CITATION: Ontario Nurses' Association v. Participating Nursing Homes, 2019 ONSC 2168
DIVISIONAL COURT FILE NO.: 362/16 and 364/16
DATE: 2019-04-30

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

Morawetz R.S.J., Gordon, Backhouse JJ.

BETWEEN:	
ONTARIO NURSES' ASSOCIATION, Applicant	*Janet Borowy/Danielle Bisnar/* Andrea Sobko for Ontario Nurses' Association
AND:	
PARTICIPATING NURSING HOMES, Respondent	*Marco Falco/David Golden*, for Participating Nursing Homes
AND:	
SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 1, Respondent	*Paul J.J. Cavalluzzo/Adrienne Telford/Lara Yeo* for Service Employees International Union, Local 1
	Carolyn L.Kay/Frank Cesario for Intervener, Attorney General of Ontario
AND BETWEEN:	*Fay Faraday*, for Intervenor, Equal Pay Coalition
SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 1, Applicant	*Aaron Hart/Andrea Bowker* for Intervener, Pay Equity Hearings Tribunal
AND:	
PARTICIPATING NURSING HOMES, Respondent	
AND:	
ONTARIO NURSES' ASSOCIATION, Respondent	**HEARD at Toronto: February 5-7, 2019**

The Court

Overview

[1] The Applicants, the Ontario Nurses' Association ("ONA") and the Service Employees International Union Local 1 ("SEIU"), apply for judicial review of the decision of the Pay Equity Hearings Tribunal (the "Tribunal") dated January 21, 2016.

[2] The ONA and the SEIU (referred to collectively as the "Unions") applied to the Tribunal alleging that the Respondent, the Participating Nursing Homes (the "PNH"), had violated the *Pay Equity Act*, R.S.O. 1990, c. P.7 (the "*Act*") by failing to properly maintain pay equity for their employees. In a lengthy and comprehensive decision, the Tribunal rejected the Unions' arguments.

[3] The Unions ask this Court to quash and set aside the Tribunal's decision and issue a declaration that the *Act*, properly construed, requires the maintenance of pay equity in predominantly female workplaces through the proxy comparison method and reliance on external comparator workplaces as set out in Part III.2 of the *Act*. Alternatively, the Unions request a declaration that the *Act* violates s. 15 of the *Canadian Charter of Rights and Freedoms* ("*Charter*") and that the violation is not justified under s. 1.

[4] We conclude that the *Act* does not contravene s. 15 of the *Charter* but that the Tribunal erred by failing to consider *Charter* values when interpreting the *Act*. The Tribunal's decision failed to give effect as fully as possible to the *Charter* equality protection, given the *Act*'s statutory mandate to recognize and redress the systemic discrimination that women have suffered in the way that they are compensated in the workforce and to ensure such discrimination does not re-emerge. This rendered its decision unreasonable.

[5] A proper balancing of the *Charter* equality protection and the statutory mandate requires that women in predominantly female workplaces covered under the *Act* have continued access to male comparators in order to maintain pay equity. This matter is remitted to the Tribunal to specify what procedures should be used to ensure that the claimants continue to have access to male comparators in order to determine whether pay equity has been maintained.

Background

Legislative Background

[6] The *Act* is human rights legislation whose purpose is to redress systemic gender discrimination in the compensation of employees employed in female job classes in Ontario. It applies to, among others, all employers in the public sector. Section 7 of the *Act* imposes a proactive obligation on employers to achieve pay equity by:

> (a) Assessing the extent to which gender discrimination in pay exists in their establishments (by determining what rate of pay would attach to work that is done

predominantly by women ("women's work") if that work were performed predominantly by men); and

(b) Increasing compensation for underpaid women's work as revealed by the assessment.

[7] Once pay equity is achieved, the *Act* requires that it be maintained.

[8] Determining whether gender discrimination in pay exists requires employers to compare the skill, efforts, responsibility, working conditions, and pay provided to female job classes in their establishments with that of male job classes (or their proxy equivalents) using a gender neutral comparison system ("GNCS").

[9] The *Act* prescribes three means of comparison: job-to-job, proportional value ("PV"), and proxy. The method used is dependent upon the gender predominance of the job classes in the workplace in question.

[10] Under the job-to-job method, female job classes are compared to male job classes of equal or comparable value in the same establishment. The job-to-job method is of no use in an establishment where there are no male job classes with which to compare and of limited use where the number of male job classes are few.

