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## EQUALITY, NON-DISCRIMINATION AND WORK-LIFE BALANCE IN CANADA

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### Introduction

The principle that everyone has a right to equal treatment was first entrenched in Canadian law in the aftermath of the Second World War when legislation began to be enacted prohibiting discrimination on the basis of sex, race and religion. Since that time, the grounds of prohibited discrimination have steadily increased. These grounds will be discussed in greater detail in the answer to question 1. Because Canada is a federal state and courts have held that legislative authority over human rights is primarily a matter of provincial jurisdiction, there is no uniform law of Canada. Nevertheless, the provisions of statutory human rights codes (HRCs) are quite similar across the country. There is, however, a second, more recent source of equality rights, and that is section 15 of the *Canadian Charter of Rights and Freedoms (Charter)*, which came into force in 1985. Section 15 guarantees the “*right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability*” but also applies to other analogous grounds that courts may identify. The *Charter* is part of Canada’s constitution and thus is national in scope. However it only applies to state action and so while it does not apply to private employers, it can be used to challenge legislation that violates equality rights as well as actions performed by government in its role as an employer.

There has been an important debate in Canada over the meaning of equality. Initially, the underlying conception of equality required formal equality. Under this approach, an employer who required all employees to meet the same physical standards would not be guilty of discrimination on the basis of sex even though the standard had a differential impact on men and women. More recently, the courts have redefined equality to mean substantive equality. Here the focus is on whether a standard or law creates a disadvantage on an enumerated ground and if so the standard will be found to be discriminatory unless it can be justified as a bona fide occupational requirement (BFOR). In order to justify a standard as a BFOR it must be demonstrated that members of the protected group could not be accommodated without undue hardship. In other words, standards must be as

inclusive as is reasonably possible to minimize their differential impact. Under this approach, intent is irrelevant; what matters is the effect of a law, rule or policy.

The issue of work-life balance has only recently become a public issue, largely as a result of the increased labour force participation of women with children. Initially families were expected to make private arrangements for caregiving responsibilities using whatever resources were available to them. In more recent years, however, small steps have been taken to provide employees with very limited rights to accommodation.

Before turning to the law we provide a brief overview of the current state of gender inequality in the labour market.<sup>1</sup> As noted earlier, women's labour force participation has increased enormously. Since the 1970s, the participation rate of women between the ages of 25 and 64 has grown steadily from less than 50% to over 76%, although it still lags behind that of men, which is currently around 85% and has been dropping. The unemployment rate of women, like that of men, varies over time and place, but the significant trend here is that since the 1990s women's overall unemployment rate is lower than that of men. Currently, the unemployment rate for men and women respectively is about 6.5% and 5.5%. However, not all women have benefitted equally from these advances. New immigrants, many of whom are visible minorities, suffer from significantly higher rates of unemployment, and female new immigrants experience higher unemployment than comparable immigrant men. As well, younger women between the ages of 15 and 24 also experience significantly higher rates of unemployment (around 12%) than other women, although it is younger men who are the most unemployed (around 15%).

Another dimension of employment equality is the quality of jobs. For example, if we consider differences in full and part-time employment, we find that the percentage of prime age women working part-time is significantly greater than that of equivalent men (21% to 7%), although in recent decades the percentage of part-time women has decreased slightly while the percentage of part-time men has slightly increased. We will return to the reasons for part-time work in question 5.

Another aspect of job quality is occupation. Women comprise about 48% of the labour force but only about 32% of senior managers and 37% of managers generally. On the other hand, about 57% of professionals are women. Also, the percentage of women in managerial and professional positions has been increasing. However, women are also

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<sup>1</sup> We have drawn on a number of sources including Vincent FERRAO, "Paid Work" in *Women in Canada: A Gender-Based Statistical Report (Statistics Canada 2015)* and Beth SYMES and Kate LAXER, "Women and Work: Thirty years after Section 15 of The Charter – Have We Made Progress?", *Report Prepared for the Canadian Chapter of the International Association of Women Judges*, National Institute of Justice Conference. St. John's, Newfoundland, updated June 2016.

over-represented in many low-wage occupations. Most strikingly, about three-quarters of all clerical and administrative employees are women. They are severely under-represented in agriculture, manufacturing, transportation, primary extraction and construction, which often provide high wage jobs.

