

# Update

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## EQUALITY RIGHTS VERSUS DEFICIT REDUCTION *SEIU LOCAL 204 ET AL V. ATTORNEY GENERAL-ONT*

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### INTRODUCTION

A recent successful constitutional challenge decision of the Ontario Court General Division released September 5, 1997 shows that the *Charter of Rights and Freedoms* can be used to prevent Governments from amending statutes which conferred benefits on disadvantaged groups. See *Service Employees International Union Local 204 et al v. Attorney General of Ontario*.<sup>1</sup>

SEIU Local 204 and its members were represented by Mary Cornish, Elizabeth Shilton and Fay Faraday of the firm. The Court upheld SEIU Local 204's application, declaring *Schedule J* of the *Savings and Restructuring Act, 1996*, amending Ontario's *Pay Equity Act*, to be unconstitutional and of no force and effect since it "created discrimination" contrary to the equality rights guaranteed by section 15 of the *Charter*. This meant the *Act's* original proxy pay equity provisions and proxy pay equity plans were reinstated for the 100,000 women in the lowest paid jobs in the public sector who had been affected by the repeal of certain legislative pay equity rights.<sup>2</sup>

Section 15(1) of Canada's *Charter* provides as follows:

Every individual is equal before and under the law and has the right to 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.

### O'LEARY DECISION

Mr. Justice O'Leary found that Ontario's *Pay Equity Act*, because of the 1996 *Schedule J* amendment, discriminates against proxy sector women by denying them the opportunity of quantifying and correcting the systemic gender-based wage inequity from which they suffer, a benefit the *Act* grants to other women working in the broader public sector. The Court found that the proxy comparison method was and is an appropriate pay equity tool in keeping with the intent of the *Pay Equity Act* to relieve women, including those working in female-segregated workplaces in the broader public sector, from systemic gender-based wage discrimination.

Mr. Justice O'Leary summarized his reasons as follows:

It is a matter of choice for government as to whether or not it legislates to remove inequity. When, however, government

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decides to legislate and identifies the disadvantaged group the legislation is intended to benefit, then it must, subject to s. 1 of the Charter, make the legislation apply fairly and equally to all within the group or government itself is guilty of discriminating. This is especially so where government itself picks up the cost of removing the inequality that is the focus of the legislation. Where legislation discriminates against a portion of the group the legislation is designed to help, the legislation contravenes s. 15(1) of the Charter and so is ultra vires unless the discrimination is demonstrably justified under s. 1 of the Charter.

The Pay Equity Act, because of the 1996 Schedule J amendment, discriminates against proxy sector women by denying them the opportunity of quantifying and correcting the systemic gender-based wage inequity from which they suffer, a benefit the Act grants to other women working in the broader public sector.

The discrimination has not been justified under s. 1 of the Charter, in that the stated objective of the Schedule J amendment does not warrant overriding the constitutional right of equal benefit of the law. Indeed, the stated objective - the restoring of the Pay Equity Act to true pay equity principles - I find to be mistaken. Proxy method was and is an appropriate pay equity tool in keeping with the intent of the Pay Equity Act to relieve women, including those working in female-segregated workplaces in the broader public sector, from systemic gender-based wage discrimination. Mr. Justice O'Leary found that the discrimination was not justified under s. 1 of the *Charter* in that the stated objective of the *Schedule J* amendment (i.e. to restore pay equity to its true principles) was false.<sup>3</sup>

The Court ordered the Attorney General to pay the applicant union's costs which were fixed at \$140,000.00 on consent.

### **SCHEDULE J**

*Schedule J* had been passed by the new right wing Conservative Ontario Government elected in June, 1995 on a platform of less government and tax cuts. *The Savings and Restructuring Act* was introduced to provide the tools to help municipalities, hospitals, colleges, universities, schools and the provincial government to meet the new financial targets.

*Schedule J* eliminated pay equity rights for women working in the broader public sector at workplaces such as nursing homes, day care centres, women's shelters, and other community service agencies. This was done by amending the *Pay Equity Act* to repeal the "proxy method of comparison" enacted in 1993 by the NDP Government which workers in almost-exclusively female workplaces in the broader public sector had calculated the extent to which their wages had to be adjusted to achieve pay equity.

#### *Schedule J*

- a. capped an employer's obligation to honour pay equity adjustments ordered in the proxy pay equity plan. The employer is only required to devote an amount equal to 3% of its 1993 payroll towards closing the wage gap identified in the proxy pay equity plans. This amount was to be paid out by September 30, 1996;
- b. released employers from the obligation to make pay equity adjustments retroactive to January 1, 1994;
- c. authorized employers not to honour the schedule of compensation adjustments for achieving pay equity set out in the plan or any other document (such as a collective

agreement) rendering negotiated pay equity agreements legally unenforceable; and

- d. abolished the proxy method of comparison as of January 1, 1997.<sup>4</sup>

The 3% cap imposed by the legislation left approximately 80% of the identified discriminatory wage gap unredressed. If proxy recipients had not signed a pay equity plan by January 1, 1997, under *Schedule J* they were no longer entitled to receive any pay equity entitlements under the *Pay Equity Act*.

