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Pay Equity: A Fundamental Human Right

Margot Young

Allard School of Law at the University of British Columbia, myoung@allard.ubc.ca

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**Pay Equity:
A Fundamental Human Right**

Margot E. Young

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For more information:

Policy Directorate

Status of Women Canada

123 Slater Street, 11th Floor

Ottawa, Ontario

K1P 1H9

Tel: (613) 995-7839

Fax: (613) 957-3359

TDD: (613) 996-1322

E-mail: policy@swc-cfc.gc.ca

This document is available for download on the Status of Women Canada

Web site at www.swc-cfc.gc.ca

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EXECUTIVE SUMMARY

This paper undertakes the limited task of determining what interpretive consequences, if any, might flow from the removal of federal pay equity provisions from their current location in the *Canadian Human Rights Act* and placement of such provisions in their own stand-alone legislation. Part of the interpretive stance courts currently bring to their consideration of the federal pay equity provisions reflects the placement of these provisions within federal human rights legislation.

Courts have held that human rights legislation has a special nature or quasi-constitutional status. This status results from the fundamental character of the values the legislation expresses and the goals it seeks to implement. There are three implications of this understanding. First, human rights legislation, by virtue of this status, is given a liberal and purposive interpretation. Second, human rights legislation is given an “organic and flexible” interpretation. The legislation is read in light of evolving social conditions and in terms of the most recent conceptions of human rights. Third, in circumstances of conflict or inconsistency with other legislation, the provisions of the human rights legislation prevail, regardless of timing of enactment.

Enactment of stand-alone pay equity legislation is unlikely alone to cause significant change in the judicial fortunes of pay equity measures. There are a number of reasons for this conclusion. Pay equity provisions share with other aspects of human rights legislation the characteristic of implementing protection of fundamental human rights. The consonance of pay equity measures with the international human rights protections to which Canada has obligated itself and with the equality provisions of the *Canadian Charter of Rights and Freedoms*, attests to this fundamental aspect. Pay equity provisions can also be characterized as remedial, providing recourse for disadvantaged and historically discriminated-against individuals. This latter claim is born out by the disproportionate economic disadvantage faced by Canadian women and their comparatively lower remuneration in the labour market. Additionally, the primacy applicable to human rights legislation in the face of other contrary legislation, is not likely to be a necessary condition of effective pay equity law. Thus, this paper does not find that concerns about losing quasi-constitutional status should figure in consideration of what legislative form to give a revised pay equity law.

Effective federal pay equity strategy is a critical political and legal issue. The question is a complex one and attempts to provide legislative remedial action have proven to be a challenge. Thus, judicial treatment of legislative measures is an important consideration. However, the real challenge does not lie in ensuring continued appropriate interpretive principles for the legislation. Rather, the tough task ahead rests in the formulation of more effective content for federal law and policy—content that results in real progress in addressing the stubborn problem of gender-based wage inequities.

SUMMARY OF RECOMMENDATIONS

There are clear and strong arguments to be made that pay equity legislation, removed from a human rights legislation context, should nonetheless be granted similar interpretive treatment—at least to the extent of being given a liberal, purposive and organic interpretation. Consequently, this paper makes no recommendation against such legislative remodelling. However, should reform of federal pay equity law encompass such legislative revision, the following recommendations are made.

- Pay equity legislation should contain textual recognition that pay equity is a fundamental human right, that the federal legislation is enacted in observance of Canada's international human rights obligations, and that pay equity is an important element of a commitment to substantive sex equality. More specifically, with respect to the last element, the legislation should contain recognition of the remedial character of pay equity law and its purpose of alleviating female workers' economic inequality. This should be done both within the text of the legislation itself and within a legislative preamble.
- Should the issue of primacy be determined to be a problem for pay equity legislation, inclusion of a primacy clause within the new legislation should be considered.
- Establishment of any new administrative agency should ensure that the agency possesses sufficient independence from government. Such an administrative feature makes designation of pay equity as a fundamental human right more credible.
- Legislative reform should be accompanied by publicity and education programs. Such programs should communicate strongly and clearly the intimate connection between pay equity and women's fundamental right to substantive equality.

INTRODUCTION

Almost all jurisdictions in Canada have some form of pay equity legislation or policy.¹ While the precise formulation of the legislative provisions—in terms of both wording and scope—differ, all have, as their objective, the guarantee of equal pay for women and men for work of equal value.² The legislative placement of these provisions, however, varies. Ontario³ and Quebec,⁴ for example, employ stand-alone pay equity legislation while the federal government situates its protections within its human rights legislation.

More specifically, the federal provisions lie within the *Canadian Human Rights Act* (CHRA).⁵ Section 11 of the CHRA sets out a complaints-based model of pay equity that applies to both

¹ The province of Alberta alone remains the exception. Section 6(1) of Alberta's *Human Rights, Citizenship and Multiculturalism Act* provides only: "Where employees of both sexes perform the same or substantially similar work for an employer in an establishment the employer shall pay the employees at the same rate of pay."

² I use the term "pay equity" to refer to "initiatives that, first, evaluate jobs performed predominantly by women against dissimilar jobs performed predominantly by men for the same employer and then, where the jobs are of comparable value, ensure that a 'female' job attracts the same pay as a comparable 'male' job" Nitya Iyer, *Working Through The Wage Gap: Report of the Task Force on Pay Equity*, February 28, 2002, # AG02055, at 2).

The term "comparable worth" designates similar initiatives, although "pay equity" emphasizes the desired end result of such legislation and "comparable worth" the process by which wage discrimination and the "gender-bias of workplace hierarchy" is addressed [Judy Fudge and Patricia McDermott, "Introduction: Putting Feminism to Work," in *Just Wages: A Feminist Assessment of Pay Equity*, edited by Judy Fudge and Patricia McDermott, (Toronto: University of Toronto Press, 1991) at 4-6].

The term "equal pay for equal work" is a different sort of initiative.

It requires a comparison of similar work performed by men and women. Where the work is similar, equal pay for equal work ensures that it attracts the same pay, regardless of whether it is performed by a woman or a man.... [T]he focus of the comparison is the similarity of the work performed (Nitya Iyer, *Working Through The Wage Gap: Report of the Task Force on Pay Equity*, February 28, 2002, # AG02055, at 3).

"Employment equity" is a remedial measure aimed at desegregating the work force, changing the employment pattern of women by encouraging, facilitating or mandating women's involvement in non-traditional work and in higher-level positions.

³ *Pay Equity Act*, R.S.O. 1990, c. P-7. This legislation was first proclaimed into force on January 1, 1988 and was the first pay equity legislation, in any jurisdiction, to apply to the private sector. Manitoba's *Pay Equity Act* (S.M., 1985-86, c. 21-Cap. P13) was the first pay equity legislation outside the context of existing human rights legislation.

⁴ *Loi sur l'équité salariale*, R.S.Q. 1995, c. E-12.001 as amended.

⁵ *Canadian Human Rights Act*, R.S. 1985, c. H-6.

the private and the public sector.⁶ This provision remains unchanged from its initial enactment in 1977 and has a somewhat troubled history, plagued by protracted and costly litigation. Nitya Iyer, a former law professor and past member of the British Columbia Human Rights Tribunal, in a recent report, points to the lack of clear definition of terms used in section 11, arguing that such lack of clarity leaves “room for very different interpretations of what the section actually prohibits.”⁷ She notes, as well, that while the Human Rights Commission has tried to clarify contested meanings through interpretation guides, the latest of these, *Equal Wage Guidelines, 1986*,⁸ has itself been the subject of extensive litigation.⁹ In a press release

⁶ Section 11 provides:

- (1) It is a discriminatory practice for an employer to establish or maintain differences in wages between male and female employees employed in the same establishment who are performing work of equal value.
- (2) In assessing the value of work performed by employees employed in the same establishment, the criterion to be applied is the composite of skill, effort and responsibility required in the performance of the work and the conditions under which the work is performed.
- (3) Separate establishments established or maintained by an employer solely or principally for the purpose of establishing or maintaining differences in wages between male and female employees shall be deemed for the purposes of this section to be the same establishment.
- (4) Notwithstanding subsection (1), it is not a discriminatory practice to pay male and female employees different wages if the difference is based on a factor prescribed by guidelines, issued by the Canadian Human Rights Commission pursuant to subsection 27(2), to be a reasonable factor that justifies the difference.
- (5) For greater certainty, sex does not constitute a reasonable factor justifying a difference in wages.
- (6) An employer shall not reduce wages in order to eliminate a discriminatory practice described in this section.
- (7) For the purpose of this section, “wages” means any form of remuneration payable for work performed by an individual and includes
 - (a) salaries, commissions, vacation pay, dismissal wages and bonuses;
 - (b) reasonable value for board, rent, housing and lodging;
 - (c) payments in kind;
 - (d) employer contributions to pension funds or plans, long-term disability plans and all forms of health insurance plans; and
 - (e) any other advantage received directly or indirectly from the individual’s employer.

⁷ Iyer, *supra* note 2, at 56.

⁸ *Equal Wage Guidelines, 1986*, SOR/86-1082.

⁹ The Guidelines are binding on any human rights tribunal that deals with equal pay complaints under the *Canadian Human Rights Act* and have as their purpose the interpretation of section 11—the pay equity provisions—of the Act. For some of the case law on these Guidelines, see *Canada (Attorney General) v. Public Service Alliance of Canada*, [2000] 1 F.C. 146 (T.D.); *Syndicat des employés de production du Québec et de l’Acadie v. Canada (Human Rights Commission) et al.*, [1989] 2 S.C.R. 879 [hereinafter *Syndicat*]; *Bell Canada v. Communications, Energy and Paperworkers Union of Canada*, [1999] 1 F.C. 113 (C.A.); *Canada (Canadian Human Rights Commission) v. Canadian Airlines International Ltd.*, [2002] 1

dated February 2001, Michelle Falardeau-Ramsay, Chief Commissioner of the Canadian Human Rights Commission, stated: “Major pay equity cases are at a virtual impasse because of the current system. We believe it is time the government made the necessary changes to ensure that pay equity becomes a reality.”¹⁰

In response to these and other concerns, the establishment of the Pay Equity Task Force was announced by the ministers of Justice and Labour in June 2001. The broad mandate of the Task Force is to conduct a comprehensive review of the current equal pay provisions of the *Canadian Human Rights Act* (section 11) as well as the *Equal Wages Guidelines, 1986*. Among other things, the Task Force will look at experiences with pay equality in Canadian provincial and territorial jurisdictions as well as international experiences. The Task Force will also study and evaluate different models and best practices for implementation of pay equity. Part of the Task Force’s work will thus be to examine and evaluate existing legislative and administrative frameworks.¹¹ In doing so, the Task Force will hold consultations with a variety of organizations and with interested individuals. Recommendations for improving section 11 of the *Canadian Human Rights Act* are due by March 31, 2003.

