BUILDING EMPLOYMENT STANDARDS AND LABOUR RELATIONS PROTECTION TO CLOSE THE GENDER PAY GAP

Equal Pay Coalition Submissions to

The Standing Committee on Finance and Economic Affairs

Bill 148, *Fair Workplaces, Better Jobs Act, 2017*

21 July 2017

ONTARIO
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Table of Contents

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OVERVIEW

1. The Equal Pay Coalition is an organization that unites more than 41 women's groups, trade unions, community groups and business organization. Since it was formed it 1976, the Coalition has been at the forefront of advocating for women's economic security. The Coalition advocates to close the gender pay gap through law reform, collective bargaining and other policies and practices to advance women's economic security.

2. The Coalition continues to pursue its vision that Ontario must eliminate systemic discrimination against women. The Coalition calls for planning and action on many levels so that Ontario achieves a 0% gender pay gap by 2025. A background history of the Coalition's campaigning is found at **Appendix A** to this submission and a list of the Coalition's member organizations and further information is available at www.equalpaycoalition.org.

3. The Coalition knows that a strong statutory framework is a key tool to close the gender pay gap. The Coalition's 12 Steps to Close the Gender Pay Gap, attached at **Appendix B**, sets out the range of action needed to provide economic security for women.

4. For many years, the Coalition has advocated to increase the minimum wage. A depressed minimum wage exacerbates the gender pay gap as most minimum wage earners are women. In 2014, the Coalition called for emergency legislation to increase the minimum wage to $15 effective immediately. The Coalition said that the minimum wage must keep pace with inflation and keep increasing until it is the level of a living wage.

5. The Coalition called for the end to the one-sided labour market "flexibility" strategies to redress the imbalance between employers and workers, primarily women, who are employed in precarious employment relationships such as part-time, casual, contract and temporary jobs. The *Employment Standards Act* needed to be improved by closing loop-holes and exemptions and by increased enforcement.

6. Further, the Coalition fully recognized that access to collective bargaining is a strong and necessary tool to close the gender pay gap. The rise of precarious employment relationships and the decline of unionization, particularly in the private sector, have the combined effect of increasing the gender pay gap. To redress the gendered pay gap, the *Labour Relations Act* needed amendment. Particularly, women workers required access to sectoral and broader-based bargaining approaches to bring meaningful access to unionization.

7. Bill 148 is a significant step in the right direction to improving the statutory framework particularly for women workers in Ontario. Bill 148 will assist in closing the gender pay gap.

8. In particular, the equal pay amendments are a significant breakthrough for women workers employed in precarious employment relationships. However, to fully meet the objective of equal work for equal pay, the Bill 148 proposals need amendments to strengthen the effectiveness.

9. We note that the Ontario Federation of Labour and the Workers' Action Centre fully endorse the Equal Pay Coalition's proposals in respect of the equal pay provisions.

10. It is the Coalition's position that the strength of the Bill 148, will depend upon 3 key features:

    (a) The clarity of the language in Bill 148;

    (b) Proactive obligations on employers to provide pay transparency to its workers;

    (c) Robust enforcement mechanisms to ensure employers live up to their obligations.

11. In these submissions, the Coalition details the analytical framework the Legislative Committee should bring to its analysis of Bill 148 and any proposed amendments. The Coalition outlines specific proposed amendments, and in general, endorses the proposed amendments of the Workers' Action Centre and the Ontario Federation of Labour. However, in some circumstances, the Coalition seeks stronger new amendments in order to fully close the gender pay gap.

PART I: BRINGING A GENDER AND EQUITY BASED LENS TO ANALYZING BILL 148

A. The Gender Pay Gap in Ontario

12. The gender pay gap in Ontario is a human rights crisis that will not close without active intervention to transform the existing statutory framework including both the Employment Standards Act and the Labour Relations Act.

13. In Ontario, the gender pay gap persists and is deeply engrained in the labour market. The gender pay gap exists regardless of whether the gap is measured by average annual earnings (29.4%) (2013); full-time full-year earnings,(24%) (2013); or hourly wages (14%)(2015).[1]

14. But the "average" data masks the depth of discrimination in Ontario's labour market. It is far more appropriate to measure the gender pay gap by examining average annual earnings of women and men in the province. This captures the gender pay gap that is driven by women's predominance in precarious work. It shows the reality of the difference in how much women and men have to meet their needs at the end of the day.

15. Based on average annual earnings,[2] Indigenous women face a gender pay gap of 57%. Women with disabilities face a gender pay gap of 46%. Immigrant women face a gender pay gap of 39% . Racialized women face a gender pay gap of 37%. Overall, Ontario women face a gender pay gap of 30% - a figure that has moved only 6-8% in the last 30 years.

16. Even using the average gap data means that women earn on average $36,000 annually while men earn on average $51,000 – a gender penalty of $15,000.

17. The gender pay gap exists at every income level, every education level, every age cohort. Women are paid less than men in almost every occupational category measured by Statistics Canada (469 of 500 occupations).

18. Gender pay inequality is still entrenched in Ontario's labour market and that is reflected in the low-wage workforce: the share of women who are low-wage workers has consistently been higher than the share of men. In 2014, 14.9 per

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[1] See Mary Cornish, *A Growing Concern: Ontario's Gender Pay Gap* (Toronto: Canadian Centre for Policy Alternatives, 2014) at pp.8-11. See CANSIM Table 202-0102 Statistics Canada, Average Male and Female Earnings and female to male earnings ratio by work activity, 2011, Ontario, all earners and full time full year. See Table 282-0072 Labour Force Survey Estimates wages of employees, NAICS Ontario, hourly wage rate.

[2] See Cornish, Every Step You Take (CCPA April 2016); Lambert & McInturff, Making Women Count (CCPA March 2016)

cent of women employees were working for minimum wage, compared to 8.8 per cent of men. The share of women making within $4 of the minimum wage increased from 24 to 34.3 per cent over the same period. This compares to a rise from 16.1 to 24.5 per cent for men.

19. Women in the bottom 60% have also been increasing their labour market human capital with greater education and work experience yet they are not reaping the rewards of those investments. While some may still face barriers to getting greater and more diverse education opportunities, it also appears that there stagnation also stems from a persistent systemic pattern of undervaluing the workplace skills and responsibilities of women and a failure to reward their effort and working conditions.

B. Gender-Based Analysis

20. Since 2008, the Coalition has called upon the Ontario government to create a new plan to close the gender wage gap. The Plan would include targets for closing the pay gap over a realistic time frame and strategies for meeting those targets. The Coalition called upon the government to close the gender pay gap no later than 2025 and in a manner similar to the Accessibility for Ontarians with Disabilities Act, 2005. The AODA requires that employers' set out measures, policies, practices or other requirements for the identification and removal of barriers with respect to goods, services, facilities, accommodation, employment, buildings, structures, and and for the prevention of the erection of such barriers

21. A key tool in the development of such a plan is the use of gender-based analysis to review all policy and legislative action by asking whether such action will close the gender pay gap.

22. As the Committee reviews any amendments to Bill 148, it should apply and implement a gender-based analysis ("GBA") and a gender mainstreaming approach to its deliberations.

23. The United Nations Convention on the Elimination of Discrimination Against Women (CEDAW) and the 1995 Beijing Declaration and Platform for Action and Beijing +10 Outcome documents require governments to implement a gender mainstreaming or human rights based approach to public policy.

24. A gender-based analysis recognizes that securing gender equality requires a multi-faceted, systemic approach as woman face systemic discrimination in all areas of their lives. By using a “gender-sensitive analysis” in all governance areas, it focuses on identifying gender differences, constraints as well as equality promoting measures.

25. In general, GBA is a lens of analysis that examines existing differences between women's and men's socio-economic realities as well as the differential impacts of proposed and existing policies, programs, legislative options, and agreements on women and men. The aim of GBA is to identify the assumptions, which are sometimes incorrect, on which policies, programs and services are based. GBA will raise relevant questions on gender equality. GBA is useful for both women and men, as well as for groups of women and men, by taking into account their diversity.

26. The International Labour Organizing adds that a gender-based analysis in the review and application of International Labour Standards:

- helps to ensure that women and men have equal access to benefits derived from these standards;
- recognizes the needs, experiences and interests of both women and men;
- enables stakeholders to manage change;
- demonstrates a willingness to undertake differential measures to respond to the needs and interests of men and women; and
- advocates equality brought about by the implementation in practice of Conventions.

27. In the Coalition's submission, if a complete gender-based analysis was undertaken of the Employment Standards Act and the Labour Relations Act prior to the introduction of Bill 148, the analysis would lead to further amendments to both Acts.

28. Bill 148 is a starting point. But from the Coalition's perspective, the work is far from complete in building a strong framework to close the gender pay gap.

