

**CANADA'S INTERNATIONAL AND
DOMESTIC HUMAN RIGHTS OBLIGATIONS
TO ENSURE PAY EQUITY:**

**OBLIGATIONS TO DESIGN AN EFFECTIVE,
ENFORCEABLE AND PROACTIVE
FEDERAL PAY EQUITY LAW**

EXECUTIVE SUMMARY

**Research Paper Commissioned by the Pay Equity Review Task Force and prepared
by**

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This paper examines what principles should inform the development of new federal pay equity legislation. Part I addresses briefly the widespread and systemic nature of the pay inequity problem with its roots in complex social structures and prejudices with many women suffering discrimination on multiple grounds. It then explores the options for developing a principled and effective response to the systemic wage discrimination problem. It explores what implications (a) international human rights commitments; (b) *Canadian Charter of Rights and Freedoms* obligations; and (c) evolving notions of employers' proactive obligations to address human rights violations have for selecting the appropriate legal framework for addressing pay equity.

International Human Rights Instruments

Canada is party to numerous legally binding international covenants and conventions respecting human rights, political and civil rights, and economic, social and cultural rights which expressly commit Canada to eliminating sex-based wage discrimination. Part II of the paper examines Canada's international human rights commitments, noting evolutions in the substantive concept of equal pay for work of

equal value and in the obligations to take proactive steps to achieve that objective.

This Part places pay equity in a historical context, reviewing Canadian and international efforts to eliminate wage discrimination beginning in the late nineteenth century and highlighting that for nearly a century international labour standards have recognized that achieving non-discriminatory wages for women is a fundamental right and that it involves a *comparison of the value of the different work that men and women do*.

From the 1948 *Universal Declaration of Human Rights* through to the 2000 *Beijing +5 Resolutions* regarding implementation of the *Beijing Declaration and Platform for Action*, international human rights instruments have evolved from simply stating general principles of non-discrimination, to setting out more and increasingly specific directives for action to be taken by members states, employers and civil society to eliminate sex-based wage discrimination. Part II summarizes 14 key obligations and principles imposed on Canada by these international instruments which must inform the design of Canadian pay equity legislation. These include

- * recognition that pay equity is a fundamental labour and human right and achieving pay equity is a matter of urgency and priority;
- * sex-based wage discrimination is systemic in nature and requires systemic and transformative remedies;
- * discrimination-free wages are achieved on the principle of “equal pay for work of equal value” which involves gender neutral comparison and evaluation of the different jobs men and women do;
- * government must take active steps, including enacting and strengthening legislation to eradicate wage discrimination and guarantee equality outcomes;
- * employers must take proactive steps to implement pay equity;
- * freedom of association and collective bargaining support the effort to achieve equality;
- * government must create expert and effective enforcement mechanisms, including legal aid where necessary and including on-going monitoring, reporting and follow up within defined time frames.

Canada's Domestic Equality Jurisprudence

Part III of the paper examines the evolution of Canada's domestic equality jurisprudence, including the concept of substantive equality and the emergence of increasingly proactive obligations on government and employers to transform and eradicate discriminatory norms and conduct.

Canadian equality jurisprudence recognizes that discrimination is primarily systemic and that the goal of equality to *transform* mainstream practices and norms which produce inequality. Human rights laws have primacy over other legislation, require effective enforcement, and seek to achieve substantive equality which, in respect of wages, means equal pay for work of equal value.

The *Charter* and human rights legislation impose on government a proactive obligation to design legislation taking into account and accommodating the needs, capacities and circumstances of disadvantaged groups who will be affected by the law; and impose on employers the proactive and ongoing obligation to identify and transform discriminatory workplace practices.

Implications for Designing Pay Equity Legislation

Part IV examines whether in light of Canada's international and domestic equality obligations, pay equity should be legislated in employment standards legislation, collective bargaining legislation, human rights laws or a specialized pay equity statute.

