

8-1-1997

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Recommended Citation

Gabriela T. Mastaglia and Valerie Oosterveld, *Women's Rights under Labor Law: A Comparative Study of Argentina and Canada*, 19 Loy. L.A. Int'l & Comp. L. Rev. 915 (1997).

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ARTICLE

Women's Rights Under Labor Law: A Comparative Study Of Argentina And Canada

GABRIELA T. MASTAGLIA* AND VALERIE OOSTERVELD**

I. INTRODUCTION

Around the world, an increasing number of women have been entering the paid labor force. In Western Europe and North America, the proportion of women in the adult labor force increased from 33% in 1970 to approximately 42% in 1990.¹ A greater change occurred in Latin America, where women's representation of the adult labor force increased from 20% in 1970 to 34% in 1990.² The rise of women in the workforce³ has consequently led to greater awareness of women's labor rights. Various national and international documents such as the 1995 Beijing Declaration and Platform for Action,⁴ the U.N. Convention on the

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1. See UNITED NATIONS, *THE WORLD'S WOMEN 1995: TRENDS AND STATISTICS* at 109, U.N. Doc. ST/ESA/STAT/SER.K/12, U.N. Sales No. E.95.XVII.2 (1995) [hereinafter *THE WORLD'S WOMEN*].

2. See *id.*

3. This Article uses the term "working women" or "women in the workforce" to refer to women in the paid labor force because these women are regulated under the domestic labor laws. This designation is not meant to detract from working women in the unpaid labor force.

4. 1995 Beijing Declaration and Platform for Action, U.N. Doc. A/Conf.177/20 (1995).

Elimination of All Forms of Discrimination Against Women,⁵ and the American Convention on Human Rights⁶ reflect this heightened awareness.

This Article analyzes the laws that protect working women in Argentina and Canada.⁷ Although Argentina has a civil law system and Canada follows the common law tradition, women in both countries confront the same issues due to their inequality with men.

The percentage of men and women vary in all sectors of the Argentine and Canadian labor force. In Argentina, the service industry—which usually offers low-paying, unstable, part-time positions—employs 86% of working women, but only 45% of working men.⁸ Only 2% of Argentine women work in agriculture, compared to 13% of Argentine men.⁹ The industrial sector consists of 12% women, compared to 41% men.¹⁰ Similarly, in Canada, the service industry employs 83% of working women, but only 57% of working men.¹¹ In Canada, only 2% of women work in the agricultural sector, compared to 4% of men.¹² In the industrial sector, women represent 15% of the labor force, compared to 40% of men.¹³

The unemployment situation of women in Argentina and Canada also differs along gender lines. For example, in 1991–1992, 7.7% of women and 6.6% of men in Argentina were unemployed, while, in Canada only 10.4% of women were unemployed, compared to 12% of men.¹⁴

This Article examines the international and domestic aspects of labor equality rights in Argentina and Canada. Part II of this

5. Convention on the Elimination of all Forms of Discrimination Against Women, adopted Dec. 18, 1979, 1249 U.N.T.S. 13, 19 I.L.M. 33 [hereinafter CEDAW].

6. American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 123, 9 I.L.M. 101.

7. This paper discusses the law in Argentina and Canada as of November 1, 1996.

8. See THE WORLD'S WOMEN, *supra* note 1, at 148.

9. See *id.*

10. See *id.*

11. See *id.*

12. See *id.*

13. See *id.*

14. See *id.* at 122. The Argentine figures represent Greater Buenos Aires statistics only.

Article introduces the international and national laws that affect Argentine women. Part III addresses Canadian women's rights, emphasizing the coexistence of both federal and provincial labor laws. Both Parts II and III address each country's women's rights with respect to wages, salaries, working environment and labor force demographics, as well as "protective" rights, such as those affecting maternity and marital status. The article concludes that though neither nation has achieved gender equality in employment law, each can learn from the other's experience and each has the essential building blocks in place to achieve future workplace equality.

II. ARGENTINE LABOR LAW AND WOMEN'S RIGHTS

A. *The Argentine Legal System: A Brief Description*

Argentina's civil law system is patterned on European continental law, and parallels the legal systems in Spain and France.¹⁵ Written laws form the core of Argentina's civil law system,¹⁶ and these laws, like U.S. statutes, provide the basic rules that judges use for deciding a case. Judicial decisions in a civil law system, however, do not represent a formal source of rights and duties. Argentine courts apply judicial decisions only to the case being decided. Thus, the decisions lack precedential value and do not become general legal rules. In contrast, the common law system relies upon the doctrine of *stare decisis*, whereby judgments of previous cases govern the judgment of present cases.¹⁷

In civil law jurisdictions, cases are often decided based on a law's interpretation. Thus, the most important question in these jurisdictions is: "What does the law really say?" The answer to this question determines the outcome because the cases are fact-specific. For example, article 249 of Law No. 20.744 states:

The contract of employment comes to an end because of the death of the employer when his personal or legal conditions, professional activity or other circumstances have been the determinant reason of the labor relationship and without them the latter cannot continue.

15. See ENRIQUE B. AFTALION ET AL., INTRODUCTION AL DERECHO 339 (1980).

16. See *id.*

17. See *id.* at 337.

In this case, the employee will be enabled to receive the severance pay mentioned in article 247 of this law.¹⁸

The meaning of "his personal or legal conditions" in this law or "other conditions" is difficult to ascertain, and the judge has sole authority to interpret and apply the law. In interpreting the words, a judge may use whatever means he or she feels necessary, such as dictionaries.

Although legislation governs in a civil law jurisdiction, case law also plays an important role. Argentine judges may refer to the decisions of judges to help determine the real meaning of the words of a law. They may also use the reasoning of other judges in similar cases as the basis of their arguments, or to ultimately arrive at their own decision.¹⁹ The other judge's reasoning, however, has persuasive, rather than precedential value.²⁰ Thus, a judge may make completely different decisions in similar cases. The key difference between the two systems is that the civil law system allows the judge more freedom to avoid earlier decisions if doing so will obtain a more equitable result.²¹

Argentina's federal government system, like Canada's, consists of one federal government and many local governments.²² The National Congress enacts the chief laws of the country, while local legislatures may enact other laws for their locality.²³ Labor laws come under the National Congress' purview because of their effect on Argentina's economic development and society.²⁴ Although the National Congress sets the national labor policies, local governments enact labor laws that are administrative in character and support federal labor laws.²⁵ These local rules apply only in

18. Law No. 20.744, art. 249, Sept. 20, 1974 (Arg.). "*Condiciones, Monto de la indemnización.* Se exige el contrato de trabajo por muerte del empleador cuando sus condiciones personales o legales, actividad profesional u otras circunstancias hayan sido la causa determinante de la relación laboral y sin las cuales ésta no podría proseguir. En este caso, el trabajador tendrá derecho a percibir la indemnización prevista en el art. 247 de esta ley."

19. See AFATALION, *supra* note 15, at 318.

20. See *id.*

21. See *id.*

22. See Law No. 24.430, art. 1, Jan. 3, 1995 (Arg.).

23. See *id.*

24. See *id.* at art. 75.

25. See *id.* at arts. 121-22.

the province²⁶ where enacted.²⁷

B. Argentine Labor Law: A Brief Description

Argentine labor law is comprised of groups of laws and agreements of different hierarchies and importance, similar to a pyramid. At the top of the pyramid is the National Constitution.²⁸ Next in rank are international treaties, national laws, professional statutes, agreements between trade unions and companies or groups of companies, and agreements between employees and employers.²⁹ Uses and customs sit at the bottom of the pyramid.³⁰ Jurisprudence has the same persuasive but non-binding role as in the general system described above.³¹

The National Constitution was initially adopted in 1853, was subsequently amended in 1860, 1866, 1898, 1957, and amended again in great detail in 1994.³² The Argentine Constitution has two parts: "Declarations, Rights and Guarantees," and the "Authorities of the Nation."³³ All federal and provincial judges must apply the National Constitution.³⁴

Three sections of the Constitution address labor issues: Article 14 concerns civil rights, and entitles every citizen to work;³⁵ Article 14-bis, incorporated into the Constitution in 1957, outlines labor rights;³⁶ and Article 75(12) expressly authorizes the National Congress to enact a national labor code.³⁷ To date, however, the

26. A province is a political organization is similar to a state in the United States, or a province of Canada.

27. CONST. ARG. arts. 123, 126.

28. *See id.* at art. 31.

29. *See* Law No. 20.744, Sept. 20, 1974 (Arg.).

30. *See id.* at art. 1.

31. *See* AFATALION, *supra* note 15, at 318.

32. *See* Law No. 24.430, Jan. 3, 1995 (Arg.).

33. CONST. ARG. pts. 1-2. For a discussion on Argentine constitutional history, see JOAQUÍN V. GONZALEZ, *MANUAL DE LA CONSTITUCION ARGENTINA* (Angel Estrada & Cia S. A. eds., 1980); HORACIO D. ROSATTI ET AL., *LA REFORMA DE LA CONSTITUCION* (Rubinzal & Culzoni eds., 1994).

34. Jonathan M. Miller, Courts and the Creation of a "Spirit of Moderation" Judicial Protection of Revolutionaries in Argentina, 1863-1929, 20 *HASTINGS INT'L & COMP. L. REV.* 231, 241 (1997).

35. *See* CONST. ARG. pt. 1, ch. 1, art. 14.

36. *See id.* pt. 1, ch. 2, art. 14-bis.

37. *See id.* pt. 1, ch. 2, art. 75(12).

National Congress has not yet enacted the labor code. Instead, National Law No. 20.744, called Ley de Contrato de Trabajo (Law of Contracts of Employment) governs labor relations.³⁸

Law No. 20.744, which is similar to a labor code, determines the basic principles and rights of the Argentine labor system.³⁹ This law essentially creates minimum labor standards. Other sources of rights, such as collective agreements and any other sources of rights and duties, cannot create less beneficial rights than those in Law No. 20.744.⁴⁰ For example, Article 150 entitles an employee to a yearly paid vacation.⁴¹ If an employee has worked for the same employer for less than five years, then the employee is entitled to a minimum of fourteen vacation days. If an employee has worked for the same employer for five to ten years, then that employee is entitled to a minimum twenty-one days. Any agreement between the employer and the employee for less vacation time is illegal and void.⁴² The employer and employee, however, can agree to a longer vacation because this benefits the worker.⁴³ For example, an agreement for thirty vacation days per year is legal.

Article 1(b) of Law No. 20.744 refers to "other laws and professional statutes."⁴⁴ The professional statutes address employees' hardships in certain occupations, such as the long hours sailors work at sea, and remedies that address the specific circumstances of the occupation.⁴⁵ They differ in the scope of activity covered. The National Congress enacted these professional statutes to govern specific types of occupations, such as sales clerks, construction workers, sailors, etc.⁴⁶

The reference to "other laws" in article 1(b) includes labor laws that complement the main labor law, Law No. 20.744.⁴⁷ For

38. This is a literal translation.

39. See generally Law No. 20.744, Sept. 20, 1974 (Arg.).

40. See *id.*

41. See *id.* at art. 150.

42. See *id.*

43. See *id.*

44. Law No. 20.744, art. 1(b), Sept. 20, 1974 (Arg.).

45. See *id.*

46. See GUSTAVO RAUL MEILIJ, CONTRATO DE TRABAJO 4 (1980).

47. See *id.* at 3; Law No. 20.744, Sept. 20, 1974 (Arg.).

instance, article 90 of Law 20.744 prohibits employment for a limited period of time, such as a month or a year, when the activity does not justify a fixed-term contract.⁴⁸ Other laws such as Law No. 24.013, however, state that it is possible to create a fixed-term employment contract for a limited period under certain circumstances.⁴⁹ The period may range from a minimum of six months to a maximum of two years.⁵⁰ For example, an employer may need to hire a woman for six months as an administrative employee assigned to normal office tasks. Article 90 of Law 20.744,⁵¹ precludes filling this job; however, under article 3 of Law No. 24.465, it is legal to employ a woman for this position for a limited period of time.⁵²

Trade unions and companies can make labor agreements, referred to as *Convenios Colectivos de Trabajo* or Collective Covenants on Employment (CCT). Although very similar to national labor laws, CCTs apply only to the activities, persons, territories and time set out in the agreement.⁵³ A CCT's authority varies according to the status of the bargaining parties. A CCT between a national union of employees and a national union of companies has greater scope and importance than one between a regional union of employees and a union of companies.⁵⁴ Individual companies and unions may enter into a CCT, but these are smaller in scope and importance than national or regional agreements.⁵⁵

National laws, like Law No. 20.744, and the scope of the CCT determine the place of the CCT within the pyramid of labor regulations. For example, a CCT of greater importance may preclude a company and its employees from establishing a CCT with rights and duties not in accordance with the rights and duties of the former.⁵⁶

Similar to the CCT, is the *laudos arbitrales* or referee's deci-

48. See Law No. 20.744, art. 90, Sept. 20, 1974 (Arg.).

49. See Law No. 24.013, Dec. 5, 1991 (Arg.).

50. See *id.*

51. See Law No. 20.744, Sept. 20, 1974 (Arg.).

52. See *id.*

53. See MEILIJ, *supra* note 46, at 5.

54. See *id.*

55. See *id.*

56. See *id.*

sions, which provide mechanisms to resolve disputes.⁵⁷ When a dispute arises between trade unions and companies, the terms of the agreement may be settled by a referee, an impartial third person selected by both parties.⁵⁸ The decision of the referee binds both parties who must then follow the CCT in accordance with the referee's interpretation.⁵⁹

Individual employment contracts cover those employees who do not fall within the CCT. Although Law No. 20.744 provides the minimum standards for employment contracts, such contracts may provide for greater rights or benefits.⁶⁰ Individual employment contracts may be written or oral;⁶¹ however, it is more difficult to prove the contents of an oral employment contract.

