

**WOMEN OF NO IMPORTANCE?: THE ONTARIO PAY EQUITY ACT AND LOW
PAID WOMEN**

by

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ABSTRACT***WOMEN OF NO IMPORTANCE: THE ONTARIO PAY EQUITY ACT AND LOW
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The Ontario *Pay Equity Act* has been hailed by many as the most progressive pay equity legislation thus far enacted in that it is the first proactive scheme to apply to both the public and private sectors. For many women in the Ontario labour force, however, it is entirely irrelevant.

In analyzing the Act I draw on the recent work of anti-essentialist and postmodern feminist legal theorists who are critical of previous scholarship for excluding the voices of many women by ignoring central aspects of their being - race or ethnicity for example - and focusing exclusively on their gender. Applying these theoretical approaches to a concrete area of law requires an anti-essentialist understanding of human identity and the use of shifting standpoints; the scrutiny of the influence of *specific* policies, laws and cases on *particular* groups of women.

I analyze the provisions of the *Pay Equity Act* in relation to those women who are becoming more marginalized in the labour market as a result of global economic restructuring, especially low paid women. In Canada, these changes have translated into the decline of manufacturing industries and growth in the service sector and an increasing

dependence on atypical forms of employment, mainly part-time work, temporary positions and homework. These trends combine to produce the 'good jobs/bad jobs scenario': the polarisation of the market into full-time, well paid, unionized occupations covered by labour laws and part time, low-paid jobs in unorganized workforces which are excluded from legislative protection. Most of these contingent workers are women, and First Nations women, disabled women, women of colour and recent immigrant women are disproportionately represented in 'bad jobs.'

Placing these women at the centre rather than the margins of the analysis reveals that they are excluded by the *Pay Equity Act* as a result of the limited coverage of the legislation, the inadequate protection of non-unionized workers, the limited comparisons allowed, the low standards of equity required and the reluctance of the Pay Equity Tribunal to rigorously examine job evaluation schemes. In effect, the legislation functions as part of the legislative deregulation which is providing a 'flexible' labour force for Canadian employers.

I conclude that, while feminist legal theorists must remain aware of the commonalities in the experiences of women, it is necessary to remain sensitive to differences in order to determine which groups of women are being marginalized by the processes of economic restructuring and what strategies will be most likely to benefit them.

TABLE OF CONTENTS

| | | |
|---|-------|------------|
| Abstract | ..... | ii |
| Table of Contents | ..... | iv |
| Acknowledgement | ..... | vi |
| Dedication | ..... | vii |
| Chapter 1 Introduction | ..... | 1 |
| Chapter 2 The Inessential Worker: Feminist Legal Theory and Labour Law | | |
| Introduction | ..... | 5 |
| I. Defining Equality | ..... | 6 |
| II. (E)merging Voices | ..... | 12 |
| III. Complicating Labour Law | ..... | 19 |
| Chapter 3 Women, Work and Value: Women's Domestic and Market Labour | | |
| Introduction | ..... | 25 |
| I. "Do You Work or are you a Housewife?" | ..... | 26 |
| II. Women's Worth | ..... | 39 |
| III. Working for Wages | ..... | 47 |
| Chapter 4 The Good Jobs/Bad Jobs Scenario: Women and Economic Restructuring | | |
| Introduction | ..... | 58 |
| I. The New Canadian Economy | ..... | 59 |
| II. The Flexible Female Worker | ..... | 66 |
| Chapter 5 Fumbling Towards Equity: Trends in Legislating Women's Pay 1951-1987 | | |
| Introduction | ..... | 76 |
| I. Fair Remuneration | ..... | 77 |
| II. Comparing Dissimilar Jobs | ..... | 87 |
| III. Combating Systemic Inequality | ..... | 94 |
| Chapter 6 Falling Short of the Ideal Woman: The Ontario <i>Pay Equity Act</i> and the Contingent Female Worker | | |
| Introduction | ..... | 101 |

| | |
|--|---------|
| I. The Ontario <i>Pay Equity Act</i> | 101 |
| II. The Limitations of the <i>Pay Equity Act</i> | 108 |
| A. Slipping Through the Cracks | 108 |
| B. Divided We Fall..... | 112 |
| C. Incomparable Women..... | 117 |
| D. Constructing Value | 125 |
| Chapter 7 Conclusion..... | 137 |
| Bibliography | 149 |

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CHAPTER ONE
INTRODUCTION

As the processes of economic restructuring revolutionize the structure and conditions of employment, it becomes imperative to critically re-assess labour laws which purport to protect vulnerable workers in order to question whether they can be effective in the era of globalization. As part of this project, feminist legal theorists interested in the localized effects of global economic changes have begun to re-examine laws intended to benefit female employees. In this thesis I analyze the effects of pay equity measures, in particular the Ontario *Pay Equity Act*, to determine whether, in the context of recent changes in the organization of production, they have the potential to raise the pay of those women who are most marginalized in the Canadian labour force.

In so doing, I draw on recent feminist legal theory, which, as I discuss in Chapter 2, criticizes feminist scholars for positing a unitary conception of 'femaleness' and universalizing from the experience of privileged women. As a result the experiences and needs of certain groups of women including, for example, disabled and First Nations women, were absent from their work. Increasingly, feminist legal scholars are attempting to remain sensitive to the distinct and often conflicting needs and interests of different groups of women. This approach has influenced my analysis of pay equity in that I have made no attempt to determine the relevance of the legislation to 'women' as an

undifferentiated category but have instead focused on a particular group: the low-paid female workers who occupy precarious, low-benefit jobs in the new Canadian labour market. I have also tried to take account of aspects of their identity other than gender which are central to their position in the labour market, particularly class, race or ethnicity, ability and citizenship status.

As I show in Chapter 3, which provides a background to my discussion of pay equity, although some women are lower paid than others, on average women's wages are lower than those of men. Much of this gender-based wage gap is attributable to occupational segregation: men and women predominate in different jobs and the jobs in which women predominate have lower wages. Feminists have argued that this demonstrates that work performed by women in the labour market is undervalued. The reason for this, they argue, is that both women and the work they have always done in the home are undervalued. Indeed, traditional scholarship on labour constructed a definition of 'work' which entirely excluded women's domestic labour. This obscured its centrality in economic life. Since industrialization, the very ability of men with children to be employed in the marketplace has been dependent on women maintaining the home and caring for their children. The undervaluation of women's labour lies at the heart of pay equity legislation in that it allows women to compare their jobs to those of higher-paid men and claim that they are performing work of equal value.

Having discussed these general themes relating to women's paid and domestic labour, I turn in Chapter 4, to analyse the effect of economic restructuring on women's employment. I first analyze the trends: the organization of production on an international basis; increasing international competition and mobility of capital; the decline in the manufacturing industries and growth of the service sector; corporate 'downsizing,' contracting out and privatization causing an increase in the number of small workplaces and the increasing number of 'non-standard' jobs including casual, temporary and home-based work. The combined effect of these changes has been a polarization of occupations into 'good' and 'bad' jobs, the former characterised by high wages, stability and generous benefits and the latter by low wages and benefits and precarious job tenure.

The majority of employees with 'bad' jobs are female. This is because women are disproportionately employed in non-standard jobs, in sectors which have been fragmented by contracting out and privatization and in sectors which are being hit hardest by international competition and free trade. Not all female workers, however, feel the harshest effects of globalization. In fact, it appears that existing labour market divisions between women - White and visible minority, First Nations and non-aboriginal, able-bodied and disabled, for instance - are being exacerbated by economic restructuring, further polarizing women in the wage labour market.

Can pay equity legislation, then, reach the flexible female workforce? I decided to aim this question at the Ontario *Pay Equity Act* because it is often presented as the high point in

the evolution of equal pay statutes. I trace the history of these laws in Chapter 5, and then examine the two main advantages of the Act. First, it is a proactive scheme: the onus is on the employer to review his or her pay scales rather than on an aggrieved employee to complain. Secondly, the Ontario Act is the only proactive legislation in Canada to cover *both* the public and private sectors. In other jurisdictions, only public employees are covered.

Since its enactment, however, there has been a feeling among feminist scholars that the *Pay Equity Act* is failing to fulfil its potential in that a number of its provisions are defeating its stated goal of attacking systemic discrimination in women's pay. In Chapter 6 I critically analyze the provisions of the Act to determine whether it can reach the women on the wrong side of the 'good' jobs/ 'bad' jobs divide. I conclude in Chapter 7 by discussing alternatives to legislation in an attempt to determine which strategies would be of most benefit to those women who are marginalized by economic restructuring.

CHAPTER TWO

THE INESSENTIAL WORKER: FEMINIST LEGAL THEORY AND LABOUR LAW

INTRODUCTION

Feminist legal theorists share a common goal: to analyze the ways in which, and to what extent, the law and legal institutions - both widely defined - influence or shape the lives of women and the extent to which they can be used to challenge their oppression.¹ In my analysis of the Ontario *Pay Equity Act* I will draw on this body of work. More particularly, my thesis is influenced by recent work done under the banner of feminist theory which ascribes to the fundamentals of feminist thought but rejects the methodology and content of much feminist literature: the anti-essentialist and postmodernist feminist critiques.

¹ Susan B. Boyd and Elizabeth A. Sheehy define feminist scholarship as 'scholarship which takes into account a woman's perspectives or interests.' They exclude from this definition works which 'purport to treat issues of concern to women in a "neutral" fashion.' "Canadian Feminist Perspectives on Law" (1986) 13 J. Law & Soc. 283 at 283.

***I. DEFINING EQUALITY: THE THEORETICAL TRADITIONS OF FEMINIST
LEGAL LITERATURE***

To discuss the development of feminist legal thought without identifying the different theoretical traditions which divide the literature would be to inadequately represent the nature of this scholarship as there are noticeable strands within it and discernible similarities in the ways in which different theorists have conceived of the law and its application to women. Yet I am reluctant to begin classifying feminist legal work as the traditional categories - liberal, socialist and radical - can appear stagnant and inflexible, incapable of encompassing the complexities of the literature.² They can also prove divisive - providing spurious ideological barriers for feminists to do battle across rather than facilitating dialogue between those with separate agendas. A better way to think of the branches of feminist legal work is to see them not as conflicting but as enhancing each other as criticism from one tradition stimulates discussion and the evolution of another line of thought.³

² Leslie Bender, "A Lawyer's Primer on Feminist Theory and Tort" (1988) 38 J. Legal Educ. 3 at note 5.

³ Mary Morton, "Ideologies of Equity and Equality in Canadian Family Law" (Paper presented at the Conference on Feminism, Critical Theory and the Canadian Legal System, Windsor, Ontario, June 4-7, 1988) cited in Susan B. Boyd & Elizabeth A. Sheehy, *Canadian Feminist Perspectives on Law* (Toronto: Resources for Feminist Research, Ontario Institute for Studies in Education, 1989) [hereinafter *Feminist Perspectives*] at 3.

The feminist tradition that surfaced first in legal scholarship was liberal feminism. Legal academics, inspired by the 'second wave' of the women's movement to adopt a conspicuously feminist stance to the law, began to contribute articles in this vein to Canadian law journals in the early 1970s.⁴ 'Equality' for women was the central concern of their scholarship and the conception of equality they adopted was that reflected in the influential *Report of the Royal Commission on the Status of Women* released in 1970 - that like should be treated alike and different should be treated differently.⁵ In adopting this classically liberal conception of equal rights for women these theorists understood gender neutrality as the appropriate underlying principle for all legislation and case-law. This led them to argue for measures such as the elimination of gender discriminatory language in statutes. The only exceptions to strict neutrality they accepted were in circumstances in which the differences between women and men were so obvious and intractable that they could not be ignored. Statutes providing for maternity leave for pregnant employees, for example, were acceptable to liberal feminists.⁶ The goal was to

⁴ In 1973, Veronica Strong-Boag noted that 'there is no adequate treatment of women and the law in Canada.' See "Cousin Cinderella: a Guide to Historical Literature Pertaining to Canadian Women" in Marylee Stephenson, ed., *Women in Canada* (Toronto: New Press, 1973) 262 at 284-5 cited in Sheehy & Boyd, *Feminist Perspectives*, *supra* note 3 at 1.

⁵ Royal Commission on the Status of Women in Canada, *Report of the Royal Commission on the Status of Women* (Ottawa: Information Canada, 1970).

⁶ See, for example, Marguerite E. Ritchie, "Alice Through the Statutes" (1975) 21 McGill L. J. 685; Marguerite E. Ritchie, "The Language of Oppression: Alice Talks Back" (1977) 23 McGill L. J. 535; Edward Ryan, "Family Law and Human Equality" (1975-76) 1 *Atlantis: A Women's Studies Journal* 74 cited in Boyd & Sheehy, *Feminist Perspectives*, *supra* note 3 at 1.

achieve equitable treatment of women within existing structures and the theory was underpinned by the assumption that if most laws could be worded and applied in a sex-neutral way this would ultimately benefit women.⁷

Gradually, demands for the formal legal equality of women were met by the legislature, culminating in the enactment of the *Canadian Charter of Rights and Freedoms* in 1982 which contained an equal rights provision specifically extended to women.⁸ When lawyers attempted to have equality provisions applied to strike down legislation, however, they often met with judicial resistance.⁹ It was soon obvious that formal legal equality could easily coexist with the continuing subordination of many women and as the traditional formulation of liberal theory did not challenge dominant models of the family, the economy and other social institutions, it was inadequate to attain the kinds of changes necessary to achieve substantive equality for women.

Other scholarship looked at the part of legal challenges in the struggles for suffrage and 'personhood' in the nineteenth and early twentieth century. See, for example, Constance B. Backhouse, "'To Open the way for Others of my Sex.' Clara Brett Martin's Career as Canada's First Woman Lawyer" (1985) 1 C.J.W.L. 1 cited in Boyd & Sheehy, *ibid.* at 1.

⁷ *Ibid.* at 1. Boyd & Sheehy give the example of Beverley Baines, "Women, Human Rights and the Constitution" in Audrey Doerr & Micheline Carrier, eds., *Women and the Constitution* (Ottawa: Canadian Advisory Council on the Status of Women, 1981) at 31-63.

⁸ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11, s. 15.

⁹ *Bliss v Attorney-General of Canada* (1979) 1 S.C.R. 183; *Attorney-General of Canada v Lavell, Isaac et al. v Bedard* (1973) 38 D.L.R. (3d) 481, interpreting the *Canadian Bill of Rights*.

The impasse in the use of liberal feminist ideas in the courtroom during the late 1970s and early 1980s was paralleled in legal scholarship. Feminist legal literature from this period reveals a crisis in confidence in the value of traditional forms of equality-thinking. To rely on a conception of equality prominent in Western thought since Aristotle was politically astute, and appealing to a concept of such historical pedigree allowed the women's movement to draw on a rhetoric which had fueled each of the Western struggles for democracy. It had achieved concrete changes, most notably in securing sanctions against sex discrimination. There was, however, a dilemma to be faced by advocates of this form of equality: whether to adopt the sameness/difference approach to equality for women in a society where sexual difference is a central organizing concept.

The liberal notion of equality has traditionally been formulated as a comparative concept - a comparison of disadvantaged and advantaged groups undertaken to demonstrate their equal entitlement to a desired social benefit. Lurking within this formulation of equality is the danger that women will be compared to an unquestioned fixed male standard; that they will be constructed as 'the other,' as something other than the norm which is male.¹⁰ Many feminist legal scholars questioned whether pursuing an 'equality' which entailed a destined-to-fail attempt at maleness was worth pursuing and developed alternative theories, grounded in liberalism but adapted to take account of what had been learned about orthodox liberal theory and embodying new conceptions of 'equality.' 'Result equality'

¹⁰ Marie Ashe calls this approach 'assimilationism.' See "Mind's Opportunity: Birthing a Poststructuralist Feminist Jurisprudence" (1987) 4 Syracuse L. Rev. 1129 at 1140-1141.

liberal feminists, for example, recognized the inadequacy of 'gender neutrality,' and the partisan nature of social, economic and political institutions, and called for laws and cases to be developed to promote *de facto* equality.¹¹

Radical feminist scholarship appears more recently in legal literature.¹² In this line of thought, the idea of equality entailing comparison with men is seen as ultimately regressive. Instead, radical feminist argue that qualities associated with women should be valued *in themselves* rather than judged according to an inherently male standard. In attempting to reveal the patriarchal underpinnings of law and the ways in which it facilitates and perpetuates 'male' control of women's lives and excludes 'women's' values, interests and needs, radical feminists have made similar arguments to those of some later forms of liberal feminism. Both, for example, called for the integration of new values into Charter interpretation. Indeed some liberal feminists, arguing for equality of results drew on radical feminist thought and demanded that 'women's values' be reflected in the law.¹³ Radical feminists did, however, tend to be more suspicious than their liberal sisters of claims that legislation and case-law could easily make changes in women's lives.

¹¹ Boyd & Sheehy, *Feminist Perspectives*, *supra* note 3 at 1-2. They cite Salina M. Shrofel, "Equality Rights and Law Reform in Saskatchewan: an Assessment of the Charter Compliance Process" (1985) 1 C.J.W.L. 108.

¹² *Ibid.* at 2 citing Patricia Hughes, "Feminist Equality and the Charter: Conflict with Reality?" (1985) 5 Windsor Y.B. Access Just. 39.

¹³ *Ibid.* citing Christine L. M. Boyle, Marie-Andree Bertrand, Celine Lacerte-Lamontagne & Rebecca Shamai, *A Feminist Review of Criminal Law* (Ottawa: Minster of Supply and Services, 1985) Part II and Angela R. Miles, "Feminism, Equality and Liberation" (1985) C.J.W.L. 42.

Feminist legal scholarship drawing on socialist theory rarely featured in Canadian legal journals until the late 1980s.¹⁴ Socialist legal feminists rejected the conception of a universal, ahistorical 'patriarchy,' constant and unchanging through all times but emphasized its tenacity; its fluid, shifting nature and the way it changed form in different periods according to dominant economic systems, social norms and culture. Gender relations, for socialist feminists, are firmly grounded in a specific historical context.¹⁵ The interests of socialist legal feminist scholars have included the 'feminization' of the labour market, the gendered nature of labour relations and the dichotomy between the public and the private manifest in the structure and interpretation of the Canadian *Charter of Rights and Freedoms*.¹⁶

¹⁴ On socialist legal feminism in Canada see Shelley A. M. Gavigan, "Paradise Lost, Paradox Revisited: The Implications of Familial Ideology for Feminist, Lesbian, and Gay Engagement to Law" (1993) 31 Osgoode Hall L. J. 589 [hereinafter "Familial Ideology"]. Boyd & Sheehy note that more 'pure' Marxist feminist approaches to law which 'stress the mode and relations of production as the primary determinant of women's oppression seem to be relatively rare in Canada.' *Feminist Perspectives*, *supra* note 3 at 5, note 12.

¹⁵ See, for example, Shelley Gavigan, "Women and Abortion in Canada: What's Law Got to do with It?" in Heather Jon Maroney & Meg Luxton, eds., *Feminism and Political Economy: Women's Work, Women's Struggles* (Toronto: Methuen, 1987) 263 at 264.

¹⁶ For examples of socialist legal feminism see Gavigan, "Familial Ideology," *supra* note 14 at note 17.

II.(E)MERGING VOICES: RECENT CRITIQUES OF FEMINIST LEGAL THEORY

Feminist scholarship in all academic disciplines has been criticized on the basis that its authors - predominantly white middle class academics - have adopted the viewpoint of particular women - themselves - from which to explain the position of all women.¹⁷ Their resulting analyses, it is argued, are too often applicable only to a specific group of relatively privileged women while conveying the impression that they are universally applicable. Consequently, not only have the significant ways in which women differ from one another been ignored, but gender has been understood as the *sole* basis of the oppression of women, obscuring the ways in which specific groups of women are oppressed as a result of other characteristics, for example their disability, race or religion.¹⁸ In North American law journals an attack on the universalist assumptions of feminist legal work has been launched in a deluge of articles protesting the exclusion of the voices and experiences of, for instance, First Nations women, women of colour, disabled women, lesbians and working-class women.¹⁹

¹⁷ Boyd & Sheehy, *Feminist Perspectives*, *supra* note 3 at 1.

¹⁸ Nitya Duclos notes that women differ from each other by 'ethnicity (by religion, origin, nationality, culture, language and more); by class; by sexual preference; by life experience, including our families; by education, ideology and political adherence; and by physical and mental ability.' "Lessons of Difference: Feminist Theory on Cultural Diversity" 1990 38 Buff. L. Rev. 325 at 355. [hereinafter "Lessons of Difference"]

Take, for example, the long-standing exclusion of women of colour in feminist legal theory.²⁰ The assumptions, knowledge, understandings and even the 'common sense' of white women, reflected in their scholarship, have been shown to erase the presence of women of color in legal theory or obscure and distort their experiences.²¹ Aboriginal women too have argued that the particular form of oppression in their lives must be integrated into feminist thought and that they must not either be ignored by White women nor merely lumped together in the undifferentiated category of 'women of colour.'²²

¹⁹ These categories are in no way complete but merely reflect the differentials which have recently begun to be included in feminist legal scholarship. It is possible that other significant factors are still absent.

See, for example, Himani Bannerji, "Introducing Racism: Notes Towards an Anti-racist Feminism" (1987) 16 Resources for Feminist Research 10; Paulette M. Caldwell, "A Hair Piece: Perspectives on the Intersection of Race and Gender" (1991) Duke L. J. 365; Kimberle Crenshaw, "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics" (1989) U. Chi. Legal F. 139; Nitya Duclos, "Disappearing Women: Reclaiming Women in Human Rights Cases" (1993) 6 C.J.W.L. 25; Angela P. Harris, "Race and Essentialism in Feminist Legal Theory" (1990) 42 Stan. L. Rev. 581; Jacinth Herbert, "'Otherness' and the Black Woman" (1989) 3 C.J.W.L. 269; Marlee Kline, "Race, Racism and Feminist Legal Theory" (1989) 12 Harv. Women's L.J. 115; Mari J. Matsuda, "When The First Quail Calls: Multiple Consciousness as Jurisprudential Method" (1989) Women's Rts. L. Rep. 7; Martha Minow, "Beyond Universality" (1989) U. Chi. Legal F. 115; Patricia Monture, "Ka-nin-geh-heh-gah-e-sa-nonh-yah-gah" (1986) 2 C.J.W.L. 159; Archana Parashar, "Essentialism or Pluralism: The Future of Legal Feminism" (1993) 6 C.J.W.L. 328; Judy Scales-Trent, "Black Women and The Constitution: Finding Our Place, Asserting Our Rights" (1989) 24 Harv. C.R.-C.L. L. Rev. 9; Esmeralda Thornhill, "Focus on Black Women!" (1985) C.J.W.L. 153; Patricia Williams, "Response to Mari Matsuda" (1989) 11 Women's Rts. L. Rep. 11.

²⁰ The term 'women of colour' can be understood as constructing white skin as the norm. See Boyd & Sheehy, *Feminist Perspectives*, *supra* note 3 at 5-6, note 18.

²¹ See Himani Bannerji *supra* note 19 .

Working-class women also have seen their interests buried beneath those of the economically privileged due to the glaring absence of any consideration of class in much feminist legal thought. This creates an illusory identity of interests between women and simultaneously obscures the commonalities in the experience of working class women and men.²³

Feminist legal scholarship has perpetuated its exclusions in a number of ways. The terminology of much scholarship is universalist. For example, the once common use of the

²² Roxanna Ng writes:

‘Although they also suffer from racism and sexism in our society, the historical and contemporary processes shaping Aboriginal women’s lives are different from those of other Canadian women.’

“Immigrant Women and Institutionalized Racism” in Sandra Burt, Lorraine Code & Lindsey Burt, eds., *Changing Patterns: Women in Canada* (Toronto: McClelland & Stewart, 1988) 184 at 185.

For reflections on First Nations Women and the law see, for example, Patricia Monture, *supra* note 19 and “A Viscious Circle: Child Welfare and the First Nations” (1989) 3 C.J.W.L. 1 and Patricia A. Monture-Okanee, “The Roles and Responsibilities of Aboriginal Women: Reclaiming Justice” (1992) 56 Sask. L. Rev. 237.

²³ In the words of Elizabeth Spelman:

[T]o refer to the power ‘all men have over all women’ makes it look as if my relationship to the bank vice president I am asking for a loan is just like my relationship to the man who empties my wastebasket at the office each night.

See *Inessential Woman: Problems of Exclusion in Feminist Thought* (Boston: Beacon Press, 1988) at 186.

Shelley A.M. Gavigan notes that class is invisible in Kline, *supra* note 19; Herbert, *supra* note 19 and Thornhill, *supra* note 19. See “Familial Ideology,” *supra* note 14 at 158.

terms 'visible minorities' and 'women' or 'aboriginal people' and 'women' as if these categories were mutually exclusive effects the theoretical erasure of certain groups of women.²⁴ Legal scholars are further criticized for overlooking specific groups of women in the content of their work; for too often failing to question whether the impact of specific laws or court decisions is experienced differently by white women and women of colour; by overlooking the relevance of ethnicity, class and other differentials and thus constructing a simplistic picture of oppression in Canadian society.²⁵

These exclusions can be seen as the outcome of the exclusive focus on gender in much feminist academic work which has too often failed to take account of whether or to what extent other facets of women's lives - citizenship, age, religion, disability - structure their experience. Given the difficulty of taking account of every constituent of an individual's identity, coupled with a desire to explore that which had for so long been ignored - gender - perhaps this is understandable. However, to ask women to consider themselves only in terms of their sex or gender - however defined - is to ignore equally important aspects of their lives and risks discarding the particular experiences of those who are not in the privileged position from which they can contribute to feminist scholarship. It also contributes to the notion that there exists a universal linkage in the experiences of all women from which can be discerned a definable feminine identity bonding all women in a

²⁴ Crenshaw states that black women are 'theoretically erased' from much feminist legal scholarship. *Supra* note 19 at 139.

²⁵ See Kline, *supra* note 19 at 121 and Duclos, "Lessons of Difference," *supra* note 18 at 356.

chain of sisterhood; an essential experience common to all women which can be understood in isolation from other strands of individual identity. But which qualities can be characterized as 'female'? And to what extent do all women share these? To search for an essential female-ness risks failing to respect women's own conceptions of their own identity, needs and interests.²⁶

Linked to these 'anti-essentialist' critiques of feminist theory is recent feminist legal work which draws on epistemological approaches originating in European critical theory.²⁷

There is in fact, a symbiotic relationship between much feminist and postmodernist work as many insights of the latter tradition have been previously explored in the work of feminist theorists, for example the challenge to the centrality of science and rationalism.²⁸

²⁶ See Minow, *supra* note 19 at 113 and 130-1.

²⁷ Susan B. Boyd, "Some Postmodernist Challenges to Feminist Analyses of Law, Family and State: Ideology and Discourse in Child Custody Law" (1991) 10 Can. J. Fam. L. 79. [hereinafter "Postmodernist Challenges"] at 81.

²⁸ On feminism and postmodernism generally see Jane Flax, "Postmodernism and Gender Relations in Feminist Theory" (1987) 12 Signs 621; Linda J. Nicholson, ed., *Feminism/Postmodernism* (New York & London: Routledge, 1990); Joan W. Scott, "Deconstructing Equality-Versus-Difference: Or, the Uses of Poststructuralist Theory for Feminism" (1988) 14 Feminist Studies 33 and Chris Weedon, *Feminist Practice and Poststructuralist Theory* (Oxford: Basil Blackwell, 1987).

On postmodernism and feminist legal theory see Ashe, *supra* note 10; Bannerji, *supra* note 19; Boyd, "Postmodernist Challenges," *supra* note 27; Annie Bunting, "Feminism, Foucault and Law as Power/knowledge" (1992) 30 Alta L. Rev. 829; Dawn Currie, "Feminist Encounters With Postmodernism: Exploring the Impasse of Debates on Philosophy and Law" (1992) 5 C.J.W.L.; Clare Dalton, "Where We Stand: Observations on the Situation of Feminist Legal Thought" (1987-88) 3 Berkeley Women's L. J. 1; Mary Joe Frug, "Postmodernism and Gender Relations in Feminist Theory" (1987) 12 Signs 621; "A Postmodern Feminist Legal Manifesto (An Unfinished Draft)" (1992) 105 Harv.

