

Vocational rehabilitation. The 1982 conference held a general discussion which will lead to the possible adoption in 1983 of a Recommendation supplementing the Vocational Rehabilitation (Disabled) Recommendation of 1955. While the provisions of the original instrument are still relevant, new developments in the field have made it necessary to broaden its scope by updating and expanding its definitions of the terms "vocational rehabilitation" and "disabled." The conference did not accept the ILO secretariat's proposal to include among disabled persons the socially maladjusted, but proposed coverage in the revised instrument for all individuals whose prospects of securing and retaining suitable employment are substantially reduced as a result of "an impairment of a physical, mental, or psychological nature duly recognized by a competent authority."

During the committee's discussions, the workers' group unsuccessfully proposed that the supplementary standard on vocational rehabilitation should take the form of a Convention. While the committee's draft conclusions were easily adopted both in committee and in plenary, the workers are expected to rekindle their call for a Convention next year.

Revision of the Plantations Convention. In the shortest and quietest technical discussion in ILO history, the conference easily adopted a protocol revising Article One of the 1958 Convention concerning the Conditions of Employment of Plantation Workers. The objective of the revision was to limit the ILO's very broad definition of the term "plantation" and thereby pave the way for wider ratification and implementation of the instrument. There was no substantive discussion of conditions of work on plantations.

The revision of the Plantations Convention marks the first time that the protocol format has been used by the ILO conference. The new procedure eliminates the need for publishing an entire new text (only 1 article of 99 was changed) with a new number. In the future, governments will have the option of ratifying either version of the Plantations Convention.

Other work of the conference

In the Conference Finance Committee, which is composed only of government members, contributors to the ILO began—at the initiative of the United States—to take a closer and more critical look at the ILO's growing practice of using supplemental budget requests to finance so-called "unforeseen" expenditures, that is, in excess of the organization's biennial program and budget.

The Structure Committee, on the other hand, accomplished little more than to call for the reconstitution and resumption of the Working Party on Structure (now in its 9th year) and to request that an item on

structure be included in the 1983 conference agenda. The structure question involves, among other things, proposed changes in the size and composition of the ILO's Governing Body and its relationship to the conference. Although some of the issues have been ironed out, the structure question is being considered as a "package" and nothing can be resolved until complete agreement is reached. □

—FOOTNOTE—

¹ Sponsors were the government delegations of Algeria, Democratic Yemen, Iraq, Jordan, Kuwait, Lebanon, Libyan Arab Jamahiriya, Morocco, Qatar, Saudi Arabia, Somalia, Sudan, Syrian Arab Republic, Tunisia, United Arab Emirates, and Yemen.

Canadian legal approaches to sex equality in the workplace

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During the last several decades, labor market discrimination against women has become a matter of considerable social and political concern. The rising female labor force participation rate over the years and its projected further increase render this issue even more important.¹ This type of discrimination can take conceptually two forms: employment discrimination and pay discrimination. The former can be defined as unequal job levels for men and women with similar qualifications, and the latter as unequal pay for men and women who have equal qualifications and are performing similar jobs, jobs of equal value, or both (that is, comparable worth).²

In this report, equal employment and equal pay legislation are discussed; then, selected cases decided by courts and boards of inquiry are analyzed; and finally, conclusions and policy implications are presented.

Public policy

Equal pay. All Canadian jurisdictions have laws which require equal pay for equal work within the same establishment, without sex discrimination. These provisions have been incorporated either in human rights legislation (Federal jurisdiction, Alberta, British Columbia, New Brunswick, Newfoundland, Northwest Territories, Prince Edward Island, and Quebec) or in labor standards legislation (Manitoba, Nova Scotia, Ontario, Saskatchewan, and Yukon Territory).

