

# CAVALLUZZO

## A Trade Union Guide to the new Federal *Pay Equity Act*

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<sup>1</sup> This initial guide builds upon the pay equity expertise at Cavalluzzo LLP and years of litigating many leading pay equity cases, particularly in Ontario and the federal sector.

## Introduction

As of August 31, 2021, the Federal government's new *Pay Equity Act* ("Act")<sup>2</sup> and the accompanying Regulation are now in effect. This new legislation enables proactive enforcement of the fundamental human right to gender equality in compensation - equal pay for work of equal value. The *Act* recognizes that systemic wage discrimination exists in the workforce.

The new federal *Pay Equity Act* applies to private sector and public sector employers with 10 more employees in the federal jurisdiction. The *Act* applies whether or not there are male comparators in a particular workplace and whether or not there are existing pay equity plans.

The new *Act* requires a single pay equity plan per employer, save certain exceptions, for multiple plans, which are described below.

Trade unions have much work to do in order to negotiate a new pay equity plan in a relatively short timeframe.

The first deadline is **November 1, 2021** when the Employer is required to post a notice in the workplace setting out its obligations to establish a pay equity plan. The pay equity plan must be completed no later than **September 3, 2024**. Any pay equity adjustments owed must start to be paid out no later than **September 4, 2024**.

This *Trade Union Guide* provides a basic and plain language overview of employers' obligations and trade union's rights and obligations in respect of enforcing pay equity for their bargaining unit members. We also attach an appendix with the summary of the key highlights of the new legislation for your quick reference.

It outlines the key steps that the *Act* and Regulation requires to create that pay equity plan, the first phases of the enforcement of the *Act* and identifies potential issues which may arise.

## Background

Pay Equity is not a new concept to the federal jurisdiction in Canada. The right to equal pay for work of equal value was first adopted in the *Canadian Human Rights Act* in 1976, Many employers did not voluntarily comply with their basic human rights obligations. The

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<sup>2</sup> The link to the Pay Equity Act (S.C. 2018, c. 27, s. 416) is here <https://laws-lois.justice.gc.ca/eng/acts/P-4.2/page-1.html>. The federal Pay Equity Act was first passed in December 2018 but not declared in effect until the Act's Regulations were proclaimed. The Pay Equity Regulation (SOR/2021-161) were proclaimed through an order in council in June 2021 which declared the Act in effect as of August 31, 2021. The link to the Pay Equity Regulation here is <https://laws-lois.justice.gc.ca/eng/regulations/SOR-2021-161/index.html>.

*CHRA* is a complaint-based regime. Trade unions met fierce resistance from employers as the unions struggled to ensure women's wages were consistent with the right of equal pay for work of equal value. Protracted, complicated and costly litigation was the result.

The new proactive *Act* is the result of years of lobbying and advocating by trade unions, including through the 2004 Pay Equity Task Force. This new law now requires employers to sit down with bargaining agents to develop a plan to redress systemic wage discrimination in their workplaces. The new *Act's* design is informed by federal human rights jurisprudence and experiences with the proactive legislation in Ontario (first in effect in 1988) and Quebec (in effective in 1996), although, there are significant differences between the new federal *Act* and its provincial counterparts.

The *Act* created a specialized Pay Equity Commissioner role with the broad mandate to administer and enforce the *Act*. The Pay Equity Commissioner is an appointment under the umbrella of the Canadian Human Rights Commission. The Commissioner has a significant role in assisting persons in understanding their rights and obligations under this *Act*. The Commissioner mediates attempts to find resolution of disputes relating to pay equity. The Pay Equity Commission has begun to issue interpretation guides and tools to assist pay equity committees to develop pay equity plans. Ultimately, the Canadian Human Rights Tribunal ("CHRT") is the final adjudicative body. The Pay Equity Commissioner can refer an important question of law or jurisdiction to the CHRT to determine. In addition, a trade union, an employer, or other affected person may appeal the Pay Equity Commissioner decisions or orders to the CHRT.

As pay equity committees are established in federal workplaces, the Pay Equity Commissioner will likely issue further interpretative guidelines and policies.<sup>3</sup> Trade unions will want to examine the interpretative guidelines carefully to ensure they are consistent with a broad and liberal interpretation of the *Act* and fulfill the purpose to redress systemic discrimination.

