

# COMMENTS ON MARILYN L. PILKINGTON'S "THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS: IMPACT ON ECONOMIC POLICY AND ECONOMIC LIBERTY REGARDING WOMEN IN EMPLOYMENT"\*

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## I. Introduction

There appear to be five sections of the *Canadian Charter of Rights and Freedoms* having immediate relevance for equality rights: 1, 7, 15, 28 and 36.<sup>1</sup> Professor Pilkington discusses the implication of these sections with respect to the labour market for women. But before equality rights can be discussed one must have a clear idea about the meaning of equality. In section II of this article the definition of equality is discussed. In section III, I consider the relevance of section 15(2) for affirmative action and equal pay for equal work programs. Section IV examines pensions issues and my conclusions are presented in section V.

## II. Definition of Equality

Professor Pilkington does not explicitly define what she understands by the term equality but it is implicitly clear what she means by inequality. After quoting a number of statistics on the male-female wage gap (e.g., in 1982, "the percentage [for female-male wage ratio] had increased to 64%"<sup>2</sup>

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\* 17 Man. L.J., immediately preceding this commentary.

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1. Part I of the *Constitution Act, 1982*, being Schedule of the *Canada Act 1982* (U.K.), 1982, c.11. The following sections will be referred to in this article:

1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

15(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and in particular, without discrimination based on race, nationality or ethnic origin, colour, religion, sex, age, or mental or physical disability.

15(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged individuals because of race, nationality or ethnic origin, colour, religion, sex, age or mental or physical disability.

28. Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

36(1) Without altering the legislative authority of Parliament or the provincial legislatures, or the right of any of them with respect to the exercise of their legislative authority, Parliament and the legislatures, together with the Government of Canada and the provincial governments, are committed to

(a) promoting equal opportunities for the well-being of Canadians,  
(b) furthering economic development to reduce disparity in opportunities, and  
(c) providing essential public services of reasonable quality to all Canadians.

2. See p. 2 of Pilkington's article in this issue.

Pilkington concludes that "to the extent that men and women do not participate equally in the range of and fruits from employment, women are a disadvantaged group".<sup>3</sup> Hence because men earn more than women, women are treated unequally and are thus a disadvantaged group. (The term "disadvantaged" is not used arbitrarily; it is used by Pilkington to justify the use of section 15(2) to correct the unequal treatment of women. This point will be discussed later on in the paper).

For Pilkington, inequality means inequality of outcomes. This retrospective concept is used instead of the prospective concept of inequality of opportunity. In economic terms, Pilkington uses an ex-post concept instead of an ex-ante concept. To better understand the difference between these two concepts of equality let us consider the following hypothetical example: suppose we have an economy where all individuals have identical marketable skills. Let us further suppose that all individuals earn identical wages and have identical incomes of \$30,000 a year. Once a year everyone in this economy goes to a region of the country that we will call Las Vegas and there gambles half their income (\$15,000). The gambling game in Las Vegas is well known by all participants and involves the following two possible outcomes and probabilities:

- (1) The probability of winning the amount of one's wager is 1/2,
- (2) The probability of losing one's entire bet is 1/2.

Before going to Las Vegas everyone has an identical income of \$30,000 per year. After leaving Las Vegas, half the population will have an income of \$45,000 and half the population will have an income of \$15,000.

Is there any meaningful sense in which one can argue that individuals in this economy are treated unequally? Is there any meaningful sense in which one can define a disadvantaged group in this economy? If one uses the definition of equality as equality of outcomes, then clearly half the population would be classified as being treated unequally. In this example, where everyone has identical skills and receives identical compensation for these skills, income is not equal. The role of chance results in a wide dispersion of income (the ratio of income of losers to winners in this economy would be .33). I would argue that from a policy point of view the appropriate definition of equality would be equality of opportunity. Our definition of "equal treatment" is that the rules of gambling in Las Vegas be known to all (i.e., everyone knows the payoffs and the probabilities of gains and losses) and the payoffs and probabilities be the same for all. If people with blue eyes have a higher probability of winning than people with brown eyes then one can say that there is inequality of opportunity and that brown-eyed people are treated unequally and discriminated against.

