

MODULE 1

Women, Work and Equality: An Introduction to Human Rights Law in the Workplace

A Popular Legal Education and Consultation Series

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Women, Work and Equality: An Introduction to Human Rights Law in the Workplace

Presented by the National Association of Women and the Law (NAWL) in collaboration with the Canadian Labour Congress (CLC).

We have the right to work in a healthy accessible environment that is safe from harassment, where workers are protected against abuse and exploitation. Barriers against our participation must be removed, particularly for those of us who belong to communities that have historically been subjected to discrimination. Employment equity programs, universal quality child care, paid leave of absence and other measures are necessary to ensure the full participation of women in the workforce.

***The World March of Women in the year 2000
It's Time for Change: Demands to the Federal Government
to End Poverty and Violence Against Women***

MODULE 1

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1. Introduction

1.1 Introduction

What immediately comes to mind when you think of human rights in the federal sector?

Do you think about a woman postal worker's right to work in an environment free of sexual harassment, racism and homophobia? Do you reflect about the nature of an employer's obligations to take into account the religious, ethnic, linguistic, racial and other differences which may exist in the work environment?

This workshop will look at the human rights framework in the federal sector – its strengths and its weaknesses. We will review recommendations that are designed to promote substantive equality for women. In order to remedy systemic patterns of discrimination, governments and employers have to adopt positive measures that enable disadvantaged groups to access employment, promotion and other opportunities for advancement.

We will examine why a wide diversity of women need to demand improvements to the *Canadian Human Rights Act* so that it speaks to women's different realities and is effective in reducing women's social and economic inequality.

The National Association of Women and the Law (NAWL) is a national non-profit women's organization. We promote the equality rights of women through legal education, research and law reform.

We recognize that women experience inequality, including wage discrimination, differently. Women's differing experiences of

systemic inequality are due to differences related to race, class, sexual orientation, disability, age, language and other factors.

We work collectively and in coalition with other groups to eliminate barriers to women's equality.

1.2 Objectives

Our main objectives for this workshop are:

- To hear from women about human rights issues in the workplace.
- To provide an overview of human rights law as it applies to women engaged in paid work in the federal sector.
- To identify weaknesses in human rights law.
- To identify wide-reaching changes that could be made to workplaces to promote women's equality.

2. Defining Discrimination and Equality

How would you describe the kind of discrimination that a wide range of women face at work? What does equality mean to you?

Handout No. 1: Pay Equality Questionnaire

The law recognizes several different kinds of discrimination. It also refers to different ideas of equality.

2.1 Legal definitions of discrimination

There are legal definitions of *direct* discrimination, *adverse impact* discrimination and *systemic* discrimination.

Direct discrimination happens when rule, practice or policy explicitly creates discrimination against a person or group of people who are protected by human rights legislation (or the *Canadian Charter of Rights and Freedoms*).

Example: An employer tells you “No Blacks, no Muslims, no women employed here.”

Adverse impact discrimination arises where an employer adopts a rule or standard that seems neutral but has a discriminatory impact or effect on an employee or a group of employees protected by human rights legislation.

Example: An employer requires that, as a condition of employment, everyone must be five feet eight inches tall, even though this is not essential for performance of the job. Most women as well as many men from certain ethnic or racial groups will be excluded by this requirement.

Systemic discrimination arises out of the application of a set of established practices or policies that have a negative impact on or exclude a designated group from hiring or advancement opportunities or fair working conditions.

Example: A white male employer only discusses job openings in the department with his buddies who meet him after work at the local bar every Friday night.

How would you define a working environment without discrimination?

2.2 Different ideas of equality

The law refers to both *formal* and *substantive* equality. It is also useful to define *equity*.

Formal equality assumes that equality exists once legislation, policies and practices apply equally to everyone without discrimination. As long as you apply the same rules to everyone, the outcome will always be fair and “equal.” According to formal equality thinking, we don’t need to be concerned if in actual fact, the outcome is much less favorable for certain groups of people than for others.

Substantive equality recognizes that in reality, the outcome is what really counts. A sign that says “No Blacks, no Muslims, no women” is hurtful and a disgrace. But even without a sign, if Blacks, women and Muslims never get hired, there is still a problem!

Due to historic and systemic advantage experienced by certain groups as well as physical differences between people, formal

equality often just maintains existing patterns of economic and social inequality. Seemingly neutral legislation, policies and practices may have an adverse impact on disadvantaged communities.

Specific measures that take into account differences between people are required to dismantle social and economic inequality. One example is the need for “proactive” pay equity legislation to dismantle sexist and racist market job valuation practices.

Equity

This term usually describes proactive legislative measures, policies or practices which governments, institutions or organizations implement as a means to work towards equality of outcome (e.g., employment equity, pay equity etc.).

2.3 Women’s rights in the workplace

Regulating work is the responsibility of provincial governments under s. 92(14) of the Constitution with some exceptions.

- Most employers fall under the provincial jurisdiction.
- Labour laws vary from one province or territory to the next.
- Work in certain areas falls within the federal jurisdiction: telecommunications, banking, inter-provincial transportation, railways, federal public service.

What employers do determines whether they must respect provincial or federal employment laws. This in turn determines what rights workers have and what recourse is available to them if their employer does not respect the law.

Governments adopt, implement and enforce laws and regulations in the following areas:

- Employment standards
- Labour codes (the right to unionize and to collective bargaining)
- Occupational health and safety
- Workers' compensation
- Human rights
- Employment Equity and Pay Equity (where applicable)
- Employment Insurance.

Some of the standards set out in employment legislation include:

- minimum wage;
- working hours;
- emergency leave;
- vacation;
- notice of termination;
- the right to refuse unsafe work; and
- time off for maternity or parental leave.

Employment and labour laws are the result of workers' historical struggles against exploitation, oppression and

discrimination. Human rights legislation is a part of this larger framework of employment and labour laws designed to protect vulnerable workers.

2.4 Challenging discrimination in the workplace

What remedies are available against discrimination?

- A grievance for unionized workers (whether or not human rights legislation is incorporated in the collective agreement).
- A complaint under employment standards legislation (return to work after maternity leave, for example).
- A complaint to the Human Rights Commission (provincial or federal).
- Pay equity legislation, where it exists.
- An action before the courts, if the *Canadian Charter* applies to your employer (as an employer, federal and provincial governments must respect the Canadian Charter.)

