ONTARIO
EQUAL PAY COALITION
IT'S TIME TO CLOSE THE GENDER PAY GAP

C-86

Division 14

FEDERAL PAY EQUITY LAW

Presentation to the

Parliamentary Standing Committee Finance

November 6, 2018

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INTRODUCTION

1. Women have the right to be paid wages that are free of sex discrimination.

2. The right to pay equity – equal pay for work of equal value – is one of the most basic of workplace human rights.[1] However, the gender pay gap persists. The most recent Census data show that not only does the gender pay gap persist, but in some parts of the country it is actually *widening*.[2]

3. On October 29, 2018, the Federal government introduced a new *Pay Equity Act,* embedded within the omnibus C-86 – the *Budget Implementation Act*. The Pay Equity Act is a very significant statute and important step towards women's equality.

4. The *Pay Equity Act* sets out for the first time in the federal jurisdiction the statutory obligation for employers to develop pay equity plans to ensure that their compensation practices provide for and remedy inequalities of equal pay for work of equal value.

5. However, in order to be fully effective, the Pay Equity Act must be designed to break the cycle of systemic discrimination.

6. In order to do so, the Act requires several significant amendments to ensure that women's work is not undervalued and undercompensated and the gender pay gap can be closed.

7. The *Act*, as currently drafted, does not deliver the robust, comprehensive and effective protection for women's equality rights. The statute is densely drafted and requires continued review. These submissions are our preliminary and initial comments about the legislation for the Finance Committee's consideration.

8. The Ontario Equal Pay Coalition reminds that Committee that as the Supreme Court of Canada stated in its May 10, 2018 decisions that leaving wage inequities in place makes women 'the economy's ordained shock absorbers'"[3]. This undermines equality because it sustains systemic sex discrimination.

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[1] Many dynamics feed into building and sustaining the gender pay gap. Pay equity addresses the specific dynamic of discrimination that arises because we have a sex-segregated labour market in which women and men do different work, often in different workplace, and in which, because of systemic discrimination, "women's work" is devalued and so paid less than "men's work" because it is done by women. As the Ontario Pay Equity Hearings Tribunal has stated: "Women are paid less because they are in women's jobs, and women's jobs are paid less because they are done by women. The reason is that women's work - in fact, virtually anything done by women – is characterized as less valuable. In addition, the characteristics attributed to women are those our society values less:" *Ontario Nurses' Association v. Women's College Hospital* (1992), 3 P.E.R. 61 at para. 16-18

[2] Kate McInturff, "Sense of the Census: Income, Wage Gaps and Poverty" (Canadian Centre for Policy Alternatives, 13 September 2017)

3 Quebec (Attorney General) v. Alliance du personnel professionnel de la santé et des services sociaux, 2018 SCC 17 para. 8

Legislation that leaves known discrimination in place can be challenged because it perpetuates systemic sex discrimination.

9. This brief is organized in three main parts. Part I sets out the legal foundation for pay equity. Part II outlines the key pay equity principles that must be fully recognized in the new Act. Part III summarizes the needed amendments to the *Act* to break the cycle of systemic discrimination.

I. THE LEGAL FOUNDATION FOR PAY EQUITY

10. Women's right to equal pay for work of equal value has been a bedrock principle recognized in the International Labour Organization's Constitution since 1919.

11. Canada ratified the ILO's Convention 100 on equal pay for work of equal value in 1972. The right to equal pay for work of equal value has been protected under the *Canadian Human Rights Act* since 1977, supplemented by *Equal Wage Guidelines* in 1986.

12. Since 1995, the federal government has acknowledged that sex-based wage discrimination continues in federal workplaces despite the existing pay equity protections in the *Human Rights Act* and *Equal Wage Guidelines*.[4]

13. In 2004, after extensive national consultation and commissioned research, the Federal Pay Equity Task Force, chaired by Beth Bilson, issued a 600-page report which recommended that the federal government enact a stand-alone proactive pay equity law that is specifically characterized as human rights law.

14. The Task Force made 113 recommendations for principles and practices that should be incorporated in the new proactive legislation. It is our observation that the current legislation ignores many of the key recommendations.

II. SEVEN FUNDAMENTAL PAY EQUITY PRINCIPLES TO ANCHOR THE ACT

15. In order to be effective, the new pay equity legislation must be anchored in and built with reference to clear human rights principles and a clear statement of purpose. These principles and purpose will help determine how different building blocks of the legislation must be shaped and integrated to deliver real substantive equality rights to women and to dismantle the systemic structures that have sustained sex discrimination for so long.