Any time pay equity legislation is discussed, acknowledgment of the continuing economic inequality of Canadian women seems obligatory. Historically and currently, women earn less money than men and are significantly segregated in what have become most stereotypically defined as “women’s jobs.”¹² Even when employed full time, the earnings of women in 1997 were only 73 percent of what men earned.¹³ Certainly, the wage gap between men and women is not entirely a factor of sex discrimination. Other variables are involved. Nonetheless, dominant understandings of this wage gap and of the gender segregation of the labour force give significant causal weight to the cumulative effect of systemic and persistent discrimination against women.¹⁴ Women’s work is undervalued and the labour market suffers from gender-biased segmentation.

F.C. 158 (T.D.); *Public Service Alliance of Canada v. Canada*, [2002] 1 F.C. 342 (T.D.); *Bell Canada v. Canada (Human Rights Commission)*, [2001] 3 F.C. 481 (F.C.A.); *Public Service Alliance of Canada v. National Capital Commission*, [1998] 2 F.C. 128 (T.D.); *Bell Canada v. Canadian Telephone Employees Assn.*, [1998] 3 F.C. 244 (T.D.); Iyer, *supra* note 2, at 56.

¹⁰ Canadian Human Rights Commission, 2001, “Pay Equity System At An Impasse—Time For Action,” Ottawa, February 15. <<http://www.chrc-ccdp.ca/news-comm/2001/NewsComm150201.asp?1=e>> (accessed March 30, 2002).

¹¹ For a full statement of the mandate, see the Task Force’s Web site: <<http://www.payequityreview.gc.ca>>.

¹² Fudge and McDermott, *supra*, note 2. Women’s inequality in the labour market is the function of a number of things: discriminatory practices in hiring, training, promotion, sexual harassment, occupational segregation, and wage disparity. Pay equity measures focus on wage disparity (Suzanne Handman and Karen Jensen, (1999) “Pay Equity in Canada: An Overview,” in 7 *Canadian Labour & Employment Law Journal*, 65, at 65).

¹³ Statistics Canada, *Women in Canada 2000: A Guide to Understanding the Changing Roles of Women and Men in Canada*. <<http://www.statcan.ca/english/ads/89-503-XPE/hilites.htm>> (accessed March 30, 2002). For earlier data, see Canadian Human Rights Commission, *Annual Report, Canadian Human Rights Commission, 1997*, (Ottawa: Minister of Public Works and Government Services Canada, 1998), at 21.

¹⁴ Handman and Jensen, *supra* note 12, at 68-69, citing Canadian Human Rights Commission, *ibid.*, at 21; Fudge and McDermott, *supra* note 2, at 4-5; N. Agarwal, “Pay Equity in Canada: Current Developments,”

The impact on women of sex-based wage disparities is reflected in the rate of female and child poverty, with its adverse consequences on the health, well-being and future of Canadian women and their children.¹⁵ Pay equity is a strategy to address wage inequities between women and men, to reduce that portion of the gap due to systemic and historic under-valuation of women's work. Thus, reform of the federal pay equity program remains a critical feminist issue—part of understanding and remedying the expression of gender discrimination in economic relations.¹⁶

This paper takes on one small element of the full range of issues around legislative reform. It confines itself to the narrow discussion of the implications for possible legislative reform of the current interpretative status assigned human rights and other fundamental rights legislation by the courts. That is, part of the interpretive baggage courts bring to their consideration of the federal pay equity provision reflects the placement of this provision within federal human rights legislation. If the federal government decides, as may very well be recommended,¹⁷ that pay equity provisions deserve their own legislative framework, is the loss of a human rights legislative context a problem?

This paper concludes that such legislative revision is unlikely to matter significantly to the judicial fortunes of pay equity measures for a number of reasons, most significant of which is the common character pay equity provisions share with other human rights protections.

The discussion that follows takes the following path. Part I provides an account of the interpretive status accorded human rights legislation, noting its various characteristics and implications. Part II details the ways in which free-standing pay equity provisions share the underlying content that catalyzes such judicial treatment of human rights legislation. Part III provides some preliminary thoughts on legislative content for a stand-alone pay equity law to solidify the desired judicial understanding of the interpretive stance pay equity measures warrant.

Labor Law Journal, (1990) 518 at 520-521; N. Weiner and M. Gunderson, *Pay Equity: Issues, Options and Experiences*, (Toronto: Butterworths, 1990), at 9. The competing explanation understands this sex-based wage disparity to be a result of neutral market forces reflecting such things as different skills, education, and family and employment choice between women and men. For a discussion of this, see Fudge and McDermott, *supra* note 2.

¹⁵ Women constitute a disproportionate share of those with low incomes. In 1997, 2.8 million women (19 percent of the total female population) lived in low-income situations whereas only 16 percent of the male population lived in a similar income bracket. In the same year, almost half of unattached senior women (49 percent) and 56 percent of families headed by lone-parent mothers had incomes which were below Statistics Canada's low-income cut-offs. Statistics Canada, "Women in Canada 2000," *The Daily*, (Thursday, September 14, 2000).

¹⁶ Fudge and McDermott, *supra* note 2, at 5.

¹⁷ For an illustration of such a recommendation in relation to equal pay for work of equal value legislation in British Columbia, see Iyer, *supra* note 2 at 102.

PART I: QUASI-CONSTITUTIONAL STATUS

Human Rights Legislation

The first comprehensive judicial statement on the interpretation of human rights legislation is found in the 1982 Supreme Court of Canada decision of *Insurance Corporation of British Columbia v. Heerspink*.¹⁸ The case established that human rights legislation is assigned a special status. Lamer J., on behalf of three of the six judges in the majority, stated that the *Human Rights Code* of British Columbia “is not to be treated as another ordinary law of general application. It should be recognized for what it is, a fundamental law.”¹⁹ This characterization of human rights legislation was expanded upon by the Supreme Court in *Winnipeg School Division No. 1 v. Craton*,²⁰ a case dealing with a conflict between provisions in the then *Manitoba Human Rights Act*²¹ and the *Public Schools Act*.²² In the course of holding that the *Public Schools Act*, although a later enactment, did not overrule the *Manitoba Human Rights Act*, McIntyre J., speaking for the Court, stated:

Human rights legislation is of a special nature and declares public policy regarding matters of general concern. It is not constitutional in nature in the sense that it may not be altered, amended, or repealed by the Legislature. It is, however, of such nature that it may not be altered, amended or repealed, nor may exceptions be created to its provisions, save by clear legislative pronouncement.²³

This special nature—or quasi-constitutional status—of human rights legislation “remain[s] axiomatic”²⁴ in the Supreme Court’s approach to interpretation of human rights legislation.²⁵ It results from the fundamental character of the values the legislation expresses and the goals it seeks. Such legislation has been found to be law of fundamental importance, incorporating certain basic goals of our society.²⁶ Thus, human rights legislation’s quasi-constitutional nature flows from the way in which it can be understood as a “blueprint” for a desirable society.

¹⁸ *Insurance Corporation of British Columbia v. Heerspink*, [1982] 2 S.C.R. 145 [hereinafter *Heerspink*].

¹⁹ *Ibid.*, at 158.

²⁰ *Winnipeg Sch. Div. No. 1 v. Craton* [1985] 2 S.C.R. 150 [hereinafter *Craton*].

²¹ S.M. 1974, c. 65, C. H175.

²² R.S.M. 1970, c. P250 and 1980 (Man.) c. 33.

²³ *Craton*, *supra* note 20, at 156. Mr. Justice McIntyre’s comments were *obiter dicta*, but, when unanimous, such *obiter dicta* is worth noting.

²⁴ *Gould v. Yukon Order of Pioneers*, [1996] 1 S.C.R. 571 per L’Heureux-Dubé, in dissent but not on this point, at 119 [hereinafter *Gould*].

²⁵ The Supreme Court, in relation to its designation of the *Canadian Bill of Rights* as a “quasi-constitutional” instrument, has described this status as a “half-way house between a purely common law regime and a constitutional one” (*Hogan v. The Queen* [1975] 2 S.C.R. 574, at 597).

The implications of this approach are several.²⁷

1. Human rights legislation by virtue of this status is given a liberal and purposive interpretation. Protected rights are to be broadly interpreted, and exceptions or defences to such rights narrowly construed.²⁸

In a recent speech, Mr. Justice Bastarache noted that “the linguistic texture and universal nature of human rights has accorded judges a significant margin of interpretative autonomy.”²⁹ While this statement relates to larger points about judicial review and autonomy with respect to constitutional interpretation, it, nonetheless, signals an understanding of human rights law in general as constituting a special interpretive task.

Indeed, it is well-established that human rights legislation is to receive a wide and liberal construction advancing the objective underlying such laws.³⁰ Colleen Sheppard, a university law professor, notes a “growing willingness” of courts to grant a large and liberal interpretation to the grounds of discrimination set out in human rights legislation.³¹ She argues: “The impact of the Canadian *Charter* and the recognized quasi-constitutional status of human rights law have reinforced the importance of according a broad and liberal interpretation to human rights legislation.”³² Judicial examples of this stance abound.³³ Illustration of some of these follows.

²⁶ *Robichaud v. Canada (Treasury Board)*, [1987] 2 S.C.R. 84, at 90 [hereinafter *Robichaud*]. It is worth mentioning that the *Quebec Charter of Human Rights and Freedoms* (S.Q. 1975, c. 6), as another piece of human rights legislation, shares this designation as quasi-constitutional legislation. (See, for example, *2747-3174 Québec Inc. v. Québec (Régie des permis d'alcool)*, [1996] 3 S.C.R. 919, per L’Heureux-Dubé, paras. 90-95.)

²⁷ The organizing principles which follow are taken from Ruth Sullivan, *Drieger on the Construction of Statutes* (3 ed.) (Toronto: Butterworths, 1994). Sullivan’s statement of the rules of interpretation applicable to human rights legislation have been adopted by the Supreme Court of Canada in *Québec (Commission des droits de la personne et des droits de la jeunesse) v. Montréal (City)*; *Québec (Commission des droits de la personne et des droits de la jeunesse) v. Boisbriand (City)*, [2000] 1 S.C.R. 665, at para. 29 [hereinafter *Boisbriand*].

²⁸ Sullivan, *ibid.*, at 383.

²⁹ Honourable Mr. Justice Michel Bastarache, “The Interpretation of Human Rights: The Challenge,” [2001] 50 UNB LJ/RD UN-B 3, at 4.

³⁰ Ruth Sullivan, *Statutory Interpretation*, (Concord: Irwin Law, 1997) at 175; Pierre-André Côte, *The Interpretation of Legislation in Canada, Third Edition*, (Toronto: Carswell, 2000), at 500. The Supreme Court of Canada has stated, in reference to the Canadian Bill of Rights case, *R. v. Smith (Edward Dewy)* [1987] 1 S.C.R. 1045, para. 42, that such an interpretation establishes “the duty of the Court not to whittle down the protections...by a narrow construction of what is a quasi-constitutional document.”

³¹ Colleen Sheppard, “Grounds of Discrimination: Towards An Inclusive and Contextual Approach,” 80 *The Canadian Bar Review*, 893, (2001) at 895.

³² Sheppard, *ibid.*, at 895.