[11] To address the inability to compare male to female job classes in female-dominated workplaces, the *Act* was amended in 1994 to introduce the proxy comparison method. This method allows a female job class in a predominantly female workplace to compare compensation to a similar job class that has achieved pay equity in another establishment where there are male comparators.

[12] Essentially, this involves comparing the compensation/value relationship for women's work performed in one employer's workplace (the "seeking employer") to the compensation/value relationship that exists for women's work performed in a different employer's workplace (the "proxy employer") where the female job classes have already achieved pay equity under the job-to-job or PV methods of comparison.

[13] The proxy method of comparison is set out in Part III.2 of the *Act*. It is a fairly complicated process involving the following steps:

1. An employer becomes a seeking employer following a declaration of a Review Officer of the Pay Equity Commission.
2. The seeking employer must identify at least one female job class in its establishment, to be identified as the key female job class. A GNCS is used to determine the value of the work performed by this key female job class.
3. The same GNCS is used to determine the value of work performed by a female job class in the proxy establishment. The selection of a proxy employer and proxy establishment is governed by O. Reg 369/93.

4. A proportional value analysis is completed by the proxy female job class being treated as if it is a male job class in the seeking employer's establishment. In so doing, the compensation/value relationship of the proxy female job class is determined.
5. Achieving pay equity under this method of comparison requires the seeking employer to adjust the compensation of the key female job class so that the same compensation/value relationship exists for the key female job class as for the proxy female job class.
6. This adjustment of compensation for the key female job class has the effect of achieving pay equity for it.
7. The key female job class is then treated as though it is a male job class in the seeking employer's establishment and its compensation/value relationship is extended to the other female job classes there. The value of the work performed by the non-key female job classes is determined using the GNCS and their compensation is adjusted to reflect the same compensation/value relationship as the key female job class. Pay equity is then said to have been achieved throughout the establishment.
8. The results of the proxy comparison methodology and the resulting compensation increases are to be incorporated into a Pay Equity Plan pursuant to s. 21.18 of the *Act*.

Factual Background

[14] Many of Ontario's elderly are cared for in nursing homes and homes for the aged. Employment in this sector is almost exclusively female.

[15] Nursing homes and homes for the aged have very similar work and job classifications. Employees in both establishments carry out similar functions of caring for the ill and elderly under similar extensive and detailed legislative requirements.

[16] The ONA represents the female job classes of approximately 2100 registered nurses and allied health professionals who work at approximately 200 nursing homes across the province.

[17] The SEIU represents female job classes including registered practical nurses, personal support workers, health care aides, dietary, housekeeping, and recreational aides in these same nursing homes.

[18] The PNH are operators of up to 143 for-profit nursing homes which constitute part of the public sector as defined in the *Act*. They are therefore required to achieve and maintain pay equity for their female employees. The Unions each have a collective bargaining agent relationship with the PNH.

[19] Because the workforce of the PNH is almost exclusively female, the parties can only assess pay equity using the proxy comparison method. The employee group known as health care aides was designated as the key female job class for the PNH and the proxy female job class. The proxy establishment was the "Unionized Municipal Homes for the Aged Across Ontario"

("Municipal Homes"). The Municipal Homes achieved pay equity for health care aides in their employ in 1994 using the job-to-job comparison method with male comparators employed by the municipality.

[20] Using the proxy comparison method, the parties determined that the pay equity gap between the average health care aide in the Municipal Homes when compared to the PNH was about $1.50 per hour in 1994. To close that pay equity gap, they agreed to adjustments over a number of years to increase compensation for all of the female job classes at the PNH. By 2005, when all the required adjustments had been implemented, pay equity was achieved.

[21] Over time, the Unions noted four significant changes within their workplaces: (1) A new legislative framework within which the PNH was required to operate; (2) New education requirements for its members: (3) Steadily increasing acuity of the residents; and (4) More medical services required to meet the rising needs of the residents.

[22] At the same time, they noted that wage gaps were re-emerging between employees of the PNH and comparable employees of the Municipal Homes.

[23] Considering the added responsibilities of their members and the wage gap that had re-emerged, the Unions concluded that pay equity was not being maintained. They reasoned that whereas female job classes in the Municipal Homes had continuing comparison to male job classes with appropriate ongoing changes in compensation, the female job classes in the PNH had no male job class with which to compare, no ongoing comparison with a proxy female job class, and no commensurate changes in compensation.

[24] The PNH disagreed, taking the position that they had achieved pay equity as required by the *Act,* which contemplated a one-time comparison with a female job class in a proxy establishment. The PNH took the position that the *Act*, properly interpreted, does not require ongoing comparison to a proxy establishment. Rather the *Act* contemplates only an internal maintenance obligation within each establishment.

