

FLASH UPDATES ON THE ISSUES OF THE DAY

WELCOME TO OUR CLIENT EVENT

October 23, 2014
Royal Ontario Museum

CAVALLUZZO

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INTRODUCTION
PAUL CAVALLUZZO

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COURTING THE COURTS FOR THE RIGHT TO STRIKE AND BARGAIN COLLECTIVELY

Paul Cavalluzzo and Adrienne Telford



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COURTING THE COURTS FOR THE RIGHT TO STRIKE AND BARGAIN COLLECTIVELY

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- "2. Everyone has the following fundamental freedoms:
- (a) freedom of conscience and religion;
 - (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
 - (c) freedom of peaceful assembly; and
 - (d) freedom of association."



WHAT'S UP (OR DOWN) WITH WOMEN'S WAGES

Janet Borowy and Jennifer Quito



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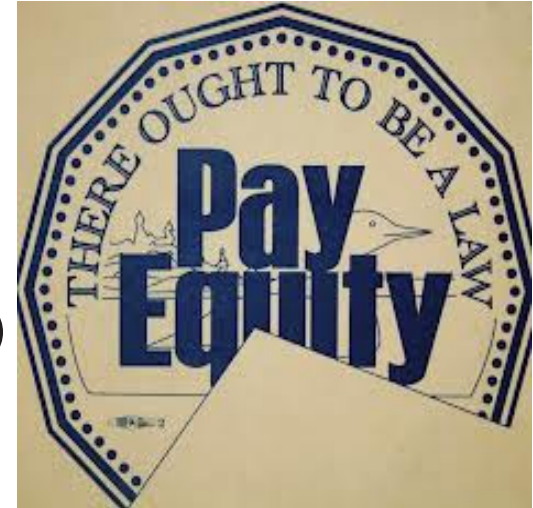
What's down with women's wages? (2011 Info)

- **31.5% gap - Annual Average earnings**
- **Men's[↑] \$100. Women[↓] \$1,400**
- **13% hourly wage gap - Part-time work not captured. Gap higher for racialized, aboriginal, disabled women.**



Cavalluzzo Pay Equity Toolbox: Legal Strategies + Political Campaigns

- *Ontario Pay Equity Act*
- *Ontario Human Rights Code*
- *Charter of Rights and Freedoms*
- *Canadian Human Rights Act (Federal)*
- *PSECA - (Not yet in force) (Federal)*



- **Equal Pay Coalition/ Media events/ Advice on government relations**
- **Complement client's political campaigns**

Unequal Wage Grids

- ***PEA* s.6(1) Pay equity = equal job rate = highest rate of compensation = top of wage grid**
- **Unequal pay lower steps of the wage grid do not violate the *PEA***
- **Seek remedy under the *Code* or *Charter***



Pay Equity Act + Charter Challenge

Participating Nursing Homes (No decision released yet)

- **Review Officer: No obligation to maintain pay equity through external male**
- ***Charter* challenge to Review Officer's interpretation of the *PEA***



Human Rights Code - Gov. as Funder of Unequal Compensation

- Excluded from the *Pay Equity Act*
- Government as funder of unequal compensation
- Limitation period/ Series of Incidents
- Systemic Discrimination



**Collective Bargaining and Pay Equity
*Syndicat démocratique des salariés du Château
Frontenac (C.S.D.) and Fairmont Le Château
Frontenac (Room Attendants Case) Case Note***

- **Issue: whether pay equity adjustment are added to the base rate and paid in addition to the general wage increase**
- **Union filed grievance. Union relied on Ontario's *Glengarry* decision, where the Ontario Court of Appeal affirms that pay equity is a quasi-constitutional right and collective bargaining could not extinguish pay equity increases.**
- **Pay equity adjustments are deemed to form part of the collective agreement applicable to the female job classes.**

Campaigns

- **Equal Pay Coalition**
 - Roundtable
 - Premier Wynne's mandate letters to the Minister of Labour and Minister of Women's Issues to work on closing the pay gap.
- **Client Campaigns**
 - SEIU Sweet 16
 - AOM Midwife Mondays



Conclusion

- *Pay Equity Act*
- *Charter Challenge*
- *Human Rights Code*
- **Campaigns for Equal Pay**