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At the Federal level, equal pay legislation was first put into effect in 1956 and amended in 1967. It required equal wages for men and women performing the same or similar work under the same or similar working conditions on jobs requiring the same or similar skill, effort, and responsibility. This legislation remained in effect until 1977, when it was replaced by the Canadian Human Rights Act embodying the equal value principle. According to the act, men and women performing work of equal value (regardless of whether the work is similar) must be paid equal wages. The act also elaborates on how the value of work may be assessed; section 11 (2) specifies that in assessing the value of work performed by persons employed in the same establishment, the criterion to be applied is the composite of skill, effort, and responsibility required in the performance of the work and the conditions under which the work is performed. The Quebec legislation calls for equal pay for equivalent work.³

Compared with the Federal and Quebec jurisdictions, the various provincial jurisdictions follow a narrow definition of equal work, such as "same work," "similar work," or "substantially the same work." In 6 of the 12 jurisdictions (Ontario, Nova Scotia, New Brunswick, Newfoundland, Prince Edward Island, and Saskatchewan), legislation also specifies factors on which equality of work may be based. These factors are education, skill, experience, effort, responsibility, and working conditions.

The legislation in a majority of jurisdictions provides for a general exception permitting differentials between the pay of men and women based on any factor other than sex. Other jurisdictions list specific exceptions which include seniority, work experience, and merit.

Several court decisions have helped to provide a more precise interpretation of equal pay legislation in Canada.⁴ In the Greenacres Nursing Home case in 1970, the Ontario Court of Appeal ruled that "the same work" did not necessarily imply "identical work" and that job comparisons should be based on work performed rather than on formal job descriptions or terms of employment. In the Riverdale Hospital Case in 1973, the concept of equal work was further broadened. Here, the Ontario Court of Appeal ruled that different job titles do not necessarily indicate different work, slightly different job assignments do not make the work unequal, and within an occupation, if some men do the same work as women, equal pay is justifiable for the whole occupation. The last point was clarified in a case in which the Saskatchewan Court of Appeal declared that even when only 5 of 46 male caretakers performed work similar to female cleaners, it should be considered a sufficient number within the provincial equal pay legislation, and that "some" employees being paid a rate of pay higher than others doing similar work warrants equal pay.⁵

The courts have also dealt with what might properly constitute "a factor other than sex" in justifying male-female pay differentials. In two decisions at the Federal level—the C.T.V. Television Network case in 1975 and the La Societe Radio-Canada case in 1977—the Court ruled that differences in the quality of work as assessed by management are sufficient to justify unequal pay. The Court acknowledged that such an assessment might be subjective and, thus, might involve an error of judgment; however, the Court held that it was not within the competence of the judiciary to review management's judgment. The courts have also ruled on whether the existence of two separate bargaining units could be considered "a factor other than sex" to permit pay differentials between them. The Alberta Court of Appeals in the Gares case in 1976 decided against it.⁶

Equal employment. As in the case of equal pay, all jurisdictions in Canada have also enacted human rights legislation. All the statutes prohibit discrimination on the basis of race, national origin, color, religion or creed, sex, marital status, and age. The age groups protected vary among jurisdictions, with the most common being between the ages of 40 or 45 and 65. Discrimination due to physical disability is proscribed in seven jurisdictions. Other prohibited grounds include sexual orientation in Quebec and pardoned offenses in the Federal jurisdiction.⁷ These statutes apply to employers, employment agencies, and trade unions. Discrimination is prohibited with respect to advertising and terms and conditions of employment including promotion, transfer, and training.

Indirect or systemic discrimination. Both direct⁸ and indirect employment discrimination is prohibited. The Canadian Human Rights Act, as well as numerous decisions by boards of inquiry in several provinces, has borrowed the concept of indirect discrimination from U.S. case law and relevant British legislation, that is, the Race Relations Act and the Sex Discrimination Act.

