

*EMPLOYMENT EQUITY** Judge Rosalie Silberman Abella**

Almost everywhere there remains a clear division of labour by sex with jobs labeled as "men's work" and "women's work". . . . It creates a situation in which work traditionally done by men commands higher pay and prestige while that traditionally done by women is accorded lower pay and prestige. . . . It has no inherent logic.¹

I. Equal Pay

Equal pay is an integral element in the implementation of employment equity. It must be included in any undertaking by employers to make the practices in the workplace more equitable.

The existence of a gap between the earnings of men and women is one of the few facts not in dispute in the "equality" debate. There are certainly open questions about it, the two main ones being the width of the gap and the right way to go about closing it. But no one seriously challenges the reality that women are paid less than men, sometimes for the same work, sometimes for comparable work.

The lawyer representing the American Federation of State, County, and Municipal Employees, the union that successfully sued the State of Washington for unfairly paying women less than men,² was quoted as saying, "Ending discrimination costs money. But no one would dare raise that as a reason for continuing to pay blacks less than whites."³ Yet costs are constantly raised as an excuse for paying women less. In the United States, women earn on average 61 per cent of what men earn.⁴

The current discussion surrounding equal pay sometimes seems to suggest that the problem is not critical. But referring to a wage gap as "only" 10 per cent creates a tendency to minimize the problem and to treat it as having decreased to a tolerable level.

It has not. In 1911, the average wage of employed women in Canada was 53 per cent that of men.⁵ In 1982, it ranged from 55 to 64 per cent.⁶ This means an improvement of 2 to 11 percentage points over the course of 70 years. What is particularly noteworthy is, first, the length of time the gap has been tolerated and, second, that it is tolerated at all.

The average annual earnings for male workers full-time, full-year in 1982 were \$25,096. For women they were \$16,056, or 63.9 per cent of male

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** Of the Ontario Provincial Court, Family Division, Toronto.

1. International Labour Office, *Equality of Opportunity and Treatment for Women Workers*, Report VII (International Labour Conference, 60th Session, 1975). Geneva: 1974, p. 20.

2. *American Federation of State, County, and Municipal Employees et al. v. State of Washington et al.* 33 FEP Cases 808.

3. Newman, Winn, quoted in Tamar Lewin, "A New Push to Raise Women's Pay" *New York Times*, January 1, 1984, sec. 3, p. 15.

4. U.S. Bureau of Labor Statistics, cited by David Laufer, "Pay Bias Enters a New Age" 6 *National Law Journal* (No. 17, January 2, 1984), p. 25.

5. Phillips, Paul and Phillips, Erin, *Women and Work Inequality in the Labour Market* (Toronto: James Lorimer, 1983) p. 52.

6. Canada, Statistics Canada, *Income Distribution by Size in Canada, 1982*. Catalogue No. 13-207. Annual. Ottawa, 1984. 55 per cent represents a comparison of male and female full-time and part-time workers; 64 per cent represents a comparison of only full-time, full-year male and female workers.

incomes. The average annual incomes for males working full-time and part-time were \$19,164. For women they were \$10,472, or 54.6 per cent of male incomes.⁷ Table 1 shows that women earned significantly less than men in every occupational category. Even in the clerical category, a full-time female employee earned on average only 66.9 per cent of the wages earned by a full-time male employee.

When it is considered too that wages affect the amount of Unemployment Insurance benefits and, usually, retirement benefits, the problem is intensified.

In 1982, in families where the husband was the primary earner, the average combined earnings of husband and wife were \$35,265. When the wife was the primary earner, the combined earnings were \$28,716. When only the husband worked, the average earnings were \$24,287 but when only the wife worked, they were \$9,956. In 11.4 per cent of families, wives earned more than, or an amount equivalent to, their husbands. There were 557,000 such families.⁸

Table 1
Female Average Earnings by Occupation as a
Percentage of Male Average Earnings — 1982

Occupation	Full-Time & Part-Time Workers	Full-Time/ Full-Year Workers Only
Managerial	55.6%	58.2%
Professional	61.8	68.0
Clerical	62.9	66.9
Sales	46.1	57.1
Service	46.7	55.5
Agriculture, etc.	47.8	56.4
Processing and machining	54.5	57.6
Product fabricating, etc.	50.2	54.0
Transportation	54.1	60.8

Source: Statistics Canada. Unpublished data from the *Survey of Consumer Finances, 1983*.

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: the acceptance of arbitrary decisions based on gender as a legitimate basis for imposing negative consequences, particularly when the economy is faltering.

If the argument had logic, let alone fairness, on its side, it would suggest that some redress has been available for women during times of economic

7. *Ibid.*

8. Canada. Statistics Canada. Unpublished data from the *Survey of Consumer Finances, 1983*.

strength. But the appeal to women as the economy's ordained shock absorbers was and is a spurious one. We would have witnessed fluctuating differences between male and female incomes over the years, depending on the clemency of the economic climate. There has been no such fluctuation.⁹ The gap persists through good times and bad times. It persists in the face of society's commitment to justice. It persists in defiance of the law.

II. Equal Pay Laws

It is unlawful in Canada to pay women less than men for the same work in the same establishment. Equal pay laws were first enacted in 1951.¹⁰ In some provinces and territories, this law is enforced by human rights agencies. These are Newfoundland,¹¹ New Brunswick,¹² Prince Edward Island,¹³ Quebec,¹⁴ British Columbia,¹⁵ Alberta,¹⁶ and the Northwest Territories.¹⁷

In Ontario,¹⁸ Manitoba,¹⁹ Nova Scotia,²⁰ Saskatchewan²¹ and the Yukon,²² the law is enforced by departments of labour. Federally, it is administered by the Canadian Human Rights Commission.²³ Collectively and colloquially these laws are called "equal pay" laws. Most legislation permits exceptions based on seniority or merit systems.

