CAVALLUZZO

SECURING EMPLOYMENT EQUITY THROUGH HUMAN RIGHTS ENFORCEMENT

PRESENTATION BY MARY CORNISH

Cavalluzzo Shilton McIntyre Cornish LLP
474 Bathurst Street, Suite 300
Toronto, ON M5T 2S6
www.cavalluzzo.com

Employment Equity Revisited Conference

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> **"The purpose of employment equity is to achieve equality in the workplace so that no person is denied employment opportunities or benefits for reasons unrelated to ability." CHRC 2014 Framework for Compliance Audits under the *Employment Equity Act.***

CANADA HAS LOST ITS WAY TO EMPLOYMENT EQUITY

In the years since the *Abella Report, e*mployment equity (EE) has lost its way in Canada and needs revitalization. A weak federal *Employment Equity Act* along with the lack of provincial specialized employment equity laws has substantially impeded Canada's progress towards becoming a country which can offer employment equity to those who live here.

SO HOW DO WE MAKE PROGRESS?

We need to continue to campaign for effective specialized EE laws. At the same time we need to more effectively enforce the existing employment equity protections and obligations which are embedded in the matrix of human rights laws, policies, and jurisprudence**.** These legal frameworks can be used to remove barriers faced by disadvantaged workers and to enforce positive equality promoting measures. In other words, to secure employment equity.

SIX KEY LEGAL FRAMEWORKS

Using Ontario as an example, there are 6 key legal frameworks which can be utilized in securing employment equity:

a. *Human Rights Code*

b. *Labour Relations Act*

c. *Pay Equity Act*

d. *Accessibility for Ontarians with Disabilities Act*

e. Anti-Discrimination Collective Agreement Provisions

f. The *Charter*

1. ***Human Rights Code***

a. Key Rights

Section 5(1): Right to equal treatment with respect to employment without discrimination

Section 6: Right to equal treatment with respect to membership in any trade union, trade or occupational association or self-governing profession without discrimination

Section 5(2) and 7(2): Freedom from harassment in the workplace

b. Systemic Remedies – Jurisprudence

There are three key human rights cases which require employers to take employment equity or affirmative action measures in order to eliminate systemic workplace discrimination:

Action Travail des Femmes v. Canadian National Railway (1987), 40 DLR (4th) 193

National Capital Alliance on Race Relations v. Canada (Health & Welfare) (1997), 28 CHRR D/179

British Columbia (Public Service Employee Relations Commission) v. BC Government and Service Employees Union (BCGEU), [199] 3 SCR 3 (known as Meiorin)

Action Travail: The Supreme Court of Canada unanimously held that the Canadian Human Rights Tribunal could order an employment equity program under the *Canadian Human Rights Act* if it was necessary to remedy discriminatory workplace practices. Amongst the remedies was an order for CN to hire one woman in every four new hires into certain jobs, where there was evidence that women had been improperly excluded for many years.

National Capital Alliance on Race Relations: Ten years after *Action Travail*, the Canadian Human Rights Tribunal imposed an extensive employment equity program on Health Canada to remedy race-based discrimination. The measures included permanent measures, such as management training in equity issues, bias-free interviewing techniques, as well as temporary measures, including setting five years of accelerated targets for promoting visible minorities into senior positions.

Meiorin**:** The Supreme Court ruled that there was a proactive employer obligation to build a workplace culture of equality in order to eliminate workplace discrimination. This decision, while infrequently used for this purpose, laid the foundation for requiring employers to engage in equality planning. The Court made clear that employers must act to prevent discrimination – they are not to wait for complaints, proven discrimination cases, or requests for accommodation before taking action.

A recent HRTO interim decision also points to how the *Code* can be used to enforce employment equity in a non-traditional employment context.

AOM v. MOHTLC:A recent interim decision of the Human Rights Tribunal of Ontario dated September 14, 2014, (2014 HRTO 1370 CanLii)) recognized the need to treat systemic discrimination claims in a different manner. The case involves an application by the Ontario Association of Midwives on behalf of over 580 midwives that the Ministry of Health and Long Term Care engaged in systemic compensation discrimination when it failed on an ongoing basis since 1994 to set and fund the compensation of regulated midwives on a gender equitable basis. The application claims that the midwives should be paid approximately 91% of the Community Health Centre physician, the male comparator used at the time the midwives' compensation was originally set by the MOHLTC in 1994 at the time of regulation. It also claims injury to dignity damages and future compliance remedies including an equitable future system for setting compensation.

The application alleges a series of interconnected allegations of practices and policies which had contributed to the subsequent inequitable pay structure. These included the failure to have an ongoing system of pay equity monitoring and the application of compensation restraints which had widened the gender pay gap.

The *Pay Equity Act* does not cover the midwives as they are independent contractors. The MOHLTC moved to dismiss as untimely the allegations prior to one year before the filing of complaint. The Tribunal found that:

> *"Systemic claims are about the operation and impact of policies, practices and systems over time, often a long period of time. They will necessarily involve an examination of the interrelationships between actions (or inaction), attitudes and established organizational structures. A human rights application alleging gender-based systemic discrimination cannot be understood or assessed through a compartmentalized view of the claim."*

In finding the application "timely" as a "series of incidents", the Tribunal said:

"Alleged incidents, along with particulars of historical practices, policies and attitudes, must be viewed comprehensively and in aggregate. It is this interwoven amalgam of conduct, actions, inaction, policies, practices, systems and attitudes which is alleged to result in differential treatment and discriminatory impact. The connections between incidents may not always be obvious and may not be purely linear or continuous. But together, the interconnected web is what constitutes the series of incidents."