Uses and customs, also known as customary law, represent the bottom of the labor law hierarchy. Article 1(e) of Law No. 20.744 states that customary law is a source of rights.⁶² This article is applied as a complement to Law No. 20.744 and serves as a guide for judges.⁶³ The application of customary law depends upon whether it is consistent with higher labor laws. It is difficult to demonstrate the practical use of customary law because case law rarely uses it. Most cases applying customary law are extremely old and consequently are not appropriate for guidance. Uses and customs are used, however rarely, in cases involving the dairy industry.⁶⁴

C. Women's Rights Under Argentine Labor Laws

The Argentine labor legal system is a complex one formed by international, constitutional and national laws. The labor system addresses the rights of working women in two ways: promoting equal rights and creating rights that address the differences between men and women—namely, maternity rights. Some employ-

57. *See id.*

58. *See id.*

59. *See id.*

60. *See* Law 20.744, Sept. 20, 1974 (Arg.).

61. *See id.* at art. 30.

62. *See* Law No. 20.744, art. 1(e), Sept. 20, 1974 (Arg.).

63. *See id.* at art. 1.

64. The most recent case that applied customary laws dates back to 1974. C.A.T., Sala V, 1974 Derecho del Trabajo 709.

ers discriminate against female employees because of the cost of maternity rights.

1. Equality Before the Law

The Argentine National Constitution contains equal rights provisions affecting working women. Article 16 establishes that all inhabitants are equal before the law.⁶⁵ The term "inhabitants" refers to both native Argentines and foreigners living in Argentina.⁶⁶ Article 14-bis, introduced into the Constitution in 1957, confers certain labor rights for both men and women.⁶⁷ For example, men and women are entitled to an equal salary for the same work. Article 14-bis echoes article 11(d) of the Convention on the Elimination of all Forms of Discrimination Against Women, which requires States Parties to ensure "[t]he right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work."⁶⁸

Argentine labor law does not differentiate between equal pay for equal work or equal pay for the same work. The tasks and characteristics of the jobs, including hours of work and levels of responsibility, must be evaluated to determine whether salaries should be equal. For example, if two doctors, one male and one female, both work the same number of hours each day and perform the same tasks in the same section of a private clinic, under Argentine law, their salaries should be equal. If the female doctor, however, is also the chief of the section, then her additional responsibilities, such as directing the staff, must be considered. The salaries should be different in this latter example; otherwise this would indicate sex-based discrimination.

Article 19 of Law No. 20.744 generally accepted that inequalities existed among employees.⁶⁹ It allowed inequalities in employment contracts, but only to compensate for other inequali-

65. See CONST. ARG. pt. 1, ch. 1, art. 16.

66. See *id.*

67. See *id.* at art. 14-bis. If article 16 of the National Constitution forbids inequalities before law, and article 14 establishes certain labor rights without distinctions of any kind, then it must be deduced that both men and women are entitled to these rights.

68. CEDAW, *supra* note 5, at art. 11(d).

69. See Law No. 20.744, art. 19, Sept. 20, 1974 (Arg.).

ties that appear in the labor relationship.⁷⁰ Article 19 was later abolished and replaced with Law No. 21.297.⁷¹ Law No. 21.297 modifies Law No. 20.744 and introduces the current article 17. Article 17 guarantees equal rights and prohibits any kind of discrimination among employees, including sex discrimination.⁷²

Article 81 elucidates the general prohibition on discrimination found in article 17. Under article 81, employers must treat all similarly situated employees the same.⁷³ Article 81 states that treatment based arbitrarily on sex, religion or race represents unequal treatment.⁷⁴

Although article 75(23) of the Constitution is not a labor law *per se*, it provides judicial guidance for the interpretation of labor rights. It states that the government will promote and take all necessary measures to guarantee human rights, especially the rights of women.⁷⁵ This article prohibits legal interpretation of laws that do not promote women's rights.⁷⁶

2. International Law

International treaties form the second important source of labor rights in Argentina.⁷⁷ Article 31 of the Constitution states that international treaties are the supreme law of the nation.⁷⁸ In addition, article 75(22) states that international treaties have precedence over national laws.⁷⁹ Therefore, under the Constitution, international treaties, called "International Treaties with Constitutional Hierarchy,"⁸⁰ deserve the same judicial treatment as constitutional rights. Despite this importance, article 1 of Law No. 20.744 does not mention the effect of the Constitution or in-

70. *Id.*

71. *See* Law No. 21.297, June 3, 1985 (Arg.).

72. *See* Law No. 20.744, art. 19, Sept. 20, 1974 (Arg.).

73. *See id.* at art. 81.

74. *See id.*

75. *See* CONST. ARG., pt. 2, ch. 1, art. 75(2).

76. *See id.*

77. *See id.* at arts. 31, 75(22).

78. *See id.* at pt. 1, ch. 1, art. 31.

79. *Id.* at pt. 2, ch. 1, art. 75(22).

80. *Id.* at art. 75(22).

ternational treaties on labor law.⁸¹ Both, however, are applicable to labor law because they rank higher in the Argentine legal pyramid.⁸² Treaties take effect immediately upon ratification, and do not require implementing legislation to make them a part of the Argentine internal law.⁸³

In 1972, Argentina ratified the Vienna Convention on the Law of Treaties.⁸⁴ Article 27 of the Convention prevents a party from invoking the provisions of its internal law as justification for failing to perform the treaty.⁸⁵ Thus Argentina's laws may not contradict the terms of the ratified international treaty. Even if Argentina had not ratified the treaty, it would have had an obligation under article 18 to refrain from acts that would defeat the purpose of the treaty until it expressed its intention to not become a party to the treaty.⁸⁶

In 1980, four years after the enactment of Law No. 20.744, Argentina signed the Convention on the Elimination of all Forms of Discrimination Against Women.⁸⁷ In 1985, Argentina codified the ratification of the Convention in Law No. 23.179.⁸⁸ Argentina has also incorporated the Universal Declaration of Human Rights,⁸⁹ the American Declaration of the Rights and Duties of Man,⁹⁰ the United Nations Charter,⁹¹ and the Charter of the Or-

81. See Law No. 20.744, art. 1, Sept. 20, 1974 (Arg.).

82. See CONST. ARG., pt. 1, ch. 1, art. 31.

83. See GERMAN J. BIDART CAMPOS, 2 DERECHOS CONSTITUCIONAL ARGENTINO 284 (1988).

84. Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 [hereinafter Vienna Convention]. This law was enacted and ratified by Argentina through Law No. 19.865. See LOUIS HENKIN ET AL., BASIC DOCUMENTS SUPPLEMENT TO INTERNATIONAL LAW, CASES AND MATERIALS 86 (1993).

85. See Vienna Convention, *supra* note 84, at art. 27.

86. See *id.* at art. 18.

87. CEDAW, *supra* note 5.

88. The U.N. Convention, CEDAW was enacted and ratified by Argentina through Law No. 23.179. See HENKIN ET AL., *supra* note 84, at 174.

89. Universal Declaration of Human Rights, arts. 2, 7, 8, 22, 23, G.A. Res. 217A U.N. Doc. A/810, at 71 (1948) [hereinafter Universal Declaration of Human Rights]; see also CONST. ARG. art. 75(22).

90. American Declaration of the Rights and Duties of Man, May 2, 1948, O.A.S. Res. XXX, OEA/Ser.L. V/II. 82, doc. 6 rev. 1, 17 (1992). See HENKIN ET AL., *supra* note 84, at 287.

ganization of the American States (O.A.S.)⁹² into its legal system. In addition, Argentina ratified the International Covenant on Economic, Social and Cultural Rights,⁹³ the International Covenant on Civil and Political Rights⁹⁴ and the American Convention on Human Rights.⁹⁵ The Argentine Constitution integrated all of these international documents, except the United Nations Charter and the Charter of the O.A.S., as International Treaties with Constitutional Hierarchy.⁹⁶

The rights set out in the International Treaties with Constitutional Hierarchy have the same protections and scope as constitutional rights. They are not, however, strictly construed as part of the Constitution. To consider the treaties as part of the Constitution would subject them to the same rigid, complicated modification rules of the Constitution, effectively binding the treaties to an unchanging status. Instead, legislators may modify the treaties at the international level, avoiding additional domestic difficulties.

Because the Argentine legal system incorporates international agreements into itself, Argentine women benefit from these agreements. The non-discrimination articles of the Universal Declaration of Human Rights⁹⁷ supplement the general non-discrimination clauses of Law No. 21.297.⁹⁸ Similarly, articles 4 and 26 of the International Covenant on Civil and Political Rights,⁹⁹ and articles 6 and 7 of the International Covenant on Economic, Social and Cultural Rights¹⁰⁰ constitute part of Argentine law. The Constitution also includes article 11 of the Convention on the Elimination of all Forms of Discrimination Against

91. U.N. CHARTER. Argentina codified this into law. See Law No. 21.195, Sept. 19, 1945 (Arg.).

92. Charter of the Organization of the American States, April 30, 1948, 2 U.S.T. 2394, 119 U.N.T.S. 3.

93. International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 19, 1966, 6 I.L.M. 360, 993 U.N.T.S. 33.

94. International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, 6 I.L.M. 368, 999 U.N.T.S. 171.

95. American Convention on Human Rights, *supra* note 6.

96. See CONST ARG. art. 75(22).

97. See Universal Declaration of Human Rights, *supra* note 89.

98. See Law No. 21.297, arts. 17, 81, April 29, 1976 (Arg.).

99. International Covenant on Civil and Political Rights, *supra* note 94.

100. International Covenant on Economic, Social and Cultural Rights, *supra* note 93.

Women, which eliminates employment discrimination against women.¹⁰¹ Further, the non-discrimination clauses of the American Declaration on the Rights and Duties of Man¹⁰² and the American Convention on Human Rights¹⁰³ have constitutional status.¹⁰⁴

Argentina has also ratified other treaties that do not have the same status as International Treaties with Constitutional Hierarchy, but are important in defining the scope of women's labor rights. For example, Argentina ratified several International Labor Organization (ILO) Conventions. These include: Maternity Protection Convention, No. 3;¹⁰⁵ Night Work (Women) Convention, No. 4;¹⁰⁶ Underground Work (Women) Convention, No. 45;¹⁰⁷ Equal Remuneration Convention, No. 100;¹⁰⁸ Discrimina-

101. CEDAW, *supra* note 5.

102. American Declaration on the Rights and Duties of Man, *reprinted in* OAS BASIC DOCUMENTS TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEMS, OEA/Ser.L/V/II.71, at 17 (1988) (adopted May 2, 1948).

103. American Convention on Human Rights, Nov. 22, 1969, 9 I.L.M. 101 (entered into force July 18, 1978).

104. Law No. 23.054, Mar. 27, 1984 (Arg.).

105. Convention Concerning the Employment of Women Before and After Childbirth, No. 3, Nov. 29, 1919, 38 U.N.T.S. 53 [hereinafter Maternity Protection Convention, No. 3], *reprinted in* 1 INTERNATIONAL LABOUR CONVENTIONS AND RECOMMENDATIONS 1919-1951, 12 (1996). Argentina ratified this treaty on November 30, 1933. *See* INTERNATIONAL LABOR ORGANIZATION, LISTS OF RATIFICATION BY CONVENTION AND BY COUNTRY 5 (1994) [hereinafter ILO LISTS]. Note that Argentina has not ratified Maternity Protection Convention, No. 103. *See id.*

106. Convention Concerning Employment of Women During the Night, No. 4, Nov. 28, 1919, 38 U.N.T.S. 67 [hereinafter Night Work (Women), No. 4], *reprinted in* 1 INTERNATIONAL LABOUR CONVENTIONS AND RECOMMENDATIONS 1919-1951, 16 (1996). The ratification of this convention was registered on Nov. 30, 1933. *See* ILO LISTS, *supra* note 105, at 6. Note that Argentina has not ratified Night Work (Women), No. 89, nor its 1990 Protocol. *See id.*

107. Convention Concerning the Employment of Women in Underground Work in Mines of All Kinds, No. 45, June 21, 1935, 40 U.N.T.S. 63 [hereinafter Underground Work (Women), No. 45], *reprinted in* 1 INTERNATIONAL LABOUR CONVENTIONS AND RECOMMENDATIONS 1919-1951, 258 (1996). The ratification of this convention was registered on March 14, 1950. *See* ILO LISTS, *supra* note 105, at 67.

