

**National Association
of Women and the Law**



**Association nationale
de la femme et du droit**

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**BRIEF BY THE
NATIONAL ASSOCIATION
OF WOMEN AND THE LAW
TO THE PAY EQUITY TASK FORCE**

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The National Association of Women and the Law (NAWL) is a national, non-profit, feminist organization that speaks on behalf of a nationwide membership of lawyers, law students, academics and individuals who share a commitment to gender equality. Since 1974, NAWL has been promoting women's equality through legal research, advocacy, reform and public education.

NAWL has made numerous oral and written submissions to all levels of government on issues affecting Canadian women, and has successfully advocated law reforms both federally and provincially. We have advanced substantive equality for women in many spheres, including criminal, family and labour law. Some of our successes include influencing legislation on sexual assault, family law, employment equity, and equal access to benefits. NAWL was also instrumental in the inclusion of the equality guarantees in the *Charter of Rights and Freedoms*.

NAWL promotes the equality of women through law reform, while recognizing that this will mean different things to different women. It is NAWL's position that every woman experiences inequality differently due to systemic discrimination on the basis of gender, race, ethnicity, nationality, class, sexual orientation, disability, age, language and other factors. We believe that substantive equality for women will be realized only where the diversity among women is recognized and valued. We are dedicated to working collectively with other organizations in order to reflect the diversity and further the equality of all women in Canada.

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SUMMARY OF RECOMMENDATIONS

It is NAWL's position that the federal government must replace the existing federal pay equity scheme with comprehensive and proactive pay equity legislation. The current complaint-based model is ineffective and inaccessible for the majority of women in Canada. Its ambiguous terminology, unspecified methodology and lack of enforcement mechanisms have resulted in extensive delays, unacceptably long waits for wage adjustments and, in many cases, a complete lack of alternatives for women with pay equity complaints. Accordingly, NAWL advocates that the federal government take steps toward remedying the situation by drafting clear and unambiguous proactive pay equity legislation.

To this end, NAWL urges that the new federal pay equity legislation incorporate several main points:

1. Recognition that despite anti-discrimination legislation, women still face inequality in the labour market, occupational segregation and the systematic devaluation of their work.
2. Recognition that racialized women face additional discrimination and confront a graver form of economic disadvantage than non-racialized women.
3. Recognition that pay equity violations are due to systemic discrimination and, as such, systemic remedies are necessary. Pay equity legislation must utilize proactive regulatory mechanisms, not only complaint-based mechanisms.
4. An affirmation of the fact that pay equity is a fundamental human right, protected under the *Canadian Charter of Rights and Freedoms* and international human rights law.
5. Recognition that pay equity is an essential mechanism for ensuring constitutional equality rights for women and other disadvantaged groups.
6. Comprehensive and proactive pay equity provisions that require that all federally-regulated employers develop and implement, in conjunction with unions if applicable, a pay equity plan and program.
7. Comprehensive coverage of all federally-regulated workplaces that (i) protects all workers, including part-time, casual, seasonal and contractual workers, (ii) guarantees enforcement despite contracting out or a subsequent change in ownership, and (iii) applies to the Federal Contractor's Program.
8. Effective methodology for job evaluations, job comparisons, wage adjustments and the timing of corrective payments.
9. Strong monitoring and enforcement mechanisms, including proactive deadlines, random inspections and the authority to award interest.

10. The participation of unions throughout the pay equity process and, in particular, the involvement of unions in negotiating and enforcing pay equity plans.
11. Accessible procedures for non-unionized women, as well as part-time, casual, seasonal and contractual workers.
12. Provisions for the continual disclosure of relevant pay equity information to both employees and their bargaining agents.
13. The creation of a separate pay equity commission and a specialized tribunal that has institutional independence and impartiality.
14. The development of a consulting and advocacy body that will enhance accessibility to pay equity by helping women, particularly non-unionized women and racialized women, enforce their rights.
15. An allocation of funding to finance pay equity wage adjustments in the federal public sector.
16. Recognition that pay equity, once achieved, must be maintained.

It is NAWL's hope that federal legislation that includes the above provisions will allow the pay equity process to move beyond the tangled mess of litigation in which the current legislation has become so mired to become an effective means of enforcing an established human right. Indeed, NAWL maintains that unambiguous, comprehensive and proactive legislation will go a long way toward granting in substance to Canadian women the basic human right that international and domestic instruments have been promising for years: pay equity.

