CAVALLUZZO

GUIDE

TO CLOSING WORKPLACE GENDER PAY GAPS

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By

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INTRODUCTION TO GUIDE

This updated CSMC Trade Union Guide gives an overview of employers' obligations and union's rights and obligations in respect of closing discriminatory gender-based pay gaps experienced by bargaining unit members. The right to pay and employment free from gender discrimination is a human right. Gender-based discrimination has contributed significantly to women's jobs generally being paid less than men's jobs of comparable value as well to women being found in the lower paying, lower valued jobs in workplaces.

This Guide gives trade unions and other equality seekers some useful tools to help in addressing these gender pay gaps which still permeate Canadian workplaces. While the Guide focusses on Ontario workplaces and laws, it provides information which is helpful across Canada. The Guide includes measures to ensure compliance under Ontario's *Pay Equity Act.* It also address measures to enforce the human rights of employees to employment equity – to be free from gender pay gaps either under the anti-discrimination provisions of the collective agreement, directly through a *Human Rights Code* application to the Human Rights Tribunal of Ontario or using the human rights provisions of the *Labour Relations Act.*

Appendix A	Pay Equity Act Compliance Checklist
Appendix B	Overview of the Pay Equity Act
Appendix C	Pay Equity Act Compliance – Making Visible and Valuing Women's Work
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Pay equity laws and policies are directed at ensuring that men and women are paid equally where they do work of equal value. Human rights and employment equity laws and policies are directed at ensuring that steps are taken to remove barriers and take positive measures to give women equal access to higher paying, often male-dominated work. Both laws and policies are necessary to close the gender pay gaps found in unionized and non-unionized workplaces.

Paying women fairly and providing them with equal opportunities in the labour market is essential to getting our economy back on track. Working women power Canada's economy. Closing workplace gender pay gaps is one of the key building blocks for forging a fair, productive and sustainable society.

This Guide was prepared by the CSMC pay equity team of lawyers – Mary Cornish, Janet Borowy and Jennifer Quito. It relies on the work from previous CHSMC Guides which also included contributions from Fay Faraday (ffaraday@faradaylaw.com) who continues to work with CSMC on pay equity compliance. Part A also relies on reports prepared by Mary Cornish for the Canadian Centre on Policy Alternatives (CCPA)[1].

PART A CLOSING GENDER PAY GAPS

1. The Right to Work Free of Gender Pay Gaps

The right to work free of discrimination in pay and employment is a fundamental human right.

[1] Cornish, Mary, *10 Ways To Close Ontario's Gender Pay Gap* (2013).and *Living Wage as a Human Right, 2012* Reports for Canadian Centre for Policy Alternatives www.ccpa.ca

It is often forgotten that human rights must be guaranteed since they are a right - not a privilege. Yet human rights recognition and enforcement are two entirely different matters.

Discriminatory pay gaps are a violation of human rights. The right of women to equal pay for work of equal value and equal treatment in pay and employment opportunities are internationally recognized human rights and labour standards. They are ratified by Canada and binding all the provinces.

Such international obligations require governments to have in place mechanisms which use the maximum available resources to "mainstream" or incorporate into all labour market mechanisms measures to ensure that women workers receive pay and employment opportunities without discrimination.

As well, Ontario's *Pay Equity Act* and *Human Rights Code* and the federal *Canadian Human Rights Act (CHRA)* represent Ontario's and Canada's guarantee to its women workers that they will not be denied equal treatment in compensation because they are women. Closing the gender pay gaps helps to create a more equal society. Equality is a centrepiece of effective democratic governance.

The discrimination which the *Pay Equity Act* and the *CHRA* equal pay for work of equal value provisions is intended to address is where female dominated jobs or "job classes" are paid less than male dominated jobs or job classes even though they have comparable skill, effort, responsibility and working conditions.

Human Rights Code provisions are intended to cover the situation where women in female dominated jobs are unable to effectively access higher valued and higher paid male dominated jobs because of workplace and other barriers. Examples of this are the fact that women dominate lower paying part-time work with unequal and vulnerable employment conditions or where women are denied access to the training and supports needed to get higher paying jobs.

Section 5 of the *Code* provides for equal treatment in employment based on sixteen grounds: sex, race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sexual orientation, gender identity, gender expression, age, marital status, family status, disability and record of offences (in employment only). Section 6 of the *Code* obliges trade unions and other vocational associations to provide their services to members without discrimination.

Section 47 of the *Code* provides that it binds the Crown and its agencies.[2] The *Code's* primacy over all other laws is the basis for the Supreme Court of Canada`s decision in *Tranchemontage v. Ontario,* which held that all Ontario adjudicative tribunals with the power to interpret and apply law are required to interpret and apply the *Code,* and where appropriate, to decline to apply provisions of their constituent statute where they conflict with the *Code* (*Tranchemontagne v. Ontario (Director, Disability Support Program),* [2006] 1 S.C.R. 513. Since *Tranchemontagne,* administrative tribunals have become part of the human rights enforcement system.

As well, embedded in other laws are equality promoting provisions such as the requirement in Ontario's *Labour Relations Act* that collective agreements must not discriminate on *Code*

[2] *Human Rights Code, s. 47(2)*. "Where a provision in an Act or regulation purports to require or authorize conduct that is a contravention of Part I, this *Act* applies and prevails unless the *Act* or regulation specifically provides that it is to apply despite this *Act*."

grounds and that arbitrators under collective agreements must interpret and apply the *Code*.[3] The labour relations collective bargaining and grievance adjudication system is one of Ontario's largest "systems" for enforcing human rights.

2. What is the Gender Pay Gap?

There are some indisputable facts. Gender pay gaps are one of the most enduring features of world labour markets. While discriminatory pay gaps are against the law, the lived reality of women is a far cry from their legal entitlements. For a discussion of this see the Canadian Centre for Policy Alternatives April 9, 2013 report by Mary Cornish, *10 Ways to Close Ontario's Gender Pay Gap*.

The overall gender pay gap represents the difference between the earnings of men and women. It can be measured in a number of different ways including total average annual earnings and full-time full-year or hourly.

Ontario's gender pay gap based on all average annual earnings is 28%. This measure includes all types of work including part-time and contract. This means on average women 72% of what men earn. When a full time full year measure is used, the gap is about 24%. The average hourly earnings difference in Ontario as of February 2013 for men and women workers is $25.99 for men and $ 22.78 for women or $3.21 an hour. [4]

As highlighted by the 2004 Federal Pay Equity Task Force report, gender pay gap are experienced more acutely by those who experience multiple forms of discrimination. Racialized women, immigrant women, Aboriginal women and women with disabilities suffer from substantially higher pay gaps. For example, racialized women in Ontario were short-changed 47 cents for every dollar non-racialized men got paid for work in 2005.[5]

While some progress has been made, the 2012 CCPA report by Mary Cornish, "A Living Wage as a Human Right" documents how discrimination continues to affect the ability of many such workers to earn a living wage. This persistent state of inequality continues while the income of the average CEO has grown to 189 times the income of the average Canadian.[6]

While some argue that the hourly difference is the best statistical measure, the measure of total earnings is the calculation that governments and policy makers should look at in order to determine what measures will actually make a difference in bringing equality to the pay cheques of men and women at the end of the year. It is for this reason Ontario's Equal Pay Coalition has focussed on the 28% gender pay gap. See also the Equal Pay Coalition website: www.equalpaycoalition.org/about-pay-equity/about-the-pay-gap.

Women workers are often segregated into low wage job ghettoes. Those who experience discrimination on a number of grounds also suffer from wider pay gaps. Women's work is devalued and the problem is systemic. The building blocks of a discriminatory society go deep,

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3 ***Labour Relations Act*, 1995, S.O. 1995, c. 1,** ss 48(12)(j) and 54

4 See Mary Cornish, *10 Ways to Close Ontario's Gender Pay Gap*, above.

5 Sheila Block and Grace-Edward Galabuzi, *Canada's Colour-Coded Labour Market,* 2011, ccpa.ca.

6 See Mary Cornish, *Living Wage as a Human Right,* above.

and arise from diverse and intersecting grounds, sustained by systemic discrimination in employment, education, health, services, housing, and political and social exclusion.

While some progress has been made in closing the gender pay gap, women should not still be taking home on average 72 cents to the male dollar given their increasing and greater education and their rising labour force participation. In Ontario, 58.2% of women are employed compared to 64.4% of men. Women for years have been investing significant time and resources in their education (now making up the majority of undergraduate & master's degree holders).

Yet women still earn less in all occupational categories and at all education levels. 62% of Canadian university undergraduate students are women. Even though women are more likely than men to go to university or college, they don't necessarily end up getting paid better once they're in the work force. In fact there is a higher percentage gap - 39%- between women and men's earnings for those between the ages of 35 and 44.

While the gender pay gap based has decreased in Ontario from 38% at the time of the passage of the 1987 *Pay Equity Act* that decrease does not represent only more earnings for women but rather also reflects decreases in male earnings, particularly with the loss of higher paid male dominated jobs particularly in the manufacturing sector.

The ILO in its 2012/13 Global Wage Report refers to this as the "composition effect". Noting that the average gender pay gap has declined in the crisis years in most countries, the ILO Report states that the decline does not necessarily imply that the situation of women has improved but rather than the labour market circumstances of men have deteriorated. In addition, given the increasing human capital attainments of women and their rising labour force participation, the gender pay gap should have been decreasing very significantly on those grounds alone.

Ontario is also lagging behind other countries in closing the gender pay gap. In Australia, the gender pay gap based on average weekly full time earnings is about 17%. The gender pay gap in the US based on median full-time, full-year earnings at 23% is almost the same as Ontario's gender pay gap based on the same measure. We need to be seeing much greater progress.

Regardless of the measure, these gender pay gaps are shockingly high given that more than 60 years has passed since world governments through the ILO passed Conventions 100 and 111 requiring equal treatment in employment and occupations and equal pay for women for work of equal value with that of men. At this rate of progress, women will have to work 13 years longer in order to earn the same pay which men earn by age 65.

Obviously, the current measures to address pay discrimination and inequalities are not effective enough. Women are still far behind the male starting line in the labour market**.**

3. What is the Impact of Gender Pay Gaps?

Canada's labour markets continue to operate to keep many women struggling at the bottom of the Occupy Movement's "99%". Women, particularly those who are multiply disadvantaged, are the face of poverty and joblessness and those most impacted by the intensification of work across Canada.

As labour market expert Monica Townson states, "Canadian Women On Their Own are Poorest of the Poor." Her CCPA report "Women's Poverty and the Recession" found that in Ontario, 20% of women are in low-wage occupations, compared to 10% of men.

Enforcing the human rights of all workers to be free of pay discrimination is a key step to lifting such workers up to a living wage. Women account Canada-wide for 60% of all minimum-wage workers. This over-representation of women at low wages was observed for all age groups. Poverty follows women into their retirement with data showing that 41.5% of single, widowed or divorced women over 65 live in poverty.

The bottom line is that bringing home substantially less pay than men follows women throughout their lives, putting women and their children at a higher risk for poverty and reducing their lifetime earnings and retirement income.

The gender pay gap also widens when women have children, and particularly when they work part-time. Women with children earn additional an 12% less than women without children. Women's opportunities for progression and higher pay in the workplace are limited by the family responsibilities which they still bear disproportionately. While the vast majority of mothers now work in the paid labour force – almost 70% of women with children under 5 are working – women with children have a significantly lower employment rate than men with children.

More than 7 out of 10 part-time workers are women, a feature of the labour market which has not changed significantly over the years. This means women are much more likely to hold multiple and non-permanent jobs. When you combine this with the fact that 60% of women are minimum wage earners, women's vulnerability to low pay is clear. As well, women predominate in sales, service and health care occupations where part-time work is the way employers structure their compensation practices. In other words, women's part time work is often not a choice but a feature of their work life imposed by the labour market objectives of employers who often resist employing many full-time workers.

4. Why Are There Still Gender Pay Gaps?

Gender pay gaps are the result of many different and intersecting causes. Women face systemic barriers in accessing the same pay as men throughout their lives. According to an expert report by international pay equity scholar Dr. Pat Armstrong, the gender pay gap is caused by the following three features of Canada's labour market which operate together to deliver substantially less pay to women than men:

(a) The majority of women are segregated from men into different work and different workplaces. In Canada, 67% of women work in traditional occupations such as teaching, nursing, clerical, admin or sales and service jobs in 2009;

(b) In general, women's segregated work is paid less than men's work and the higher the concentration of women, the lower the pay. Women's skills and competencies are undervalued because of their association with women as are sectors and industries such as health care and services in which women predominate; and

(c) Women's lower pay reflects the systemic undervaluation of women's work relative to that of men.

The above three factors, Dr. Armstrong writes:

> *"combine to create pervasive and often invisible discrimination….The size and persistence of the wage gap clearly indicates that the problem does not stem simply*

from individual women and their capacities or from the practices of a few employers. Although there are certainly differences in the way individual women are treated by individual employers, women as a group face a common set of practices that disadvantage them in the labour force."

These include gender-biased compensation and employment practices, absence of employment equity laws and insufficient employment and training supports, lack of affordable child care and accommodation of care responsibilities, to name a few. Dr. Armstrong's 2008 Report "Equal Pay for Work of Equal Value" [7]sets out a detailed explanation of the factors which cause the gender pay gap.

In Ontario there are also some very specific problems contributing to the current ongoing gender pay gaps.

While pay equity was implemented initially mainly for workers who had a union to fight for them, most of the original pay equity plans negotiated and implemented back in the 1990's have not been maintained properly. With workplaces undergoing widespread changes since 1990, either through mergers, restructurings, layoffs, new and changed jobs and requirements, the old pay equity plans are out-dated and are of little help in determining whether male and female comparable jobs in workplaces are being paid the same. Many businesses also came into existence after 1990 and have not carried out pay equity compliance measures.

Most employers are ignoring their obligations and some unions who are inundated with many pressing workplace problems have not given pay equity enforcement sufficient priority. With many women's jobs being paid at discriminatory wages, there is an urgent need to take strong enforcement measures.

In addition to the difficulties in enforcing the *Pay Equity Act,* there are also the difficulties experienced in enforcing employment equity obligations of employers so that women in female dominated jobs are able to access higher paying male dominated work. In 1995, the Ontario government repealed the *Employment Equity Act, 1993.*

(d) Why Does Closing the Gender Pay Gap Matter?

Pay equality matters because it is a fundamental human right as described above.

But it also matter of economic and social importance. As stated by the World Economic Forum in its 2013 Global Gender Gap Report: ``The most important determinant of a country's competitiveness is its human talent—the skills, education and productivity of its workforce—and women account for one-half of the potential talent base throughout the world."

The World Bank President also captures this point well: "When countries value girls and women as much as boys and men; when they invest in their health, education, and skills training; when they give women greater opportunities to participate in the economy, manage incomes, own and

[7] Expert report by Dr. Pat Armstrong prepared for the Public Service Alliance of Canada in the Federal Court of Canada proceeding, Public Service Alliance of Canada and Nycole Turmel v. Her Majesty the Queen in Right of Canada Court File T-1949-00, June, 2008.

run businesses – the benefits extend far beyond individual girls and women to their children and families, to their communities, to societies and economies at large."

As well, women, families, communities and the economy suffer where there is pay inequality. The estimated annual lost income potential of Canadian women due to the pay gap, according to 2005 Royal Bank of Canada report was $125 billion.

Closing the gender pay gap benefits employers and workers by creating quality jobs with fair pay. The skills and abilities of working women are vital to economic and social development at all levels of the province starting at workplaces, in communities and through the provincial economy. We need a society which rewards everyone fairly for their work regardless of their gender.

In 1988, with the passage of Ontario's *Pay Equity* Act, the Government pledged an "unalterable commitment" to end pay discrimination.[8] Yet, the Pay Equity Commission acknowledges that there is widespread non-compliance with the law. As well, women in workplace with less than 10 employees are not covered by the law. Further, not all gender pay gaps are closed by the *Pay Equity Act.*[9] There is need to revisit the scope of the *Pay Equity Act* and its enforcement machinery as well as to design new mechanisms for bringing pay equity enforcement to all Ontario women, particularly those who are not unionized.

5. What are the Legal Obligations to Close the Gender Pay Gap

(a) *Pay Equity Act*

Pay equity laws implement Convention 100 by requiring employers, working with unions if any, to develop plans or measures to compare using the criteria of skill, effort, responsibility and working conditions the value of female-dominated work (eg a registered practical nurse) with that of male dominated work such as a paramedic or IT professional. Where the work is comparable in value but the male job is paid more, the female job must be increased in pay to the comparable male job.[10]

Ontario's *Pay Equity Act* is a human rights remedy designed to rectify and prevent the persistent and systemic compensation discrimination experienced by women arising from their labour market occupational segregation and the prejudices and stereotypes, sustained by labour market practices, which had under-described, under-valued and underpaid women and their work relative to men and their work.

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[8] See Equal Pay Coalition, *Framework for Action*, 2008 supra.

[9] See decision of the Ontario Divisional Court in *CUPE Local 1999 v. Lakeridge Health Corp.,* 2011 ONSC 2804 (CanLII), <http://canlii.ca/t/flj1h which held that unequal wage grids were not unlawful under the *Pay Equity Act* even though they delivered less pay to female job classes than their comparator male job classes.

[10] For description of the operation of Ontario's *Pay Equity Act* see the Pay Equity Commission website, www.pec.on.ca.

Employers are required under s. 7 of the *PEA* to achieve and maintain pay equity for their workers, whether represented by a union or not so long as the employer has 10 or more employees or is a public sector employer of any size.

Employers in smaller workplaces are not required to prepare pay equity plans but must still "establish and maintain compensation practices that provide for pay equity." *Commport Communications International* (No.2).

A bargaining agent has an obligation under section 7(2) of the *PEA* not to bargain for or condone compensation practices that would contravene that law.

For a fuller explanation of the *Pay Equity Act* provisions, see the CSMC *Overview of the Pay Equity Act* attached as Appendix B to this Guide.

(b) *Human Rights Code* Obligations

Employer and bargaining agents also have broader equity and collective bargaining responsibilities provided for in other workplace laws.

Bargaining agents have a proactive obligation under the *Human Rights Code* to carry out their representational obligations under the *Labour Relations Act (LRA)* and pursuant to the collective agreement in a manner which promotes the equality of its women members and those doing "women's work".

> *6. Every person has a right to equal treatment with respect to membership in any trade union, trade or occupational association or self-governing profession without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, marital status, family status or disability.*

The basic right of employees to equal treatment in pay and employment conditions is set out in s. 5(1) of the *Code*

> *5. (1) Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, record of offences, marital status, family status or disability.*

A unionized employer has the obligation to negotiate exclusively with the trade union concerning all matters which affect the compensation of those job classes. This exclusive obligation flows from the provisions of the *LRA* and its jurisprudence. Similarly, under the *Code,* both a trade union and employer have positive obligations to ensure that the decisions affecting the compensation of women's work performed in that bargaining unit.

As well, "special programs" or employment equity plans are protected from been held discriminatory as reverse discrimination under section 14(1).

> 14. (1) A right under Part I is not infringed by the implementation of a special program designed to relieve hardship or economic disadvantage or to assist disadvantaged persons or groups to achieve or attempt to achieve equal opportunity or that is likely to contribute to the elimination of the infringement of rights under Part I.

The Federal pay equity and human rights obligations are set out in Part H below. See also Part B.7, F & G for discussion of securing human rights and employment equity obligations.