The current debate on equal pay laws centres on whether the concept of equal pay can only be applied to substantially similar jobs or whether it can be applied to dissimilar jobs of comparable value. The provincial legislation in all jurisdictions states that women must be paid equally for equal or "substantially similar" work. The early tendency was to enforce the concept of "equal pay for equal work" only where pay differentials could be proven between identical jobs. More recently, the courts have interpreted the legislation as allowing comparison of similar job function as well as actual job description.²⁴ One court held, for example, that female nurses' aides

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9. Canada. Statistics Canada, Consumer Income and Expenditure Division. *Earnings of Men and Women: Selected Years, 1967 to 1979*. Catalogue No. 13-577. Occasional. Ottawa, 1981, p. 11; *supra*, note 5, p. 52.
 10. Ontario *Female Employees Fair Remuneration Act*, S.O. 1951, C.26. Ontario was followed by Saskatchewan (1952), British Columbia (1953), Canada (1956), Manitoba (1956), Alberta (1957), Nova Scotia (1957), Prince Edward Island (1959), New Brunswick (1961), the Yukon (1963), Quebec (1964), the Northwest Territories (1966), and Newfoundland (1971).
 11. *Newfoundland Human Rights Act*, R.S.N. 1970, C.262, as amended S.N. 1974, No. 114, s.10.
 12. *New Brunswick Human Rights Act*, R.S.N.B. 1973, C.H-11. (Equal pay provisions have been deemed to be included in the general prohibition against discrimination on the basis of sex).
 13. *Prince Edward Island Human Rights Act*, S.P.E.I. 1975, C.72, s.7(1).
 14. *Charter of Human Rights and Freedoms*, R.S.Q. 1977, C.C-12, s.19.
 15. *British Columbia Human Rights Act*, S.B.C. 1984, C.22, s.7.
 16. *Individual Rights Protection Act*, R.S.A. 1980, C.I-2, s.6.
 17. *Fair Practices Ordinance*, R.O.N.W.T. 1974, C.F-2, s.6.
 18. *Employment Standards Act*, R.S.O. 1980, C.137, s.33.
 19. *Employment Standards Act*, R.S.M. 1970, C.E110, as amended S.M. 1975, C.20, Part IV, ss. 39-43.
 20. *Labour Standards Code*, S.N.S. 1972, C.10, as amended S.N.S. 1976, C.41; S.N.S. 1977, C.68, 55-56-57.
 21. *Labour Standards Act*, R.S.S. 1978, C.L-1, Part III.
 22. *Labour Standards Ordinances*, R.O.Y.T. 1971, C.L-1, as amended O.Y.T. 1973 (1st), C.13, s.12.1.
 23. *Canadian Human Rights Act*, S.C. 1976-77, C.33, as amended 1977-78, C.22; 1980-81, C.54; 1980-81-82, C.111; 1980-81-82, C.143, s.11(1).
 24. *Attorney General of Alberta v. Gares* (1976), 67 D.L.R. (3rd) 635 (Alta. S.C. Trial Div.); *Re Board of Governors of Riverdale Hospital and the Queen in Right of Ontario*, [1973] 2 O.R. 441 (C.A.); *Re Leisure World Nursing Homes Ltd. and Director of Employment Standards et al.* (1980), 29 O.R. (2d) 144 (Div. Ct.).

should be paid the same as male orderlies for similar work, even though there might have been discrepancies in some particulars of the jobs.²⁵

There is thus no requirement in law that the jobs be strictly equal to justify equal pay for equal or similar work. So long as jobs are similar in content, and performed under similar working conditions, they can reasonably be compared under provincial laws to determine if the wages for one are arbitrarily lower or higher than for another.

Despite the existence of these equal pay laws, many women still earn 10 to 20 per cent less than men even where they are employed in the same occupation and within the same firm.²⁶ Canadian studies using one of the two accepted approaches for assessing equal pay²⁷ show that women typically earn 50 to 80 per cent of what men earn.²⁸ A differential of 10 to 20 per cent can be directly attributed to discrimination. The rest is accounted for by differences in such areas as experience, education, training, and absences from the labour force.²⁹

But even these differences, which result in adjustments to wages, are themselves apt to be the result of past and present discrimination. Factors such as experience and education may well reflect barriers generated by stereotyping—the public and private expectations society has formed about women.

Similar findings in the United States are instructive. A 1981 report by the National Research Council of the United States³⁰ concluded that less than half the wage disparity between full-time male and full-time female workers could be explained by non-discriminatory factors. The rest of the gap, namely, 20 cents on the dollar, could not be accounted for through any non-discriminatory rationale.³¹

A recent study by the U.S. Census Bureau showed that the amount of the disparity in wages between white men and women who entered the labour force in 1980 was almost twice that which could be attributed to discrimination in 1970.³²

25. *Attorney General of Alberta v. Gares*, *supra*, note 24; *Re Board of Governors of Riverdale Hospital and the Queen in Right of Ontario*, *supra*, note 24.

26. Gunderson, Morley, "Work Patterns" in *Opportunity for Choice: A Goal for Women in Canada*, ed. Gail C.A. Cook (Ottawa: Statistics Canada/ C.D. Howe Research Institute, 1976) p. 120; Canada. Labour Canada, Women's Bureau. *Women in the Labour Force, 1978-1979, Part II—Earnings of Women and Men*. Ottawa, 1981.

27. There are two basic methods that have been used to measure levels of earnings discrimination. The "sampling" approach compares the earnings of men and women holding identical jobs within the same establishment and having equal qualifications, performance, and work hours. In the "adjustment" approach, the female-to-male gross earnings ratio is computed, and net differences are then obtained by adjusting for differences in work-productivity factors. The unexplained differences that result are said to reflect discrimination.

28. A number of these studies are reviewed by Gunderson, Morley, *The Male-Female Earnings Gap in Ontario: A Summary*. Employment Information Series Number 22. (Toronto: Ontario Ministry of Labour, Research Branch, 1982); Gunderson, Morley, *supra*, note 26, p. 120.

29. Ostry, Sylvia, *The Female Worker in Canada* (Ottawa: Dominion Bureau of Statistics, 1968) p. 42.

30. Treiman, Donald J., and Hartmann, Heidi I. eds., *Women, Work and Wages: Equal Pay for Jobs of Equal Value*. A report by the Committee on Occupational Classification and Analysis, Academy of Behavioral and Social Sciences, National Research Council (Washington, D.C.: National Academy Press, 1981) pp. 13-43.