108. Convention concerning Equal Remuneration for Men and Women Workers for Equal Value, No. 100, June 29, 1951, 165 U.N.T.S. 303, [hereinafter Equal Remuneration Convention, No. 100], *reprinted in* 1 INTERNATIONAL LABOUR CONVENTIONS AND RECOMMENDATIONS 1919-1951, 649 (1996). Argentina ratified this convention on August 24, 1956. *See* ILO LISTS, *supra* note 105, at 132.

tion (Employment and Occupation) Convention, No. 111;¹⁰⁹ and Workers with Family Responsibilities Convention, No. 156.¹¹⁰ These international laws form a part of Argentine national law and are considered part of the supreme law of the nation. Law No. 20.744 incorporated many of these international provisions.¹¹¹ Labor courts directly apply these incorporated international laws in their decisions.¹¹²

This system of international laws holds great importance for working women. The integration of international law into national law and the grant of near-constitutional status to rights stemming from international law elevate international law to a useful and active role in ensuring women's rights. As a result, the rights available to Argentine women are comparable to any developed country.

3. Special Labor Rights for Women

In addition to the constitutional, national and international laws pertaining to labor, Argentina has specific labor laws which delineate labor rights for women. Title VII of Law No. 20.744 solely applies to female employees.¹¹³ It reiterates the principle of equal rights between men and women and sets out special rights to address women's sexual and social situations and is divided into four chapters.

Chapter I contains general provisions about the right of women to employment. In particular, article 172 states that

109. Convention Concerning Discrimination in Respect of Employment and Occupation, No. 111, June 25, 1958, 362 U.N.T.S. 31 [hereinafter Convention Concerning Employment Discrimination], reprinted in 2 INTERNATIONAL LABOUR CONVENTIONS AND RECOMMENDATIONS 1952-1976, 176 (1996). Argentina ratified this convention on June 18, 1968. See ILO LISTS, *supra* note 105, at 148.

110. Workers with Family Responsibilities, No. 156, June 23, 1981, 1331 U.N.T.S. 295, reprinted in 3 INTERNATIONAL LABOUR CONVENTIONS AND RECOMMENDATIONS 1977-1995, 120 (1996). Argentina ratified this convention on March 17, 1988. See ILO LISTS, *supra* note 105, at 200.

111. See Law No. 20.744, Sept. 20, 1974 (Arg.).

112. If the international treaties become part of the internal legal system of Argentina as soon as they are ratified, then the judges must apply the law, and therefore must apply those international documents. See *Estrella Fernandez v. Sanatorio Guemes* 311 Fallos 1602 (1988).

113. See Law No. 20.744, Sept. 20, 1974 (Arg.).

“woman can celebrate any kind of contract of employment.”¹¹⁴ This article also provides that no CCT or any regulation may discriminate based on gender or marital status, even if marital status changes during the labor relationship.¹¹⁵ Furthermore, all CCT must comply with the principle of equal remuneration for equal work.¹¹⁶

Article 172, however, only benefits already employed women and does not address discrimination against women applying for jobs.¹¹⁷ In addition, article 172 does not necessarily eliminate pay inequalities between men and women.¹¹⁸ Although an employer may pay every employee the same base salary, the employer may put into place an “incentive system” that awards extra pay to employees who produce more goods or work more efficiently.¹¹⁹ As long as the incentive system does not provide rewards based on gender or marital status, it is legal.¹²⁰ The incentive system, however, may reward more male than female workers if the male employees are more efficient, for example because men can generally lift more weight than women.¹²¹

Article 174 of Title VII affords women the right to rest for two hours if they work in the morning and in the afternoon.¹²² This right differs from those described above because an employee can contract out or waive this right.¹²³ Depending on the women’s type of work, the number of her working hours, the damage that a two hour interruption may have on her work and her general interest in taking such a break, a woman may be exempt from this right.¹²⁴ If any one of these reasons exists, the provincial or national administrative authority may suspend or reduce this rest

114. *Id.* at art. 172. In the Argentine mentality, the act of hiring an employee is likened to the “celebration” of a contract between two free parties.

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. CSJN, 1966 *Derecho del Trabajo* 449.

121. *Id.*

122. *See* Law No. 20.744, Sept. 20, 1974.

123. *Id.*

124. *Id.*

period.¹²⁵

Article 175 specifies that women cannot do their work at home if they have been hired to work on the premises of the company.¹²⁶ The underlying purpose of this article is to prevent the employer from illegally extending the maximum working hours, by forcing the women to finish work at home that they did not finish at the office during the day.¹²⁷ Implicitly, the law also prevents employers from marginalizing women because in asking women to work at home, women would be expected to do their work and look after children at the same time.

Article 176 forbids the hiring of women for unhealthy and dangerous jobs.¹²⁸ Both provincial and national administrative regulations specify these positions.¹²⁹ For example, Law No. 11.317 of 1924 enumerates the following jobs forbidden to women: the distillation of alcohol; the manufacture of coloring toxic matters, flammable materials, explosives, or metals; mining work; and the loading and unloading of ships.¹³⁰ The law imposes strict liability on an employer who does not adhere to article 176 if a woman suffers an illness or accident from doing forbidden work.¹³¹ The employer is presumed guilty and must pay the legally established compensation.¹³²

Chapter II deals with pregnancy and maternity issues. Article 177 protects a woman from termination for being pregnant once she has notified her employer of a pregnancy.¹³³ The notification must be in a written form, such as a telegram or a special postal letter called *carta documento*, and include a medical certificate that estimates the date of birth.¹³⁴ If the employer dismisses a woman who properly notified her employer within seven and a half months before or after childbirth, the law presumes that the

125. *Id.*

126. *Id.* at art. 175.

127. *Id.*

128. *Id.* at art. 176.

129. *Id.*

130. See Law No. 11.317, Nov. 19, 1924 (Arg.).

131. *Id.*

132. *Id.*

133. See Law No. 20.744, art. 177, Sept. 20, 1974 (Arg.).

134. See *id.*

termination was due to her pregnancy.¹³⁵ If the employer cannot demonstrate that it terminated the woman for reasons unrelated to the pregnancy, the employer must pay a high price, often normal compensation plus one year's salary to the fired woman.¹³⁶

Article 177 also provides for maternity leave for a period of forty-five days before and forty-five days after the birth of a child.¹³⁷ In addition to paying the employee on maternity leave her regular pay during the ninety-day period, an employer must keep her job open until her return.¹³⁸ An employee may reduce the first forty-five days to thirty days and elect to add it to the forty-five days after the birth.¹³⁹ The probable date of the child's birth could also alter these time periods.¹⁴⁰ If the child is born before the probable date, the remainder of the first forty-five days will be added to the period following childbirth.¹⁴¹

In addition to the ninety day maternity leave provided in article 177, a woman may be entitled to further leave in certain cases. These include: (1) when she has had a baby or (2) when she must take care of her minor ill child or children.¹⁴² For example, a woman who has worked for the same employer for at least one year and who must take care of her baby or other children because of illness, may receive between three and six months *additional* paid leave.¹⁴³ After her leave expires, she has the right to return to her former job.¹⁴⁴ If the employer cannot offer her the same position, the employer may offer her a different job within the same category.¹⁴⁵ If she does not agree to this change, the employer must pay her compensation.¹⁴⁶ Articles 183 and 184, however, provide that if it is impossible for the employer to give her a

135. *See id.* at art. 178.

136. *See id.* at art. 182.

137. *See id.* at art. 177.

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. *See id.* at arts. 177, 183.

143. *See id.*

144. *See id.*

145. *See id.* at art. 183.

146. *See id.*

job, then the compensation decreases.¹⁴⁷

Article 179 provides that any female employee who is nursing may take two half-hour breaks during each working day, for one year following a baby's birth.¹⁴⁸ After the one year period, the employee may request an extension if she must continue nursing her baby for medical reasons.¹⁴⁹ If an employer does not allow the two half-hour breaks, or if the employee cannot have the baby with her at work, then the workday of the female employee will be reduced by one hour.¹⁵⁰ In such a situation, the employer must pay the employee the same salary as if she had worked the entire day.¹⁵¹

Chapter III addresses discrimination based on a woman's marital status.¹⁵² Under article 181, if an employer fires a woman within three months before or six months after marriage, the employer must pay costly compensation if it cannot justify her dismissal.¹⁵³

4. Jurisprudence of the Argentine Supreme Court

The highest court in Argentina has ruled in several cases that discrimination is forbidden against working women; that every person is equal before the law; and that all people who are subject to the same law must be treated in the same way under the same circumstances.¹⁵⁴ In particular, in 1988, the Supreme Court decided *Estrella Fernandez v. Sanatorio Guemes S.A.*,¹⁵⁵ a labor discrimination case. In this case, the employer, an important clinic in

147. See *id.* at arts. 183-84.

148. See *id.* at art. 179.

149. See *id.*

150. See MELIJ, *supra* note 46, at 221.

151. See *id.*

152. See Law No. 20.744, Sept. 20, 1974 (Arg.).

153. See *id.* at art. 181.

154. See Don Rafael Etchevarne en autos con la sucesion de don Carlos Salas, sobre desalojamiento, Recurso de Hecho, 137 Fallos 105 (1922); Don Juan Hannah Drysdale y otros contra la Provincia de Buenos Aires, sobre Devolucion de una suma de dinero, 149 Fallos 417 (1927); Amelia Alarcon de Vidal Y Otros v. Nacion Argentina, 258 Fallos 176 (1952); Juana Magdalena Ana Muniz Barreto de Alzaga y Otros v. Antonio Destefanis, 270 Fallos 374 (1968).

155. *Estrella Fernandez v. Sanatorio Guemes S.A.*, 311 Fallos 1602 (1988).

Buenos Aires, dismissed a female nurse.¹⁵⁶ She sued the clinic for unjustified dismissal and sought compensation.¹⁵⁷ She claimed that her employer discriminated against her and did not pay her a wage proportional to her job duties and efficiency.¹⁵⁸ She did not explicitly claim, however, that the pay difference was due to gender-related discrimination.¹⁵⁹ In deciding this case, the Argentine Supreme Court considered the provisions of article 14-bis of the National Constitution,¹⁶⁰ article 81 of Law No. 20.744,¹⁶¹ the Universal Declaration of Human Rights,¹⁶² the ILO's Equal Remuneration Convention No. 100,¹⁶³ and other Argentine Supreme Court cases, including *Segundo, Daniel c/ Siemens S.A.*;¹⁶⁴ *Dardanelli de Cowper, Ana Inés Marta c/ Aerolíneas Argentinas S.A.*;¹⁶⁵ *Capitán Jorge Santana y otros*;¹⁶⁶ *Ferrer, Roberto O. Ministerio de Defensa*;¹⁶⁷ and *Rieffolo Basilotta, Fausto*.¹⁶⁸ The Court also examined several U.S. Supreme Court cases, including *Corning Glass Works v. Brennan*¹⁶⁹ and *McDonnell Douglas Corp. v. Green*.¹⁷⁰

In *Estella Fernandez*, the Court declared it lawful to pay different wages for the same tasks if the difference arose from justified objective circumstances.¹⁷¹ In addition, it held that the employee must prove the circumstances of the discrimination and that the employer must justify the different employees' salaries based

156. See *id.* at 1607.

157. See *id.* Under Argentine law, when a employee is dismissed unjustifiably he or she must be paid compensation determined by his or her salary.

158. See *id.*

159. See *id.*

160. ARG. CONST. art. 14-bis.

161. See Law No. 20.744, art. 81, Sept. 20, 1974 (Arg.).

162. See Universal Declaration of Human Rights, *supra* note 89.

163. See Equal Remuneration Convention, No. 100, *supra* note 108.

164. See *Segundo, Daniel c/ Siemens S.A.* 308 Fallos 1032 (1986).

165. See *Dardanelli de Cowper, Ana Inés Marta c/ Aerolíneas Argentinas S.A.* 306 Fallos 1560 (1984).

166. See *Capitán Jorge Santa Ana y otros Fallos* 1018 (1985).

167. See *Roberto Ferrer c/ Ministerio de Defensa* (F.293.XX - 11/25/86).

168. *Basilotta Rieffolo* (R.234.XX - 2/5/1987).