PART B – STEPS FOR CLOSING THE GENDER PAY GAPS

Given the complexity of the forces operating in the discriminatory labour market, closing the gender pay gaps requires many co-ordinated actions by many diverse labour market actors and institutions.

1. 10 Key Province-Wide Steps for Closing the Gender Pay Gap

The CCPA Report, 10 Key Steps to Closing Ontario's Gender Pay Gap identifies the province-wide required steps as follows:

(a) Treat Closing the Gap as a Human Rights Priority;

(b) Raise Awareness through Education and Equal Pay Days

(c) Develop Closing the Gender Pay Gap Plans;

(d) Enforce and Expand Pay Equity Laws;

(e) Implement Employment Equity Law and Policies;

(f) Promote Access to Collective Bargaining;

(g) Increase the Minimum Wage;

(h) Provide Affordable and Accessible Child Care;

(i) Mainstream Equity Compliance Into Government Laws and Policies;

(j) Mainstream Equity Compliance into Workplaces and Businesses.

2. Workplace Steps for Closing the Gender Pay Gaps

This Guide focuses on the following key steps for closing gender pay gaps at the workplace level:

(a) Treat Closing the Workplace Pay Equity Gaps as a Human Rights Priority;

(b) Raise Awareness through Ongoing Education and Equal Pay Day Activities;

(c) Develop Workplace Closing the Gender Pay Gap Plans;

(d) Close Pay Gaps by Enforcing Employment Equity Obligations;

(e) Close Pay Gaps by Unionizing Workers;

(f) Close Pay Gaps through Pay Equity Act Enforcement;

(g) Close Pay Gaps through Collective Bargaining; and

(h) Close Pay Gaps through Human Rights Enforcement

3. STEP #1 Treat Closing the Gap as a Human Rights Priority – It's a Right Not a Raise

Focusing on closing the gender pay gaps as a human rights violation that must be remedied is an important way to keep the issue at the forefront of employer and union priorities. Given how much money is lost from bargaining unit members pocketbooks as a result of discriminatory pay gaps, both employers and unions need to make these human rights violations a priority for workplace actions and for union resources.

When dealing with workplace pay equity compliance, it is important to keep at the forefront of discussions with the employer that pay and employment discrimination is unlawful and will not be tolerated. Measures to close the pay gap have to treated with special importance as human rights remedies.

Women's right to equal pay and employment opportunities is not a "frill" or a "perk" to be ignored when inconvenient or costly. Human rights are supposed to be "guaranteed" and a human-rights based focus keeps this guarantee in the forefront.[11] This is particularly important when it comes to discussions about austerity measures.

Making those workers who are owed pay equity adjustments or require equality promoting measures bear the brunt of austerity measures sets back the cause of gender equality many years and will increase rather than close the pay gaps. Women need support and effective laws and policies to get an equal place in the labour market before they are asked to bear any unfair share of austerity measures.

4. STEP #2 Raise Awareness Through Education and Equal Pay Days

Despite the overwhelming evidence of the gender pay gap, there are many who believe, including some bargaining unit members and union officials that it is no longer a problem. There is a need to raise awareness about the gender pay gap in order to ignite action to close it. Annual or even weekly or occasional Equal Pay Days are a key way to do this

Annual Equal Pay Days have been proclaimed around the world by governments such as the US, EU, and Australia.[12] No such days have been proclaimed by Canada or provincial governments. US President Barack Obama well described its purpose in his 2012 EPD proclamation: "to recognize the full value of women's skills and their significant contribution to

[11] See discussion of a human-rights based analysis in *A Living Wage as a Human Right*, above and in Mary Cornish, Closing The Global Gender Pay Gap: Securing Justice for Women's Work (2007). *Comparative Labor Law & Policy Journal* 28(2).

[12] See http://www.equalpaycoalition.org/take-action/ for brief description of world Equal Pay Days.

the labour force, acknowledge the injustice of wage discrimination and join efforts to achieve equal pay."[13]

Ontario's Equal Pay Coalition declared April 9, 2013 Equal Pay Day in Ontario, the same day it is recognized in the US.[14] This day represents the fact that women in Ontario on average must work more than 15 months into the new year in order to earn what men earn on average by the end of the previous year.

The EPC called on Premier Kathleen Wynne to officially declare an annual EPD in Ontario starting with April 9, 2013. By asking everyone to join in and wear "red" to signify how far women are in the "red" when it comes to their pay, the day is aimed at bringing everyone together (including legislators, policy makers, employers, trade unions and employees) to discuss the issue and ignite action to close the pay gap. The goal is that Equal Pay day will be earlier each year if the pay gaps start to be addressed.

The Equal Pay Coalition website – fairontario.ca – has many ideas for holding Equal Pay Day events. For example, you can hold Equal Pay Day lunch time workplace events – sell muffins at 72 cents for women and a $1 for men.

Awareness of pay and employment equity issues and compliance can also be embedded in union workplace educational materials.

5. STEP #3 Develop Workplace Closing the Gender Pay Gap Plans

Workplaces need a road map to establish freedom from pay and employment discrimination and to close the gender pay gaps. "Pay Equity Plans" have so far been the primary way of doing this since the *Pay Equity Act* requires such plans in certain circumstances. Employment equity plans were required under Ontario's 1993 *Employment Equity Act* which was repealed in 1995 before they could be implemented.

So in addition to having the statutory Pay Equity Plan, another idea is to negotiate an umbrella "closing the gender pay gap" plan – which would incorporate the *Pay Equity Act* plan as well as other employment equity planning measures to address the other gender pay gaps.

Solving a persistent problem requires employer and union leadership and planning - analyzing what works, what doesn't and what further steps or revisions to a plan are necessary. Creating significant workplace change of this magnitude requires information about the barriers and issues, workplace negotiations, and a clear action plan with realistic and timely goals and targets and resources.

As highlighted above, reducing the gender pay gap requires action on many fronts. With the twentieth anniversary of Ontario's *Pay Equity Act* in 2007, the Equal Pay Coalition started its

[13] http://www.whitehouse.gov/the-press-office/2012/04/17/presidential-proclamation-national-equal-pay-day-2012

[14] See the US National Committee on Pay Equity website for US Equal Pay Day actions. http://www.pay-equity.org/day.html.

campaign calling on the Ontario Government to develop, implement and resource a province-wide Closing the Gender Pay Gap plan to close the 28% gender pay gap by 2025 as well as plans at the community and workplace levels. [15] The Coalition's 2007 Framework for Action as well as recent 2013 letter to Premier Wynne calls on the Government working with opposition leaders to establish such a Plan.[16]

Ontario's 1987 *Pay Equity Act* was passed as a result of the NDP–Liberal 1985 Accord which had pay equity in both party platforms, While Ontario's gender pay gap has decreased as a result of that law and other measures, the gap is still far too high. There is a need to leverage that same co-operation which brought Ontario's law to now take the next generation of steps which will close Ontario's gender pay gap.

6. STEP #4 Close Pay Gaps by Enforcing Employment Equity Obligations

(a) Introduction

Employment equity means having a workplace free of discrimination. In the context of closing gender pay gaps, it means having a workplace where women are able to access higher paying work now often dominated by men or removing barriers which restrict women's ability to access full time work with proper pay and benefits.

With a weakly enforced federal *Employment Equity Act,* and with the provinces lacking similar specialized employment equity laws, Justice Rosalie Abella's 1984 urgent call for effective employment equity enforcement remains largely unanswered (Royal Commission Report on Equality in Employment). Equality-seeking groups such as Ontario's Colour of Poverty Campaign and the EPC have been urging provincial governments to pass specialized employment equity laws and have been calling on the federal government to strengthen – not weaken – federal employment equity obligations.

(b) Special Employment Equity Laws and Federal Contractors Programme

For federally regulated workplaces even the weak federal *Employment Equity Act* still requires employers to take important steps. (see 6 c. below) As well, the Federal Contractors' Program (FCP) administered by Human Resources and Skills Development Canada (HRSDC), requires provincially regulated employers with 100 or more employees bidding on federal contracts of $200,000 or more to certify that they will implement employment equity measures. While a federal Conservative omnibus budget bill eliminated the mandatory statutory language for this programme, the FCP still exists to date. Many large provincially regulated employers who have federal grants are covered, like universities and colleges.

(c) Securing Employment Equity Through Human Rights Enforcement

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[15] The Framework for Action, The Equal Pay Coalition of Ontario, 2008, http://www.equalpaycoalition.org/wp-content/uploads/2011/09/Framework-for-Action-EPC-2008-C0308.pdf.

[16] See http://www.equalpaycoalition.org/take-action/

Even without specialized employment equity laws or FCP obligations in place, the existing human rights jurisprudence requires that employers take employment equity measures in order to comply with their human rights obligations under human rights codes and collective agreements and other human-rights related laws such as the *Labour Relations Act* and the *Employment Standards Act.*[17]

Canadian courts and adjudicators have identified wide-ranging employment equity obligations which bind employers and trade unions, whether or not they are covered by the federal *Employment Equity Act*. These employment equity obligations flow from the inter-connecting and wide-ranging matrix of pro-active equity obligations which arise from federal and provincial human rights laws and policies, the *Charter,* labour relations and pay equity laws, and collective agreements.

While employees represented by unions have greater employment equity protections flowing from their collective agreements and labour relations law, non-unionized employees also have employment equity rights flowing from general and specialized human rights laws. Powerful jurisprudence, mostly from the Supreme Court of Canada, requires all employers to build a culture and reality of workplace equality by pro-actively designing workplace rules and practices to eliminate discrimination and promote the equality of disadvantaged groups.

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)* made it clear that the employer and bargaining agent if any have positive obligations to ensure that workplace standards and rules (which would include compensation standards and rules) must be designed from the outset to incorporate the realities of women's work. The Court found this included 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.*

Courts and human rights tribunals have repeatedly affirmed that human rights legislation must be interpreted contextually to adapt to changing conditions and have issued strong, transformative remedies that are aimed at securing the promise of human rights guarantee

The only way to carry out the powerful directions contained in this broad web of obligations is for employers, (with input from employees or in partnership with any union) to engage in pro-active employment equity planning and remedial measures such as those identified in the Abella Report and required by the federal *Employment Equity Act*: They are:

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[17] For a discussion of the enforcement of employment equity through human rights, see *Securing Employment Equity Through Human Rights Enforcement* by Mary Cornish, Fay Faraday and Janet Borowy, Chapter in forthcoming book, Employment Equity in Canada: 25 Years After the Abella Report, Agocs, C, Lynk, M and Craig, J (eds) Toronto: University of Toronto Press.

(i) mapping the demographics of the workforce;

(ii) identifying and eliminating barriers to full and equal workplace participation by groups experiencing discrimination;

(iii) instituting positive policies and practices to accelerate progress towards an inclusive workforce;

(iv) developing an employment equity plan; and

(v) monitoring plan compliance and revising the plan to meet changing circumstances.

In other words these employment equity planning steps can be part of the workplace closing the gender pay gap plan. The employment equity planning measures can help to close the gender pay gap by helping to move women into higher paying male dominated jobs or gain access to full-time work. Such planning helps to mainstream human rights compliance into workplace practices by measures such as analyzing the impact that recruitment and retention practices as well as pay and promotion structures and conditions of work have on vulnerable groups.

Despite the strongly-worded legal precedents and laws, employers have to a large extent ignored these pro-active planning and remedial measures and often exclude unions or their non-unionized employees from any human rights planning they do. Many still delay taking any action, hoping no complaint will be filed and that human rights and pay equity commissions are too weak or under-resourced to catch them.[18]

See also (1) Part G below re: Closing Pay Gaps Through Human Rights Enforcement for a further discussion of these issues; (2) *Securing Employment Equity Through Human Rights Enforcement* by Mary Cornish, Fay Faraday and Janet Borowy[19]; and (3) Pro-Active Employment Equity Obligations in Ontario's Provincially Regulated Workplaces by Mary Cornish and Fay Faraday. (www.cavalluzzo.com)

7. STEP #5 Close Pay Gaps by Unionizing Workers

(a) Unionization Reduces the Gender Pay Gap

Another key closing the gender pay gap tool is for Unions to organize to bring the benefits of unionization to more women's jobs. Unionization has been shown to be a fast way to increase women's pay. The "union advantage" in pay is on average $5.11 per hour compared to non-unionized workers.[20] As well, in Ontario where unions were given a joint role with employers to create pay equity plans, unionized women were much more likely to receive pay equity adjustments which helped to close the gap with their male co-workers performing work of comparable value.

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18 Cornish et al. *Securing Employment Equity By Enforcing Human Rights Laws*, above.

19 Cornish et al. *Securing Employment Equity By Enforcing Human Rights Laws*, above.

20 See *Living Wage as a Human Right*, above.

One reason that the pay gap has decreased over the years is the increasing unionization of women, particularly in the public sector. With the reduction in male-dominated and often unionized manufacturing jobs, the unionization rate for women is now 31.1% compared to 28.2% although much of that is due to their high presence in public sector jobs.

The private sector unionization rate for women is 12.5% compared to 19.0% for men because of their higher presence in sales and service occupations. Unionized part-time workers have higher hourly earnings and work more hours leading to average weekly earnings of $427.26 versus $240.39 for non-unionized part time workers. Yet, collective bargaining rights have been weakened in Ontario and across the country. As well, the privatization of public services has also led to women losing important pay equity gains they made as unionized workers in the public sector.

All of this means that union organizing departments should be seen as part of the team helping to close the gender pay gap.

(b) Use Securing Pay Equity Rights As An Organizing Tool

The quickest and most effective way to get pay equity for non-organized employees is to unionize and then:

(i) get a collectively bargained wage which will reduce the wage gap;

(ii) have a union take forward their claim for pay equity

Given the high degree of pay equity non-compliance in the unorganized sector, unions could offer to assist non-organized workers with securing pay equity as a technique for attracting workers to sign membership cards. As non-organized employers are liable for outstanding pay equity adjustments back to the effective date of their obligations, eg. in the public sector back to January 1, 1990, unions can assist workers to achieve substantial wage increases which will set a higher floor for bargaining once organized.

Most non-unionized workplaces have not seen any pay equity adjustments. With many workers not seeing much in the way of pay increases, pay equity adjustments are an important way to bring higher pay to women workers.

Unions could, as part of an ongoing attempt to organize a large non-unionized workplace, provide assistance to the workers to file *Pay Equity Act* complaints. As well, unions could notify the Pay Equity Commission to go into the workplace as part of their monitoring campaign.

As well, there are provisions in the *Pay Equity Act* which help unorganized employees to file complaints anonymously, using the union as their agent.

<u>Group Representation</u>

An employee or a group of employees may appoint any person or organization to act as the agent of the employee or group of employees before the Hearings Tribunal or before a review officer. s. 32 (3)

<u>Anonymous Representation</u>

Where an employee or group of employees advises the Hearings Tribunal or the Pay Equity Office in writing that the employee or group of employees wishes to remain anonymous, the agent of the employee or group of employees shall be the party to the proceeding before the Hearings Tribunal or review officer and not the employee or group of employees.

This agent, in the agent's name, may take all actions that an employee may take under this Act including the filing of objections under Part II and the filing of complaints under Part IV. s. 32 (4) -(5)

PART C STEP #6 CLOSING PAY GAPS THROUGH *PEA* ENFORCEMENT - ACHIEVING PHASE

8. Introduction

There are two clear stages required to comply with the *Pay Equity* Act in Ontario workplaces:

Step 1 Achieve Pay Equity

Step 2 Maintain Pay Equity

These obligations are set out in s. 7 of the *Pay Equity Act* as follows:

Section 7(1)

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

Section 7(2)

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

See Part H below re: Pay Equity Compliance in the federal sector.

9. Achieving Pay Equity

The initial stage in achieving pay equity consists of the process of identifying male and female job classes within the establishment, conducting gender neutral evaluations of the jobs, comparing the wages of female and male job classes of comparable value, developing a pay equity plan which identifies the extent of any discriminatory wage gap, and receiving pay equity wage adjustments that close any discriminatory wage gaps.

The *PEA* sets out the various methods and time tables for achieving pay equity for different sectors and sizes of employers: See *PEA*, Part II (public sector and large private sector employers), Part III (Small Private Sector Employers), Part III.1 (Proportional Value Comparisons) and Part III.2 (Proxy Comparisons).

The Tribunal has long-held that Part I of the Act sets out the general obligations of the *Act* as a whole. It also applies to new employers since 1988. Parts II, III.1 and III.2 of the Act specify the

technical steps to change compensation practices and the specific job class comparison methods required to meet these general overarching obligations. The obligation to maintain applies to all employers to whom the Act applies. *See: Group of Employees v. Ontario Public Service Employees Union,* [1993] O.P.E.D. No. 47.

The Cavalluzzo *Pay Equity Compliant Checklist (*See Appendix A) June, 2013 helps to effectively consider pay equity implementation issues and work to address them. For a history and overview of pay equity in the public sector, see Chapter 6 in Tim Hadwen et al, Ontario Public Service Employment & Labour Law..

A summary of the steps required to achieve and maintain pay equity are set out in the Cavalluzzo *Overview of the Pay Equity Act*" (See Appendix B). The Pay Equity Commission's *A Guide to Interpreting Ontario's Pay Equity Act*, issued August, 2012 also provides a summary of employer and union obligations and rights although for reasons including those set out below it is not always right. It is only the Tribunal which establishes binding jurisprudence. A useful review of important principles which should guide the job evaluation process is the Cavalluzzo document, "*Pay Equity Act Compliance – Making Visible and Valuing Women's Work (*See Appendix C).

10. Pay Equity Compliant Resolution Required

The *Pay Equity Act* requires that employers and trade unions work together to resolve pay equity implementation issues on a principled basis which will ensure that the overall pay equity/job evaluation process is consistent, free of gender bias and transparent. Pay equity systems should be created which are capable of being explained, replicated and maintained in the future. This means focussing on the principles that ensure women's and men's work are both described fully and fairly and valued appropriately.

These principles are drawn from the *Pay Equity Act*, the jurisprudence of the Pay Equity Hearings Tribunal, the International Labour Organization's "Promoting Equity: Gender-Neutral Job Evaluation for Equal Pay: A Step-By-Step Guide" (International Labour Office, Geneva, 2008) ("ILO Guide") [21]and the Canadian Human Rights Commission Guide ("CHRC Guide") which is available from the CHRC. The 2004 Federal Pay Equity Task Force Report also contains important research and principles.[22]

Pay equity compliance requires keeping at the forefront of the process, the requirements of the *Pay Equity Act*, the dynamics which sustain gender discrimination in the compensation of women's work and the need to make visible and value the work both women and men perform.

11. Making Work Visible - Inclusivity

Ensuring that both men's and women's work is made visible and valued is one of the greatest challenges in ensuring a gender neutral job evaluation process.

[21] www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_164966.pdf;

[22] Pay Equity Review Task Force, *Pay Equity: A New Approach to a Fundamental Right* (Ottawa: Justice Canada, 2004)

"The job evaluation process must include all aspects of work done by men and women even if the work was not previously valued, understood or even noticed. Missing or overlooking elements of work has created much of the gender bias problem.