31. *Ibid.*

32. Study by Gordon W. Green Jr., senior Census Bureau official. Cited by Robert Rear, "Women's Pay Lags Further Behind Men's" *New York Times*, January 16, 1984 p. 1. See also Treiman and Hartmann, eds., *supra*, note 30, pp. 17-24.

A study of those who received Master of Business Administration degrees from the Columbia Graduate School of Business from 1969 to 1972 showed that women start out with salaries substantially equal to their male counterparts but in 10 years women with equal training, the same credentials, and similar work experience to the men were earning an average of only 81 per cent of their male counterparts' salaries.³³

In a sense, it matters little whether the earnings gap between genders is caused by blatant, subtle, or benign design. So long as it persists, it signals the need for investigation, continued monitoring, and redress.

The conclusion is inescapable; equal pay legislation has had little impact on the earnings gap.³⁴ This result occurs partly because most equal pay legislation is applicable only where both men and women are employed at the same or similar jobs in the same firm. It ignores the substantial number of women in segregated jobs or in businesses where there are few men or none with whom to compare salaries. A more important factor is that, as a concept, "equal pay for equal or similar work" fails to deal with the fundamental problem: the undervaluation of work done by women.

A further factor is that the legislation is not being rigorously enforced, although there appears to be better enforcement in the public than in the private sector.³⁵ The general lack of enforcement was observed by the Royal Commission on the Status of Women as early as 1970³⁶ which noted that only a handful of complaints are filed, they are processed slowly, and they are inconsistently dealt with across Canada.

The unavailability of class actions under relevant human rights or employment legislation³⁷ and the need to prove intentional rather than systemic or indirect discrimination, except under the *Canadian Human Rights Act*,³⁸ also militate against the effective resolution of equal pay cases.

33. Devanna, Mary Anne, Graduate School of Business, Columbia University. Draft Thesis, p. 27. Also cited in Fraker, Susan, "Why Women Aren't Getting to the Top" *Fortune*, April 16, 1984, p. 40-45.

34. Bergmann, Thomas J., and Hills, Frederick S. "Internal Labor Markets and Indirect Pay Discrimination" 14 *Compensation Review* (No. 4 1982), p. 41; Blumrosen, Ruth G. "Wage Discrimination, Job Segregation, and Title VII of the Civil Rights Act of 1964" 12 *University of Michigan Journal of Law Reform* (No. 3, Spring 1979), p. 399; Cook, Gail C.A. and Eberts, Mary, "Policies Affecting Work" in Gail C.A. Cook ed., *supra*, note 26, pp. 174-175; Greenberger, Marcia, "The Effectiveness of Federal Laws Prohibiting Sex Discrimination in Employment in the United States" in *Equal Employment Policy for Women*, ed. Ronnie Steinberg Ratner (Philadelphia: Temple University Press, 1980) p. 118; Niemann, Lindsay, *Wage Discrimination and Women Workers: The Move Towards Equal Pay for Work of Equal Value in Canada*, Women's Bureau Series A: Equality in the Workplace, No. 5 (Ottawa: Labour Canada, Women's Bureau, 1984) pp. 42-54.

35. Boyd, Monica and Humphreys, Elizabeth, *Labour Markets and Sex Differences in Canadian Incomes* (Ottawa: Economic Council of Canada, 1979); Gunderson, Morley, "Earnings Differentials Between the Public and Private Sectors" 12 *Canadian Journal of Economics* (May, 1979), pp. 228-242; Gunderson, Morley, *Labour Market Economics: Theory, Evidence and Policy in Canada* (Toronto: McGraw-Hill Ryerson, 1980) p. A2.19; Shapiro, Daniel, and Stelcner, Morton *Male-Female Earnings Differentials Within the Public and Private Sectors, Canada and Quebec, 1980* (Montreal: Concordia University, 1980).

36. Canada. *Royal Commission on the Status of Women in Canada*. Report. Ottawa, 1970, pp. 72-75.

37. While the Quebec *Charter of Human Rights and Freedoms*, R.S.Q. 1977, C. C-12, as amended, does not provide for class actions, the *Code of Civil Procedure*, R.S.Q. 1977, C. C-25, which applies to the Quebec *Charter*, does permit them.

38. *Canadian Human Rights Act*, S.C. 1976-77, C.33, as amended.

Ontario now provides for constructive discrimination in section 15 of the *Ontario Human Rights Code* R.S.O. 1981, C.53, but issues of equal pay are not dealt with by the Ontario Human Rights Commission. They are, rather, dealt with under section 33 of the *Employment Standards Act*, R.S.O. 1980, C.137.

The question of whether or not the Quebec *Charter of Human Rights and Freedoms*, R.S.Q. 1977, C. C-12, as amended, prohibits indirect discrimination has not been finally decided. See *Commission des droits de la personne du Quebec c. L'Homme* (1982), 3 C.H.R.R. D/849 (Que. C.A.); *Commission des droits de la personne du Quebec c. Etko Canada Inc.* (1983), 4 C.H.R.R. D/1787 (Que. Sup. Ct.).

III. International Commitments

Convention 100, the Equal Remuneration Convention, was adopted by the International Labour Organization in 1951. It supports the concept of equal pay for work of equal value. Canada ratified this Convention in 1972,³⁹ thus creating a binding international commitment to apply the principle of equal remuneration for men and women for work of equal value.⁴⁰

In 1976,⁴¹ Canada also acceded to the United Nations International Covenant on Economic, Social and Cultural Rights, which contains a commitment to equal remuneration for work of equal value.⁴²

39. As of January 1, 1984, 105 countries had ratified the Convention. (International Labour Organization, "Chart of Ratifications of International Labour Conventions". Geneva, 1984).

40. The four substantive provisions of Convention 100 are:

Article 1

For the purpose of this Convention:

- (a) the term "remuneration" includes the ordinary, basic or minimum wage or salary and any additional emoluments whatsoever payable directly or indirectly, whether in cash or in kind, by the employer to the worker and arising out of the worker's employment,
- (b) the term "equal remuneration for men and women workers for work of equal value" refers to rates of remuneration established without discrimination based on sex.

