

**BRIEF TO THE  
CANADIAN HUMAN RIGHTS ACT REVIEW PANEL**

Submitted by :

Action travail des femmes  
La Table féministe de concertation provinciale de l'Ontario  
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## Introduction

On April 8<sup>th</sup>, 1999, the Minister of Justice announced the creation of a Panel to review the *Canadian Human Rights Act*. At that time, the Minister stated that she wanted to increase the protection afforded by federal human rights enforcement mechanisms. Today, ordinary women question the efficiency of the *Act* in protecting their rights, the Auditor General has criticised the *Act's* capacity to provide appropriate and timely remedies for rights violations,<sup>1</sup> and Canada has recently come under unprecedented criticism from international bodies because of its failure to “promote, respect, protect and fulfil” fundamental human rights, and in particular those of Canadian women.<sup>2</sup> The current Review of the *Act* must address these failures. The Minister must seize the opportunity to strengthen and reframe the *Act* so that it helps women, and particularly women from vulnerable constituencies (such as disabled women, Aboriginal women and women of colour) put an end to the persistent patterns of disadvantage which still characterise their place in society.

Canada has formally undertaken to respect the human rights set out in various international instruments, including the *Universal Declaration of Human Rights*,<sup>3</sup> the *International Covenant on Economic, Social and Cultural Rights*,<sup>4</sup> the *International*

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<sup>1</sup> Auditor General's Report (1998). Online: [http://www.oag-bvg.gc.ca/domino/reports/nsf/html/98menu\\_e.html](http://www.oag-bvg.gc.ca/domino/reports/nsf/html/98menu_e.html).

<sup>2</sup> United Nations Economic and Social Council, Committee on Economic, Social and Cultural Rights, *Consideration of Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant: Concluding Observations of the Committee on Economic, Social and Cultural Rights (Canada)*, 10 December 1998, E/C.12/1/Add.31. United Nations Human Rights Committee, *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Concluding Observations of the Human Rights Committee (Canada)*, Geneva, 07 April 1999, CCPR/C/79/Add. 105 (1999). United Nations Committee on the Elimination of Discrimination Against Women, *Adoption of the Report of the Committee on the Elimination of Discrimination Against Women on its Sixteenth Session: Concluding Observations of the Committee on the Elimination of Discrimination Against Women (Canada)*, 29 February 1997, A/52/38/Rev.1.

<sup>3</sup> *Universal Declaration of Human Rights*, GA Res. 217 A (III) UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948).

<sup>4</sup> *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 U.N.T.S. 3, Can. T.S. 1976 No. 46 (entered into force January 3, 1976, accession by Canada August 19, 1976). Hereinafter, “ICESCR”.

*Covenant on Political and Civil Rights*<sup>5</sup> the *Convention on the Elimination of all Forms of Discrimination against Women*<sup>6</sup> and the *Convention on the Elimination of all Forms of Racial Discrimination*.<sup>7</sup>

If Canada has made commitments on an international level in the field of human rights, federal human rights legislation is surely a measure of its willingness to honour them. Indeed, the Courts have said that domestic laws should be interpreted in conformity with the provisions of the international instruments that Canada has ratified, on the premise that Parliament legislates in a manner in keeping with these international obligations.<sup>8</sup> Yet recently, the United Nations Human Rights Committee Report noted with great concern, among other things, the high rates of poverty among women in Canada, especially among single mothers.<sup>9</sup> The United Nations Committee on Economic, Social and Cultural Rights, urged 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”.<sup>10</sup> Evidently, the protection afforded to women by existing federal human rights legislation is inadequate and must be strengthened.

The fact is that women are still confronted with widespread and inescapable discrimination in Canada, and this is even more true in the case of women who are disabled, Aboriginal, elderly, lesbians, single mothers, of colour, or simply poor, to name but a few. In this country, women are poorer than men. The poverty rate of single

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<sup>5</sup> *International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171, Can. T.S. 1976 No. 47 (entered into force March 23, 1976, accession by Canada May 19, 1976). Hereinafter, “*ICPCR*”.

<sup>6</sup> *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, 1249 U.N.T.S. 13, Can. T.S. 1982 No. 31 (entered into force September 3, 1981, accession by Canada January 10, 1982). Hereinafter, “*CEDAW*”.

<sup>7</sup> *Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, 660 U.N.T.S. 195, Can. T.S. 1970 No. 28 (entered into force January 4, 1969, ratified by Canada November 13, 1970). Hereinafter, “*CEFRD*”.

<sup>8</sup> *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038.

<sup>9</sup> United Nations Human Rights Committee, *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Concluding Observations of the Human Rights Committee (Canada)*, Geneva, 07 April 1999, CCPR/C/79/Add. 105 (1999) at paragraph 20.

<sup>10</sup> United Nations Economic and Social Council, Committee on Economic, Social and Cultural Rights, *Consideration of Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant: Concluding Observations of the Committee on Economic, Social and Cultural Rights (Canada)*, 10 December 1998, E/C.12/1/Add.31.

mothers is 57.2% and those of elderly “women without family ties” is 43,4%.<sup>11</sup> Aboriginal women, immigrant women, women of colour and handicapped women have significantly higher poverty rates than other women<sup>12</sup>, as well as the men of their respective communities.<sup>13</sup>

Even if women have a job and live above the poverty line, their average annual wage is still only 72% of that of men’s.<sup>14</sup> When income from any source is considered (not just wages or salary), the situation is even worse: women earn or receive annually only 58% of what men do.<sup>15</sup> And, often trapped by this context of economic inequality, women are subjected to widespread social violence : they are sexually abused as children, sexually assaulted as adults, battered in their own homes and, still too often, harassed in the workplace.<sup>16</sup>

Nonetheless, since the adoption of the *Act* in 1977, women have made some significant steps towards equality. Just twenty years ago, for example, in the *Bliss*<sup>17</sup> case involving a pregnant woman’s right to unemployment benefits, the Supreme Court held that pregnancy-related discrimination did not constitute discrimination on the basis of sex. The *Bliss* case exemplifies how a formal analysis of equality is often of no use to women who are fighting to have their differences from men recognised, while at the same time searching for recognition as “equal human beings, equally capable and equally deserving”.<sup>18</sup>

Happily, ten years later in the *Brooks* case<sup>19</sup>, the Supreme Court reversed its decision, stating clearly that discrimination on the basis of pregnancy does constitute

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<sup>11</sup> Shelagh Day et Gwen Brodsky, 1998. *Women and the Equality Deficit : The Impact of Restructuring Canada’s Social Programs*. Ottawa: Status of Women Canada. Page 6.

<sup>12</sup> *Ibid*, page 6.

<sup>13</sup> *Ibid*, page 6.

<sup>14</sup> *Ibid*, page 7.

<sup>15</sup> *Ibid*, page 7.

<sup>16</sup> “Some statistics on violence against women”. Online at the Status of Women Canada’s web site: <http://www.swc-cfc.gc.ca/dec6/index.html>.

<sup>17</sup> *Bliss v. Canada (A.G.)* [1979] S.C.R. 183.

<sup>18</sup> *Egan v. Canada* [1995] 2 S.C.R. 513, at 545.

<sup>19</sup> *Brooks v. Canada Safeway Ltd* [1989] 1 S.C.R. 1219.

discrimination on the basis of sex. Considering a disability plan that denied benefits to pregnant women, the Court said :

... an unfair disadvantage may result when the costs of an activity from which all of society benefits are placed upon a single group of persons. This is the effect of the Safeway plan. It cannot be disputed that everyone in society benefits from procreation. The Safeway plan, however, places one of the major costs of procreation entirely upon one group in society : pregnant women....Removal of such unfair impositions upon women and other groups in society is a key purpose of anti-discrimination legislation.<sup>20</sup>

The rejection of the narrow, formal approach to equality once endorsed in the *Bliss* decision epitomises the transformation of equality thinking. The Supreme Court has developed a conception of human rights related to substantive, rather than formal, equality. In other words, we have moved away from simply looking at whether, on a superficial level, a law, policy or practise treats women and men differently. Instead, using a framework based on substantive equality, we look at the *impact* of laws, policies and practises on women. For example, in the *Brooks* case, the Court found that pregnancy-related discrimination had a negative *impact* on women in a way that it did not on men.

Furthermore, equality is revealed, not as a matter of superficial sameness and difference, but rather a “matter of inequality, that is, dominance, subordination, and material disparities between groups”.<sup>21</sup> Again, in this sense, in the *Brooks* case, the Supreme Court considered not only the disability plan but also the larger question of how women are penalised because they bear children, and what measures might be necessary to end this disadvantage. The Court did not hesitate to bring its inquiry to the so-called private realm of the family, and dealt with discrimination even when a certain measure of personal choice –i.e. the decision to become pregnant– was involved. The Court recognised that women can be different from men, yet at the same time, have the right to the same dignity and respect as men.

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<sup>20</sup> *Brooks, supra*, note 19, page 1238.

<sup>21</sup> Shelagh Day and Gwen Brodsky. 1999. *Women's Economic Inequality and the Canadian Human Rights Act*. Ottawa : Status of Women Canada. Page 17.

The *Act* was adopted in 1977, almost a decade before the *Canadian Charter of Rights and Freedoms*<sup>22</sup> began to bring equality rights to life. The revision of the *Act* should ensure that the *Act* complies with the *Charter*. It should also be an effective vehicle for implementing international human rights treaty obligations.

Just as human rights jurisprudence has evolved, the time has come for the *Act* to be modernised. The notion of substantive equality is essential for the advancement of women's rights and should be incorporated into the language and the framework of the *Act*, and the Canadian Human Rights Commission should have the capacities necessary to enforce human rights in an efficient and timely fashion. The following text contains our ideas on how to make this possible.

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<sup>22</sup> *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982* being the Schedule B to the *Canada Act 1982* (U. K.), 1982, c. 11 Hereinafter, "*Charter*".

## 1. The Language of the Law : Naming Inequality

### 1.1 The Purpose of the *Act*

The provisions regarding the purpose of the *Act* are vital in that they clarify Parliament's intention in enacting human rights legislation, and thus colour the interpretation of every section of the entire *Act*. Human rights legislation calls for an interpretation consistent with the purpose of the *Act*.<sup>23</sup>

The current purpose of the *Act* refers to individuals having equality of opportunity. Equality of opportunity is associated only with liberal principles and formal equality, or treating like individuals in the same way. In other words, the understanding of equality currently reflected in the *Act* is one which refers only to the fact that the same laws and policies should apply to everyone.

Since the adoption of the *Charter*, Canadian courts have rejected the formal definition of equality in favour of a substantive one. Women have much to gain from substantive equality, because the focus is on the impact that laws and practices have, and therefore on equality of results, and there is recognition of the fact that different treatment is sometimes needed to achieve equality.

The Purpose of the *Act* should be changed to reflect four basic principles : 1. past discrimination has created serious disadvantage for women and the men of certain vulnerable constituencies, and remedial action on a systemic basis is necessary to overcome these disadvantages; 2. discrimination is revealed by looking at the effect or impact of rules and practises on disadvantaged groups; 3. the *Act* aims to help women achieve substantive equality, and particularly those women whose inequality is also deepened by being disabled, Aboriginal, elderly, lesbians, single mothers, of colour, or

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<sup>23</sup> *R. v. Big M. Drug Mart* [1985] 1 S.C.R. 295.

simply poor; 4. human rights are of such fundamental importance that they merit paramount status over all the other laws of Canada.

### The necessity of systemic remedial action

The purpose of the *Act* should also refer to the systemic positive remedial action necessary to overcome the persistent patterns of inequality that remain in Canadian society. Indeed, international law is increasingly recognising that it is just as important for governments to create the objective conditions that enable people to actively enjoy their rights as to not infringe protected rights.<sup>24</sup> The traditional conception of rights as obligations solely not to intervene has a negative impact on women and any other group that is in a situation of inequality. In other words, inequality must be addressed through government action.

This principle is recognised under the Canadian *Charter*, and was interpreted by the Supreme Court in the *Eldridge*<sup>25</sup> case involving the right to sign language interpreters for deaf people when they need medical services. In this affair, Laforest, J., stated unequivocally that :

The principle that discrimination can accrue from a failure to take positive steps to ensure that disadvantaged groups benefit equally from services offered to the general public is widely accepted in the human rights field.”<sup>26</sup>

He then goes on to explain that :

... the adverse effects suffered by deaf persons stem not from the imposition of a burden not faced by the mainstream population, but rather from a failure to ensure that deaf persons benefit equally from a service offered to everyone.

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<sup>24</sup> Albie Sachs. 1998. “ Human Rights in the Twenty First Century: Real Dichotomies, False Antagonisms”. In *Human Rights in the 21<sup>st</sup> Century: Prospects, Institutions and Processes/Les droits de la personne au 21<sup>ème</sup> siècle : Perspectives et modes de protection*. Edited by Thomas A. Cromwell, Danielle Pinard and Hélène Dumont Montréal : Les Éditions Thémis/Canadian Institute for the Administration of Justice.

<sup>25</sup> *Eldridge v. British Columbia (A.G.)* [1997] 3 S.C.R. 624. See also *Vriend v. Alberta*, [1998] 1 S.C.R. 493 at 532-34.

<sup>26</sup> *Eldridge*, *supra*, note 25, page 681.

... the respondents ... maintain that s.15(1) does not oblige governments to implement programs to alleviate disadvantages that exist independently of state action ...[and] that governments should be entitled to provide benefits to the general population without ensuring that disadvantaged members of society have the resources to take full advantage of those benefits. In my view, this position bespeaks a thin and impoverished vision of s. 15(1). It is belied, more importantly, by the thrust of this Court's equality jurisprudence.<sup>27</sup>

Ultimately, the problem of entrenched patterns of inequality in our society calls for wide-ranging, systemic remedies such as affirmative action and employment equity programs, and a regulatory or compliance approach to discrimination in the workplace, in accommodation, and in services. The purpose of the *Act* should reflect this systemic approach to remedying discrimination as this will guide the actions of the Commission in fulfilling its different mandates, as well as the Tribunal when it finds a violation of the *Act*.

