

# CAVALLUZZO

## **WHERE TO GO FOR PAY EQUITY: CANADIAN REMEDIES FOR GENDER PAY DISCRIMINATION**

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By

**Mary Cornish and Jennifer Quito**

**Cavalluzzo Shilton McIntyre & Cornish LLP**

**474 Bathurst Street, Suite 300, Toronto, Ontario, M5T2S6**

**T. 416-964-1115 F. 416-964-5895**

**www.cavalluzzo.com**

**mcornish@cavalluzzo.com**  
**jquito@cavalluzzo.com**

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1 Mary Cornish is a senior partner at Cavalluzzo Shilton McIntyre & Cornish in Toronto.; Jennifer Quito is an associate with the firm. The assistance of articling student Emily Dixon is gratefully acknowledged.

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## **Introduction: The Right to Pay Equity**

The right of women to equal pay for work of equal value and equal treatment in pay and employment opportunities are internationally recognized human rights and labour standards.<sup>2</sup> Laws securing these rights are necessary because gender pay gaps are one of the most enduring features of world labour markets and continue to be regularly documented in Canada.

As of the latest Statistic Canada data available for 2011, based on average annual earnings, Canadian women earn about 66.7% of what Canadian men earn.<sup>3</sup> When a full time full year measure is used, the gap is 72%.<sup>4</sup> Disconcertingly, both of these gaps grew from the previous years. The hourly gap for 2013 is 86%,<sup>5</sup> however this figure obscures the fact that more than seven out of 10 part-time workers are women, and are thus are in more precarious work situations.<sup>6</sup>

As highlighted by the 2004 Federal Pay Equity Task Force report, “Pay Equity: A Fundamental Human Right”, racialized women, immigrant women, Aboriginal women and women with disabilities suffer from substantially higher pay gaps.<sup>7</sup> For example, racialized women in Ontario were short-changed 53.4 cents for every dollar non-racialized men got paid for work in 2005.<sup>8</sup>

Given women’s increasing and greater education (now making up the majority of undergraduate & master’s degree holders) and their rising labour force participation

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2 Pay equity is guaranteed by Convention 100 of the International Labour Organization and the United Nations Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW). For more information see: International Labour Organization’s “Promoting Equity: Gender-Neutral Job Evaluation for Equal Pay: A Step-By-Step Guide” (International Labour Office, Geneva, 2008) (“ILO Guide”) <[http://www.ilo.org/declaration/info/publications/eliminationofdiscrimination/WCMS\\_122372/lang--en/index.htm](http://www.ilo.org/declaration/info/publications/eliminationofdiscrimination/WCMS_122372/lang--en/index.htm)>

3 Statistics Canada, CANSIM Table 202-0102 1, 4

Average female and male earnings, and female-to-male earnings ratio, by work activity, 2011 constant dollars. We used a custom table to obtain this data. To recreate this table, go to the “Add/Remove Data” tab on this table, and then check off the box titled “Full-year full-time workers.” This table can be recreated for any province and some metropolitan census areas, but not for the territories. <<http://www5.statcan.gc.ca/cansim/pick-choisir?lang=eng&p2=33&id=2020102>>

4 Ibid.

5 Statistics Canada “Average hourly wages of employees by selected characteristics and occupation, unadjusted data, by province (monthly),” <<http://www.statcan.gc.ca/tables-tableaux/sum-som/l01/cst01/labr69a-eng.htm>> In 2013, the hourly average wage for women is \$22.58. The hourly average wage for men in 2013 is \$26.14. This represents a female to male wage ratio of 86%.

6 See <http://www.statcan.gc.ca/pub/89-503-x/2010001/article/11387-eng.pdf>.

7 2004 Federal Pay Equity Task Force report : Pay Equity: A New Approach to a Fundamental Right, <<http://www.collectionscanada.gc.ca/webarchives/20071121061932/www.justice.gc.ca/en/payeqlsal/6000.html>>

8 Block, Sheila “With Two Women Leaders, Can We Build A Gender Balanced Budget?” See <http://www.wellesleyinstitute.com/news/with-2-women-leaders-can-we-build-a-gender-balanced-budget>.

(now at 58.2% %),<sup>9</sup> the continuing pay gaps show the market is not rewarding women for their human capital contributions.<sup>10</sup>

## Why do Gender Pay Gaps Still Exist?

Gender pay gaps are the result of many different causes. According to international pay equity scholar Dr. Pat Armstrong, gender pay gaps are caused by the following three features of Canada's labour market which operate together to deliver substantially less pay to women than men:

- (a) The majority of women are segregated from men into different work and different workplaces. In Canada, 67% of women work in traditional occupations such as teaching, nursing, clerical, admin or sales and service jobs in 2009;
- (b) In general, women's segregated work is paid less than men's work and the higher the concentration of women in an occupation, the lower the pay. Women's lower pay reflects the systemic undervaluation of women's work relative to that of men.<sup>11</sup>

Dr. Armstrong writes that these three factors *combine to create pervasive and often invisible discrimination*. This includes gender-biased compensation and employment practices, insufficient employment and training supports, and lack of affordable child care and accommodation of care responsibilities, to name a few.

Gender-based pay discrimination is addressed through several types of legal remedies. Attached as Appendix A is a Chart "Canadian Legislation That Addresses Gendered Pay Inequalities" which sets out these laws across Canada.

## What is Equity: Four Canadian Legal Remedies

There are four general types of laws addressing pay discrimination, all of which will be explained in greater detail below. Each type of law has a different definition and approach to approaching pay equity. They are as follows:

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9 See <http://www.statcan.gc.ca/pub/89-503-x/2010001/article/11387/tbl/tbl002-eng.htm>. 2009 data

10 While some progress has been made, the 2013 Canadian Centre for Policy Alternatives Report by co-author Mary Cornish, 10 Steps to Closing the Gender Pay Gap demonstrates how discrimination continues to affect the ability of women to realize their right to pay equity.<sup>10</sup> The 2012 CCPA Report "A Living Wage as a Human Right" also documents how discrimination continues to affect the ability of not only women but other disadvantaged workers who cannot earn a living wage.<sup>10</sup>

11 Expert report by Dr. Pat Armstrong prepared for the Public Service Alliance of Canada in the Federal Court of Canada proceeding, *Public Service Alliance of Canada and Nycole Turmel v. Her Majesty the Queen in Right of Canada* Court File T-1949-00, June, 2008.

1. **Equal Pay For Equal or Similar Work** – These laws guarantee a woman equal pay for equal, or substantially similar, work as a man. Such a law could be applied where a female electrician was earning less than a male electrician. These laws are generally complaint-based and can be found in either human rights legislation or labour or employment standards laws such as:

- Federal - ss. 7 and 10 of the *Canadian Human Rights Act*, RSC 1985, c H-6
- Ontario- s. 42, *Employment Standards Act*, S.O. 2000, C.41
- Quebec- s. 19, *Charter of human rights and freedoms*, RSQ, c C-12
- Manitoba- s. 82(1) *Employment Standards Code*, CCSM c E110
- Nova Scotia- s 57(1).*Labour Standards Code*, RSNS 1989, c 246
- Prince Edward Island- s 7(1) *Human Rights Act*, RSPEI 1988, c H-12
- New Brunswick- s 37.1(1).*Employment Standards Act*, SNB 1982, c E-7.2
- Alberta- s. 6(1), *Alberta Human Rights Act*, RSA 2000, c A-25.5
- Saskatchewan - s 17(1).*Labour Standards Act*, RSS 1978, c L-1
- Newfoundland and Labrador- s. 11 (1), *Human Rights Code*, RSNL 1990, c H-14
- British Columbia- s. 12 (1) *Human Rights Code*, RSBC 1996, c 210BC *HRC* at ss 21(1), 37(2).
- Yukon - s.44 *Employment Standards Act*, RSY 2002, c 72
- Northwest Territories- s. 9.(1) *Human Rights Act*, SNWT 2002, c 18

While such provisions are useful, they fail to address the issue of systemic gender discrimination as reflected in Canada's sex-segregated labour market. In order to address pay inequalities between men and women who are performing dissimilar jobs, several jurisdictions introduced "equal pay for work of equal value laws," as described below.