c. ***Human Rights Code*** **Policies and Guidelines**

The Ontario Human Rights Commission has 22 policies and guidelines which also provide an important source of employment equity protections. Since 2006 they have a formal status under section 30 and 45.5 as providing guidance to the Ontario Human Rights Tribunal for the *Code's* application. These policies require all employers working with unions to engage in proactive planning and to take proactive measures to secure a discrimination-free workplace

The *Guidelines on Developing Human Rights Policies and Procedures (*updated in January 2008*)* states that employers have ultimate responsibility for ensuring healthy and inclusive environment, and for preventing and addressing discrimination and harassment; employers will be held liable for failing to do so. The Guidelines state that employers have the obligation to be aware of how their policies, practices, and programs have an adverse impact or result in discrimination. The Commission Guidelines could also be relied on in the other frameworks discussed below.

2. ***Labour Relations Act***

The *Labour Relations Act* includes important EE obligations for employers and protections that can be used by trade unions and disadvantaged groups to secure employment equity. For example:

Discrimination prohibited: The LRA provides that collective agreements "must not discriminate against any person if the discrimination is contrary to the *Human Rights Code* or the *Canadian Charter of Rights and Freedoms*" (s. 54).

Duty to bargain in good faith: The duty to bargain in good faith under the LRA has been interpreted to mean that bargaining must not include unlawful or discriminatory proposals (s. 17).

Duty of fair representation: Unions are required, as exclusive bargaining agents, not to discriminate in their representational or referral duties (s. 74).

Remedy for discrimination: Where these provisions are violated, the Labour Board has the power to issue remedies, "despite the provisions of any collective agreement" (s. 96(4)). This includes the power to amend the collective agreement, and to direct the parties to apply the collective agreement in a non-discriminatory manner.

3. ***Pay Equity Act***

The *Pay Equity Act* is a specialized EE law because of its important acknowledgement of the existence of systemic discrimination in compensation of female job classes. It places direct proactive obligations on employers and trade unions to identify and rectify that discrimination on an ongoing basis. The *Act* sets out a number of proactive obligations on employers to establish and maintain pay equity for female job classes with comparable male job classes. These include:

Pay Equity Plan: Many employers are required to develop pay equity plans which identify what pay equity adjustments are owing to rectify the discrimination.

Bargaining Obligations: Employers and unions are prohibited from bargaining for or agreeing to compensation practices that would fail to achieve or maintain pay equity

Maintaining Pay Equity: Employers and unions must, after agreeing to an original pay equity plan, monitor the workplace for changes that would affect the validity of their original pay equity plan

The *Pay Equity Act* co-exists with the jurisdiction of the *Code* which also addresses the issue of discriminatory pay.

4. ***Accessibility for Ontarians with Disabilities Act***

The *Accessibility for Ontarians with Disabilities Act* is also a specialized EE law. It requires employers to develop, implement, and enforce province-wide accessibility standards to achieve accessibility for Ontarians with disabilities. The specific employment obligations are found in the Integrated Accessibility Regulation which requires employers to proactively establish accessible employment policies, procedures, and requirements for prevention, identification, and removal of barriers across all stages of an employment cycle for persons with disabilities. The system is enforced through reporting to and monitoring by the Accessibility Directorate of Ontario. 2014 is a reporting year for the private and public sectors. Organizations with 20 or more employees must self-report on all standards by the end of 2014 by submitting an online report advising the government that they have met all of their accessibility requirements.

5. ***Collective Agreement Anti-Discrimination Provisions***

Most Ontario collective agreements contain provisions prohibiting *Code*-based discrimination. Some also have specialized employment equity provisions.

Arbitrators have the power under the *Labour Relations Act* to interpret and apply relevant legislation, including the *Human Rights Code*. As such, arbitrators can impose employment equity measures under those provisions.

6. The *Charter*

a. Key Provisions

S. 15(1) – purpose is to prevent government from making distinctions that perpetuate/impose disadvantage (*R v. Kapp*)

S. 15(2) (affirmative action) – purpose is to ameliorate conditions of disadvantaged groups, allowing government to "proactively combat discrimination"

Affirmative action measures are not "justified discrimination" or discrimination in any sense, but rather are necessary to promote and secure equality (*R. v. Kapp*)

b. *Charter* Jurisprudence

In a key *Charter* case, the Federal Court of Appeals in *Perera v. Canada* (1998) 158 D.L.R. (4th) 341 (FCA) ruled that the *Charter* requires employment equity measures to be taken by government employers to remedy systemic discrimination. The Court stated that s. 24 of the *Charter* includes the necessary jurisdiction to "provide effective remedies for breaches of a citizen's constitutional rights to equality" and where there is systemic discrimination and warranting circumstances, it is appropriate to order employment equity plan measures. *Perera* involved a civil claim by visible minority applicants against their former employer, Canadian International Development Agency, alleging that the employer violated s. 15(1) by engaging in systemic discrimination, including biased promotion procedures and work assignments.

Conclusion

Employers are violating human rights laws when they fail to engage in employment equity planning, goals and measures Employers have been mostly ignoring these proactive obligations and hoping that employees and trade unions will not pursue them and that human rights institutions are too busy and/or under resourced to hold them accountable. With an increasingly precarious labour market where it is often not feasible to expect employee complaints, it is necessary to pursue structures of proactive enforcement. Equality seekers need to make use of the victories that have been won over the years through jurisprudence or laws which can help to pave the way for securing employment equity for disadvantaged groups. Enforcing the existing legal matrix of obligations is critical to securing a more just and equitable society.