of the exceptional financial crisis that Newfoundland was facing in 1991.

The Newfoundland Government and the other provincial Attorneys General who intervened all argued that the legislation did not violate women's s. 15 equality rights, in particular because the Government did not have a constitutional obligation to enter into the pay equity agreement. The Supreme Court of Canada soundly rejected that argument and found that the Pay Equity Agreement created an existing legal obligation on the Government to end pay discrimination. There was no doubt that women hospital workers had been paid less than men for work of equal value and the Pay Equity Agreement was a significant achievement. The Court underlined that "progress on such an important issue, once achieved, should not be lightly set aside."

The Court acknowledged that women's jobs are "chronically underpaid". It stressed that work is an important part of life and that what people do for a living and the respect or lack of respect with which their work is regarded is a large part of who they are: "Low pay often denotes low status jobs, exacting a price in dignity as well as dollars". As a result the women's interest in pay equity was of great importance. The Court ruled that the effect of the *Public Sector Restraint Act* in 1991 was to affirm a policy of gender discrimination which the provincial government had itself denounced three years previously. With the *Act*, "female hospital workers were being told that they did not deserve equal pay despite making a contribution of equal value". As a result, the Court ruled that the *Act* discriminated on the basis of sex contrary to s. 15 of the *Charter*. With respect to the issue of Section 1, the Court held that justifying a violation of *Charter* rights required a government to prove that (a) the legislation had a pressing

and substantial objective; (b) the substance of the law is rationally connected to the objective; (c) the law impairs the *Charter* right as little as possible; (d) the effect of the law is proportional to its objective; and (e) the positive effects of the law outweigh the negative.

The Newfoundland Government and intervener governments argued that the Court had no power to review any matters relating to a province's budgetary process and policy development. The Supreme Court soundly rejected this argument, ruling that budgetary and policy choices are not immune to *Charter* review. The Court stressed that normally budgetary considerations cannot be relied upon to justify violations of *Charter* rights and that the Court "will continue to look with strong scepticism at attempts to justify infringements of *Charter* rights on the basis of budgetary constraints." To do otherwise "devalues the *Charter* because there are *always* budgetary constraints and there are *always* other pressing government priorities". Nevertheless, the Court found that at some point, a financial crisis can attain a dimension that elected governments must be accorded significant scope to take remedial measures, even if the measures taken have an adverse effect on a *Charter* right. On the particular facts, the Court found that the law had a pressing and substantial objective, finding that in 1991 the Newfoundland Government faced an unprecedented and severe fiscal crisis. The decision suggests that to rely on budgetary considerations to justify a *Charter* violation, there must be a true financial emergency.

The Court found that the *Act* minimally impaired the *Charter* rights because of the scale of the "exceptional" financial crisis (anticipated $200 million deficit) and the cost of implementing pay equity ($24 million, which amounted to more than 10% of the entire projected deficit). The government had invited the union to consult on alternatives for cutting costs and undertook other measures to cut costs (cutting jobs, cutting government services, freezing wages, cutting hospital beds, etc.)

The Court then found that the positive effects of the law were far-reaching since the province maintained its credit rating which enabled the Government to finance the provincial debt. By contrast the effect on the rights of women workers was to defer pay equity and leave the women hospital workers with their traditionally lower wage scales for a further three years.

Finally, the Court expressly rejected the s. 1 analysis proposed by the Court of Appeal.

The Canadian Labour Congress had argued at the Supreme Court of Canada in the NAPE case, that section 1 requires that the government demonstrate that in enacting a law it engaged in decision-making which took into account Charter rights by (a) actively identifying which effects of the legislation have implications for Charter rights; and (b) actively and demonstrably engaging in a process which prioritizes its decision-making to preserve Charter rights and avoid infringements of Charter rights. This approach is consistent with Canada's domestic human rights law and with Canada's international human rights commitments which mandate it to actively "use gender-impact analyses in the development of macro- and micro-economic and social policies in order to monitor such impacts and restructure policies in cases where harmful impact occurs". By failing to conduct the above gender analysis, the CLC had argued that legislatures have in the past erroneously identified pay equity adjustments as a target for retrenchment because they have failed to recognize and treat these adjustments as the fundamental human rights remedies that they are. This results in a false comparison in which

workers in female-dominated job classes are characterized as getting "wage increases" that others are not.

PART VII SOME LESSONS LEARNED

Engendering a labour law system is a complex and lengthy process. Some of the lessons which have been learned from the Canadian experience with advancing equality through laws and litigation are set out below.

The Importance of Laws and Litigation to Equality Advancements

Pay and employment equity rights are meaningless if they can not be translated into reality in the places where women work. This means women's equality rights must be enshrined in laws and such laws must be enforceable ---otherwise they are only a privilege or luxury to be removed when no longer convenient or deemed too costly. Canada's equality seeking groups used a mixed strategy of lobbying for laws and then litigating to enforce those laws. At the same time, unions used these laws to form the basis for collective agreement equality protections which could be enforced under the workplace arbitration procedures. There can be no doubt that substantial progress was achieved as a result of this multi-pronged legal equality strategy.

The Role of NGOS and Unions

Canada's advances in human rights, labour and *Charter* jurisprudence as described above have come primarily as a result of lobbying for laws and litigation by NGO's and unions to compel enforcement of those laws. This started in the 1980's with the Court interventions of the Legal Education and Action Fund. LEAF's predecessor group had lobbied to ensure that Canada's constitution included the section 15 equality guarantee. LEAF organized women lawyers to intervene in *Charter* cases to ensure that section 15 was interpreted to promote women's substantive and not formal equality. Action Travail des Femmes, a women's NGO won the first leading employment equity ruling. The efforts of these NGOs resulted in many of the initial cases interpreting Canada's human rights and *Charter* provisions establishing important precedents consistent with Canada's international equality obligations. Later, many of the important equality cases in both the human rights and *Charter* field were carried forward by unions, including the leading pay equity human rights and *Charter* cases brought forward in Ontario and the *BCSGEU* case. While unions have not always properly defended women's interests, overall Canadian unions have played a key role in working in coalitions with women's groups and using their collective bargaining power and litigation and lobbying actions to push forward gender equality issues.[94]

Armed with the pro-active substantive equality rulings of the early 1980's and the ineffectiveness of complaint-based laws, women through NGOs and Unions sought pro-active pay and employment equity laws which would concretely require employers to the take the necessary planning steps to identify and rectify pay and employment discrimination. This resulted in pro-active pay equity laws like Ontario's *Pay Equity Act* and the federal *Employment Equity Act*. At the same time, once those laws were passed, unions and NGOs like Ontario's

Equal Pay Coalition made substantial efforts to implement those laws. When efforts at the bargaining table did not lead to equitable results, Ontario unions used the adjudicative procedures before the Pay Equity Hearings Tribunal to force employers to comply with the *Act* and to establish precedent-setting decisions which would guide other employers so that further litigation was not necessary.

Unions and NGOs continue to address violations of women's rights through a number of strategies including lobbying for legal reforms, litigating to establish court precedents, supporting the equality role of unions and collectively bargained equality measures, using international equality mechanisms to question Canadian rights violations, and defending the equality role of the state.[95]

The Role of the State

Canadian women recognize the importance of the state as a defender of their equality interests. Women depend on the state for equality promoting laws and to provide equitable employment and funding for services which accommodate women's needs including day care. This need for state action has lead to the mixed strategy of both lobbying for effective laws and then litigating to ensure those laws are enforced.

