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**Women and Work and the Canadian Human Rights Act**

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After many months of debate, the federal legislation on human rights became fully effective on March 1, 1978. Part of the legislation, establishing a Canadian Human Rights Commission, had been proclaimed in force months earlier, in August 1977, but the Canadian Human Rights Act became effective as a whole just over a year ago.1 The anti-discrimination provisions of the Act apply to employees of federal institutions previously outside the ambit of provincial human rights statutes,2 and, in the words of at least one commentator in early 1978, the federal Act had potential to "establish the federal government as the leader in human rights matters."3

This paper is an assessment of the validity of this assertion about the Act's potential having special regard to discrimination against women in the workforce. The first section of the paper is an outline of the major provisions of the Act which affect the position of working women. The second section is a theoretical analysis of the legislation, focusing on limitations inherent in the Act which result both from definitions of discriminatory actions and from the choice of legal remedies for women facing discriminatory behaviour at work. The third section is a brief look at the operation of the Canadian Human Rights Commission during its first year of activity.

A. THE CANADIAN HUMAN RIGHTS ACT: AN OVERVIEW

The purpose of the Act, as stated in s.2, is to give effect to the principle that:

(a) every individual should have an equal opportunity with other individuals to make for himself or herself the life that he or she is able and wishes to have, consistent with his or her duties and obligations as a member of society, without being hindered in or prevented from doing so by discriminatory practices based on . . . sex or marital status . . .

Part I of the Act defines discriminatory practices. S. 3 states that sex and marital status are, among others, "prohibited grounds of discrimination". Discriminatory practices are defined by ss.5-13. In relation to employment, s.7 states

7. It is a discriminatory practice, directly or indirectly,
   (a) to refuse to employ or continue to employ an individual, or
   (b) in the course of employment, to differentiate adversely in relation to an employee, on a prohibited ground of discrimination.

Subsequent sections of the Act prohibit advertising of employment which expresses preferences based on prohibited grounds of discrimination (s.8), exclusion from membership in an employee organization on a prohibited ground of discrimination (s.9) and adoption by an employer or employee organization of a policy or agreement which tends to deprive an individual or class of individuals of employment opportunities on a prohibited ground of discrimination (s.10). S.11 of the Act establishes that it is a discriminatory practice for an employer to differentiate in wages paid to male and
female employees employed in the same establishment who are performing work of equal value. S.14, however, provides that there is no discriminatory practice if

(a) any refusal, exclusion, expulsion, suspension, limitation, specification or preference in relation to any employment is based on a bona fide occupational requirement.

Thus, since s.14 may be used to justify employment decisions which would otherwise constitute discriminatory practices, the interpretation of s.14 is critical to an assessment of the role of the Act in eliminating discrimination against women in the workforce.

Part II of the Act establishes the Canadian Human Rights Commission (s.21), with responsibility for administering the Act and for developing information programs, research programs, and liaison with provincial Human Rights Commissions. The Commission may on application or on its own initiative issue guidelines binding on the Commission and on any human rights tribunal established under the Act (s.22(2)). Pursuant to s.15(2), the Commission may also give advice and assistance in relation to special programs designed to prevent or eliminate disadvantages suffered by any group of individuals because of (among other factors) sex or marital status, where the special programs are designed to improve opportunities for the group. As well, the Commission may recommend that federal contracts include terms which prohibit discriminatory practices under the Act (s.19).

Part III contains the mechanism for implementing the goals of the Act. The procedure requires the filing of a complaint with the Commission by an individual or a group having reasonable grounds for believing that a person is engaging or has engaged in a discriminatory practice (s.32(1)). If the complaint is filed by someone other than the victim of the discriminatory practice, the Commission may refuse to deal with the complaint unless the victim consents. (s.32(2)). Significantly, however, where the Commission has reasonable grounds for believing that an employer is engaging in a discriminatory practice, the Commission may initiate a complaint. (s.32(3)). The Commission is required to deal with any complaint filed unless there has been a failure to exhaust other grievance or review procedures (s.33)(a) or, for example, the complaint is trivial, frivolous, vexatious, or made in bad faith. (s.33(b)(iii)).

In dealing with complaints, the Commission may appoint an investigator (s.35) who must submit a report to the Commission. The Commission may adopt the report or dismiss the complaint (s.36). In the event that the complaint has not been settled during the investigation, or dismissed, the Commission may appoint a conciliator "for the purpose of attempting to bring about a settlement of the complaint" (s.37(1)). Terms of settlement may be referred to the Commission for approval or rejection (s.38).

S.39 permits the Commission to appoint a Human Rights Tribunal at any stage after the filing of a complaint. The tribunal must notify the Commission, the complainant and the person against whom the complaint was made (and any other person, in its discretion) of its investigation of the complaint, and must give an opportunity of appearing before the tribunal, presenting evidence, and making representations, to all persons notified (s.40). S.41 provides that at the conclusion of its inquiry, the tribunal may make an appropriate order, including cessation of a discriminatory practice, and restriction of rights or compensation to the victim of the discriminatory practice.

S.45 prohibits intimidation or discrimination against anyone who makes a complaint under the Act. Further, s.46 provides for fines of up to $10,000 for an employer or employee organization guilty of an offence under the Act; it is an offence to fail to comply with the terms of any settlement of a complaint, to obstruct a tribunal or an investigator, to reduce wages in order to eliminate discrimination, or to contravene s.45.

This overview of the legislation indicates that the primary focus of the Act is the resolution of individual cases of discrimination. The Act provides the means of investigating complaints and for negotiation and settlement where complaints are well-founded. There are also provisions for levying fines where there is an offence under the Act, and the Commission has responsibilities for educating the public on issues of discrimination. Although in some ways the federal legislation may provide greater protection against discrimination than the provincial Acts, the overall pattern of the federal Act is similar to that adopted by most of the provinces in Canada. The essential issue is whether this form of legislation can effectively curtail or prevent discriminatory practices in relation to women in the workforce.