In a free society we don't want to force equal outcomes. To have equal outcomes in our hypothetical society we would have to tax gambling gains

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3. Pilkington, *ibid.*, p. 12.

at 100% and subsidize losers 100% of their losses. Such a scheme would fully negate the effects of gambling and have the exact same effect as prohibiting gambling. Requiring equal outcomes restricts individual liberty and would be inconsistent with section 7 of the *Charter* guaranteeing everyone "the right to life, liberty and security of person."

### A. The Charter and Equality

A key question is what is the concept of equality embedded in the *Charter*. I would argue that the *Charter's* definition of equality is equality of opportunity. The clearest place to find support for this is in section 36(a) where the *Charter* states that governments are committed to "promoting equal opportunities for the well-being of Canadians."<sup>4</sup> In section 15(1) the *Charter* states that "every individual is equal before and under the law."<sup>5</sup> Essentially, this is a statement of equal opportunity and not equal outcomes, i.e., individuals will be treated the same under the law. For example, under these same laws some will be convicted of crimes and spend time in jail and others will not; there is a guarantee of equal treatment but not equal outcomes. Section 15(2) allows for remedial action for those disadvantaged because of "race, nationality or ethnic origin, colour, religion, sex, age or mental or physical disability"<sup>6</sup>; it does not allow for correction for people disadvantaged with low valued skills resulting in low wages. Unequal outcomes due to a wide range of circumstances are clearly allowed for in section 15(2).

We have argued that Pilkington implicitly defines equality as equality of outcomes. Hence, she would look at incomes to judge whether there was equal treatment:

For the purposes of determining whether the law prima facie infringes equality, impact as well as treatment is material. A law which appears to be neutral in its application to men and women may actually operate to the disadvantage of women and infringe section 15(1) of the *Charter* as, for example, where requirements for entitlement to government pension benefits fail to take account of and unduly penalize women who have withdrawn from the labour force to bear and raise children<sup>7</sup>.

According to Pilkington's interpretation, if women freely choose to withdraw from the labour force to bear and raise children and hence receive different pensions than men do (i.e., an unequal outcome), then the pension laws — according to this interpretation — would have to be struck down as violating section 15(1). This is the clearest example where Pilkington shows that her concern is with equal outcomes.

If Pilkington were correct in her interpretation of the *Charter* then *all* laws could be subject to the criticism of possible unequal outcomes. Consider the following two examples:

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4. *Supra*, note 1.

5. *Supra*, note 1

6. *Supra*, note 1

7. Pilkington, *ibid.*, p. 9

1. Currently, tax laws exempt capital gains below a certain amount from paying tax. Suppose it is shown that women, for whatever reason (e.g., they are more risk adverse), earn less of their income in the form of capital gains than men do and hence shelter less of their income than men. Would this section of the tax code be struck down as being to the disadvantage of women?
2. Suppose it is statistically shown that women rob more banks than men. Would the section of the Criminal Code which prescribed jail sentences for bank robbers have to be declared unconstitutional on the grounds that it resulted in harsher treatment of women?

Enacting constitutionally valid laws would be an impossible task if they had to guarantee equal outcomes for every racial, gender, age and physical disability group. Using Pilkington's constitutional interpretation, the *Charter* would make a mockery of Canadian laws. For this reason alone, Pilkington cannot be correct in her definition of equality.

Not being a lawyer, I may be on shaky grounds criticizing Pilkington's legal interpretation. Nevertheless, I would argue that Pilkington tries to force her definition of equality onto the *Charter*. Unfortunately for Pilkington, this definition doesn't fit. The *Charter* seems clear in defining equality as equality of opportunity.