29. However, at this stage and for the purposes of the Committee's deliberations, the Coalition submits that it is critical that you bring a gender-based analysis to your assessment of Bill 148 inclusive of, but not limited to:

(a) the importance of the increase in the minimum wage to the differential impact on the earnings or ability to earn of Ontario men and women and the future earnings of girls and boys;

(b) provisions which help to close the gap in earnings and working conditions of women;

(c) whether women facing discrimination on multiple or intersecting grounds

experience a greater impact on their earnings, the ability to earn and working conditions;

(d) reflect and address the lived unequal compensation experience of men and women in Ontario;

(e) examine and consider who will be affected by the Bill 148 amendments and how will the effects of any recommended legislative change be different for women and men; and

(f) how will innovative solutions be developed to address the gender issues you have identified? Are solutions needed to address concerns of women or men with potentially intersecting grounds of discrimination?

30. A failure to bring a gender lens, and a gender-based analysis to Bill 148 will mean that the deeply structural discriminatory impacts of work restructuring and changes in the employment relationship will be left unexamined and without redress.

31. Finding and implementing solutions for women`s pay gap barriers should emphasize prevention and combatting barriers before they are put in place. An equal pay compliant culture should be promoted as a key economic and business development measure.

C. Government's Mandate to Close the Gender Pay Gap

32. The gender-based analysis is a critical tool to close the gender pay gap. The mandate to close the gender pay gap is a requirement set down by the Premier in her letters to six of her Cabinet Ministers.

33. In September 2016, the Premier required that the Ministers of Labour, Women's Issues, Finance, Economic Development and Growth, Education as well as the Minister for Advanced Education and Skills Development were required to work collaboratively to close the gender pay gap.

34. The Premier's letter to the Minister of Labour stated that,

> "Working with the ministers of Women's Issues, Finance, Economic Development and Growth, Education, and Advanced Education and Skills Development, develop a strategy for the economic empowerment of women that addresses the needs of women at all economic levels. As part of this empowerment strategy, you will work with the Minister Responsible for Women's Issues and Associate Minister of Education (Early Years and Child Care) to develop a Gender Wage Gap strategy that will provide

practical recommendations by spring 2018 to close the wage gap between women and men. In order to map out this plan, you will consult with stakeholders including leaders in the business, labour, human resources and equality-advocacy communities to garner practical input and expertise."

35. The Minister of Finance was required to support women's economic empowerment by,

"… develop a long-term strategy to support the economic empowerment of women that addresses the needs of women at all economic levels.

"Supporting the Minister of Labour to develop a Gender Wage Gap strategy, that will support the women's economic empowerment strategy. Collectively these strategies will include measures to address the gender wage gap, enhance women's attachment to the labour market, and address other barriers to women's full economic participation."

36. The Minister of Women's Issues is to "ensure a gender lens is brought to the development of government policies and programs" and to "lead the development of gender-based analysis to be applied to support and inform the development of policies and programs across government."

37. The Coalition submit that to fulfill this mandate to close the gender wage gap and redress barriers to women's full participation in the labour market, changes proposed in Bill 148 must be supported but also require amendment in order to fully met the needs of women's at all economic levels.

D. It Makes Economic Sense: Ontario Government's Own Study Says So

38. In 2016, the Ministry of Labour retained Deloitte LLP to assist in estimating the potential costs and opportunities to the province's economy from closing the gender wage gap. The Ministry's Gender Wage Steering Committee relied upon this report in its report released in August 2016. The Equal Pay Coalition filed a Freedom of Information request and received a copy of this report in late June 2017.

39. The report concluded that the costs to the Ontario economy for not taking steps to close the gender pay gap are simply too great.

40. The Deloitte Report, entitled "Impacts of Closing Ontario's gender wage gap", estimated that annually, on average and using the hourly wage data, that women

on average receive $7200 less than their male counterparts.[3]

41. This pay differential amounts to $18billion in foregone income per year. The gender wage gap represents 2.5% of Ontario's overall GDP.

42. Closing the gender wage gap could increase annual consumption of goods and services by as much as $11.6 billion.

43. By closing the gender wage gap, Ontario good see a significant boost in revenues with personal income tax and sales tax revenues increasing and government transfers decreasing. Deloitte estimated that the annual additional revenues could be as high as $2.7 billion which is a significant annual opportunity.

44. At the firm and employer level, Deloitte's concluded that employers would see important benefits to companies' productivity and success: such as strengthening intrinsic and extrinsic motivations; reducing abensteeism; increased perceptions of a fair workplace; and increased opportunities to retina top female employees.

45. As the report stated, "at the most fundamental level, closing the gender pay gap would be a tangible expression of women's equality in society and in the workplace."[4]

46. Bill 148 represents a modest measure to right the balance towards equality and fairness. In today's labour market, there is little balance between the power of employers and the precariously employed women. Bill 148, as a measure towards closing the gender pay gap, makes economic sense.

47. As the 1984 Royal Commission on Equality in Employment warned of the hugely negative impact on women of perpetuating discriminatory low wages:

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

[3] Deloitte LLP Impacts of Closing the gender wage gap, June 2016, at page iv
[4] Ibid at page v

particularly when the economy is faltering."[5]

E. Bill 148 Equality in Pay – A Fundamental Human Right

48. The right to not earn less income because you are a woman is a fundamental human rights entitlement. It encapsulates:

(a) a substantive human rights entitlement to sex equality in the workplace;

(b) a systemic human rights remedy for discrimination; and

(c) as implemented through employment standards and collective bargaining and collective agreement enforcement, a human rights enforcement mechanism for eradicating discrimination and ensuring equality outcomes.

49. The challenge that the government must meet is to ensure that equality in pay is a fully realized human right through Bill 148's amendments to both the ESA and the LRA.

PART II: THE EMPLOYMENT STANDARDS ACT AND CLOSING THE GENDER PAY GAP

50. The *Employment Standards Act* and its predecessor legislation have long been recognized as the key employment statute that determines women's rights in the workplace. Women, Indigenous and racialized workers, young workers and those in small workplaces are those most dependent on employment standards protection.

51. But the ESA has been reviewed, tinkered with and modified in an *ad hoc* manner over the past fifty years. While the ESA provides a generalized set of minimum statutory protections, those protections have been eroded through special rules and exemptions to such an extent that it is commonly referred to as resembling a piece of Swiss cheese. At present, "the majority of Ontario employees are affected by exemptions or special rules such that fewer than a quarter are estimated to be fully covered by the provisions of the ESA".[6]

52. To assist in closing the gender pay gap, it is the Coalition's submission that it is time to move the ESA out of the status of "labour law's little sister" and to provide

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[5] Justice Rosalie Abella, Report of the Commission on Equality in Employment (Ottawa, 1984) at 233-239.Canadian Human Rights Commission, Time for Action: Special Report to Parliament on Pay Equity (Ottawa: Minister of Public Works and Govt. Services, 2001)

[6] Leah Vosko et al, *Closing the Employment Standards Enforcement Gap: An Agenda for Change* (June 2017) at p. 14.

a robust framework of workplace rights[7] that fully protect women workers in all forms of the employment relationship.[8]

53. Bill 148 makes important strides to provide that more robust protection. However, there is work left to do. The Coalition focuses specifically on the amendments that are needed to ensure that the proposals in Bill 148 are fully effective.

A. Minimum Wage increase to $15 in 2019

54. Bill 148's increase to a $15 minimum wage is a very important measure to close the gender pay gap.

55. Women make up two-thirds of Ontario's minimum wage earners. Indigenous women, racialized women, women with disabilities, immigrant, migrant, and refugee women are even more likely to be working at the minimum wage. Without the benefit of a union, their employers have ignored their obligations to ensure women's work is paid at a rate equal to men's work of comparable value. Low minimum wage policies ensure that working women and their children remain in poverty.

56. The Coalition calls for the increase of minimum wage to $15 to take effect immediately.

57. Wages for low and modest income workers have been largely stagnant for 40 years with the result that the current minimum wage leaves full-time full-year minimum wage workers well below the poverty line. The minimum wage was frozen for 12 years out of 20 between 1995 and 2015. It is unnecessary for workers to wait another two years to access the $15 minimum wage.

58. The Coalition further submits that in today's primarily service based economy, the exemptions to the minimum wage are unnecessary and should be removed.

59. Bill 148 requires amendments to affect both of these recommendations.

RECOMMENDATION: Amend Bill 148 to ensure that the increase to a $15 minimum wage takes effect immediately.

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[7] In referring to "workplace rights", the Coalition agrees with the *Changing Workplaces Review Final Report's* analysis that these are not simply "employment standards" but enforceable rights and legal obligations with which employers must comply.

[8] See Judy Fudge, "Reconceiving Employment Standards Legislation: Labour Law's Little Sister and the Feminization of Labour" (1991), 7 *Journal of Law and Social Policy* 73-89

RECOMMENDATION: Amend s. 14 of Bill 148 is amended to include the repeal of minimum wage exemptions in Regulation 285/01 under the ESA.