169. See *Corning Glass Works v. Brennan*, 417 U.S. 188 (1974).

170. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

171. See *Estrella Fernandez v. Sanatorio Guemes* 311 Fallos 1602, 1608-09 (1988).

on objective and reasonable facts.¹⁷² This case established the burden of proof that subsequent cases have followed.¹⁷³

5. Governmental Anti-Discrimination Measures and Other Measures to Encourage the Hiring of Women

Labor laws ensure that female employees enjoy at least the same rights as men; female employees, however, have additional rights based on their potential. In this sense, a women's legal situation seems privileged. On the other hand, some protective laws, such as article 174, restrict the kind of work women can do.¹⁷⁴ Employers view these protective laws as undesirable encumbrances because an employer will be fined if a woman is injured while doing forbidden work, and it has the burden of justifying dismissals of pregnant or newly-married employees.¹⁷⁵ Additionally, employers believe that female employees are expensive. For example, an employer must hire another employee to replace a pregnant employee on maternity leave, and pay both salaries. These beliefs have led to discriminatory hiring in order to avoid having women employees. This leaves women in an untenable dilemma. The government enacts labor laws to protect the rights of women workers, but employers would prefer not to hire women who may claim those rights. Those already employed rarely claim discrimination for fear of losing their jobs.

Women in Argentina do not have specific guidelines for proving sex discrimination in hiring. Argentina lacks a rule similar to that announced in the U.S. Supreme Court case, *Texas Department of Community Affairs v. Burdine*.¹⁷⁶ *Burdine* establishes "[t]he burden that shifts to the defendant [the employer] . . . is to rebut the presumption of discrimination by producing evidence that the plaintiff was rejected . . . for a legitimate, nondiscriminatory reason."¹⁷⁷ No legal presumption of discrimination exists in the Argentine legal system. A woman who has not been hired

172. See *id.* at 1608.

173. See *id.*

174. See Law No. 20.744, art. 176, Sept. 20, 1974 (Arg.).

175. See *id.* at arts 178, 181.

176. 450 U.S. 248 (1980).

177. NORMAN VIERA, CONSTITUTIONAL CIVIL RIGHTS IN A NUTSHELL § 45, at 234 (2d. ed. 1990).

must present conclusive evidence other than the fact of non-hiring.¹⁷⁸ It is usually difficult for a woman to meet this burden.

To counteract women's inequality in the job market, the Argentine government has tried to encourage companies to hire women. On March 23, 1995, the government enacted Law No. 24.465.¹⁷⁹ Article 3 of this law entitles employers to hire certain groups of persons, including women, under a different employment regime.¹⁸⁰ First, they can hire women for a fixed periods of time, from six months to two years.¹⁸¹ When the fixed period ends, the employer is not obliged to renew the contract nor to pay compensation.¹⁸² This differs from the general labor system, which prohibits the hiring of hourly workers for fixed period of time, because the employment relationship is considered permanent until the employee is fired, resigns or dies. Likewise, under the general system if an employer dies or the company closes, severance pay is usually required.¹⁸³ Additionally, under article 3, if an employer hires a woman on a fixed-term contract, the employer pays only fifty percent of the usual tax imposed for each employee.¹⁸⁴

D. Recap

The main problems concerning labor discrimination against women in Argentina are not legal, but are social and economic. The laws, both national and international in origin, protect women. The employers, however, must choose to accept these laws. At present, employers view women as too costly, even though the benefits they can bring to a workplace may far outweigh a potentially costly, time-limited maternity leave. Therefore, most problems arise before a woman is even hired. These problems are less visible, harder to fix, and manifest themselves

178. See *Estrella Fernandez v. Sanatorio Guemes* 311 Fallos 1602 (1988).

179. See Law No. 24.465, Mar. 23, 1995 (Arg.).

180. See *id.* at art. 3(1).

181. See *id.*

182. See *id.*

183. See Law No. 20.744, arts. 249, 251, Sept. 20, 1974 (Arg.).

184. See Law No. 24.465, art. 3(2), Mar. 23, 1995 (Arg.). Employers in Argentina must pay certain sums of money for each employee, in order to cover the cost of social programs.

more broadly within societal and economic prejudices against women workers.

Although the Argentine government recognizes the existence of these problems and has attempted to encourage the hiring of women, no statistics exist to determine if the laws have had any positive effect. To date, no official report that discusses success or failure of the new measures exist. This makes it difficult to substantiate claims of ongoing discrimination. The ideal report would present a region-by-region breakdown of statistics, as women confront different mentalities and prejudices, due to the differing economic and social make-up.

III. CANADIAN LABOR LAWS AND WOMEN'S RIGHTS

A. The Canadian Legal System

The Canadian legal system generally follows the common law, which is judge-made law.¹⁸⁵ Canada has a federal system, under which the federal and provincial governments divide duties along territorial lines. Generally, the federal government possesses the power to enact laws concerning matters of national importance,¹⁸⁶ and the provincial governments focus on areas of local concern.¹⁸⁷ For example, criminal law and the regulation of trade and commerce, aeronautics, navigation and shipping, and currency and coinage fall under federal control.¹⁸⁸ Provincial concern extends to such areas as education, local property, and civil rights, which enables provinces to pass laws regarding trade unions, work hours, workers' compensation, paid vacations, industrial standards, and other issues that define the employment relationship.¹⁸⁹

Generally, either labor law, (the law of collective bargaining)

185. See PATRICK FITZGERALD & KING MCSHANE, *CANADA'S LEGAL SYSTEM* 15 (1979); see also GERALD L. GALL, *THE CANADIAN LEGAL SYSTEM* 30 (1995). The only exception to this is Quebec, where areas of the law within provincial jurisdiction are governed by the Quebec Civil Code. The law governed by the Civil Code is often referred to as "private law," that is, the laws governing family relations, property, inheritance, contractual obligations and commercial dealings.

186. This includes undertakings of an inter-provincial, country-wide or international scope.

187. THEO A. OPIE & LAUREN BATES, *1996 MASTER LABOR GUIDE* 6 (1996).

188. CAN. CONST. (Constitution Act, 1982) sched. B, ch. 11, § 91.

189. *Id.* §§ 92-93.

or employment law (the common law that treats employers and employees as contracting parties in the buying and selling of labor), governs Canadian workplace relations.¹⁹⁰ Estimates show that approximately 33% of the Canadian workforce is unionized.¹⁹¹ This number has remained stagnant over the past three decades, unlike in the United States, which has experienced a drop in union density from 23% in 1980 to 16% in 1990.¹⁹² Labor and employment laws operate independently, as well as concurrently. For example, employment law may be used to address issues not provided for in a collective agreement, and *vice versa*.

Statutes at the federal and provincial levels directly regulate both the labor and employment regimes.¹⁹³ Each regime differs, although both are based on a common understanding of basic rights. This understanding comes from many sources: international law, the law of other jurisdictions, especially the United Kingdom and the United States, and the Canadian Charter of Rights and Freedoms (Charter of Rights).¹⁹⁴

The Charter of Rights is part of the Canadian Constitution and addresses rights and freedoms such as freedom of conscience and religion;¹⁹⁵ freedom of thought, belief, opinion and expression;¹⁹⁶ freedom of peaceful assembly;¹⁹⁷ the right to life, liberty and security of the person;¹⁹⁸ the right to be presumed innocent until proven guilty;¹⁹⁹ and the right not to be subjected to cruel and unusual treatment or punishment.²⁰⁰ The Charter of Rights

190. See W. H. JENNINGS & THOMAS G. GRUBER, *CANADIAN LAW* 191-92 (1979).

191. See Diane Galarneau, *Unionized Workers*, PERSPECTIVES (Can. 1996).

192. See *id.* at 43. The Canadian figure has remained steady only because of an increase in unionization in the public sector. Otherwise, the shift in jobs from the goods to the service industry would have led to a decline in the unionization rate. See *id.* at 49-50.

193. See OPIE & BATES, *supra* note 187, at 6. The Northwest Territories and the Yukon fall under federal jurisdiction, although both have enacted their own human rights and employment standards legislation.

194. CAN. CONST. (Constitution Act, 1982) pt. I, (Canadian Charter of Rights and Freedoms), § 1.

195. See generally *id.* § 2(a).

196. *Id.* § 2(b).

197. *Id.* § 2(c).

198. *Id.* § 7.

199. *Id.* § 11(d).

200. *Id.* § 12.

was enacted to control the government's power to infringe on the rights of individuals.²⁰¹ Under the Charter, rights can be infringed only to the extent that section 1 allows. Section 1 provides: "The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."²⁰²

The Charter of Rights contains two sections that are significant to equality rights for women in Canadian society. Section 15(1), the equality provision, states: "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."²⁰³

Section 15(2), a limiting provision, protects laws or programs designed to assist disadvantaged people in obtaining equality.²⁰⁴ It provides: "Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."²⁰⁵

Section 15 rights are among those that Section 1 protects.²⁰⁶ For example, in *McKinney v. University of Guelph*,²⁰⁷ which involves the employment context, the Supreme Court of Canada concluded that mandatory retirement at age sixty-five is age discrimination, however, this discrimination may be reasonably justified in a free and democratic society.²⁰⁸

Section 28 of the Charter of Rights also addresses the issue of equality. It states: "Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to

201. See generally, GALL, *supra* note 185, at 24.

202. CAN. CONST. (Constitution Act, 1982) (Canadian Charter of Rights and Freedoms), § 1.

203. *Id.* § 15(1).

204. *Id.* § 15(2).

205. *Id.*

206. *Id.* § 1.

207. See *McKinney v. University of Guelph* [1990] 3 S.C.R. 229 (S.C.C.).

208. *Id.* at 238.

male and female persons.”²⁰⁹ Section 28 is narrower in scope than section 15. It requires all provisions of the Charter of Rights to be applied without discrimination between the sexes.²¹⁰ This would include section 2(d), which provides for freedom of association, the basis of collective bargaining rights in Canada.²¹¹

The Canada Labour Code governs both collective bargaining and employee–employer relationships for federal public servants, federal Crown corporations and in federally–regulated industries.²¹² Other legislation covering workplace relations supplements this Code, such as the Canadian Human Rights Act and Employment Equity Act.²¹³ Similar to other provinces,²¹⁴ Ontario has enacted its own labor and employment legislation to cover public and private sector companies and employees that are not federally regulated, like provincial public servants, provincial Crown corporations, and broader municipal sector organizations such as municipalities, hospitals, and universities.²¹⁵ The Labour Relations Act²¹⁶ governs collective bargaining relationships. The Employment Standards Act²¹⁷ sets out minimum standards for wages, vacations, hours of work, overtime pay, and pregnancy and parental leave. The Act also entitles women to equal pay for work of equal value.²¹⁸ Ontario has a Pay Equity Act,²¹⁹ and until recently, an Employment Equity Act.²²⁰ Other Ontario legislation governing workplace relationships includes the Occupational

209. CAN. CONST. (Constitution Act, 1982) (Canadian Charter of Rights and Freedoms), § 28.

210. *See id.* “Notwithstanding anything in the Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.” *Id.*

211. *Id.* § 2(d).

212. *See* Canada Labour Code, R.S.C. (1985) amended by § 2.

213. *See generally*, Canada Human Rights Act, R.S.C. (1985) (as amended); Employment Equity Act, R.S.C. (1985) (as amended).

214. Ontario will be used throughout this Article to provide examples of labor and employment laws, as it is generally similar to laws in other provinces. Ontario is the most populous province.

215. *See* NAN WEINER, EMPLOYMENT EQUITY: MAKING IT WORK 22 (1993).

216. *See generally* Labour Relations Act, R.S.O. (1990) (Can.).

217. *See generally* Employment Standards Act, R.S.O. (1990) (Can.).

218. *See generally id.*

219. *See generally* Pay Equity Act, R.S.O. (1990) (Can.).

220. *See generally* Employment Equity Act, R.S.O. (1993) (Can.).

Health and Safety Act,²²¹ Workers' Compensation Act,²²² and the Human Rights Code.²²³

*B. Canada's International Obligations Regarding
the Employment of Women*

Canada has ratified a number of international conventions that affect the rights of working women, many through its participation in the International Labour Organization (ILO). Once an ILO convention is ratified, it generally becomes part of Canadian law only through implementing legislation.²²⁴ The implementing legislation, however, may not overtly identify the convention, thereby requiring an objective evaluation to determine whether the entire convention has domestically passed into force. Federal governance of labor standards presents some difficulties, as some provinces' standards may exceed the standards Canada has accepted internationally, while others may fall below.²²⁵ This occurs even though, theoretically, international law aims to provide the base reference point for Canadian labor law.²²⁶

The starting point for analyzing international law concerning working women is the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW),²²⁷ which Canada ratified in 1982.²²⁸ Under article 11(1) of CEDAW, states must ensure equal opportunity for women, including the right to equal pay and treatment with respect to work of equal value.²²⁹ Further, under article 11(2), states must adopt specific measures to prevent discrimination against women in the workplace because of

221. See generally Occupational Health and Safety Act, R.S.O. (1990) (Can.).

222. See generally Workers' Compensation Act, R.S.O. (1990) (Can.).

223. See generally Human Rights Code, R.S.O. (1990) (Can.).

224. See Ronald St. J. Macdonald, *The Relationship Between International Law and Domestic Law in Canada*, in CANADIAN PERSPECTIVES ON INTERNATIONAL LAW AND ORGANIZATION 122 (R. St. J. Macdonald et al. eds, 1974).