In our hypothetical world where everyone was identical and received identical treatment, chance alone was sufficient to yield unequal outcomes. In the real world, many other factors including the different choices individuals make — will lead to unequal outcomes. Unequal outcomes per se yield little information about discriminatory behaviour or unequal treatment. While unequal treatment necessarily implies unequal outcomes, the converse is not true; unequal outcomes do not necessarily imply unequal treatment and as such should not be used as a test of discriminatory behaviour.

### III. Unequal Treatment

Section 15(2) of the *Charter* allows for unequal treatment within two contexts:

#### A. Disadvantaged Individuals

Section 15(2) applies to disadvantaged individuals "including those that are disadvantaged because of race, nationality or ethnic origin, colour, religion, sex, age or mental or physical disability."<sup>8</sup> Let us take the case of "disadvantaged" females considered by Professor Pilkington. The crucial question becomes how one would determine if a group were disadvantaged. Professor Pilkington doesn't answer this question directly but from the discussion in her paper, I would interpret her position to be that unequal outcomes (in terms of labour income) would be sufficient to determine a disadvantaged status.

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8. *Supra*, note 1

Let us examine the Canadian labour market to see if a case can be made for disadvantaged status for women. The prime evidence used by Pilkington is the male-female wage gap. Table 1 is reproduced from Gunderson (1980) which surveys thirteen Canadian studies. From this survey Gunderson concludes that

on average, in Ontario and the rest of Canada, the female/male earnings ratio for full-time, full-year workers, unadjusted for differences in productivity related factors, is approximately .60 . . . When productivity adjusted comparisons are made within the same narrowly defined occupations within the same establishments . . . the wage gap . . . tends to be in the range of .90-.95<sup>9</sup>

For United States data, Gunderson concludes that "as with the Canadian data, the adjusted ratios in narrowly-defined specific occupations, especially within the same establishment, were quite high, averaging .94 in the five studies reported."<sup>10</sup> The results from Block (1982) are consistent with the results reported by Gunderson<sup>11</sup>. Block attempts to correct for experience and turnover by looking solely at individuals who have never married.

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9. Morley Gunderson, *The Male-Female Earnings Gap in Ontario: A Summary*. (Toronto: Ministry of Labour, Research Branch, 1980) at 17.
  10. *Ibid* at 19.
  11. Walter Block, "Economic Intervention, Discrimination and Unforeseen Consequences" in W.E. Block and M.A. Walker (eds.), *Discrimination, Affirmative Action, and Equal Opportunity* (Vancouver: The Fraser Institute, 1982).

The raw wage ratio between men and women for full-time, full year workers is in the 60% range (it is the 64% figure for 1982 that Pilkington quotes). This figure completely ignores a large number of factors which affect worker productivity. These raw figures do not take into account education levels, training, experience, turnover rates or age (to name but a few examples). When allowance is crudely made for these factors, the male-female wage gap essentially disappears. It is for this reason that equal pay legislation applying to specific industries for specific jobs and holding constant a number of productivity factors has had minimal impact on the economy. (Hence the push for equal pay for work of equal value where a number of productivity figures cannot be held constant.)

Pilkington would argue that because women bear and raise children they tend to take part-time jobs, invest less in education and training, have less on the job experience, have higher turnover rates and, as a consequence, have lower wage incomes. Pilkington would then argue that this lower wage outcome is evidence that women are a disadvantaged group. I argued in my example of the hypothetical economy that different incomes as a result of chance should not be considered as evidence of discriminatory behaviour. Here I would argue further that different incomes as a result of choice should similarly not be considered as evidence of discrimination. Inequality of outcomes due to choice is not the definition of inequality that should be used in our *Charter of Rights*. In fact, section 7 guarantees freedom of choice. If the exercise of that freedom results in different outcomes, so be it.

The example of women in the labour force chosen by Pilkington is more complicated than the case of different racial or religious groups. Working age women fall into at least two categories: single women who never intend to marry and those who do marry.