Comparing the wages of men and women is fraught with difficulty but whatever the measure chosen there is a gendered wage gap, although it has been narrowing. If we use hourly earnings, on average women make about 86% of men. However, if we look at weekly earnings the gap widens to 76% and if we look at annual earnings it widens again to 67%. The reason for this is that on average women work fewer hours than men. It is also important to recognize that these figures are for all women and all men, but other wage gaps emerge when we refine the analysis by considering the intersections of gender and visible minority status, disability, and indigenous status.

**1. Is sex a cause of discrimination in your legal system? What other circumstances are discriminatory? Does the prohibition of discrimination also include indirect discrimination?**

Yes, sex is a ground of discrimination under both the *Charter* and under HRCs. As well, HRCs expressly protect employees from sexual harassment and other forms of discrimination. These vary somewhat from jurisdiction to jurisdiction, but in general every person has a right to equal treatment, in respect of employment, without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, record of offences, marital status, family status or disability.

As noted in the introduction Canadian courts no longer make a distinction between direct discrimination and adverse-affect or indirect discrimination. If an employee can establish that they have suffered an adverse effect in the workplace on account of an enumerated characteristic they will likely succeed in establishing employment discrimination unless the employer can prove that the workplace rule or policy, which created the adverse effect, is a BFOR. In order to meet this test, the rule or policy must be necessary, within reason, to accomplish the purpose it was created to achieve, adopted in good faith and rationally connected to the performance of the job. As well, the employer has a duty to accommodate adversely affected employees up to the point of undue hardship, which is reached if accommodation is excessively costly or creates health and safety risks.<sup>2</sup>

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<sup>2</sup> British Columbia (Public Service Employee Relations Commission) v. BCGSEU, [1999] 3 S.C.R. 3.

**2. What is the legal consequence of discrimination on grounds of sex or other circumstances? Specifically, what is the legal consequence of an unfair dismissal of a pregnant worker or a worker exercising work-life balance rights?**

Human Rights Tribunals (HRT) in Canada have broad remedial powers under HRCs. They can order an employer to do anything that, in the opinion of the HRT, the party ought to do to promote compliance with an HRC. This includes compensation for lost wages, compensation for injury to dignity, feelings and self-respect, and reinstatement. The monetary compensation for loss of dignity due to sex discrimination can be quite substantial.<sup>3</sup>

Dismissal on account of pregnancy is treated very seriously by HRTs and courts. As well, the law protects employees exercising their statutorily protected rights to unpaid leave, which include pregnancy and parental leave, among others. Employees whose leave rights are violated are entitled to compensation and/or reinstatement as described above (also see Question 7).

**3. Are there examples of wage discrimination, access to employment and/or promotion development between men and women? What treatment do these cases receive by the legislation and case law? What measures does the legislation regulate to promote equal treatment between men and women in the workplace?**

As mentioned in the introduction, HRCs and the *Charter* prohibit discrimination on a variety of grounds including sex. These laws cover discrimination in hiring and promotion as well as pay. However, a general prohibition against discrimination in employment on the basis of sex leaves many issues unresolved.

Human rights laws in Canada are generally complaint driven and remedies are reactive, individual and compensatory, not proactive and systemic.<sup>4</sup> As a result, progress toward achieving equality has been slow. An alternative approach, employment equity, was first adopted by the federal government in 1986. It requires federally regulated employers to conduct a workplace analysis to determine the representation of four protected groups (women, visible minorities, persons with disabilities and indigenous peoples) in their workforce, conduct a review of employment systems, practices and policies to identify and remove barriers that adversely affect members of protected groups, and develop plans

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<sup>3</sup> For example, see *T.O.P. v. Presteve Foods Ltd.*, 2015 HRTO 675.

<sup>4</sup> For an important exception, see *CN v. Canada (Canadian Human Rights Commission)*, [1987] 1 SCR 1114, where a human rights tribunal ordered the employer, CN, to adopt proactive measures to address systematic discrimination in hiring women.

to increase the representation of members of protected groups in their workforce until equity is achieved.

Legislative measures to close the gendered pay gap have also gone beyond prohibitions on sex discrimination. In some provinces, even before the enactment of human rights codes, legislation was enacted requiring equal pay for equal work. While these laws prohibited separate pay scales for men and women, they failed to address the fact that men and women tended to perform different work. It was only in the 1980s that some jurisdictions enacted pay equity legislation requiring equal pay for work of equal value. In some Canadian jurisdiction these laws had a proactive dimension that required employers to conduct reviews of pay practices to determine if employees in predominantly female jobs were being paid less than employees in predominantly male jobs and if so to take steps to achieve pay equity.