B. Equal Pay for Equal Work

60. Bill 148 recognizes and reinforces the fundamental principle that workers who are doing similar work should be paid the same.

61. The *Employment Standards Act* protection for **Equal Pay for Equal Work** is currently found in Part XII of the Act. Historically, this ESA right dealt solely with discrimination based on gender (currently s. 42 of the ESA).

62. Bill 148 introduces two new sections to guarantee equal pay for equal work without distinction based on "**difference in employment status**" (s. 42.1) or "**temporary help agency status**" (s. 42.2). If an employee works part-time, or has temporary, seasonal or casual status, or is employed by a temporary help agency, these proposed amendments will obligate employers to pay them the same rate of pay as full-time employees.

63. This is a significant step in the right direction. This new approach, which follows the approach adopted in the European Union, will greatly assist in closing the gender pay gap. These Bill 148 amendments are a significant breakthrough for women workers and especially so for Indigenous, racialized, immigrant, younger and disabled women who predominate in precarious part-time, temporary, seasonal, casual and temporary help agency work.

64. However, the strength of the proposed equal pay rights will depend on three key features:

    (a) the clarity of the language in the statute;

    (b) proactive obligations on employers to provide pay transparency; and

    (c) robust enforcement mechanisms to ensure employers live up to their obligations.

65. While the right to equal pay for equal work based on sex has been in the ESA since 1968, it has provided very limited protection for women workers because the language and jurisprudence construed the right very narrowly. For example, the statutory requirement in s. 42 that a woman and a man be doing "substantially the same" work allowed employers to create or maintain minor

differences between women's and men's jobs in order maintain pay differences. Moreover, s. 42 provided for a broad range of exceptions which further hollowed out the protective potential of the right.

66. As a result, simply replicating the language of s. 42, as Bill 148 does, is insufficient as under the existing language employers have been able to manipulate job duties to evade the equal pay for equal work obligations. Unless the statutory language is tightened, the promise of equal pay for equal work, particularly for non-union workers, will be largely illusionary.

67. Further, since the ESA equal pay right was introduced in 1968, *Human Rights Code* and *Pay Equity Act* principles have evolved to more precisely address the problems noted above. As a result, there are avoidable inconsistencies between the ESA provisions, the *Pay Equity Act* and the *Human Rights Code* which should be corrected as a housekeeping matter.

68. In order for equal pay protections to be effective, employees need to know what the wage structure is in their workplace. This information is generally not available in non-unionized workplaces. Bill 148 gives employees a right to request a review of their own rate of pay, but it does not provide a means to ensure employees have the information needed to determine if they are receiving equal pay. To make these rights effective, employers must have a proactive obligation of pay transparency that requires them to post wage rate information in the workplace and to report this information to the Ministry of Labour. Employees also need to be protected from reprisal for asking about and discussing wage rates.

69. Finally, Bill 148 includes transitional provisions that would allow collective agreements that are in effect on 1 April 2018 to remain non-compliant with the new equal pay standards for the duration of the collective agreement. Where unionized part-time, temporary, seasonal or casual status workers are paid a lower rate than full-time employees, arbitrarily and unfairly, these workers will continued to be paid unequal wages until the expiry of that collective agreement – a state of non-compliance that could persist for years. There is no reason to introduce this exemption below the basic standards floor.

70. Accordingly, the Equal Pay Coalition submits that Bill 148's provisions on ESA Part XII Equal Pay for Equal Work need revisions in three areas:

    (a) to clarify the scope of the protection;

    (b) to include a proactive employer obligation to provide pay transparency; and

(c) to remove the transition provisions that exempt collective agreements that are in effect on 1 April 2018 from compliance with the equal pay standards.

71. The Equal Pay Coalition sets out its proposed amendments to the Equal Pay provisions below. Appendix C sets out a clean version of the full text of how Part XII, Equal Pay for Equal Work, sections 42 to 42.3, would read with the Equal Pay Coalition's proposed amendments.

1. Scope of Equal Pay Protection

a. Section 42: Ensuring the Basic Equal Pay Protection is Effective

72. **What exists now:** The current ESA right to equal pay for equal work is based on the ground of sex. Section 42(1) provides that,

> 42. (1) No employer shall pay an employee of one sex at a rate of pay less than the rate paid to an employee of the other sex when,
>
> (a) they perform *substantially the same kind of work* in the same establishment;
>
> (b) their performance requires *substantially the same skill, effort and responsibility*; and
>
> (c) their work is performed under *similar working conditions*.

73. **The Problem:** The language in s. 42(1) of "substantially the same" has been interpreted and applied in an unduly narrow fashion which enables or encourages employers to manipulate minor job duties or responsibilities to maintain unequal pay.

74. **The Solution:** The words "substantially the same" should be amended and replaced by **"similar"** in subsections 42(1)(a) and (b). A new provision should be added to emphasize that minor differences in duties or job titles will not prevent work from being considered similar.

75. **The Rationale:** First, the term "similar" avoids the narrow focus on "same" duties. In doing this it aims to prevent the evasion of equal pay obligations which has occurred by making minor changes to the assignment of duties and responsibilities in order to maintain unequal pay. The objective is to ensure that

the principle of equal pay for equal work is broadly achieved in practice.

76. Second, the term “similar" is consistent with the definition of job class in the *Pay Equity Act* which also aims to ensure that jobs doing similar work are paid the same. This language should be replicated in order to maintain a consistent approach between the ESA and the *Pay Equity Act*.

77. Apart from preventing avoidance strategies, the standard of equal pay for “similar” work with “similar” skill, effort and responsibility is consistent with the language in the *Pay Equity Act*.

78. Even with the language of "similar", employees will face a struggle proving to an ESA Adjudicator that the work is indeed similar. Employers may again seek to manipulate job duties to evade the equal pay standard. To pre-empt this, the Legislature should clearly spell out that the intent of the legislation is to ensure that such subjective and minor changes to duties and responsibilities cannot be used as a mechanism to avoid paying precariously employed workers the same pay.

79. **In summary**, with the amendments proposed by the Equal Pay Coalition, these sections would read as follows:

PROPOSED NEW LANGUAGE

Equal pay for equal work

42. (1) No employer shall pay an employee of one sex at a rate of pay less than the rate paid to an employee of the other sex when,

(a) they perform **similar** work in the same establishment;

(b) their performance requires **similar** skill, effort and responsibility; and

(c) their work is performed under similar working conditions.

(1.1) For the purposes of s. 42(1), work will be considered similar despite minor variations or differences in duties, responsibilities or work assignments.

b. Section 42: Exceptions to the right to equal pay

80. **What exists now:** The current ESA sets out four exceptions to the right to equal pay for equal work in s. 42(2) as follows:

> 42. (2) Subsection (1) does not apply when the difference in the rate of pay is made on the basis of,
>
> (a) a seniority system;
>
> (b) a merit system;
>
> (c) a system that measures earnings by quantity or quality of production; or
>
> (d) any other factor other than sex.

81. **The Problem:** The exceptions in s. 42(2) are so broad that they essentially hollow out the protection afforded by s. 42(1). Historically these exemptions proved fatal to precariously employed women workers who challenged that they were paid less as a result of gender discrimination. Section 42(2)(c) exempts piece rate systems and s. 42(2)(d) sets out an extremely broad and ambiguous exception clause. Meanwhile, it is clear that different seniority systems and merit systems themselves have been structured or applied in ways which perpetuate systemic sex discrimination.

82. Historically, s. 42(2)(d) was interpreted in the wider context of an employer's wage policies and employment relations. An employer's wage policy and wage structure would be relied upon as "any other factor" that could justify a difference in pay. While the original language of the Act was clearly designed to prevent an employer from paying employees differently based on sex, the exceptions allowed for differential wages to exist if the factor is proven to be something other than sex or if it fell within the exceptions of seniority, merit or payment based on quality or quantity of production. Adjudicators and arbitrators examined whether a bona fide employment or wage policy accounted for the separate wage rate. If such a policy existed, it was deemed to be "any other factor" that created a permissible exception to the equal pay standard. That expansive loophole must be closed.

83. **The Solution:** The Equal Pay Coalition proposes that s. 42(2)(a) and (b) be amended to only allow exceptions for formal seniority and merit systems that do not discriminate contrary to the Human Rights Code. The Coalition further proposes that s. 42(2)(c) and (d) be deleted in their entirety.

84. **The Rationale:** The proposed amendments to the language of the seniority system and merit compensation system parallel language of the exemptions in the Pay Equity Act. The Pay Equity Act requires an employer to show that a difference in job rate is both objective and does not discriminate on the basis of sex. The ESA exemption language should mirror the Pay Equity Act language on seniority and merit systems to ensure consistency in redressing discrimination in these pay structures.

85. The basket exclusion clause in s. 42(2)(d) creates a loophole that has allowed discriminatory pay practices to continue and is so broad that it largely defeats the right in s. 42(1). The Changing Workplace Review explicitly concluded that any exceptions or exemptions from the equal pay right must be objective, such as a seniority system or a merit system. No further exemptions are required.