### **1. Single Women Who Never Intend to Marry**

Since this group of women, in general, does not intend to bear or raise children, they will invest more in their education, will not have interrupted labour market careers and as such should have actual careers similar to males. Block (1982) has shown the wage differential for the never married group is non-existent.

### **2. Married Women**

The case of married women presents the economic theorist with a number of subtle problems. Married women who are in the labour force are also part of a more general partnership arrangement. Historically, economics concerned itself with only two aspects of the household: as a consumer of goods and as a supplier of labour. The new household economics developed by Becker considered the household as a producing unit.<sup>12</sup>The household combined the time of its members with market goods to produce the outputs ultimately desired by the members of the household.Re-

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12. Gary Becker, *Treatise on the Family* (Cambridge, Mass., Harvard University Press, 1981).

cently Williamson (1985) has made a start on applying transaction economics to the study of the family firm<sup>13</sup>

There are two possible types of marriages that women may enter. In the first type, which we will call the "career marriage", each partner to the marriage puts their career ahead of the marriage and makes no special sacrifices for the marriage. In this particular case, each partner to the marriage invests in marketable human capital which would survive dissolution of the marriage. In this situation one would expect investment patterns in education, turnover rates, participation in full-time jobs and experience to be similar for both male and female members of the marriage. With a modern marriage such as this one would expect no male-female wage differential. As such, this is not an interesting case, in our context, to examine.

The other type of marriage partnership may be called the "traditional marriage". In this type of marriage women may agree to acquire family-specific human capital which, although useful in producing household output, may have little marketable value outside the marriage. In addition, women may agree to forego investment in marketable human capital in order to help pay for her husband's acquisition of human capital. In such a case, if a woman works full-time but has less education (and less experience if her entry into the labour force occurs after child-rearing is finished), her earnings will be less than men with more education, more experience and less job turnover. In addition, a woman, because of her work in the household firm, may take only lower-paying part-time market jobs. As long as the marriage partnership is a viable concern, lower female wages pose no problem, for it must be remembered that both male and female wages contribute to family income; lower wages to women are borne by the entire family and the wage differential can be viewed as a cost of household production. This method of family organization would only be carried out if it maximized *total* family well-being. The partnership contract which is implicit in every marriage will compensate family members for their contribution to family output. Individual wages do not represent individual claims to goods; this is so because the individual belongs to a family partnership. It is the individual's claim to family assets which ultimately determines the individual's claim to goods. Hence, for married individuals the wage differentials between gender groups are meaningless! Since female and male wages do not take into account claims on family income, this differential has no bearing whatsoever on the material well-being of each of the gender groups.

An important problem occurs if dissolution of the family partnership takes place. Since the female member of the partnership invests in family-specific assets, a divorce leaves her with greatly diminished marketable skills. Such is not the case with the male member of the partnership and this may give him an incentive to enjoy the investment made by his partner and then dissolve the marriage. But this particular contractual problem is not unique to the marriage contract; there are many contracts where one

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13. See O. Williamson, "Transaction Cost Economics" (Toronto: University of Toronto, Law and Economics Workshop Series, 1985).

party invests in transaction-specific assets. These contracts will involve one of two mechanisms to deal with the transaction specific assets involved. Either an up-front payment is made to the individual investing in transaction-specific assets or termination penalties are provided. The latter solution not only gives the correct incentive to the party not investing in transaction-specific assets not to behave opportunistically and terminate the contract, but also compensates the individual investing in transaction-specific assets.

To some extent family law takes the second route and provides for safeguards to wives if divorce occurs. If women have a problem, it is not a problem in the labour market but a problem with family law. For safeguards to be optimal they must adequately compensate women for their investment in family specific assets and their diminished marketable skills. A division of the physical property accumulated during the marriage may not be sufficient. Family law should take account of both physical capital and human capital accumulated during the marriage. Hence if there is a problem for women, the solution is to be found in equitable family law provisions for the division of family assets on divorce. (The other solution is for women to protect themselves with individually written marriage contracts with appropriate safeguards rather than adopting the standard form State contract.) The solution is not to be found in a multitude of labour law changes (e.g., affirmative action programs, equal pay for work of equal value, etc.) Such changes unduly involve government in a wide range of private market activities. Such changes run into conflict with section 7 of the *Charter* guaranteeing "life, liberty and security of person." Furthermore, such changes impose costs on employers who are entirely innocent of the effects which divorce may have on women. Such changes also distort the price system and result in numerous inefficiencies. If there is a problem in family law, then that problem should be corrected; the government should not become involved in every aspect of market activity.