The postmodern rejection of 'grand theory' in favour of 'local and specific knowledge'²⁹ also mirrors the approach of feminists who criticize the universalizing ways in which concepts such as 'capitalism' or 'patriarchy' have been created and applied, and explore the nuances of the conflicting, contradictory nature of these concepts.³⁰

Postmodernist feminist scholarship merges with other strands of anti-essentialist feminist work in understanding gender, race and class as integrated and interdependent in order to gain a more comprehensive picture of the complexities of capitalist, patriarchal racist societies.³¹ Within feminist legal scholarship, these trends translate into the scrutiny of *particular* policies, laws and cases in relation to *specific* groups of women, eschewing any attempt to develop a general theory of 'women' and 'the law.' This approach markedly contrasts with the work of those feminist legal theorists who attempted to identify a root cause of women's oppression by and under 'the law.'³²

L. Rev. 1045, *Postmodern Legal Feminism* (New York: Routledge, 1992) and "The Problem of Sexual Difference and Equality in Feminist Legal Scholarship" (1992) 26 New Eng. L. Rev. 666.

On law and postmodernism more generally see, for example, Alan Hunt, "The Big Fear: Law Confronts Postmodernism" (1990) 35 McGill L. J. 507 and Gerald Turkel, "Michel Foucault: Law, Power and Knowledge" (1990) 17 J.L. & Soc. 170.

²⁹ Ashe, *supra* note 10 at 1161.

³⁰ Boyd, "Postmodernist Challenges," *supra* note 27 at 81.

³¹ Boyd, "Postmodernist Challenges," *supra* note 27 at 83.

³² See, for example, the work of Catharine MacKinnon and for a defense of her work see Frances Olsen, "Book Review of *Feminism Unmodified* by Catharine A. MacKinnon" (1989) 89 Colum. L. Rev. 1147.

Although much feminist work has preceded and contributed to postmodern thought it has also been open to challenge by those who see feminism as forming part of the Enlightenment tradition. In particular, those feminist scholars who have exposed purportedly universal truths as springing from a particular standpoint - that of powerful men - now find themselves challenged as attempting to posit their own 'truth' which again excludes the voices of the less powerful.³³ Thus postmodern approaches both reinforce and challenge preceding modes of feminist thinking.

Universalism and essentialism were the unavoidable byproducts of a quest for a single feminist standpoint which inevitably required the suppression of dissenting voices. The postmodern stance, allied with other anti-universalist critiques, requires that, in particular contexts, where identifiable groups of women share common interests, they be considered separately and in relation to other groups, allowing traditionally suppressed viewpoints to become an integral part of feminist legal discourse.³⁴

The development of this work challenges the continued use of the traditional categorisation of feminist legal literature into liberal, radical and socialist.³⁵ However acceptance of these criticisms does not entail the comprehensive rejection of previous

³³ Boyd, "Postmodernist Challenges," *supra* note 27 at 81.

³⁴ Ashe, *supra* note 10 at 1162.

³⁵ Boyd & Sheehy, *Feminist Perspectives*, *supra* note 3 at 2.

feminist thought or even of the insights of white middle-class women. Rather, it requires that previous analyses be extended, restructured and abandoned if necessary to fit the experiences of many different groups of women.³⁶ Thus, it can be used in labour law to 'complicate' the analysis of legal provisions by introducing a variety of standpoints from which to look at the law.

III. COMPLICATING LABOUR LAW: ANTI-ESSENTIALIST AND POSTMODERNIST FEMINIST APPROACHES

Traditionally, those - predominantly male - scholars writing critically about the labour market were preoccupied with the concept of class, ignoring the significance of other relevant characteristics including gender and race.³⁷ Socialist and Marxist theorists in particular have been criticized for allowing their interest in class to obscure the importance of other differentials. This omission stemmed from the writings of Marx, who understood an individual's class position as being determined solely by his or her direct relationship to the means of production. As Marxist theory developed, during a period when the majority

³⁶ Boyd & Sheehy, *Feminist Perspectives*, *supra* note 3 at 23. They cite Daiva K. Stasiulus who outlines the socialist feminist analysis of women's oppression as resulting in part from the support given by the state to a household consisting of a male 'breadwinner' and full-time housewife. She argues it can be used in looking at Canadian immigration laws and policies which, she argues, reinforce and sustain the dependency of immigrant women on their male partners. See "Rainbow Feminism: Perspectives on Minority Women in Canada" (1987) 16 *Resources for Feminist Research* 5 at 7.

³⁷ Roxanna Ng, "Immigrant Women: The Construction of a Labour Market Category" (1990/1991) 4 *C.J.W.L.* 96 at 111 [hereinafter "Immigrant Women"].

of women worked at home rather than in the wage labour market, their domestic labour was excluded from the very notion of 'work.' Women's domestic labour was not seen as an integral part of the production process and consequently they were understood as 'dependents,' their class status and their experience of class assumed to be identical to that of the (male) breadwinner.³⁸

In contrast, as mentioned previously, many feminist theorists and activists have focused too exclusively on gender, abandoning any analysis of the different experiences and interests of women of different races and classes. Some radical feminists even argued that women, by reason of their shared responsibility for domestic labour, have an identity of interests and form a class in themselves.³⁹ This call to a universal 'women's experience' masks power differences between working class and middle class women. It also denies the possibility that men and women of the same class have similar needs and interests and can form alliances to serve their interests.

Race too is central in the constitution of class relations, but is often written of as if totally distinct from social class.⁴⁰ Roxanna Ng has explored how 'class' has traditionally been

³⁸ Pat Armstrong & Hugh Armstrong, *Theorizing Women's Work* (Toronto: Garamond Press, 1990) c. 5.

³⁹ See, for example, Christine Delphy, *The Main Enemy* (London: 1977) & *Close to Home* (London: Hutchinson, 1984).

⁴⁰ On this see, for example, M. Patricia Connelly & Pat Armstrong, eds., *Feminism in Action* (Toronto: Canadian Scholars' Press, 1992) at 5. See also Ng, "Immigrant Women," *supra* note 37.

conceived of solely as a socio-economic status by those researching race, while ethnicity and race have been thought of as encompassing only 'descent, common religion, and a shared feeling of belonging to the same group.' Race and class, then, have been treated as analytically distinct. Thus, for example, authors writing about Black persons may bring class into the equation only when analyzing the economic status of Black persons, rather than recognizing its wide-ranging relevance.⁴¹ As racism is situated in a capitalist patriarchal society it is difficult to analytically separate the workings of race, class and gender.⁴² A black working-class woman refused a job for example, who feels she has been discriminated against may have difficulty in determining whether she was discriminated against on the basis of her colour, class, gender or all three.

An anti-essentialist approach requires that gender, race and class oppression are seen as interlinked and analyzed in an integrated manner. Rather than each being added together and treated as 'additions' they must be analyzed in such a way as to expose how each constitutes and re-constitutes the others and the ways in which they intersect to help shape the experience of any individual.⁴³ The concerns of this recent scholarship should not be

⁴¹ Ng, "Immigrant Women," *supra* note 37 at 111. She cites the works of John Porter, *The Vertical Mosaic. An Analysis of Social Class and Power in Canada* (Toronto: University of Toronto Press, 1965) and Edward Robbins, "Ethnicity or Class? Social Relations in a Small Canadian Industrial Community," in *The New Ethnicity: Perspectives from Ethnology* (New York: West Publishing, 1975).

⁴² Bannerji, *supra* note 19 at 11.

⁴³ Shelley Gavigan criticizes feminist legal scholars for presenting 'a pyramid of oppressions' instead of truly integrating various differentials - race, sex, class, for example - into their analysis. Gavigan, "Familial Ideology," *supra* note 14 at 591-592.

taken as meaning that different groups of women have no commonalities. While focusing on the differences between groups of women, it is necessary also to stretch across boundaries and make connections between their experiences. This is of particular importance in analyzing labour law as many different groups of women experience very similar difficulties in the labour market. Women across class and race divisions face the conflict inherent in attempting to undertake both waged work in the market and unpaid domestic labour. Similarities *and* contradictions must be explored to understand the interrelationships and conflicts between different groups of women in society. Specific laws and cases must be analyzed in relation to different groups of women in specific circumstances to understand the complexity of the relation of the law to women's lives.

With this note of caution in mind, the concerns of anti-essentialist and postmodern feminist legal theory can be applied to labour law to develop an understanding of the ways in which labour legislation and cases impact on different groups of workers. Traditionally, 'labour law,' as theorized and taught, was a rather male affair, viewed from the perspective of those performing work for wages in the labour market (generally men) and ignoring those who worked at home (almost exclusively women). 'Labour laws' were statutes and decisions structuring and regulating the forms and conditions of market-based paid labour.⁴⁴ These laws are premised on the notion that the model 'worker' is in full-time employment, working outside the home fulfilling the role of family breadwinner with

⁴⁴ Hanne Petersen, in her discussion of Danish labour law, argues that 'traditional labour law is based upon male cultural hegemony.' "Perspectives of Women on Work and Law" (1989) 17 International Journal of the Sociology of Law 327 at 333.

a woman at home to maintain their home and raise their children.⁴⁵ The unpaid labour of women in the home was again ignored, the links between domestic and wage labour rarely drawn, and the difficulties for women in juggling two forms of labour apparently irrelevant.⁴⁶

Drawing on the insights gleaned from the work of anti-essentialist and postmodernist theorists of law, it is apparent that to fully comprehend the ways in which legal regulations impact on the lives of the many different groups in the labour market requires the adoption of shifting standpoints from which to view the legal provisions. For feminists, as Hanne Peterson has argued in her call for a 'feminist post-modernist' approach to the study of labour law, the search for a '*woman's* standpoint' or a '*woman's* perspective' must be abandoned. Instead, sensitivity to the contradictions and intersections of race, age, class and other relevant categories will facilitate an understanding of the commonalities between women in the paid labour market and also the ways in which some women can benefit from, and others be disadvantaged by, the laws which structure work in the paid labour market.

I am interested in analyzing the position of low paid female workers in the Canadian economy. To do this I will attempt to use shifting standpoints in looking at the effects of

⁴⁵ Joanne Conaghan "The Invisibility of Women in Labour Law: Gender-neutrality in Model-building" (1986) 14 Int'l J. Soc. of Law 377 at 380.

⁴⁶ See *infra* Chapter 3.

economic restructuring on these women and the extent of their protection under pay equity legislation. In order to fully explore their labour market experience, I will also attempt to discern the ways in which this group of women are divided across the axes of class, race or ethnicity, citizenship and disability.

CHAPTER THREE

WOMEN, WORK AND VALUE: WOMEN'S DOMESTIC AND MARKET LABOUR

INTRODUCTION

Women's work in the home and in the labour market are intimately connected. Household arrangements help determine the pattern of an individual woman's labour market participation, and shape her experience of paid labour. In relation to women's pay, feminists have argued that the work women have traditionally performed in the home has been attributed with little value in our society and this is related to a devaluation of their market labour and lower pay. In this Chapter, I will explore these themes and set up the background to my examination of pay equity by discussing women's household labour and the history of women's participation in the wage labour market.

I. "DO YOU WORK, OR ARE YOU A HOUSEWIFE?"¹: WOMEN AND DOMESTIC LABOUR²

When the domestic tasks performed by Canadian women in the late twentieth century are compared to those women performed in pre-industrial times and throughout the nineteenth and twentieth centuries, similarities are apparent.³ In fact, there is a marked continuity in the work that *both* women and men have performed in the home. Responsibility for the day-to-day tasks such as cooking, cleaning, sewing and caring for children and the elderly have generally been undertaken by women, while men have been responsible for less frequently required tasks, for example gardening, electrical repairs or the maintenance of home exteriors. In Ontario, the sexual division of labour has been present in non-native homes since the pre-industrial colonial era when both men and women undertook

¹ This question was posed in the Canadian census of 1971. See Elizabeth Batten, Dianna Gray, Carolyn Hallett, Albertha Lewis, and Jane Lewis, "Houseworkers" in *Working Women in Newfoundland* (St. John's, Newfoundland: Women's Place, 1974) at 24, cited in Ruth Roach Pierson, "The Politics of the Domestic Sphere" in Ruth Roach Pierson & Marjorie Griffin Cohen, *Canadian Women's Issues. Volume II: Bold Visions* 1 at 9.

² The term 'housework,' often used to encompass the work done by women in the home, can, as Meg Luxton has argued, disguise some of the work women do, particularly that involved in caring for children. I have chosen to use 'domestic labour' or the phrase suggested by Luxton, 'domestic work' interchangeably. See Meg Luxton, *More Than a Labour of Love: Three Generations of Women's Work in the Home* (Toronto: The Women's Press, 1980).

³ On the history of women's work in Canada see, for example, Marjorie Griffin Cohen, *Women's Work, Markets, and Economic Development in Nineteenth-Century Ontario* (Toronto: University of Toronto Press, 1988) and "Capitalist Development, Industrialization, and Women's Work" [hereinafter "Capitalist Development"] in Graham S. Lowe & Harvey J. Krahn, *Work in Canada: Readings in the Sociology of Work and Industry* (Scarborough, Ont: Nelson Canada, 1993) 14 at 20.

household production - women for domestic consumption and men for sale in the market.⁴ As industrialization revolutionized production and family life in the nineteenth century, most women continued to work at home while their husbands ventured outside to perform waged work.

Those few women who entered the paid labour force at this time faced a rigid division of labour and were employed in jobs which mirrored tasks from their sphere of responsibility in the home. This sexual division of labour still operates in relation to many male and female workers: women predominating in occupations such as cleaning services, the garment industry, nursing or childcare,⁵ and men in, for example, manufacturing, transportation or construction.⁶ In contrast, some highly educated men and women enter occupations which have little resemblance domestic labour such as, medicine, the law, management or engineering.⁷

⁴ Cohen, *ibid.* at 20.

⁵ In 1994, 70% of all employed women worked in either teaching, nursing and health-related occupations, clerical positions or sales and service occupations, compared to only 31% of employed men. For example, 86% of nurses and health-related therapists, 80% of clerks, 56% of service personnel and 46% of salespersons were women. There has been some change since 1982, when 77% of employed women were in these occupational categories. Statistics Canada, *Women in Canada*, 3rd ed. (Ottawa: Statistics Canada, 1995) at 67 [hereinafter *Women in Canada*].

⁶ *Ibid.* at 68. In 1994, 81% of workers in manufacturing, 91% in transportation and 98% in construction were male.

⁷ *Ibid.* at 67-68. Women are still in a minority in professions in the natural sciences, engineering and mathematics, where they constitute only 19% of employees. This has changed little since 1982 where they made up 15% of these professions and they still account for a relatively small share of total university enrollments in these fields. The

The sexual division of labour has been constructed as ahistoric, cross-cultural and inevitable in various discourses - political, moral, religious, scientific and legal. Through each, an ideology of women's natural domesticity has been created and sustained; a portrait of women as innately suited to the work they perform, the natural inhabitants of the domestic sphere. While men have been envisioned as actors in the public arena, in courts and legislatures, for example, and also in the wage-labour market, women have been constructed as guardians of the private sphere, suited for domestic labour, childcare and charitable work. Both sexes have in this process been accorded universal, immutable character traits: men as competitive, assertive, combative initiators and women as caring, nurturing, placid and passive.⁸

This picture of sexual difference, of polarized 'masculine' and 'feminine' essences, flows from a Western theoretical tradition centred around conceptual dichotomies.⁹ Here the public/private dichotomy posits two conceptually distinct public and private spheres to

number of women employed in diagnostic and treating positions in medicine and related health professions has increased. In 1994, 32% of doctors and dentists were female, rising from 18% in 1982. Women are a majority in the teaching professions - 63% of teachers are female and 57% of professionals employed in the social sciences or religion in 1994 were women.

⁸ Pierson, *supra* note 1 at 3.

⁹ This essentialist conception of sexual difference has been attacked by postmodern feminist legal theorists. See, for example, Dawn Currie, "Feminist Encounters With Postmodernism: Exploring the Impasse of Debates on Philosophy and Law" (1992) 5 C.J.W.L. 63 and Mary Joe Frug, "The Problem of Sexual Difference and Equality in Feminist Legal Scholarship" (1992) 26 New Eng. L. Rev. 666.

which men and women are ascribed. This worldview has both shaped and been sustained by the ways in which the sexes have laboured at home and in the marketplace. For example, the notion that women are primarily responsible for rearing children in the home¹⁰ has been integral to dominant moral and religious discourses and supported by 'experts' including psychologists who claim that a more or less consistent interaction between a young child and its mother is essential to the psychological well-being of the child.¹¹

Laws and legal institutions have played a role in creating and sustaining the ideology of female domesticity. Canadian legislatures, courts and legal academics have, historically, enforced the exclusion of women from public life and still frequently promote or uncritically accept the idea of the mother as primary responsible for child rearing.¹²

¹⁰ On the 'ideology of motherhood' see Susan B. Boyd, "Child Custody, Ideologies, and Employment" (1989) 3 C.J.W.L. 113. See also Evelyn Nakano Glenn et al., eds., *Mothering: Ideology, Experience, and Agency* (New York: Routledge, 1994); Carol Smart, ed., *Regulating Womanhood: Historical Essays on Marriage, Motherhood and Sexuality* (London & New York: Routledge, 1994); Betsy Wearing, *The Ideology of Motherhood* (Sydney: Allen, 1984).

¹¹ The federal government Division of Child Welfare, newspapers and magazines all disseminated this advice to women during the 1920s. See Veronica Strong-Boag, "Intruders in the Nursery: Childcare Professionals Reshape the Years One to Five, 1920-1940" in Joy Parr, ed., *Childhood and Family in Canadian History* (Toronto: McClelland & Stewart, 1982) 160. Similarly, 'experts' have claimed that juvenile delinquency is related to mothers undertaking paid labour outside the home. See Helen Levine & Alma Estable, *The Power Politics of Motherhood: A Feminist Critique of Theory and Practice* (Ottawa: Carleton University Press Mimeo, 1981) cited in Pat Armstrong & Hugh Armstrong, *Theorizing Women's Work* (Toronto: Garamond Press, 1990) at 22.

Decisions in child custody cases, for example, have accepted a conception of motherhood in which mothers who labour solely in the home are taken as the norm to which women who also work outside are compared and often found wanting.¹³

Feminists have been critical of the very notion of there being separate spheres. Feminist legal scholars have sought to reveal the ways in which the so-called 'private' sphere has been created and interfered in by statutes, regulations and court decisions.¹⁴ However, this feminist literature attacking the notion of separate private and public spheres has itself been criticized for adhering to an essentialist conception of 'women' and ignoring differences between and among different groups of women.¹⁵ Scholars have too often

¹² On the role of ideologies see Michael D.A. Freeman, "Legal Ideologies, Patriarchal Precedents, and Domestic Violence" in Michael D.A. Freeman, ed., *State, Law and the Family: Critical Perspectives* (London: Tavistock Publications, 1984) 51; Martha Minow, "Foreword: Justice Engendered" (1987) 101 Harv. L. Rev. 10; Frances E. Olsen, "The Family and the Market: a Study of Ideology and Legal Reform" (1983) 96 Harv. L. Rev. 1497 and "From False Paternalism to False Equality: Judicial Assaults on Feminist Community, Illinois 1869-95 (1986) 84 Mich. L. Rev. 1518; Deborah L. Rhode, "Association and Assimilation" (1986) 81 Nw. U. L. Rev. 106; Nadine Taub & Elizabeth M. Schneider, "Perspectives on Women's Subordination and the Role of Law" in David Kairys, ed., *The Politics of Law* (New York: Pantheon Books, 1982).

¹³ See Boyd, *supra* note 10. She argues that the ideology of motherhood meshes with an ideology of equality so that employed mothers are often assumed to have opportunities in the workforce equal to employed fathers and the fathers assumed to have equal 'parenting potential.' These circumstances are often uncritically assumed without taking account of which parent in fact undertakes most childcare responsibilities, and can lead to decisions which work against employed mothers.

¹⁴ See, for example, Olsen, *supra* note 12 and Jane Ursel, *Private Lives, Public Policy* (Toronto: Women's Press, 1992).

¹⁵ See, for example, Katherine Arnup, "Lesbians, Divorce, and Child Custody in Canada" (1989) 3 C.J.W.L. 18; Kimberle Crenshaw, "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and

assumed that all women have been historically confined to the home, an assumption that reflects a tendency of white middle-class feminist academics to universalize from the experience of a distinct group of (relatively privileged) women.

Indeed it is questionable whether the ideal woman of the ideology of domesticity was ever truly reflected in the lives of *any* group of women. Even at the height of social acceptance of separate spheres ideology, during the Victorian era, urban women in middle and upper-class households who remained at home frequently delegated the day-to-day care of their children and homes to working class women they employed as nannies and servants.

Domestic servants worked *both* in the wage labour market and at home, as did those women employed in the other limited number of occupations open to women in the late nineteenth and early twentieth centuries - for instance in factories, as waitresses, or as telephone operators. Many others worked for free in their husbands' businesses such as family farms. These criticisms highlight the necessity, when thinking about the work women do, to take account of the differential ways in which domestic labour is experienced by different groups of women - middle class and working class, white and visible minority, those who perform it for free in their own homes and those who both work unpaid in their own homes and for wages in the house of an employer.

Antiracist Politics" (1989) U. Chi. Legal F. 139 at 155-6 and Marlee Kline, "Complicating the Ideology of Motherhood: Child Welfare and First Nations Women" (1993) 18 Queen's L. J. 306.

As part of the critique of the public/private distinction, feminists have also criticized traditional theories of work for constructing and sustaining a conceptual separation of domestic and paid labour. Feminist legal theorists have shown how the laws constructing work presuppose a certain arrangement of the home.¹⁶ Within academic scholarship, the working life of the male worker was often analyzed in isolation from his home life.

Constructing a conceptual divide between the wage labour market and the home, thinking of them as two distinct spheres operating independently, obscured the relationship that existed between the domestic conditions of the husband and his employment in the labour market; that the ability of men to take part in waged labour was entirely dependent on women raising their children and maintaining their home.¹⁷

This observation is not merely of historical interest. Even after the massive influx of women into the paid labour force during the mid-twentieth century, the model of 'the worker' from the earlier period lingers on. Most workplaces are still structured around the expectation that an individual occupying a job is 'male' in the sense of being either single or supported by a non-working wife and therefore substantially free of work and family

¹⁶ See, for example, Nancy E. Dowd, "Work and Family: The Gender Paradox and The Limitations of Discrimination Analysis in Restructuring the Workplace" (1989) 24 Harv. C.R.-C.L. L. Rev. 79.

¹⁷ Meg Luxton, "Conceptualizing Women in Anthropology and Sociology," in Canadian Research Institute for the Advancement of Women/ Institut Canadien de Recherches sur les Femmes, ed., *Knowledge Reconsidered: A Feminist Overview* (Ottawa: CRIAW/ICRAF, 1984) cited in Armstrong & Armstrong, *supra* note 11 at 14.

responsibilities during (and even after) working hours.¹⁸ Most people, however, live as part of a dual-income couple.¹⁹

Dual income couples, particularly those with children, are faced with a conflict between the two types of labour that must be performed daily - at home and in the paid workplace. By all accounts, it appears that the sexes are resolving the conflict in significantly different ways. For a great many men with working partners and children, there is a continuity with male work patterns in the middle of the century when most had spouses who laboured at home: they negotiate the work-family conflict by ignoring it. In contrast, most women find the answer in the 'double day': a neat euphemism for a draining endeavor - the battle to perform two jobs, paid work and domestic labour, in one workday. A recent study shows that most women involved in paid labour return from their place of employment and then perform the majority of domestic labour.²⁰ Katherine Marshall looked at patterns of sex segregation in domestic labour in 1990 drawing on figures from Statistics Canada's General Social Survey and defining 'housework' as meal preparation and cleaning up, cleaning and laundry, tasks which she estimated made up 78% of all domestic labour.²¹

¹⁸ Dowd, *supra* note 16 at 87.

¹⁹ In 1992, both spouses were employed in 61% of all husband-wife families. (This term includes both married couples and those living common law). This is an increase from 1967 when both spouses were employed in 33% of families. Statistics Canada, *Women in Canada*, *supra* note 5 at 87.

²⁰ Arlie Hochschild named it 'The Second Shift.' See *The Second Shift: Working Parents and the Revolution at Home* (New York: Viking, 1989).

She discovered that of women employed on a full time basis, 52% were responsible for all of these tasks and 28% for most of them, while only 10% shared responsibility equally and another 10% had spouses who performed all of this work.²² Low paid women were more likely than the more wealthy to be primarily responsible for housework, perhaps because they are unlikely to hire domestic help.

As a result of their more onerous domestic responsibilities, most women are less likely than men to fit the model of the worker presupposed in current employment arrangements and often find it difficult to juggle their domestic and caring responsibilities. This is due to the built-in inflexibility in most full time jobs, in which workers are expected to work for eight hours a day, five days a week, adhering to a uniform starting and quitting time and taking pre-arranged holidays.²³ As a result, when, for example, a child unexpectedly has to stay home from school, or a family member becomes ill and requires care, the female worker will have difficulties in making short-notice alternative arrangements.

The result, for many women, particularly women with children, is a pattern of labour force attachment which differs from that of most men. They are much more likely to have interrupted careers or undertake a second career when their children reach school-age and

²¹ Katherine Marshall, "Employed Parents and the Division of Housework," *Perspectives on Labour and Income* (Statistics Canada) 5, no. 3 (Autumn 1993) 24, excerpted in Pierson & Cohen, *supra* note 1 at 56.

²² *Ibid.* at 58.

²³ See Dowd, *supra* note 16.

to work on a part-time basis which allows them to balance their paid employment and domestic responsibilities, although often at the cost of being paid very low wages.²⁴ Some attempt to do everything - the 'superwoman' phenomenon - juggling full-time paid labour, domestic chores and family responsibilities. A select group of women, however, mainly white and middle-class, negotiate the work-family conflict by employing working-class women to carry out domestic labour and childcare in their homes.

It is necessary to take account of characteristics other than gender in analyzing the interdependence of domestic and workplace labour to highlight the ways in which some groups of women are placed at a greater disadvantage than others by the work/family conflict. The dynamics of class, race and gender intersect in the working lives of both wealthy and poor women as becomes clear when looking at the example of domestic servants in the Canadian economy.

The dual-income couples who are the main employers of domestic servants are predominantly middle class and white while the women they employ are uniformly working class and mainly women of colour, often citizens of 'developing countries' resident in Canada for the specific purpose of being employed as domestic servants.²⁵

²⁴ In 1994, 26% of women are employed on a part-time basis compared to only 9% of men and 69% of all part-time workers were female. Statistics Canada, *Women in Canada* at 65. It appears that a growing number of women work in part-time jobs because they are unable to find full-time work. In 1994, 34% of all female part-time workers indicated they would prefer full-time employment, increasing from 22% in 1989. Statistics Canada, *Women in Canada*, *supra* note 5 at 66, Chart 6.3.

Consequently, the dynamics of race, class and immigration interplay in the peculiar and oppressive working conditions negotiated by most domestic workers and laws - specifically immigration and labour legislation and regulations - are instrumental in creating these conditions.²⁶

The Domestic Worker Program has since 1955 regulated the immigration of women into Canada for the purpose of undertaking domestic labour. Initially women entering Canada under the scheme were primarily of Caribbean origin, but since the late 1970s, predominantly Filipino women have been recruited.²⁷ Women entering under the Domestic Worker Program have rigid limitations placed on their occupational mobility in that they must be employed for a period of 2 years before they can apply for landed immigrant status.²⁸

²⁵ The Task Force on Immigration Practices and Procedures, for example found that 71.4% of employers of domestic help gave their main reason for doing so as being to "free both spouses for the labour market." See *Domestic Workers on Employment Authorizations* (Ottawa: Office of the Minister, Employment and Immigration, 1981) at 35-45 cited in Sedef Arat-Koc, "In the Privacy of Our Own Home: Foreign Domestic Workers as Solution to the Crisis of the Domestic Sphere in Canada" in M. Patricia Connelly & Pat Armstrong, *Feminism in Action* (Toronto: Canadian Scholars' Press, 1992) 149 at 149.

²⁶ *Ibid.* at 151-152.

²⁷ Patricia M. Daenzer, *Regulating Class Privilege: Immigrant Servants in Canada, 1940s-1990s* (Toronto: Canadian Scholar's Press, 1993) at 10.

²⁸ *Ibid.* at 13.

The convergence of the circumstances of the paid domestic worker, the contradiction of doing 'housework' for pay, being squeezed between the private and public spheres, means domestic workers experience many of the difficulties of domestic labour and additional strains stemming from their peculiar situation.²⁹ For the majority, who live in their employers' home, the identity of their residence and workplace can leave them isolated and vulnerable to exploitation. Because the worker is, in effect, permanently under her employer's supervision, it can become difficult for her to maintain a private life, and her leisure time may be invaded at any time, rendering her hours of work infinitely expandable. Occasionally, very poor working conditions- shockingly low pay, few holiday, harassment and abuse - are uncovered.

Although covered by most employment protection legislation, domestic workers seeking to enforce the legislation encounter difficulties including the fear of being found out and losing their job, the difficulty of finding out about their rights and the problems of locating free legal advice and assistance. Given the extent of their dependence on their employers for their continuing residence in the country and eventual landed immigrant status, it is unlikely that many of these women would bring a complaint about their working conditions.³⁰

²⁹ Arat-Koc, *supra* note 25 at 154-157.