86. **In summary,** the Equal Pay Coalition's proposed amendments on this section would read as follows:

PROPOSED NEW LANGUAGE

42(2) Subsection (1) does not apply **if the employer is able to show that the difference in pay is the result of**

(a) **a formal seniority system that does not discriminate on the basis of sex or any other ground protected under the *Human Rights Code*; or**

(b) a merit compensation plan that is based on formal performance ratings and that has been brought to the attention of the employees and that does not discriminate on the basis of sex or any other ground protected under the *Human Rights Code*.

c. Section 42.1 Equal Pay for Equal Work: "Difference in Employment Status"

87. **What is proposed in Bill 148:** Bill 148 amends Part XII Equal Pay for Equal Work by adding an entirely new section to the ESA. The new provision, section 42.1, ensures that "difference in employment status" shall not be used as a basis to pay an employee at a rate of pay less than a full-time employee doing similar work.

88. This addition of “employment status” as prohibited ground of pay differentials corrects one of the major exceptions relied upon by employers and confirmed in the interpretation of the ESA where “job status” was deemed to be “any other factor than sex.”

89. **The Problem:** Unfortunately, because Bill 148 replicated the existing language of s. 42(1) and (2), it replicated all the enduring shortcomings of that language which undermined robust protection for the principle of equal pay for equal work.

90. **The Solution:** The Equal Pay Coalition recommends that the modernized language for s. 42 as detailed above be applied to the new s. 42.1 as follows:

(a) replace "substantially the same" with **similar**;

(b) include language to emphasize that minor variations cannot be relied upon to find that work is not similar;

(c) amend the seniority system language in s. 42.1(2)(a) to mirror the *Pay Equity Act* language with the **onus on the employer** to demonstrate that the system does **not discriminate contrary to the *Human Rights Code***;

(d) amend the merit system language of s. 42.1(2)(b) to mirror the *Pay Equity Act* language and ensure merit systems do not discriminate contrary to the *Human Rights Code*;

(e) repeal the exceptions in Bill 148’s proposed s. 42.1(2)(c) and s. 42.1(2)(d)

91. **In summary**, the amendments proposed by the Equal Pay Coalition would read as follows:

PROPOSED NEW LANGUAGE:

42.1 (1) No employer shall pay an employee at a rate of pay less than the rate paid to another employee of the employer because of a difference in employment status when,

(a) they perform similar work in the same establishment;

(b) their performance requires similar skill, effort and responsibility; and

(c) their work is performed under similar working

conditions.

(1.1) For the purposes of s. 42.1(1), work will be considered similar despite minor variations or differences in duties, responsibilities or work assignments.

(2) Subsection (1) does not apply if the employer is able to show that the difference in pay is the result of

(a) a formal seniority system that does not discriminate on the basis of sex or any other ground protected under the Human Rights Code; or

(b) a merit compensation plan that is based on formal performance ratings and that has been brought to the attention of the employees and that does not discriminate on the basis of sex or any other ground protected under the Human Rights Code.

d. Section 42.2 Equal Pay for Equal Work: "Temporary Help Agency Workers" and "Assignment Employee Status"

92. **What is proposed in Bill 148:** Bill 148 proposes to amend Part XII to add a new s. 42.2 to ensure equal pay for workers assigned into a workplace from a temporary help agency. This is a welcome addition. For too long, temporary help agency workers have reported working side-by-side with other workers in an establishment, completing similar tasks and holding similar responsibilities, yet being paid many dollars less per hour in pay.

93. **The Problem:** Again, Bill 148 replicates the existing language of s. 42(1) and (2) which undermined robust protection for the principle of equal pay for equal work. Moreover, the proposed s. 42.2(2) provides an extremely expansive exception which can significantly undermine the protection promised in s. 42.2(1).

94. **The Solution:** As with s. 42.1, the Equal Pay Coalition recommends that the modernized language for s. 42 as detailed above be applied to the new s. 42.2 as follows:

(a) replace "substantially the same" with similar;

(b) include language to emphasize that minor variations cannot be relied upon to find that work is not similar;

(c) amend the language in s. 42.2(2) to mirror the exceptions for formal seniority and merit systems that do not discriminate contrary to the Human Rights Code as proposed for both s. 42(2) and s. 42.1(2).

PROPOSED NEW LANGUAGE:

42.2 (1) No temporary help agency shall pay an assignment employee who is assigned to perform work for a client at a rate of pay less than the rate paid to an employee of the client when,

(a) they perform **similar** work in the same establishment;

(b) their performance requires **similar** skill, effort and responsibility; and

(c) their work is performed under similar working conditions.

(1.1) **For the purposes of s. 42.2(1), work will be considered similar despite minor variations or differences in duties, responsibilities or work assignments.**

(2) Subsection (1) does not apply **if the employer is able to show that the difference in pay is the result of**

(a) **a formal seniority system that does not discriminate on the basis of sex or any other ground protected under the *Human Rights Code*; or**

(b) **a merit compensation plan that is based on formal performance ratings and that has been brought to the attention of the employees and that does not discriminate on the basis of sex or any other ground protected under the *Human Rights Code***.

e. Pay Transparency

95. **What Bill 148 proposes:** In both s. 42.1(6) and s. 42.2(6) Bill 148 introduces

new provisions under which an employee can request that their employer or temporary help agency review the employee's pay if the employee believes their pay fails to comply with the equal pay for equal work right. The employer or temporary help agency can either (a) adjust the employee's pay or (b) if the employer or temporary help agency disagrees with the employee's belief, provide a written response setting out the reasons for their disagreement.

96. **The Problem:** Bill 148's proposed "written response" provisions wrongly place the onus solely on the non-union employee to ask an employer for a review of their rate of pay and whether it is in compliance with s. 42.1 or 42.2. Put simply, for a non-union worker, particularly those with a temporary help agency, asking for a review of their pay is a request to have their job terminated.

97. Moreover, in order for this right to be effective, employees need to know what the pay structure is in their workplace. Non-unionized workers, and in particular temporary help agency workers, do not have access to this information. Workers can be disciplined or even terminated for disclosing or discussing their wages. While Bill 148 creates an important right to have pay inequalities addressed, it needs to ensure that employees have a right to disclosure of the information that would enable them to access this right and Bill 148 needs to ensure that employees are protected from reprisals for seeking information about or seeking to enforce their rights.

98. **The Solution:** Bill 148 should be amended to comply with other models of pay transparency internationally. For example, in Iceland, the United Kingdom, Australia, Denmark and other countries, legislation ensures that Employers have the proactive obligation to report wage information about job classifications to identify wage gaps relating to gender and other factors such as employment status.

99. On Equal Pay Day this year, the Equal Pay Coalition called on the Ontario government to introduce a new *Pay Transparency to Close the Gender Pay Gap Act*. After years of lobbying for such legislation, the Coalition said now is the time for decisive action to close the gender pay gap. Bill 148 presents an opportunity for such action.

100. A full transparency mechanism contains three main principles: (i) the workers' right to know and ask for wage information; (ii) the employer's proactive obligation to disclose wage information, including obligations to post information in the workplace and report information to the Ministry of Labour; and (iii) protection against reprisals for workers who share or discuss wage information, seek information about their rights or seek to enforce their rights.

101. The provincial government has an opportunity to be a leader on pay transparency to ensure that precariously employed workers have a full right to equal pay.

102. The proposed posting obligations of the pay rates in a workplace are consistent with the language in the *Pay Equity Act*. Employers in this province currently have the obligation to post a pay equity plan, a new plan or an amended plan in a prominent place within a workplace. As proposed by the Coalition, the Pay Transparency reports would require similar posting.

103. The public disclosure of information on the pay rates of male and female workers along with their job status is recognized internationally as the most significant way to assist in closing the gender pay gap. Posting of the job rates and pay structures, based upon job status or assignment employee status will equally assist with closing the gap.

104. The Coalition proposes ensuring that sections 42.1 (6) and 42.2 (6) are effective by amending Bill 148 to introduce a new section 42.3 to the ESA as follows:

NEW PROPOSED LANGUAGE Section 42.3

Section 42.3 Equal pay for Equal Work: Pay transparency

42.3 (1) No later than May 15 of every year, each employer shall file an annual Pay Transparency Report with the Minister.

(2) The employer's annual Pay Transparency Report in subsection (1) shall disclose the following information relating to the prior 12-month period ending on March 31 of each year:

(a) annual individual compensation of male employees, categorized by each classification and job status within the establishment,

(b) annual individual compensation of female employees categorized by each classification and job status within the establishment,

(c) if an employee's compensation is expressed as an hourly rate, the hourly wage rate and the annual compensation of male employees categorized by

each classification and job status within the establishment,

(d) if an employee's compensation is expressed as an hourly rate, the hourly wage rate and the annual compensation of female employees categorized by each classification and job status within the establishment,

(e) the number of steps in a pay range by each classification and job status within the establishment,

(f) the rate of progression through a pay range by each classification and job status within the establishment.