At the same time that governments were playing a positive equality role, they were also engaging themselves in inequitable practices which had to be challenged. Ironically, the decisions from Canadian courts directing a broad and systemic approach to establish a culture of equality became established just as the governing political\economic climate in the early 1990's seemed to have little time for a broad and generous view of human rights obligations. As elsewhere in the world, in both private and public sector Canadian workplaces, the emphasis became on restructuring to downsize and cut costs. The cutbacks to the public sector by the "tax-cutting" and "public-sector" reducing governments of the 1990's adversely impacted Canadian women as set out earlier in this paper. It also lead to the repeal of some pay and employment equity legislative protections. This in turn led to the use of the *Charter* in the *SEIU* and *OPSEU* et al cases.

The Importance of the *Charter*

The 1997 *SEIU Local 204 et al v. AG (Ont)* decision represented a significant equality breakthrough through the use of litigation to challenge Government cutbacks and repeals of equality rights. It showed that the *Charter* could be used to prevent Governments from taking away hard fought for legal rights from disadvantaged groups. At the same time, the unsuccessful *Ferrel* decision upholding the repeal of the *Employment Equity Act, 1993* and the 2004 *NAPE* decision shows that such litigation is also uncertain and a bad precedent can also live for many years to haunt equality seekers who seek the Court's protections. Given the huge costs of such litigation, such uncertainties make *Charter* litigation relatively inaccessible as only institutions like unions can usually fund such litigation and even then, those challenges are not frequent.[96]

Using International Obligations

Unions and women's organizations have also used the enforcement mechanisms under international equality instruments as well as using such instruments as interpretive guides in domestic litigation. When Canada presented its 5th periodic report to the UN Committee on the Elimination of Discrimination against Women under CEDAW's Article 18. FAFIA representing 45 NGOs filed its own Submission to the Committee responding to the Report and detailing the continuing inequalities facing Canadian women in violation of Canada's CEDAW commitments. The Committee issued a report criticizing Canada's performance. Complaints have also been made to the UN by groups about the failure of Canada to properly enforce its human rights laws. The UN Committee recommended that Canada's human rights laws be amended so as to guarantee access to a competent tribunal and an effective remedy in all cases of discrimination.[97]

The Importance of Pay Equity

Properly valuing and paying women for the work they do is critical to achieving women's economic equality. To the extent that Canada's equity laws are successfully enforced, unfortunately their success or anticipated success often leads to attacks on the law. 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 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

Pro-Active Employment Equity Obligations

The *B.C.S.G.E.U* decision has important implications for future equality enforcement and was only possible as a result of years of equality litigation which paved the way for the Court to establish such wide-ranging equality priniciples and directions for employers. Firstly, by clearly focussing on workplace standards and the need to ensure that these standards themselves are inclusive, the *B.C.S.G.E.U* decision emphasizes the importance of addressing discrimination at the systemic level as well as at the individual level. Secondly, the decision expands the concept of accommodation as it applies to workplace standards. A standard is itself "discriminatory", not "neutral", where it reflects only the needs, abilities and requirements of one group of workers -- most often male, white and able-bodied workers. In this context, "accommodation" does not mean enabling individuals to meet the discriminatory standard. Rather, it means *transforming* the standard into a new and different standard which better reflects the diversity in society. Thirdly, the decision may provide a legal basis for requiring employers to conduct the type of workplace review which is mandated, or has in the past been mandated, by separate employment equity legislation.[98]

B.C.S.G.E.U took the employer's positive equality obligation a significant step further to require the employer to establish and to maintain a workplace free of discriminatory work standards. There is a good argument, this requires employers and unions to undertake a comprehensive review of workplace standards, similar to the type of review which can be required under the

Federal *Employment Equity Act*. Unions can also argue that they should be able to participate in any review of existing standards, or in the development of new standards, particularly in light of the Supreme Court of Canada's statement in *B.C.S.G.E.U* that they "are obliged to assist in the search for possible accommodation."[99] The *B.C.S.G.E.U* case is a good example of the use of litigation to establish a new precedent which is then taken back to the bargaining table by unions to use as a reason why employers must negotiate further equality advances. [100]

Pursuing Employment Equity Under Provincial Human Rights Laws

As the federal pro-active *Employment Equity Act* applies only to the federal sector and to those provincially-regulated employers who are part of the Federal Contractors Program, the majority of Canadian employees are not covered by pro-active employment equity laws. Yet, the equality litigation pursued under general human rights laws reviewed in this paper established requirements and guidelines for employers to follow in establishing employment equity in their workplaces in any event backed up by the systemic remedies which have been ordered.[101]

Costs and Delays

There can be no doubt that the high costs of litigation and the length of time it takes to hear cases and get a decision is a significant impediment to the use of litigation as an equality tool. Those factors certainly limit the use of the tool to those who have significant resources and are able to wait for the decision. In the second pay equity *Charter* litigation in Ontario, *CUPE et al. v. Atty-Gen (Ont),* unions looked to alternative dispute resolution through mediation with the Government to resolve the issues after two years of litigation. While the settlement meant that no precedent was established, this lead to the affected women receiving up to $414 million over 3 years without waiting for a court ruling which was uncertain. Legal Aid Ontario has also set up a test case programme to fund on a modest tariff public interest litigation and this has been a factor in increasing access to justice for equality seekers. However, such funds are limited.

Taking on Patriarchal Values and Constraints

There is a need to specifically acknowledge and address the dynamics of the social, cultural and patriarchal values and institutions which affect the perceptions of women and their work. Effective measures to provide more and better jobs for women require state actors and social partners to develop mechanisms which address these social and institutional labour market constraints. Otherwise, women's attempts to secure a better position in the labour market will continue to be frustrated by social and cultural norms that label women as secondary or marginal. Promoting equality requires promoting long-lasting changes in parental roles, family structures, institutional practices, the organization of work and time, personal development, independence, and the involvement of men.[102]

CONCLUSION

Canada is a country of contradictions when it comes to labour market equality enforcement. As revealed in this paper, Canada has played a leading role world-wide in enacting proactive pay and employment equity laws and adopting a pro-active result-based equality approach. At the

same time, Canada's actions often stand in sharp contrast to its commitments, laws and policies. Canada has often failed to effectively enforce these laws and its social and economic policies have contributed to an erosion of women's equality rights.

As this paper shows, ensuring pay and employment equity for women requires results-based, outcome-directed steps to be taken by governments, employers and unions to ensure that the international gender equality standards are felt at the national and local levels and become a reality for women in their daily lives. As the structure of women's employment is constantly in flux with the new economy, pay and employment equity measures will similarly need to constantly adapt to ensure measures are addressing the inequities women face as they increasingly face precarious employment.

While equality promoting laws are an important and necessary first step, they are not sufficient. Progressive laws often coexist with growing inequalities in labour force participation, income and access to decent work because the laws are not enforced or supported. Urgent action is needed to make real progress. Just as the world of work is being transformed by the drivers of the new globalized economy, so must Canada's workplaces be transformed and engendered to be inclusive of Canada's women workers. 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. Racial minority, Aboriginal women and women with disabilities suffer the most acute discrimination and often work in the informal areas of the economy that have the least protection. 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.

Labour market regulation is a critical lever of public policy to be used by a country to provide its women workers with the right to function equally with men. With many businesses relying on exploiting cheap female labour and many men refusing to give up their privileged positions, changing women's labour market status engages a very heated debate. Yet women and their organizations, working with unions and other NGOs, are mobilizing for transformative legal and economic pay and employment equity changes. Fundamental to this transformation is an understanding that achieving women's equality is not a women's issue but a local, national and international issue of the highest priority for ensuring sustainable development.

Harnessing the full potential of a country to compete in a globalized world requires unleashing the full productive potential of its labour force. Canada, like other nation states, will not develop or prosper without ensuring the full participation of women and men in all aspects of social, political and economic life.