225. See HUGH M. KINDRED ET AL., INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED IN CANADA 205 (1987).

226. As international law does for every state party. See *id.*

227. CEDAW, *supra* note 5.

228. Convention on the Elimination on All Forms of Discrimination Against Women, 1982 Can. T.S. No. 31.

229. See *id.* at art. 11(1).

marriage or maternity.²³⁰ Finally, article 11(3) provides for a periodic review of protective legislation.²³¹ As described below, Canadian labor law and the Charter of Rights have incorporated these ideals, although not all regions of Canada have adopted employment equity.

The ILO Equal Remuneration Convention, No. 100,²³² obliges states to promote and, insofar as is consistent with the methods in operation in the country for determining pay rates, ensure that all workers receive equal pay for work of equal value.²³³ This Convention has been in force for Canada since November 16, 1972.²³⁴ "Work of equal value" however, has a different connotation than "equal work." The Universal Declaration of Human Rights addresses the concept of equal pay for equal work, which refers to women being paid the same wage as men doing the same job.²³⁵ The Equal Remuneration Convention, however, goes further, as does CEDAW by addressing the problems associated with determining equal pay for equal work in cases where women comprise the majority of the workforce, and no equivalent male counterpart exists.²³⁶ Equal pay for work of equal value implies a measuring of positions and a determination that certain female-occupied positions equal *other* male-occupied positions, thereby requiring similar pay scales. To this end, both the Convention and its accompanying recommendations provide that countries should implement objective systems to appraise the work performed. In addition, the Convention provides for a combination of national laws, regulations and collective agreements to implement equal pay for work of equal value.²³⁷

Curiously, the terms "equal pay for equal work" and "fair wages . . . for work of equal value" are mixed in the International Covenant on Economic, Social and Cultural Rights (ICESCR), which, in section 7(a)(1) provides for: "Fair wages and equal re-

230. *See id.* at art. 11(2).

231. *See id.* at art. 11(3).

232. Equal Remuneration Convention, *supra* note 108.

233. *Id.* at arts. 1-2.

234. ILO LISTS, *supra* note 105, at 132.

235. Universal Declaration of Human Rights, *supra* note 89.

236. *See* Equal Remuneration Convention, *supra* note 108, at arts. 2-3.

237. *See id.*

muneration 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."²³⁸ This wording appears to require nations to implement both fair wages and equal pay for the same work.

Canada is also a party to the ILO Convention concerning Employment Discrimination, No. 111.²³⁹ This Convention requires countries to prohibit employment discrimination. Discrimination includes "[a]ny distinction, exclusion or preference made on the basis of . . . sex . . . which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation."²⁴⁰ The Convention covers the entire spectrum of working people, whether they are public servants, private employees, independent workers or wage-earners.²⁴¹ Under this Convention, nations must create a national policy against discrimination.²⁴²

Although Canada has ratified numerous international treaties regarding women's rights, it has not ratified the ILO Convention Concerning Maternity Protection, No. 103²⁴³ nor its predecessor, ILO Maternity Protection Convention, No. 3.²⁴⁴ Both conventions provide for twelve weeks of maternity leave, with entitlements to cash benefits and medical care.²⁴⁵ Maternity Protection Convention, No. 103, however, allows for flexibility as to when those

238. International Covenant on Economic, Social, and Cultural Rights, *supra* note 93. This Covenant was ratified by Canada in 1976. International Covenant on Economic, Social, and Cultural Rights, 1976 Can. T.S. No. 46.

239. Convention Concerning Employment Discrimination, No. 111, *supra* note 109. This convention has been in force in Canada since November 26, 1964. See ILO LISTS, *supra* note 105, at 148.

240. Convention Concerning Employment Discrimination, No. 111, *supra* note 109, at art. 1(1).

241. See *id.* at art. 1(3).

242. See *id.* at art. 3.

243. Convention Concerning Maternity Protection, No. 103, June 4, 1952, 214 U.N.T.S. 321 [hereinafter Convention on Maternity, No. 103], reprinted in 2 INTERNATIONAL LABOUR CONVENTIONS AND RECOMMENDATIONS 1952-1976, 37 (1996). This convention entered into force on September 7, 1955, and had 31 ratifications as of December 31, 1993. See ILO LISTS, *supra* note 105, at 4.

244. Maternity Protection Convention, No. 3, *supra* note 105. This convention entered into force on June 13, 1921, and had 31 ratifications as of December 31, 1993. See ILO LISTS, *supra* note 105, at 5.

245. See Convention on Maternity, No. 103, *supra* note 243, at arts. 3-4; Convention on Maternity, No. 3, *supra* note 105, at art. 3.

twelve weeks begin.²⁴⁶ The period can begin before the date of birth or at the date of birth. Recommendation No. 95,²⁴⁷ which expands upon both conventions, recommends that fourteen weeks be the minimum leave.²⁴⁸ Countries may adopt Recommendation 95 voluntarily. Other aspects of both conventions include the right of a pregnant or new mother to receive cash and medical benefits during her maternity leave.²⁴⁹ The employer, however, cannot be entirely liable for the cost of the benefits.²⁵⁰ Additionally, employers must allow nursing mothers to interrupt their work to nurse.²⁵¹ Finally, employers are prohibited from dismissing an employee on maternity leave.²⁵² Although Canada is not a party to either convention, its current maternity leave provisions exceed the Convention's maternity leave requirements, and its other current laws arguably fulfill most of the remaining requirements.²⁵³ For example, Canada's health care system relieves both the employer and the employee from the costs associated with maternity health care. Further, the federal unemployment insurance system provides maternity benefits so that a new mother is not deprived of an income.²⁵⁴ Canada's labor laws, however, do not explicitly provide for nursing breaks.²⁵⁵

Canada has also failed to ratify the ILO Workers with Family Responsibilities Convention, No. 156.²⁵⁶ This convention aims to

246. See Convention on Maternity, No. 3, *supra* note 105, at art. 3.

247. Recommendation, No. 95, 2 International Labour Conventions and Recommendations 1952-1976, 44 (1996).

248. *Id.* at art. I(1)(1).

249. See Convention on Maternity, No. 103, *supra* note 243, at art. 4; Convention on Maternity, No. 3, *supra* note 105, at art. 3(c).

250. See Convention on Maternity, No. 103, *supra* note 243, at art. 4(4), (8); Convention on Maternity, No. 3, *supra* note 105, at art. 3(c).

251. See Convention on Maternity, No. 103, *supra* note 243, at art. 5; Convention on Maternity, No. 3, *supra* note 105, at art. 3(d).

252. See Convention on Maternity, No. 103, *supra* note 243, at art. 6; Convention on Maternity, No. 3, *supra* note 105, at art. 4.

253. A fuller description of maternity leave legislation is provided *infra* Part 3(b).

254. See Employment Ins., R.S.C. (1996) (Can.).

255. It is possible, however, to argue that nursing breaks might be provided for under the accommodation rules of the human rights legislation.

256. See Workers With Family Responsibilities Convention, *supra* note 110. This convention entered into force on August 11, 1983 and as of December 31, 1993, it had 20 ratifications. ILO LISTS, *supra* note 105 at 200.

create effective equality of opportunity and treatment for men and women workers with family responsibilities.²⁵⁷ It provides that states should strive to adopt a national policy to enable these persons to engage in employment without being subject to discrimination, and, to the extent possible, without conflict between their employment and family responsibilities.²⁵⁸ This Convention states that family responsibilities shall not constitute a valid reason for termination of employment.²⁵⁹

Canada has implemented laws to fulfill its international obligations with respect to working women. For example, the federal government and the provinces have enacted anti-discrimination laws which fulfill the requirements of the ILO Convention Concerning Employment Discrimination, No. 111.²⁶⁰ Only the federal government and Quebec, however, have adopted employment equity legislation that fulfills the requirements of the equal pay for work of equal value provisions of the CEDAW, ICESCR and the ILO Equal Remuneration Convention, No. 100.²⁶¹ Though the domestic legal framework of rights for working women described below is fairly comprehensive, not all of the issues raised in the international conventions ratified by Canada are addressed.

C. Women's Rights Under Canadian Labor Laws

1. Equality Before the Law

Under Section 28 of the Charter of Rights, discussed above, Canadian women have the right to equality in the application of the Charter.²⁶² Section 15(1) expands upon this right by stating that "every individual is equal before and under the law" although the section does not preclude affirmative action programs.²⁶³ The right to equality before and under the law is reinforced at the federal and provincial levels through human rights legislation. In the context of labor and employment rights, the combination of sec-

257. See Workers With Family Responsibilities Convention, *supra* note 110, at art. 3.

258. See *id.* at arts. 4, 5.

259. See *id.* at art. 8.

260. See Convention Concerning Employment Discrimination, *supra* note 109.

261. See Equal Remuneration Convention, *supra* note 108.

262. See CAN. CONST. § 28.

263. See *id.* § 15(1).

tion 15(1) and the human rights legislation provide for equal and non-discriminatory treatment for women and men before labor tribunals, courts and in legislation, as well as in government positions.

a. Human Rights Codes

All jurisdictions in Canada have enacted legislation designed to prohibit discrimination based on sex, race, color, marital status, and mental or physical disability. In addition, each province adds other categories to the list. Ontario, for example, prohibits discrimination based on ethnic origin, place of origin, citizenship, criminal record, ancestry, family status, sexual orientation and creed.²⁶⁴ Other provinces include categories such as religion, political beliefs, language, source of income and place of residence in their lists of prohibited grounds.²⁶⁵ The values expressed in the Universal Declaration of Human Rights have influenced the composition of these lists.²⁶⁶

In the labor and employment context, discrimination has been defined as any distinction, exclusion or preference based on certain grounds that nullifies or impairs equal opportunity in employment or equality in the terms and conditions of employment.²⁶⁷ An employer may be liable for both direct and constructive discrimination.²⁶⁸ Under constructive discrimination, an employer engages in discriminatory conduct if it adopts a rule or standard for genuine business reasons that is facially neutral and applicable to all employees, but has an adverse discriminatory effect on certain employees. Thus, an employee need not prove discriminatory intent.

Persons who believe that their employer has discriminated against them based on one of the enumerated grounds, including sex, may file a complaint with an administrative body, usually known as a Human Rights Commission. The Commission investi-

264. See Human Rights Code, R.S.O., § 5(1) (1990) (Can.).

265. See OPIE & BATES, *supra* note 187, at 325.

266. See Universal Declaration of Human Rights, *supra* note 89.

267. See OPIE & BATES, *supra*, note 187, at 324.

268. Ontario (Human Rights Commission) and Simpsons-Sears Ltd. [1985] 2 S.C.R. 537.

gates the complaint and attempts to settle the issues.²⁶⁹ If settlement is inappropriate or not forthcoming, a more formal hearing may take place.²⁷⁰

All jurisdictions prohibit discrimination based on sex. Sections 5 and 7 of the Ontario Human Rights Code address such workplace discrimination.²⁷¹ In particular, section 5(1) states that every person has a right to equal treatment with respect to employment without discrimination based on sex.²⁷² Section 10(2) further defines "the right to equal treatment." It provides that the right to equal treatment without discrimination based on sex includes the right to equal treatment without discrimination based on pregnancy.²⁷³ In addition, section 7(2) states that every employee has the right to freedom from harassment in the workplace by the employer or an agent of their employer, or by another employee, because of sex.²⁷⁴ Section 7(3) states that every person has a right to be free from:

- (a) a sexual solicitation or advance made by a person in a position to confer, grant or deny a benefit or advancement to the person where the person making the solicitation or advance knows or ought reasonably to know that it is unwelcome; or
- (b) a reprisal or a threat of reprisal for the rejection of a sexual solicitation or advance where the reprisal is made or threatened by a person in a position to confer, grant or deny a benefit or advancement to the person.²⁷⁵

Employers may justify their discriminatory practices on the basis of gender with a showing of a bona fide occupational requirement or qualification (BFOR).²⁷⁶ Employers, however, must satisfy their duty of accommodation, to the point of hardship, be-

269. In Ontario, this power is found in the Human Rights Code, R.S.O. §§ 29, 33 (1990) (Can.).

270. *See id.* § 36(1).

271. *See id.* §§ 5(1), 7(2).

272. *See id.* § 5(1).

273. *See id.* § 10(2).

274. *See id.* § 7(2).

275. *See id.* § 7(3).