**4. What rights of work-life balance are recognized in your labor regulation? Specifically, does the labor regulation recognize workers the right to adapt their working time (distribution and/or reduction of working hours)? What capacity does the employer have to oppose or limit the exercise of these rights?**

The issue of work-life balance has attracted growing attention, but to date the policy response has been limited. For the most part, policy makers have addressed work-life conflicts by providing leave rights, only some of which are paid. These are discussed in more detail in question 7. While leave rights are important, they are inadequate. As a result, employees have attempted to use the existing prohibition against family status discrimination to force employers to accommodate their family responsibilities. In a recent judgment, the Federal Court of Appeal held that family status extends to parental obligations that engage the legal responsibilities for children. In order to establish a case of family status discrimination an employee will have to show that their work obligations significantly interfere with their ability to fulfill their legal obligations for childcare (not personal choices such as music lessons) and that they have made reasonable efforts to meet those obligations through alternative arrangements.<sup>5</sup> The result is that employees are primarily responsible to resolve work-family conflicts through their own efforts and can only look for accommodations from their employer in limited circumstances.

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<sup>5</sup> Johnstone v. Canada (Border Services), [2014] FCA 110.

**5. Are part-time contracts used as an instrument to achieve work-life balance? If so, is the legal regime of part-time work adequate for this purpose?**

As we noted in the introduction, women are significantly more likely than men to work part-time hours, but are they doing it as a means of achieving work-life balance? Since Canadian women continue to assume disproportionate responsibility for caregiving, it is not surprising that they are significantly more likely than men to report this as their reason for working part-time (16% to 3%).<sup>6</sup> Women in couples with children are much more likely to be working part-time than similarly situated men (around 35% to 14%) and nearly 66% of women in couples with children under five report they work part-time in order to provide care for their children, compared to about 15% for men. It is notable however, that in the last twenty years caregiving has declined as a reason for women working part-time as has the percentage of women in couples with children working part-time.

Apart from the loss of earnings that comes with part-time work, the legal system provides few protections for part-timers. Part-time employees have no right to be paid at the same wage rate as full-timers or to receive the same benefits. Part-time employees may also find it more difficult to qualify for unemployment benefits if they lose their jobs. This is because under Canadian law employees must have worked between 420 and 700 hours (depending on unemployment rates in the region of the country where they live) in order to qualify for benefits. Not surprisingly, a higher proportion of women than men are unable to qualify for regular unemployment benefits because they have failed to accumulate enough hours. However, it must also be noted that part-timers are entitled to the same basic employment standards as full-time employees such as vacation and holiday pay.

**6. Can the employer alter working hours of workers exercising work-life balance rights through overtime and/or irregular distribution of working time?**

As noted in our answer to question 4, there are limited circumstances in which an employer may be obliged to schedule hours to accommodate an employee's caregiving responsibilities and in these circumstances an alteration of working hours that interfered with that accommodation would be unlawful. However, if an employer can establish that any other arrangement would result in undue hardship to the employer, there is no duty to accommodate.

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<sup>6</sup> It is also the case that 29% of men and women report that they work part-time hours as a personal or voluntary preference. It is unknown whether the preference for part-time is in some cases constrained by the lack of suitable alternative care-giving arrangements.

**7. Do workers have permits or the right to suspend the employment contract (leave of absence) due to family and personal circumstances? If so, are they paid leave of absences? Do workers maintain the right to return to their previous job post? What capacity does the employer have to oppose or limit the exercise of these rights?**

The earliest leave rights were for pregnancy/maternity and parental care after a child is born or adopted. These are discussed in more detail in questions 8 and 9. Since then a variety of other leave rights have been added, although they differ from province to province. In Ontario for example, employees who work for employers who regularly employ more than 50 employees are eligible for 10 days of personal emergency leave, which may be taken for personal illness, injury or medical emergency or due to the death, illness, injury, medical emergency or urgent matter related to a family member. In some limited circumstances, the employee may also be entitled to sickness benefits under the federal government employment insurance (EI) scheme. Otherwise, the leave is not required to be paid. Employees in Ontario are also eligible for family medical leave, family caregiver leave, and critically ill childcare leave. Space does not allow for a fuller description of the availability of these leaves, but crucially all are unpaid.<sup>7</sup>

