LITIGATING PAY AND EMPLOYMENT EQUITY: STRATEGIC USES AND LIMITS- THE CANADIAN EXPERIENCE

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INTRODUCTION

For women there is one constant - regardless of the country they live in and the sector of society they come from, they face widespread system discrimination in employment, whether they work in the formal or informal economy and whether they are employed or self-employed. (ILO, 2004 and 2003, and Cornish, 2003). The issue of gender discrimination in compensation and employment for women is one of the central discrimination issues facing international institutions, national legislators, human rights agencies, employers and unions. 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. Such measures include a combination of legislative, policy and enforcement actions. (Cornish and Faraday, 2004) The success of these measures can ultimately be measured by one test - have they lead to a measurable and real reduction in the discrimination faced by women in labour markets. Effective enforcement means that the persons and groups who are discriminated against are empowered and enabled to achieve their equality rights found in equity laws and policies. (ILO, 2003 and Cornish, 2003).

Drawing upon the experience before both Canadian courts and administrative tribunals, this paper considers the benefits and limits of using litigation to advance the equality rights of women, including women who are multiply disadvantaged as a result of issues such as race, indigenous status and disability. Part I of the paper will set the context for the discussion by reviewing the Canadian context of gender inequality in employment and the Canadian legal framework for addressing equality issues through litigation. Part II of the paper reviews the Canadian approach to litigation as a key gender equality tool; Part III and IV of the paper highlights key Canadian cases that have strategically applied the *Canadian Charter of Rights and Freedoms*, collective agreement provisions, and existing pay, employment equity and human rights laws, with Part III reviews cases with particular application to employment equity and Part IV to pay equity. Part V of the paper reviews some lessons learned in using litigation as a strategy. Litigation has won important new workplace rights, enforced existing rights and prevented governments from repealing equality rights or otherwise acting in a discriminatory manner. At the same time, litigants face many drawbacks, including high costs, uncertainty and lengthy adjudication delays. The paper concludes by stressing the importance of approaching litigation as one of many tools for advancing the equality rights of women. The Annexes to the paper list various systemic pay and employment equity remedies and third-party monitoring mechanisms which have been ordered by Canadian adjudicative bodies.

PART I CANADIAN CONTEXT

Gender Discrimination and Pay and Employment Equity

Redressing systemic gender discrimination in employment requires a multi-faceted approach. This paper explores one aspect of this equality enforcement paradigm - the strategic and legal issues involved in challenging workplace gender discrimination through litigation in the area of pay and employment equity. Pay equity is the human rights remedy designed to address one aspect of women's unequal position in the labour force, namely the undervaluing of women's

work. 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.

Canadian Equity Legal Framework

International human rights standards require that countries have an accessible and enforceable pay and employment equity system. (Cornish and Faraday, 2004, Cornish, Shilton and Faraday, 2003). Litigation is an enforcement strategy which uses the adjudicative enforcement processes. Such litigation can include both a hearing-based mechanism or alternative dispute resolution mechanisms. By its very nature, such strategies generally require that pay and employment equity rights are enforceable through constitutional, legislative and/or contractual mechanisms.

Canada's equity protections for women arise from all three of these mechanisms while also relying on Canada's international commitments. As a federal nation, in Canada, these rights are found in the Federal Constitution, both provincial and federal laws, general human rights laws, laws specific to pay and employment equity, employment standards laws as well as rights which arise from collective bargaining agreements for unionized employees. Canada is also signatory to many ILO and UN conventions which prohibit discrimination and require pro-active gender equality measures. (Cornish and Faraday, 2003). It also has obligations as a signatory to NAALC, the labour side agreement to the North American Free Trade Agreement which has equality requirements. (Cornish and Verma, 2003)

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.*

The Commission report also noted that the negative impact on women of perpetuating discriminatory low wages is staggering:

> *The cost of the wage gap to women is staggering. And the sacrifice is not in aid of any demonstrably justifiable social goal. To argue, as some have, that we cannot*

> *afford the cost of equal pay to women is to imply that women somehow have a duty to be paid less until other financial priorities are accommodated. This reasoning is specious and it is based on an unacceptable premise that the acceptance of arbitrary distinctions based on gender is a legitimate basis for imposing negative consequences, particularly when the economy is faltering.*

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. As well, starting in 1987 with *Ontario's Pay Equity Act*, 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. In addition, at the federal level, there is a specialized *Employment Equity Act* which 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.(Cornish, 1996, Armstrong and Cornish, 1997, Cornish, Faraday and Verma, 2001)

Lobbying for Equality Laws

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* covering the public and private sectors and requiring 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. 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. (Cornish, 2003, Armstrong and Cornish,1997 and Achieving Equality, 1992). The comprehensiveness of the model combines legislative, collective bargaining,

adjudicative and enforcement mechanisms to arrive at an effective equality result. This model is used in the Federal Government's proactive *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 new Federal employment equity law. 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.