Discrimination is revealed by looking at the effect or impact on disadvantaged groups of the law or conduct under scrutiny

In 1989, in the *Andrews*<sup>28</sup> case, the Supreme Court of Canada asserted a new and important analysis of equality under the Canadian *Charter*. The Supreme Court recognised that in order to develop a meaningful understanding of equality, we must go beyond a formal analysis of equality. Specifically, this means that the rights of women, be they disabled, of colour, lesbian, elderly, poor, mothers of young children, Aboriginal, Jews or Muslims, etc. must be evaluated not simply in terms of the formal equality of individuals but in relation to the concrete, collective life experiences of these different groups of women. As a Supreme Court Judge, Bertha Wilson stated that :

...it is important to look not only at the impugned legislation which has created a distinction that violates the right to equality but also the larger social, political and legal context (...). ...it is only by examining the larger context that a court can determine whether differential treatment results in inequality or whether, contrariwise, it would be identical treatment which would in the particular context result in inequality or foster disadvantage. A finding that there is discrimination will, I think, in most but perhaps not all cases, necessarily entail a search for

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<sup>27</sup>*Eldridge, supra*, note 25, page 675 and pages 677-78.

<sup>28</sup> *Andrews v. Law Society of British Columbia* [1989] 1 S.C.R.143.

disadvantage that exists apart from and independent of the particular legal distinction being challenged.<sup>29</sup>

In other words, as Lynn Smith writes, “...the comparisons inherent in equality analysis must be made in the social and political setting from which the particular questions arise, and in the Canadian historical context.”<sup>30</sup>

When women’s equality is measured in relation to the larger social, political and legal context, the persistent, deeply rooted disadvantage experienced by women – and even more so by particular groups of women – stands out clearly.

In the *Andrews* case, the Court concluded that in order to achieve the purpose of correcting inequalities between people, where members of certain groups have been systematically disadvantaged in comparison with others, effects, as much as intent of the law or conduct under scrutiny, should be examined. Along with the contextual approach to equality, embracing the notion of adverse impact discrimination is what has taken equality rights off paper and into Canadian and Quebec women’s lives : this way of looking at equality has been, and will be, vital in bridging the gap that looms large between, on one hand, the promise of human rights and on the other, the concrete reality of women’s experience.

The purpose of the *Act* should reflect this substantive approach to equality which includes adverse impact discrimination and promotes a definition of discrimination that focuses on impact. Indeed, recent Supreme Court decisions reiterate the impact-focused analysis of discrimination. For example, Claire L’Heureux-Dubé, J., has declared that :

To summarise, at the heart of s. 15 is the promotion of a society in which all are secure in the knowledge that they are recognised at law as equal human beings, equally capable, and equally deserving. A person or group of persons has been

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<sup>29</sup> *R.v. Turpin* [1989] 1 S.C.R. 1296, pages 1331-1332.

<sup>30</sup> Lynn Smith. 1998. “Does Section 15 have a future?”. In *Human Rights in the 21<sup>st</sup> Century: Prospects, Institutions and Processes/Les droits de la personne au 21<sup>ième</sup> siècle : Perspectives et modes de protection*. Edited by Thomas A. Cromwell, Danielle Pinard and H el ene Dumont Montr eal : Les  ditions Th emis/Canadian Institute for the Administration of Justice. Page 105.

discriminated against within the meaning of s. 15 of the Charter when members of that groups have been made to feel, by virtue of the impugned legislative distinction, that they are less capable, or less worthy of recognition or value as human beings or as members of Canadian society, equally deserving of concern, respect, and consideration. These are the core elements of a definition of “discrimination”—a definition that focuses on *impact* (i.e. discriminatory effect, rather than on *constituent elements* (i.e. the grounds of the distinction)).<sup>31</sup>

Focusing on adverse impact in a contextual approach to discrimination has guided the Supreme Court in cases such as the *Weatherall*<sup>32</sup> affair, where male penitentiary inmates challenged the fact that they were submitted to frisk searches and surveillance by women prison guards while women prison inmates were not submitted to frisk searches and surveillance by male prison guards. Gérald La Forest, J., stated that :

... equality does not necessarily connote identical treatment and, in fact, different treatment may be called for in certain cases to promote equality. Given the historical, biological and sociological differences between men and women, equality does not demand that practices that are forbidden where male officers guard female inmates must also be banned where female officers guard male inmates. The reality of the relationship between the sexes is such that the historical trend of violence perpetrated by men against women is not matched by a comparable trend pursuant to which men are the victims and women the aggressors. Biologically, a frisk search or surveillance of a man’s chest area conducted by a female guard does not implicate the same concerns as the same practice by a male guard in relation to a female inmate. Moreover, women generally occupy a disadvantaged position in society in relation to men. Viewed in this light, it becomes clear that the effect of cross-gender searching is different and more threatening for women than for men. The different treatment to which the appellant objects thus may not be discrimination at all.<sup>33</sup>

Indeed, despite the fact that the grounds of discrimination are framed in a neutral fashion (i.e. the *Act* forbids discrimination on the basis of sex, race, sexual orientation, not discrimination against women, people of colour, lesbians and gays, and so on), the *Act* should explicitly acknowledge that a key purpose of this legislation is to alleviate the social and economic disadvantage suffered by women, and particularly so by certain groups of women such as women of colour, disabled women, single mothers and so on.

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<sup>31</sup> *Egan, supra*, note 18, page 545.

<sup>32</sup> *Weatherall v. Canada (A.G.)* [1993] 2 S.C.R. 872

<sup>33</sup> *Ibid*, pages 877-878.

In keeping with the contextual and impact-focused analysis of equality advanced by the Supreme Court, then, the *Act* should recognise that the greatest barriers to women's equality – and to other disadvantaged groups' equality – now result from systemic discrimination,<sup>34</sup> and therefore, that it is necessary to analyse equality in a way that lays bare adverse impact discrimination. At the same time, the *Act* should clearly state that its purpose is to fulfil, taking into account the context of different women's experience, (racism, homophobia, antisemitism, the marginalisation of disabled people, poverty, and so on), all Canadian and Quebec women's equality rights.

The *Act* aims to help women achieve substantive equality

The Purpose of the *Act* should contain a provision that explicitly states that the *Act's* purpose is to help women, and particularly the women of certain groups such as women of colour, disabled women, single mothers and Aboriginal women, as well as the men of historically disadvantaged groups, to achieve substantive equality and to alleviate their social and economic disadvantage.

Under article 2 of the *Convention on the Elimination of All Forms of Discrimination Against Women*, Canada has contracted :

- (a) To embody the principle of the equality of men and women in *[its]* national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle;  
(...)
- (c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination;  
(...)
- (f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women (...).

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<sup>34</sup> As did the Supreme Court in the *Meiorin* case : *British Columbia (Public Service Employees Relations Commission) v. BCGSEU*, S.C.C., No. 26274, September 9th, 1999, par. 29.

In short, while equality for all disadvantaged groups is the aim of the *Act*, because women are disadvantaged as women, and because of the cumulative disadvantage of women that also belong to one or several disadvantaged groups, the goal of women's substantive equality merits particular attention in the Purpose of the *Act*. Such a provision is in keeping with Canada's undertakings under the *Convention on the Elimination of All Forms of Discrimination Against Women*.

### Human rights have paramount status

The Canada Human Rights *Act* deals with the fundamental and inalienable rights of human beings<sup>35</sup> and benefits from a quasi-constitutional status.<sup>36</sup> If there is a conflict between the *Act* and any other federal law, the *Act* prevails.

Currently, provincial and territorial human rights legislation, with the exception of Nova Scotia, New Brunswick and the North West Territories, has primacy over other provincial and territorial statutes.

Either in the purpose clause or elsewhere, the *Act* should explicitly affirm the paramountcy of the *Act*.

### 1.2 Affirming the right to equality

Instead of simply forbidding discrimination in a number of specific circumstances, the *Act* should affirm the right to equality. Affirming a right to equality is in keeping with a substantive approach which focuses on the impact of policies and practises on women – in other words on results – rather than on discriminatory intent or discrimination on the face of a policy or practise. The purpose of the *Act* is remedial rather than punitive or repressive : it was enacted in order to protect and create remedies for women and other disadvantaged groups. It is therefore more fitting that the *Act* be positive and proclaim

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<sup>35</sup> See the *Universal Declaration of Human Rights*, *supra*, note 3.

their right to equality, rather than taking a negative approach and simply prohibit certain discriminatory conduct.

The guarantee of a right to equality reflects the fact the government must act (rather than just abstain from intervening) to end inequality between groups. This vision of a proactive government is in fact an important underpinning of the *Act*, and should be stated in a substantive provision.

Indeed, as previously stated, the notion of equality as stemming from an obligation not to do something is often harmful to women because women live in a situation of inequality. Ostensibly neutral rules maintain their neutral appearance as long as they are examined in isolation. But in the context of social patterns of inequality, not doing anything often just perpetrates women's inequality. An employer who has, in the past, not hired many women cannot simply cease to automatically refuse women's job applications. The employer must take positive action to compensate for the historical exclusion of women from the workplace, actively solicit their candidacies for job openings, make sure that job requirements do not exclude them without reason, and ensure that the women hired will not be sexually harassed in the workplace. Affirming the right to equality reflects this reality more than prohibiting an employer from discriminating does.

Many international instruments affirm a right to equality rather than just prohibiting discrimination, namely, article 7 of the *Universal Declaration of Human Rights*, and article 26 of the *International Covenant on Political and Civil Rights* as well as article 14 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, and section 15 of the *Canadian Charter*. The *Convention on the Elimination of All Forms of Discrimination Against Women* reflects the proactive role that government must play in the elimination of discrimination. The Convention declares that :

3. 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

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<sup>36</sup> See *Craton v. Winnipeg School Division (no. 1)* [1985] 2 S.C.R. 150 and *CN v. CCDP (Action travail des femmes)* [1987] 1 S.C. R. 1114.

guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.

Section 10 of Quebec's *Charte des droits et libertés* proclaims a right to equality:

10. Every person has a right to full and equal recognition and exercise of his human rights and freedoms, without distinction, exclusion or preference based on race, colour, sex, pregnancy, sexual orientation, civil status, age except as provided by law, religion, political convictions, language, ethnic or national origin, social condition, a handicap or the use of any means to palliate a handicap.

Discrimination exists where such a distinction, exclusion or preference has the effect of nullifying or impairing such right.

The Quebec Charter then goes on to specify different sectors where discrimination is expressly forbidden. The right to equality then offers another distinct way of articulating the other human rights and fundamental freedoms guaranteed in the Quebec Charter.<sup>37</sup>

Similar to the Quebec Charter, the Saskatchewan *Human Rights Code* both affirms the right to equality with respect to certain sectors and then goes on to prohibit discriminatory conduct.

## **2. Complaint processing : An Accessible Procedure for Enforcing Rights**

The Canadian Human Rights Commission (hereinafter, "the Commission") should act as an institution actively engaged in dismantling the obstacles that prevent women and other disadvantaged groups from participating fully in all aspects of society. When the *CHRA* was adopted and the Commission was created, Parliament effectively acknowledged that it is in the public interest to eliminate the damage done to society by discrimination. When a woman comes forward and declares that she is being discriminated against, the Commission's role should be to facilitate the enforcement of her rights.

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<sup>37</sup> See, for example, *Commission des droits de la personne du Québec et Commission scolaire Richelieu*, Tribunal des droits de la personne du Québec, 10 octobre 1991 (Judge Michèle Rivet).

Recourse to the Commission should be accessible: in other words, the procedure should be simple, and until the hearing stage of the complaint, representation by a lawyer should not be necessary. It should also be an efficient process that offers appropriate remedies for the rights that have been infringed and that takes place over a relatively short period of time.

To create a more accessible and efficient process, we propose several changes to the existing system of complaint processing : affirming the Commission's mandate to ensure that claimants are able to make out their case, cutting back delay at every stage of the proceedings, creating real powers for investigators, allowing for fair and timely settlements and a positive balance between amicable settlements and the adjudication of complaints, providing for temporary measures to preserve rights or evidence in certain cases, representation of claimants before the Tribunal, guaranteed access to the Tribunal and when the Commission is required to do so, making sure it plays an active role in enforcing settlements and Tribunal orders.

### 2.1 Helping claimants make out their case

Few women possess the necessary resources or expertise to conduct a legal battle for the enforcement of their rights. The mandate of the Commission to be an advocate for human rights should mean that during the investigation of complaints, the Commission investigates for and in the name of claimants. This does not entail ignoring evidence that there has been no discrimination. Rather, in a case of sexual harassment, for example, the investigator should actively seek evidence in support of a woman's claim. Or, in the case of a complaint alleging systemic discrimination, the Commission could arrange for an expert report on a pre-employment test to determine its validity.

Under regulations adopted by virtue of the Québec Charter, the Commission des droits de la personne et des droits de la jeunesse du Québec acts for the claimant :

5. The Commission has the obligation to act for the presumed victim of discrimination or exploitation. For that purpose, it shall use all its technical knowledge, expertise and means of investigation in its search for evidence concerning all situations of discrimination or exploitation reported in the complaint.<sup>38</sup>

## 2.2 Cutting back delays

Presently, the time it takes to process, settle or decide a complaint of discrimination is one of the most important factors that contribute to the public's loss of confidence in the Commission. As Mary Cornish wrote so succinctly : "Delay works against both claimants and respondents in that evidence suffers, morale declines and costs rise."<sup>39</sup> If indeed, as the Justice Minister announced in her press release on April 8<sup>th</sup>, 1999, she wishes to increase public confidence in federal human rights enforcement mechanisms, it is essential that complaints be processed more quickly. Even the Supreme Court has remarked on the serious consequences that delay can have for human rights claimants in terms of reinstatement and other forms of reparation.<sup>40</sup>

*In 1985, Canadian Pacific Railways is hiring blue-collar workers for its entry-level position. In 1986, Action travail des femmes files a complaint of systemic discrimination involving the Railway's recruitment, evaluation and selection methods for the job. After 5 and a half years, the Investigation Department files its report. After another two years, the Conciliation Department's report is filed. Finally, in 1995, the complaint is settled. The Railway adopts an employment equity plan including numerical hiring goals, modifications to its recruitment and selection methods, a policy against sexual harassment and training for management. But in the years since, the Railway has not hired one single blue-collar worker!*

*Canadian National Railways hires "assistant flagmen" for the 1987 summer season. In 1988, after negotiation attempts fail, Action travail des femmes and four individual claimants file a complaint of systemic discrimination concerning recruitment methods*

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<sup>38</sup> *Principes directeurs en matière de traitement des plaintes et procédure d'enquête*, Commission des droits de la personne et des droits de la jeunesse du Québec, Assemblée des commissaires, 1990.