## **Part I The Key Concepts**

### **1. What is pay equity?**

Pay equity is a fundamental human right. Pay equity laws are designed to rectify and prevent the persistent and systemic compensation discrimination in wages and compensation practices experienced by women. Pay equity laws aim at ensuring gender equality.

Historically, the first efforts to address the deep and persistent pay gap between women's pay and men's pay were for "equal pay for equal work". Employers are required to pay men and women the same compensation for doing the *same job*, at the *same workplace*.

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<sup>3</sup> See the new Federal Pay Equity Commission website at <https://www.payequitychrc.ca>.

This is the legal principle of equal pay. For example, equal pay ensures that a clerical worker position is paid equally whether a man or a woman does the job. But this early equality law did not do enough. Because women tended to work in different jobs than men, equal pay laws did not necessarily assist them.

Pay equity, or "equal pay for work of equal value", is distinct. Pay equity requires that employers pay men and women the same wage for doing work of *equal value*. An employer is required to pay a woman the same compensation as a man, if the job is of equal value. For example, a technician's job historically and stereotypically is dominated by men. A clerical job is historically and stereotypically dominated by women. If these two different jobs are of the same value, pay equity requires that their compensation is equal.

Pay equity is a very significant remedial tool because it recognizes that discrimination arises because of women's labour market occupational segregation. Women tend to work in different jobs than men. Women-dominated jobs are generally paid less and valued less than male-dominated jobs. The longstanding prejudices and stereotypes, sustained by labour market practices which funnel women into certain jobs, meant that women's work was under-described, under-valued and underpaid relative to men and their work.

Pay equity remedies the discrimination by fully valuing women's work and adjusting the job rate of jobs dominated by women to the job rate of jobs dominated by men where the jobs are of equal value.

The purpose clause of the new federal *Act* recognizes that systemic discrimination exists and must be remedied. Section 2 of the *Act* states:

*The purpose of this Act is to achieve pay equity through proactive means by redressing the systemic gender-based discrimination in the compensation practices and systems of employers that is experienced by employees who occupy positions in predominantly female job classes so that they receive equal compensation for work of equal value, while taking into account the diverse needs of employers, and then to maintain pay equity through proactive means.*

As proactive legislation with the obligation to create a pay equity plan, trade union efforts should focus on fully valuing women's work.

## **2. The Act's application**

The proactive Federal pay equity regime has two basic phases. The first phase, from November 1, 2021 to September 3, 2024, is to *establish* pay equity. This phase requires that pay equity committees work to develop a pay equity plan(s) for each employer.

If the pay equity plan identifies that compensation adjustments and increases are owed to female job classes, the *Act* sets out up to a five-year period for payments depending on the amounts owed and size of the employer.

The second phase is the employer's obligation to *maintain* pay equity. An updated pay equity plan must be posted no later than September 4, 2029.

The *Act* also requires the employer provide the Pay Equity Commissioner with an annual pay equity maintenance review,

**a) *The employers***

The federal pay equity legislation covers federally-regulated businesses and industries, both public and private sector, with 10 or more employees.

Employers to whom the *Act* applies includes the Crown, federal public administration, the Canadian Armed Forces, the RCMP and businesses and industries covered by the *Canada Labour Code*. Typical federal private sector employers include: air transportation, including airlines, airports, and aviation support operations; banks, including authorized foreign banks; telecommunications, radio and television broadcasting, including telephone, internet, telegraph, and cable systems; navigation and shipping activities, including port services and ferries; rail and road transportation services that regularly cross borders, including trucks and buses; and activities related to interprovincial connections, including canals, oil and gas pipelines, tunnels, and bridges that cross borders.

The *Act* also applies to federally regulated dependent contractors within the definition of the *Canada Labour Code*.

*(i) How is an employer defined and what about related employers?*

Section 3 (2) of the *Act* defines "employer" with reference to key federal jurisdictional statutes, such as the *Canada Labour Code*, the *Financial Administration Act*, the *Royal Canadian Mounted Police Act*.

Indigenous governing bodies are exempt from application of the *Act* until a regulation specifies that the *Act* applies. Similarly, the government of the Yukon, Northwest Territories and Nunavut identified as employers, but are exempt until a date is specified by Regulation.

*(ii) Group of employers*

The *Act* provides that a "group of employers", two or more employers, may apply to the Pay Equity Commissioner to be recognized as a "single employer" for the purpose of establishing a pay equity plan. The Commission then has discretion under section 106 of the *Act*, to recognize a group of employers if the employers are "part of the same industry", have "similar compensation practices" and have "positions with similar duties and responsibilities".