ANNEX "A"

CHECKLIST FOR PAY AND EMPLOYMENT EQUITY LAWS FOR WOMEN: INTERNATIONAL HUMAN RIGHTS OBLIGATIONS

The following pay and employment equity obligations which flow from international human rights instruments should guide the development and implementation of pay equity and employment laws for women.

A. PAY EQUITY

Basic Principles and Obligations

The principle of *equal pay for work of equal value* or pay equity must be guaranteed, requiring that women's jobs where comparable to men's jobs must have equal compensation. ILO *Equal Remuneration Convention (No. 100)* (ILO *Convention No. 100*), Article 1; *International Covenant on Economic, Social and Cultural Rights* (*ICESCR*), Article 7; *Convention on the Elimination of Discrimination Against Women* (*CEDAW*), Article 11; *Beijing Platform for Action* (*Beijing Platform*), Paras. 165, 166, 175, 178

Equal pay for work of equal value is a fundamental labour standard of the highest priority, necessary for building a sustainable, just and developed society. ILO *Declaration on Fundamental Principles and Rights at Work* (ILO *Declaration*); *CEDAW*, Preamble; *Beijing Platform*, Para. 41

Governments must enact pay equity legislation to ensure that the right is guaranteed. ILO *Convention No. 100*, Article 2(2); *CEDAW*, Articles 2(b), 2(f); *Beijing Platform*, Paras. 165(a), 178(a)

Pay equity or the elimination of the "compensation gap" between men's and women's jobs must be achieved "without delay". *CEDAW*, Article 2

Pay equity must break the cycle of systemic discrimination by providing a framework to challenge systemic assumptions and practices that lead to the undervaluing and under-compensating of women's work. *CEDAW*, Preamble

Governments must ensure the full and practical realization of the right to equal pay for work of equal value. *CEDAW*, Articles 2, 24; *Beijing Platform*, Para. 175(k); *ICESCR*, Articles 3, 7

Governments must signal that they have made a strong commitment to achieving pay equity, that they have dedicated themselves unreservedly to achieving pay equity, and that they have mobilized adequate resources to achieving pay equity. *CEDAW*, Articles 2, 24; *ICESCR*, Article 2; *Beijing Declaration*, Para. 7; *Beijing Platform*, Paras. 4, 5

Employers have a proactive obligation to achieve pay equity in their workplaces. *Beijing Platform*, Para. 178(a), (h), (l), (o); *Beijing +5 Resolution*, Para. 82(h)

Scope of Pay Equity Obligations

Pay equity must be achieved in both the public sector and the private sector. *CEDAW*, Articles 2(d), (e); *Beijing Platform*, Para. 178(a), (h), (l), (o)

Special measures are required to ensure that public authorities and public institutions act in compliance with pay equity obligations. *CEDAW*, Article 2(d)

Methodologies for Achieving Pay Equity

Pay equity laws should require specific gender inclusive or gender neutral methodologies for evaluating and comparing the different jobs that men and women do and for reformulating wage structures of female-dominated jobs. ILO *Convention No. 100*, Article 3; *Beijing Platform*, Para. 178(k), (o)

Unions must be afforded an active role in developing and enforcing pay equity. ILO *Convention No. 100*, Article 4; *Beijing Declaration*, Para. 20; *Beijing Platform*, Paras. 166(l), 178(h)

Protection for the most vulnerable workers must be ensured by providing reasonable opportunity for representatives/agents of non-unionized employees to participate in developing and enforcing pay equity. *Beijing Platform*, Para. 45

Enforcement of Pay Equity Rights

Complaints regarding lack of pay equity must be enforceable before a competent and expert tribunal. *International Covenant on Civil and Political Rights* (*ICCPR*), Article 3; *CEDAW*, Article 2(c)

Mechanisms to adjudicate systemic wage discrimination must be strengthened. *Beijing Platform*, Para. 178(l)

An effective remedy for systemic wage discrimination must be provided, and competent authorities must enforce pay equity remedies where granted. *ICCPR*, Article 3

Meaningful sanctions must be imposed for the failure to comply with pay equity obligations. *CEDAW*, Article 2(b)

A mechanism for external oversight and auditing of employers' compliance with pay equity should be provided. *ICESCR*, Articles 16, 17; *CEDAW*, Part V; Beijing Platform for Action, Para. 178©)

B. EMPLOYMENT EQUITY

Basic Principles and Obligations

The principle of employment equity must be guaranteed, requiring equality of opportunity and treatment in employment and occupation for all women, including those who are disadvantaged on the basis of race, colour, indigenous states, religion, disability, political opinion, national extraction or social origin. *ICESCR*, Articles 2, 7; *ICCPR*, Article 26; CEDAW, Article 11(1)(b); *International Convention on the Elimination of all Forms of Racial Discrimination* (*CERD*), Articles 4, 5(e)(i); *Universal Declaration of Human Rights*, Articles 2, 7, 23; ILO *Discrimination (Employment and Occupation) Convention* (*No. 111)* (ILO *Convention No.111*), Articles 1, 2, 3(b); ILO *Employment Policy Convention (No. 122)* (ILO *Convention No. 122*), Article 2(c); *Durban Programme of Action on Racism, Racial Discrimination, Xenophobia and Related Intolerance* (*Durban Programme*), Articles 48, 66; *Beijing +5 Resolution*, Paras. 74(b), 82(a), (e); *Declaration on the Rights of Disabled Persons*, Articles 6, 7; *Declaration on the Rights of Mentally Retarded Persons*, Articles 2,3; *Declaration on Race and Racial Prejudice*, Article 9; *Standard Rules on the Equalization of Opportunities for Persons with Disabilities*, Rule 8; *World Programme of Action Concerning Disabled Persons*, Paras. 116-118

The right to work must be guaranteed and protected from discrimination. *ICESCR*, Article 6; *CERD*, Article 5(e)(i); *CEDAW*, Article 11(1)(a)

Governments must enact employment equity legislation to ensure the right is guaranteed. *CEDAW*, Articles 2(b), 2(f); ILO *Convention No. 111*, Article 3(b); ILO *Maternity Protection Convention*

(Revised) (No. 183) (ILO *Convention No. 183*), Article 12

Employment equity is a fundamental labour standard. ILO *Declaration on Fundamental Principles and Rights at Work*, Preamble, Article 1(b); *Beijing Platform*, Para. 41

Achieving employment equity is a required action for achieving the full implementation of human rights. *Beijing Declaration,* Paras. 9, 21; *CERD*, Article 2; ILO *Convention No. 111,* Preamble; *Standard Rules on the Equalization of Opportunities for Persons with Disabilities*, Preamble, Rules 7(1), 15(2)

In preventing employment discrimination, the multiple and intersecting forms of discrimination experienced by individuals must be taken into account. *Beijing Platform*, Para. 178(f), (j), (p); *Beijing +5 Resolution,* Para. 83(d); *Durban Programme*, Articles 49, 51, 104(c); *Draft Declaration on the Rights of Indigenous Peoples*, Article 18

Governments must signal that they have made a strong commitment to achieving employment equity, particularly through legislation, that they have dedicated themselves unreservedly to achieving employment equity, and that they have mobilized adequate resources. *ICESCR*, Article 2(1); *Beijing Platform,* Para. 5

<u>Scope of Employment Equity Obligation</u>

Employment equity must be proactively achieved in both the public sector and the private sector. *CEDAW*, Article 2(d), (e); *Beijing Platform,* Paras. 165(b), (o), 178(b), (h); *Beijing +5 Resolution*, Para. 82(m); *Standard Rules on the Equalization of Opportunities for Persons with Disabilities*, Rules 5, 8; *Durban Programme*, Article 215

Employment equity must be achieved for part-time as well as full-time workers. ILO *Part-Time Work Convention (No. 175)* (ILO *Convention No. 175*), Article 4(c)

