

EQUAL PAY COALITION

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Sent via facsimile

Emanuela Heyninck, LLB.,
Commissioner,
The Pay Equity Commission
400 University Avenue
11th Floor
Toronto, ON M7A 1T7

Dear Commissioner:

Re: Campaign to Bring Pay Equity to all Ontario Women

20th Anniversary of the *Pay Equity Act*

As Ontario moves towards the 20th Anniversary of the *Pay Equity Act*, the Equal Pay Coalition is mounting an Ontario-wide campaign to bring public and electoral attention to the need for Ontario's pay equity system to be revitalized, strengthened and adequately resourced and enforced. The Coalition, with its broad-based membership of trade unions, community and social justice organizations and business and professional women's organizations represents over one million Ontarians.

As you know, the Coalition led the campaign which brought the *Act* to Ontario's workplaces in 1988 and lobbied for its expansion in 1992 to cover predominantly female workplaces. As 2008 draws near, many employers are ignoring their obligation to pay women fairly and women and society as a whole are suffering as a result. It is once again necessary to take action to ensure the promise of pay equity - a fundamental human right - is kept. Ontario women, regardless of the size or sector of their workplace, the lack of male comparators or the precariousness of their work are entitled to be paid free of the systemic gender-based prejudice which values and pays their work less than comparable men's work. The Coalition is writing this letter to ask the Commission to join this new campaign and take a strong stand on the measures, policies and funding to properly implement the *Act*.

Pay Equity Act Achievements

Ontario's *Pay Equity Act* in the early 1990's did address much of the undervaluation of unionized women's work. The pay equity plans that were forged in the late 1980's and early 1990's led by Ontario's trade unions delivered substantial pay equity adjustments to many Ontario women. Ontario's pro-active model covering the public and private sector has served as an important international model for implementing ILO Convention 100 on Equal Remuneration for Work of Equal Value. It is important to recognize and build on these achievements.

Widespread Pay Equity Non-Compliance

The Ontario legislature gave the mandate for cleansing Ontario's workplaces of gender-based pay discrimination to Ontario's employers and unions, under the enforcement supervision of the Commission and the Pay Equity Hearings Tribunal. In your Fall, 2006 speech to an Ontario Federation of Labour Seminar, you advised that: 1) the "private sector is largely non-compliant"; 2) there are many outstanding enforcement issues in the public sector, particularly with respect to maintenance of pay equity; and 3) the Commission is working with very limited resources given these enforcement challenges.

The Coalition shares the Commission's view that there are serious enforcement issues to address: These issues include the following;

- a. Most pay equity plans from the early 1990's have never been amended, despite how out of date they are: many job classes no longer exist; many job classes have undergone substantial change; many new job classes for whom pay equity was never established have never been subjected to any pay equity process. As well, many new organizations and businesses have been established since the early 1990's and failed to set up their workplaces with pay equity compliant wages as the *Act* requires.
- b. Many public sector women's jobs have been privatized, with women having to leave behind their pay equity adjusted wages. With downsizing, those women's jobs that remained were given increasing responsibilities but without the appropriate pay equity adjustment required by the original plan;
- c. With the end of the "Charter" settlement payments in 2006, women working in the predominantly female public sector workplaces who used the "proxy" method are once again left without the necessary funding to ensure that they receive the pay equity adjustments identified in their 1993 pay equity plans. These women are far from "achieving" pay equity, and at the same time are seeing themselves fall far behind their comparators in the public sector.

- d. As well, private sector employers now employ increasingly fewer “employees” as they seek to transform their employees into independent contractors to avoid legislative employee entitlements, such as pay equity.
- e. With the weakening of Ontario’s labour laws in the mid-1990’s, women employees facing worsening employment conditions find it increasingly difficult to gain collective bargaining rights and therefore a bargaining agent to claim their pay equity rights.