2. **Equal Pay for Work of Equal Value:** These laws guarantee that a woman, or a female "job class" will receive the same pay for work of a comparable value ratio, as a identified male comparator. This guarantee is commonly known as **pay equity** or **EPWEV**. Such laws are found in the following jurisdictions:

- Federal -s.11 of the Canadian Human Rights Act, RSC 1985, c H-6
- Ontario- Pay Equity Act, RSO 1990, c P.7
- Quebec- Pay Equity Act, RSQ c E-12.001
- Manitoba-Pay Equity Act, CCSM c P13
- Nova Scotia-Pay Equity Act, RSNS 1989, c 337
- Prince Edward Island-Pay Equity Act, RSPEI 1988
- New Brunswick-Pay Equity Act, SNB 2009, c P-5.05
- Yukon- s.15(1), Human Rights Act, RSY 2002
- Northwest Territories- s.40.1 Public Service Act, RSNWT 1988, c P-16.

These laws can be proactive, such as the Ontario and Quebec *Pay Equity Acts*, and require employers to achieve and maintain pay equity by using a gender neutral comparison system to assess the relative value of female and male job classes and remedy any pay equity gap, subject to certain exceptions where a difference in pay is permissible.

These laws can also be complaint-driven such as ss. 11 of the *Canadian Human Rights Act* (“*CHRA*”), and will be triggered when an employee complains of wage discrimination.

**3. Human Rights Legislation that Redresses Gendered Pay Inequality-**  
Human rights codes/laws generally prohibit unequal treatment in employment (which includes pay). Such laws are found in the following jurisdictions:

- Federal- ss. 7 and 10 of the *Canadian Human Rights Act*, RSC 1985, c H-6
- Ontario- s. 5, *Human Rights Code*, R.S.O. 1990, c H.19
- Quebec- s. 16, *Charter of human rights and freedoms*, RSQ, c C-12
- Manitoba- s. 14(2)(e) *Human Rights Code*, CCSM c H175
- Nova Scotia- s. 5(1), *Human Rights Act* RSNS 1989, c 214
- Prince Edward Island- s. 6(1) *Human Rights Act*, RSPEI 1988, c H-12
- New Brunswick- s 4(1)(b), *Human Rights Act*, RSNB 2011, c 171
- Alberta - s. 7(1), *Alberta Human Rights Act*, RSA 2000, c A-25.5
- Saskatchewan- 6.(1)*Saskatchewan Human Rights Code*, SS 1979, c S-24.1

- Newfoundland and Labrador- s. 10 (1), *Human Rights Code*, RSNL 1990, c H-14
- British Columbia- s. 13 *Human Rights Code*, RSBC 1996, c 210BC *HRC* at ss 21(1), 37(2).
- Yukon- s.9, *Human Rights Act*, RSY 2002
- Northwest Territories- s. 7.(1) *Human Rights Act*, SNWT 2002, c 18
- Nunuvut- s. 9(1)(b). *Human Rights Act*, SNu 2003, c 12

4. **Constitutional Guarantee of Equality-** The *Canadian Charter of Rights and Freedoms* section 15 requires gender equality in government actions which can cause or sustain pay inequalities.

Where one should go for pay equity depends on many factors, as will be discussed below. As well, each remedial option carries with it a different definition of equitable pay to consider. Not all conceptions of “equality” are equal.

### **1. Equal Pay for Equal Work**

“Equal pay for equal work” laws were the first laws dedicated to addressing the gendered wage gap. Under these laws, equal pay is achieved if men and women are paid the same for substantially similar work.

As compared to equal value provisions, equal pay for equal work legislation encompasses a narrow definition of fair wages since they only provide a remedy for females whose male comparator is performing substantially similar work. They do not address systemic discrimination in pay.

On the other hand, such provisions have a broader reach than pay equity provisions since they have the advantage of applying to both the public and private sector and some equal value laws only cover the public sector. As well, such provisions can assist in closing gaps *within* job classifications. An example of the application of an equal pay for equal work provision is set out below:

#### **Case Note: Walsh v. Mobil Oil Canada**

Under Alberta’s *Human Rights Act*, equal pay for equal or similar work is guaranteed under the following section:

**6(1) Where employees of both sexes perform the same or substantially similar work for an employer in an establishment the employer shall pay the employees at the same rate of pay.**

In a decision decided partly under this section, the Human Rights Panel of Alberta found that the Employer had discriminated against the applicant, a female land surface land

representative, contrary to ss. 6(1) and 7 *Alberta Human Rights Act*.<sup>12</sup> The Panel first found that the employer had exhibited paternalistic actions towards the applicant, the first woman in her company to work out on the field, by disguising them as safety concerns. Interestingly, the panel found that such actions were based on unconscious assumptions and biases towards women, but that these were later remedied when the applicant complained about them, and they ceased.<sup>13</sup>

The panel did go on to find, however, that the complainant's salary and job classification were lower as compared to her male counterpart at the Company who performed similar work, and thus found that she had been discriminated against and remedial action was required.<sup>14</sup>

## 2. Equal Pay for Work of Equal Value

The second definition of equal wages is equal pay for work of equal value ("EPWEV"). This definition focuses on the value, and not the type of work performed. Such laws implement the International Labour Organization Convention's 100 *Equal Remuneration for Work of Equal Value* by requiring employers to develop plans or measures to compare male and female work by assessing their skill, effort, responsibility and working conditions. Under this system, the work of a female predominant position or "job class" such as a registered practical nurse could be compared with that of a dissimilar male dominated position, such as a paramedic or IT professional to ascertain whether they should paid the same if of comparable or proportional value.

EPWEV laws are human rights remedies designed to rectify and prevent the persistent and systemic compensation discrimination experienced by women. As noted by Dr. Armstrong above, these arise from their labour market occupational segregation and the prejudices and stereotypes which influence their pay. As a result, labour market practices have under-described, under-valued and underpaid women and their work relative to men and their work.

The most serious limitation of EPWEV laws is their scope of coverage. With the exception of Ontario and Quebec, pay equity statutes apply exclusively in the public sector and broader public sector. In the other Canadian jurisdictions, then, the private sector has no specifically legislated pro-active obligation to achieve pay equity. However, as will be addressed in Part 3: Human Rights Prohibitions on Gender-Based Discrimination of this paper, such gaps may be covered by human rights codes/laws which, while arguably having an implicit proactive obligation are still complaint-based. However, most workers have been left to rely on complaints-driven mechanisms for achieving equity.

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12 Walsh v. Mobil Oil Canada, 2005 AHRC 13 (CanLII), <<http://canlii.ca/t/fi09m>>

13 Walsh v. Mobil Oil Canada, ibid. paras.317-319.

14 2005 AHRC 13 (CanLII) para. 347.

An overview of proactive pay equity legislation as well as the complaint driven models of pay equity is set out below.

### **A. Proactive Mechanisms**

Proactive pay equity provisions impose an obligation on employers to achieve pay equity, instead of relying on vulnerable employees to mount complicated and expensive pay equity challenges. In order to provide a contextual description of proactive pay equity legislation, the Ontario *Pay Equity Act* (the “ON PEA”) is described in detail below, along with accompanying case note summaries. An outline is then provided of the Quebec *Pay Equity Act*, (“QBC PEA”), alongside a brief case note.

#### **1. Ontario's Pay Equity Act**

Ontario's *Pay Equity Act* applies to the public sector and private sector with 10 or more employees.

There are two clear stages required to comply with the *Pay Equity Act* in Ontario workplaces: first to achieve and then maintain pay equity. These obligations are set out in s. 7(1) which states: “Every employer shall establish and maintain compensation practices that provide for pay equity in every establishment of the employer.” Section 7(2) states “No employer or bargaining agent shall bargain for or agree to compensation practices that, if adopted, would cause a contravention of subsection (1).