Article 2

1. Each member shall, by means appropriate to the methods in operation for determining rates of remuneration, promote and, in so far as is consistent with such methods, ensure the application to all workers of the principle of equal remuneration for men and women for work of equal value.
2. The principle may be applied by means of
 - (a) National laws or regulations;
 - (b) Legally established or recognized machinery for wage discrimination;
 - (c) Collective agreements between employers and workers; or
 - (d) A combination of these various means.

Article 3

1. Where such action will assist in giving effect to the provisions of this Convention, measures shall be taken to promote objective appraisal of jobs on the basis of the work to be performed.
2. The methods to be followed in this appraisal may be decided upon by the authorities responsible for the determination of rates of remuneration, or, where such rates are determined by collective agreements, by the parties thereto.
3. Differential rates between workers, which correspond, without regard to sex, to differences, as determined by such objective appraisal, in the work to be performed, shall not be considered as being contrary to the principle of equal remuneration for men and women workers for work of equal value.

Article 4

Each member shall co-operate as appropriate with the employers' and workers' organizations concerned for the purpose of giving effect to the provisions of this Convention.

For a thorough summary of the history of this Convention and its ratification by Canada, see Niemann, Linsay, *supra*, note 34.

41. Similarly, the European Economic Community issued a directive on equal pay to its member countries in 1975. The directive, which came into force in 1976, "requires equal pay for the same work or for work to which equal value is attributed." (Organization for Economic Co-Operation and Development. *Equal Opportunities for Women*. Paris, 1979, p. 80).

In France, the Netherlands, Italy, Sweden, Greece, Portugal, Switzerland, West Germany, Ireland, and Denmark, laws were enacted during the 1970s to require equal pay for work of equal value.

France, the Netherlands and Italy: see Chester, R. Simon G. "Equality in Employment—Observations from International and Comparative Law". Paper prepared for the Commission of Inquiry on Equality in Employment. November, 1983, pp. 199, 211, and 218.

Sweden: *Equality of Treatment Between Men and Women in Employment*. Geneva, International Labour Office: 1980, p. 40.

Greece: Spiliotopoulos, Sophia (International Labour Office). "The Way the Law Works in Greece" *Women at Work* (1981, No. 1) p. 19.

Portugal: "Equality of Opportunity and Treatment in Portugal" *Women at Work* (1980, No. 1) pp. 22-23.

Switzerland: "Switzerland Constitution Makes Equality of Treatment More Explicit" *Social and Labour Bulletin* (1981, No. 3), pp. 354-356.

West Germany: See International Labour Office. "Law on Equal Opportunities at Work and for Maintenance of Acquired Rights in Case of Merger or Takeover" *Social and Labour Bulletin* (1980, No. 4), pp. 466-467.

Ireland and Denmark: see Forman, John, "The Equal Pay Principles Under Community Law: A Commentary on Article 119 EEC" *Legal Issues of European Integration* (No. 1, 1982), p. 23.

42. Article 7 of this Covenant requires:

Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work.

Finally, in 1981, Canada ratified the United Nations Convention on the Elimination of All forms of Discrimination against Women. Article 11(1) of this Convention requires that member governments provide men and women with equal remuneration in respect of work of equal value.⁴³

Despite the ratification of these international instruments, and though they are binding on the provinces, the provinces have done little to enact the legislation necessary to ensure compliance.⁴⁴

The federally enacted *Canadian Human Rights Act* specifically requires that there be equal pay for work of equal value.⁴⁵ Since the Canadian Human Rights Commission has jurisdiction over only 11 per cent⁴⁶ of the Canadian workforce, provincial compliance with these international obligations is critical to most working women. Until provincial laws are changed to articulate and effectively enforce the "equal pay for work of equal value" concept, little change in the income gap is likely to occur.

IV. Equal Value

The *Canadian Human Rights Act*⁴⁷ applies to all federal departments, agencies, crown corporations, and corporations under federal jurisdiction. Section 11 of the *Canadian Human Rights Act* states:

- (1) It is a discriminatory practice for an employer to establish or maintain differences in wages between male and female employees employed in the same establishment who were performing work of equal value.
- (2) In assessing the value of work performed by employees employed in the same establishment the criterion to be applied is the composite of the skill, effort and responsibility required in the performance of the work and the conditions under which the work is performed.
- (2.1) Separate establishments established or maintained by an employer solely or principally for the purpose of establishing or maintaining differences in wages between male and female employees shall be deemed for the purposes of this section to be a single establishment.

43. Article 11(1) of this Convention requires State Parties to:

... take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular:

(d) The right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work.

44. Section 19 of the Quebec *Charter of Human Rights and Freedoms*, R.S.Q. 1977, C.C-12, states:

Every employer must, without discrimination, grant equal salary or wages to the members of his personnel who perform equivalent work at the same place.

A difference in salary or wages based on experience, seniority, years of service, merit, productivity or overtime is not considered discriminatory if such criteria are common to all members of the personnel.

See *M. Robert Senay v. La Corporation Les Aiments Aulit Limitee*, an as yet unreported judgement of the Cour des Sessions de la Paix District de Montreal, February 17, 1984, where section 19 of the Quebec *Charter* was interpreted to mean equal pay for substantially the same work but involving separate job categories.

45. S.C. 1976-77, C.33, as amended, S.11.

46. *Supra*, note 5, p. 171; see also Mossman, Mary Jane, and Jai, Julie Ramona "Women and Work and the Canadian Human Rights Act" in *(Un)Equal Pay: Canadian and International Perspectives*, ed. Ceta Ramkhalwansingh (Toronto: Resources for Feminist Research, Ontario Institute for Studies in Education, 1979) p. 9.

47. S.C. 1976-77, C.33, as amended.

- (3) Notwithstanding subsection (1), it is not a discriminatory practice to pay to male and female employees different wages if the difference is based on a factor prescribed by guidelines issued by the Canadian Human Rights Commission pursuant to subsection 22(2) to be a reasonable factor that justifies the differences.
- (4) For greater certainty, sex does not constitute a reasonable factor justifying a difference in wages.
- (5) An employer shall not reduce wages in order to eliminate a discriminatory practice described in this section.
- (6) For the purposes of this section, "wages" means any form of remuneration payable for work performed by an individual and includes salaries, commissions, vacation pay, dismissal wages, bonuses, reasonable value for board, rent, housing, lodging, payments in kind, employer contributions to pension funds or plans, long-term disability plans and all forms of health insurance plans and any other advantage received directly or indirectly from the individual's employer.