³³ *Heerspink*, *supra* note 18; *Craton*, *supra* note 20, *Ontario Human Rights Commission and O’Malley v. Simpson-Sears Ltd.*, [1985] 2 S.C.R. 536 [hereinafter *O’Malley*]; *Bhinder v. Canadian National Railway Company*, [1985] 2 S.C.R. 561 [hereinafter *Bhinder*]; *Canadian National Railway Company v. Canada*

In the *Ontario Human Rights Commission and O'Malley v. Simpson-Sears Ltd.* case, McIntyre J. stated:

The accepted rules of construction are flexible enough to enable the Court to recognize in the construction of a human rights code the special nature and purpose of the enactment..., and give to it an interpretation which will advance its broad purposes. Legislation of this type is of a special nature, not quite constitutional but certainly more than the ordinary—and it is for the courts to seek out its purpose and give it effect.³⁴

In *Zurich Insurance Co. v. Ontario (Human Rights Commission)*, Sopinka J. wrote:

In approaching the interpretation of a human rights statute, certain special principles must be respected. Human rights legislation is amongst the most preeminent category of legislation. It has been described as having a “special nature, not quite constitutional but certainly more than the ordinary....” One of the reasons such legislation has been so described is that it is often the final refuge of the disadvantaged and the disenfranchised. As the last protection of the most vulnerable members of society, exceptions to such legislation should be narrowly construed.³⁵

In *Dickason v. University of Alberta*,³⁶ L'Heureux-Dubé J., in dissent, but not on this point, wrote:

In order to further the goal of achieving as fair and tolerant a society as possible, this Court has long recognized that human rights legislation should be interpreted both broadly and purposively. Once in place, laws which seek to protect individuals from discrimination acquire a quasi-constitutional status, which gives them preeminence over ordinary legislation.³⁷

(Human Rights Commission) and Action travail des femmes, [1987] 1 S.C.R. 1114 [hereinafter *Canadian National Railway Co.*]; *Robichaud*, *supra* note 26; *Zurich Insurance Co. v. Ontario (Human Rights Commission)*, [1992] 2 S.C.R. 321 [hereinafter *Zurich*]; *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554 [hereinafter *Mossop*]; *Gould*, *supra* note 24, at 635; *Béliveau St-Jacques v. Fédération des employées et employés de services publics inc.*, [1996] 2 S.C.R. 345 at 402-403.

³⁴ *O'Malley*, *ibid.*, at 547.

³⁵ *Ibid.*, at 339. L'Heureux-Dubé J., in her dissenting judgment in *Mossop*, *supra* note 33, at 62, reiterates this point: “This long line of cases mandates that courts interpret human rights legislation in a manner consistent with its overarching goals, recognizing as did my colleague Sopinka J. for the majority in *Zurich Insurance*... that such legislation is often ‘the final refuge of the disadvantaged and the disenfranchised’.”

³⁶ *Dickason v. University of Alberta*, [1992] 2 S.C.R. 1103 [hereinafter *Dickason*]; see also *Craton*, *supra* note 20 at 156; *Canadian National Railway Co.*, *supra* note 33, at 1136.

³⁷ *Dickason*, *ibid.*, at 1154.

The strong message, thus, is that courts are not to “inspect these statutes with a microscope, but should...give them a full, large and liberal meaning consistent with their favoured status in the lexicon of Canadian legislation.”³⁸

Ambiguities and other interpretive doubts are resolved so as to promote the anti-discriminatory goals of the legislation. In a well-known and oft-cited passage from *Canadian National Railway Co. v. Canada (Human Rights Commission)*, Dickson C.J. wrote:

Human rights legislation is intended to give rise, amongst other things, to individual rights of vital importance, rights capable of enforcement, in the final analysis, in a court of law. I recognize that in the construction of [human rights] legislation the words of the Act must be given their plain meaning, but it is equally important that the rights enunciated be given their full recognition and effect. We should not search for ways and means to minimize those rights and to enfeeble their proper impact.³⁹

In this case, the Supreme Court held that the authority conferred on human rights tribunals to order measures designed to prevent “the same or a similar [discriminatory] practice occurring in the future” could encompass an order obligating C.N. to hire women at a specified rate until the proportion of female employees in the relevant category attained a certain percentage. The Court’s generous and liberal interpretation of the legislation, more specifically, its rejection of “strict grammatical construction” in favour of a more purposive interpretation, facilitated articulation of this novel order.⁴⁰

In *P.S.A.C. v. Canada (Department of National Defence)*,⁴¹ a case involving the Public Service Alliance of Canada’s complaint that the Department of National Defence discriminated in wage payment to its female employees, the Federal Court of Appeal awarded compensation for discriminatory practices which predated the filing of the complaint. In reaching this decision, the Court of Appeal stated that the provisions of the *Canadian Human Rights Act* are to be given a large and liberal interpretation so the Act’s anti-discrimination purpose may be achieved.

As counterpart to a broad and liberal reading of the rights protected in human rights legislation, a purposive interpretation also requires that a more constrained approach be taken to any exceptions or defences to such rights the legislation sets out. In *Dickason*, Cory J. makes this

³⁸ *Canada (Attorney General) v. Rosin*, [1991] 1 F.C. 391, at 401, per Linden J.A., quoted with approval by Lamer C.J. in *University of British Columbia v. Berg*, [1993] 2 S.C.R. 353, at 373 [hereinafter *Berg*]; *Gould*, *supra* note 24, at para. 122, per L’Heureux-Dubé J., in dissent but not on this point. See also *Syndicat*, *supra* note 9, at 927, per L’Heureux-Dubé J. in dissent: the provisions of human rights legislation should “not receive a technical or restrictive application.”

³⁹ *Canadian National Railway Co.*, *supra* note 33, at 1134.

⁴⁰ For the Court’s discussion, see, *ibid.*, at 1133, 1145. See also Robichaud, *supra* note 26, at 89-90.

⁴¹ *P.S.A.C. v. Canada (Department of National Defence)*, [1996] 3 F.C. 789 (Fed. C.A.).

point: “Current human rights enactments seek to broaden the impact of individual rights, yet they strive to provide a balancing mechanism so that the many competing interests of society can be accommodated.”⁴² Thus, the Court has stressed that it is particularly important when interpreting human rights legislation to be sensitive to the balancing among competing values and interests represented by the defences and exceptions.

Interpretive doubts should be resolved in such a way that the overall purpose of the legislation—the promotion and protection of rights—is fostered. Thus, exceptions and defences in human rights legislation are strictly construed.⁴³

In *Bhinder*, Dickson C.J., in dissent but not on this point, wrote:

The tribunal began by stating that human rights legislation is remedial and that the policies of the Act are not to be compromised or abridged unless by the express language of the legislation. The *bone fide* exception must be interpreted narrowly so as not to conflict with the remedial aims of the Act.⁴⁴

On another occasion the Supreme Court stated:

It has been decided by this Court in *Ontario Human Rights Commission v. Borough of Etobicoke*, [1982] 1 S.C.R. 202, and reaffirmed in *Bhinder v. Canadian National Railway Co.*, [1985] 2 S.C.R. 561, that *bona fide* occupational qualification exceptions in human rights legislation should, in principle, be interpreted restrictively since they take away rights which otherwise benefit from a liberal interpretation.⁴⁵

The case of *West End Construction Ltd. v. Ontario (Ministry of Labour)* saw the Ontario Court of Appeal use a similar principle to justify a narrow interpretation of a defence provision under the *Limitations Act* of Ontario. The complainant sought compensation under the Ontario *Human Rights Code* for discriminatory acts. The issue was whether this was “an action for a sum of money under a statute” within the meaning of Ontario’s *Limitation Act*. The phrase was certainly broad enough to capture such an action, given the ordinary meaning of the words. However, the Court stated that the defence did not apply. The Court stressed that the Code is “proactive legislation,” creating unique remedies and a specific enforcement process designed to

⁴² Dickason, *supra* note 36, at 1121. See also, *Zurich*, *supra* note 33, at 340-341; *O’Malley*, *supra* note 33, at 552-553, 554, 555.

⁴³ Dickason, *ibid.*, at 1121, *Bhinder*, *supra* note 33, at 567-569.

⁴⁴ *Bhinder*, *ibid.*, at 567-568. See also, *Zurich*, *supra* note 33; *O’Malley*, *supra* note 33.

⁴⁵ *Brossard (Town) v. Québec (Commission des droits de la personne)*, [1988] 2. S.C.R. 279 at 307 [hereinafter *Brossard*]. See also, *Bhinder*, *ibid.*, at 567-569; *Zurich*, *ibid.*, at 339, 358: “As the last protection of the most vulnerable members of society, exceptions to such legislation should be narrowly construed.... Defences to discrimination under the Code must be narrowly construed so that the larger objects of the Code are not frustrated” (per Sopinka J. writing for the majority).

“ensure that the dignity of our citizenry is sustained.”⁴⁶ The Court also relied on the quasi-constitutional status of the Code in concluding:

I do not believe that it is possible to force-feed the hybrid proceedings created by the Code into a limitations statute which finds its origins in 1833 when this type of affirmative action legislation was in no one’s contemplation.... If there is to be a limitation period, it must be fashioned to fit the Code.⁴⁷

Thus, human rights legislation enjoys an expansive interpretation. As instruments with the central purpose of protection of fundamental human rights, the Supreme Court of Canada has confirmed in a large number of cases that they are to be given a broad and liberal interpretation. A note of caution, however, is apposite. The guidelines dictating a broad interpretation of human rights legislation do not justify reading “the limiting words out of the Act or otherwise [circumventing] the intention of the legislature.”⁴⁸

2. Important provisions of human rights legislation are to be read in light of evolving social conditions and in terms of the most recent conceptions of human rights. Drieger calls this approach to the general terms and concepts of the legislation “organic and flexible.”⁴⁹

Unlike “ordinary” legislation, where the assumption is that the meaning of the legislation is fixed at enactment and changed only by amendment or repeal, human rights legislation shares with constitutional legislation a more dynamic or “organic” interpretive process. Ruth Sullivan, author of a leading text on interpretation, and a law professor, describes such a process.

[M]eaning is not tied to the framer’s original understanding but is permitted to evolve in response to both linguistic and social change.... [T]he judicial approach appears to be more flexible and responsive to an evolving external context than is the case for ordinary legislation.

An organic interpretation involves an interpretation that evolves to reflect changing social and political thoughts and environments.⁵⁰

Thus, human rights legislation should be given a dynamic interpretation, as are constitutional provisions. For example, the Trial Court Judge in *Dickason* stated that the rights guaranteed by provincial human rights statutes should be protected to the same degree as comparable ones guaranteed in the Charter. That is, ensuring protection of the rights in provincial human

⁴⁶ *West End Construction Ltd. v. Ontario (Ministry of Labour)*, (1989), 62 D.L.R. (4th) 329 (Ont. C.A.), at 341 [hereinafter *West End Construction*].

⁴⁷ *West End Construction*, *ibid.*, at 338, 340.

⁴⁸ *Berg*, *supra* note 38, at 371 (Lamer C.J.).

⁴⁹ Sullivan, *supra* note 27, at 387-388.