<sup>39</sup> Ontario Human Rights Code Review Task Force. 1994. *Achieving Equality, A Report on Human Rights Reform*. (Mary Cornish, Chair). Toronto : Ministry of Citizenship. Page 164.

<sup>40</sup> *Large v. Stratford* [1995] 3 S.C.R. 733.

*and the selection tests. After four and a half years, the Investigation Department files its report. After two years of formal conciliation attempts, in 1994, the parties agree to settle the complaint. CN modifies its recruitment methods and withdraws an electricity test that was effectively excluding women when knowledge of electricity was not required to do the job. However, in 1994, the hiring “boom” is long over. Since the settlement, CN has hired almost no “assistant flagmen”. The critical mass of women necessary to overcome discriminatory stereotypes and transform the macho culture of the workplace is far from having been attained.*

An investigation procedure tailored to each case as well as the creation of real investigative powers are two elements that will help reduce delay.

### 2.3 Real investigative powers

*J. was a manual worker for a railway company. She was the only woman in a team of twenty workers responsible for the maintenance of the railway track, often in distant and isolated regions of Quebec. She filed a complaint with the Commission alleging that the sexual and sexist harassment by two co-workers and the foreman poisoned her working conditions and forced her to resign.*

*During the investigation of her complaint, the investigator asked the company to provide the names of witnesses. After taking several months to provide the names, the company agreed that the investigator could meet with the witnesses but only at their Head Office, accompanied by the Human Resources representative in charge of the case, and after a preliminary “information session” with each one, in the absence of the Investigator, during which the company would “draw their attention to what had happened” and “inform them of their rights”. The company also requested to see the list of questions that the investigator wished to ask each witness, but this last request was refused.*

According to art. 43 (2.2) of the Act, on *ex parte* application to a judge of the Federal Court, if the judge is satisfied that there are reasonable grounds to believe that there is evidence relevant to the investigation of a complaint, the judge may issue a search warrant to the Commission. No specific provision gives an investigator the power to take testimony under oath.

These provisions are simply not adequate. In instances where co-operation from respondents is lacking, the fact that the investigator does not have any true investigative powers inevitably has a certain influence on the way an inquiry is conducted.

With the current model, the claimant's rights are decided on the basis of simple declarations, declarations that could very well have been made under the shadow of management authority, as in the case described. As well, there is no guarantee that documentary evidence is complete, nor furnished promptly.

An inquiry into the infringement of human rights is a serious matter. The fact that the investigators do not have any real power trivialises human rights, and in specific cases, can also contribute significantly to delay as investigators must make compromises and try an incremental approach when they are collecting evidence, or as a last resort, prepare an application to the Federal Court.

Investigators should have the power to compel witnesses to testify and to take their declarations under oath, as is the case under Quebec's *Charte des droits et libertés de la personne* and the *Fair Practices Act* of the North West Territories.

#### 2.4 Fair and timely settlements

Creating legislative incentives for claimants to negotiate amicable settlements – and therefore, inevitably, to make certain compromises – regarding violations of their fundamental, inalienable human rights is a delicate business. The Supreme Court has ruled that human rights laws have “quasi-constitutional” status<sup>41</sup> and has declared unequivocally that a person cannot bargain away her human rights.<sup>42</sup> As Major, J. of the Supreme Court explains :

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<sup>41</sup>See, for example, *CN v. CCDP*, *supra*, note 36.

<sup>42</sup> See *Newfoundland Association of Public Employees v. Newfoundland (Green Bay Health Care Centre)* [1996] 2 S.C.R. 3 and *Ontario Human Rights Commission v. Etobicoke* [1982] 1 S.C.R. 202.

Human rights legislation frequently deals with situations where the parties may not possess equal bargaining power. By prohibiting the ability to contract out of the statute, the courts have prevented the exploitation of inequality of bargaining power. If contracting out were allowed, those without bargaining power might be coerced or forced to give up their rights under human rights legislation.<sup>43</sup>

As Major, J. observes, the claimant and the respondent in a human rights complaint do not possess equal bargaining power; and if this is generally true in areas of provincial jurisdiction, it is particularly patent in the context of federally-regulated enterprises, the federal government and federal agencies. Whereas the claimant is often a one-time user of the Commission, respondents tend to have more experience with the system and are more frequently represented by lawyers. The claimant is thus less able to collect and analyse the information allowing her to accurately predict the outcome of her complaint before the Tribunal. Yet currently, the *Act* gives considerable importance to conciliation as a way of dealing with human rights complaints and therefore could be seen to encourage claimants to accept settlements in which they give up their rights under the *Act*. It is therefore important that the *Act* contain mechanisms that compensate for the unequal bargaining power of claimants and ensure that settlements do not compromise the principles that underlie the *Act*.

Jeremy McBride describes the issue of promoting settlement of human rights claims (against the State) in the following manner :

An essential characteristic of human rights is that they are generally regarded as fundamental and inalienable. It might, therefore, be thought that the very idea of a settlement is at variance with this conception of human rights. However, it becomes more acceptable if the process is not seen as, or intended to be, a way of negotiating away the right but rather of agreeing the steps needed to restore it and to remove any consequences resulting from its infringement. (...). Settlements are, therefore, entirely consistent with the fundamental nature of human rights so long as they do not in some way seek to entrench a derogation from human rights standards.<sup>44</sup>

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<sup>43</sup> *Newfoundland Association of Public Employees, supra*, note 42, page 11.

<sup>44</sup> Jeremy McBride. 1993. "Friendly Settlement of International Human Rights Claims by Individuals". In *Solutions de rechange au règlement des conflits/Alternative Dispute Resolution*, edited by Claude Samson and Jeremy McBride. Sainte-Foy (Québec) : Les Presses de l'Université Laval. Page 278.

Conciliation of complaints is therefore acceptable once a preliminary finding of discrimination has been made, and it is only “the steps needed to restore the right” that are actually negotiated.

Writing about constitutional rights, Robin Sharma has a similar approach to Jeremy McBride. According to Robin Sharma, alternative dispute resolution techniques such as conciliation :

... often rest upon the disputing parties arriving at compromises. An individual whose equality rights have been violated should not have to negotiate towards some middle ground to have the matter dealt with. Constitutional rights cannot easily be the subject of compromise.<sup>45</sup>

However, once there is a finding that a constitutional right has been violated, Sharma considers appropriate the negotiation of a remedy to restore that right.

Presently, only after the investigation report is tabled does the Commission focus on conciliation of the parties to a complaint, and this sequence of events is reaffirmed by the fact that the person who has acted as an investigator is not eligible to act as a conciliator (section 47, par. 2). In this way, the system currently in place at the Commission addresses concerns both about inequality of bargaining power between the parties and about the importance of not pushing claimants to renounce their fundamental rights or accept second rate settlements.

Inequality of bargaining power between the parties is compensated for, at least in part, by an investigation report in the hands of both parties which concludes that there has been discrimination against the claimant. Thus the claimant gathers additional bargaining power from the Commission’s preliminary finding in her favour, and ultimately the prospect that the Commission may refer her claim to the Tribunal and represent her in the course of the adjudicative process.

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<sup>45</sup> Robin Sharma, 1993. “The Adequacy of the Adversarial System in Charter Litigation”, 3 *National Review of Constitutional Law* 99, page 119.

The same report provides a third party determination –granted, a preliminary one, but nonetheless weighty in moral terms – that human rights have been violated, which in turn focuses the discussion on the remedy, rather than the scope of the right itself or the facts of the case. Unlike the situation in conciliation processes initiated before any investigation has taken place, respondents are less likely to feel pressured to make an offer to “buy out” the claimant when they are not yet sure that they have done anything wrong, and claimants do not have to negotiate in a factual void because certain premises of their claims have been validated by the investigation.

Whether conciliation is done by Commission or Tribunal personnel, and whether conciliation is systematically carried out by a different person than the investigator of the complaint is of less concern than the fact that the *Act* continues to provide for a conciliation process after the findings of an Investigation Report are sent to the parties to a complaint. Obviously, if one’s aim is solely to cut the cost of complaint processing, placing the major thrust of the conciliation process after an investigation has determined the facts which gave rise to the complaint does not make sense. However, if one’s aim is to increase the quality of justice for claimants and respondents alike by encouraging fair and fact-based amicable settlements, it makes excellent sense. This distinction represents the difference between promoting amicable settlement as a form of second-class justice for those in whom we do not wish to invest the resources necessary for the adjudication of their claims, and promoting amicable settlement as a more informal process in which the parties are able to, more or less, anticipate the result of a claim before the Tribunal.

Rather than trying to push claimants to settle complaints as soon as possible in any manner that they will, through ignorance or resignation, agree to accept, concerns about delay and backlog of complaints can be better addressed by giving investigators statutory powers to set peremptory deadlines for the production of documents and responses to a complaint, and streamlining the investigation process by better tailoring it to the specific nature of each complaint. For example, systemic discrimination complaints are bound to necessitate somewhat longer investigations while cases involving the evaluation of the credibility of witnesses should be referred rapidly to the Tribunal so that the people

appointed to decide these questions according to the provisions of the *Act* – Tribunal members – can hear the evidence and render a decision.

## 2.5 A balance between settlement and adjudication

An appropriate balance between resolution of complaints through settlement and their adjudication is essential to an efficient complaint processing system. The incessant back-and-forth between claimant and respondent that first the investigator, and then the conciliator carries out is time-consuming and at some point becomes inefficient. After a certain point, having all concerned in the same room for a pre-hearing conference is actually a much more efficient way of getting to the bottom of things, either by precipitating a settlement or by going forward to a hearing of the complaint.

Unwillingness to adjudicate human rights complaints – perhaps more appropriate when the *Act* was first adopted – today contributes to the fact that people no longer have confidence in the system. Modern human rights reform, for example, in Quebec, recognises that setting up a Tribunal to hear those complaints which cannot be settled within a reasonable amount of time and with a reasonable expenditure of energy is actually an essential component of efficient, credible and fair complaints processing. The corollary of this is also true and is embodied by the present system. The adjudicative process is remote and inaccessible, and respondents are not inclined to see settling a complaint as an immediate priority. Complaint processing drags on for years and years with rising costs for all concerned. Some claimants become disillusioned and lose faith in the system; others invest heavily in defending their complaint resulting in great personal sacrifice.

Rather than competing with or displacing amicable settlement as a way to deal with complaints, creating easier access to a forum to decide complaints can often actually give momentum to the settlement process.

The United Nations Human Rights Committee has called for reform of Canadian human rights law in this sense, stating that “ enforcement mechanisms provided in human rights legislation need to be reinforced to ensure that all human rights claims not settled through mediation are promptly determined before a competent human rights tribunal ”.<sup>46</sup>

## 2.6 Temporary measures to preserve rights or evidence

*S, assistant flagwoman, works with two male colleagues in a wooded area along the track leading to the train yards of a railway company. She is the only woman in a gang of three. Contrary to the way new workers usually receive informal, on-the-job training, her two colleagues never show her how to do the more complex parts of the job – the mechanised tasks that are much less tiring than the “pick and shovel” ones. The truck that comes and picks them up at lunchtime inevitably drives them to a restaurant with topless waitresses, so most of the time, S. simply brings a lunch and eats it in the truck. One day, S. begins to criticise the way the gang works. The atmosphere disintegrates and a co-worker threatens her : “If you don’t shut up, I’m going to lay you down in the bushes and when you get up afterwards, it’s gonna hurt!”.*

*Shaken, S. asks her foreman if she can change gangs. The foreman refuses, citing seniority and the collective agreement.*

*Action travail des femmes informs S. of the possibility of filing a complaint with the Commission, but S. declines. “What will that do, she says, I’m still stuck with the same gang, it’ll just be worse.”*

Particularly in sexual harassment cases, by the time a woman files a complaint, she has almost always been forced out of her job. Sexual harassment is usually deeply damaging to women, who often “resign” from their jobs at great personal and financial cost, feeling totally powerless. Reinstatement, many years later when the complaint is settled or the Tribunal makes a ruling, is illusory. The remedy that the *Act* offers comes as too little, too late.

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<sup>46</sup>United Nations Human Rights Committee, *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Concluding Observations of the Human Rights Committee (Canada)*, Geneva, April 7, 1999, CCPR/C/79/Add. 105 (1999).

In situations where the physical or psychological integrity of the claimant is threatened, or if evidence is about to disappear, the Commission should have the power to ask the Tribunal to make a temporary order to preserve rights or evidence. This way, for example, in the case cited, the woman could have obtained a decision ordering her employer to re-assign her pending the outcome of the inquiry.

Section 81 of the Quebec Charter provides for the possibility for the Tribunal to make a special temporary order in certain circumstances.

## 2.7 Representation of claimants before the Tribunal

Emphasis on systemic discrimination in the recent British Columbia human rights reform reflects the realisation that it is now systemic discrimination that represents the greatest obstacle to equality. Describing discrimination resulting from the application of rules which are on their face neutral, McLachlan, J. has observed that : “...this more subtle type of discrimination, which rises in the aggregate to the level of systemic discrimination, is now much more prevalent than the cruder brand of openly direct discrimination”.<sup>47</sup>

Unfortunately, while British Columbia recognises the importance of systemic discrimination at least on paper, under its system, the Commission provides no representation for individual claimants. Claimants are entitled to legal representation through the legal aid system. Concerning the Canadian Human Rights Commission, David J. Mullan alludes to the plight of individuals making complaints and refers to the growing concern that the Commission’s preoccupation with “complex and resource intensive systemic discrimination complaints” is “at the expense of effective servicing of complaints of individual or direct discrimination”.<sup>48</sup> We would be wary of any prioritising of systemic complaints if it implies sacrificing so-called individual complaints, for example, in the area of representation of claimants.

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<sup>47</sup> *Meiorin, supra*, note 34, par. 29.