276. *See OPIE & BATES, supra* note 187, at 324, 397.

fore claiming the exception.²⁷⁷ In evaluating whether the employer actually has a BFOR argument, a Human Rights Commission or court will consider the cost of the accommodation, outside sources of funding, safety requirements and any applicable legal standards.²⁷⁸

Several cases have addressed this issue. In *Mandseth v. Elliott*,²⁷⁹ an employer denied a woman employment as a woodcutter because the employer did not believe that she could handle the work, even though she had previous related experience. The Commission held that the employer discriminated against her based on gender, and that the employer had no BFOR argument.²⁸⁰ Similarly, in *Guthro v. Westinghouse Canada Inc.*,²⁸¹ an employer denied a female employee a transfer to a position in a large motor assembly department, which was all male. Two junior male employees with less experience eventually were hired into the positions. The Board of Inquiry found that Westinghouse had discriminated against Guthro.²⁸²

b. Minimum Employment Standards

The federal and provincial governments have enacted legislation setting the minimum workplace standards in the area of wages, hours, overtime pay and paid vacations, among others. In Ontario, this legislation is called the Employment Standards Act (ESA).²⁸³ The ESA applies to employers (other than those companies and businesses falling under exclusive federal jurisdiction) and employees in Ontario. An "employee" is broadly defined in section 1(c) as including a person who:

- (a) performs any work for or supplies any services to an employer for wages;
- (b) does homework for an employer; or
- (c) receives any instruction or training in the activity, busi-

277. *See id.* at 397.

278. *See id.*

279. *Mandseth v. Elliott* [1990] 11 C.H.R.R. D/498 (B.C.C.H.R.).

280. *See id.* at D/499.

281. *Guthro v. Westinghouse Canada Inc.* [1991], 15 C.H.R.R. D/388 (Ont. Bd. Inq.).

282. *Id.* at D/392.

283. *See generally* Employment Standards Act, R.S.O. (1990) (Can.).

ness, work, trade, occupation or profession of the employer.²⁸⁴

Thus, the ESA excludes independent contractors because they do not fall within the definition of "employee." Formal titles, however, do not determine status, only an objective evaluation of the employment situation suffices.²⁸⁵ Therefore, people who have the title of "independent contractor" but only work for one company and who are subject to the control of that company may fall under the ESA despite their title.

Similarly, the definition of employer is also broad and liberal. Under section 1, the term "employer" includes:

- (a) any owner, proprietor, manager, superintendent, overseer, receiver or trustee of any activity, business, work, trade, occupation, profession, project or undertaking who has control or direction of, or is directly or indirectly responsible for, the employment of a person therein; and
- (b) any associated or related corporations, individuals, firms, syndicates or associations treated as one employer . . . where any one has control or direction of, or is directly or indirectly responsible for, the employment of a person therein.²⁸⁶

This definition allows for more than one business to be considered an employer. As such, a secondary business can be held liable for contravention of the ESA if the primary employer is unable or unwilling to comply.

The rights protected under the ESA are subordinate to a collective agreement that provides greater rights or benefits to an employee covered.²⁸⁷ Minimum standards legislation such as the ESA, however, is needed because of the historic inability or unwillingness of Canadian unions to organize in industries where women workers predominate.²⁸⁸

284. *Id.* § 1(c).

285. See M. NORMAN GROSSMAN, *A PRACTICAL GUIDE TO THE LAW OF HIRING IN ONTARIO* 7 (1996).

286. See generally *Employment Standards Act, R.S.O.*, § 1 (1990) (Can.).

287. *Id.* § 4.

288. See L. BRISKIN & L. YANZ, *UNION SISTERS: WOMEN IN THE LABOUR MOVEMENT* (1983); Judy Fudge, *Gender Issues in Arbitration: An Academic Perspective*, in *LAB. ARB. Y.B.* 119, 119-20, (Jeffrey Sack et al. eds., 1991).

c. Labor Relations Acts and Collective Agreements

Employees and employers covered by collective agreements are subject not only to employment standards and human rights legislation, but also to labor relations legislation. Labor relations legislation governs the collective bargaining relationship between the trade unions, on behalf of the employees, and the company.

In Ontario, the Labour Relations Act (OLRA)²⁸⁹ is important to unionized women. Section 54 of the OLRA prohibits a collective agreement from discriminating against any person in a manner contrary to the Ontario Human Rights Code or the Charter of Rights.²⁹⁰ Additionally, section 48(12)(j) empowers arbitrators to interpret and apply human rights and other employment-related statutes, despite any conflict between the statutes and the terms of the collective agreement.²⁹¹ Although these two sections appear to import anti-discrimination legislation into the employment relationship, some collective agreements contain their own anti-discrimination clauses that either incorporate the Human Rights Code by reference or that mimic terms of the Code. For example, a typical clause might read: "There shall be no discrimination by the Company or the Union against any employee because of race, ancestry, place of origin, color, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, family status or handicap." Inclusion of such a clause makes arbitration the remedy for any grievance alleging a violation of the non-discrimination clause. Experts argue that this clause favors both the employer and employees because arbitration is typically less time-consuming and less expensive than litigation or proceeding through all of the steps of the Human Rights Commission. In the United States, an estimated ninety-four percent of all collective agreements contain a non-discrimination clause.²⁹²

In *City of Winnipeg*,²⁹³ a clause in the collective agreement prohibited discrimination on the basis of gender.²⁹⁴ Article 3 of

289. Labour Relations Act, R.S.O. (1995) (Can.).

290. *See id.* § 54.

291. *See id.* § 48(12)(j).

292. *See* N. Peter Lareau, *Drafting the Union Contract*, para. 5A.12 (1995), quoting BNA, BASIC PATTERNS IN UNION CONTRACTS, 130-31 (12th ed., 1989).

293. *City of Winnipeg* [1985] 22 L.A.C. (3d) 332 (Manitoba).

294. *See id.* at 333.

the collective agreement stated:

The City agrees that there shall be no discrimination, interference, restriction, or coercion exercised or practiced with respect to any employee in the matter of wage rates, training, upgrading, promotion, transfer, layoff, recall, discipline, classification, discharge or otherwise by reason of age, race, creed, color, national origin, political or religious affiliation, sex or marital status, place of residence, nor by reason of his membership or activity in the Union.²⁹⁵

In this case, the City claimed that it was entitled to maintain a policy of requiring both male and female instructors to staff the pool at all times.²⁹⁶ The policy ignored the seniority rights of female instructors.²⁹⁷ For example, the City denied the request of a woman to part-time work between 12:00 and 4:00 p.m. for the reason that all other employees on that shift were female and it believed that it needed at least one male working during these hours.²⁹⁸ Consequently, the City assigned the complainant different hours, and a male instructor with less seniority received the 12:00 to 4:00 p.m. shift.²⁹⁹

Specifically, the City argued that each shift needed one male instructor for reasons of public decency.³⁰⁰ It stated that male instructors were necessary to carry out certain functions in the male locker room, including assisting patrons and handling medical or other emergencies; there was no practical staffing alternative that included female instructors.³⁰¹ The complainant testified, however, that the type of problems that generally arose included stuck lockers, lost locker keys, or lost clothing and the maintenance men on duty could handle these problems.³⁰² Further, in the event of a medical emergency, a female lifeguard could announce that she was entering the male locker room.³⁰³ The complainant also testi-

295. *See id.* at 334.

296. *See id.* at 332.

297. *See id.* at 334.

298. *See id.* at 338.

299. *See id.* at 333.

300. *See id.* at 332.

301. *See id.* at 334.

302. *See id.*

303. *See id.*

fied that the City allowed the male maintenance staff to enter the women's locker room to deal with plumbing and other problems.³⁰⁴ Additional evidence showed that other City-run pools with all-female shifts had no problems.³⁰⁵ The Board found no danger to public decency or to public safety if the instructors at the pool were of only one sex on any given shift.³⁰⁶ The Board also concluded that the City exercised its rights of management in an unreasonable and unjustified manner³⁰⁷ and the Board upheld the grievance.³⁰⁸

Some collective agreements contain sexual harassment clauses that require employers to discipline an employee who engages in sexual harassment.³⁰⁹ The discipline process should include an investigation that balances the competing interests of the two employees.³¹⁰ The clause need not be directed specifically at sexual harassment. In *Canada Post*, the arbitration board interpreted the more general anti sex-discrimination clauses to fulfill the role of a specific anti-sexual harassment clause.³¹¹ Because the collective agreement was committed to eliminating sex discrimination, the board felt that the employer had an affirmative duty to establish and maintain a working environment free from sexual harassment, objectively investigate claims, and to take steps to avoid the consequences of harassment.³¹²

Whether or not a collective agreement contains an express sexual harassment clause, a potential conflict of representation may occur in the case where one bargaining unit employee alleges that another bargaining unit employee has harassed her. Each union member should theoretically be able to seek assistance from

304. *See id.* at 335.

305. *See id.* at 336.

306. *See id.* at 341.

307. *See id.*

308. *See id.* at 332.

309. Mary E. Saunders, *Gender Issues in Arbitration: A Management Perspective*, in LAB. ARB. Y.B. 133 (Jeffrey Sack et al. eds., 1991). For an example of a collective bargaining agreement expressly prohibiting sexual harassment see *Re British Columbia Institute of Technology and B.C.G.E.U.* [1993] 32 C.L.A.S. 135 (B.C.).

310. *See* Saunders, *supra* note 309, at 135.

311. *See Re Canada Post Corp.* [1983] 11 L.A.C. (3d) 13, 16-18 (Can.).

312. *See id.* at 13; *see also* Sheila J. Greckol, *Gender Issues in Arbitration: The Employee's Perspective*, in LAB. ARB. Y.B. 143 (Jeffrey Sack et al. eds., 1991).

the union. In reality, however, because allegations of harassment are reported to the company, which must take disciplinary action if the allegations are proven, the union usually represents the alleged harasser. The female employee must rely on the company to advance her claim.³¹³ If the harasser receives his discipline under the collective agreement, then the harassed woman then becomes a company witness. One board of arbitration noted that, in such cases, "the trade union is cast in the invidious position of generally espousing principles which deplore sexual harassment while at the same time vigorously defending an accused employee who proclaims innocence and is entitled to fair representation by his union in the pursuit of his grievance against discharge."³¹⁴ It therefore appears that the union's fair duty of representation, which labor relations legislation guarantees, does not get fulfilled equally as between the harassed and the harasser.

2. Rights Relating Specifically to Women

a. Sexual Harassment of Women

All provincial and federal human rights legislation, as well as some collective agreements, prohibit sexual harassment. Under section 61.7 of the Canada Labour Code, sexual harassment means:

[A]ny conduct, comment, gesture, or contact of a sexual nature

- (a) that is likely to cause offence or humiliation to any employee; or
- (b) that might, on reasonable grounds, be perceived by that employee as placing a condition of a sexual nature on employment or on any opportunity for training or a promotion.³¹⁵

Further, the Canadian Human Rights Commission issued guidelines on February 1, 1983 that describe sexual harassment as:

1. verbal abuse or threats;
2. unwelcome remarks, jokes, innuendoes or taunting;

313. See Greckol, *supra* note 312, at 150.

314. *Re Canadian National Ry Co.* [1988] 1 L.A.C. (4th) 183, 195 (Can.).

315. *Id.* at 196 (quoting § 61.7 of the Canada Labour Code).

3. displaying of pornographic or other offensive or derogatory pictures;
4. practical jokes which cause awkwardness or embarrassment;
5. unwelcome invitations or requests, whether indirect or explicit, or intimidation;
6. leering or other gestures;
7. unnecessary physical contact such as touching, patting, pinching, punching; or
8. physical assault.³¹⁶

These definitions cover both the physical and psychological aspects of sexual harassment.

Many cases have been decided under the sexual harassment provisions of the provincial and federal human rights legislation. The Ontario Human Rights Commission confronted the issue of sexual harassment in *Olarte v. Commodore Business Machines Ltd. and DeFilippis*.³¹⁷ In this case, the second-shift foreman, who was in charge of a plant's operation, had the power to hire and fire employees.³¹⁸ This foreman made many explicit comments and requests for sexual contact to female workers under his supervision.³¹⁹ When they refused his advances, they were treated more harshly than before.³²⁰ Many of the women were so intimidated that they quit their jobs; some filed complaints of sexual harassment with the Ontario Human Rights Commission.³²¹ The company transferred the foreman to another plant, where he continued to treat female employees in a similar manner.³²² These women also filed sexual harassment complaints.³²³

316. See ARJUN P. AGGARWAL, *SEXUAL HARASSMENT IN THE WORKPLACE* 9-10 (2d ed. 1992).

317. 83 C.L.L.C. 16,229 (Div. Ct. 1985).