B. AN ASSESSMENT OF THE ACT

(1) Justifiable Discrimination: The Bona Fide Occupational Requirement

The interpretation of the Act's provisions prohibiting discriminatory practices is the key to the quality of protection against discrimination for working women. Clearly, a broad interpretation of the discriminatory practices defined in ss.7-11 of the Act by the Commission will provide more opportunities for complaints to the Commission, and the possibility that the Commission's intervention will eliminate discriminatory practices. However, a very significant provision in this Part of the Act is s.14, the section which permits an employer to justify an existing discriminatory practice on the basis of a bona fide occupational requirement. An employer who can demonstrate that being male is a bona fide occupational requirement may continue a practice of employing only male workers in particular job categories. Although this is on the employer to show entitlement to s.14 as defence to a charge of discrimination, an examination of the interpretation of this phrase in similar statutes detracts from the efficacy of the new federal Act as a means of protecting women from discrimination in employment.

From a conceptual point of view, the bona fide occupational requirement can be criticized as an unnecessary part of the legislation. Since there is no suggestion that the Act's intent is to compel an employer to hire or promote an employee who is unqualified for a job or promotion, it is arguable that the explicit reference to a bona fide occupational requirement is superfluous.
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decision possessed inherent possibilities of sex­
prohibitions relating to the definition of the
occupational requirement are well-illustrated in the
decisions of American courts. Like the Canadian Act, the
American legislation17 designates certain employment
practices unlawful if they are based on discrimination
because of race, color, religion, sex or national origin.18
However, s.703(e) provides that an employer (or others)
will not commit an unlawful employment practice
in those certain instances where
religion, sex, or national origin is a bona
fide occupational qualification
reasonably necessary to the normal
operation of that particular business or
enterprise . . .
The cases which interpret the bona fide occupational qualification are not entirely consistent in the reasoning they adopt. For example, in Weeks v. Southern Bell Telephone and Telegraph Co.19 Bell gave evidence of its belief that the job of switchman was too onerous for women; however, Bell failed to show that all or substantially all women would be unable to perform the tasks involved, and consequently the Court held that they were unable to claim that being male was a bona fide occupational requirement. However, the test used focused on the general characteristics of women as a group, and not the individual abilities of particular women. Thus, despite the apparent success of the complainant in Weeks, the test adopted in reaching the decision possessed inherent possibilities of sex-stereotyping.
Sex-stereotyping may also occur if the test adopted takes into account “the prevailing views in society” about women in the workforce. In Fogg v. New England Tel. and Tel. Co.,20 the basis of the complaint was a denial of promotion to a woman in a company where almost no positions in senior management were held by women. The court accepted that the company’s practice of delegating women to junior positions reflected “the mores and standards” of our society rather than conscious policy of sex-discrimination. The effect is a
the Equal Employment Opportunity Commission (EEOC) in the United States. The EEOC guidelines also provide for a narrow interpretation of the *bona fide* occupational qualification exception in relation to matters of sex discrimination. In particular, the guidelines state that the Commission will find the exception unwarranted where there is a refusal to hire because of sex based on assumptions of the comparative employment characteristics of women in general (such as an assumption of a high turnover rate among women); where there is a refusal to hire based on stereotyped characteristics of the sexes (such as assumptions that men are less capable of assembling intricate equipment or that women are less capable of aggressive selling); and where the refusal to hire is based on preferences of co-workers, the employer, clients or customers, except in cases requiring employees to be male or female for the purpose of authenticity or genuineness.

The presence of s.14 in the *Canadian Human Rights Act* presents a challenge for the Commission. By narrowly construing the ambit of a *bona fide* occupational requirement, the Commission will enhance job opportunities for women in non-traditional work. However, in deciding whether discriminatory action based on occupational requirements is justified in particular cases, the Commission’s interpretation of s.14 clearly involves more than a mechanical application of a statutory formula. A decision whether s.14 applies to justify discriminatory behaviour involves attitudes and ideas about the roles of men and women in society at large as well as in the workplace and in the particular job concerned. Moreover, the decision also invites consideration of the usefulness of interference with the choice of personnel by private employers, and may invoke concern about the efficacy of “reverse discrimination.” Thus s.14 is very significant not only because its interpretation will have immediate repercussions in the workforce and the job opportunities which may be available to women; in addition, s.14 implicitly embodies unformulated ideas about the proper sphere for women in the workforce, leaving it to the tribunals established by the Commission to decide on a case-by-case basis whether decisions of employers reflect discrimination or merely “occupational requirements.” The point is that ideas about what work should be done by women (and by men) form a fundamental part of our social structure so that decisions about the application of s.14 must always reflect, to a greater or lesser extent, the subjective social context in which they are made. The Commission’s task is a difficult one because its ideas about appropriate jobs for women may differ substantially from those of employers, and because a decision by a Human Rights Tribunal that an employer may not rely on s.14 will in all likelihood require a very substantial reorganization of job structures within a particular workplace. To apply s.14 as the Advisory Council suggested would result in a fundamental restructuring of jobs in the Canadian workforce.

The implications of s.14 for fundamental change in the structure of employment raises the major philosophical issues in connection with the Act. This issue is whether the Act is directed primarily to amelioration of the most glaring instances of sex discrimination in employment, or whether the Act is designed to effect a major restructuring of the workforce so that men and women may have equal opportunities in their work. While this issue is of some significance in relation to the interpretation of s.14, it is critically important to the enforcement procedures of the Act, and its analysis in the context of enforcement highlights a major difficulty with the legislation.