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 still remains active in helping people to bring forward pay equity cases, lobbying for amendments, and working 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 an Ontario *Employment Equity Act* which was then repealed by a successor conservative government which argued it was reverse discrimination. A federal *Employment Equity Act* under a Liberal government was strengthened at the same time in 1995 when Ontario's law was repealed. (Armstrong and Cornish, 1997 and Cornish, 1996)

Canadian Gender Inequality in Employment

Despite the progress made by Canada which ranks near the top of the UN list for the highest quality of life in the world, Canadian women and their families face very substantial economic inequalities (Canada, 2002, Canada, 2001 and Statistics Canada, 1995). Canadian women account for nearly half the labour force. In addition to performing work that is central to their employer's business, women support themselves, their children, and often their spouses and parents as well as contributing to their communities. Yet, Canadian women performing paid work are still greatly disadvantaged in comparison to men. In 1997, women employed full-year, full-time averaged just 73% of male full-time earnings (Statistics Canada, 2000). Equally significant, women accounted for less than 20% of those in the ten top paying jobs and more than 70% of those in the ten lowest paying jobs.

Over the past two decades, Canadian women's poverty and therefore children's poverty has increased steadily Almost 52% of families with children headed by sole support mothers were poor at the time of the 1970 Royal Commission report and that figure has increased to 56%. Canada's aboriginal peoples rank 63rd on the UN index. Human rights laws have not been effective in eliminating systemic racism with women of colour, immigrant women and refugee women underpaid and under-represented in Canadian society. Like these other groups, Canadian women with disabilities also face substantial barriers (FAFIA, 2003). The same world-wide trends in women's labour market inequalities many flowing from the new economy

can be found in Canada. More women are working in the labour force and throughout their reproductive years. The workforce is "feminizing" with a rise in "precarious" jobs and "harmonizing down" of standards. The wage gap between men and women is still high but decreasing. Some of this is likely attributed to the fall of male wages, particularly those who are racialized and young. The rise of "non-standard" jobs has been driven by an increase in temporary work and self-employment. (Cornish, 2003, Vosko et al, 2003 and Armstrong, 1996).

PART II THE CANADIAN APPROACH TO GENDER EQUALITY

Canada's advances in human rights, labour and *Charter* jurisprudence as described later in this paper have come primarily as a result of litigation brought by unions and women's NGO's. 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. This successful strategy 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. These have since guided workplace equality laws and rulings. Canadian legislation avoids any reference to "intention" and focusses on identifying whether the effect of practices is discriminatory even if such effect is unforeseen. (Cornish, 2003)

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* 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 sexual harassment. 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." (Robichaud v. The Queen)*

Finally, the Court ruled in *Action Travail des Femmes v. Canadian National Railway* 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 avoid any reference to "intention" and instead are focussed on identifying whether the effect of practices is discriminatory even if such effect is unforeseen (Cornish, Faraday and Verma, 2001 and Keene, 2002).

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 s. 15(1) decision, *Andrews v. Law Society of British Columbia*. The Court's recent decision in the 1999 case, *Law v. Canada (Minister of Employment & Immigration)* pulled together the threads of its s.15(1) jurisprudence. 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 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 equality litigation has been focussed on the employment area. The next section of the paper addresses the cases which have arisen in both the employment and pay equity contexts.

PART III EMPLOYMENT EQUITY LITIGATION

Introduction

Canadian human rights laws give 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 racism to occur. Remedying and preventing systemic discrimination requires employment equity or affirmative action measures which address and and accommodate disadvantaged groups' needs.

Establishing Pro-Active Obligations and Plans

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". (Cornish, Faraday and Verma, 2001). 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."*

The Court analysed 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."*

Affirmative action or employment equity programs as described above acknowledge that existing social and legal arrangements have actively benefited certain groups and disadvantaged others...[and] aim to restore the balance.

B.C.G.S.E.U.