318. See *id.* at 16,245.

319. See *id.* at 16,246-56.

320. See *id.* at 16,270-71, 16,246-56.

321. See *id.* at 16,245, 16,266.

322. See *id.* at 16,271.

323. See *id.* at 16,270.

The Board allowed all of the complaints.³²⁴ It found that the women did not collude in their stories, as they had little, if any, contact with each other.³²⁵ Furthermore, the noise, physical layout of the plant, and the cultural and language barriers between the women prevented communication with one another.³²⁶ The Board concluded that the company was vicariously liable for the acts of the foreman because he was in charge of the plant during his shift and therefore functioned as part of the "directing mind" of the corporate entity.³²⁷ The Board awarded the women damages for lost wages and general suffering.³²⁸ It directed the foreman to cease his sexual harassment of female employees, and ordered the company to take necessary steps to ensure that the foreman ceased his illegal actions.³²⁹ The foreman and the company's appeal of the Board's decision was unsuccessful. The Divisional Court upheld the Board's finding of sexual harassment and a causal connection between the sexual harassment and the termination of the female worker's employment.³³⁰

A new development in Ontario may allow women to bring sexual harassment complaints under the Occupational Health and Safety Act (OHSA), even though the Ontario Human Rights Code deals specifically with the issue of sexual harassment in the workplace.³³¹ The OHSA offers the possibility of reinstatement to a woman who suspects that her employment was terminated because she raised a sexual harassment complaint.³³² In contrast, the Ontario Human Rights Code only allows a woman to receive monetary damages if she is found to have been dismissed for a discriminatory or retaliatory reason.³³³ The issue of whether the OHSA is a proper basis for complaints of this nature, however, has

324. *See id.* at 16,270, 16,295.

325. *See id.* at 16,270.

326. *See id.* at 16,246-36, 16,270-71.

327. *See id.* at 16,288.

328. *See id.* at 16,295.

329. *See id.*

330. *See Olarte v. Commodore Business Machines, Ltd. and DeFilippis* 49 O.R. (2d) 17 (Div. Ct. 1985).

331. *See Ontario Human Rights Code*, § 7(2), (3).

332. *See Occupational Health and Safety Act*, § 50.

333. *See Human Rights Code*, R.S.O. § 8 (1990) (Can.).

not yet been decided in law. In the recent case of *Re Lyndhurst Hospital*, various arguments were presented, both for and against the use of the OHSA.³³⁴ In this case, the complainant, Au, complained on several occasions to management at Lyndhurst Hospital that she was being sexually harassed by her supervisor at work.³³⁵ She alleged that she was subsequently subjected to reprisal and retaliation from her supervisor for making the complaints.³³⁶ The hospital terminated Au's employment several months after her last reprisal complaint.³³⁷ The hospital explained that her position was eliminated due to restructuring.³³⁸ Au applied to the Ontario Labour Relations Board (OLRB) for reinstatement on two grounds:

- (1) that the sexual harassment constituted a hazard under the OHSA; and
- (2) that she was wholly or partly terminated due to her allegations against her supervisor of sexual harassment, which violated the anti-reprisal section of the OHSA.³³⁹

The hospital brought a motion to dismiss the complaint for lack of a *prima facie* case and because the OHSA was inapplicable to the facts in question.³⁴⁰ The hospital argued that sexual harassment was not a hazard covered by OHSA, and that a statutory amendment would be required to include it within the Act.³⁴¹ The hospital also claimed that the OHSA is designed to deal with physical structures and the presence of objects or substances in the workplace, rather than people and their conduct or misconduct.³⁴² Further, section 50 of the OHSA requires a causal nexus between the discharge and alleged harassment for a successful complaint.³⁴³ No such nexus existed, as there was a time lag between the last re-

334. *Re Lyndhurst Hospital*, (June 20, 1996) O.L.R.D. No. 2120 (Ontario Labor Relations Board), appeal dismissed (September 4, 1996) O.J. No. 3274 (Ont. Ct. Gen. Div.).

335. *See id.* at 3-4.

336. *See id.* at 4-5.

337. *See id.* at 6.

338. *See id.*

339. *See id.*

340. *See id.* at 2.

341. *See id.* at 16.

342. *See id.* at 17.

343. *See id.* at 23.

praisal complaint and the termination.³⁴⁴ Finally, the hospital argued that the OHSA should be read in a manner that restricts a multiplicity of proceedings, that the Ontario Human Rights Code was designed to address complaints such as this, and therefore provides the proper forum.³⁴⁵

Au argued that health and safety concerns have evolved, and that the OHSA's list of hazards is not exhaustive.³⁴⁶ She referred to reports in which sexual harassment was shown to be harmful to the health of the victim.³⁴⁷ Au argued that if sexual harassment is not dealt with under the OHSA, the victim's ability to deal with this health hazard will be reduced.³⁴⁸ She also argued that nothing prevented both the OLRB and the Human Rights Commission from having jurisdiction over the matter because each body was subject to different thresholds and different legislation with varied purposes.³⁴⁹ The OLRB should therefore deal with the part of the complaint falling under its jurisdiction. Au argued that because she reported the sexual harassment, she met the requirements under the OHSA. Finally, she argued that the hospital's motion should be dismissed if any part of the decision to discharge her was linked to her complaints of sexual harassment.

The Board agreed with Au and dismissed the employer's motion. The Board noted that pleadings should be struck where it is "plain and obvious" that no reasonable claim exists, and the claim is certain to fail, as opposed to being unlikely to succeed.³⁵⁰ The majority believed that the action had some chance of success and that there was an arguable case on the pleadings.³⁵¹ Nonetheless, the Board felt that it was neither necessary nor appropriate to answer the question of whether the OSHA covers sexual harassment, as the OHSA is designed to be flexible enough to respond to a myriad of fact situations and evolving knowledge.³⁵² The Board

344. *See id.*

345. *See id.* at 20.

346. *See id.* at 25.

347. *See id.* at 26.

348. *See id.* at 26-27.

349. *See id.* at 28.

350. *See id.* at 36.

351. *See id.* at 37-38.

352. *See id.* at 38.

noted that the term "hazard" was not defined by the OHSA,³⁵³ and, therefore, it was not plain and obvious that stress and harassment were not occupational hazards in the ordinary or statutory meaning of the word.³⁵⁴ Finally, the Board concluded that it was inappropriate to dismiss the matter on a discretionary basis, "despite the practical and legal problems involved in fitting a subject that is clearly a human rights ground into a statute that does not refer to it directly."³⁵⁵ Thus, it appears that a definitive answer as to whether the OHSA covers cases of sexual harassment will be unclear until the Board actually hears the case and decides the issue on the merits.

b. Pregnancy Rights

Pregnant women maintain certain rights under both human rights and employment standards legislation. The laws prohibit discrimination due to pregnancy and guarantee the right to pregnancy leave and the concomitant right to reinstatement.

An employee cannot be dismissed because she is pregnant. Section 10(2) of the Ontario Human Rights Code provides that the "right to equal treatment without discrimination because of sex includes the right to equal treatment without discrimination because a woman is or may become pregnant."³⁵⁶ Therefore, an employer must accommodate a pregnant employee to the point of the employer's undue hardship. For example, if a pregnant employee develops complications that require her to sit down for a certain number of hours each day, the employer must reasonably accommodate her condition unless this accommodation would cause bona fide hardship for the employer.

One of the leading cases on pregnancy-related discrimination brought under the Ontario Human Rights Code is *Wiens v. Inco Metals Co.*³⁵⁷ In this case, Inco Metals Co. (Inco) had a policy of refusing employment to women with child-bearing potential in the Inco Pressure Carbonyl (IPC) processing area of its plant because Inco believed that occasional accidental emissions of nickel carbo-

353. *See id.*

354. *See id.* at 41.

355. *See id.* at 47.

356. Human Rights Code, R.S.O., § 10(2) (1990) (Can.).

357. *Wiens v. Inco Metals Co.* [1988] 9 C.H.R.R. D/4795 (Ont. Bd. Inq.).

ryl gas could harm a fetus.³⁵⁸ As a result, Inco prohibited Wiens, the complainant, from working in the IPC area, despite being qualified for the training and having adequate seniority.³⁵⁹ The Board summarized the main dilemma such a case poses: "The employer may be acting with two motives; a desire to protect a potential fetus from physical damage and also a desire to protect the company from tort liability to a child born deformed. Balanced against these issues is the principle of equality of opportunity in the workplace."³⁶⁰ After examining the extensive evidence presented on the health effects of nickel carbonyl gas, the Board concluded that the risk of harm to the fetus was minimal, and, therefore, the restrictive policy did not constitute a reasonable and bona fide occupational qualification.³⁶¹ This case shows that the balance between a woman's right to workplace equality and an employer's protective measures designed to avoid tort liability is a delicate one, and any policy that represents over-protection of the employer will not meet this balance.³⁶²

Another example of a complaint brought under the Human rights Code is *Emrick Plastics v. Ontario Human Rights Commission*.³⁶³ This case involves an employer's appeal of a Board of Inquiry finding that the employer failed to reasonably accommodate an employee named Heincke, by refusing to transfer her to a new job during her pregnancy.³⁶⁴ Heincke worked in the spray painting area of the plant. Her obstetrician requested that she be transferred to an available job in the packing area where paint solvents would be in lower concentrations. The employer asked the obstetrician to provide documentation absolving the employer from any responsibility relating to Heincke's health and her unborn baby resulting from poor air quality in the workplace.³⁶⁵ When Heincke's

358. *See id.*

359. *See id.*

360. *See id.* at D/4811-12.

361. *See id.* at D/4795.

362. BRIAN A. GROSMAN & JOHN R. MARTIN, DISCRIMINATION IN EMPLOYMENT IN ONTARIO 92 (1994).

363. *Emrick Plastics v. Ontario Human Rights Commission* [1992] 90 D.L.R. (4th) 476 (Ont. Div. Ct.).

364. *See id.* at 477.

365. *See id.* at 478.

doctor failed to provide such a letter, the employer put Heincke on an involuntary leave of absence.

Based on these facts, the Court dismissed the employer's appeal. The Court concluded that the Board of Inquiry had sufficient evidence to find that the employer had discriminated against Heincke on the basis of sex.³⁶⁶ The employer was not entitled to require that Heincke's obstetrician visit the workplace and provide a legal indemnity of the employer from possible lawsuits.³⁶⁷ The employer also failed to reasonably accommodate Heincke when it refused to transfer her to an available position in the packing department when the position was satisfactory to both Heincke and her doctor.³⁶⁸

The federal government and all of the provinces provide for maternity leave. The provisions generally provide that a pregnant employee who has worked for the same employer for a specified period of time, ranging between twenty weeks to twelve months, is entitled to an unpaid maternity leave of between twelve and twenty weeks.³⁶⁹ In Ontario, the Employment Standards Act provides that a pregnant employee who commenced employment with her employer at least thirteen weeks before the estimated date of delivery is entitled to a leave of absence, without pay, for seventeen weeks.³⁷⁰ The employee may choose to extend this leave period by an additional six weeks. The woman continues to be considered an employee for the entire period of her leave.³⁷¹ At the conclusion of her leave, the employer must reinstate the female employee to the position she held prior to the leave or to another comparable position.³⁷²

Maternity leave may be followed by parental leave. The federal government and all jurisdictions except Alberta, Saskatchewan and the Yukon Territory provide for parental or child care benefits in their employment standards legislation.³⁷³ The provi-

366. See *id.* at 487.

367. See *id.* at 482.

368. See *id.* at 487.

369. See OPIE & BATES, *supra* note 187, at 202.

370. See Employment Standards Act, R.S.O., § 35(1) (1990) (Can.).

371. See *id.* §§ 35(1), 37(1)-(2).

372. See *id.* § 43(1).

373. See OPIE & BATES, *supra* note 187, at 202-04.

sions generally state that a natural or adoptive parent who has worked for the same employer for a specified period of consecutive months is entitled to unpaid parental leave between twelve and thirty-four weeks, with Quebec having the longest leave allowance.³⁷⁴ In some jurisdictions both parents may take the parental leave, while other jurisdictions require parents to share the allotted leave.³⁷⁵ While on leave, the parent continues to be an employee.³⁷⁶ At the end of the leave, the parent must be reinstated to the same or comparable position.³⁷⁷

c. Equality in Pay and Equality in Job Opportunity

Canadian women fought for decades for equal pay and equal employment opportunities. They have achieved, to a large extent, nationwide laws prohibiting pay discrimination. Laws introducing equality in opportunity, however, have been slow in coming and quick to disappear.

1. Pay Equity

All Canadian jurisdictions enacted some form of legislation to eliminate wage inequality between men and women.³⁷⁸ The legislation evolved through four distinct phases.³⁷⁹

Phase one is equal pay for equal work. This principle requires that male and female employees be paid the same wage for doing identical work (for example, waiters and waitresses). This legislation exists in every province.³⁸⁰

Phase two refers to equal pay for similar or substantially similar work. This principle applies where male employees and female employees may have different job titles, but perform substantially the same work (for example, male janitors and female cleaners). This type of legislation also exists in every province.³⁸¹

374. *See id.* at 202.

375. *See id.*

376. *See id.*

377. *See id.*

378. *See id.* at 453.

379. *Id.* at 453-54.

380. *Id.* at 454.

