

Pay Equity in the Sky

The Case of Air Canada and Canadian Airlines

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Au Canada, le paysage législatif regorge de cas d'équité en emploi en suspens à cause des ambiguïtés statutaires. Le cas des employés de « Canadian Union Pacific » et des compagnies aériennes Air Canada et « Canadian Airlines » illustre bien les problèmes des plaignantes face à la juridiction fédérale qui concerne les implications du mot « establishment » dans les clauses de l'équité salariale de la section onze de la Charte des droits humains. Comme le cas des compagnies aériennes le démontre, les agents négociateurs et l'employeur se sont empêtrés dans un bourbier légal dû au comportement de l'employeur qui n'est pas intéressé à payer les ajustements salariaux à son personnel.

The first point that has to be made about the “Airlines case” is that both the initial Tribunal decision and the subsequent Federal Court decision were a surprise, or perhaps a better word would be “shock,” to those with a long history in pay equity practice. For decades the word “establishment” in Section 11 of the *Canadian Human Rights Act* (CHRA) had been interpreted one way—then a Human Rights Tribunal accepted an argument by a creative legal team on behalf of Air Canada and Canadian Airlines with regard to the interpretation of the word “establishment.” For the first time ever in a pay equity implemen-

tation exercise in Canada (and likely anywhere), it was accepted that employees in a female-dominated bargaining unit of the same employer (flight attendants) could not compare themselves to male-dominated jobs in other bargaining units in the same workplace (namely pilots and maintenance crews) because they were, it was argued, in separate “establishments.” The idea seemed unbelievable—this was precisely how pay equity implementation had worked for many years and indeed how it was supposed to work. Unfortunately for the flight attendants both the Tribunal and the Federal Court agreed with this rather bizarre interpretation thus making a pay equity exercise virtually impossible in the highly unionized airline industry where nearly all employees are in different bargaining units.

In recent years pay equity analysts have asked: does pay equity policy benefit women (see, for e.g., Chicha; Fudge; Hart; Hallock; Kainer; Nelson and Bridges)? We would like to say that it is an effective strategy to redress gender-based wage discrimination; however, the real answer to this question relates to problems around pay equity implementation—and the often complex and unpredictable legal hurdles that may actually end up resulting in few gains for women. The fact that the gender wage gap in Canada remains at 30

per cent, despite proactive pay equity legislation in six Canadian provinces, reinforces the view that pay equity has made only modest improvements in women’s wages.¹ Legal analyses of pay equity offer numerous examples detailing how pay equity exercises end up in a legal quagmire over the interpretation of key terms and technical procedures set down in legislation.² For example, when the *Ontario Pay Equity Act* came into force in 1990, extensive litigation ensued to determine “who is the employer”; “what constitutes gender neutrality of a job comparison methodology”; and “who is an employee” for pay equity purposes, were only some of many, lengthy and costly cases that had to be decided before many pay equity exercises could proceed.³ Many became long drawn out affairs ending up before Tribunals or the courts where technical legal questions about the precise meaning of terms was highly contested. The Public Service Alliance of Canada, a union representing civil service workers, spent 14 years in litigation with the federal Canadian government debating the appropriate job comparison methodology to be applied before reaching a \$3.5 billion pay equity settlement in 1999. The Communication Energy and Paperworkers (CEP) union began their pay equity dispute with Bell Canada in 1988

over pay equity adjustments owed to 5,000 telephone operators. After a strike, a series of court battles, a federal Human Rights Tribunal decision requiring Bell to pay \$150 million to its telephone operators, and a public relations campaign by the union to shame the company to pay up, the CEP continues its legal struggle with the company. Now at the Supreme Court of Canada, Bell continues to dispute its legal obligation to pay wage adjustments to the remaining 300 telephone operators still employed by the company. The Public Service Alliance filed a pay equity complaint with Canada Post in 1983 on behalf of administrative and clerical staff that just last year reached the federal Canadian Human Rights Tribunal. Over this 20-year period the case involved 401 days of hearings while 44,000 pages of transcripts and 1,000 exhibits were submitted by the union in its final written argument to the Tribunal in January 2003.⁴ The Canada Post case has yet to be concluded.

That technical-legal decisions continue to plague pay equity implementation is evident from long-standing federal pay equity case which we will examine in this paper—*CUPE/Canadian Airlines International Ltd.*, commonly referred to as the *Airlines* case.⁵ The major issue confronting the litigants in this complaint concerns the interpretation of the term “establishment” under section 11 of the *Canadian Human Rights Act* (CHRA).⁶ The term establishment simply refers to “who is covered” under the federal statute for pay equity purposes. However, its legal meaning is, as noted earlier, surprisingly far from straight-forward. In fact, litigation over the interpretation of establishment has become so convoluted that the *Airlines* complaint has been mired in legal argument for 17 years. It is no wonder that this case has almost receded from public memory.⁷ Yet, this pay equity decision could be the lynch pin in the federal jurisdiction as its outcome could ultimately decide the scope of

coverage of pay equity under the CHRA for all federal sector workers.