[25] The Unions applied to Reviewing Services of the Pay Equity Commission. In a decision dated August 5, 2010, the Senior Review Officer addressed the ONA's application, and found as follows:

> There is no language in Part III.2 of the Act requiring seeking employers to request new or updated information from the proxy employer and timeframes or conditions to trigger the requirement. The collection of data from the proxy employer was required to be a one-time only occurrence; and it was required for a single use – to provide the parameters for a key female job class wage line; pay equity is achieved on the basis of the key female job class wage line and as such is internalized to within the seeking employee's control and constrained to the seeking employer's compensation practices.

[26] In a decision dated August 26, 2010 the same Senior Review Officer ruled on the SEIU's application and reached the same conclusion.

[27] The Unions applied to the Pay Equity Hearings Tribunal ("Tribunal"), objecting to the findings made by the Senior Review Officer. Before the Tribunal, the Unions took the position that there is a statutory duty on the PNH to maintain pay equity through the proxy comparison method, and, to the extent the *Act* does not so require, it contravenes s.15 of the *Charter*.

Jurisdiction

[28] Pursuant to ss. 2 and 6(1) of the *Judicial Review Procedure Act*, R.S.O. c. J.1, the Divisional Court has jurisdiction to hear an application for judicial review.

Standard of Review

[29] Several cases have determined that the Tribunal's interpretation of its home statute is to be reviewed on a standard of reasonableness. (See *Canadian Union of Public Employees Local 1999 v. Lakeridge Health Corporation*, 2012 ONSC 2051 (Ont. Div. Ct.), *Corporation of the City of Windsor v. Moor,* 2018 ONSC 2055 (Ont. Div. Ct.); *Brant Haldimand-Norfolk Catholic District School Board v. Ontario Secondary School Teachers' Federation,* 2011 ONSC 1232 (Ont. Div. Ct.); *Ontario Nurses Assn. v. Ontario (Pay Equity Hearings Tribunal)* (1995), 23 O.R. (3d) 43 (C.A.)).

[30] However, in its decision the Tribunal decided two *Charter*-related issues that require somewhat different consideration.

[31] In the first, it found the *Act* does not contravene the equality provisions contained in s.15 of the *Charter*. There is no doubt that when a tribunal has determined the constitutionality of a law, the standard of review is correctness (*Doré v. Barreau Du Quebec*, 2012 SCC 12, [2012] 1 S.C.R. 395).

[32] In the second, the Tribunal found that this was not a case in which *Charter* values should be used as an aid in interpretation of the *Act*. Where, as here, the Unions seek to attack the consistency of a discretionary administrative decision with the *Charter,* the standard of review is reasonableness as provided in *Doré* and in *Loyola v. Quebec (Attorney General)*, 2015 SCC 12, [2015] 1 S.C.R. 613:

> [37] On judicial review, the task of the reviewing court applying the *Doré* framework is to assess whether the decision is reasonable because it reflects a proportionate balance between the *Charter* protections at stake and the relevant statutory mandate: *Doré*, at para. 57…
>
> …
>
> [39] The preliminary issue is whether the decision engages the *Charter* by limiting its protections. If such a limitation has occurred, then "the question becomes whether, in assessing the impact of the relevant *Charter* protection and given the nature of the decision and the statutory and factual contexts, the decision reflects a proportionate balancing of the *Charter* protections at play": *Doré,* at para. 57. A proportionate balance is one that gives effect, as fully as possible to the *Charter*

> protections at stake given the particular statutory mandate. Such a balance will be found to be reasonable on judicial review: *Doré,* at paras. 43-45.

The Decision of the Tribunal

The Constitutional Question

[33] The Unions argued that any provision under the *Act* which bars a female job class that achieved pay equity under Part III.2 proxy provisions from maintaining such pay equity by ensuring that no further pay gap emerges after January 1, 1994 with the designated comparators in the proxy employer workplace, violates s. 15 of the *Charter* and is not saved by s. 1 of the *Charter.* To the extent the *Act's* provisions constitute such a bar, the Unions asked the Tribunal to decline to apply them as unconstitutional.

[34] The Tribunal found that the *Act* does not contravene s. 15 of the *Charter.*

[35] It held that to the extent the *Act* creates a distinction in the pay equity maintenance obligation depending on the method used to achieve pay equity, that distinction arises not because of sex, but because of the *locus* of the employment relationship. The Tribunal found that this is neither an enumerated nor analogous ground of discrimination covered by s. 15.