³⁰ In Ontario, employees in establishments where only one worker is employed cannot form a union. Thus, domestic workers are prevented from doing so. Domestic labourers have, despite the inadequacy of this provision, organized themselves. In 1979 a number of women's and immigrant's organizations established the International Coalition to End Domestic's Exploitation (INTERCEDE) which counsels domestic workers, advocates on

Class, race and the circumstances of their immigration interact and are implicated in the potential for exploitation of the domestic worker inherent in the employer/servant relationship. The differing class status of domestic workers and their employers, in combination with the domestic worker's work being undertaken in their home and her dependency on them for being granted landed immigrant status can create 'a very peculiar relation of domination.'³¹ Race and class are intimately connected with the conditions of immigration laid down in these laws as particular racial and ethnic groups - mainly Filipino and Caribbean women - are organized into a particular position in the wage labour market which determines their class status, having being brought into Canada specifically to perform this labour. They form a unique class of women workers, who must 'earn' their status as landed immigrants, their right to be a member of the general population, through service as a domestic worker.³² This is a concrete example of the ways in which race or ethnicity play a part in the constitution of class relations.³³

their behalf and has organized demonstrations over working conditions, beginning with a demonstration in 1981. Pierson, *supra* note 1 at 19-20.

³¹ See Arat-Koc, *supra* note 25 at 154 and 157 & Daenzer, *supra* note 27 at 141.

³² Daenzer, *ibid.* at 141.

³³ Daenzer argues that there is 'latent imperialism' permeating the relationship between Canada and the source countries of domestic workers and sees the circumstances surrounding the entry of immigrant domestic workers into Canada as a modern form of colonization. *Ibid.* at 2 and 4.

Daenzer argues that the relationship of the domestic worker and her female employer is one in which women exploit women. It challenges those forms of feminism which belittle differences between women and see them as a unitary oppressed class. The employing women are enabled to work because they transfer their domestic tasks to immigrant domestic workers in the same way that many men have been able to work by transferring these tasks to their wives. In this case, the transfer takes place between mainly white middle-class women and working-class immigrant women of colour, and may involve exploitative working conditions and pay.³⁴ Thus, the relationship between the domestic worker and her female employer is of particular importance for feminists in that it highlights both the difficulty of negotiating the modern workplace for women with family responsibilities and the differences and connections which divide and unite different groups of women in the economy.

II. WOMEN'S WORTH: THE UNDERVALUATION OF WOMEN'S LABOUR

Despite being indispensable to the functioning of the economy, household work is largely invisible: no-one witnesses the effort involved and no lasting monument to the effort expended survives at the end of a long work day.³⁵ Even when the work is recognized it is often trivialized, considered undemanding and requiring little skill or effort, a view which

³⁴ Arat-Koc, *supra* note 25 at 167.

³⁵ *Ibid.* at 152-153.

takes no account of the difficulties and stresses involved in maintaining a home.³⁶ Perhaps these perceptions of domestic labour are to some extent attributable to the assumption that women have some kind of pre-programmed expertise in household tasks and childrearing and do not have to learn the skills required to perform these tasks.

Household labour has also been undervalued in scholarship on labour and the economy. In traditional political and economic thought, 'work' was defined to comprehend only labour performed for pay or profit in the formal economy. Domestic labour was seen as unrelated to the art of profit-making and therefore valueless.³⁷ It is also absent from many government studies of the 'economy' and has been excluded from calculations of Gross National Product made by national and international bodies.³⁸ In the legal arena, too,

³⁶ Luxton argues that the view of housework as requiring little skill or effort can be traced to the introduction of domestic appliances - the washing machine, for example, or the vacuum cleaner - which removed heavy physical work from domestic labour. Luxton, "Housework" (1977) 12 *Canadian Dimension* 35 at 36, cited in Pierson, *supra* note 1 at 8-9. Arguably housework has become in many ways more demanding. The germ theory of disease advanced in advertisements for domestic products, for example, has raised the standards of cleanliness demanded of home workers. See Barbara Ehrenreich and Deirdre English, "Microbes and the Manufacture of Housework," in *For Her Own Good: 150 Years of the Experts' Advice to Women* (New York: 1978) 127 cited in Pierson, *ibid.* at 9.

³⁷ Pat Armstrong & Hugh Armstrong *supra* note 11 at 13. They note that this definition also excludes unpaid work performed in the market - such as that done for family firms - and some paid work performed in the home or on the streets as part of the underground economy. e.g. laundry, baby-sitting or prostitution.

Margaret Benston saw domestic labour as valueless as it produced goods for household use rather than market exchange. See "For Women, The Chips are Down," in Jan Zimmerman, ed., *The Technological Woman: Interfacing with Tomorrow* (New York: Praeger, 1983) cited in Armstrong & Armstrong, *supra* note 11 at 77.

³⁸ Arat-Koc, *supra* note 25 at 153.

courts and legislatures have underestimated the importance of women's domestic labour. During the 1970s, for example, Irene Murdoch, who was married to a farmer in Alberta, argued that her domestic labour and unpaid help with the farm during the 25 years of their marriage should be considered a 'financial contribution,' and, as such, entitle her to part ownership of the farm on her divorce. Her plea was refused by the Supreme Court of Canada in a decision which provoked many other 'farm wives' to organize and protest the devaluation of their unpaid labour.³⁹

Feminist theorists, particularly those writing from a socialist standpoint, have sought to have the importance of domestic labour recognized; to push it out from the margins towards the centre of political and economic thought.⁴⁰ In the 1970s many endeavored to widen traditional definitions of work to include domestic labour and became embroiled in what became known as the 'domestic labour debate.' Marxist theorists initiated the debate by arguing that domestic work was not productive in the orthodox Marxian sense of producing a surplus value or profit. The home, they argued, was solely a site of consumption and reproduction.⁴¹ Socialist feminists responded by arguing that work

³⁹ See "The Economics of Marriage: The Case of Irene Murdoch," in Paula Bourne, ed., *Women in Canadian Society*, rev. ed. (Toronto: Ontario Institute for Studies in Education, 1978) 1.

⁴⁰ Pierson, *supra* note 1 at 6.

⁴¹ Armstrong & Armstrong point to Wally Secombe as the initiator of this debate. Secombe did see domestic labour as necessary to capitalism as through household work commodities purchased are converted for domestic consumption. See "The Housewife and Her Labour Under Capitalism" (1974) 83 *New Left Review* 3 cited in Armstrong & Armstrong, *supra* note 11 at 78.

performed in the home, despite being unpaid, does have value. Countering those streams of political economic thought which had uncritically adhered to the doctrine of separate spheres, they emphasized the interconnectedness of domestic labour and the formal economy, of public 'production' and domestic 'reproduction,' and argued that women contribute to the production of labour power by raising children and enabling men to work in the public sphere.⁴² On a practical level, feminist activists have based a number of political initiatives on a call for the revaluation of domestic labour. During the 1970s campaigns for wages to be paid in exchange for domestic labour were initiated throughout the Western world and in Canada a number of Wages for Housework Committees were established.⁴³

The notion that domestic labour is undervalued is of central importance in the development of the concept of pay equity and feminists have argued that it is intimately connected with the gender-based wage gap under which the wages of employed women are only 72% of those earned by their male counterparts.⁴⁴ The low level of women's

⁴² See, for example, Peggy Morton, "Women's Work is Never Done," in *Women Unite!* (Toronto: The Women's Press, 1972) cited in Armstrong & Armstrong, *ibid.* at 77-78 and Pierson, *supra* note 1 at 6.

⁴³ See Pierson, *ibid.* at 10-11.

⁴⁴ Statistics Canada, *Women in Canada*, *supra* note 5 at 86. This figure relates to women and men employed on a full-time, full-year basis in 1993. Women earned an average of \$28,400. The gender based wage gap has closed somewhat in recent years. In the early 1980s, women's average earnings were around 64% of those of men and 68% in 1990. However, some of the narrowing of the gap can be attributed to decreases in the earnings of men. Between 1989 and 1993, the earnings of women rose by almost 8% once the effects of inflation were accounted for while men's earnings decreased by about 2%.

wages forces many into poverty and more than half - 56% - of the total population living on low incomes are female.⁴⁵ There is a particularly devastating effect on lone-parent families headed by a women as 60% of these families exist on incomes falling below the government's Low Income Cut-offs.⁴⁶

Focusing exclusively on the gender based wage gap can hide other earning differentials.

Wage inequities create fissures between and among many groups in society:

immigrant/non immigrant, white/visible minority or First Nations/non-aboriginal for example. These axes of inequality intersect and divide the workforce and must each be explored to present an accurate picture of wage distribution across society. Recent research conducted by Krishna and Ravi Pendakur based on an analysis of 1991 Census data has exposed large earnings disparities between whites and visible minorities and aboriginal peoples in Canada.⁴⁷

Similarly, when analyzing women's wages, focusing exclusively on the average wage levels can hide the extent to which some groups of female workers are paid less than others. It is necessary to take account of facets of women's identity other than their

⁴⁵ *Ibid.* at 84.

⁴⁶ *Ibid.* at 86. Families or individuals are classified as 'low income' if they spend, on average, at least 20 more percentage points of their pre-tax income than the Canadian average on food, shelter and clothing. The number of people in the family and the size of the urban or rural area where they reside are also taken into consideration.

⁴⁷ Krishna Pendakur & Ravi Pendakur, *Earnings Differentials Among Ethnic Groups in Canada* (Hull: Corporate and Intergovernmental Affairs, 1995).

gender in order to provide a clear picture of their relative positions in the economy. The Pendakurs' study found that Canadian-born white and visible minority⁴⁸ women receive the same average wage and there is only a small earnings differential between white immigrant and white Canadian-born women.⁴⁹ Aboriginal women and visible minority immigrant women, however, earn about 7% less than White Canadian-born women⁵⁰ and when they refined their analysis of Canadian-born women and compared them according to their national origins, Greek and Aboriginal women are found to earn significantly less - 15% - than women of British origin.

In breaking down the category 'women,' then and analyzing the wages of different groups of women, we discover that visible minority women who have immigrated into Canada and women of Greek and Aboriginal origin born in Canada are the lowest paid female workers in the Canadian labour market.⁵¹ Other studies have highlighted significant

⁴⁸ As the term 'visible minority' comprehends diverse groups, Pendakur and Pendakur wished to question whether a sub-group's advantage could mask another's disadvantage. They analyzed the wages of both the categories 'visible minorities,' 'persons of aboriginal descent' and 'persons of European descent' and of 25 ethnic sub-groups of the three categories. *Ibid.* at 2.

⁴⁹ Among white immigrant women, only women who reported being of Spanish origin earned less than British origin Canadian-born women. *Ibid.* at 16.

⁵⁰ *Ibid.* at 16. Chinese origin immigrant women were the exception in that they earned no less than White Canadian born women.

⁵¹ *Ibid.* at 14-17. The wage pattern is different among men. Canadian-born visible minority men earn around 11% less than Canadian-born white workers. Immigrant visible minority men earn around 15% less. Canadian-born Greek, Portugese, Black and Chinese men had average earnings of 12-16% less than British origin men and immigrant men of

differences between the wages of disabled and able-bodied women. The median employment income of women with a disability is 84% of that for non-disabled women, and the average wage rate of disabled women varies depending on the nature of their disability.⁵² Cross-cutting all other wage gaps are those attributable to the class status of the worker - wage gaps which are an intrinsic to the occupational hierarchy of a capitalist system.

Instead of thinking about a singular wage 'gap,' then, it is more useful to think of a number of interlinked 'gaps' which affect different women in different ways consequent on characteristics - class, race, age, immigrant status, disability - which divide them. This allows a clear identification of those women who are at the bottom rung of the wage ladder. Mainly due to the efforts of labour and feminist activists in presenting women's low pay as a matter of pressing social importance, male-female differences have caused much public consternation and been the subject of collective bargaining and legislation across Western nations. However, these developments have too frequently taken place alongside ignorance of or apathy towards other wage inequalities. Although pay equity legislation is intended to combat only male/female wage differences and these will be my

Greek origin and those included in the nine visible single ethnic background origins earned more than 14% less than those of British origin.

Aboriginal men had an earnings differential of between 15-19%.

⁵² Women with seeing disabilities have the highest median employment income while those with speaking disabilities have the lowest. Statistics Canada, *Selected Socio-economic Consequences of Disability for Women in Canada* (Ottawa: Statistics Canada, 1990) [hereinafter *Consequences of Disability*] at 28.

central concern, the scholarly attention to and political activity around female-male gaps should not obscure other equally important pay differences.

Much of the gap can be accounted for by women's predominance in the part-time workforce, their working less overtime than their male counterparts and the different shift premiums they receive. Pay equity legislation, however, is solely aimed at a certain part of the gap: that proportion attributable to the market and social undervaluation of women's work. Feminists draw attention to the sex-based occupational segregation which operates in the wage labour market so that most men and women are employed in distinct occupations. As a result of this segregation, many jobs are 'women's work' in the sense that their incumbents are overwhelmingly female. Also, many of the jobs which meet this description are, like nursing and childcare, an extension of the tasks for which women have been held responsible in the home for centuries. Feminists argue that the devaluation of domestic labour has been carried over from the domestic sphere so that these types of jobs are devalued in the market place too and paid at lower rates than predominantly male occupations.⁵³ Other jobs performed by a mainly female workplace may not so clearly resemble domestic tasks - clerical and secretarial work for example, or customer service in the retail industry - but these jobs are still devalued for the very reason that they are performed by women and women have not had the social and economic power to ascribe value to the work that they do.

⁵³ Judy Fudge & Patricia McDermott, "Introduction: Putting Feminism to Work" in Judy Fudge & Patricia McDermott, *Just Wages: A Feminist Assessment of Pay Equity* (Toronto: University of Toronto Press, 1991) at 5.

Pay equity legislation is grounded in the theory of the undervaluation of women's work. It recognizes that a woman may be employed in a job of equal value to that of a higher paid man and allows her to compare their work and claim a wage adjustment on this basis. I will discuss this more fully in Chapter 5.

III. WORKING FOR WAGES: WOMEN IN THE PAID LABOUR MARKET

Ideologies which construct women as the natural inhabitants of the private sphere obscure the extent to which women have throughout history worked for wages outside the home. Even when the notion of women's innate domesticity had widespread appeal in the late nineteenth and early twentieth century women worked in the few occupations open to them, mainly as domestic servants, factory workers, waitresses and telephone operators. They were mainly young, single and working class and generally left the paid labour force on marriage.⁵⁴

During both World Wars the pattern of women's labour force participation altered as female labour became essential to occupations previously considered unsuitable including heavy industry, farm work and munitions, and they were actively encouraged, even assisted, to enter the labour market. In World War II in particular, the National Selective

⁵⁴ On women's paid labour in this period see Marjorie Griffen Cohen, *Women's Work, Markets and Economic Development in Nineteenth Century Ontario* (Toronto: University of Toronto Press, 1988).

Service vigorously recruited women, providing housing, travel expenses, medical and recreational facilities and, most significantly, childcare. As a result, by 1944 there were 1,077,000 women in the paid labour force, an estimated 35% of them married.⁵⁵ At the War's end, however, these women were expected to vacate their places to provide jobs for returning servicemen and most did. Childcare and all the other inducements were soon abandoned. As a consequence the female labour force participation rate plummeted, not rising again until the mid-1950s⁵⁶ and never exceeding the wartime high until the late 1960s.⁵⁷

Despite recent memories of women working as mechanics, on farms and in other traditionally male work, in the 1950s the ideology of domesticity held sway in government policies and the home was re-established as the 'naturally' female domain, at least for middle-class women. These house-bound women did not, however, uncritically accept their ascribed roles and rumours of widespread discontent among 'housewives' began circulating in women's magazines in the late 1950s, revealing a malaise not apparent in the

⁵⁵ Manpower Review, "Women's Employment in Canada: A Look at the Past", (1975) 1 cited in S.J. Wilson, *Women, Families and Work* (Toronto: McGraw-Hill Ryerson, 1991) at 81.

⁵⁶ The participation rate began to increase in 1954. Ruth Roach Pierson, *"They're Still Women After All": The Second World War and Canadian Womanhood* (Toronto: McClelland & Stewart, 1986) cited in Pierson, *supra* note 1 at 3.

⁵⁷ Wilson, *supra* note 55 at 81-82.

images of the ecstatic housewife praising her most recently acquired household product which were a staple of 1950s advertising campaigns.⁵⁸

By the mid 1960s, the separate spheres ideology was under strain and becoming increasingly difficult to sustain as women of the middle-classes followed their working class counterparts into the paid labourforce in significant numbers. By 1961, 30% of paid workers were female, including many married women who were increasingly likely to work until the birth of their first child and then re-enter the paid labour market after their children reached school-age.⁵⁹ Couples were faced with the choice of sustaining the myth of female domesticity or retaining their social status as a double income became essential to maintaining the trappings of a middle-class existence. Many decided that both partners would work for pay, and this arrangement has become increasingly popular over the years until 52% of adult women work for pay,⁶⁰ including over half of those who have children younger than 3 years old.⁶¹

⁵⁸ Veronica Strong-Boag, "Working Wives and the Good Life: 1945-60," May 1992 cited in Pierson, *supra* note 1 at 2.

⁵⁹ Sylvia Ostry, *The Female Worker in Canada* (Ottawa: Queen's Printer, 1968) cited in Pierson, *ibid.* at 4.

⁶⁰ Statistics Canada, *Women in Canada*, *supra* note 5 at 71, Table 6.1.

⁶¹ *Ibid.* at 64. Women with pre-school-aged children are less likely than those with children of school-age to be employed. 57% of women with children under the age of 6 were employed in 1994, compared to 69% of those whose youngest child was between the ages of 6-15.

During this period from the 1960s to the present, women entering the wage labour force have faced harassment and discrimination and fought to have their right to equality in the paid workforce recognized by employers, co-workers, legislatures and the courts. They forced federal and provincial governments to pass legislation prohibiting discrimination in hiring, training and promotion.⁶² From 1985, Section 15, the equality rights provision of the *Canadian Charter of Human Rights and Freedoms*, has embodied a legal right not to be discriminated against on the grounds of sex.⁶³ In *Action Travail des Femmes v Canadian National Railway Company*⁶⁴ the Supreme Court of Canada ruled that human rights legislation can be used to provide a remedy for discrimination and that a Human Rights Tribunal can take remedial measures, in this case requiring an employer who had discriminated against women to hire a certain number of women.⁶⁵ Despite these anti-discrimination provisions women had difficulty in having discrimination on the grounds of

⁶² The Ontario *Human Rights Code*, for example, provides that everyone is entitled to 'employment without discrimination' on the basis of sex. R.S.O. 1990, c. H.19.

⁶³ Section 15(1) of the Charter provides:

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

Canadian Charter of Fundamental Rights and Freedoms, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, s. 15(2).

⁶⁴ (1984), 5 C.H.R.R. D/2327 (Cdn. Human Rights Tribunal); rev'd in part by [1985] 1 F.C. 96 (Fed.C.A.); rev'd by [1987] 1 S.C.R. 1114.

⁶⁵ The Human Rights Tribunal had required the employer to hire one woman in every four hired until a goal of 13% representation of women was reached.

pregnancy recognized as sex discrimination.⁶⁶ More recently, feminists and labour activists have been successful in drawing attention to the widespread problem of workplace sexual harassment. Such behaviour is now specifically prohibited under the *Canada Labour Code*⁶⁷ which includes a provision that employers must make 'every reasonable effort' to prevent sexual harassment.⁶⁸ Similar measures have been enacted in a number of provinces.⁶⁹

⁶⁶ In 1989, the Supreme Court of Canada finally made clear that discrimination based on pregnancy is sex discrimination. *Brooks, Allen and Dixon v Canada Safeway Ltd.* [1989] S.C.R. 1219.

The Ontario *Human Rights Code* specifically applies to pregnancy. *Human Rights Code*, *supra* note 61, s. 10(2).

⁶⁷ Sexual harassment is defined as:

any conduct, comment, gesture, or contact of a sexual nature that is (a) likely to cause offence or humiliation to any employee, or (b) that might on reasonable grounds be perceived by that employee as placing a condition of a sexual nature on employment or on any opportunity for training or promotion.

Canada Labour Code R.S.C. 1985 c. L-2.

The Supreme Court held that sexual harassment is sex discrimination in *Janzen and Govereau v Platy Enterprises Ltd.*, [1989] 1 S.C.R. 1252.

⁶⁸ The definition of harassment has been held to include creating a 'poisoned' environment by exerting pressure to engage in sexual activity. (*Kotyk and Allary v Canada Employment and Immigration Commission* (1983) 83 C.L.L.C. 17,012 (Can. H.R. Trib.), *affrd.* 84 C.L.L.C. 17,005 (Can. H.R. Rev. Trib.)) and more subtle forms of harassment including touching, leering and rude personal remarks. (*Potapczyk v MacBain* (1984) 84 C.L.L.C. 17,017 (Can. H.R. Trib.)).

⁶⁹ The Ontario *Human Rights Code* R.S.O. 1990, c. H.19. includes a general right to be free from harassment. *Supra* note 61 at S. 5(2) and a specific provision relating to sexual harassment. *Ibid.* at 7(2).

The fight for pay equity legislation formed part of these struggles. During the 1960s, the only extant legislation regulating women's wages were equal pay acts from the 1950s which allowed women to claim a wage adjustment only where they were employed in the *same* work as a higher paid male employee. In Ontario, for example, a claim could be made under the *Female Employees Fair Remuneration Act* of 1951.⁷⁰ Equal pay measures proved largely irrelevant as the problem of devaluation of women's work could not be addressed under them. Occupational segregation meant that most low paid women were employed in predominantly female jobs and were unable to compare their pay to a man doing the same work. More beneficial would be an opportunity to claim equal pay to a man performing a different but equally valuable job. In the 1960s, women began to agitate for equal pay for work of equal value legislation to allow them to make such a comparison. In Chapter 5 I will discuss the struggles for equal pay for work of equal value and pay equity legislation.

Not all activism was centred around state bodies nor aimed at forcing the government to pass legislation. Many union women fought to have women's interests recognized within the union movement.⁷¹ They tended to adopt traditional methods available to organized labour for improving working conditions, including strike action and collective

⁷⁰ R.S.O. 1951, c. 26.

⁷¹ See, for example, Mary Cornish & Lynn Spink, *Organizing Unions* (Toronto: Second Story Press, 1994); Carl J. Cuneo, "Trade Union Leadership: Sexism and Affirmative Action," in Linda Briskin & Patricia McDermott, eds., *Women Challenging Unions: Feminism, Democracy and Militancy* (Toronto: University of Toronto Press, 1993).

bargaining.⁷² Substantial gains were made as a result of the activism of union women. In 1968, for example, the Canadian Labour Congress enacted a new clause in its constitution calling for the eradication of sex discrimination in employment.⁷³ However, the Canadian unions often proved uninterested in or actively hostile to the needs and interests of female workers, including their female members, and many women found they had to struggle not only against employers but also against and within the union movement.⁷⁴ Their hostility is ironic given the long history of female support for the union movement.⁷⁵ Female participation in union struggles often took the form of women lending support to the actions of male workers rather than independent direct action and has been hidden due to the focus on organized labour on the part of historians of labour movements.⁷⁶

Scholarship on unions does, however, record the vast increase in the number of women

⁷² Strikes over women's wages took place throughout the 1970s and 1980s. See Heather Jon Maroney, "Feminism at Work" in Heather Jon Maroney & Meg Luxton, eds., *Feminism and Political Economy: Women's Work, Women's Struggles* (Toronto: Methuen, 1987).

⁷³ "Canadian Labour Congress adopts Change in Structure" (1968) 13 Canadian Labour 9.

⁷⁴ On women in the Canadian union movement see Linda Briskin & Lynda Yanz, eds., *Union Sisters: Women in the Labour Movement* (Toronto: Women's Press, 1983); Linda Briskin & Patricia McDermott, eds., *Women Challenging Unions: Feminism, Democracy and Militancy* (Toronto: University of Toronto Press, 1993) and Julie White, *Sisters and Solidarity: Women in Unions in Canada* (Toronto: Thompson, 1993).

⁷⁵ For example, female telephone operators in Toronto took strike action in 1907. See Joan Sangster, "The 1907 Bell Telephone Strike" (1978) 3 Labour 109 cited in Anne Forrest, "A View from Outside the Whale: The Treatment of Women and Unions in Industrial Relations" in Briskin & McDermott, *ibid.*, 325 at 326.

⁷⁶ Forrest, *ibid.* at 327. She notes that, given the harassment women faced when they organized into unions and the lack of interest on the part of male unions in recruiting them, their patterns of activism are understandable.

joining unions during the mid-twentieth century.⁷⁷ By 1992, 31% of all female workers were unionized.⁷⁸

Despite the influx of female workers in the 1960s, unions remained male-dominated in their leadership, interests and priorities. Meetings were arranged at times when many women would be unlikely to attend given their home and family commitments and it was not unusual for critical decisions to be taken among small groups of people in stereotypically male settings, such as bars, with female members unlikely to be in attendance.⁷⁹ Ignorance and apathy on the part of unions toward the particular difficulties faced by female workers in the wage labour market and the interplay of domestic and workplace labour in the lives of women, was reflected in their policies and preoccupations. 'Women's issues' - discrimination, harassment, equal pay, childcare - were too often put on the back burner.⁸⁰

⁷⁷ In 1962, 16% of union members were female. For much of the 1960s and 1970s, they joined unions more rapidly than men and the number of women as a percentage of the total number of union members increased consistently over this period. Statistics Canada, "Corporations and Labour Unions Returns Act, Part II - Labour Unions," Cat: 71-202 (Ottawa 1966-89) cited in Julie White, "Patterns of Unionization" in Briskin & McDermott, *supra* note 74 at 192. Women accounted for 79% of the total growth in union membership between 1983 and 1992 and were 35% of all union members in 1983 and 41% in 1992. Statistics Canada, *Women in Canada*, *supra* note 5 at 68.

⁷⁸ *Ibid.* At 68. 38% of all male workers were unionized in 1992.

⁷⁹ See, for example, Carl J. Cuneo, "Trade Union Leadership: Sexism and Affirmative Action" [hereinafter "Trade Union Leadership"] in Briskin & McDermott, *supra* note 74 at 109.

⁸⁰ Warskett gives the example of the Canadian Labour Congress's 1984 campaign to promote job creation. To combat unemployment, the Congress recommended a

Feminist activists within the union movement have been vocally critical of traditional union practices and have worked to develop and implement a number of strategies aimed at increasing female representation in leadership positions and making unions responsive to the needs of their female members. Some have formed women-only unions such as The Federation of Women's Teachers' Associations of Ontario;⁸¹ others have chosen to initiate separate organizing strategies within traditional unions by establishing women's caucuses and locals, women's committees and women-only educational conferences.⁸² Slowly, the influence of these changes has filtered into union practice. In recent years, meeting times have been rescheduled, initiatives to move women into leadership positions have been implemented,⁸³ and, as a consequence, 'women's issues' have moved closer to the centre of bargaining agendas.⁸⁴

redistribution of work through reducing hours of work with no cut in pay and the end of compulsory overtime. No links were drawn between the campaign and the 'double day' of labour performed by many women. "Can a Disappearing Pie be Shared Equally?: Unions, Women and Wage 'Fairness'" in Briskin & McDermott, *ibid.*, 249 at 254.

⁸¹ Cited in Linda Briskin, "Union Women and Separate Organizing" in Briskin & McDermott, *ibid.* at 90.

⁸² The Public Service Alliance of Canada, for example, has provided women-only training courses for dealing with sexual harassment at work. Cuneo, "Trade Union Leadership," *supra* note 79 at 124-125.

⁸³ Many unions established affirmative action seats for women including, for example, the Ontario Federation of Labour in 1983. See Ronnie Leah, "Black Women Speak Out: Racism and Unions" in Briskin & McDermott, *supra* note 74, 157 at 159.

⁸⁴ This includes sexual harassment. The Women's Caucus of the Ontario Public Service Employees Union succeeded in having a constitutional amendment passed at the union's Convention that included a right to freedom from 'sexual harassment.' Debbie Field, "Coercion or Male Culture: A New Look at Co-Worker Harassment," in Briskin & Yanz,

Certain groups of women have faced greater difficulties in unions due to the interplay of their gender and other facets of their identity, notably race, disablement and sexual orientation. Women of colour, for example, face both racism and sexism at work and within the labour movement. To counter racism, activists adopted separate organizing techniques during the 1980s.⁸⁵ In Ontario, for example, a Coalition of Black Trade Unionists was formed and Black caucuses have been organized at the Federation of Labour annual conventions since 1985. Increasingly, unions have been developing unified strategies aimed at combating both sexism and racism.⁸⁶

Persons with disabilities still do not have a loud voice within the union movement, perhaps because, unlike visible minority groups, they are not concentrated in regions, making it more difficult for them to organize. They have, however, joined together and drawn attention to the ways in which unions could better serve their disabled members, such as improving accessibility to union meetings, providing information in media other than print

supra note 73 at 156. See also, for example, Carl J. Cuneo, "Trade Union Leadership," *supra* note 79 at 109.