1. PAY EQUITY AS A HUMAN RIGHT

Pay equity is a basic human right and is a key mechanism for ensuring the full respect and promotion of women's constitutional equality rights.¹ It is the right to be paid equally for work of equal value, and it is the right to employment free of discrimination. Just as women have the right to life, liberty and security of the person and the right to be equal before the law, so too do women have the right to remuneration proportional to the value of the work they perform. Pay equity is neither a bonus to be distributed during economic booms nor a ploy that results in undeserved windfalls. Rather, pay equity redresses historic employment discrimination according to basic human rights principles. Pay equity, along with employment equity and anti-discrimination norms in the workplace, is an essential measure to ensure the full equality of women in Canadian society.

1.1 International Obligations

Pay equity has been internationally recognized as a fundamental human right. The *International Covenant on Economic, Social and Cultural Rights*, part of the *International Bill of Rights* and ratified by Canada in 1976, guarantees the right of everyone to equal remuneration for work of equal value.² Several other international instruments, also ratified by Canada, express the same guarantee.

These international instruments not only affirm Canada's obligation to achieve pay equity, but they also affirm Canada's obligation to take active measures toward that end. For example, Article 2 of the *Equal Remuneration Convention (ILO No. 100)*, ratified by Canada in 1972, states:

1. Each Member shall, by means appropriate to the methods in operation for determining rates of remuneration, promote and, in so far as is consistent with such methods, ensure the application to all workers of the principle of equal remuneration for men and women workers for work of equal value.
2. This principle may be applied by means of:
 - (a) National laws or regulations;
 - (b) Legally established or recognized machinery for wage determination;
 - (c) Collective agreements between employers and workers; or
 - (d) A combination of these various means.³

¹ For a detailed analysis of pay equity as a basic human right, please see M.A. Young, *Pay Equity: A Fundamental Human Right* (Ottawa: Status of Women Canada, 2002) [hereinafter Young].

² *International Covenant on Economic, Social and Cultural Rights*, G.A. res. 2200A (XXI), 21 U.N.GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, entered into force Jan. 3, 1976, Article 7(a)(i).

³ *Equal Remuneration Convention (ILO No. 100)*, 165 U.N.T.S. 303, entered into force May 23, 1953, Article 2.

The *Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)*, which was ratified by Canada in 1981, similarly mandates that states take “all appropriate measures to eliminate discrimination against women in the field of employment,” with a mind to securing equal remuneration and benefits for work of equal value.⁴ *CEDAW* imposes a positive obligation on state parties to take the necessary measure to ensure that women’s equality rights are not infringed by discriminatory practices in the workplace and elsewhere. Indeed, in *The Federal Plan for Gender Equality*, the federal government acknowledges that *CEDAW* requires positive-action measures to remedy the historical oppression of women. The *Beijing Declaration and Platform for Action*, Fourth World Conference on Women, likewise requires that governments take action to guarantee the rights of women and men to equal pay for work of equal value.⁵

Article 2 of the *Discrimination (Employment and Occupation) Convention* (ILO No. 111), ratified by Canada in 1964, takes a parallel stance: “Each Member for which this Convention is in force undertakes to declare and pursue a national policy designed to promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with a view to elimination any discrimination in respect thereof.”⁶

The terms of the *Discrimination Convention* and the other international instruments cited above must be recognized and adhered to by the Canadian government. By ratifying these instruments, the Canadian government has created an obligation of compliance. In *The Federal Plan for Gender Equality*, the federal government recognizes that it is bound by its international obligations, specifically those under *CEDAW*.⁷

1.2 Domestic Obligations

The Canadian government has domestic obligations to realize pay equity in addition to its international obligations.

The federal government created an obligation to achieve pay equity in the 1977 *Canadian Human Rights Act (CHRA)*.⁸ According to section 11(1) of the *CHRA*, “It is a discriminatory practice for an employer to establish or maintain differences in wages between male and female employees employed in the same establishment who are performing work of equal value.” Section 11(5) clarifies the point by noting, “[f]or greater certainty, sex does not constitute a reasonable factor justifying a difference in wages.” The fact that Parliament unanimously passed the *CHRA* underscores the importance of the federal government’s obligation to the realization of pay equity.

⁴ *Convention on the Elimination of all Forms of Discrimination against Women*, 18 December 1979, U.N.T.S. 1981 No. 20378, art. 11(1) at 18 (entered into force 3 September 1981).