The Airlines Case: A Brief Summary

In 1991 and 1992, CUPE filed complaints with the Canadian Human Rights Commission (CHRC), on behalf of its flight attendants against Air Canada and Canadian

devised the *Equal Wages Guidelines* (EWGs) in 1986. The EWGs included section 10, a provision intended to clarify the term “establishment” in reference to the personnel functions of a firm:

For the purposes of section 11 of the Act, employees of an establishment include, notwithstanding any collective agreement

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Airlines International Ltd., alleging that the airlines had discriminated against these predominantly female groups by paying them lower wages and by having a salary structure that requires the flight attendants to work longer to reach the maximum pay than the two male comparator groups, the pilots and the maintenance and technical workers.

Both airlines defended the complaints, arguing that the three job groups named in the complaints were not in the same “establishment” for purposes of section 11 of the CHRA, but were in fact in three separate establishments, and therefore pay equity comparisons could not be conducted using the pilots or the technical and maintenance workers as male comparators. The employers put forward this argument because section 11 of the CHRA states:

It is a discriminatory practice for an employer to establish or maintain differences in wages between male and female employees employed in the *same establishment* who are performing work of equal value. [emphasis added]

Later, in an effort to elucidate the meaning of establishment in section 11 of the CHRA, the Commission

applicable to any employees of an establishment, *all employees of the employer subject to common personnel and wage policy*, whether or not such policy is administered centrally. [emphasis added]

The airline employers argued that because the flight attendants, the pilots and the maintenance and technical workers had separate collective agreements, and each group belonged to separate bargaining units, they constituted separate establishments. The employers argued that individual collective agreements for each of the bargaining units formed a “common wage and personnel policy” because, they argued, most policies concerning wages and personnel matters are found in collective agreements. Since the airlines argued that each bargaining unit was a separate establishment, cross-unit comparisons were precluded in pay equity implementation and wage adjustments cannot be applied using the male comparators outside of the flight attendant’s bargaining unit.

CUPE (joined by the Canadian Human Rights Commission as co-complainant) argued that the wording of section 10 of the EWG’s was designed specifically to *ensure* that

comparisons across bargaining units would be possible. CUPE presented evidence to support the view that each airline was an establishment in which there were numerous bargaining agents operating in an interrelated manner to accomplish the “core function of the employer,” namely, “the business of transporting passengers and cargo by air domestically and internationally” (*Canada v. Ca-*

napel the decision. Hence, the major issue hindering the implementation of pay equity in the complaint before the Federal Court of Appeal, was whether the employers, Air Canada and Canadian Airlines International Division Ltd., were correct in interpreting the definition of establishment under section 11 of the *Canadian Human Rights Act* as the “bargaining unit.”

work” and women, “women’s work,” a pattern entrenched in the labour force in all industrialized nations for more than a century. A classic example of a gender divided workforce is that of female clerical workers who work in the office, versus male manufacturing workers who work in the plant of the same company and at the same location.

This gender segmentation is perpetuated by the way Canadian labour boards certify bargaining units when unions are originally formed. Both the Canada Labour Board at the federal level and provincial boards shape bargaining units using a long-standing policy called the *community of interest* whereby units are certified, typically by workplace, according to the type of work being done. This means that bargaining units end up being composed primarily of women doing female-dominated work or primarily of men doing male-dominated work—even if they have been organized by the same union.

Within the airlines, the gender divide consists of the female flight attendants who service passengers and who are in a separate bargaining unit from the male technical service workers that provide maintenance and other services for the airplanes on the ground, and First and Second Officers (pilots) who fly the airplanes. In this situation, because male units are off-limits as male comparators, the scope of implementation of equal pay is seriously curtailed for the female flight attendants who cannot compare their jobs with the technical service workers (ground crew) and the pilots, even though they are employed by the same company. Further, despite the fact that the flight attendants work in the same workplace (the airplane) as the pilots, they were nonetheless deemed to work in a separate establishment, according to the Tribunal and Federal Court. But that is currently not the end of the story. In a March 2004 the appeal by CUPE to the Federal Court of Appeal was successful and has completely reversed the previous two de-

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nadian Airlines Int'l Ltd 172). CUPE had urged the Tribunal to look first and foremost at “whether employees are involved in the same operating line of business or core function of the employer” (*Canada v. Canadian Airlines Int'l Ltd* 172-173). Their evidence included the existence of a common personnel policy that was the same and available to all employees of each airline, including a “pension plan, employee travel passes, vacation policies, time and leave of absence policies, general employee benefits programs relating to health, disability and dental plans” (*Canada v. Canadian Airlines Int'l Ltd* 170), as well as harassment policies, employee assistance programs, theft policies, and absenteeism policies—not to mention employee affiliation, common uniforms, the same badges with companies logos, and so on. CUPE also argued that at Canadian Airlines there had been a corporate-wide appeal to accept wage concessions from the employer.