⁵⁰ Sullivan, *supra* note 30, at 100.

rights legislation requires the guidance of “the criteria formulated by the highest court in the land to scrutinize actions which violate a comparable protected right under the Charter.”⁵¹

In *Canada (Attorney-General) v. Public Service Alliance of Canada*, Trial Court Justice John Evans, as he then was, wrote that, because of the quasi-constitutional status of the *Canadian Human Rights Act*, it is appropriate to interpret the pay equity provisions in that Act in ways that reflect changing and subsequent experience.

Parliament was aware that section 11 represented more a statement of principle than a complete prescription. It is consistent with Parliament’s intention that the “living tree” of the *Act* should be nourished by the experience of other jurisdictions in dealing with the social injustice at which section 11 is aimed: systemic wage discrimination for work of equal value resulting from the historical segregation of the labour world by gender, and the under valuation of women’s work.⁵²

Justice Evans also reproved the federal government for a legal argument, based he said:

...on the narrowest possible interpretation of the *Canadian Human Rights Act*.... It paid only lip service to the regular admonitions of the Supreme Court of Canada that, as quasi-constitutional legislation, human rights statutes are to be interpreted in a broad and liberal manner.⁵³

The Court, in this case, went on to give a more liberal and expansive interpretation of the Act in rejecting the federal Attorney General’s position with respect to the definition of the problem at the centre of the pay equity provisions and measures the Tribunal could lawfully employ to tackle the problem.

The Supreme Court of Canada, itself, has consistently taken such a flexible and adaptive approach to its interpretation of human rights legislation. Thus, the Court has expressed a concern to develop the particular provisions of human rights legislation with an eye to its general policies and goals. This approach explains the development of adverse effect discrimination and the duty to accommodate in the *Simpsons-Sears* case, despite the absence of a clear textual base for such a development.⁵⁴ McIntyre J. wrote:

The *Code* accords the right to be free from discrimination in employment. While no right can be regarded as absolute, a natural corollary to the recognition of a rights must be the social acceptance of a general duty to

⁵¹ *Dickason v. University of Alberta*, 91 A.R. 350, at 365 (Alta. Q. B.).

⁵² *Canada (Attorney-General) v. Public Service Alliance of Canada*, [1999] F.C.J. No. 1531 [hereinafter *PSAC (1999)*].

⁵³ *Ibid.*, at para. 239 (Evans J.).

⁵⁴ *O’Malley*, *supra* note 33, at 547-548, 549-552, 554.

respect and to act within reason to protect it.... In this case, consistent with the provisions and intent of the *Ontario Human Rights Code*, the employee's right requires reasonable steps towards an accommodation by the employer.⁵⁵

Recognition of a duty to accommodate, despite the absence of textual reference to it, made sense as a reflection of currently accepted notions of the character of discrimination, its systemic bases and appropriate measures to address it.⁵⁶

In *Canada v. Mossop*,⁵⁷ L'Heureux-Dubé's dissenting opinion illustrates a similar interpretive stance. She argues that legislative intentions—in this case to exclude same-sex relationships from coverage under the term “family status”—are not decisive. Indeed, she argues that the phrase had evolved to encompass gay and lesbian relationships, despite the obvious contrary intent of the Act's framers.

Even if Parliament had in mind a specific idea of the scope of “family status,”...concepts of equality and liberty which appear in human rights documents are not bounded by the precise understanding of those who drafted them. Human rights codes are documents that embody fundamental principles, but which permit the understanding and application of these principles to change over time. These codes leave ample scope for interpretation by those charged with that task.... The enumerated grounds of discrimination must be examined in the context of contemporary values, and not in a vacuum. As with other such types of legislation, the meaning of the enumerated grounds in s. 3 of the *Act* is not “frozen in time” and the scope of each ground may evolve.⁵⁸

This approach is not without its detractors. Human rights legislation, of course, remains subject to amendment through the standard legislative process. That is, its quasi-constitutional status does not confer on it the kind of protection from amendment that entrenchment of constitutional documents establishes. For that reason—ease of amendment—it has been suggested that the interpretation of human rights legislation, while liberal and purposive, should not be “organic.” Marceau J.A., writing at the Federal Court of Appeal level in *Canada (Attorney General) v. Mossop*, illustrates such concerns.

[T]he main reason why the Charter had to be interpreted...without the same deference to the historical intentions of the drafters and legislators, is that the difficulties of amending the Constitution could cause its provisions to fall behind changes in society's conception of basic societal values.... I believe that if the courts were to adopt, in interpreting human rights acts, a “living tree” approach towards discerning new grounds of discrimination for proscription,

⁵⁵ *Ibid.*, at 554-555.

⁵⁶ Sullivan, *supra* note 27, at 388.

⁵⁷ *Mossop*, *supra* note 33.

⁵⁸ *Ibid.*, at 621-622.

or re-defining past meanings foreign to existing grounds, they would step outside the scope of their constitutional responsibilities and usurp the function of Parliament.⁵⁹

3. In circumstances of conflict or inconsistency with other types of legislation, the provisions of the human rights legislation prevail regardless of timing of enactment.⁶⁰

Human rights codes in many provinces contain primacy clauses.⁶¹ These clauses have been held effective by the Supreme Court of Canada.⁶² Such clauses, however, may not be necessary. The Supreme Court of Canada has also held that, in the case of a conflict between human rights legislation and other legislation, the human rights legislation is paramount, even in the absence of a primacy clause, regardless of date of enactment of the other legislation and whether the other legislation is more specific.⁶³ This is due to an understanding of human rights legislation as possessing a “special nature,” declaring “public policy regarding matters of general concern.”⁶⁴

In *Heerspink*, Mr. Justice Lamer, speaking for a minority of the Court, stated:

When the subject matter of a law is said to be the comprehensive statement of the “human rights” of the people living in that jurisdiction, then there is no doubt in my mind that the people of that jurisdiction have through their legislature clearly indicated that they consider that law, and the values it

⁵⁹ *Canada (Attorney General) v. Mossop*, [1991] 1 F.C. 18, at 33 (F.C.A.); affd [1993] 1 S.C.R. 554 (S.C.C.).

⁶⁰ Sullivan, *supra* note 27, at 184.

⁶¹ For example, the British Columbia *Human Rights Code* stipulates in section 4: “If there is a conflict between this Code and any other enactment, the Code prevails” ([RSBC 1996] Chp. 210). The Ontario *Human Rights Code* states in section 47(2): “This Act applies and prevails unless the Act or regulation specifically provides that it is to apply despite this Act” (RSO 1990 c.H. 19). Section 2 of the *Canadian Bill of Rights* sets out a notwithstanding declaration that the Bill of Rights is supreme over any other federal statute unless in the other statute “it is expressly declared...that it shall operate notwithstanding the Canadian Bill of Rights.” This clause in the Bill of Rights has been held by the Supreme Court to have the effect of rendering inoperative inconsistent statutes passed without a notwithstanding clause. *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177; *McBain v. Lederman* [1985] 1 F.C. 856, at 833 (C.A.). See also, Anne Bayefsky, “Parliamentary Sovereignty and Human Rights in Canada,” 31 *Political Studies*, 239, (1983), cited in Peter Hogg, *Constitutional Law of Canada (2001 Student Edition)*, (Toronto: Carswell, 2001) at 295, fn. 51.

⁶² *Scowby v. Glendinning* [1986] 2 S.C.R. 226, at 236 (*obiter dictum*, referring to the primacy clause in section 44 of the *Saskatchewan Human Rights Code*), cited in Hogg, *ibid.*, at 295, fn. 50.

⁶³ *Craton*, *supra* note 20. This conclusion runs counter to what Hogg calls the “orthodox doctrine of parliamentary sovereignty”: the notion that Parliament has the right to make or unmake any law including the law of a predecessor Parliament with the correlative. Thus, under this doctrine a later statute is regarded as impliedly repealing an earlier statute to the extent of any inconsistency between the two (Hogg, *supra* note 61, at 652). See also, Sullivan, *supra* note 30, at 226.

⁶⁴ *Craton*, *supra* note 20, at 156. Peter Hogg takes issue with this judicial conclusion, arguing that other legislation as well “declares public policy regarding matters of general concern.” Hogg asserts: “The Court is in no position to create priorities between public policies” (Hogg, *supra* note 61, at 295, fn. 51).

endeavours to buttress and protect, are, save their constitutional laws, more important than all others. Therefore, short of that legislature speaking to the contrary in express and unequivocal language..., it is intended that the [Human Rights] Code supersede all other laws when conflict arises.⁶⁵

This passage has subsequently been endorsed by the Supreme Court of Canada in a number of other cases. In *Craton*, for example, Mr. Justice McIntyre, writing for the unanimous Court wrote:

To adopt and apply any theory of implied repeal by later statutory enactment to legislation of this kind would be to rob it of its special nature and give scant protection to the rights it proclaims.⁶⁶

To conclude, the quasi-constitutional status of human rights legislation, an appellation that captures the nature of such legislation as protective of fundamental rights, dictates a broad and liberal, as well as flexible and evolving, interpretation and grants such legislation presumptive primacy over other legislative enactments.

Other Legislation

Human rights legislation is not alone in its designation as quasi-constitutional. The features that determine the quasi-constitutional status of human rights legislation are shared by other types of legislation, to varying degrees. So for instance, municipal development plans have been granted quasi-constitutional status, due primarily to their foundational role. In *Old St. Boniface Residents Assn. v. Winnipeg (City)*,⁶⁷ La Forest J., in dissent but not on this point, wrote that the Greater Winnipeg development plan, passed by a city by-law, was a quasi-constitutional instrument and, therefore, was to be interpreted in a liberal and flexible way.

The plan is the instrument by which overall planning for the entire territory of the city is instituted. It is a general, long-term policy document which serves as a framework in which specific policies and zoning by-laws are formulated. It may be viewed as the very foundation of all planning.⁶⁸

As well, the development plan, because it limited city council powers and had special, more cumbersome amendment procedures, further shared constitutional features.

⁶⁵ *Heerspink*, *supra* note 18, at 157-158, per Lamer J., speaking for justices McIntyre and Estey. See also, *Zurich*, *supra* note 33, at 359; *Bhinder*, per C.J., *supra* note 33, at 574: “[F]ederal legislation is inoperative to the extent it conflicts with the Canadian Human Rights Act.” As well, see, *Canada (Attorney General) v. Druken*, [1989] 2 F.C. 24 (F.C.A.) and *Canada (Attorney General) v. Uzoaba*, [1995] 2 F.C. 569 (F.C.T.D.).

⁶⁶ *Craton*, *supra* note 20, at 156. It should be noted, however, that this passage was *obiter dicta*. See also, *Bhinder*, *supra* note 33, at 575.

⁶⁷ *Old St. Boniface Residents Assn. v. Winnipeg (City)* (1990), 75 D.L.R. (4th) 385 (S.C.C.) [hereinafter *Old St. Boniface*].

⁶⁸ *Ibid.*, at 389.