Principle 1: Pay equity is a fundamental human right.

16. Women have the fundamental human right to be free from systemic sex discrimination in pay. A "right" is just that – it is a legal *entitlement* that must be enforced. It is not a privilege. It is not an option. fundamental human rights, pay

[4] Status of Women Canada, *Setting the Stage for the Next Century: The Federal Plan for Gender Equality* (1995)

equity must take priority over all laws save the Constitution. The current gender pay gap is a human rights crisis which must be addressed as such.

Principle 2: Eradicating the pay gap is a mandatory human rights obligation.

17. The corollary to pay equity being a fundamental human right is that employers have a mandatory human rights *obligation* to ensure that they deliver non-discriminatory pay for women. Pay equity is not simply a voluntary "best practice" or a "business case".

18. In her 1984 *Report of the Royal Commission on Equality in Employment*, Justice Rosalie Abella squarely condemned the discriminatory gender pay gap as a profound social harm that serves no justifiable social goal:

> "The cost of the wage gap to women is staggering. And the sacrifice is not in aid of any demonstrably justifiable social goal. To argue, as some have, that we cannot afford the cost of equal pay to women is to imply that women somehow have a duty to be paid less until other financial priorities are accommodated. This reasoning is specious and it is based on an unacceptable premise that the acceptance of arbitrary distinctions based on gender is a legitimate basis for imposing negative consequences, particularly when the economy is faltering."[5]

19. More recently the Supreme Court of Canada issued decisions on pay equity where the Court affirmed that pay equity laws are part of the ongoing efforts to achieve women's right to equality by ending the systemic sex discrimination that produces and sustains "the deep and persistent gap between women's and men's pay".

20. Pay equity legislation recognizes that systemic sex discrimination in compensation is rooted in the reality of a sex segregated labour market in which women's work – work done by employees in predominantly female job classes – is devalued because it is done by women.[6]

Principle 3: Pay equity legislation must *increase efforts* to close the wage gap and must *strengthen* the ability to achieve and maintain pay equity in practice.

21. The new legislation must be an advance in securing robust, effective protection for women's human rights. There must be no regression in the analysis or commitment to achieving and maintaining substantive equality and eliminating

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5 Justice Rosalie Silberman Abella, *Equality in Employment: A Royal Commission Report* (Canada: 1984) at p. 234

6 Quebec (Attorney General) v. Alliance du personnel professionnel de la santé et des services sociaux, 2018 SCC 17 Centrale des syndicates du Quebec v Quebec (Attorney General), 2018 SCC 18

systemic discrimination. There must be no regression from the existing *Canadian Human Rights Act.*

22. New legislation must be designed in a way that does not foster or replicate the previous federal practice of protracted litigation.

Principle 4: Pay equity legislation must ensure that unions have an active role in developing and enforcing pay equity rights.

23. The right to join a union, to be represented by a union in negotiations and rights enforcement, and to go on strike (or have recourse to an effective dispute resolution mechanism where the right to strike has been limited) have all be recognized as fundamental constitutional rights that are guaranteed under the *Charter*'s protection for freedom of association. Workers have the right to be represented and protected by their union in advocating for and enforcing pay equity rights at all stages of developing a pay equity plan, monitoring changes in the workplace that affect pay equity, developing pay equity maintenance plans, and enforcing rights.

24. Unilateral employer action cannot override the Union's active role in developing and enforcing pay equity rights.

25. Non-unionized workers also have a right to collective action and must be entitled to have representatives or agents participate in developing, maintaining and enforcing pay equity.

Principle 5: Pay equity legislation must provide comprehensive protection for workers in the federal public and private sectors that prevents techniques of "fissuring" the workplace from undermining equality rights.

26. Pay equity legislation must provide comprehensive protection to all workers in the federal jurisdiction, in both the public and private sectors. It must encompass full-time, part-time, seasonal, casual, temporary agency workers, and dependent contractors. It must also apply to government contractors.

Principle 6: Pay equity legislation must ensure that pay equity rights are effectively enforced.

27. Effective enforcement of pay equity rights requires that the legislation provide a meaningful, effective and timely remedy for systemic wage discrimination that redresses the systemic discrimination identified. Those rights must be enforced before a competent and expert tribunal. Meaningful sanctions must be applied when there is a failure to comply. The rights must be effectively enforceable for both unionized and non-unionized workers.

Principle 7: Pay equity legislation must promote pay transparency and proactive accountability.

