

SUBMISSION TO TASK FORCE ON PAY EQUITY

The B.C. Human Rights Coalition wishes to thank the Task Force for this opportunity to share our thoughts on such an important issue.

INTRODUCTION TO B.C. HUMAN RIGHTS COALITION

The B. C. Human Rights Coalition is a charitable non-profit community based organization which was formed in 1982 with the very broad mandate to promote and strengthen human rights throughout B.C. and Canada. It has 75 member groups from across the province. The Coalition's general overall purpose can be found in its constitution as follows:

- (1) To provide an opportunity for better understanding of human rights issues among organizations and individuals with an interest in those issues;
- (2) To encourage dialogue on human rights matters from different points of view, and thus to educate members and the public about human rights problems encountered by different groups and individuals;
- (3) To educate and assist people in British Columbia with respect to human rights issues;
- (4) To provide assistance and mediation services for people in British Columbia with respect to their human rights under the provincial and federal legislation and the Canadian Charter of Rights and Freedoms, including the right not to be discriminated against for reasons of race, religion, national or ethnic origin, colour, age, sex, sexual orientation, marital status, family status, disability and other analogous grounds;
- (5) To encourage cross-interest awareness and involvement between and among the members of the public.

The Coalition's services integrate information, education, consultation, investigation, mediation, research and advocacy. The Coalition has assisted employers, unions and institutions throughout the province in developing policies on human rights, as well as training them in the administration of those policies. We also conduct investigations for internal complaints on a contract basis. Advocacy services assist clients from Intake to Hearing. The Coalition also assists the private bar in its representation of clients through preparation for hearings and legal research. In addition, the Coalition mediates, negotiates and settles many complaints.

ISSUES AND QUESTIONS

Is there a problem and should the Government of British Columbia be concerned?

In February 2001, the Ministry of the Attorney General published a discussion paper titled Pay

Equity in British Columbia. This document notes that in 1997, women earned on average 73% of what men earned. This 27% wage gap demonstrates that women have not achieved economic equality.

Section 15 of the Charter of Rights and Freedoms guarantees equality rights to all Canadians. The Government of British Columbia should be concerned and take action to ensure that all of its citizens are not discriminated against and in particular, ensure that men and women receive equal pay for work of equal value.

In December 1998, Canada was criticized for its failure to adequately protect women from wage discrimination by the United Nations Committee on Economic, Social and Cultural Rights. On reviewing Canada's report on its compliance with the International Covenant on Economic, Social and Cultural Rights, that Committee stated:

The Committee is also concerned about the inadequate legal protection in Canada of women's rights which are guaranteed under the Covenant, such as the absence of laws requiring employers to pay equal remuneration for work of equal value in some provinces and territories, restricted access to civil legal aid, inadequate protection from gender discrimination afforded by human rights laws and the inadequate enforcement of those laws.

And the Committee encouraged Canada "to adopt the necessary measures to ensure the realization of women's economic, social and cultural rights, including the right to equal remuneration for work of equal value."¹ Meeting Canada's obligations under this human rights treaty, to which Canada became a signatory in 1976, requires British Columbia, as well as other provinces, to introduce legislation that requires employers to pay equal pay for work of equal value.

It is submitted that British Columbia has a duty to honour the commitments undertaken as a signatory to the United Nations *Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)*(GA Res. 34/180, UN GAOR, 34th Sess., (Supp. No. 46), UN Doc. A/34/46 (1982), Can. T.S. 1982 No. 31.) Article 11(1)(d) requires States parties to ensure that women have the "right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value..." (Canada ratified *CEDAW* in 1981).

Equal Pay for Work of Equal Value

¹See *Concluding observations of the Committee on Economic, Social and Cultural Rights: Canada. 10/12/98. E/C.12/1/Add.31*, paras. 16 and 53

Only two jurisdictions in Canada provide full protection against wage discrimination. The province of Ontario and the federal government have equal pay for work of equal value guarantees. Of the remaining provinces, Manitoba provides these protections for public sector workers only and the other provinces (British Columbia, Alberta, Saskatchewan, Quebec, New Brunswick, Nova Scotia, Prince Edward Island, and Newfoundland) provide only the guarantee of equal pay for similar work.

The *Canadian Human Rights Act*, which applies in federal jurisdiction, prohibits paying women less than men for work of equal value. In 1984, the Public Service Alliance of Canada (PSAC), on behalf of nearly 200,000 current and former federal civil servants, launched a pay equity complaint against the federal government. The Canadian Human Rights Commission ordered a tribunal hearing of the issue. On July 29, 1998, after 262 days of hearings during which extensive pay-equity and statistical expert testimony was heard, the Human Rights Tribunal ruled that the federal government had discriminated against the women who were covered by the complaint. After an appeal to the Federal Court, Trial Division, which the government lost in October 1999, the Government of Canada decided to settle with the women workers. The case took more than 15 years.

The *Workplace Equity Guide*² contains thousands of pages that outline the laws that the various governments have enacted, records the pay equity decisions that have been made and has a mind numbing number of guidelines and forms that come with the enforcement regimes. Pay equity has become a science that only a few human resource specialists have the time and aptitude to comprehend.

For most women, the complexity of pay equity litigation and the outcomes achieved offer little solace. The gap between the wages men receive and the wages that women are paid continues to exist.