Employees on leaves of absence continue to accumulate seniority and have a right to participate in employer benefit plans. At the end of the leave, employees have a right to reinstatement to the position they held prior to the leave or, if that position no longer exists, to a comparable one. Employees are also entitled to the pay rate they would have received had they not taken the leave. The right to reinstatement does not protect employees who are terminated for reasons unrelated to the leave. An employer who unlawfully refuses to reinstate an employee may be ordered to do so and to compensate that employee for any loss incurred. As well, the employer may also be prosecuted and fined or jailed, although this happens extremely rarely.

**8. Is there maternity leave? If so, what is its duration? Who hold the right to maternity leave? Are workers entitled to compensation or Social Security benefits during this time?**

As noted above, there is a right to unpaid maternity leave under provincial employment standards laws, provided the mother has worked for their employer for the minimum time stipulated by the province. The duration of the leave varies between 15 to 18 weeks, depending on the province, and may be taken before or on the date of birth. A pregnant employee who exercises her right to maternity leave may be able to receive EI benefits if

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<sup>7</sup> For a description, see Ontario Ministry of Labour, Guide to the Employment Standards Act, 2000.



she has accumulated sufficient insurable employment. Maternity benefits typically cover 55% of the employee's wage and last up to 15 weeks.

**9. Is there parental leave? If so, what is its duration? Who can take this leave? Are workers entitled to compensation or Social Security benefits during this time?**

Under employment standards laws, *all* employees, regardless of their gender, who have a child come into their custody, care and control for the first time are entitled to 35 to 52 weeks of unpaid parental leave, depending on the province. As well, EI benefits are available to parents who have new born children or who have legally adopted a child, provided the parent has met the hours of work qualification. Parental EI benefits typically cover 55% of the employee's wage for 35 weeks taken within the first year of adoption or birth. Both parents can apply for parental benefits however the 35 weeks will be split between them. EI benefits are more generous in Quebec than in the rest of Canada.

In most of Canada there is no dedicated paid paternity leave so in a two-parent family it is up to the couple as to how to divide parental leave benefits. An exception is Quebec, where there is a dedicated 5 weeks of paternity leave that can only be taken by the spouse (male or female) of the woman who gave birth. This benefit is in addition to the parental leave benefit. The result is that about 75% of Quebec fathers take paternity leave (and receive benefits), whereas in the rest of Canada about 25% of fathers take parental leave (and only about 13% receive benefits).<sup>8</sup>

**10. What is the role of collective bargaining in promoting equality between men and women in the workplace and work-life balance? Does collective bargaining often improve the legal regulation in this matter? Or does it limit the exercise of work-life balance rights?**

Before talking about the role of collective bargaining in promoting equality, it is important to know that only 30.6% of employees are covered by a collective agreement and that the rate has been slowly dropping for many years. However, the overall coverage rate masks an enormous difference between union coverage in the private sector (16.7%) and the public sector (75.5%). As a result, any equality-promoting effects of collective bargaining have the greatest impact in the public sector, where women are disproportionately employed.

Measured by average hourly earnings, unionized women make 95% of what unionized men make, compared to 81% for non-union women. One reason for this is that unionized

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<sup>8</sup> Leanne FINDLAY and Dafna KOHEN, "Leave Practices of Parents After the Birth or Adoption of Young Children" (Statistics Canada, 2012).

women are much better positioned to benefit from human rights, pay equity and employment equity laws because of the resources that unions can bring to bear in getting these laws enforced and because they can have disputes over these issues resolved expeditiously through grievance arbitration rather than having to take them through administrative tribunals that are often back-logged. Unions have also often negotiated more generous benefits and leave entitlements than the statutory minimum. For example, many collective agreements provide for employer-paid leaves or for top-ups on EI benefits. Some unions have negotiated flexible work arrangements that accommodate workers' care-giving responsibilities and in a few instances unions have negotiated child-care benefits. Although there was a time when unions were complicit in excluding women, negotiating gendered wage scales or insisting on seniority rights to block accommodations, in general they have become strong promoters of gender equality, especially as women now comprise a little more than half of all union members.

### References and judicial decisions

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