The nine circumstances justifying a pay differential are different performance ratings; seniority; red circling (wage curtailment following downgrading); a rehabilitation assignment; a demotion pay procedure; a procedure of phased-in wage reductions; a temporary training position; a labour shortage requiring premium wages; and a change in the work performed.⁴⁸ The requirement that the employees be in the same establishment is a potential barrier to the comprehensive enforcement of the federal equal pay law.

A provision of the *Canada Labour Code* permits an inspector under the code, where he or she has reasonable grounds to believe that section 11 of the *Canadian Human Rights Act* has been breached, to refer the matter to the Canadian Human Rights Commission for enforcement. This provision came into force in 1978 and has not yet been used.⁴⁹

Under section 11 of the *Canadian Human Rights Act*, equal pay cases are to be examined using the standard that men and women must be paid equally for work "of equal value." In the United States, the analogous term is "comparable worth." The United States Supreme Court has held that the concept of comparable worth encompasses claims by women for "increased compensation on the basis of a comparison of the intrinsic worth or difficulty of their job with that of other jobs in the same organization or community."⁵⁰

In the *County of Washington v. Gunther*,⁵¹ the Supreme Court also ruled that claims of sex-based wage discrimination can be brought under either

48. Canadian Human Rights Commission. *The Canadian Human Rights Act: Employer Guide*. Ottawa, 1981, pp. 29-30.

49. *Canada Labour Code*, R.S.C. 1970, C.L-1, as amended, s.38.1. The newly-established Equal Pay Unit of Labour Canada is to have a consultative and educational role.

50. *County of Washington v. Gunther*, 25 FEP Cases 1521 (1981).

51. *Ibid.*

of two statutes: Title VII of the *Civil Rights Act*⁵² or the *Equal Pay Act*.⁵³ The American *Equal Pay Act* of 1963 describes equal work as that requiring equal skill, effort, and responsibility being performed under similar working conditions.⁵⁴ Title VII of the *Civil Rights Act*⁵⁵ prohibits discrimination on the basis of sex and other factors. Similarly, it may be that an "equal pay" claim in Canada also can be brought in alternative forums—either pursuant to "equal pay" legislation or, after April, 1985 pursuant to section 15 of the *Charter of Rights and Freedoms*.⁵⁶

The "equal value" approach goes beyond the obvious prohibition against paying lower wages to women for the same work as men do, by directing attention to the lower wages women are generally paid in the workforce. As Table 1 shows, the problem is inequitable pay practices throughout the workforce rather than isolated cases of wage discrimination.

Under the "equal value" concept, the value of the job, rather than the job function or description, becomes determinative, an approach that at least one author says is consistent with basic economic theory which dictates that competitive market forces would ensure that people be paid a wage that reflects the value of their contribution to the output.⁵⁷

The "equal value" approach calls for using job evaluations⁵⁸ to examine pay structures in the labour force. It means looking at those jobs in which women predominate and comparing their wage rates with those paid for jobs at a comparable level in which men predominate. If a wage difference is found, it then becomes a question of trying to determine whether it is a legitimate or fair one. Wages should be defined, as they are in the *Canadian Human Rights Act*⁵⁹ and in the International Labour Organization Convention 100,⁶⁰ to mean total remuneration received, including all forms of benefits and employer contributions, direct or indirect.⁶¹

V. Occupational Segregation

For women, it is vital that equal pay be seen through the "equal value" lens. There are some jobs that have traditionally been held mainly by women and will probably continue so to be held, as Table 2 shows, despite a decade of equal opportunity programs.⁶²

52. *Civil Rights Act of 1964*. Pub. L. No. 88-352, 78 Stat. 253 (codified at 42 U.S.C. para. 2000e (1976)).

53. *Equal Pay Act, 1963*. Pub. L. No. 88-38, 77 Stat. 56 (codified at 29 U.S.C. para. 206(d)(1) (1976)).

54. "Equal Work" pursuant to the *Equal Pay Act, 1963* has been held to mean that the jobs should be "substantially equal" rather than identical, even if the nature of the jobs make it impractical for both sexes to work interchangeably. *Shultz v. Wheaton Glass Co.* 421 F.2d 250 (3rd Cir., 1970); *Hodgson v. Brookhaven General Hospital*, 436 F.2d 719 (1973); *Brennan v. City Stores, Inc.* 479 F.2d 235 (5th Cir., 1973).

55. Pub. L. No. 88-352, 78 Stat. 253 (codified at 42 U.S.C. para. 2000e (1976)).

56. *The Constitution Act, 1982*, C.11 (U.K.) Section 15 does not come into force until after April 17, 1985.

In *Board of Governors of the Seneca College of Applied Arts and Technology v. Pushpa Bhaduria*, [1981] 2 S.C.R. 181, (1981), 124 D.L.R. (3d) 193, the Supreme Court of Canada held that no civil cause of action was available in Ontario for the violation of the right not to be discriminated against in employment. This case was decided prior to the *Charter* and thus does not necessarily mean that there is not now a civil cause of action. In *Re Ontario Film and Video Appreciation Society and Ontario Board of Censors* (1983), 41 O.R. (2d) 583 (Ont. H.C.); aff'd (1984), 45 O.R. (2d) 80 (Ont. C.A.), it was held that the common law was subject to the *Charter*.

57. Gunderson, Morley, "Labour Market Aspects of Inequality in Employment and Their Application to Crown Corporations". Paper prepared for the Commission of Inquiry on Equality in Employment. October, 1983.

58. International Labour Organization Convention 100 (Equal Remuneration Convention) calls for the use of job evaluations in determining equal pay for male and female workers doing work of equal value.

59. S.C. 1976-77, C.33, as amended, s.11(6).

60. Article 1(a).

61. This broader definition has been recommended for inclusion in provincial legislation by the Nova Scotia Federation of Labour ("Improvements to Working Conditions of Women Through Changes to N.S. Labour Standards Code". Brief submitted to the Nova Scotia Advisory Council on the Status of Women, September, 1983, p. 4).