⁸⁵ Leah, *supra* note 83 at 160. See also her "Linking the Struggles: Racism, Feminism and the Union Movement" in Jesse Vorst, ed., *Race, Class, Gender: Bonds and Barriers* (Toronto: Garamond, 1989) at 166-195.

⁸⁶ The Ontario Federation of Labour's Women's and Human Rights Committees, for example, jointly developed a *Statement on Equal Action in Employment* pointing to the similarities between racism and sexism and co-sponsored a forum on employment equity at the Ontario Federation of Labour Convention. June Veacock makes the point that the importance of race and racial discrimination could be lost in these joint strategies and Leah notes that many anti-racist activists within unions receive little support from white women activists on the issue of racism'. See Leah, *supra* note 83 at 162 and 168.

and promoting employment equity.⁸⁷ Gay and lesbian union members, too, have found some support within the union movement, for example, in financing complaints about the absence of same-sex spousal benefits, educating the workforce on creating a less hostile environment and preventing harassment and discrimination. Within the Public Service Alliance of Canada, for example, a Lesbian and Gay Support Group was established in 1990 and it aims to support lesbian and gay members and press for their interests to be represented within the union movement.⁸⁸

As I will discuss in Chapter 4, recent structural changes in the Canadian economy mean that the continued existence of unions is dependent on their ability to attract female members, many of these being visible minority women and low paid. It is therefore important that changes made at the rhetorical and policy level translate throughout union membership and leadership to enable unions to appeal to this group.

⁸⁷ CUPE, for example, has a Members with Disabilities Ad Hoc Committee which first met in 1990 and aims to draw attention to the concerns of persons with disabilities in relation to their work and their position in the union movement. White, *supra* note 74 at 228.

⁸⁸ *Ibid.* at 219. A lesbian and gay support group was established in 1990 within the Public Service Alliance of Canada which aims to support lesbian and gay members and press for their interests to be represented within the union movement. The first caucus for gay and lesbian members was held at the 1989 CUPE Women's Conference and a Pink Triangle Committee of gay and lesbian activists held its first meeting in 1992. *Ibid.* at 228 and 230-231.

CHAPTER FOUR

THE GOOD JOBS/BAD JOBS SCENARIO: WOMEN AND ECONOMIC RESTRUCTURING

INTRODUCTION

Economic production has been going through a process of restructuring for more than a decade, revolutionizing what it means to work for pay in Canada. Women, particularly those who were already marginalized in the economy, are experiencing the harsh effects of these changes. In this Chapter I will sketch the evolving trends of economic restructuring.¹ I will then explore the impact of these trends on those women at the bottom of the economic hierarchy.

¹ Marjorie Griffin Cohen cautions:

Economic restructuring is a seductive term because it appears benign and implies an inevitability imposed by some type of external force over which people have no control: its presentation as a universal force make "restructuring" appear apolitical and, in conjunction with this, gender, race and class neutral.

"Feminism's Effect on Economic Policy" [hereinafter "Economic Policy"] in Ruth Roach Pierson & Marjorie Griffin Cohen, *Canadian Women's Issues. Volume II: Bold Visions* (Toronto: Lorimer, 1995) at 274.

I. THE NEW CANADIAN ECONOMY: ECONOMIC GLOBALIZATION AND EMPLOYMENT IN CANADA

The trend towards organization on an international basis, often termed economic 'globalization' can be analyzed as a number of economic trends which are acting in tandem to revolutionize both the processes of production and the experience of employment across the globe.² There has, for example, been a discernible trend towards increasing international competition and mobility of capital as multinational companies move their production sites around the world seeking cheaper labour, larger markets, and less stringent labour and environmental legislation. Now goods which would once have been manufactured in a single location are being assembled at one site from component parts produced in another centre, often in a different country.³ Those aspects of production

Other feminists have criticised academic work on economic restructuring for undervaluing women's unpaid labour and assuming their wages are supplementary to that of a male breadwinner. See, for example, Diane Elson, *The Impact of Structural Adjustment on Women* (London: Commonwealth Secretariat, 1987) and Marjorie Williams, *Gender and Economic Policies in the Context of Structural Adjustment and Change: The Productivity Link* (Ottawa: North-South Institute Workshop, 1992) at 12-14 cited in Janine Brodie, "Shifting the Boundaries: Gender and the Politics of Restructuring" [hereinafter "Shifting the Boundaries"] in Isabella Bakker, ed., *The Strategic Silence* (Ottawa: Zed Books, 1994) [hereinafter *The Strategic Silence*] 46 at 49.

² Janine Brodie, "Canadian Women, Changing State Forms, and Public Policy" in Brodie, ed., *Women and Canadian Public Policy* (Toronto: Harcourt Brace, 1996) [hereinafter *Canadian Public Policy*] 1 at 1.

³ I am drawing in particular on Isabella Bakker, "Pay Equity and Economic Restructuring: The Polarization of Policy?" [hereinafter "Economic Restructuring"] in Judy Fudge & Patricia McDermott, eds., *Just Wages. A Feminist Assessment of Pay Equity*, (Toronto: University of Toronto Press, 1991) [hereinafter *Just Wages*]; Bakker, *The Strategic Silence*, *supra* note 1; Brodie, *Canadian Public Policy*, *supra* note 2 and Heather Menzies, "Re-thinking the Social Contract: Women, Work, and Technology in the Post-Industrial Era" (1990) 4 C.J.W.L. 205.

dependent on highly trained workers or on advanced technology are generally carried out in Western countries whereas the more basic manufacturing tasks are undertaken in 'developing' countries. Many North American corporations, for example, compete with producers in the Pacific Rim and 'Third World' by transferring production to cheap labour zones in 'developing' countries, a practice which is facilitated by free trade agreements such as the North American Free Trade Agreement (NAFTA).

Changes at the global level are having a direct impact on industry in Canada. One effect is that, in line with other Western industrialized economies, manufacturing industries have declined and there has been a concomitant growth of the service sector. A century ago manufacturing industries employed almost half of the Canadian paid labour force and service industries less than one third of employees.⁴ The proportion of the labour force employed in the service industries increased gradually, and by the mid-twentieth century almost half of employed Canadians worked in the service sector and only around 20% in manufacturing. During the last twenty years, there has been an acceleration in the trend towards growth in the services so that by 1995, 74% of the labour force worked as service providers.⁵

⁴ Statistics Canada defines the service sector as including 'trade; finance, insurance and real estate; business, educational, and health and social services; accommodation, and food and beverage services; other services; public administration; transportation; and communications.' Statistics Canada, *Women in Canada: A Statistical Report*, 3rd ed. (Ottawa: Statistics Canada, 1995) [hereinafter *Women in Canada*] at 70, note 3.

⁵ The share of total employment in the service sector has increased from 40% (1.9 million) in 1946 to 74% (10.0 million) in 1995. Statistics Canada, *Labour Force Annual Averages* [hereinafter *Annual Averages*] (Ottawa: Statistics Canada, 1995).

The evolving 'information economies' of Western industrialized nations are driven by technological innovations - notably semiconductors and fibre optics - and centred around financial, research and other information transactions conducted through micro-electronic communication systems which form world-wide electronic communications networks.⁶ Companies have adopted the new advanced information and materials technologies to increase productivity in goods and services and utilized them in ways which replace labour, contributing to an increase in structural unemployment.⁷

Among those who still have a job, many are witnessing massive changes in the terms and conditions of their employment as the traditional terms of employment are also being 'restructured.'⁸ The most common form of employment in Canada remains the traditional model - a full time, permanent position performed for an employer from nine to five, five days a week. Increasingly though workers are being employed under 'non-standard forms of employment.' The most prevalent of these is part-time work - generally defined as employment which requires less than 30 hours per week⁹ - which is now undertaken by

⁶ See, for example, Bakker, "Economic Restructuring," *supra* note 3 at 255.

⁷ Carla Lipsig-Mumme, "Organizing Women in the Clothing Trades: Homework and the 1983 Garment Strike in Canada" in M. Patricia Connelly & Pat Armstrong, eds., *Feminism in Action* (Toronto: Canadian Scholars' Press, 1992) 121 at 123.

⁸ On the Canadian aspects of globalization see Robert Chodos, Rae Murphy, Eric Hamovitch, *Canada and the Global Economy: Alternatives to the Corporate Strategy for Globalization* (Toronto: James Lorimer, 1993) and James Laxer, *False God; How the Globalization Myth Has Impoverished Canada* (Toronto: Lester, 1993).

⁹ This is the definition of part-time work adopted by Statistics Canada. See, for example, *Women in Canada: A Statistical Report* 3rd ed. (Ottawa: Statistics Canada, 1990) at 65.

17% of the labour force.¹⁰ The incidence of temporary work, homework¹¹ and own-account self employment,¹² is also increasing.

¹⁰ Statistics Canada, *Annual Averages*, *supra* note 5 at A-21.

¹¹ Data collection organizations, including Statistics Canada, have not systematically monitored the growth in temporary work or homework. In 1989, 8% of working-age (15-64) paid employees were employed in a position with a specific termination date, a figure which appears to have increased over the last 10 or 20 years. See Krahn, *Quality of Work in the Service Sector* (Ottawa: Statistics Canada, General Social Survey Analysis Series No. 6, Cat. No. 11-612E, 1992) cited in Harvey J. Krahn & Graham S. Lowe, *Work, Industry and Canadian Society*, (Scarborough, Ont.: Nelson, 1993), note 75 at 106.

White, relying on unpublished data for 1989 from the Labour Market Activity Survey found that 10% of workers are employed full-time but for only part of the year. This figure includes those who were employed in a purportedly permanent position but who left their employment or were fired. Julie White, *Sisters and Solidarity: Women in Unions in Canada* (Toronto: Thompson, 1993) at 170.

¹² In the past decade, self employment accounted for 10% of overall job growth in Canada. Economic Council of Canada, *Good Jobs, Bad Jobs: Employment in the Service Economy* (Ottawa: Supply and Services Canada, 1990) [hereinafter *Good Jobs, Bad Jobs*] at 12. By 1990, about 14% of all employed Canadians were self-employed compared to 11% in 1975. This includes both employers - self-employed who employ others to work for them - and the own-account self employed. Gary L. Cohen, "Self-employment in Canada" (1989) *Canadian Social Trends* 17 and Henry Pold "A note on self-employment" (1991) *Perspectives on Labour and Income* 46 cited in Krahn & Lowe *supra* note 11 at 76.

Women form the far greater part of the increase in self employment - 136% compared to 39% for men. Urban Dimensions Group, *Growth of the Contingent Workforce in Ontario: Structural Trends, Statistical Dimensions and Policy Implications* (Toronto: Urban Dimensions Group 1989) at 40, cited in Bakker, "Economic Restructuring," *supra* note 3 at 266.

The extent to which the self employed are disadvantaged in the workforce is unclear. managerial, professional and technical workers are more likely to become self-employed than clerical and manual workers. At least some of the increase in self-employment is attributable to more advantaged workers attempting to allay the effects of increasing job insecurity. See Krahn & Lowe, *supra* note 11 at 76.

These 'non-standard' forms of employment are all typically characterized by precarious job tenure, lack of benefits such as pension and maternity provisions, low levels of unionization and limited coverage under employment regulations.¹³ Expanding sectors of the economy are those which tend to employ workers on non-standard contracts. For example, within the service sector, the commercial services have been experiencing growth, rather than the public services - education, health and welfare and public administration - which expanded during the mid-20th century.¹⁴ It is the commercial sector, where most new jobs are to be found and in which workers are most likely to be employed on a part-time and temporary basis.

The shift towards employing a non-standard labour force has been facilitated by the policies of neo-conservative governments across Western nations which have simultaneously promoted international competition through enacting free trade agreements and deregulated the labour market by eroding legal protection for employees.¹⁵ In the

¹³ These forms of work have been collectively named 'atypical,' 'contingent' or 'non-standard' employment. The Economic Council of Canada found that in the late 1980s, one-third of all jobs were non-standard, including more than three quarters of jobs in the service sector. See Economic Council of Canada, *Good Jobs, Bad Jobs*, *supra* note 12 at 81.

¹⁴ M. Cote, "The labour force: into the '90s" in *Perspectives on Labour and Income* (Ottawa: Statistics Canada, 1990) at 13 & W.G. Picto, T. Wannell & D. Lynd, *The Changing Labour Market for Postsecondary Graduates* (Ottawa: Statistics Canada, 1987) at 7-8, cited in Krahn & Lowe, *supra* note 11 at 43.

¹⁵ The Canadian government has entered into the Canada/US Free Trade Agreement (FTA) and the North American Free Trade Agreement (NAFTA). See Marjorie Griffin Cohen, "The Implications of Economic Restructuring for Women: The Canadian Situation" in Bakker, *The Strategic Silence*, *supra* note 1 at 105.

1980s, businesses and governments united in calling for 'global competitiveness' and promoted employment 'flexibility' as the panacea to intense international competition. Both government and capital presented worker flexibility as a necessary and inevitable consequence of economic changes.¹⁶

Paralleling the growth in the contingent workforce in the last decade has been a fragmentation in the structure of employing institutions. The combined effect of corporate downsizing, contracting out of government services and aspects of production in the private sector and the privatization of publicly owned corporations has been an exponential growth in the number of small establishments.¹⁷ These tend to pay less, have less generous benefit packages, and are less likely to have union organization than the large-scale employers they replaced.¹⁸ Government transfers to sub contractors are a clear example

Labour deregulation is one aspect of a policy of neoconservative governments to attract private capital. They also advocate reducing inflation, cutting expenditure on social welfare, privatization and deficit reduction. Judy Fudge, "Fragmentation and Feminization: The Challenge of Equity for Labour Relations Policy" in Brodie, *supra* note 2 at 65.

¹⁶ Belinda Leach, "'Flexible' Work, Precarious Future: Some Lessons From the Canadian Clothing Industry" (1993) 30 *Canad. Rev. Soc. & Anth.* 64 at 66. See also Rosemary Warskett, "Can a Disappearing Pie be Shared Equally?: Unions, Women, and Wage Fairness" in Linda Briskin & Patricia McDermott, eds., *Women Challenging Unions: Feminism, Democracy and Militancy* (Toronto: University of Toronto Press, 1992) at 258.

¹⁷ Between 1976 and 1984, 87% of all jobs created in Canada were in establishments employing less than 20 people. Urban Dimensions Group, *supra* note 12 at 7-8.

¹⁸ In 1989 the overall rate of unionization in Canada was 38%. In firms with fewer than 20 workers, 13% were unionized. Fudge, *supra* note 15 at 61. On the difficulties of unionizing small firms see J. O'Grady, "Beyond the Wagner Act" in Daniel Drache, ed., *Getting On Track* (Montreal & Kingston: McGill-Queen's University Press, 1992) 153 cited in Fudge, "Fragmentation and Feminization, *supra* note 15 at 60.

of transfers from employers with higher standards of protection to those with less, as are large private firms that contract out their warehousing or distribution concerns to small, low-wage/low-benefit firms.¹⁹

The combined effect of these changes has been a polarization of wages. As an increase in jobs in highly paid employment - principally in managerial, professional and administrative occupations - is matched by a growing number of low paid jobs - particularly in the service sector - and a reduction in jobs in the middle wage scales, and workers are increasingly being paid either very well or very poorly.²⁰ Wage polarization is developing in tandem with a polarization in job security and legal regulation of employment,

¹⁹ Jeffrey Pfeffer & James Baron, "Taking the Workers Back Out: Recent Trends in the Structuring of Employment" in Barry Straw & L.L. Cummings, eds., *Research in Organizational Behaviour* (Greenwich, CN: JAI Press, 1988) cited in John Myles, "Post-Industrialism and the Service Economy" in Graham S. Lowe & Harvey J. Krahn, *Work in Canada: Readings in the Sociology of Work and Industry* (Scarborough, Ont.: Nelson Canada, 1993) at 129 and James Sacouman & Henry Veltmeyer, "Canada in the Restructuring of America: Restricted Proletarianism and Its Implications" (Presented at the Conference on Canadian Political Economy in the Era of Free Trade Conference, Carleton University, Ottawa, April 1990) [unpublished] at 82-3, cited in Bakker, "Economic Restructuring," *supra* note 3 at 265-6.

²⁰ Economic Council of Canada, *Good Jobs, Bad Jobs*, *supra* note 12 at 14. The Economic Council highlighted increasing polarization but found it impossible to predict whether it was due to post recession adjustments or a long-term trend. *Ibid.* at 10. See also John Myles, Garnett Picot & Ted Wannell, "Wages and Jobs in the Eighties: Changing Youth Wages and the Declining Middle" Research Paper 17 (Ottawa: Statistics Canada, 1988) 52.

This dualization is not solely attributable to the shift to services, but is an economy-wide trend. Myles, *supra* note 19 at 124. Neither should it be assumed that all jobs created in the service industries are "bad jobs." There has been an increase in both well-paid and low-paid jobs within this sector. See Harvey Krahn, "Quality of Work in the Service Sector" in Lowe & Krahn, *supra* note 19, 43 at 45.

culminating in a good jobs/bad jobs scenario.²¹ Increasingly workers are either highly paid, in stable, unionized jobs providing fringe benefits and protected under labour legislation or poorly compensated, in precarious employment, without benefits, unorganized and excluded from regulatory measures. Those involved in contingent forms of employment and employed by small firms are routinely excluded from Canadian labour protection measures, including the Ontario *Pay Equity Act*, as I will discuss in Chapter 6.²²

II. THE FLEXIBLE FEMALE WORKER: WOMEN AND ECONOMIC RESTRUCTURING

Female workers are severely impacted by the emerging trends of economic restructuring.²³ Firstly, they are disproportionately employed in 'non-standard' jobs. A large majority - 69% - of the part-time labour force is female and women are also highly represented in temporary, casual and other forms of non-standard employment.²⁴ Secondly, contracting

²¹ See, for example, Economic Council of Canada, *Good Jobs, Bad Jobs*, *supra* note 12.

²² See *supra*, Chapter 6.

²³ On women in the global economy see Bakker, "Economic Restructuring," *supra* note 3 and *The Strategic Silence*, *supra* note 1; Lourdes Beneria, "Gender and the Global Economy" in Arthur MacEwan & William Tabb, eds., *Instability and Change in the World Economy* (New York: Monthly Review, 1989); Swasti Mitter, *Common Fare Common Bond: Women in the Global Economy* (London: Pluto Press, 1986) and V. Spike Peterson & Anne Sisson Runyan, *Global Gender Issues* (Oxford: Westview Press, 1993).

Increasing numbers of women say they work part-time because they can not find full-time employment. In 1994, 34% of all female part time workers indicated they would prefer to work full-time but could find only part-time work, compared to 22% in 1989. See Statistics Canada, *Women in Canada*, *supra* note 9 at 66.

out of government services and privatization of crown corporations has taken place in sectors where many women are employed, including computer services, data processing, cleaning services and child care.²⁵ As a result the employees of small scale establishments are also disproportionately female.

There is concern about women's wages as they are underrepresented in highly paid occupations but dominate in expanding low-wage sectors of the new globalized economy.²⁶ Myles, Picot and Wannell have found that the wage distributions of both sexes have become increasingly polarized but that of female workers shifted mainly towards the bottom and that of men toward the top. They found also that wage polarization has been most pronounced in the three occupations where women are concentrated - clerical, sales and services.²⁷ It is particularly disturbing that women are employed in jobs providing few

²⁴ In 1988, 36% of women and 23% of men were employed in non-standard employment - part-time, short term and own-account self employment. Economic Council of Canada, *Employment in the Service Sector* (Ottawa: Supply and Services Canada 1991).

²⁵ Urban Dimensions Group, *supra* note 12 at 34.

²⁶ The vast majority of women in the paid labour market work in the service sector. In 1994, 86% of all employed women held service sector jobs compared to 63% of employed men and 53% of all service-sector workers were female. In contrast, only 14% of employed women, compared to 37% of men, worked in goods-producing industries - including agriculture, resource based industries such as mining, forestry and fishing, manufacturing, construction and utilities. This figure has increased from around 20% in the mid-1970s. Statistics Canada, *Women in Canada*, *supra* note 9 at 67.

²⁷ J. Myles, G. Picot, and T. Wannell, *Wages and Jobs in the 1980s: Changing Youth Wages and the Declining Middle* (Ottawa: Statistics Canada, Social and Economic Studies Division, 1988) at 26. For a more detailed analysis of women's wages, see *infra* Chapter 3.

pension benefits as they are likely to live longer into retirement than their male counterparts and will require additional health care coverage and adequate pension provision.²⁸

International competition has the potential to impact most dramatically in the female-dominated low-wage personal service sector.²⁹ For this reason, many feminist organizations have been opposed to Canada entering into free trade agreements.³⁰ The National Action Committee on the Status of Women (NAC), for example, was part of the Pro-Canada Network which campaigned in opposition to free trade.³¹ Recent surveys

²⁸ Maureen Donnelly, "The Disparate Impact of Pension Reforms on Women" (1993) 6 C.J.W.L. 419 and Lowe & Krahn, *supra* note 19 at 48.

²⁹ Urban Dimensions Group, *supra* note 12 at 15.

³⁰ See Isa Bakker, "Free Trade: What's at Risk?" (1987) 2 Feminist Action/feministe 1; Sylvia Bashevkin, "Free Trade and Canadian Feminism: The Case of the National Action Committee on the Status of Women" (1989) 15 Canadian Public Policy 353; Marjorie Cohen, *The Macdonald Report and Its Implications for Women* (Toronto: National Action Committee on the Status of Women, 1985); Jill Vicker, Pauline Rankin, Christine Appelle, *Politics As If Women Mattered: A Political Analysis of the National Action Committee on the Status of Women* (Toronto: University of Toronto, 1993) 272 cited in Cohen, *supra* note 1 at 277, note 41.

³¹ On the Action Canada Network, see, for example, Peter Bleyer, "Coalitions of Social Movements as Agencies for Social Change: The Action Canada Network," in William K. Carroll, ed., *Organizing Dissent: Contemporary Social Movements in Theory and Practice* (Toronto: Garamond Press, 1992) 102.

Prior to NAC joining the Pro-Canada network, a Coalition Against Free Trade had been organized by Laurell Ritchie, a trade unionist on the NAC executive. Canadian women opposed to free trade have made links with women in Mexico and the U.S. in groups such as *Mujer a Mujer*, *Mujeres en Accion Sindical*, Labour Notes and through NAC. A "Women's Plan of Action" was endorsed by 100 Women from Central America, Canada and the United States and issued at the First International and Working Women's

demonstrate that some labour-intensive work is being moved from Canada to 'export-processing zones' along the US/Mexican border.³² In the first three years of operation of the Canada/US Free Trade Agreement, women's employment in manufacturing dropped by over 11%.³³

Poorly paid women, then, are situated squarely on the wrong side of the good jobs/bad jobs divide: disproportionately represented in firms employing part-time and temporary workers, often unprotected by governmental labour regulations, with little job security, pensions or benefits and unrepresented by a union.³⁴ Their 'flexibility' is fueling the new Canadian economy. Judy Fudge argues that these changes represent a 'feminization' of the labour force operating through two interacting trends. First, as more women take up paid employment there has been a 'feminization of the labour force.'³⁵ Secondly, she argues we

Conference on Economic Integration and Free Trade, organized by *Mujera Mujer* and *Mujeres En Accion Sindical* and co-sponsored by NAC and Labour Notes held in Valle De Bravo, Toluca, Mexico, 8 February 1992. The plan is reprinted in Pierson & Cohen, *supra* note 1 at 335-336.

³² Menzies, *supra* note 3 at 207.

³³ The largest job losses were in the garment industry - a 20% decline - and electrical production - a 17% decline. Marjorie Griffin Cohen, "The Implications of Economic Restructuring for Women: The Canadian Situation" in Bakker, *The Strategic Silence*, *supra* note 1, 103 at 109.

³⁴ Women are particularly affected by the growth in jobs that provide little or no pension coverage as, on average, they live longer into retirement than men. See, for example, Donnelly, *supra* note 28.

³⁵ Linda Briskin & Patricia McDermott refer to this phenomenon as the 'feminization of the workforce.' "The Feminist Challenge to the Unions" in Briskin & McDermott, *Women Challenging Unions: Feminism, Democracy and Militancy* (Toronto: University of

are witnessing a 'feminization of labour' in that many jobs, held by both male and female workers, are taking the form of traditionally female jobs in being low-paid and performed under non-standard terms and conditions. As a result, the labour-market experience of many men is moving closer to that of traditionally low-paid female workers.³⁶

This rhetoric of 'feminization' should not hide the fact that certain women are being disadvantaged more than others by economic restructuring. As Janine Brodie points out, professional women will be likely to survive the birth of the new global economy relatively unscathed, many of them because they employ less privileged women in their homes to allow them to concentrate solely on paid labour.³⁷ Meanwhile, existing labour market divisions among women - white/visible minority, middle class/working class, immigrant/non-immigrant, able bodied/disabled - are exacerbated by economic reorganization.³⁸ The example of women working in the garment industry highlights the

Toronto Press, 1993) 3 at 3 and Fudge, "Fragmentation and Feminization," *supra* note 15 at 62-64.

Marjorie Griffin Cohen cautions against assuming that the rate of women entering the labour force will continue to rise and argues that economic restructuring may slow its pace. There was an absolute decrease in women's the rate of participation of women in the paid labour force from 58.6% in July 1991 to 57.4% in the Spring of 1992. Although it is not possible to know if this trend will continue, she argues that it may be attributable to the impact of free trade on the manufacturing sector. Cohen, *supra* note 33 at 106 citing Department of Finance, *Quarterly Economic Review: Annual Reference Tables I, June* (Ottawa: Minister of Supply and Services, 1991) and Statistics Canada *The Labour Force*, Catalogue 71-001, selected years. (Ottawa: Minister of Supply and Services, n.d.).

³⁶ Fudge, "Fragmentation and Feminization," *supra* note 15 at 64.

³⁷ Janine Brodie, "Shifting the Boundaries: Gender and the Politics of Restructuring" in Bakker, *The Strategic Silence*, *supra* note 1, 46 at 51.

intersections of race, class, gender and immigration in women's experience of economic restructuring.³⁹

The garment industry in the Metropolitan Toronto area is a model of industry in the 1990s: dominated by female workers in its lower pay levels, relying on contingent, non-unionized labour and hit hard by international competition and free trade. In the words of Armine Yalnizyan, the garment industry is the Distant Early Warning line of labour-intensive sectors of the Canadian economy.⁴⁰ It is a test case for the flexible labour experiment and an indicator of changes to come for many workers in the new global economy.

The driving force behind the economic reordering of the garment industry is the changing role of the retailer in the production process. Increasingly, large retailers and distributors,

³⁸ Fudge, "Fragmentation and Feminization," *supra* note 15 at 64 citing Marjorie Cohen, "The Feminization of the Labour Market: Prospects for the 1990s" in Drache, *supra* note 18 at 64 at 114.

Judy Fudge and Harry Glasbeek have similarly argued that the experience of fragmentation on the basis of race, ethnicity and gender has been increased by the processes of globalization. See "The Politics of Rights: A Politics with Little Class" (1992) 1 Social & Legal Studies 45. For a criticism of their analysis see Didi Herman, "Beyond the Rights Debate" (1992) 1 Social and Legal Studies 25.

³⁹ I have drawn on Alexandra Dagg & Judy Fudge, "Sewing Pains: Homeworkers in the Garment Trade," in Lowe & Krah, *supra* note 19, 185 and Armine Yalnizyan, "From the DEW Line: The Experience of Canadian Garment Workers" in Linda Briskin & Patricia McDermott, *Women Challenging Unions: Feminism, Democracy and Militancy* (Toronto; University of Toronto Press, 1993) 284.

⁴⁰ Yalnizyan, *ibid.* at 284. In 1980, 73% of manufactured goods bought in Canada were Canadian-made. In 1991, only 56% of all manufactured goods were domestically produced and 55% of clothing. Dagg & Fudge, *ibid.* at 190.

mainly multinational companies, have tightened their control of the industry world-wide. In Canada, a small number of large retailers - primarily the Hudsons Bay Company, Eaton's and Dylex - control more than 40% of market.⁴¹ Operating as contractors these companies reign over a complex arrangement of subcontractors and homeworkers, dictating to the garment manufacturers not only the styles their stores require but other detailed requirements such as when the garments are to be produced and the cost of their production.