⁵ *Beijing Declaration and Platform for Action*, Sections 167 and 180.

⁶ *Discrimination (E&O) Convention*, 1960., Article 2.

⁷ *The Federal Plan for Gender Equality* (Ottawa: Status of Women Canada, 1995) at para. 406. [hereinafter *The Federal Plan*].

⁸ *Canadian Human Rights Act*, R.S.C. 1985, c. H-6.

The importance of the obligation is further underscored by its quasi-constitutional status. Indeed, as the Supreme Court of Canada noted in *Canada (Attorney General) v. Mossop*, “[i]t is well established that human rights legislation has a unique quasi-constitutional nature.” Evans J. applied this principle directly to the federal pay equity scheme in *Canada (Attorney General) v. Public Service Alliance of Canada*,⁹ noting that section 11(1) of the *CHRA* has a quasi-constitutional status. Thus, as a legislated human right with quasi-constitutional status, section 11(1) must be upheld in accordance with the values of a free, just and democratic society.

Any legislative pay equity scheme will be subject to scrutiny under the *Canadian Charter of Rights and Freedoms*. In particular, section 15(1) of the *Charter* states:

15(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

According to the Supreme Court of Canada, section 15(1) provides not only formal equality between women and men, but also, and most importantly, substantive equality. In addition, the equality guarantees are not subject to dismissal solely because of cost or inconvenience.¹⁰ As such, a pay equity infringement cannot be justified solely on the basis of expense.

The federal government must also take legislative action toward the substantive realization of pay equity because of its domestic commitment to gender equality analysis. In the 1995 *Federal Plan for Gender Equality*, the federal government developed the concept of gender-based analysis as a means of addressing discrimination against women. The government mandated that legislators engage in gender-based policy analysis at every stage of the legislative process:

Gender analysis is based on the standpoint that policy cannot be separated from the social context, and that social issues are an integral part of economic issues. Social impact analysis, including gender analysis, is not just an add-on, to be considered after costs and benefits have been assessed, but an integral part of good policy analysis.¹¹

The government notes that gender-based analysis is particularly important because of the fact that many women experience unequal pay for work of equal value.¹² Indeed, one of

⁹ [2000] 1 F.C. 146 at 187.

¹⁰ *Schachter v. Canada*, [1992] 2 S.C.R. 679 at 709.

¹¹ R. McKinley, *Gender Analysis of Policy* (Draft), (Ministry of Women’s Affairs, New Zealand, 1993) cited in *The Federal Plan*, *supra* note 7 at 18

¹² *The Federal Plan*, *supra* note 7 at 39.

the main objectives of *The Federal Plan* is to improve women's economic autonomy and well-being.¹³

In addition, *The Federal Plan* specifically emphasizes the importance of improving the economic and employment status of federal employees, the eighth objective of *The Federal Plan* being to "Advance Gender Equality for Employees of Federal Departments and Agencies." As such, it is particularly important that the government consider the pay inequities that currently confront female federal employees when it reconstitutes the federal pay equity legislation.

The Department of Justice elaborated on the concept of gender-based analysis in the 1998 *Guide to Gender Equality Analysis*:

Gender equality analysis is a process to help identify and remedy problems of gender inequality that may arise in policy, programs and legislation. It is premised on an understanding of the continuing reality of women's inequality in Canadian society, and a recognition that our legal principles and rules have historically been based on values and assumptions about appropriate gender roles that may restrict women's choices and actions. The object of gender equality analysis is to replace those assumptions with a consideration of the specific situations of women in all facets of society, such as the labour market, the family and the community, and thus shape laws, policies, and programs that respond to women's needs and priorities.¹⁴

The Department of Justice notes that gender equality analysis must be considered at every stage of government policy and program development, not only to avoid future problems and litigation, but also because of ethical commitments and the importance of recognizing the diversity and dignity of all members of society.¹⁵ In particular, the Department of Justice highlights the importance of gender equality analysis in legislative drafting. The drafting of the new pay equity provisions is no exception.

Indeed, as the Department of Justice articulates, the federal government has a "commitment that future legislation and policies will include an analysis of their potential for unequal impacts on women and men and a commitment to adopt strategies that advance gender equality." Accordingly, the federal government must honour this commitment at every stage of the pay equity legislative process.