28. Pay transparency in the form of mandatory disclosure of compensation information enables workers, particularly non-unionized workers, to know and enforce their pay equity rights. Proactive accountability measures such as filing pay equity plans and pay equity maintenance plans facilitates rights enforcement and monitoring.

III. AMENDMENTS REQUIRED TO DELIVERY PAY EQUITY

29. Pay equity legislation encompasses a number of technical elements – what we have called the "building blocks" of pay equity.

30. Each of the building blocks is a step in the creation of a pay equity plan. The pay equity plan is a legally-binding and enforceable document, just like a collective agreement or contract, which sets out the employer's steps to achieve equal pay for work of equal value, close any gender pay gaps and maintain pay equity in the workplace.

31. Our comments below are based upon the principles above and track to the current Act and specific provisions. Where the 2004 Pay Equity Task Force made a specific recommendation, we provide that reference.

32. Our comments are organized in two parts: (a) the amendments to the Act as drafted where we propose amended language or deletion of language and (b) key pay equity building blocks that are missing from the Act.

A. Amendments and Deletions to the Act

(i) SECTION 2: THE PURPOSE CLAUSE

33. As set out above, pay equity means equal pay for work of equal value. In a nutshell, pay equity involves comparing female-dominated job(s) to male-dominated job(s) in an establishment to ensure that female-dominated jobs are paid at least as much as male-dominated jobs of similar value.

34. The *Pay Equity Act* contains a purpose clause. The current purpose clause as drafted is not acceptable in a human rights and a pay equity statute.

35. Section 2 contains a qualifying phrase "while taking into account the diverse needs of employers".

36. In this particular clause, this language undermines the intentions of the Act, which is to address systemic gender wage discrimination. It undermines the human right of equal pay for work of equal value.

37. For comparison, the current purpose clause of the Canadian Human Rights Act states that:

> The purpose of this Act is to extend the laws in Canada to give effect, within the purview of matters coming within the legislative authority of Parliament, to the principle that all individuals should have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have…….without being hindered in or prevented from doing so by discriminatory practices based on race, national or ethnic origin, colour, religion, age, sex, sexual orientation, gender identity or expression, marital status, family status, genetic characteristics, disability or conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered.

38. You will note that there is no reference to the diverse needs of employers in the *Canadian Human Rights Act*. The current draft of the purpose clause is unforeseen in a Canadian human rights legislation. As it currently stands, the purpose clause does not recognize Canada's commitment to human rights and its international obligations.

39. The 2004 Task Force on Pay Equity recommended that the Government "enact new stand-alone, proactive pay equity legislation in order that Canada can more effectively meet its international obligations and domestic commitments, and that such legislation be characterized as human rights legislation." (Recommendation 5.1) and "the new federal pay equity legislation include a purpose clause and/or preamble to provide a context and interpretive framework for the legislation" (Recommendation 5.9) .

40. The current language derogates from human rights so that the fundamental human right of equal pay for work of equal value is screened through the needs of employers. The current language significantly limits fundamental human rights as all obligations and rights will have to be read through the needs of employers.

41. If the intention of this language is to acknowledge that there are diverse types of employers with different realities and structures in the federal jurisdiction, this objective is accomplished in the operational sections of the Act. There are different provisions for different sizes and types of employers, processes for unionized and non-unionized workplaces, and other types of flexibility built in to the regulation.

42. Further and as part of the purpose section of the Act, the requirement for pay equity must be clearly and directly spelled out in the body of the Act to ensure the obligations and responsibilities are known to the parties.

43. The 2004 Task Force, Recommendation 8.2 set out that the new federal legislation provide that the employer is responsible for ensuring that pay equity implementation and maintenance are free of gender discrimination. Ontario's Pay Equity Act sets out these obligations in section 7 of its Act.

(a) **Proposed Amendment regarding the preamble, purpose clause and employers' obligations:**

44. The phrase “while taking into account the diverse needs of employers” must be deleted.

45. The following should be substituted, relying upon the straightforward language in Ontario:

Preamble

Whereas it is desirable that affirmative action be taken to redress gender discrimination in the compensation of employees employed in female job classes

Section 2.1 Purpose

The purpose of this Act is to redress systemic gender discrimination in compensation for work performed by employees in female job classes.

The value of female and male job classes must be determined using a gender-neutral job evaluation tool that evaluates the skill, effort and responsibility required in the performance of the work and the conditions under which the work is performed.