Occupational sex-segregation operates among the bodies which contract with the retailer. Designing, fabric purchasing and cutting are male-dominated occupations while the employees who sew clothes for subcontractors are almost exclusively female. The retailers generally have no direct contact with these women but are indirectly increasing control over them. Retailers are, for example, demanding very fast production rates and issue work orders erratically leaving employees with no dependable schedule and periods of unemployment. Homeworkers in particular have been found to be paid at shockingly low wages - their contracts frequently allow employers to avoid overtime, vacation pay and benefits - although factory-based women too are very low paid.⁴²

⁴¹ Yalnizyan, *ibid.* at 289.

⁴² The I.L.G.W.U. found the average wage of the women in their survey to be \$4.50 an hour, with some receiving only \$2.50 or \$1.00 per hour. Dagg & Fudge, *supra* note 39 at 192. The employers do not pay premiums for Unemployment Insurance or the Canada Pension Plan. Yalnizyan, *ibid.* at 290.

A very high percentage of women employed in the garment industry in the Toronto area are of recent Chinese origin. The industry employs poorly paid immigrant labour in order to compete in the restructuring international labour market.⁴³ The outcome is that 'Third World' women who were drawn to North America due to its perceived economic advantages, who left their homelands as the development of capitalism pushed them towards countries of more advanced industrial development, found themselves employed in marginalized sectors of the labour market in their new home. Despite most already having landed immigrant status, they are in a similar situation to immigrant domestic workers⁴⁴ to the extent that language and cultural barriers exacerbate their poor working conditions by creating barriers to their receiving information on their rights under the law, organizing to better their position or making complaints to state bodies.⁴⁵

The garment industry can also be viewed as a test case for the continuing viability of the union movement as it is now imperative that unions attract the new contingent female workforce, not only for the benefit of the workers themselves, but also to ensure the continuance of unions into the twenty-first century. Their traditional constituency - the

⁴³ Ng, "Immigrant Women: The Construction of a Labour Market Category" (1990/1991) 4 C.J.W.L. 96 at 101, citing Folker Frobel et. al., *The New International Division of Labour* (Cambridge: Cambridge University Press, 1977, translated into English in 1980) and Saskia Sassen-Koob, "Toward a Conceptualization of Immigrant Labour" (1981) 2 International Social Problems 165.

⁴⁴ See *supra* Chapter 2.

⁴⁵ Yalnizyan, *supra* note 39 at 297.

heavy manufacturing sector - is rapidly declining and with it the source of new (male) members.

It is essential, then, that unions become established in the growth sectors of the economy, notably the service sector. However, these sectors are where unions have found it difficult to gain a foothold.⁴⁶ Moreover, labour market fragmentation is resulting in potential union members labouring in isolated small-scale units, which cause great difficulties in developing collective strategies to challenge exploitative working conditions and low wages.⁴⁷ Part of the failure of unions to attract female members is attributable to their traditional male-centred priorities and structures.⁴⁸

Old-style policies and practices are likely to be unattractive to the new contingent worker and those unions which adopt novel strategies are more likely to successfully attract contingent female workers. One union which has met with success is the International Ladies' Garment Workers' Union (ILGWU) which has organized garment workers in Toronto.⁴⁹ The Union set up a Homeworkers' Association which became one of its Locals and makes its presence known by word of mouth and community-service announcements

⁴⁶ *Partnership and Participation in the 1990s: Labour Law Reform in Ontario*, Report of the Labour Representatives to the Labour Reform Committee of the Ministry of Labour, April 14 1991.

⁴⁷ Yalnizyan, *supra* note 39 at 289.

⁴⁸ See *supra* Chapter 2.

⁴⁹ Yalnizyan, *supra* note 39 at 294-295.

on television and in local newspapers, including Chinese-language papers. It organizes day trips and tea parties for homeworkers and provides services which include advocacy for women appearing before the provincial Employment Standards branch, organizing activities, social events and seminars on workers' rights.⁵⁰

The garment industry is just one example of the effects of economic restructuring on a specific group of female workers. Considering how these changes affect 'women' in general, then, is inadequate. In an increasingly polarized labour market, while remaining aware of the connections between women, it is crucial to consider the differential impact of employment legislation on different groups of women, as I will do in the following Chapters in relation to pay equity legislation.

⁵⁰ As the Ontario Labour Relations Board cannot permit bargaining units of only one worker, the IGLWU has no certificate for Local 12 and as a result the Homeworker's Association cannot engage in collective bargaining. The ILGWU formed a Coalition for Fair Wages and Working Conditions for Homeworkers in 1991 from advocacy groups, legal clinics, women's organizations and church groups to campaign for legislative reforms. They have recommended that the definition of 'employer' in the *Labour Relations Act* be changed in order to make the principal contractor - the owner of the label - accountable for employment standards for all employees involved in the production of their garments rather than the worker's immediate employer.

CHAPTER FIVE

FUMBLING TOWARDS EQUITY: TRENDS IN LEGISLATING WOMEN'S PAY

1951-1987

INTRODUCTION

Three legislative models have been enacted in Canadian jurisdictions in an attempt to close the male/female wage gap: 'equal pay for equal work,' 'equal pay for work of equal value' and proactive 'pay equity.'¹ Each represents an attempt to refine earlier laws in order to eradicate the difficulties experienced by women seeking wage adjustments. In this Chapter I trace the development of legislation on women's pay and explore the benefits and deficiencies of each of the models. As the Ontario *Pay Equity Act* is the most comprehensive and far-reaching of Canadian proactive pay equity laws, the history of pay legislation in Canada can be seen as culminating in its enactment.

¹ Patricia C. McDermott uses this framework in "Pay Equity in Canada: Assessing the Commitment to Reducing the Wage Gap" [hereinafter "Pay Equity in Canada"] in Judy Fudge & Patricia McDermott, eds., *Just Wages: A Feminist Assessment of Pay Equity* (Toronto: University of Toronto Press, 1991) and in "Equal Pay in Canada" in F. Eyraud, *Equal Pay Protection in Industrialized Market Economies: in Search of Greater Effectiveness*, (Geneva: International Labour Organization, 1993) 43 at 43.

Carl J. Cuneo adopts a similar approach, dividing legislative measures into three stages: 'equal pay for equal work,' 'equal pay for similar or substantially similar work' and 'equal pay for work of equal or comparable value.' The third stage has two phases - a complaints model and a model with 'some degree of pro-activity.' *Pay Equity: The Labour-Feminist Challenge* [hereinafter *The Labour-Feminist Challenge*] (Toronto: Oxford University Press, 1990) at 17-18.

I. FAIR REMUNERATION: EQUAL PAY FOR EQUAL WORK

The history of the legal regulation of women's pay in Canada stems from the aftermath of the Second World War. During the war years there had been a massive increase in the participation of women in paid work when they became essential to war-time production. Arguably, the experience of large numbers of women undertaking 'men's jobs' created a climate where the idea of a woman being paid the same wage as a man doing the same job did not seem surprising. The years immediately after the War were also a period of economic growth, when legislation attacking the gender-based wage gap would be less likely to be thought of as a costly irrelevancy. In 1948 the Canadian government ratified the *Universal Declaration of Human Rights* which included a measure providing that '[e]veryone, without any discrimination, has the right to equal pay for equal work,' a formula that was subsequently adopted by a number of governments across Western industrialized nations.²

The province of Ontario was the first jurisdiction in Canada to legislate equal pay for equal work when it enacted the *Female Employees Fair Remuneration Act* in 1951.³ The Act

² The *Universal Declaration of Human Rights* G.A. Resolution 217 (III), G.A.O.R., 3rd Sess, Pt. I, Resolutions, p. 71, art. 23(2).

³ *Female Employees Fair Remuneration Act*, R.S.O. 1951, c. 26.

This legislation was passed partly as the result of the efforts of Margaret Hyndman, one of the first practicing female lawyers in Canada. See M. J. Mossman, "Unequal Access; Women Lawyers in a Changing America" Review of R. Chester (1986) 2 C.J.W.L. 178.

enabled a female employee who earned less than a man in the same job to make a claim for a wage adjustment before the Fair Employment Practices Branch of the Department of Labour.⁴ Subsequently legislation was passed in most other jurisdictions which resembled the Ontario legislation in requiring employers to pay female workers equally to male colleagues employed in the same work but only compelling them to do so when a woman brought a successful claim before a court or tribunal.⁵

The wording of these early legislative schemes often allowed wage comparisons only between women and men employed in identical jobs. The Ontario Act specified that the male comparator must be employed in 'the same work' as the woman making the equal pay claim.⁶ This presented difficulties for women who felt a male colleague was doing essentially the same job although his job had a different title. She could be employed as a

She also acted as counsel for the plaintiffs in *The Bell Canada Case*. See Christine J.N. Kates, "Identical or Substantially Identical': Bell Canada and the Struggle for Equal Pay 1967-1976" (1990) 4 C.J.W.L. 133.

⁴ The Director of the Branch could recommend to the Minister of Labour that a conciliation officer be appointed to settle the grievance. If the officer failed to do so, the Minister could appoint a conciliation committee to recommend a course of conduct to the Director. The Director could then make a recommendation to the Minister who could then issue the final order. *Female Employees Fair Remuneration Act*, *supra* note 3 at ss. 2-4.

⁵ In order of enactment they were Saskatchewan - *Equal Pay Act*, 1952 (S.S. 1952, c. 104); British Columbia - *Equal Pay Act* (S.B.C. 1953 (2nd Sess.), c. 6); Canada - *Female Employees Equal Pay Act*, R.S.C. 1956, c. 38; Manitoba - *Equal Pay Act* (S.M. 1956, c. 18); Nova Scotia - *Equal Pay Act* (S.N.S. 1956, C. 5); Alberta - *The Alberta Labour Act* R.S.A. 1955, c. 167 as am. S.A. 1957, c. 38, s. 41; Prince Edward Island - *Equal Pay Act* (S.P.E.I. 1959, c.11) and New Brunswick - *Female Employees Fair Remuneration Act* 1966 (2nd) c. 5 (S.N.B. 1960-61, c. 7).

⁶ *Female Employees Fair Remuneration Act*, *supra* note 3, s. 2(1).

Nurses' Aide, for example, and he as an Orderly, although they both performed the same tasks. A further deficiency of the legislation was that minor differences between the jobs performed by the woman and the man could be used by an employer to justify differential wage rates.

The 'same work' formula in the Ontario legislation was later broadened to read:⁷

....substantially the same kind of work performed in the same establishment, the performance of which requires substantially the same skill, effort and responsibility and which is performed under similar working conditions....⁸

Many of the legislative provisions in other jurisdictions too were altered to allow a broader comparison⁹ and the federal *Female Employees Equal Pay Act*, when enacted in 1956 provided for equal pay for 'identical or substantially identical work.'¹⁰

⁷ The *Female Employees Fair Remuneration Act* was repealed in 1961 and replaced by a provision in the *Ontario Human Rights Code*. S.O. 1961-62, c. 93, ss. 5, 19. From 1968 it has been included in *Employment Standards Acts*. See S.O. 168, c. 35, s. 19.

⁸ *Employment Standards Act*, R.S.O. 1980, C. 137, s. 33(1).

⁹ For example, 'substantially the same work' in Nova Scotia (*Labour Standards Code*, S.N.S. 1972, c. 10, s. 55, *as am.* By S.N.S. 1976, c. 41, s. 9), 'similar or substantially similar work' in the British Columbia (*Human Rights Act* S.B.C. 1984, c. 22, s. 7) and 'the same or similar work, under the same or similar conditions' in Newfoundland (*Newfoundland Human rights Code*, R.S.N. 1970, c. 262, s. 10, *as am.* by S.N. 1974, No. 114, s. 6.).

¹⁰ R.S.C. 1956, c. 38, s. 4(1).

Employers who tried to avoid awarding women equal pay by rewording job descriptions, could be challenged under this legislation. For example, in the *Riverdale Case*¹¹ female nursing assistants were being paid at a lower rate than male nursing orderlies. The job description of the nursing assistants stated that they were required to 'assist professional nursing staff by performing routine duties' in caring for hospitalized patients. The job description of the male orderlies was the same except for the omission of the word 'routine' even though their duties did appear to be very similar to their female colleagues. The Court of Appeal decided the work done by the nursing assistants and that by the orderlies required equal skill, effort and responsibility and they were both performed under similar working conditions.

Despite the changes in the statutory wording, the provisions of the Act could still be interpreted restrictively to allow relatively minor differences in the work performed by the comparators to defeat a claim for equal pay. In the 1967 case *Filiatrault et al. v Ontario Department of Health*,¹² an Ontario judge considered a complaint by two women

¹¹ *Re. Board of Governors of the Riverdale Hospital and the Queen in Right of Ontario* (1973), 34 D.L.R. (3d) 289.

¹² [Unreported]. Discussed in Walter Surma Tarnopolsky & William Pentney, *Discrimination and the Law* (Toronto; R. De Boo, 1985) at 12-38 - 12-39.

The case was heard by Ontario County Court Judge Anderson, sitting as a Board of Inquiry under the *Ontario Human Rights Code* which contained the 'equal pay for similar work' provision from 1962-68.

employed as Hospital Aides in two separate hospitals who claimed they were being paid less than male Hospital Attendants. Despite the differing job titles, he concluded that the work done by the female Aides in one of the two establishments was 'without significant difference' from that performed by the Attendants and they were, therefore, undertaking the 'same' work. However, in respect of the women in the second hospital, he concluded that, since the female Aides had closer and more skilled supervision than the male Attendants, their work was sufficiently different to deny them equal pay.¹³

The main problem with the 'equal pay for equal work model' was simply that men and women were not doing the same jobs. As I documented in Chapter 2, throughout the nineteenth and twentieth century, women and men have to a great extent been segregated in the paid labour market; undertaking *different* jobs with *different* skills, responsibilities and working conditions. Under equal pay for equal work legislation, even in its broader form, a woman could not compare her work to a higher paid man whose work, although dissimilar to hers, could be seen as equally *valuable*. A female clerical worker, for example, could not claim her work to be of equal value to that of a higher paid male welder and demand a wage adjustment. Given the sex-based segregation of the labour market, it was not possible for equal pay for equal work legislation to combat the gender wage gap.

¹³ *Ibid.* at 12-39.

The inadequacy of the 'equal pay for equal work' formula was apparent and, by the late 1960s, many courts and tribunals appeared tired of its limitations, stretching the statutory wording as far as possible to facilitate a woman's equal pay claim. In *Regina v Howard et al., ex parte Municipality of Metropolitan Toronto*¹⁴ in 1970, the Ontario Court of Appeal again heard a case concerning hospital employees, this time female Nurses' Aides and male Orderlies. This time the court applied a wide understanding of what could constitute comparable work. The 'same' work, they decided, was not 'identical' work and minor differences in job content would not prevent an equal pay claim.¹⁵

The 1975 case of *Re. Harris and Bell Canada*¹⁶ highlights the inadequacies of the 'equal pay for equal work model.' In the first instance, the Referee appointed under the Act adopted a wide view of 'work,' interpreting it to mean 'an accumulation of skills.' The Federal Court of Appeal, however, adopted a very restrictive interpretation of the wording of the Act. Mr. Justice Thurlow stated:

...Parliament did not require that there be equal pay for 'similar or substantially similar' work, nor that there be equal pay for work involving

¹⁴ (1970), 13 D.L.R. (3d) 451.

¹⁵ In the later case of *Re. Leisure World Nursing Homes and Director of Employment Standards* (1980), 29 O.R.(2d) 144 the Ontario Divisional Court held that unless there were 'significant differences' between the jobs, the decision of the Referee under the *Employment Standards Act* would not be quashed. For a similarly wide interpretation of the 'same work,' this time before the courts of Alberta, see *Attorney General of Alberta v Gares* (1976), 67 D.L.R. (3rd) 635.

¹⁶ (1975), 58 D.L.R. (3d) 610. On this case see Kates, *supra* note 3.

'similar or substantially similar' skills or knowledge or talents. Nor did it require equal pay for work of 'equal or substantially equal' value. What was required was that female employees be paid at a rate that was not less than the rate of pay for male employees for 'identical or substantially identical' work.¹⁷

Given such restrictive interpretations given to the wording of equal pay for equal work acts it is not surprising that they appear to have had little if any effect on the earnings gap.¹⁸ Morley Gunderson notes that econometric studies have never detected any discernible impact of equal pay policies on the gender wage gap.¹⁹ In 1976, women still earned, on average, 10-20% less than men after variables such as education, hours worked, overtime, etc. were taken into account.²⁰

¹⁷ *Re Harris and Bell Canada, ibid.* at 611-612. Mr. Justice Urie said:

...what a female employee does for an employer and what a male employees does for an employer shall be deemed to be the same, or essentially and without material qualifications the same, if what the employees have to do, the acts or actions the employees are called upon to perform or what is done by the employees for the employer are the same or essentially and without material qualification the same. When the requirement of the *Act* is stated in such a fashion it is not possible, in my opinion, to view the word 'work' as meaning 'an accumulation of skills' as found by the referee. Implicitly, if not explicitly, he then decided that work may be substantially the same irrespective of the fact that the jobs, duties and services may be quite different.

¹⁸ See Gail C.A. Cook & Mary Eberts, "Policies Affecting Work" in Gail C.A. Cook, ed., *Opportunity for Choice: A Goal for Women in Canada* (Ottawa: Statistics Canada/C.D. Howe Research Institute, 1976) at 174 cited in Rosalie Silberman Abella, "Employment Equity" (1987) 16 Man. L.J. 185 at 189. And Lindsay Niemann, *Wage Discrimination and Women Workers: The Move Towards Equal Pay for Equal Value in Canada* (Ottawa: Minister of Supply and Services, 1984) at 42-54.

¹⁹ Morley Gunderson, "Male-female wage differentials and policy responses" (1989) 27 *Journal of Economic Literature* 46.

During the time that the equal pay for equal work formulation was becoming increasingly strained, in the late 1960s, a revolution was taking place in the lives of many women. Specifically, those middle-class women who in the previous decade would have been expected to labour solely in the domestic sphere, entered the paid labour market.²¹ It was during this time also that rumours of a 'Second Wave' of the women's movement were heard.²² More and more middle-class women entered higher education as the educational system expanded and universities became more accessible due to low tuition fees, readily available student loans and grants, and their expectations about their lifestyles changed. However, after attending universities and colleges they often ended up excluded from many jobs for which they were qualified or paid poorly for the work they did.²³

The women joining the Canadian wage labour force at this time began to voice concerns about their position in the workforce. By the mid 1960s, union women, many of them

²⁰ Canada, Labour Canada, Women's Bureau, *Women in the Labour Force, 1978-1979, Part II - Earnings of Women and Men* (Ottawa: Ministry of Supply and Services, 1981).

²¹ See, for example, Nancy Adamson, Linda Briskin & Margaret McPhail, *Feminist Organizing for Change* (Toronto: Oxford University Press, 1988) at 39.

²² The period of organizing to win the vote and property rights in the nineteenth and early twentieth century is often termed the 'First Wave' of the women's movement. Adamson, Briskin & McPhail *ibid.* at 3.

Although the granting of suffrage is generally taken to mark the end of the First Wave, Nancy Cott views the period from 1910-1930 as a period of transition within feminism during which the nineteenth century movement evolved into modern feminism. See *The Grounding of Modern Feminism* (New Haven, Conn: Yale University Press, 1987).

²³ Adamson, Briskin & McPhail, *supra* note 21 at 39.

working-class, were taking action over issues of importance to female employees such as the paucity of women in union leadership, sexual harassment, child care and also the inadequacies of the existing equal pay for equal work legislation.²⁴ Activists tended to be unionized women involved with women's committees and caucuses at the national level in the Canadian Labour Congress and in local federations of labour and union branches. As a consequence they tended to focus on the traditional union methods of improving working conditions - collective bargaining and strike action²⁵ - rather than legislation. Faced with antagonism towards their presence and interests in many unions, they made significant advances in forcing the union movement to acknowledge the importance of women's concerns.²⁶ The Canadian Labour Congress in 1968, for example, adopted a clause in its constitution for eradication of sex discrimination in employment.²⁷

²⁴ See Timpson, Annis May, "The Politics of Employment Inequality in Canada; Gender and The Public Sector" in Julia Evetts, ed., *Women and Career: Themes and Issues in Advanced Industrial Societies* (London: Longman, 1993) at 46 and Rosemary Warskett, "Political Power, Technical Disputes, and Unequal Pay: A Federal Case" in Fudge & McDermott, *supra* note 1, 172 at 177.

²⁵ A series of strikes over wages took place in the 1970s and 1980s e.g. in the private sector by Blue Cross & Radio Shack employees and in the public sector by federal government clerk's and Lower Mainland Municipal Workers in B.C. See Heather Jon Maroney, "Feminism at Work" in Heather Jon Maroney & Meg Luxton, eds., *Feminism and Political Economy: Women's Work, Women's Struggles* (Toronto; Methuen, 1987).

²⁶ See, for example, Mary Cornish & Lynn Spink, *Organizing Unions* (Toronto: Second Stroy Press, 1994); Carl J. Cuneo, "Trade Union Leadership: Sexism and Affirmative Action", in Linda Briskin & Patricia McDermott, eds., *Women Challenging Unions: Feminism, Democracy and Militancy* (Toronto: University of Toronto Press, 1993); Ruth Frager, "No Proper Deal: Women Workers and The Canadian Labour Movement, 1870-1940", in Linda Briskin & Linda Yantz, eds., *Union Women* (Toronto: Women's Educational Press, 1983) and *Sweatshop Strike: Class, Ethnicity, and Gender in The Jewish Labour Movement of Toronto 1900-1939* (Toronto: University of Toronto Press, 1992).

Union agitation was accompanied by feminist thought and activism among professional and middle-class women.²⁸ A number of bodies, such as the Voice of Women,²⁹ the National Council of Jewish Women, the Canadian Federation of University Women and the Y.W.C.A., had publicly represented the interests of different groups of women. They united around the demand that a Royal Commission be established to study the position of women in Canadian society and formed the Committee for Equality for Women. Having had previous experience in lobbying governments and the sympathy of numerous M.P.s and government officials, they tended to focus their efforts on state bodies.³⁰ Faced with these demands, the government established the Royal Commission on the Status of Women in 1966.

The *Report* of the Royal Commission, issued in 1970, noted the lack of success of equal pay for equal work laws, attributing this to the difficulty in proving the law had been

²⁷ "Canadian Labour Congress adopts Change in structure" (1968) 13 Canadian Labour 9.

²⁸ See generally Warskett, *supra* note 24 at 172.

²⁹ The re-emergence of the Canadian women's movement is often traced back to the founding of the Voice of Women (VOW) in 1960 to campaign against the proliferation of nuclear arms. See Ruth Roach Pierson, "Global Issues" in Ruth Roach Pierson & Marjorie Griffen Cohen, *Canadian Women's Issues: Volume II. Bold Visions* (Toronto: Lorimer, 1995) 360 at 376 and Kay Macpherson and Meg Sears, "The Voice of Women: A History" in Gwen Matheson, ed., *Women in the Canadian Mosaic* (Toronto: Peter Martin Associates Limited, 1976) 81.

³⁰ Cerise Morris, "Determination and Thoroughness: The Movement for a Royal Commission on the Status of Women in Canada" (1980) 5 Atlantis 10 cited in Adamson, Briskin & McPhail, *supra* note 21 at 51.

violated and poor enforcement of the legislation.³¹ The Commission recommended adopting the terminology of the International Labour Organization (I.L.O.) Convention 100 of 1951 which had not at that time been ratified by the Canadian government. This convention provided for 'equal pay for work of equal value.'³²

II. COMPARING DISSIMILAR JOBS: EQUAL PAY FOR WORK OF EQUAL VALUE

Equal pay for work of equal value allows a woman employed in a *different* job from a male colleague to be paid the same wage when the work that she performs is of equal

³¹ Royal Commission on the Status of Women in Canada, *Report of the Royal Commission on the Status of Women* (Ottawa: Information Canada, 1970) at 72- 75.

³² See *ibid.* at 75. The *Convention Concerning Equal Remuneration for Men and Women Workers for Work of Equal Value* provides:

Each Member shall, by means appropriate to the methods in operation for determining rates of remuneration, promote and, insofar as is consistent with such methods, ensure the application to all workers of the principle of equal remuneration for men and women workers of equal value.

The principle of equal pay for work of equal value was supported by the Canadian government, but they were opposed to adopting it as binding on states. See "Equal Remuneration for Men and Women" (1952) *The Labour Gazette* 1344 at 1345, cited in Marilee Marcotte, *Equal Pay for Work of Equal Value* (Kingston, Ont: Industrial Relations Centre, Queen's University, 1987). This was because the federal, provincial and territorial governments were generally in favour of the principle of equal value but not prepared to enact legislation. International Labour Conference, *Report V(1) and (2). Equal Remuneration for Men and Women Workers or Work of Equal Value* 1950, cited in Lindsay Niemann, *Wage Discrimination and Women Workers: The Move Towards Equal Pay for Work of Equal Value in Canada* (Ottawa: Minister of Supply and Services, 1984) at 17. The government abstained during the final vote for adoption.

value to the work he is undertaking. Under this legislation, in contrast with equal pay for equal work provisions, both similar and dissimilar jobs can be compared. A laundry worker and a custodial worker for example³³ or a cook and a painter can be compared under equal value legislation.³⁴ The concept of equal pay for work of equal value is based on different theoretical underpinnings from equal pay for equal work. Rather than adopting strict Aristotelian equality, it has its basis in theories that work performed by women is culturally devalued. The concept of equal pay for work of equal value implies that women's work is paid less because it is attributed with little value by current dominant cultural and market notions.³⁵ It reveals the systemic nature of women's low pay, rather than giving the impression that incidences of women receiving low wages are an anomaly.³⁶

³³ Canadian Human Rights Commission, *Equal Pay Casebook 1978-1984* (Ottawa: Canadian Human Rights Commission) at 8.

³⁴ One of the most important British Cases, *Hayward v Cammell Laird*, involved comparisons being made between a female cook and male painters and light carpenters. [1985] Industrial Cases Reporter 71 (Industrial Tribunal 1984), No. 5979/84 (Liverpool Industrial Tribunal, Sept. 12, 1985), [1986] Industrial Cases Reporter 862 (Employment Appeal Tribunal), [1988] Queen's Bench 12 (Court of Appeals, 1987) [1988] 2 All England Law Reports 257 (House of Lords), No. 5979/84 (Liverpool Industrial Tribunal, July 20, 1988). See Steven L. Willborn, *A Secretary and a Cook; Challenging Women's Wages in the Courts of the United States and Great Britain* (Ithaca: ILR Press, 1989).

³⁵ See *supra* Chapter 2.

³⁶ Section 4 of the Ontario Act states that the purpose of the legislation is to 'redress systemic gender discrimination in compensation for work performed by employees in female job classes, thus grounding the legislation in theories of the systemic undervaluation of women's work. *Pay Equity Act*, R.S.O. 1990, c. P.7, s. 4(1).

Canada finally ratified the I.L.O. Convention 100 in 1972 and was thus required to ensure the application of equal remuneration for men and women workers for work of equal value. Despite this international obligation, no jurisdiction in Canada passed equal value legislation until it was enacted as part of the Quebec *Charte des droits et libertes de la personne* in 1975.³⁷ By this time, the National Action Committee on the Status of Women was campaigning to have equal pay for work of equal value incorporated in the proposed Canadian human rights legislation and the I. L. O. had reiterated its commitment to equal value in 1975 - International Women's Year - by including an equal value provision in its "Declaration on Equality of Opportunity and Treatment of Women Workers."³⁸

³⁷ *Charte des droits et libertés de la personne* (1975). Section 19 covers "equivalent work":

Tout employeur doit, sans discrimination, accorder un traitement ou un salaire égal aux membres de son personnel qui accomplissent un travail équivalent au même endroit.

³⁸ International Labour Office, "Declaration on Equality of Opportunity & Treatment of Women Workers," (1976) *Women Workers and Society: International Perspectives* 202. This included a provision that:

Special measures shall be taken to ensure equal remuneration for work of equal value for women also in occupations in which women predominate and to measure the relative value of their work with full regard to the qualities essential to performing the job.'

Special measures shall be taken to raise the level of women's wages as compared with that of men's and to eradicate the causes of lower average earnings for women possessing the same or similar qualities or doing the same work or work of equal value.

In 1977, the federal government passed the *Human Rights Act* which provided that women should be paid equally to men employed in work of equal value.³⁹ Section 11(1) of the Canada *Human Rights Act* reads:

It is a discriminatory practice for an employer to establish or maintain difference in wages between male and female employees employed in the same establishment who are performing work of equal value.