The Supreme Court of Canada has also indicated that equality in the workplace is an important objective that employers must try to attain. Indeed, in the 1999 "firefighters case," frequently known as *Meiorin*, (*British Columbia v. British Columbia Government and Services Employees' Union*) concerning occupational requirements and their impact

¹³ *The Federal Plan*, *supra* note 7 at Objective 2.

¹⁴ Department of Justice, *Diversity and Justice: Gender Perspectives, A Guide to Gender Equality Analysis* (Ottawa: Department of Justice, 1998) at 2.

¹⁵ *Ibid.*

on women, the Court stated that employers must “build conceptions of equality into workplace standards.” This is consistent with the duty imposed on employers by the *Employment Equity Act (EEA)*, which provides mechanisms to identify and eliminate barriers to employment for disadvantaged groups identified in the *EEA*, and in particular for women.

In June 2000, the *Canadian Human Rights Act (CHRA)* Review Panel, chaired by the Honourable Gérard Laforest, released its report and recommendations on proposed changes to the *CHRA*. It proposed to include in the *CHRA* a duty to ensure equality: “it is time to cast the language of the Act in a more positive way, to create a duty on the part of employers and service providers to promote equality and eliminate discrimination in much the same way that the Canada Labour Code creates a general duty for employers to ensure the protection of the safety and the health of its employees at work.”¹⁶ NAWL supports this approach and recommends that it should inspire the drafting of future pay equity legislation. Indeed, in light of the ongoing and persistent nature of discrimination against women in the workplace, it is incumbent upon the federal government to take legislative action to address this inequality and ensure that employers change their practices and patterns.

It is NAWL’s position that, in light of the domestic and international commitments and obligations outlined above, the Canadian government has a positive obligation to adopt legislation that will remedy the systemic inequality of women in the workforce. The Canadian government must adopt legislation that will create a duty on the part of employers and service providers to promote equality and eliminate discrimination in the workplace. More specifically, it must adopt legislation that will force employers to eliminate discrimination in wages, just as it has already adopted employment equity legislation that forces employers to eliminate discrimination in their hiring and promotion practices. The adoption of pro-active pay equity legislation is an essential step towards ensuring women’s equality in the workplace and ensuring women’s Section 15 constitutional equality rights under the *Charter*.

2. PAY EQUITY: A RIGHT BUT NOT A REALITY

2.1 The Ongoing Devaluation of Women’s Work

Despite section 11(1) of the *CHRA* and the Canadian government’s obligation to pay equity, pay equity has yet to be achieved. Women employed full-time continue to earn 72.5 per cent of men’s income,¹⁷ and women continue to head the majority of low-income households.¹⁸ Many factors contribute to the disparity in income between men

¹⁶ Department of Justice, *Promoting Equality: A New Vision* (Ottawa: Canadian Human Rights Act Review Panel, 2000) at 11 [hereinafter *Promoting Equality*].

¹⁷ Statistics Canada, *Survey of Consumer Finances: Earnings of Men and Women* (Ottawa: Statistics Canada, 1997) catalogue No. 13-217-XIB.

¹⁸ Statistics Canada, “Women in Canada 2000: A Gender-based Statistical Report” (Ottawa: Minister of Industry, 2000) [hereinafter “Women in Canada”].

and women; however, pay equity is the most significant factor, accounting for approximately half of the difference.

Under the current legislative scheme, few women have the time and resources to file pay equity complaints. Complaints generally take so many years to resolve that unions are among the only parties with the resources to pursue them. Few non-unionized women employees are able to bring pay equity claims, and the unionized women who do typically wait years for any type of resolution. The current pay equity scheme ranks only marginally above a state of paralysis. It offers little substantive remedy to the majority of women who confront wage discrimination in the workplace.

2.2 Pay Equity and Racial Discrimination

If the current pay equity scheme offers little to the majority of women who confront wage discrimination in the workplace, then it offers even less to racialized women. Racialized women face a graver form of economic disadvantage than their non-racialized counterparts. These women are discriminated against on the basis of their gender, as well as on the basis of their colour or ethnic origin, leaving them particularly susceptible to economic disadvantage. Indeed, De Wolff describes a “polarization of income” between racialized and non-racialized women.¹⁹ Studies indicate, however, that this gap could be diminished by enacting pay equity legislation that would address wage discrimination on the basis of race.²⁰

Accordingly, the particular concerns of racialized women not only require further analysis, but also must be recognized and addressed by the new pay equity legislative scheme. To assist in this effort, this brief will now turn to the unique concerns of racialized women.