Pay Equity Enforcement Must Adapt to Constant Workplace Change

Pay equity enforcement in 2007 must recognize that ongoing workplace change is a given in a new economy where women’s work is increasingly precarious and insecure. Despite such constant change, pay inequities and the prejudices about women’s work remain a persistent feature of globalized work. Women who are also disadvantaged as a result of prejudice based on race, disability and aboriginal status experience these inequities most acutely. Ontario, despite its *Pay Equity Act* is no exception to this global pattern of discrimination. Without constant pro-active vigilance and enforcement which recognizes and adapts to these changing patterns of underpayment, any pay equity gains that were made in the early 1990’s by mostly unionized workers will be eroded and those who never achieved pay equity will be consigned to ongoing discriminatory pay conditions. It would be difficult to find any Ontario public or private sector workplace where the structure and conditions of women’s and men’s jobs are the same as they were 20 years ago. Yet, the Commission in its policies and practices appears to assume the early 1990’s status quo and places a heavy onus on complainants to prove change has taken place. Given the *Act’s* recognition that systemic discrimination is widespread and given workplace change is a constant, the onus should be on employers, not on employees or trade unions, to show how they have taken the steps over the years to maintain equitable wages for women’s work.

It is clear that the current enforcement procedures and policies are not working. The reasons for this are varied. Some lie with the structure of the Act itself. Others lie with the determination of many employers to avoid their pay equity obligations. But unfortunately some also lie with the Commission’s policies and practices.

Exchange of Communications between the Commission and the Ontario Federation of Labour and Various Unions

We have reviewed with concern the exchange of correspondence dated July 18, 2007 and July 25, 2007 between the Commission and the Ontario Federation of Labour, OPSEU, CUPE, OSSTF, and USW District 6. The Coalition shares the concerns raised by the OFL and the Unions in their letter.

While the Coalition appreciates some of the points made in the Commission's letter of July 25, 2007 and applauds various Commission initiatives, it is difficult not to see the Commission's recent restrictive intake procedures and maintenance interpretations as being directed more at deflecting demands for its rationed staff time and resources than as being appropriate, pro-active interpretations of the *Pay Equity Act*. The Commission has been placed by the Government in the unenviable position where it appears to be choosing what parts of the *Act* it is able to commit resources to enforcing.

The Coalition welcomes the Commission's recent efforts noted in its letter to focus on the "targeted monitoring of sectors, such as retail where women employees are particularly vulnerable and unrepresented". However, the non-compliance problem is widespread and one finger in the dyke will not address the serious non-compliance problem which exists. There is clearly a need to develop innovative new strategies, pro-active interpretations of the existing *Act* and potentially new legislative mechanisms to address the many diverse forms of women's work in Ontario - public and private sector - unionized and non-unionized. The Coalition hopes that the Commission will be open to reassessing its policies and practices so that it can make the public and private sector in Ontario widely "pay equity compliant".

The Proper Approach to Pay Equity Maintenance and Enforcement

Given the current differences between the Commission and the OFL, Unions and the Coalition on pay equity enforcement, the Coalition has appended to this letter, its view of the proper legal considerations which should be informing the Commission's enforcement of the *Act* in both a unionized and non-unionized context.

As the Commission acknowledges in its letter of July 25, 2007, trade unions have played a key role in the *Act's* enforcement. They have been struggling to make employers comply with their maintenance obligations by trying to establish joint maintenance processes and committees which would lead to the necessary pay equity adjustments and amended Pay Equity Plans. However, this effort is now being undermined by the Commission's recent maintenance policies. The July 25, 2007 letter states that there is no obligation under the *Pay Equity Act* for a union or employer to negotiate a pay equity maintenance plan or set up terms of reference for a process to review the existing pay equity plan. These steps have been referred to as a "cadillac approach". Nothing could be further from the truth.

For the reasons highlighted in Appendix "A", such steps are not only consistent with Tribunal jurisprudence but they are also consistent with the other legal obligations of workplace parties. Given the wording of sections 7, 13, 14.1 and 14.2 of the *Act* and the requirements of the *Human Rights Code* and the *Labour Relations Act*, pay equity enforcement by the Commission requires a pro-active interpretation. The Commission's new approach to the filing of complaints and its instructions to Review Officers with respect to pay equity maintenance negotiations reflect a failure to properly understand that the pay

equity, human rights and collective bargaining responsibilities of employers and trade unions are inextricably linked and mutually reinforcing.