62. Ostry, Sylvia. *The Occupational Composition of the Canadian Labour Force*, 1961 Census Monograph (Ottawa: Dominion Bureau of Statistics 1967) pp. 6-8, 27-28, 50-53.

Table 2
Occupational Distribution of Women, 1982

Occupation	% of All Female Workers
Managerial, administrative	5.6%
Natural sciences	1.3
Social sciences	1.8
Religion	0.1
Teaching	5.8
Medicine, health	8.5
Artistic, recreational	1.4
Clerical	33.2
Sales	10.0
Service	18.8
Agriculture	2.6
Processing	1.8
Machining	0.3
Product fabrication	4.8
Construction trades	0.2
Transport equipment operation	0.5
Materials handling	1.3
Other crafts and equipment operating	0.5
Unclassified	<u>1.1</u>
Total Female Labour Force	<u>99.6%*</u>

*Does not equal 100 per cent because figures are not available for every occupational category.

Source: Statistics Canada. *The Labour Force, Annual Averages*. Catalogue No. 71-529. Ottawa, 1983.

When a list of the 10 jobs in which women workers predominated in 1971 is compared with the equivalent list for 1981, nine of the 10 jobs are the same. The 10 jobs listed in Table 4 accounted for 42 per cent of the total female labour force in 1981; in 1971 they accounted for 41 per cent.⁶³ Considering that the participation rate for women in the general labour force increased by more than 10 percentage points during this period, the continued occupational segregation is even more striking.⁶⁴

In the United States, 80 per cent of the women in the workforce are in only 20 of the Labor Department's 427 job categories.⁶⁵

Although every effort should be made to encourage women to diversify into jobs traditionally held by men, many women will still go on preferring clerical, service, and sales jobs, jobs characterized by lower levels of income, status, and mobility rather than the occupations in which men are concentrated.⁶⁶

63. Canada. Statistics Canada. *Population: Labour Force Occupation Trends*. Catalogue No. 92-920. Ottawa, 1983. Census of Canada 1981.

64. Canada. Statistics Canada. *Historical Labour Force Statistics—Actual Data, Seasonal Factors, Seasonally Adjusted Data*. Catalogue No. 91-201. Annual. Ottawa, 1983, p. 225.

65. Cited by Tamar Lewin, "A New Push to Raise Women's Pay" *The New York Times*, January 1, 1984.

66. Boyd, Monica, "Occupational Segregation: A Review" in *Sexual Equality in the Workplace: Proceedings of a Conference*. Ottawa: Labour Canada, Women's Bureau, March, 1982, p. 66-92; see also Werneke, Diane, "The Economic Slowdown and Women's Employment Opportunities" 117 *International Labour Review* (No. 1, January-February, 1978), pp. 37-51.

Table 3
Percentage Distribution of Earners
By Earnings Group and Gender — 1982

Full-Time Workers	% Males	% Females
Under — \$1,000	1.0	1.2
\$1,000 — 1,999	0.7	1.2
2,000 — 3,999	1.4	2.1
4,000 — 5,999	2.2	3.5
6,000 — 7,999	2.1	5.7
8,000 — 9,999	3.1	8.6
10,000 — 11,999	3.6	9.2
12,000 — 14,999	7.0	18.2
15,000 — 19,999	16.2	24.1
20,000 — 24,999	17.7	12.5
25,000 — 29,999	15.4	7.8
30,000 and over	<u>29.7</u>	<u>6.0</u>
Total*	<u>100%</u>	<u>100%</u>
Average earnings	\$25,096	\$16,056
Median earnings	\$23,608	\$15,075

*Does not equal 100 per cent because of rounding.

Source: Statistics Canada. *Income Distribution By Size in Canada*. Catalogue No. 13-207. Ottawa, 1984.

Table 4
Selected Occupational Distribution of Women, 1981

Job Categories	Number of females employed	% of all female workers	% female in job category
1. Secretaries and stenographers	368,025	7.6	98.9
2. Bookkeepers and accounting clerks	332,325	6.8	81.9
3. Salespersons/Clerks	292,915	6.0	59.4
4. Tellers & cashiers	229,320	4.7	92.7
5. Waitresses and hostesses	200,710	4.1	85.7
6. Nurses	167,710	3.5	95.4
7. Elementary and kindergarten teachers	139,625	2.9	80.4
8. General office clerks	115,015	2.4	80.5
9. Typists and clerk typists	102,970	2.1	97.8
10. Janitors, charworkers, & cleaners	<u>96,735</u>	2.0	41.2
	2,045,350		

Source: Compiled from Statistics Canada. Census of Canada 1981. *Population: Labour Force Occupation Trends*. Catalogue No. 92-920. Ottawa, 1983.

In 1982, 50 per cent of women with full-time jobs earned less than \$15,000 per year. Fewer than 22 per cent of men worked full-time for this amount or less.⁶⁷

The chance for promotion or transfer from these female-dominated jobs has historically been remote. And the jobs themselves tend to produce habits that flow from the nature of the work rather than the gender of the employee. As one researcher comments, "Low-paying, dead-end, marginal jobs with little future prospects have high rates of turnover, absenteeism, and tardiness, no matter who is in the job."⁶⁸ The U.S. National Research Council found that job segregation by sex, race, and ethnicity is common in today's labour market and is an important source of wage differentials. "Not only do women do different work than men, but . . . the work women do is paid less, and the more an occupation is dominated by women, the less it pays."⁶⁹

The argument has effectively been made that throughout society we undervalue and therefore underpay work done by women, and that this is a reflection of community expectations regarding male and female behaviour.⁷⁰ There is no disputing that sex-role stereotypes have affected labour market decisions, thus limiting women's options and expectations, and shaping their behaviour.⁷¹

But it matters little whether female-dominated jobs pay less because they are held by female workers⁷² or because the jobs are undervalued by the company or marketplace.⁷³ The issue is whether job segregation should go on being permitted to justify income differentials that are inequitable. As one writer has observed: ". . . if the crucial importance of women's jobs in our society suggests that these jobs are undervalued only because they are held by women, why should women be asked to change their choices, rather than asking society to change how it rewards those choices?"⁷⁴

VI. Effect of Unionization

It has been demonstrated that unionization significantly improves women's earnings and decreases the earnings gap between men and women.⁷⁵ One study showed that the male/female differential in unionized establishments is 10 per cent smaller than in non-unionized establishments.⁷⁶ The

67. *Supra*, note 6.