The Supreme Court of Canada's 1999 decision in the *Meiorin* case (*British Columbia (Public Service Employee Relations Commission) v. BC Government and Service Employees Union*) 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. (Cornish and Verma, 2001)

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."*

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."*

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

One Ontario Board of Inquiry in the case of *McKinnon and Ontario Human Rights Commission v. Ontario (Ministry of Correctional Services)*, a case of a complaint under human rights legislation of ongoing racial harassment and discrimination of a correctional services worker, ordered innovative systemic remedies. In making the order, the Board of Inquiry 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 "A" sets out numerous examples of these orders.

Perera v. Canada

A court has now determined that employment equity measures could be ordered under the *Charter of Rights and Freedoms* and this form of litigation is being used to protect employees of government bodies at both the provincial and federal levels.

In the 1999 case of *Perera v. Canada,* the Federal Court of Appeal held that it was possible under s. 15 of the *Charter* to make a claim against a government agency alleging systemic discrimination in employment. In *Perera*, employees of a federal government agency 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 remedies under s. 24(1) of the *Charter*.

The federal government Ministry in *Perera* brought a motion to strike the statement of claim as disclosing no reasonable cause of action. While the Federal Court Trial Division struck the portion of the claim which requested pro-active systemic remedies such as hiring programmes, the Federal Court of Appeal ruled that the statement of claim should stand. The Court referred to the systemic remedies that Canadian Human Rights Tribunals had awarded in *Action Travail* and *Robichaud* and ruled that "the courts must have, under section 24 of the *Charter*, the power to impose similar remedies when they deem it appropriate."

Delisle v. Canada

In 1999, the Supreme Court of Canada in *Delisle v. Canada* also suggested that where a person is employed by a state *Act* and or such employer interferes with rights under the *Charter*, these infringements can be challenged under the *Charter* directly and need not be protected and enforced separately under other statutes or human rights laws. Although that case dealt with an allegation that freedom of association had been violated by excluding members of the RCMP from collective bargaining statutes, the analysis with respect to the application of the *Charter* to government-employers is equally applicable to allegations of s. 15(1) equality rights infringements. (Cornish and Faraday, 1999 b) In upholding this claim, the Court noted that the Supreme Court of Canada in *Action Travail des Femmes* and *R. v. Robichaud* had found such measures to be warranted in cases of systemic discrimination:

> *"... in cases where attitudes or behaviour need to be changed, an instrumental approach to remedies is necessary in order to enforce compliance with the purposes and objectives of human rights codes or legislation. It necessarily*

> *follows, in my view, that the courts must have, under section 24 of the Charter, the power to impose similar remedies when they deem it appropriate.*
>
> *"Indeed, it would be astonishing if the Federal Court, as a Superior Court of record with a supervisory jurisdiction did not have jurisdiction to enforce constitutional equality rights in the federal sphere by providing to an aggrieved citizen an appropriate and just remedy pursuant to section 24 of the Charter."*

National Capital Alliance on Race Relations

In the 1997 decision in *National Capital Alliance on Race Relations v. Canada (Health & Welfare)* ["*NCARR*"], a Canadian Human Rights Tribunal followed *Action Travail* to impose an extensive remedial employment equity Program on Health Canada a federal government department. Their 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 in *NCARR* are set out in full as Annex "B" to this paper, a useful illustration of the orders which can be achieved through litigation.

Eldridge v. B. C.

In determining which employers are subject to *Charter* scrutiny with respect to employment equity, the Supreme Court of Canada's decision in *Eldridge v. British Columbia (Attorney General)* broadened the range of entities and activities that can be subject to *Charter* scrutiny. In particular, that case determined that where a private entity is acting in furtherance of or acting to implement a specific government program or policy, it will be considered "government" for the purposes of the *Charter*. (Cornish, Faraday and Verma, 2001)

Ferrel v. Ontario (Attorney General)

The repeal of Ontario's *Employment Equity Act* was one of the first actions of a new conservative government in Ontario in 1995. Four individuals unsuccessfully challenged the repeal as being contrary to s. 15(1) of the *Charter*. *Ferrel v. Ontario (Attorney General)*. 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 has been widely criticized by equality-seeking groups. Leave to appeal to the Supreme Court of Canada was refused.

Inter-Sectional Approach to Discrimination

Those who suffer from multiple disadvantages have sought to require the Courts to recognize the different nature of their discrimination. (Cornish, Verma and Wente, 2003) . Madam Justice L'Heureux-Dube recognized this reality in *Canada (A.G.) v. Mossop.*

> *...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.*

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..