The Act applies to employees in all federal departments and agencies and in Crown corporations and to private companies which are chartered or regulated by the federal government, which includes much of the transportation industry, banks and the media. In total it covers 11% of employees in Canada.⁴⁰

The first equal pay complaint dealt with by the Canadian Human Rights Commission, in 1979,⁴¹ involved two substantially dissimilar jobs. A group of federal government librarians, more than 66% of whom were women, argued that they should be paid the same as the predominantly male group of historical researchers as their jobs were of equal value. The Commission found in favour of the librarians and a \$2.3 million settlement was achieved between the Treasury Board and the Public Service Alliance of Canada which

³⁹ *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, s. 11(1).

⁴⁰ The *Canadian Human Rights Act* is still in force and is the only remedy available to federally employed workers.

⁴¹ It was finally settled and approved on 17 December 1980.

had represented the librarians. The adjustments were from \$500 to \$2,500 annually and they received back-pay of up to \$5,900 each.⁴²

Stereotypically female work has been compared with traditionally male occupations under the federal Act and found to be of equal value. In 1980, for example, a number of female clerks and telephone operators working for the Quebec North Shore Paper Company compared their work to that of male land and wood measurers being paid as much as \$10-\$30 more per week. During negotiations with the Quebec Commission, it was agreed that the work they were performing was “équivalent” in terms of the legislation.⁴³

Thus, equal value legislation proved to be a significant advance on the previous legislative model, allowing women who could not previously have made claims to bring and win equal pay cases. The problem with both the equal pay for equal work and equal value legislation, however, was that they were complaint based. They required a woman who feels she is being underpaid to file a complaint in order for the legislation's provisions to be applied. Under the federal legislation, for example, a complaint had to be lodged with the Canadian Human Rights Commission.⁴⁴

⁴² See “Federal Government Librarians Win \$2 Million in Back Wages” (approved 17 December 1980) digested in (1981) 2 C.H.R.R. at *Cases of Note: Summaries of Recent Decisions and Settlements*, 20 January 1981. The settlement is also discussed in Canadian Human Rights Commission, *supra* note 33 at 5-7.

⁴³ Tarnopolsky & Pentney, *supra* note 12 at 12-47.

⁴⁴ *Canadian Human Rights Act*, *supra* note 39, s. 32.

Under this model of enforcement, a woman must recognize that her employer is in contravention of the legislation and be prepared to commit the time, expense and stress necessary to file a complaint.⁴⁵ It is possible for complaints made under the federal legislation to take a number of years. From 1978-1993 it only resolved about 100 complaints.⁴⁶ An example is the complaint made to the Human Rights Commission in December 1979 by the Public Service Alliance of Canada (P.S.A.C.) in respect of the seven sub-groups of the federal government's General Services Category. The three lowest paid groups - food laundry and miscellaneous personnel service workers - were predominantly female while the others - messengers, custodial workers and employees in building and store services - were predominantly male. The Treasury Board, against whom the claim was brought, admitted they were performing work of equal value. A settlement was not reached until 3 years later in 1982.⁴⁷ More recently, in 1994, a settlement was reached between the Federal Government and the Professional Institute of the Public Service of Canada. A number of pay equity complaints had been filed by the Institute as

Cuneo split existing pay equity legislation models into three categories: complaint-based, proactive and integrated. Complaint based systems require an individual to initiate a complaint; proactive schemes place the onus on the employer to achieve pay equity and integrated models combine aspects of both. "The State of Pay Equity: Mediating Gender and Class through Political Parties in Ontario" [hereinafter "The State of Pay Equity"] in Fudge & McDermott, *Just Wages*, *supra* note 1 at 40.

⁴⁵ Marjorie Griffin Cohen, "Paid Work" in Pierson & Cohen, *supra* note 29 at 99-100.

⁴⁶ Canadian Human Rights Commission, *Annual Report 1993* (Ottawa: Minister of Supply and Services, 1994) at 73.

⁴⁷ The Treasury Board agreed to pay back-pay of \$17 million and award a salary increase of \$12 million in total. See Canadian Human Rights Commission, *ibid.* at 8.

far back as 1979 and they had been under consideration by a Human Rights Tribunal for almost four years. This case does demonstrate that for the individuals pursuing a claim the rewards can be substantial. The women in this case received back-pay from \$11,000 to \$58,000 and annual increases of between \$3,200 and \$12,500.⁴⁸

Combined with the length and expense of negotiation and litigation, a woman may face the possibility that she will lose her job or otherwise singled out by an employer who becomes aware of her claim. The employer, meanwhile, is encouraged to continue with current pay arrangements until they are challenged. It is not surprising that the Canadian Human Rights Commission has concluded that the equal value provisions of the *Human Rights Act* 'have largely failed to live up to their billing.'⁴⁹ In its 1993 *Annual Report*, the Commission stated:

As the Human Rights Act stands at present, the Commission's role in dealing with inequalities in pay is much the same as its role with respect to other types of discrimination: it can investigate complaints, and it can seek to promote respect for the principle of equal pay through information programs. That approach has had some commendable results in individual cases, but it is slow, laborious, confrontational and limited in its overall effectiveness.⁵⁰

⁴⁸ Canadian Human Rights Commission, *Annual Report 1994* (Ottawa: Minister of Supply and Services, 1995) 67-68.

⁴⁹ Canadian Human Rights Commission, *Annual Report 1993* (Ottawa: Minister of Supply and Services, 1994) at 72.

⁵⁰ *Ibid.* at 79.

The Commission has, since late 1980s, proposed that the law be changed to a proactive scheme where employers review their own pay arrangements.

The irony of the 'equal pay for work of equal value' legislation is that the terminology implies that the systemic undervaluation of women's work will be remedied. However, the method provided for enforcing the legislation is individualistic and complaints-based. If wage discrimination is seen as systemic and pervasive, a complaints-based system is inadequate in combating it. As the Canadian Human Rights Commission has stated:

'By its very nature, the complaint-based model is ill-equipped to uncover patterns of undervaluation that are pervasive but for the most part unintentional. It contains no real incentive for employers and unions to identify and close wage gaps, and in the last resort it relies on extremely laborious and contentious methods for its enforcement.'⁵¹

III. COMBATING SYSTEMIC INEQUALITY: PROACTIVE PAY EQUITY LAWS

The alternative to a complaints-based legislative structure is a proactive scheme under which compliance is mandatory. The employer is responsible for determining whether there is a discriminatory pay regime in operation in his or her workplace and developing and implementing plans to remedy this situation rather than avoiding examining the wage structure until an employee makes a complaint.⁵² This legislation, then, is based on an

⁵¹ *Ibid.* at 81.

⁵² Judy Fudge & Patricia McDermott, "Introduction: Putting Feminism to Work", in Judy Fudge & Patricia McDermott, eds., *Just Wages*, *supra* note 1 at 3.

understanding of systemic undervaluation of women's work, as was the previous equal pay for work of equal value legislation, but a method of implementing equal pay is provided which does not depend on an individual worker pursuing a grievance.

The first proactive pay equity law in Canada was enacted in Manitoba in 1985.⁵³ Although it initially it applied only to the province's civil servants, a year later it was extended to cover the broader public sector, including Crown corporations, universities and health care facilities.⁵⁴ Although the government will provide advice to both public and private bodies on implementing pay equity, there is no *requirement* on private sector bodies to do so. This has proved to have been a great weakness of the Act, given the number of women employed in the private sector. The other proactive schemes passed since the Ontario Act - Prince Edward Island (1988),⁵⁵ New Brunswick (1989)⁵⁶ and Nova Scotia (1989)⁵⁷ - do not apply to the private sector. There is also a monetary cap on the funds an employer is required to commit to pay equity wage adjustments of 1% of the preceding year's payroll.⁵⁸ The Manitoba Act, then represents a tentative first step towards pay equity.

⁵³ *Pay Equity Act*, S.M. 1985-86, c. 21.

⁵⁴ *Ibid.*, s. 13(1) and Schedule A. See Roberta Ellis-Grunfeld, "Pay Equity in Manitoba" (1987) 16 Man. L. J. 227.

⁵⁵ *Pay Equity Act*, R.S.P.E.I. 1988, c. P-2.

⁵⁶ *Pay Equity Act*, S.N.B. 1989, c. P-5.01

⁵⁷ *Pay Equity Act*, R.S.N.S. 1989, c. 16.

⁵⁸ *Manitoba Pay Equity Act*, *ibid.*, s. 7(3). On the adjustments required under the Ontario legislation see *infra* Chapter 6.

In Ontario meanwhile, the equal pay for equal work formulation had been the legal standard since 1951. Women's groups and labour organizations united to fight for proactive equal value provisions. Lobbying by the Ontario Equal Pay Coalition - a collectivity of women's groups and labour associations - forced women's pay to the centre of the 1985 provincial election campaign.⁵⁹ The outcome - the collapse of the Conservative government and the election of a minority Liberal government - made the enactment of such legislation finally politically possible. In May of 1985 the New Democratic Party (N.D.P.) pledged to give the Liberals support in exchange for the enactment of a number of legislative measures including a proactive pay equity law covering both the public and private sectors.⁶⁰

The Ontario Act has a wider coverage than the Manitoba *Pay Equity Act* in that it applies not only to the broader public sector⁶¹ but also to the private sector. Indeed, it is the only

For a comparison of the proactive statutes see McDermott, "Pay Equity in Canada," *supra* note 1 and in "Equal pay in Canada", *supra* note 1.

⁵⁹ Barbara J. Falk, "A Reasoned Response: Pay Equity in Ontario" in Chaykowski, Richard P., ed., *Pay Equity Legislation* (Kingston, Industrial Relations Centre, 1989) at 10-11.

⁶⁰ Their agreement was embodied in the N.D.P./ Liberal Accord which contained an undertaking to draft pay equity legislation. For the role of the political parties in developing the legislation see Carl J. Cuneo, "The State of Pay Equity" *supra* note 44 at 33.

⁶¹ By this I mean educational institutions, health facilities, social services organizations etc.

proactive pay equity legislation to apply to the private sector.⁶² The extent of coverage of the Act had been a point of contention before its enactment.⁶³ During the drafting of the *Pay Equity Act* - from the introduction of the first Bill into the legislature for the first reading in February 1985 until its enactment - hundreds of briefs and oral presentations were put forward by business organizations, women's groups, unions, employee associations, community groups and government officials and the government consulted with many of these bodies.⁶⁴ Government options for the shape of the legislation were set

⁶² None of the other pay equity Acts in Canada apply to the private sector.

The Prince Edward Island Act provisions apply to the Government, agents of the Crown including Crown corporations, educational institutions, hospitals, nursing homes receiving government funding and a number of other bodies receiving government funds. See *Pay Equity Act*, R.S.P.E.I. 1988, C. P-2. At s. 1(k).

The New Brunswick legislation applies to all government departments, the Civil Service Commission, library boards, the Liquor Licensing Board, the Women's Directory and a number of other bodies. It does not include school districts, hospitals, the Electric Power Commission, the Liquor Corporation, or the Workers' Compensation Board. See *Pay Equity Act*, S.N.B. 1989, C. P-5.01 at s. 1(1)

In Nova Scotia, the legislation applies to civil servants, corrections employees, highway workers, certain hospital employees, crown corporations, hospitals and school boards and their employees, universities, municipalities and municipal enterprises and their employees and public sector corporations. *Pay Equity Act*, R.S.N.S. 1989, c. 16, s. 4(1).

⁶³ See Cuneo, "The State of Pay Equity," *supra* note 44 at 42-43.

⁶⁴ Two pay equity bills were introduced in the legislature. Bill 105, which applied to the public sector, was incorporated into Bill 154 covering both the public and private sectors. Public Service Pay Equity Bill 105 was introduced for the first reading on 11 February 1986. OLA 1986, 3999-4000. In September and October of 1986, 42 briefs and 28 oral presentations were submitted about the Bill. Public Archives of Ontario. Standing Committee on the Administration of Justice, RG 18 F, Acc. 20499, Box 4, Exhibits (Bill 105); Box 6, Transcripts J-17 to J-29, 23 September to 8 October 1986. Pay Equity Bill 154 was introduced in November 1986. Public hearings were conducted and the Standing Committee on the Administration of Justice heard 61 oral presentations and received 194 written briefs and letters. PAO, SCAJ, RG 18 F, Acc. 20499 Boxes 4 & 5, Exhibits (Bill

out in a Green Paper tabled in the House in November of 1985⁶⁵ and the government then established two separate business and labour advisory groups to give advice on matters such as job evaluation and pay equity plans as public consultation on pay equity continued.⁶⁶

During this process, interested groups polarized into two opposing camps.⁶⁷ The first fought for the widest possible application of the concept of pay equity and was made up of the Ontario Equal Pay Coalition, labour organizations such as the Ontario Federation of Labour, liberal and socialist-leaning women's organizations, including the National Action Committee on the Status of Women and the Coalition of Visible Minority Women. In opposition, a number of bodies formed a looser alliance to represent opponents of pay equity or those who wished for a more limited interpretation of the concept. Included in this camp were business associations and employer associations including the Canadian

154); Box 6, Transcripts J-51 (23 February 1987) to J-69(11 March 1987). Cuneo, *ibid.* at 35.

⁶⁵ Ontario Government, *Green Paper on Pay Equity* (Toronto: Attorney General and Minister Responsible for Women's Issues, 1985) at 3.

⁶⁶ These received 236 written briefs and heard 149 oral presentations during consultations in Toronto, Windsor, Sudbury, Thunder Bay and Ottawa. Ontario Legislative Assembly, *Hansard Official Report of Debates: Legislative Assembly of Ontario*, (Toronto: Queen's Printer, 1986), at 3370-1. See David Clark, Gail Cook & William Dimma, *The Report of the Consultation Panel on Pay Equity* (Toronto: Ontario Women's Directorate, 1986). A confidential oral report was made to Premier David Peterson and Ian Scott - Attorney General and Minister responsible for women's issues. Cuneo, "The State of Pay Equity," *supra* note 44 at 35.

⁶⁷ Cuneo names these two groups the 'labour-feminist alliance' and 'the male business alliance.' I feel the latter term could be taken to imply that both business people and opponents of the bill are exclusively male. Cuneo, *ibid.* at 33.

Manufacturers Association and the Canadian Federation of Independent Business, neo-conservative organizations such as the National Citizen's Coalition and conservative women's groups such as REAL Women of Canada.

To what extent, then, were the interests of low paid women represented in the process of drafting the Ontario *Pay Equity Act*? The long and convoluted process of consultation did allow many sectors of society with conflicting interests to express their views. Not all these interests, however, were embodied in the Act. Cuneo's analysis views the Act as 'only partly' a product of the public consultation process. He argues that alternatives were aired in the public consultation process while policies were being developed in government agencies including the cabinet, the Ministries of Labour and Justice, the Ontario Women's Directorate and the Legislative Assembly:

[L]obbying signaled to the state what groups in society favoured and rejected, and this favouring and rejecting was being influenced by the state's own agenda, shaped by prior gender, race/ethnic, and class forces.⁶⁸

The interests of low paid, visible-minority and working class women, rarely represented in the corridors of power, were heard in public as part of the consultation process.

However, they were only some of the many groups attempting to impose their views on the government and had less power to influence than certain other groups, particularly

⁶⁸ He notes that Bill 105 was written and presented in public (11 February 1986) before lobby groups developed briefs for the public consultation panel on pay equity. (February-April 1986). *Ibid.* at 56.

those in the business community.⁶⁹ The Equal Pay Coalition coordinated responses to government proposals and made compromises and was seen as the voice of labour and women's groups.⁷⁰ In attempting to confront the business organizations while representing a wide range of interests coherently, it found it difficult to consistently represent the interests of the most marginalized women in the labour market. Composed mainly of unionized women, the Coalition frequently represented their interests, which were not identical to and often conflicted with those of unorganized women. Consequently, class and race/ethnic contradictions were often obscured.⁷¹ The voice of low paid women was lost, as is apparent in the structure of the *Pay Equity Act* which I will discuss in the next Chapter.

⁶⁹ *Ibid.* at 33-34.

⁷⁰ Sue Findlay argues that the Coalition had 'virtual ownership' of the pay equity issue in Ontario. Findlay, "Making Sense of Pay Equity: Issues For A Feminist Political Practice" in McDermott & Fudge, *Just Wages*, *supra* note 1 at 103.

⁷¹ Cuneo criticizes the authors of the *Report of the Consultation Panel on Pay Equity* for not recognizing class and race/ethnic contradictions. "The State of Pay Equity," *supra* note 44 at 35.

CHAPTER SIX

FALLING SHORT OF THE IDEAL WOMAN: THE ONTARIO PAY EQUITY ACT AND THE CONTINGENT FEMALE WORKER

INTRODUCTION

Inquiring whether the Ontario *Pay Equity Act*¹ has benefited 'women' in general, as an apparently homogeneous group, obscures that its provisions are not equally accessible to all women. A more probing analysis is necessary; one which focuses on the economically marginalized - the low paid, contingent workers, the non-unionized and employees in deregulated workplaces. An approach is required which does not focus exclusively on gender but takes account also of other characteristics which divide low paid women from the more advantaged including class, race or ethnicity, citizenship and disability.

I. THE ONTARIO PAY EQUITY ACT: AN OUTLINE

All employers whose establishments are covered by the Ontario *Pay Equity Act* must maintain compensation practices providing for pay equity and both employers and unions are prohibited from agreeing to a compensation plan which does not meet the

¹ *Pay Equity Act*, R.S.O. 1990, c. P.7.

requirements of the Act.² The Act sets out a detailed, step-by-step procedure which employers must follow. Where the employees are unionized, each step in the process is negotiated with the employer.

In non-union settings, the employer unilaterally decides how to implement the Act. An employer covered by the Act must first divide the jobs in his or her establishment³ into groups of similar jobs termed 'job classes'⁴ and identify each class as either 'female' or 'male.' A job class is considered to be 'female' if at least 60% of its incumbents are women and 'male' if at least 70% or more of the positions in the class are filled by men. A class can also be designated as 'female' or 'male' by agreement during collective bargaining or by the Pay Equity Commission.⁵ After all the job classes have been

² *Ibid.*, s. 7 (1)-(2).

³ 'Establishment' is defined as 'all of the employees of an employer employed in a geographic division.' A geographic division is 'a county, territorial district or regional municipality described in the *Territorial Division Act*' and the Municipality of Metropolitan Toronto. The Territorial District of Sudbury and The Regional Municipality of Sudbury are considered one geographic division for the purposes of the Act. *Ibid.*, s. 1(1).

There are provisions allowing an employer to decide, or an employer and bargaining agent to agree to include employees within two or more geographical divisions within the same 'establishment' for the purposes of the Act. See ss. 15(2) & 14(3).

⁴ 'Job class' is defined as:

[T]hose positions in an establishment that have similar duties and responsibilities and require similar qualifications, are filled by similar recruiting procedures and have the same compensation schedule, salary grade or range of salary rates.

Ibid., s. 1(1).

designated as male or female, the employer applies a 'gender neutral job comparison system' to each class to determine the value of the work being performed.⁶ In practice, this means that a job evaluation study is implemented in the workplace.⁷ The employer then seeks male job classes which are of equal or comparable value to each of the female job classes. When the results of the job evaluation study show that a male-dominated job

⁵ *Ibid.*, s. 1(1). Canada's four other proactive pay equity Acts also require a comparison between male and female. The Manitoba *Pay Equity Act* provides that both male and female job classes have a cut-off of 70%. (S.M. 1985-86, c. 21 at s. 1). The New Brunswick *Pay Equity Act* follows the Ontario Act in stipulating a 70% standard for male job classes and 60% for female job classes. (S.N.B. 1989, c. P-5.01 at s. 1(1)). Under the Prince Edward Island and Nova Scotia legislation, the cut-offs are 60% for both male and female job classes. (*Pay Equity Act* R.S.P.E.I. 1988, c. P-5.01 at s. 1(g)-(h) and *Pay Equity Act* R.S.N.S. 1989, c. 16 at s. 13(1)(j)&(m)).

Arguably, the higher the female cut-off standard, the fewer women in an establishment will be covered by the legislation, although there has been little research undertaken on the importance of gender predominance in job classes. See Patricia McDermott, "Pay Equity in Canada: Assessing the Commitment to Reducing the Wage Gap" [hereinafter "Pay Equity in Canada"] in Judy Fudge & Patricia McDermott, eds., *Just Wages: A Feminist Assessment of Pay Equity* (Toronto: University of Toronto Press, 1991) at 24-26.

⁶ *Pay Equity Act*, *supra* note 1, s. 12.

⁷ The Pay Equity Commission and Tribunal have distinguished job comparison and job evaluation systems implying that a firm can carry out a job comparison without necessarily having to use one of the widely available job evaluation schemes marketed by management consultants. See, for example, Ontario Pay Equity Commission, *How To Do Pay Equity Job Comparisons* (Toronto: Ontario Pay Equity Commission, 1989); Ontario Nurses Association v Women's College Hospital [No.1] 1 P.E.R. 53 at 67.

Employers seem to be using the generic job evaluation schemes as the basis of job comparison rather than developing a scheme unique to their establishment. Patricia McDermott notes that the distinction between a 'job comparison' system and a 'job evaluation' system is meaningless as 'pay equity exercises....have become synonymous with job evaluation' in Ontario. "Pay Equity in Canada," *supra* note 5 at 26.

class is performing work of equal or comparable value to a female-dominated class but has a higher wage rate, the employer must adjust the women's wages.⁸

Public employers and those in the private sector who employ 100 or more workers are required to post 'pay equity plans' describing the comparison system selected, its application to the job classes and details about the wage adjustments to be made. Where unions are recognized, a plan must be posted for each union and for the non-unionized segment of the workforce.⁹

Each year, not more than 1% of the previous year's payroll need be spent on pay equity adjustments.¹⁰ The process of making adjustments must continue until each female job class has achieved pay equity. Public sector employers were the first employers required to begin making wage adjustments under the Act, beginning on January 1 1990. Deadlines for private employers were phased in over later years.

The Act established the Pay Equity Commission of Ontario¹¹ consisting of the Pay Equity Hearings Tribunal¹² and the Pay Equity Office.¹³ All parties to the Act can complain to the

⁸ *Pay Equity Act*, *supra* note 1, s. 26.

⁹ *Ibid.*, s. 13.

¹⁰ *Ibid.*, s. 13(6). The Act requires that the amount spent every year in achieving pay equity be not less than the lesser of 1% of the employer's payroll during the last year and the amount required to achieve pay equity.

¹¹ *Ibid.*, s. 27.

Commission about any violation of its provisions¹⁴ and employees and bargaining agents can complain that a plan is not being implemented properly or that a change in circumstances has rendered the plan inappropriate for the female job class.¹⁵

Unorganized workers have no right to negotiate the implementation of the Act with the employer and can only make representations to their employer after any pay equity plan is posted.¹⁶ If there are no complaints made, the plan is deemed to be approved by the Commission and is binding on the employer and employees.¹⁷ However, the employees can complain about subsequent violations of the Act. Where an employer does not post a plan, his or her employees can complain to the Commission if they feel there has been a breach of the Act.¹⁸ The Commission appoints a review officer to investigate and attempt

¹² *Ibid.*, ss. 28-32. The Hearings Tribunal makes determinations on matters that arise under the Act.

¹³ *Ibid.*, ss. 33-34. The Office is responsible for the enforcement of the Act and of the orders of the Hearings Tribunal.

¹⁴ *Ibid.*, s. 22(1). Complaints by both unionized and non-unionized workers are anonymous. *Ibid.*, s.32(4).

¹⁵ *Ibid.*, s. 22(2).

¹⁶ This must be done within 90 days of the posting. *Ibid.*, s. 15(4). If the employer then amends the plan and posts it for a second time, the employees then have 30 days to challenge it before the Commission. *Ibid.*, s. 15(7).

¹⁷ *Ibid.*, s. 15(8).

¹⁸ *Ibid.*, s. 22(1).

to help the parties reach a settlement¹⁹ and where this is not possible, the Hearings Tribunal holds a hearing.²⁰

Ideally, an employee covered by the Ontario *Pay Equity Act* would receive a substantial adjustment to her pay with the minimum of effort, obstruction or delay. The employee capable of doing this, the Act's 'ideal woman,' is employed in a job performed solely or mainly by female employees. Her employer is required to post a pay equity plan and does so after having fully negotiating its provisions with her union. A group of predominantly male workers in her establishment is receiving higher wages but has been found by a job evaluation scheme to be undertaking work of equal value to the female employee. As a consequence, her employer raises her salary to equal that of the male comparator.

The Pay Equity Hearings Tribunal and Ontario courts have been prepared to interpret the Act broadly to facilitate the making of claims and enable women to receive substantial pay adjustments. In *Ontario Nurses' Association v Ontario (Pay Equity Hearings Tribunal)*²¹ for example, the Ontario Court of Appeal upheld a Tribunal decision that a pay equity adjustment should be made *on top of* an increase in pay stemming from a collective agreement. This decision indicates that pay equity adjustments may have to be paid in addition to previously negotiated raises or subsequently bargained increases unrelated to

¹⁹ *Ibid.*, s. 23.

²⁰ *Ibid.*, s. 25(1).

²¹ (1993), 23 O.R. (3d) 43.

pay equity. These adjustments will not be allowed to be substituted for a pay equity increase. This is the case, even where, as in *Ontario Nurses Association*, the wages of a female job class will exceed the salary of its comparable male job class as a result of the combined increases.

Comprehensive information documenting the success of the Act is not available as there is no requirement for an employer to file pay equity plans with a regulatory agency. Neither is there a requirement for details about the pay adjustments made under the Act to be made publicly available. Morley Gunderson undertook a survey based on about 30 cases and found the average settlement made under the Act to be about \$4,400, or a 20% wage increase.²²

For many women, however, the comparatively trouble-free gateway to higher pay is closed. There are four aspects of the legislation which are important in their exclusion: the limitations in the coverage of the Act, the importance of unionization, the difficulties in finding a male job class with which to compare the work of the female-dominated positions and the requirement of a gender neutral job evaluation scheme. My aim is to

²² Morley Gunderson, *Comparable Worth and Gender Discrimination: An International Perspective* (Geneva: International Labour Office, 1994) [hereinafter *Comparable Worth*] at 79. His calculations are based on information provided by the Ontario Pay Equity Commission (1991) and from the National Committee on Pay Equity (1990). His calculation of the overall average adjustment is not weighted by the number of recipients since this information is not always available. In calculating the average adjustment, he excluded the two highest and two lowest adjustments as unrepresentative. There was a large variation from \$400 to \$13,450. *Ibid.* at 79-80 and 82, note 7.

expose the ways in which the substance and implementation of the Act works to exclude many women - particularly those most marginalized as a result of recent economic reordering described in Chapter 4.

II. THE LIMITATIONS OF THE PAY EQUITY ACT

A. SLIPPING THROUGH THE CRACKS: EXCLUSIONS IN COVERAGE OF THE ACT

The Ontario *Pay Equity Act*, as I discussed in Chapter 5, is unique in covering both the public and private sectors. Undoubtedly this is an advance on previous legislative regimes. However, it could result in the impression that the Act's coverage is very broad. In fact, there are two very important exclusions from the Act's coverage which are of great significance to marginalized workers wishing to make an equal pay claim.

First, the form of a woman's employment - the terms of her contract, the number of hours she works, the permanence of her position - can leave her out in the cold. Casual, temporary and self employed workers are all excluded from the provisions of the Act.²³ Secondly, her workplace may be too small: employing insufficient numbers to meet the requirements of the legislation. Firms which employ fewer than 10 employees are entirely

²³ For casual work see *Pay Equity Act*, *supra* note 1, ss. 8(3) & (4).

excluded²⁴ and private sector firms employing 10 to 99 workers, although covered by the Act, are not required to develop pay equity plans.²⁵ Thus, the coverage of the private sector is more limited than it may at first appear.

Ironically, for an Act which purports to be an attempt to close the gender based wage gap, many of the workers employed in the excluded forms of employment are female. A large number of female workers in Ontario are involved in casual and temporary employment rather than in the 'traditional' workforce,²⁶ growing numbers of women are self employed,²⁷ and many more are homeworkers.²⁸ As discussed in Chapter 4, workers involved in casual and temporary work, homework and self employment are traditionally and increasingly lower paid. Thus, workers who are becoming ever more alienated in the new Canadian labour force - those in the most need of receiving higher wages - are excluded by the *Pay Equity Act*.

²⁴ Part III of the Act requires implementation by small private sector employers and applies only to those who employ more than 9 employees. *Ibid.*, s. 18.

²⁵ Employers with workforces of 10-99 employees 'may' establish pay equity plans. *Ibid.*, s. 19.