MOVING TARGET: PENSION REFORM ACROSS CANADA

Amanda Darrach



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MOVING TARGET: PENSION REFORM ACROSS CANADA

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AGENDA

- 1. Review of the story so far**
- 2. Developments by Province**
- 3. The Trends:**
 - A. Target Benefit Plans**
 - B. Provincial Plans**

MOVING TARGET: PENSION REFORM ACROSS CANADA

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THE STORY SO FAR:

- **Late 00s marked by a wave of expert commissions on pensions**
- **Ontario: Arthurs Report, 2008**
- **Alberta/British Columbia: Alberta-British Columbia Joint Expert Panel on Pension Standards (JEPPS), 2008**
- **Maritimes: Nova Scotia, Pension Review Panel, 2009; New Brunswick, Task Force on Protecting Pensions**
- **Quebec: D'Amours Report, 2013**

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SO WHAT HAPPENED?

- **Federal:** Wave of pension amendments
- **Alberta:** *Employment Pension Plans Act (2012)*, in effect September 1, 2014
- **British Columbia:** *Pension Benefits Standards Act (2012)*, not yet proclaimed
- **Manitoba/Saskatchewan:** package of pension amendments

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SO WHAT HAPPENED?

- **Ontario:** immediate vesting, no partial wind-ups, grow-ins on termination, expansion of JSPPs, public sector asset transfers...
- **Quebec: Bill 3 (Municipal Plans)**
 - Sharing of past and future plan deficits with active members;
 - Employer may suspend indexing
 - Establishment of a stabilization fund; and
 - Arbitrations after one year of negotiation

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SO WHAT HAPPENED?

- **Nova Scotia/New Brunswick:** proposed amendments similar to Ontario, legislation not yet proclaimed
- **PEI:** ... nope, still no pension legislation

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TREND #1: TARGET BENEFIT PLANS

- Two major types of pension plans in Canada: a defined benefit (“DB”) plan and a defined contribution (“DC”) plan
 - DB = guaranteed benefit based on a formula, employer contributes based on actuarial valuation
 - DC = set contributions, benefit based on amount in employee account at time of retirement
- A target benefit plan “aims” to provide a defined benefit, but is based on set contribution levels
- If plan funding falls below a certain level, the member ‘s accrued benefits can be reduced (not permissible in most cases in defined benefit plans)

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FIRST OUT OF THE GATE

- **New Brunswick was the first to adopt this model – the “Shared Risk Pension Plan” in the New Brunswick government (December 2013)**
- **Key features:**
 - **Contributions fluctuate between 8%-10% based on the funded status of the plan**
 - **Two types of benefits: base benefit and indexing (indexing only if plan is in surplus)**
- **Benefits cut if plan is less than 100% funded for 2 years in a row**
- **Cut is for both active and retired members**

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WHERE ELSE?

- **Federal:** private sector federally regulated plans only
- **Quebec:** only in the pulp and paper sector
- **BC/Alberta:** in legislation, waiting for regulations
- **Ontario/Nova Scotia:** in legislation, waiting for regulations, for unionized workplaces only
- **Saskatchewan:** it is in the legislation already

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TROUBLE IN PARADISE

- **Lawsuit has been filed in New Brunswick**
- **13,000 former public servants claim the legislation is unconstitutional**
- **Of particular concern is retroactive elimination of cost of living adjustments**
- **Case is still in early stages**
- **Hot issue: do you allow retroactive conversion?**

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TREND #2: POOLED REGISTERED PLANS (and other pooled plans)

- **Federal: federal government acted legislation enabling PRPPs**
- **Alberta, British Columbia and Saskatchewan have enacted enabling legislation but no plans yet**
- **Nova Scotia to enact legislation**
- **Ontario has stated intention to enact legislation**

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ONTARIO ORPP

- **To be launched in 2017**
- **Mandatory for all employers who do not offer a comparable workplace pension**
- **Employers and employees contribute equal amounts (up to 1.9% each) on earnings up to \$90,000**
- **Details TBA**

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QUEBEC: VRSPs

- **Came into effect July 1, 2014**
- **For employees without access to a group plan with source deductions offered by employers**
- **Mandatory for employers with 5 or more eligible employees with over 1 year of service (phased in)**
- **Employers not required to contribute but must establish plan and make payroll deductions**
- **Default contributions of 2% to 2017, 3% to 2018, and 4% thereafter, but may be changed (including to 0)**
- **Employees may opt out**

A TWEET ON SOCIAL MEDIA @ WORK – WHOSE BUSINESS IS IT?