#### PROXY COMPARISON METHOD

Prior to the 1993 Amendments, the *Pay Equity Act*, 1987 required public, broader public and private sector employers to implement pay equity for women using the job-to-job method of comparison. This left women working in workplaces filled exclusively by women unable to establish that they were suffering from wage discrimination. There were no men in their work force with whom they could compare their wages.<sup>5</sup>

The 1993 Amendments providing for proportional value or wage line method and the proxy comparison method was introduced so that certain women working in the broader public sector, that is to say, for employers supported in large part by government funds, could achieve pay equity even though so few men worked for their employers as to make a pay comparison with male co-workers impossible.

Mr. Justice O'Leary referred to these 1993 amendments as follows:

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for employers supported in large part by government funds, could achieve pay equity even though so few men worked for their employers as to make a pay comparison with male co-workers impossible.<sup>6</sup>

#### GOVERNMENT'S FISCAL OBJECTIVES

Mr. Justice O'Leary found the Government, in moving to cap proxy pay equity adjustments at 3 per cent of payroll and eliminate the proxy method, acted essentially for fiscal reasons.<sup>7</sup> Pay equity adjustments under proxy plans, though applying exclusively to the broader public sector (i.e., to non-government employees), were 100 per cent government funded. The proxy method introduced in 1993 to redress systemic wage discrimination in predominantly female workplaces provided for a very gradual achievement of pay equity. Proxy pay equity was far from being fully implemented in 1995 and was thus a program with substantial expanding costs. It was therefore targeted for cuts by the government.

The Court found that based on the government's current estimates, the annual wage bill in all proxy workplaces in the broader public sector would need to be increased at the maturity of all the proxy pay equity plans by \$484 million annually to fully eradicate discriminatory wages in all Ontario proxy workplaces. By the government's own estimate, the 3 per cent cap payment is \$418 million per year less than the amount all the proxy recipients in the sector would have received at maturity date if *Schedule J* had not been enacted.<sup>8</sup>

#### SECTION 15 VIOLATION

Mr. Justice O'Leary rejected the Government's position that Schedule J was necessary to remove the proxy method of comparison which was flawed and restore pay equity to its true principles. The Court found

that the proxy method did identify systemic discrimination in compensation and it had been

removed from the *Act* in the absence of any study on the efficacy of the proxy method in operation and in the absence of any demonstrated problem or any literature concluding proxy is inappropriate. The government terminated the comprehensive quantitative and qualitative review of the Pay Equity Act by Professor Katherine Swinton, put in place by the previous government, which had included among its terms of reference a study to assess the initial impact of the proxy and proportional methodologies. The government did not recommence its own substantive review of the Pay Equity Act by Jean Read until the spring of 1996, a number of months after Schedule J had already been passed. Proxy pay equity was not part of the mandate of the Read Review. Ms. Winter was not consulted by the government concerning her views and was not involved in any critique of proxy until she was retained by the government in early January 1997 to prepare an affidavit in these proceedings.<sup>9</sup>

Mr. Justice O'Leary concluded that:

the Schedule J amendment cannot be justified on the basis that to restore the Act's integrity it was necessary to remove the proxy method, a flawed tool that did not quantify gender-based wage inequity. I have found that basis is false. The respondent's entire justification of the amendment is grounded on the proposition I have just found faulty.<sup>10</sup>

Mr. Justice O'Leary concluded that the Government had not satisfied him

that the proxy method fails to identify the undervaluation of women's work in the proxy sector. Rather, I am satisfied that it

is an appropriate method of quantifying the extent of gender-based systemic wage discrimination in that sector.<sup>11</sup>

The Court specifically accepted the following opinion of Dr. Armstrong:

The proxy comparison method was legislated and implemented in a manner which followed the same principles as the original Act. The addition of proxy was simply an extension of the sequence, established in the 1987 Act, of looking first to the closest comparator and then continuing the search until an appropriate comparator is found. Proxy was limited to the public sector where jobs and employers are similar; required an order from the Commission to ensure that the proper sequence had been followed; and was restricted to comparisons with similar organizations in the geographic region. Proxy was therefore consistent with both the original principles of the Act and with other pay practices.<sup>12</sup>

Contrary to the view of the Government's expert, Nadine Winter, O'Leary relied on Dr. Armstrong's evidence.

