



Janet Stahle-Fraser, "Woman with Cropped Hair," Part 1 of diptych, handprinted colour woodcut, 1998, 10" x 7".

Hidden in the Past

How Labour Relations Policy and Law Perpetuate Women's Economic Inequality

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Les politiques et les lois des relations de travail au Canada désavantagent systématiquement les travailleuses parce que le travail et les syndicats endossent un modèle de travail « mâle » et « industrialisé ». Les conséquences de cette approche sont d'abord, le petit nombre de femmes syndiquées dans les industries où les femmes dominent, ensuite, une représentation syndicale axée sur la ségrégation des sexes et sur les négociations collectives, enfin, un salaire plus bas pour le travail traditionnel des travailleuses dans les milieux syndiqués.

“A woman's place is in her union” is the colloquial expression of the research finding that unions are good for women. Many studies have documented this advantage: by comparison with equivalently qualified women in the non-union sector, organized women earn significantly higher wages, have better fringe benefits, and greater job security.

However, this does not mean that union women are equal to union men; they are not. Collective bargaining has narrowed but not eliminated the gender gap in pay, which remains substantial. On average, union women earned \$2.77 (13.4 per cent) less per hour than equivalently qualified union men in 1997 (Drolet 2001) plus an unquantified difference in fringe benefits (Currie and Chaykowski).¹

The persistence of this gap is generally attributed to women's unequal status in the labour movement. There is no doubt that unions co-operated with employers in the past to ensure male privilege and that the legacy of those discriminatory practices continues to affect the economic prospects of union women today. But this limited analysis heaps too much weight on union shoulders. Of greater significance to women is the industrial relations system within which unions function.

Canadian industrial relations policy and law, which date from 1944 but remain little changed today, were shaped in response to a war-time crisis in traditional men's work; hence, the very structure as well as the application of the law embody this purpose. The particular features of this system—highly regulated right to organize, fragmented union representation, decentralized collective bargaining, and restricted right to strike—reflect the compromise between organized labour and capital that simultaneously acknowledged and constrained the right of (male) workers to bargain collectively through unions of their choice. For men—at least for those employed in manual occupations in large primary and secondary sector firms, the result was an acceptable—if diminished, version of “free” collective bargaining. Not so for women, who were

and continue to be systematically disadvantaged by a labour relations system that assumes a “male” and “industrial” model of both work and unionism (Forrest 1997).

A gender analysis of labour relations policy and law has been overlooked by most critics of labour-management relations.² Because the system is ungenerous to all workers its one-sidedness is usually framed as a class rather than a gender problem. There is ample evidence that the right to organize was wrenched from an unwilling government and subsequently protected only to the extent necessary to minimize work stoppages. The result is policy and law that fix the balance of power in favour of employers whose managerial prerogative is carefully protected in unionized workplaces.

Yet, within this intentionally restrictive framework men have fared better than women. The strongholds of traditional men's work—capital-intensive manufacturing, natural resource extraction, construction, and transportation—are better organized than women-dominated manufacturing and service industries. Union men also have privileged access to the better paying, more secure jobs in organized workplaces and earn more than equivalently qualified union women. All are logical outcomes of Canada's industrial relations system.

Organizing Women-Dominated Industries

Industrial relations law and policy have failed women, most particularly those employed in traditional women's work in the private sector. In the women-dominated industries of banking, insurance, retail, and services union density falls below 15 per cent (Akyeampong), not because

are more complex in industries where there is a limited history of collective bargaining and few established protocols.

Labour board definitions of appropriate bargaining units developed for manufacturing and resource industries do not always fit the service sector. The less certain dividing line between managerial and non-managerial employees and the many forms

tions, the company offered its newly organized workers nothing more than they already had: no increase in wages, no improvement in benefits, no job security, and contract language "so outmoded as to be more relevant in the 1940s" (Forrest 1989: 195). "Hard bargaining" of this sort was lawful, the Ontario Labour Relations Board ruled, because Eaton's was prepared to sign a collective agreement, if only on its own terms (Forrest 1989).