Employment standards such as the minimum wage need to be improved to advance the social and economic equality of women and other historically disadvantaged groups.

Two thirds of people who earn minimum wage are women. Unionization is often the most important factor associated with increasing the wages of low-income workers. Strategies to fight systemic discrimination against women need to include challenging the effects of “neutral” laws like Employment Standards Acts that set the minimum wage.

Handout No. 2: Minimum Wage and Women’s Equality

3. Filing a Complaint Against Discrimination in the Workplace

Human rights legislation exists in all federal, provincial and territorial jurisdictions in Canada. This workshop focuses on human rights complaints filed under the *Canadian Human Rights Act* (CHRA). Similar rules exist in most provinces.

To consult provincial and federal human rights legislation, visit the Human Rights Research and Education Centre at: www.uottawa.ca/hrrec.

3.1 The objectives of the Canadian Human Rights Act

- To **prohibit discrimination** on a number of grounds, such as:
 - sex;
 - sexual orientation;
 - race;
 - colour;
 - disability
 - ethnic origin;
 - national origin;
 - religion;
 - age (except for mandatory retirement age);
 - marital status;
 - family situation; and
 - conviction for an offence for which a pardon has been granted.
- To **prohibit discrimination in specific circumstances** such as in the provision of services, housing,

acquiring property, employment, membership in unions and professional organizations.

- To **provide recourse** for victims of discrimination and harassment.

In contrast to the *Canadian Human Rights Act*, several provincial human rights laws also prohibit discrimination on the basis of receipt of social assistance, social condition, political belief, and criminal record regardless of whether a pardon has been granted. The *Northwest Territories Human Rights Act* prohibits discrimination on the basis of gender identity, and several human rights tribunals have also ruled that protection from sex discrimination includes protection from discrimination against transgendered people.

The Canadian Human Rights Commission is an administrative body responsible for overseeing the *Canadian Human Rights Act* and the *Employment Equity Act*. Its mandate is to ensure that the principles of equality and non-discrimination are upheld in all areas of federal jurisdiction. The Commission's activities include:

- Reviewing and investigating formal complaints
- Helping parties to resolve disputes through mandatory mediation and conciliation
- Referring complaints to the Canadian Human Rights Tribunal
- Conducting public interest research and public education.

For details on the complaint process, visit the website of the Canadian Human Rights Commission at: www.chrc-ccdp.ca.

3.2 The *Grover* Case

Like all other human rights legislation, the *Canadian Human Rights Act*, is a complaints-based model.

This means that it is up to workers to complain if they think their rights are being violated.

The Grover case – a case of racial discrimination – illustrates certain limits of a complaints-based model when it comes to fighting discrimination

Handout No. 3: The Grover Case

3.3 The Action Travail des Femmes Case

The Action Travail des Femmes case is an example of systemic discrimination against women in the workplace. The Canada Human Rights Tribunal ordered Canadian National (CN) to implement an affirmative action plan. The Plan included the objective of hiring one woman for every four blue-collar positions to be filled.

At the time the order was made in 1987, this case was a landmark decision. The decision was seen as a blueprint for achieving substantive equality for blue-collar women workers at CN Rail. The case was an important precedent for all women and other historically excluded groups seeking jobs traditionally held by white, able-bodied men.

The case implies that proactive solutions are necessary to dismantle systemic practices and assumptions that lead to the undermining of women's rights in the workplace. This applies to pay equity as well as employment equity.

Over time, the results of this case at CN have been disappointing. Women are still only marginally present in blue-collar jobs. This demonstrates that remedying systemic discrimination requires effective mechanisms to monitor employer progress and compliance over time. Unless obliged to do so, many employers are unlikely to correct systemic discrimination and promote equality on their own.

Handout No. 4: Action Travail des Femmes

3.4 The Weaknesses of the Complaints-based Model

As we have already stated, the *Canadian Human Rights Act* is a complaints-based approach to discrimination. Whether it is Mr. Grover or the unemployed women applying for blue-collar jobs at CN, the people being subjected to discriminatory treatment must file complaints against powerful employers. The burden of challenging the employer's compliance with the human rights laws falls on the shoulders of the weaker party. The process can stretch out over many years.

Other weaknesses of a complaints-based model:

- Identifying, challenging and seeking a remedy for discrimination depends entirely on the victim of discrimination.
- The prohibited grounds of discrimination are limited. (e.g., social condition not included).
- It is reactive, not proactive.
- The burden of proof rests on the complainant.

- Discrimination is often very difficult to prove (e.g., especially for complainants alleging racial discrimination).
- Discrimination is often very costly to prove (expensive expert reports are necessary to prove systemic discrimination and pay inequity).
- Delays are often very long.
- In reality, the process is inaccessible to the most vulnerable (disabled women, poor women, women of colour, immigrant women, unemployed and non-unionized women).
- The Commission rarely initiates a complaint on its own even though it has the authority to do so.
- Often, the solution applies only to the individual who has complained, even though many other women may have similar problems.

4. Reforming Human Rights Legislation

The problems associated with complaints-based human rights legislation are not new. The need to reform human rights legislation has been recognized for several years.

4.1 NAWL's recommendations

In 1999, the federal government appointed an independent four-person panel, to undertake a review of the *Canadian Human Rights Act*. The review examined the complaints-based model and made recommendations to improve it. The chair of the Canadian Human Rights Act Review Panel was retired Supreme Court of Canada Judge Gérard La Forest.

NAWL produced an extensive brief with several creative recommendations. Some of NAWL's recommendations:

- The *Act* should do more than prohibit discrimination. It should clearly state that its purpose is to alleviate women's social and economic disadvantage, especially for women from certain groups – Aboriginal women, women of colour, disabled women, lesbians.
- To make the complaint process more accessible, the Commission should be much more active in investigating for and on behalf of the presumed victim of discrimination.
- Rather than just process complaints, the *Act* should also force employers to provide the objective conditions that enable women to enjoy their equality rights.
- The *Act* should prohibit discrimination on the basis of social condition.

- The Act should recognize social and economic rights like the right to an adequate standard of living, to housing, to food and to clothing.