[36] The Tribunal went on to hold that, in any event, the *Act* is an ameliorative program aimed at redressing systemic gender discrimination in compensation for work performed by employees in female job classes and that the distinction drawn in the legislation has, as its object, the furtherance of that ameliorative program and is saved under s. 15(2) of the *Charter*. It found that the *Act* is focused on identifying and redressing systemic discrimination embedded in the compensation practices of individual employers in particular workplaces. The Tribunal further held that not requiring them to maintain pay equity with deemed male comparators furthered the *Act*'s ameliorative purpose.

[37] The Tribunal went on to consider the broader legislative scheme and reasonableness of the government measures. The Tribunal concluded that the claimants' right to maintain pay equity with deemed male comparators is not discriminatory because the legislative history of the *Act* "recognizes that not all women will benefit from the *Act*, not all will benefit equally, and the wage gap between men and women will not be completely eliminated."

[38] Lastly, the Tribunal found the maintenance scheme for proxy plans does not perpetuate historic stereotyping or disadvantage and therefore does not contravene s.15(1) of the *Charter*.

The *Charter* as an Aid to Interpretation

[39] The Unions urged the Tribunal to interpret the scope of the *Act's* maintenance obligation (when pay equity had been achieved using the proxy methodology) having regard to the *Charter* value of equality. It declined to do so.

[40] The Tribunal viewed its task as determining the extent of a positive obligation imposed by statute, specifically, the extent of the PNH's obligation to maintain pay equity as imposed by s. 7(1) of the *Act*.

[41] The Tribunal noted that this was not a situation in which *Charter*-protected conduct was said to have contravened the legislation the Tribunal was empowered to apply, and was therefore distinguishable from *Doré,* and *Taylor-Baptiste v. Ontario Public Service Employees Union,* 2015 ONCA 495, 126 O.R. (3d) 481. It held there was no ambiguity in the legislation and therefore no requirement to consider *Charter* values in its analysis.

The Tribunal's Interpretation of the Maintenance Obligation

[42] Having eschewed the requirement to consider *Charter* values in its interpretation of the *Act,* the Tribunal determined that the PNH was in compliance with its maintenance obligation.

[43] The Tribunal observed that pay equity under the *Act* is established on an employer-by-employer basis, requiring each individual employer to whom the *Act* applies to critically examine its own compensation practices using one of three comparison methodologies. This is completed in order to determine if women's work is equitably compensated as compared to men's work having regard to the value of each.

[44] The Tribunal noted that the *Act* does not require wage parity as between different employers and that, accordingly, rates of pay for the same or similar women's work may vary depending on the identity and characteristics of their employer.

[45] The Tribunal added that the *Act* only requires pay equity for compensation practices in each individual establishment so that where the same female job class exists in more than one establishment of the employer, it is possible that pay equity may be achieved in each establishment even though those two female job classes are paid different rates. Stated differently, even though female job classes may perform work of the same value for the same employer, the *Act* contemplates that their rates of pay may vary depending on the characteristics of the individual establishment in which they work.

[46] The Tribunal further noted that even where female job classes perform work of the same value for the same employer within the same establishment, the *Act* contemplates that their rate of compensation may vary depending on whether they are unionized or which bargaining unit they are in.

[47] The Tribunal described the proxy method of comparison as a significant departure from other methods of comparison because it measures one employer's compensation practices in its establishment against the compensation practices in an establishment of a different and unrelated employer, without assuming there will be wage parity between the key female job class of the seeking employer and any of the proxy female job class.

[48] It was within this context that the Tribunal went on to consider the employer's obligation to maintain pay equity under s. 7(1) of the *Act*. It noted that the *Act* does not contain any specific

indication of how pay equity is to be maintained where it is achieved using a particular methodology.

[49] The Tribunal held that in the absence of a definition of "maintenance" in the *Act*, the scope of the obligation to maintain must be ascertained from a consideration of the *Act* as a whole. The Tribunal explained that the plain meaning of "maintain" suggests that the obligation is to continue the compensation/value relationship that is established when a female job class rate becomes pay equity compliant. Accordingly, both compensation and value (the amalgam of skill, effort, responsibility and working conditions) must be monitored for each job class in an establishment to ensure that pay equity is maintained.