Labour boards draw the line at employer demands that lack "any semblance of business justification" (Forrest 1989: 198). But Eaton's and other large-scale employers of women's labour have legitimate, even pressing, business reasons for maintaining labour costs at the industry norm that in service industries is often little above the minimum required by law. Thus, despite the company's admission that it was unwilling to improve wages and benefits because to do so would only encourage further union organizing, the Ontario board detected no "anti-union animus." So long as an employer participates in the bargaining process—its negotiating committee meets the union regularly, provides the necessary information, and exchanges proposals—and does not undercut the bargaining authority of the union by unilaterally changing the terms and conditions of employment, bargaining directly with employees, or engaging in other forms of anti-union conduct, labour boards are unlikely to find a violation of the duty to bargain in good faith. George Adams describes the purpose of the law as bringing the parties to the table; there is an expectation but no requirement that they come to agreement (10/91-4). Labour boards do not ask whether an employer's offer is fair and are careful to guard against union efforts to use the duty to redress an imbalance in bargaining power.

Frustrated by their employer's intransigence, the Eaton's workers struck. But there, again, the law failed them. On the picket line, they con-

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these employees do not wish to be represented by unions or because unions have ignored these industries, but because the law allows employers to avoid collective bargaining. Problems with the law were evident as early as the 1950s, following the high-profile failures to organize Eaton's and the chartered banks, and remain uncorrected today. Over the last 20 years, worker-initiated organizing drives in retail (e.g., Sears, Walmart, Eaton's), the banks (e.g., CIBC, TD, Canada Trustco), and fast-food restaurant chains (e.g., MacDonald's, Wendy's) have failed to establish on-going collective bargaining relationships.

The Canadian system of collective bargaining requires unions to be legally recognized as exclusive bargaining agents; yet, the certification procedure imposes a myriad of rules that afford employers legitimate ways to delay and avoid collective bargaining. Among other things, labour boards are called upon to determine whether a union's proposed bargaining unit is appropriate for collective bargaining and which jobs should be excluded from the union because the employees exercise managerial functions, have access to confidential information, or perform jobs that put them at arm's length from their co-workers. Inevitably, these questions

of "non-standard work" (e.g., part-time, casual, and limited term contract) characteristic of service industries are but two issues that often require labour relations boards to hear detailed evidence about who does what in the workplace and with what degree of authority. As a result, workers often wait months for the outcome of certification. Even if the issues are resolved in the union's favour, these delays sap workers' support for the union, especially in small bargaining units³ where managers and employees work side-by-side and labour turn-over is often rapid. In the worst cases, the long delays between application and certification allow employers time to undermine workers' confidence in the union's ability to protect their interests, as a number of studies have shown.⁴

In all jurisdictions,⁵ the law requires an employer to bargain in good faith and make every reasonable effort to conclude a collective agreement with a certified union. However, the reality often falls short of the theory. An employer who wishes to evade its legal obligations may do so by simply refusing to come to terms with the union. A "no-concessions" bargaining strategy is often lawful and effective, as the Eaton's case demonstrates. After months of negotia-

fronted the full economic power of an employer with “deep pockets.” In general, the law permits employers to draw on the full extent of their managerial prerogative and financial resources to resist union bargaining demands. Eaton’s responded by assigning managers to perform bargaining unit jobs, hiring replacement workers, and removing pickets from mall entrances. It could also have shifted work to other locations, eliminated jobs, or even closed a store down.

Workers, by contrast, can only stop working, a sanction that has little import in the service sector where struck firms offer the same services in many locations. It is almost impossible for a small group of workers—in the Eaton’s case, less than four per cent of its employees at only six of its 110 stores (Forrest 1989: 202)—to inflict a meaningful economic penalty against a national/multi-national employer within the law. Union actions to bridge the gap in bargaining power such as sympathy strikes by other unions, working to rule in supplier or client firms, picketing that blocks access to the struck location, and other workers’ refusals to cross a picket line are almost always unlawful and so expose unions to fines and individual workers to industrial discipline.⁶ In the service sector, striking workers are often forced to rely on public support, which is uneven and unreliable at best.