4.2 The La Forest Report: Reforming the CHRA to promote equality

Released on June 21, 2000, the panel's final report "Promoting Equality, A New Vision", endorsed many of our recommendations.

Key recommendations from the panel reflecting NAWL's position:

- Create a positive obligation for employers to promote equality in the workplace.
- Remove the s. 67 exception that the *Act* applies to First Nations communities covered by the *Indian Act* just as it does to all other Canadians.
- Prohibit discrimination based on social condition.
- A clear vision of substantive rather than formal equality:

"...everyone should have the same right to participate in the matters covered by the Act. This involves adopting the notion of "substantive equality" which requires an acceptance of the fact that everyone is different and that positive measures may be needed to ensure that some individuals may participate as fully as others. These equalization measures should not be looked on as "special" measures but rather as simply what it takes to recognize the right of

*everyone to participate as fully as they can
in work and services.”*

Canadian Human Rights Act Review Panel, page 8

Unfortunately, so far, the federal government has failed to follow-up and implement the recommendations.

5. A Systemic Remedy for Systemic Discrimination

Improving human rights legislation is not the only way of fighting systemic discrimination in the workplace.

5.1 The Abella Report - Employment Equity

The discrimination an individual woman faces in her workplace is often a part of a much deeper, systemic problem:

...systemic discrimination in an employment context is discrimination that results from the simple operation of established procedures of recruitment, hiring and promotion, none of which is necessarily designed to promote discrimination. The discrimination is then reinforced by the very exclusion of the disadvantaged group because the exclusion fosters the belief, both within and outside the group, that the exclusion is the result of “natural” forces, for example, that women “just can’t do the job”...

(CN Railway Co. v. Canada (CHRC), [1987]

1 S.C.R. 1114 [Action travail des femmes])

In 1984, Justice Abella became the sole commissioner of the Royal Commission on Equality in Employment. In her report, she concluded that systemic discrimination in federally regulated workplaces was creating real barriers for certain designated disadvantaged groups — women, Aboriginal people, visible minorities and disabled people. Justice Abella

recommended a systemic solution to remedy this widespread problem.

Justice Abella came up with the term and the concept of “employment equity”: a proactive mechanism the federal government should adopt to correct systemic inequality faced by the four designated groups. She explained:

“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.”

**Judge Rosalie Silberman Abella
Royal Commission on Equality in Employment, 1985**

Justice Abella recognized that equity sometimes requires different treatment in order to level the playing field, especially for historically disadvantaged groups. Achieving equity also requires that the employer make an effort to accommodate differences to the extent that it does not cause them undue hardship. This means taking a critical look at job entry requirements and comparing them to actual job duties to make sure that they do not exclude women and other groups for arbitrary reasons. This may also mean assigning a prayer room so a Muslim employee can pray or providing an appropriately designed workstation for an employee in a wheelchair.

5.2 The Federal *Employment Equity Act*

Following release of the Abella Report, the federal *Employment Equity Act* was adopted in 1988 and amended in 1995. The Act

applies to federally regulated employers with 100 or more employees. As s.2 of the *Act* states, the purpose of the *Act* is:

- ...to achieve equality in the workplace so that no person shall be denied employment opportunities or benefits for reasons unrelated to ability and, in the fulfilment of that goal
- to correct the conditions of disadvantage in employment experienced by women, Aboriginal peoples, persons with disabilities and members of visible minorities by giving effect to the principle that employment equity means more than treating persons in the same way but also requires special measures and the accommodation of differences.

Employment equity is supposed to be about removing barriers and transforming any entrenched workplace practice or policy that has a discriminatory effect on a protected group (women, Aboriginal peoples, persons with disabilities and members of “visible minorities”). In order to do so, each employer must analyze its workforce and come up with an Employment Equity Plan. The plan is supposed to set out how the employer is going to correct any significant differences between the degree of diversity of its workforce and the degree of diversity amongst qualified people available in the labour market in general.

Though the *Act’s* purpose is valid and right, some people think it falls short of its goal. For example, the *Act* requires employers to make “reasonable progress” towards employment equity, without defining how this is to be measured.

Ten years later, the Canadian job market is still characterized by “women’s jobs” and “men’s jobs.” Although women have made some progress especially in white-collar jobs, their presence is still marginal in many blue-collar jobs. In all occupations, progress for disabled women and men has been

painfully slow. And for “visible minority” women and men, at least one recent study pointed to the fact that even when people of colour are hired in greater numbers in federally-regulated workplaces, they still face subtle and not-so-subtle racism on the job.

5.3 How to respond to employment equity myths

Due to misinformation and the neoliberal agenda that encourages less government and more “free markets”, many myths have developed about employment equity. Without a doubt, employment equity legislation still needs to be improved. Recent statistics regarding workplace participation and the wage gap show that the *Act* is not sufficient to eliminate systemic discrimination. For example, people of colour, women and men, continue to be shut out of opportunities for advancement within the federal government. However, employment equity remains one important mechanism to remedy the equity deficit for women, people of colour, people with a disability and Aboriginal peoples in federally regulated workplaces.

How would you respond to the following myths?

- 1) Employment equity is “reverse discrimination.”
- 2) Employment equity means lowering job standards.
- 3) Employment equity can only be implemented in a healthy economy.

In reality, do these kinds of statements just reveal resistance to the changes that employment equity aims to bring about?

5.4 Promoting employment equity

Although there is a federal Employment Equity Act, several provinces still haven't adopted legislation on employment equity. Yet this type of legislation has the potential to be an important mechanism for transforming the workplace and promoting equality for everyone. Indeed, this kind of legislation places the onus on the employer to ensure a workplace that is free from discrimination.

If the federal Employment Equity Act was improved, it would be more effective. The Canada Labour Congress (CLC) has recommended that the Act be amended to require that employers respect numerical objectives and precise delays in hiring and promoting women, people of colour, people with disabilities and Aboriginals peoples. The CLC has also recommended that an Employment Equity Commission be created and that specific measures be adopted to sanction employers that don't respect the law. Such measures would be more likely to effectively promote and better respect women's equality in the workplace.

6. Employers' Duty to Build Equality Into Workplace Standards

Before 1999, employers had a **duty to accommodate** a person who was negatively affected by a workplace rule because of a protected ground of discrimination.