The Coalition requests that the Commission reconsider its approach in light of these considerations. Otherwise, it appears that the trade unions will once again have to engage in lengthy litigation at the Tribunal in order to establish the appropriate pay equity maintenance precedents and overturn Review Officer Orders based on erroneous Commission policies. This happened with some regularity in the late 1980's and early 1990's requiring very expensive litigation by unions at the Tribunal in cases such as *ONA v. Regional Municipality of Haldimand Norfolk*, *ONA v. Women's College Hospital*, *OPSEU v. Cybermedix* and various CUPE decisions. While these Unions all established through Tribunal litigation precedents which then bound the Commission and continue today as the leading cases, such a litigation approach wastes much needed resources which could be used to tackle the many enforcement issues. In addition, non-unionized women who cannot afford to litigate, are left without any recourse.

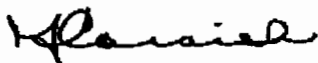
Restoration of Commission Funding

As you indicated in your Fall, 2006 speech, the Commission's resources for addressing its responsibilities are very limited and a far cry from those available to the Commission when it started in 1988. The Commission itself has been a victim of the new economy and governmental downsizing. This is not acceptable and the Coalition is calling for the Commission to be restored to the funding level needed to address its many enforcement responsibilities.

Conclusion

The Coalition looks forward to meeting with the Commission to discuss these issues. A campaign to bring pay equity to all Ontario women is greatly needed. We hope that the Commission will join this campaign and that the concerns we have raised in this letter can be addressed.

Yours truly



Mary Cornish,
Chair,
Equal Pay Coalition

cc. Wayne Samuelson, Terry Downey and Irene Harris, Ontario Federation of Labour
Honourable Steve Peters, Minister of Labour,
Andrea Horwath, New Democratic Party Women's Critic
Christine Elliott, Progressive Conservative Party Women's Critic
Warren (Smokey) Thomas, President, OPSEU
Paul Moist, CUPE National, President
Sid Ryan, CUPE Ontario, President
Ken Coran, OSSTF, President
Wayne Fraser, USW District 6, Director

Appendix "A"

Pay Equity Responsibilities of Employers and Bargaining Agents

Requirement to Maintain Pay Equity

The purpose of *Act* as stated in section 4(1) is to "redress systemic gender discrimination in compensation for work performed by employees in female job classes". The *Act* recognizes that pay equity once established through the initial pay equity plan, must be maintained as required by sections 7, 13, 14.1 and 14.2.

Employers and Unions Cannot Contract out of the *Act*

As the Divisional Court in the *Ontario Northland Transportation* case made clear, neither employers or unions are entitled to contract out of the provisions of the *Act*. As a result, the deemed approval sections of the *Act* with respect to the original pay equity plans do not insulate either party from ensuring that the appropriate steps are taken to ensure that those doing women's work continue to have their compensation cleansed of discrimination both with respect to salary and benefits. The deemed approval provisions only relate to "compensation practices that existed immediately before the effective date", namely January 1, 1988. (See para. 34 of the *Ottawa Board of Education* decision which cites section 13(11) of the *Act*.) All employers in Ontario, regardless of whether they have deemed approved pay equity plans are subject to complaint if their compensation practices subsequent to January 1, 1988 do not result in pay equity compliant wages. There is no time limit on filing complaints.

Pay Equity Obligations of Unions

Unions have the obligation under section 7(2) of the *Act* not to "bargain for or agree to compensation practices, that if adopted would cause a contravention of subsection (1)." - that is would fail to establish or maintain pay equity.

Intersection of *Pay Equity Act*, *Human Rights Code* and *Labour Relations Act* Obligations of Unions and Employers

The obligations of employers and unions under the *Pay Equity Act* must be interpreted in a proactive manner which is consistent with their other intersecting human rights and labour relations obligations.