#### ***Application of the ON PEA to Different Employers***

The ON PEA sets out the various methods and time tables for achieving pay equity for different sectors and sizes of employers: See *PEA*, Part II (public sector and large private sector employers), Part III (Small Private Sector Employers), Part III.1 (Proportional Value Comparisons) and Part III.2 (Proxy Comparisons).

#### ***Size of Employer***

The Act does not apply at all to employers who have less than 10 employees. However, employers that were in existence prior to January 1, 1988 but had fewer than 10 employees will become subject to the *Act* and be required to achieve pay equity as of the date that they have 10 or more employees.

#### ***New Employers***

The ON PEA also contains different requirements for employers depending on whether they were in existence before or on January 1, 1988, which is when the act came into force. For ease of reference, employers that came into existence after January 1, 1988 shall be referred to in this paper as “New Employers.”

The Ontario Pay Equity Hearings Tribunal (“PEHT”) has held that Part I of the ON PEA, which sets out the general obligations of the *Act* including the obligation to achieve and

maintain pay equity applies to all employers. See: *Group of Employees v. Ontario Public Service Employees Union*, [1993] O.P.E.D. No. 47.

Employers in existence when the ON PEA was introduced were given time to phase in pay equity adjustments at 1% of their annual payroll. In contrast, New Employers are not entitled to such a phase-in period and must open pay equity compliant.

### ***Achieving Pay Equity***

Parts II, III.1 and III.2 of the ON PEA specify the technical steps to change compensation practices and the specific job class comparison methods required to meet these general overarching obligations. The obligation to maintain pay equity applies to all employers to whom the Act applies.

The initial stage of achieving pay equity consists of identifying male and female job classes within the establishment, conducting gender neutral evaluations of the jobs, comparing the wages of female and male job classes of comparable value, developing a pay equity plan which identifies the extent of any discriminatory wage gap, and receiving pay equity wage adjustments that close any discriminatory wage gaps. Below is a description of the three methods that can be used to achieve pay equity.

#### ***Job-to-job Method of Comparison***

Under the ON PEA, pay equity may be achieved under the job-to-job method, the proportional value method, or the proxy method. The job-to-job method may be used by any employer subject to the ON PEA, and requires that a female job class be matched with a comparable male job class on the basis of the points received through the job evaluation process. Comparability is usually established through a banding process where classifications that fall between a defined point range are considered to be 'comparable'.

Within the unionized setting, a male comparator is first looked for within the female job class' bargaining unit. If more than one comparator is found, the female job class must be compared to the lowest paid of these comparators. If no such comparator is found within the bargaining unit, a search must be conducted for a comparable male within the entire establishment. It must be noted here that 'establishment' under the s.1 of the ON PEA refers to all of the employees of an employer employed in a geographic division, and can thus have an expansive interpretation. If more than one male comparator is found, the female job class is compared to the lowest paid of these comparators.

If no comparable male is found within the establishment, a search is conducted for a male classification that is lower valued than the female job class, and yet higher paid. If more than one lower-valued-higher-paid male job class is found, the female job class will be compared to the highest paid male job class. In all of the above cases, the wages of the female job class will be adjusted to the job rate of the male job class, so as to provide for pay equity.

The switch from choosing the lowest paid comparable male and the highest paid non-comparable male likely reflects the ON PEA's recognition that a female job class should not be prejudiced by having her wages compared to a male job class which is already recognized to have lesser value than hers.

If a lower-valued-higher-paid male job class cannot be found within the establishment, the employer can use the proportional value method of pay equity if they are in the public sector, or if they are a private sector employer with more than 100 employees that was in existence when the ON PEA came into force on January 1, 1988, or they are a private sector employer in existence on or before January 1, 1988. New employer may also use the proportional value method.

### ***Proportional Value Method of Pay Equity***

The proportional value method of pay equity involves comparing a female job class to a "representative group of male job classes." This is done by using regression analysis, which involves plotting the wage rates and point values of the male job class so as to create a 'best fit' line, and later doing the same for the female job class. The liens are compared, and the wage rates of the female job classes are accordingly adjusted to the male wage line, so as to provide for pay equity.

### ***Proxy Method of Pay Equity***

If an employer does not have sufficient male job classes within its establishment to engage in the proportional value method and it is in the broader public sector as stated in a Schedule to the ON PEA, it must use the proxy method of pay equity.

Such an employer is referred to as the "seeking employer" since it must seek information from another establishment, known as the "proxy employer". A proxy employer is a public sector employer with a similar business to the seeking employer whose female job classes have already received pay equity adjustments, since they are large enough to have sufficient male job classes to have achieved pay equity by either using the job-to-job or proportional value method. A Schedule to the Act sets out the required proxy employers for seeking employers. A key example of a seeking employer would be a Long Term Care home, whose proxy employer would be a municipally funded Home for the Aged.

The seeking employer identifies a "key female job class", which will likely be the most populous job class within the establishment. The proxy employer then gives the seeking employer information about the pay equity adjusted wages of this same female job class within their establishment. This can be thought of as the seeking employer 'importing' the pay equity adjusted wages of the proxy employer for this job class.

The wages of the key female job class in the seeking employer are then adjusted to the wages provided by the proxy employer. In doing so, the wages of the key female job class of the seeking employer become pay equity compliant. The pay-equity adjusted

wages of the key female job class of the seeking employer then forms the basis of a pay-equity adjusted wage line *within* the seeking employer through.

Similar to the regression analysis technique used in the proportional value method, the remaining female job classes of the seeking employer are then also plotted on a regression line, and their wages are proportionally adjusted to the pay for job value relationship established by the regression line of the pay-equity adjusted wages of the key female job class.

### ***Maintaining Pay Equity***

Maintaining pay equity is an ongoing process of ensuring that female job classes are not subject to any systemic discrimination in their compensation. Maintaining pay equity is required to be a regular part of the compensation practices of an employer and the monitoring practices of trade unions. The maintenance obligations arise from section 7 of the ON PEA and also from section 14.1 which is a stand-alone provision.

It addresses “changes in circumstances” which make a pay equity plan no longer appropriate and enable parties to re-enter into pay equity negotiations. (See Ontario Pay Equity Commission publications - *Maintaining Pay Equity Using the Job-to-Job and Proportional Comparison Methods* and *Maintaining Pay Equity Using the Proxy Comparison Method*.)

Employers and bargaining agents must take the necessary steps to ensure that any identified gap in compensation between comparable male and female job classes identified in the “achievement” stage is not allowed to widen. See *CUPE Local 1776 v. Brampton Public Library* [1994] O.P.E.D. No. 37. While there have been some decisions dealing with this obligation, there are likely to be further decisions setting out in more detail the responsibilities. To date, the maintenance obligation has been found to include obligations set out below:

Where the pay equity plan is no longer appropriate, steps need to be taken to amend the pay equity plan. This is done by the employer (for unorganized employees) posting the amended plan which gives notice to the employees who can then file complaints. If those employees are subsequently organized, the employer must negotiate any changes with the bargaining agent and where there are unresolved disputes, seek an order of the Review Officer. Any pay equity adjustments form part of the collective agreement.

### ***For More Information:***

A summary of the steps required to achieve and maintain pay equity are set out in a Guide on the Cavalluzzo website.<sup>15</sup> This includes an *Overview of the Pay Equity Act*<sup>16</sup> (See Guide - Appendix B). The Pay Equity Commission’s *A Guide to Interpreting*

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<sup>15</sup> CSMC Trade Union Guide to Closing Workplace Gender Pay Gaps < <http://www.cavalluzzo.com/resources/publications/guide-to-closing-workplace-gender-pay-gaps>>

*Ontario's Pay Equity Act*, issued August, 2012 also provides a summary of employer and union obligations and rights although for reasons including those set out below it is not always right. It is only the Tribunal which establishes binding jurisprudence. A useful review of important principles which should guide the job evaluation process is the Cavalluzzo document, "*Pay Equity Act Compliance – Making Visible and Valuing Women's Work* (See Appendix C of Guide).