68. Blumrosen, Ruth, *supra*, note 34, p. 421; see Atkinson, Tom, "Differences Between Male and Female Attitudes Toward Work" 10 *Canadian Business Review* (No. 2, Summer, 1983), pp. 47-51; see also Boyd, *supra*, note 66, p. 69.

69. *Supra*, note 30, p. 28.

70. Barrett, Nancy S., "The Impact of Public Policy Programs on the Status of Women Obstacles to Economic Parity for Women" 72 *American Economics Review* (No. 2 May 1982), pp. 160-165; Blumrosen, Ruth, *supra*, note 34, p. 155; *supra*, note 30, p. 93.

71. Koziara, Karen S., Pierson, David A., and Johannesson, Russell E., *The Comparable Worth Issue: Current Statistics and New Directions, Proceedings of the 1983 Spring Meeting*. Madison, Wisconsin: Industrial Relations Research Association, p. 505.

72. Spelfogel, Evan J., "Equal Pay for Work of Comparable Value: A New Concept" 32 *Labour Law Journal* (No. 1, January, 1981), p. 31; *supra*, note 30, pp. 56-62.

73. Breton, Alberta, *Marriage, Population and the Labour Force Participation of Women* (Ottawa: Economic Council of Canada, 1984).

74. "Paying Women What They're Worth" *QQ - Report from the Centre for Philosophy and Public Policy* 3 (No. 2, Spring, 1983), pp. 3-4.

75. Gunderson, Morley, "Equal Pay in Canada" in *Equal Pay for Women: Progress and Problems in Seven Countries*, ed. Barrie O.P. Pettman (London: MCB Books, 1976) pp. 129-146; White, Julie, *Women and Unions* (Ottawa: Canadian Advisory Council on the Status of Women, 1980) pp. 53-73.

76. Gunderson, Morley, "Male-Female Wage Differentials and the Impact of Equal Pay Legislation" 57 *Review of Economics and Statistics* (November, 1975) p. 467.

American Federation of Labor-Council of Industrial Organizations (AFL-CIO) at its 1979 convention adopted a motion supporting equal wages for jobs of comparable worth. The Canadian Labour Congress (CLC) and the Canadian Union of Public Employees (CUPE) in Canada also strongly support "equal value" laws.⁷⁷

The number of women unionists increased by almost 300 per cent between 1962 and 1981, compared to a 72.5 per cent increase for men.⁷⁸ Even with this enormous increase, female union members represented only 29 per cent of all women in the labour force, while almost 40 per cent of all male workers are unionized.⁷⁹

Collective agreements are bound by equal pay legislation.⁸⁰ Both management and unions are accountable for violations of equal pay legislation.

VII. Job Evaluations

There are undeniable problems in comparing dissimilar jobs. The current methods⁸¹ involve a point system by which each job is measured in each of four areas—skill, mental and physical effort,⁸² responsibility, and working conditions.

Under "equal pay for equal work" laws, each of these four aspects of a job has to be similar to justify similar pay. Under "equal pay for work of comparable or equal value" laws, the sum of the points represent what the job is worth. The evaluator looks at the total points rather than the points given to each of the four components. In this way, the work of a female typing-pool supervisor can be compared to the work of a male painter. Table 5 compares predominantly male occupations with predominantly female occupations judged to be of comparable worth, based on a study of monthly salaries for American government jobs in designated locations.

While this is theoretically a workable method, and is a great improvement over systems that compare jobs aspect-by-aspect, it is limited by the latitude for discretion it allows.⁸³ Effort and responsibility are difficult to measure objectively.

77. Canadian Labour Congress, Women's Bureau, *Equal Partners for Change: Women and Unions* (Ottawa: CLC Labour Education and Studies Centre, 1982); Canadian Union of Public Employees, "Equal Pay" in *Equal Opportunities Kit*, Ottawa, 1982.

78. During this period the number of women union members increased from 248,884 to 979,862. The number of unionized men increased from 1,268,701 to 2,188,206 (Statistics Canada data, cited by Jackie Smith, *The Toronto Star*, March 19, 1984, p. 81).

79. *Ibid.*

80. *Attorney General of Alberta v. Gares*, *supra*, note 24; *Canadian Human Rights Act*, S.C. 1976-77, C.33, as amended, s.10.

81. See, for example, the method, known as the Aiken Plan, outlined by the Canadian Human Rights Commission in *Methodology and Principles for Applying Section 11 of the Canadian Human Rights Act*. (Ottawa, undated). In the United States, one of the major methods used is the one developed by Hay Associates, the largest job evaluation consultants in the U.S., which takes into account knowledge and skill, problem-solving, accountability, and working conditions.

82. In *Hodgson v. Daisy Manufacturing Co.* 317 F.Supp. 538 (W.D. Ark. 1970), the Court held that "effort" includes both physical and mental labour, with neither automatically commanding higher wages if the degree of effort expended is comparable. See also the *Canadian Human Rights Act*, S.C. 1976-77, C.33, as amended, s.11(2).

83. Alexander, Judith, A. *Equal-Pay-for-Equal-Work Legislation in Canada*. Discussion Paper No. 252. Ottawa: Economic Council of Canada 1984, pp. 62, 71.

Table 5

The Gender Gap

Below is a comparison of predominantly male and female occupations judged to be of comparable worth, based on a study of monthly salaries for Government jobs in designated locations.

Registered Nurse (F)	\$1,723
Vocational Education Teacher (M)	2,260
(Minnesota)	
Typing Pool Supervisor (F)	\$1,373
Painter (M)	1,707
(Minnesota)	
Senior Legal Secretary (F)	\$665
Senior Carpenter (M)	1,040
(San Jose, Calif.)	
Licensed Practical Nurse (F)	\$1,030
Correctional Officer (M)	1,436
(Washington State)	
Secretary (F)	\$1,122
Maintenance Carpenter (M)	1,707
(Washington State)	
Mental Health Technician (F)	\$1,135
Automotive Mechanic (M)	1,681
(Illinois)	
Licensed Practical Nurse (F)	\$1,298
Electrician (M)	2,826
(Illinois)	

Source: Commission on the Economic Status of Women, State of Minnesota, Hay Associates, Norman D. Willis & Associates. Copyright © 1984 by the New York Times Company. Reprinted by permission.