Despite the evidence presented by CUPE, both the Tribunal and subsequently the Federal Court found the airlines’ arguments more compelling and that the definition of “establishment” could indeed include bargaining unit. This left CUPE and the Commission with no option but to

The Crux of the Matter: Gender Segmentation

There are two important implications of the Federal Court decision. First, the functional definition of establishment was upheld by the court with the result that individual collective agreements are seen to represent common personnel and compensation policies. As a consequence, the bargaining unit functions as a separate establishment making cross-unit comparisons virtually impossible. For workers doing female-dominated work in predominantly female workplaces, like the flight attendants at the airlines, access to redress under the equal pay for equal value provision of the CHRA will not be achievable since male comparators who are not in the same bargaining unit are not available for comparison purposes. This problem also extends to female predominant groups within non-union settings since under the CHRA they too will not have access to male comparators in bargaining units.

Second, and more importantly, this decision does not challenge wage inequities that have been built upon a deeply-rooted gender segregated labour market. As many studies have demonstrated, men tend to do “men’s

cisions (*Canada [Human Rights Commission] v. Air Canada*).

The Federal Court of Appeal Decision

The reasons for the decision were written by Mr. Justice Rothstein with Mr. Justice Nadon concurring. Mr. Justice Evans, who it is interesting to note wrote the reasons for the majority in the Public Service Alliance of Canada case in 1999 which resulted in the \$3.5 billion pay equity settlement mentioned earlier, submitted concurring reasons of his own in this decision. It must be said that it appears that Justice Evans has learned a great deal about both the theory and practice of pay equity implementation now having been involved in two major, lengthy cases in the federal arena.

Justice Rothstein's main reasons for supporting the appeal are first that "the definition of establishment should not be based on the myriad of details found in collective agreements." He was compelled by the document *Air Canada's Labour Relations Policy and Principles* "speaks of a single mission for Air Canada as a whole" and that "this document is evidence of the type of common personnel and wage policy to which section 10 of the Guidelines refers" (*Canada [Human Rights Commission] v. Air Canada* par. 39 and 40). This decision also found that to interpret the EWGs in such a restrictive way (limiting comparisons to stay within each bargaining unit) "would make comparisons impossible in a practical sense" and they "cannot be read to contemplate the impossible" (*Canada [Human Rights Commission] v. Air Canada* par. 28).

This decision of Justice Rothstein was indeed adequate; however, since the airlines had won two rounds, perhaps Mr. Justice Evans felt it necessary to explain the purpose of pay equity legislation in case an appeal is launched by the airlines to the Supreme Court of Canada. His concurring decision sets out some basic prin-

ciples about the reasons for pay equity that are indeed helpful to have set out in a decision from such a high court in Canada as the Federal Court of Appeal. One of the first points that Justice Evans makes is that the purpose of pay equity legislation is:

... the elimination of the wage gap between men and women performing work of equal value

The reasons for pay equity legislation are reinforced throughout the decision. Not only does he point out that limiting comparison within a bargaining unit would very likely preclude comparisons between "blue collar" and "white collar" bargaining units, he makes the point that such a restrictive interpretation "strikes at the heart of the pay equity principle" because of the gendered segmented

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resulting from historic and systematic undervaluation of women's work and the segmentation of the labour market by gender. (*Canada [Human Rights Commission] v. Air Canada* par. 52)

This point, although obvious to many, needs to be expressed clearly in cases about pay equity. The decision then discusses how the "interpretive dilemma" arose from the poor drafting of section 10 of the Canadian Human Rights Act and that to side with one interpretation proposed by the airlines would be to:

...seriously impede the implementation of the broad legislative purpose underlying section 11: closing the wage gap resulting from systemic gender discrimination and the segregation of the labour market in employment settings subject to federal regulation. (*Canada [Human Rights Commission] v. Air Canada* par. 58).

Justice Evans then notes that "interpretive doubts should be resolved in such a way that the overall purpose of the legislation" is fostered (*Canada [Human Rights Commission] v. Air Canada* par. 60).

nature of the labour force. He describes the restrictive interpretation as "implausible" because "it will do very little, if anything" to further the objective of closing the wage gap (*Canada [Human Rights Commission] v. Air Canada* par. 81). He also makes an important point that is often ignored in pay equity jurisprudence, namely that since women's work has been systemically undervalued "An important goal of pay equity legislation is to remedy the discriminatory effects of the operation of a gendered labour market" (*Canada [Human Rights Commission] v. Air Canada* par. 83).