Representation of claimants by the Commission before the Tribunal is another crucial part of compensating for the unequal bargaining power of claimants. It is an important practical and symbolic way of saying that all human rights violations are serious matters, and that it is in society's interest that these violations cease. On a day to day basis, Commission lawyers have the expertise and, when necessary, are aware of the need to “nurture the case law” that means that they are best equipped to bring all claims before the Tribunal. Claimants who wish to be represented independently of the Commission should be able to do so, and groups should be able to intervene when the issues involved touch the constituencies that they represent. However, the Commission should, as a general rule, be present before the Tribunal.

We would caution against any attempts to withdraw services or institutional support for individual claimants in the name of reallocating them to strategic or systemic complaints. While, as we have noted, women experience long-standing systemic and structural discrimination and this must be addressed, this need cannot justify ignoring or short-changing “individual” complaints. In reality, the distinction between systemic and individual discrimination is often artificial. Often a complaint presented as an individual problem can be found to have a systemic dimension. Besides, to the extent that a settlement or a Tribunal decision is publicised, an individual complaint often has a ripple effect: it serves to educate other potential claimants and respondents and thus has a systemic impact.

## 2.8 Access to the Tribunal

Currently the *Act* gives the Commission exclusive control over access to the Tribunal (section 49 (1)). The Commission carries out this gatekeeping function with excessive zeal, as only approximately 6% of complaints filed are referred to the Tribunal. By vesting a discretionary power in the Commission to decide whether or not the Tribunal

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<sup>48</sup> David Mullan. 1999. “Tribunals and Courts – The Contemporary Terrain: Lessons from Human Rights Regimes” 24 *Queen’s Law Journal* 643, page 646.

will hear a complaint, the *Act* subjugates the remedy for human rights violations to the Commission's approval.

Rights are only rights to the extent that there is a remedy available when they are violated. The Commission should not, as the *Act* currently provides, have the ability to extinguish human rights, and this is even more critical in a context where a person who believes her human rights have been violated cannot go directly to court.<sup>49</sup>

The revision of the *Act* should guarantee independent access to the Tribunal for people whose complaints the Commission has decided not to deal with, or not to refer to the Tribunal. The Commission's initial role in screening and processing complaints should be maintained, but its discretion should be clarified and narrowed. The Commission must no longer be able to pass judgement on the gravity of human rights violations, and should be bound to refer all substantiated complaints to the Tribunal. Independent access to the Tribunal for people whose complaint has been refused by the Commission will act as a safety net if the Commission continues to adopt such a narrow view of discrimination or seek such high standards of proof that too many complaints are snuffed out, as is presently the case.

In essence, this model is described as "Model B" in the document prepared for the Review Panel by Shelagh Day and Gwen Brodsky.<sup>50</sup> It also resembles the scheme in place in Québec before the narrow interpretation given to section 84 of the Québec Charter by the Québec Court of Appeal in the *Francoeur* decision.<sup>51</sup>

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<sup>49</sup> *Seneca College of Applied Arts and Technology v. Bhadauria* [1981] 2 S.C.R. 181.

<sup>50</sup> Shelagh Day and Gwen Brodsky. 1999. "Screening and Carriage: Reconsidering the Commission's Functions". Paper prepared for the CHRA Review Panel.

## 2.9 Enforcement of settlements and Tribunal orders

*According to the terms of the Tribunal order confirmed by the Supreme Court in the CCDP(ATF) v. CN Railway affair, CN has to hire one woman for every four blue collar entry level positions filled until such time as women are represented in proportion to their availability on the job market. CN was ordered to cease using the Bennett mechanical aptitude test because of its discriminatory impact on women. CN was also ordered to make quarterly reports of progress under these and other conditions of the order to the Commission, and to send a copy to Action travail des femmes.*

*In 1996, CN stopped sending the reports. At the same time, a spot check of a few reports revealed that several members of ATF who had been laid off at CN were still counted as employees occupying blue collar jobs. ATF received accounts from members applying for positions as train engineer that the Bennett test was once again in use. Furthermore, whereas fifteen positions as train engineer were filled, only two women were hired, though more had successfully passed all the tests and interviews required. In 1998, CN sent one further report. In 1999, one, page-long report was received composed strictly of titles and columns of zeros.*

If settlement agreements or Tribunal orders are not respected, ultimately all the energy put into processing complaints by claimants and by the Commission is lost. The Commission should see complaint processing through to the very end, including overseeing implementation of remedies. It should take its role in seeing that settlements and Tribunal orders are respected seriously, and the government must ensure that the Commission has sufficient resources to this end.

As well, if settlements are not respected, the claimant should be able to file a new complaint. Ordinary women have access to the Commission in a way that they do not to the Courts, and this would ensure that settlements could be enforced. This is the case in Ontario, Newfoundland, Manitoba and, if the settlement intervenes while the complaint is before a Board of Inquiry, in Nova Scotia.<sup>52</sup> Presently, the *Act* provides for the possibility

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<sup>51</sup> Ménard c. Rivet et al., 200-09-000557-956, Quebec Court of Appeal, July 24<sup>th</sup>, 1997. Leave to appeal to the Supreme Court refused on March 19<sup>th</sup>, 1998, decision no. 26222.

<sup>52</sup> See section 43 of the *Ontario Human Rights Code*, R.S.O. 1990, c. H-19, section 23(3) of Newfoundland's *Human Rights Code*, R.S.N. 1990, c. H-14, section 31 of the *Manitoba Human Rights Code*, C.P.L.M. c. H-175, and section 34(5) of the *Nova Scotia Human Rights Act*, R.S.N.S. 1989, c.214.

of fines and penal proceedings against the party that does not respect a settlement. This is not helpful in implementing a remedy for the infringement of human rights.

### **3. The Role of the Commission : An Advocate for Human Rights**

#### 3.1 Clarifying the different roles of the Commission

The many roles of the Commission create confusion and controversy. The *CHRA* mandates the Commission to play several roles, including :

- providing public education and advancing social policy;
- drafting complaints;
- on occasion, initiating complaints;
- investigating complaints;
- conciliating the parties to a complaints;
- deciding whether the complaint should go forward to a full hearing;
- if the case proceeds, representing public interest.

The Commission is an advocate for human rights in general, and presumably it is also so in a specific context when it drafts a complaint, when it appears before the Tribunal and when, if ever, it initiates a complaint. On the other hand, once it goes on to investigate a complaint, or to attempt to bring parties to settle a complaint, or to decide whether the complaint should go forward to the Tribunal, the Commission must act in a neutral fashion and appear to be impartial. Trying to be all things to all people results in pleasing no one : claimants may feel betrayed because they believed the Commission was a human rights advocate and not, as it turns out, the “judge” of their cause, and respondents may question the neutrality of the Commission, whose investigators and conciliators must then make a particular effort to appear impartial.

The revision of the *Act* should serve to disentangle and clarify the many roles of the Commission, both in terms of the *CHRA* and the *Employment Equity Act*.

### 3.2 Conflicts with the *Employment Equity Act*

The *Employment Equity Act (EEA)* further entangles the Commission's various roles. The Commission must be an advocate for human rights, specifically, for the goal of employment equity for designated groups. The Commission must assist and at the same time, audit or police employers. It must receive information on progress toward employment equity from these employers (and by the same token, information on the discrimination that persists in the workplace). In addition, according to the *Act* (see section 40(3)), the Commission could also initiate a complaint against one of these employers, and then investigate and decide to refer the complaint to the Tribunal.

Specifically, when a woman working for an employer covered by the *EEA* wishes to file a complaint against her employer, there are three ways in which the protection afforded to her by the *Act* is reduced or eliminated.

Firstly, if the Commission is "of the opinion that the matter has been adequately dealt with in the employer's employment equity plan prepared pursuant to section 10 of the *Employment Equity Act*", section 41, par. (2) of the *Act* deprives the employee who believes that she has been discriminated against of the right to file a complaint.

Section 41, par. (2) should be deleted from the *Act*. After all, women whose employers are required by law to prepare an employment equity plan should not be disadvantaged when the time comes to file a complaint against them. The decision to not deal with a complaint is final, with no possibility of appeal nor obligation for the Commission to motivate its decision. Taking away a woman's right to be heard by the Commission when her fundamental, individual human rights are involved has a serious potential for creating further injustice and discrediting the entire system.

Also, even assuming that an employment equity plan provides for adequate systemic measures to correct existing discrimination, the plan will never provide for compensation for past discrimination. The goal of the *Act* is to provide recourse for women and other

disadvantaged groups who have suffered discrimination. Only if women have already been “made whole”, or compensated for past discrimination would a complaint be without object. If this were the case, the Commission could simply refuse to deal with the complaint under the existing provisions of the *Act*.

Secondly, if the Commission does decide to investigate complaints of discrimination against employers covered by the *EEA*, the information the employers have disclosed to the Commission is not available to the Commission investigators (see section 34 (2), *CHRA*). If the complaint alleges systemic discrimination in the workplace, it is entirely conceivable that the Commission investigator must then try to compile, by some other means, some of the very same information already filed with the Commission in the context of the *EEA* (for example, statistics concerning the under-representation of designated groups in various job positions).

Presently, the *EEA* states that information obtained by the Commission is privileged but can be disclosed for any purpose relating to the enforcement of the *EEA* (section 34). This section must be modified so that information obtained by the Commission could be disclosed for any purpose relating to the enforcement of the *EEA or the CHRA*. Discrimination is against public order, and of all institutions, the Commission should not place the employers’ right to confidentiality above women’s and other disadvantaged groups’ right to be free from discrimination.

Thirdly, section 54.1 of the *Act* curtails the remedial power of the Tribunal when the respondent is an employer under the *EEA*. This section should also be abolished. In the case of a substantiated complaint of systemic discrimination, the Tribunal should have the same power to order the adoption of a plan or program designed to remedy the situation that it does for any other employer. After all, the *EEA* is not supposed to serve as an alibi for employers that discriminate, but rather it is supposed to achieve equity in the workplace.

It is important to understand that employment equity plans are not enforced in the same manner as a Tribunal decision or settlement that has been filed with the Federal Court. Even if the remedial measures called for by a complaint were identical to the goals in the employment equity plan, women would have a distinct advantage in seeing their employer formally commit to carrying out the remedial measures in a settlement, or be ordered to do so by the Tribunal. The *EEA* asks employers to make only “reasonable progress” towards employment equity and is based on a consensual model; the *Act* sets out fundamental rights for women that have been in effect since 1977 and are not satisfied by a mere plan to fulfil them on a progressive basis.

Human rights accorded to women under the *Act* should always have priority, and never be sacrificed to the Commission’s duties in conformity with other laws such as the *EEA*.

#### **4. Systemic Discrimination : The Need for Positive Action**

Since the *Act* was adopted in 1977, experience has shown that one of the most efficient ways to make significant steps towards equality is by requiring positive measures to be taken. As Mary Cornish states:

An educational, voluntary approach to overcoming systemic discrimination has been followed at the federal and provincial level for many years. In the absence of an effective enforcement process, the results have been very poor, particularly considering the amount of money that has gone into such educational measures.<sup>53</sup>

Human rights legislation is increasingly taking the need for positive, systemic remedial measures into account, as witnessed by the adoption of proactive pay equity legislation in several jurisdictions, as well as by contemporary international human rights law.<sup>54</sup> Furthermore, when confronted with evidence of systemic discrimination, the Supreme Court of Canada has consistently required employers to take positive, broad-based action

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<sup>53</sup> Ontario Human Rights Code Review Task Force, *supra*, note 39, page 164.

<sup>54</sup> Albie Sachs, *supra*, note 24, page 12.

to overcome systemic discrimination, pointing out that this is the only way to give meaningful effect to human rights laws.<sup>55</sup>

With the adoption of, first, human rights legislation and then, the Canadian *Charter*, the government embarked on a course that promotes awareness of rights in the Canadian and Québec population. Ultimately, the solution to the problem of overload at the Canadian Human Rights Commission, and at that, at all the Human Rights Commissions across the country, is the creation of a culture in which respect for women's, and other disadvantaged groups' human rights, is mandatory and uniformly accepted.

#### 4.1 Regulatory or compliance model

Legislative provisions should be passed making clear that the right to equality means that employers, and service and accommodation providers are required to take positive measures to overcome discrimination and to take into account the different needs and abilities of all women.

##### - Service and accommodation providers

Like employers under employment equity legislation, service providers should be required to develop and implement positive policies and practices to overcome discrimination against women, be they disabled, elderly, lesbians, mothers, prisoners, Aboriginal, of colour, poor, of national or ethnic origin different from the majority, etc.

The federal government provides, funds, or regulates many important services, for example, inter-provincial and international transportation, unemployment benefits and other government services, recreation, voting, telecommunications, and banking. As part of a proactive approach to discrimination, federally funded or regulated service providers should be required to develop a service equity plan with implementation and monitoring mechanisms.

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<sup>55</sup> Ontario Human Rights Code Review Task Force, *supra*, note 39, page 164.

For example, the government should adopt standards to ensure that all new construction or renovation or rental of federal buildings makes them accessible to people with disabilities.

An interesting example of the proactive compliance model that could be used for other areas, too, is the *Americans with Disabilities Act of 1990 (ADA)*<sup>56</sup> whose stated goal is “to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities”, “to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities” and “to ensure that the Federal Government plays a central role in enforcing the standards established in this *Act* on behalf of individuals with disabilities”.

The *ADA* reflects current thinking that only wide-ranging legislation creating positive obligations can bring about significant, tangible change for groups that have been traditionally marginalised or excluded. The *ADA* applies to public service and accommodation providers, telecommunication companies offering telephone services to the general public as well as to employers of fifteen employees or more.

While employers and public service and accommodation providers must take responsibility for initiating steps to eliminate systemic discrimination, society as a whole benefits from the exercise. Various tax provisions set out in the *ADA* reflect this vision.

In a complaints-based model, individual employers or service providers who are named in a complaint may be ordered to make changes in order to respect a claimant’s rights. In a compliance-based model, all employers and all service providers must make the same kinds of changes within the same timeline. Under a compliance model, leaving systemic barriers in place as long as possible no longer represents a competitive edge, and at the same time, no particular employer or service provider is stigmatised or singled out as a discriminator. Change comes more quickly for excluded or marginalised groups, and the

costs – both human and economic – associated with complaint processing are diminished. A culture of compliance is created with benefits for the whole society.