In the United States, the concept was articulated by the Supreme Court in *Griggs v. Duke Power Co.* in 1971. The Court unanimously endorsed a results-oriented definition of what constitutes employment discrimination and indicated that intent does not matter; the consequences of an employer's actions determine whether it may have discriminated under Title VII of the Civil Rights Act.⁹

Enforcement. In the enforcement of both the equal pay and equal employment legislation, the method common to all jurisdictions is investigation based on employee complaints. (Although, sometimes, Human Rights Commissions may file a complaint or commence an investigation.) All the acts provide for the settlement of com-

plaints, if possible, by conciliation and persuasion and for an initial, informal investigation into a complaint by an officer who is directed to effect a settlement. If conciliation fails, a board of inquiry is usually appointed; it may issue orders for compliance, compensation, and so on. This order may be appealed to the Supreme Court of the Province on questions of law, fact, or both. The Federal jurisdiction allows an appeal by either the complainant or defendant to a review tribunal, if the original tribunal had fewer than three members.¹⁰ In practice, the emphasis has been to concentrate on effectuating a satisfactory settlement rather than legal guilt.¹¹

Analysis of cases

Methodology. In order to study the incidence of pre- and post-employment sex discrimination, 52 board of inquiry and court cases were analyzed.¹² These were all the cases that were adjudicated by boards of inquiry, and in some cases by courts, from 1975 to 1980, in Alberta, British Columbia, New Brunswick, Nova Scotia, Ontario, and Saskatchewan. (To our knowledge, no relevant cases were decided by either boards or courts in other jurisdictions.)

Although the bulk of a typical human rights commission's workload consists of cases that do not go to a board, the data on, for example, conciliated cases or cases under investigation are confidential and, therefore, are not analyzed.

The cases covered a cross-section of industries and institutions and were not confined to blue-collar or lower level white-collar workers; professional, technical, and to some extent administrative and managerial workers were also involved. A majority of the cases involved secretarial workers (38 percent) and unskilled laborers (21 percent).

Pre- and post-employment discrimination cases. Pre-employment discrimination cases decided by selected boards of inquiry include allegations regarding male-female job stereotypes, height and weight restrictions, refusal to interview female applicants, sex not being a bona-fide occupational requirement, discriminatory job interviews, and discriminatory job advertisement.

Decisions of boards of inquiry have prohibited such pre-employment barriers as height and weight requirements for a police constable's job,¹³ and for jobs requiring physical strength;¹⁴ discriminatory or sex stereotyped questions in job interviews;¹⁵ and employers' misconceptions and stereotypes about traditionally male or female jobs such as not considering: a woman for the job of a cost accountant trainee,¹⁶ a man for the position of a copywriter,¹⁷ a woman as a rental clerk for a rental truck agency,¹⁸ and a woman for heavy-duty janitorial work.¹⁹

A bona-fide occupational qualification exemption with respect to sex discrimination has been very narrowly construed by the boards. Employers' arguments such as: work being too strenuous for a woman,²⁰ customer preference for service from either a man or a woman,²¹ restaurant atmosphere is created by having all female waitresses,²² lack of restroom facilities for women,²³ and male-dominated and remote worksite,²⁴ have been rejected by boards of inquiry in several jurisdictions.

Post-employment discrimination cases deal with casual workers denied full-time jobs; promotion; dismissal; reemployment; pregnancy; and sexual harassment.

Casual to permanent employment. At least three boards of inquiry in Saskatchewan,²⁵ New Brunswick,²⁶ and Ontario²⁷ have dealt with complaints from women regarding their attempt to switch from part- to full-time permanent jobs with the same employer. In these cases, the boards of inquiry held against the employers for denying women permanent positions because of their sex.