Elichai Shaffir



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SOCIAL MEDIA: THE FACTS

- Facebook – over 500 million users
- Twitter – over 200 million users
- Blogs – over 150 million



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MYTHS OF SOCIAL MEDIA:



- What's said on Facebook is “private” and “between friends”
- Not including names is enough to prevent a breach of confidentiality
- Once deleted the post is gone forever
- What I do in my free time is my own business

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RELEVANT CASELAW:

- *Wasaya Airways LP v. Air Line Pilots Assn., International (Wyndels Grievance)* (2010), 195 L.A.C. (4th) 1 (Marcotte)
- *Chatham-Kent (Municipality) v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada), Local 127 (Clarke Grievance)*, [2007] O.L.A.A. No. 135 (Williamson)
- *Canada Post Corp. v. Canadian Union of Postal Workers (Discharge for Facebook Postings Grievance)*, [2012] C.L.A.D. No. 116 (A. Ponak)
- *Lougheed Imports Ltd. (c.o.b. West Coast Mazda) v. UFCW Local 1518*, [2010] B.C.L.R.B.D. No. 190 (A. Matacheskie)
- *Groves v. Cargojet Holdings Ltd.*, [2011] C.L.A.D. No. 257 (M. Somers)

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RELEVANT CASELAW:

- *EV Logistics v. Retail Wholesale Union, Local 580 (Discharge Grievance)*, [2008] B.C.C.A.A.A. No. 22 (Laing)
- *CEP, Local 64 v. Corner Brook Pulp and Paper Limited* (2013), 239 L.A.C. (4th) 87 (Oakley)
- *Ontario Secondary School Teachers' Federation v. Simcoe County District School Board*, 2013 CanLII 62014 (ON LA) (Hayes)
- *Communications, Energy and Paperworkers Union of Canada v. Bell Technical Solutions*, 2012 CanLII 51468 (ON LA) (Chauvin)
- *Tremblay v. 1168531 Ontario Inc.*, 2012 HRTO 1939 (CanLii)

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MAIN POINTS FROM CASELAW:

- **No Real Expectation of Privacy**
 - *“Where the internet is used to display commentary or opinion, the individual doing so must be assumed to have known that there is a potential for virtually world-wide access to those statements” (Chatham-Kent)*
 - **No control over the dissemination of information once it’s posted**



A TWEET ON SOCIAL MEDIA @ WORK - WHOSE BUSINESS IS IT?

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MAIN POINTS FROM CASELAW:

- **You Can Be Disciplined for Off-Duty Conduct Involving Social Media?**
 - Cases contradict the conventional wisdom that what employees do on their own time is their own business
 - Off-duty conduct involving social media will constitute employment related misconduct if the employer's business interests or reputation is harmed
 - Postings made outside of working hours, even with a personal computer or device, can be cause for discipline and professional misconduct if there is a real connection between the workplace and the activity in question

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MAIN POINTS FROM CASELAW:

- **Connecting the Dots to the Workplace**
 - Naming the employer or co-workers
 - Including co-workers as friends
 - Accessing the general site during work hours

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MAIN POINTS FROM CASELAW:

- **Mitigating Factors May Reduce Penalty**
 - **Removing offensive post immediately**
 - **Accept responsibility, apologize and show remorse**
 - **Provocation**
 - **Seniority**
 - **No previous discipline**
 - **Impulsive comment**
 - **Privacy settings were activated**

A TWEET ON SOCIAL MEDIA @ WORK - WHOSE BUSINESS IS IT?

