

ONTARIO SUPERIOR COURT OF JUSTICE

BETWEEN:

CANADIAN UNION OF PUBLIC EMPLOYEES
ONTARIO NURSES' ASSOCIATION
ONTARIO PUBLIC SERVICE EMPLOYEES UNION
SERVICE EMPLOYEES INTERNATIONAL UNION
UNITED STEELWORKERS OF AMERICA
ELIZABETH CHONTOS
ANGELA DIPIETRO
MARY KELLY
and PATRICIA WILLIAMS

Applicants

- and -

THE ATTORNEY GENERAL OF ONTARIO
THE MINISTER OF FINANCE and
THE LIEUTENANT GOVERNOR IN COUNCIL

Respondents

APPLICATION under Rule 14.05(3)(g.1) of the *Rules of Civil Procedure*
and the *Canadian Charter of Rights and Freedoms*, including ss.15, 24(1) and 28

NOTICE OF APPLICATION

TO THE RESPONDENT

A LEGAL PROCEEDING HAS BEEN COMMENCED by the applicants. The claim made by the applicants appears on the following page.

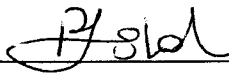
THIS APPLICATION will come on for hearing at 10:00 am. on February 25, 26, 27, 28 and March 1, 2002 at Toronto, Ontario.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application you or an Ontario lawyer acting for you must forthwith prepare a notice of appearance in Form 38A prescribed by the Rules of Civil Procedure, serve it on the applicant's lawyer or, where the applicant does not have a lawyer, serve it on the applicant, and file it, with proof of service, in this court office, and you or your lawyer must appear at the hearing.

IF YOU WISH TO PRESENT AFFIDAVIT OR OTHER DOCUMENTARY EVIDENCE TO THE COURT OR TO EXAMINE OR CROSS-EXAMINE WITNESSES ON THE APPLICATION, you or your lawyer must, in addition to serving your notice of appearance, serve a copy of the evidence on the applicant's lawyer or, where the applicant does not have a lawyer, serve it on the applicant, and file it, with proof of service, in the court office where the application is to be heard as soon as possible, but at least two days before the hearing.

IF YOU FAIL TO APPEAR AT THE HEARING, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO OPPOSE THIS APPLICATION BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

Date: July 18, 2001

Issued by 
Local Registrar

Address of
Court office:

**TO: The Attorney General of Ontario
The Minister of Finance
The Lieutenant Governor in Council**

**c/o Constitutional Law Division
720 Bay Street, 7th Floor,
Toronto, ONT
M5G 2K1**

**Telephone: (416) 326-2624
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APPLICATION

1. THE APPLICANTS MAKE APPLICATION FOR:

- a. A declaration that the Respondents' action in capping government funding for pay equity in the broader public sector at a level that is less than the full amount owing required to achieve pay equity under the *Pay Equity Act* for workers performing public services in the broader public sector violates s. 15(1) and s. 28 of the *Charter* and is not saved under s. 1 of the *Charter*;
- b. A declaration that the Respondents' action in discontinuing ongoing government funding for proxy pay equity adjustments in the broader public sector that are owing under the *Pay Equity Act* from 1 January 1999 onwards to workers in predominantly female workplaces violates s. 15(1) and s. 28 of the *Charter* and is not saved under s. 1 of the *Charter*;
- c. A declaration that the Respondents are responsible for funding proxy pay equity adjustments owed under the *Pay Equity Act* in the broader public sector to workers in predominantly female workplaces;
- d. An order under s. 24(1) of the *Charter* requiring the Respondents to pay the full costs of the proxy pay equity adjustments in the broader public sector that are owing under the *Pay Equity Act* plus interest on the amounts that are in arrears;
- e. Their costs of this application; and
- f. Such further and other relief, including any necessary interim relief, as counsel may advise.

2. THE GROUNDS FOR THE APPLICATION ARE:

- a. In the paragraphs below the Respondents are referred to collectively as the Government.

Pay Equity Act: The Obligation to Eliminate Sex-Based Wage Discrimination

- b. The *Pay Equity Act*, R.S.O. 1990, c. P-7 redresses gender discrimination in

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compensation for work performed by employees in Ontario who work in female job classes (“women’s work”). The Act requires that the compensation of workers performing women’s work be increased so that they are paid the same as workers performing men’s work of similar value.