Dr. Armstrong says that each of the job-to-job, proportional value and proxy methods has its own associated benefits and limitations. None of these methods are a perfect instrument for achieving equality. All of these methods, however, are still effective measures for reducing the wage gap caused by the discriminatory undervaluation of women's work.

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measures for reducing the wage gap caused by the discriminatory undervaluation of women's work. "

In my opinion, the manner in which proxy was legislated and implemented ensured that the proxy comparison method followed the same principles as the original Act and properly identified systemic discrimination in the health and social services sector.<sup>13</sup>

Mr. Justice O'Leary also noted that *Schedule J* was not an incremental approach to pay equity

It must also be noted that the *Schedule J* amendment cannot be justified as an incremental approach to pay equity. It is not a matter of putting off to another day, when the same can be afforded, the correction of the gender-based systemic wage inequity from which women in the proxy sector undoubtedly suffer. *Schedule J* and the government's position on this application tells proxy sector women they are not and cannot be covered under the Pay Equity Act even though other women in the broader public sector have had their systemic gender-based wage inequity 100 per cent cured.<sup>14</sup>

### **FERREL DECISION**

In finding that there was a section 15 violation, Mr. Justice O'Leary made a troubling comment relying on the decisions of the Ontario Court General Division in *Ferrel v. AG-Ont* about how it may have been permissible if the Government had decided to repeal the entire *Pay Equity Act*. (see injunction decision of Macpherson, J. December 29, 1995 and decision of Dilks, J. July 9, 1997) Although it was not necessary for him to do so, he commented that there would likely have been no violation had the whole *Act* been repealed.<sup>15</sup>

The *Ferrel* decision has also been relied upon by the Ontario Court General Division in the recent trial decision rejecting the *Charter*

challenge to the Harris government's repeal of the *Agricultural Labour Relations Act*, the NDP legislation which extended collective bargaining rights to agricultural workers. *Dunmore v. Ontario (Attorney General)* (1997) 37 O.R. (3d) 287

The applicants' appeal of the *Ferrel* decision was heard by the Ontario Court of Appeal on April 6-7, 1998. The Ontario Federation of Labour and LEAF were granted intervenor status in that proceeding. The decision is reserved.

### **SECTION 1**

The Court found that the Government's stated purpose for the legislation was false.

If that ground is untrue, if indeed the proxy comparison method is an appropriate method of quantifying systemic gender-based pay inequity in the public sector, then the stated objective of the *Schedule J* amendment cannot be of sufficient importance to warrant overriding a constitutional right. Indeed the amendment has no logical objective at all. It purports to cure a problem with the *Pay Equity Act* that did not exist.<sup>16</sup>

Accordingly, the Court found that the Government did not even make it through the first hurdle of the section 1 test and the section 15 discrimination was not justified under section 1.

### **CONCLUSION**

The Ontario Government did not appeal the O'Leary decision. In December, 1997 the Government announced it had set aside \$140 million to fund the retroactive pay equity adjustments owing as a result of O'Leary's decision. The Government refused to remove its ongoing cap of \$500 million on annual public sector pay equity funding and has said it will

redistribute the \$500 million fairly among the employer's of women requiring pay adjustments. For 1998, it is estimated there will be a \$90 million shortfall. That is, with the reinstatement of proxy pay equity, \$590 million is required. This proposed "redistribution" may be the subject of a further *Charter* challenge.

The Ontario Government is trying to rely on the following portion of the O'Leary decision to support its action in moving to redistribute "fairly" the existing ongoing \$500 million annual funding.

I point out there was no attempt by the respondent to establish that in order to live within the \$500 million cap government placed on pay equity spending, the government had to remove the proxy method and throw the full weight of the funding reduction on those working in the proxy sector. It was not explained why the burden could not have been apportioned equitably amongst all workers in the broader public sector who benefited from the \$380 million still paid annually by government towards the cost of wage adjustments in that sector.<sup>17</sup>

These statements were not necessary to the decision and should not be relied upon to determine that redistributing the funding among the public sector women is fair. O'Leary was just pointing out in the judgement that the Government had not looked at any other less discriminatory measures when it passed *Schedule J*. However, there is a good argument that the Government should be required to look elsewhere in the provincial budget for the extra \$90 million for 1998 before it takes the money from employers who are using it to end systemic compensation discrimination.

1. (1997) 35 O.R. (3d) 508 (Ont. Ct. General Division)
2. Above, at p. 516

3. Above, at pp. 535-536
4. Above, at p. 520
5. Above, at p. 531, 533.
6. Above, at p. 510
7. Above, at p. 520-521
8. Above at p. 521
9. Above, at p. 532-533
10. Above at p. 535
11. Above at p. 532
12. Above, at p. 533-34
13. Above, at p. 534
14. Above, p.535
15. Above, at p. 526
16. Above, p.529
17. Above, at p. 535