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RECOMMENDATIONS:

- **Understand and follow organizational policies specific to the use of social media in the workplace**
- **Refrain from work related venting on social media**
- **Avoid posting or sharing posts that are not consistent with the values of the workplace**
- **Remember the mitigating factors that arbitrators consider and take sincere and immediate action to repair any damage**

**WHO'S CHANGING
THE DIAPERS?
ACCOMMODATING
FAMILY STATUS**

Nadia Lambek



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WHO'S CHANGING THE DIAPERS? ACCOMMODATING FAMILY STATUS

Nadia Lambek

At the start of 2014 a number of questions remained unsettled in the case law on family status:

- 1. What does family status include? Does it protect child-care obligations? What about elder-care obligations?**
- 2. What is the onus on an employee to show they have been discriminated against on the basis of family status?**
- 3. What does accommodation mean in the context of family status?**
- 4. What, if any, relevance do personal choices have in the discrimination analysis**

WHO'S CHANGING THE DIAPERS? ACCOMMODATING FAMILY STATUS

Nadia Lambek

Ontario Human Rights Code

Employment

5. (1) Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, record of offences, marital status, family status or disability.

Definitions re: Parts I and II

10. (1)

“family status” means the status of being in a parent and child relationship

WHO'S CHANGING THE DIAPERS? ACCOMMODATING FAMILY STATUS

Nadia Lambek

Canada Human Rights Act

Prohibited grounds of discrimination

3. (1) For all purposes of this Act, the prohibited grounds of discrimination are race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability and conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered.

Employment

7. It is a discriminatory practice, directly or indirectly,

...

(b) In the course of employment, to differentiate adversely in relation to an employee, on a prohibited ground of discrimination.

WHO'S CHANGING THE DIAPERS? ACCOMMODATING FAMILY STATUS

Nadia Lambek

Childcare Obligations Covered Under Family Status

[70] The childcare options that are contemplated under family status should be those that have immutable or constructively immutable characteristics, such as those that form an integral component of legal relationship between a parent and a child.

...

[72] Voluntary family activities, such as family trips, participation in extracurricular sports events, etc. do not have this immutable characteristic since they result from parental choices rather than parental obligations. These activities would not normally trigger a claim to discrimination resulting in some obligation to accommodate by an employer

Canada (Attorney General) v. Johnstone, 2014 FCA 110

WHO'S CHANGING THE DIAPERS? ACCOMMODATING FAMILY STATUS

Nadia Lambek

No Hierarchy of Human Rights: *Prima Facie* Test Does Not Set a Higher Standard

[93] I conclude from this analysis that in order to make out a *prima facie* case where workplace discrimination on the prohibited ground of family status resulting from childcare obligations is alleged, the individual advancing the claim must show

- i. That a child is under his or her care and supervision;
- ii. That the childcare obligation at issue engages the individual's legal responsibility for that child, as opposed to a personal choice;
- iii. That he or she has made reasonable efforts to meet those childcare obligations through reasonable alternative solutions, and that no such alternative solution is reasonably accessible, and
- iv. That the impugned workplace rule interferes in a manner that is more than trivial or insubstantial with the fulfillment of the childcare obligation.

Canada (Attorney General) v. Johnstone, 2014 FCA 110

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WHO'S CHANGING THE DIAPERS? ACCOMMODATING FAMILY STATUS

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Issues that Remain:

- What is the status and scope of elder-care protections?
- Does family status only cover the parent-child relationship? What about other family members?
- How strictly will decision-makers rely on whether an obligation engages an “individual’s legal responsibility”? And how will they continue to define “personal choice”?
- What are “reasonable efforts” and “reasonable alternatives”? How does an employee prove they have made “reasonable efforts to meet childcare obligations through reasonable alternative solutions”?
- What demands must an employee make on a spouse or relative to assist in providing care?