New Section 2. 2. - Pay equity required and the Employer obligations

Pay equity required

(1) Every employer shall establish and maintain compensation practices that provide for pay equity in every establishment of the employer.

(2) No employer or bargaining agent shall bargain for or agree to compensation practices that, if adopted, would cause a contravention of subsection (1).

(ii) SECTION 3(1) DEFINITION OF EMPLOYER

46. The current Act does not include a definition of employer. This is a significant oversight which requires an amendment.

47. The 2004 Task Force, emphasized the need to go beyond the technical form of an employment relationship to assess the relationship of economic dependence.

48. The proposed amendment draws from the Occupational Health and Safety definition of employer which explicitly recognizes that in order to protect workers health and safety, the primary employer must be held responsible. The same principle should apply to pay equity as a fundamental human right.

49. Numerous recommendations were made regarding the need for a broad definition of employer: 6.5, 6.10, 6.11, 6.11a, 6.12 and others

(a) *Proposed amendment: definition of employer*

"employer" means one who employs one or more employees, or contracts for the services of one or more employees, and includes a contractor or subcontractor who performs work or supplies services and a contractor or subcontractor who undertakes with an owner, constructor, contractor or subcontractor to perform work or supply services.

50. **(iii) PAY EQUITY COMMITTEES**

Sections 14 (1), 16(1) and 16 (2), 17, 18, 19)

51. The section to develop a pay equity committee is a very weak and limited obligation to create a committee. The current language does not deliver on a significant obligation to ensure the employees voices are heard.

52. The Act requires that employer are “to make reasonable efforts to establish a pay equity committee”.

53. However, a pay equity committee is a fundamental cornerstone to establishing a pay equity plan in the work. There are numerous sections with the very weak language of ‘reasonable efforts’. This raises the question of why the Committees are not mandatory or why a higher threshold of ‘best efforts’ was not built into the Act.

54. The lack of access to a pay equity committee is most egregious for non-unionized employees. The requirement for a pay equity committee is voluntary in a workplace is non-unionized whether to establish a committee. The voluntary standard significantly disenfranchises non-union employees.

55. Further, the 2004 The Task Force, Recommendation 16.2 set out that the new federal pay equity legislation should also impose a responsibility on employers, employees and employee representatives to deal in good faith and without discrimination in the course of the pay equity process, including all deliberations of the pay equity committee. The good faith requirement is missing from the Pay Equity Act.

56. The proposed amendment is twofold. First, the establishment of the pay equity committee is mandatory. Second, the Employer is required to negotiate in good faith. The good faith obligation draws upon the language in Ontario’s Pay Equity Act and the 2004 Task Force recommendation.

(a) *Proposed Amendment*

The Employer must establish a pay equity committee and shall negotiate in good faith and endeavour to agree, before the mandatory posting date, on a pay equity plan.

(iv) SECTION 20(1) THRESHOLD OF UNANIMITY ON PAY EQUITY COMMITTESS

57. Section 20(1) regarding voting in pay equity committees states that a decision of the groups who represent employees must be *unanimous,* or they forfeit the right to vote and the employer's decision prevails.

58. This is a very concerning and peculiar requirement particularly given the complexity of some enterprises and the number of bargaining agents or groups of employees involved.

59. Section 20 (1) fails to fulfill the 2004 Task Force recommendations on employee participation.

60. The 2004 Task Force recommended that the new federal pay equity legislation provide that all employees, whether unionized or not, have the right to participate in pay equity implementation and maintenance.

61. The Task Force further recommended that the new federal pay equity legislation provide that the pay equity committee holds decision-making authority with respect to the content of the pay equity plan as well as the maintenance of results. The Task Force also recommended that where employer and employee representatives on the pay equity committee disagreed, the dispute is submitted to the proposed Canadian Pay Equity Commission to assist the parties to resolve the dispute, failing which the Commission makes a decision. (Recommendation 8.2, 8.6, 8.7, 8.8)

62. There is no requirement for unanimity in the Quebec legislation; a majority agreement is required. There should be an amendment to bring this in line with Quebec's approach.

Proposed amendment using the precedent

Quebec Pay Equity Act Section 25

The representatives of the employees as a group and the representatives of the employer as a group have one vote, respectively, within the pay equity committee.

If, on a given question, a majority decision is not reached among the representatives of the employees, the employer shall decide the question.

What this language means is that if the parties on the committee are unable to attain a majority vote, the employer may act.