(3) The employer shall post the Pay Transparency Report in prominent places in each workplace for the establishment to which the document relates in such a manner that it may be read by all of the employees in the workplace.

(4) No employer or temporary help agency may do any of the following:

(a) require, as a condition of employment, that an employee refrain from disclosing the amount of their wages;

(b) require an employee to sign a waiver or other document that purports to deny the employee the right to disclose the amount of their wages.

(5) Section 74 applies to this Part with no exceptions.

f. Transition: Delete the Exceptions for Existing Collective Agreements

105. **What is proposed by Bill 148:** Bill 148 includes transition provisions that create an unnecessary exemption for collective agreements that are in conflict with the new equal pay for equal work rights. The proposed s. 42.1(7) and s. 42.2(7)

provide that if a collective agreement is signed prior to April 1, 2018 and contains a provision which pays part-time, temporary, seasonal, casual or assignment employees an unequal wage, this collective agreement provision prevails and is not in breach of the newly proposed ESA equal pay standard.

106. **The Problem:** A fundamental principle of the ESA is that no employer or trade union may contract out of its basic provisions (s. 4). This principle of mandatory compliance with minimum standards is reiterated in the new s. 42.1(3) and (4) and s. 42.2(3) and (4). And yet this principle is directly contradicted by s. 42.1(7) and s. 42.2(7) which would permit non-compliance with minimum standards in unionized workplaces for a period that could extend for several years.

107. This would give unionized workers lesser protection than non-unionized workers and may, as a result, run afoul of the right to freedom of association protected under s. 2(d) of the Charter. By effectively punishing workers for having secured a collective agreement, Bill 148's transition provisions arguably undermine the rationale for unionization which is to collectively bargain protection above minimum standards.

108. In a climate where some unions face pressure to sign 4-year collective agreements in order to avoid lengthy strikes, and in a context where collective agreements will continue to be signed up to March 31, 2018, precariously employed, lower paid workers could be forced to wait for years before they receive the minimum standard of equal pay for equal work.

109. The Developmental Services sector is an example where this delayed access to equal pay will have a significantly detrimental impact to women workers. These workers tend to peoples with disabilities who often live in group homes. These front line workers are predominantly women who tend to the daily needs of their clients twenty-four hours per day, every week. In this sector, and in some collective agreements, part-time and casual employees are paid significantly less for similar work of the full-time employees. In these workplaces, it is women and racialized workers that have been relegated to lower wages as part-timers and casuals. This is a sector where collective agreements expire on March 31st and have lengthy terms. These women workers will be relegated to lower wages for years after the new ESA provisions become effective in the province.

110. As the Changing Workplaces Review acknowledged, the evidence demonstrates that part-time work, contract work and other forms of precarious employment relationships are deeply gendered. They are also deeply racialized. Maintaining this differential payment structure in collective agreements is arguably a violation of basic human rights.

111. The transition provisions which allow for extended non-compliance with equal pay rights are unnecessary and create an arbitrary distinction.

112. It is the Coalition's position that to close the gender pay gap, which is a human rights crisis in this province, there should be no exemptions or transition period. The lower wage is arguably a form of systemic discrimination which the amendment is seeking to cure.

RECOMMENDATION: Delete sections 42.1(7), (8) and (9) and sections 42.2(7), (8) and (9)

C. Definition of Employee

113. As outlined above, a critical factor that influences and helps perpetuate the gender pay gap is the degree to which women disproportionately in precarious non-standard forms of employment. But beyond the precariousness presented by part-time, temporary, casual, seasonal and temporary agency work, women's precarious work is intensified by employers' deliberate misclassification of workers as own-account independent contractors rather than employees. Again, it is racialized women who bear the greatest burden of this precariousness.

114. This precarious work contributes to the gender pay gap not merely because these workers are paid less than full-time or permanent workers *doing the identical jobs in the same workplaces*, but because the precarity of the job prevents effective enforcement of employment standards and contractual obligations.

115. Where workers are misclassified as independent contractors they are denied protection under both the ESA and LRA. As a result, workers who are misclassified have no protection for any minimum standards and are entirely denied the right to unionize. To the extent that social protections such as EI, WSIB, and CPP are also contingent on employee status, misclassified workers are also denied these broader work related protections.[9]

116. To be clear workers who are misclassified are in fact subject to the degree of control and supervision that in law accords with employee or dependent contractor status. This misclassification is pursued by employers as a means of

[9] For a fuller analysis of the impact of misclassification, see Fay Faraday, *Demanding a Fair Share: Protecting Workers Rights in the On-Demand Service Economy* (CCPA: July 2017)

lowering costs and shifting risk onto the individual worker. For example, as businesses compete for work that is contracted out from lead businesses, women working for cleaning companies end up being required to purchase their own cleaning supplies and are treated as independent contractors even though all aspects of their work, what they do, how they do it, when they do are strictly controlled by the company for which they work.

117. Misclassification then is a business strategy that enables employers to compete on the basis of low costs because not only are employment standards evaded and costs privatized onto the backs of individual workers, but workers also avoid paying benefits and payroll taxes that would otherwise be owed for employees. Misclassification doesn't only hurt individual workers but it results in a systemic underfunding as billions of dollars are withheld from core social programs.[10]

118. To get at the root of this precariousness, it is necessary to amend the definition of "employee" in the ESA to encompass dependent contractors. As the Changing Workplaces Review report concluded,

> "we reject the notion that the Ministry of Labour in Ontario can effectively redress the problem of misclassification of workers who would be called 'dependent contractors' under the LRA at the administrative level by interpreting the existing ESA definition of employee to include such people."[11]

RECOMMENDATION: Amend the definition of "employee' in the ESA to include "dependent contractor" as follows:

"dependent contractor" means a person, whether or not employed under a contract of employment, and whether or not furnishing tools, vehicles, equipment, machinery, material, or any other thing owned by the dependent contractor, who performs work or services for another person for compensation or reward on such terms and conditions that the dependent contractor is in a position of economic dependence upon, and under an obligation to perform duties for, that

[10] See *Changing Workplaces Review Final Report* at pp. 262-265. A study of the construction industry in Ontario alone found that from 2007 to 2009, employee misclassification as independent contractors resulted in $1.4 to $2.4 billion each year in lost revenue to the Workplace Safety Insurance Board, income tax, Canada Pension Plan and Employment Insurance: see, Ontario Construction Secretariat, "Underground Economy in Construction — It Costs Us All" (July 2010) as cited in Workers Action Centre, Still Working on the Edge: Building Decent Jobs from the Ground Up (March 2015) at pp. 18–19.

[11] *Changing Workplaces Review Final Report* at p. 267

person more closely resembling the relationship of an employee than that of an independent contractor.

D. Part XIV Leave of Absence Provisions

1. Personal Emergency Leave: Sexual Violence Leave

119. There are a wide range of specifically gendered dynamics that continue to disrupt women's employment, that lead women to miss work and to lose their jobs, and that contribute to the gender pay gap. These submissions focus specifically on the need for women to have paid and unpaid leave to address the consequences of sexual violence.

120. Women continue to face widespread sexual harassment and sexual violence both in the workplace and in their intimate relationships as the government has recognized in its Act Plan to Stop Violence and Harassment.

121. A 2014 Pan-Canadian study on intimate partner violence and its impacts at work revealed some staggering figures. Of the 8700 largely unionized workers who were surveyed:

Nearly 1/3 reported experiences of intimate partner violence;

53% said the violence continued at work (calls, texts, stalking);

38% reported it affected their ability to get to work;

82% said it negatively affected their work performance;

60% called in sick due to violence; and

8.5% lost their jobs due to the violence.[12]

122. Women facing sexual violence should not also have to face the risk of losing their jobs because of that violence. They need the paid and unpaid leave that will enable them to build security in their lives without losing their jobs. This paid and unpaid leave, along with job protection, is necessary in order for women to have the economic security that enables them to leave abusive relationships and allows them to address health, housing, and legal issues, and address the physical, emotional and schooling needs of their children whose lives are also

[12] CLC study cited in Unifor, *Workers Facing Domestic Violence*

affected by this violence.

123. It is commendable that in Bill 148 the government has recognized that paid leave for women facing intimate partner violence is needed. However, the leave is insufficient. And as it is presently structured, women facing sexual violence in fact have fewer effective personal emergency leave days than other workers. Because the two days of sexual violence leave are grouped in with the general 10 days of personal emergency leave, women facing sexual violence in fact only have 8 days of personal emergency leave unrelated to violence while other workers have 10.

124. Moreover, the extent of sexual violence leave is insufficient to enable a woman to address the multiple, complex health, housing and legal matters that arise in situations of violence.