[50] Where pay equity has been achieved through use of the proxy comparison method, using that same method to maintain pay equity would involve the substantial practical impediment of obtaining information about changes in job duties and responsibilities in the proxy employer's establishment which might impact the value of the work performed by the proxy female job classes relative to the key female job class. The Tribunal reiterated that the *Act's* focus is on the specific compensation practices that determine what an employer pays its own female job classes in a given establishment, and that in the context of the *Act* as a whole, the proxy methodology is extraordinary in the sense that the seeking employer's compensation practices are held up to scrutiny against the compensation practices of another employer.

[51] The Tribunal held that not only is it possible to maintain pay equity without continuing resort to the compensation practices in the proxy establishment, it is what the *Act* contemplates.

[52] The Tribunal determined that the initial comparison and adjustment of the value/compensation ratio of the key female job classes to match the value/compensation ratio of the proxy female job class is capable of being expressed as a mathematical equation. The equation describes a gender neutral wage line capable of being plotted on a matrix where the increasing value of a job results in movement along the "x" axis, and the increasing compensation rate of a job results in movement along the "y" axis. The complexity of the equation will depend on the extent to which the slope of the wage line is other than constant. If it is constant, the relationship and the equation may be very simply expressed as one of $/point of value. Regardless of how the compensation/value equation is expressed, either of its variables may change over time, with the consequence that the other must also change if the same result is to be maintained.

[53] The Tribunal summarized its findings as follows:

> In summary, the *Act's* obligation to maintain pay equity applies regardless of the methodology of comparison used. Pay equity that is achieved under a proxy plan must be maintained. Generally speaking, maintenance requires the on-going monitoring of any changes in either the compensation or the value (the amalgam of skill, effort, responsibilities and working conditions) of female job classes and the male job classes (including the deemed male job classes) used for comparison purposes. In the case of proxy plans, however, maintenance does not require the monitoring of changes to the value or compensation of the female job classes in the proxy establishment. To so require

> would be inconsistent with the over-riding principles that the *Act* mandates each *individual employer* to whom it applies to ensure that its own compensation practices are free from gender discrimination. Instead, what is required is monitoring of the compensation and value relationship of the non-key female job classes and the key female job class as compared to the compensation/value relationship (PV line) that has already been determined to provide for pay equity.

Analysis

The Constitutional Question

[54] The Tribunal held that the *Act* does not contravene the *Charter*. The Unions maintain that it does.

[55] The substantive equality analysis under s. 15(1) of the *Charter* proceeds in two stages: (1) Does the law create a distinction based on an enumerated or analogous ground? and (2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping?

[56] Under the first stage of analysis, the first and arguably most critical step is to identify a distinction created by the law in question. In some instances the distinction will be apparent on the face of the law. In other instances, the distinction will be indirect - that although the law purports to treat everyone the same, it has a disproportionately negative impact on a group or individual that can be identified by factors relating to enumerated grounds (*Withler v. Canada* (A.G.), 2011, SCC 12, [2011] 1 S.C.R. 396).

[57] The *Act* creates no obvious distinction on its face. To the contrary, the few provisions in the *Act* directed towards maintenance of pay equity apply the concept without distinction.

[58] Accordingly, for the Unions to be successful, they must establish that the *Act*, although it purports to treat everyone to whom it applies the same, has a disproportionately negative impact on its members.

[59] In our view, albeit for reasons different than those of the Tribunal, the Unions have failed to meet this initial threshold.

[60] The Unions frame the s. 15(1) analysis in para. 33 of the factum of SEIU:

> The impugned provisions provide women in predominantly female workplaces with lesser protection from systemic sex discrimination by denying them the right to maintain pay equity with deemed male comparators. Despite evidence of the connection of gender to the sectors, workplaces, and occupations of Nursing Homes, the Tribunal found that

> the legislative denial of the right to maintain pay equity with deemed male comparators was not related to the gender of the women in predominately female workplaces but rather to their "locus of employment". As was recently found by the Supreme Court in *CSQ*[1], such formalistic logic is wrong in law as it is inconsistent with substantive equality. Like the case at bar, at issue in *CSQ* was whether the proxy provision in Quebec's pay equity legislation violated section 15 of the *Charter* by giving lesser pay equity rights to women in female dominated workplaces, as compared to women in workplaces with male comparators. The Court rejected the government's characterization of the legislative distinction as based on "locus of employment" as opposed to sex, noting that such a position "erases the sex-based character of the legislative provisions and obscures the fact that the claimants disproportionately suffer an adverse impact *because they are women*". The Court found that the impugned provisions made "an inescapable" distinction on the ground of sex by providing differential treatment to "women in workplaces with male comparators…and those without such comparators.