1.6 million Canadian women, or approximately 11 percent of the female population in Canada, identify themselves as visible minorities.²¹ These women experience additional forms of discrimination that exacerbate the existing conditions of economic disadvantage that confront women generally.

Indeed, according to Statistics Canada, visible minority women have among the lowest total incomes of all income groups. In 1995, the total income for visible minority women aged 15 and over averaged \$16,600, as compared to \$19,500 for their non-visible minority counterparts. Visible minority men, in contrast, had a total income of \$23,600.²²

In addition, visible minority women tend to earn less employment income than other women. In 1995, the average full-time, full-year employment income of visible minority

¹⁹ A. De Wolff, “The Face of Globalization: Women Working Poor in Canada” (2000) 20(3) *Canadian Woman Studies* 54 at 55.

²⁰ See e.g. J. Lapidus and D.M. Figart, “Remedying ‘Unfair Acts’: U.S. Pay Equity by Race and Gender” (1998) 4(3) *Feminist Economics* 7.

²¹ *Ibid.* at 19.

²² *Ibid.* at 231.

women was \$27,500, \$3,000 less than that of non-visible minority women.²³ The situation is even graver for visible minority women of particular ethnic backgrounds. Specifically, Latin American and Korean women who were employed on a full-time, full-year basis earned less than \$23,000 in 1995. This is markedly lower than the employment income of visible minority men, which averaged \$36,088 in 1995, and non-visible minority men, which averaged \$43,200.²⁴

Aboriginal women face particularly stark income realities. In 1996, the average total income for Aboriginal women was \$13,300, over \$6,000 less than that of their non-visible minority counterparts.

Some academics question the effect that conventional pay equity legislation can have on the specific forms of wage discrimination confronting racialized women.²⁵ However, others note that, while it would be mistaken to expect law alone to solve the problems of any marginalized group, “law can deal with some of the more conspicuous manifestations of discrimination in employment on grounds of race and gender.”²⁶

In order for the law to do so, however, it is first very important to remember that race and gender are not mutually exclusive spheres of experience.²⁷ Rather, they function together as a whole, creating an identity in which one cannot be separated from the other, and an experience of discrimination that cannot simply be relegated into categories of racism and sexism. To ignore this point is to essentialize the experiences of all women, regardless of race or other experience-defining features.

The current pay equity provisions of the CHRA do not contain any reference to the particular issues confronting racialized women. Accordingly, as Ashiagbor points out, this legislation is “inadequate to address the disadvantage of women who face different obstacles due to the interaction of race and gender.”²⁸

As such, it is NAWL’s position that the new federal pay equity legislation must expressly recognize the fact that racialized women face additional forms of discrimination and confront specific forms of economic disadvantage, and must provide for mechanisms to prevent and remedy this discrimination and disadvantage.

Indeed, the federal government of Canada has an obligation to do so. The right to equal pay for equal work was specifically guaranteed to individuals of any race, colour, or

²³ *Ibid.* at 230.

²⁴ *Ibid.* It is important to note that, as full-time, full-year employment income statistics, these numbers only begin to scrape the surface of the issue. They do not address the fact that many visible minority women receive disproportionately low pay for work done on a part-time or seasonal basis.

²⁵ See e.g. J. Kainer, “Pay Equity Strategy and Feminist Legal Theory: Challenging the Bounds of Liberalism” (1995) 8 C.J.W.L. 440 at 460-462.

²⁶ D. Ashiagbor, “The Intersection between Gender and ‘Race’ in the Labour Market: Lessons for Anti-Discrimination Law” in A. Morris and T. O’Donnell, eds., *Feminist Perspectives on Employment Law* (London: Cavendish Publishing Ltd., 1999) 139 at 139 [hereinafter Ashiagbor].