125. In 2016 Manitoba passed legislation under which, in every 52 week period, a woman facing domestic violence is entitled to five paid days leave and five unpaid days leave which may be taken intermittently or consecutively, and a further 17 weeks unpaid leave.

126. There is currently a private members bill before the Ontario Legislature – Bill 26: *Domestic and Sexual Violence Workplace Leave, Accommodation and Training Act, 2016* – which is model legislation providing for 10 days paid leave and further unpaid leave for a reasonable time or time prescribed in regulation. The Bill also sets out protections for confidentiality and workplace training on domestic violence and sexual violence in the workplace.

RECOMMENDATION: Amend Bill 148 to adopt and incorporate all the provisions of Bill 26 *Domestic and Sexual Violence Workplace Leave, Accommodation and Training Act, 2016*

2. Personal Emergency Leave provisions

127. Section 50 of the ESA provides an employee with access to ten PEL days. The objective of personal emergency leave provisions ("PEL") is to provide a minimum unpaid protection for employees from arbitrary dismissal due to personal emergencies including injury, illness, medical emergency, or death. An employee has access to ten PEL days

128. It is women who predominately rely upon the personal emergency leave provisions. The leaves are often used by women who care for children or elderly family members.

129. Bill 148 advances these provisions to (i) apply to all workers including those in small businesses; (ii) include two fully paid days out of the ten and (iii) very importantly, remove the requirement for proof of illness from a qualified health professional.

130. In the Coalition's submission, two paid days is insufficient to meet the demands of women with care responsibilities, either child or elder care. In light of the objective to close the gender pay gap, there is no reason that the personal emergency days should not be fully paid days. The paid emergency days would amount to less than one per month or less than 3% of work time over a full year. The emergency leave provisions remain far less than the annual time most remain dedicate to personal emergency time of their children and elders.

RECOMMENDATION: Amend Bill 148 and s. 50 of the ESA to include 10 paid personal emergency days.

131. The Coalition endorses the creation of the Family Day as a statutory holiday.

132. The Coalition also endorses the extension of the family medical leave provisions to 27 weeks to provide care or support to a dependent. The Coalition recommends increased flexibility in access medical leaves for single days, rather than a full week if so required.

E. Paid Vacation

133. The proposed additional vacation provisions are an important addition to the basic statutory minimum framework including the personal emergency and family leave provisions above. Ontario had one of the least generous paid vacation standards in the country prior to the proposed Bill 148 amendment.

134. The Coalition supports the continued increase of paid vacation time so that the amount of paid vacation is increased with greater length of service with an employer.

F. Scheduling

135. The majority of part-time workers are women. The need for consistent scheduling hours of work means that a women knows what her basic earnings will be and is also in a position to better manage her dependent care responsibilities. All too often, as the Employers cut shifts or loses shifts, a woman loses income.

136. Bill 148 provisions are a step in the right direction to providing workers with extremely modest control over their schedules and by moving the minimum three-hour pay rule into the ESA from Regulation 285/01. But, it is only a very modest step and far from what workers actually need to fully balance work and their dependent responsibilities.

137. The Coalition fully supports the Worker's Action Centres recommendations regarding improvements to the ESA in respect of scheduling including, but not limited to the requirement for initial minimum hours estimate; two-week notice of work schedules; the minimum pay provisions and on-call protections.

PART III: THE *LABOUR RELATIONS ACT*: ACCESS TO UNION REPRESENTATION AND COLLECTIVE BARGAINING

138. The right to union representation and collective bargaining is a critical statutory right for women. Unionization is an equality promoting tool for closing the gender pay gap.

139. Through union representation women have access to just cause protection and mechanisms to enforce their statutory rights in the Pay Equity Act and the Human Rights Code. The unionized wage premium in Ontario is 28.2%, or $6.43 per hour.

140. Apart from increasing women's wages, union protection often leads to greater access to full time positions and/or more secure and greater part-time hours. As well, it means women have someone to negotiate with their employer to secure their pay equity rights.[13]

141. The very foundation of Ontario's labour law recognizes that there is a profound inequality in bargaining power between individual employees and employers. The Ontario system privileges mechanisms whereby employees can join together to form a trade union to bargain collectively with their employer. The rationale in

[13] Cornish, 2014 at 10 and footnote 74.

this industrial pluralistic model is that the parties are best left to set the terms and conditions of employment themselves.

142. Union certification and bargaining on a workplace by workplace model. The unionization and collective bargaining model is predicated on a particular norm – of an non-fragmented, male-dominated labour force, working in regular and secure employment, working for a family wage.[14]

143. The challenge is that the current labour relations norm upon which the LRA is based is significantly eroding the in Ontario labour market. Smaller workplaces and precarious employment relationships combine to defeat the modest LRA rights that currently exist.

144. The Coalition focuses its submissions on the following revisions to the Labour Relations Act as immediate steps to close the gender wage gap.

A. Card-Based Certification

145. Card-based certification should apply in the non-construction sector to all sectors.

146. Bill 148 proposes to extend card-based certification for the temp agency industry, the building services sector, as well as the home care and community services industry. If passed, only four sectors (including the male-dominated construction industry) will permit workers to unionize through card-based certification in the province.

147. The exclusion of retail and other non-construction sectors is a blatant differential treatment which has an extremely negative impact on women in female-dominated sectors.

148. One of the most enduring features of Ontario's labour market, despite women's increased participation since the 1970's is that the majority of employed women continue to work in occupations in which they have been traditionally concentrated. In 2009, 67% of all employed women were working in teaching, nursing and related health occupations, clerical or other administrative positions, or sales and service occupations. This compared with 31% of employed men. 75.5% of clerks and other administrators are women. The retail sector is highly female dominated.[15] The "cashier" classification is 95% women which has the highest level of female-predominance other than nurses.

[14] Fudge, Labour Law's Little Sister, ibid.
[15] See Statistics Canada Women in Canada, 2010 Paid Work

149. There is no reason why female dominated sectors should be excluded from the card-check certification provisions.

150. As part of the provisions to support card-based certification, the Coalition supports expanded access to remedial certification without a vote.

B. Bargaining Unit Structure: Sectoral and Broader-Based Bargaining

1. Consolidation of Bargaining Units

151. The Coalition supports the revision of the LRA to enable a union or employer to apply to the OLRB combine bargaining units represented by the same union. As the Labour Board held, such a provision provides the means of enhancing administrative efficiency and convenience, lateral mobility, a common framework of employment conditions and the promotion of industrial stability".[16]

152. This recommendation is consistent with the OLRB current approach to designate larger bargaining units pursuant to PSLRTA.

2. Sectoral Bargaining/Broader Based Bargaining

153. While it is important that Bill 148 has addressed improvement to employment standards, the Coalition stresses that employment standards on their own do not provide sufficient support for workers' rights. Workers also need the right to organize. It is through unionization, collective representation, collective bargaining and the ability to exert collective strength through the right to strike that workers are able to ensure that the protections they have are robust and are truly enforced.

154. The Supreme Court of Canada has strongly ruled that the right to unionize, the right to bargain and the right to strike are fundamental rights that are protected under the *Charter*. Freedom of association is protected as a *Charter* right because it enables those who are marginalized to associate in order to rectify systemic imbalances of power – particularly the imbalance of power that exists between workers and employers. The Court has further recognized that the power imbalance between workers and employers means that without legislative protection for the right to unionize and bargain collectively, most workers would be unable to exercise their constitutionally protected freedom of association. As a result, the Court has ruled that government has a positive obligation to ensure

[16] Marriott Corp., 1994 CanLII 9820 (ON LRB) para 2; Mississauga Hydro-Electric Commission, 1993 CanLII 7839 (ON LRB).

that workers – particularly vulnerable workers – have legislative support for an effective and meaningful right to unionize and bargain collectively. They must have the right to strike or where this right is restricted they must be guaranteed an effective dispute resolution mechanism.

155. The current model for unionization and collective bargaining that exists in the LRA was designed for male standard employment of the mid-20th century – full-time, full-year jobs for employees who were directly employed by a single employer.

156. What is needed beyond this, however, is protection for broader based bargaining that is more responsive to the structures and patterns of female dominated work, including in-home care work, part-time retail and food services work often for large multinational chains, restaurant work and so on.

157. The Changing Workplaces Review has strongly endorsed the need to adopt models of broader based bargaining which will provide access to the right to unionize for workers whose work structures are a barrier to organizing under the LRA. The CWR has recommended broader based bargaining models that would apply to franchise operations, to publicly funded in-home care and to the creative industries.

158. The Coalition supports these calls for broader based bargaining. These are all female dominated industries in which women face precarious work. The Coalition also supports the Migrant Workers Alliance for Change and the Caregivers Action Centre's call for broader based bargaining for migrant workers.

159. In the Coalition's submission there are three main components to sectoral bargaining: (i) that the "true employer" is identified including through joint and several liability provisions required to pierce through existing chains and networks of subcontractors or multi-employer structures; (ii) that each sector may require specific modification to adopt to the precarity of the workers' employment relationship and structure; and (iii) that regional certification processes be developed.