(2) **Enforcing the Act: Individual Initiative and Voluntary Compliance**

Human rights legislation is generally directed at changing attitudes about discrimination and enforcing behaviour which is non-discriminatory. However, it is of some significance to determine whether the primary focus of legislation is changing attitudes or enforcing a code of behaviour, and there is an ongoing debate about the comparative effectiveness of Acts directed to each of these purposes. On the one hand, changing attitudes about discrimination through information and education programs can result in equality of opportunity by consensus, although the educative process may be a very long-term one. By contrast, legislating to prohibit discriminatory behaviour has much more immediate and obvious effects, even though compelling non-discriminatory behaviour may not result in any change in attitudes. Indeed, compelling employers to act without discrimination against women may actually entrench discriminatory attitudes despite conformity with legislative requirements. Legislation which has as its primary focus changing discriminatory attitudes through education programs reflects a view that discrimination can be curtailed or eliminated through awareness and understanding of the issue; it assumes that employers discriminate against women without being aware of the implications of their actions. By contrast, the underlying premise of legislation which, to its primary goal, compels non-discriminatory behaviour is that employers may choose to discriminate on the basis of sex in employment decisions because it is more advantageous to them; in this context, changing attitudes alone will not be sufficient.

This latter view accords with a view of sex discrimination as a structural or systemic problem of society. It assumes that the position of women in the workforce is related to economic and social forces which shape the roles available to men and women, not according to the abilities of individuals, but because of the needs of the workforce and of the goals of employers. Advocates of this view assert that only by legislating changes in behaviour will effective changes in women's work occur. Of course, such legislation requires a substantial interference with the organization of the workplace and may result in considerable disruption for employers. Not surprisingly, such legislation needs to be carefully drawn and thoughtful preparation for its introduction may be essential.

The *Canadian Human Rights Act* is designed to address women’s roles in the workforce both by means of changing attitudes and also by compelling non-discriminatory behaviour on the part of employers. It empowers the Commission to conduct research and information programs and to advise in relation to the adoption of special programs for disadvantaged groups, are clearly designed to increase awareness of and influence attitudes about human rights. At the same time, its powers to invest and hear complaints and to make recommendations
action by an employer. These enforcement powers are

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However, an effective challenge to structural
discrimination against working women requires a
primary legislative focus on changes in behaviour;
structural discrimination is not the result of a lack of
awareness but rather of a choice of priorities which
encourages continued discrimination against working
women. To overcome structural discrimination against
working women, the Commission must emphasize its
powers to compel non-discriminatory behaviour among
employers; effective change cannot occur through
education alone.

The Canadian Human Rights Act relies substantially
on a complaints mechanism initiated by the victim of
discrimination. Yet substantial reliance on individual
complaints of sex discrimination to trigger the complaint
procedures poses a number of problems. The
complainant must first recognize that discrimination on
the basis of sex has occurred; interestingly, this may
result in a failure to detect employers who adopt very
subtle forms of discrimination. 26 This point was well-
documented by Leon Mayhew 29 in a study of racial
discrimination, in which he noted the inappropriateness
of a process relying on individual complaints of
discrimination in relation to middle and senior
management positions. Promotion to these positions
generally depends, at least in part, on a collegial
relationship, which would usually be destroyed by
lodging a complaint of sex discrimination. Moreover,
Mayhew also suggested that complaints may be seen to
have less likelihood of success where the employer is a
very large or strategic concern, and the process may
never be triggered at all in relation to these employers.
The overall effect of these criticisms of the complaint
process is an inconsistent and piecemeal enforcement of
the Act. 30

The enforcement provisions of the Act also adopt the
norm of the provincial Acts in providing for conciliation
and negotiation with employers against whom
complaints are lodged. As has been suggested
frequently, 31 there is a potential danger that acts of
discrimination by employers will be tolerated by the
bargaining process. In view of the practical difficulties
faced by a victim of sex discrimination who lodges a
complaint but remains in the workplace, the prospect
that her complaint may not result in any real sanction
against the employer is another deterrent to the effective
operation of the enforcement mechanisms of the Act.

However, the Act does not rely solely on individual
complaints to enforce its provisions; the Commission
may also initiate complaints under the Act, although
effective use of these powers may well require
investigative resources beyond its capacity. 32 In addition,
the Commission may recommend contract compliance
pursuant to s.19 and a tribunal may order affirmative
action by an employer. These enforcement powers are
augmented by the educative role of the Commission. For
example, s.22 authorizes the Commission to develop
information programs and to “endeavour by persuasion,
publicity, or any other means that it considers
appropriate” to discourage and reduce discriminatory
practices. Pursuant to s.15, the Commission may also
advise employers in relation to the adoption of
voluntary programs of affirmative action in relation to
certain employees including those discriminated against
on the basis of sex. These provisions obviously reflect a
recognition that eliminating discrimination may require
action on a broader basis than can be achieved by
resolving individual complaints.

Overall, the Act provides a wide range of measures
which may be adopted by the Commission or its
tribunals to eliminate discriminatory attitudes and
behaviour. However, it is essential to recognize that
equal opportunity for working women cannot be
achieved by education programs and complaints
procedures dependent on victim-initiation. Such
measures have had little effect in relation to sex
discrimination in the past. For example, in 1967 the
federal public service prohibited sex discrimination. Yet
a study of the public service in 1970 33 indicated that
women in the public service were still concentrated in
low-paid and low-responsibility jobs, with shorter
career ladders, and frequently classified to prevent
sideways movement. In a similar study of the Toronto
legal profession in 1971, 34 40% of Toronto law firms
openly admitted to a prejudicial attitude to women
applicants for employment. The Ontario Human Rights
Code was amended in 1971 to include “sex” and
“marital status” as prohibited grounds of discrimination
and sex discrimination was prohibited by the Codes of
both the Canadian Bar Association and the Law Society
of Upper Canada. However, a report in late 1978
indicated widespread discrimination on the basis of sex
in the Ontario legal profession. 35 In such a context, the
efficacy of measures which depend primarily on a
victim-initiated complaint process, and voluntary
compliance and educational procedures, must be called
into question.