There is no deadline for the group of employers to apply to act as one. The date that the "group" is recognized is after the *Act* came into effect and the "earliest day" that enables the group to meet its obligations.

The Pay Equity Commissioner has issued an interpretative guideline on the "Group of Employers" question. The guideline refers to the "same industry" as a "group of enterprises with substantially identical lines of work, which provide a closely related set of products, goods or services". The guideline indicates, by way of example, that franchises of the same business banner may be determined to be group of employers.

A "related employer" is not defined in the *Act*. In other pay equity jurisdictions, the determination of a related employer turned on the existing labour law, human rights and common law tests for a related employer as well as what elements of those tests advanced the purposes of the *Act*. The *Act* is a remedial measure to redress systemic discrimination. The *Act* is meant to improve the situation for women unfairly and adversely affected by compensation systems or practices. The criteria to be applied should be those that best accord with the objectives, structure and scheme of the *Act* to provide pay equity for female job classes.<sup>4</sup>

### **(b) Who is an employee?**

Section 3(1) defines an employee as a person employed in the public service, an officer or non-commissioned member of the Armed Forces, and a person employed in connection with any federal work, undertaking or business under s. 2 of the *Canada Labour Code*. Importantly, dependent contractors, as defined under the *Canada Labour Code* are included for coverage under the *Act*. Persons employed by the governments of the Yukon, Northwest Territories and Nunavut are also included under the *Act*.

Students enrolled in student employment programs are exempt from the *Act* as are students enrolled during the student's vacation periods.

It is also important to note that the term "non-unionized employee" is also defined in section 3 (1). Non-unionized employee refers to an employee who is not a member of a bargaining unit and not declared to be in a managerial or confidential position in matters relating to industrial relations. This definition is particularly relevant as we describe the pay equity committee structure below.

### **3. The pay equity plan prevails over the collective agreement**

The *Act* requires that there be connections between the collective bargaining process and the pay equity process. Pay equity has long been recognized as both a labour relations issue and a human rights issue. The pay equity plan secures the fundamental human

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<sup>4</sup> See for example, the Ontario Pay Equity Hearings Tribunal, *Ontario Nurses Association v. Haldimand-Norfolk (Regional Municipality) (No.3)*, 1989 CanLII 1454 (ON PEHT), <https://canlii.ca/t/1svvc>.

right to redress systemic wage discrimination. The pay equity plan prevails over a collective agreement.

Section 95 of the *Act* outlines where there is "an inconsistency" between the most recent version of a pay equity plan and the employees' collective agreement, the pay equity plan prevails over the inconsistency. Any increase in compensation as a result of the pay equity plan is "deemed to be incorporated into and form part of the collective agreements" governing the employees.

## **Part II          Summary of the Obligations**

### **1.          *Employer obligations under the Act***

To summarize briefly, here is a list of the employer's proactive obligations in the development of the pay equity plan and the payment of pay equity compensation increases. These are also the obligations of the pay equity committee where there is one. The following list provides a general summary. Please refer to the specific section referenced for the exact language of the obligation.

- a. Establish a pay equity plan (s. 12). The *Act* requires a single pay equity plan for a single employer. This approach is different than in some provincial jurisdictions such as Ontario where, in general, a separate pay equity plan is negotiated for each bargaining unit. Multiple pay equity plans are an exception and described in greater detail below (s. 30).
- b. Post a notice of the employer's obligations under the *Act*, **no later than November 1, 2021**. The notice must be printed or electronic, in accessible formats, and readily available to all employees who may be covered by the plan. The notice shall remain posted until the pay equity plan is finalized (s.14 of *Act* and ss. 3-12 of the Pay Equity Regulation).
- c. Make "reasonable efforts" to establish a pay equity committee to develop the plan. A pay equity committee is required where the employees are represented by a trade union if there are 10 or more employees (s.16(1)). The composition of the committee and its role is described below.
- d. Provide "any information in the employer's possession" that the pay equity committee considers necessary for the establishment of the pay equity plan (s.23)
- e. Identify job classes which are jobs with similar duties and responsibilities, similar qualifications, are part of the same compensation plan, and are within the same range of salary rate (s. 32). For the core public administration, a single job class refers to the same group and level (s. 34).