- c. The amount by which compensation for women’s work must be increased to remove sex-based wage discrimination is a “pay equity adjustment”.
- d. Under the *Pay Equity Act*, employers and bargaining agents are required to negotiate pay equity plans which identify the pay equity adjustments owing to workers performing women’s work.
- e. Pay equity adjustments are phased in incrementally. The *Pay Equity Act* requires that each year employers must devote an amount equal to at least 1% of the previous year’s payroll towards paying pay equity adjustments to increase compensation for employees performing women’s work. Employers must continue to make these annual payments until the entire pay equity adjustment has been paid out and the discriminatory wage gap has been fully closed.

Government Funding of Public Sector Pay Equity Adjustments

- f. In 1991, the Government commenced a policy of funding public sector pay equity adjustments owing to workers in the broader public sector performing public services. The Government committed to contributing almost \$1 billion annually at maturity towards adjustments in the broad public sector.

Pay Equity Entitlements in the Broader Public Sector

- g. When the *Pay Equity Act* was originally enacted in 1987, it contained only one method for identifying wage discrimination: the job-to-job comparison method. When the legislation was introduced, however, the Government acknowledged that women working in predominantly female workplaces experienced the greatest degree of sex-based wage discrimination but could not access pay equity using the job-to-job comparison method. As a result, s. 33(2)(e) of the *Act* committed the Pay Equity Office to conducting studies with respect to systemic wage discrimination in sectors of the economy where employment has traditionally been predominantly female and required the Pay Equity Office to report to the Government and make recommendations as to how wage discrimination in these sectors could be

redressed.

- h. Following the Pay Equity Office studies and reports under s. 33(2)(e), the *Pay Equity Act* was amended in 1993 to introduce two new wage comparison methods: the “proportional value method” and the “proxy comparison method” which are designed to redress wage discrimination in predominantly female workplaces.
- i. The proxy comparison method is used to identify sex-based wage discrimination in predominantly female workplaces only in the broader public sector where workplaces are similar in terms of nature of work, similarity of job classes, funding and level of regulation.
- j. Broader public sector workplaces perform government services, are highly regulated by government and are heavily funded by government. Without additional government funding, front-line employers in the broader public sector cannot increase employees wages.
- k. Prior to the introduction of the proxy comparison method, the Pay Equity Hearings Tribunal had ruled that in light of the degree of provincial government regulation and government funding of workplaces in the broader public sector, the provincial Government effectively set compensation practices in the broader public sector and therefore was the employer of these workplaces for pay equity purposes.
- l. In 1993, when the proxy comparison method was added to the *Pay Equity Act*, the Government recognized the degree to which broader public sector employers were dependent upon the government for funding and the Government committed itself to funding 100% of the pay equity adjustments owing in the broader public sector under the proxy comparison method.
- m. At the same time, the Government introduced s. 1.1 to the *Pay Equity Act* to prohibit further broader public sector litigation seeking to name the government as the employer for pay equity purposes.

Proxy Pay Equity Adjustments to be Phased in Over Time

- n. The *Pay Equity Act* prescribed that, under the proxy comparison method, the first payment towards pay equity adjustments for employees in the broader public sector was due on 1 January 1994. Further pay equity adjustments are due on 1 January of each subsequent year until the full pay equity adjustments have been paid out.

- o. According to Government estimates, from 1994, it will take on average 20 years to fully pay out all the pay equity adjustments owing under the proxy comparison method in the broader public sector.

The Applicants' Entitlement to Pay Equity Adjustments

- p. The Union applicants in this matter represent employees working in predominantly female workplaces in the broader public sector. In accordance with their representational responsibilities under the *Pay Equity Act*, they have negotiated pay equity plans with the broader public sector employers for their members doing women's work. These pay equity plans identify pay equity adjustments that are owing to their members.
- q. The individual applicants in this matter are all employed in predominantly female workplaces in the broader public sector. They are represented by the Union applicants. Each of the individual applicants is entitled to a pay equity adjustment under a pay equity plan negotiated using the proxy comparison method under the *Act*.

Government's Attempt to Repeal Proxy Pay Equity

- r. In 1995, the Government decided to cap at \$500 million annual government funding for pay equity adjustments owed to all workers in the public sector. This \$500 million covers the full cost of pay equity adjustments for the Ontario Public Service and for broader public sector workplaces that used the job to job and proportional value comparison methods.
- s. As this was not sufficient to provide funding for the ongoing proxy pay equity adjustments owing over many future years to women in public sector predominantly female workplaces, the Government legislated *Schedule J* to the *Savings and Restructuring Act, 1996*. *Schedule J* amended the *Pay Equity Act* to eliminate the proxy method of comparison and to cap the mandatory pay equity adjustments that had been identified as owing under proxy pay equity plans to a total of 3% of the employer's 1993 payroll.
- t. Of the \$500 million, approximately \$62 million was directed towards pay equity adjustments for broader public sector workplaces that used the proxy method of comparison. This \$62 million, however, covered only approximately 22% of the total pay equity adjustments owing under the proxy

method. At maturity, the full cost of pay equity adjustments under proxy alone is estimated by the Government to be \$484 million annually. On the other hand, those women workers who achieved pay equity using the job to job and proportional methods achieved their fully adjusted pay equity wages as of 1 January 1998 with funding from the Government.