There are also examples outside Canada. The recent
report of the Equal Opportunities Commission in the
United Kingdom 36 indicates that there is “clearly a long
way to go before equality between the sexes is achieved
in the workplace.” 37 The report is based on a study
conducted by the Commission to examine the
effectiveness of the Sex Discrimination Act of 1975. The
study indicates that the majority of industrial employers
have taken formal steps to ensure avoidance of unlawful
discrimination pursuant to the Act. Significantly,
however, only 10% of employers had taken more
positive action and conducted an analysis of their
workforce (by sex and job category, pay level, etc.) to
examine the status of women in their organization;
moreover, only 2% had taken more specific action to
create equal opportunities for women workers. In this
latter category, one company had adopted a
comprehensive analysis and monitoring system in
relation to their employees; significantly, in the last four
years, this company showed a 115% (from 41 to 89)
increase in the number of women in middle and senior
management grades. The Commission also noted a
number of approaches to the EOC for guidance on
developing policy to enhance equal opportunities for working women. However, overall, the change in employment practices was negligible, particularly in relation to job segregation, recruitment and training, and promotion.

Despite these conclusions, the Commission's report is generally positive. In particular, it ends with the statement that:

...it is important that those in industry take part in the discussion on equality of opportunity, since in due course the Commission's guidance publications will be worked into Statutory Codes of practice, over which of course the fullest prior consultation will take place. 38

It is obvious that the Commission views the achievement of equality of opportunity for working women as a long term goal, and its achievements to this point as small, but significant, steps along the way. Undoubtedly, the education of public opinion, as well as industrial employers, is a very long term process. In view of experiences elsewhere, however, one might well question whether the long term goal can ever be effected by voluntary measures for creating equal opportunity. Indeed, the final paragraph of the Commission's report suggests that more coercive measures will be required in the future. The accomplishments of the UK Commission after three years may be an indication of what can be expected from the Canadian Commission after a similar period of operation. The critical question is whether it is enough.

Some years ago, the answer to this question in the United States was a resounding no. Originally, Title VII of the Civil Rights Act of 1964 made sex a prohibited ground of discrimination and established a complaint procedure before the Equal Employment Opportunities Commission with power to attempt settlements. The complainant or the Attorney-General (and since 1972, the EEOC) could also initiate civil action, and could obtain injunctions, orders for re-instatement or back-pay, etc. However, since 1968, recognizing the need for a broader-based approach to the problem, Congress granted the power to the EEOC to conduct industry-wide investigations to deal with sex discrimination. The celebrated case involving American Tel. and Tel. Co. resulted from one such investigation. 39 Thus, exercising its authority and resources to initiate investigations rather than depending on the individual complaint mechanism, 40 the EEOC has effected a very substantial change in the opportunities for women workers at AT & T.

Interestingly, equal employment opportunities were also enhanced in the U. S. A. by an altogether different technique. From 1965, Presidential Executive Orders instituted contract compliance requirements for all government contracts with companies of more than fifty employees or whether the value of the contract exceeded $50,000. 41 The requirement included the adoption of affirmative action programs and was monitored by the Office of Federal Contract Compliance. The penalty for failure to comply was the severance of contractual relations; in addition, the Secretary of Labor was empowered to publish names of uncooperative companies or to recommend criminal proceedings or Title VII actions. These measures, in particular, forced behavioural change on employers, with or without attitudinal change, and represent a clear departure from measures which focus primarily on changing attitudes. While s.19 in the Canadian Human Rights Act presents a clear opportunity for a similar program in Canada, it is less clear that the opportunity will be accepted.

Many commentators regard measures like those in the U. S. A. to be necessary to provide equal opportunities for working women. However, it is clear that the goal of changing attitudes, assuming that it may also be successful over a very much longer time span, is not without its attraction. A society in which there is no adverse discrimination because of a consensus that such discrimination robs both individuals and society as a whole of full potential is an excellent ideal. The danger in opting for the elimination of discrimination by changing attitudes alone, however, is that very little real progress will occur, even over an extended period of time. The focus on conciliation in the complaints procedure may, at worst, result in little more than band-aid relief for the victim, and do little to change the ideas of an employer about his or her discriminatory attitudes. There is little stigma attached to discrimination and the sanctions which may be imposed are not really substantial (at least by comparison with the U. S. A.), even when they are actually levied. In the result, the Act appears to regard discrimination as a problem, but not one for which it is necessary to adopt firm and effective procedures. By contrast, the invasion of property rights in society is regarded as much more serious than the interference with a female employee's opportunities within the workforce. 42

Overall, the Canadian Human Rights Act may deserve the accolade bestowed on it as the "leader in human rights matters" in Canada, but this view should not obscure the fact that the legislation does not, from a theoretical perspective, provide a means for effectively ensuring equal opportunities for women workers. 43 This view by no means suggests that the Act is useless. On the contrary, just as provincial human rights legislation has contributed to an understanding of discrimination in the workplace, the federal Commission will undoubtedly be of some assistance. However, it is essential to understand the limitations inherent in the legislative choices of the Act, and to recognize that the goal of eliminating sex discrimination in employment is unlikely to be wholly achieved by the means adopted. More significantly, it is essential to recognize this Act's limitations in order to ensure that the Act will not be regarded as having solved the problem of discrimination against women in the workforce.