- f. Determine the gender predominance of the job class, female or male<sup>5</sup>. A job class is predominantly female if 60% of the positions are occupied by women. A job class is a male job class if 60% of the positions are occupied by men. Consideration is given to the historic incumbency and the gender-based stereotyping of the job (s. 35-38).
- g. Determine the value of work considering the skill, effort, responsibility and working conditions of the job (s. 41-42).
- h. Determine the value of work using a gender-neutral method. (s. 43).
- i. Calculate the compensation for the job classes using a total compensation approach. However, the *Act* does provide for exemptions and differences in compensation, such as, a seniority system, red-circling, geographic area, training program wages (s.44-46). Also, s. 46 allows for the exclusion of the non-receipt of benefits from the total compensation calculation due to the temporary, casual, or seasonal nature of a position. This exclusion arguably lowers the bar on pay equity with an adverse effect on temporary, casual, or seasonal nature of a position.
- j. Compare the compensation of the job classes using either the "equal average method" or the "equal line method" (s. 47-50).
- k. If there are no predominantly male job classes at the Employer, differences in compensation are determined by identifying three male job classes from another employer with similar characteristics or the job classes set out in the Regulation schedule (s. 60 of *Act* and ss. 18-30 of Regulations).
- l. Identify pay equity adjustments (s.51).
- m. Post a draft pay equity plan with a notice to employees that they may provide comments on the plan (s. 52).
- n. **No later than September 3, 2024**, a pay equity plan must set out whether a pay equity committee was established, the job classes and their gender, the value of the job classes, the pay equity adjustments owed to female job classes and the date of any compensation increases (s. 51, s. 55).
- o. Start compensation increases September 4, 2024 (s. 60-61) If the pay equity compensation increases constitute more than 1% of the employer's payroll for the previous year, adjustments may be phased in. (s. 61 (2)). The

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<sup>5</sup> The Act uses the terms "female" and "male". Neither term should be interpreted in a manner to exclude trans and non-binary peoples. Pay equity is about the job; not the individual.

Employer has either 54 months to complete the adjustments or 78 months. All pay equity adjustments must be completed by 2029 (s. 61 (2) (c)).

- p. Do not reduce compensation of a job class in order to achieve pay equity (s.98).
- q. Take no reprisals for an employee's involvement in the pay equity process (s. 102).
- r. By **June 30, 2025**, prepare an annual report to the Pay Equity Commissioner on the status of the plan (s. 89).
- s. Maintain the pay equity plan and post an updated plan no later than **September 4, 2029**. (s. 64).

## **2. Trade union rights and obligations**

The *Act* recognizes bargaining agents as defined in the *Canada Labour Code* and the *Public Sector Labour Relations Act*. The bargaining agent's significant responsibilities under the *Act* are also informed by their broader human rights and collective bargaining rights and responsibilities provided for in other workplace laws.

Trade unions have a proactive obligation under the *Canadian Human Rights Act* to carry out their representational obligations pursuant to the collective agreement in a manner which promotes the equality of its women members and those doing "women's work". As the Supreme Court of Canada's decision in *British Columbia (Public Service Employee Relations Commission) v. B. C. Government and Service Employees Union (Meiorin)* made clear, the employer and bargaining agent have positive obligations to find out whether discrimination exists in workplace standards and rules and to prevent future discrimination. Equality must be built into workplace standards.

### **(a) Pay equity committees**

The new Federal *Pay Equity Act* requires that a Pay Equity Committee be established for each employer. The bargaining agent has the right to participate on a pay equity committee no matter the size of the workplace (s. 19).

In this regard, a trade union is a co-partner and has a key voice in the creation of the pay equity plan. The *Act* requires the workplace parties to jointly analyze the total compensation of the female and the male job classes and ensure that women's work is fully valued and free of discrimination.

The pay equity committee must have the representation of bargaining agents. If there is more than one bargaining agent, each bargaining agent must have a least one representative (s. 19 (1)). Representation is by the bargaining agent, not by bargaining

unit. Each trade union selects the committee member(s) who will represent the employees who are members of any bargaining unit of the employer. (s. 14 (1) (d)).

The trade union has the obligation under the *Act* to provide any trade union representative on the committee with "sufficient direction" to enable the trade union member to perform their work on the committee (s. 21 (2)). The trade union is also obligated to provide any relevant information that is necessary for the establishment of the pay equity plan (s.23 (2)). All members on the pay equity committee are required to keep information exchanged confidential (s. 24).