(v) SECTION 12, 54 and 89

REQUIREMENT TO ESTABLISH FILE A PAY EQUITY PLAN

63. To ensure that pay equity is fully tracked and enforced in the federal jurisdiction the current legislation requires an amendment that employer's file their pay equity plan with the Pay Equity Commissioner.

64. Currently, the legislation does not require employers to file their pay equity plan with the Pay Equity Commissioner. Instead, as set out in s. 89, employers are required to submit an annual statement with limited information with respect to the status of pay equity in the workplace. If the Commissioner and the Pay Equity Unit are to be effective in enforcing the legislation, they will require more information than what is required in the annual statement. Without the pay equity plan's filed with the Commission, there is no meaningful baseline from which to monitor or audit an employer.

65. The requirement to file an annual report will not provide the necessary pay transparency to rigorously enforce pay equity.

66. The lack of the obligation to file a plan with the Commission is a serious gap in the legislation. Section 52 sets out the process for posting a draft pay equity plan in the workplace with a 60 day review period. However, posting in the workplace is not a substitute for filing a plan with the key enforcement agency.

67. One of the acknowledged weaknesses of both the Quebec and the Ontario Pay Equity Act is that it does not require employers to file pay equity plans with the Pay Equity Commission. As a result, there is no systemic way to identify the organizations which did not comply with the Act. It is acknowledged that, particularly in the private sector, there is widespread non-compliance which once again depends on individual employees or unions filing complaints to activate compliance. The Act did not enable periodic audits. As the Task Force stated, "the very existence of such provisions would have been an effective incentive for organizations to comply with the Act." (p. 128 of Task Force report)

68. The first amendment is the requirement to establish and file a pay equity plan with the Pay Equity Commission.

69. The second recommended amendment is that the timeline for employees review of the pay equity plan should be extended to 90 days to enable employees full access and opportunity to review the plan once completed.

70. The third amendment, particularly to s. 12 and 89 of the Act is that requirement to file a copy of the pay equity plan with the Canadian Pay Equity Commission no later than 15 days after its completion.

Proposed Amendments to s. 12, 54 and 89.

Section 12 amendment:

Every employer must establish a pay equity plan in accordance with this Act in respect of its employees and file the plan with the Pay Equity Commissioner.

Section 52 (and related clauses)

That every employee is provided with 90 days to review the draft plan and provide written comments.

Section 89 (c) - Annual Statement

(c) a copy of the Employer's pay equity plan

(vi) 41(2) VALUE OF JOB CLASSES ALREADY DETERMINED

71. Section 41(2) allows an Employer or a pay equity committee to determine that the value of work *has already been determined.* This gives an Employer, particularly in a non-unionized workplace, unilateral power to shelter what it has done to date without the requirement to properly evaluate women's work.

72. Employers will want to rely on "existing" pay equity and/or job evaluation plans. However, one of the significant issues identified by the 2004 Task Force was the exemption in the Quebec pay legislation for "pay relativity plans" which enabled employers to file prior internal pay reviews or plans in the process of development with the Commission for deemed approval (s. 119). Unions had little or no involvement in the assessment of the filed plans.

73. Subsequently, the pay relativity provision of the Act was found unconstitutional.

74. The Task Force recommended that where the Canadian Human Rights Tribunal, a Federal court or the Supreme Court of Canada has rendered a decision or disposition of an issue, the disposition is final and binding. This provides for a maintenance review of an old plan if required and the involvement of employees' representatives. (Recommendation 15.5)

75. No employer may rely on an existing and alleged pay equity plan without full pay transparency on whether the plan is compliant with the federal legislation.

76. The employer will (re-) post the plan in the workplace and file the pay equity plan with the federal government. Unions and non-union employees may have full right to comment upon such plans and to file a complaint of non-compliance to the Federal Commission.

77. Section 41 (2) raises significant concerns in light of the issue of the employer's unilateral control of the pay equity process identified above.

Amendment required

This provision should be struck from the Act.

(vii) Section 46 (f) Compensation Exemptions for precarious workers should be removed

78. This section allows for the exclusion of the non-receipt of compensation – in the form of benefits that have monetary value – due to the temporary, casual or seasonal nature of a position.

79. This new provision would violate the determination of compensation within the current *Canadian Human Rights Act* and s. 11 and the Equal Wage Guidelines.

80. Section 11 (7) of the Canadian Human Rights defines that wages mean any form of remuneration payable for work performed by an individual and includes employer contributions to pension funds or plans, long-term disability plans and all forms of health insurance plans. There is no limit based upon an employee's job status.