Having set out the basic elements of the ON PEA, this paper will examine some key cases that highlight their jurisprudential development.

### ***Case Note: New Employers and Transparency In Maintenance***

In *Oakwood Retirement Communities Inc. v. S.E.I.U. Local 1 Canada (Oakwood)*,<sup>16</sup> SEIU argued that a Part I "New Employer" has an obligation to "plan" for achieving pay equity and a duty to negotiate with the bargaining agent. The Pay Equity Hearings Tribunal ("PEHT") found that there was no such requirement in Part I (unlike in Part II) and found that "the responsibility for achieving pay equity rests with the employer" since section 7(1) places the burden of establishing and maintaining pay equity compliant compensation practices squarely upon employers.

Under subsection 7(2), trade unions must avoid agreeing to or bargaining compensation practices that would cause a breach of subsection 7(1). The PEHT therefore found that whatever steps an employer may take to achieve pay equity in a bargaining unit must be "readily transparent" to the bargaining agent so that it can assure itself it is not sanctioning compensation practices that run afoul of the Act. However, the Tribunal concluded this does not mean the same range of negotiations between employers and trade unions contemplated by other Parts of the Act.

The *Oakwood* Tribunal did ultimately find that the employer had not met that requirement and ordered them to redo their pay equity implementation process and compensate employees as necessary retroactively to 2006. However, it still seems to encourage a litigious approach where the bargaining agent sits on the sidelines while being provided with information and then is left to file a complaint against the employer for a breach of its section 7 obligations as the remedy. The *Oakwood* decision does state that "Nothing in this decision should be taken to preclude or discourage the parties from voluntarily engaging in a broad range of negotiations concerning all aspects underlying the achievement of pay equity in the bargaining unit."

### ***Case Notes: Abuse of Process and Delay, and Estoppel***

In *Addiction Services of Eastern Ontario v CUPE*,<sup>17</sup> the employer, a government funded non-profit, failed to provide its required pay equity adjustments.<sup>18</sup> The employer

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16 2010 CanLII 76245 (ON PEHT).

17 2009 CanLII 31617 (ON PEHT).

18 Ibid at para 1.

attempted to argue that the union was estopped from claiming the adjustments due to a previous settlement it had reached with government for pay equity adjustments before 2005.<sup>19</sup>

The employer also argued that that it was prejudiced by the fact that it took the Review Services Officer 29 months to issue the Order that it must pay out the adjustments, since this employer was prohibited from carrying over reserves from one fiscal period to the next, and was thus in a precarious financial position.

The PEHT held that there is no provision in the *PEA* that relieves an employer from its pay equity obligations because of an inability to pay.<sup>20</sup> Further, the panel ruled that estoppel did not apply in this case since the Union's settlement with the government pertained to the government's obligation to *fund* pay equity adjustments in the proxy sector, and not the actual pay equity *obligation* of proxy employers themselves, which remained in force [emphasis added].<sup>21</sup> It also ruled that the 29 month-long investigation did not bring the administration of justice into disrepute since the employer had full notice that the compliant had been filed during this time, and thus, of its potential pay equity liability.

Interestingly in a following case called *Queensway Nursing Home v. Group of Confidential Employees*,<sup>22</sup> the PEHT accepted an abuse of process and delay argument, though the delay in this case was 8 years long.

## **2. Quebec's Pay Equity Act**

Quebec also has a dedicated *Pay Equity Act* (QBC *PEA*), which applies to all public employers and private employers with 10 employees or more, excluding senior managers, police officers and fire fighters.<sup>23</sup> Pay Equity may be achieved through the job-to-job, proportional value, or proxy method.<sup>24</sup> Quebec introduced amendments to its *Pay Equity Act* ("PEA") in May of 2009 through its Bill 25, *An Act to Amend the Pay Equity Act*.

Under Bill 25, any employer that grows to 10 more employees within the course of the year will become subject to the QBC *PEA* the following year, whereas previously, only those employers who had 10 or more employees in 1997 were covered by the law.<sup>25</sup>

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19 Ibid at para 12.

20 Ibid at para 8.

21 Ibid at para 13.

22 2010 CanLII 56873 (ON PEHT) [Queensway].

23 Que PEA ss 8(6), 8(7).

24 Que PEA at s 61.

25 Ibid at s 4. Prior to the amendment, the Act only applied to employers with an average of ten or more employees, assessed at a fixed point near the end of the calendar year. See Que PEA, (past version: in force between Jun 8, 2007 and May 27, 2009) at s 4, as amended by *An Act to*

As there was a serious concern about non-compliance under the QBC *PEA*, the amendments created a grace period for non-compliant employers with 50 or more employees to create a pay equity plan by December 31, 2010 with adjustments paid with interest to November 211, 2001, or they had to pay a fine.

This Bill also amended the *PEA* by expanding the scope of the proxy provisions. Whereas the previous proxy provisions mandated the use of two typical male comparators such as a maintenance worker and foreman, the Bill now allows the use of other male comparators, so long as they have similar characteristics in both the seeking and proxy employer.<sup>26</sup>

Most importantly, the amendments to the QBC *PEA* require that employers conduct pay equity audits every five years in order to assess if compensation adjustments are needed.<sup>27</sup> It also requires that the Minister produce a report on the implementation of the amendments to the QBC *PEA* directly to the legislature some 10 years after its implementation on May of 2019.

These amendments are particularly noteworthy as both the Ontario and Quebec experiences of pay equity implementation and maintenance have shown that pay equity compliance can be quite poor, and that continuous, mandated and structured reviews of pay equity compliance are necessary to prevent the creation of new pay equity gaps.

#### ***Case Note: Conseil du trésor [Treasury Board] Respondent and Regroupement les Sages-femmes du Québec***

Both the ON *PEA* and the QBC *PEA* only apply to employees and would thus exclude true self-employed or independent contractors.

In *Conseil du trésor [Treasury Board] Respondent and Regroupement les Sages-femmes du Québec*,<sup>28</sup> is significant, since the Commission de L'Equité Salariale held that midwives who work in health care centres were subject to the QBC *PEA*, despite the fact that midwives were technically not considered to be staff of the healthcare institutions in which they work under the *Loi sur les services de santé et les services sociaux* (LSSS). The Commission emphasized that the meaning of 'employee' under the QBC *PEA* differs from other statutes and only requires that the individual is a "natural

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Amend the Pay Equity Act, RSQ, c 9.

26 Quebec National Assembly, Bill 25, An Act to Amend the Pay Equity Act <<http://www.ces.gouv.qc.ca/documents/publications/anglais25.pdf>>

27 Que PEA, supra at s 76.1.

28 Conseil du trésor [Treasury Board] Respondent and Regroupement les Sages-femmes du Québec CÉS-232-3.6-6976

person who undertakes to do work for remuneration under the direction or control of an employer,” to fall under its ambit.<sup>29</sup>

The Commission found that the work of the midwife conformed to the above definition given the midwife’s obligation to perform her duties personally; the lack of opportunity for profit and loss; the control of the healthcare institution in monitoring the quality of her care; her vacation days and parental rights and benefits. As such, the midwives were considered to be employees of the Quebec Treasury Board for the purposes of the QBC *PEA*. As a result of the decision, the Quebec Treasury Board was required to do the pay equity analysis and comparison process required by the *QBC PEA* and pay equity adjustments were subsequently paid to the midwives.<sup>30</sup>

In Ontario, s. 1.1(1) of the *ON PEA* prevents the Ontario Government from being the employer of a person other than those covered under the Ontario Public Service. Ontario’s midwives who are considered to be independent contractors and are paid for their services by designated funding received by the Ministry of Health and Long Term Care are considering launching an application to challenge their inequitable pay relative to publicly funded male work under the *Human Rights Code*.

## ***B. Complaint-Based Mechanisms***

### ***1. Canadian Human Rights Act***

The *Canadian Human Rights Act* applied to all federally regulated employees until 2008 when the Government enacted the *Public Sector Equitable Compensation Act*, which is discussed below. *PSECA* now is the EPWEV law covering most public sector employees.

