SUBMISSION of
WEST COAST Legal Education & Action Fund
to the TASK FORCE ON PAY EQUITY
Nitya Iyer, Chair
November 30th, 2001

The principle that men and women should receive equal remuneration for work of equal value is a matter of special and urgent importance.

Article 41, International Labour Organization's Constitution, 1919

1.0 West Coast LEAF Association

West Coast LEAF Association is the British Columbia branch of the national Women's Legal Education and Action Fund ("LEAF"). LEAF is a federally incorporated, non-profit organization, which was founded in 1985 to secure equal rights for Canadian women as guaranteed by the Canadian Charter of Rights and Freedoms (the "Charter"). To this end, LEAF and West Coast LEAF engage in test case litigation, equality research, law reform advocacy and public legal education. Through such endeavours, the organization has developed particular expertise with respect to the interaction between equality among persons and any law having a particular impact on women.

This submission represents the views of West Coast LEAF, a branch of LEAF.

1.1 Executive Summary

This submission is limited to a discussion of the fundamental reasons why the British Columbia government has an obligation to promote equal pay for work of equal value, particularly in light of Canada's international obligations under International Labour Organization Convention No. 100 and the Beijing Declaration, adopted by Canada as one of the members of the United

Nations in 1995. Equal pay for work of equal value was the first internationally recognized legal human right – by the International Labour Organization in 1919. Pay equity can be implemented through legislation, litigation or collective bargaining. Ultimately, legislation is broader in scope and less expensive than either of the other two options.

The submission first outlines a number of concepts fundamental to a discussion of the issue of pay equity. The next section briefly outlines the two of Canada's essential international obligations with regard to women and employment. The third section addresses the only current legislative response to pay equity in B.C. – the B.C. Human Rights Code ("HRC"). The final section encapsulates West Coast LEAF's main concerns and recommendations with respect to the implementation of a pay equity scheme in British Columbia.

1.2 Recommendations

1. The government of British Columbia should make an immediate commitment to Canada's international obligations regarding pay equity.

2. The crucial concept of "equal pay for work of equal value" should be incorporated into any legislation that the government enacts. Any such legislative response should not be complaint driven but proactive, with positive obligations placed on employers to ensure pay equity. Pay equity legislation should apply to all workplaces in the province, both public and private regardless of the size of the establishment for which a person works.

3. The government of British Columbia should immediately acknowledge that equal pay for work of equal value is a fundamental right of the women of British Columbia and - in light of this government's commitment to the *Charter of Rights and Freedoms* - it is committed to finding a results-based program to ensure that this right is fulfilled in a timely manner.

PART II

2.0 Core Concepts of Pay Equity

“Equal pay for work of equal value” is the core concept of any legislation that seeks to address the effects of countless years of systemic discrimination against “women’s” work which has resulted in the current gender wage gap. Systemic discrimination is the unintended offshoot of seemingly neutral policies that have a disproportionately negative impact on certain groups in society vis-à-vis other groups. It must be emphasised that “equal pay for work of equal value” is a much broader concept than “equal pay for work that is similar or substantially similar” in that the latter notion does not allow for the comparison of jobs that are different but that may provide an employer with equal value. It also does not address the occupational segregation of women, nor challenge the under-valuing of women’s work in general.

Wage disparities exist for a variety of reasons, such as education levels or seniority, but there is clear empirical evidence that ten to fifteen percent of the current wage gap is related to sex discrimination (Morely Gunderson. *Comparable worth and gender discrimination: An International Perspective* (Geneva, International Labour Office, 1994) p.1; *Canadian Labour Law Reports (CLLR)* “Equal Pay/Pay Equity introduction,” 1102 *CLLR* (1997)). It is that portion of the gender wage gap that pay equity legislation aims to address and is not aimed at changing the structure of the workplace.

The preceding comments should be kept in mind throughout this submission, as these core concepts are what equal pay legislation is all about.

2.1 International Instruments and Canada’s Obligations

There are two major international instruments that are particularly relevant to any discussion concerning pay equity and equal pay legislation. They are: International Labour Oganization Convention Number 100 and the Beijing Declaration of 1995.

The International Labour Organization’s (“ILO”) Convention Number 100, the Convention concerning Equal Remuneration for Men and Women for Work of Equal Value (“C100”), came

into force on May 5, 1953. Canada ratified C100 in 1972. For the purposes of this submission, Articles one and two of C100 are particularly pertinent:

> *Article 1*
>
> *For the purpose of this Convention--*
>
> *(a) the term remuneration includes the ordinary, basic or minimum wage or salary and any additional emoluments whatsoever payable directly or indirectly, whether in cash or in kind, by the employer to the worker and arising out of the worker's employment;*
>
> *(b) the term equal remuneration for men and women workers for work of equal value refers to rates of remuneration established without discrimination based on sex.*
>
> *Article 2*
>
> *1. Each Member, shall, by means appropriate to the methods in operation for determining rates of remuneration, promote and, in so far as is consistent with such methods, ensure the application to all worker of the principle of equal remuneration for men and women worker for work of equal value.*
>
> *2. This principle may be applied by means of--*
>
> *(a) national laws or regulations;*
>
> *(b) legally established or recognised machinery for wage determination;*
>
> *(c) collective agreements between employers and workers; or*
>
> *(d) a combination of those various means.*