Pregnancy. In British Columbia, the "reasonable cause" provision of the Human Rights Code has had a major impact in broadening the scope of prohibited grounds of discrimination that otherwise would have been excluded.²⁸ In one case, a British Columbia board of inquiry ruled that a woman who was fired from her job as a reservation clerk, when she told her employer that she was pregnant, had been discriminated against.²⁹ In another case, a board of inquiry allowed sick leave benefits to teachers absent from employment for sickness caused or aggravated by pregnancy, under the "reasonable cause" provision.³⁰

Sexual harassment. In a precedent-setting decision, an Ontario board of inquiry declared in August 1980 that sexual harassment is discrimination based on sex, according to section 4(1) of the Human Rights Code. In this case, *Anna Korchzak and Cherie Bell v. Ernest Lada and the Flaming Steer House Tavern, Inc.*, the complainants had alleged that they had been sexually harassed by their employer, the owner of the restaurant. Although the complainants lost, Board Chairman Owen Shime declared that ". . . there is no reason why the law, which reaches into the work place so as to protect the work environment from physical or chemical pollution or extremes of temperature, ought not to protect employees from negative psychological and mental effects where adverse gender-directed conduct emanating from a management hierarchy may reasonably be construed to be a condition of employment." Thus, sex as a prohibited ground of discrimination includes sexual harassment where because of a worker's sex some term or condition of employment is modified by the sexual harassment.³¹

Indirect or systemic discrimination. In 7 of the 52 cases, systemic discrimination was found. An analysis of these cases revealed that the approach adopted in the *Griggs* case, which was previously mentioned, has now been widely emulated in Canada; malice or intent to discriminate is no longer a relevant factor. For example, in a case involving a female applicant, the board decided that the Commission's minimum height requirement of 5 feet, 10 inches "virtually eliminates women as police constables," as only 5 percent of Canadian women are that tall.³²

Remedies ordered. In most cases in which discrimination was found and that went before a board of inquiry, more than one remedy was ordered. The most frequently given one was compensation for lost wages; the other remedies (in order of frequency) were orders to employers to:

- display the relevant human rights code in predominant places in employer premises;
- stop their unlawful conduct;
- compensate for general damages;
- compensate for expenses incurred by the complainant;
- compensate for pain and humiliation suffered by the complainant;
- reinstate the complainant;
- send a letter of apology to the complainant;
- offer employment or interview at the next available opening;
- have the relevant human rights commission conduct a human rights workshop for company executives;
- amend application form or other selection tools, or both;
- send a letter of apology to the relevant human rights commission; and
- provide separate facilities for women.

Conclusions

The cases discussed in this report seem to indicate that entry and training requirements should be carefully established and maintained only if they are necessary prerequisites for employment and promotion. Therefore, employers should develop clear equal opportunities policies to ensure that they are not discriminating by default of appropriate action and to give themselves some safeguard in case their policies are challenged. For instance, organizations must issue explicit instructions regarding the employment interview through their personnel departments. Interviews should be structured and only questions of direct relevance to the job should be asked.

Organizations should keep in mind that, over the years, substantial evidence of validity has accumulated for many of the predictors. When comparing employment tests, ability tests and work sample tests—relative

to personality and interest tests—have proved the most valid. References, recommendations, and interviews usually have been found to be less valid as predictors of job success.³³ Choices of predictors to be used in staffing systems should be governed by the nature of the job, and the validity of the predictors. Staffing systems can be improved considerably by standardization (to obtain reliable information), and by the validation process. Emerging research evidence seems to indicate that validity of tests need not be specific to the situation.³⁴

There would appear to be three broad types of human resource policies which might be used to assist minority workers.³⁵ First, taking labor supply and demand as given, one might attempt to make the labor market operate more efficiently by means of placement activities, worker counseling, and labor mobility or related measures, which would be appropriate regardless of the labor market structure. Second, one might attempt to upgrade the supply of minority workers by means of greater investment in education and training. Third, following the labor market segmentation approach, one might recommend solutions lying on the demand side rather than the supply side, with a requirement for government employment and expenditure policy to favor those in the secondary sector. This would include equal opportunity and affirmative action programs.