²⁶ James Sacouman & Henry Vertmeyer, "Canada in the Restructuring of America: Restricted Proletarianism and Its Implications." (Presented at the Conference on Canadian Political Economy in the Era of Free Trade, Carleton University, Ottawa, April 1990) cited in Isabella Baker, "Pay Equity and Economic Restructuring: The Polarization of Policy" in Fudge & McDermott, *supra* note 5, 254 at 263.

²⁷ See *supra* Chapter 3.

²⁸ See *supra* Chapter 2.

The second of the Act's lacunae, the exclusion of smaller workplaces, also serves to take pay equity out of the hands of low paid women. Contracting out, downsizing and privatization are producing small sized firms and large firms with small workplaces in sectors of the economy where women predominate.²⁹ The Pay Equity Commission has estimated that, taking account of both those workers who are covered by federal legislation rather than the Ontario Act, and the exclusion of private sector workplaces of less than 10 workers means that 0.5 million of Ontario's 2.2 million female workers are not covered by the Ontario legislation.³⁰ If the trend of small establishment growth continues as a facet of the reordering of the Canadian economy, it can be expected to have a radical effect, not least on the number of women who will be covered by the Act.

By abandoning any conception of a monolithic female labour force and substituting a perception of women workers as made up of members of distinct societal groups, we find, on close examination of each of these exclusions, that certain segments of the female labour force are more likely to find themselves outside the Act's sphere of influence than

²⁹ The proportion of workers employed in establishments with less than 20 workers was increasing in the years just before the enactment of the *Pay Equity Act* - from 16.28% in 1978 to 24.01% in 1986. J. O'Grady, "Beyond the Wagner Act" in DANJIEL Drache, ed., *Getting on Track* (Montreal and Kingston; McGill-Queen's University Press, 1992) 153 at 159 cited in Judy Fudge, "Fragmentation and Feminization: The Challenge of Equity for Labour-Relations Policy" in Janine Brodie, *Women and Canadian Public Policy* (Toronto: Harcourt Brace, 1996) 57 at 60-61.

³⁰ See Ontario Pay Equity Commission, *Report to the Minister of Labour by the Ontario Pay Equity Commission on Sectors of the Economy Which Are Predominantly Female* (Toronto: Ontario Pay Equity Commission, 1991) cited in McColgan, Aileen, "Legislating Equal Pay? Lessons From Canada" (1993) Indus. L. J. 269 at 281.

others. Slipping through the cracks in the coverage of the legislation are women who are more likely to be working class than middle class, visible minority than white, immigrant than born in Canada, able-bodied than disabled.

To illustrate this point, consider women employed in the garment industry.³¹ The many female workers in this sector of the economy who sew clothes in their own homes are immediately excluded from the Act by the very fact that they work in the home where there is only one employee. Garment workers who labour outside the home generally work in factories employing no more than 30 people.³² Here, the spotlight turns to the less-than-10 exclusion and the provisions for private firms of 10-99 employees. Women in workplaces employing less than 10 people are excluded from the Act's provisions and those who are employed in firms of 10-99 employees can only make a complaint to the Pay Equity Commission after their employer has posted a plan, or, where he or she chooses not to do so, if they feel their wages are inequitable. Thus, the purportedly

³¹ See *supra*, Chapter 4.

³² Visible minority women and immigrant workers are currently more often employed in private establishments staffed by small numbers of workers than white, non immigrant women. The N.D.P. drew attention to this fact during the drafting of the Act. Ontario Legislative Assembly 17 December 1986 Hansard Official Report of Debates at 4299. In the Justice Committee, Evelyn Gigantes of the N.D.P. moved to amend Bill 154 to allow that where firms of 10-99 employees had a bargaining agent they should post pay equity plans which would then be the basis of labour-management negotiations. The Conservatives contended that small firms would not have resources to do this, and this was reflected in the Bill. Transcript J-70, 30 Mar. 1987, 7; Transcript J-72, 31 Mar. 1987, 1-2, 5-7; Transcript J-74, 1 Apr. 1987, 25-9; Transcript J-77, 6 Apr. 1987, 39-40. Gigantes moved two amendments in the Committee of the Whole House which were also defeated. OLA, 10 June 1987, 1261-2, 1272, 1275. Transcript J-76, 6 Apr. 1987 and OLA 9 June 1987, 1217-18, 1227.

proactive scheme now functions as a complaint-based system, dependent on individual employees enforcing pay equity. Despite provisions for the anonymity of complainants, this provision can seem little more than ludicrous in respect of a non-unionized woman whose job is precarious and who probably has very little information about her employer's wage policies.³³ Even where an employer is required by the legislation to implement pay equity, he or she may not have done so as compliance with the Act, in both the public and private sectors, has been far short of satisfactory.³⁴

***B. DIVIDED WE FALL: THE RELEVANCY OF THE ONTARIO PAY EQUITY ACT
TO NON-UNIONIZED WOMEN***

As was discussed in Chapter 2, women have traditionally had lower rates of unionization than men and still are less likely to be unionized. Unfortunately for non-unionized women in Ontario, the effectiveness of the *Pay Equity Act* depends to a great extent on the collective strength of female employees. Unorganized women who wish to enforce the legislation face a number of obstacles their unionized counterparts do not have to confront.³⁵ As a result, settlements tend to be larger in unionized organizations than in non-unionized establishments.³⁶

³³ The N.D.P. made this argument during the drafting of the Act. O.L.A. 17 December 1986 at 4299.

³⁴ Almost a year after the dates proscribed for posting pay equity plans, only around half of the employers required to do so had actually posted a plan. Gunderson, *Comparable Worth*, *supra* note 22 at 80.

In establishments where a union is recognized, employee representatives negotiate the implementation of pay equity with management.³⁷ Powerful unions with adequate resources and an active, rather than rhetorical, commitment to female workers and wage parity have exploited the potential of the Act³⁸ and may even be strengthened by this bargaining process.³⁹ In contrast, employers of a non-unionized workforce design and

³⁵ McColgan argues that unionization is the main factor in determining whether a woman will be able to make gains under the legislation. *Supra* note 30 at 285-6. See also Hugh & Pat Armstrong, "Limited Possibilities and Possible Limits for Pay Equity: Within and Beyond the Ontario Legislation" in Fudge & McDermott, *supra* note 5 at 110 [hereinafter "Limited Possibilities"].

Some groups of non-unionized women have managed to make effective use of the Act. The Ontario Coalition for Better Child Care, for example, has supported workers attempting to make use of the Act. See Sue Findlay, "Making Sense of Pay Equity: Issues for a Feminist Political Practice" in Fudge & McDermott, *ibid.* at 102 and note 24.

³⁶ Gunderson, *Comparable Worth*, *supra* note 22 at 80.

³⁷ Separate pay equity plans are posted for each 'bargaining unit' in an establishment and for those sections of the workforce that are not unionized. *Pay Equity Act*, *supra* note 1, s.14.

³⁸ Public Sector unions, including C.U.P.E. and O.P.S.E.U. were active in appointing pay equity advisers, developing manuals and holding workshops. Findlay, *supra* note 35 at 102.

³⁹ Carl J. Cuneo, "The State of Pay Equity: Mediating Gender and Class through Political Parties in Ontario" [hereinafter "The State of Pay Equity"] in Fudge & McDermott, *supra* note 5, 33 at 42. See also Armstrong & Armstrong, "Limited Possibilities," *supra* note 35 at 117-8.

The Ontario Nurses Association conducted a pay equity litigation strategy. See Judy Fudge, "Litigating Our Way to Gender Neutrality: Mission Impossible?" in Fudge & McDermott, *supra* note 5 at 60. As Fudge notes, the O.N.A. does not have a strike fund since the majority of its members are not permitted to strike. It can therefore divert money into litigation. Moreover, almost all of the members and leaders of the Association are female, and pay equity is likely to be a priority for many of them. This would not be the case in a union with a high number of male members. *Ibid.* at 65-66.

implement the entire pay equity process unilaterally. Management defines 'establishment' and 'employer,' categorizes job classes as male and female and is solely responsible for the selection and implementation of the job evaluation system. The only possible recourse for the employees of a non-unionized establishment, or those unorganized members of a predominantly unionized workforce is to complain to the Pay Equity Commission with the same problems that this move would entail for workers in small firms and for any worker forced to rely on a complaint-based system.⁴⁰ Effectively, then, non-unionized workers are rendered passive non-participants in a process designed and implemented by their employer.

Even where pay equity has been achieved, non-unionized employees may find themselves at a disadvantage. Employers are required to 'maintain compensation practices that provide for pay equity'.⁴¹ However, differences in compensation between a female and male job class occurring after pay equity has been achieved are explicitly stated not to contravene the legislation if the employer can demonstrate that the difference is the result of differences in bargaining strength.⁴² Unorganized workers must obviously be detrimentally affected by this provision, given that they have limited bargaining strength, but unionized women could also be disadvantaged, as separate bargaining units within

⁴⁰ See *supra* Chapter 5.

⁴¹ *Pay Equity Act*, *supra* note 1, s. 7.

⁴² *Ibid.*, s. 8(2).

establishments tend to be male and female-dominated, with the latter being more likely to have less bargaining clout.⁴³

A recent case, *York Region Board of Education v Canadian Union of Public Employees Local 1734*,⁴⁴ demonstrates that the pay equity tribunal is aware of the potential of this exception to defeat claims for pay equity. Female job classes had achieved pay equity in 1989, but by 1991 it had become apparent that disparities in pay were occurring in relation to some of the female job classes and their male comparators as a result of collective bargaining. The union attempted to address these disparities through collective bargaining but were unable to do so and filed a complaint. The York Board argued it did not have to maintain pay equity as the differences in the wage rates were the result of differences in bargaining strengths of the different job classes. The Tribunal directed the employer to pay the amounts necessary to regain pay equity stating that pay equity had not been achieved for *all* the employees in the establishment, so this statutory exception could not be relied upon.

The double burden effect of the legislation operates again in relation to non-unionized women as it did in respect of contingent and small-establishment employees. Those who are already marginalized in the labour market - in particular those employed in small firms and in low paying service sector jobs - are placed at a disadvantage. Visible minority and

⁴³ On these provisions see Patricia McDermott, "Pay Equity Challenge to Collective Bargaining in Ontario" in Fudge & McDermott, *supra* note 5, 122 at 125.

⁴⁴ Pay Equity Hearings Tribunal, January 18, 1995.

First Nations women, who are less likely than other women to be members of a union, are particularly disadvantaged.⁴⁵

It is clear that the number of women in an organization, the pay and benefits they receive and the extent of their unionization are interlinked factors, each of which operates to perpetuate and reinforce the others. Consider, for example, the position of women employed in small workplaces. They are less likely to be unionized than employees of large-scale employers as declining rates of unionization are linked to workplace size.⁴⁶ Also, in a climate where unionization is too often considered a questionable if not subversive activity, workers in a small firm in which any attempts at organization would be easily detected by management may fear to alienate themselves from their employer.⁴⁷ The result, as a recent study undertaken by SPR Associates has found, is that women in smaller, non-union establishments with a high proportion of female employees are particularly unlikely to receive a pay adjustment under the Ontario Act.⁴⁸

⁴⁵ Julie White, *Sisters and Solidarity: Women in Unions in Canada* (Toronto: Thompson, 1993) at 165-7.

⁴⁶ See *supra* Chapter 3.

⁴⁷ Employers became increasingly resistant to unionization during the recession of the late 1980s and early 1990s. See White, *supra* note 45 at 174-5.

⁴⁸ Gunderson, *Comparable Worth*, *supra* note 22 at 80.

C. INCOMPARABLE WOMEN: FINDING A COMPARATOR MALE JOB CLASS

Theorists of the undervaluation of women's work have understood job segregation as a central contributant to the gender wage gap: the employment of men and women in distinct occupations facilitates the undervaluation of the work women do and results in their receiving lower pay.⁴⁹ The intersection of job segregation and low pay is highlighted by the economic position of women in establishments staffed solely by female workers. Among the lowest paid workers in Canada, these women generally undertake stereotypically 'female' work in small-scale establishments in both the private sector - the garment industry being the most salient example - and in the wider public sector - child-care, community and social services and small health care services.⁵⁰ In the front-line of the new flexible labour force, they are among the most marginalized workers in the Canadian economy.

Any measure intended to substantially reduce the wage gap must be capable of being used by women in all-female workplaces. The Ontario *Pay Equity Act*, as initially enacted, was found lacking in this regard; its capacity to provide pay adjustments for job classes in these workplaces was widely criticized since its inception.⁵¹ As the *Pay Equity Act* only functioned when a female job class can be compared to a male job class in the *same*

⁴⁹ See *supra* Chapter 3.

⁵⁰ Sue Findlay, *supra* note 35 at 82.

⁵¹ See, for example, Findlay, *ibid.* and McColgan, *supra* note 30 at 277.

establishment, the absence of male employees effectively prevented the operation of the Act.⁵² For example, while nurses in large urban teaching hospitals could easily find a male comparator this often proved impossible for those working in small rural hospitals or clinics.⁵³

The exclusion of all-female workplaces was rooted in the definition of 'establishment'. The Green Paper which preceded the Act offered three options for this definition based on function, geography and corporate identity. The functional definition delineates an establishment by the boundaries of a compensation plan or personnel policy within a company, allowing a corporate body to be split into a number of establishments and comparisons to be made only within, not between these units.⁵⁴ The corporate definition would have enabled the most scope for comparisons by allowing organizations subsumed in a single corporate identity to constitute a single establishment. The definition finally embodied in the Act was geographic: comparisons were to be made between divisions of an establishment within the physical boundaries of a territorial area - more specifically, 'a country, territorial district or regional municipality' or the Municipality of Metropolitan

⁵² Cuneo points out that the possibility of making *between* establishment comparisons received very little consideration during the drafting of the Act. "The State of Pay Equity," *supra* note 39 at 45.

⁵³ See Hugh & Pat Armstrong, "Lessons from Pay Equity" (1990) 30 *Studies in Political Economy* 29.

⁵⁴ The male business alliance favoured either the functional definition or the geographic definition. Cuneo, "The State of Pay Equity," *supra* note 35 at 47.

Toronto.⁵⁵ This definition permits a comparison on a broader basis than the functional definition but is not as inclusive as the corporate definition. Where a company employed an all female workplace in one of its locations and men doing comparable work in another branch outside the territorial area, for example, they were unable to make a pay equity comparison.

In part as a response to this restrictive definition of 'establishment', the Ontario Nurses' Association attempted to wrest an expansive definition of 'employer' from the Pay Equity Hearings Tribunal, to allow as wide a number of comparator job classes as possible for women.⁵⁶ In *O.N.A. v Haldimand-Norfolk (No. 3)*⁵⁷ the Association was attempting to find comparator male job classes for its registered and public health nurses. They argued that the police, like the nurses were employees of Haldimand-Norfolk Regional Municipality. The Tribunal decided that the definition of the employer embodied in the Ontario *Labour Relations Act* should not be applied. It set out a four tests: who has 'overall financial responsibility?'; 'who has the responsibility for compensation practices?'; 'what is the nature of the business, service or enterprise' and 'what is most consistent with

⁵⁵ *Pay Equity Act*, *supra* note 1, s. 1(1). The Ontario Equal Pay Coalition wanted a corporate definition to be adopted where a comparable male - performing work of the same value at a higher rate - could not be found at the same location as the woman seeking an adjustment. The N.D.P. attempted to enact a related-establishment provision allowing the Pay Equity Commission to determine how jobs should be compared where there is no appropriate comparator. Cuneo, "The State of Pay Equity," *supra* note 39 at 45-46.

⁵⁶ Susan Pigg, "Nurses and Pay Equity", *The Toronto Star*, 28 August 1990, E-1 cited in Fudge, *supra* note 39 at 66.

⁵⁷ (1989), 1 P.E.R. 17 (P.E.H.T.), affirmed by the Ontario Court of Appeal in *Re Haldimand-Norfolk and O.N.A.* (1989), 1 P.E.R. 188 (Ont. H.C.).

achieving the purpose of the *Pay Equity Act*?⁵⁸ This expansive definition of employer allowed the nursing jobs to be compared to those of much higher paid members of the police force.

The Tribunal placed a more restrictive interpretation of 'employer' in *Barrie (City) v C.U.P.E., Local 2380 (Barrie Public Library Board)*.⁵⁹ They asked which entity is responsible for negotiating or implementing existing compensation practices and valuing work and concluded that:

In the vast majority of cases, the existing collective bargaining or employment relationships will be the ones used for the implementation of pay equity. Not only does that make sense for the effective achievement of the goals of the Act, it is the approach that best conforms with the scheme of the Act. Furthermore, the employers in those relationships will usually be the entities who will be found by the Tribunal to control the compensation practices and the attaching of value to work.⁶⁰

They did accept that the presumption in favour of this entity being the employer could be rebutted but only where another entity has 'such profound involvement in the compensation practices and the attaching of value to work that it must be found to be the employer for the purposes of the Act.'⁶¹

⁵⁸ A similar approach was adopted in *C.U.P.E., Local 1582 v Metropolitan Toronto (Municipality) (Metropolitan Toronto Library)* (1990), 1 P.E.R. 112.

⁵⁹ (1991), 2 P.E.R. 93.

⁶⁰ *Ibid.* at para. 25.

⁶¹ *Ibid.* at para. 41.

However, the Pay Equity Tribunal set out a wider definition in *Kingston-Frontenac Children's Aid Society (No. 2)*⁶² in which they followed *Haldimand-Norfolk (No. 3)* in emphasizing the financial reliance of the Children's Aid Society on government and the control by the Ministry of Community and Social Services and held that the employees were, for the purposes of the *Pay Equity Act*, government employees rather than employees of the Children's Aid Society.

In the wake of this decision, the Ontario Legislature enacted legislation defining who could be considered a Crown employee - those employed by the Crown or one of the agencies set out in regulations.⁶³ Persons are considered civil or public servants or Crown employees only if they have been 'expressly appointed as such' by the Public Service Commission, Cabinet or a Minister and if an employee is not employed by a designated agency, he or she cannot be considered a Crown employee. The *Pay Equity Act* was amended to take account of this provision.⁶⁴ Thus, complainants who could previously have been considered employees of the Crown under the wide interpretation of the Act's wording adopted by the Tribunal would no longer be able to make a claim.

⁶² (1992), 3 P.E.R. 117.

⁶³ *Public Service Statute Law Amendment Act, 1993*, S.O. 1993, c. 19.

⁶⁴ *An Act to amend the Pay Equity Act*, S.O. 1993, c. 4

The restrictions on comparisons which could be made proved to have a near paralyzing effect on the operation of the Act as 1/2 million women were stranded without a comparator male job class.⁶⁵ Female workers in low paying, non-unionized sectors of the economy in particular found the Act to be irrelevant. Only 9% of the female job classes in the social sciences sector qualified for pay equity adjustments compared to 61% in universities and colleges. Unionization was a central factor in whether a women would have her work compared to a male colleague: 36% of non-unionized workplaces had some employees in female job classes excluded, compared to 16% in unionized workplaces.⁶⁶ These deficiencies of the Act were apparent from the outset. Gunderson has found that, in the private sector, only about 18% of employees have received pay equity adjustments and these amounted on average to about 0.6% of the payroll. He attributes much of this to the difficulties these women have in identifying a male comparator.⁶⁷

The Pay Equity Office of the Pay Equity Commission was charged by the government with undertaking a study on wage inequities in predominantly female sectors.⁶⁸ Two different processes were recommended by the Office to be carried out where comparators

⁶⁵ Ontario Pay Equity Commission, *Report to the Ministry of Labour by the Pay Equity Commission on Sectors of the Economy Which Are Predominantly Female*, cited in McColgan, *supra* note 30 at 281.

⁶⁶ These statistics are from studies carried out by SPR Associates in 1990 and Canadian Facts in 1991, cited in McColgan, *ibid.* at 278.

⁶⁷ Gunderson, *Comparable Worth*, *supra* note 22 at 80.

⁶⁸ *Pay Equity Act*, *supra* note 1, s. 33(2)(E). For an inside account of the preparing this report see Findlay, *supra* note 35.

could not be identified, one for the public and one for the private sector.⁶⁹ The *proxy comparison* method - to be used in the public sector - allows comparisons to be made with male job classes in external establishments.⁷⁰ When applied, this method lessens the effects of the restrictions on the definition of 'employer' as a comparator could be found in an establishment under another employer. The proxy organization would have been in the same geographic division and providing similar services. Mike Harris's Progressive Conservative government has since repealed the proxy comparison provisions effective from January 1, 1997.⁷¹ In the interim, the pace of wage adjustments has been increased and public sector employers using the proxy method are required to pay up to 3% of their 1993 payroll towards pay equity adjustments by the end of 1996.

In the private sector, *proportional value* provisions allow wage adjustments to be made where there are no comparable male job classes. This is a method of comparing female and male job classes indirectly. First, the 'relationship between' the value determined for the work of a representative male job class and the compensation received by that class is determined. Then the same principle is applied in the compensating female job classes and

⁶⁹ Both were introduced by the *Statute Law Amendment (Government Management and Services) Act* 1994, R.S.O. c. 27.

⁷⁰ The government had initially rejected the proxy comparison method, arguing that same-establishment comparison was a basic principle of the Pay Equity Act. See Ontario Ministry of Labour, *Policy Directions: Amending The Pay Equity Act*, (Toronto: Ministry of Labour, 1990) at 4 and 82-3.

⁷¹ *Saving and Restructuring Act* 1996 S.O.1996. Schedule J.

the wage for the female class is determined as a proportion of that of the male job class.

This should enable more women to receive pay equity adjustments.

Even for those who identify a comparable male job class, however, there is no guarantee they will receive a substantial pay adjustment.⁷² Non-unionized workers must first be compared to a non-unionized male job class; only if one cannot be found will they be compared to male job classes throughout the establishment.⁷³ Unionized workers are compared initially to other employees in the same bargaining unit. As in Ontario bargaining units within an establishment tend to be either male or female dominated,⁷⁴ this provision also works to keep pay equity adjustments as low as possible. Female bargaining units tend to have less bargaining power than their male-dominated counterparts and, as a consequence, the wages of male workers within female dominated units are often depressed. A higher standard of pay equity would exist where a women could compare her job to an employee within a male-dominated unit. Moreover, where no job class of comparable value can be found, the female job class is deemed comparable to any male job

⁷² See McColgan, *supra* note 30 at 280.

⁷³ *Pay Equity Act*, *supra* note 1, ss. 6(4)(b), 6(5).

⁷⁴ This is because of the approach adopted by the Ontario Labour Board in certifying unions as 'bargaining units' under the *Labour Relations Act*. The workforce is split into units of 'community interest' and a union with sufficient support in a unit is certified as the bargaining unit by the Labour Board. The Board tends to adopt a very narrow view of what constitutes 'community interest.' For example, manual and administrative staff are unlikely to be represented by the same bargaining unit. Thus, where a union increases its representation in an establishment, this tends to produce a greater number of bargaining units. In a sex-segregated workforce, this often results in units of predominantly male or female workers. See McColgan, *supra* note 30 at 280.

class performing work of lower value which is paid at a higher rate⁷⁵ and where a number of job classes are performing work of equal value, the women's pay need only match that of the lowest paid male job class.⁷⁶

D. CONSTRUCTING VALUE: 'WOMEN'S WORK' AND JOB EVALUATION

The Ontario regime and most other legislated pay equity schemes depend on the technique of job evaluation, a process which involves valuing the occupations in an establishment according to their worth to the employer.⁷⁷ This is generally done by allocating points to a number of factors - most frequently the skill, effort and responsibility required by the job and the working conditions in which it is performed.⁷⁸ These points are then totaled, allowing jobs in an establishment to be ranked and paid according to their place in the hierarchy.

Job evaluation has been the target of criticism which began as a trickle of articles and books in the late 1970s and has since developed into a cottage industry. A major strand of these critiques attack evaluation schemes for embodying sex bias.⁷⁹ Occupational

⁷⁵ *Pay Equity Act, supra* note 1, s. 6(2).

⁷⁶ *Ibid.*, s. 6(3)(a).

⁷⁷ *Ibid.*, s. 5.

⁷⁸ Each factor is divided into sub factors. Working conditions, for example, may be divided into noise level, temperature etc.

segregation along gender lines results in most women performing work which demands different kinds of skills, effort and responsibility from that undertaken by the majority of men and is carried out in different working conditions within different kinds of

⁷⁹ These critiques first started to appear in the United States in the late 1970s. See, for example, Joan Acker, "Sex Bias in Job Evaluation; A Comparable Worth Issue" in *Ingredients and Doing Comparable Worth: Gender, Class and Pay Equity*, (Philadelphia: Temple University Press, 1989) [hereinafter *Doing Comparable Worth*]; Sara Evans & Barbara Nelson, *Wage Justice: Comparable Worth and the Paradox of Technocratic Reform*, (Chicago: University of Chicago Press, 1989); Debra Lewis, *Just Give Us The Money*, (Vancouver: Women's Research Centre, 1988); Leslie Zebrowitz McArthur, "Social Judgement Biases in Comparable Worth Analysis" in Heidi Hartmann, ed., *Comparable Worth: New Directions for Research*, (Washington, DC: National Academy Press, 1985) [hereinafter *New Directions*]; Helen Remick, "Strategies for Creating Sound, Bias Free Job Evaluation Plans," in Helen Remick, *Job Evaluation and E.E.O.: The Emerging Issues* (New York: 1979), "Beyond Equal Pay for Equal Work: Comparable Worth in the State of Washington" in Ronnie Steinberg, ed., *Equal Employment Policy for Women*, (Philadelphia: Temple University Press, 1980), "The Comparable Worth Controversy" (1981) 10 *Public Personnel Management* 371, "Dilemmas of Implementation: The Case of Nursing" and "Major Issues in a priori Application" in H. Remick, ed., *Comparable Worth and Wage Discrimination*, (Philadelphia: Temple University Press, 1984) [hereinafter *Comparable Worth*]; Donald Schwab, "Job Evaluation and Pay Settings: Concepts and Practices", in E.R. Livernash, ed., *Comparable Worth: Issues and Practices*, (Washington: Equal Employment Advisory Council, 1985) & "Job Evaluation and Research Needs" in *New Directions* Ronnie Steinberg, "Identifying Wage Discrimination and Implementing Pay Equity Adjustments" in United States Commission on Civil Rights, ed., *Comparable Worth: Issue for the 80s* (Washington: Commission on Civil Rights, 1984); David Thompson, "Eliminating Pay Discrimination by Job Evaluation" (1978) 55 *Personnel* 11; Donald Treiman & Heidi Hartmann, *Women, Work and Wages: Equal Pay for Jobs of Equal Value* (Washington DC: National Academy Press, 1981) [hereinafter *Women, Work and Wages*]; Ronnie Steinberg & Lois Haignere, "Equitable Compensation: Methodological Criteria for Comparable Worth", [hereinafter "Equitable Compensation"] in Christine Bose & Glenn Spitze, eds., *Ingredients for Women's Employment Policy*, (Albany: State University of New York Press, 1987).

organizational structures.⁸⁰ Vast numbers of studies have shown that women's work has been allocated the lowest value ratings in traditional job evaluation schemes.⁸¹

These studies reveal that women's work is attributed less value as it is not comprehended in the structure and implementation of job evaluation schemes. For example, when women carry out work in similar ways to men their work is often differently interpreted. Female nurses could be seen as supervising their patients, not unlike a male manager supervising employees but nurses are seldom conceived of as being in a 'supervisory' position and are therefore unlikely to be given points for supervision.⁸² Aspects of female occupations which could be thought of as different from but comparable to male job skills are also undervalued. Heavy lifting has been found to be rewarded more than finger dexterity;⁸³ repeated lifting and whole body movement by male labourers more than repeated movement of arms, hands and wrists by typists; the possibility of injury from machines

⁸⁰ Joan Acker in *Doing Comparable Worth*, *ibid.*; Pat Armstrong & Hugh Armstrong, & *A Working Majority: What Women Must Do for Pay* (Ottawa: Canadian Advisory Council on the Status of Women, 1983).

⁸¹ Lists of commonly overlooked features of female jobs are provided in Steinberg & Haignere, "Equitable Compensation", *supra* note 79, Methodological Criteria for Comparable Worth" 1987 and Ontario Pay Equity Commission, *How to Do Pay Equity Comparisons*, *supra* note 7 at 11.

⁸² Armstrong & Armstrong, "Limited Possibilities", *supra* note 35 at 112.

⁸³ Paula England & Norris, "Comparable Worth: A New Doctrine of Sex Discrimination" (1985) 66 Social Science Quarterly 627, cited in Jane Gaskell, "What Counts As Skill? Reflections on Pay Equity," in Fudge & McDermott, *supra* note 5, 141 at 145.

more than working with patients with communicable diseases such as A.I.D.S. or hepatitis.