<u>Methodologies for Achieving Employment Equity</u>

The principle of gender equality must be constitutionalized. *CEDAW*, Article 2

i. General

Women's right to free choice of employment, the right to promotion, job security, equal benefits and conditions of service, and the right to receive vocational training and retaining must be ensured. *CEDAW*, Article 11(1)(c)

Women's right to social security and the right to paid leave in cases of retirement, unemployment, sickness, invalidity, old age, and other incapacity to work must be ensured. *CEDAW*, Article 11(1)(e)

Governments must coordinate with regional and international institutions and actors to ensure employment equity for women living in poverty. *Beijing +5 Resolution*, Para.101(d)

Government policies must include gender equality training and gender-awareness campaigns. *Beijing +5 Resolution*, Paras. 82(j), (k)

Homeworkers' protection against discrimination in employment and occupation must be ensured. ILO *Home Work Convention (No. 177)* (ILO *Convention No. 177*), Article 4(2)(b)

Unions must be afforded an active role in promoting employment equity. ILO *Convention No. 111,* Articles 1(b), 3(a); *Beijing Platform,* Paras. 178(d), 180(a); *Standard Rules on the Equalization of Opportunities*

for Persons with Disabilities, Rules 6, 9; *World Programme of Action Concerning Disabled Persons*, Para. 131; *Durban Programme*, Article 215; ILO *Workers with Family Responsibilities Convention (No. 156)* (ILO *Convention No. 156*), Article 11; ILO *Convention No. 183*, Articles 4(4), 11; ILO *Convention No. 122*, Article 3

Occupational segregation should be eliminated through measures such as counselling, placement, and the diversification of occupational choices. Equal participation in highly-skilled jobs and senior management positions should be promoted. *Beijing Platform*, Para. 178(g)

Employment equity must be facilitated by increasing access to risk capital, credit schemes, microcredit, and facilitating microenterprises and small and medium-sized enterprises. *Beijing +5 Resolution*, Paras. 74(b), 82(g)

ii. Women and Families

Working mothers must be free from discrimination. ILO *Convention No. 183*, Articles 6, 8, 9, 10; *ICESCR*, Article 10; *CEDAW*, Article 11(2)

Governments must promote programmes and policies that enable women and men to reconcile their work and family responsibilities. *Beijing +5 Resolution*, Paras. 82(b), (c), (d);*CEDAW*, Article 10; ILO *Convention No. 156*, Article 3(1)

Workers with family responsibilities must be able to integrate into the labour force, as well as re-enter it after absences due to family responsibilities. ILO *Convention No. 156*, Article 7

Family support services and flexible working arrangements should be provided by the employer. *Beijing Platform*, Para. 180(b)

iii. Women with Disabilities

Governments must support personal assistance programmes and interpretation services to increase the level of participation of persons with disabilities in everyday life at work. *Standard Rules on the Equalization of Opportunities for Persons with Disabilities*, Rule 4

Negative attitudes and prejudices concerning disabled workers must be overcome, by means of state-initiated campaigns. *Standard Rules on the Equalization of Opportunities for Persons with Disabilities*, Rule 7(4)

Employment equity for disabled persons must be achieved in both rural and urban areas. *World Programme of Action Concerning Disabled Persons*, Para. 128

Employment equity for disabled persons should be achieved through various measures, including incentive-oriented quota schemes, designated employment, loans or grants for small businesses, contract compliance, and tax concessions. *Standard Rules on the Equalization of Opportunities for Persons with Disabilities*, Rule 7(2); *World Programme of Action Concerning Disabled Persons*, Para. 129

Technical aids for persons with disabilities and access to them must be supported by governments to achieve employment equity. *World Programme of Action Concerning Disabled Persons*, Para. 129

iv. Indigenous Women

Governments must ensure employment equity for indigenous peoples. *Durban Programme*, Article 16; ILO *Indigenous and Tribal Peoples in Independent Countries Convention (No. 169)* (ILO *Convention No. 169*),

Article 20; *Draft Declaration on the Rights of Indigenous Peoples*, Articles 18, 22

Governments must enact and supervise legislation and other measures for employment equity for indigenous and tribal peoples. ILO *Convention No. 169*, Article 33; *Draft Declaration on the Rights of Indigenous Peoples*, Article 37

Social security and other occupational benefits must be ensured without discrimination for indigenous and tribal peoples. ILO *Convention No. 169*, Articles 20(1)(c), 24

Vocational training must be tailored to suit the special needs of indigenous and tribal peoples. ILO *Convention No. 169*, Article 21

Handicrafts, rural and community-based industries, and a subsistence economy and traditional activities shall be recognized as important factors in the maintenance of cultures and in economic self-reliance and development of indigenous and tribal peoples. ILO *Convention No. 169*, Article 23

v. Women Disadvantaged by Racism, Racial Discrimination, Xenophobia and Related Intolerance

Methods for achieving employment equity for victims of racism, racial discrimination, xenophobia and related intolerance include civil rights enforcement and public education and communication within the workplace. *Durban Programme*, Article 104(a)

Enterprises organized and operated by women who are victims of racism, racial discrimination, xenophobia and related intolerance should be supported by promoting equal access to credit and training programmes. *Durban Programme*, Article 103

The public and the private sectors should improve the prospects of targeted groups, particularly those subject to multiple discrimination, facing the greatest obstacles in finding, keeping or regaining work. *Durban Programme*, Article 104(c)

Governments should promote and observe international instruments and norms on workers' rights to avoid the negative effects of discriminatory practices, racism and xenophobia in employment and occupation. *Durban Programme*, Article 106

Both the private and the public sector should foster the growth of businesses dedicated to improving economic and educational conditions in underserved and disadvantaged areas. *Durban Programme*, Article 104(b)

<u>Enforcement of Employment Equity Rights</u>

A national coordinating committee for employment equity should be permanent and based on legal and administrative regulation, composed of pluralistic forces, and guaranteed autonomy and resources. *Standard Rules on the Equalization of Opportunities for Persons with Disabilities*, Rule 17; *Durban Programme*, Articles 90, 91; *National Institutions for the Promotion and Protection of Human Rights (Paris Principles)*

Employment equity must be enforceable before a competent and expert tribunal, and the remedies must be effective and enforced when granted. *ICCPR*, Article 3; *CERD*, Article 6; *Durban Programme*, Articles 108, 165; *Standard Rules on the Equalization of Opportunities for Persons with Disabilities*, Rule 15(4); *CEDAW*, Article 2

Meaningful sanctions must be imposed for the failure to comply with employment equity obligations. *CEDAW*, Article 2(b); *Standard Rules on the Equalization of Opportunities for Persons with Disabilities*, Rule

15(2)

Progress in employment equity must be reported annually. ILO *Convention No. 111* Article 3(f)

Legislation implementing employment equity must be reviewed and monitored. *Beijing Platform*, Para. 178(c); *Standard Rules on the Equalization of Opportunities for Persons with Disabilities*, Preamble, Part IV

C. OVERVIEW OF SOURCES

International Human Rights Instruments
Convention on the Elimination of All Forms of Discrimination against Women (CEDAW):
http://www.unhchr.ch/html/menu3/b/e1cedaw.htm
ILO Declaration on Fundamental Principles and Rights at Work:
http://www.ilo.org/public/english/standards/relm/ilc/ilc86/com-dtxt.htm
ILO Discrimination (Employment and Occupation) Convention (No. 111):
http://www.unhchr.ch/html/menu3/b/d_ilo111.htm
ILO Equal Remuneration Convention (No. 100): http://www.unhchr.ch/html/menu3/b/d_ilo100.htm
International Covenant on Economic, Social and Cultural Rights (ICESCR):
http://www.unhchr.ch/html/menu3/b/a_cescr.htm
International Covenant on Civil and Political Rights (ICCPR):
http://www.unhchr.ch/html/menu3/b/a_ccpr.htm
International Convention on the Elimination of all Forms of Racial Discrimination (CERD):
http://www.unhchr.ch/html/menu3/b/d_icerd.htm
Universal Declaration of Human Rights:
http://www.unhchr.ch/udhr/lang/eng.htm