Government's Attempt to Repeal Proxy Pay Equity Ruled Unconstitutional

- u. In 1996, Local 204 of the Service Employees International Union (one of the Union applicants in the present case), commenced an application challenging the constitutionality of *Schedule J* of the *Savings and Restructuring Act*.
- v. In 1997, Mr. Justice O'Leary of the Ontario Court (General Division) ruled that *Schedule J* of the *Savings and Restructuring Act* violated s. 15(1) of the *Charter* and was not saved under s. 1. He declared *Schedule J* to be unconstitutional and of no force and effect: *SEIU Local 204 v. Ontario Attorney General* (1997), 35 O.R. (3d) 508 (Gen. Div.).

Government's Failure to Pay the Proxy Pay Equity Adjustments

- w. Following Justice O'Leary's decision, in 1998 the Government conducted surveys of all broader public sector workplaces that had used the proxy pay equity method to determine the total cost of outstanding proxy pay equity adjustments that were owing in the broader public sector.
- x. In the spring of 1999 the Government paid a one-time retroactive payment of \$150 million towards proxy pay equity adjustments in the broader public sector. This payment covered the proxy pay equity adjustment increments that were owing in the broader public sector from 1 January 1994 to 1 January 1998 as a result of the restoration of the proxy pay equity plans by the *SEIU Local 204* decision.
- y. Notwithstanding Justice O'Leary's decision, the Government has retained the \$500 million cap on government funding for pay equity in Ontario, which as outlined above, caps funding for proxy pay equity at a level considerably below the total adjustments owing under the *Pay Equity Act*. The Government's funding cap thereby replicates the practical effect of *Schedule J* even though that legislation was ruled unconstitutional.

- z. Since the retroactive payment in 1999, the Government has repeatedly refused to fund any further proxy pay equity adjustments in the broader public sector excluding the women in the proxy sector from the benefits of fully funded equitable wages which are enjoyed by other public sector women and men performing public services.
- aa. The Government has knowingly capped pay equity funding at a level that perpetuates discriminatory wages. In addition, the Government has discontinued funding for proxy pay equity adjustments while knowing that this action:
 - i. fails to redress the wage discrimination that has been identified under the Pay Equity Act;
 - ii. exacerbates the existing disadvantage which women in predominantly female workplaces already face since they are among the lowest paid women in the public sector;
 - iii. reinforces the discriminatory view that the work performed in predominantly female workplace is not “valuable”, a prejudice which the *Pay Equity Act* was designed to eliminate.
- bb. As a result of the Government’s actions in capping and discontinuing funding for proxy pay equity adjustments, the individual applicants and the Union applicants’ members continue to be owed proxy pay equity adjustments that were due from 1 January 1999 onwards.
- cc. *Canadian Charter of Rights and Freedoms*, including sections 1, 15(1), 24(1) and 28;
- dd. *Rules of Civil Procedure*, Rule 14.05(3)(g.1).

3. **THE FOLLOWING DOCUMENTARY EVIDENCE** will be used at the hearing of the Application:

- a. The affidavit of Dr. Pat Armstrong, sworn the 15th day of April 2001 and the exhibits attached thereto;
- b. The affidavit of Lawrence Walter, sworn the 14th day of April 2001 and the exhibits attached thereto;
- c. The affidavit of Elizabeth Chontos, sworn the 13th day of April 2001 and the exhibits attached thereto;

- d. The affidavit of Angela DiPietro, sworn the 12th day of April 2001 and the exhibits attached thereto;
- e. The affidavit of Mary Kelly, sworn the 12th day of April 2001 and the exhibits attached thereto;
- f. The affidavit of Pat Williams, sworn the 12th day of April 2001 and the exhibits attached thereto;
- g. Such further and other documentary evidence as counsel shall advise and this Honourable Court permit.

Date of issue: July 18, 2001

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- and -

SUPERIOR COURT OF JUSTICE

Proceeding Commenced at TORONTO

NOTICE OF APPLICATION

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