It remains to be determined what percentage of employees of a particular gender must be in a job before it begs comparison with a job dominated by the other gender: a simple or a substantial majority. In the United States, a predominantly female job is one in which 70 per cent of the occupants are women.⁸⁴ More realistically, any job in which more than 50 per cent of the occupants are of one gender should be considered a job dominated by that gender.⁸⁵

Although job evaluations of this kind may seem a formidable exercise in human and market judgement, it is already the case that most large companies have job-classification and job-evaluation systems by which they determine how much to pay employees. The exercise therefore does not require the introduction of a foreign mechanism into the corporate system. It simply means adding to existing corporate practices a component designed to fine-tune classification systems which themselves were established ostensibly to ensure an equitable and reasonable pay structure for employees. The new component must screen for the discriminatory undervaluation of jobs held by women and must cancel the bias that led to the lower wage in the first place.

It will take time before such a system is refined to the point where it can easily and precisely be applied. It will also take sensitivity and discretion. But it is essential to making pay structures finally equitable.

In two recent cases, the method has been successfully used by the Canadian Human Rights Commission to recover lost wages for women. In one,⁸⁶ a complaint was filed as a result of a wage difference of almost 20 per cent between government employees in the Library Sciences Classification, which was more than 56 per cent female, and employees in the Historical Research Classification, which was more than 75 per cent male. A job evaluation of the two tasks was performed and it was concluded that the librarians did work of equal value to that done by historical researchers. The settlement provided for \$2.3 million in back pay as well as continuing annual adjustments ranging from \$500 to \$2,500.

In another case,⁸⁷ a claim was instituted by the Public Service Alliance because tasks performed by women in the General Services Occupation Group (kitchen, laundry, and miscellaneous personal service) attracted considerably lower wages than those performed primarily by men in the same occupation group (messenger, custodial, building, and store services). A \$17 million settlement was negotiated with the Treasury Board.

This does not mean that the only way to narrow the income gap is through the complex "equal value" test. Other methods that have been

84. Waldman, Elizabeth and McEaddy, Beverly J., "Where Women Work—An Analysis by Industry and Occupation" 97 *Monthly Labor Review* (1974), pp. 10-11.

85. The Canadian Human Rights Commission has ruled that "50 per cent plus one does not constitute dominance, and that a clear majority of one sex would have to be sustained over a period of time for the group to be considered sex-dominated." (Canadian Human Rights Commission. "Hospital Technicians" from the *Summary of Decisions*, May-June 1982 in *Equal Pay Casebook, 1978-1983*. Ottawa, 1983, p. 8).

86. Canadian Human Rights Commission. "Librarians and Historical Researchers" from the *Summary of Decisions*, December, 1980; news release of Dec. 17, 1980 in *Equal Pay Casebook 1976-1983*. Ottawa, 1983, pp. 5-6.

87. Canadian Human Rights Commission. "General Services", news release of March 19, 1981; news release of March 2, 1982, in *Equal Pay Casebook, 1978-1983*. Ottawa, 1983, pp. 7-8.

advanced include equalizing base or entry pay rates;⁸⁸ eliminating the uses of separate seniority lists for men and women; reducing the steps within the job classifications or at least making sure that "female" jobs have no more of these steps than do "male" jobs; expressing wage rates for "female" jobs exactly as they are for men, either by hour or by month; giving similar wage increases across the board; bottom-end loading increases to add an extra per-hour increase for lower-paid workers;⁸⁹ and eliminating "rug-ranking," a system that bases the earnings of secretaries on the status of the persons for whom they work rather than on the work they do. These are all methods worth considering seriously.

The alternative to exploring ways in which to close the wage gap is to leave the issue to the vagaries of the marketplace. Those who suggest that equal pay and other economic issues for women be left to the awakening sensibilities of the marketplace either do not appreciate that the values of the marketplace may themselves be discriminatory⁹⁰ or do not care that they are. The marketplace is a convenient altar upon which many needs are sacrificed. The economically and strategically powerful elements in society have not in the past exhibited any great ability to isolate and address the discrimination women and minorities have experienced in employment, particularly when economic imperatives urged insensitivity. It is unreasonable to expect that this will change in any significant way unless the marketplace is directed by statute to concentrate on the problem.

VIII. Conclusion

Employment equity is a strategy designed to obliterate the present and the residual effects of discrimination and to open equitably the competition for employment opportunities to those arbitrarily excluded. It requires a "special blend of what is necessary, what is fair and what is workable."⁹¹

To ensure freedom from discrimination requires government intervention through law. It is not a question of whether we need regulation in this area but where and how to apply it. Based on history, present evidence, and apprehensions for the future, the elimination of all forms of discrimination requires more, rather than less, law.

We need equal opportunity to achieve fairness in the process, and employment equity to achieve justice in the outcome.

Law in a liberal democracy is the collective expression of the public will. We are a society ruled by law—it is our most positive mechanism for protecting and maintaining what we value. Few matters deserve the attention of law more than the right of every individual to have access to the opportunity of demonstrating full potential.

88. Equal Pay Information Committee (Vancouver, British Columbia). Submission to the Commission of Inquiry on Equality in Employment. November, 1983.

89. *Ibid.* This was in 1981 with the British Columbia Government Employees Union workers. Lower paid workers were given an increase of 6 per cent while higher paid workers received only a 3 per cent wage increase.

90. *Supra*, note 57, pp.6.10-6.18.

91. *Lemon v. Kurtzman*, 411 U.S. 192, 201 (1973).

What is needed to achieve equality in employment is a massive policy response to systemic discrimination. This requires taking steps to bring each group to a point of fair competition. It means making the workplace respond by eliminating barriers that interfere unreasonably with employment options.

It is not that individuals in the designated groups are inherently unable to achieve equality on their own, it is that the obstacles in their way are so formidable and self-perpetuating that they cannot be overcome without intervention. It is both intolerable and insensitive if we simply wait and hope that the barriers will disappear with time. Equality in employment will not happen unless we make it happen.