It appears, then, that as a “*quasi-constitutional*” document, the plan should be interpreted with an appropriate measure of flexibility, which reflects a balance between its general, long-term nature, and its statutorily mandated function as the foundation of the planning process.⁶⁹

Another characteristic human rights legislation shares with some other legislation is the protection of fundamental rights. So, for instance, the Supreme Court of Canada has established that language rights are also a category of fundamental human rights.⁷⁰ The consequence of such a designation is that legislation dealing with language rights too has been granted a “purposive and liberal” interpretive approach.⁷¹ The Supreme Court has said that “[l]anguage rights must in all cases be interpreted purposively....”⁷²

In *Reference Re Manitoba Language Rights*, the Court spelled out more specifically this line of reasoning.

The importance of language rights is grounded in the essential role that language plays in human existence, development and dignity. It is through language that we are able to form concepts; to structure and order the world around us. Language bridges the gap between isolation and community, allowing humans to delineate the rights and duties they hold in respect of one another, and thus to live in society.⁷³

The fundamental character of language rights stems also from the particular constitutional structure and political history of Canada. In the Federal Court of Appeal in *Canada (Attorney-General) v. Viola (C.A.)*, Décaré J.A. wrote:

The 1988 *Official Languages Act* is not an ordinary statute. It reflects both the Constitution of the country and the social and political compromise out of which it arose. To the extent that it is the exact reflection of the recognition of the official languages contained in subsections 16(1) and (3) of the *Canadian Charter of Rights and Freedoms*, it follows the rules of interpretation of that Charter as they have been defined by the Supreme Court of Canada. To the extent also that it is an extension of the rights and guarantees recognized in the Charter, and by virtue of its preamble, its purpose as defined in section 2 and its taking precedence over other statutes in accordance with subsection 82(1), it belongs to that privileged category of quasi-constitutional legislation

⁶⁹ *Ibid.*, at 390.

⁷⁰ *R. v. Mecure* (1988), 48 D.L.R. (4th), at 57. See also, *Société des Acadiens du Nouveau-Brunswick Inc. v. Assn. of Parents for Fairness in Education Grand Falls District 50 Branch* (1986), 27 D.L.R. (4th) 406; *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712.

⁷¹ *Jones v. Attorney-General of New Brunswick* [1975] 2 S.C.R. 182; *Attorney General of Quebec v. Blaikie*, [1979] 2 S.C.R. 1016; *Attorney General of Quebec v. Blaikie*, [1981] 1 S.C.R. 312.

⁷² *R. v. Beaulac*, [1999] 1 S.C.R. 768, at para. 25 [hereinafter *Beaulac*].

⁷³ *Manitoba Language Rights*, [1985] 1 S.C.R. 721, at 744.

which reflects “certain basic goals of our society” and must be so interpreted “as to advance the broad policy considerations underlying it.” To the extent, finally, that it is legislation regarding language rights, which have assumed the position of fundamental rights in Canada but are nonetheless the result of a delicate social and political compromise, it requires the courts to exercise caution and to “pause before they decide to act as instruments of change.”⁷⁴

Similar concerns are echoed in legislation protecting the rights of Aboriginal peoples. Such legislation too shares constitutional significance and involves issues of fundamental rights. Thus, it has also been favoured with a liberal interpretation. In a 1983 Supreme Court of Canada decision, *Nowegijick v. R.*,⁷⁵ the Court was asked to consider section 87 of the *Indian Act* which stipulated that “the personal property of an Indian...situated on a reserve” was exempt from taxation. In holding that wages received for off-reserve logging were exempt under section 87, Dickson J. stated:

It seems to me...that treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indians. If the statute contains language which can reasonably be construed to confer tax exemption that construction, in my view, is to be favoured over a more technical construction which might be available to deny exemption.⁷⁶

This same principle was articulated by Dickson C.J. in *Simon v. The Queen*⁷⁷ and has been affirmed a number of times since.⁷⁸

Remedial legislation has also been found to deserve a similar broad and liberal interpretation. While it is difficult to come up with a precise definition of remedial legislation, any legislation intended to correct a specific legal, social or economic problem can be labelled remedial. More specifically, the term is most likely to be attached to legislation whose purpose is to protect vulnerable groups in society. Thus, legislation aimed specifically at inherently vulnerable groups, such as children, or legislation whose purpose is to deal with situational vulnerability in certain relationships, such as shareholders or consumers, can fall under this rubric.⁷⁹ For instance, in

⁷⁴ *Canada (Attorney-General) v. Viola*, [1991] 1 F.C. 373 (C.A.), at 386. This passage was relied upon by the Federal Court of Appeal in *St.-Onge v. Canada (Commissariat aux langues officielles)*, [1992] 3 F.C. 287, at 298, and subsequently quoted by the Supreme Court of Canada in *Beaulac*, *supra* note 72, at para. 21.

⁷⁵ *Nowegijick v. R.* [1983] 1 S.C.R. 29 [hereinafter *Nowegijick*].

⁷⁶ *Ibid.*, at 36.

⁷⁷ *Simon v. The Queen*, [1985] 2 S.C.R. 387.

⁷⁸ See *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85, at 143 (La Forest J.): “[I]t is clear that in the interpretation of any statutory enactment dealing with Indians, and particularly the Indian Act, it is appropriate to interpret in a broad manner provisions that are aimed at maintaining Indian rights, and to interpret narrowly provisions aimed at limiting or abrogating them.” See also: *Sioui v. R.*, [1990] 1 S.C.R. 1025, at 1035 (Lamer C.J.); *Opetchesah Indian Band v. Canada*, [1997] 2 S.C.R. 119, at 153 (McLachlin J., as she was then).

⁷⁹ Sullivan, *supra* note 30, at 176.

Genereux v. Catholic Children's Aid Society of Metropolitan Toronto (Municipality),⁸⁰ section 43(8) of Ontario's *Child Welfare Act*—a provision granting power to hear fresh evidence on appeal—was to be applied. The Ontario Court of Appeal gave a reading to that provision contrary to the common law. Cory J.A., as he was then, held:

It can be seen that the judge hearing the appeal is granted a very wide discretion [to receive new evidence] with no restrictions imposed. This is remedial legislation dealing with the welfare of children. It should be broadly interpreted. Undue restrictions should not be placed upon it. Specifically, narrow restrictions should not be placed upon it. Specifically, narrow restriction should not be read into the section when they do not appear in the legislation.⁸¹

In *British Columbia Development Corporation v. Friedman*,⁸² Dickson C.J. understood the *British Columbia Ombudsman Act* to be remedial and, therefore, subject to a “large and liberal” interpretation in keeping with the provincial *Interpretation Act*.⁸³ In the *Toronto Area Transit Operating Authority v. Dell Holdings Ltd.*,⁸⁴ the Court held that remedial provisions of the Ontario *Expropriations Act* were to be given a large and liberal interpretation.⁸⁵ And, in *R. v. Beaulac*,⁸⁶ Lamer C.J. and Binnie J. wrote, in a concurring judgment, that remedial provisions, such as the one at stake in the case (the language rights afforded by section 530 of the *Criminal Code*), are, in the words of the Canadian *Interpretation Act*, to “be given such ‘fair, large and liberal construction and interpretation as best ensures the attainment of [their] objects’.”⁸⁷

The liberal and purposive interpretation given human rights legislation can also be understood from this perspective: human rights legislation too has been considered remedial.

[The *Canadian Human Rights Act*] is not aimed at determining fault or punishing conduct. It is remedial. Its aim is to identify and eliminate

⁸⁰ *Genereux v. Catholic Children's Aid Society of Metropolitan Toronto (Municipality)* (1985), 53 O.R. (2d) 163 (C.A.) [hereinafter *Genereux*].

⁸¹ *Ibid.*, at 164-165. This passage was quoted and relied upon by the Supreme Court of Canada in *Catholic Children's Aid Society of Metropolitan Toronto (Municipality) v. M(C)*, [1994] 2 S.C.R. 165 at 187, in aid of an equally liberal interpretation of a similar provision in *Ontario's Child and Family Services Act*.

⁸² *British Columbia Development Corporation v. Friedman*, [1984] 2 S.C.R. 448 [hereinafter *Friedman*].

⁸³ *Ibid.*, at 458.

⁸⁴ *Toronto Area Transit Operating Authority v. Dell Holdings Ltd.*, [1997] 1 S.C.R. 32 [hereinafter *Dell Holdings*].

⁸⁵ *Ibid.*, at 45.

⁸⁶ *Beaulac*, *supra* note 72.

⁸⁷ *Beaulac*, *ibid.*, at para.1, quoting from *Interpretation Act*, R.S.C. 1985, c. I-21, s.12.

discrimination. If this is to be done, then the remedies must be effective, consistent with the “almost constitutional” nature of the rights protected.⁸⁸

The remedial character of human rights law reinforces or captures from another perspective the fundamental and special nature of the protections it affords. This judicial approach was well summarized by Weiler J.A. in *Roberts v. Ontario*.⁸⁹

A human rights code is not like ordinary law. It is a fundamental law which declares public policy.... Because a human rights code is not an ordinary statute, rules of statutory interpretation which advocate a strict grammatical construction of the words are not the proper approach to take in interpreting its provisions; focusing on the limited words of the section itself would ignore the dominant purpose of human rights legislation.... A human rights code is remedial legislation and is to be given such interpretation as will best ensure its *objects* are attained.⁹⁰

Thus, in *Robichaud v. the Queen*,⁹¹ the Supreme Court held that authority to issue orders “against the person found...to have engaged in the discriminatory practice” was broad enough to allow orders against an employer in respect of a discriminatory practice engaged in by an employee while at work. The remedial purposes of the Act justified such a liberal reading of such powers. La Forest J. wrote:

It is clear to me that the remedial objectives of the Act would be stultified if the above remedies were not available as against the employer.... Not only would the remedial objectives of the Act be stultified if a narrower scheme of liability were fashioned; the educational objectives it embodies would concomitantly be vitiated.... [T]he interpretation I have proposed makes education begin in the workplace, in the micro-democracy of the work environment, rather than in society at large.⁹²

More specifically, the Supreme Court has held that the special character or quasi-constitutional nature of human rights legislation in part, at least, flows from the fact that such legislation “is

⁸⁸ *Robichaud*, *supra* note 26, at 92.

⁸⁹ *Roberts v. Ontario* (1994), 19 O.R. (3d) 387 (C.A.) [hereinafter *Roberts*].

⁹⁰ *Ibid.*, at 394 (C.A.) (emphasis in original). This case involved the charge that a government program that provided special assistance to visually impaired persons under 18 years of age constituted age discrimination under section 1 of the *Ontario Human Rights Code*. In upholding the charge, the Court gave a narrow reading to the section 14(1) exemption contained in the Code, which allowed for special programs designed to assist disadvantaged persons. The Court stated that its narrow reading of the exemption provision was in promotion of substantive equality and fairness, purposes underlying the Act as a whole and the specific exemption provision. Thus the reading down of the exemption was in aid of giving the substantive anti-discrimination right in the Code a liberal reading and broad application.