81. The 2004 Task Force recommended that all employees in the federal jurisdiction, including part-time, casual, seasonal and temporary workers (Recommendation 6.4). The Task Force also recommended that the legislation define compensation for pay equity purposes as total compensation, including base pay, flexible pay and benefits with monetary value. (Recommendation11.1)

82. The Supreme Court in the recent pay equity decisions held that the Government cannot pursue law reform strategies that lower the bar on pay equity in order to encourage employer compliance. The main question is why does the new federal pay equity legislation reduce the entitlements that women employed in precarious jobs currently access under the CHRA?

83. Given the other changes to Part 3 of the Canada Labour Code regarding equal pay, the proposed Pay Equity Act language is inconsistent.

84. This specific exemption should be removed from the Pay Equity Act.

Amendment required:

The exemption is removed.

(viii) Methods of Comparison. Sections 49- 50

81. This section is limiting the pay equity adjustments that women may be entitled to receive. It is an unnecessarily complex section which means that interpretative issues will abound.

82. Section 50 (1) (b) (i) limits adjustments if the entire female regression wage line is "entirely" below the male line. This is a whole group approach. If some part of the line is above the male wage line, what happens to the female job classes below the line? Gender discrimination in compensation is not redressed as some women will be paid unequally.

    Section 50 (2) claims to deal with the issue of the "crossed regression lines" and leaves this entirely unaddressed and for regulation at some later date. The proposed comparison method seems to be the "whole group comparison" methods that the Treasury Board tried in the federal public service case, and which would have required very exact matching of female value and range characteristics to be exactly a match for male groups (and not the line itself) within the same range of values.

83. The 2004 Task Force, Recommendation 11.5 called for in organizations of 100 or more employees, that wage gaps must be estimated on an overall basis by comparing predominantly female job classes to the wage line for solely predominantly male job classes.

84. This approach is the simplest and recognized by pay equity experts. The Task Force explicitly recommended the reliance on a regression wage line and not the line to segment approach in the proposed legislation.

(ix) **Retroactivity in pay equity maintenance**

85. Clause 88 (4) on Increases in Compensation in the provisions for maintenance of pay equity appears to **exclude** retroactivity for employees where wage gaps have arisen in the interim between posting the original pay equity plan and the five year review.

86. However the provision only requires retroactivity to when the revised pay equity plan was posted, not to when the gap first occurs.

87. Also much of the calculations seem to left to regulations.

88. S. 88 (2) with reference to lump sums is particularly unclear regarding any adjustments regarding the "previous pay equity plan was posted and to end no later than the day on which the revised plan was posted in accordance with 85(2).

89. A similar provision in Quebec's legislation, which denied retroactive pay equity adjustments back to the time of the breach, was recently struck down by the Supreme Court of Canada.

90. The Ontario Pay Equity Act provides for retroactivity where adjustments in compensation that are made after the day provided for in the pay equity plan, the employer shall make the adjustments retroactive to that date or retroactive to the day of the contravention of the Act.

91. The federal Act should be amended in order to take into account this recent judgement and not replicate unconstitutional language.

Proposed Amendment

Pay equity Adjustments are retroactive to the effective date for the implementation of pay equity plans as set out in s. 55 or retroactive to the day of the contravention of the Act.

(x) Improve the Pay Equity Compliance and Adjustment Timelines: s. 55,60-63.

92. The 2004 Task Force recommended proactive pay equity legal obligations almost 15 years ago. As the new Pay Equity Act stands, women will wait over 10 year to receive a pay equity remedy. One year for the regulation development. Three years for pay equity plan development. Eight years for compensation and remedies to be paid out in the case of workplaces with less than 99 employees.

93. Such lengthy timelines do not demonstrate reasonable diligence on the part of the Government to introduce proactive pay equity.

94. In *Centrale des syndicats du Québec v. Quebec (Attorney General) 2018 SCC 18*, Justice Abella stated that a six-year legislatively delayed access to pay equity with a two year grace period as close to the line for an unreasonable delay.

95. In terms of the introduction of the federal legislation, this is not a situation where further considerable research and analysis is required. There is extensive policy experience elsewhere to draw on for inspiration. Moreover, s. 11 of the CHRA, obligating equal pay for work of equal value, has existed since 1976.

96. The lengthy proposed timelines are unnecessary.

Proposed Amendment

s. 55 The final version of the pay equity plan must be posted within two years, subject to an amendment to the timelines at the pay equity committee level.

s. 60-63 The pay equity adjustment phase should be no longer than 5 years from the date that the pay equity plan must be posted.