The primary role of the bargaining agent during the establishment phase is to be active and engaged in all facets of the pay equity analysis on the pay equity committee. Front-line trade union members know their work, their skills and responsibilities. Through their bargaining agent representative on the pay equity committee, the work of trade union women members work can be fully valued.

Following the establishment of pay equity, the trade union's right is to be a participant in the pay equity maintenance phase. Section 64 of the *Act* requires the Employer to advise the trade union that the pay equity maintenance process will be underway and to set up a pay equity maintenance committee.

### ***(b) Single or multiple plans***

The *Act* presumes that there is a single pay equity plan for a single employer, no matter the location of the employer's establishments or outlets.

However, the *Act* enables a bargaining agent or employer to apply to the Pay Equity Commission to approve that the employer may have more than one pay equity plan. (s. 30). The party applying for multiple plans will likely have to demonstrate how that would better serve the purpose of the *Act* to redress systemic gender-based discrimination in compensation and that female-job classes would not be adversely affected by that approach. Before providing approval for multiple plans, the Commissioner will take submissions from the affected employer and non-union employees, if any. The Commissioner is bound by s. 30 (5) to deny the application if "such a plan would not enable enough male job classes to be identified".

### ***(c) Trade union compliance with the Act***

Finally, three other elements of the new *Act* set out further trade union obligations. Section 103 requires that the trade union not "take reprisal against a person" who enforces their rights under the *Act*, including allegations of non-compliance with the *Act*.

Section 119 empowers the Pay Equity Commissioner to issue an order against a trade union as well as an employer for failing to comply with the *Act* if the Commissioner's compliance audit (s. 118) supports such a finding.

The Act allows for administrative monetary penalties to be set for employers and trade unions through regulations. The Act establishes the maximum penalty a trade union could be subject to of either \$30,000 or \$50,000, depending upon the size of the employer, for non-compliance with the Act. The Act makes clear that the objective of the penalties is to promote compliance with the Act.

### **Part III Implementing Pay Equity: potential limits to robust application.**

As the workplace parties set up the pay equity committees and begin implementing the new Act, there will be many questions. The Act continues to have gaps, loopholes and areas which may require further legal analysis, including consistency with the Charter of Rights and Freedoms equality provisions. We anticipate that further issues will arise, particularly involving the maintenance of pay equity.

For the purposes of this initial guide, we highlight two potential issues which may result in early disputes with an employer.

#### **1. Section 41 (2) previous pay equity plans and "value predetermined"**

One of the gaps in the new Act involves the ability of an employer (and pay equity committee) to rely upon a prior pay equity plan or job evaluation system to conclude that no further work is required. Section 41(2) allows the Employer (or committee) to conclude that the "value of the work has already been determined by means that complies" with the Act.

Some employers may seek to file prior internal pay reviews and trade unions may have had little or no involvement with the development of those prior "internal relativity" or "job evaluation" plans

Such prior plans may be a means by which employers could seek to evade their obligations under the Act. Trade unions will want to approach such prior "value determinations" of the women's work very cautiously. In Quebec, the ability of employers to rely upon prior plans, or "pay relativity plans" was found to be unconstitutional.<sup>6</sup> If the trade union was not involved in the development of the prior plan, the union may want to file a notice of matter in dispute, under section 147, to the Federal Commissioner.

#### **2. Workings of the pay equity committee: when the employer decides**

One important element of the new Act is an employer's obligation to take all reasonable efforts to establish a pay equity committee where all or some of the employees are represented by a bargaining agent in a workplace. The Committee structure requires all bargaining agents and non-union employee representation.

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<sup>6</sup> see *Syndicat de la fonction publique v. Procureur général du Québec*, [2004] J.Q. no. 21 The decision was not appealed in Quebec.

Section 19 of the *Act* prescribes the mandatory composition of the new Pay Equity Committee as follows:

- a. the committee must have at least 3 members;
- b. at least 50% of the committee members must be women;
- c. two-thirds of the members of the committee must be employees to whom the pay equity plan relates;
- d. all bargaining agents are represented with at least one person. The *Act* references representation by bargaining agent and not by bargaining unit. The bargaining agent is obligated to select their own committee member;
- e. one representative is selected by the employer;
- f. at least one member represents non-union employees. The non-unionized employees must select their representative by a vote;
- g. decision making is by unanimous vote.

If an Employer is unable to establish a committee based upon these terms, it must advise the Pay Equity Commissioner.