However, in 1999, the Supreme Court handed down a decision that makes it a lot more difficult for an employer to demonstrate that accommodation is not possible.

In *Meiorin* (after Ms. Tawney Meiorin, the B.C. firefighter who filed the grievance in this case), the Supreme Court decided that for women and other protected groups, equality had to mean more than just being “accommodated” within discriminatory workplace rules. It wasn’t just a case of bending the rules for an individual who had complained of discrimination. Now the rules themselves had to change and take into account differences between individuals and between groups of individuals.

Rather than just accommodating individuals, employers must now “build conceptions of equality into workplace standards”.

6.1 The Duty to Accommodate: the *O’Malley Case*

In the *O’Malley* case, the Supreme Court of Canada explained that an employer had a duty to accommodate an employee who is Seventh Day Adventist and could not work on Saturdays.

Handout No. 5: The O’Malley Case: the Duty to Accommodate

The duty for employers to accommodate exists up to the point of “undue hardship.” For example, in the *Canada Human Rights Act* (art. 15(2)), undue hardship is defined with respect to:

- health;
- safety (complainant or grievor, co-workers, public); and
- the financial cost of accommodation.

In addition to these considerations, the courts have also taken into account:

- the interchangeability of the workforce and facilities; and
- the prospect of “substantial interference” with the rights of other employees”.

In unionized workplaces, both the union and individual grievors have a role to play in finding appropriate solutions when workplace rules discriminate against people belonging to groups protected by human rights legislation. In non-unionized workplaces, the same is true of individual complainants.

6.2 A Turning Point for Equality Rights: The *Meiorin* Case

In 1999, in the *Meiorin* decision, the Supreme Court remarked that the “heart of the equality question” was:

... the goal of transformation, ... an examination of the way institutions and relations must be changed in order to make them available, accessible, meaningful and

*rewarding for the many diverse groups of
which our society is composed...*

(para. 41, Meiorin)

The Supreme Court decided that employers have not only a duty to accommodate but a positive obligation to take into account different groups of people and different individuals when they design workplace rules. Employers must now “build conceptions of equality into workplace standards”.

For an employer to show that a discriminatory workplace rule is a legitimate job requirement, it must now prove that:

- it adopted the standard for a legitimate work-related purpose;
- the standard is truly necessary to the accomplishment of that purpose; and
- it is impossible to accommodate individual employees without imposing undue hardship upon the employer.

At issue in *Meiorin* was the validity of a test for forest firefighters that involved running 2.5 km in 11 minutes or less. This test had been designed to high scientific standards. However, the researchers did not take into account:

- the possibility of gender bias affecting the choice of the test;
- the fact that the test might not measure women’s performance as well as men’s;
- the possibility that women develop different work methods than men; or,
- women’s physiology.

Nor had the researchers completed sex-specific validation of the test. The Court concluded that the government had not proven that passing the test was truly necessary for identifying which women would be able to do the job safely and efficiently.

This decision tells us how important it is that any evaluation, job requirement... or wage structure be truly gender-inclusive!

Handout No. 6: *The Meiorin Case*

7. Promoting Equality

How can we convince governments that they have to improve their anti-discrimination laws, adopt legislation on pay equity and employment equity and truly accommodate women's needs at work? We can certainly invoke the constitutional obligation to respect and promote equality as well as the commitments that Canada has made in international law.

7.1 The role of the Canadian Charter

The **Constitution** has a special status. It is the "supreme law of the land." It takes precedence over any other law or regulation.

This means that any law or section of a law that contradicts the Constitution can be struck down or judged to be invalid unless the Court determines that, according to section 1, it is "justifiable in a free and democratic society."

The *Canadian Charter of Rights and Freedoms* has formed part of the Constitution since 1982. Section 15 of the *Canadian Charter* reads as follows:

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, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

The list of grounds on which discrimination is prohibited is an open-ended one. For example, the courts have added to the grounds already enumerated in s. 15 other “analogous” grounds such as sexual orientation and Canadian citizenship.

Section 15 has a dual purpose: both **to remedy and to prevent discrimination** against groups suffering social, political and legal disadvantage in our society. When a person challenges a law that violates section 15, an analysis of her or his claim should thus look to the **effects** of the law on that person as a member of a protected group.

The *Canadian Charter of Rights and Freedoms* applies to:

- Parliament and the government of Canada;
- legislature and government of the provinces and territories; and
- relations between the government and individuals in Canada.

The *Charter* does not apply to relations between private individuals (e.g., between family members or neighbours, between landlords and tenants, between employees and private sector, employers, between banks and clients).

In a limited number of Charter cases, the Supreme Court of Canada has imposed on governments a **positive obligation** to take action to protect and promote equality. The *Vriend* case and the *Dunmore* case are two examples.

In *Vriend*, the Court affirmed that provincial governments must respect the *Charter* when they adopt human rights laws. They must respect and promote all people's human rights and cannot exclude certain groups from this protection.

The Supreme Court decided that Alberta had discriminated against gays and lesbians when it refused to include sexual orientation in the list of prohibited grounds of discrimination.

Handout No. 7: The *Vriend* Case

In *Dunmore*, the Supreme Court of Canada ruled that the Ontario government violated agricultural workers' freedom of association by adopting labour law provisions which denied agricultural workers the right to form trade unions and engage in collective bargaining.

The *Dunmore* case suggests that once a government has enacted legislation to help realize fundamental rights and freedoms, the government must act so that marginalized and vulnerable groups may also be able to benefit from the protection of that legislation.

Handout No. 8: The *Dunmore* Case: A Positive State Obligation

We can use this principle to demand improvements to laws and policies in order to ensure meaningful protection of women's equality rights.

7.2 The role of international law

We can also use international human rights law to hold Canada accountable for its obligation to improve the social and economic condition of women.

Canada has committed itself on an international level to take proactive measures to advance women's equality in Canada, particularly in the areas of employment, education, reproductive health, family law, child care and social security. The nature of this obligation is expressed most directly in the following conventions that Canada has signed and ratified.

- *Convention for the Elimination of All Forms of Discrimination Against Women (CEDAW).*
- *International Covenant on Civil and Political Rights.*
- *International Covenant on Economic, Social and Cultural Rights.*

For example, Article 3 of CEDAW:

States Parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.