Over the years, pay discrimination complaints under the *CHRA* have been addressed not only under section 11 – the EPWEV provision but also under sections 7 and 10.

s. 11 of the *CHRA* is an EPWEV provision. It states that 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, which is assessed by examining the skills, effort, responsibility and working conditions of a job

On the other hand, section 7 states that it is a discriminatory practice to differentiate adversely in relation to an employee on a prohibited ground, such as sex. Section 10 provides that it is a discriminatory practice for an employer to pursue a policy or practice or enter into an agreement affecting matters relating to employment that deprives an individual or class of individuals of employment opportunities on a prohibited ground of

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29 Conseil du trésor [Treasury Board] Respondent and Regroupement les Sages-femmes du Québec CÉS-232-3.6-6976 para. 52-53.

30 Conseil du trésor [Treasury Board] Respondent and Regroupement les Sages-femmes du Québec CÉS-232-3.6-6976 para. 71- 91.

discrimination. These provisions are anti-discrimination methods of addressing gendered pay inequality, and are similar in nature to s. 5 of the Ontario *Human Rights Code* discussed below in Part 3 – Human Rights Legislation that Redresses Gender Pay Inequality.

Noting the unique structure of the *CHRA* in providing for both EPWEV and general prohibitions against sex-based wage discrimination, the below examines some notable recent decisions under the *CHRA*.

**Case notes: Canada (Attorney General) v. Walden (Walden) and Harkin v. Attorney General (Harkin)**

In *Canada (Attorney General) v. Walden (Walden)*,<sup>31</sup> the Federal Court reviewed a decision of the Canadian Human Rights Tribunal (the *CHRT*), which held that the federal government's compensation of the female dominated class of Medical Adjudicators constituted a discriminatory practice in employment, contrary to ss. 7 and 10 of the *Canadian Human Rights Act* (the *CHRA*).<sup>32</sup>

In this case, both the female dominated job class of Medical Adjudicators, most of whom were Registered Nurses, and the male dominated job class of Medical Advisors, most of whom were male doctors, made determinations of disabilities under the Canadian Pension Plan. Despite engaging in such similar work, the government had classified the Medical Adjudicators within the Program and Administrative Services Group, which provided for lower salary and benefits than the Health Services Group, in which the male doctors were placed.

The *CHRT* had decided that the government's compensation policy "failed to recognize the professional nature of the work" conducted by the Medical Adjusters and that this constitutes discrimination under the *CHRA*, as it denies these employees "professional recognition and remuneration commensurate with their qualifications."<sup>33</sup>

MacTavish J of the Federal Court examined the *CHRT*'s decision by noting that the appropriate standard of review is reasonableness.<sup>34</sup> In applying this standard to the *CHRT*'s assessment of the appropriate comparator group, the Court held that the *CHRT* did not err in its analysis that the male dominated job class of Medical Advisors comprised an appropriate comparator group for the Medical Adjudicators.<sup>35</sup>

The Court noted that in contrast to ss. 7 and 10, s. 11 was intended to address systemic discrimination resulting from the long-standing societal undervaluation of work

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31 2010 FC 490 (CanLII) [Walden], aff'd *Walden v Canada (Social Development)*, 2007 CHRT 56 (CanLII).

32 Ibid at paras 5-6.

33 Ibid at paras 55-56.

34 Ibid at paras 6, 77, 93, 137.

35 Ibid at paras 82.

performed by female-dominated occupational groups.<sup>36</sup>" The Court cited Justice Evans' observation in *Canada (Attorney General) v. Public Service Alliance of Canada*, 1999 CanLII 9380 (FC), [2000] 1 F.C. 146 that since this type of systemic discrimination is hard to prove, s.11 creates a rebuttable presumption of gender-based discrimination when it can be shown that men and women working in the same establishment are paid different wages for work of equal value.<sup>37</sup>

The Court further noted that the complaint at hand was not solely about differences in compensation, stating that:

*While the issues of classification and compensation are undoubtedly intertwined, this is not simply a wage discrimination case. While the complainants are undoubtedly concerned about their level of compensation and the extent of their employment benefits, they have also complained of the professional recognition allegedly denied to Medical Adjudicators as a result of their exclusion from the Health Services Group.*<sup>38</sup>

Accordingly, the Court upheld the CHRT's remedial order that the government compensate the complainants for over thirty years in lost wages and dismissed the government's application for judicial review.<sup>39</sup>

in *Harkin v. Attorney General (Harkin)*,<sup>40</sup> the CHRT adjudicated a discrimination complaint alleged by employees of the Public Service Staff Relations Board (PSSRB).<sup>41</sup> The complainants in *Harkin* alleged that they were also owed wage adjustments paid by the Treasury Board between 1984 and 1991 to other federal public servants in comparable clerical positions, as a result of a series of pay equity complaints brought in relation to those other classifications under s. 11 of the *CHRA*.<sup>42</sup>

Here, the complainants attempted to raise their complaints under ss.7 and 10 of the *CHRA* since their employer had not assessed their SERW, as mandated under s. 11,

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36 2010 FC 490, para. 99.

37 2010 FC 490, pars. 100-101.

38 Walden, *supra* note 1 at para 80 [emphasis added].

39 *Ibid* at paras 5, 193, 166, 180, 190. The CHRT, in a later decision regarding remedies, decided that the "complainants failed to prove lost wages on the balance of probabilities or to provide evidence of pain and suffering among the majority of complainants," resulting in that only two of the complainants were ordered compensation. Upon the judicial review, Kelen J of the Federal Court held that the CHRT erred in law by requiring the complainants to prove the "quantum of damages on a balance of probabilities" and that the CHRT breached natural justice by dismissing their claim for pain and suffering damages without directing the complainants to adduce more evidence. The CHRT's remedial decision was thus set aside and referred back for redetermination. See, *Walden v Canada (Social Development)*, 2010 FC 1135 at paras 3, 67, 76, rev'd 2009 CHRT 16, aff'd, 2011 FCA 202.

40 2010 CHRT 11 (CanLII).

41 *Ibid*.

42 *Ibid* at paras 2-3, 27-28.

and they thus had no evidence upon which to support a claim under this provision of this statute.<sup>43</sup>

The CHRT distinguished the facts of *Walden* by noting that the Medical Adjudicators were paid differently for performing similar or substantially similar work as the Medical Advisors which is prohibited by s. 7(b), and highlighted that this was different from EPWEV claims covered by s.11 which assesses the value of dissimilar female and male work. As the claimants could not make out that they were receiving discriminatory wages for similar work under ss. 7 and 10 of the *CHRA*, the CHRT held that a *prima facie* claim of discrimination had not been established.<sup>44</sup>

This distinction by the CHRT is noteworthy, since it sharply distinguishes the difference between EPWEV guarantees, equal pay for equal work, and general anti-discrimination provisions as explained in the first part of this paper.

However, left untouched by the court was the almost impossible structural hurdle that the decision in *Harking* creates for complainants, since they cannot make an complaint under s.11 unless their employer has assessed and valued their SERW, and yet these complainants have no power to force their employer into this type of assessment. Such a decision is disappointing since it detracts from the remedial nature of ss.7 and 10 of the *CHRA*, and the overall goal of closing gender pay gaps.

### ***The Public Sector Equitable Compensation Act and the Public Service Labour Relations Board***

In March of 2009, the *Public Sector Equitable Compensation Act* ("PSECA") was enacted as part of the Federal Government's budgetary restraint laws. While this legislation has not yet been proclaimed, it will soon come to address the pay equity related matters of most federal employees. This paper details the key highlights of PSECA and concerns with this legislation in Part 4: The Charter as a Pay Equity Remedy as the PSECA has been challenged in the courts as unconstitutional. While the statute says that it is "pro-active", that fact is disputed in the constitutional challenge.