C. THE CANADIAN HUMAN RIGHTS COMMISSION: THE FIRST YEAR

In our first report, we committed ourselves to use the tools of recourse, awareness and advocacy to ensure that the legislation that established the Canadian Human Rights Commission fulfilled its important purpose. The past twelve months are crowded with examples of our efforts to gain support for our objectives by translating the principle of equality of opportunity into everyday experience. 44
This statement, from the Preface of the Commission’s ANNUAL REPORT for 1978, indicated that initiatives were undertaken by the Commission to implement principles of equality. The preface further indicated that the Commission’s work encompassed both “providing a means of redressing individual complaints” and “contributing to the process of attitudinal change.”43 In addition, the ANNUAL REPORT clearly evidenced concern for structural discrimination. For example, although the Commission recognized that discrimination may occur as a result of “intentional bigotry” or “irrational prejudice”, it also recognized that some forms of discrimination required a different explanation.46

We cannot therefore define discrimination purely in terms of behaviour motivated by evil intentions; the definition has to include the impact of whole systems on the lives of individuals—what is called structural or systemic discrimination. As well as offering redress in isolated cases of discrimination against specific individuals, therefore, the Commission must study employment systems and social programs from the point of view of their effect on certain groups . . . [where] a system established for some other purpose . . . operates to exclude some people from opportunities that it makes available to others.47

These statements are of special importance in relation to discrimination against working women since it is clear that measures which affect structural barriers to equal opportunity are needed in addition to those which provide redress for individual complaints. However, an assessment of the work of the Commission in its first year, at least in relation to sex discrimination, indicates small successes in relation to individual complaints rather than effective change in relation to structural barriers to equal opportunity for women. Moreover, despite the existence of legislative provisions to compel non-discriminatory behaviour, the primary emphasis of the Commission’s work in the sex discrimination area has been on attitudinal and long-term change.

(1) Complaints and Compliance.

There were 2929 inquiries, complaints and requests for referrals to the Canadian Human Rights Commission in 1978.48 However, only 164 were accepted for investigation, and, of these, 26 were dismissed after investigation and 10 withdrawn by the complainant; only 11 were settled after investigation.49 Since most of the formal complaints, 117 in number, were still pending at the end of December 1978, it is virtually impossible to assess the effectiveness of the complaints procedure. Moreover, the statistics do not indicate the number of complaints related to sex discrimination, so a comparison with other forms of discrimination is also impossible. It is significant, however, that there is no mention in the statistics of any complaints initiated by the Commission itself (as permitted by the Act), so that the complaints mechanism appears to have relied wholly on victim-initiation.50

The ANNUAL REPORT contained some examples of complaints to the Commission based on sex discrimination. In one case,51 three women were fired by a transportation company because of a company policy with regard to women working on a road crew. Although the foreman was satisfied with the work of these employees, company policy prevented their employment because of inadequate facilities for the women; in fact, however, the foreman had made arrangements for separate facilities in relation to this particular crew. After investigation by the Commission, a settlement was reached: the three complainants received written apologies, compensation for lost income and incidental expenses incurred as a result of the termination, and offers of employment.52 The company also issued written instructions to all its departments ordering compliance with the act.

The ANNUAL REPORT indicates that it received several other complaints about company policies affecting the admission of women to the Armed Forces and to amateur sports, and about height requirements which effectively denied women access to employment. A complaint about a denial of employment opportunities by Bell Canada in fulfilling its contract with Saudi Arabia was investigated by the Commission, and conciliation was started. There were also complaints about discrimination based on prejudice rather than stated policy, and complaints about practices which differentiated adversely against working mothers, in areas such as maternity leave and benefits. The Commission also reported that sexual harassment is “a discriminatory barrier to the professional development of women.”54

It is clear, however, from the ANNUAL REPORT that the Commission’s primary emphasis in handling complaints was on conciliation to produce settlements.

The human rights officer assigned to investigate the formal complaint takes the initial approach that the complainant is seeking help with a problem, and that he or she will cooperate in providing all possible evidence to get to the truth of the matter. The investigator also assumes that the person or organization complained of . . . is not intentionally discriminating, and will want to cooperate fully with the investigation.55

To protect this spirit of cooperation, information obtained in the investigation is routinely restricted to the two parties, although the terms of settlement may be publicized with the consent of both parties “to help the Commission maximize the voluntary efforts of organizations and individuals to be fair and non-discriminatory.”56

Moreover, it is clear that most complaints do not result in a formal hearing by a Human Rights Tribunal established under the Act. By February 1979, only three tribunals had been announced and none had yet been established.57 Interestingly, two of these first three tribunals were required as a result of claims of discrimination based on sex and marital status. In one, a woman complained after a denial of employment as a member of the Governor-General’s Foot Guards; in the other a woman complained after she was informed that
she could not claim an income tax deduction for a man
whom she supported and with whom she had lived in a
common law marriage relationship for five years. Both
these cases have potential as precedents affecting many
other women in similar circumstances and both cases
also involve a Department or agency of the federal
government. It is probably significant that in such cases
conciliation has proved unsuccessful; where the rights
of a single individual are concerned, conciliation may be
useful to resolve the problem, but where the issue has
far-reaching consequences for many people, cooperation
from employers, including the federal government, is
less likely. This situation underlines the need for
measures in addition to the complaints process to
eliminate discrimination.

No recommendations for contract compliance were
made by the Commission in 1978. The ANNUAL
REPORT stated8 that the Commission required
clarification of “the implication and effectiveness” of
s.19 before requesting such regulations. Moreover,
because contractors under provincial jurisdiction must
already comply with the provincial human rights
legislation, s.19 must be implemented in the context of
federal-provincial relations.