The Committees that monitor the implementation of these conventions require that governments submit reports **every four years** explaining their progress in implementing these conventions.

Recently, an alternative report of the Feminist Alliance for International Action (FAFIA) on Canada's track record regarding

CEDAW highlighted the general lack of political will, at the federal level, to improve the condition of women.

In January 2004, the United Nations CEDAW committee concluded that systemic discrimination against women is still pervasive in Canada. The UN committee called on the federal government to:

- Take proactive measures to remedy the socio-economic condition of women, especially Aboriginal women, immigrant women and domestic workers.
- Focus on reducing the feminisation of poverty.
- Correct existing gaps in terms of women's access to civil law legal aid.
- Conduct a gender analysis of eligibility requirements for employment insurance and consider the possibility of increasing the amount of parental benefits.

7.3 NAWL campaigns

NAWL continues to lobby the federal government to improve the *Canadian Human Rights Act* and implement the recommendations of the La Forest report that reflect NAWL's brief.

We are also engaged in a Pan-Canadian Pay Equity Campaign with the CLC and other pay equity advocacy groups to improve the federal pay equity system for women and to expand its application to people of colour, Aboriginal people and people with disabilities.

7.4 What you can do now

- Organize your own workshop about human rights and women's equality using these materials!
- Write to Minister of Justice to request that he follows up on the recommendations of the Canadian Human Rights Review Panel Report.
- Ask your provincial government to adopt legislation on pay equity, if it hasn't already done so.
- Join our Pan-Canadian Pay Equity Campaign!

8. Conclusion

Canada has an obligation to protect and promote women's equality in the workplace under domestic and international law.

We need to continue to fight for our human rights in the face of an aggressive neo-liberal agenda that is pushing for government deregulation or downsizing. This neo-liberal agenda discourages all proactive measures that create and maintain mechanisms to enable the most disadvantaged to have full access to employment opportunities and advancement.

Employers and the federal government have an obligation to change workplace culture and rules to accommodate women's diverse realities and better protect and promote women's equality. While we have focused on human rights as a means of helping all women in Canada to achieve substantive equality, this must be linked to broader struggles for a livable minimum wage, recognition of women's traditionally unpaid work, increased access to safe and affordable housing, a national childcare program and pay equity.

HANDOUTS

Handout No. 1

Pay Equality Questionnaire

1. Women make up what percentage of the full-time, full-year workforce?
39% 42% 47% 51%
2. In 2000, the average employment income of women as a percentage of men's average employment income was?
60.2% 64.4% 66.0% 70.8%
3. What percentage of women workers earned less than \$20,000 annually?
30% 40% 50% 60%
4. What percentage of women workers earned more than \$50,000 annually?
7% 17% 27% 37%
5. What is the proportion of women who work in teaching, nursing, health care, sales, service, and clerical sectors?
4/10 5/10 6/10 7/10
6. What share of the lowest paid occupations do women hold?
60% 66% 71% 76%
7. What share of the highest paid occupations do women hold?
15% 23% 27% 33%
8. In the banking sector, seven out of every ten workers are women. What is the wage gap in this sector?
64% 68% 70% 73%

9. People of colour are generally more highly educated than the rest of the population.
 True False
10. On average, workers of colour earn how much less per year than white male workers?
 \$10,900 \$11,700 \$12,500 \$15,650
11. What is the wage gap for Aboriginal women workers?
 15% 35% 40% 45%
12. What percentage of the working age population of people with disabilities had incomes below \$15,000?
 25% 30% 40% 50%
13. How many people with disabilities who were not in the labour force, reported that they were able to work?
 25% 30% 40% 50%
14. What is the single most effective way to reduce the wage gap?
 Unionize Self-Employment Win \$\$ on "I want to be a millionaire"
15. How much more do unionized workers of colour earn than non-union?
 7% 14% 27% 30%
16. The average wage for women in unionized jobs is how much higher per hour than the wage per hour in non-union jobs?
 \$2.00 \$3.00 \$4.00 \$5.00
17. Part-time workers covered by a collective agreement earn what percentage of the hourly wage of their full-time counterparts?
 75.5% 80% 89.5% 94.3%

Pay Equality Questionnaire: the answers

1. In 2001, 46.2% of employed persons were women versus 37.1% in 1976, indicating that women's presence in the Canadian labour market has grown markedly. (PETRF page 12)
2. In 2000, average employment income for full-time, full-year female workers was equal to 70.8% of average employment income for men versus 70.9% in 1995...the wage gap is found at all levels of education and, surprisingly, it has widened for the most educated, falling from 70.8% in 1995 for university graduates to 67.5% in 2000. (PETFR page 12)
3. More than half of all women earners earned less than \$20,000 and almost one in three earned less than \$10,000. (page 81)
4. Just 6.8% (7%) of working women earned more than \$50,000 in 1997, compared to 21.8% of men, and only 13.6% of working women earned more than \$40,000 compared to 33.7% of men. (page 81)
5. Occupational segregation means that a substantial proportion of women are employed in a limited range of occupations where the femininity ration or proportion of women is very high. For example, in 2002, 70% of all female workers in Canada worked in the areas of teaching, nursing and related health occupations clerical or other administrative positions, and sales and service occupations. (PETFR page 14)
6. The occupational segregation of women and low wages usually go hand in hand. For example... the share of lowest-paying occupations by women working full-year, full-time is more than three quarters (76.5%) compared to their 41% total share of full-time, full-year work. In addition, women earn less on average than men in every single low-paying occupational group with the exception of babysitters, nannies and parents' helpers. (PETFR page 15)