(xi) **Ensuring women are not losing out on other human rights protections**

97. The BIA2, Section 425(1) amends the *CHRA* so that women are not able to make a comprehensive claim relying upon all key elements of the CHRA.

98. Based upon this language women are restricted from using the CHRT to combine a broad claim of systemic discrimination in compensation. This provision replicates a significant weakness in both Quebec and Ontario's human rights forums.

99. What this means is that women are required to go to two venues to fully redress systemic discrimination in compensation: one for pay equity and the other for human rights.

The BIA section reads: Non-application of sections 7, 10 and 11

> 40.2 The Commission does not have jurisdiction to deal with complaints made by an employee, as defined in subsection 3(1) of the Pay Equity Act, against an employer that is subject to that Act, alleging that
>
> (a) the employer has engaged in a discriminatory practice referred to in section 7 or 10, if the complaint is in respect of the employer establishing or maintaining differences in wages between male and female employees who are performing work of equal value; or
>
> b) the employer has engaged in a discriminatory practice referred to in section 11.

100. The Act should be amended so not to restrict human rights claims.

101. Ontario's *Pay Equity Act* has been criticized as having limited effect in eliminating systemic discrimination because it only requires that the job rate at the top of a wage grid be equalized with a male comparator in order to close the gender pay gap. This leaves beyond scrutiny how wage grids are in fact gendered and structured in ways the create and perpetuate systemic sex discrimination. For example, even where male and female job classes are of equal value, and are paid the same at the top job rate, wage grids for female dominated job classes often (a) start below the start rate for male job classes; (b) have more steps than male job classes before reaching the top of the wage grid; and (c) take longer periods to move from one grid step to the

next than male job classes. What this means is that a worker in a female job class may lose thousands of dollars relative to the comparable male job class over the period of time she is moving from the start rate to the pay equity compliant top job rate.[7]

102. Recognizing this, the Task Force recommended that the new law must require a complete analysis of the overall pay structure between female and male job classes. The elements to be compared include (a) the starting rate; (b) the number of steps on a pay grid; and (c) the length of time it takes to move up the pay grid. Where differing pay structures exist, such as wage grids, those pay structures must be harmonized (Recommendation 11.9)

103. Women should not be blocked from taking broad claims of systemic gender discrimination, inclusive of equal value claims, to the CHRA.

104. This section of the Act should be deleted

105. Women should be able to rely upon s. 7 and s. 10 of the CHRA when making equal pay for equal value claims .

(xii) Far-reaching Regulation Power s. 181 (1) undercuts the Act.

106. Clause 181 (1) a allows the Governor in Council to make regulations "exempting, with or without conditions, any employer, employee or position, or any class of employers, employees or positions, from the application of any provision of this Act".

107. This is a complete escape clause and a source of major concern.

108. This should be deleted from the Act.

[7] *Canadian Union of Public Employees Local 1999 v. Lakeridge Health Corporation*, 2012 ONSC 2051 (Div. Ct.)

(b) MAJOR BUILDING BLOCKS MISSING FROM THE CURRENT LEGISLATION

Intersectional Factors:

105. The 2004 Task Force recommended that a job class would be female-dominated when the *combined* representation of employees of a designated group is 60 per cent or more of the employees in that job class (workers who are women, Indigenous, racialized, immigrant, or have disabilities, for example) (See Recommendation 9.6). These are the four designated groups in the Employment Equity Act .

106. The job class definition should take into account wage discrimination against other designated groups where there is an intersection of gender, Indigeneity, (im)migrant status, racialization and disability. (See Recommendations 6.8 and 6.9).

107. One significant absence in the legislation is any consideration of Intersectionality, and the recommendation in the Bilson report that "the new federal pay equity legislation contain specific provisions establishing a process by which complaints may be made … concerning violations of the principle of equal pay for equal work on the grounds of gender, membership in a visible minority, Aboriginal ancestry or disability".

108. While we acknowledge that applying an Intersectional framework to pay equity presents some challenges, there may be ways to accomplish this in the definition of job classes. Or the Pay Equity Commissioner could be directed to develop an approach to recognizing and addressing other forms of systemic discrimination in compensation.