The second instrument of note is the 1995 Beijing Declaration and Platform for Action (the "Beijing Declaration") issued by the United Nations' Fourth Conference on Women and adopted by Canada in 1995. The Beijing Declaration states (in part):

We are determined to:

…

33. Ensure respect for international law, including humanitarian law, in order to protect women and girls in particular

…

38. We hereby adopt and commit ourselves as Governments to implement the following Platform for Action, ensuring that a gender perspective is reflected in all our policies and programmes. We urge the United Nations system, regional and international financial institutions, other relevant regional and international institutions and all women and men, as well as non-governmental organizations, with full respect for their autonomy and all sectors of civil society, in co-operation with governments, to fully commit themselves and contribute to the implementation of the Platform for Action.

The Beijing Platform for Action has very strong language dealing with the issue of wage discrimination practices among men and women and sets out the following:

F. Women and the Economy

152. Discrimination in education and training, hiring and remuneration, promotion and horizontal mobility practices, as well as inflexible working conditions, lack of access to productive resources and inadequate sharing of family responsibilities, combined with a lack of or insufficient services such as child care, continue to restrict employment, economic, professional and other opportunities and mobility for women and make their involvement stressful. Moreover, attitudinal obstacles inhibit women's participation in developing economic policy and in some regions restrict the access of women and girls to education and training for economic management.

163. Taking into account the fact that continuing inequalities and noticeable progress coexist, rethinking employment policies is necessary in order to integrate the gender perspective and to draw attention to a wider range of opportunities as well as to address any negative gender implications of current patterns of work and employment. To realize fully equality between women and men in their contribution to the economy, active efforts are required for equal recognition and appreciation of the influence that the work, experience, knowledge and values of both women and men have in society.

Strategic objective F.1.

Promote women's economic rights and independence, including access to employment, appropriate working conditions and control over economic resources.

Actions to be taken:

165. By Governments:

(a) Enact and enforce legislation to guarantee the rights of women and men to equal pay for equal work or work of equal value;

Strategic objective F.5.

Eliminate occupational segregation and all forms of employment discrimination

Actions to be taken:

178. By governments, employers, employees, trade unions and women's organizations:

(a) Implement and enforce laws and regulations and encourage voluntary codes of conduct that ensure that international labour standards, such as International Labour Organization convention No. 100 on equal pay and workers' rights, apply equally to female and male workers;

(k) Increase efforts to close the gap between women's and men's pay, take steps to implement the principle of equal remuneration for equal work of equal value by strengthening legislation, including compliance with international labour laws

and standards, and encourage job evaluation schemes with gender-neutral criteria;

According to *A.G. Canada v. A.G. Ontario et al, Reference Re Weekly Rest in Industrial Undertakings Act, Minimum Wages Act and Limitation of Hours of Work Act*, [1937] A.C. 326 (P.C.) (the "*Labour Conventions*" case) and P. Hogg, *Constitutional Law of Canada*, (Toronto: Carswell, loose-leaf edition, 2000) the current state of Canadian law is rather curious in that:

> the government of Canada, which creates treaty obligations, is powerless to ensure the performance of many of those obligations. Of course, it can still perform without impediment treaties which impose obligations which can be performed solely by the executive action of the federal government, and it can ensure the performance of treaties which require legislation within the legislative competence of the federal parliament; but the federal government cannot ensure the performance of treaties which require legislation within the legislative competence of the provinces (p. 11-13 to 11-14).

The courts have consistently held that the conditions of employment of workers are a matter within the class of subjects termed "property and civil rights in the province" coming under s.92 (13) of the *Constitution* and thus employment standards and the like are in the legislative jurisdiction of the provinces.

Therefore, the provinces must take action. The province allows the Federal government to enter into these agreements on their behalf and any legislation that is enacted cannot violate Canada's international legal obligations. This includes any legislation that is presently in force.

As mentioned above, in the *Labour Conventions* case the Privy Council held that the Federal government of Canada is unable to enact legislation in compliance with international obligations if such legislation encroaches upon the exclusive powers of provincial governments. The *Labour Conventions* case thus established the foundation for the argument that it is only the provincial governments which may enact legislation to comply with International Labour Organization Conventions.

It is our submission that, since the federal government is unable to enact legislation that ensures that ILO C100 and the Beijing Declaration are put into effect, the government of British Columbia must do so.