⁹¹ *Ibid.*

⁹² *Ibid.*, at 93, 94, 95.

often the final refuge of the disadvantaged and the disenfranchised...the last protection of the most vulnerable members of society.”⁹³

Connected to this line of cases are those relatively recent cases that demonstrate the development of liberal interpretation principles for enactments that recognize the rights of individuals belonging to disadvantaged groups. Pierre Côté, author of a scholarly book on legal interpretation, makes explicit such a connection when he argues that “such directives are to the welfare state what guidelines favouring protection of individual rights are to classical liberalism.”⁹⁴ In support of this statement, Côté points to a number of Supreme Court of Canada decisions. Thus, the Supreme Court of Canada relied on the principle of liberal interpretation in relation to the *Unemployment Insurance Act*⁹⁵ in *Canadian Pacific Ltd. v. Attorney General of Canada*.⁹⁶ La Forest J. wrote that “a law dealing with social security should be interpreted in a manner consistent with its purpose.”⁹⁷ A liberal interpretation of the *Unemployment Insurance Act* was also employed by L’Heureux-Dubé J. in *Hills v. Attorney General of Canada*.⁹⁸

In *Finlay v. Canada (Minister of Finance)*,⁹⁹ McLachlin J. (as she was then), in a dissenting judgment, articulated a broad principle of interpretation that “a court, faced with general language or contending interpretations arising from ambiguity in statutory language, should adopt an interpretation which best assures adequacy of assistance.”¹⁰⁰ In another case, this one involving interpretation of the Ontario *Employment Standards Act*, Iacobucci J. argued that, because it was “benefits-conferring legislation,” the Act should be “interpreted in a broad and generous manner. Any doubt arising from difficulties of language should be resolved in favour of the claimant.”¹⁰¹

In *Abrahams v. Canada (A.G.)*,¹⁰² a case which involved entitlement to unemployment benefits, Wilson J. adopted an interpretive approach that favoured the claimant, stating that:

⁹³ *Zurich*, *supra* note 33, at 339.

⁹⁴ Pierre-André Côté, *The Interpretation of Legislation in Canada* (Third edition) (Scarborough: Carswell, 2000) at 521.

⁹⁵ *Unemployment Insurance Act*, R.S.C., 1985, c. U-1.

⁹⁶ *Canadian Pacific Ltd. v. Attorney General of Canada*, [1986] 1 S.C.R. 678 [hereinafter *Canadian Pacific*].

⁹⁷ *Ibid.*, at 689.

⁹⁸ *Hills v. Attorney General of Canada* [1988] 1 S.C.R. 513 at 537. See also, *Canada (Attorney General) v. Xuan*, [1984] 2 F.C. 348 (F.C.A.).

⁹⁹ *Finlay v. Canada (Minister of Finance)*, [1993] 1 S.C.R. 1080 [hereinafter *Finlay*].

¹⁰⁰ *Ibid.*, at 1113.

¹⁰¹ *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, para. 36. See also, with respect to employment standards: *Helping Hands Agency Ltd. v. British Columbia (Director of Employment Standards)* (1996), 131 D.L.R. (4th) 335 (B.C.C.A.). Work-related injuries: *Chaput v. Montréal (S.T.C.U.M.)*, [1992] R.J.Q. 1774 (C.A.). *Québec Automobile Insurance Act: Langlois v. Dagenais*, [1992], R.R.A. 489 (C.A.); *Lemay v. Productions Pram Ltd.*, [1992] R.J.Q. 1738 (C.A.).

¹⁰² *Abrahams v. Canada (A.G.)*, [1983] 1 S.C.R. 2 [hereinafter *Abrahams*].

Since the overall purpose of the Act is to make benefits available to the unemployed, I would favour a liberal interpretation of the re-entitlement provisions. I think any doubt arising from the difficulties of the language should be resolved in favour of the claimant.¹⁰³

This case thus establishes a liberal reading of both federal and provincial social welfare legislation.

To summarize this first part of the paper, the quasi-constitutional status of human rights legislation is reflected in the broad, liberal and purposive interpretation courts are willing to accord it. Such legislation, however, is not alone in being granted such an interpretation. Other legislation has been found to also involve fundamental rights and, correspondingly, has met with similar judicial attitudes. In addition, remedial legislation and legislation protecting or benefiting disadvantaged or vulnerable groups is also given more liberal and purposive readings.

¹⁰³ *Ibid.*, at 10.

PART II: STAND-ALONE PAY EQUITY LEGISLATION

As mentioned in the beginning of this paper, the choice between two general structural avenues for reform of the federal pay equity legislation catalyzes this discussion. Federal measures can remain within the *Canadian Human Rights Act*, or these measures can be situated within their own free-standing legislative scheme. The first option would mean that pay equity will continue to be seen as part of a regime of human rights legislation. The second opens the possibility that pay equity measures will be construed differently, perhaps as labour legislation, as a form of employment right consistent with other employment legislation whose purpose is protecting vulnerable workers. This latter possibility raises the question of whether current judicial interpretive approaches to pay equity will change, losing for pay equity advocates important judicial help in ensuring expansive pay equity measures.

My argument is that this concern about judicial interpretation alone ought not to determine whether pay equity provisions are retained within the *Canadian Human Rights Act*. Three conclusions buttress this argument. First, pay equity measures share enough of the hallmarks of legislation granted a large and liberal interpretation that a sound case can be made for continued application of such interpretive principles to them. Second, critical commentary on judicial interpretation indicates an organic interpretation is applied increasingly by the judiciary even in cases where the formal markers supporting such an interpretation are not present. My third conclusion rests on the first two. Given these first two conclusions—that pay equity legislation would itself warrant a kind of quasi-constitutional status or at least a liberal and an organic interpretation on its own right and that, in any case, the trend increasingly seems to be for courts to apply a liberal and purposive interpretation broadly to all statutes—the only factor attached to human rights legislation that might matter to stand-alone pay equity legislation is the assumption of primacy. I do not see how this judicially assumed characteristic will be of significance to pay equity legislation and, in any case, if the conclusion is that it will matter, a primacy clause can be inserted in the new legislation.

In support of the first of my three contentions—that pay equity measures ought to garner, on their own, the same kind of interpretation human rights legislation enjoys—it is useful to return to the first part of this paper's discussion. Scrutiny of judicial arguments about interpretation of quasi-constitutional legislation and other forms of legislation, which receive a large and liberal, and purposive interpretation reveals that the following legislative characteristics are important: protection of fundamental rights, implementation of central public policy concerns, remedial nature, conferral of benefits upon, or protection to, vulnerable, disadvantaged groups. Pay equity measures, even abstracted from their human rights legislative context, possess all these characteristics. A strong case can therefore be made that judicial interpretive attitudes toward these provisions ought not to depend on their legislative housing.

Pay Equity Legislation as Quasi-Constitutional Legislation

It is worth spending some time discussing this particular characteristic that pay equity shares with more general human rights legislation as this is, perhaps, the most compelling reason for arguing that pay equity legislation deserves generous judicial treatment. As the discussion in Part I illustrates, an important factor in the assignment of special status to human rights laws is that such laws protect fundamental rights. Hunter writes that the purpose of anti-discrimination legislation is as follows.

The mischief which the legislature is seeking to remedy...is the affront to human dignity, the insult or the wounding of the spirit of the individual by the use of derogatory or offensive exclusions or restrictions or other morally discreditable acts based on race or religion or...other factors....¹⁰⁴

Pay equity, as a variety of human rights, can claim this objective as its own. (After all, it is no coincidence that legislative protection of pay equity has often been through the mechanism of inclusion within human rights legislation.)

Three observations are persuasive of this understanding of pay equity measures. First, pay equity measures are required of the federal and the provincial governments by virtue of government obligations under international human rights law. Second, pay equity measures are properly seen as legislative actions dictated by a proactive and substantive approach to the equality rights enshrined in the *Canadian Charter of Rights and Freedoms* and by sex discrimination protections in federal and provincial human rights legislation. And, third, pay equity provisions share remedial and benefit-conferring characteristics with other non-human rights legislation that has been accorded a similarly liberal and purposive interpretation.

In the absence of evidence to the contrary, it is presumed that the legislature intends to observe the values and policies of international law and constitutional law when it enacts legislation.¹⁰⁵ Thus, an interpretation which fulfills or complies with these values is preferred over one that does not.¹⁰⁶ Of course, this interpretive presumption is rebuttable. Parliament or a legislature

¹⁰⁴ I.A. Hunter, "Human Rights Legislation in Canada," cited in *Re Rocca Group Ltd. and Muise* (1979), 102 DLR (3d) 529 at 534 (PEI SC).

¹⁰⁵ Martha Jackman, "Women and the Canada Health and Social Transfer: Ensuring Gender Equality in Federal Welfare Reform," 8 *Canadian Journal of Women and the Law*, (1995), 371; Bruce Porter, "Judging Poverty: Using International Human Rights Law to Refine the Scope of Charter Rights," 15 *Journal of Law and Social Policy*, (2000), 117.

¹⁰⁶ Sullivan, *supra* note 30, at 177; Sullivan, *supra* note 27, at 330. With respect to international human rights, L'Heureux-Dubé J. wrote in *Baker v. Canada (Minister of Citizenship and Immigration)* that "the values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review.... [International human rights law] is also a critical influence on the interpretation of the scope of the rights included in the *Charter*" ([1999] 2 S.C.R. 817). The Quebec Court of Appeal in *Commission des droits de la personne et des droits de la jeunesse v. Ville de Montréal* and *Commission des droits de la personne et des droits de la jeunesse v. Ville de Boisbriand*, with respect to interpreting section 10 of the Quebec *Charter of Human Rights and Freedoms*, wrote: "[Translation] In addition, the Canadian provinces' successive adoption of human rights laws and, in 1982, of a constitutional charter is in keeping with an

can pass legislation contrary to principles of international law or legislation that, while not formally contrary to the Charter, fails to advance proactively its values. But courts, in the absence of strong evidence to the contrary, will assume this is not the intent. Moreover, the more fundamental or important the value, the clearer contrary legislative intent must be.¹⁰⁷

International Obligations

The first observation is the simple reminder that Canadian enactments of pay equity legislation reflect commitments agreed to in a variety of international human rights instruments. More specifically, the principle of equal pay without discrimination based on gender is enshrined in a variety of guises in a number of international documents originating in the United Nations and the International Labour Organization (ILO), a specialized organization of the United Nations established in 1946. (Canada is a member of both organizations.) Thus, pay equity legislation reflects not only domestic constitutional and legislative commitments to sex equality but also an international consensus about fundamental sex equality. Accordingly, federal (and provincial) law establishing pay equity protection is understood in light of Canada's international obligations to economic sex equality, generally, and to the elimination of wage discrimination, specifically.¹⁰⁸

Article 23 of the *Universal Declaration of Human Rights*, adopted by the United Nations General Assembly in 1948, establishes that “[e]veryone, without discrimination, has the right to equal pay for equal work.”¹⁰⁹ Prior to this, the principle of equal pay for equal work had been included within the Preamble to the Constitution of the International Labour Organization at its founding in 1919.¹¹⁰ In 1951, this principle of equal pay for equal work was broadened through the adoption by the member nations of the ILO of *Convention (No. 100) Concerning Equal Remuneration for Men and Women Workers for Work of Equal Value*.¹¹¹ This Convention codified the principle of equal pay for work of equal value by requiring all ratifying countries

international context of affirmation of human rights and freedoms. These constitute relevant law prevailing during the adoption of the Quebec *Charter* and that can be usefully referred to for the purposes of interpreting it” [references in the original text have been omitted] (33 C.H.R.R. D/149 at D/158, para. 56) [hereinafter *Boisbrand (C.A.)*].