Conclusion

The *Airlines* case clearly demonstrates the importance of defining establishment broadly to permit cross-bargaining unit comparisons. Advocates of pay equity consistently emphasize that the wider the scope of application the greater the choice of male comparators and the fairer the outcome. Allowing for a province-wide definition of establishment is one recommendation that has been proposed while others have argued that the term should encompass the employer and its affiliate operations.⁸ In some proactive pay equity statutes

the employers and establishment are identified and designated responsible for redressing gender-based wage discrimination.⁹

The issue of establishment remains a controversial concern in the federal sector. In 2001 the Federal Pay Equity Task Force was appointed to review section 11 of the CHRA. The establishment definition was identified as a crucial area of research and a report commissioned where many points in this paper were raised (see Kainer and McDermott). The Task Force released its report in early 2004 and the *Airlines* case continues to wend its way through the courts. Moreover, Air Canada has undergone significant restructuring with major layoffs in the past year as it undergoes bankruptcy protection. The unions representing workers at Air Canada have accepted \$1.1 billion in labour cost concessions, with additional pressure from management to accept reductions in pension benefits (see Wong; "Air Canada to cut 150 jobs in Calgary").¹⁰ Still, many wonder whether the airline will survive in the next few years. Ironically, after more than a decade of legal wrangling over pay equity implementation, market forces, and not litigation, may ultimately have far greater influence over the pay equity outcome at these airlines.

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¹In 1987 the gender wage gap in Canada for full-time full year workers was 34 per cent. Twelve years later the gap remained at 30 per cent for full-time annual earnings according to a Statistics Canada analyst Marie Drolet (2001, 2002) (see also Carey).
²Several excellent examinations of pay equity litigation in Canada are Suzanne Handmann and Karen

Jensen; Fudge; Stinson.

³These questions were addressed in a series of cases referred to as *Haldimand-Norfolk* and *Women's College Hospital* that were heard before the Ontario Pay Equity Hearings Tribunal between 1989 and 1992. Similar questions have been addressed in the federal jurisdiction see: *Time for Action: Special Report to Parliament on Pay Equity*.

⁴Personal communication with legal counsel representing Public Service Alliance (PSAC) workers complaint against Canada Post, January 2, 2003. See also *Time for Action* (8).

⁵Although we use the term "the case" here we are actually referring to two separate decisions about the definition of establishment. The first is a decision of the Canadian Human Rights Tribunal, *CU.P.E v. Canadian Airlines International Ltd.* The second is the result of an appeal of the Tribunal decision by the Federal Court of (Trial Division) in 2002, *Canada v. Canadian Airlines Int'l Ltd.*

⁶The *Canadian Human Rights Act* (CHRA) covers unionized and non-unionized federally-regulated employees whose work is deemed to be a federal undertaking, typically work that is primarily interprovincial or federal in character, about ten per cent of the Canadian workforce. The equal pay for equal value clauses contained in section 11 of the CHRA are complaint-based, meaning that a complaint must be filed to redress systemic wage discrimination in pay.

⁷The complaint is not mentioned in the media, despite Air Canada's high profile coverage of its restructuring plans and intense litigation over paying down the airline's pension deficit. Additionally, other high profile cases particularly the complaint by the Public Service Alliance (PSAC) and the CEP complaint against Bell Canada have overshadowed the *Airlines* case.

⁸Labour submissions including the Canadian Auto Workers, the Communication Energy and Paperworkers and the Canadian Labour Congress to the federal Task Force on Pay

Equity argue for a broad definition of establishment. Similarly, submissions to the Ontario *Green Paper* on pay equity in 1987 concerning the establishment definition pointed out that it was very important to include a broadly defined area for comparison purposes.

⁹For instance, Quebec's *Pay Equity Act* identifies private sector enterprises and in Ontario's *Pay Equity Act*, a list of public sector employers is provided in a schedule in an Appendix.

¹⁰In the Calgary division 60 per cent of the maintenance staff have been reduced since 2002.

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R. LEIGH KRAFFT

the unfound poem

I begin my searching among the pillows
still burdened by the weight of sleep
knowing it arrived in the night.

I remember
chasing fragments of language
around in the dark.

somewhere between here
and the sticky kitchen linoleum
I'm sure to stumble upon it.

I bend through an ache
to pick up the scattered items
in my path: an orange peel, a tiny kitty,
a pile of twisted laundry slumped against the wall.

the sun rises
on the silent side of the house
and gold light glows among the old maples,
but my bones sink into the sofa
and there are no thoughts at all.

after the children have had their breakfast
I send them out to do some digging
knowing their love for dirt, and dandelions.

as I watch them through the window pane
one broken line scrapes itself across my mind,
my hands suddenly still in the dishwasher
waiting for more words to fall into place,
seeds seeking a warm fallow space.

R. Leigh Krafft's poetry appears earlier in this volume.