Wherever possible, it is essential for any government that is committed to respecting human rights to adopt a compliance or regulatory model. Disability is one area where such a model is an obvious choice. Yet, in spite of section 24 of the *Act* which specifically provides for the adoption of regulations concerning standards of accessibility to services, facilities or premises, none have ever been adopted.

Although accessibility for persons with disabilities to services and facilities provides an obvious illustration of how a compliance model can be appropriate and effective, it is our view that the Commission should be empowered to regulate and enforce compliance with standards developed to cure systemic problems faced by any protected group, or in a particular industry or service on a service-wide or industry-wide basis.

- Employers

*With eighteen years of seniority, J. is a train wagon cleaner at Via Rail. This position involves washing the exterior of train wagons and requires both physical strength and considerable agility. J. became pregnant and continued cleaning train wagons until she was six months pregnant, when her doctor advised her to cease doing hard physical labour in contorted positions. She informed her employer of her doctor's recommendation. Via Rail then reassigned her to cleaning passenger trains at the Montreal's Central Train Station.*

*Now seven months pregnant, this work requires J. to squeeze in between each set of seats in the train and bend down to pick up refuse left there by passengers, and she is still obliged to wear construction boots. She is required to be on her feet for her entire shift. Her doctor has again advised her that this work represents a danger for her and her unborn baby's health. J. appealed to her employer for a further reassignment. Via Rail replied that it could accommodate J. no further, and informed her that she would henceforth be considered on leave without pay. Two months before her due date, J. is left with no income, nor is she eligible for ordinary Employment Insurance benefits. Her partner has a job but not a high-paying one, and J. is loath to start off this new era of their relationship in a situation of total and unexpected financial dependence.*

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<sup>56</sup> Public Law 101-336, July 26<sup>th</sup>, 1990, 104 Stat. 327. Online: [janweb.icdi.wvu.edu/kinder](http://janweb.icdi.wvu.edu/kinder).

*J.'s union has filed a grievance contesting the employer's decision to put her on leave in violation of the collective agreement. Negotiated by and for a bargaining unit composed almost exclusively of men, the collective agreement contains no provisions regarding maternity leave or other pregnancy-related leave. Furthermore, when she receives her Employment Insurance maternity benefits, her weekly benefits will be substantially lower because of the two months with zero income that will be factored into her reference period.*

*Before J. can file a complaint at the Commission, she must exhaust grievance procedure and await an arbitrator's award concerning the grievance, a procedure which will probably take several years. Her child will be in school before any complaint she might file is resolved.*

Examples of areas where a compliance or regulatory model should be adopted are questions raised by pregnancy and breastfeeding. Guidelines establishing federally-regulated employers' obligations in these domains are sorely lacking. Nowhere is the necessity of different treatment in order to arrive at equality so patent as in the case of pregnant women (or women having recently given birth, or breastfeeding women). Under federal jurisdiction, women working for employers who refuse to consider women's childbearing role as a legitimate reason to apply existing working conditions in a flexible manner are denied their equality rights every day, and currently the *Act* provides no meaningful recourse.

The example above represents nothing out of the ordinary when it comes to pregnant women in non traditional jobs. Some women continue working and risk their fetuses or unborn baby's health with occasionally tragic consequences for their pregnancy. Guidelines in the area of pregnancy and breastfeeding could protect women's equality rights and make it clear to employers that women should not have to bear the costs of procreation alone.

Sexual and sexist harassment is another area where a compliance model is appropriate. The Commission has adopted guidelines to help employers implement the sections 247.1 and following of the *Canada Labour Code* requiring employers to have a policy against

sexual harassment. However, putting the guideline in the form of regulations that have force of law offers better protection for women in the workplace.

The *Employment Equity Act* is another example of proactive legislation. Unfortunately, this *Act* demands only minimal efforts from employers. The *Employment Equity Act* merits a specific review in and of itself to transform it into a more effective instrument.

#### - Compliance

The Commission should have an audit function to ensure compliance with the various regulatory schemes. Once the Commission's mandate as a human rights advocate is clearly recognised in the *Act*, any major problems identified in an audit could be the object of a Commission initiated complaint which would then be heard by the Tribunal.

#### - Not a veil for discrimination

Currently, section 41(2) of the *Act* stipulates that the Commission can refuse to deal with a complaint that, in its view, has already been dealt with in an Employment Equity Plan. Along the same lines, section 17 (3) of the *Act* stipulates that no complaint can be laid where the Commission has approved the "accommodation" plan for services, premises, facilities, etc.

Obviously, any positive measures that have been taken to overcome discrimination will be considered as part of the evidence in any claim. But as previously stated, to go so far as to refuse the right to file a complaint to the woman whose employer or service provider continues to discriminate is wrong, and flies in the face of the fundamental nature of human rights. Experience has shown that it is easier for employers to give lip service to the principle of equality than it is for them to change their workplace.

To see the patterns of systemic discrimination, we need to look at women's experience as a group. But this analysis of women as a group and the need for positive action should

not take away from the fact that discrimination affects individual women's lives. What irony if the result of recognising the need for systemic action means that, in spite of the legislation set up to end discrimination, an individual woman who has been discriminated against should once again be excluded from the protection of the law. For the same reasons referred to in the third chapter, no provision of the *Act* should make it more difficult for a woman whose employer or service provider is regulated by a compliance program to file a complaint.

#### 4.2 Contract compliance

Another primary area where the federal government should strengthen measures to combat discrimination is in the awarding of contracts and grants. (See, for example, the *Manitoba Human Rights Code*, sec. 56, on contract compliance). Contract compliance works to extend the federal government's policy against discrimination in the workplace to the private sector. The Federal Contractor's Program stipulates that companies with 100 or more employees who receive a contract or grant of \$200 000 or more must produce an Employment Equity Plan within the meaning of the *Employment Equity Act*.

First of all, the current Federal Contractor's Program needs to be strengthened. The Program should be expanded to cover employers with 50 employees or more and apply when a company or institution has received, in a fiscal year, \$50 000 or more (a succession of smaller contracts is sufficient to remove a company from the application of the program). The designated groups should include women not just as a group but also within the groups of disabled people, Aboriginal people and visible minorities.

Second of all, once the Commission's role as an advocate for human rights is firmly established in the *Act*, the Commission could be responsible for audits of companies and institutions to whom the Program applies. Right now, the Department of Human Resources is responsible for these audits and is unable to keep up with the demand.

*In 1996, a major gas company advertises itself as an equal opportunity employer and actively recruits women to apply for the entry position of pipeline worker. When all but one of several hundred women who then apply for the job are never hired, a group of women ask Action travail des femmes to investigate.*

*It turns out that since 1990, the gas company has been a Federal Contractor under the Program. It had eventually submitted an Employment Equity Program in 1993, but beyond changing its recruitment method,(using an employment equity logo, sending its job postings to a few women's groups, etc.) the company has not actually implemented any more of the steps neatly set out in its employment equity plan to correct the historic exclusion of women from its blue collar jobs! An Access to Information request reveals that while the company should have been audited in 1995, the Department of Human Resources has done no follow-up since it received the Plan in 1993.*

Lip-service to employment equity contributes to growing cynicism in the population over the government's commitment to combat discrimination. The government should provide adequate resources to ensure that existing measures to protect human rights are taken seriously by employers and service providers.

#### 4.3 The “Duty to Accommodate”

The notion of “accommodation”, when referring to the dismantling of the barriers that have kept women and other disadvantaged groups on the margins or excluded them from the workforce, housing and public services, is in itself unfortunate. In fact, “accommodation” is a misnomer for the kinds of changes women are seeking. The notion of a duty to dismantle barriers, to transform the norm, to question exclusion, to undo harm, would be far more appropriate and consistent with the goals of substantive equality.<sup>57</sup>

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<sup>57</sup> In French, the term “accomodement” is less offensive. It means “arranger”, the meaning closer to the English, “accommodate”. But at the same time, it also means “rendre propre à l'usage qu'on doit en faire” or “to make suitable for the purpose that one is to make of it”, and thus clearly impugns the rule or system that needs to be changed or rethought. Only the former meaning has the connotation of contriving

As Shelagh Day and Gwen Brodsky have pointed out:

...from a conceptual point of view there is a problem with... the image of equality that accommodation projects. It endorses the idea that some people are “ the same ” and some people are “ different ”, and that those who are “ the same ” are, deservedly, dominant. This sameness-difference approach assumes that there are “ normal ” people and “ others ”, who are by definition “ abnormal ”, and that a world full of barriers to the “ abnormal ” people is normal. The status quo is normal but some will need adjustments made to this normal world because they are not normal. These adjustments are said to “ accommodate ” them.<sup>58</sup>

Margot Young makes a similar observation when she writes :

...special treatment is justified as an entitlement based on unique characteristics of the group; maintained is an unstated norm, divergence from which is termed difference. The role of existing institutions in constructing such "difference" is left unexamined; difference continues to reside in the individual. The approach simply reinstates the problem of difference, as the dominant within our society conceptualize it.<sup>59</sup>

In a passage cited with approval in a unanimous decision of the Supreme Court in the case of forest firefighter Tawney Meiorin, Shelagh Day and Gwen Brodsky go on to state:

The difficulty with this paradigm is that it does not challenge the imbalances of power, or the discourses of dominance, such as racism, able-bodyism and sexism, which result in a society being designed well for some and not for others. It allows those who consider themselves "normal" to continue to construct institutions and relations in their image, as long as others, when they challenge this construction are "accommodated".

... Accommodation does not go to the heart of the equality question, to the goal of transformation, to 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. Accommodation seems to mean that we do not change procedures or services, we simply "accommodate" those who do not quite fit. We make some concessions to those who are "different", rather than abandoning the idea of "normal" and working for genuine inclusiveness.<sup>60</sup>

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something or setting something up for a use for which it was not initially intended and thus draws the same criticism as the English “ accommodate ”.

<sup>58</sup> Shelagh Day and Gwen Brodsky. 1996. “The Duty to Accommodate : Who Will Benefit?” *75 Can. Bar Rev.* 433 at 462.

<sup>59</sup> Margot Young. “Sameness/Difference: A Tale of Two Girls”, *4 Review of Constitutional Studies* 150 at 162.

<sup>60</sup> Shelagh Day and Gwen Brodsky, *supra*, note 58, page 463.

In the recent *Meiorin* case, McLachlan, J., described how the duty to accommodate can legitimise systemic discrimination :

Although the Government may have a duty to accommodate an individual claimant, the practical result of the conventional analysis is that the complex web of seemingly neutral, systemic barriers to traditionally male-dominated occupations remains beyond the direct reach of the law. The right to be free from discrimination is reduced to a question of whether the “mainstream” can afford to confer proper treatment on those adversely affected, within the confines of its existing formal standard. If it cannot, the edifice of systemic discrimination receives the law’s approval. This cannot be right.<sup>61</sup>

The 1998 amendments to the *Act* anticipated the unified approach adopted by the Supreme Court decision in the *Meiorin* affair and make no distinction between direct and adverse effect discrimination and the duty to accommodate. Our question, then, is: does the notion of a duty to accommodate lead to significant changes that work towards making institutions, the workplace, housing and public services available, accessible and meaningful for the many different women in our society?

The case law involving the duty to accommodate women *per se* is rare; the majority of cases involve religious and age discrimination. A rapid survey of the case law (32 reported decisions of Federal Human Rights Tribunals, Appeal and Supreme Court decisions) reveals no example of accommodation of women as a group. In other words, the duty to accommodate women does not appear to be leading, for example, to systemic or structural change of the workplace in male job ghettos. Three cases surveyed involved accommodation of pregnant women in the workplace.

In general, a highly problematic aspect of the duty to accommodate is the defence of undue hardship.

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<sup>61</sup> *Meiorin*, *supra*, note 34, par. 42.

*H. was employed as a mechanic with Air Canada. She was recalled from layoff while pregnant. Air Canada decided that H. could not be exposed to fumes and solvents, lift heavy objects or stand for prolonged periods of time because of her pregnancy. Air Canada then laid off H. from her job, citing her “ medical unfitness ”. The Commission dismissed H.’s discrimination complaint, basing its decision on Air Canada’s evidence that it did not have a vacancy in a suitable position for the purpose of accommodating H. Air Canada was not required to create a new position to accommodate H. The Federal Court upheld the Commission’s decision : 1998 F.C.J. No.193 (QL).*

In the example above, the position that, for a company the size of Air Canada, to accommodate one pregnant mechanic represents undue hardship is simply untenable. (Indeed, if this woman lived in Quebec and was governed by provincial law, she would have had a legal right to be reassigned or withdraw from her job with income replacement benefits under workers’ health and safety legislation). This case illustrates the fact that defence of undue hardship means that economic considerations – and trivial ones at that – are used to deny women equality. Furthermore, implicit in any defence of undue hardship is that some women can be discriminated against because it is more efficient and economical for employers and service providers to do so – a principle that is surely contrary to the purpose of human rights legislation.

The Supreme Court first talked about accommodation short of undue hardship in the *O’Malley* case<sup>62</sup> involving religious discrimination. McIntyre J. said that once reasonable efforts to accommodate have been made, if an employee is still not fully accommodated, she might have to choose between her religion and her employment. Should a woman have to choose between her income and her pregnancy?

Permitting the Governor in Council to make regulations prescribing standards for assessing undue hardship does not deal with the inherent problems raised by this defence.

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<sup>62</sup> *Ontario Human Rights Commission and O’Malley v. Simpson-Sears Ltd.* [1985] 2 S.C.R. 536.

The very nature of human rights is such that they must not vary with the economic climate or political vagaries.

As previously stated, the notion of accommodation short of undue hardship was developed in the context of religious and age discrimination and consequently, has a particular application in these contexts. Again, in the case of discrimination on the basis of disability, individual accommodation, such as customising a work site to suit the capacities of a particular person, is essential. But in the context of discrimination against women as a group, or people of colour, or people of minority national or ethnic origin, the undue hardship defence is most often, if ever, simply not appropriate. The right to equality means that the offending norm should be changed, otherwise, in the words of McLachlan, J., “The right to be free from discrimination is reduced to a question of whether the “mainstream” can afford to confer proper treatment on those adversely affected.”<sup>63</sup>

In the *Beaulac*<sup>64</sup> case, Bastarache, J. recently stated for the Supreme Court:

...in the context of institutional bilingualism, an application for service in the language of the official minority group must not be treated as though there was *one primary* official language and a *duty to accommodate* with regard to the use of the *other* official language. The governing principle is that of the *equality* of both official languages. (Emphasis added.)