PART IV PAY EQUITY LITIGATION

Tribunal Litigation under Ontario's *Pay Equity Act*

Introduction

The health care sector in Ontario was the focus of many of the leading Tribunal and Court decisions and settlements under Ontario's pro-active *Pay Equity Act* which came into force in 1988. 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. (Armstrong and Cornish, 1997, Armstrong, Millar and Cornish, 2003 and Cornish, 2004)

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.

Duty to Bargain in Good Faith with Unions and Disclose Information

The first case in 1989 *Cybermedix Health Services Ltd.* involving a public health laboratory brought by the bargaining agent, the Ontario Public Service Employees Union 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.

This decision was later followed by the Tribunal in *Haldimand Norfolk (No.6)* and *Riverdale Hospital (No.1)*. Ontario law requires a employer to negotiate in good faith and endeavour to agree on a pay equity plan for the employees in the bargaining unit. In the Haldimand Norfolk workplace, ONA was required to go the Pay Equity Hearings Tribunal to get a ruling that the employer was failing to bargain in good faith. This further 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 and historical gender predominance of job classes and information about proposed gender neutral comparison systems in order to assess the suitability of the proposed systems. (Cornish, 2004)

Determining the "Pay Equity Employer"

In *ONA v. Haldimand-Norfolk*, the Tribunal ruled that nurses at a public health unit funded by the Haldimand Norfolk municipal government could look to the municipal government as their "pay equity employer" in order to find male comparators 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? Applying that test, the Tribunal found that the Regional Municipality was the pay equity employer of the health unit nurses and therefore such nurses could seek to compare their work to other male job classes, such as the police who were employed by the Municipality.

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 1992 amendments to the *Pay Equity Act* which brought in other mechanisms for pay equity comparisons in predominantly female workplaces without the necessity of defining a new pay equity employer. (Cornish, 2004)

Criteria for Gender Neutral Comparison Systems and Evaluations

The Haldimand Norfolk public health unit was also the site of the first major ruling on the criteria to govern the development of a "gender neutral comparison system". *ONA v. Haldimand-Norfolk (No. 6)*. This was followed up by the decision in *ONA v. Women's College Hospital* (No. 4) which was a large public hospital.

In the *ONA v. Haldimand Norfolk* and *ONA v. WCH* 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 decisions set the criteria for developing new job evaluation schemes that would make visible and positively value women's work in virtually any employment situation. 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.

Another Tribunal decisions dealt with a complaint by government nurses employed by a government psychiatric facility. They challenged the validity of the Government/OPSEU Plan but this complaint was dismissed by the Tribunal in a ruling *Management Board Secretariat (No.6)*. The plan had been developed based on a "policy-capturing" methodology which involved developing a statistical model of specific job content divided into factors and then using modelling to determine and remove gender effect from that model. The Tribunal upheld the model as reasonable based on the large size and variation of the job classes in the province-wide unit and the brief time for negotiating the plan. (Cornish, 2004)

Using General Human Rights Laws

Efforts were also made to use anti-discrimination clauses to secure pay equity. The Ontario Divisional Court decision in *Nishimura v. Ontario Human Rights Commission* 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 will decide what standards are to apply within its mandate." (Cornish and Faraday, 1999 b)

Charter Litigation

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

In the nursing home sector, the Service Employees International Union, Local 204 took on an important pay equity issue in defence of its predominantly female nursing home membership and other similarly situated women. In 1996, the Union brought a challenge under section 15 of Canada's *Charter of Human Rights and Freedoms* alleging that the Ontario Government's repeal of the proxy comparison method was gender discrimination. A new right wing Government took power in June, 1995 and one of its first actions was to cut pay equity funding for public sector pay equity adjustments so it was capped at $500 million and then through *Schedule J* to the *Savings and Restructuring Act, 1996,* repealed the proxy comparison method alleging it was too costly and unworkable and capped the adjustments owing at 3% of the previous years payroll. As noted earlier, 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. This was based on an annual estimated payroll cost of $22 million which compounds each year. This was in contrast to proportional and job-to-job adjustments which were going to "max out" in 1998, the statutory completion date. The Ontario Government decided that it was not prepared to pay for these adjustments and since the public agencies required public funding to pay for the adjustments, the Government decided to repeal the proxy right so employers would no longer have the obligation. (Cornish, 2004)