The Proxy method of comparison

109. The 2004 Pay Equity Task Force Report emphasized that pay equity rights must be accessible to workers in both the federal public and private sectors. \

110. In particular, the Task Force recommended that female-dominated workplaces, where no male comparator exists within an organization, must also be able to access pay equity. The Task Force recommended that the "proxy" method be applied by which comparison can be made to an external comparator. (Recommendation 11.13)

111. The Task Force also recommended that the new Pay Equity Commission assist and approve the wage methodology and comparators in female-dominated workplaces. As proposed by the Task Force employers would be provided with assistance which would eliminate any claims that complying with pay equity is onerous.

112. The current Act does not fully implement a proxy comparison method for female-dominated workplaces. This comparison method is left to be designed by regulation at a later date.

113. It is surprising that this is missing from the Act especially in light of the 2004 Task Force recommendation to include proxy as a comparison method.

114. The Supreme Court stated that systemic sex discrimination in pay "exists in the workforce whether or not there are male comparators in a particular workplace" and "women in workplaces without male comparators may suffer more acutely from the effects of pay inequity precisely because of the absence of men in their workplaces". [Centrale des syndicates du Quebec v Quebec (Attorney General), 2018 SCC 18 at para 29, 34].

Specialized and Standalone Pay Equity Commission and Pay Equity Hearings Tribunal:

115. The legislation does not include either a standalone Pay Equity Commission to conduct training, education and investigations. The legislation does not include a specialized Pay Equity Hearings Tribunal with the exclusive jurisdiction to adjudicate claims of discrimination in compensation.

116. The 2004 Task Force report recommended that both oversight agencies be created. As the Task Force stated

> "one of the most important factors in determining the effectiveness of such legislation is the clear definition and appropriately defined authority of oversight agencies charged with the interpretation, application and enforcement of statutory provisions.

117. We are advised that additional members of the Canadian Human Rights Tribunal with specific expertise in pay equity will be designated to deal with the issues that arise.

118. However, such appointments do not meet the recommendations of the 2004 Task Force. Further the Task Force explicitly stated that the new federal pay equity legislation should provide adequate financial and human resources to oversight agencies to support the achievement of pay equity within a reasonable period of

time, and that the government continue to allocate sufficient resources for the administration of pay equity legislation. There is no allocation of funds to education, training or enforcement of pay equity.

Investigation and Enforcement for Non-Union employees

119. The legislation is missing the key institutional components of the enforcement infrastructure any legal support centre to ensure access to justice and rights enforcement for non-unionized workers.

120. Non-union women do not benefit from pay equity advantages compared to unionized women workers. Unionized women see a smaller pay equity gap than their non-union counterparts.

121. For the 2004 Task Force, the issue was how to ensure the non-union women were less vulnerable and their rights were enforced. The Task Force recommended that employees whether unionized or not have right to participate in pay equity implementation and maintenance (Recommendations 8.1 – 8.12)

122. Governments have recognized that in order for fundamental human rights to exist in practice, non-unionized workers need meaningful and effective representation and advocacy. This recognition underpinned the Ontario government's decision to establish the Human Rights Legal Support Centre as one of the three equal pillars of the human rights enforcement system. The publicly funded HRLSC provides legal advice and representation without fees for claimants who are seeking to enforce their fundamental human rights. The federal government's revival of the Charter Challenges Program similarly recognizes the need for advice and representation to protect fundamental rights.

123. The new pay equity law should similarly consider what building blocks it must incorporate to ensure that for non-unionized women these fundamental rights can be realized in practice.

Pay transparency is a necessary component of the law.

The Federal government committed to pay transparency in the February 2018. It is surprising that neither the new Pay Equity Act nor the BIA contain pay transparency provisions.

The 2004 Task Force recommended posting of pay equity plans and reviews in the workplace (Recommendation 13.5 and 17.14)

It is long recognized that an employer's obligation to provide pay transparency, in conjunction with proactive pay equity legislation, is a key element of closing the gender pay gap. Several countries, Iceland, United Kingdom, and Australia, developed pay transparency obligations.

There are three basic elements to pay transparency: (a) the employees' right to be given information about the pay structures in the workplace by gender and job status; (b) the employer's obligation to post the pay structures in the workplace and to submit copies of the pay structure by gender and job status to the new pay equity oversight Commission and (c) protections against employer's reprisals where an employee asks for such information.

Pay transparency is particularly important for non-unionized workers. (See Recommendation 8.11 and 8.12)

Pay transparency encompasses:

a. proactive duties on an employer to post/report on pay structures in the workplace;

b. employees' right to request and be given pay transparency reports; and

c. employees protection from reprisals for requesting pay information, discussing pay, seeking to enforce their rights.