For the moment it is important to note that while PSECA is not yet in force, the transitional provisions of the *Budget Implementation Act 2009* (*BIA*) provide that the Public Service Labour Relations Board ("PSLRB") will adjudicate pay equity complaints brought under sections 7, 10 and 11 of the *CHRA* that were filed with the Canadian Human Rights Commission but not yet referred to the CHRT.<sup>45</sup>

Thus far, the PSLRB has decided in two cases before it, that it has the power to interpret the *Equal Wages Guidelines, 1986* and to assess the propriety of the job classification system used by the federal government.

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43 Ibid at paras 75-76.

44 Ibid at paras 105-06, 109.

45 SOR/86-1082; Melançon, *supra* at paras 26-27.

This is quite important since, as *Walden* demonstrates, the government's classification system forms the basis on which job classes are determined, and accordingly, the gender dominancy of a particular job class, and their compensation. See: *Melançon et al. v. Treasury Board and the Department of Industry, the Department of Health and the Canadian International Development Agency (Melançon)* 2010 PSLRB 20 and *Hall et al. and Association of Canadian Financial Officers v. Treasury Board (Hall)* 2010 PSLRB 19.

### **C. EPWEV Limitations**

It is important to note that even when EPWEV provisions are available in a jurisdiction, they are not available to all women, and in fact, have considerable jurisdictional gaps.

Consider the following examples:

- \* To engage the comparison method in the New Brunswick and Manitoba pay equity statutes, each female and each male job class must have at least 10 incumbents. This effectively precludes access for many female positions, including in small broader public sector workplaces and for female dominated workplaces.
- \* Many of the statutes require a direct comparison between a female job and a male job of comparable value. Given the nature of occupational segregation, even where a workplace has both male and female job classes, they will not necessarily be at the same level. For example, in a nursing home the male job classes of janitor and director will be at the bottom and top of the wage scale but the female job classes such as health care aide and nurse will be in between and will not be able to find a direct comparator.

Only the federal, Ontario and Quebec and possibly the Manitoba statutes allow proportional value comparisons or indirect comparisons between general male and female wage lines.

- \* With the exception of Quebec and the Ontario broader public sector, pay equity can only be achieved where there are both male and female jobs within the same establishment. Ontario predominantly female dominated workplaces are left with no access other than to equal pay for equal work or general human rights laws.

### **3. Human Rights Legislation and Gender Pay Discrimination**

Canada's human rights codes/laws all prohibit sex-based discrimination in employment. Pay is a fundamental feature of employment. Despite the presence of other equal pay for equal work or EPWEV laws, human rights codes/laws also continue to provide a an

additional remedy. Such laws are crucial additional tools to remedy pay inequality by filling in the legislative gaps that are found in under-inclusive pay equity laws.

Such gaps may relate to the inapplicability of pay equity legislation to private sector employers, or employers of a certain size, or employers who cannot use the proxy method, or predominantly female jobs which are considered independent contractors.

A key example of such a human rights law provision is found in s. 5(1)(d) and (m) of the Nova Scotia *Human Rights Act* (“NS HRA”), which states that discrimination is prohibited in respect of employment on the basis of sex.<sup>46</sup> As will be demonstrated by the following case note, this human rights provision can be used to address EPWEV issues.

### **Case Note: *Lockhart v. New Minas (Village)***

In *Lockhart v. New Minas (Village)* (*Lockhart*),<sup>47</sup> the Nova Scotia Human Rights Board of Inquiry (the Board) ruled that it had jurisdiction to adjudicate a complaint that an individual had been discriminated against within the context of employment, on the basis of sex, because she was paid unequally for work of equal value. In that case, the Board dismissed the employer's argument that it lacked jurisdiction to hear pay equity complaints that involved valuing dissimilar jobs since among other things, the legislation did not include enough specificity as to how a job evaluation would be completed.

The Board pointed out that the NS PEA itself states that none of its provisions abrogate any rights under Nova Scotia's *Human Rights Act* (NS HRA), and therefore, that the NS HRA is part of the provincial legislative network that addresses the issue of unequal pay for work of unequal value.<sup>48</sup>

The Board also acknowledged that given its jurisdictional limitations, the NS PEA is “far from a complete response to pay inequity in Nova Scotia, and that treating this legislation as the sole tool to address pay inequity would leave many employees without a remedy.

In affirming its jurisdiction, the Board made a comment that should be kept in mind when assessing whether a pay equity complaint should and can be raised in a human rights forum:

If one accepts pay equity as a human right it seems to follow that the violation of the principle of pay equity may constitute sex discrimination either under the general no discrimination provision for an employment relationship, or if present, under an express provision dealing with equal pay for work of equal value.<sup>49</sup>

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46 Human Rights Act, RSNS 1989, c 214, <<http://canlii.ca/t/523h0>> retrieved on 2013-11-14

47 2008 NSHRC 1 (CanLII) [Lockhart].

48 Ibid at para 25.

49 Ibid at para 17.

Similarly, the Ontario Divisional Court in *Nishimura v. Ontario (Human Rights Commission*<sup>50</sup> has also ruled that the Ontario Human Rights Tribunal (HRTO) can address wage inequality issues that are not addressed by the ON PEA.

### **Case Note: Canadian Union of Public Employees, Local 1734 v. York Region District School Board (York Region)**

In the Ontario case of *Canadian Union of Public Employees, Local 1734 v. York Region District School Board (York Region)*, the Divisional Court considered two applications for judicial review to set aside decisions of the Ontario Pay Equity Hearings Tribunal regarding the harmonization of wage grids.

It is first important to note that under s. 6.(1) of the ON PEA, pay equity is achieved where the job rate for the female job class is at least equal to her male comparator. “Job Rate” under the statute refers to the highest rate of compensation for a job class, which also makes it the top rate of a wage grid.

At issue in the above cases was whether shorter wage grids for the male comparator, which implied that the male incumbents would reach their job rate sooner than their female counterparts, violated the ON PEA.<sup>51</sup> The result of these unequal wage grids was that the female incumbents at certain steps of the grids would be paid less than their male comparators, which amounted to the female incumbents being paid thousands of dollars less than the males by the time they had reached their job rate.

The Divisional court held that the PEHT’s decision that unequal wage grids did not violate the ON PEA was reasonable.<sup>52</sup> The PEHT’s reasoning was extremely technical, and decided that so long as the job rates of the male and female incumbents were equal, then all of the unequal steps below on the wage grid did not violate the legislation. The Court went on to uphold that the PEHT’s above interpretation did not violate the Ontario *Human Rights Code*. The Divisional Court first noted that the PEHT’s decision regarding the Code attracted a standard of reasonableness since it was considering an interpretation of its home statute, and because its members have expertise in the area of human rights, employment and collective bargaining.<sup>53</sup> The Court also held that that the ON PEA was not discriminatory on its face since it did not require, nor authorize a discriminatory act. However, the Court acknowledged that the legislation was under inclusive, as it does not purport to eliminate all wage differentials between men and women.<sup>54</sup>

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50 (1989), 70 O.R. (2d) 347 (Div. Ct.) at 354.

51 Ibid at paras 2, 4.

52 Ibid at para 43.

53 Ibid at paras 59-62.

54 Ibid at paras 69.

While the Court held that unequal wage grids are not addressed by the ON PEA, they did not note that such gaps could be vulnerable to challenge independently under the *Human Rights Code*, or the restrictive provisions of the ON PEA itself which lead to the decision may be vulnerable to a challenge under s. 15 of the Charter on the basis of under inclusiveness.<sup>55</sup>

#### 4. The Charter as a Pay Equity Remedy

The *Canadian Charter of Rights and Freedoms* provides in section 15(1) that: Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

This provision could be used to gain access to pay equity for some groups of workers or alternatively to protect gains which have been made under existing pay equity legislation. Examples of using the *Charter* to gain access to pay equity may include litigating an unequal wage grid, as suggested in *Lakeridge*, above.

The *Charter* has already been used to protect pay equity gains, as explained in the case notes below.