Critics have suggested changes in both the scope and enforcement of equal opportunity legislation in Canada in order to improve its effectiveness. Instead of the case-by-case approach adopted by most human rights commissions, class action suits, routine investigation of firms,³⁶ and contract compliance have been advocated.

Equal opportunity legislation may be a necessary condition for the elimination of sexual inequality. But legal approaches are limited because they operate only on the demand side of the problem (that is, the employer side) and do little to change supply (that is, education and training). Moreover, the existing empirical evidence points to only a limited impact of such legislation; the small number of complaints filed is apparently because of ignorance of legislation, lack of resources, and fear of employer reprisals.³⁷ However, these and other cases do have an educational effect and may have served to enhance public awareness of the need to provide equality of opportunity. □

— FOOTNOTES —

¹ In January 1982, women accounted for more than 40 percent of the Canadian labor force. By the year 2000, the labor force participation rate of women is expected to approach that of men. See Carole Swan, *Women in the Canadian Labour Market* (Ottawa, Ontario, Employment and Immigration Commission, July 1981).

² Naresh C. Agarwal, "Pay discrimination: Evidence, policies and issues," in Harish C. Jain and Peter J. Sloane, *Equal Employment Issues: Race and Sex Discrimination in the USA, Canada and Britain* (New York, Praeger Publishers, 1981).

Harish C. Jain, "Employment and pay discrimination in Canada: Theories, evidence and policies," in John Anderson and Morley Gunderson, eds., *Union-Management Relations in Canada* (Toronto and Reading, Mass., Addison-Wesley, 1982).

⁴ Harish C. Jain, *Ibid.* Also see Naresh C. Agarwal, "Pay discrimination."

⁵ *Ibid.*

⁶ *Ibid.*

⁷ Harish C. Jain, "Race and sex discrimination in Canada," *Relations Industrielles*, forthcoming.

⁸ *Ibid.*

⁹ In this case, the Court struck down educational requirements and employment tests, stating that these requirements could not be justified on the grounds of business necessity because they were not valid or related to job performance, and they had adverse impact because they screened out a greater proportion of blacks than whites. However, if business necessity could be proved, that is, if the educational and testing requirements that had disproportionate or adverse impact on minorities were related to job performance, then the practice was not prohibited.

¹⁰ Harish C. Jain, "Employment and pay discrimination."

¹¹ Daniel G. Hill, "The Role of the Human Rights Commission: The Ontario Experience," *University of Toronto Law Journal*, Vol. 19, 1979, pp. 390-401.

¹² Harish C. Jain, "Race and sex discrimination."

¹³ *Ann Colfer v. Ottawa Board of Commissioners of Police*, 1978, an Ontario board of inquiry decision.

¹⁴ *Kathleen Grafe v. Sechelt Building Supplies (1971) Ltd.*, a British Columbia board of inquiry.

¹⁵ *Kerry Segrave v. Zeller's Ltd.*, 1975, an Ontario board of inquiry decision.

¹⁶ *Stairs v. Maritime Cooperative Services Ltd.*, 1975, a New Brunswick board of inquiry decision.

¹⁷ *Francis Perry v. Robert Simpsons Ltd.*, 1976, a Nova Scotia board of inquiry decision.

¹⁸ *Betty-Ann Shack v. London Drive-Ur-Self Ltd.*, 1974, an Ontario board of inquiry decision.

¹⁹ *E. Garnett v. Kompleat Industries Ltd.*, 1979, a British Columbia board of inquiry decision.

²⁰ *Betty-Ann Shack*. Similarly, in the *David J. Foreman et al v. Via Rail Canada Inc.*, 1980, a Federal case, the tribunal held that Via's acuity standards were not based on a bona-fide occupational requirement because Via had failed to justify the standards. This was not a sex discrimination case; however, it is an important bona-fide occupational case.

²¹ *Donald J. Berry v. The Manor Inn*, 1980, a Nova Scotia board of inquiry decision.