The concept of inclusivity is relevant to the processes of describing jobs and of choosing the factors. It is essential that the job evaluation process capture (i.e. include) all aspects or requirements of each job in the organisation and all working conditions associated with it. Factors, examples and weights must fairly represent jobs and job tasks done by men and women." CHRC Guide

The ILO Guide notes that it is important for a committee to:

"include members who have as direct as possible knowledge of the main jobs to be evaluated". This ensures "that the characteristics of the jobs to be evaluated are more fully taken into account";

"include members who are willing to recognize and eliminate any gender bias that might affect the process or the evaluation tool";

"allow female workers to play a significant role in the process which concerns them most directly"; women members "help better identify the overlooked requirements of female jobs" and "exert an influence over the decisions female dominated jobs involving the highest number of employees should have priority." This should include "employees from different hierarchical levels". p. 10

Be trained in the "dynamics of wage discrimination" and the "methodological aspects related to implementing pay equity." p. 11 This helps "identify the prejudices and stereotypes which can appear in different steps of the programme and should deal with the following points: "the factors which account for wage discrimination; the influence of prejudices and stereotypes on job perception; the influence of prejudices and stereotypes on evaluation methods and the influences of prejudices and stereotypes on compensation systems. It also helps members "carry out the process in a rigorous manner, including understanding the evaluation method, the data collection procedures, the evaluation procedures, the components of total compensation and the values and mission of the enterprise." p. 11

12. **Obligations of New Employers**

(a) *Pay Equity Act* Part I Obligations

The Act recognizes two categories of employers:

(i) employers that were in existence on the date that the *Pay Equity Act* came into effect (i.e. employers who existed on January 1, 1988); and,

(ii) new employers established after that date.

Given the changes to the economy, many of Ontario's current employers are considered "new employers".

These employers are treated differently because when the *Act* was introduced, it allowed employers who were then in existence a period in which they could gradually move their compensation practices into compliance with the new law by phasing-in pay equity adjustments at !% payroll annually, (although they could not create new wage gaps or widen existing ones).

Employers who came into existence after the *Act* took effect are to achieve pay equity immediately and are not entitled to a phase-in period. They must open pay equity compliant.

The obligations of new employers, created after January 1, 1988, are set out in Part I of the *PEA.* The fundamental obligation to achieve and maintain pay equity is set out in section 7 which is found in Part I.

New employers are not covered by Part II of the *Pay Equity Act* which explicitly requires taking steps over set periods of time and the posting of pay equity plans.

In order to achieve pay equity, though, these employers must still compare male and female job classes and pay female job classes at least as much as the male job classes of comparable value: see: *Pay Equity Act*, s. 11(2) and 11(3)

In addition, employers that were in existence prior to January 1, 1988 but had fewer than 10 employees will become subject to the *Act* and be required to achieve pay equity as of the date that they have 10 or more employees.

(b) Obligations to Negotiate Pay Equity

The explicit mandatory duty to bargain pay equity is only set out directly in Part II of the Act. The Pay Equity Hearings Tribunal in *SEIU Local 1 v. Oakwood Retirement Communities,* 2001 CanLII 76245 (ON PEHT) rejected the arguments that new employers had an obligation to bargain pay equity compliance with the bargaining agent.

SEIU had argued that a Part I employer has an obligation to "plan" for achieving pay equity and a duty to negotiate with the bargaining agent. The Tribunal found there was no such requirement in Part I (unlike in Part II) and found that "the responsibility for achieving pay equity rests with the employer" since section 7(1) places the burden of establishing and maintaining pay equity compliant compensation practices squarely upon employers.

Under subsection 7(2), trade unions must avoid agreeing to or bargaining compensation practices that would cause a breach of subsection 7(1). The Tribunal therefore found that whatever steps an employer may take to achieve pay equity in a bargaining unit must be "readily transparent" to the bargaining agent so that it can assure itself it is not sanctioning compensation practices that run afoul of the *Act*. However, the Tribunal concluded this does not mean the same range of negotiations between employers and trade unions contemplated by other Parts of the Act.

The *Oakwood* decision seems to encourage a litigious approach where the bargaining agent sits on the sidelines while being provided with information and then is left to file a complaint against the employer for a breach of its section 7 obligations as the remedy.

The *Oakwood* decision does state that "Nothing in this decision should be taken to preclude or discourage the parties from voluntarily engaging in a broad range of negotiations concerning all aspects underlying the achievement of pay equity in the bargaining unit. "

As result of the above, unions with new employers should consider the following steps:

(a) try to get collective bargaining language as part of the first collective agreement, which requires the employer to negotiate pay equity compliance with the bargaining agent;

(b) Require the employer to disclose all information with respect to the pay equity compliance steps it has taken to ensure its pay structure is free of unlawful pay gaps;

(c) Review whether the employer has properly identified male and female job classes as prescribed in the *Act*;

(d) Review whether the employer has properly evaluated the male and female job classes based on a composite of skill, effort, responsibility and working conditions;

(e) Review whether the employer has employer has properly achieved pay equity by comparing male and female job classes in accordance with the comparison methods as identified in the *Act*;

(f) Review whether the employer has followed the proper job comparisons following the sequence of search for male comparators identified in the *Act*;

(g) Review whether the employer has paid pay equity compliant wages back to the date its operations commenced; and if not ensure such payments are made; and

(h) Monitor the employer's maintenance of pay equity;

(i) file complaints under the *Pay Equity Act* where employer action or inaction violates the *Act*.

PART D STEP #6 CLOSING PAY GAPS THROUGH *PEA* ENFORCEMENT - MAINTAINING PHASE

1. Ongoing Obligations to Ensure No Pay Gaps

Maintaining pay equity is an ongoing process of ensuring that female job classes are not subject to any systemic discrimination in their compensation. Maintaining pay equity is required to be a regular part of the compensation practices of an employer and the monitoring practices of trade unions. The maintenance obligations arise from section 7 of the *Act* and also from section 14.1 which is a stand-alone provision. It addresses "changes in circumstances" which make a pay equity plan no longer appropriate and enable parties to re-enter into pay equity negotiations. (See Ontario Pay Equity Commission publications - *Maintaining Pay Equity Using the Job-to-*

Job and Proportional Comparison Methods and *Maintaining Pay Equity Using the Proxy Comparison Method*.)

Employers and bargaining agents must take the necessary to steps to ensure that any identified gap in compensation between comparable male and female job classes identified in the "achievement" stage is not allowed to widen. While there have been some decisions dealing with this obligation, there are likely to be further decisions setting out in more detail the responsibilities. To date, the maintenance obligation has been found to include obligations set out below:

Any identified gap in compensation between comparable male and female job classes identified in the "achievement" stage and closed by the identified pay equity adjustments in that Plan must not be allowed to widen. See *CUPE Local 1776 v. Brampton Public Library* [1994] O.P.E.D. No. 37.

The first step is to ensure that the original female job classes from the original Pay Equity Plan have continued since the date of that plan to receive the compensation of their designated male comparator where the job to job comparison method is used. This requires creating a chart for all the original female job classes and their male comparators and then tracking all compensation changes of the female job classes and those comparator male job classes over the period since the original plan. Where the proportional value comparison method is used, this requires on a regular basis updating the representative "male" wage line to ensure that the original female job classes continue to be paid according to that updated male pattern of wages.

Where the pay equity plan is no longer appropriate, steps need to be taken to amend the pay equity plan. This is done by the employer (for unorganized employees) posting the amended plan which gives notice to the employees who can then file complaints. If those employees are subsequently organized, the employer must negotiate any changes with the bargaining agent and where there are unresolved disputes, seek an order of the Review Officer. Any pay equity adjustments form part of the collective agreement. The obligation to maintain pay equity in accordance with the old plan will exist until the new plan is posted *(BICC Phillips Inc. (1997)*, 8 P.E.R. 142).

The employer must ensure employees continue to be paid in a manner which is free of systemic gender discrimination in the valuation and payment of that work, including ensuring that such inequity is not being inadvertently hidden by incorrect identification of job classes or by other incorrect implementation measures.

2. **Maintaining Pay Equity is a Joint Responsibility**

The obligation to maintain pay equity is a joint responsibility. *Ottawa Board of Education* (1995), 6 P.E.R. 45.

An employer is required to ensure (in conjunction with the bargaining agent) that its compensation practices do not result in any pay gap between comparable male and female job classes.

Specifically Tribunal jurisprudence has interpreted this requirement to include the following:

Section 7(2) obliges both employers and trade unions not to bargain to disrupt compensation practices that provide for pay equity or to bargain for any compensation practice that does not

provide for pay equity for female job classes. See *St. Joseph's Villa,* (19 August 1993) 0345-92 (PEHT) and *Ottawa Board of Education.*

A trade union is prohibited from condoning the University's failure to maintain pay equity. See *York Region Board of Education (CUPE)* (1995), 6 P.E.R. 3.

Where parties exceed their obligation under the *Act* in the "achievement" stage, this does not relieve the employer or the union from the statutory section 7 obligation of "maintaining" the agreement that was reached. The parties must ensure that the wage gap identified in the achievement process is not widened. See *CUPE Local 1776 v. Brampton Public Library.*

3. **Changed Circumstances**

(a) Sections 14.1(1) and Section 22(2) (b)

Two sections in the *PEA* set out "changed circumstances" procedures. Section 14.1 addresses the obligations to bargain and section 22(2)(b) deals with the right to file a complaint in respect of changed circumstances.

Section 14.1(1) states:

> *14.1(1) If, in an establishment in which any of the employees are represented by a bargaining agent, the employer or the bargaining agent is of the view that because of changed circumstances in the establishment the pay equity plan for the bargaining unit is no longer appropriate, the employer or the bargaining agent, as the case may be, may by giving written notice require the other to enter into negotiations concerning the amendment of the plan.*

Section 14.1 is a stand- alone provision separate from the s.7 maintenance obligation. A Part II employer, i.e., an employer who is required to or elects to do a pay equity plan, looks to Part II for guidance on pay equity maintenance just as it did for achieving. Section 14(1) allows a subjective determination of when negotiations may be necessary on the part of either party. *Ottawa Board of Education* that is, when either party "is of the view" that this is necessary.

The s. 14.1 provision was introduced as part of the major amendments to the *Act* in 1993. The underlying purpose of the provisions is to protect pay equity advancements and to ensure that pay equity is maintained when a workplace restructures or changes as often is the case in the public and private sector. The changed circumstance provisions apply to Part II employers: private sector employers with over 100 employees and the public sector.

The changed circumstances negotiations involve amending a deemed approved pay equity plan, rather than the whole-scale negotiation of a new plan.

The bargaining agent may also give notice to the Commission of failure reach an agreement.

If the plan is amended, any applicable compensation adjustments shall not be less than the adjustment that would have been made under the plan, before it was amended.

Once those negotiations are started, through written notice, the Act sets out a 120 days schedule for negotiations and failing agreement, the union or the employer may notify the Pay Equity Commission of a failure to reach agreement on the plan's amendment.

Section 22 set out provisions to enforce s. 14.1, which state:

> *22. (1) Any employer, employee or group of employees, or the bargaining agent, if any, representing the employee or group of employees, may file a complaint with the Commission complaining that there has been a contravention of this Act, the regulations or an order of the Commission.*
>
> *(2) Any employee or group of employees, or the bargaining agent, if any, representing the employee or group of employees, may file a complaint with the Commission complaining with respect to a pay equity plan that applies to the employee or group of employees that,*
>
> *(b) because of changed circumstances in the establishment, the plan is not appropriate for the female job class to which the employee or group of employees belongs.*

The s. 14.1 provisions are tied to general s. 14 obligations where an employer and union are required to negotiate in good faith and agree to a pay equity plan which includes determining job classes. The Tribunal has held that the changed circumstances negotiations are more limited than the achievement negotiations in that s. 14.1 (2) does not require that the parties agree to a gender neutral comparison system as part of the plan amendments. (*Ottawa School Board No. 2, (1996)*).

(b) What Renders a Deemed Pay Equity Plan No Longer Appropriate?

The pay equity plan sets out how pay equity is to be achieved and to be maintained in the workplace. Pay equity is achieved when female job classes have been compared to male job classes of equal value, using one of three comparison methods, and the job rate of the female job class is at least equal to the job rate of male job class (Section 5.1 and 6). The determination of the value of the work of the female and male job classes is based upon four key criteria: skill, responsibility, effort, working conditions when the work is normally performed. (Section 5).

It is important to know the details of the pay equity plan to achieve pay equity to establish the "baseline" to compare to the changed circumstances. The information required would include the comparison method relied upon in the plan; the job classes; the comparators and how jobs were valued as a starting point.

"Changed circumstances" do not function as a "post facto" justification or defense to an employer for a failure to maintain pay equity in accordance with a deemed approved and posted plan. Rather, at the moment the changes occur to render the plan inappropriate, the plan needs to be amended.

When assessing whether or not a pay equity plan is no longer appropriate, the two key questions are:

(i) whether a pay equity gap has emerged between the male and female job classes as set out in the deemed approved plan and,

(ii) whether there is a change in the value of the male comparators or the female job classes.

The Pay Equity Commission has stated that the following may constitute changed circumstances that could render the plan inappropriate under the *Act*:

(i) new job classes (creation of an entirely new job class in the establishment or significant changes to an existing job class);

(ii) vanishing job classes;

(iii) changes to the value of job classes

(iv) changes to the gender of job classes;

(v) changes to job rates;

(vi) Certification of a bargaining agent after a deemed approved plan; and

(vii) Restructuring within the organization.

There are a wide range of situations which may amount to “changed circumstances” which render a pay equity plan inappropriate. No one Tribunal decision succinctly summarizes the indicators of changed circumstances. When the Tribunal looks at changed circumstances, it is primarily concerned with whether or not a new pay equity gap has emerged. The Tribunal will consider if there is a detrimental impact of changes on the female job classes.

The following are some indicators that the Pay Equity Hearings Tribunal has addressed to date:

In *BICC Phillips (1997),* the Pay Equity Hearings Tribunal applied a two-part test that looks at (1) whether the job rates for the female job classes are at least equal to their pay equity comparator; and (2) if not, whether there is any justification in the *Pay Equity Act* for this difference in job rates.

In *Ford Motor Company (2003)* CanLII 57509 (ON PEHT)*,* the Tribunal concluded that the Employer made numerous changes at the car plants and establishment under review which fit within the meaning of s. 14.1. Two plants had been demolished. One plant was rebuilt. Employees were relocated to other facilities. Two job titles were renamed. The employer re-organized work to a "team" management style at Plant II. Those changes constitute changed circumstances. In this case, the employer claimed that there were no changed circumstances, but had not provided detailed evidence to support its claim.

In *Group of Employees v. Parry Sound District General Hospital*, 1996 CanLII 8067 (ON PEHT), the Tribunal was critical of a Review Service officer's order that did not specify the nature of the changed circumstances. The Tribunal raised the following questions to interpret changed circumstances: what "job class titles had changed" and how the change affected those job classes; specifically what "job class content had changed" and the effect on those job classes; the identity of the "new job classes [which] were created," and why the Plan is no longer appropriate.

The Tribunal emphasized that to establish a prima facie case under s. 22(2) (b), the applicants must plead facts which, if proven, would establish each element of the provision of s. 14.1 specifically that (i) a changed circumstances; (ii) the plan is no longer appropriate; (iii) the job class for which the plan is not appropriate is a female job class; and (iv) the applicants belong to that female job class.

In *Niagara (Regional Municipality) v. CUPE, Local 1287*, 1999 CanLII 14829 (ON PEHT), the Tribunal considered whether the vacancy of a male comparator job class resulted in "changed circumstances" and/or a failure to maintain pay equity. The Tribunal held in this case that there had been no wage impact resulting from the vacancy of the male comparator job class at issue. The affected female job classes were not denied wage increases received by other job classes.

In *Corporation of Wawa (Municipality) v. Confidential Employee*, 2010 CanLII 8687 (ON PEHT), the Tribunal reviewed the employer's changes to a posted deemed approved plan in a non-unionized setting. The Tribunal gave careful consideration to whether or not the employer unilaterally undervalued certain female job classes and overvalued certain male job classes in the new plan. The Tribunal examined the changes to job titles and considered whether the value of the job classes were the same or equivalent between the old and the new plan.

(c) Certification of a Bargaining Unit

Where a group of employees is unionized after a pay equity plan is signed, the union certification constitutes a changed circumstance (*St. Joseph's Villa* and *Ottawa Board of Education*.

However, certification may not necessarily render the plan inappropriate: *Parry Sound District General Hospital (No. 2)* (1996), 7 P.E.R. 73. If the certification results in some employees of the employer, who had previously been covered by one pay equity plan, being in the bargaining unit and some employees being outside the bargaining unit, the plan must be split for the two groups, in order to comply with s. 14 of the *Act* which requires that there be a separate pay equity plan for each bargaining unit and a pay equity plan any part of the establishment not in the bargaining unit (*St. Joseph's Villa*).

The newly certified union may not have the ability to negotiate any part of the plan that will apply to the new bargaining unit - the plan may simply be split and deemed approved. This will depend however, on whether there is any evidence that the plan contravenes the *Act* or whether the changed circumstance renders the plan no longer appropriate. A change in the composition of the unit following certification may cause the plan to be inappropriate (*Ottawa Board of Education*).

(d) Workplace Restructuring and Changes

Restructuring of the workplace or the elimination of jobs would likely qualify, as would the merger of job classes (*Parry Sound District General Hospital*). A *PSLRTA* restructuring specifically triggers the need to create new pay equity plans.

If a job class cannot be evaluated because it was vacant at the time of pay equity negotiations, and the job class is subsequently filled, this might constitute a changed circumstance (*Barrie Public Library,* (1991), 2 P.E.R. 93)

A vacant male comparator job class may not result in a plan being inappropriate if a widening wage gap does not occur as a result of unequal general wage increases (*Niagara (No. 2)* (1998-99), 9 P.E.R. 25).

The demolishment of a plant, the rebuilding of a plant, relocation of employees to other facilities, renaming of two job titles and a change to a team management style within an establishment would constitute changed circumstances which may or may not have an impact on the plan (*Ford Motor Co. of Canada*. See also section 9 Sale of Business below.

(e) Tips for Assessing Whether There are Changed Circumstances

The starting point to assess changed circumstances is to review the deemed approved pay equity plan relied upon to achieve pay equity including the comparison method used.

Next, the analysis would consider two questions:

(i) is there a pay equity wage gap between the male and female job classes as set out in the deemed approved plan?

(ii) is there change in the value of the male comparators or the female job classes?

The more specific investigation to meet the evidentiary standard should consider factors such as:

(i) Are male job classes allocated differential improvements or adjustments in terms, conditions or wage increases and female job classes did not receive comparable improvements? These compensation adjustments cannot be subject to s. 8 exemptions. For example, special case adjustments in negotiations may create a pay equity gap.

(ii) Has that organization experienced significant restructuring to change the content of the job duties responsibilities and job classes' working conditions?

(iii) Have job titles changed which also involved changes in skill, effort, responsibilities and working conditions?

(iv) Significant changes to content of job classes as to change their value? What are the specific changes in the skill, the effort, the responsibility and working conditions. Have qualifications changed since the last time the position were evaluated?

(v) Merger of job classes – male or female or gender neutral - which may impact or change the comparator?

(vi) The creation of new positions and whether these have been compared to the male comparator?

(vii) Are the comparators in the original plan still appropriate or has the value changed it is no longer appropriate?

(viii) If a proportional value comparison method, has the wage line been redrawn after each negotiated wage increase? (if the wage increases are percentage based)

(ix) Was Pay Equity Plan a non-union plan and how the unit is now organized?