However, Section 20(1) adds a very peculiar requirement. It requires that the decision of the group of employees has to be unanimous to count as a vote. The members of the committee who represent employees (both union and non-union) have one vote. If members of the committee who are there to represent employees cannot, *as a group*, reach a unanimous decision, their one vote is forfeited. *The employer's vote prevails.*

Section 22 sets out conditions for the functioning of the committees and book-off for pay equity committee work. The employer is obligated to provide the "its premises and equipment for the work of the committee." Employees who are members of the pay equity committee, must be provided "time away from their work, as required, to participate in training sessions and meetings of the committee and to perform their work as a member of the committee." An employee who takes time away from their work in for the pay equity committee work is deemed to be at work.

Sections 109 and 110 of the *Act* empower the Pay Equity Commissioner to assist the pay equity committee should disputes arise.

#### **Part IV      Dispute resolution and jurisdiction of the Pay Equity Commission**

The new *Act* establishes a new dispute resolution mechanism under the umbrella of the Canadian Human Rights Commission. The *Canadian Human Rights Act* was amended to authorize the creation of the Pay Equity unit to support the Commissioner. The starting point is with a complaint to the Commissioner and the timelines for filing complaints and appeals are quite tight as we outline below.

Under section 104 of the *Act*, the Pay Equity Commissioner's mandate is, amongst other duties, is to (a) ensure the administration and enforcement of the *Act* and to facilitate the resolution of disputes relating to pay equity. The Commissioner may conduct an audit or

an investigation for non-compliance with the *Act*. Where a violation of the *Act* is found, a party has a right of review to the Commissioner.

Section 147 to 150 of the *Act* provide the dispute resolution sections and identify three different types of methods to resolve a dispute. First, during the development of the plan, if the employer and employee members of a committee do not agree "*in respect of a matter at any step leading to the establishing of a pay equity plan or the updating of a pay equity plan*", a trade union may file a "Notice of Matters in Dispute" with the Pay Equity Commissioner (s. 147). The Commissioner's role is to attempt to assist the parties to settle any part or all of the matter and all parties are given an opportunity to make submissions. The Commissioner may make an order settling the dispute and the contents of the order form part of the pay equity plan.

Second, at the point of posting a pay equity plan, if the employer (not a committee) proceeded with the plan development, a bargaining agent may file a "Notice of Objection" (s. 148) where it objects to the pay equity plan. Particulars of the objection are to be filed with the Pay Equity Commissioner. Third, under section 150, a trade union may file a complaint with the Commissioner regarding any other contravention of the *Act* other than s. 32 to 51 of the *Act*. For example, such complaints could apply to where an employer failed to make the pay equity compensation increases. In addition, a trade union may file a complaint "where it has reasonable grounds to believe that the employer attempted to influence non-union employees on the committee" or where "it believes another trade union acted in bad faith, in an arbitrary or discriminatory manner while exercising its functions" under the *Act*.

The *Act* sets out a 60 day limit for filing a complaint from the time the incident or circumstances giving rise to the complaint was known or ought to have been known. (s. 152 (2)). The Commissioner is required to assist the parties in a resolution and settlement of the complaint.

The Commissioner may investigate of the complaint (s. 156). Through the investigation, the parties have an opportunity to present evidence and make representations. The Commissioner is required to make an order to settle the dispute or dismiss the complaint in whole or in part. Any order forms part of the pay equity plan (s. 157(3)). Following the Commissioner's decision, a party may request a review within 30 days. Following such a decision, a trade union may appeal to the Canadian Human Rights Tribunal within 30 days after the day they have received the decision or order.

Finally, the Pay Equity Commissioner also has the broad powers to consider discriminatory wage practices beyond s. 11, equal pay for work of equal value. Such claims often involve s. 7 (reprisals) and s. 10 (no discrimination in employment) of the *Canadian Human Rights Act*. The Pay Equity Commission may investigate such complaints or sever some or all of the allegations involving the broader claims to the Human Rights Commission rather than the Pay Equity division. (s. 40 (4.2) of *Canadian Human Rights Act*. One example of a broader claim may involve a wage grid dispute

where the female job classes are paid on a wage grid with more steps than the male comparator job classes<sup>7</sup>.

### **Concluding Comments**

The Pay Equity Commissioner has begun to provide "Interpretations, Policies and Guidelines" to assist the workplace parties which may be found on the Commissioner's new website: [www.payequitychrc.ca](http://www.payequitychrc.ca). We anticipate that further interpretative guides or policies will be issued by the Commissioner. A specific pay equity complaint form is not available on the CHRA Commission website.