7. ...women are highly under represented in the ten highest-paying occupations... women's share of the highest-paid occupations is less than one quarter (23.3%) much lower than their overall representation of full-year, full-time workers (41%). (PETFR page 16)
8. The data indicate that close to half (48.8%) of the women in the workforce covered by the (federal) *Employment Equity Act* work in the banking sector. This industry, where seven out of ten employees are women (71.4%) has the lowest wage ratio at 64% well below the average of 78.6 percent. (PETFR page 20)
9. Members of visible minorities are generally more educated than the rest of the population ...Relative to the rest of the population, there are proportionately more university graduates among visible minorities: 30% and 36.3 percent respectively for visible minority women and men compared with 21.4 percent and 22.2 percent.
10. While women, who are not members of a visible minority, earn almost 30 percent less than their male counterparts, women and men who are members of a visible minority group also earn significantly less than men who are not members of a visible minority group. For example, visible minority men earn, on average, \$7,014 less a year than other men. Women who are not members of a visible minority group earn \$12,696 less a year. Visible minority women are the worst off, averaging \$15,653 less per year, almost twice the average shortfall of visible minority men. This is what we mean by double jeopardy – if you are a woman you earn less but if you are a woman and a visible minority you earn even less. (PETFR page 36)
11. With respect to wages, Aboriginal persons are also clearly disadvantaged compared with the rest of the population...the wage gap for Aboriginal female workers is extremely high and exceeds that of Aboriginal male workers, which is already considerable. Aboriginal women: 45.6% Aboriginal men: 61.5% (PETFR page 40)

12. More than half of the working age population with disabilities had incomes below \$15,000 and only one-third had incomes above \$30,000 in data available in 1991. The poverty rate of workers with disabilities who were employed was 13.4%. (page 71)
13. While some disabilities prevent some people from working, 40% reported that they could work. These people were forced to live in poverty or on low incomes from social assistance, worker's compensation, or limited Canada Pension Plan (CPP) disability benefits. The high rates of unemployment reflect the continuing failure of employers and governments to address barriers. (Page 71)
14. The odds are not that good for self-employment - 72% of women who are self-employed earn less than \$20,000 a year, and the odds of winning a million \$ aren't that good either. But, the union advantage is the most effective.... (page 101)

Hourly wage \$

	Union	Non-union
All workers	\$18.53	\$14.09
Men	\$19.45	\$15.81
Women	\$17.40	\$12.28

15. Although the unionization rate for workers of colour was somewhat lower than average, this group earned 27% more per hour than non-unionized workers of colour. (page 109)
16. It's actually \$5.00 more or 31% higher than the average wage of women in non-unionized jobs. Again, see the Union Advantage handout. (page 99)
17. With one in four women working part-time, provisions about part-time work are especially relevant to women. 70% of collective agreement now have specific part-time provisions. And, part time workers earn 94.3% of the hourly full-time union wage! (page 108)

Stats are taken from the Pay Equity Task Force Report (PETFR) where indicated. All other stats from Falling Behind: The State of Working Canada, 2000 (Canadian Centre for Policy Alternatives, by Andrew Jackson, David Robinson, Bob Baldwin and Cindy Wiggins)

Handout No. 2

Minimum Wage and Women's Equality

- The majority of people earning a minimum wage are living in poverty.
- Two-thirds of people who earn a minimum wage are women, especially seniors (Statistics Canada, 2003).
- In most provinces and territories, the minimum wage is not enough to meet the basic needs of a woman living alone or of a single mother with a child or older parent to support.
- A woman earning a minimum wage would have to work over 90 hours per week to escape poverty.
- In 2000, the World March of Women (WMW) demanded that the federal government increase the minimum wage to \$10.00/hour. This demand was part of a comprehensive strategy proposed to eliminate poverty and violence against women.
- In 2005, not a single province or territory has fulfilled this WMW demand!
- But advocacy is still alive and well! The UN Platform for Action Committee, the National Anti-Poverty Organization (NAPO) and the Feminist Alliance for International Action (FAFIA) have called for a living wage and a guaranteed income that allows women to do more than just survive.
- The National Anti-Poverty Organization (NAPO) is currently involved in a *Living Wage* campaign with its national and regional partners. The goal is to raise minimum wage

rates across the country to \$10.00 and to reintroduce a federal minimum wage at the same level.

Sources: Statistics Canada 2003

For more information on the NAPO Living Wage campaign,

<http://www.napo-onap.ca/en/action.html#living>

You can compare minimum wage rates between provinces and territories in Canada at

http://www110.hrdchrhc.gc.ca/psait_spila/lmnec_eslc/eslc/salaire_minwage/report1/index.cfm/doc/english cope-225

Handout No. 3

The *Grover* Case

Facts

- Mr. Grover is a scientist working at the National Research Council (NRC).
- He is born in India and immigrates to Canada in 1978 with his family.
- He has received many research grants during his university studies in India and France where he graduated with a doctorate with great distinction.
- Mr. Grover has an excellent reputation in the field of optics. In fact, he is considered to be “one of the most well known scientists in his field at the NRC.”
- He is hired at the NRC in 1981 and immediately begins to be subject to discrimination and constant harassment in his workplace.
- Two managers try to get in the way of his professional development.
- They do the following:
 - Deny Mr. Grover enough money to do his research.
 - Do not give him the support of student research assistants.
 - Subordinate him under a junior scientist.
 - Prevent him from participating in international conferences.
 - Block him from the possibility of being promoted to the position of director in his department even though he is one of the most competent.
 - Finally, he is fired!

Decision

The Tribunal determines that Mr. Grover faced discrimination on the prohibited ground of race and colour.

Remedy

The Tribunal orders that Mr. Grover be reintegrated into the NRC when a contract he is qualified for comes up. The agents of discrimination, the two managers are ordered by the Tribunal to pay Mr. Grover \$5000 to compensate him for the humiliation, suffering, lack of salary and the denial of a promotion that he experiences.

The entire complaints process from start to finish takes 5 years!

**Sources: Canada (Attorney General) v. Grover (No.1.) (1992) 18 Canadian Human Rights Reporter D/1 (Can Trib)
To read a complete copy of the decision,
visit <http://www.cdn-hr-reporter.ca/index.htm>.**

Handout No. 4

Action Travail des Femmes

Facts

Action travail des femmes (ATF) is a community group that helps women looking for work in non-traditional workplaces:

- ATF files a complaint of systemic discrimination against Canadian National (CN) on behalf of women applying for and working in blue-collar jobs in the St. Lawrence region.
- At the time, even though women make up 13% of the “blue-collar” workforce in Canada, they hold only 0.7% of blue-collar jobs at CN.
- ATF argues that women are subjected to discriminatory employment practices:
 - it is much more difficult for women than men to get blue-collar positions;
 - sexist jokes, sex stereotypes and sexual harassment poison the everyday work environment;
 - women are subjected to physical strength tests that do not reflect the actual job requirements (lifting and carrying a brake knuckle weighing 80 pounds); and
 - negative stereotypes with respect to women and the “kind of work” women are capable of doing are widespread (e.g., women are viewed as “disruptive to the workforce” or “not tough enough to handle supervisory jobs”).