Thus, despite the Eaton’s strikers *cause célèbre* status in Toronto, positive press coverage, and a six-month work stoppage, collective bargaining did not take root. Not long after the strikers returned to work, their unions were decertified or lost their bargaining rights as a result of inactivity (Forrest 1989: 210).

Policy changes designed to remedy this obvious structural imbalance of power in private-sector services have been short-lived or rendered ineffective by timid application. Pro-worker legislation such as the ban on hiring replacement workers during strikes, implemented by the New Democratic Party (NDP) in Ontario, was

immediately overturned by the subsequent Conservative government in response to employers’ threats to relocate to more accommodating jurisdictions. Longer-lived but no more effective is the availability of final and binding arbitration to end first agreement disputes. In place for 20 years in some jurisdictions, the imposition of first agreements is a remedy that is sparingly (except in Quebec) and

en’s work.” Using data for the economy as a whole, Marie Drolet (2002) concluded that 46.8 per cent of the gender gap in hourly wages is explained by women’s over-representation in low wage industries and occupations, 38.8 per cent by gender discrimination,⁸ and only 10.6 per cent by differences in personal characteristics. There are no studies of the gender gap in wages for the union

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conservatively applied. Newly certified unions should not expect radical improvements from the arbitration process. In first agreement situations, arbitrators impose terms and conditions of employment similar to those in comparable workplaces (Labour Law Casebook Group 413-20), which could mean not much at all in predominantly non-union industries. In any event, the imposition of a first collective agreement through arbitration does not ensure a second, which unions, however small and isolated, must bargain on their own. No surprise, then, that first agreement arbitration has not led to organizing breakthroughs in the service sector.

Institutionalized Job Segregation by Gender

Labour relations policy and law establish gender as a legitimate basis for union representation and collective bargaining. The result is that job segregation by gender is as sharp in the union as in the non-union sector⁷ and has the same negative consequences for union women. Study after study has demonstrated that women earn less than men primarily because they are women and tend to be employed in undervalued “wom-

sector on its own; however, there is no reason to believe the results would be significantly different.

Job segregation by gender and low pay for traditional women’s work are facts of life in unionized workplaces, in part, because workers are divided by occupation during the certification process. Depending on the jurisdiction, one or all of blue-collar/manual, office/clerical, professional, sales, security, part-time, casual, contractually limited, self-employed, and home workers are routinely separated from each other. These distinctions are based more on employers’ than employees’ needs, Judy Fudge argues. However, even when labour boards take workers’ interests into account they often rely on out-dated and sexist assumptions about their community of interest. In many jurisdictions, the social construction of women and “women’s work” as essentially different from men and traditional men’s work is affirmed by the labour board construct of appropriate bargaining unit.

The Ontario board has been particularly rigid in its approach, assuming, for example, that pink-collar and part-time workers have economic interests different from—even in conflict with—full-time, blue-collar/manual workers in the same estab-

lishment. Although it is now rethinking its approach to part-time (but not office and clerical) workers (Adams 7/43-6), the legacy of this policy legitimates the different/inferior terms and conditions of employment attached to this form of traditional women's work. In the union sector, part-time workers are almost always paid less for doing the same jobs as full-time employees in the same es-

Labour relations policy and law can perpetuate job segregation by gender and inferior terms and conditions of employment for traditional women's work within bargaining units, as well as between them. It is standard bargaining practice, and not unlawful, for employers and unions to negotiate seniority clauses that restrict workers' mobility within a bargaining unit, even when the result is

she was paid the established rate for her job—and had she filed a grievance alleging gender discrimination it could not have succeeded without her union's support. There was no violation of the union's duty of fair representation—her union took her concerns seriously and investigated the matter fully (Christian)—and no violation of the employer's duty to bargain in good faith. In theory, Ms

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tablishment in the union sector. Their “Other”/lesser status is also affirmed by their more limited rights for promotion or in the event of cutbacks. Where full- and part-time workers are both organized, the latter are commonly prevented from moving into the full-time jobs for which they are qualified, even when their accumulated seniority is greater than their full-time competitors.