[61] We agree with the Unions that the Tribunal (which did not have the benefit of the Supreme Court of Canada's decision in *CSQ*) erred in determining that a distinction based upon a denial of the right to maintain pay equity with deemed male comparators was a distinction based on the locus of employment. That issue was conclusively decided in the following paragraphs from *CSQ:*

> [23] The first question is therefore whether the limitation challenged by the unions – a six-year pay equity delay mandated by s. 38, for women employed in workplaces without male comparators - draws a distinction on the basis of sex.
>
> [24] In my view, it does. The goal of pay equity legislation is to recognize and remedy the discrimination that *women* have suffered in the way they are compensated in the workforce. This is systemic discrimination premised on the historic economic and social devaluation of "women's work" compared to "men's work" (*Report of the Commission on Equality in Employment* (1984), at p. 232; Final Report of the Pay Equity Task Force (2004), at pp. 25-27). Accordingly, pay equity legislation, including the *Act* at issue here, draws a distinction based on sex in targeting systemic pay discrimination against women. And, as explained later in these reasons, the specific provisions of the *Act* that target particular groups of women based on where they work – such as s. 38 – also necessarily draw a distinction based on sex.
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> [25] The contrary view adopted by the trial judge, the Court of Appeal, and my colleague, is that the distinction created by the *Act* was based not on sex, but on the absence of male comparative groups in the enterprise. This is "formal

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[1] *Centrale des Syndicats du Québec v. Quebec (Attorney General),* 2018 SCC 18, [2018] 1 S.C.R. 522 ("*CSQ*").

> equality", an approach expressly rejected by this Court in *Andrews v. Law Society of British Columbia,* [1989] 1 S.C.R. 143, where the Court refused to apply a rigid Diceyan analysis and declared, instead, that substantive equality is the premise underlying s.15.

[62] In *CSQ* the law under scrutiny was ss. 37 and 38 of the *Pay Equity Act* of Quebec. The effect of these sections was that women in workplaces without male comparators were denied access to pay equity for almost six years longer than women in workplaces that had male comparators. The impugned law created a distinction.

[63] As pointed out by the intervenor, the Attorney General of Ontario, ss. 7(1) of the *Act* creates no such distinction. It requires every employer to whom the *Act* applies to "establish and maintain compensation practices that provide for pay equity in every establishment of the employer." The obligation to maintain pay equity applies regardless of the methodology by which pay equity was achieved. There is no distinction created by the *Act* insofar as maintenance is concerned.

[64] We have considered whether the *Act* is discriminatory on its face because there is no mechanism spelled out in the *Act* for maintaining pay equity by reference to male work for women in predominantly female workplaces reliant on the proxy method. However, we have concluded that there is an interpretation of the *Act* that would render it non-discriminatory-namely, that the employer must maintain a compensation practice that involves ongoing comparison of the key female job class to a proxy female job class. Accordingly, we find that the *Act* does not contravene the *Charter*.

[65] What the Unions properly take issue with is the manner in which the law is being applied and whether and to what extent s. 15 of the *Charter* should be considered in interpreting the *Act.*

The *Charter* as an Aid to Interpretation

[66] In our view, the Tribunal erred by failing to consider "*Charter* values" when interpreting the *Act.*

[67] The framework to be applied in reviewing administrative decisions for compliance with *Charter* values was squarely before the Supreme Court of Canada both in *Doré* and in *Loyola.* In *Doré,* the Court began its analysis with the following statement: "It goes without saying that administrative decision-makers must act consistently with the values underlying the grant of discretion, including *Charter* values." Accordingly, it is now settled law that administrative decision makers must balance the *Charter* values at play with the statutory objectives of the legislation in question.

[68] The Tribunal held that an ambiguity in the legislation is required before *Charter* values are to be considered. This issue was dealt with in *Taylor-Baptiste* by the Court of Appeal of Ontario:

> Their first submission is that an administrative tribunal can only consider *Charter* values in its decision-making if an ambiguity exists in the provision of its home or enabling

statute at issue in the case. In support of their submission, they rely on the statement in *Bell ExpressVu*[2] that "to the extent this Court has recognized a '*Charter* values' interpretive principle, such principle can *only* receive application in circumstances of genuine ambiguity."