Job evaluation processes often fail to capture work which requires a variety of skills to be employed simultaneously or switching from one level of task to another level or from person to person.⁸⁴ These features are reflected in a number of female-dominated occupations, particularly in the caring professions: a child care worker providing comfort to a forlorn child, while simultaneously dealing with an irate parent on the telephone, for example, or a nurse attending to a patient, reporting to a doctor and then greeting visiting relatives. Job evaluation schemes are often structured to record singular, autonomous, regularly performed tasks and the multilevel nature of much women's work disappears. Questionnaires filled in by employers or employees themselves, for example, often leave scant space for job description. Most predominantly-male jobs involve discrete tasks, taught skills and tangible products or results, all of which can be easily captured in job evaluation surveys.

Female workers frequently find that the formal description of their job does not adequately reflect their actual responsibility or the variety of tasks they routinely perform. Clerical jobs - 'secretary', 'typist', 'receptionist' - in particular, are notorious for the mismatch between job description and day-to-day work.⁸⁵ The skills involved - polite manner,

⁸⁴ Armstrong & Armstrong, "Limited Possibilities," *supra* note 35 at 114.

⁸⁵ See Gaskell, *supra* note 83 at 150.

conciliatory approach, cooperation - are untaught, often attributed to 'innate' female abilities, and frequently go unrecognized in the job description. The stereotype of a secretary - a competent and efficient 'Girl Friday' smoothing the way for a powerful but disorganized man - pervade social perceptions of her position which focus more on her relationship to her boss than the work she performs, which may include much of what is enumerated in her superior's job description. Abilities and duties that are overlooked here may similarly disappear in the job evaluation process.

By all accounts, job evaluation was developed to establish and perpetuate existing wage hierarchies and used by management to reinforce power and control.⁸⁶ North American unions have been ambivalent towards its use. Many have harboured a strident aversion towards it⁸⁷ while others have supported it and been prepared to negotiate wages within the framework of the employer's system.⁸⁸ Traditional schemes attribute maximum value to job characteristics of management positions and least to occupations already at the bottom of the pay scale.⁸⁹ The highest points are reserved for job features which can only

⁸⁶ Lois Haignere, "Pay Equity Update" (Paper delivered to the Canadian Bar Association, Toronto, April 1990) [unpublished] cited in Armstrong & Armstrong, "Limited Possibilities", *supra* note 35 at 112. See also Remick, *Comparable Worth*, *supra* note 79 and Treiman & Hartmann, *supra* note 79 .

⁸⁷ McDermott notes a 'regularly mentioned' exception from the United States. The United Steelworkers of America was actively involved in implementing the Co-operative Wage Study, a joint union-management job evaluation system. "Pay Equity in Canada," *supra* note 5 at 137.

⁸⁸ Armstrong & Armstrong, "Limited Possibilities," *supra* note 35 at 112 and McDermott, "Pay Equity in Canada," *supra* note 5 at 131.

be found in management positions: independence, responsibility for supervising employees, formal educational qualifications. In contrast, teamwork and the skills inherent in meeting the needs of patients or customers are given little weight.⁹⁰ Consequently, women's jobs at the bottom of an establishment's wage hierarchy would remain there in the wake of a traditional job evaluation process which had not been re-assessed for use under pay equity legislation.

Can a process found to be imbued with gender bias and developed to perpetuate existing wage hierarchies be used to alter rather than replicate wage hierarchies? In Ontario, the job evaluation system used by an employer must be 'gender neutral'⁹¹ - a term unfortunately undefined in the Act. The very notion that a job evaluation system can be in any way neutral is open to question. Despite the reams of scholarship analyzing its biases it is often presented as a neutral way of determining wages, implying that what constitutes value is self-evident and can be objectively determined. Critics have contested this view of job evaluation as part of the feminist project of exposing subjectivity lurking behind purported neutrality. The main factors in job evaluation schemes - skill, effort,

⁸⁹ McDermott, *ibid.* at 131.

⁹⁰ Haignere, *supra* note 79 at 114-115.

⁹¹ *Pay Equity Act*, *supra* note 1, s.13(2)(a). The 4 other provinces with 'proactive' pay equity legislation - Manitoba, New Brunswick, Nova Scotia and Prince Edward Island - all require evaluation by a gender neutral scheme. McDermott, "Pay Equity in Canada," *supra* note 5 at 22. The Pay Equity Commission has issued guidelines on gender neutrality. See Ontario Pay Equity Commission, *Pay Equity Commission Newsletter*, Pay Equity Commission Implementation Series, No.9, vols 1(7), 1(9) & 2(11) & Pay Equity Commission, *How To Do Pay Equity Job Comparisons*, *supra* note 7. The Pay Equity Hearings Tribunal need not treat these guidelines as binding.

responsibility and working conditions - all require judgments to be made. None are self evident.

Gaskell concentrates on one of the factors in the job evaluation process - skill. She writes:

there is no one correct, objective version of how much skill is involved in doing a job. In making statements about and evaluations of skill, we stand in our historical time and place, in our culture.⁹²

The defining of what is 'skillful', she concludes, is the result of social and cultural processes which shape perceptions of skill in society, the economy and the workplace. Those with the power to construct their jobs as most skillful according to the dominant values of society win. The overriding theme threaded through our workplace cultures and wider society, that mental work is in some way more 'skilled' than manual, reflects and perpetuates the power of managers over manual workers. The result is that 'skill' can be demonstrated by men more than women,⁹³ managers more than workers, white people more than members of visible minorities.

What constitutes effort, responsibility and difficult working conditions, is also contingent and open to interpretation. Does giving orders or following them require more effort? Are

⁹² Gaskell, *supra* note 83 at 142.

⁹³ Acker argues that the association of masculinity with mechanical and technical 'skills' and femininity with patience and dedication to 'repetitive tasks' is an 'ideological weapon' in the exclusion of women from male-dominated jobs. Joan Acker, "Class, Gender and the Relations of Distribution" (1988) 13 *Signs* 473 at 482.

errors made at lower levels not as important as those made by management? The highest factor levels for responsibility are generally only awarded to the upper echelons of management because they require a particular relationship with organizational policy making to which only top executives can lay claim. The misinterpretation of a test by a medical technician, however, may be viewed (particularly by the patient) as equally important to a fiscal error made by a hospital administrator.⁹⁴ And what is meant by poor working conditions - a stressful atmosphere, working with noisy machinery, dealing with noxious substances?

Instead of seeing the Act as requiring an objective and gender neutral definition of valuable work, it is more useful to conceive of it as part of a competition: a clash over conflicting interpretations of value involving employers, management, unions and employees in a struggle over its social and economic meaning. This analysis allows all the biases inherent in job evaluation schemes to be exposed, drawing attention to pay differentials between aboriginal people and non-aboriginal people, visible minority and white men, immigrant and non-immigrant workers and men and women. Job evaluation tends to obscure the power relations involved by granting wage allocation a veneer of objectivity.⁹⁵ In particular, the presentation of the results in a numerical form implies that a mathematical equation has been carried out to finally determine the incontestable value of

⁹⁴ Steinberg, *supra* note 79 at 194-5.

⁹⁵ Armstrong & Armstrong, "Limited Possibilities," *supra* note 35 at 112 and Steinberg, *supra* note 79 at 218.

each job.⁹⁶ This is part of a wider critique of the tendency of job evaluation to convert issues of power into mere technicalities, undermining the potential of the pay equity process.⁹⁷

The task of ultimately determining what will constitute 'gender neutrality' in Ontario was tossed into the hands of the Pay Equity Tribunal by the provincial Legislative Assembly. The tribunal's members have had ample opportunity to ponder the meaning of neutrality as a number of job classification systems have been the subject of court challenges by the O.N.A. which met with little success in wresting a wide interpretation of 'gender neutrality' from the tribunal.⁹⁸

In *Ontario Nurses Association v Haldimand-Norfolk [No. 4]* the tribunal prevented evidence being led as to the generally discriminatory nature of job evaluation schemes; only evidence about the application of the comparison system being negotiated by the employer and union could be presented.⁹⁹ A similar decision was reached by a different

⁹⁶ Gaskell, *supra* note 83 at 141.

⁹⁷ Armstrong & Armstrong, 'Limited Possibilities', *supra* note 35 at 113 and Fudge & McDermott, "Conclusion: Pay Equity in a Declining Economy: The Challenge Ahead," in Fudge & McDermott, *supra* note 5, 281 at 285.

⁹⁸ The union represents 55,000 nurses in hospitals, nursing homes and other institutions throughout Ontario. Most disputes remitted to Review Officers have been from the health sector. Ontario Pay Equity Commission, Newsletter June 1990 2(12). On their litigation strategy, see Fudge, "Litigating", *supra* note 39.

⁹⁹ (1989), 1 P.E.R., 49. The tribunal had earlier prevented the intervention of William M. Mercer, the management consulting firm responsible for job evaluation system purchased

panel of the tribunal in *O.N.A. v Women's College Hospital [No. 1]* where the management-consultant firm Stevenson, Kellogg, Ernst and Whinney was prevented from intervening in defense of their job evaluation scheme.¹⁰⁰ The court characterized the proceedings as being of a private nature rather than a matter of public interest.¹⁰¹ Both decisions involve a spurious distinction being drawn between 'job comparison systems' - the term used in the Act to refer to plans which are negotiated for a particular workplace - and general job evaluation plans pedaled by management-consultant firms. This distinction obscures the extent of reliance on job evaluation schemes in the implementation of pay equity. Few if any pay equity plans are unique to particular workplaces; most apply generic schemes with minor moderations.

In this line of decisions, the tribunal lost the opportunity to fully explore the ways in which the undervaluation of women's work permeates the most widely marketed job evaluation plans and to consider options for developing plans more responsive to work performed by women. The Act is intended to address *systemic* wage discrimination. By requiring

by Haldimand-Norfolk Regional Municipality, arguing that they had only a commercial and incidental interest in the proceedings. The O.N.A. wanted to present Dr. Pat Armstrong as an expert witness to comment generally on the Mercer comparison system. She was allowed to comment on the nature of women's work in the health-care sector.

¹⁰⁰ (1989) 1 P.E.R. 53. See Fudge, "Litigating," *supra* note 39 at 69.

¹⁰¹ The tribunal admitted that 'the reality' appears to be that job evaluation plans may be utilized as the basis of bargaining proposals under section 14. The O.N.A. later filed identical complaints against other hospitals attempting to utilize the same scheme. A request from the management consultancy firm to reconsider the earlier decisions in this light was denied. *O.N.A. v Women's College Hospital [No. 2]* (1990), 1 P.E.R., 179 at 183.

individual legal challenges to specific plans, the tribunal does not address pay differentials as a systemic problem. Instead it has adopted an individualized approach to address systemic inequities.¹⁰²

In taking this stance, the tribunal ignored the interests of low-paid, non-unionized women. Expensive litigation can generally be conducted only by well financed unions, such as the Ontario Nurses Association which already have a substantial amount of power to determine the values embedded in the job evaluation plan as employers are required to negotiate with them. For non-unionized workers, management exerts unilateral control over the process of job evaluation - determining the information required, selecting aspects of work to be valued and deciding on the weight to be placed on each factor in a scheme. The very people whose only option is to challenge a plan in court are precisely those least able to do so - non-unionized workers. In effect, the court brought litigation in as a necessary step in implementing pay equity by refusing even to consider enumerating general standards for job evaluation plans.¹⁰³

The combined effect of the legislature's failure to provide a definition of gender neutrality and the court's sidestepping of the issue of systemic sex discrimination in job evaluation

¹⁰² See Fudge, *supra* note 39 at 73.

¹⁰³ As Steven Willborn argues, in the context of comparing pay equity initiatives in the United Kingdom and the U.S.A., litigation is an expensive way to implement pay equity. See *A Secretary and a Cook: Challenging Women's Wages in the Courts of the United States and Great Britain*, (Ithaca: ILR Press, 1989).

schemes is the marginalization of low-paid, visible minority, immigrant and aboriginal women - those with the least opportunity and power to shape the meaning of the value of their work. These are also the women most likely to be disadvantaged by the Act's application to small workplaces, non-unionized workforces and all-female establishments. As a consequence, the Ontario *Pay Equity Act* is not reaching those women being most marginalized by economic restructuring.

CHAPTER SEVEN

CONCLUSION

In my analysis of women's work and equal pay initiatives I have drawn on recent critiques of feminist legal theory, set out in Chapter 2, which protest the exclusion of many groups of women and call for a non-essentialist understanding of female identity. In accordance with the insights of this work I have avoided any attempt to determine the impact of the Ontario *Pay Equity Act* on 'women' as an undifferentiated category. Neither did I undertake the complex project of mapping out the Act's effects on all relevant groups of female workers. Instead I have analysed the effects of the legislation on the group in which I am interested - those women who are most marginalized in the Canadian workforce. I have attempted to discern the ways in which these low paid women are divided across the axes of class, race or ethnicity, disability and citizenship and the extent to which these facets of their lives structure their labour market experience.

In Chapter 3 I discussed the arguments of feminist scholars who view the gender-based wage gap as arising from the undervaluation of the work that women do. They argue that this is related to the continuing devaluation of domestic labour for which women are still primarily responsible. Since the pre-industrial period, Canadian women have been responsible for domestic tasks such as cooking, sewing and caring for children and the

elderly.¹ A parallel division of labour was always built into the market place and still operates so that many women take jobs which resemble their traditional domestic chores, for instance catering, cleaning or childcare. Others - secretaries and shop-assistants, for example - adopt a subordinate and assisting role.

In much non-feminist scholarship, the very idea of 'work' has encompassed only labour performed for pay or profit. Domestic labour is considered irrelevant to profit-making and therefore formally valueless.² Discounting domestic work in this way obscures the interdependence of household and marketplace labour: that the structure of market work presupposes and is dependent upon a certain arrangement in the home of the worker. The ability of men to work outside the home has always been dependent on women taking responsibility for raising children and maintaining the home.³ This model of the male worker lingers on in the current market place which is still structured on the expectation that an individual is single or supported by a non-working wife and thus effectively free of domestic and family responsibilities. As a result, given the continued refusal of many men

¹ Marjorie Griffin Cohen, *Women's Work, Markets, and Economic Development in Nineteenth-Century Ontario* (Toronto: University of Toronto Press, 1988) and "Capitalist Development, Industrialization, and Women's Work" in Graham S. Lowe & Harvey J. Krahn, *Work in Canada; Readings in the Sociology of Work and Industry* (Scarborough, Ont: Nelson Canada, 1993) 14 at 20.

² Pat Armstrong & Hugh Armstrong, *Theorizing Women's Work* (Toronto: Garamond Press, 1990) at 13.

³ Nancy E. Dowd, "Work and Family: The Gender Paradox and The Limitations of Discrimination Analysis in Restructuring the Workplace" (1989) 24 Harv. C.R.-C.L. L. Rev. 79.

to take equal responsibility for domestic work, most women undertaking waged work face a 'double day' in which they perform both their paid work and domestic labour.⁴ Some more wealthy women avoid the double day by hiring female homeworkers, often for very low pay. Like many other low-paid female workers, these homeworkers become trapped in a double bind of labouring for low wages outside the home and then returning there to begin a second shift.

As shown in Chapter 4, low paid women are being pushed further into the margins of economic life by the processes of economic restructuring. The resulting decline in manufacturing industries and growth of the service sector in Canada over the past ten to twenty years has been accompanied by an increase in non-standard forms of employment - including part-time, temporary and casual work. There has also been a fragmentation of employing bodies due to corporate downsizing and contracting out producing an increasing number of small-scale establishments.⁵ In response to global changes, neo-conservative governments across Canada have enacted deregulatory legislation, removing legal protection for employees, and have placed their hope for a bright economic future in 'employee flexibility' as an alternative to spiralling unemployment. The outcome has been

⁴ Katherine Marshall, "Employed Parents and the Division of Housework," *Perspectives on Labour and Income* (Statistics Canada) 5, no. 3 (Autumn 1993) 24, excerpted in Ruth Roach Pierson & Marjorie Griffin Cohen, *Canadian Women's Issues: Volume II. Bold Visions* (Toronto: Lorimer, 1995) at 56.

⁵ See Economic Council of Canada, *Good Jobs, Bad Jobs: Employment in the Service Economy* (Ottawa: Supply and Services Canada, 1990) and Judy Fudge, "Fragmentation and Feminization: The Challenge of Equity for Labour-Relations Policy" in Janine Brodie, ed., *Women and Canadian Public Policy* (Toronto: Harcourt & Brace, 1996) 57.

a polarization of occupations into 'good' and 'bad' jobs. Fortunate employees are finding themselves in high pay/high benefit jobs, usually in large-scale unionized workforces while others languish in part-time and temporary positions, without the protection of a union, receiving few benefits and low pay.

Female workers are disproportionately represented on the downside of this equation.

Many women are employed in 'bad jobs' particularly in the burgeoning service sector.⁶

Women are the majority of employees in firms employing non-standard workers, where governmental labour regulations do not apply, where job security, pensions and benefits are low and where they are likely to be unorganized. Their 'flexibility' is fuelling the restructured Canadian economy.

Economic reorganization is also working to exacerbate existing labour market divisions *among* women as workers already marginalized - First Nations women, for example and recent immigrants - are pushed further from economic security. To analyse the effects of restructuring on 'women' is therefore inadequate. In line with anti-essentialist and postmodern strands in feminist theory, it is necessary to place these women at the centre rather than the margins of analysis.

⁶ Isabella Baker, "Pay Equity and Economic Restructuring: The Polarization of Policy?" in Judy Fudge & Patricia McDermott, eds., *Just Wages: A Feminist Assessment of Pay Equity* (Toronto: University of Toronto Press, 1991) 254 at 268-273.

For pay equity legislation to be effective in closing the gender-based wage gap it must reach those women who feel the effects of economic restructuring most keenly. As I demonstrated in Chapter 5 and 6, the Ontario *Pay Equity Act* renders employers responsible for maintaining equitable wage scales and thus represents an advance on complaints-based 'equal pay for work of equal value' schemes which allowed dissimilar work to be compared but were dependant on an aggrieved employee making a complaint. It also covers employees in *both* the public and private sectors. On studying the Act more closely, in Chapter 6, however, it became clear that determining which workers are *excluded* from its provisions or work for employers who do not have to meet its most stringent requirements is a more revealing exercise than finding out who are fully covered.

Employers in small private workplaces, for example, are either entirely excluded from coverage or have less onerous obligations placed on them, despite the recent proliferation of small establishments in female-dominated sectors of the economy. The growing numbers of non-unionized female workers are also placed at a disadvantage in that their employers are empowered to make unilateral decisions on all aspects of the pay equity exercise, rendering them vulnerable to abuse and able only to bring a complaint after the provisions of the Act have been violated. Women in all-female workplaces also have difficulties in finding male job classes with which to compare their work.

As non-unionized women and those in small-scale and all-female workplaces are generally relatively low paid, the structure and implementation of the *Pay Equity Act* functions to exclude the very women who are most in need of a pay adjustment. Ironically, given that

the Act has been hailed as the most comprehensive proactive pay equity legislation thus far enacted, far from representing a all-out attack on the systemic undervaluation of women's work the legislation actually has the potential to play a part in the perpetuation of labour market deregulation. This is because, in excluding many workers and forcing others to bear the onus of bringing a complaint when its provisions are breached, it enables employers to hire 'flexible' non-unionized workers who will be unlikely to complain if employed at very low wages.

The Ontario Act could also play a part in job polarization and the perpetuation of labour market divisions being caused by economic transitions as it fails to reach those who are already marginalized on the basis of their race, for instance, or immigrant status. These include, as I have shown in Chapters 3 and 4, recent Chinese immigrants in the garment industry or Filipino nannies working under an immigrant visa in Toronto. It is more likely to benefit those in well paid, secure employment than those forced to take up 'bad' jobs in the wake of radical economic reordering, pushing low paid women further into the margins of the economy.

Furthermore, when factors such as race and class are brought into the equation it becomes clear that women are implicated, along with men, in the other wage gaps which exist alongside the male/female gap - between First Nations and non-aboriginal people, White and visible minority workers and also between the different classes within the labour market. For a truly equitable labour market these differentials too must be attacked.

However, critics of pay equity legislation often argue that it can obscure these other differentials.⁷

Johanna Brenner, in her critique of pay equity initiatives, argues that these other, non gender-based wage gaps could be legitimated by the enactment of pay equity acts.

This legislation, she argues, implies that, except for an easily remedied lapse in relation to women's pay, the market is allocating rewards in a neutral and equitable manner.⁸ As a result, the other wage gaps will be presumed to be attributable to 'objective' differences such as differences in skill or effort.⁹ Workers at the bottom of the class hierarchy, for example, could be thought of as contributing less effort than those at the top and therefore could justifiably be paid much less than management positions.¹⁰ Brenner argues that the notion of pay equity stems from a liberal-individualist worldview in which wage hierarchies and the notion of meritocracy are acceptable. She notes that under a more radical worldview all jobs could be considered an essential part of the whole labour process and each worker deserving of equal pay.¹¹

⁷ Johanna Brenner, "Feminist Political Discourses: Radical Versus Liberal Approaches to Feminization of Poverty and Comparable Worth" (1987) 1 *Gender and Society* 447 at 459.

⁸ Pat Armstrong & Hugh Armstrong, "Limited Possibilities and Possible Limits for Pay Equity: Within and Beyond the Ontario Legislation" in Fudge & McDermott, *supra* note 6, 110 at 110.

⁹ Brenner, *supra* note 7 at 448-449.

¹⁰ Rosemary Warskett, "Political Power, Technical Disputes, and Unequal Pay: A Federal Case" in Fudge & McDermott, *supra* note 6, 172 at 189.

¹¹ Brenner, *supra* note 7 at 447-457.

Critics have suggested alternative strategies which do not use the controversial technique of job evaluation.¹² For example, the wages of low paid jobs could be increased directly without any comparisons being made or by running a linear regression analysis on female and male-predominated jobs to calculate the relationship between gender and pay and then adjusting the female wage by the amount by which it is found to be depressed.¹³

Alternatively, the starting rates of predominantly male and female jobs, such as clerical and manual workers, could be equalized and their pay scales integrated to ensure continued wage equity.¹⁴ Another strategy would be to implement across-the-board dollar increases giving every worker the same absolute increase, rather than a percentage increase which would result in higher-paid workers receiving a greater absolute wage rise.¹⁵

Less pessimistic views of the potential of pay equity and the Ontario *Pay Equity Act* in particular have been put forward by others who see it as embodying a more radical

¹² See, for example, Rosalie Silberman Abella, "Employment Equity" (1987) 16 Man. L. J. 185; Carl J. Cuneo, *Pay Equity: The Labour-Feminist Challenge* (Toronto: Oxford University Press, 1990) at 103-108; Debra Lewis, *Just Give Us the Money* (Vancouver: Women's Research Centre, 1988) and Aileen McColgan, "Legislating Equal Pay? Lessons From Canada" (1993) Industrial L. J. 269.

¹³ Cuneo, *ibid.* and Lewis, *ibid.* The British Columbia Government Employees Union, for example, have used this strategy in negotiating a pay increase of 6% for its lowest-paid members while more highly paid employees received pay rise of 3%. Abella, *ibid.* at 200.

¹⁴ McColgan, *supra* note 12 at 284. In 1979, the British Columbia division of the Canadian Union of Public Employees (CUPE) negotiated for the equalization of base or starting rates of pay of their predominantly female clerical workers and predominantly male manual employees.

¹⁵ Abella, *supra* note 12 at 200.

potential than merely that of ensuring a more equitable gender-mix among the higher paid.¹⁶ They understand pay equity as an attack on the notion of 'value' as it is currently constructed in the labour market and claim that it can be used to reveal that what is now considered valuable is not natural or inevitable but has emerged from power struggles over the social meaning of labour. Similar power struggles have taken place before the Pay Equity Tribunal, for example in the cases conducted by the Ontario Nurses Association. The arguments made about the worth of women's work and the biases embodied in job evaluation schemes can be seen as a challenge to established understandings of value.

There is something to be gained, then, by seeking alternatives to job evaluation based pay equity *and* trying to make gains under it *and* using it to attack dominant notions of value. Nancy Adamson, Linda Briskin and Margaret McPhail make a useful distinction between the feminist strategies of 'disengagement' and 'mainstreaming' which is relevant here. Mainstreaming entails working within existing societal structures to bring about immediate changes in the lives of women while retaining more comprehensive visions of social change.

In relation to pay equity, the feminist and labour activists who fought for the Act can be seen as 'mainstreaming.' The Ontario Nurses Association, have also fought for immediate benefits for women, using job evaluation methods to make some concrete financial gains for as many women as possible and attempting to gain wide interpretations of the Act

¹⁶ Pat Armstrong and Hugh Armstrong, "Lessons From Pay Equity" (1990) 23 *Studies in Political Economy* 29 and Ronnie J. Steinberg, "Radical Challenges in a Liberal world: The Mixed Success of Comparable Worth." (1987) 1 *Gender & Society* 466.

from the Pay Equity Tribunal. As can be seen from the government's re-definition of 'employer' under the Act after some progressive decisions from the Tribunal, gains made in this way have to be fought for and can be taken away at any time by a hostile government.

In contrast, the strategy of disengagement requires that feminists focus on longer-term goals which necessitate structural changes and may entail the need to work outside dominant paradigms of thought.¹⁷ Those scholars who argue for a re-conceptualization of the market place to accommodate women and revalue their work while challenging notions of hierarchy and value are carrying out a strategy of disengagement.

As Adamson et. al. argue, both mainstreaming and disengagement are necessary to achieve social change and a tension must be maintained between them so that the overall vision of change is not compromised while concrete gains are made in the lives of women.¹⁸ One way to maintain this tension is to think of wage equity initiatives as an integral part of a more extensive re-conceptualization of the labour market. Thus, pay equity legislation is related to a whole range of strategies for making the labour market meet the needs of working women including, for instance, parental leave or sexual harassment policies.

¹⁷ Nancy Adamson, Linda Briskin & Margaret McPhail, *Feminist Organizing For Change: The Contemporary Women's Movement in Canada* (Toronto: Oxford University Press, 1988) at 177.

¹⁸ Adamson, Briskin & McPhail, *ibid.* at 176.

Patricia McDermott has argued, for instance, that pay equity and employment equity initiatives in particular should be seen as interdependent strategies.¹⁹ Both are aimed at combating the detrimental effects of occupational segregation: pay equity intended to raise the wages of female-dominated jobs and employment equity to move more women into traditionally male jobs. They have, however, been treated as distinct and, in Ontario as in most other jurisdictions, have been embodied in separate legislative measures.²⁰

Legislating both simultaneously and conceiving of them as connected would, for example, prevent employers from implementing 'employment equity' by creating new job categories wherein women are paid little more than in their traditionally female jobs. Increased wages for female workers would be seen as an integral part of the success of employment equity.²¹

The more direct methods for raising the pay of low paid women workers could be used in conjunction with job-evaluation based pay equity legislation. However, most alternatives suggested involve negotiating with an employer during the process of collective bargaining, which is not an option for the many non-unionized women in the Ontario labour force. The importance of unionization in protecting women from exploitative employment cannot be overestimated as I have shown in Chapter 4. Moreover, as pay

¹⁹ Patricia McDermott, "Pay and Employment Equity: Why Separate Policies" in Brodie, *supra* note 5, 89.

²⁰ Employment equity in Ontario had been initiated under the 1993 *Employment Equity Act* (S.O. 1993, c. 35) which was recently repealed by the Progressive Conservative government. See the *Job Quotas Repeal Act* S.O. 1995, c. 4.

²¹ McDermott, *supra* note 19 at 101.

equity depends on comparing male and female wages it is becoming more and more meaningless in an economic climate where men's wages are hurtling downwards.²² Raising the statutory minimum wage may be a more effective strategy, particularly for non-unionized women who are unable to negotiate their wage levels and also for low paid men.²³ In contemplating strategies to combat women's low pay it becomes clear that a discourse which constructs low paid men and women as being in opposition obscures the extent to which they have similar interests in the restructured wage labour market.

For any strategy to be successful it is necessary to be attentive to the differences between groups of women in order to clearly identify those who are becoming more marginalized in the Canadian economy. It is no less important, however, to draw connections between the experiences of different groups of women, identifying the commonalities in their experience, in order to foster the unity necessary for effective political action. Similarities *and* contradictions must be explored to understand the interrelationships and conflicts between different groups of women in society and develop strategies which are most likely to benefit those who are most in need.

In 1985-86, the Canadian Union of Public Employees' Ontario Council of Hospital Unions proposed a minimum entry-level rate of \$10.00 per hour. Most of the low-paid workers who would benefit were women. Cuneo, *supra* note 12 at 105.

²² Isabella Bakker, *supra* note 6 at 272.

²³ Judy Fudge, "Limiting Equity: The Definition of "Employer" Under the Ontario Pay Equity Act" (1990-91) 4 C.J.W.L. 556 at 558.

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