Where labour relations policy and law institutionalize the gender division of labour they reify small differences among workers that benefit employers more than workers and men more than women. Why differences between “non-standard” and “regular” employees are more fundamental than other potential conflicts of interests, for example, between skilled and unskilled or junior and senior workers, has never been explained. In practice, community of interest is a political, not a “natural” construct. Knitting together the diverse sectional interests related to occupation, department, seniority, skill level, race/ethnicity, and gender is an essential aspect of union education that begins but does not end with an organizing drive. Unions that fail to take on this project leave their members vulnerable to employer whipsawing.⁹

to lock women out of higher paid, male-dominated job categories. Moreover, in absence of pay equity legislation, it is neither uncommon nor unlawful for employers and unions to evaluate female-dominated jobs by different criteria than male-dominated jobs and so “reproduce, rationalize, and legitimate” lower pay for jobs historically performed by women (Steinberg 388-90).

Consider the case of Beatrice Harmatiuk, who was employed as a housekeeper at Pasqua Hospital where she earned less than her co-workers employed as caretakers. Although similar in skill, responsibility, and working conditions, the all-male caretaker job scored ahead of the all-female housekeeper job in the negotiated job evaluation scheme because of its marginally greater physical demands. By contrast, the extra mental effort required of housekeepers who interacted with patients went unrecognized. Ms Harmatiuk lost two appeals to her employer and union before she won her point at the Saskatchewan Human Rights Tribunal.

Ms Harmatiuk was forced to take her complaint to the Tribunal because, by the standards labour relations policy and law, she had incurred no wrong. There was no violation of the collective agreement—

Harmatiuk's and other housekeepers could have used Saskatchewan's labour relations legislation to hold their employer and union to account if they subsequently failed to correct the discriminatory elements of the job evaluation scheme; however, this would be a novel use of a law that was never intended to promote gender equality.

Decentralized Wage Bargaining

Inferior terms and conditions of employment for traditional women's work are all but ensured by the long-standing policy preference for decentralized wage determination. Originally intended to control wage growth in unionized “men's work,” this policy preference now weighs more heavily on union women. The gender gap in wages is largest in countries where wage bargaining is fragmented and decentralized (Kidd and Shannon; Reiman), that is, where workers in female-dominated bargaining units generally bargain on their own or with other female-dominated groups. In Canada, women are more often located in the smallest and lowest paid bargaining units (Currie and Chaykowski) and establishments (Drolet 2002) where they are poorly positioned to close the gender gap in

wages, even when their unions are solidly behind the demand.

For workers in women-dominated bargaining units and establishments closing the gender gap in pay necessitates bargaining in alliance with workers in male-dominated bargaining units and establishments; yet, labour relations law and policy make this all but impossible. Unlike other OECD countries, the majority of collective bargaining in Canada involves only one bargaining unit in one establishment. This high degree of fragmentation is the consequence of what H. D. Woods and Sylvia Ostry called a “bias” (270) in labour law that originates in the certification process. Single-establishment certification is the norm in Ontario and within establishments separate bargaining units are generally created for blue-collar, white-/pink-collar, sales, craft/professional employees, and others. Bargaining units are not so narrowly described in every jurisdiction, however. Both the Canada and British Columbia boards prefer employer-wide bargaining units where collective bargaining is well established (Adams 7/19-23). But whatever the practice, bargaining rights follow certification rights. In all jurisdictions, the law requires each union/bargaining unit, no matter how small, to negotiate its own collective agreement.

Though not unlawful in itself, it is a violation of the duty to bargain in good faith for a union to make its desire for broader-based bargaining a strike issue. Accordingly, it is impossible for company-, industry-, or even establishment-wide bargaining to emerge unless it would be in the interests of the employer. But fewer and fewer firms are willing to negotiate on this basis. Economic restructuring and globalization have heightened competitive pressures among workers within and between firms. The consequence is that well-established, broader-based bargaining has broken down in many industries as more and more unions are pressured to settle for wages and working con-

ditions that reflect the profitability of each establishment (Chaykowski 2001: 241).