**DE-STIGMATIZING MENTAL ILLNESS!
A CHALLENGE TO US ALL**
Danielle Bisnar



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DE-STIGMATIZING MENTAL ILLNESS! A CHALLENGE TO US ALL

Danielle Bisnar

OVERVIEW

- 1. Mental Illness and addictions in the workplace: legal implications for our clients**
- 2. De-stigmatizing mental illness**
- 3. Striking the right balance in protecting workers' privacy**
- 4. Challenges and strategies for worker advocates**

DE-STIGMATIZING MENTAL ILLNESS! A CHALLENGE TO US ALL

Danielle Bisnar

1. MENTAL ILLNESS IN THE WORKPLACE

- **1/5 Canadians will experience mental illness or addiction in a given year**
- **Mental illness and addiction are disabilities with legal protection from discrimination**
 - ***Human Rights Codes***
 - ***Charter of Rights and Freedoms***
 - ***International Convention on the Rights of Persons with Disabilities***

DE-STIGMATIZING MENTAL ILLNESS! A CHALLENGE TO US ALL

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1. MENTAL ILLNESS IN THE WORKPLACE

- **Unions and associations are at the forefront of advancing human rights for disabled workers**
 - **Duty to accommodate**
 - **Duty to inquire**
 - **Duty of fair representation**
- **Invisible disabilities pose particular challenges for representation**
 - **Stigma**
 - **Privacy issues**

DE-STIGMATIZING MENTAL ILLNESS! A CHALLENGE TO US ALL

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2. DE-STIGMATIZING MENTAL ILLNESS

There is no question but that the mentally ill in our society have suffered from historical disadvantage, have been negatively stereotyped and are generally subject to social prejudice.

R. v. Swain, (1991) S.C.R. 933 at 994

DE-STIGMATIZING MENTAL ILLNESS! A CHALLENGE TO US ALL

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2. DE-STIGMATIZING MENTAL ILLNESS

OHRC, Policy on preventing discrimination based on mental health disabilities and addictions

- Accommodation: dignity, individualization, integration and full participation
- Inclusive design
- Confidentiality of medical information
- Consent and capacity

www.ohrc.on.ca

DE-STIGMATIZING MENTAL ILLNESS! A CHALLENGE TO US ALL

Danielle Bisnar

3. PROTECTING WORKERS' PRIVACY

- The right to privacy protects fundamental *Charter* values of dignity, integrity and autonomy

The essence of privacy...is that once invaded, it can seldom be regained. For this reason, it is all the more important for reasonable expectations of privacy to be protected at the point of disclosure.

R. v. O'Connor, [1995] 4 SCR 411 at para. 119

DE-STIGMATIZING MENTAL ILLNESS! A CHALLENGE TO US ALL

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3. PROTECTING WORKERS' PRIVACY

- Disclosure of medical information: what can workers' reasonably expect from their advocates?
 - *Personal Health Information Protection Act, 2004*
 - *Occupational Health and Safety Act*
- Disclosure of medical information may be required where workers are:
 - Seeking sick leave and/or disability benefits
 - Seeking accommodation in the workplace
 - Subject to governance by a professional regulatory body (eg. College of Nurses, College of Teachers)

DE-STIGMATIZING MENTAL ILLNESS! A CHALLENGE TO US ALL

Danielle Bisnar

3. PROTECTING WORKERS' PRIVACY

Employees are only required to provide as much medical information as is “objectively reasonable”. The “least intrusive non-punitive approach that balances the legitimate business interests of the employer and the privacy interests of the employee” is appropriate.

Ontario Nurses' Association v. Hamilton Health Sciences (2007), 167 L.A.C. (4th) 122 (Surdykowski)

DE-STIGMATIZING MENTAL ILLNESS! A CHALLENGE TO US ALL

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4. CHALLENGES AND STRATEGIES FOR WORKER ADVOCATES

Strategies for building trust and protecting workers' privacy

- a) Tailor extent of information disclosed to issues engaged and worker's individual circumstances**
- b) Explain the grievor's duty to cooperate in accommodation process in an accessible manner**
- c) Minimize the circle of disclosure**

DE-STIGMATIZING MENTAL ILLNESS! A CHALLENGE TO US ALL

Danielle Bisnar

4. CHALLENGES AND STRATEGIES FOR WORKER ADVOCATES

- Cavalluzzo's *Charter and Human Rights Code* challenge to regulation of disabled nurses
- Our client:
 - RN with 30+ years of experience, diagnosed with bipolar disorder, stable on medication, strong community supports
- *Regulated Health Professions Act, 1991*
 - Stigma and adverse impacts of public label of “incapacity”
- Our position:
 - Human rights principles require individualized approach to management of potential risk to public posed by disabled professionals