¹⁰⁷ Sullivan, *supra* note 30, at 178.

¹⁰⁸ *Boisbriand (C.A.)*, *supra* note 106.

¹⁰⁹ Article 23 (2.), *Universal Declaration of Human Rights*, GA Res. 217 (III), UN Doc. A/810 (1948).

¹¹⁰ *Constitution of the International Labour Organization* (1948) 15 U.N.T.S. 194. The International Labour Organization is an agency of the United Nations, founded in 1919 to promote social justice and international recognition of human and labour rights. Its work involves the formulation of international minimum standards of basic labour rights. In 1944, the principle of equal remuneration was reaffirmed in the *Declaration of Philadelphia*. The Declaration is attached as an annex to the ILO Constitution and elaborates upon the principles to guide the domestic policies of member nations.

¹¹¹ (1953) 165 U.N.T.S. 303 [hereinafter *Convention No. 100*]. This Convention entered into force on May 23, 1953. Member governments of the ILO, once a convention has been adopted by the ILO, are expected to submit the convention within one year to their national legislative bodies to be ratified. Following such ratification, member nations are obliged to ensure that national law and practice conform with the convention. The *Equal Remuneration Recommendation (No. 90)* was adopted at the same time as *Convention No. 100* and sets out

to “ensure the application to all workers of the principle of equal remuneration for men and women workers for work of equal value.”¹¹² Following on its heels in 1958 was ILO *Convention (No. 111) Concerning Discrimination in Respect of Employment and Occupation*.¹¹³ It bound ratifying nations to formulate and apply a national policy for the promotion of equal treatment in employment and occupation to eliminate discrimination on the basis of, among other things, sex.¹¹⁴ Canada ratified Convention No. 111 on November 26, 1964.

procedures for the progressive application of the general principles outlined in the Convention. These are essentially guidelines for achievement of the principles in the Convention and stipulate, among other things, that member states should “establish or encourage establishment of methods for objective appraisal of the work to be performed...with a view to providing a classification of jobs without regard to sex....” (*Equal Remuneration Recommendation No. 90*, 1951, OB 14, Vol. XXXIV, No. 1 Pub. in Official Bulletins).

¹¹² This Convention was ratified by Canada in 1972. More specifically, the relevant sections of the Convention read as follows:

Article 1

For the purpose of this Convention—

the term remuneration includes the ordinary, basic or minimum wage or salary and any additional emoluments whatsoever payable directly or indirectly, whether in cash or in kind, by the employer to the worker and arising out of the worker’s employment;

the term equal remuneration for men and women workers for work of equal value refers to rates of remuneration established without discrimination based on sex.

Article 2

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

2. This principle may be applied by means of—

(a) national laws or regulations;

(b) legally established or recognized machinery for wage determination;

(c) collective agreements between employers and workers; or a combination of these various means.

International Labour Organization Convention Concerning Equal Remuneration for Men and Women Workers for Work of Equal Value, Art. 2, para. 1, 165, *United Nations Treaty Series* 303. Adopted at the same time was the *Equal Remuneration Recommendation (No. 90)*. This Recommendation contains guidelines for the progressive application of the general principles set forth in Convention No. 100 (1951, OB 14, Vol. XXXIV, No. 1. Pub. in Official Bulletins).

¹¹³ (1964) 521 U.N.T.S. 427 [hereinafter Convention No. 111].

¹¹⁴ Convention No. 111 is paired with *Discrimination (Employment and Occupation) Recommendation (No. 111)* (1958, OB, Vol. XLI, No. 2, 79) which, in Article 2, reasserts women’s right to receive the same remuneration as men for work of equal value.

Adoption of the *International Covenant on Economic, Social and Cultural Rights (CESCR)*¹¹⁵ in 1966 gave the principle of equal remuneration for work of equal value United Nations recognition. Canada ratified this Covenant in 1976. Article 7 of the CESCR obligates state parties to take active steps to realize the right to “equal remuneration for work of equal value without distinction of any kind, in particular [to ensure that] women ...[are] guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work....”¹¹⁶ Ratification of the United Nations *Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW)*, which Canada and Quebec did in 1981, provides a number of additional international obligations relevant to pay equity. Article 7 of this Convention states a general obligation to eliminate all forms of discrimination against women. More specific to pay equity concerns is Article 11.1, which provides an obligation to eliminate discrimination against women in the field of employment, stipulating the right to equal remuneration and to equal treatment in respect of work of equal value.¹¹⁷

¹¹⁵ GA. Res. 2200A (XXI), 21 UN GAOR, (Supp. No. 16) 52, UN Doc A/6316 (1966), 993 U.N.T.S. 3, Can. T.S. 1976 No. 46.

¹¹⁶ Canada has been criticized by the Committee which monitors the CESCR, the United Nations Committee on Economic, Social and Cultural Rights, for failure to provide adequate legal protection from wage discrimination for Canadian women.

The Committee is also concerned about the inadequate legal protection in Canada of women’s rights which are guaranteed under the Covenant, such as the absence of laws requiring employers to pay equal remuneration for work of equal value in some provinces and territories, restricted access to civil legal aid, inadequate protection from gender discrimination afforded by human rights laws and the inadequate enforcement of those laws.

The Committee further admonished Canada “to adopt the necessary measures to ensure the realization of women’s economic, social and cultural rights, including the rights to equal remuneration for work of equal value.” (*Concluding Observations of the Committee on Economic, Social and Cultural Rights: Canada*, 10/12/98: paras. 16 and 53.)

In full, Article 7 states:

The State parties to the present Covenant recognize the right of everyone to the enjoyment of just and favorable conditions of work which ensure, in particular:

Remuneration which provides all workers, as a minimum, with:

Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;

A decent living for themselves and their families in accordance with the provisions of the present Covenant;

Safe and healthy working conditions;

Equal opportunity for everyone to be promoted in his employment to an appropriate higher level. Subject to no considerations other than those of seniority and competence;

Rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays.

¹¹⁷ GA Res. 34/189, UN GAOR, 34th Sess., (Supp. No. 46), U.N. Doc. A/34/46, (1982) Can. T.S. 1982 No. 31.

The *Beijing Declaration and Platform For Action*,¹¹⁸ a product of the Fourth World Conference on Women in Beijing, builds on CEDAW, providing more detailed contemporary interpretation of what CEDAW requires by way of strategies for gender equality. Twelve critical areas of concern are identified by the Platform for Action, one of which is “Women and the Economy.” Strategic objectives for this area include elimination of “all forms of employment discrimination.”¹¹⁹ More specific actions highlighted as necessary to realize this objective stipulate that governments, among other actors, are to implement laws that ensure that international labour standards, such as ILO Convention No. 100 on equal pay and workers’ rights, apply equally to female and male workers. Governments are also to enact laws and introduce implementing measures to prohibit discrimination on grounds of sex in relation to employment, increase efforts to close the gap between women’s and men’s pay, take steps to implement the principle of equal remuneration for equal work of equal value by strengthening legislation, establish and strengthen mechanisms to adjudicate matters relating to wage discrimination and review and, where necessary, reformulate the wage structures in female-dominated professions to raise their low earnings.¹²⁰

In 1998, the ILO revisited the basic character of the principles set out in Convention No. 100 and Convention No. 111 in the *ILO Declaration on Fundamental Principles and Rights at Work* and its annexed *Follow-up to the Declaration*¹²¹ adopted by the International Labour Conference. These conventions were designated as two of the eight basic conventions of the ILO, with a resulting prioritization of the equal pay principle expressed in them.

This backdrop of international conventions and agreements—all of which provide for measures dealing with pay inequities between women and men—places strong obligations on the Canadian and provincial governments to implement legislative measures advancing pay equity. It also provides the Canadian judiciary with compelling interpretive guides to ensure strong and effective interpretation of such legislative measures.

Constitutional and Legislative Obligations

Reinforcing these specific international commitments to pay equity, are domestic constitutional and legislative expressions of equality as one of the fundamental values of Canadian society. Most powerfully, of course, is the Charter’s protection of rights to, among other things, sex equality. Section 15 of the Charter has been held by the Supreme Court, dating from its first equality decision, to enshrine a substantive understanding of equality.¹²² This understanding

¹¹⁸ United Nations, *Report of the Fourth World Conference on Women, Beijing, China*, September 4-15, 1995, A/CONF. 177/20, 17 October (1995). Canada is one of the 187 governments party to these documents.

¹¹⁹ *Ibid.*, Strategic Objective F-5.

¹²⁰ See, for example, paragraph 168.

¹²¹ International Labour Conference, 86th Session, Geneva, June 1998.

¹²² In *Andrews v. The Law Society of British Columbia*, the Supreme Court of Canada’s first section 15 case, Justice McIntyre wrote: “[A] bad law will not be saved merely because it operates equally upon those to whom it has application nor will a law necessarily be bad because it makes distinctions.” (*Andrews*, at 169.) In summing up this approach in the recent case of *Law v. Canada*, Justice Iacobucci for a unanimous Supreme

means that section 15 addresses not only direct discrimination but also discrimination's indirect and systemic effects.¹²³ Systemic discrimination in the employment context has been described by the Supreme Court of Canada as “discrimination that results from the simple operation of established procedures of recruitment, hiring and promotion, none of which is necessarily designed to promote discrimination.”¹²⁴ This “most subtle”¹²⁵ discrimination infects standard pay practices and job evaluation systems through action of “long-standing social and cultural mores [that] carry with them value assumptions that contribute to discrimination in ways that are substantially or entirely hidden and unconscious.”¹²⁶

While the Charter has not been held to impose positive rights on government,¹²⁷ pay equity measures are clearly not only consistent with, but act in furtherance of, the notions of equality section 15 advances. Pay equity measures have been described by one commentator as “an example of a remedy to fix ‘adverse effects’ or ‘systemic discrimination’.”¹²⁸ In *Public Service Alliance of Canada v. Department of National Defence*, Mr. Justice Hugessen of the Federal Court adopted similar observations about pay equity's purpose in remedying systemic discrimination.¹²⁹ As such, pay equity legislation warrants the same kind of broad, liberal and purposive interpretation human rights legislation receives. Moreover, a purposive interpretation (one that works to advance the underlying purpose of substantive sex equality informing pay equity measures) fits well with one of the most basic principles of

Court stated that “equality in s. 15 must be viewed as a substantive concept.” (*Law v. Canada (Minister of Employment and Immigration)* [1999] 1 S.C.R. 497, para 25.) See also *Lovelace v. Ontario*, [2000] 1 S.C.R. 950, where the Supreme Court found section 15(2) of the Charter to enhance and explain a substantive concept of equality “by recognizing that achieving equality may require positive action by government to improve the conditions of historically and socially disadvantaged individuals and groups in Canadian society” (para. 42).