International Policy Instruments
Beijing Declaration and Platform for Action:
http://www.un.org/womenwatch/daw/beijing/platform/declar.htm
Further Actions and Initiatives to Implement the Beijing Declaration and Platform for Action ("Beijing +5 Resolution"): http://www.un.org/womenwatch/daw/followup/ress233e.pdf
Declaration on Race and Racial Prejudice: http://www.unhchr.ch/html/menu3/b/d_prejud.htm
Declaration on the Rights of Disabled Persons: http://www.unhchr.ch/html/menu3/b/72.htm
Declaration on the Rights of Mentally Retarded Persons:
http://www.unhchr.ch/html/menu3/b/m_mental.htm
Draft Declaration on the Rights of Indigenous Peoples:
http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/E.CN.4.SUB.2.RES.1994.45.
Durban Declaration and Action Programme on Racism, Racial Discrimination, Xenophobia and Related Intolerance: http://www.un.org/WCAR/durban.pdf
ILO Employment Policy Convention (No. 122): http://www.unhchr.ch/html/menu3/b/k_ilo122.htm
ILO Home Work Convention (No. 177):
http://www.ilo.org/public/english/employment/skills/recomm/instr/c_177.htm
ILO Indigenous and Tribal Peoples in Independent Countries Convention (No. 169):
http://www.unhchr.ch/html/menu3/b/62.htm
ILO Maternity Protection Convention, (Revised) (No. 183): http://www.ilo.org/ilolex/cgi-lex/convde.pl?C183
ILO Part-time Work Convention (No. 175): http://www.ilo.org/ilolex/cgi-lex/convde.pl?C175
ILO Workers with Family Responsibilities Convention (No. 156):
http://www.ilo.org/ilolex/cgi-lex/convde.pl?C156
National Institutions for the Promotion and Protection of Human Rights ("Paris Principles"):
http://www1.umn.edu/humanrts/resolutions/48/134GA1993.html
Standard Rules on the Equalization of Opportunities for Persons with Disabilities:
http://www.un.org/documents/ga/res/48/a48r096.htm
World Programme of Action Concerning Disabled Persons:
http://www.un.org/esa/socdev/enable/diswpa00.htm

ANNEX "B"

TERMS OF THE CANADIAN HUMAN RIGHTS TRIBUNAL'S REMEDIAL ORDER IN *NATIONAL CAPITAL ALLIANCE ON RACE RELATIONS (NCARR)*

NCARR Permanent Measures included orders to do the following:

- Set standards to ensure that visible minority employees are evaluated not only on experience, but also on desirable skills in determining suitability for promotion.
- Train selection-board members in bias-free interviewing techniques and, where possible, use selection boards that are diverse in composition.
- Train all managers and human resource specialists on strategies to recruit, promote and retain visible minorities, including sensitization to diversity and employment equity issues, including systemic barriers.
- Conduct workshops on the benefits of a diverse workforce and human rights legislation, with mandatory management attendance.
- Set clearly defined qualifications for all senior managerial positions and ensure that these criteria are known to everyone interested in moving into senior management and to all those involved in the staffing process.
- Develop in advance those parts of the selection process intended to assess necessary skills and use them when filling acting appointments.
- Develop a computerized inventory of visible minority and white employees in feeder positions who are interested in advancement, so that this information is available to staffing managers when acting positions become available.

NCARR Temporary Corrective Measures included these orders:

- Appoint visible minorities into the Senior Management category at twice the rate of availability for five years in order to reach 80% proportional representation of this designated group within this time frame.
- Appoint visible minorities into the groups from which management are drawn at twice the rate of availability for five years in order to reach 80% proportional representation in those groups.
- Appoint visible minorities to acting positions for four months or longer, at twice the rate of availability for four to five years (depending on the group) to enable visible minorities to develop the requisite job qualifications needed to be screened into permanent competitions when they become available.
- In any competition where visible minority candidates have been considered but a visible minority candidate was not selected a report is to be provided outlining why the visible minority candidates were not found to be qualified.
- All Staffing Notices are to state that the employer is an "Equal Opportunity Employer" and that the advertisement is aimed at visible minorities.
- Individual career plans are to be developed for all employees (white and visible minority) in feeder group positions who are interested in advancement.

- Outreach recruitment sources for visible minorities are to be developed and used when hiring into feeder groups where the tribunal found significant under representation.

- Mentoring programs are to be established, with training of current Senior Management on methods of mentoring a culturally diverse workforce. Good mentoring is to be rewarded.

- Visible minorities are to be invited to attend management training sessions and courses and 25% of the seats are to be set aside for visible minorities.

- A person is to be appointed with full powers and responsibility for ensuring the implementation of the special temporary corrective measures and to carry out any other duties to implement this order.

- Senior management are to undergo an annual performance assessment regarding full compliance with the order.

- An Internal Review Committee is to be created, to include an equal number of departmental managerial representatives and delegates from the Advisory Committee on Visible Minorities with additional expertise to be made available on an as required basis to monitor the implementation of this plan. The Committee shall meet on a quarterly basis.

ANNEX "C"

SYSTEMIC HUMAN RIGHTS REMEDIES ORDERED BY HUMAN RIGHTS ADJUDICATORS

NOTE: Numbers in parentheses refer to the cases cited below

Workplace Orders by Human Rights Adjudicators

- develop and implement a comprehensive workplace harassment and discrimination policy, which includes a definition of harassing behaviours, an internal complaints process, and specific notification that complaints arising under the policy can be taken to the Human Rights Commission;(1)
- review or amend internal workplace standards or restrictions that adversely impact certain groups and bring the standards into compliance with the *Code*;(2)
- implement "special programs", such as employment equity programs, or plans to remedy past discrimination as well as prevent future discrimination;(3)
- change hiring and/or recruitment practices in order to achieve proportional representation in the organization;(4)
- create a race relations committee at the workplace (which may include external members) to meet periodically to set objectives and measures to improve race relations at the workplace;(5)
- establish an internal review committee to monitor the implementation of the Orders or a plan which includes periodic reports to senior management;(6)
- appoint a person responsible with full powers to ensure that the implementation is carried out.(7)
- require employers and managers to attend a training program specifically designed for them to identify and address instances of harassment and inappropriate behaviour;(8)
- train senior management on methods of mentoring its cross-culturally diverse workforce and rewarding good mentoring; (9)
- amend management training curriculum to include a requirement that there be circulated to all employees in the workplace clear information circulars on available resources and remedies for those with harassment concerns;(10)
- implement annual performance assessments of senior managers regarding full compliance with the Orders;(11)
- design and require attendance of all employees at education and training programs with respect to discrimination and harassment, which may highlight the benefits of a diverse workplace;(12)
- post copies of or distribute the human rights decision or notices about human rights in a place accessible to employees at the workplace;(13)
- require the employer to state in all staffing notices, advertisements, job postings, job searches and other staffing communications that the employer is an "Equal Opportunity Employer";(14)
- retain a human rights consultant, with expertise in creating an effective grievance procedure and training for employees in the workplace;(15)

- provide individual career plans and training programs for visible minorities.(16)

- ensure senior management be evaluated with respect to their compliance with human rights policies(17)

Third-party Monitoring Mechanisms

Human Rights Boards of Inquiry have also ordered that third parties monitor the implementation of systemic remedies, in order to ensure compliance and effectiveness. While the Human Rights Commission has typically played this role, as Commission resources are increasingly lowered other third parties may take on the role of monitoring implementation of systemic remedies.