#### ***Previous Litigation***

##### ***Case Note: SEIU Local 204 v. Ontario (Attorney General)***

In 1995, the Conservative Ontario Government slashed pay equity funding when it came into office and then repealed the proxy comparison method through Schedule J to the *Savings and Restructuring Act, 1996*. SEIU Local 204 (now Local 1) challenged that the repeal violated section 15 of the *Canadian Charter of Rights and Freedoms*. In a September, 1997 decision of the Ontario Superior Court of Justice, Mr. Justice O'Leary struck down the repeal as a violation of the affected women's equality rights and the proxy law came back into force as did the negotiated proxy pay equity plans. See *SEIU Local 204 v. Ontario (Attorney General)*<sup>56</sup> Mr. Justice O'Leary found that using the work and pay equity target rates of the female job classes in the proxy comparator employer (here the unionized municipal homes for aged) was appropriate for the very reason that they already had been able to achieve pay equity using the male comparator job classes available to them in their municipal workplace. The female job classes in the municipal homes for the aged were found to be a practical and reasonable measuring stick of discrimination precisely because they had already achieved pay equity in relation to comparable male job classes.

While the Ontario Government subsequently paid out in 1998 over \$150 million in pay equity adjustments owing, it then made a policy decision to cease funding further proxy

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55 Ibid at paras 69-80.

56 (1997), 35 O.R. (3d) 508 (Gen. Div.).

pay equity adjustments. As a result of the Government's decision to stop funding the proxy pay equity adjustments, the nursing homes and many other proxy employers declined to make further pay equity adjustments.

The refusal of the Government to continue such funding was the subject of another challenge by CUPE, ONA, SEIU Local 1, USWA and OPSEU. See *CUPE et al v. Ontario (Attorney General) Ontario Superior Court of Justice* (01-CV-214432). As a result of a May 2003 settlement of that *Charter* challenge, the Government agreed to provide proxy pay equity funding to the health and long-term care sector, among others. That settlement covered proxy pay equity funding for the period through to March 31, 2006. The Nursing Homes and other employers used the pay equity funding received pursuant to this settlement to continue their progress to the required rate to achieve pay equity.<sup>57</sup>

### ***Current Litigation***

#### ***Case Note: Maintaining Pay Equity using the Proxy Comparison Method***

As mentioned above in the explanation of the ON *PEA*, all employers including those using the proxy comparison method have an obligation under section 7(1) of the Act to "maintain compensation practices that provide for pay equity in every establishment of the employer". Generally, pay equity is maintained using the same method as was used to achieve pay equity and therefore they should continue to use the proxy method by that principle.

Two unions, the Ontario Nurses Association and the Service Employees International Union Local 1 filed application to the PEHT alleging that approximately 143 Participating Nursing Homes which used the proxy comparison method to achieve pay equity through a 1995 Pay Equity Plan (which provided for a \$1.50 per hour adjustment for the SEIU bargaining units) have failed to maintain pay equity and a wage gap has been allowed to emerge. Regulation 363/93 to the *PEA*, Proxy Method of Comparison, identifies that the proxy comparator for the nursing home sectors is the "Homes for the Aged" operated by one of more municipalities under as it was then, the *Homes for the Aged and Rest Homes Act*, and is now the *Long Term Care Act, 2007*.

The Unions are seeking to revoke two Review Officer decisions which found no contravention of the *Act* as they determined there was no obligation under the *PEA* to continue to track the wages of the external male comparator. SEIU has also filed a Notice of Constitutional Challenge arguing in the alternative any provisions of the *PEA* which block the access of women to their proper external comparators violates the equality provisions of the *Charter* relying on many of the same arguments from the original *Charter* challenges referred to above.

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57 Ibid at paras 301, 304.

### **Case Note: The Public Sector Equitable Compensation Act (PSECA)**

The above-noted 2004 Federal Government Pay Equity Review Task Force Report sets out detailed recommendations for a new pro-active pay equity statute. The Task Force recommended a new federal pay equity law that would impose a specific pro-active obligation on employers to review their pay practices, identify any pay equity gaps and develop a pay equity plan to remedy discriminatory gaps in compensation. It recommended the creation of a pay equity commission and a pay equity tribunal, based on the proactive legislation models that exist in Ontario and in Québec.

The Harper government rejected these recommendations and introduced the *PSECA*.<sup>58</sup>

*PSECA* removes around 400,000 federal employees from the jurisdiction of the *Canadian Human Rights Tribunal (CHRT)*, as it relates to pay equity. It applies to all employees in the core public administration of the federal government, and employees of the various separate agencies listed in the relevant schedules of the *Financial Administration Act*, as well as those working for the Royal Canadian Mounted Police, and the Canadian Forces.<sup>59</sup> As noted above, private sector workers and the remaining public sector workers remain covered by s. 11 of the *CHRA*.

This legislation is seen to be controversial by many. Beyond using the terminology of “equitable compensation matter,” instead of the more commonly understood concept of a “equal pay for work of equal value,” it ties pay equity to collective bargaining, and prohibits unions from assisting members in bringing a pay equity complaint outside of the bargaining period.<sup>60</sup>

If pay equity is not achieved through the bargaining process, individual workers are left to file a complaint with the PSLRB, but without their union's support: in fact, the *PSECA* imposes a \$50,000 fine on any union that would encourage or assist their own members in filing a pay equity complaint.

In addition, *PSECA* raises the threshold of female predominance in a job class to 70%, whereas previously, the *Equal Wages Guidelines*, 1986, provided for the following calculations of gender-predominance: 70% if the occupational group has less than 100

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58 The Task Force commissioned research on a number of key pay equity implementation issues which may be of assistance to unions in both the federal and provincial jurisdictions. Executive summaries of that commissioned research were available but the Federal Government has taken such links off its website. See the Task Force research paper by Mary Cornish, Elizabeth Shilton and Fay Faraday Canada’s International and Domestic Human Rights Obligations to Design an Effective, Enforceable and Proactive Federal Pay Equity Law (November 2002).

59 Treasury Board of Canada Secretariat FAQ: The Public Sector Equitable Compensation Act <<http://www.tbs-sct.gc.ca/lrco-rtor/relations/faq/pseca-lersp-eng.asp#faqq1>>

60 Ibid at 9-10.

members; 60% of the occupational group if it has 100-500 members; 55% if it has more than 500 members.

More controversially, *PSECA* requires that market forces and an employer's recruitment and retention needs inform the assessment of whether an equitable compensation matter exists, where such factors have been commonly treated as *exceptions* to pay equity in other jurisdictions such as Ontario.<sup>61</sup>

A number of unions, including the Professional Institute of the Public Service of Canada and the Public Service Alliance of Canada are challenging the constitutionality of the *PSECA*, along with the *Expenditure Restraint Act*. In summary, these applications allege that the *PSECA* violates the fundamental equality rights of women in the federal public sector to be free from wage discrimination in the payment of their work and perpetuates ongoing sex-based wage discrimination by government actors in the federal public sector.