Overall, the ANNUAL REPORT of 1978 indicates that
the Commission has established procedures and
initiated the process of complaints-investigation.
However, it is clear that its primary emphasis is on
conciliation, which will affect only the rights of the
individual complainant, and that it has yet to embark on
investigation initiated other than by the victim of
discrimination. Moreover, the Commission has not
exercised its legislative power to recommend contract
compliance, and there are no indications that it will do
so in the near future.9 However, in view of the large
number of cases pending at the end of 1978,10 and the
problems of staff allocation encountered,11 any real
analysis of the Commission in terms of complaints and
compliance must be deferred. It is sufficient to point out
that the present trend appears to be a primary emphasis
on voluntary compliance and conciliation, despite the
existence of legislative provisions which could compel
compliance. In the context of discrimination against
women in the workplace, the continuation of such a
trend is unlikely to produce substantial changes.

(2) Education Programs and Attitudinal Change

The Commission has initiated a number of programs
to increase awareness of human rights issues. In
particular, its efforts in relation to equal pay have great
significance for women workers. In September 1978, the
equal pay guidelines were announced, and the
Commission released information pamphlets outlining
the meaning and application of equal pay.62 The
Commission has also introduced an Equality in
Employment program which is intended to assist
employers to comply with the Act.63 In addition, there
are Special Programs Officers of the Commission
available to improve opportunities for particular groups
or to prevent, reduce or eliminate disadvantages caused
to groups, including women.64 Special programs may
be introduced voluntarily or as part of a settlement, and
the Commission’s goal is to find solutions “that meet the
employer’s business needs, avoid complaints of ‘reverse
discrimination’ and meet the long term objective of
correcting the disadvantages faced by many people.”65
Special programs involving affirmative action could be
very effective in that their impact is on women as a
group rather than just on an individual complainant.
Unfortunately, the ANNUAL REPORT of 1978 contains
too few details of the Equality Employment program or
of Special Programs relating to sex discrimination to
evaluate them properly as means of ensuring equality of
opportunity for working women. As with complaints,
however, it is clear that the primary emphasis of the
Commission is on voluntary compliance achieved by
attitudinal change. In pursuit of this goal, the
Commission published a wide range of literature and
Commission members were very busy during 1978 with
speaking engagements to publicize the work of the
Commission.

In relation to its goal of increasing awareness of
human rights, the Commission has also been active in
monitoring proposed federal legislation. In the context
of discrimination against working women, the
Commission made recommendations on Bill C-14 (An
Act to Amend the Unemployment Insurance Act),
particularly in relation to s.30 and s.46 (which disenfranchise
pregnant employees to more than fifteen weeks of
maternity benefits despite availability for work during
the early months of pregnancy).66 The Minister of
Employment and Immigration replied that the proposed
legislation was not discriminatory towards women, and
the Commission has undertaken further studies as a
result of data supplied by the Minister.67 Subsequently,
in March 1979, the Canadian Advisory Council on the
Status of Women announced its intention to complain
formally to the Commission about a regulation under the
Unemployment Insurance Act which requires an
employee to work at least twenty hours per week to
qualify for benefits under the Act.68 The regulation
excludes many part-time workers from benefits
coverage, and 71% of part-time workers are female.69
Even prior to the complaint, the Commission had been
investigating the impact of the regulation to assess
whether it was “in keeping with the spirit” of the
Canadian Human Rights Act.70 In so doing, the
Commission was performing a useful monitoring role to
ensure that federal legislation conforms to the
requirements of the Act. Unfortunately, the process
requires long hours of investigation and negotiation,
and to date, the Commission has not been successful in
ensuring implementation of the changes it has
recommended.

In view of the short time-span of the Commission’s
work, it is again difficult to form definite conclusions
about its effectiveness in changing attitudes about
women’s roles in the workforce. It has engaged in a wide
variety of activities, and designed a number of programs
to extend awareness of the Act’s provisions and to assist
voluntary compliance. Although there is little concrete
evidence of change in employment opportunities for
women after one year, it is probably too early to expect
substantial changes as a result of these measures. The
danger is that, even after a number of years, little change
will have occurred. The Commission’s emphasis on
voluntary compliance as a result of awareness and
attitudinal change is clear, but only time will indicate the
wisdom of its choice. Despite the validity of a focus on
attitudinal change in combating some forms of
discrimination, experience elsewhere suggests that more
direct and compulsory measures are needed to eliminate
discrimination against women who work. As has been
demonstrated, the Canadian Human Rights Act presents difficulties from a theoretical perspective in relation to the opportunities for working women. Moreover, at the end of its first year, it is clear that the Commission has yet to take full advantage of all of the opportunities presented by the legislation. Within the context of the legislation, the Commission must re-evaluate the focus of its efforts in relation to sex discrimination in the workplace. Half the population of Canada deserves a better chance for "social justice"; and, in the Commission's words, "social justice" demands no less than "social change."71

FOOTNOTES

1. Part II of the Act, which sets up The Canadian Human Rights Commission and s.657, were proclaimed in force August 10, 1977. The rest of the Act was proclaimed in force as of March 1, 1978.

2. About 1,162,323 employees are under the jurisdiction of the Canadian Human Rights Commission. This is approximately 11% of all Canadian employees, and almost half are employees in industries under federal jurisdiction; the rest are public service employees, RCMP or Canadian forces members specifically deemed to be crown employees by s.48(4) of the Act, or employees in federal government enterprises and agencies. An estimated 32.6% of these 1,162,323 persons are women.

For a more detailed breakdown, see "Table 1 – Estimated number of persons who come under the jurisdiction of the Canadian Human Rights Commission ..." prepared by the Research Branch of the Canadian Human Rights Commission, May 26, 1978.

The Canadian Human Rights Act also applies to areas of the private sector subject to federal regulation, with the exception of provisions of the Indian Act; chartered banks; grain elevators; uranium mines; radio and television stations; some railways and trucking companies; and airlines. See Canadian Human Rights Commission, ANNUAL REPORT, March 16, 1979, at 3.


4. s.9(3) defines an employee organization as a trade union or other organization whose purpose is to negotiate the terms of employment with employers.