The following third-party monitoring mechanisms have been ordered:

- where it was found that an employer was engaged in discriminatory hiring practices, the Tribunal ordered "special temporary measures" which included the appointment of a person responsible with full powers to ensure the application of the special temporary measures and to carry out other duties to implement the decision; as well as, requiring submission of periodic reports to the Human Rights Commission during the implementation of the Special Temporary Measures; (18)

- education seminars or human rights training are to be designed under the direction of the Human Rights Commission; (19)

- report to the Race Relations Division of the Human Rights Commission about steps taken to eradicate inequality; (20)

- have the Human Rights Commission approve harassment and discrimination policies and monitor their implementation; (21)

- report to the Human Rights Commission on the results of a review of standards or a workplace policy which may adversely impact certain members of a disadvantaged group, and the development of mechanisms to accommodate individuals; (22)

- retain a human rights consultant and have the Human Rights Commission monitor the implementation of a grievance procedure; (23)

- provide information and statistics to the Human Rights Commission to permit the Commission to monitor employment practices; (24)

- report to the Human Rights Commission the name, address, and phone number of targeted employees during a period of monitoring and provide the Commission with reasons why an employee leaves employment during this period; (25)

- require reporting an explanation for instances where visible minority candidates have not been selected for vacancies; (26)

- the Human Rights Commission monitors the implementation of a Tribunal decision for a period of time to ensure compliance with human rights legislation; (27)

- require modification of employment standards and tests to come into compliance with the *Code* which are satisfactory to the Tribunal or provide an "implementation plan" to the Tribunal (which may include reports of why existing training programs are ineffective); (28)

- the Tribunal remains seized so that if further steps are required to implement the Order, the parties

may return to the Tribunal; (29)

- the appointment of a third-party monitor at the expense of the employer to ensure compliance with Board orders. (30)

Cite References

1. *Wall v. Embro* (1995) 27 C.H.R.R. D/44 (Ont. Bd. of Inquiry).
2. See *Law v. Canada*, [1999] 1 S.C.R. 497 and *Corbiere v. Canada* [1999] 2 S.C.R. 203, where the Court recognized the ground of "aboriginality-residence" as the basis of the discrimination claimed by the applicant.
3. [1993] 1 S.C.R. 554.
4. *Kearney v. Bramalea Ltd.* (No. 2), (1998) 34 C.H.R.R. D/1 (Ont. Bd. of Inquiry)
5. *Action Travail*, supra; *Canada (A.G.) v. Green, supra* at 27; *Pitawanakwat v. Canada (Dept. of Secretary of State)* (1994), 21 C.H.R.R. D/355; *Gauthier v. Canada (Canadian Armed Forces)*, supra
6. *Action Travail des Femmes*, supra note 5; *Pitawanakwat v. Canada (Department of Secretary of State) supra*; *National Capital Alliance on Race Relations v. Canada (Health and Welfare)*, supra
7. *Dhillon v. F.W. Woolworth Ltd* (1982) 3 C.H.R.R. D/743 (Ont. Bd. of Inquiry); *Ahluwalia v. Metropolitan Toronto (Municipality) Commissioners of Police* (1983) 4 C.H.R.R. D/1757 (Ont. Bd. of Inquiry).
8. *National Capital Alliance on Race Relations v. Canada (Health and Welfare)*, supra
9. Ibid.
10. *National Capital Alliance on Race Relations v. Canada (Health and Welfare)* [1997] C.H.R.D. No. 3 (CHRT)
11. *Pitawanakwat v. Canada (Dept. of Secretary of State)*, supra
12. *National Capital Alliance on Race Relations v. Canada (Health and Welfare)*, supra
13. *Canada (A.G.) v. Green, supra* at 27;*Pitawanakwat v. Canada (Dept. of Secretary of State)*, supra
14. *Curling v. Torimiro*, supra, at 18; *Drummond v. Tempo Paint*, supra at D/190; *Espinoza v. Coldmatic Refrigeration of Canada Ltd.*, supra; *Moffatt v. Kinark Child and Family Services*, supra at D/360 [distribution of decision was province wide]; *Miller v. Sam's Pizza House*, supra
15. *National Capital Alliance on Race Relations v. Canada (Health and Welfare)*, supra
16. *Espinoza v. Coldmatic Refrigeration of Canada Ltd.* (1995), 95 CLLC 230-026
17. *National Capital Alliance on Race Relations v. Canada (Health and Welfare)*, supra
18. *McKinnon and Ontario Human Rights Commission v. Ontario (Ministry of Correctional Services) et al.*, [2002] O.H.R.B.I.D. No. 22
19. *Lee v. T.J. Applebee's Food Conglomeration, supra* at D/4788; *Canada (A.G.) v. Green*, supra at p. 27

20. *Lee v. T.J. Applebee's Food Conglomeration*, supra at D/4788

21. *Curling v. Torimiro,* supra, at 17; *Drummond v. Tempo Paint,* supra at D/190; *Moffatt v. Kinark Child and Family Services,* supra

22. *Gohm v. Domtar*, supra

23. *Espinoza v. Coldmatic Refrigeration of Canada Ltd.*, supra

24. *Niedzwiecki v. Beneficial Finance System*, (1982), 3 C.H.R.R. D/1004; *Miller* v. *Sam's Pizza House,* supra

25. Ibid.; *Curling v. Torimiro,* supra

26. *National Capital Alliance on Race Relations v. Canada (Health and Welfare),* supra

27. *Miller v. Sam's Pizza House, supra*

28. *Morgoch v. Ottawa (City) (No.2)*, supra, at D/93; *Turnbull v. Famous Players* (2001), 40 C.H.R.R. D/333 at D/364-365

29. *Lee v. T.J. Applebee's Food Conglomeration, supra; Chiswell v. Valdi Foods 1987 Inc., supra*

BIBLIOGRAPHY

Reports, Texts and Articles

Abella, Rosalie Silberman. (1984). Equality in Employment: The Report of the Commission on Equality in Employment, Ottawa: Supply and Services Canada

Armstrong, Pat and Hugh Armstrong. 1994. *The Double Ghetto*. Toronto: McClelland & Stewart.

Armstrong Pat and Mary Cornish. 1997. *Restructuring Pay Equity for a Restructured Work Force: Canadian Perspectives* Oxford, UK: Blackwells.

Armstrong, Pat, Mary Cornish and Elizabeth Millar, 2003, "Pay Equity: Complexity and Contradiction in Legal Rights and Social Processes", Chapter 7, Changing Canada: Political Economy As Transformation. Health in the Workplace". Montreal, McGill-Queen's University Press, 2003. Edited by Wallace Clement and Leah F. Vosko.

Chotalia, Shirish Prindit Chotalia "Human Rights Law in Canada", Toronto: Carswell 1995.

Cornish, Mary. 2003. *Engendering Citizenship and Labor Market Regulation: International and Canadian Perspectives.* Paper commissioned by the World Bank and presented to the World Bank 5th Gender and Law Conference, "Law, Institutions and Gender Equality", March 18th-19th, 2003.

Cornish, Mary, 2004, "Review of the Ontario Pay Equity Experience in the Health Care Sector", New Zealand Pay Equity Task Force Health Initiative Research Project"

Cornish, Mary, Fay Faraday and Veena Verma. 2004. *Securing Gender Justice, The Challenges Facing International Labour Law.* Prepared for the Compendium of Papers arising from the Meeting the Challenges of Globalization Conference at University of Western Ontario, October, 2003.

Cornish, Mary, "Employment and Pay Equity in Canada - Success Brings Both Attacks and New Initiatives" (1996) *Canada-United States Law Journal*, v. 22.