In summary, the crude evidence on inequality of outcomes in male and female earnings indicates very little about inequality of treatment. In fact, it is difficult to believe that a majority group like women face unequal treatment and are disadvantaged.

## **B. Amelioration of the Condition of Disadvantaged Individuals**

Unequal treatment, to be constitutional, must result in an amelioration of the disadvantaged group. If the law does more harm than good, it would violate section 15(2). Professor Pilkington discusses how affirmative action may put a stigma of lower quality on all members of a disadvantaged group. Such a stigma may outweigh any possible benefits of such a program and as a result would cause such a program to violate section 15(2).



"Wage equity" programs such as "equal pay for work of equal value" may result in unequal treatment and would have to be justified under section 15(2). The equal pay law in Ontario compares female dominated groups (containing 60% females) to male dominated groups (containing 70% males)<sup>14</sup>. Generally, under such laws points are awarded for each job characteristic (e.g., responsibility, skill, physical demands and working conditions). A weighting scheme is determined for each characteristic and with this weighting scheme a total point count is obtained. If a female's job has the same point count as a male's job and pays less wages then there are grounds for increasing the wages of the female's job. This plan would seem to imply unequal treatment for males and females. If such is the case, in order to satisfy section 15(2), these programs must demonstrate that they ameliorate the conditions of disadvantaged individuals.

One should note the normative name given to these programs. The name "wage equity" attempts to establish the case that these programs are correcting past wrongs. But it is not clear why it is more equitable to have wages set by a formula by bureaucrats than by impersonal market forces; in fact, "wage equity" programs may themselves be inequitable. Just because the market doesn't value work the same way an arbitrary formula does doesn't mean the market is inequitable. Such a formula may itself result in inequities because it only takes some subset of relevant factors into account and gives an arbitrary point allocation to each. These formulae typically ignore such factors as non-wage benefits, implicit lifetime terms of the contract and variability of income in the particular occupation.

The market-determined wage takes all of these relevant factors into account. To understand how this is so, one must understand how the price system operates in free markets. If the price of labour is set too high, given all of the attributes of the job, individuals will supply more labour of that particular type than there is demand for that labour. With an excess of labour, the price of labour will fall. (One will note that arbitrary formulae, in general, do not take supply and demand conditions into account.)

The role of price is crucial in free markets: price transmits information to market participants effectively and efficiently; price provides incentives to economic agents to optimally use this information, and; price allocates resources efficiently. If there is too much labour in a particular market the price will fall, encouraging buyers to purchase more and owners of resources to put their resources to other uses where they can be employed more efficiently.

The price system is an efficient provider of information. Arbitrary formulae cannot obtain (at the same cost) all the information that prices convey. Arbitrary formulae, by overriding the information inherent in market prices, needlessly throw away valuable information. Arbitrary formulae interfere with the normal operations of the price system and destroy its efficiency property. These arbitrary formulae involve the government in almost every aspect of economic life. If applied economy-

14. *Pay Equity Act*, S.O. 1987, c. 34..

wide, these formulae would destroy the price system. Liberty would be greatly impaired without the basic economic freedom to enter into mutually advantageous wage contracts.