It is time that Parliament recognised that there is not *one primary* sex in Canada, men, and a *duty to accommodate* the *other* sex, women. Equality between men and women should govern the protection of women’s human rights under the *Act*. After all, by the year 2000, surely women should have the right to be considered one of the Official Sexes of Canada!

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<sup>63</sup> *Meiorin, supra*, note 34, par. 29.

<sup>64</sup> *Beaulac c. R.* [1999]1 S.C.R 768, par. 39.

## **5. Successor Employers and Service Providers : Maintaining Responsibility for Human Rights Claims**

*According to the order confirmed by the Supreme Court (CN v. Canada (CCDP) (Action travail des femmes) [1987] 1 S.C.R. 1114 ), CN must hire one woman for every four blue collar positions it fills in the St-Laurent region. But in the last few years, once certain gangs have completed their regular hours of work on the railway, workers have the option of completing the work “on contract”. The foremen choose their own gangs and the work continues without the collective agreement applying. As private contractors, the foremen are not subject to the 1 in 4 hiring quota for women, and often pass over them when choosing their new gangs.*

*A less patent but similar phenomenon occurs as CN privatizes strips of the railway in the region covered by the Supreme Court order. The same work is done, often by mostly the same people, but women have to start all over again to obtain their fair share of work, dealing this time with not one but many smaller, scattered employers.*

In the context of corporate transformations such as mergers, sales, contracting out, downsizing, etc. it is important that employers not be able to evade their responsibility for human rights. Just as collective agreements are passed on to subsequent employers in certain Labour Codes (see, for example, section 45 of the *Quebec Labour Code*, and sections 44 to 47.1 of the *Canada Labour Code*), responsibility for human rights claims and, as the case may be, obligations resulting from settlements and Tribunal orders should be handed on to successive employers or service providers as part and parcel of the corporate package.

## **6. Grounds of discrimination : Bringing the Act up to International Standards**

### **6.1 Social Condition**

#### **6.1.1 As a prohibited ground of discrimination**

In Canada, in every group, community or segment of society, women are poorer than men, and women are disproportionately represented among the very poor.<sup>65</sup> And, as Shelagh Day and Gwen Brodsky have observed, women are not poor for the same reasons that men are poor :

Women's persistent poverty and general economic inequality are caused by a number of interlocking factors:

- the social assignment to women of the role of unpaid caregiver for children, men and old people;
- the fact that in the paid labour force women perform the majority of the work in the “caring” occupations and that this “women’s work” is lower paid than “men’s work”;
- the lack of affordable, safe child care;
- the lack of adequate recognition and support for child care and parenting responsibilities that either constrain women’s participation in the labour force or double the burden they carry;
- the fact that women are more likely than men to have non-standard jobs with no job security, union protection, or benefits;
- the entrenched devaluation of the labour of women of colour, Aboriginal women, and women with disabilities;
- and the economic penalties that women incur when they are unattached to men, or have children alone.<sup>66</sup>

If including social condition in the *Act* as a prohibited ground of discrimination increases the possibility that the *Act* be effective in dealing with women’s poverty and women’s economic inequality, it is surely a good thing. But would this be the case?

Currently, Quebec’s *Charte des droits et libertés* and the Newfoundland *Human Rights Code* include respectively as a prohibited ground, “social condition” and “social origin”. Human rights legislation in Alberta, Manitoba, Nova Scotia, PEI and the Yukon prohibit discrimination on the basis of “source of income”, while Saskatchewan prohibits discrimination on the basis of “receipt of public assistance”.<sup>67</sup>

A survey of the case law reveals that while these provisions are useful in dealing with negative stereotyping of people on social assistance, particularly where low income women and children are denied access to accommodation, they don’t get to the heart of the structural causes of poverty and economic inequality. This is the case even in Quebec

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<sup>65</sup> See *infra*, notes 11, 12, 13, 14 and 15.

<sup>66</sup> Shelagh Day and Gwen Brodsky, *supra*, note 21, page 2.

<sup>67</sup> In the field of accommodation, Ontario prohibits discrimination on the basis of “receipt of public assistance”.

and Newfoundland, where the legislation contains the broader term of “social condition” or “social origin” (rather than “source of income”).

In other words, simply adding “social condition” as a prohibited ground of discrimination in the *Act*, while it will certainly be useful in combating negative stereotyping of low income women (and men), is not enough. In order to get to the underlying causes of women’s inequality, the revision of the *Act* must shape it into a tool that can more adequately address women’s material inequality.

Social and economic rights are encompassed by equality rights. If women’s economic inequality is not addressed, women will never be able to achieve substantive equality. However, if it is to address the issues that are crucial to the most disadvantaged women in Quebec and Canada, in our view, the *Act* must explicitly include social and economic rights.

#### 6.1.2 Recognition of social and economic rights

Canada’s commitment to equality rights is clearly expressed by the ratification of international human rights instruments ( such as the *ICCPR*, the *ICESCR*, *CEDAW* and the *Beijing Action Program*), the *Canadian Charter of Rights and Freedoms*, as well as by other domestic legislation such as the *CHRA*. Given the substantive definition of equality adopted by the Supreme Court of Canada, this commitment to equality rights must also mean a commitment to eliminating the social and economic inequality which plagues Canadian and Quebec women. Indeed, section 36 of the *Constitution Act of 1982* clearly sets out the federal government’s commitment to “promoting equal opportunities for the well-being of Canadians”, “furthering economic development to reduce disparity in opportunities” and providing equal access to quality social programmes for all Canadians.<sup>68</sup>

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<sup>68</sup> Section 36, Part III of the *Constitution Act, 1982* being the Schedule B to the *Canada Act 1982* (U. K.), 1982, c. 11.

In a country with as many resources as Canada, violations of social and economic rights are inherently connected to violations of the right to equality. In the words of Bruce Porter and Martha Jackson,

...the issue is not an inability to guarantee the essential enjoyment of social and economic rights because of limited resources, but rather a failure to adequately address social and economic inequality.<sup>69</sup>

In the past, social and economic rights have too often been considered as matters in which the courts should not intervene. This narrow vision of social and economic rights has been clearly rejected in international law. As the UN Committee on Economic, Social and Cultural Rights has stated :

The adoption of a rigid classification of economic, social and cultural rights which puts them, by definition, beyond the reach of the courts would thus be arbitrary and incompatible with the principle that the two sets of human rights are indivisible and interdependent. It would also drastically curtail the capacity of the courts to protect the rights of the most vulnerable and disadvantaged groups in society.<sup>70</sup>

Presently, in Canada and Quebec, a broader vision of social and economic rights, in keeping with the orientation of international law, is emerging, supported both by the Canadian Human Rights Commission<sup>71</sup> and numerous legal experts.<sup>72</sup>

In international law, the *Universal Declaration of Human Rights* and the human rights treaties that have grown from it reflect a vision where civil, political, social and economic rights form a whole. The *Universal Declaration* states that everyone has a right to an adequate standard of living,<sup>73</sup> to social security, and to the realization of the economic,

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<sup>69</sup> Martha Jackman and Bruce Porter. 1999. "Women's Substantive Equality and the Protection of Social and Economic Rights under the Canadian Human Rights Act". Ottawa: Status of Women Canada. Page 55.

<sup>70</sup>United Nations Committee on Economic, Social and Cultural Rights, *Nineteenth Session General Comment No. 9 The Domestic Application of the Covenant, Committee on Economic, Social and Cultural Rights*, Geneva, November 16<sup>th</sup> - December 4<sup>th</sup> 1998, E/C.12/1998/24 at par. 7, 9 and 10.

<sup>71</sup> Canadian Human Rights Commission. 1998. *Annual Report 1997*. Page 2. Online: [chrc-ccdp.ca/ar-ra/ar97-ra97/menu.asp?l=e](http://chrc-ccdp.ca/ar-ra/ar97-ra97/menu.asp?l=e). Canadian Human Rights Commission. 1999. *Annual Report 1998*. Page 1. Online : <http://www.chrc-ccdp.ca/ar-ra/as98-ra98/menu.asp?l=e>.

<sup>72</sup> See, for example, Pierre Bosset. 1996. "Les droits économiques et sociaux : parents pauvres de la Charte québécoise?" 75 *Can. Bar Rev.* 583; Lucie Lamarche. 1995. "An Historical Review of Social and Economic Rights: A Case for Real Rights" 15 ( 2 and 3) *Canadian Women Studies* 12; Martha Jackman. 1999. "From National Standards to Justiciable Rights: Enforcing International Social and Economic Guarantees Through Charter of Rights Review" 14 *Journal of Law and Social Policy* 69.

<sup>73</sup> *Universal Declaration of Human Rights, supra*, note 3, article 25.

social and cultural rights indispensable for her dignity and the free development of her personality.<sup>74</sup> Likewise, Canada has recently reiterated the inseparability of civil, political, social and economic rights by voting in favour of a United Nations General Assembly Resolution stating that : “All human rights and fundamental freedoms are indivisible and interdependent” and the “full realization of civil and political rights without the enjoyment of economic, social and cultural rights is impossible.”<sup>75</sup>

Authors Shelagh Day and Gwen Brodsky have argued convincingly that implicit in international human rights instruments is the recognition of the innate relationship between civil and political rights, economic, social and cultural rights, and equality rights. In this perspective, equality rights are seen to form a bridge between civil and political rights, and social and economic rights.

The Covenants guarantee the right of everyone to enjoy equally civil and political rights, and economic, social, and cultural rights. But there is more. Together, the *ICESCR* and the *ICCPR* delineate the multiple dimensions of equality. To enjoy equality, a woman must be able to enjoy fully all her rights. Equality is a bridging and an encompassing value, whose realization requires the full realization of both civil and political rights, and economic, social, and cultural rights.<sup>76</sup>

In particular, social and economic rights can be seen to hold a special importance for women because of the social assignment to women of the role of unpaid caregiver for children, men and old people, one of the factors cited earlier that explain why women are poor. As Day and Brodsky have noted :

The *ICESCR* is important to women's equality because its subject matter is practical, material conditions, and because it articulates the responsibility of governments for making those conditions adequate. As Barbara Stark points out, it recognizes “the right of every human being to be nurtured — to be housed, fed, clothed, healed and educated.” These rights, she argues, describe women's work. Caregiving work is constructed as female and therefore as undeserving of adequate compensation; and this is a major factor in women's poverty. Stark says the importance of the *ICESCR* lies in the fact that it “shifts the responsibility from women to the State for some nurturing work.” (Footnotes omitted.)<sup>77</sup>

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<sup>74</sup> *Universal Declaration of Human Rights, supra*, note 3, article 22.

<sup>75</sup> Res. GA NU 32/130 (1997).

<sup>76</sup> Shelagh Day et Gwen Brodsky, *supra*, note 11, page 55.

<sup>77</sup> Shelagh Day et Gwen Brodsky, *supra*, note 11, page 56.

Furthermore, recognising the importance of social and economic rights as fundamental components of equality rights is consistent with the substantive and contextual reading of equality rights adopted by the Supreme Court of Canada, as well as with its jurisprudence on the role of international law in interpreting the Canadian *Charter* and human rights legislation. It is also consistent with the international perspective emerging on the interrelationship between equality rights, and social and economic rights.<sup>78</sup> As Bruce Porter and Martha Jackman have stated, including social and economic rights in the *Act* would thus simply “fill out the current approach to the protection of equality and dignity, and ...build on what has already been recognized, internationally and domestically, as implicit in that guarantee.”<sup>79</sup>

This broader vision of the protection of equality and dignity means that, consistent with international human rights treaties ratified by Canada, the *Act* should include social and economic rights and more specifically, recognise the right to adequate food, clothing, housing, health care, social security, education, work which is freely chosen, child care, support services and other fundamental requirements for security and dignity of the person. The list of social and economic rights to be protected should be drawn from Canada’s international human rights commitments, in other words, from the *Universal Declaration of Human Rights*, the *ICESCR*, *CEDAW* and the *Convention on the Rights of the Child*.<sup>80</sup> The courts can then look to international sources for guidance on the meaning of these rights.

The *Act* should state clearly that Parliament and the Government of Canada have an obligation to take steps, to the maximum of available resources, with a view to achieving

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<sup>78</sup> See, for example: “ *Le droit à une nourriture suffisante (art. 11) : 12/05/99. Observation générale 12 (E/C.12/1999/5). (General Comments)*”, par. 18, Comité des droits économiques, sociaux et culturels des Nations Unies: “En outre, toute discrimination en matière d'accès à la nourriture, ainsi qu'aux moyens et aux prestations permettant de se procurer de la nourriture, que cette discrimination soit fondée sur la race, la couleur, le sexe, la langue, l'âge, la religion, les opinions politiques ou autres, l'origine nationale ou sociale, la fortune, la naissance ou toute autre situation, dans le but d'infirmier la jouissance ou l'exercice, en pleine égalité, des droits économiques, sociaux et culturels, ou d'y porter atteinte, constitue une violation du Pacte.”

<sup>79</sup> Bruce Porter and Martha Jackman, *supra*, note 69, page 55.

progressively the full realisation of the enumerated social and economic rights (as does, for example, the South African Constitution). A separate adjudication mechanism must be set up so that complaints relating to the “ progressive realisation ” of these rights could be heard and adjudicated. The model proposed by the National Anti-Poverty Organisation (NAPO) and articulated in Bruce Porter and Martha Jackman’s recent study, where a specialised “Social Rights Tribunal” would be established to receive and hear complaints with the respect to the “progressive realisation” of social and economic rights represents an interesting and ground-breaking approach to providing recourse and remedy for the violation of these rights.<sup>81</sup>

In the model proposed by NAPO, as in international law, “the focus of tribunal or court scrutiny will be on the most vulnerable groups in society, and on those who are deprived of the “minimum essential elements” of the right”.<sup>82</sup> This way, women, and particularly women who are disadvantaged in more than one way, will be afforded the greatest protection. Also, a more rigorous standard of review would be applied to “deliberately retrogressive measures” with respect to the realisation of social and economic rights, such as the repeal of the Canada Assistance Plan and other social program cuts, that have had a disproportionate impact on low-income women.