²² *Kesterton v. Spinning Wheel Restaurant*, 1975, a British Columbia board of inquiry decision.

²³ *Jean Tharp v. Lornex Mining*, 1975, a British Columbia board of inquiry decision.

²⁴ *Ibid.*

²⁵ *Gail Oliver v. Her Majesty the Queen in right of Saskatchewan as represented by the Minister of Highways and Transportation of Sas-*

katchewan, 1976, a Saskatchewan Human Rights Commission formal inquiry decision.

²⁶ *Shirley Naugler v. The New Brunswick Liquor Corporation*, 1976, a New Brunswick board of inquiry decision.

²⁷ *Hetty Hendry v. L.C.B.O.*, 1980, an Ontario board of inquiry decision.

²⁸ Bill Black, "'Reasonable cause' in Human Rights Legislation," *Labour Research Bulletin*, Vol. 9, February 1981.

²⁹ *H.W. v. Riviera Reservations*, 1976, a British Columbia board of inquiry decision.

³⁰ *Kerrance Gibbs and Surrey Teachers Association v. Board of School Trustees School District #36 (Surrey, B.C.)*, 1979, a British Columbia board of inquiry decision.

³¹ *Anna Korchzak and Cherie Bell v. Ernest Lada and the Flaming Steer Steak House Tavern Inc.*, 1980, an Ontario board of inquiry decision.

³² *Ann Colfer v. Ottawa Board of Commissioners of Police*, 1978, an Ontario board of inquiry decision.

³³ Herbert G. Heneman III, Donald P. Schwab, John A. Fossum, and Lee D. Dyer, *Personnel/Human Resource Management* (Homewood, Ill., Richard D. Irwin, 1980).

³⁴ Frank L. Schmidt and John E. Hunter, "Development of a general solution to the problem of validity generalization," *Journal of Applied Psychology*, Vol. 62, October 1977, pp. 529-40. Also see, Marvin D. Dunnette and Walter C. Borman, "Personnel Selection and Classification Systems," *Annual Review of Psychology*, Vol. 30, 1979, pp. 477-525; Frank L. Schmidt, John E. Hunter, Robert C. McKenzie and Tressie W. Muldrow, "Impact of valid selection procedures on work-force productivity," *Journal of Applied Psychology*, Vol. 64, December 1979, pp. 609-26; and Mary L. Tenopyr, "Trifling he stands," *Personnel Psychology*, Vol. 34, Spring 1981, pp. 1-17.

³⁵ Harish C. Jain and Peter J. Sloane, *Equal Employment Issues*.

³⁶ Apparently, routine investigation of firms does bring increased backpay settlements. For instance, 157 investigations and routine audits under Ontario's equal pay regulations resulted in \$284,000 of salary increases and backpay settlements for female employees over a 10-month period, April 1980 to January 1981. Thirty-six employers were found guilty in cases involving 134 women. The beefed-up inspection procedures by the Ministry of Labour were made possible by the hiring of 11 officials who were added to the Ministry's equal pay monitoring team in Spring 1980. See *Globe and Mail*, Feb. 27, 1981, p. B-8. A comparison of previous statistics highlights the role of routine audits in increasing backpay settlements. In 1979-80, nine employers were found guilty involving 44 employees and \$56,212 in settlement; in 1978-79, eight employers involving 29 employees were found guilty and the settlement was \$8,311; in 1977-78, nine employers involving 20 employees were found guilty and the settlement was \$6,672.67. The exception to the rule was during 1976-77 when 29 employers and 452 employees were involved and the settlement was \$535,966.02. However, during 1975-76, the settlement sum of \$31,248.88 was in line with other years and involved 17 employers and 76 employees. These figures were provided by the Women's Bureau of the Ontario Ministry of Labour.

³⁷ *The Status of Women in Canada* (Ottawa, Ontario, Information Canada, 1970).