Current Legislation in British Columbia

B.C. HUMAN RIGHTS CODE

SECTION 12 OF THE CODE

S. 12 provides for protection against discrimination in wages on the basis of sex for “work that is similar or substantially similar”. There have been a few successful cases under this section [*Kelly v. Vanderhoof* (5 C.H.R.R. D/2159), *Powell v. Mission Auto* (10 C.H.R.R. D/6447), *Trenholm v. Consolidated Fastfrate* (19 C.H.R.R. D/238), *Ikeda v. FTI Magna* (unreported B.C.H.R.T. August 12, 1997)]. In *Reid v. Vancouver Police et al.* (2000 BCHRT 30) the complaint was dismissed because it was determined that the comparative groups did not have the same employer but it was held that the women who filed the complaint were paid less than a group of men who did similar

² Published by CCH Canadian Ltd.

work. All of these cases dealt with situations where women were performing jobs that were similar to jobs performed by men.

S. 12 does not allow a woman to file a complaint because she is paid less than a male co-worker but is doing different work that requires more skill and effort and creates more value. S. 12 does not address disparity in wages that is based on the fact that work that has been traditionally deemed to be 'women's work' is valued less and paid less because it is done by women and not men.

SECTION 13 OF THE CODE

In *Androniuck v. Guilford* (21 C.H.R.R. D/400) a complaint of discrimination in wages was upheld under section 8 of the old *Act* (now section 13) despite the respondent's protest that the complainants had not filed a complaint under section 7 (now section 12 of the *Code*). At page D/408 the Member wrote:

[102] Section 8 of the *Act* prohibits discrimination in employment on the basis of a number of grounds including sex, and s. 7 prohibits discrimination in wages on the basis of sex...Wages are a term or condition of employment. I conclude, that a complaint alleging discrimination in wages can also be filed under s. 8 of the *Act*.

Although the issue has not been dealt with by a B.C. Tribunal, there is an Ontario Supreme Court decision that strongly suggests that section 13 of the *Code* could allow a Tribunal to consider complaints of sex discrimination based on the concept of *equal pay for work of equal value* as well as equal pay for similar work. In *Nishimura v. Ontario (Human Rights)* [S.C. Ont. 11 C.H.R.R. D/246] the Court considered an appeal of a decision by the Ontario Human Rights Commission after a complaint was rejected because (p. D/247 para. 5):

"To interpret s. 4 of the Ontario Human Rights Code to include the principle of equal pay for work of equal value, goes beyond the intent of the Legislature in drafting s.4. Therefore, that aspect of the complaint which involves the principle of equal work for of equal value is beyond the jurisdiction of the Commission."

S. 4 of the Ontario *Code* is similar in wording to s. 13 of the B.C. *Code*. The Ontario Supreme Court allowed the appeal and wrote at p. D/248:

[17] ...I have concluded that the allegations of unequal pay for work of equal value can constitute sex discrimination contrary to s. 4(1)

[18] The wording of s 4(1) is very broad and the alleged discrimination fits within the definition of discrimination set forth by McIntyre J. in *Andrews v. The Law Society of British Columbia, supra*. It also falls within what is described as structural or systemic discrimination on the principles established in the *Simpson-Sears Ltd.*,

Action travail des femmes, and *Robichaud* decisions to which reference has already been made.

[19] Four other principles support my conclusion. First, that a broad and liberal construction is required when one is considering human rights legislation, because of its quasi-constitutional status... Secondly ...it is not necessary to prove an intent to discriminate... Thirdly, that a decision to dismiss as outside the jurisdiction of the Commission should only be made in the clearest of cases and fourthly, that the question of whether the very broad language of the *Code* includes structural and pay discrimination is a question to be decided by the Commission itself.

Eventually a Tribunal may be asked to decide whether or not s. 13 can be used to advance an equal pay complaint based on the value of the work performed. However, without any legislative wording to support such an interpretation, the Courts will no doubt be asked to review any decision on this topic.

RECOMMENDATION

We support an amendment to the *B.C. Human Rights Code* that is similar in nature to section 11 of the *Canadian Human Rights Act*. S. 11 reads as follows:

Equal wages

11(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 are performing work of equal value.

Assessment of value of work

11(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.

Separate establishments

11(3) 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 the same establishment.

Different wages based on prescribed reasonable factors

11(4) 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 27(2), to be a reasonable factor that justifies the difference.

Idem

11(5) For greater certainty, sex does not constitute a reasonable factor justifying a difference in wages.

No reduction of wages

11(6) An employer shall not reduce wages in order to eliminate a discriminatory practice described in this section.

Definition of "wages"

11(7) For the purposes of this section, "wages" means any form of remuneration payable for work performed by an individual and includes

- (a) salaries, commissions, vacation pay, dismissal wages and bonuses;
- (b) reasonable value for board, rent, housing and lodging;
- (c) payments in kind;
- (d) employer contributions to pension funds or plans, long-term disability plans and all forms of health insurance plans; and
- (e) any other advantage received directly or indirectly from the individual's employer.

Any legislative initiative should ensure that there is sufficient flexibility to enact regulations pursuant to section 49 of the *Code*.

As noted previously, litigation of pay equity is complex and time consuming. Any change to the law should also include an education and research component. All parties involved in a pay equity scheme require assistance to help identify possible inequities and need the tools required to measure and redress them.

The Coalition thanks the Task Force for considering this submission.

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