²⁷ *Ibid.*

²⁸ *Ibid.* at 143.

national or ethnic origin in the *International Convention on the Elimination of All Forms of Racial Discrimination*, which was ratified by Canada in 1970.²⁹

In addition, Canada has endorsed the *Declaration and the Plan of Action* adopted by the United Nations World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance held in Durban, South Africa from August 31 to September 2, 2001. In the *Plan of Action*, states expressed their commitment to recognize the effect that discrimination, marginalization and social exclusion have had and continue to have on many racial groups, and to take appropriate measures in respect of employment with a view to preventing racial discrimination (Article 48). More specifically, the *Plan of Action* urges states to support the creation of workplaces free of discrimination through a multifaceted strategy that includes civil rights enforcement, public education and communication in the workplace, and to promote the rights of workers who are subject to racism, racial discrimination, xenophobia and related intolerance (Article 104(a)). It further urges states “to give special attention, when devising and implementing legislation and policies designed to enhance the protection of workers rights to the serious lack of protection, and in some cases exploitation as in the case of trafficked persons and smuggled migrants, which make them more vulnerable to ill treatment such as confinement in the case of domestic workers and also being employed in dangerous and *poorly paid jobs*” (Article 105; our *emphasis*).

Canada has thus committed itself on the international scene to take effective action to prevent and remedy the manifestations of racism in the workplace, and in particular the pay discrimination that affects racial minorities. This commitment must be used to interpret the existing constitutional obligations of the Canadian government to ensure the equality rights of Aboriginal workers and workers of colour. It is NAWL’s opinion that the government must take positive measures to ensure that women from these disadvantaged groups be protected from wage discrimination based on their colour, ethnic origin or other personal characteristics that are the basis for racial discrimination in the workplace. Pay equity is a human right for all women; it is imperative that it is upheld, and particularly so for racialized women who are disproportionately affected by discrimination in the workplace.

2.3 Pay Equity and Disability

Individuals who are disadvantaged bear the brunt of discrimination in the workplace. As such, like racialized women, women living with disability are disproportionately affected by discrimination in the workplace. This discrimination translates into economic disadvantage.

Indeed, there is a significant gap between the earnings of persons with disabilities and those without. According to the Survey of Labour Income and Dynamics, in 1998 the average annual earnings of women with disabilities were \$7,190 compared to \$17,310 for

²⁹ *International Convention on the Elimination of All Forms of Racial Discrimination*, 660 U.N.T.S. 195, entered into force Jan. 4, 1969, Article 5(e)(i).

women without disabilities.³⁰ It is important to note that, beyond this wage gap, disabled women often face an added form of economic disadvantage because they are frequently responsible for financing their own disability supports, including technical devices and aids as well as modifications to the workplace.

It is NAWL's position that the unique concerns of disabled women must be recognized and addressed by the new pay equity legislative scheme. The government must take positive measures to ensure that women living with disability are protected from wage discrimination based on their disability or other personal characteristics that are the basis for discrimination in the workplace.

The new pay equity legislation must be premised on the fact that pay equity is an essential mechanism for upholding the constitutional equality rights of women and other disadvantaged groups, including women with disability.

3. PROBLEMS WITH THE CURRENT MODEL

Canada's commitment to prevent and remedy pay discrimination against women, and in particular racialized women, is not upheld by the current federal pay equity regime.

The present federal pay equity model is governed by section 11 of the *Canadian Human Rights Act*. According to section 11(1), "[i]t is a discriminatory practice for an employer to establish or maintain differences in wages between male and female employees employed in the same establishment who are performing work of equal value."

Under the *CHRA*, where individual employees or unions believe an employer is in violation of section 11, they may file an allegation before the Canadian Human Rights Commission for investigation. After investigating the allegation, the Commission will decide whether to dismiss the complaint, approve a settlement or refer the matter to conciliation or the Canadian Human Rights Tribunal.

Although *prima facie* the complaint-based model may seem efficient and just, in reality, the current system is unconscionably slow and inequitable. The complaint process is marred by delay at every turn, most frequently caused by extensive litigation over ambiguous aspects of the legislation. It is NAWL's position that it is important to consider the sources of the delays and litigation, and the problems that arise therefrom, so that the problems are not replicated in the new federal legislation.

³⁰ See *Advancing the Inclusion of Persons with Disabilities: A Government of Canada Report* (December 2002) at 38-39.

3.1 Inaccessibility

One of the main problems with the current federal pay equity scheme is inaccessibility. The manner in which the pay equity complaint process unfolds virtually precludes individual employees from filing a complaint, unless they are extremely patient, knowledgeable and resourceful. Furthermore, since the majority of cases drag on for years and years, an individual employee filing an allegation must have extremely deep pockets.