Denying any social or economic right based on a prohibited ground of discrimination should also be explicitly prohibited. Like Bruce Porter and Martha Jackman, we believe that complaints of discriminatory denial (including complaints referring to discriminatory impact on protected groups) should be heard in the same manner as any other complaint under the *Act*, as is presently the case in Quebec.<sup>83</sup> However, we caution against the adoption of exceptions to the right to equality as broad as those proposed by Bruce Porter and Martha Jackman.

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<sup>80</sup> Res. GA 44/25, Off. Doc. GA UN, 44<sup>th</sup> Sess. (Supp. no. 49), UN Doc. A/44/49 (1989).

<sup>81</sup> Bruce Porter and Martha Jackman, *supra*, note 69.

<sup>82</sup> Bruce Porter and Martha Jackman, *supra*, note 69, page 78.

<sup>83</sup> See as an example of the adjudication of the discriminatory denial of the right to free public education, *Commission des droits de la personne du Québec et Commission scolaire Richelieu*, *supra*, note 37.

More specifically, Bruce Porter and Martha Jackman propose that denial of a social and economic right based on a prohibited ground of discrimination should be considered a discriminatory practice “ unless such a denial is reasonable and bona fide considering health, safety and cost ”. Denying a remedy for discrimination because of the cost involved runs counter to the goal of alleviating historical economic and social disadvantage. The more a group is disadvantaged, the higher the cost of remedying that discrimination may be...and according to the proposed model, the harder it will be for that group to convince the Tribunal that it is possible for the government to one day cease the discriminatory practice! The group is disadvantaged precisely because the members of that group bear a weight that should be shouldered by society as a whole. The proposed model thus favours the remedying of less deeply-rooted discrimination, and puts discrimination ingrained into the economy out of the reach of the law. It could very well reinforce the social and economic inequality from which women are trying to emerge.

If we look to international law, and more specifically to the terms of the *ICESCR*, no exceptions to equal enjoyment of social and economic rights are permitted. Contrary to social and economic rights in general whose realization is limited by the “maximum of available resources” (Article 2 (1)), the overarching obligation not to discriminate articulated in Article 2(2)<sup>84</sup> must be implemented immediately and is in no way subject to the standard of progressive realization .<sup>85</sup>

Furthermore, Article 3 of the *Covenant* states that :

3. The States Parties to the present *Covenant* undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present *Covenant*.

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<sup>84</sup> Article 2(2) of the *ICESCR* reads as follows : “The States Parties to the present *Covenant* undertake to guarantee that the rights enunciated in the present *Covenant* will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

<sup>85</sup> *General Comment No. 3* of the Committee on Economic, Social and Cultural Rights declares that budgetary limitations or financial constraints do not remove a State Party’s immediate obligation of non-discrimination : *The Nature of States Parties’ Obligations, General Comment No. 3*, adopted Dec. 13<sup>th</sup>-14<sup>th</sup> 1990, U.N. ESCOR, Comm. On Econ., Soc. & Cult. Rts., 5th Sess., 49th and 50th meetings, at par. 9, U.N. Doc. E/C.12/1990/8 (1990).

Thus, Canada cannot satisfy its obligations under Article 3 if, when women and men are compared as groups in relation to a particular right, women are more disadvantaged. The undertaking to progressively realize the rights in the *Covenant* cannot be interpreted to mean that men will realize these rights sooner or more fully than women. Furthermore, women are not a homogeneous group, and among the poorest and most vulnerable women in Canada are Aboriginal women, women of colour, immigrant and refugee women, women with disabilities, single mothers, and elderly women. These women experience not just the disadvantage of their gender, but also discrimination and inequality based on their race, colour, national origin, disability, marital status and age. In light of Articles 3 and 2(2), the progressive realization of *Covenant* rights thus requires an egalitarian distribution of social and economic benefits at any point in time.

International social and economic rights should be incorporated into the *Act* in so as to guarantee the minimum entitlements set out in international human rights instruments, and so as to provide a way to monitor and adjudicate the respect of these entitlements. Indeed, the Commission should be responsible for monitoring Canada's international commitments in the human rights field in general, and for reporting on violations to the Canadian government.

In conclusion, in order for women to be able to one day achieve substantive equality, the *Act* should explicitly include social and economic rights. Then and only then will the federal human rights regime address the underlying causes of women's inequality.

## 6.2 Gender identity

Trans/Action, a Vancouver-based community organization, has proposed that "gender identity" be added to the *Act* as a prohibited ground of discrimination. Trans/Action defines this ground in the following manner :

Protection from discrimination on the ground of gender identity means protection against discrimination for anyone who, temporarily or permanently, is or is perceived to be a member of the gender other than his or her assigned gender.<sup>86</sup>

Trans/Action states further :

The intention of this proposed amendment is to protect all trans people from discrimination, including people who identify as pre-operative, post-operative and non-operative transsexuals, cross dressers, drag kings, drag queens, transgenderists, transvestites, gender benders, butch lesbians (even if they don't identify as trans), femme gay men (even if they don't identify as trans), boys, and pangendered people.<sup>87</sup>

Trans/Action advocates that the protection must operate in such a way that self-identification is defining. In other words, non-discrimination on the grounds of gender identity would require an employer or service provider to treat a person according to which sex they claim, temporarily or permanently, to belong.

It is important to protect people from discrimination and harassment because they are or are understood to be a member of any particular sub-group of transgendered persons. In our view, however, it is problematic that self-identification be defining.

More specifically, we are concerned about the impact of this approach on women. Because, of the two sexes, women are the disadvantaged group, women have developed services and political organisations that are designed specifically to assist women to address the forms of disadvantage that flow from their biological difference from men, from the construction of women's biology as inferior, and from the cultural and social construction of women's roles and women's status as socially, legally, politically, economically subordinate. The importance of these services and political organisations is unquestionable. They are places where women can come to understand how they have been constructed as the second sex, how each woman learns the lessons of her sex from birth and throughout childhood, what consequences flow from these lessons, and how

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<sup>86</sup> Trans/Action Proposed Resolution, June 1999.

<sup>87</sup> *Ibid.*

each woman, and women as a group, can come to struggle with those teachings in adulthood.

Human rights law has recognised, since its inception, that there is a legitimate reason for women's spaces, and that women should be permitted to have political and social space from which those who are not women are excluded.

Because of women's disadvantage in employment and services, women have fought to obtain employment equity and service equity programs, which set targets and devise measures that will increase the representation of women in jobs and at levels in employment where they are underrepresented. Women have also strived to increase the representation of women in political life, on boards, courts, and in the Senate. Protection from discrimination for transgendered persons should not operate in such a way as to undermine the fragile and important efforts that women have made to create spaces for their political and social development individually, and as a group, and for providing support to each other as victims of pervasive male violence and male dominance. Nor should such protections permit persons who claim to be women to diminish women's access to jobs and opportunities that they have fought to obtain because of long-standing under-representation.

This, however, could be a potential consequence of making gender purely a matter of self-identification. Men as a group and men's organisations are at no risk from women who identify as men, since men are not a disadvantaged group and there is no space required by men to deal with the effects of their disadvantage. However, women as a group and women's organisations are at risk from those who are not women but identify themselves, either temporarily or permanently, as women.

Since the 1970's women have fought repeatedly to retain women-only space, and to explain the need for it. Men have objected to being excluded from Take Back the Night Marches, from employment in women's service organisations, from women's unions, from the editorial pages of women's newspapers.

Although in a different form, the same issue arises again here. A correlative of the proposal to alter the *Act* to make gender identity a matter of self-identification is the assertion that those who want access to women's spaces are women because they claim to be so, and that consequently, they cannot be excluded on the basis that they are not women. For example, on June 17, 1995, the following recommendation was adopted in Houston, Texas by the International Conference on Transgender Law and Employment Policy:

Given the right to define one's own gender and the corresponding right to free expression of self-defined gender identity, no individual could be denied access to a space or denied participation in an activity by virtue of a self-defined gender identity which is not in accord with chromosomal sex, genitalia, assigned birth sex, or initial gender role.<sup>88</sup>

Because the current proposal to add "gender identity" as a prohibited ground of discrimination to the *Act* is premised on an understanding of gender as purely a matter of self-identification, we are not able to support this proposal. In our view, before any reform is undertaken in this area, the complex policy question of the interaction between rights for transgendered persons and women's rights must be subjected to serious study, and specific consultation with the women's organisations whose constituents stand to be most affected. We recommend that until such time as an approach to this issue is developed that does not threaten to erode the rights of women, "gender identity" as a matter of self-identification should not be included in the *Act* as a prohibited ground of discrimination.

### 6.3 Association with a person identified by a prohibited ground of discrimination

As the primary caregivers of children and also – increasingly so in the context of cutbacks to social services – of disabled children, other disabled family members and elderly relatives, women often must juggle their own responsibilities on a professional

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<sup>88</sup> "The Right of Access to Gendered Space and Participation in Gendered Activity". Cited in Transgendered Law Reform Project, Appendix A (1996, Vancouver, High Risk Society, ISBN 0-96-80565-0-4).

level with the needs of their children or dependent relatives. While the *Act* currently protects children and disabled or elderly family members from discrimination themselves, no such protection is extended to the women who assume their care. Thus, the law offers no more consideration to a woman who must absent herself from work in order to accompany an ageing parent who needs medical attention to the hospital, or take her disabled child for physiotherapy, than to the employee who absents himself, for example, for recreational purposes.

Also, the *Act* currently offers no protection to the person who advocates or stands up for people who themselves are protected by the *Act*. Thus, if retaliation is made against the employee who tries to come to the aid of a colleague who is being sexually harassed, he has no recourse under the *Act*. This obviously discourages people who support egalitarian values or believe in respecting the differences of others from manifesting themselves, and leaves those who do, vulnerable.

The Ontario *Human Rights Code* contains a provision concerning discrimination by association :

12. A right under Part I [*Freedom from Discrimination*] is infringed where the discrimination is because of relationship, association or dealings with a person or persons identified by a prohibited ground of discrimination.

In order to take into account the reality of the caregiving responsibilities that many women assume at the same time as their paid work, and to protect those people who defend the values on which human rights legislation is based, a revised *Act* should contain a similar provision.

## **7. Exclusions from the protection of the *Act*: Discrimination created by the *Act* itself**

### 7.1 Women not legally present in Canada or outside Canada

Currently, the protection of the *Act* does not extend to women and other victims of discrimination who are not lawfully present in Canada. This goes against a fundamental

principle underlying human rights protection : human rights constitute the minimum protection guaranteed to every human being. In Canada, human rights should constitute protection available to all people subject to federal laws, and in fact, are doubly important in the context of women and men who are already vulnerable because of their tenuous immigration status.

The *Act* also allows discrimination by Canadian officials, such as Visa Officers, as long as these Visa Officers are acting outside Canada. We believe that women's right to equality without discrimination on the basis of sex, race, colour and national and ethnic origin, and other principles reflected in the *Act* – and guaranteed in the *Canadian Charter* – should govern the actions of the Canadian government and all of its representatives, regardless of whether these actions take place inside or outside Canada.

#### Women not lawfully present in Canada

*In British Columbia, currently more than fifty women Fujian Chinese refugee claimants are detained by immigration authorities while waiting for their claims to be processed. Although refugee claimants are usually allowed to live freely in Canada until their claims are determined, these women are held in a prison. Some are separated from their children who have been placed in foster homes. Occasionally, some are held in segregation for periods of time.*

Presently, section 40 (5)(a) of the *Act* states that the Commission may not deal with a complaint in relation to a discriminatory practice unless the victim of the practice was lawfully present in Canada. This section of the *Act* should be abolished.

Violations of fundamental human rights should not be tolerated anywhere in Canadian society, and we all have an interest in seeing that where violations occur, recourse and remedy are available. Women who have applied for refugee status but have not yet had their application processed, women who have inadvertently let their visitor or student visa expire, domestic workers fleeing abusive employers who are thus from one day to the next illegally present in Canada because their work permits are specific to one

employer – all these women are subject to Canadian law and use Canadian services, yet, by virtue of section 40 (5)(a), are afforded no protection by the *Act*.

Women without legal status as Canadian citizens or permanent residents are, by definition, a particularly vulnerable group, often doubly disadvantaged because of their race, religion, and national and ethnic origin. There is no justification for excluding these women from the scope of the *Act*. Doing so necessarily removes from human rights scrutiny the actions of all federally regulated employers and service providers when dealing with this group of women, as well as the actions of Immigration personnel whose job it is to deal with the regularisation of these women's status or, as the case may be, their voluntary departure or even deportation.

In the area of immigration, a significant degree of discretion is vested in the Minister and the Department of Immigration. Nonetheless, decision-making exempt from sexist and racist stereotypes is surely required. However, presently, section 40(5)(a) prevents scrutiny of decisions and practices for violations of fundamental human rights.

Furthermore, human rights legislation must itself conform to the *Charter*,<sup>89</sup> which applies to “every human being physically present in Canada and by virtue of such presence amenable to Canadian law”.<sup>90</sup> Unless the current Review of the *Act* leads to the repeal of section 40(5)(a), the equality guarantees under section 15 of the *Charter* will undoubtedly one day be found to prohibit the discrimination created by this section of the *Act*.

The *Universal Declaration of Human Rights* states in its Preamble that “human rights should be protected by the rule of law”. Women present in Canada, but not legally so, are obviously no longer protected by the law of their country of origin. Excluding them from the protection of Canadian law leaves them in a vacuum, contrary to the express terms of the *Universal Declaration*.

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<sup>89</sup> *Vriend, supra*, note 25.

<sup>90</sup> *Singh v. Minister of Employment and Immigration* [1985] 1 S.C.R. 177 , page 202.