5. The Canadian Human Rights Commission, pursuant to ss.11(3) and 22(2) of the Canadian Human Rights Act, issued the Equal Wage Guidelines on September 18, 1978 prescribing the factors justifying different wages for equal work.

According to the Guidelines, reasonable factors include different performance ratings where there is a formal appraisal system; seniority; red-circling (where an employee's position is re-evaluated and down-graded and the employee's wages are fixed until they equal the wages in the down-graded position); a rehabilitation assignment; a demotion pay procedure; or a temporary training position.

These Guidelines also provide that the skill required, the effort required, the responsibility and conditions under which an employee works are to be considered in determining if employees are performing work of equal value in the same establishment.

6. An example is the Equal Wage Guidelines, referred to supra, fn. 5.

7. However, no complaints may be dealt with unless a) the act or omission occurred in Canada and the victim was lawfully present or entitled to be present in Canada, or b) the act occurred outside Canada but the victim was a Canadian citizen or landed immigrant or c) there was no identifiable victim. (s.32 (5)). The latter possibility (s.32(5) (c) recognizes that there may be instances of discrimination where there is no particular individual identifiable as a victim who could complain about the unlawful act.

8. The Governor in Council may make regulations prescribing procedures to be followed by investigators (s.35(4)); and s.35(2) authorizes investigators to enter any premises or make such inquiries as are necessary for the investigation of the complaint, and to require production of any documents relevant to the investigation.

9. S.37(1) provides that the commission may also choose to appoint a conciliator immediately upon the filing of the complaint.


11. S.41(3) allows the tribunal to award special punitive compensation of up to $5000 if the employer has wilfully or recklessly discriminated or if the victim's feelings or self-respect have suffered.


14. HUNTER supra note 12.

15. Ibid.

16. In two cases, Hadley v. City of Mississauga (May 21, 1976) and Cosgrove v. City of North Bay (May 21, 1976), Boards have considered the meaning of bona fide in this context. In both cases, the Board was required to decide whether a compulsory retirement age of 60 for firefighters represented discrimination on the basis of age, or whether the requirement could be justified on the grounds that a bona fide occupational requirement of the job of firefighting was being under the age of sixty. The Boards in these cases reached opposite conclusions on whether age, on the facts, was a bona fide occupational requirement. Moreover, the Boards used different reasoning about the interpretation of a bona fide occupational requirement. In Hadley, the Board stated that each case must be examined on an individual basis, rather than relying on general or class concepts, while in Cosgrove, the Board declared that the practical reality of the work-a-day would and life in general must support the bona fides.

Cosgrove was appealed by the Commission, and the Board's decision was upheld. The court decided that the Board's finding that the mandatory retirement provision was a BFOR was a finding of fact. See Re Ontario Human Rights Commission and City of North Bay (1977), 17 O.R. (2d) 712. Since capacity may be a different issue with respect to age than it is with respect to sex, these cases may not be directly relevant to problems of sex discrimination. However, the need to focus on individual characteristics rather than those generally ascribed to persons in a particular group may be similar for both the aged and women.