The parties allege that the *PSECA* violates freedom of expression under section 2(b) of the *Charter* by prohibiting unions from expressing views or advising members on equitable compensation complaints.<sup>62</sup> This prohibition was also challenged as violating the right to the freedom of association under section 2(d).<sup>63</sup> It was then argued that the *PSECA* violates section 15 by failing to "provide a meaningful individual complaint process," as employees cannot bring complaints without the "institutional support" of their unions and are denied access to the CHRC as a means of redress.<sup>64</sup>

The parties also allege that by insulating pay equity within collective bargaining, the *PSECA* further infringes section 2(d) in that it compels unions to negotiate and potentially waive human rights obligations, which may create conflicts of interest.<sup>65</sup>

In terms of the right to equality under section 15 of the *Charter*, PIPSC and PSAC argue that by modifying the assessment of compensation to include an analysis of "private market forces" and "employer needs" regarding recruitment and retention,<sup>66</sup> *PSECA*

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61 *Public Sector Equitable Compensation Act* (S.C. 2009, c. 2, s. 394) s.4.(1)

62 PIPSC Notice of Application at para 40.

63 PSAC Notice of Application at paras 19-20, 26.

64 *The Constitution Act, 1982*, Schedule B to the *Canada Act 1982* (UK), 1982, c 11; Notice of Application of *The Professional Institute of the Public Service of Canada, Raymond Lazzara, Deborah Anne Chamney and Humayoun Akhtar*, CV-09-375977(ONSC) at para 1 [PIPSC Notice of Application]; Notice of Application of *John Gordon, Patricia Ducharme, Megan Adam, Nick Stein, Chris Aylward, Darrell-Lee McKenzie, and Public Service Alliance of Canada*, CV-09-377318 (ONSC) at paras 3-5 [PSAC Notice of Application]; online: [http://www.equalityrightscentral.com/canada\\_equality\\_rights\\_law.php?page=charter\\_equality\\_rights&subtopic=Cases&id=20100628105956&doc=pay+equity-text-Dec1-2010.htm](http://www.equalityrightscentral.com/canada_equality_rights_law.php?page=charter_equality_rights&subtopic=Cases&id=20100628105956&doc=pay+equity-text-Dec1-2010.htm).

at para 49; PIPSC Notice of Application, at paras 29, 34.

65 Ibid at paras 23-24.

66 Senate Report, supra note 77 at 8.

imports a differential analysis than under the *CHRA*, positioning women in a vulnerable position, as market forces are the "primary cause and common rationalization for wage discrimination."<sup>67</sup> Further, it is argued that as the threshold for defining a "female predominant" job class is increased under the *PSECA*, this results in excluding certain job classes from accessing equitable compensation, and subjects federal public service workers to a different standard than private sector employees.<sup>68</sup>

Finally, with regards to the new jurisdiction of the PSLRB over pay equity complaints, it is argued that the *PSECA* "fails to provide substantive remedies" for discrimination since the PSLRB can only order lump sum payments, as opposed to remedies such as the imposition of classification reform, which allows for systemic issues to be addressed.<sup>69</sup> In sum, it is pleaded that the *PSECA* will "further entrench existing wage discrimination for workers in female-dominated groups."<sup>70</sup>

The federal government through its Office of the Chief Human Resource Officer has conducted consultations stakeholders about proposed *PSECA* regulations and issued various policy directions on issues such as: 1) Job Group; 2)Equitable Compensation Assessment; 3) The Value of Work - SERWC; 4) The Value of Work - Recruitment and Retention Needs; 5)The Value of Work - Prescribed Factors; 6) Provision of Data; and 7) Technical Aspects. The latest consultations took place in March, 2013.<sup>71</sup> Draft regulations have still not been provided. The Government has said that the law will be proclaimed once the regulations are issued and approved. There is still no information as to when that will happen. However even after *PSECA* comes into force, a two-year transition period will commence, which will allow employers and bargaining agents to prepare for its full implementation.<sup>72</sup>

## Conclusion

As can be seen from this article, there are many ways to address gender pay discrimination: through equal pay for equal work provisions, equal pay for equal value (pay equity) provisions, general anti-discrimination prohibitions or through the *Charter*.

The various laws may also work in tandem with another, or overlap with another, or serve to fill in legislative gaps. It is hoped that this paper has underscored that one does not need a dedicated *Pay Equity Act* to address gendered pay wage inequalities.

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67 PSAC Notice of Application, *supra* at para 40; PIPSC Notice of Application, *supra* at para 25.

68 *Ibid* at para 26; PSAC Notice of Application, at paras 44-45.

69 *Ibid* at para 37; PSAC Notice of Application, at paras 50-52.

70 *Ibid* at para 55.

71 See sheet on *PSECA* – Equitable Compensation at <http://www.tbs-sct.gc.ca/lrcor/relations/equity-parite-eng.asp>

72 The Public Service Alliance of Canada's February, 2009 document gives a good summary of criticisms of the *PSECA*. See <http://psac.com/news/2009/issues/200902pseact-e.shtml>

At the same time, Appendix A to the paper "Canadian Laws that Remedy Pay Inequalities" reveals that several jurisdictions such as Alberta, Saskatchewan, Newfoundland and Labrador, British Columbia and Nunavut do not even have any EPWEV provisions. And even where such legislation exists, such as Manitoba, Nova Scotia, Prince Edward Island and New Brunswick, they are only available to those in the public sector. And where both private and public sector employees are covered as in the Ontario and Quebec Acts, smaller employers under 10 employees are excluded. There is still much that needs to be done in ensuring that there is a comprehensive legal framework in every jurisdiction in Canada.

Pay Equity is human right, and it should be available for all.

## **APPENDIX A - CANADIAN LAWS THAT REMEDY PAY INEQUALITIES**

Jurisdiction	Equal Pay for Work of Equal Value	Equal Pay for Equal or Similar Work	Prohibition on Gender Discrimination in Employment
Federal	s.11 of the <i>Canadian Human Rights Act</i> , RSC 1985, c H-6		ss. 7 and 10 of the <i>Canadian Human Rights Act</i> , RSC 1985, c H-6
Ontario	<i>Pay Equity Act</i> , RSO 1990, c P.7	s. 42, <i>Employment Standards Act</i> , S.O. 2000, CHAPTER 41	s. 5, <i>Human Rights Code</i> , R.S.O. 1990, c H.19
Quebec	<i>Pay Equity Act</i> , RSQ c E-12.001	s. 19, <i>Charter of human rights and freedoms</i> , RSQ, c C-12	s. 16, <i>Charter of human rights and freedoms</i> , RSQ, c C-12
Manitoba	<i>Pay Equity Act</i> , CCSM c P13	s. 82(1) <i>Employment Standards Code</i> , CCSM c E110	s. 14(2)(e) <i>Human Rights Code</i> , CCSM c H175
Nova Scotia	<i>Pay Equity Act</i> , RSNS 1989, c 337	s 57(1). <i>Labour Standards Code</i> , RSNS 1989, c 246	s. 5(1), <i>Human Rights Act</i> RSNS 1989, c 214
Prince Edward Island	<i>Pay Equity Act</i> , RSPEI 1988	s 7(1) <i>Human Rights Act</i> , RSPEI 1988, c H-12	s. 6(1) <i>Human Rights Act</i> , RSPEI 1988, c H-12
New Brunswick	<i>Pay Equity Act</i> , SNB 2009, c P-5.05	s 37.1(1). <i>Employment Standards Act</i> , SNB 1982, c E-7.2	s 4(1)(b), <i>Human Rights Act</i> , RSNB 2011, c 171
Alberta	--	s. 6(1), <i>Alberta Human Rights Act</i> , RSA 2000, c A-25.5	s. 7(1), <i>Alberta Human Rights Act</i> , RSA 2000, c A-25.5
Saskatchewan	--	s 17(1). <i>Labour Standards Act</i> , RSS 1978, c L-1	6.(1) <i>Saskatchewan Human Rights Code</i> , SS 1979, c S-24.1
Newfoundland and Labrador	--	s. 11 (1), <i>Human Rights Code</i> , RSNL 1990, c H-14	s. 10 (1), <i>Human Rights Code</i> , RSNL 1990, c H-14
British Columbia	--	s. 12 (1) <i>Human Rights Code</i> , RSBC 1996, c 210BC HRC at ss 21(1), 37(2).	s. 13 <i>Human Rights Code</i> , RSBC 1996, c 210BC HRC at ss 21(1), 37(2).
Yukon	s.15(1), <i>Human Rights Act</i> , RSY 2002	s.44 <i>Employment Standards Act</i> , RSY 2002, c 72	s.9, <i>Human Rights Act</i> , RSY 2002
Northwest Territories	s.40.1 <i>Public Service Act</i> , RSNWT 1988, c P-16,	s. 9.(1) <i>Human Rights Act</i> , SNWT 2002, c 18	s. 7.(1) <i>Human Rights Act</i> , SNWT 2002, c 18
Nunavut	--	--	s. 9(1)(b). <i>Human Rights Act</i> , SNu 2003, c 12