### Discrimination by Canadian officials acting outside the country

*A father, mother, and two children apply from Greece to join the maternal grandparents in Montreal as sponsored immigrants. Processing of the family's applications is nearly complete when, under section 19(1) of the Immigration Act, a Medical Officer declares that the son's diabetes "might reasonably be expected to cause excessive demands on health or social services". Consequently, both the boy's and his mother's applications are refused, despite the fact that the boy's diabetes has been controlled at minimal cost for several years. Despite the stereotypical and erroneous way in which the boy's disability has been categorised as a drain on society, and his mother's case held to follow his, and without any regard for either the mother's or the boy's potential contribution to Canadian society, no recourse is available under the Act for the mother, nor for her son.*

*Ms. Naqvi, a single woman from Pakistani, applies for a visitor's visa in order to visit her sister in Canada. The visa officer refuses her request, stating that she would "stay illegally in the country and get married there", and this, without ever having interviewed Ms. Naqvi! Recourse is available under the Act only for Ms. Naqvi's sister, but even with a finding of discrimination, no remedy is available.*

Currently, section 40(5)(c) prevents the Commission from investigating discriminatory acts committed by Canadian officials, such as Visa Officers, as long as these officials are outside the country and the people discriminated against are not Canadian citizens or permanent residents. This exclusion means that immigration selection and the granting of visas to enter Canada is exempt from human rights scrutiny.

Given the blatant racism and marked preference for white, northern European immigrants that has characterised Canada's immigration policy until the recent past, exempting Canadian immigration officers posted in other countries from the principles of the *Act* is even less justifiable.

Concerns about extraterritorial application of the *Act* have sometimes been cited as the rationale behind section 40(5)(c). But investigating human rights complaints in this field involves examining the policies and practises of the Immigration Department and their employees. The objects of scrutiny are exclusively Canadian government practices,

policies and personnel, and any remedial orders would be made exclusively against them.

As Chantal Tie has written :

Nobody argues that Canadian visa officers operating abroad are operating without jurisdiction because of extraterritorial considerations when applying Canadian Immigration Laws. Why then, should extraterritorial considerations arise when we seek to review their decisions under human rights legislation?<sup>91</sup>

Indeed, a certain concept of human dignity is at stake here, one which :

...recognises that the responsibility of (...) government is unbounded by international borders and driven by concern for people, not just “the people”, and that a “foreigner’s experience of the Canadian legal system, wherever it may occur, should be blanketed in protection.”<sup>92</sup>

The Courts have considered Canadians whose attempts to sponsor relatives abroad have been thwarted by discriminatory practices to be themselves “victims” of discrimination and therefore able to file a complaint under the *Act*. Arguments concerning dignity have again been invoked. For example, in the case involving Ms. Naqvi discussed above, when standing of Ms. Naqvi’s sister to bring a complaint was granted, the Judge remarked :

The affront to the dignity of the Complainants must be regarded as more severe when many of the same personal characteristics which comprise the grounds of the discriminatory practice are shared by the Complainants - i.e. race, national and ethnic origin and gender...<sup>93</sup>

However, the Courts have also ruled that in terms of remedy, no order to process the relative’s request for landing is available. A stalemate has been reached in that the *Act* can apply to third party “victims” of discrimination, but no remedy is available to these third party “victims”.<sup>94</sup>

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<sup>91</sup> Chantal Tie. 1994. “Immigrant Selection and the Canadian Human Rights Act” 10 *Journal of Law and Social Policy* 81 at 91.

<sup>92</sup> Donald Galloway. 1991. “The Extraterritorial Application of the Charter of Rights to Visa Applicants” 23 *Ottawa L. Rev.* 335.

<sup>93</sup> *Naqvi v. Canada (Employment and Immigration Commission)* [1993] C.H.R.D. No. 2 (QL) at 83. Cited in Chantal Tie, *supra*, note 91, page 94.

<sup>94</sup> In fact, we believe that when the Immigration Department is allowed to practice sexism and racism with impunity, all of Canadian society is a victim.

The *Immigration Act* and the administration of it are subject to the provisions of the *Charter*.<sup>95</sup> Moreover, section 3(f) of the *Immigration Act* stipulates that an immigration objective is :

(f) to ensure that any person who seeks admission to Canada on either a permanent or a temporary basis is subject to standards of admission that do not discriminate in a manner inconsistent with the Canadian Charter of Rights and Freedoms;...

While the Federal Court of Appeal has held that the *Charter* does not apply to visa officer decisions made outside of Canada,<sup>96</sup> many authors question the wisdom of this ruling and consider that eventually the Supreme Court will reverse the trend and render a decision to the opposite effect.<sup>97</sup>

In any case, in the meantime, section 40(5)(c) of the *Act* should be abolished and a clear break with past traditions of flagrant discrimination and racism in the selection of immigrants to Canada should be established. Discrimination by Canadian officials, exercising powers granted to them by Canadian law, to determine the admissibility of foreign women (and men) to Canada, should be subject to scrutiny under the *Canadian Human Rights Act*.

## 7.2 Discriminatory provisions made pursuant to the *Indian Act*

*Trudy is a Mohawk woman who has lived all of her life in Kahnawake, an Indian reservation near Châteauguay, Quebec. In 1986, Trudy married Peter, who has also lived all of his life in Kahnawake. Peter was legally adopted and raised from birth by a Mohawk couple, but his biological parents were respectively black and Jewish. Both Trudy and Peter are “traditionalists” devoted to traditional Mohawk values, customs and practices. Trudy and Peter have four children. Yet neither Trudy, Peter, nor their children are considered to be members of the Kahnawake Mohawk Band.*

*At age 21, Peter lost his status as a Band member, and all the privileges and rights that go with it, because he didn't have at least 50% Indian blood. When Trudy married Peter, she too lost her status as a Band member because of her marriage to a “non-Indian” (the Mohawk Council does not recognize Bill C-31 and has its own rule that says that for men*

<sup>95</sup> *Singh, supra*, note 90 at 201.

<sup>96</sup> *Ruparel v. Canada (Minister of Employment and Immigration)*, [1990] F.C.J. No.701 (QL). Cited in *Chantal Tie, supra*, note 91, page 95.

<sup>97</sup> See, for example, *Donald Galloway, supra*, note 92 and *Chantal Tie, supra*, note 91.

*and women alike, marriage to a non-Indian entails loss of status). In spite of the fact that Trudy's children live in Kahnawake and are being raised as Mohawks, they are not Band members either, and officially are not allowed to go school in Kahnawake.*

*Trudy and her family's exclusion was based on Band Membership criteria established in 1984 by the Mohawk Council of Kahnawake aimed at countering the steady assimilation of the centrally located Kahnawake Mohawks. Mostly because of mixed marriages, a growing number of non-Mohawks live in Kahnawake and this is endangering the culture, traditions and language of the Mohawk people.*

*In 1991, Trudy and Peter and their children filed a complaint with the Canadian Human Rights Commission. In 1998, a Tribunal ruled in their favour, having first taken great pains to conclude that the policy of the Mohawk Council of Kahnawake concerning band membership had not been made "under or pursuant to" the Indian Act within the meaning of Section 67 of the Canadian Human Rights Act.<sup>98</sup>*

Section 67 of the *Canadian Human Rights Act* was adopted in a context where a formal definition of equality prevailed, and was intended to prevent non-Aboriginal people from challenging the rights of Aboriginal peoples under the *Indian Act*. In 1977, this was no doubt a laudable objective. Since then, however, the prevailing contextual and substantive approach to equality, together with the adoption of section 15 (2) of the *Canadian Charter*, meets this objective without any express provision to this effect being necessary in the *Act*.

The adoption of section 67 also pursued a second, more sinister objective, which was to prevent First Nation women who, through marriage to non-Indians, had lost their status under the *Indian Act*, from making claims for discrimination.<sup>99</sup> This discriminatory objective can clearly no longer be justified, and furthermore, no longer constitutes government policy either, as reflected by the adoption in 1985 of Bill C-31 re-establishing these women's status as Indians.

Yet in spite of the adoption of Bill C-31, discrimination against First Nation women created by the previous *Indian Act*, (namely, upon marriage to non-Indians, the loss of

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<sup>98</sup> *Jacobs v. Mohawk Council of Kahnawake*, Canadian Human Rights Tribunal, March 11, 1998. Online: [www.chrt-tcdp.gc.ca/jacobs-f.htm](http://www.chrt-tcdp.gc.ca/jacobs-f.htm).

their status while the non-Indian women married to Indians acquired status) continues to have serious and widespread repercussions for these women and their children. Many of these women have never been able to re-establish residence on their reserves, and their children's fate is even more uncertain. Evelyn Obomsawin, from the Native Women's Association, testified eloquently at the Montreal Round Table discussions concerning the Abenakis "C-31" women's struggle to ensure their children's full inclusion in Odanak, a reserve community located near Sutton, Quebec; her story is a telling illustration of the fact that the damage done to First Nation women and their communities by the *Indian Act* is far from having been repaired.<sup>100</sup> The Mohawk Council of Kahnawake, for example, does not recognize Bill C-31 and considers that it has exclusive jurisdiction over Band Membership in Kahnawake.<sup>101</sup>

The continued presence of section 67 represents an obstacle for and can prevent First Nation women from challenging what they perceive to be discrimination within their own communities. This was not the purpose for which section 67 was enacted.

The *Jacobs* case illustrates that while Band councils may have sound and compelling concerns about the protection of their culture and community from outside influences, their responses to these concerns may not always justify the kinds of discriminatory actions undertaken by the Bands. Exempting Bands' actions from all scrutiny for human rights violations is not acceptable, and is bound to have a greater impact on women, particularly given the chaos and injustice created by the discrimination perpetrated by the historic application of certain provisions of the *Indian Act* to First Nation women.

While any law governing Aboriginal peoples should take into account the distinct culture, way of life, traditions and values of the Aboriginal peoples concerned, it is not appropriate that the *Act* provide no recourse for the women of Aboriginal communities or self-governing nations when their fundamental rights are violated.

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<sup>99</sup> *Jacobs, supra*, note 98, page 21.

<sup>100</sup> Round Table discussions, *CHRA* Review Panel, Montreal, September 30, 1999.

The current distinction between acts “made under or pursuant to” the *Indian Act*, which are shielded from scrutiny by section 67 of the *Act*, and those policies which are not, which consequently can be scrutinised, is artificial and arbitrary. Section 67 should be repealed so that all of the actions of Band Councils can be scrutinised for human rights violations.

This position is in conformity with section 15 of the *Charter*. Indeed, denying the protection of the *Act*, particularly to “C-31 women” who lost their status under the *Indian Act* and are still struggling to overcome the grievous disadvantage imposed on them by this loss, would constitute a violation of section 15 equality rights.<sup>102</sup> The *Charter* applies to the *Act*, and any revision of the *Act* must endeavour to respect the spirit and the letter of the *Charter*.

This position is also in continuity with the position adopted in Part II of the Constitution concerning the Rights of the Aboriginal Peoples of Canada, and most specifically, paragraph 4 of section 35. Section 35 reads :

35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
- (2) In this Act, “aboriginal peoples of Canada” includes the Indian, Inuit and Métis peoples of Canada.
- (3) For greater certainty, in subsection (1) “treaty rights” includes rights that now exist by way of land claims agreements or may be so acquired.
- (4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

In the context of heated public debate at the time of the repatriation of the Constitution, paragraph 4 of section 35 of the Constitution was adopted to embody the Canadian government’s commitment to the fact that Aboriginal women’s rights would not be sacrificed during the process begun in order to right the wrongs done to the Aboriginal peoples of Canada.

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<sup>101</sup> *Jacobs, supra*, note 98, page 10.

<sup>102</sup> The ground would be an analogous one situated at the intersection of sex, aboriginality or race, and perhaps even residence (see *Corbiere v. Canada (Minster of Indian and Northern Affairs)* [1999] 2 S.C.R. 203).

Furthermore, providing recourse under the *Act* when Aboriginal people wish to challenge what they perceive to be discrimination within their own communities does not negate Aboriginal communities' aspirations for greater autonomy or self-government. After all, international human rights instruments such as the *Universal Declaration of Human Rights* establish common ideals for the peoples of all nations.

Section 67 of the *Act* no longer has a valid reason to exist. While there is undoubtedly room for improvement in terms of greater involvement of Aboriginal people, and especially, Aboriginal women, in the Human Rights Tribunal decision-making process and at the Commission, it should be possible, without evacuating the concerns, traditions and values specific to Aboriginal communities, for First Nation women to challenge their Band Councils' or self-governing nations' actions under the *Act*.

### 7.3 Cap on moral damages

Section 53 (2), par. (e) of the *Act* currently sets a maximum of twenty thousand dollars (20 000\$) on the damages that a Tribunal can award for "pain and suffering".

The *Act* should not place any limit on moral damages. The obligation for the claimant to prove moral damages constitutes a sufficient check on any award the Tribunal might make. Any maximum set by the *Act* will eventually be outdated. At the same time, setting a maximum for moral damages creates a more limited regime of responsibility for respondents to human rights complaints than for defendants in civil suits under common (or civil) law, reflecting a paternalistic attitude towards people who must make claims under the *CHRA*.

## Conclusion

Since the adoption of the *Act* in 1977, human rights jurisprudence has evolved significantly. Today, the notion of substantive equality essential for the advancement of women's rights must be incorporated into the language and the framework of the *Act*. The Canadian Human Rights Commission should have the capacities necessary to enforce human rights in an efficient and timely fashion, and claimants should have access to a hearing before a Human Rights Tribunal with representation by a Commission lawyer. The role of the Commission as an advocate for human rights should be clarified, and in case of conflict with the *Employment Equity Act*, the Commission's role as an advocate for human rights should not be compromised. A compliance or regulatory model of human rights enforcement should be adopted to reverse systemic discrimination against women and other disadvantaged groups in an efficient and effective manner. As well, given the changing economy, responsibility for human rights claims must be maintained for successor employers and service providers.

Social condition should be included in the *Act* as a prohibited ground of discrimination, and the *Act* must explicitly include social and economic rights. The *Act* will then become an effective vehicle for implementing international human rights treaty obligations. Finally, the revision of the *Act* must ensure that the *Act* complies with the *Charter*. In other words, the discrimination created by the *Act* itself should be repealed. Specifically, the protection offered by *Act* should extend to women not legally present in Canada, or outside Canada but subject to the decisions of Canadian officials applying Canadian laws, and discriminatory provisions made pursuant to the *Indian Act* should no longer be exempted from review under the *Act*.