Cornish, Mary and Fay Faraday, "Achieving Pay and Employment Equity for Women - Human Rights and Business/Development Imperatives" (2004) prepared for New Zealand International Pay and Employment Equity Conference, NACEW, New Zealand, June 28-29, 2004.

Cornish, Mary and Fay Faraday (2004) "Litigating Pay and Employment Equity: Strategic Uses and Limits - The Canadian Experience". Prepared for the International Pay and Employment Equity for Women Conference held by the New Zealand Advisory Council on the Employment of Women, Wellington, New Zealand, June 28-29, 2004

Cornish, Mary, Veena Verma and Margaret Wente, "Racism & Employment: Strategies for Change" (2003)

Equal Pay Coalition website: http://www.web.net/~equalpay/lobby.html

Fudge, Judy (2003) " Labour Market Deregulation and the Retreat from Pay Equity in Canada: Women's Work in an Era of Free Trade". Prepared for Conference on *Women's Access to the Economy in the Current Period of Economic Integration: What Economy?*, April 23-25, 2003, Montreal, Quebec, p4 [hereinafter *Retreat from Pay Equity in Canada*].

International Labour Office. 2004. *Global Employment Trends for Women 2004.*

ILO Director-General. 2003. *Time for Equality at Work: Global Report under the Follow-up to the ILO*

Declaration on Fundamental Principles and Rights at Work, International Labour Conference 91st Session 2003, Report I(b), Geneva, International Labour Office.

ILO World Commission on the Social Dimension of Globalization. 2004. *A Fair Globalization: Creating Opportunities For All.* Geneva: International Labour Organization.

Keene, Judith, *Human Rights in Ontario*, 2nd ed. 1992, Toronto: Carswell, pp.8-10.

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

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

Vosko, Leah, Nancy Zukewich and Cynthia Cranford. 2003. *Precariousness in the Canadian Labour Market: Towards Improved Indicators of Labour Market Insecurity.* Unpublished.

LEGAL DECISIONS

Andrews v. Law Society of British Columbia (1989), D.L.R. (4th) 1 (S.C.C.).

British Columbia (Public Service Employee Relations Commission) v. BC Government and Service Employees Union (re: Tawney Meiorin) (1999), 176 D.L.R. (4th) 1 (S.C.C.)

Canada Safeway v. Saskatchewan Human Rights Commission [1999] S.J. No. 228(Sask. Q.B.).

CNR v. Canada (Human Rights Commission) (1987) 1 S.C.R. 1114 [Action Travail des Femmes].

Cybermedix Health Services Ltd. (1989) 1 P.E.R. 41

Delisle v. Canada (Deputy Attorney General) [1999], 2 S.C.R. 989.

Eldridge v. British Columbia (Attorney General) (1997), 149 D.L.R. (4th) 577 (S.C.C.)

Ferrel v. Ontario (Attorney General) (1998), 42 O.R. (3d) 97 (C.A.).

Haldimand Norfolk (No.6) (1991) 2 P.E.R. 105 and Riverdale Hospital (No.1) (1990) 2 P.E.R. 1

Haldimand-Norfolk (Regional Municipality) Commissioners of Police v. Ontario Nurses' Association [1989] O.J. No. 1995; [1990] O.J. No. 1745.

Insurance Corp. of British Columbia v. Heerspink (1982), 3 C.H.R.R. D/1163 (S.C.C.)

Law v. Canada (Minister of Employment & Immigration) (1999), 170 D.L.R. (4th) 1 (S.C.C.)

Management Board Secretariat (No.6) (1998-1999) 9 P.E.R 48.

Manitoba Council of Health Care Unions v. Bethesda Hospital (1992), 88 D.L.R. (4th) 60 (Man. Q.B.)

McKinnon v. Ontario (No. 3) (1998) 32 C.H.H.R. D/1 (Ont. Board of Inquiry)

National Capital Alliance on Race Relations v. Canada (Health & Welfare) ["NCARR"] (1997), 28 C.H.R.R. D/179

Newfoundland (Treasury Board) v. N.A.P.E. [2004] S.C.J. No.61

Nishimura v. Ontario Human Rights Commission (1989), 70 O.R. (2d) 347

ONA v. Haldimand-Norfolk (No. 3) (1989), 1 P.E.R. 17 *ONA v. Women's College Hospital* (No. 4) (1992) 3 P.E.R. 61

ONA v. Haldimand-Norfolk (No. 6) (1991) 2 P.E.R. 105

Re: Ontario Human Rights Commission v. Simpson Sears Ltd. (O'Malley), (1985) 2 S.C.R.

Perera v. Canada (1998), 158 D.L.R. (4th) 341.

Riverdale Hospital (No.1) (1990) 2 P.E.R. 1

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

Syndicat de la fonction publique c. Procureur général du Québec (9 January 2004), unreported (Qué. C.S.)

ENDNOTES:

1. See: Pay Equity Task Force (2004) " Pay Equity: A New Approach to Fundamental Rights" Minister of Justice and Minister of Labour, Government of Canada, p.9 [hereinafter *Pay Equity: A New Approach to Fundamental Rights*]; Cornish, Mary and Fay Faraday (2004) "Litigating Pay and Employment Equity: Strategic Uses and Limits - The Canadian Experience". Prepared for the International Pay and Employment Equity for Women Conference held by the New Zealand Advisory Council on the Employment of Women, Wellington, New Zealand, June 28-29, 2004 [hereinafter *Litigating Pay and Employment Equity*].

2. *Litigating pay and Employment Equity,* supra note 1at 1.

3. *Ibid.* at 5.

4. *Ibid.*

5. Cornish, Mary and Fay Faraday (2004) "Achieving Pay and Employment Equity for Women - Human Rights and Business/Development Imperatives". Prepared for New Zealand International Pay and Employment Equity Conference, NACEW, New Zealand, June 28-29, 2004 [hereinafter *Achieving Pay and Employment Equity*].

6. *Ibid.*

7. Cornish, Mary (2003) " Engendering Citizenship and Labour Market Regulation - International and Canadian Perspective". Prepared for the 5th Annual World Bank Gender and Law Conference, "Law, Institutions and Gender Equality", Washington, March 18-19, 2003 [hereinafter *Engendering Citizenship*].

8. See: *Engendering Citizenship*, supra note 7.

9. *Ibid.*

10. See: *Litigating Pay and Employment Equity*, supra note 1.

11. See: Cornish, Mary, Veena Verma and Fay Faraday (2001) " From Principle to Reality: Enforcing Canadian Women's Right to Economic Equality". Prepared for the International Association of Official Human Rights Agencies 53rd Annual Conference "Civil Rights in the Millennium: A Call to Action" Cincinnati, Ohio July 25, 2001 [hereinafter *From Principle to Reality*].

12. See: *From Principle to Reality*, supra note 11.

13. *Ibid.*

14. See the Bibliography to this paper for the cite references to all the decisions referred to in Parts V & VI of this paper.

15. See: *Litigating Pay and Employment Equity*, supra note 1.

16. See: *Achieving Pay and Employment Equity*, supra note 5.

17. *Ibid.*

18. Statistics Canada (2004) " Women in Canada: Work Chapter Updates 2003", Minister of Industry, Ottawa, 6 [hereinafter *Women in Canada: Work Chapter Updates 2003*].

19. *Women in Canada: Work Chapter Updates 2003,* supra 17 at 6.

20. *Ibid.* at 8.

21. *Ibid.*

22. Statistics Canada (2001), *2001 Census of Population*; *Pay Equity: A New Approach to Fundamental Rights*, supra note 1 at 12.

23. *Pay Equity: A New Approach to Fundamental Rights,* supra note 1 at 12.