The paper finds that addressing and enforcing pay equity through employment standards laws, collective bargaining laws and existing human rights models does not satisfy international and domestic equality commitments for the following reasons:

- * Employment standards laws are built on a formal equality standard of equal pay for equal work; are not directed towards eradicating systemic discrimination; are complaint-based; and fail to recognize pay equity as a fundamental, quasi-constitutional right.
- * Collective bargaining laws fail to recognize pay equity as a fundamental human right; deny the possibility of achieving pay equity to non-unionized women; cannot remedy systemic discrimination; fail to guarantee a substantive equality outcome; make pay equity vulnerable

to trade-offs in bargaining; and fail to provide sufficiently expert and effective enforcement mechanisms.

- * While a human rights law could recognize pay equity as a fundamental right, the current human rights models are inadequate because they are reactive and complaints-based; fail to address the systemic nature of the discrimination; encourage a culture of resistance to equality claims; fail to provide effective enforcement because employees lack direct access to adjudicate their claims; fail to provide effective monitoring, reporting and follow-up; and fail to provide sufficiently detailed direction on how to implement pay equity.

The paper concludes that separate, comprehensive, specialized pay equity legislation that imposes on employers proactive obligations to achieve substantive equality best complies with Canada's international and domestic equality obligations.

Comprehensive proactive pay equity legislation is the only model that recognizes wage discrimination as a systemic problem that demands a systemic remedy. Specialized pay equity legislation is best able to define the right to pay equity in sufficiently detailed and concrete terms to enable the workplace parties to act on their obligations, to minimize litigation and delay, to provide an expert and effective enforcement mechanism, and to provide for meaningful and effective monitoring, reporting and follow up.

The symbolic implications of enacting specialized pay equity legislation would also signal a serious commitment to eradicating wage discrimination and would promote a culture of compliance.

The paper concludes that flowing from Canada's international human rights commitments and its domestic equality jurisprudence, new pay equity legislation should be designed to reflect the following principles:

- (a) Canada has an obligation to enact strengthened pay equity legislation and to treat pay equity as a fundamental human right that has primacy over all other non-constitutional rights.
- (b) Employers have a proactive obligation to identify and rectify discriminatory workplace practices. Pay equity legislation must be proactive and must address the systemic nature of the pay equity problem.

- (c) Pay equity legislation must apply to both the public and private sector.
- (d) Pay equity legislation must be designed to recognize the interconnection between the right to organize, collective bargaining and the achievement of equality. It must enable unions and non-unionized employee representatives/agents to participate at all stages of developing and enforcing pay equity entitlements.
- (e) Pay equity legislation must *ensure* and *guarantee* that women can achieve non-discriminatory wages. It must provide for strong enforcement of pay equity obligations which is characterized by the following four elements:
 - (i) It must articulate pay equity obligations in sufficient detail to give workplace parties clear guidance to act upon their obligations and to minimize litigation.
 - (ii) It must identify clear time frames within which steps must be taken and within which substantive equality must be achieved. Failure to comply must result in clear and meaningful sanctions.
 - (iii) It must provide for strong enforcement through an expert tribunal with broad remedial powers. Complainants must have direct access to the tribunal and legal aid must be provided where necessary to support enforcement.
 - (iv) It must provide for strong reporting, external monitoring and follow up on compliance.

The paper also examines more specifically the following potential elements in legislation:

- * a preamble/purpose clause;
- * the concept of “gender inclusivity” versus “gender neutrality” in job evaluation/comparison;
- * whether “reasonable factors” which result in permissible wage differentials should be listed;
- * the role of unions in achieving pay equity;

- * a broad outline of elements in an enforcement mechanisms that could *ensure* compliance with international and domestic human rights obligations;
- * mechanisms for reporting, monitoring and follow-up; and
- * consolidating jurisdiction over pay equity matters in a single expert pay equity tribunal.

Conclusions

Part V concludes that Canadian equality principles and Canadian obligations under international human rights instruments are mutually reinforcing and complementary. In designing new pay equity legislation and choosing between different design options, the Task Force and Government must ensure that the law adopts all necessary measures to fully achieve pay equity for women in the federal sector. This requires an effective, enforceable and proactive federal pay equity law. As the government reviews the options for enacting new legislation, it must measure each policy choice, each legislative choice, to determine what is needed to *ensure* equality. Where a choice must be made, the government must choose the option that will *guarantee* equal pay for work of equal value. To this end, Part V concludes with a checklist of the international and domestic human rights obligations that should inform the design of the new pay equity law.