2.2 *The B.C. Human Rights Code*

There are several pieces of legislation that dictate the basic working conditions of people living in British Columbia. These are:

1. *Human Rights Code*, R.S.B.C. 1996, c.210;
2. *Employment Standards Act*, R.S.B.C. 1996, c. 113;
3. *Labour Relations Code*, R.S.B.C. 1996, c.244
4. *Employment Equity Act*, R.S.C. ♦; and
5. *Canadian Human Rights Act*, R.S.C, 1985, c. H-6.

Of the five statutes enumerated above, two are federal acts (*Employment Equity* and the *Canadian Human Rights Act*) and therefore only apply B.C. residents employed by the federal government. Of the other three, only the Human Rights Code includes mention of pay equity.

Non-unionized British Columbians who feel they are not receiving equal pay for work of equal value can only turn to the *Human Rights Code* ("HRC"). Section 12 of the HRC states as follows:

> *Discrimination in wages*
>
> *12. (1) An employer must not discriminate between employees by employing an employee of one sex for work at a rate of pay that is less than the rate of pay at which an employee of the other sex is employed by that employer for similar or substantially similar work.*
>
> *(2) For the purposes of subsection (1), the concept of skill, effort and responsibility must, subject to factors in respect of pay rates such as seniority, merit systems and systems that measure earnings by quantity or quality of production, be used to determine what is similar or substantially similar work.*

(3) A difference in the rate of pay between employees of different sexes based on a factor other than sex does not constitute a failure to comply with this section if the factor on which the difference is based would reasonably justify the difference.

(4) An employer must not reduce the rate of pay of an employee in order to comply with this section.

(5) If an employee is paid less than the rate of pay to which the employee is entitled under this section, the employee is entitled to recover from the employer, by action, the difference between the amount paid and the amount to which the employee is entitled together with the costs but

(a) the action must be commenced no later than 12 months from the termination of the employee's services, and

(b) the action applies only to wages of an employee during the 12 month period immediately before the earlier of the date of the employee's termination or the commencement of the action.

It is readily apparent that this section of the HRC provides a means to attack an employer's discriminatory pay policies, however, it is a far cry from legislation which implements the goals and policies mandated by the Beijing Declaration and C100. On the positive side, the HRC does apply to workers in the private sector as well as the public. But it has three serious flaws:

a. It is complaint-driven, forcing women to come forward on an individual level. The complaint-driven model has also proven to be ineffectual in addressing systemic discrimination issues such as equal pay for work of equal value;

b. The case *Reid et al v. Vancouver (City) et al (No. 5)* illustrated the weakness of the language of Section 12 of the HRC in its inability to address pay equity, as discussed below; and,

c. The language addresses only the issue of equal pay for equal work (and even that one not well), not the more complex issue of equal pay for work of equal value.

These fundamental shortcomings were made obvious in the recent decision of the BC Human Rights Tribunal in *Reid*, infra, which is discussed in more detail in the next section.

2.3 Canadian Case Law on "Pay Equity"

In *Reid et al v. Vancouver (City) et al (No. 5)*, 2000 BCHRT 30, the (mainly) female complainants were communications operators with the Vancouver Police Department. They alleged that they were discriminated against under both s. 12 and s. 13 of HRC because they were paid less than fire dispatchers, who were predominantly male. The Tribunal held that the complainants were not discriminated against under s. 12 of the HRC because they were not employed by the same employer and thus s. 12 was not applicable to their situation. The decision clearly fleshes out the severe limitations of s. 12 of the HRC in the struggle for "equal pay for work of equal value". First, though not discussed per se, the HRC does not allow for complaints arising from discrimination in pay for work of equal value, merely for work that is similar or substantially similar. The HRC is thus much more restrictive than the Act and does not allow for pay equity arguments involving the comparison of jobs that are substantially different but of "equal value" to an employer. Second, the case clearly demonstrates that confining redress to employees of the same employer can have severely negative consequences on complainants, which are also obviously unjust in that once again the parameters of comparison are too limited.

It may or may not be surprising that Reid stands virtually alone in challenge to discriminatory wage practices. The obvious costs as well as the time and effort spent pursuing such claims indicates that the complaint driven nature of the HRC is another effective barrier to resolving the gender wage gap in this province.

PART III

3.0 Conclusion

1. The government of British Columbia should make an immediate commitment to Canada's international obligations regarding pay equity.

2. The crucial concept of "equal pay for work of equal value" should be incorporated into any legislation that the government enacts. Any such legislative response should not be complaint driven but proactive, with positive obligations placed on employers to ensure pay equity. Pay equity legislation should apply to all workplaces in the province, both public and private regardless of the size of the establishment for which a person works.

3. The government of British Columbia should immediately acknowledge that equal pay for work of equal value is a fundamental right of the women of British Columbia and - in light of this government's commitment to the *Charter of Rights and Freedoms* - it is committed to finding a results-based program to ensure that this right is fulfilled in a timely manner.