160. The Coalition recommends that the government commit to an ongoing process, with active participation from women workers, to develop broader based bargaining protections that are responsive to the structures of women's work.

CONCLUDING COMMENTS

161. Bill 148 introduces modest changes to Ontario's employment and labour law regime.

162. In the Coalition's submission, this is not a neutral exercise. In order to close the gendered pay, the Legislative Committee is required to consider how the existing employment and labour laws contribute or ameliorate that gap.

163. Our recommendations in these submissions, particularly the equal pay for equal work recommended amendments, are designed to ensure that the Bill 148 truly assist in closing the gendered wage gap.

Respectfully submitted

Fay Faraday and Jan Borowy

Co-Chairs of the Equal Pay Coalition

21 July 2017

APPENDIX A

Who is the Equal Pay Coalition?

With the founding of the Ontario Equal Pay Coalition in 1974, the Coalition brought together trade unions, women's and business women's organizations and community organizations to lobby for the implementation of ILO Convention 100 Equal Pay For Work of Equal Value.

The Equal Pay Coalition is a coalition of organizations to seek the implementation of equal pay for work of equal value both through legislation and collective bargaining. The Coalition has over 39 constituent and partner groups which represent Ontario women and men who support equal pay for work of equal value. Some of our member groups include:

The Coalition met with a succession of Ontario Ministers of Labour pushing for a strong equal pay for work value law; increases to the minimum wage as a pay equity down payment for the most vulnerable women workers; strong collective bargaining laws to help women bargain pay equity; and implementation of sectoral wages in female-dominated sectors.

With a strategy of working with all political parties who supported equal pay for work of equal value, the Coalition gained the support of both the New Democratic Party and the Liberal Party which resulted in pay equity being part of the Liberal/NDP Accord when the Liberals came to power in 1985.

As such, the Liberal Government issued a Green Paper on Pay Equity in 1985 which called for input on the design of the law. After two years of consultations, the Legislature passed the 1987 Pay Equity Act, effective January 1, 1988.

As this law was based on the job-to-job method and did not cover women who had no direct comparator in a workplace, the Predominantly Female Workplace study was made part of the Act. This Study reported to the Minister of Labour and resulted in the amendments to the Act in 1992 which provided for the proportional and proxy comparison method. This provides women in predominantly female workplace with a mechanism to identify their discriminatory pay gap. At the same time, as a result of cases which were finding that the Ontario Government and larger public sector employers were being found to be "employers" under the Act and responsible for pay equity, the Ontario Government in the early 1990's agreed to fund all public sector pay equity adjustments. In exchange, the Government included an amendment which prevented the Ontario Government from being found as an employer of another entity in the public sector. As well, after lobbying efforts by many groups, Ontario passed the

Employment Equity Act.

When the Progressive Conservative government came to power in 1995, Ontario ‘s leadership in the pay equity field ended. The Government quickly moved to repeal the proxy comparison sections of the Act which covered approximately 100,000 public sector women; ended the funding of such adjustments; eliminated funding for Pay Equity Legal Clinic; repealed the Employment Equity Act; and repealed Labour Relations Act provisions which had assisted and facilitated the union organizing of women workers.

As a result of the SEIU et al. v. Attorney General (Ont) legal challenge, Mr. Justice O’Leary struck down provisions of the Savings and Restructuring Act, 1996 as a violation of section 15 of the Charter of Rights and Freedoms. With the proxy provisions reinstated, the Coalition lobbied again for the funding of the proxy adjustments. After paying out more than $200 million in funding adjustments after years of delay, the government then stated that pay equity was the cost of doing business and it was not prepared to fund public sector agencies to pay these adjustments. A further Charter challenge, CUPE et. Al v. Attorney General(Ont) was brought in 2001 which resulted in the Government reaching a settlement two years later in 2003. This led to the requirement for the Government to pay out up to $414 million in pay equity adjustments for the over 100,000 women in predominantly female workplaces. This settlement lasted for a period of three years and the Ontario Government has again reverted to refusing to pay the necessary pay equity adjustments. Based on the government’s own figures, $78.1 million is owing for 2006 and 2007, a further $77.6 million is owed in 2008 and about $467.9 billion will be owed from 2008-2011.

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From 2006- 2008, the Coalition lobbied all political parties to take immediate steps to improve the enforcement of the Pay Equity Act and continues to do so today.

In 2008, the twentieth anniversary of the Pay Equity Act, the Coalition released the Framework for Action on Pay Equity in Ontario which called upon the Provincial government to take action to end the gender pay gap crisis in the Ontario.

APPENDIX B

12 STEPS TO CLOSE THE GENDER PAY GAP

How do we get to a 0% Gender Pay Gap by 2025?

Ontario's Gender Pay Gap is unacceptable: 57% for Indigenous women, 39% for immigrant women and 30% average for All Women in Ontario.

The Equal Pay Coalition calls on the Ontario government to develop a comprehensive strategy to close the gender pay gap.

STEP 1 Treat closing the gap as a human rights priority

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.

Closing the gender pay gap has not been a priority in public policy and employer practices. That has to change. 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 enforcement is not a partisan issue. It is a legal fundamental obligation of all those who govern, regardless of their party, to co-operate to take the necessary human rights measures to close the pay gap.

STEP 2 Raise awareness through annual Equal Pay Days and education

The gender pay gap it not a matter for the history books. There is a need to raise awareness about the gender pay gap in order to ignite action to close it. Equal Pay 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. All governments should enshrine an annual Equal Pay Day in April each year. Businesses should embed awareness of the closing gender pay gap in business vision, values and goals. Awareness of pay equity issues should also be embedded in educational curriculum for students. **April 11, 2017 is Equal Pay Day in Ontario.**

STEP 3 Develop the "Close the gender pay gap by 2025 Plan"

Solving a persistent problem requires leadership and planning. The Coalition calls on Ontario Premier Kathleen Wynne, NDP Official Opposition leader Andrea Horwath and Progressive Conservative Leader Patrick Brown to work with the Coalition, employers, trade unions and other equality seeking stakeholders to develop, implement and resource a province-wide plan to close Ontario's gender pay gap by 2025. Ending the gender pay gap by 2025 requires a clear action plan with realistic and timely goals, targets and resources.

STEP 4 Enforce and expand pay equity laws

Pay equity laws and policies are directed at ensuring that men and women are paid equally where they do work of equal value. 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. Employment standards and labour laws set the minimum floor of rights and access for employees to a voice in the workplace. These three sets of laws and policies are necessary to work together close the gender pay gap. All employers must comply with the existing *Pay Equity Act, Employment Standards Act, the Labour Relations Act and Human Rights Code* obligations.

A *new pay transparency standard* would require employers to report and post the hourly wage and pay structures, any merit pay systems, the occupation and the nature of the employment relationship (such as part-time, contract, temporary agency).

Modernize the Employment Standards Act Equal Pay for Equal Work sections. The Coalition recommends that, given that women are the majority of workers in a non-standard employment relationship, the ESA should be amended to ensure part-time, part-year, contract, temporary agency workers are paid the same rate as full-time workers.

Ontario delivers public services through its own employees or through transfer payment agencies without providing proper funding to ensure pay equity is both achieved and maintained for those doing women's work. *The pay equity adjustments that are owed to women working to provide public services to Ontarians require full funding.*

There is a need to r*estore sufficient funding to the Pay Equity Commission* to carry out its important tasks. The Government must introduce effective and fully-staffed enforcement mechanisms to ensure compliance with the *Act*.

STEP 5 Implement employment equity law and policies

Pay disparities faced by racialized women, aboriginal women and women with disabilities are greater. Access to better paying jobs is a critical step in closing the gender pay gap.

Employment equity laws and policies should be implemented requiring employers to plan to end discriminatory practices facing women, racialized and aboriginal peoples, people living with disabilities and others who are similarly disadvantaged.

It's time to reintroduce Ontario's repealed *Employment Equity Act*. This proactive legislation helped to redress workplace discrimination in recruitment, employment conditions and retention against women, racialized workers, aboriginal peoples and persons with disabilities – all major factors contributing to the gender pay gap.

STEP 6 Promote access to collective bargaining

Unionization is one of the most effective tools to close the gender pay gap. One reason that the pay gap has decreased over the years is the increasing unionization of women, particularly in the public sector. The "union advantage" in pay is on average $5.11 per hour compared to non-unionized workers. Unions have a joint role with employers to create pay equity plans and 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. However, unionization rates are declining, particularly in the private sector. The rise of precarious employment relationships, such as short-term contract, temporary agency and other forms has weakened the trade union representation of women .

The *Labour Relations Act* must be amended to include card-based certification and expanded access to remedial certification without a vote. We question why does the construction sector, a male-dominated sector, have access to card-based certification and female-dominated sectors do not? The Coalition further supports measures to improve union access to employee information to facilitate organizing.