Binding authority prevents the acceptance of the appellant's submission. Slightly more than a decade after deciding *Bell ExpressVu,* the Supreme Court rejected an argument similar to the appellants' when, in *R. v. Clarke*[3], it stated, at para. 16:

> Only in the administrative law context is ambiguity not the divining rod that attracts *Charter* values. Instead, administrative law decision-makers "must act consistently with the values underlying the grant of discretion, including *Charter* values" (*Doré*, at para. 24). The issue in the administrative context therefore, is not whether the statutory language is so ambiguous as to engage *Charter* values, it is whether the exercise of discretion by the administrative decision-maker unreasonably limits the *Charter* protections in light of the legislative objective of the statutory scheme.

[69] The framework for analysis by a reviewing court is set out in *Doré* and *Loyola*: (1) Determine the preliminary issue of whether the decision engages the *Charter* by limiting its protections; and (2) If such a limitation has occurred determine whether, in assessing the impact of the relevant *Charter* protection and given the nature of the decision and the statutory and factual contexts, the decision reflects a proportionate balancing of the *Charter* protections at play. A proportionate balance is one that gives effect, as fully as possible to the *Charter* protections at stake given the particular statutory mandate. Such a balance will be found to be reasonable on judicial review.

[70] We find that the Tribunal's decision limits the equality provision of s.15(1) of the *Charter* because it denies women in predominantly female workplaces (compared to women who have male comparators within their establishments) the right to maintain pay equity with reference to male work. The fundamental precept of pay equity is that there should be equal pay for work of equal value between women and men. The *Act* expressly seeks to identify and redress systemic sexual discrimination in the way they are compensated in the workforce. The touchstone of a pay equity analysis is the comparison to male work, as men enjoy the benefit of compensation tied to the value of their work-as opposed to their gender.

[71] As noted above, although the *Act* does not create a distinction upon which discrimination can be alleged, the manner in which the pay equity maintenance provision of the *Act* is being applied by the PHN does create such a distinction.

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[2] *Bell ExpressVu Limited Partnership v. Rex,* 2002 SCC 42, [2002] 2 S.C.R. 559.
[3] *R. v. Clarke*, 2014 SCC 612, [2014] 1 S.C.R. 612.

[72] Women in predominantly female establishments have their pay equity maintained without ongoing reference to a male comparator. Women in other establishments have their pay equity maintained by ongoing reference to a male comparator. The distinction is undeniable.

[73] That it is a distinction based on sex is also undeniable given the *CSQ* decision.

[74] The *Charter* value at issue is equality, and, specifically, how it should be applied in the context of an employer's obligation to maintain pay equity.

Statutory Objectives of the *Act*

[75] The statutory objectives of the *Act* are twofold. First, to recognize and redress the discrimination that women have suffered in the way they are compensated in the workforce. Second, to ensure such discrimination does not re-emerge.

Proportionate Balancing of *Charter* protections and statutory mandate

[76] The Tribunal was required to balance the severity of the interference of the claimants' *Charter* protection with the statutory objectives of the *Act*. Instead, the Tribunal focused its analysis on the broader legislative scheme and the reasonableness of the government measures as opposed to the discriminatory effects of its interpretation on women in female dominated workplaces and the objectives of the *Act*.

[77] In concluding that it is possible to maintain pay equity for women internally in female dominated workplaces without continued resort to deemed male comparators, the Tribunal fails to consider that this denies the claimants' right to quantify and correct any pay gap that has re-emerged since 1994; the same opportunity that is available to women in other establishments under the *Act* where there are male comparators.

[78] The Tribunal concluded that ongoing maintenance did not require access to the proxy methodology because it was extraordinary and because the *Act*'s focus, rather than being an exercise in comparison between workplaces, is on an employer paying its own female job classes in a given establishment a wage free from gender discrimination. In so doing, the Tribunal failed to address the *Act*'s statutory objectives of recognizing and redressing discrimination that women have suffered in the way they are compensated in the workforce and to "ensure such discrimination does not re-emerge".

[79] Maintaining pay equity by internal comparison of female job classes does nothing to ensure that the key female job class wage to which the other female classes are compared reflects any re-emergence of a pay equity gap since 1994. The Tribunal fails to explain why the proxy method which was considered essential to achieving pay equity in workplaces with insufficient male comparators is not essential to maintain pay equity.

[80] By defining "maintenance" for those using the proxy methodology as requiring the continuation of the wage adjustment made in 1994 without ongoing relation to a male comparator, the Tribunal failed to give effect as fully as possible to the equality protection at stake, given the statutory mandate.

[81] There is nothing to support the Tribunal's bald conclusions that not requiring the employer to maintain pay equity using the proxy methodology furthers the *Act*'s ameliorative purpose or that it does not perpetuate historic disadvantage or stereotyping.

