USING THE *CHARTER* TO REDRESS GENDER DISCRIMINATION IN EMPLOYMENT

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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 ableism 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.

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 a 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 focuses on the theme of challenging gender-based labour market discrimination through the use of the *Charter of Rights and Freedoms*.

Parts I-IV of the paper set the context for the discussion using the *Charter* as a tool to engender 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. Part III then sets out the legal framework which Canada has developed to address gender-based employment discrimination. With this context set, Part V then reviews and analyzes how the *Charter* has been used by equality seekers to challenge inadequacies, cutbacks and repeals of pay and employment equity laws and other discriminatory government actions.[14] Finally, Part V of the paper highlights some of the lessons that have been learned.

PART I GENDER DISCRIMINATION IN THE CANADIAN LABOUR MARKET

Gender-based Discrimination Is Complex and Systemic

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]

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]

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.[18]

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.[19] 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. [20] 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.[21]

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.

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 under the *Pay Equity Act* 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. [22]

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[23]. For women, securing gender justice in labour markets requires a combination of transformative measures which are aimed at every aspect of women's inequality.[24] However, a review of all the required transformative measures lies outside the scope of this paper which instead addresses the narrower issues of how the *Charter* can be used to engender the labour market in the area of pay and employment equity.

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. These obligations set the context for the rights and obligations which the state and citizens have under domestic human rights laws and the *Charter*.

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.[25] 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".[26] Objective 2 of the Plan calls for promoting the valuation of women's paid work.[27] This principle flows from Canada's obligations under *Equal Remuneration Convention* (No.100)[28] 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".[29]

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. [30]

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. [31]

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.* [32]

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.[33]

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.[34] 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. [35] 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.[36]

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 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 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*.[37] 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.[38]

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.[39] 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. [40]

Newfoundland Association of Public & Private Employees v. Newfoundland Treasury Board and Minister of Justice " (*"NAPE")*

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 <u>normally</u> 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 V 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 the *Charter* are set out below.

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.[41]

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 and the *NAPE* cases.

The Importance of Pay and Employment Equity Laws and Litigation to Equality Advancements

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

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 has 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.[42]

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.[43]

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.

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. The *Charter* will continue to be an essential tool in holding governments accountable for their essential role as a promoter and defender of women's economic equality.

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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. 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*].

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22. *Ibid.*

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

24. *Ibid.*

25. 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*].

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27. *Ibid*. para 36-46.

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

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

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

31. *Ibid.*

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

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

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

35. *Ibid*.

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

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

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

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

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

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

42. 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*].

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