381. *Id.* For example, the Canadian Human Rights Commission awarded 470 female federal government librarians equalization adjustment payments ranging from \$500 to

Phase three is equal pay for work of equal value. This principle differs radically from phase one and phase two, as it does not compare "work" but the "value" of work. To determine "value," job evaluation techniques are developed, allowing comparison between dissimilar jobs. Jobs are, therefore, ranked by category."³⁸²

Phase four is referred to as pay equity. Pay equity assumes that wage discrimination against women is endemic to the economy and requires a broad and systemic remedy.³⁸³ This type of legislation does not simply prohibit wage discrimination, but places obligations on employers to scrutinize their pay practices and ensure that these practices comply with the legislation.³⁸⁴

Presently, Alberta, British Columbia, Saskatchewan, the Northwest Territories, and the private sectors of Manitoba, New Brunswick, Newfoundland, Nova Scotia, Prince Edward Island, and the Yukon have legislation governing phase two.³⁸⁵ The federal jurisdiction, Quebec, and the Yukon's public sector are governed by legislation covering phase three.³⁸⁶ The only provinces that have progressed to Phase Four with respect to the public sector are Manitoba, New Brunswick, Newfoundland, Nova Scotia and Prince Edward Island, and Ontario with respect to both the public and private sectors.³⁸⁷

Ontario's Pay Equity Act came into force on January 1, 1988.³⁸⁸ The purpose of the Act, as stated in section 4(1), is to "redress systemic gender discrimination in compensation for work performed by employees in female job classes."³⁸⁹ The Act applies to all public sector and all private sector employers with more than nine employees, including part-time employees.³⁹⁰ All public and private sector employers with more than 100 employees are

\$2500 annually, plus back pay of up to \$5900 each, after comparing their jobs with those of historical researchers, who were predominantly male. *Id.*

382. *Id.*

383. *See id.* at 454-55.

384. *See id.*

385. *See id.* at 455.

386. *See id.*

387. *See id.*

388. Pay Equity Act, R.S.O. (1990) (Can.).

389. *Id.* at § 4(1).

390. *Id.* § 18. Summer students, however, are not covered by the Act.

required to use a "gender-neutral comparison system"³⁹¹ to differentiate male and female job classes, to determine which jobs are of equal value to the employer, and to develop a pay equity plan.³⁹² Under section 13(2)(e), any pay inequities exposed as a result of this comparison must be remedied within a specified period of time.³⁹³ Section 6 of the Act states that pay equity is achieved when male and female job classes of equal value have the same pay rate.³⁹⁴

2. Employment Equity

Employment equity is not only related to women's equality. It is best described as:

[A] set of activities designed to ensure that an organization has equality for all its employees in all aspects of employment, such as recruiting, hiring, compensation, training, and so on. The goal of [employment equity] is to have organizations' workforces mirror or reflect the composition of the labour market from which each recruits, for employment policies and practices to work well for all employees, and for all employees to be able to progress to the full extent of their ability (given opportunities).³⁹⁵

"Employment equity aims to remove systemic discrimination to ensure that those who have been traditionally disadvantaged are given equal opportunities with those who have not been traditionally disadvantaged."³⁹⁶ The groups identified as traditionally disadvantaged include: women, aboriginal peoples or First Nations people, disabled people, and visible or racial minorities.³⁹⁷ Employment equity aims to help these groups overcome the cumulative effects of past and present discrimination.³⁹⁸ These four groups have been targeted because they, as a whole, are disadvantaged through higher levels of unemployment and underemploy-

391. *Id.* § 12.

392. *Id.* § 13.

393. *Id.* § 13(2)(e).

394. *See id.* § 6.

395. WEINER, *supra*, note 215, at 1.

396. *Id.*

397. *Id.*

398. *See id.*

ment, lower levels of pay for equal qualifications, and lower levels of participation in positions of authority such as management positions.³⁹⁹

How does employment equity work? Essentially, the employer will initially conduct a workforce survey to determine the extent to which the four designated groups are equally employed in its workforce.⁴⁰⁰ The employer will also review its employment policies and practices to identify and remove barriers to hiring, retention, and promotion of members of the designated groups.⁴⁰¹ Finally, the employer will draft and implement a plan to provide specific goals and timetables for the elimination of barriers and the implementation of positive measures with respect to retention and promotion of members of the designated groups.⁴⁰²

What kind of employment barriers do Canadian women face which are to be corrected by employment equity? Women, especially women who fall into more than one disadvantaged group, are likely to experience various aspects of discrimination, including sexual harassment and stereotypical assumptions. These assumptions are that women do not need to work, that women are unable to do certain kinds of work, that women have divided loyalties between work and family, and that women do not need to be paid as much as men.⁴⁰³ Employment equity has the heavy burden of tackling all of these assumptions and practices. Solutions include balancing the workforce, clearing unfounded prejudices, and reducing sexual harassment as more women progress through to the higher levels of organizations.

Progress on employment equity across Canada, however, has been inconsistent. Only the federal government presently has mandatory employment equity laws.⁴⁰⁴ Both the federal government and Quebec have contract compliance programs that apply to organizations supplying goods and services to the government.⁴⁰⁵ These businesses must pursue employment equity in their

399. *See id.* at 6.

400. *See* CHERYL J. ELLIOTT, *EMPLOYMENT EQUITY HANDBOOK* 22 (1994).

401. *See id.* at 29.

402. *See id.*

403. *See id.* at 75.

404. OPIE & BATES, *supra* note 187, at 489.

405. *See id.*

workplaces. On the other hand, employment equity legislation introduced in Ontario in 1994 has since been repealed due to a conservative shift in the provincial government.⁴⁰⁶ In the rest of Canada, employment equity is dealt with indirectly through affirmative action provisions in human rights statutes, rather than in a separate statute specifically dealing with the issue.⁴⁰⁷

The federal Employment Equity Act was passed in 1986, and covers federally regulated employers with at least 100 employees.⁴⁰⁸ This legislation covers approximately five percent of the Canadian workforce.⁴⁰⁹ The purpose of the Act, as set out in section 2 is "to achieve equality in the work place so that no person shall be denied employment opportunities or benefits for reasons unrelated to ability and . . . to correct the conditions of disadvantage in employment experienced by [the designated groups]."⁴¹⁰ Under the federal Act, employers are required to: (1) identify and eliminate employment barriers; (2) institute positive policies, practices and reasonable accommodation to ensure representation of qualified designated group members; (3) collect and report on data showing number and proportion of designated group members within the organization; and (4) develop employment equity plans that set out goals and timetables for establishing employment equity.⁴¹¹ Ontario's Employment Equity Act was similar in design to the federal legislation. Since its repeal, the Ontario government introduced a voluntary, non-legislated, form of employment equity, which it called the Equal Opportunity Plan. Many women's groups view this voluntary form of employment equity as a step backward in the fight for equality.

Canadian women can call upon a fairly comprehensive web of legislation and case law to demonstrate their right to equality in the workplace. There are laws with the goal of ensuring that women and men receive the same treatment, such as minimum standards, human rights and employment equity legislation. Additionally, there are laws that ensure that a woman's ability to re-

406. *See id.*

407. *See id.*

408. *See* Employment Equity Act R.S.C. § 3 (1985) (as amended) (Can.).

409. *See* WEINER, *supra* note 215, at 25.

410. *See* Employment Equity Act, R.S.C., § 2 (1985) (as amended) (Can.).

411. *Id.*

produce does not hamper her ability to advance in the workplace.

Are these laws necessarily advancing the situation of women in Canadian society? Since 1941, the female share of the labor force has more than doubled.⁴¹² Nonetheless, women are still overwhelmingly found in specific industries and occupations characterized by low pay, low skill requirements, low productivity, and low prospects for advancement.⁴¹³ Moreover, the wage gap between men and women workers is narrowing slowly, despite the enactment of pay equity and employment equity legislation. This is largely due to the concentration of women in lower paying positions.⁴¹⁴ In 1970, women earned 59.9% of what men earned in comparable positions.⁴¹⁵ This improved to 63.8%⁴¹⁶ in 1980, and 62.2% in 1994.⁴¹⁷ While the laws may narrow the wage and employment gap between men and women, more than legislation is needed in Canadian society to close the gap entirely.

More fundamentally, a change in society's way of thinking about working women is needed. A more balanced sharing of familial and parental roles is necessary so that women are not forced to take part-time positions or positions with less responsibility. A greater acceptance of women in non-traditional, and usually more lucrative, occupations is needed. Finally, greater recognition of labor innovations, such as flexible work hours, job-sharing, and flexible benefits, are not only beneficial to women, but they may allow men to better balance their lives so work and family can be equally attended to, thereby easing each spouse's burden.

IV. CONCLUSION

As more and more women enter the workforce, it becomes clear that rights for working women are a key to women's equality. It is important to study the legal rights of women in the workforce,

412. PAT ARMSTRONG AND HUGH ARMSTRONG, *THE DOUBLE GHETTO: CANADIAN WOMEN AND THEIR SEGREGATED WORK* 18 (Revised ed. 1989).

413. *See id.* at 18.

414. *See id.* at 42.

415. *See id.* at 43.

416. *See id.*

417. *THE CANADIAN ALMANAC AND DIRECTORY* 1997, 1-53 (Ann Marie Aldighieri ed., 1996). This figure takes into account all earners, including part-time earners.

even though the law is only one method to reach gender equality.

The issues that confront working women in Argentina and Canada are similar, but the responses of each country differ. These responses can be loosely grouped in terms of "equality" and "protective" approaches to labor rights. Both countries have legislatively addressed equality and protective aspects of women's rights. The core of each country's labor rights for women are the equality provisions found in their constitutions and in anti-discrimination legislation. Moreover, each country has introduced minimum employment standards, equal pay for equal work provisions, maternity leave policies, and affirmative action legislation.

Each country, however, has taken a slightly different course in determining the meaning of these rights. Canada focuses upon the "equality" approach, acknowledging that a "protective" approach is necessary with respect to maternity. The Ontario Board of Inquiry in *Wiens* best summarizes this approach to equality rights: the balance between a woman's right to workplace equality and an employer's protective measures designed to reduce an employer's tort liability is delicate, and any policy which represents over-protection will not meet this balance.⁴¹⁸ Thus, certain Argentine laws with respect to prohibited work, for example, would likely not meet this balancing approach.

On the other hand, the reverse is also true: Canadian laws would not meet the Argentine balance of international duties and domestic implementation. Argentina has developed more laws along the "protective" approach to labor rights. This may be partly due to the differing methods of treaty implementation. In Argentina, ILO Conventions automatically become part of the domestic law. Certain laws that fall into the "protective" mold more so than the "equality" mold reflect the content of these conventions, such as the Night Work (Women) Conventions⁴¹⁹ and Underground Work (Women) Convention.⁴²⁰ Therefore, Argentina has addressed certain issues raised in the ILO Conventions,

418. *Wiens v. Inco Metals Co.* [1988] 9 C.H.R.R. D/4795 (Ont. Bd. Inq.).

419. See Night Work (Women), No. 4, *supra* note 106; Convention Concerning the Employment of Women During the Night (Revised), No. 41, June 19, 1934, 40 U.N.T.S. 3, reprinted in 1 INTERNATIONAL LABOUR CONVENTIONS AND RECOMMENDATIONS 1919-1951, 237 (1996).

420. See Underground Work (Women) Convention, No. 45, *supra* note 107.

such as nursing and having a baby in the workplace, that Canada has yet to confront directly.

The differing methods of treaty implementation have other effects. Because Argentina does not require implementing legislation before a ratified treaty becomes law, Argentine women have the advantage of relying on international law to interpret their rights. On the contrary, international conventions must be implemented through legislation in Canada and because it is not always clear that legislation is intended to uphold Canada's international obligations, it is difficult to refer to international law in domestic courts. This system is disadvantaged when confronting issues such as the repeal of employment equity legislation by the Ontario government.

Legislation, however, is not the only answer to the problems women face in the workforce. If it were, then both Argentina and Canada should be commended for having comprehensive laws in place that provide equality in the workplace. The main problem in both countries is the effective application of the law. For example, jobs which women are prohibited from holding in Argentina by law, are the same jobs that women have often been denied *de facto* in Canada by employers' hiring practices.

Argentina is hampered in monitoring legal effectiveness because it does not have statistical programs in place that track the application of certain laws as Canada does. This makes it more difficult to convince lawmakers and judges that certain legal interpretations lead to equality, while others do not, or even that certain laws are working. The severe disadvantage of lacking adequate statistical gender analysis was recognized in the 1995 Beijing Declaration and Platform for Action, which states that insufficient gender analysis has meant that women's contributions and concerns remain too often ignored in labor markets.

Different types of cases have been litigated in Argentina and Canada. Argentine women have focused on the issues of unequal wages. In Canada, while challenges to rules, regulations and laws may have originally focused on pay equity and non-discrimination under human rights codes, the cases are now wide-ranging and aim to target all areas of inequality, whether in maternity leave provisions for natural and adoptive mothers, in sexual harassment in the workplace, or in examining occupational requirements. The

result is that a body of law now exists in Canada that Argentina is only beginning to develop. Equal pay for work of equal value, sexual harassment at work, and employment equity are some examples.

Both Argentina and Canada have only begun to treat women equally in the workforce, and each can learn something from the other's experiences. Both countries have the fundamental legal building blocks for achieving workplace equality. The challenge is to develop and apply the law to reach those goals.