Decision

Five years after the formal complaint is filed with the Commission, the Tribunal acknowledges that women blue-collar workers at CN rail have been subjected to systemic discrimination based on sex. Discriminatory recruitment, hiring and promotion practices prevent and discourage women from competing for and remaining in blue-collar jobs.

Remedy

In 1984, for the first time in Canada, the Canadian Human Rights Tribunal orders an employer to implement an **affirmative action program**.

This decision is appealed by CN Rail to the Federal Court of Appeal. The affirmative action order is upheld, except the proactive objective of hiring one woman for every four blue-collar positions to be filled.

The Supreme Court of Canada reverses the decision of the Federal Court of Appeal. It reinstates the original decision of the Tribunal. The Court orders CN Rail to comply with a proactive **affirmative action plan** to remedy the systemic discrimination “to prevent the same or similar discriminatory practices from occurring in the future.” Aspects of this plan include:

- 25% of workers hired at CN Rail in blue-collar positions must be women; and
- CN must submit quarterly reports to demonstrate compliance.

For a summary of the case, visit
http://www.hrcr.org/safrica/equality/railway_canada.html

Sources: A study conducted by Rachel Cox for the Canadian Human Rights Act Review Panel reveals that CN has not complied with several key aspects of the order. To access the report discussing CN’s non compliance and recommending more effective enforcement mechanisms, visit <http://canada.justice.gc.ca/chra/en/action1.html#1>.

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Handout No. 5

The O'Malley Case: The Duty to Accommodate

Facts

- Ms. O'Malley works for Simpson Sears as a retail salesperson.
- She is hired full time in 1971 on condition that she will be available to work on Friday evenings, on a rotating basis, and on two of three Saturdays per month.
- She is a competent salesperson in her department.
- In 1978, she becomes a Seventh Day Adventist. She begins to observe the Sabbath (Friday sundown to Saturday sundown).
- Because of her new religious obligations, she can no longer work on Saturdays.
- She informs her employer who, as a result, offers her a part-time position since there are no full-time positions for someone with her qualifications who cannot work on the weekend.
- Ms. O'Malley files a written complaint with the Ontario Human Rights Commission claiming discrimination in employment on the basis of her religion.
- She appeals the unfavourable decision of the Tribunal.

Decision

- In a unanimous decision, the Supreme Court of Canada concludes that Ms. O'Malley did suffer **adverse effect discrimination** by her employer on the prohibited ground of religion.
- The employer's rule requiring full time employees to work on rotating Saturdays had the effect of discriminating against Ms. O'Malley because of her creed.
- Consequently, Ms. O'Malley was forced to choose between her livelihood and her religion.

- Under the Ontario *Human Rights Code* s. 4(1) g, the employer has a duty to accommodate Ms. O'Malley.
- The onus or responsibility of proving that reasonable steps were taken to accommodate the employee (to the point of undue hardship) rests with the employer. This burden was not discharged by Simpson Sears.
- Simpson Sears did not try to rearrange work periods for Ms. O'Malley's benefit nor did the employer take further concrete steps to accommodate her.

Remedy

Simpson Sears was ordered by the court to pay the employee's costs and to compensate her for the difference between the sum she earned for the period she was a part-time employee and the amount she would have earned as a full-time employee during this period.

Source: *Ontario (Human Rights Comm.) and O'Malley v. Simpsons-Sears Ltd. (1985), 7 C.H.R.R. D/3102 (S.C.C.)*
at: http://www.scc-csc.gc.ca/judgments/index_e.asp.

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Handout No. 6

The *Meiorin* Case

Facts

- Ms. Meiorin is a forest firefighter employed by the government of British Columbia.
- She is a competent and respected worker who works as a part of a three-person Initial Attack Crew fighting forest fires in the district of Golden Forest.
- For three years, she works without incident.
- In 1994, following recommendations of a research team, the province establishes new physical abilities standards for firefighters.
- The province requires Ms. Meiorin, to undergo physical testing.
- One part of the test requires running 2.5 km in 11 minutes or less.
- Ms. Meiorin takes 49.4 seconds more than the allotted time to complete the run. Ultimately, she is fired.
- The union files a grievance, on Ms. Meiorin's behalf, on the ground that she has been unfairly dismissed. The new standard is discriminatory on the basis of sex. This is a case of adverse impact discrimination. Given women's lower aerobic capacity, the new test has the effect of excluding many more women than men from firefighting jobs.

Decision

The arbitrator determined that Ms. Meiorin had been a victim of adverse effect discrimination and that the employer had not proven that it had tried to accommodate her. Furthermore, failing to meet the new standard did not make Ms. Meiorin a risk to the public, colleagues or herself; she was still able to do her job safely and efficiently. The arbitrator ordered that Ms.

Meiorin be reinstated and compensated for lost wages and benefits.

Even though the government had gone to great lengths to conduct scientific studies to determine physical abilities standards that respected human rights, the Supreme Court ultimately ruled that the British Columbia Human Rights Act did not allow the government to fire Ms. Meiorin. The Court ruled that the government had not demonstrated that the aerobic standard it chose to adopt was reasonably necessary to identify people who were able to perform the job of a forest firefighter safely and efficiently.

First, the government researchers had measured the *average* aerobic capacity of subjects doing firefighting exercises rather than attempting to determine the *minimum* standard required of every forest firefighter. Second, the researchers did not take the appropriate precautions to make sure that women's physiology and potentially different work methods were taken into account when the aerobic standard for firefighting—and the test for the aerobic standard--were developed. (Meiorin, para. 74)

In applying the new test for a legitimate job requirement, the Supreme Court suggested asking the following questions:

- (a) Has the employer investigated alternative approaches that do not have a discriminatory effect, such as individual testing against a more individually sensitive standard?
- (b) If alternative standards were investigated and found to be capable of fulfilling the employer's purpose, why were they not implemented?
- (c) Is it necessary to have all employees meet the single standard for the employer to accomplish its legitimate purpose or could standards reflective of group or individual differences and capabilities be established?