(f) Need to Challenge Review Services Approach to Changed Circumstances

The Review Services approach of minimizing union involvement in maintenance is best summarized as effectively either reading out the requirements of s. 14.1 of the *Act* entirely or (ii) strictly limiting the interpretation of changed circumstances where the union has no involvement in the plan amendments. This approach is not consistent with the Tribunal's interpretation of s. 14.1.

It is necessary to make sure that the Review Services application details the manner in which the plan is no longer appropriate and pay equity is no longer maintained. For example, providing evidence that a wage gap has emerged or the duties and responsibilities of jobs changed to change the value of the job classes which has led to a pay gap. Where the issue is the employer's failure to disclose information to appropriately assess the s.14.1 changes, the application should rely upon the broad right to disclosure long-recognized by the Tribunal and identify this issue in the application.

(g) Effective Date of Changes/Amendments to the Plan

Any amendments will be effective as of the date of the triggering event - the changed circumstance (*Ottawa Board of Education*).

The obligation to maintain pay equity in accordance with the old plan will exist until the new plan is posted (*BICC Phillips Inc.*).

4. **Relationship to General Pay Equity Obligation and Other Issues**

The specific sections in the *PEA* which address the situation of a sale of business or changed circumstances provide specific obligations for ensuring the wage gap does not widen. However, this does not detract from the wider obligation to maintain pay equity found in section 7.

The *PEA* does not clearly set out the relationship between the section 7 maintenance obligation and section 22(2)(b) which sets out the right of an employee, group of employees or bargaining agent to file a complaint where due to a "change in circumstance" the pay equity plan is not appropriate. The Tribunal has indicated that section 22(2)(b) is available to deal with some kinds of workplace changes occurring after the posting of a plan, and also after full achievement of pay equity. For example, the vacancy over a significant period of time in a male comparator job class could be either a section 7 maintenance issue and/or "changed circumstances" under s. 22(2)(b): See *Niagara No. 2.*

The employer cannot use the “change of circumstance” as a defence to a failure to maintain” pay equity between comparable male and female job classes (*BICC Phillips Inc).*

In a unionized workplace, an employer cannot unilaterally fail to maintain pay equity between comparable male and female job classes on the basis that there has been a change in circumstances. The employer is required to negotiate the necessary changes to the pay equity plan caused by the alleged change in circumstance and if no agreement, the plan cannot be changed until amended by a Review Officer or Tribunal Order. The original plan must be maintained until a new plan is agreed to or ordered.

If there is no bargaining agent, the employer can unilaterally amend and post the revised pay equity plan but this is then subject to challenge by the unrepresented employees.

A change in pay practice does not necessarily give rise to a change in circumstance. For example, when a collective agreement increased the threshold at which part-time employees could receive premium/overtime pay, but did not change the employees’ hourly pay rate, the Tribunal found this change did not contravene the *Act* even though it may have reduced employees’ take-home pay: (*Children's Aid Society of the County of Lanark and the Town of Smiths Falls* September 7, 2005 and January 5, 2006, 3565-04-PE (P.E.H.T.). In that case, the increase in the threshold for premium pay applied to all job classes. It was not asserted that female job classes were denied a benefit that remained available to either a male job class or their proxy comparator.

5. Sale of a Business

(a) Section 13.1

The *Pay Equity Act’s* Sale of Business provisions are set out in s. 13.1 below:

> ***13.1 (1)*** *Sale of a business - If an employer who is bound by a pay equity plan sells a business, the purchaser shall make any compensation adjustments that were to be made under the plan in respect of those positions in the business that are maintained by the purchaser and shall do so on the date on which the adjustments were to be made under the plan.*
>
> *Plan no longer appropriate*
>
> ***(2)*** *If, because of the sale, the seller's plan or the purchaser's plan is no longer appropriate, the seller or the purchaser, as the case may be, shall,*
>
> ***(a)*** *in the case of employees represented by a bargaining agent, enter into negotiations with a view to agreeing on a new plan; and*
>
> ***(b)*** *in the case of employees not represented by a bargaining agent, prepare a new plan.*
>
> *Same*
>
> ***(3)*** *Clause 14 (2) (a), subsections 14.1 (1) to (6) and 14.2 (1) and (2) apply, with necessary modifications, to the negotiation or preparation of a new plan.*
>
> ***(4)*** *Repealed*

Application to certain events

(4.1) *This section applies with respect to an occurrence described in sections 3 to 10 of the Public Sector Labour Relations Transition Act, 1997. For the purposes of this section, the occurrence shall be deemed to be the sale of a business, each of the predecessor employers shall be deemed to be a seller and the successor employer shall be deemed to be the purchaser.*

Definitions

(5) *In this section,*

"business" includes a part or parts thereof;

"sells" includes leases, transfers and any other manner of disposition.

(b) What Constitutes a Sale?

The *Act* defines a "sale of a business" very broadly. It can include all of the following:

Sale; Lease; Transfer; Merger; Acquisition; Amalgamation; and any other manner of disposition.

(c) Pay Equity Obligations on Sale

After the sale of a business, unions and employers must examine all pay equity plans and determine whether they are still appropriate.

The sale may result in the plan no longer being appropriate. Bargaining agents may initiate the process for negotiations for a new plan if this is the case or they may file a complaint claiming that the plan is no longer appropriate. Non-union employees may also file a complaint. The new plan will be effective as of the date of the sale. The following circumstances may result in the plan no longer being appropriate:

(i) The addition or subtraction of jobs from a pay equity plan;

(ii) Restructuring of existing departments or creating new ones;

(iii) New jobs in new areas;

(iv) New products, services or manufacturing processes;

(v) Changes in job duties or responsibilities which are sufficient to alter the value of jobs in the pay equity plan;

(vi) Changes to the composition of the bargaining unit or non-union group;

(vii) The gender neutral comparison system (GNCS) no longer adequately captures the work of the female and male job classes which may necessitate an amendment to the GNCS or selection or negotiation of a new GNCS (See: Pay Equity Commission Guide.)

A new plan would likely be necessary where there was a sale of part of a business and the seller's business contracts and the purchaser's business expands, with an accompanying loss or gain of employees. Once the sale has occurred and the consequences of the transaction are apparent, a determination should be made about whether a new plan is required *The Child's Place* (February 28, 2002) 0730-01 (PEHT).

(d) What are Purchasers and Buyers Obligations?

Neither the purchaser nor the seller may opt out of their obligations under the *Act.*

The purchaser will be bound by the plan in place. The seller will continue to be bound by the plan if they continue the business in some part and have employees. The old plan will continue to be effective until a new plan is developed, if necessary.

However, the Tribunal has stated, that it is difficult to construe s. 13.1 as absolving the seller of liability for outstanding adjustments at the point of the sale. In fact, it is possible to construe s. 13.1 as holding the seller and purchaser jointly and severally liable for payments that the seller failed to make in a timely way (*Child's Place*).

6. Review Services and Tribunal Litigation on Maintaining Pay Equity

In a 1997 decision, the Tribunal referred to the following test for whether the pay equity obligations set out in a pay equity plan have been maintained:

(i) Are the job rates for the female job classes at least equal to those of the male job classes identified under the pay equity plan as performing work of equal or comparable value to them and has this consistently been the case from the date that pay equity was achieved under the plan?

(ii) If the answer to (I) is negative, is there any justification in the *Pay Equity Act* for this difference in job rates?"

See *BICC Phillips Inc.*

Various unions are now in the process of litigating under the *Pay Equity Act* a variety of maintenance issues, including the obligations of employers and unions. Hopefully this will expand the Tribunal's directions in this area.

Review Services, whose Officers make the initial decision under the *PEA* have issued decisions over the last number of years which have restricted the pay equity rights of employees and minimize the obligations of employers to engage with unions in the pay equity process. These decisions have often been inconsistent with what the Commission said in previous publications.

The Tribunal has issued a number of troubling decisions: *Oakwood Retirement Communities Inc. v. S.E.I.U. Local 1 Canada,* 2010 CanLII 76245 (ON PEHT) and *Canadian Union of Public Employees, Local 543.3 v. Windsor-Essex County Health Unit,* 2010 CanLII 61201 (ON PEHT). (Note: decisions of the Pay Equity Hearings Tribunal can be accessed at canlii.ca and are no longer found on the PEHT website.)

7. Process for Maintaining Pay Equity

The Pay Equity Commission has recommended that a pay equity Maintaining Committee be established in each bargaining unit in order that there is a systematic process for monitoring change in the workplace. This includes a comprehensive review each year of their compensation practices to ensure that they have maintained pay equity and make any necessary retroactive adjustments required. Ontario Pay Equity Commission publication - Maintaining Pay Equity Using the Job-to-Job and Proportional Comparison Methods.

(Note: Review Services has taken the position such a committee process involving the workers is not mandatory and unions have been disputing this interpretation of the *PEA*). Both the ILO Job Evaluation Guide and 2004 Pay Equity Task Force see the use of a committee process as ensuring to ensuring the involvement of women workers and the gender inclusiveness of the process.

Generally, employers and bargaining agents use the same comparison method or methods for maintenance purposes which they used the first time to achieve pay equity unless that process is not appropriate. See *Brampton Public Library.* If there is a disagreement, there is a procedure for seeking the Commission's assistance in settling, deciding or adjudicating the dispute.

8. Maintenance Pay Equity Adjustments

The only wage gap which can be phased in at 1% of payroll is the wage gap identified in the "achievement" phase. Any wage gap which is created after the effective date of the employer's initial pay equity obligations must be immediately eliminated and cannot be redressed out the of 1% of payroll set aside. This includes the cost of pay equity for new job classes or changes to existing job classes which are so significant as to result in a new job class. See *Regional Municipality of Peel* (1992), 3 P.E.R. 191 (PEHT).

Employers who are late doing their plan, must make all adjustments as if they were paid on time and this may require significant retroactive adjustments. See: *Renfrew County and District Health Unit (No. 3)* (2001 - 02), 12 P.E.R. 114 (PEHT).

Only past pay increases that are clearly identified as pay equity adjustments can be counted as pay equity adjustments for the purpose of meeting the obligation to achieve or maintain pay equity. Other increases must be added to the pay equity target rate.

There is no time limit for filing complaints under the *Act*. This applies to complaints against unions and employers. This includes complaints that a deemed approved plan does not meet the basic standards of the *Act*. If a complaint is upheld, the adjustments are retroactive to the date of the violation of the *PEA*.

9. Interest Owing on Outstanding Pay Equity Adjustments

Both Review Officer decisions and Tribunal decisions have regularly ordered employers to pay interest on pay equity adjustments which they have found to be owing. Such interest is calculated in accordance with the process established in *Hallowell House Ltd.,* [1980] OLRB Rep. Jan. 35 which has been followed and applied by the Pay Equity Hearings Tribunal in *Peterborough (Clow)* (No. 3) (1996). 7 P.E.R. 33. After calculating the amount owed to each employee and former employee, the amount is divided in half and the Bank of Canada prime rate of interest at the time the first payment was required is applied.

10. Maintaining Pay Equity using the Proxy Comparison Method

The proper way to maintain pay equity for workplaces using the proxy comparison method is now a subject of dispute under the *PEA.* Review Services has maintained that pay equity for those using the proxy comparison method is only maintained internally within the bargaining unit and does not continue to track the comparators in the external workplaces which were designated by the Proxy Regulation during the achievement phase.

(a) Maintaining within the Bargaining Unit

The Commission previously issued a Fact Sheet which addresses this issue: "Maintaining Pay Equity Using the Proxy Comparison Method". In summary, this Fact Sheet states that employers using the proxy comparison method are required to do the following:

(i) Each January 1, give the necessary pay equity adjustment required until the wage gap is closed using a minimum 1% of annual payroll;

(ii) Give any non-pay equity increase on top of the pay equity adjustments required by the proxy pay equity plan and increase the target rates by the same amount;

(iii) Do not allow the wage gap to widen, eg. by negotiating or permitting percentage wage increases;

(iv) Do not reduce pay equity target rates; and

(v) Establish or negotiate where a union exists, a regular maintenance review process to deal with changed circumstances that may occur in the organization. eg. new job classes, changes in duties or responsibilities of job classes, organizational restructuring, mergers, amalgamations and unionization or decertification. Prepare and post amended plans as necessary.

Unions have argued that Part III.2 of the Act does not take away from the general obligation that all employers must maintain pay equity. Nothing in Part III.2 authorizes an employer to allow a pay equity wage gap to re-emerge. All employers including those using the proxy comparison method have the obligation under section 7(1) of the Act to "maintain compensation practices that provide for pay equity in every establishment of the employer". No employer or bargaining agent, shall bargain for or agree to compensation practices that, if adopted, would cause a contravention of subsection (1)." See *Welland County General Hospital* (No.2) (1994, 5. P.E.R. 12 and *York Region Board of Education* (CUPE) (1995). Generally, pay equity is maintained using the same method as was used to achieve pay equity and therefore they should continue to use the proxy method by that principle.

As a statute with a remedial human rights purpose, the *Pay Equity Act* must be interpreted in a large and liberal fashion. The Supreme Court of Canada has stated that such legislation is "intended to give rise, amongst other things to individual rights of fundamental importance, rights capable of enforcement, in the final analysis in a court of law." The Court further stated that "we should not search for ways and means to minimize those rights and to enfeeble their proper impact". See *Canadian National Railway v. Canada (Canadian Human Rights Commission)* [1987]1 S.C.R. 1114.

(b) Maintaining by Tracking the External Comparator

Unions are taking the position that the employer and the bargaining agent have an obligation to maintain proxy pay equity by continuing to keep the appropriate relationship between the female job class in the workplace and the comparator female job classes originally used in the seeking employer's workplace. While this obligation is not referred to in the Commission's publication, it follows from the employer's ongoing maintenance obligations under section 7. This means that unions should track the compensation increases which have been received by the relevant female job classes in the employer originally used as the "proxy" and identified in the proxy pay equity plan. The Schedule in the Proxy Comparison Method Regulation, identifies which employer is the "proxy employer" for each kind of "seeking employer" using the proxy method. This issue is now being litigated under the *PEA* by unions and will need to be determined by the Tribunal.

Two unions, the Ontario Nurses Association and the Service Employees International Union Local 1 filed application to the PEHT alleging that approximately 143 Participating Nursing Homes which used the proxy comparison method to achieve pay equity through a 1995 Pay Equity Plan (which provided for a $1.50 per hour adjustment for the SEIU bargaining units) have failed to maintain pay equity and a wage gap has been allowed to emerge. Regulation 363/93 to the *PEA*, Proxy Method of Comparison, identifies that the proxy comparator for the nursing home sectors is the "Homes for the Aged" operated by one of more municipalities under as it was then, the *Homes for the Aged and Rest Homes Act,* and is now the *Long Term Care Act, 2007*.

The Unions are seeking to revoke two Review Officer decisions which found no contravention of the *Act* as they determined there was no obligation under the *PEA* to continue to track the wages of the external male comparator. SEIU has also filed a Notice of Constitutional Challenge arguing in the alternative any provisions of the *PEA* which block the access of women to their proper external comparators violates the equality provisions of the *Charter* relying on many of the same arguments from the original *Charter* challenges referred to above.

In 1995, the Conservative Ontario Government slashed pay equity funding when it came into office and then repealed the proxy comparison method through Schedule J to the *Savings and Restructuring Act, 1996.* SEIU Local 204 (now Local 1) challenged that the repeal violated section 15 of the *Canadian Charter of Rights and Freedoms.* In a September, 1997 decision of the Ontario Superior Court of Justice, Mr. Justice O'Leary struck down the repeal as a violation of the affected women's equality rights and the proxy law came back into force as did the negotiated proxy pay equity plans. See *SEIU Local 204 v. Ontario (Attorney General)* (1997), 35 O.R. (3d) 508 (Gen. Div.). Mr. Justice O'Leary found that using the work and pay equity target rates of the female job classes in the proxy comparator employer (here the unionized municipal homes for aged) was appropriate for the very reason that they already had been able to achieve pay equity using the male comparator job classes available to them in their municipal workplace. The female job classes in the municipal homes for the aged were found to be a practical and reasonable measuring stick of discrimination precisely because they had already achieved pay equity in relation to comparable male job classes.

While the Ontario Government subsequently paid out in 1998 over $150 million in pay equity adjustments owing, it then made a policy decision to cease funding further proxy pay equity adjustments. As a result of the Government's decision to stop funding the proxy pay equity adjustments, the nursing homes and many other proxy employers declined to make further pay equity adjustments. The refusal of the Government to continue such funding was the subject of

another challenge by CUPE, ONA, SEIU Local 1, USWA and OPSEU. See *CUPE et al v. Ontario (Attorney General) Ontario Superior Court of Justice (01-CV-214432).* As a result of a May 2003 settlement of that *Charter* challenge, the Government agreed to provide proxy pay equity funding to the health and long-term care sector, among others. That settlement covered proxy pay equity funding for the period through to March 31, 2006. The Nursing Homes and other employers using the received pay equity funding pursuant to this settlement to continue their progress to the required rate to achieve pay equity.

The SEIU Local 1 and ONA v. Participating Nursing Homes proceeding is still before the Tribunal with expert witnesses being called by all parties.

PART E PROCESS ISSUES – ACHIEVING AND MAINTAINING PAY EQUITY

1. Employer Obligation to Disclose Pay Equity Information

Section 14 of the *PEA* requires the parties to negotiate in good faith and includes the obligation to disclose information necessary or relevant to pay equity negotiations.

> *For the parties to negotiate in good faith and endeavour to agree...there must be disclosure of relevant pay equity information. Disclosure is required to foster rational and informed discussions and to enable the parties to move towards settlement. The parties must have sufficient information to intelligently appraise the other's proposals, to formulate their own positions in bargaining pay equity, and to fairly represent their members. O.P.S.E.U. v. Cybermedix Health Services Ltd.,* [1989] O.P.E.D. No. 4 at para. 20.

With respect to the timing of disclosure, depending on the particular stage of negotiations, the Tribunal in *Cybermedix* commented:

> *Disclosure must be made when parties cannot agree on an issue without the information requested. Both parties are entitled to sufficient information to make informed choices at all stages of the process. para. 24.*

With respect to the scope of disclosure, the Tribunal has held that the information requested for negotiations must be related to an issue in the bargaining. The Tribunal has indicated this includes but is not limited to:

(i) job titles, gender composition of positions, compensation schedules, salary grades or range of salary rates per position and existing job descriptions. *O.P.S.E.U. v. Cybermedix Health Services Ltd.*

(ii) all information necessary to consider the four criteria under the *Act* for job class: 1) positions in an establishment that have similar duties and responsibilities; 2) require similar qualifications; are filled by similar recruiting procedures; and have the same compensation schedule, salary grade, or range of salary rates. *Riverdale Hospital v. CUPE Local 79,* (1990) OPED, No. 6.

(iii) information concerning the evaluation system and the results of the evaluation of the bargaining unit jobs including the distribution of points across the degree levels of each subfactor and the total point score of each bargaining unit position. *Gloucester (City) V. CUPE Local 1525*, (1991) O.P.E.D. No. 20.