[82] It is no answer for the Tribunal to find that the denial of the claimants' right to maintain pay equity by ongoing access to deemed male comparators is not discriminatory because the *Act* does not apply to all women, not all will benefit equally, the wage gap between men and women will not be completely eliminated, and they have not challenged their exclusion under the *Charter*. The fact that there are women excluded from the scope of the *Act* or that wage parity with male job classes may not be realized for non-discriminatory reasons is irrelevant to the analysis of whether denying access to the proxy provisions for maintenance has a discriminatory effect on the claimants who do come within the scope of the *Act* and who constitutionally challenge their treatment under it.

[83] The Tribunal cites a practical impediment that proxy comparison on an ongoing basis would be an onerous task for the proxy employer. The Tribunal finds that information about proxy employers' compensation rates is largely in the public domain and proxy employers are required to monitor the work and pay of their own female job classes in order to maintain pay equity. To the extent proxy female job classes are in a bargaining unit, the applicable collective agreement setting out their compensation (and incorporating as required by the *Act* any pay equity adjustments) must be filed with the Ministry of Labour and is available to consult. Proxy comparators will be applied from the date the pay equity gap is alleged to have re-emerged. There will be no need for the proxy employer to go back to 1994. Moreover, there is no consideration, if proxy comparison is denied, of whether the onus this puts on proxy employers is outweighed by the harmful impact on the people to whom this pay equity scheme was designed to help.

[84] Not requiring access to deemed male comparators so as to enable women working in predominantly female workplaces to maintain pay equity does not give effect as fully as possible to the *Charter* protection of equality.

[85] The Tribunal's decision was therefore unreasonable.

Other Grounds

[86] The Unions challenged the reasonableness of the Tribunal's decision under two other broad headings: (1) That it erred in its interpretation of the *Act* by removing the requirement for a male comparator; and (2) That its interpretation undermines the fundamental purpose of the *Act* to remedy systemic discrimination.

[87] The failure to recognize and consider the *Charter* protected equality rights at play infects the remainder of the rationale provided by the Tribunal. It changes the lens through which the Tribunal was obliged to examine the issue. Accordingly, there is little to be gained by re-examining those findings in detail.

Conclusion

[88] We have found that the *Act* itself does not contravene s. 15 of the *Charter* but that the Tribunal erred by failing to consider *Charter* values when interpreting the *Act*. In reaching its decision, the Tribunal disproportionately limited and failed to give effect as fully as possible to the claimants' *Charter* protected rights to equality, given the statutory mandate to redress systemic discrimination in the compensation of employees employed in female job classes in Ontario. This rendered its decision that maintaining pay equity did not require continued resort to male comparators unreasonable.

[89] In accordance with *Delta Air Lines Inc. v. Lukács*, 2018 SCC 2, [2018] 1 S.C.R. 6 and where s. 30 of the *Act* gives the Tribunal exclusive jurisdiction to exercise the powers conferred on it, it is generally appropriate to remit the matter back to the decision maker for reconsideration.

[90] In this case we do not consider it appropriate to send this matter back to the Tribunal to reconsider a proportionate balancing of the *Charter* protections at play, further delaying the relief the claimants have sought for many years. We conclude that the only proportionate balancing of the *Charter* right of equality with the statutory mandate of the *Act*, properly construed, requires the maintenance of pay equity in predominantly female workplaces through the proxy method of comparison. Accordingly, this matter is remitted to the Tribunal to specify what procedures should be used to ensure that the claimants who achieved pay equity through the proxy methodology continue to have access to a male comparator in order to determine whether pay equity has been maintained.

[91] The parties have advised that no order for costs is required.

RSJ

Morawetz R.S.J.

Gordon J.

Backhouse J.

Date: 30 April 2019

CITATION: Ontario Nurses' Association v. Participating Nursing Homes, 2019 ONSC 2168
DIVISIONAL COURT FILE NO.: 362/16 and 364/16
DATE: 2019-04-30

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

Morawetz,R.S.J., Gordon, Backhouse JJ.

BETWEEN:

ONTARIO NURSES' ASSOCIATION, Applicant

AND:

PARTICIPATING NURSING HOMES, Respondent

AND:

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 1, Respondent

AND BETWEEN:

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 1, Applicant

AND:

PARTICIPATING NURSING HOMES, Respondent

AND

ONTARIO NURSES' ASSOCIATION, Respondent

REASONS FOR JUDGMENT

Released: April 30, 2019