24. *Ibid.* at 14.

25.Statistics Canada, *1996 Census of Population*; *Pay Equity: A New Approach to Fundamental Rights*, supra note 1 at 36.

26. *Pay Equity: A New Approach to Fundamental Rights,* supra note 1 at 36.

27. *Ibid.* at 40.

28. *Ibid.* at 44.

29. *Women in Canada: Work Chapter Updates 2003*, supra note 6 at 9.

30. *Ibid.* at 9.

31. *Ibid.*

32. *Ibid.*

33. *Ibid.*

34. *Women in Canada: Work Chapter Updates 2003, Ibid.* at 7.

35. *Ibid.*

36. Armstrong, Pat and Mary Cornish (1997) "Restructuring Pay Equity for a Restructured Work Force: Canadian Perspectives" in Gender, Work and Organization , Vol. 4, No. 2, UK: Blackwells, p.76 [hereinafter *Restructuring Pay Equity*].

37. *Restructuring Pay Equity, Ibid.* at 76.

38. *Women in Canada: Work Chapter Updates 2003*, supra note 6 at 8.

39. *Ibid.*

40. *Restructuring Pay Equity,* supra note 35 at 76.

41. Fudge, Judy (2003) " Labour Market Deregulation and the Retreat from Pay Equity in Canada: Women's Work in an Era of Free Trade". Prepared for Conference on *Women's Access to the Economy in the Current Period of Economic Integration: What Economy?*, April 23-25, 2003, Montreal, Quebec, p4 [hereinafter *Retreat from Pay Equity in Canada*].

42. International Labour Organization, *Global Employment Trends for Women 2004*, 2004.

43. Armstrong, Pat, Mary Cornish and Elizabeth Millar, 2003, "Pay Equity: Complexity and Contradiction in Legal Rights and Social Processes", Chapter 7, Changing Canada: Political Economy As Transformation. Health in the Workplace". Montreal, McGill-Queen's University Press, 2003. Edited by Wallace Clement and Leah F. Vosko [hereinafter *Pay Equity: Complexity and Contradiction*].

44. Cornish, Mary, Fay Faraday and Veena Verma (2003) " Securing Gender Justice, The Challenges Facing International Labour Law" . Prepared for the Compendium of Papers arising from the Meeting the Challenges of Globalization Conference at University of Western Ontario, October, 2003 [hereinafter *Securing Gender*].

45. *Restructuring Pay Equity*, supra note 35 at 77.

46. *Ibid.*

47. *Ibid.*

48. *Retreat from Pay Equity in Canada*, supra note at 5.

49. See: *Achieving Pay and Employment Equity*, supra 5.

50. *Ibid.*

51. Cornish, Mary and Veena Verma (2003) " Enforcing International Labour Standards in the Americas in an Era of Free Trade". Prepared for the Canadian Bar Association's 3rd Annual International Law Conference "Few Barriers or No Barriers? Directions in International Law and Practice" May 30-31, 2002, Ottawa, Ontario, Canada [hereinafter *Enforcing International Labour Standards*].

52. Status of Women (1995) *Setting the Stage for the Next Century: The Federal Plan for Gender Equality*, Ottawa, Canada [hereinafter *Setting the Stage*].

53. *Ibid.* para 36-46.

54. ILO *Equal Remuneration Convention (No. 100)* (ILO *Convention No. 100*).

55. *Setting the Stage*, supra note 51at para 411.

56. *See: Achieving Pay and Employment Equity*, supra 5.

57. See: *Achieving Pay and Employment Equity*, supra 5.

58. *Ibid.*

59. See: *Enforcing International Labour Standards*, supra note 50.

60. Handbook of Existing Rules Pertaining to Human Rights in the Inter-American System, OEA/Sec.LV11.65, Doc.6, July 1st, 1985, Article 1, p. 26.

61. IACHR Regulations, Article 26 and 28, 1985 Handbook, p. 125.

62. Abella, Rosalie Silberman. (1984). Equality in Employment: The Report of the Commission on Equality in Employment, Ottawa: Supply and Services Canada.

63. See: *Restructuring Pay Equity,* supra note 35;. *Engendering Citizenship,* supra note 7.

64. See: *Restructuring Pay Equity,* supra note 35.

65. *Ibid.*

66. See: *Employment and Pay Equity in Canada,* supra note 64; *Restructured Work Force,* supra note 35; *From Principle to Reality*, supra note 11.

67. *Robichaud* v. *Canada Treasury Board,* [1987] 2 SCR 84.

68. *Ibid,* at para 13.

69. *CNR v. Canada (Human Rights Commission)* (1987) 1 S.C.R. 1114 [*Action Travail des Femmes*].

70. See: *From Principle to Reality*, supra note 11; Keene, Judith, *Human Rights in Ontario*, 2nd ed. 1992, Toronto: Carswell, pp 8-10.

71. *Andrews* v.*Law Society of British Columbia* (1989), D.L.R. (4TH) 1 (S.C.C.).

72. *Law v. Canada (Minister of Employment & Immigration)* (1999), 170 D.L.R. (4th) 1 (S.C.C.).

73. *From Principle to Reality*, supra note 11.

74. See Annex B & C re: systemic remedies

75. Cornish, Mary, Veena Verma and Margaret Wente (2003) "Racism & Employment: Strategies for Change". Prepared for the Canadian Institute Conference, " The Employer's Duty to Accommodate", April 28-29, 2003 [hereinafter *Racism and Employment*].

76. *Canada (A.G.)* v. *Mossop* (1993) 1 S.C.R.

77. *Ibid.* 645.

78. Ontario Human Rights Commission (October 2001), " An Intersectional Approach to Discrimination: Discussion Paper", online: <www.ohrc.on.ca>.

79. *From Principle to Reality,* supra note 11.

80. *Action Travail des Femmes,* supra note 69 at para 46.

81. *Ibid.* at para 39.

82. See: *From Principle to Reality*, supra note 11.

83. *British Columbia (Public Service Employee Relations Commission) v. BC Government and Service Employees Union (Meiorin)* (1999), 176 D.L.R. (4th) 1 (S.C.C.) at para 54 [hereinafter *Meiorin*].

84. *Ibid.*

85. See: *Restructuring Pay Equity,* supra 35; *Pay Equity: Complexity and Contradiction*, supra note 42. Cornish, Mary (2004) "Review of the Ontario Pay Equity Experience in the Health Care Sector, New Zealand Pay Equity Task Force Health Initiative Research Project", [hereinafter *Review of the Ontario Pay Equity Experience*].

86. See: *Review of the Ontario Pay Equity Experience.*

87. *Ibid.*

88. *Ibid.*

89. See: Cornish, Mary and Fay Faraday (November 1999) "The Future of Pay Equity Enforcement in Canada".

90. See: *From Principle to Reality*, supra note 11.

91. See: *Delisle* v. Canada (Deputy Attorney General) [1999] 2 S.C.R. 989.

92. See: *Review of the Ontario Pay Equity Experience,* supra note 83.

93. See: Equal Pay Coalition website: http://www.web.net/~equalpay/lobby.html.

94. See: *Restructuring Pay Equity,* supra note 35; Cornish, Mary, "Employment and Pay Equity in Canada - Success Brings Both Attacks and New Initiatives" (1996) *Canada-United States Law Journal*, v. 22 [hereinafter *Employment and Pay Equity in Canada*].

95. See: *Engendering Citizenship*, supra note 7.

96. See: *Litigating Pay and Employment,* supra note 1.

97. *Ibid.*

98. See: *From Principle to Reality*, supra note 11.

99. *Ibid.*

100. See: *Racism & Employment,* supra note 73.

101. *From Principle to Reality*, supra note 11.

102. See: *Securing Gender*, supra note 43.