

Adjudicating Systemic Equality Issues: The Unfulfilled Promise of *Action Travail des Femmes*

Dianne Pothier*

A quarter-century ago, in the Action Travail des Femmes case, the Supreme Court of Canada gave strong endorsement to the principle that systemic remedies should be widely available in human rights cases to combat entrenched patterns of discrimination, and indicated that such remedies could be expected to be effective in meeting that objective. This paper considers developments in the area of systemic remedies since Action Travail des Femmes was decided, and concludes that the promise held out by the Supreme Court remains unfulfilled and indeed that the viability of systemic remedies themselves is very much in question. At the federal level, amendments to the Canadian Human Rights Act retrenched the tribunal's remedial powers, by seemingly inhibiting the imposition of hiring quotas in cases where systemic discrimination in employment had been established. In addition, the generation-long saga of the McKinnon case in Ontario laid bare the almost insurmountable challenges of enforcing systemic orders against a recalcitrant respondent, and revealed the limits of the human rights system's institutional capacity. Most recently, in the Moore decision, the Supreme Court has cast doubt even on the availability of systemic remedies, by holding — on the basis of a superficial analysis and contrary to its own long-standing jurisprudence — that only individual remedies should have been ordered in a case which unmistakably had systemic dimensions. While the decision may reflect the Court's concern that the tribunal decision intruded excessively into the realm of public policy and finance, it provides no meaningful guidance on how government can be held accountable for its human rights obligations.

* Professor Emeritus, Schulich School of Law at Dalhousie University. This is the revised version of a paper that formed the basis of a presentation at the Queen's University Centre for Law in the Contemporary Workplace workshop, "Adjudicating Human Rights in the Workplace: After Ontario's Pinto Report, Where Do We Go Next?" (9 November 2012). I would like to thank the CLELJ's editors and anonymous reviewers for their helpful comments.