Where a trade union is certified for a bargaining unit, (where the original pay equity plan was prepared on the basis employees were non-unionized), the Tribunal has stated that the union is entitled to the information necessary to carry out their obligations under the *Act.* See *St. Joseph's Villa,* [1993] O.P.E.D No. 38. This includes at a minimum:

(i) Information necessary to ensure that the previous plan is being implemented according to its terms. This requires that the bargaining agent have knowledge of the terms of the plan. This includes the identification of the establishment, the job classes, and the GNCS. With respect to the GNCS, this includes information concerning the evaluation manual, the job collection questionnaire and the wage adjustment methodology including the banding process. It also required that the bargaining agent be provided with the values assigned to the work of the female job classes and the male job classes.

(ii) the means by which the duties and responsibilities of the female job classes within the bargaining unit and those male job classes outside the bargaining unit which are potential male comparators were ascertained, including any job descriptions, and /or the content of job fact sheets, and any future changes in those duties and responsibilities.

(iii) for those male job classes which are potential comparators, the job rate, the maximum hours of work and any future changes to those terms; and

(iv) the gender composition of the job classes identified in the Plan, the number of incumbents in each job class and any future changes. *St. Joseph's Villa.*

In addition to the above-noted obligations, a party to a proceeding under the *Pay Equity Act* must produce all information which is "arguably" relevant to the issues in the proceeding. *Dufferin-Peel Roman Catholic Separate School Board v. Group of Employees*, (1998) O.P.E.D. No. 1. citing *Kingston and Frontenac Children's Aid Society* (1990) 2 P. E. R. 310. This has included information such as job questionnaire and informational charts used by the Pay Equity Committee in carrying out its responsibilities under the Act, *Salvation Army on Behalf of Group of Employees,* (No. 2) (1996, 7, PER, 2 and *Ottawa Board of Education v. OSSTF*, (1997) O.P.E.D. No. 2.

While the Tribunal has stated there is no obligation to bargain pay equity with a "new business", it has required a new employer to make it "readily transparent" to the bargaining agent what it is doing to comply with the *PEA*. See *Oakwood Retirement Communities* (above).

2. **Pay Equity Settlements and Releases**

(a) Individual Employee Settlements and Releases

Unions and employees must be very careful in drafting releases or settlements to ensure that they protect employees' pay equity entitlements. This issue has been addressed twice recently in circumstances where individual employees have been terminated and have signed settlements with general language releasing their employers from future legal claims. See *Bucyrus Blades of Canada v. McKinley* (2005), 250 D.L.R. (4th) 316 (Ont. Div. Ct.); *Better Beef Ltd. v. MacLean* (2006), 80 O.R. (3d) 689 (Div. Ct.).

In both situations, at the time they were terminated the employees had outstanding concerns with respect to their pay equity entitlements which were not addressed in the subsequent monetary settlement on termination. In both cases the Pay Equity Hearings Tribunal looked at the underlying facts to determine whether the employer had complied with its pro-active obligation to achieve pay equity under the *Act*. However, on judicial review, in both cases the Ontario Divisional Court overturned the Tribunal's decisions, held the parties to the terms of the release and found that the individual employees had released their claims for pay equity.

In these decisions, the Court found that "the law does not interfere with the right to contract out of the *Pay Equity Act* when settling a claim under that *Act*." The Court noted that settling an individual claim in these circumstances is distinct from a situation where an employee might bargain away a statutorily-protected right as a term of employment or as a precondition to employment. The Court also ruled that "a release signed by one employee does not, in law, release an employer from its obligations to its female employees pursuant to the requirements of the *Act*."

(b) Collective Agreement or Pay Equity Plan Releases

Unions should also be very careful not to sign collective agreement or pay equity plan documents which release employers from pay equity obligations unless this is because employers are in fact paying pay equity compliant wages.

Since there is an ongoing obligation to maintain pay equity, it is not appropriate to release the employer from future liabilities. Such a release may expose the trade union to liability for a breach of its duty of fair representation under the *LRA* or under section 7(2) of the *PEA*.

3. Dealing with the Deemed Approval of Pay Equity Plan Issue

Employers argue that the original plan is deemed approved as a result of section 13(11) of the *PEA.*

The *Ontario Northland* Tribunal (*Ontario Northland Transportation Commission v. Pay Equity Hearings Tribunal,* 1993 CanLII 5424 (ON PEHT) decision upheld by the Divisional Court makes it clear that the hat the deemed approval sections of the *PEA* do not insulate an employer from a section 22 complaint under the *PEA* that the plan violated the Act.

The decision states that the deemed approval only relates to "compensation practices that existed immediately before the effective date", namely January 1, 1988. (See para. 34 of the decision which cites the provisions of section 13(11) of the *Act.*).

An employer remains responsible to ensure that all its compensation practices after January 1, 1988 are pay equity compliant;

"When the provision of the Act alleged to be contravened sets an exact requirement, we will inquire whether the impugned aspect of the plan is correct. When the provision is not capable of exact complaint, but implies a range or an exercise of discretion, we will inquire whether the impugned aspect of the plan is reasonable.". (para. 46)

The decision refers to the definition of the job rate as "the highest rate of compensation for a job class" as an example of a precise standard.

4. **Reprisals/Section 9 Complaints**

(a) Section 9 Anti-Reprisal Obligations

Section 9 of *PEA* prevents reprisals against employees who engage in activity under the Act.

Reduction of compensation prohibited

9(1) *An employer shall not reduce the compensation payable to any employee or reduce the rate of compensation for any position in order to achieve pay equity.*

Intimidation prohibited

(2) *No employer, employee or bargaining agent and no one acting on behalf of an employer, employee or bargaining agent shall intimidate, coerce or penalize, or discriminate against, a person,*

(a) *because the person may participate, or is participating, in a proceeding under this Act;*

(b) *because the person has made, or may make, a disclosure required in a proceeding under this Act;*

(c) *because the person is exercising, or may exercise, any right under this Act; or*

(d) *because the person has acted or may act in compliance with this Act, the regulations or an order made under this Act or has sought or may seek the enforcement of this Act, the regulations or an order made under this Act.*

The Tribunal has the following specific powers to remedy a breach of section 9(2).

25(2) *The Hearings Tribunal shall decide the issue that is before it for a hearing and, without restricting the generality of the foregoing, the Hearings Tribunal,*

(b) *where it finds that an employer has contravened subsection 9 (2) by dismissing, suspending or otherwise penalizing an employee, may order the employer to reinstate the employee, restore the employee's compensation to the same level as before the contravention and pay the employee the amount of all compensation lost because of the contravention;*

(c) where it finds that an employer has contravened subsection 9 (1) by reducing compensation, or has failed to make an adjustment in accordance with subsection 21.2 (2), may order the employer to adjust the compensation of all employees affected to the

rate to which they would have been entitled but for the reduction in compensation and to pay compensation equal to the amount lost because of the reduction

The burden is on the employer to prove that they did not intimidate, coerce, penalize or discriminate against the claimant

> ***25(7)*** *In a hearing before the Hearings Tribunal, a person who is alleged to have contravened subsection 9 (2) has the burden of proving that he, she or it did not contravene the subsection.*

(b) Who May Bring a Reprisal Complaint?

The following persons are entitled to anti-reprisal protection:

(i) A person who may or is participating in a proceeding under the *Act*

(ii) A person who has made or may make a disclosure required in a proceeding under the *Act*.

(iii) A person who is exercising or may exercise any right under this *Act;*

(iv) A person who has acted or may act in compliance with the *Act*, regulations or an order under the Act or who has sought or may seek enforcement of the *Act*, regulations or an order made under the *Act*(s. 9(2)).

Those who have entitlement to a pay equity plan, without having any further involvement in the pay equity process, have a "right" under the *Act*. It is not necessary to be actively involved in the pay equity process in order to raise a s. 9(2) complaint (*New Liskeard Board of Police Commissioners (No.2)* (1991), 2 P.E.R. 65).

Those who have entitlement to a pay equity adjustment are protected by the provision (*Great Lakes Brick and Stone Ltd.*, (1994), 5 P.E.R. 1).

The *Act* is a proactive system and therefore, in most cases, the beneficiaries of the *Act* will have been passive recipients. Clearly, the intention of the legislature was not to limit the protection of the provision to those who file complaints or are otherwise actively involved in the process (*(Peterborough) Clow (No. 3)*.

(c) Proving a Reprisal Complaint

The applicant has the initial burden to raise a *prima facie* case. Once that burden has been met, the onus is on the employer to disprove the allegation. A *prima facie* case can be established, for example, by proving that the applicant had or was entitled to receive a pay equity increase and that the applicant had suffered a detriment (*Liquor Control Board of Ontario* (No. 3) (1997), 8 P.E.R. 1; *Management Board Secretariat* (No. 6) (1998-99), 9 P.E.R 48)

When dealing with employee terminations, if anti-pay equity animus is the main reason or incidental to the reason to dismiss the employee, s.9(2) will have been violated. The onus is on the employer to establish, on a balance of probabilities, that the reasons given for the discharge are the only reasons and secondly, that the reasons are not tainted by an anti-pay equity

motive. For instance, the applicant's increased wage rate, as a result of a pay equity increase, must not have been a consideration in the decision to terminate her employment

The Tribunal has held:

> *Whenever the timing of the discipline or discharge coincides with the enjoyment or seeking of a benefit, it should be scrutinized closely and false motives should not be allowed to masquerade as legitimate ones. If an employer has implemented a genuine management objective, even though it coincides with the enjoyment of a benefit, the employer will be able to discharge its onus so long as he employer's conduct is not tainted with anti-pay equity animus. ((Peterborough) Clow (No. 3)).*

Although the onus is on the responding party to disprove the allegation, an applicant should still challenge the evidence of the responding party through cross-examination and the presentation of its own evidence (*Liquor Control Board of Ontario* (No. 2) (1995), 6 P.E.R. 148).

The employer must demonstrate more than a seemingly plausible explanation for their conduct. It must be established that there is no taint of anti-pay equity animus to the reasons given for the employee's dismissal. (*Plantagenet* (No.1) (1997), 8 P.E.R. 32)

The reason must be legitimate but does not have to be a sound business judgment. The Tribunal will not concern itself with the employer's decision if it is free of anti-pay equity animus, therefore only facts relating to motive will be relevant (*Alzheimer Society* (1997), 8 PER 187. 551-95).

The *Act* and its reprisal provisions will not prevent employers from implementing legitimate management concerns about the structure and composition of the workforce *(Peterborough) Clow (No. 3)*).

The employer cannot escape liability by placing the blame for the prohibited conduct on a member of management. The employer must ensure that conduct towards the applicant was legitimately motivated before supporting it. The lack of effort to ensure the legitimate motivation will not absolve the employer of responsibility under the *Act* (*(Peterborough) Clow (No. 3)* and *Alzheimer Society of Chatham-Kent v. Moon,* 1997 CanLII 12220 (ON PEHT).

(d) Anti-Reprisal Remedies

Reinstatement is the remedy of choice for a violation of s. 9(2) because of job loss.

However, the Tribunal may not order reinstatement if the employer persuades them that it would not be practicable (*(Peterborough) Clow (No. 3)*.

If the position no longer exists, it will be appropriate to order reinstatement to an alternative position that is similar with no loss of wages. To argue that the person ought not be reinstated at all, simply because the position no longer exists, would go against the remedial nature of the Act and the liberal construction warranted in order to meet the goal of addressing systemic discrimination in compensation. (*Plantagenet (No.1)*.

The Tribunal may consider the following factors when determining whether reinstatement is appropriate:

(i) the impact of reinstatement in the workplace on the employees;

(ii) the impact of reinstatement in the workplace on the employees;

(iii) whether there has been any change in management (ie: is the offending individual still in the workplace?);

(iv) the skill set required for the job;

(v) whether there has been any change in job duties. (*Alzheimer Society of Chatham-Kent v. Moon* (see above).

With respect to remedial relief, the following applies:

(a) **An order of lost wages may be made but the applicant has an obligation to mitigate those damages. If the applicant fails to reasonably mitigate, damages may be reduced by one-third.**

(b) **Although the *Act* is silent on the subject, the Tribunal has ruled that interest may be awarded on damages. *(Peterborough) Clow (No. 3)*; *Royal Crest Lifecare Group (No. 5)* (November 18, 2002); *Helping Hands Daycare* (No. 2) (11 October, 2006), 2387-05 (P.E.H.T.). Interest will be calculated by dividing the amount owing in half and applying the applicable *Courts of Justice Act* interest rate ((*Plantagenet (No.1)*).**

(c) **An applicant's out-of-pocket costs (ie: accommodation, travel, etc.) are not recoverable.**

(d) **The Tribunal has not yet awarded damages for mental distress to an applicant but it appears that it is a possibility if the evidence establishes enough distress to warrant such an award ((*Peterborough) Clow (No. 3)* (above).**

(e) **Expenses incurred by an applicant in attempts to mitigate losses may be compensated. (*Alzheimer Society of Chatham-Kent v. Moon (*above).**

(f) **Legal fees are not recoverable ((*Peterborough) Clow (No. 3)* and *Alzheimer Society of Chatham-Kent v. Moon*)**

6. Dealing with the Pay Equity Commission and Pay Equity Hearings Tribunal

(a) The Pay Equity Commission

The Pay Equity Commission released in August, 2012 a Guide to Interpreting Ontario's Pay Equity Act,[23] Various of their good previous guiding documents (some referred to in this Guide) have disappeared from the website.

[23] http://www.payequity.gov.on.ca/en/resources/guide/ope/index.php

While the Guide is helpful in many respects, the ultimate interpretation of the Act rests with the Pay Equity Hearings Tribunal. As a result, it is necessary where appropriate to challenge what is in the Guide. For example, ONA and SEIU are currently challenging the Commission's limited interpretation of an employer's obligation to maintain under the proxy comparison method.

Review Services no longer functions to provide any significant assistance to Unions in resolving disputes with employers. In the early stages of the *Act's* implementation, it was useful for Unions to file applications to review services in order to get the assistance of a Review Officer to help with the process of getting employer to comply. Since around 2005, the Ontario Pay Equity Commission has set up a much more complicated intake process which has had the effect of discouraging applications, particularly by non-unionized employees.

As well, there are often substantial delays in getting Review Services Officers to make decisions. Once the decision or order is released, if the union or employee wins, the employer usually appeals to the Tribunal and the process starts again as the Tribunal hearing completely reconsiders the facts and issues. If the employer wins at Review Services, the union or employee either has to give up, settle or proceed to the Tribunal.

(b) Expediting Review Services Applications

It is important to remember that a trade union or employee can proceed to the Tribunal with the application it brought to Review Services so long as it spends a reasonable period of time at Review Services in order to provide an opportunity for settlement. *Haldimand-Norfolk* (No.1) (1990), 1 P.E.R. 1.

In order to move quickly through Review Services it is necessary to provide an application to Review Services which provide full details about the claim and attaches relevant documentation. Arrange to serve the employer with this material at the same time that you provide the application to the Tribunal. Don't wait for the Commission to serve the Employer. Let the Commission know that you have served the employer. In the covering letter to the Commission, advise them that it is essential that the issue be resolved as quickly as possible as the affected members will be continuing to work at discriminatory wages until the matter is resolved. In the letter advise of the dates that you are available within one month of filing the application where you could meet with the Officer and/or the employer to discuss resolution and settlement of the application. It is important to be clear about what resolution is being sought.

(c) Pay Equity Hearings Tribunal

The Pay Equity Hearings Tribunal website provides forms and rules to assist with the filing of applications. After the pleadings are completed, the Tribunal will schedule a pre-hearing conference lead by a Tribunal Vice Chair who will not hear the case. This is a time when you can try to settle your case with the assistance of the Tribunal. If settlement is not possible, the Vice Chair will work with the parties to get the case prepared for hearing including steps for the disclosure of documents, witnesses and other matters.

PART F STEP #7 CLOSE PAY GAPS THROUGH COLLECTIVE BARGAINING

1. Keeping Pay Equity and Collective Bargaining Distinct

While there are important linkages, pay equity compliance as a human rights remedy is a different process from collective agreement negotiations: The ILO Job Evaluation Guide states:

> *"It is important the union and management representatives clearly distinguish the process of achieving pay equity from the process of negotiating a collective agreement. Pay equity is a fundamental human right which must not be subject to concessions or compromises that characterize collective agreement negotiations. Distinguishing between the issues of pay equity and those of collective agreements also helps to limit the potential conflicts between women's and men's interests in trade unions" p. 11*

Unions have two separate obligations with respect to the compensation of employees within its bargaining unit. They are required to ensure that it presents collective bargaining compensation proposal which fairly represent the entitlement of its members to collective bargaining adjustments. They are also required to take necessary actions under the *PEA* to redress any compensation which is not pay equity compliant. This issue was considered in the Tribunal's decision in *Welland County General Hospital (No.2)* (1994) 5 P.E.R. 12

> *"The Union points out that it is subject to a dual set of obligations. As a collective bargaining agent, it is required to fairly represent and advance the interests of all members of the bargaining unit. Under the Act it has a role to play in ensuring that pay equity is achieved for the female job classes in the bargaining unit." Welland County General Hospital (No.2)* (1994) 5 P.E.R. 12, para. 42

2. Collective Agreement Negotiations

Employers often try to get unions to sign off in collective agreement negotiations that the wage rates agreed to comply with the *Pay Equity Act.* Unless the union has satisfied itself that this is the case, such language should be avoided and could be challenged by individual employees either as a breach of the union's obligations under the *Human Rights Code* or the *Pay Equity Act.*

While unions are not prevented from negotiating increases to male comparator job classes in negotiations, if such an increase is obtained, steps need to then be immediately taken after the negotiations to get the employer to give the same adjustment to the female comparator job class so that the pay gap is not widened.

3. Pay Equity, Collective Bargaining and Interest Arbitration

Pay equity adjustments are a human rights remedy and not a regular "wage increase". They should not be considered a wage increase for the purpose of interest arbitration. Otherwise, women's wages would be

> *"artificially suppressed, contrary to the spirit of the Act and, in particular, ss.9(1), which prohibits the reduction of wages to achieve pay equity." (Welland County General Hospital (No.2)* (above).

The *Welland County* decision was also relied on in the *United Counties of Leeds, Grenville and Lanark District Health Unit* decision of the Ontario Labour Relations Board, [1997] O.L.R.D. No. 1928 (Whitaker). That decision noted that the Tribunal's Welland County decision which it stated

"attaches significant importance to the notion that pay equity negotiation and collective bargaining are two separate and distinct processes. This view is consistent with the practical experience of workplace parties, where as a matter of course, these two sets of negotiations are dealt with separately. In order to preserve the integrity of each, it is necessary to interpret the governing legislation in a manner which requires the least impairment by one process of the other." para.34.

The *United Counties* decision also found that it was being called upon to decide a question which required "pay equity" expertise and this should be left to the Tribunal alone to "determine the question and if necessary fashion a remedy pursuant to its jurisdiction under the Pay Equity Act.". para. 35.

This decision at paragraph 28 also relied on the Ontario Divisional Court decision in *West Park Hospital (1992),* O.J. No. 523, where the Court concluded that parties, subsequent to the negotiation of a collective agreement, must determine whether it has an impact on pay equity compliance. If it does, the parties must either agree to vary the plan or use the enforcement mechanisms of the Act to "achieve the necessary variations in the pay equity plan".

All of the above decisions recognize that an interest arbitration board must make decisions separate from their pay equity implications in order to respect the separate interest arbitration process and mandate and then separately address any pay equity implications. As the Divisional Court stated in *West Park* (cited at para. 28 of the *United Counties of Leeds, Grenville and Lanark District Health Unit*)

"The result as we see it, is not a contravention of the Pay Equity Act, but an award made by the Board in accordance with its mandate which in turn requires further adjustments in the pay of female dominated jobs in order to comply with the Pay Equity Act and the agreement entered into between the parties pursuant to the Act. There is no breach of the Act and no loss of jurisdiction in the Board." which are within its jurisdiction to make.