18. Supra note 17, s.703.

19. 408 F. 2D 228 (5th Cir. 1969)
22. In a leading American case, Griggs v. Duke Power Co. 401 U. S. 424 (U. S. C. 1970) it was held that there can be discrimination where there is no difference in the treatment of groups as long as there is a disproportionate impact on a Title VII protected group. Thus an employment test requiring good scores on an aptitude test and a high school diploma, where they are not job related, was held to be discriminatory as it resulted in indirect discrimination against blacks. However, the effect of this case has been undercut by a more recent U. S. C. decision, General Electric Co. v. Gilbert 429 U. S. 125 (1976). In that case, female employees were denied disability benefits for absence due to pregnancy. This was held to be non-discriminatory despite its disproportionate effect on women; the Court held that there was a rational basis for distinguishing pregnancy because it is voluntary, unlike other disabilities. In reaching this decision the U. S. C. rejected an EEOC guideline providing that benefits should apply to pregnancy as well as to other temporary disabilities. This represents a retreat from the Griggs position and perhaps a trend towards undermining the effect of Title VII. For a more detailed discussion of the Gilbert case, see Cohen, General Electric Co. v. Gilbert: Comment (1977), 18 S. T. L. J. 608, Frobes, General Electric v. Gilbert: A Lesson in Sex Education and Discrimination”, [1977] UTAH L. R. 119, Peters, Sex Discrimination—Distinctions Between Title VII and Equal Protection—General Electric v. Gilbert (1978), 31 RUTGERS L. R. 91, Ogg, “Title VII—Are Exceptions Swallowing the Rule?" (1977), 13 TULSA L. J. 102.
27. Originally issued by the Equal Employment Opportunity Commission, November 22, 1965, the Guidelines on Discrimination Because of Sex were reaffirmed by the Commission on February 21, 1968 (33 F. R. 3344), amended on August 19, 1969 (34 F. R. 13367), and last amended and reissued on March 30, 1972 (37 F. R. 6835), effective on April 5, 1972. The Guidelines are codified as Title 29 CFR, Chapter XIV, Part 1604, Sections 1604.1 to 1604.10, as amended. The EEOC and the courts (which have generally followed EEOC guidelines although they are not bound by them) have recognized five categories for which an employer claim that sex is a bona fide occupational qualification is accepted:
1) where unique sexual characteristics are required for authenticity or genuineness, e.g. an actress, or undercover police agent.
2) where a certain sex is required for reasons of propriety or privacy e.g. locker room attendant.
3) where the primary function of a business requires the employees to have sex appeal e.g. waitress at the Playboy Club. Thus if the court had found Diaz supra fn. 21, that sex appeal was required by the airline business and the essence of the business would be undermined without it, sex would have been held to be a bona fide occupational qualification.
4) where sex is important for psychological or psycho-sexual reasons e.g. male supervisors counselling delinquent boys.
5) in a prison situation, where there is the danger of sexual assault, women may be excluded from prisoner-contact positions to avoid security problems.
28. See the CANADIAN LABOUR CONGRESS, SUBMISSION TO THE HOUSE OF COMMONS ON BILL C-25.
30. Further limitations of the complaints mechanism are discussed in BOHNEN Women Workers in Ontario (1973), 51 U. OF T. FAC. L. R. 45.
31. ROBERTS, supra note 13.
32. For example, under the Nova Scotia Human Rights Act, The Commission has similar powers to initiate complaints, but has done so in only 10% of all cases. See Elizabeth LENNON, “Sex Discrimination in Employment: The Nova Scotia Human Rights Act”, (1976), 2 DAL. L. J. 593.
34. Linda S. DRANOFF, Women as Lawyers in Toronto (1972), 10 O. H. L. J. 177.
36. EQUAL OPPORTUNITIES COMMISSION, EQUALITY BETWEEN THE SEXES IN INDUSTRY: HOW FAR HAVE WE COME? (1978), a booklet produced by the Equal Opportunities Commission, Overseas House, Quay Street, Manchester M3 3HN, England. See also Anna COOTE, Equality and the Curse of the Quango, NEW STATESMAN (1 December 1978) 734.
37. Id., at 22.
38. Ibid.
39. This investigation and an informal settlement negotiated by the EEOC with AT & T resulted in back pay for 13,000 women and the introduction of affirmative action programs. See Jain, infra note 40. The changes cost AT & T between $23 million and $35 million annually. See Report of the Twentieth Century Fund Task Force on Women and Employment, EXPLOITATION FROM 9 TO 5 (New York, Lexington Books: 1975) at 71.
40. JAIN, “Affirmative Action in Practice: A Prototype for Canadian Action?” (1975) HUMAN RELATIONS 16. A recent illustration of the sweeping effect of The American law is an October 30, 1978 decision of the U. S. District Court of New Jersey. In that case brought by Kyriaki Kyriazi, Western Electric’s Keerney plant was found to have discriminated against women as a group. Newspaper advertisements publicizing the decision appeared (i.e. NEW YORK TIMES, February 4, 1979, 44) inviting women who may have been discriminated against to file a claim at the “Stage II” proceedings, at which time the Court would determine the damages and other relief available to individual women. At these proceedings any eligible woman will be presumed to have been discriminated against and entitled to recover unless Western Electric can rebut the presumption. Clearly this broader-based approach has a much greater impact than legislation focusing on the resolution of individual complaints only.
41. Executive Order 11246, issued in 1965 forbade discrimination on the basis of race, color, religion, or national origin for federal contracts. Executive Order 11375, which took effect on October 13, 1968, extended the original order to include discrimination on the basis of sex. See Report of the Twentieth Century Fund Task Force on Women and Employment, supra, fn. 39, at 103.
42. There are no punitive damages available under the Canadian Human Rights Act other than those permitted by s.41(3) (supra at fn. 11); in general an employer found to be discriminating will merely be ordered to compensate the victim. The issue of sex
discrimination is generally regarded as an individual, rather than a societal, problem.

43. Much of the 45% wage gap between male and female workers is due to the concentration of women in low-paying job ghettos rather than the result of unequal pay for equal work.

44. CANADIAN HUMAN RIGHTS COMMISSION, ANNUAL REPORT 1978 (March 16, 1979), iii.

45. Ibid.

46. Id., at 5.

47. Ibid.

48. Id., at 34-35.

49. Ibid.

50. Ibid.

51. Id., at 8.

52. Ibid. Two of the complainants accepted the offers of employment; the third had already accepted another job.

53. Id., at 8-9. There were also 4 formal complaints under the equal pay provision (s.11). Id., at 12.

54. Id., at 9.

55. Id., at 25.

56. Id., at 25-26

57. GLOBE AND MAIL, 23 February 1979.

58. Supra, fn. 44, at 18.

59. Interestingly, in March 1979, the federal government announced a new program of “affirmative action consultants”, who will seek the voluntary participation of crown corporations and private firms with government contracts worth $200,000 and at least 50 employees in programs to create job opportunities for women, natives, and the physically handicapped. Elizabeth McAllister, the Director of Affirmative Action for Employment Canada indicated that the voluntary program could result in contract compliance in the future. The announcement did not indicate that this federal initiative was linked to the legislative authority given to the Canadian Human Rights Commission in s.19, but informal links seem both desirable and appropriate. See the TORONTO STAR, 13 February 1979.

60. The ANNUAL REPORT indicates that many of the staff members of the Complaints and Compliance Branch were hired and trained only by the end of 1978. Supra, fn. 44, at 26.

61. Id., at 12.

62. Id., at 13.

63. Id., at 13-14.

64. Id., at 14.

65. Id., at 14.

66. In Bliss v. Attorney-General of Canada, the Supreme Court of Canada decided that a pregnant employee was entitled only to fifteen weeks maternity benefits despite the employee’s availability for work and qualification (in the absence of the pregnancy) for additional benefits. The decision was announced on 31 October 1978.

67. Supra, fn. 68, at 23.

68. The TORONTO STAR, 1 March 1979.

69. Ibid.

70. In late February, the Employment and Immigration Department initiated legal action in the Federal Court to determine whether the Commission had jurisdiction to investigate its affairs. The Court ruled in favour of the Commission, but the decision is under appeal. MONTREAL STAR, 28 February 1979, and discussions with Commission Officers, April 1979.

71. The Commission’s ANNUAL REPORT indicates that its ultimate objectives are social justice and social change, that is, “the restoring of rights to those who have been deprived of them by discrimination; and the improvement of social systems and public attitudes so as to reduce and eventually eliminate the incidence of discrimination.” Id, at 1.