- (d) Is there a way to do the job that is less discriminatory while still accomplishing the employer's legitimate purpose?
- (e) Is the standard properly designed to ensure that the desired qualification is met without placing an undue burden on those to whom the standard applies?
- (f) Have other parties who are obliged to assist in the search for possible accommodation fulfilled their roles? ... the task of determining how to accommodate individual differences may also place burdens on the employee and, if there is a collective agreement, a union. (*Meiorin*, para. 65)

In the end, Ms. Meorin's past work performance was probably the most convincing evidence that something was wrong with the researchers' test!

Remedy

The S.C.C. restored the order of the arbiter.

Source: *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Services Employees' Union+* (*Meiorin Grievance*) [1999] 3 S.C.R.3 at:
http://www.scc-csc.gc.ca/judgments/index_e.asp.

Handout No. 7

The *Vriend* Case

Facts

- Mr. Vriend is hired in 1987 as the coordinator of a laboratory at King's College in Alberta.
- He receives positive evaluations, salary increases and a promotion.
- In 1991, the Board of this Christian college adopts a homophobic code of conduct prohibiting "homosexual practices."
- The President of the Board asks Mr. Vriend to state his sexual orientation and he replies, in writing, that he is gay.
- Following this exchange, Mr. Vriend is fired on the sole ground of non-compliance with the College's policy on "homosexual practice."
- Mr. Vriend files a complaint of discrimination against his employer on the ground of sexual orientation with the Alberta Human Rights Commission (AHRC).
- AHRC rejects the complaint because this ground of discrimination is not one of the prohibited grounds in the *Individual Rights Act of Alberta*.
- Mr. Vriend, a victim of discrimination, is left with no recourse against his employer before his provincial human rights commission.
- Mr. Vriend then launches a court case against the provincial government.
- He claims the province has infringed his constitutional equality rights protected under s. 15(1) of the *Charter*.
- By failing to include sexual orientation as a prohibited ground of discrimination, the Alberta government has effectively discriminated against all gays and lesbians in the province.

Decision

- The case goes all the way to the Supreme Court of Canada (S.C.C.).
- In 1998, the S.C.C. confirms that the College discriminated against Vriend and that the *Individual Rights Act* is discriminatory.
- In omitting sexual orientation as a prohibited ground of discrimination, the Albertan government violated the constitutional equality rights of gays and lesbians.
- The S.C.C. finds that this discrimination cannot be justified in a free and democratic society.
- As a remedy, the S.C.C. judicially amends the *Individual Rights Act* of Alberta by “reading in” sexual orientation as a prohibited ground of discrimination. In essence, the court changes the Act to add sexual orientation as a prohibited ground of discrimination even though it is not explicitly mentioned in the *Act*.

Source: To read the complete decision, visit:
<http://www.lexum.umontreal.ca/csc-scc/en/index.html> .
Type in *Vriend v. Alberta* [1998] 1 S.C.R.

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Handout No. 8

***Dunmore*: A Positive State Obligation**

In *Dunmore*, the Ontario government had adopted labour law provisions which denied agricultural workers the right to form trade unions and to engage in collective bargaining. The Supreme Court of Canada ruled that the Ontario government had violated agricultural workers' freedom of association.

The Court concluded that workers do not have a constitutional right to demand legislation setting out their right to unionize and protecting them from unfair labour practices. However, in this case, because the government had chosen to enact the *Labour Code* and extend important labour protection to workers in Ontario, it could not arbitrarily exclude agricultural workers from its scope.

The Supreme Court decided that without the protection of the *Labour Code*, agricultural workers would have a fundamental freedom enshrined in the Constitution – the freedom of association including the right to form unions - but it would just be a “hollow right.” They would be unable to exercise this right and form unions because of fear of retaliation, unfair labour practices, difficult socio-economic conditions and so on.

The Supreme Court's decision in *Dunmore v. Ontario (Attorney General)* [2001] S.C.R. is available on line at : www.lexum.umontreal.ca/csc-scc/en/index.html.

Module 1

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http://www.swc-cfc.gc.ca/pubs/pubspr/066238931X/200502_066238931X_e.pdf

Ministry of Human Resources and Skills Development, 2004, *Employment Equity, Myths and Realities* On line:
http://www.hrsdc.gc.ca/asp/gateway.asp?hr=en/lp/lo/lsw/we/publications/mr/myths_realities.shtml&hs=wzp

Caselaw

Except for *Action travail des femmes*, Supreme Court decisions are available on line at:
<http://csc.lexum.umontreal.ca/en/index.html>.

Decisions of the Canadian Human Rights Tribunal are available on line at:
<http://www.chrt-tcdp.gc.ca>

CN Railway Co. v. Canada (CHRC), [1987] 1. S.C.R. 1114 [*Action travail des femmes*].

British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Services Employees' Union, [1999] 3 S.C.R. 3 (Meiorin).

Ontario (Human Rights Comm.) and O'Malley v. Simpsons-Sears Ltd. [1985] 2 S.C.R. 536

Dunmore v. Ontario (Attorney General) [2001] 3 S.C.R. 1016

Grover v. Canada (N° 1) (1992) 18 Canadian Human Rights Reporter D/1 (Can Trib)

Vriend v. Alberta [1998] 1 S.C.R. 493.

Laws and International Instruments

Employment Equity Act (1995, c.44), on line:
<http://laws.justice.gc.ca/en/E-5.401>

Convention for the Elimination of All Forms of Discrimination Against Women: <http://www.un.org/womenwatch/daw/cedaw/cedaw.htm>

International Covenant on Civil and Political Rights:
<http://www.hrweb.org/legal/cpr.html>

International Covenant on Economic, Social and Cultural Rights:
http://www.unhchr.ch/html/menu3/b/a_ceschr.htm

Useful Web Sites

Canadian Human Rights Commission:
<http://www.chrc-ccdp.gc.ca>

Canadian Human Rights Tribunal:
<http://www.chrt-tcdp.gc.ca>

Human Rights Research and Education Centre
http://www.uottawa.ca/hrrec/links/sitescan_e.html

Feminist Alliance for International Action
<http://www.fafia-afai.org>