Many labour relations experts such as Paul Weiler defend the existing fragmented, gender-segregated system of union representation and collective bargaining as essential to workers’ right to self-organize. In Weiler’s view, efforts to promote women’s economic equality that disrupt established collective bargaining practices should be avoided. Addressing the federal Pay Equity Task Force, Weiler argued that any “equal pay or pay equity statute which allows comparisons of the value of work regardless of bargaining unit boundaries would wholly undermine the notion of free collective bargaining” (10).

Elevating the structures that perpetuate male privilege to immutable principles of labour law is incompatible with women’s right to equal pay for work of equal value, as the case of *Canadian Union of Public Employees v. Canadian Airlines/Air Canada* (1998) demonstrates. In this situation, flight attendants in a female-dominated bargaining unit were denied access to their logical, and only, male comparators in the male-dominated ground crew and pilot unions on the grounds that each bargaining unit constituted its own, unique system of labour relations. This was the employer’s position in bargaining, later affirmed by the Canadian Human Rights Commission. Taking note of the differences in negotiated terms and conditions of employment in the three collective agreements, the Commission ruled that each of the three bargaining units was a functionally separate establishment, notwithstanding the fact that all work out of the same locations.

This result is a classic catch-22. First, labour relations law imposes gender-segregated patterns of union representation and decentralized wage bargaining, then, when different/inferior terms and conditions of employment are negotiated for female-dominated bargaining units, the result is interpreted as differences in

workers’ bargaining preferences and priorities, not as evidence of systemic gender discrimination.

This interpretation was rejected by the federal government’s Pay Equity Task Force. Members of the Task Force identified the fragmented and gender-segregated structure of union representation and collective bargaining as obstacles to gender equality (Canada 448, 462), even as they acknowledged the important role unions have played in advancing the rights of women. Their recommendations include a new structure—the “pay equity unit”—that would span all of the operations of a single employer and so ensure equal pay for work of equal value for workers across all bargaining units (Canada 206). If implemented, this form of broader-based bargaining would blunt the “male/industrial” bias in labour relation law while protecting workers’ right to organize into gender-segregated, occupation-based unions.

Conclusion

Union women have put the issue of gender equality on the bargaining agenda of a reluctant labour movement. Pushing and prodding their way forward, feminist activists have insisted that unions address systemic barriers to women’s economic equality such as sexual harassment, family responsibilities, and low pay for traditional women’s work. The results are impressive. Limited at first to collective agreements negotiated by the most progressive unions, the fruits of these initiatives are now widespread. Sexual harassment policies and procedures, paid maternity/parental leave with no loss of seniority, family leave with pay, and pay equity legislation now benefit all or, in the case of pay equity legislation, hundreds of thousands of women (and men) in the non-union as well as in the union sector.

These gains have been made against the grain of an industrial relations system that is “male” and “industrial” in structure and purpose. But

much of this is hidden in the past. Present-day collective bargaining policy and law, though rooted in the sexist norms and mores of the 1940s, appear to be nothing more than the workings of a system that sets the balance of power in favour of employers. It takes a feminist analysis to reveal the subtle ways that these norms and practices discriminate against women workers in particular. More importantly, it takes feminist activists to press for change.

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¹In 1997, non-union women earned an average of \$4.19 (23.5 per cent) less per hour than equivalently qualified non-union men (Drolet 2001: 28).

²But see Fudge and Forrest (1997).

³The average size of newly certified unions in private-sector services in Ontario between 1981 and 1999 was 28 employees (Yates).

⁴See Thomason and the references cited therein. Using certification data for Ontario during the 1980s, Thomason concluded: "An employer who insists on a hearing, commits an unfair labour practice, and extends the period between the application and final disposition of the certification by 100 days ... can reduce the proportion of employees supporting the union by almost 15 per cent and the probability of certification by nearly 20 per cent" (223).