¹²³ *British Columbia (Public Service Employee Relations Comm.) v. B.C.G.E.U.*, [1999] 3 S.C.R. 3.

¹²⁴ *Canadian National Railway Co.*, *supra* note 33, at 1139.

¹²⁵ *Public Service Alliance of Canada v. Department of National Defence*, [1996] 3 F.C. 789, per Hugessen J., at para. 14, quoting from *Public Service Alliance of Canada v. Canada (Treasury Board)* (1991), 14 C.H.R.R. D/341 (Can. Trib).

¹²⁶ *Ibid.*

¹²⁷ The Supreme Court of Canada has yet to rule definitively on this point. Cases, such as *Eldridge v. British Columbia (Attorney General)* [1997] 3 S.C.R. 624, *Vriend v. Alberta* [1998] 1 S.C.R. 493 and *Dunmore v. Ontario (Attorney General)* 207 D.L.R. (4th) 193, point in the direction of more fulsome obligations but remain couched within an, albeit broadly conceived, notion of legislative commission garnering constitutional attention. Lower court cases, such as *Masse v. Ontario* (1996) (Ont. T.D.) 134 D.L.R. (4th) 20, have ruled against positive obligations under section 15.

¹²⁸ Patricia Hughes, “A Feminist Looks at Pay Equity Law,” *Feminism and Law Workshop Series*, Faculty of Law, University of Toronto, Friday, November 27, 1992.

¹²⁹ *Supra*, note 125, at paras. 14, 15. See also Evans J. in *Canada (Attorney General) v. P.S.A.C.*: “...the policy motivating the enactment of the principle of equal pay for work of equal value is the elimination from the workplace of sex-based wage discrimination. The kind of discrimination at issue here is systemic in nature: that is, it is the result of the application over time of wage policies and practices that have tended either to ignore or to under-value work typically performed by women” ([1999], 35 C.H.R.R. D/387 at D/413).

statutory interpretation. The presumption favouring constitutionally valid interpretation in its broad form means that, when faced with a choice of interpretations, the court will favour an interpretation that renders the legislation constitutionally valid. A more dilute version of this presumption results in the infusion of interpretation with constitutional and international human rights values. This presumption then, reinforces, in the case of pay equity legislation, the precept that judicial interpretations should reflect the underlying substantive equality objectives of pay equity law.

Constitutional enshrinement of the values informing pay equity law is certainly one indication that pay equity reflects core social values and policy. Additionally, however, are the judicial pronouncements that wage discrimination, more generally understood, constitutes a form of sex discrimination prohibited by human rights statutes themselves.¹³⁰ That is, courts have found that prohibitions against sex discrimination in the employment context can carry similar sorts of concerns otherwise caught by more specific equal pay provisions within either human rights legislation or stand-alone legislation. While more focussed and detailed in its proscriptions, pay equity nonetheless falls under the same rubric of fundamental rights protection assigned to broader human rights anti-discrimination provisions.

Remedial and Benefits-Conferring Status

An argument about the special interpretive status of pay equity provisions is reinforced by an understanding that these provisions do impact the protection of vulnerable members of society. Illustrating this understanding is the decision by a federal human rights tribunal in *Public Service Alliance of Canada v. Canada (Treasury Board) (No. 2)*¹³¹ where the Tribunal found that section 11 of the Quebec Charter was remedial legislation dealing with salary inequities arising between jobs deemed by some process of evaluation to be of equal value.

To conclude, to the extent that there is concern about the loss of the interpretive status assigned human rights legislation if federal pay equity measures are placed outside human rights legislation, there are strong arguments in favour of judicial extension of such a status to whatever legislative form pay equity initiatives should take. Pay equity legislation should be seen as protective of fundamental human rights—through its reflection of international, constitutional and domestic equality rights. It must, as well, be seen as important remedial and benefits-conferring legislation.

Interpretive Practice

My second conclusion—that courts are likely in any case to give the desired liberal and purposive interpretation to pay equity legislation—flows from a number of judicial and academic comments. Courts have stated that all statutes, regardless of whether or not they

¹³⁰ In *Syndicat, L'Heureux-Dubé's* dissenting judgment notes: "The prohibition against wage discrimination is part of a broader legislative scheme designed to eradicate all discriminatory practices and to promote equality in employment" (*supra* note 9, para. 87).

¹³¹ (1996), 29 C.H.R.R. > D/349.

are constitutional or quasi-constitutional in nature, are to be interpreted contextually. In *Québec (Commission des droits de la personne et des droits de la jeunesse)*, the Supreme Court noted with approval the following excerpt translated from Côté, *Interprétation des lois*.

Without going so far as to say that words have no intrinsic meaning, their dependence on context for real meaning must be recognized. A dictionary provides a limited assortment of potential meanings, but only within the context is the effective meaning revealed....¹³²

Similarly, the Supreme Court, in *Rizzo & Rizzo Shoes Ltd. (Re)*,¹³³ recognized that statutory interpretation cannot rest on the wording of the legislation alone and adopts the following statement from *Drieger on Construction of Statutes*.

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.¹³⁴

As well, federal and provincial interpretation acts typically provide that legislation is to be considered remedial and read so as to receive a large and liberal construction. The federal *Interpretation Act*, for instance, states: “Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.”¹³⁵

The Question of Primacy

My third and last conclusion rests on the contention that while legislative primacy may be important for human rights legislation generally, it is unlikely to be important for stand-alone pay equity laws. This assumption flows primarily from the more specific focus of pay equity

¹³² Pierre-André Côté, *Interprétation des lois* (Third edition) (Montréal: Thémis, 1999), at 355-356, as quoted in *Québec (Commission des droits de la personne et des droits de la jeunesse) v. Montréal (City); Québec (Commission des droits de la personne et des droits de la jeunesse) v. Boisbriand (City)* [2000] 1 S.C.R. 665, at para. 31.

¹³³ *Rizzo*, *supra* note 101.

¹³⁴ Elmer Driedger, *Construction of Statutes* (Second edition) (Toronto: Butterworths, 1983), at 87, as quoted in *Rizzo*, *ibid.*, at para. 21. See also, *R. v. Hydro-Québec*, [1997] 3 S.C.R. 213, *Royal Bank of Canada v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411, *Verdun v. Toronto-Dominion Bank*, [1996] 3 S.C.R. 550, *Friesen v. Canada*, [1995] 3 S.C.R. 103.

¹³⁵ R.S., c. I-23. Section 10 of the *Ontario Interpretation Act* stipulates that every Act “shall be deemed to be remedial” and directs that each Act shall “receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit” (R.S.O. 1980, c. 219). Section 8 of the *British Columbia Interpretation Act* states: “Every enactment must be construed as being remedial, and must be given such fair, large and liberal construction interpretation as best ensures the attainment of its objects” (RSBC 1996 Chapter 238).

provisions, which are unlikely to target or implicate other legislative enactments and thus unlikely to result in conflict. In any case, should the issue of primacy be determined to be a problem, it is always possible for the drafters to include a primacy clause within any new legislation.

PART III: RECOMMENDATIONS

While there are distinct advantages to the sort of interpretation human rights legislation receives, there are clear and strong arguments to be made that pay equity legislation, removed from its human rights legislative context, deserves similar treatment.¹³⁶ Consequently, no recommendation against such legislative remodelling is forthcoming. However, a number of cautions are worth extending. In particular, careful thought should be given to the construction of such legislation, in light of securing for it a liberal and purposive or “organic” interpretation.

If reform of federal pay equity law encompasses the enactment of separate pay equity legislation, such legislation should contain textual recognition that pay equity is a fundamental human right, that the federal legislation is enacted in observance of Canada’s international human rights obligations, and that pay equity is an important element of a central commitment to substantive sex equality. More particularly, it is remedial legislation enacted to alleviate female workers’ economic inequality. This should be done both in terms of a provision within the text of the statute itself and with respect to a legislative preamble. In particular, although rare among contemporary statutes, a preamble can serve important interpretative purposes. Even within more traditional interpretive doctrines, preambles remain a source of interpretive guidance for the courts, providing insight into legislative understandings of the mischief the statute seeks to address.¹³⁷

While, the details and character of the administrative structure used to implement pay equity measures lie obviously well beyond the scope of this paper, some general thoughts on this issue apply. In its Report to Parliament, *Time for Action*, the federal Human Rights Commission emphasizes the importance of an administrative and adjudicative structure that sits at arms length from government.¹³⁸ Establishment of any new agency of administrative oversight must possess this characteristic in order for legislative characterization of pay equity as a fundamental human right to ring true.¹³⁹

¹³⁶ With the possible exception, of course, of being accorded primacy over other conflicting pieces of federal legislation.

¹³⁷ Reference within the *Individual Rights Protection Act*, Alberta’s human rights legislation at the time, to equality as a “fundamental principle and as a matter of public policy” served as a crucial interpretive guide for the Alberta Supreme Court in *Alberta (Attorney General) v. Gares*, ([1976] A.J. No. 360, at para. 109). Similarly, the Supreme Court in *O’Malley* stated: “To begin with, we must consider the nature and purpose of human rights legislation. The preamble to the *Ontario Human Rights Code* provides the guide....” *Supra* note 33, at 546.

¹³⁸ *Time for Action*, online: <http://www.chrc-ccdp.ca/pe-ps/TFA-LTD/SRPE_TC_TDM_RSPS.asp?l=e> (accessed March 30, 2002).

¹³⁹ This importance has been signalled by the courts. Thus, for example, the Trial Court in *Bell Canada v. CTEA* ([1998] 3 F.C. 244, para. 138) found that, given that the interests at stake in human rights legislation are quasi-constitutional and fundamental, a high level of independence is required of human rights tribunals. The Court further stipulated that there should be a relatively strict application of the administrative principles of *Valente v. the Queen et al* [1989] 2 S.C.R. 673.

Connected to these issues as well is a concern that, regardless of the legislative strategy the federal government chooses to implement pay equity measures, any legislative reform should be accompanied by a publicity and education program. While such a program obviously serves a number of substantive compliance and enforcement goals, it should also communicate strongly and clearly the intimate connection between pay equity and women's substantive equality. Emphasis that pay equity is a fundamental right, a "basic entitlement," to adopt the words of Nitya Iyer from the context of a similar recommendation in her report,¹⁴⁰ creates a political and social climate that supports indirectly, and subtly, judicial conclusions in the same vein.

Conclusion

Effective federal strategy to deal with the persistent sex-based wage disparities suffered by Canadian women is a critical political and legal issue. The range of political and legal measures—both internationally and nationally—chosen to accomplish the goal of pay equity illustrates the complexity of the issue and underlines the fact that effective and politically rigorous review of current federal law is a challenging task. Clearly, judicial treatment of whatever legislative measures emerge from this review process is a consideration worthy of attention. However, if the analysis undertaken by this paper bears true, the real challenge to reform lies not in retention of existing interpretive status but in formulating a new and more effective content to federal law that results in real change to the stubborn political problem of gender-based wage inequities.

¹⁴⁰ Iyer, *supra* note 2, at 104.

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