Sometimes it is argued that markets do not operate perfectly. But government laws do not operate perfectly either. In the market, as long as there is competition there will be no market discrimination. But with "equal pay for work of equal value", government bureaucrats will have a monopoly on wage setting for a substantial part of the economy. Such a monopoly allows for much more in the way of effective discrimination than competitive markets possibly could. Governments will be tempted to favour "politically powerful" groups and discriminate against those groups who are "politically weak". Governments will set wage formulae to maximize their chances of being re-elected. The deadweight cost of this government action will be the efficiency loss from the misallocation of resources.

A loss of efficiency will not be the only loss. Anytime government action confers benefits, groups will spend real resources to gain those benefits. Such rent-seeking activity to obtain favourable wage setting formulae will tend to dissipate any gains particular groups receive because of government policies.

"Equal pay for work of equal value" will increase the wages of some women above the market wage. This higher wage will reduce the demand for this type of labour. (Higher wages will also increase the supply, and as the government will have to find some way of allocating the scarce high paying jobs, this will provide it with an additional source of political patronage.) Those women receiving high wages will benefit (although the benefits will be reduced after netting out rent-seeking costs) and those women who became unemployed will lose. Hence not all women will gain. "Equal pay for work of equal value" will be discriminatory to some women.

The fact that some women will lose their jobs yields some insight into the motives of some supporters of equal pay legislation. The major proponents of equal pay for work of equal value tend to be trade unions. In fact, this type of legislation tends to raise women's wages artificially. Since both part-time and full-time women tend to be substitutes for predominantly male union labour, raising the price of a substitute will increase the demand for union labour. Therefore, the effect of such legislation is the same as the effect of minimum wage laws: those willing to work for less, and who might otherwise only be hired for less, are shut out of the market and are effectively prohibited from competing with an established supply of labour. As well, the effect of such legislation is similar to that of legislation requiring different working conditions for women than men. For example, in Arkansas in 1915 women had to be paid time and a half for work in excess of eight hours a day. There was no such requirement for men. Was this legislation enacted to give preferential treatment to women? Its proponents at the time would have argued that it was. But though one can argue the intent of a law, its effects may be a different matter. It is one thing

to pass a law requiring better pay conditions for women, but it is another for a law to result in a higher level of welfare for women. This law clearly made women a higher cost source of overtime labour and preserved all overtime work for men. The effect of the law was to make women a disadvantaged group. Most similar provisions have been struck down in the U.S during the past twenty-five years, and properly so; it is for reasons such as these that we have a constitution to limit the power of government, for it is abundantly clear that governments can greatly infringe on the rights of individuals and discriminate against "politically weak" groups in society — much more so than private groups or individuals ever could.

In summary, some women will be worse off because of equal pay laws. Rent-seeking will dissipate most gains. Society as a whole will be worse off. With these economic results it is difficult to make a case that this so-called policy of wage equity will ameliorate the conditions of women. Consequently, such programs should be viewed as not conforming to the conditions outlined in section 15(2).

#### IV. Pensions

Pilkington's discussion of pensions again involves considering unequal outcomes as being the same as unequal treatment. Insurance companies sell life insurance and annuities on the basis of group mortality experience. They cannot set premiums on the basis of individual mortality experience, for as soon as an individual dies the terms of the contract are over and it is too late to decide on a premium. Therefore, premium setting must occur prior to the contingency being insured. If women live longer than men they will pay a lower rate for life insurance and a higher rate for pensions. This is exactly what one observes in the marketplace. It is hard to argue that this is discriminatory to women. (If such is the case how does one explain the lower rate of life insurance paid by women?) Life insurance companies give equal treatment to groups with the same mortality experience. I would argue that the *Charter* uses the definition of equality as equal treatment and not as equal outcome; therefore, the current practices of life insurance companies must be constitutionally valid.

#### V. Conclusions

The *Charter* does seem to use equality of opportunity as its working definition of equality. Therefore, the interpretation of the *Charter* should not be concerned with guaranteeing equal outcomes. In a free society where individuals have different values and different skills it is not surprising that monetary wages will not always be equal. Therefore, I disagree with Professor Pilkington's thesis, which depends crucially on defining equality as equality of outcomes.