- a. Where there is a bargaining agent for female job classes, the employer has the obligation to negotiate exclusively with that agent concerning all matters which affect the compensation of those job classes. This exclusive obligation flows from the provisions of the *Labour Relations Act* and its jurisprudence.
- b. Unions have a co-existing proactive obligation under the *Human Rights Code* and under the *Labour Relations Act* to carry out their representational

obligations under the *Labour Relations Act* and pursuant to any collective agreement in a manner which promotes the equality of its women members and those doing “women’s work”.

- c. Under the *Human Rights Code*, the bargaining agent and any employer both have pro-active obligations to ensure that any decisions affecting the compensation of women’s work (ie. all such decisions since the original Pay Equity Plan) are free from unlawful gender discrimination. The Supreme Court of Canada’s decision in *British Columbia (Public Service Employee Relations Commission) v. B. C. Government and Service Employees Union (re: Tawney Meiorin)* The Court expressly rejected the concept that it should be left to equality seeking employees or unions to complain later about workplace standards. Instead, the Court found such standards and rules (which would include compensation standards and rules) must be designed from the outset to incorporate the realities of women’s work and its systemic undervaluation and underpayment. This includes a positive obligation to take measures to find out whether discrimination exists and to prevent future discrimination.

“Employers designing workplace standards owe an obligation to be aware of both the differences between individuals and differences that characterize groups of individuals. They must build conceptions of equality into workplace standards. By enacting human rights statutes and providing that they are applicable to the workplace, legislatures have determined that the standards governing the performance of work must be designed to reflect all members of society in so far as reasonably possible. “ para. 68.

Requirement for Joint Maintenance Committees and Amended Pay Equity Plans

The Tribunal in the Ottawa Board of Education states as follows:

“The direction given to Part II employers is that when the impact of on-going maintenance amounts to changed circumstances in the establishment making an already deemed approved plan no longer appropriate, the plan is to be amended. Where there is a bargaining agent, these amendments are to be negotiated with the bargaining agent. Once amended pursuant to s. 14.1, the amended plan is again deemed approved, ss. 14.2(2) and s. 14(5). Where there is no bargaining agent, the amended plan is to be posted by the employer” ss. 14.1(5), ss. 14.2(1).

The requirement for Pay Equity Maintenance Committees including the bargaining agent or if none, affected employees flows not only from the above decision but from a number of other requirements.

- a. Many Gender Neutral Comparison Systems provided for in the *Act* and agreed to between bargaining agents and employers as the foundational basis of the valuations in the original Pay Equity Plans, provided for the use of the a joint pay equity committee as an essential feature of arriving at a gender neutral pay equity plan. As a result, these committees must continue to be used by employers as a required feature of the pay equity maintenance process. Such committees are also essential in order to ensure that the pay equity maintenance process, both its job content collection and evaluation processes are suitably informed by the job knowledge of the workers who are considered to have the best knowledge concerning their work, as distinct from their supervisors who currently dominate the compensation process. Unfortunately, most employers disbanded their committee after the original Pay equity Plan was posted. It fell to Unions to struggle to have those Committees recreated as maintenance committees.
- b. In the context of a unionized workplace, it is necessary for the employer to undertake the process of maintenance jointly as no adjustment to compensation can be made without the consent of the bargaining agent. In order for the Union to be appropriately satisfied about consenting to any adjustment, there is a legal obligation for it to be involved in the decision-making in order that the Union could properly carry out their representational and pay equity and human rights responsibilities.

Closing the Maintenance Gap

The parties must clearly distinguish in their compensation negotiations between negotiations for collective bargaining compensation adjustments or regular wage increases and those adjustments which are required to establish or maintain pay equity. Where this is not done, female job classes either fail to receive the adjustment necessary to bring their compensation to a level playing field with comparable male job classes or else lose out on receiving the regular wage adjustments that such male job classes receive. Regular wage adjustments do not count as pay equity adjustments and the use of separate maintenance committees and procedures helps to keep these procedures separate and pay equity compliant.

Monitoring Gender Incumbency of Job Classes

Employers are required as part of its maintenance obligations to monitor the ongoing gender incumbency of the job classes which are set out in the original Pay Equity Plan and also any new job classes. See *Pioneer Youth Services* decision which states: "a change in gender incumbency over time may constitute a changed circumstance".