The Union has properly separated the pay equity compliance process from the collective bargaining process as required by the Pay Equity Act.

"The Act contemplates and indeed requires that there be certain connections between the collective bargaining process and the pay equity process. Where a pay equity plan is prepared in respect of employees represented by a bargaining agent, the employer and the bargaining agent must negotiate the plan (ss.14(2)). Adjustments provided for under the plan must be incorporated into and prevail over the relevant collective agreement (ss.13(10)). Note that it is only the adjustments and not the plan itself that are incorporated into the collective agreement. If the plan itself were incorporated there would be no need for a provision like ss.13(9), which makes the plan, like a collective agreement, binding upon the employer, the bargaining agent and the employees covered by it." Para. 47

"Not only does nothing in the Act compel the negotiation of a pay equity plan to be carried out in conjunction with collective agreement negotiations, the Act appears to contemplate that the two processes will occur separately. Surely if the Act contemplated that pay equity and collective bargaining were going to occur in conjunction, we might expect that the posting dates for plans would coincide with the commencement dates of the relevant collective agreements. Instead, all plans have a mandatory posting date of January 1st. As well, in the event of a negotiating impasse, different mechanisms for

resolution are available under collective bargaining regimes and the pay equity regime. In the former, depending on the governing legislation, a strike/lockout may occur, or resort may be had to arbitration, as occurred here. In the latter, resort must be had to the Pay Equity Commission (s.16).”

4. Enforcing Pay Equity Adjustments through Grievances

Sections 13(9) and (10) of the *Pay Equity Act* provide that an approved pay equity plan is binding on the parties, the pay equity plan prevails over all relevant collective agreements, and the adjustments in the plan are deemed to be incorporated into and form part of the relevant collective agreements:

> *13. (9) A pay equity plan that is approved under this Part binds the employer and the employees to whom the plan applies and their bargaining agent, if any.*
>
> *13. (10) A pay equity plan that is approved under this Part prevails over all relevant collective agreements and the adjustments to rates of compensation required by the plan shall be deemed to be incorporated into and form part of the relevant collective agreements.*

5. Negotiating Pay Equity Compliance Processes

Collective agreement provisions can either provide an alternate forum for enforcing pay equity rights or can provide additional rights – particularly in relation to job evaluation and maintenance of pay equity – to make more effective the rights which are set out in the *Pay Equity Act.*

Given the difficulties with expeditious enforcement using Review Service and the Tribunal, negotiating Terms of Reference for a pay equity achieving and/or maintenance process embedded in the collective agreement is an important way to enforce pay equity effectively. Various unions have negotiated pay equity maintenance protocols in their collective agreements.

6. Challenging Discriminatory Pay under CA Anti-Discrimination Provisions

Most collective agreements have anti-discrimination clauses. Under s. 48(12)(j) of the *Labour Relations Act*, an arbitrator has jurisdiction to interpret and apply human rights and other employment-related statutes:

> 48. (12) *An arbitrator or the chair of an arbitration board, as the case may be, has power,*
>
> (j) *to interpret and apply human rights and other employment related statutes, despite any conflict between those statutes and the terms of the collective agreement.*

This enables an arbitrator to consider whether the wage rates in a collective agreement or any other provision impacting women’s pay violate the right to be free of discrimination in employment under s. 5(1) of the *Human Rights Code*. See *Parry Sound (District) Social Services v. OPSEU*, (2003) 230 D.L.R. (4th) 257: which found that substantive rights in the *Human Rights Code* and other employment-related statutes are incorporated into each collective agreement.

Accordingly, unions should consider the possibility of filing grievances with respect to pay gaps which are not covered by the *Pay Equity Act.*

For example, the Pay Equity Hearings Tribunal found that unequal wage grids which delivered less pay at different steps of the grid was not a violation of the *Pay Equity Act.* In 2010 decisions in *Canadian Union of Public Employees, Local 1999 v. Lakeridge Health Corporation*, 2010 CanLII 46187 (ON PEHT) and *Canadian Union of Public Employees, Local 1734 v. York Region District School Board*, 2010 CanLII 29715 (ON PEHT), the Tribunal found that although female job classes took longer to reach the job rate and had unequal starting rates and pay at different steps in the grid than their male comparator, this was not a violation of the PEA as the Act was not meant to cover all pay equity gaps. It was suggested that such gaps might be a matter for a *Code* complaint or a *Charter* challenge to the *Pay Equity Act.* These decisions were upheld by the Ontario Divisional Court in *CUPE Local 1999 v. Lakeridge Health Corp.,* 2011 ONSC 2804 (CanLII), which held that unequal wage grids were not unlawful under the Pay Equity Act even though they delivered less pay to female job classes than their comparator male job classes.

Therefore where women are unable to access rights directly under the *PEA,* collective agreement (and human rights tribunal) remedies may allow them to access pay equity rights.

PART G STEP #8 CLOSE PAY GAPS THROUGH HUMAN RIGHTS ENFORCEMENT

1. Challenging Discriminatory Pay Through an HRTO Complaint

The right to equal treatment in pay and employment is guaranteed to women by section 5 of the *Human Rights Code.* The *Code* requires that employers establish and maintain equal treatment in compensation for men and women. The *Code* covers all Ontario workplaces regardless of size and provides a remedy for workers in workplaces with 10 or less employees. This obligation exists in addition to the *Pay Equity Act* obligations of an employer. The enactment of the *Pay Equity Act* does not remove jurisdiction from Commission to deal with pay equity complaints; *Nishimura v. Ontario Human Rights Commission* (1989), 70 O.R. (3d) 247 (Ont. Div. Ct.):

Unequal wage grids could by challenged by a union application to the Tribunal. As well, a *Code* complaint could also be the pay equity remedy for women in predominantly female private workplaces which are not covered by the proxy comparison method.

2. Challenging Discriminatory Pay at the Labour Board

Labour board remedies may also be useful for closing pay gaps.

For example, if an employer lays off or contracts out women's jobs because they have been awarded pay equity adjustments, arguably this can be characterized as an unfair labour practice. It could be argued that such layoffs or contracting out constitute intimidation, coercion or a reprisal for attempting to exercise rights integral to labour relations or that such conduct interferes with the union's representation of its members in relation to the right to receive non-discriminatory wages. It would be necessary to build the appropriate evidentiary record to show that the layoffs or contracting out were motivated by anti-pay equity animus.

If such a claim was pursued under the *Canada Labour Code*, the Labour Board has the power to issue substantive interim orders which may be useful in blocking the layoffs or contracting out pending a resolution of the dispute.

As well, a collective agreement is not a valid collective agreement if it discriminates on the basis of sex. .

> *A collective agreement must not discriminate against any person if the discrimination is contrary to the Human Rights Code or the Canadian Charter of Rights and Freedoms. 1995, c. 1, Sched. A, s. 54.*

Accordingly, it would be an unlawful labour practice to bargain for a wage or other proposal which violated the *Pay Equity Act* or which would result in discriminatory pay gaps. Remedy for discrimination

Section 96(4) gives the Labour the power to

> *"determine what, if anything, the employer, employers' organization, trade union, council of trade unions, person or employee shall do or refrain from doing with respect thereto and such determination, without limiting the generality of the foregoing may include,* ***despite the provisions of any collective agreement****, any one or more of,*
>
> *(a) an order directing the employer, employers' organization, trade union, council of trade unions, employee or other person to cease doing the act or acts complained of;*
>
> *(b) an order directing the employer, employers' organization, trade union, council of trade unions, employee or other person to rectify the act or acts complained of; or*
>
> *(c) an order to reinstate in employment or hire the person or employee concerned, with or without compensation, or to compensate instead of hiring or reinstatement for loss of earnings or other employment benefits in an amount that may be assessed by the Board against the employer, employers' organization, trade union, council of trade unions, employee or other person jointly or severally. 1995, c. 1, Sched. A, s. 96 (4).emphasis added.*

3. Challenging Discriminatory Pay Through *Charter* Litigation

In Ontario, advances for non-organized workers under the *Pay Equity Act* were mostly made in the public sector where government pay equity funding was available and, where such funding was taken away, *Charter* litigation was brought by Unions to address the repeal of such rights and funding. See *SEIU Local 204 v Attorney General (Ontario)* (above). This decision of Mr. Justice O'Leary restored pay equity rights for both organized and non-organized workers using the proxy comparison method by finding that the repeal of the those rights by Schedule J of the *Savings and Restructuring Act, 1996* . After this successful *Charter* challenge, the Government paid out more than 150 million dollars and then stopped funding the adjustments. This lead to a further *Charter* challenge, *CUPE et al v. Attorney-General (Ont)* which led to a mediated settlement which required the payment of up to $414 million of pay equity funding for proxy sector adjustments for both organized and non-organized workers.

As funding remains a critical issue for pay equity compliance, consideration could be given to a further *Charter* challenge to the lack of funding or to the discriminatory way in which funding is provided for male and female work in the public sector.

See Part below re: Federal *PSECA Charter* litigation.

PART H FEDERAL SECTOR PAY EQUITY COMPLIANCE

1. Introduction

For federally regulated employees and bargaining units, the pay equity rules are different.

Most federal public service workers are now covered by the *Public Sector Equitable Compensation Act* which was enacted in March, 2009 but has not yet been proclaimed.

Private sector workers and the remaining public sector workers remain covered by section 11 of the *Canadian Human Rights Act ("CHRA").*

In 2004 the Federal Government's Pay Equity Review Task Force released its Report which sets out detailed recommendations for a new pro-active pay equity statute.

The Task Force recommended a new federal pay equity law that would impose a specific pro-active obligation on employers to review their pay practices, identify any pay equity gaps and develop a pay equity plan to remedy discriminatory gaps in compensation. It recommended the creation of a pay equity commission and a pay equity tribunal, based on the proactive legislation models that exist in Ontario and in Québec. The Harper government rejected these recommendations when it adopted the *PSECA.*

The Task Force commissioned research on a number of key pay equity implementation issues which may be of assistance to unions in both the federal and provincial jurisdictions. Executive summaries of that commissioned research were available but the Federal Government has taken such links off its website.

See the Task Force research paper by Mary Cornish, Elizabeth Shilton and Fay Faraday *Canada's International and Domestic Human Rights Obligations to Design an Effective, Enforceable and Proactive Federal Pay Equity Law* (November 2002).

2. Section 11 *Canadian Human Rights Act*

As unions who operate primarily in the provincial jurisdiction in some cases also have bargaining units in the federal jurisdiction, it will be important for them to be aware of the separate pay equity regime that applies to those federal bargaining units.

The pay equity entitlements of employees under federal jurisdiction are found in the *Canadian Human Rights Act* and particularly section 11 and the *Equal Wages Guidelines* enacted under that *Act.* Unlike the Ontario *Pay Equity Act* which sets out a detailed pro-active scheme to achieve pay equity, the federal legislation sets out a basic right to pay equity and has a complaint-based enforcement system.

3. *Public Sector Equitable Compensation Act (`PSECA`)*

The *PSECA* will restrict the substance and the application of pay equity in the public sector. This includes:

(a) **removing the right of public sector workers to file complaints for pay equity with the Canadian Human Rights Commission.**

(b) **fundamentally redefining pay equity concepts such as female predominance (requiring 70% dominance) and including discriminatory "market factors in the evaluation of whether or not jobs are of "equal" value.**

(c) **transforming pay equity into an "equitable compensation issue" that must be dealt with at the bargaining table along with other collective bargaining issues. If pay equity is not achieved through the bargaining process, individual workers are left to file a complaint with the Public Service Labour Relations Board, but without their union's support: in fact, the *PSECA* imposes a $50,000 fine on any union that would encourage or assist their own members in filing a pay equity complaint!**

Pay equity is a fundamental human right that has been protected by the *Canadian Human Rights Act* since 1977. It should not be bargained away during collective bargaining. When a government violates women's right to pay equity, the Supreme Court of Canada has said that is an infringement of their constitutional equality rights. Pay equity is guaranteed by Convention 100 of the International Labour Organization and the United Nations *Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW).*

A number of unions, including the Professional Institute of the Public Service of Canada and the Public Service Alliance of Canada are challenging the constitutionality of the *PSECA*, along with the *Expenditure Restraint Act*. In summary, these applications allege that the *PSECA* violates the fundamental equality rights of women in the federal public sector to be free from wage discrimination in the payment of their work and perpetuates ongoing sex-based wage discrimination by government actors in the federal public sector.

This includes establishing procedures that deny such women the ability to effectively implement and enforce even these eroded substantive rights. It also imposes remedial restrictions, which deny such women the right to have sex-based wage discrimination fully eradicated and prevented.

The federal government through its Office of the Chief Human Resource Officer is currently engaged in consulting with stakeholders about proposed *PSECA* regulations. It issued various policy directions in its June 10, 2010 meeting on the following issues: 1) Job Group; 2)Equitable Compensation Assessment; 3) The Value of Work - SERWC; 4) The Value of Work - Recruitment and Retention Needs; 5)The Value of Work - Prescribed Factors; 6) Provision of Data; and 7) Technical Aspects.

The Public Service Alliance of Canada's February, 2009 document gives a good summary of criticisms of the *PSECA.* See http://psac.com/news/2009/issues/200902pseact-e.shtml

APPENDIX "A"

CSMC *PAY EQUITY ACT* COMPLIANCE CHECKLIST

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Implementing and maintaining pay equity under the *Pay Equity Act* depends on having detailed and accurate records. This is particularly challenging because the process of achieving pay equitycontinues over many years. This checklist aims to assist unions in their efforts. It is divided into three sections which address the different stages that your union may be at in the pay equity process:

(1) Getting Organized

(2) Achieving Pay Equity and

(3) Maintaining Pay Equity

Part 1: Getting Organized

Because the pay equity process continues over several years, it is important to have structures in place to ensure that the records and the institutional knowledge within your union about pay equity is maintained. Here are some questions that union reps can consider in diagnosing where your union is at with pay equity.

- How many bargaining units do you have?
- What sectors are they in?
  - public sector
  - private sector
  - broader public sector - proxy sector
- Do all of your units have pay equity plans?
  - do you have any units/employers that bargain pay equity through a central or joint process?
- What kind of pay equity plans are they?
  - job-to-job comparisons

- proportional value
- proxy comparisons

- Where are the pay equity plans kept?

- Where are the records with respect to the development of the pay equity plans?

  - who is responsible for maintaining these records?
  - what kinds of records do you have?
    - information on wages and benefits for all job classes
    - gender neutral comparison system
    - job descriptions
    - job questionnaires
    - job ratings
    - job comparisons

- Where are the records with respect to the implementation of pay equity?

  - what kinds of records do you have?
  - records of what pay equity adjustments were paid out and when?
  - records of any other settlements or agreements that were reached?
  - records of any amendments to the pay equity plans?
  - who is responsible for maintaining these records?

- Who negotiated the pay equity plans?

  - Are they still with the union?
  - Who has the records with respect to the development and negotiation of the pay equity plans?

- Does your union have local pay equity committees?

  - Do these committees continue to be active in monitoring pay equity compliance?

- Have any of your units negotiated pay equity maintenance protocols?

  - are local committees involved in this?

- What has happened in new units you have certified?

  - Had pay equity previously been achieved?
  - Have you obtained information on the status of pay equity from the employer?

- Have there been any pre-existing pay equity plans?
- Was it necessary to carve the bargaining unit out of an existing pay equity plan?
- Was a new pay equity plan developed?

- What systems do you have in place to find out when there have been changed circumstances in a workplace?

  - Who do you contact to get this information?

Part 2: Has Pay Equity Been Achieved in Your Workplace?

Below is a list of documents and facts that unions can organize to assist in tracking pay equity implementation and to ensure compliance with pay equity maintenance. These are also examples of the kinds of documents and facts that may need to be compiled in the context of a pay equity maintenance complaint to either the Pay Equity Commission or Pay Equity Hearings Tribunal.

- A copy of the Pay Equity Plan

  - copies of any amendments to the Pay Equity Plan

  - copies of all other agreements, settlements, or letters of understanding relating to pay equity since the time the Pay Equity Plan was developed

- A copy of the Gender Neutral Comparison System that was used to evaluate the job classes and develop the Pay Equity Plan.

- A complete list of the job classes in the bargaining unit (or at the establishment if the pay equity plan used comparators from outside the bargaining unit)

  - list of the female job classes and their rates of pay
  - list of the male job classes and their rates of pay

- Job descriptions for all the job classes

- Job questionnaires and ratings sheets for each of the job classes

- Information about the kind of comparison that was used to develop the Pay Equity Plan (i.e. job-to-job, proportional value or proxy comparisons)

  - the results of the comparisons

- If your workplace used the proxy comparison method to achieve pay equity:

- a copy of the Notice of Inability to Achieve (which authorizes a workplace to use the proxy method)
- identity of the proxy employer
- information about the proxy employer job classes that were used to develop the Pay Equity Plan

- Schedule of pay equity adjustments owing under the Pay Equity Plan
  - the total amount of pay equity adjustments owed
    - the amount of pay equity adjustments that have been paid
      - total amount paid each year
      - pay equity adjustments for each job class
  - when they were paid
  - amount of pay equity adjustments still owing (if any) under the original Pay Equity Plan

- Date pay equity was achieved (if it has been achieved)

- Information about and results from any prior complaints to the Pay Equity Commission/Pay Equity Hearings Tribunal

- Check to see whether all pay equity adjustments owing under the original plan have been paid as required.

Has Pay Equity Been Maintained in Your Workplace?

The obligation to maintain pay equity can arise from a range of different factual circumstances. While each case is unique on its facts, these circumstances can be divided conceptually into at least three general categories:

(1) Ensuring that the pay equity target rate has been appropriately adjusted in light of non-pay equity collective bargaining increases that have been negotiated during the “achievement phase”.

(2) Ensuring that the pay gap between female and male job comparators has not improperly increased during or after the “achievement phase”.

(3) Addressing evolving factual circumstances that affect the appropriateness of the original Pay Equity Plan.

This part of the checklist identifies some facts to consider and track when assessing if pay equity has been maintained. Other facts and/or documents may also need to be tracked depending on the particular circumstances in each workplace.

- Copies of all collective agreements since the pay equity plan was developed.
  - What non-pay equity collective bargaining increases have been made?
  - Have appropriate changes be made to the pay equity target rate in light of collective bargaining increases?
  - Have any wage gaps been created or widened between female job classes and male comparators as a result of collective bargaining or compensation increases or changes since the original plan?
  - Create a Chart to track the original female job classes and their male comparators to see that the female job classes have received all the compensation adjustments which their male comparator job classes received since the original plan (where the job –to-job comparison method was used) or that the female job classes received the compensation they were entitled to as a result of the redrawing of the wage line where proportional value was used where there were changes in the job value or pay of male job classes.
- Is there a pay equity maintenance protocol at the workplace?
  - Is it in the collective agreement?
  - Is it in the pay equity plan?
  - Is it in a separate policy?
- Have any new job classes been created?
  - job descriptions of the new job class
  - gender predominance of the new job class
  - have new job classes been evaluated?

- job questionnaire and rating of the new job class

- Have any male comparator job classes been eliminated?

