
January 1996

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Recommended Citation

Discussion, *Discussion after the Speeches of N. Thompson Powers and Mary Cornish*, 22 Can.-U.S. L.J. 279 (1996)

Available at: <https://scholarlycommons.law.case.edu/cuslj/vol22/iss/36>

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DISCUSSION AFTER THE SPEECHES OF N. THOMPSON POWERS
AND MARY CORNISH

QUESTION, *Professor King*: When an employer enacts an affirmative action plan in the present context, is there the possibility of a suit for reverse discrimination due to the issue of quotas?

ANSWER, *Mr. Powers*: Sure, that is a possibility. When an individual is passed over for a promotion, that could be something that would give rise to litigation. Our experience is that people tend not to file charges because they have missed a promotion as long as they have any hope that they may be promoted later on. If you consider race or sex in terminating people, you are running a substantial risk that there will be litigation. First, because the person at that point has nothing to lose; and second, you are not just skating on thin ice, you are trying to walk on water. There is just no support that I have found for taking race and sex into account in termination.

QUESTION, *Professor King*: What you are saying is that litigation is unlikely because the person who is involved always has the hope of receiving a promotion in some other context.

ANSWER, *Mr. Powers*: That is generally the situation.

QUESTION, *Professor King*: I suppose that it might be a little different with unions or unionized companies?

ANSWER, *Mr. Powers*: Oh, sure.

QUESTION, *Mr. Entin*: Tom, you talked about the narrow tailoring requirement in U.S. law. I take it that Canadian law does not have this notion that we should not think in terms of race or sex unless there is no real alternative. U.S. law, particularly after the *Adarand* case, seems to rest on the notion that we just should not do that unless there is no real alternative. I guess I want to ask Mary Cornish if that is reflected in Canadian law. And I also want to ask Tom if you could talk a little more in terms of what other alternatives might be out there and what an employer would have to be competent of being able to show to satisfy the narrow tailoring requirement that we have under U.S. law.

ANSWER, *Ms. Cornish*: Unlike the American situation, we also have a Charter of Rights which has a quality section that is part of the Constitution. In that Charter of Rights quality section, there is a specific subsection which authorizes affirmative action for special measures. So within the Constitution itself there is an authorization for special measures. In addition, I think almost every Human Rights Code has a section authorizing special measures. So we have not had this same kind of attack on it.

Nevertheless, we have had attacks. For example, I was involved in

a case where the government was arguing that it had an assistive devices program which only gave assistive devices to people up to the age of twenty-three. The person in this case needed a closed circuit television magnifier. However, because he was fifty-five, he was excluded from the program.

The government argued that because the program as a whole was a special measure, they could make whatever measures they wanted to make within the program. As a result, this special measures section had insulated their program from any attack. The Ontario Court of Appeals, in *Roberts* disagreed. The court found that if you have a special program, you cannot then internally, within that program, say you are going to hand out the assistive devices on the basis of race. However, they did say that you may be able to base it on race if you could rationally connect the provision of the program on the basis of race. For example, if you had limited funding and you had to decide who was going to get assistive devices, you may in fact look around to determine which group might be the most needy. Or in terms of age, if you could determine that younger people needed these devices more, then you might have been able to have an age requirement. But you had to have some basis upon which to say that.

Essentially the government has used age as a funding technique. It determined how many people it believed were under the age of twenty-three and said that is it. They then came into the court and said, "we do not have the money to go about this." The court responded, "well, you cannot do it that way. You cannot just say that you are going to use a prohibitive ground because of cost." That gives you some idea of how the courts would look at it.

COMMENT, *Mr. Powers*: I am not sure that the constitutional standard that requires narrow tailoring is going to become a statutory standard. Also, while I think Justice O'Connor would be inclined to move the law that way, until she does it, we cannot be sure that it is required. But I think it is prudent to consider how you would respond to the suggestion that you have not narrowly tailored this; that you have not given adequate consideration to less specific means of taking race and sex into account.

I would start with expanded and focused recruitment to help overcome current underutilization. To the extent that using expanded recruitment has not eliminated the underutilization, evidence exists that you need something more direct and specific, such as targeted goals.

QUESTION, *Mr. Delay*: In the United States, it was often said as justification of affirmative action that it would make the American economy grow stronger and that the discriminated groups would themselves grow stronger if these practices were put in place. Yet we have not seen the results in the African-American community in terms of overall economic improvement. When we try to talk about pay equity

schemes and discrimination schemes in the global context, it is often used as an enticement to say that sustainable development will occur if pay equity schemes are put into place. But it seems to me that the fastest growing economies in the world are those of Japan, South Korea, the Philippines, Chile, and Indonesia, all of which have no pay equity schemes. Is it not true, really, that this is more of a mirage, a dream to say that pay equity pursues sustainable development? Is this not really just an aspiration of certain groups within aging industrial democracies that have freedom in equality as some sort of false ethical underpinning? Do we have any economic data to prove that sustainable development is greatly enhanced when we pursue things like pay equity?