⁵Labour relations falls within provincial jurisdiction. The consequence is a multiplicity of statutes that differ one from the other in small rather than large ways.

⁶The consequences for participating in an unlawful strike vary by circumstance but can include dismissal.

⁷Using collective agreement data from

Ontario for the years 1980-1990, Currie and Chaykowsky estimated that almost two-thirds of women workers in the union sector would have to change jobs in order to eliminate gender segregation. This is higher than the Duncan indexes estimated for the economy as a whole (Fortin and Huberman).

⁸Most researchers accept that the portion of the gender gap in wages not accounted for by differences in worker or workplace differences should be labelled gender discrimination.

⁹Whipsawing occurs when an employer seeks to impose the inferior terms and conditions of employment negotiated with one group of workers on better-paid workers. The tactic is most successful when the better-paid group is fearful that it may lose jobs to the lower paid group. The tactic can be used in reverse by unions in a tight labour market.

References

Adams, George W. Canadian Labour Law. 2nd ed. Aurora: Canada Law Book, 2003.

Akyeampong, Ernest B. "Fact-Sheet on Unionization." *Perspectives on Labour and Income* 13 (3) (2001): 46-54.

Canada. *Pay Equity: A New Approach to a Fundamental Right. Pay Equity Task Force Final Report 2004*. Ottawa: Pay Equity Task Force, 2004.

Canadian Union of Public Employees v. Canadian Airlines International/Air Canada (1998). 34 C.H.R.R. D/442 (C.H.R.T.)

Chaykowsky, Richard P. "Collective Bargaining: Structure, Process, and Innovation." *Union-Management Relations in Canada*. 4th ed. Eds. Morley Gunderson, Allen Ponak, and Daphne Gottlieb Tara. Toronto: Addison Wesley Longman, 2001. 234-71

Christian, Timothy J. "The Developing Duty of Fair Representation." *Labour Arbitration Year Book* 2 (1991): 3-30.

Currie, Janet and Richard Chaykowsky. "Male Jobs, Female Jobs, and Gender Gaps in Benefits Coverage in Canada." *Research in Labor Economics* Solomon W. Polachek, ed. Greenwich, CT: JAI Press, 1995. 171-210.

Drolet, Marie. *The "Who, What, When and Where" of Gender Pay Differentials*. The Evolving Workplace Series. Ottawa: Statistics Canada, Human Resources Development Canada, 2002.

Drolet, Marie. *The Persistent Gap: New Evidence on the Canadian Gender Wage Gap*. No. 157. Ottawa: Statistics Canada, Business and Labour Market Analysis Division, 2001.

Forrest, Anne. "Securing the Male Breadwinner: A Feminist Interpretation of P.C. 1003." *Relations Industrielles* 52 (1) (1997): 91-113

Forrest, Anne. "Organizing Eaton's: Do the Old Laws Still Work?" *Windsor Yearbook of Access to Justice* 8 (1989): 190-213

Fortin, Nicole M. and Michael Huberman. "Occupational Gender Segregation and Women's Wages in Canada: An Historical Perspective." *Canadian Public Policy*, 28 Supplement, S11-39 (2002): S23.

Fudge, Judy. "Rungs on the Labour Law Ladder: Using Gender to Challenge Hierarchy." *Saskatchewan Law Review* 60 (1996): 237-263.

Harmatiuk v. Pasqua Hospital, 4 CHRR 239, D/1177-81.

Kidd, Michael P. and Michael Shannon. "The Gender Wage Gap: A Comparison of Australia and Canada." *Industrial and Labour Relations Review* 49 (July) (1996): 729-46.

Labour Law Casebook Group. *Labour and Employment Law: Cases, Materials and Commentary*. Sixth ed. Kingston: IRC Press, 1998.

Reiman, Cornelis A. "Has Enterprise Bargaining Affected the Gender Wage Gap in Australia?" Canberra: The National Centre for Social and Economic Modelling, Univer-