In order to redress the gendered wage gap and the increase in precarious work in the Ontario labour market, sectoral and broader based bargaining approaches should be implemented. For example, Australia has a system of wage awards for sectors.

STEP 7 Increase the minimum wage

Women are the majority of Ontario's 534,000 minimum wage workers. Aboriginal women, immigrant and refugee women, women with disabilities and racialized women are even more likely to be working at the minimum wage.

Any increase to statutory minimum wage laws serves as a down payment on closing the gender pay gap for vulnerable workers. The Coalition calls for the Ontario government to bring in emergency legislation to increase the minimum wage to $15 per hour effective immediately. The minimum wage must keep up with inflation and keep on increasing until it is at the level of a living wage.

STEP 8 Provide affordable and accessible child care

Women with children earn much less money. Many women work part-time because of lack of affordable child care. In 1988, the Government fully recognized that access to an affordable child care program was a cornerstone to ensure women's equality.

Despite many other reports calling for affordable, high quality child care, we have made little progress in access to a child care program. In Ontario, there are licensed spaces for just 1 in 5 children and fees are upwards of $40 to $60 per day, per child. The time for a program is now.

STEP 9 Mainstream equity compliance into government laws and policies

All social and economic policies should be vetted by government departments for their impact, answering this question: *do they help close or widen gender pay gaps*?

Public policies use an approach which assumes all employees face "similar" or " neutral" circumstances to predominantly able-bodied, white, male workers. There is a systemic failure to account for the different and unequal circumstances facing women and particularly those who racialized, Aboriginal, have disabilities or are poor. Cabinet policy submissions should include a sign off to ensure proposed laws and policies have been reviewed for their contribution to closing these pay gaps. Labour market knowledge, research and monitoring that is sensitive to human rights is key to an effectively ending the gender wage gap.

STEP 10 Mainstream equity compliance into workplaces and businesses

Employers also need to mainstream equity compliances into their workplace practices, including analyzing the impact recruitment and retention practices as well as pay and promotion structures and conditions of work have on vulnerable groups. The pay transparency law above is a starting point to make this happen.

STEP 11 End Violence and Harassment of Women

Sexual violence and harassment is connected to gender inequality and contributes to the gender wage gap. A woman who is the victim of assault or harassed out of a job is left with few economic resources. The closing the gender wage gap strategy needs to respond to the root causes of violence, including education, employment, and poverty. The Ontario government designed a targeted strategy to end Gender-based violence. This strategy needs to be continued. There is no reason why Ontario doesn't create its own task force examining the disproportionate rates of missing and murdered Aboriginal women and girls in the province as part of the strategy to end gender inequality.

STEP 12 Secure Decent Work for Women Across the Economic Spectrum

It is time for the Ontario government to commit to the Decent work agenda. For almost four decades, the notion of labour market “flexibility” has been one-sided. The employers' cut costs and find ways to reduce the unit cost of labour. The employment relationships most strongly associated with women and dominated by women, the precarious forms of part-time, contract, and temporary, have taken hold as the new model. The precarious labour market means predominantly lower wages, less access to benefits, holiday pay, overtime pay, pensions, severance pay and employment insurance. A Decent work agenda will redress precarious jobs in the labour market.

APPENDIX C:

EQUAL PAY COALITION PROPOSAL

EMPLOYMENT STANDARDS ACT, SECTIONS 42 TO 42.3

Equal pay for equal work: Sex

42. (1) No employer shall pay an employee of one sex at a rate of pay less than the rate paid to an employee of the other sex when,

(a) they perform similar work in the same establishment;

(b) their performance requires similar skill, effort and responsibility; and

(c) their work is performed under similar working conditions.

(1.1) For the purposes of s. 42(1), work will be considered similar despite minor variations or differences in duties, responsibilities or work assignments.

(2) Subsection (1) does not apply if the employer is able to show that the difference in pay is the result of

(a) a formal seniority system that does not discriminate on the basis of sex or any other ground protected under the *Human Rights Code*; or

(b) a merit compensation plan that is based on formal performance ratings and that has been brought to the attention of the employees and that does not discriminate on the basis of sex or any other ground protected under the *Human Rights Code*.

(3) No employer shall reduce the rate of pay of an employee in order to comply with subsection (1).

(4) No trade union or other organization shall cause or attempt to cause an employer to contravene subsection (1).

(5) If an employment standards officer finds that an employer has contravened subsection (1), the officer may determine the amount owing to an employee as a result of the contravention and that amount shall be deemed to be unpaid wages for that employee.

Equal pay for equal work: Employment status

42.1 (1) No employer shall pay an employee at a rate of pay less than the rate paid to another employee of the employer because of a difference in employment status when,

(a) they perform similar work in the same establishment;

(b) their performance requires similar skill, effort and responsibility; and

(c) their work is performed under similar working conditions.

(1.1) For the purposes of s. 42.1(1), work will be considered similar despite minor variations or differences in duties, responsibilities or work assignments.

(2) Subsection (1) does not apply if the employer is able to show that the difference in pay is the result of

(a) a formal seniority system that does not discriminate on the basis of sex or any other ground protected under the *Human Rights Code*; or

(b) a merit compensation plan that is based on formal performance ratings and that has been brought to the attention of the employees and that does not discriminate on the basis of sex or any other ground protected under the *Human Rights Code*.

(3) No employer shall reduce the rate of pay of an employee in order to comply with subsection (1).

(4) No trade union or other organization shall cause or attempt to cause an employer to contravene subsection (1).

(5) If an employment standards officer finds that an employer has contravened subsection (1), the officer may determine the amount owing to an employee as a result of the contravention and that amount shall be deemed to be unpaid wages for that employee.

(6) An employee who believes that their rate of pay does not comply with subsection (1) may request a review of their rate of pay from the employee's employer, and the employer shall,

(a) adjust the employee's pay accordingly; or

(b) if the employer disagrees with the employee's belief, provide a written response to the employee setting out the reasons for the disagreement.

Equal pay for equal work: Difference in assignment employee status

42.2 (1) No temporary help agency shall pay an assignment employee who is assigned to perform work for a client at a rate of pay less than the rate paid to an employee of the client when,

(a) they perform similar work in the same establishment;

(b) their performance requires similar skill, effort and responsibility; and

(c) their work is performed under similar working conditions.

(1.1) For the purposes of s. 42.2(1), work will be considered similar despite minor variations or differences in duties, responsibilities or work assignments.

(2) Subsection (1) does not apply if the employer is able to show that the difference in pay is the result of

(a) a formal seniority system that does not discriminate on the basis of sex or any other ground protected under the *Human Rights Code*; or

(b) a merit compensation plan that is based on formal performance ratings and that has been brought to the attention of the employees and that does not discriminate on the basis of sex or any other ground protected under the *Human Rights Code*.

(3) No client of a temporary help agency shall reduce the rate of pay of an employee in order to assist a temporary help agency in complying with subsection (1).

(4) No trade union or other organization shall cause or attempt to cause a temporary help agency to contravene subsection (1).

(5) If an employment standards officer finds that a temporary help agency has contravened subsection (1), the officer may determine the amount owing to an assignment employee as a result of the contravention and that amount shall be deemed to be unpaid wages for that assignment employee.

(6) An assignment employee who believes that their rate of pay does not comply with subsection (1) may request a review of their rate of pay from the temporary help agency, and the temporary help agency shall,

(a) adjust the assignment employee’s pay accordingly; or

(b) if the temporary help agency disagrees with the assignment employee’s belief, provide a written response to the assignment employee setting out the reasons for the disagreement.

Equal pay for equal work: Pay transparency

42.3 (1) No later than May 15 of every year, each employer shall file an annual Pay Transparency Report with the Minister.

(2) The annual Pay Transparency Report referred to in subsection (1) shall disclose the following information relating to the prior 12-month period ending on March 31 of each year:

(a) annual individual compensation of male employees, categorized by each classification and job status within the establishment,

(b) annual individual compensation of female employees categorized by each classification and job status within the establishment,

(c) if an employee's compensation is expressed as an hourly rate, the hourly wage rate and the annual compensation of male employees categorized by each classification and job status within the establishment,

(d) if an employee's compensation is expressed as an hourly rate, the hourly wage rate and the annual compensation of female employees categorized by each classification and job status within the establishment,

(e) the number of steps in a pay range by each classification and job status within the establishment,

(f) the rate of progression through a pay range by each classification and job status within the establishment.

(3) The employer shall post the Pay Transparency Report in prominent places in each workplace for the establishment to which the document relates in such a manner that it may be read by all of the employees in the workplace.

(4) No employer or temporary help agency may do any of the following:

(a) require, as a condition of employment, that an employee refrain from disclosing the amount of their wages;

(b) require an employee to sign a waiver or other document that purports to deny the employee the right to disclose the amount of their wages.

(5) Section 74 applies to this Part with no exceptions.