- Have there been any significant change in job duties of existing job classes? Have the changed jobs been re-evaluated?

  - new job descriptions

  - new job questionnaires and ratings

- Has there been a new union certification?

  - was there a pre-existing pay equity plan?

  - is the pre-existing pay equity plan no longer appropriate in light of the certification?

- Sale of a business

  - is there a change in the scope of establishment?
  - is there a change in the scope of the bargaining unit?

  - are there pre-existing or multiple pay equity plans?

    - did they use different Gender Neutral Comparison Systems?
    - different methods for achieving pay equity?
    - has pay equity been achieved under the existing plans or is it still in process?

  - new job classes?

  - new female job classes and/or male comparators?

  - Has pay equity been achieved for the post-sale business? This may involve re-visiting all the steps that are necessary to achieve pay equity in the first place.

APPENDIX "B"

CSMC OVERVIEW OF THE *PAY EQUITY ACT*

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A. OVERVIEW OF THE ACT'S PURPOSE AND STRUCTURE

1. The *Pay Equity Act* was enacted in order to redress systemic sex-based wage discrimination in Ontario workplaces. The *Act* applies to all public sector employers and all private sector employers with more than ten employees, to all employees of these employers, and to their bargaining agents.

   Preamble
   Section 4(1) - purpose
   Section 3 - application

2. Roughly speaking, the *Act* identifies the extent of pay inequity by comparing compensation paid to female job classes with those paid to male job classes of similar value. Compensation includes wages and benefits.

   Section 5.1, 1(1)

3. By design, pay equity is achieved through a process that is largely self-managed by the workplace parties. In unionized workplaces, the employer and bargaining agent negotiate with respect to defining the scope of the employer's establishment, selecting a gender neutral comparison system for evaluating jobs, evaluating the jobs, selecting appropriate job comparators, preparing the pay equity plan, and maintaining the pay equity plan. In non-unionized workplaces, the employer prepares the pay equity plan but employees must have an opportunity to review the plan and recommend changes to the plan.

   Sections 14, 15
   Sections 21.8, 21.9
   Sections 21.20, 21.21

4. There are two bodies which have roles in enforcing the *Pay Equity Act*: the Pay Equity Commission, through its Review Officers and the Pay Equity Hearings Tribunal.

5. Any disputes that arise out of the negotiation or preparation of a pay equity plan or problems with enforcement of the plan can be the subject of complaints to the Pay Equity Commission. Complaints are investigated by Review Officers of the Pay Equity Commission who can order the parties to take such steps as are necessary to prepare or implement the plan.

   Sections 22-24

6. Where an employer or a bargaining agent fails to comply with an order made by a Review Officer under section 24, a Review Officer may refer the matter to the Hearings Tribunal.

   Section 24(5)

7. Where a Review Officer makes an order under section 24, an employer or bargaining agent that has been named in an order may request a hearing before the Hearings Tribunal with respect to the order. Where the order was made following a complaint but the complaint has not been settled, the complainant may also request a hearing.

   Section 24(6)
   Section 23(4) - request for hearing where Review Officer decides not to deal with complaint

8. The Hearings Tribunal shall also hold a hearing if a Review Officer is unable to effect the settlement of a complaint and has not made an order under s. 24(3).

   Section 25(1)(a)

9. The Hearings Tribunal conducts a new hearing into the complaint and has broad power to make such orders as are necessary to ensure compliance with the Act.

   Section 25(2)

B. PREPARING A PAY EQUITY PLAN

10. A pay equity plan applies to an “establishment”. An establishment consists of all the employees of an employer in a “geographic division” which is generally a county, territory or regional municipality as described in the Territorial Division Act.

    Section 1, definitions

11. The parties, however, can negotiate a broader identification of an establishment. The parties can agree to a central pay equity plan that covers multiple employers and multiple bargaining agents across two or more geographic divisions.

Section 2
Section 21.16

12. The parties must identify which jobs classes in an establishment are done primarily by women and which are done primarily by men. A “job class” is made up of positions with similar duties and responsibilities. The workplace parties can negotiate the scope of positions which will constitute a job class. A “female job class” is one in which 70 per cent or more of the members are female. A “male job class” is one in which 70 per cent or more of the members are male.

Section 1, definitions
Sections 6(6)-(10)

13. The job classes are then evaluated using a “gender neutral comparison system”. This means that the value of the work is measured using a composite of the skill, effort, responsibility and working conditions required by the job.

Section 5(1)

14. The female job classes are then compared to male job classes of comparable value using the mechanisms identified in the *Act.* If the workplace is unionized, the comparison first takes place between male and female job classes within the bargaining unit. If there is no male job class of comparable value within the bargaining unit, the female job class is compared to a male job class of similar value anywhere else at the establishment. If the workplace is not unionized, the search takes place first between non-unionized jobs. If no male job of comparable value is found here, a non-unionized female job can be compared to male job classes in the bargaining unit.

Section 6(4), 6(5)

15. Where the wage paid to a female job class is lower than that paid to its male comparator, pay equity is achieved by adjusting the female wage so it is at least equal to the male wage”. The amount by which the female wage must be increased to achieve pay equity is usually referred to as the “pay equity adjustment”.

Section 5.1(1)

16. Where the workplace is unionized, the workplace parties negotiate and sign documents known as “pay equity plans”. W here the workplace is not unionized the employer is responsible for preparing the pay equity plan and employees are entitled to review and recommend changes to the plan.

Sections 14, 15
Sections 21.8, 21.9
Sections 21.20, 21.21

17. A pay equity plan includes information such as the system used to evaluate jobs, the method of comparison used, and a list of the job classes which formed the basis of the comparisons. It also sets out the result of that comparison and identifies the extent to which the wages of any female job classes must be adjusted to achieve pay equity. The plan also includes a schedule of when the pay equity adjustments will be paid out.

    Sections 13, 21.6, and 21.18

18. Pay equity adjustments required under pay equity plans are phased in gradually. Each year, the employer must devote an amount equal to at least 1% of its annual payroll towards increasing the wages of those female job classes which are entitled to a pay equity adjustment.

    Section 13(4),(5) and (6)
    Section 21.10(3)
    Section 21.22

19. In a unionized workplace, the pay equity adjustments required by a pay equity plan shall be incorporated into and form part of the relevant collective agreements.

    Section 13(10)
    Section 21.5(2)
    Section 21.18(5)

20. After the pay equity plans are in place, the *Act* provides that pay equity must be "maintained", that is the employer must maintain compensation practices that provide for pay equity and not allow the compensation gap to widen again.

    Section 7

21. The *Act* permits parties to amend pay equity plans in response to changed circumstances. However, any amendment to the pay equity plan must be negotiated between the employer and the bargaining agent. If the parties are unable to agree to amendments, they must notify the Pay Equity Commission. If the workplace is not unionized, the employer can amend the plan and, if they disagree with the changes, the employees are entitled to file an objection to the amendment with the Pay Equity Commission. In the event of a failure to agree or an objection, a Review Officer of the Pay Equity Commission will investigate and endeavour to effect a settlement or, if necessary, make an order deciding the outstanding issues.

    Sections 14.1, 14.2, 15 and 16

C. METHODS OF COMPARISON

22. Not all workplaces are structured the same: some have both male and female job classes, others have few male job classes and some have no male job classes. Therefore the *Act* outlines three different wage comparison mechanisms which are tailored to suit different kinds of workplaces. These mechanisms are:

(i) job-to-job comparison (Part II);

(ii) ii) proportional value comparison (Part III.1); and

(iii) proxy comparison (Part III.2).

(1) Job-to-Job Comparison

23. Job-to-job comparison is used when a single establishment has both male and female job classes and the female job classes can be matched up with male job classes of equal or comparable value.

24. If the female job class is paid less than the comparable male job class, the wages of the female job class must be raised so that they are at least equal to the male wages.

Section 6

25. Employers using the job-to-job comparison method phase in pay equity incrementally. Each year, they must devote at least 1% of their annual payroll towards closing the gap. Public sector employers using this mechanism must close the entire wage gap by January 1, 1998.

Section 13(7)

(1) Proportional Value Comparison

26. Proportional value comparison is used when an establishment has both female and male job classes but the job-to-job comparison method cannot be used because a female job class cannot be matched to a male job class of equal or comparable value.

Section 21.2

27. Under proportional value comparison, the female job class is compared to a "representative group of male job classes". To establish this representative group, the male job classes are plotted on a graph which measures the wage rate on the vertical axis and the value of the job on the horizontal axis. A "male wage line" is constructed, either by drawing it free-hand on the graph or by using the statistical method called regression analysis. The female job classes are then plotted on the graph. If they fall below the male wage line, the wage rate for the

female job class must be increased by the amount necessary to bring it up to the line.

Section 21.3
Pay Equity Commission, Step By Step to Pay Equity: Using the Proportional Value Comparison Method, pp. 12-17

28. Again the pay equity adjustments are phased in gradually. Each year the employer must devote at least 1% of its annual payroll towards closing the wage gap. Public sector employers using this method must close the entire wage gap by January 1, 1998.

Section 21.10(3)

(1) Proxy Comparison Method

29. The proxy comparison method is set out in Part III.2 of the *Pay Equity Act*.

30. The proxy comparison method applies only to public sector employers which either have no male job classes or which do not have enough male job classes to construct a male wage line using the proportional value comparison method. The list of public sector employers which are subject to the *Act* is set out in the Schedule to the *Act.*

Schedule to the *Pay Equity Act*;
See also: Ontario Regulation 396/93

31. Before the proxy comparison method can be used, the employer must notify the Pay Equity Commission that it was unable to achieve pay equity using either the job-to-job or proportional value comparison methods. A Review Officer at the Pay Equity Commission must then investigate to confirm that the employer cannot use the job-to-job or proportional value methods and that the employer is a public sector employer eligible to use the proxy method. If these criteria are satisfied, the Review Officer issues a Proxy Order declaring the employer to be eligible to use the method. This employer is then known as a “seeking employer”.

Section 21.2(5)
Section 21.12

32. Under the proxy comparison method, the seeking employer is matched with a “proxy employer” which has already negotiated a pay equity plan. The “seeking employer” borrows wage and job value information from the “proxy employer” to conduct its job comparisons. The “proxy employer” is another public sector employer whose business is similar in nature to that of the seeking employer but which has male job classes. Which kind of organization will be used as the appropriate proxy employer in any particular case is designated in Ontario Regulation 396/93.

Schedule to Ontario Regulation 396/93

33. The seeking employer identifies its “key female job classes” which are the female job classes with the greatest number of employees or the female job classes whose duties are essential to the delivery of the service provided by the employer. The seeking employer then requests wage and job information from the proxy employer regarding its female job classes whose duties and responsibilities are similar to those of the key female job classes.

Section 21.11(1), definitions
Section 21.17

34. As indicated above, the female job classes at the proxy employer have already had their wages adjusted to achieve pay equity. Therefore, to achieve pay equity, the female job classes at the seeking employer are compared to similar female job classes at the proxy employer. For example, a health care aide at a nursing home is compared to health care aide at a home for the aged whose wages have already been adjusted to a pay equity rate.

Section 21.15

35. Following the same graphing process as the proportional value method, wage and job value information for the proxy employer’s female job classes is used to construct a wage line representing non-discriminatory wages. The seeking female job classes are then plotted against the wage line. W here the seeking female job classes fall below the line, their wages are increased to the line.

Section 21.13
Section 21.15

36. Wage adjustments under proxy pay equity plans are retroactive to January 1, 1994.

Section 21.22(1)

37. Pay equity adjustments required under proxy pay equity plans are also phased in gradually. Each year the employer must devote at least 1% of its annual payroll towards closing the wage gap. However, unlike public sector employers using the job-to-job or proportional value comparison methods, there is no end date by which pay equity must be achieved under the proxy method. The pay equity adjustments will be phased in at a rate of 1% of payroll each year over as many years as are needed to close the gap.

Section 21.22(2)

APPENDIX "C"

PAY EQUITY ACT COMPLIANCE –
MAKING VISIBLE AND VALUING WOMEN'S WORK

By

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A. PAY EQUITY COMPLIANT RESOLUTION REQUIRED

The *Pay Equity Act* requires that employers and trade unions work together to resolve pay equity implementation issues on a principled basis which will ensure that the overall pay equity/job evaluation process is consistent, free of gender bias and transparent. Pay equity systems should be created which are capable of being explained, replicated and maintained in the future. This document focusses on the principles which should guide ensuring that women's and men's work are both described fully and fairly and valued appropriately.

The above-noted principles which should guide the work of employers and trade unions are drawn from the *Pay Equity Act*, the jurisprudence of the Pay Equity Hearings Tribunal, the International Labour Organization's "Promoting Equity: Gender-Neutral Job Evaluation for Equal Pay: A Step-By-Step Guide" (International Labour Office, Geneva, 2008), ("ILO Guide") http://www.ilo.org/declaration/info/publications/lang--en/docName--WCMS_101325/index.htm; and the Canadian Human Rights Commission Guide ("CHRC Guide")

This requires keeping at the forefront of the process, the requirements of the *Pay Equity Act*, the dynamics which sustain gender discrimination in the compensation of women's work and the need to make visible and value the work both women and men perform in workplaces.

In that regard, the following statement from the ILO Job Evaluation Guide is of note:

> *"It is important the union and management representatives clearly distinguish the process of achieving pay equity from the process of negotiating a collective agreement. Pay equity is a fundamental human right which must not be subject to concessions or compromises that characterize collective agreement negotiations. Distinguishing between the issues of pay equity and those of collective agreements also helps to limit the potential conflicts between women's and men's interests in trade unions" (p. 11)*
>
> *ILO Job Evaluation Guide.*

B. MAKING WORK VISIBLE - INCLUSIVITY

Ensuring that both men's and women's work is made visible and value is one of the greatest challenges in ensuring a gender neutral job evaluation process.

"The job evaluation process must include all aspects of work done by men and women even if the work was not previously valued, understood or even noticed. Missing or overlooking elements of work has created much of the gender bias problem.

The concept of inclusivity is relevant to the processes of describing jobs and of choosing the factors. It is essential that the job evaluation process capture (i.e. include) all aspects or requirements fo each job in the organisation and all working conditions associated with it. Factors, examples and weights must fairly represent jobs and job tasks done by men and women."

CHRC Guide

The ILO Guide notes that it is important for a committee to:

"include members who have as direct as possible knowledge of the main jobs to be evaluated". This ensures "that the characteristics of the jobs to be evaluated are more fully taken into account";

"include members who are willing to recognize and eliminate any gender bias that might affect the process or the evaluation tool";

"allow female workers to play a significant role in the process which concerns them most directly"; women members "help better identify the overlooked requirements of female jobs" and "exert an influence over the decisions". These female members should come from the "female dominated jobs involving the highest number of employees should have priority." This should include "employees from different hierarchical levels". p. 10

Be trained in the "dynamics of wage discrimination" and the "methodological aspects related to implementing pay equity." p. 11 This helps "identify the prejudices and stereotypes which can appear in different steps of the programme and should deal with the following points: "the factors which account for wage discrimination; the influence of prejudices and stereotypes on job perception; the influence of prejudices and stereotypes on evaluation methods and the influences of prejudices and stereotypes on compensation systems. It also helps members "carry out the process in a rigorous manner, including understanding the evaluation method, the data collection procedures, the evaluation procedures, the components of total compensation and the values and mission of the enterprise." p. 11

C. CHALLENGING THE STATUS QUO - OPENNESS TO CHANGE

Since the purpose of the *Pay Equity Act* is to examine the existing compensation practices, employers and trade union must be alert to the fact that historical and current job evaluation processes may unintentionally include gender biases.

The CHRC Guide emphasizes the importance of staying open to changing the status quo to

eliminate bias.

> *All participants (including employees, managers, job evaluation committee members, job information collectors and so on) should be sensitized and trained regarding the job evaluation process and the goals fo pay equity, i.e., the elimination of gender bias. People who still favour the previous system may cause problems in the process of evaluating jobs using new criteria. There is no point in involving people in this process who are unwilling to consider necessary changes.*
>
> *As pay equity is about questioning past assumptions and relationships, all those involved in the pay equity process need to remain open to new ideas and allow new results to emerge. If evaluators are committed to maintaining the status quo, they will overlook cases where change is warranted. It may be helpful to use some new people who have a vested interest in providing new insights.*
> *While it is true that change is difficult and challenges people on many levels, for the pay equity process to have a chance of succeeding, it is essential that the people taking part in it stay open to change.*
> *CHRC Guide.*

The Pay Equity Hearings Tribunal has noted that parties must be alert to the systemic discrimination embedded in existing compensation practices and traditional job evaluation schemes:

> *"Compensation practices have reflected long standing historical, social and economic relations in which men were the "bread winners" and women the "at home care givers". When women entered the work force in large numbers, compensation systems continued to reflect that unequal economic status. Women's work differs from men's work, both historically and today. Women work predominately in the clerical, retail and service sectors and men continue to dominate the managerial, industrial and financial sectors. More importantly, however, for pay equity purposes, the skill, effort, responsibility and working conditions required for women's work differ from men's work. Many pay practices have failed to record or to value these differences. Deeply held attitudes meant the gender of a job class was viewed in the assessment of its value: if it was "women's work", it often led people, without any conscious decision making, to give less value to the work."*
>
> *"Traditional job evaluation often reinforced and perpetuated these attitudes, largely rewarding the skills and job content characteristics of male work and ignoring or giving less value to the skills and job content requirements of women's work. originally job evaluation was designed and applied in industrial and manufacturing workplaces, and to managerial positions. When these systems were applied to workplaces in the health, service and office sectors, few changes were made to the underlying assumptions with which the value of jobs was assessed. The skills, ability and experience of women in these jobs were not recognized, leading to inaccurate and inadequate appraisal of the value of their work, and the resultant wages paid to them "*(pp.116-117).
> *ONA v. Haldimand Norfolk* (No.6), 2. P.E.R. 105.

D. *PAY EQUITY ACT* COMPLIANCE REQUIREMENTS

a. Redressing Systemic Discrimination in Compensation of Women's Work

The purpose of the *Pay Equity Act* is to take affirmative action to redress the systemic discrimination in compensation for work performed by employees in female job classes.

> *Pay Equity Act*, Preamble, Union May 6, 2010 Document Brief, Vol. 2, Tab 9.
> *ONA v. Haldimand Norfolk (No.6)*, 2 P.E.R. 105
> *Women's College Hospital*, (No.4), 3. P. E..R. 6.

b. Frequently Overlooked Aspects of Women's Work

The Tribunal in the *Women's College Hospital* decision, citing expert evidence, calls for parties to take care to capture and value the "frequently overlooked aspects of women's work" which include:

> *... skill characteristics in the areas of communication, co-ordination, emotional work in crisis situations, fine motor movement, operating and calibrating technical equipment, establishing and maintaining record-keeping systems, and writing and editing others' correspondence and reports; effort characteristics such as concentration, stress from inflexible deadlines, lifting people, listening for long periods of time, sitting for long periods of time, getting work accomplished without resort to formal sources of control and authority, and performing multiple tasks simultaneously; responsibility characteristics such as protecting confidentiality, caring for patients, clients and inmates, representing the organization through communications with the public, preventing damage to technical equipment and instruments, and actual or proximate (as opposed to formal or ultimate) responsibility; and working conditions characteristics such as exposure to disease and human waste, emotional overload, stress from communication with difficult and angry clients, working in open office spaces, and stress from multiple role demands. [Ronnie Steinberg, "Social Construction of Skill: Gender, Power, and Comparable Worth", Work and Occupations, May 1990, at p.14.]*"
>
> *Women's College Hospital*, (No.4), 3. P. E..R. 6.

c. GNCS Requirements

The *Pay Equity Act* requires that the parties establish and apply a GNCS which will "positively identifies and values characteristics of work, particularly women's work, which were historically undervalued or invisible."