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. The Court ordered the reinstatement of the proxy method provisions in the *Pay Equity Act.*

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. Mr. Justice O'Leary 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, Mr. Justice O'Leary noted in his 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 of the *Charter.* The case claimed that government is 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 plans negotiated by their unions 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. (Equal Pay Coalition, 2004)

Newfoundland Association of Public & Private Employees v. Newfoundland Attorney General

In this case, the Newfoundland Association of Public and Private Employees challenged its employer, the Newfoundland Government's failure to make pay equity adjustments. After negotiating a pay equity agreement as part of its collective agreement NAPE to eliminate sex-based wage discrimination for its public sector employees, the Newfoundland government passed a law to reduce the amount of money it had to pay to rectify the discrimination. The 1991 *Public Sector Restraint Act* eliminated millions of dollars that were owing for the years 1988 to 1990 and delayed payment of pay equity remedies from 1991 forward. NAPE grieved the violation of its collective agreement. The arbitration board found the government's decision violated the collective agreement and held that the *Public Sector Restraint Act* allowing the elimination of the retroactive adjustments was discriminatory and violated section 15 of the *Charter.* The *Act*'s denial to workers in female-dominated jobs of human rights remedies devised to redress discrimination on the basis of sex is differential treatment on the basis of sex

and that the government had not demonstrated the violation was justified under s.1 of the *Charter* as reasonably necessary in a free and democratic society.

The initial arbitration decision was overturned by the Newfoundland Court of Appeal. NAPE appealed to the Supreme Court of Canada. The Canadian Labour Congress intervened in the appeal along with LEAF and other equality-seeking groups. The appeal was opposed by with four provincial government intervenors. The decision will consider a government's obligations to consider *Charter* equality obligations in their budgeting process. Section 1 of the *Charter* permits the violation of equality rights where the infringement is reasonably necessary in a free and democratic society.

The Canadian Labour Congress argued at the Supreme Court of Canada, 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 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. Failure to acknowledge the implications of retrenching on this Charter right and human rights remedy contributes to a backlash against workers in female-dominated jobs, thereby compounding their discrimination.

The appeal was heard in May, 2004 and the decision is reserved.

PART V SOME LESSONS LEARNED

The Importance of 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 they must be enforceable -–otherwise they are only a privilege or luxury to be removed when no longer convenient or deemed too costly. As the review of the Canadian litigation in this article has shown, litigation has been and continues to be a key tool in Canada in this enforcement arsenal.

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. For many Canadian women, particularly low-income women, Canada's lofty equity laws and principles have not been effectively translated into workplace changes. 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. (Armstrong and Cornish, 1997)

The improvements which have been made in reducing the inequality faced by women workers in Canada has come as a result of the persistent efforts of unions and women's NGOs who who 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 collective bargaining, using international equality mechanisms to question Canadian rights violations, and defending the equality role of the state. (Cornish, 2003 and FAFIA, 2003)

Litigation and 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. Armed with the rulings of the early 1980's in cases like *Robichaud* and *Simpsons Sears*, and the ineffectiveness of complaint-based laws, women 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.

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. Reduction of public sector jobs disproportionately affected women and racial minorities, among others, who have been driven into the informal economy where jobs are

insecure and low-paying. Funding crises in the public sector have reduced women's access to day care, retraining and other employment-enhancing strategies. (Armstrong and Cornish, 1997) It also lead to the repeal of the proxy sections of Ontario's *Pay Equity Act* covering women in predominantly female workplaces and also to the repeal of Ontario's *Employment Equity Act, 1993.*

Charter Litigation

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* 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.

Using International Obligations in Litigation

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. (FAFIA, 2003)

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. (Cornish, Faraday and Verma, 2001)

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 *Meiorin* that they "are obliged to assist in the search for possible accommodation." (Cornish and Faraday, 1999 and Cornish, Faraday and Verma, 2001) 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. (Cornish, Verma and Wente, 2003)

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. (Cornish, Faraday and Verma, 2001)

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

Overall, litigation, despite its drawbacks remains an essential feature of the system for enforcing pay and employment equity rights. Combined with other policy and legal tools, litigation is necessary so that governments and employers are called to account for their gender inequitable employment practices and laws.

ANNEX "A"

SYSTEMIC HUMAN RIGHTS REMEDIES

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)

ANNEX "B"

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

The 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.

The 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.

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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*