ANSWER, *Ms. Cornish*: I know that governments still sign documents that say that. I mean, literally these world documents actually refer to this. But it is interesting in two aspects. First, I think that in terms of looking at it in a world context, you are not necessarily going to see pay looked at in the same context. For example, in the Beijing Declaration. You also have in some of the economies that you are describing people talking more in relation to women being self-employed. Women in agricultural sectors, for example. We would not think of it as pay equity in the sense that you would think of pay equity laws in Canada. So I think there is some different context in which it is looked at. But certainly what is interesting in Ontario, and I guess this is part of the debate over the fiscal conservative agenda, is that at the moment it is based at driving the wage rate down in Ontario. There have been a number of ways in which that has been done, both by reducing labor laws to discourage unionization, and now by taking away pay equity, because women in fact received money. And one of the things I may not have talked about was that women got money under this pay equity law. Discrimination was identified; they got money, then everybody says to them, "hey, I am really sorry, we cannot afford this."

Secondly, in good times nobody can afford it either. Essentially, no one ever wants to afford it if it requires employers to pay. I think, at times, it takes more sophisticated employers to sort this out in order to see that their future is not in trying to figure out how to have a Mexican wage in Canada and the United States.

COMMENT, *Ms. Houston*: We looked at exactly the same issue that is being addressed in trying to make a business case for justifying any affirmative action in our corporation. One of the things we did was to look at the economic analysis of those countries that are experiencing the largest economic growth. We lined those up with some additional measures based on the context of the culture. Most of those countries that you have named are constituted quite differently demographically than either Canada or the United States. And it is simply a

social demographic fact of life that countries will deal with this issue differently. Our work forces are constituted quite differently. The demands that are being made by the populations are quite different. So when we are looking at some of these initiatives, I think it is really some of these barriers of productivity that in fact have created some of the issues that were raised in the question.

COMMENT, *Mr. Powers*: Those comments also raise questions about the empirical basis for affirmative action. I think there is no question that affirmative action has significantly increased employment opportunities for minorities and women. I think the argument against affirmative action is not that it does not work, it is that it works too well for the satisfaction of some people. It seems to me that it is, in a sense, rough justice, but I think it is a justice that is needed. I do not know what the situation is in other countries. I think in this country it is very important for us to be able to demonstrate, particularly with minorities, that opportunities exist, in fact, and that results are being achieved. I think affirmative action has done a good job in helping us along that road. I hope we stay the course. I do not think that there are many white males who would say that it is a disadvantage to be a white male.

QUESTION, *Mr. Wismer*: First, I am curious as to what really happened with the pay equity, equal pay for work of equal value and how women did? What happened to the wage levels with respect to nurses and policeman? Two, how did it work? Who were the arbiters as to what work was of equal value, and how was that handled?

ANSWER, *Ms. Cornish*: The process of adjudication was involved. The Pay Equity Commission, which provided both educational consulting services to both employers and unions, had an initial level of adjudication at that stage by a review officer which could then be appealed to a Tribunal. None of these are in the courts. They are basically specialized tribunals which deal solely with pay equity in the adjudication of those issues.

In the nursing context, the litigation went on for about four years regarding what the gender-neutral comparison system should be. Employers attempted to use existing compensation systems such as job evaluation systems. There was lengthy litigation over those systems, and whether or not they were gender-biased.

In answering question two, two different sectors of the health care industry were in fact found to be gender-biased. The parties then went out and negotiated again and ultimately arrived at a settlement in which they came up with a competent comparator. In the end they actually did not come up with a specific job. Nurses in Ontario received very substantial wage increases as a result of the process. Another example, a university used what was called a policy-capturing approach, or more of a wage-line approach. It was determined that female job

classes earned on average \$2,800 less than if they had been a male job class. As a result, the female job classes within the university went up \$2,800. But again, this was phased in at one percent of payroll. In other words, you did not just get \$2,800. You would get it over a period of time.

A secretary of a school board was compared to the grounds keeper of the school board. You might also have a cashier being compared to a stock clerk within a retail grocery store chain. So those are the kinds of examples of comparisons.

Just to reiterate, I think the real problem that the pay equity law had in Ontario was its success. There was a high number of female job classes in social service agencies and in public sector agencies. The government assisted these various agencies in funding these adjustments.

When this government came in intent on downsizing the government and downsizing the budget, one of the immediate problems was this funding. Thus, the first thing they did was cap the funding that had been done. In addition, in Ontario there is also a process. The initial Pay Equity Act only dealt with those situations in which you actually did this comparison and found a comparable situation. The male job class had to be comparable. But part of the problem was that many sectors, particularly, for example, daycare centers and nursing homes, had no comparable male job classes because they are so female-dominated that there are not enough male jobs. In the end, they came up with legislative amendments concerning "proportional comparison," which allowed for this wage line process for the male jobs. In addition, they came up with "proxy comparison." So that if you had no male job at all within your workplace, in the public sector only, you were designated a job in another public sector agency. Thus, for example, workers in individual rape crisis centers did not have another male in the center. They ended up getting the same adjustment, relatively speaking, as the abuse worker in a hospital that had a larger pool of male jobs to actually make the comparison with. That particular technique was repealed by the Ontario government in December in its Finance Bill. They repealed proxy comparisons and limited the adjustments on it. So that gives you some idea of how it is carried out.

QUESTION, *Professor King*: I would ask Tom about the timing. I suppose the ultimate decision will be made in the next election on affirmative action, in terms of traditional appointments. Would you say that, Tom?

ANSWER, *Mr. Powers*: Certainly that will have a big effect. I think it is only a matter of time until Justice Blackmun is ready to retire or be replaced. He is the one that seems to be closest. When we will get another case is hard to say. I think there is a case coming out of the Third Circuit which is going to be another loser for affirmative action. We will just have to see.