> *ONA v. Haldimand Norfolk (No.6)*, 2. P.E.R. 105.

To be gender neutral, a system

> *must be able to analyze and rectify systemic patterns of wage discrimination". To do this, "particular attention must be paid in valuing the work of female job classes to ensure the comparison system remedies the historical undervaluation of women's work" (p.114).*
> *"The Act recognizes that gender biases have existed and the gender neutral comparison system must work to consciously remove these biases. Gender bias can enter at different points in the process: in collecting information on job classes; in the selection and definition of sub-factors by which job classes may be evaluated; in weighting of*

factors and in the actual process of evaluating jobs ... The purpose of using a gender neutral comparison system is to remove the arbitrariness and gender biasing in the valuing of work" (p.116) and *""ensure that each component which forms part of the comparison system is gender neutral. Bias in one means the system as a whole is not gender neutral. Gender bias must be eliminated from all parts of the comparison system" (p.118).*

ONA v. Haldimand Norfolk (No.6), 2. P.E.R. 105.

d. Ensuring Gender Neutrality in Relying on Job Information

1. Tribunal's Four Considerations for Assessing Gender Neutrality

The Tribunal in *Haldimand-Norfolk* sets out four considerations in assessing gender neutrality with respect to ensuring there is full and accurate job content information for the rating process. Those considerations are set out below:

1. "What is the range of work performed in the establishment?"

This requires looking to the nature of the organization, the services it provides or the products it produces" (P.119).

2. "Does the system make work, particularly women's work, visible in this workplace?"

According to the Tribunal, the *"requirement to make women's work visible is a vitally important part of the requirements to accurately capture the work performed. Since the Act is specifically addressed to the historical undervaluation of women's work, special attention must be paid by the parties to making visible those aspects of women's work which have been unrecognized" (p.119).*

3. "Does the information being collected accurately capture the skill, effort, responsibility and working conditions of all female job classes and the male job classes to be compared?"

For the Tribunal, the question of making women's work visible and that of accurately capturing the four factors are intimately linked. It explicitly recognizes that women and men hold different jobs and that such jobs require different skills and conditions of work.

The system must account for and reflect the differential job characteristics of both male and female work and positively value them. (p. 120)

This means going beyond simply adding on examples from women jobs or including women in the evaluation committees. According to the Tribunal, the Act requires parties

'to cast their minds to the reasons that women's work has been required work but has not been recognized or valued by the organization," (p.120). "Both the requirement to collect accurate job information as well as the requirement to give value to alternative ways in which women's work is organized are key to making women's work visible (p.121).

4. "Is the information collected accurately and consistently?"

The parties must

"*assure themselves that answers given are not a reflection of gender, education, class or ethnic background" (p.129).*

ONA v. Haldimand Norfolk (No.6), 2. P.E.R. 105.

The CHRC Guide also addresses the importance of making women's work visible in the process of capturing the job content of the male and female job classes:

> *"Lack of visibility of aspects of women's work is one of the main reasons that women's work has been undervalued in the past. It is only when jobs are well understood and everything about them has been properly defined and described that effective job evaluation can take place. When some of the information is overlooked, the organisation will not be able to properly value, understand and manage a job. Understanding a job allows the organisation to set appropriate recruiting requirements, define and measure performance standards and determine the appropriate compensation for equity purposes.*
> *CHRC Guide.*

2. The Importance of Incumbent Information and Risks of Supervisory Job Information

The Tribunal in *Haldimand Norfolk* stated that

> The *"best source of information on the job requirements are the incumbents of the jobs"* (p.122). Such information may be gathered in a variety of ways as long as the data are collected consistently and accurately.
>
> *ONA v. Haldimand Norfolk (No.6)*, 2. P.E.R. 105.

The Tribunal criticized the sole use of supervisory reviews because such reviews prevented incumbents from providing accurate job information.

The CHRC Guide also addresses this issue:

> *Although the employees are the experts about the requirements of their jobs, it is often not they who describe their jobs most effectively for evaluation purposes. They should be offered training so that they can describe their jobs in a way that makes their work visible. It may be useful to collaborate with them directly in order to produce a document that mentions, in clear language, the best examples fo the requirements of each job."*

CHRC Guide

In collecting job information, it is important to remember that it is the position and not the incumbent which is being described. As well, the following matters have also been considered important to prevent gender bias and to ensure fair description of work content:

"Ignore the job title. The job title may also influence a rater's judgment in gender neutrality or occupational preference. The job title may also be inaccurate".

"Is there enough information to evaluate the job?"

Is it clearly understood what the incumbents mean when they use verbs such the following: manage, supervise, review, prepare, maintain, ensure, research, identify, develop, advise?"

Is any job content in female jobs overlooked or under-described?' Studies have shown that men tend to over describe their responsibilities and women will tend to under describe theirs. (eg. If male job classes define activities as "manage", "direct" or "authorize" and female job classes define activities as "supervise", "coordinate" or "recommend" then gender bias may be present in the way jobs have been described."
".....Are technical terms used in male dominated jobs but not in female dominated jobs.?"

"The Job Evaluation committee must be sure that the job duties listed in the job questionnaire are accurate, understood and free of bias"

CCH "Workplace Equity Guide" "Gender Neutral Comparison System",

d. Principles for Ensuring Gender Neutrality and Fairness

"Neutrality must be the goal at all times. Fairness is the equivalent of equity and gender neutrality. It requires that all jobs be judged without biases or assumptions that are based on stereotypes or misunderstanding. An important tool for minimizing bias is a committee whose members have taken sensitivity training and are prepared to challenge bias where they see it. Since stereotypes form part of our culture, concrete steps need to be taken to make them visible, question, and overcome them." CHRC Guide.

e. Consistency and Accuracy

1. Introduction

Consistency in the treatment of job classes is the hallmark principle which overlays the entire job evaluation process:

In order for job evaluation to contribute to fair compensation practices, the process must treat all jobs equally, i.e., according to the same rules and the same level of interest. Words must be carefully chosen to provide a consistent level of information. All assumptions and procedures should apply to all jobs. If assumptions are made for some jobs but not others, or if equipment is considered for some but not others, the results will not be neutral. Consistency is one of the most important elements of any job evaluation process because what has been left out in the past has often caused gender bias.

It is essential to take measures to ensure that the evaluation teams are following an identical process, and that there are no differences between one evaluation and the next, between different members of the team, or at different times during the evaluation process. The evaluations should be monitored, comparing them, and examining the documentation to make sure that all posts are treated in the same way in their description (the same amount of detail and the same subfactor levels allocated for similar tasks).

CHRC Guide,

2. Different Approaches to Ensure Consistency and Lack of Bias

There are a number of different approaches to ensure consistency and lack of bias. This includes looking not only at the ratings for an individual job class but also by subfactor and across the establishment.

One procedure often adopted by committees is to evaluate several jobs at the same time, first on one subfactor, and then the next, until all the jobs chosen for that session have been evaluated on all the subfactors. This method (subfactor by subfactor) allows several jobs to be compared at the same time.

In some committees, each committee member carries out the evaluations separately, and they then pool their ideas and discuss their decisions, until they reach a consensus. In others, all the discussion takes place in the group session. After reading the information, the group holds a discussion, citing examples taken from the questionnaire or other document, and then reaching a consensus. The examples that justify a decision are documented and at the end the committee reviews the rating sheet they have produced for the job in question.
CHRC Guide

The ILO Guide also recommends this approach:

"Levels should be assigned for one sub-factor at a time for all jobs, that is, the evaluation should proceed on a sub-factor by sub-factor rather than a job-by job basis. Thus, all jobs will be assigned a level for the concentration sub-factor, then all jobs will be assigned a level for the confidentiality of information subfactor, and then the same process will be carried out for the psychological environment subfactor and so on. This way of proceeding has several advantages:

If each job is evaluated separately, the comparative approach which is the very basis of the process will be compromised.

Evaluation on a factor by factor basis guarantees that a standardized process will be applied to all jobs;

The Committee members will not be influenced by their opinion on the job as a whole, and the halo effect can thus be avoided".
ILO Guide

f. Some Recognized Sore Thumbing and Factor Analyses Tests

The following excerpts from the CHRC Guide highlight recognized tests for sore thumbing and factor analyses:

1. Distribution of subfactor levels:

It is very useful to carry out an analysis of the distribution of the frequency of the levels of all the factors. If it should turn out that no post has been classified at the minimum or maximum level of a particular subfactor, it may be necessary to modify the range of levels, and therefore the points allocated to the subfactor. Trends become more obvious if the results are presented in graphic form. CHRC Guide

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2. Correlation of subfactors:

It is also useful to analyse how some of the subfactors correlate with each other. Above all, it is important to know if the subfactors measuring management responsibilities correlate too closely with those measuring skill or effort. With traditional systems, one often finds that the higher levels in some skill subfactors have been "reserved" for management posts. This makes it impossible to register a high level of skill in a post that has no management responsibilities, for example work on the organisation's policies or procedures. If the skills subfactor is only measuring the position of the post in the hierarchy, this may be a sign of bias in favour of managerial posts, which in turn may imply gender effects. In other words, if most of the management posts in an organisation tend to be predominantly male, the system may be discriminating against non-management jobs, which tend to be predominantly carried out by women. On the contrary, the system ought to take into account the skills demanded for each job, and not subordinate the evaluation of the post to its position in the hierarchy of the organisation. CHRC Guide

3. Consistency of application:

The data for the subfactors need to be checked one by one. For each subfactor, the format and content of the justification written for each post needs to be checked, ensuring that similar texts describing aspects on the same level are equivalent to each other. The number of the level of the subfactor should also be checked to eliminate any error in the transcription of data. If it is necessary to alter the text or the level number, this should be done. Sometimes it is necessary to go back to the supporting document to check the information. CHRC Guide

4. Checking Evaluations by Function

A check should be carried out on the evaluations of all the jobs together, organised into departments or functions. In this way, one can see how the jobs contributing to the same function relate to each other, and the progression between them, from entry-level posts through to those with a higher level of responsibility within the organisation. It is useful to focus on the subfactors with the greatest weight within the system, which also makes it easier to compare posts at different levels. CHRC Guide

5. Analyses of Gender Effects

In light of the need to make visible and value women's work and ensure a new hierarchy removed of gender bias, gender effects analyses must be conducted.

> *A gender analysis needs to identify the effect on jobs in which women predominate. A comparison is made of men's and women's jobs that have approximately the same number of total points. Have the female jobs benefited from the implementation of the new system and from making visible the skills and responsibilities that were previously omitted? Or, on the contrary, has the same relative order been reproduced as before, with female jobs at the bottom?*
>
> *With a more detailed analysis, a comparison is made of how many men's and women's posts there are at the highest and lowest levels of the skills and effort subfactors. At the same time, it is important to ensure that women's jobs are not clustered together at the lower ranges of these factors. CHRC Guide*

g. Clarity and understandability

It is essential that there be a clear understanding of the language used in the SES/U GNCS tool

> *Any confusion over the meaning or significance of the wording at any stages of the job evaluation process can compromise the quality and fairness fo the results. The job evaluation process is based on information concerning jobs which comes from the people who carry out the work and their supervisors. This input is analysed using a tool for classifying aspects of a job in terms of factors and subfactors. It is important that the language used in all the tools is very clear. It is important to avoid jargon and ambiguous terminology that may lend itself to multiple interpretations. If some members of the team do not interpret the language used in the same way, or if several different interpretations are possible, the process will probably lead to unfair results.*
> .....
> *What we do always want to avoid is any situation where the committee members substitute their own opinion concerning the requirements of a job instead of using verifiable information collected from people who actually do the job. Evaluations should always be made on the basis of the documented information, and not on the personal opinion of raters.*
> .....
> *When people notice omissions or lack of clarity in the documents, it is important to ask for clarification, by telephone or in writing, by the member of staff who actually carries out the job and by his/her supervisor. The questions and explanations received should be circulated to all the committee members. It is important to bear in mind the general rule that value cannot be assigned to elements that cannot be seen: we should always strive to make the work visible. CHRC Guide,*

g. Ensuring Transparency

It is important to ensure that there is a proper record of the job evaluation process. There must be sufficient information to provide an appropriate explanation/rationale ultimately to the

affected bargaining unit members. As well, there must be sufficient information to support an ongoing maintenance process.

> *Since one of the main objectives when implementing a job evaluation system is to make visible work that was previously undervalued, the way the results of the evaluation are recorded is of crucial importance.*
>
> *The members of the evaluation team should be very careful to register enough of the information found on the questionnaire (filled in by the people who carry out the work) to inform the decision regarding levels of each subfactor in the system.*
> *CHRC Guide*

APPENDIX D

LIST OF CASES CITED IN GUIDE

1. *Tranchemontagne v. Ontario (Director, Disability Support Program),* [2006] 1 S.C.R. 513

1. *Commport Communications International* (No.2), July 14, 2006 File No. 4067-05-PE (P.E.H.T.)

2. *British Columbia (Public Service Employee Relations Commission) (re: Tawney Meiorin) v. BCGSEU,* [1999] 3 S.C.R. 3

3. *Group of Employees v. Ontario Public Service Employees Union,* [1993] O.P.E.D. No. 47

4. *CUPE Local 1776 v. Brampton Public Library,* [1994] O.P.E.D. No. 37

5. *(BICC Phillips Inc. (1997)*, 8 P.E.R. 142

6. *Ottawa Board of Education (1995)*, 6 P.E.R. 45

7. *St. Joseph's Villa,* (19 August 1993) 0345-92 (PEHT)

8. *York Region Board of Education (CUPE)* (1995), 6 P.E.R. 3

9. *Ford Motor Company (2003)* CanLII 57509 (ON PEHT)

10. *Group of Employees v. Parry Sound District General Hospital*, 1996 CanLII 8067 (ON PEHT)

11. *Niagara (Regional Municipality) v. CUPE, Local 1287*, 1999 CanLII 14829 (ON PEHT)

12. *Corporation of Wawa (Municipality) v. Confidential Employee*, 2010 CanLII 8687 (ON PEHT)

13. *Barrie Public Library,* (1991), 2 P.E.R. 93)

14. *Niagara (No. 2)* (1998-99), 9 P.E.R. 25)

15. *Ford Motor Co. of Canada*, (No.3) (2002-03), 13 P.E.R. 4

16. *Children's Aid Society of the County of Lanark and the Town of Smiths Falls* September 7, 2005 and January 5, 2006, 3565-04-PE (P.E.H.T.)

17. *The Child's Place* (February 28, 2002) 0730-01 (PEHT)

18. *Oakwood Retirement Communities Inc. v. S.E.I.U. Local 1 Canada,* 2010 CanLII 76245 (ON PEHT)

19. *Canadian Union of Public Employees, Local 543.3 v. Windsor-Essex County Health Unit,* 2010 CanLII 61201 (ON PEHT)

20. *CUPE Local 1776 v. Brampton Public Library* (1994), 5 P.E.R. 51 (PEHT)

21. *Regional Municipality of Peel* (1992), 3 P.E.R. 191 (PEHT)

22. *Renfrew County and District Health Unit (No. 3)* (2001 - 02), 12 P.E.R. 114 (PEHT)

23. *Hallowell House Ltd.,* [1980] OLRB Rep. Jan. 35

24. *Peterborough (Clow)* (No. 3) (1996), 7 P.E.R. 33

25. *Welland County General Hospital* (No.2) (1994), 5. P.E.R. 12

26. *Canadian National Railway v. Canada (Canadian Human Rights Commission),* [1987] 1 S.C.R. 1114

27. *SEIU Local 204 v. Ontario (Attorney General)* (1997), 35 O.R. (3d) 508 (Gen. Div.)

28. *O.P.S.E.U. v. Cybermedix Health Services Ltd.,* [1989] O.P.E.D. No. 4

29. *Riverdale Hospital v. CUPE Local 79,* (1990) OPED, No. 6

30. *Gloucester I City) V. CUPE Local 1525*, (1991) O.P.E.D. No. 20

31. *Ontario Nurses Association v. St. Joseph's Villa,* [1993] O.P.E.D No. 38

32. *Dufferin-Peel Roman Catholic Separate School Board v. Group of Employees*, (1998) O.P.E.D. No. 1.

33. *Kingston and Frontenac Children's Aid Society* (1990) 2 P. E. R. 310.

34. *Salvation Army on Behalf of Group of Employees,* (No. 2), (1996) 7 P.E.R. 2

35. *Ottawa Board of Education v. OSSTF*, (1997) O.P.E.D. No. 2

36. *Bucyrus Blades of Canada v. McKinley* (2005), 250 D.L.R. (4th) 316 (Ont. Div. Ct.)

37. *Better Beef Ltd. v. MacLean* (2006), 80 O.R. (3d) 689 (Div. Ct.)

38. *Ontario Northland Transportation Commission v. Pay Equity Hearings Tribunal,* 1993 CanLII 5424 (ON PEHT

39. *New Liskeard Board of Police Commissioners (No.2)* (1991), 2 P.E.R. 65)

40. *Great Lakes Brick and Stone Ltd.*, (1994), 5 P.E.R. 1

41. *Liquor Control Board of Ontario* (No. 3) (1997), 8 P.E.R. 1

42. *Management Board Secretariat* (No. 6) (1998-99), 9 P.E.R 48)

43. *Liquor Control Board of Ontario* (No. 2) (1995), 6 P.E.R. 148)

44. *Plantagenet* (No.1) (1997), 8 P.E.R. 32)

45. *Alzheimer Society* (1997), 8 PER 187. 551-95

46. *Alzheimer Society of Chatham-Kent v. Moon,* 1997 CanLII 12220 (ON PEHT)

47. *Royal Crest Lifecare Group (No. 5)* (November 18, 2002)

48. *Helping Hands Daycare* (No. 2) (11 October, 2006), 2387-05 (P.E.H.T.)

49. *Haldimand-Norfolk* (No.1) (1990), 1 P.E.R. 1

50. *Welland County General Hospital (No.2)* (1994) 5 P.E.R. 12

51. *United Counties of Leeds, Grenville and Lanark District Health Unit*, [1997] O.L.R.D. No. 1928 (Whitaker)

52. *West Park Hospital (1992),* O.J. No. 523

53. *Parry Sound (District) Social Services v. OPSEU*, (2003) 230 D.L.R. (4th) 257

54. *CUPE 1999. v. Lakeridge Health Corporation*

55. *CUPE 1734 v. York Region Board of Education,*

56. *CUPE Local 1999 v. Lakeridge Health Corp.,* 2011 ONSC 2804 (CanLII)

57. *Canadian Union of Public Employees, Local 1999 v. Lakeridge Health Corporation*, 2010 CanLII 46187 (ON PEHT)

58. *Canadian Union of Public Employees, Local 1734 v. York Region District School Board*, 2010 CanLII 29715 (ON PEHT)

59. *CUPE Local 1999 v. Lakeridge Health Corp.,* 2011 ONSC 2804 (CanLII)

60. *Nishimura v. Ontario Human Rights Commission* (1989), 70 O.R. (3d) 247 (Ont. Div. Ct.)