However, at these early stages of the implementation of the *Act*, there will be many interpretative questions. For a trade union, a central guiding question is whether the interpretation of the *Act* advances the remedies to end gendered wage discrimination and ensures that a robust and broad interpretation of the *Act* is applied.

The *Act* enables the Federal government to develop further regulations. We anticipate further round of regulations to guide the pay equity processes, particularly regarding the maintenance of pay equity.

The new Pay Equity Act provides a unique opportunity to remedy systemic gender discrimination in compensation practices. There is much work to be done between now and September 3, 2024.

Over the course of the coming months Cavalluzzo LLP will provide further guides to assist in the process. We will prepare a guide on the gender neutral comparison methods to ensure women's work is fully valued. We anticipate preparing further analysis of the application of the *Act's* comparison methods: the equal average method; the equal line method and the proxy comparison method for employers with no male job classes.

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<sup>7</sup> see for example, *Canadian Union of Public Employees Local 1999 v. Lakeridge Health Corporation*, 2012 ONSC 205

## Appendix

### HIGHLIGHTS – TRADE UNIONS AND THE FEDERAL PAY EQUITY ACT

- As of **August 31, 2021**, the Federal government's new Pay Equity Act ("Act") and the accompanying Regulation are in effect.
- The federal pay equity legislation covers federally-regulated businesses and industries, both public and private sector, with 10 or more employees.
- The first deadline is **November 1, 2021** when the Employer is required to post a notice in the workplace setting out its obligations to establish a pay equity plan

#### The Pay Equity Committee

- Employers must make "reasonable efforts" to establish a pay equity committee where the employees are represented by a trade union if there are 10 or more employees (s.16(1)).
- Bargaining agents have the right to participate on a pay equity committee no matter the size of the workplace (s. 19).
- Composition of the Pay Equity Committee:
  - If there is more than one bargaining agent, each bargaining agent must have a least one representative. (s. 19 (1)).
  - at least 50% of the committee members must be women.
  - two-thirds of the members of the committee must be employees to whom the pay equity plan relates.
  - at least one representative is selected by the employer.
  - at least one member represents non-union employees. The non-unionized employees must select their representative by a vote.
- Employees participating on a committee receive their regular pay for that time.
- The Act generally requires a single pay equity plan for a single employer (s.12). However, a bargaining agent or employer may apply to the Pay Equity Commission to approve the creation of more than one pay equity plan. (s. 30).
- In a committee vote, the Act provides that "the members who represent employees have, as a group, one vote and the members who represent the employer have, as a group, one vote", and that "a decision of a group counts as a vote only if it is unanimous".

- If the members who represent employees cannot, as a group, reach a unanimous decision on a matter, the vote of the group of members who represent the employer prevails. In practice therefore employees will forfeit their right to vote unless ALL employee representatives are unanimous in their position.
- There is some ability for bargaining agents to file complaints against employers (or other bargaining agents) for violation of the Act, including for attempts to influence non-union employees on the committee.
- Bargaining agents as well as employers can be subject to orders for failure to comply with the Pay Equity Act, and are potentially subject to administrative monetary penalties up to a maximum of \$50,000 that may be set by regulation.

### **Pay Equity Plans**

- The pay equity plan must be completed no later than **September 3, 2024**.
- A pay equity plan must set out whether a pay equity committee was established, the job classes and their gender, the value of the job classes, the pay equity adjustments owed to female job classes and the date of any compensation increases.
- The compensation of a job class cannot be reduced to achieve pay equity.
- Any pay equity adjustments owed must start to be paid out no later than **September 4, 2024**. There is a period of up to five years to make payments owed under a pay equity plan.

### **Interaction of Pay Equity Plans and Collective Agreements**

- Where there is "an inconsistency" between the most recent version of a pay equity plan and the collective agreement, the pay equity plan prevails over the inconsistency (s.95).
- Any increase in compensation as a result of the pay equity plan is "deemed to be incorporated into and form part of the collective agreements".

### **Maintenance of Pay Equity**

- By **June 30, 2025**, an annual report to the Pay Equity Commissioner on the status of the plan must be prepared (s. 89).
- Employers must advise trade unions that the pay equity maintenance process will be underway and set up a pay equity maintenance committee.
- A pay equity plan must be maintained, and an updated plan must be posted no later than **September 4, 2029**. (s. 64).