Of course, few individual employees can actually afford to litigate against a large corporation for years and years. As such, it is a rare exception for an individual employee to file a complaint. Rather, unions bring and pursue almost every pay equity complaint. Unfortunately, this means that employees who are not represented by unions are basically left out of the pay equity complaint equation. As the CHRC points out, women “performing female-predominant work in non-unionized, federally-regulated settings have benefited little from the federal pay equity provisions.”³¹ These women lack the resources not only to file claims, but also to monitor compliance and challenge an employer’s comparison or evaluation of jobs.

The extensive delays associated with pay equity cases are one of the main reasons individual employees cannot feasibly bring complaints under the current model. As the Commission noted in its 2001 analysis of pay equity, *Time for Action*, allegations of breaches of human rights norms are frequently met with defensive responses, which generally translate into extensive litigation and delays. A complaint brought against Bell Canada by individual Bell employees, later joined in a systemic complaint by the Canadian Telephone Employees’ Association, the Communications, Energy and Paper workers Union of Canada, and Femmes-Action on behalf of over 20,000 employees, serves as a prime – though not at all isolated – example.

The Bell Canada case has continued for nearly 15 years since the initial wage discrimination complaint. Initially, the parties engaged in a successful joint pay equity study. However, at its conclusion, they could not agree on the payout necessary to correct the wage discrimination confirmed by the analysis. Subsequent mediation failed, and the complaint went before the Human Rights Tribunal in 1996.

Since then, Bell Canada has delayed the proceedings – as well as other pending pay equity proceedings – by bringing at least eleven procedural motions on issues ranging from the right of unions to file such complaints to, more recently, the institutional independence of the Tribunal. In May 2001, the Federal Court of Appeal held that the Tribunal was institutionally independent, thereby allowing the Bell Canada case, as well as numerous other backlogged ones, to proceed. Nevertheless, damage was done. Not only do the Bell Canada employees continue to wait for the wage discrimination correction payments almost 15 years later, but also other employees are effectively

³¹ Canadian Human Rights Commission, *Time for Action: Special Report to Parliament on Pay Equity* (February 2001) at 6 [hereinafter *Time for Action*].

deterred from bringing their own complaints. Few individuals have the resources and wherewithal to pursue a complaint through 15 years of litigation.

Because few employees are willing or able to take on a 15-year litigation commitment, the complaint-based system results in the unequal implementation of the pay equity provisions, which raises serious questions under the *Charter*. In addition, the inaccessibility of the current pay equity regime seems in violation of the Canadian government's international and domestic obligations to realize pay equity.

3.2 Delay

Delay, and the cost therein, is clearly the cause of much of the inaccessibility to the current federal pay equity scheme.

As noted by the CHRC, the current pay equity provisions abound with inherent opportunities and incentives for delay. The ambiguous terms of the complaint-based legislation provide ample fuel for litigation, and there are no incentives to avoid delay. In fact, because the Tribunal does not have the express jurisdiction to award interest, the incentives are quite the opposite. Essentially, the longer employers delay spending money on wage adjustments, the longer employers have to invest the money or spend it on other items, without the prospect of being penalized with interest payments.

Indeed, the delays are perfectly allowable under the current pay equity scheme. Employers are within their rights when they file motions dealing with procedural as oppose to substantive legal issues. Nevertheless, these delays amount to little more than a stalling mechanism financed by the taxpayers of Canada. In addition, they force complainants to settle or withdraw, as complainants' limited resources dwindle in the face of tireless and well-funded employers. Moreover, they dissuade many potential complainants from filing claims at all. As such, they unreasonably and unconscionably detract from the resolution of pay equity infringements as guaranteed by domestic and international human rights instruments.

The individuals involved in pay equity claims – from the employees to the Tribunal members – are all too aware of this fact. Even judges regularly make reference to the employers' attempts to “hinder” and “delay”³² the progression of pay equity cases, some using phrases such as “desperate”³³ to describe the “high-gear litigation”³⁴ tactics of such parties as Bell Canada and the Government of the Northwest Territories (G.N.W.T.). Less tangible, but equally perceptible, are the tones of disdain with which the judges write about the excessive time frames of the cases. As Pelletier J. notes in *Bell Canada v. Canadian Telephone Employees Assn.*, “By all appearances, pay equity claims are like

³² See e.g. *Bell Canada v. Canadian Telephone Employees Assn.* [2000] F.C.J. No. 947.

³³ *Northwest Territories v. Public Service Alliance of Canada* [2001] 3 F.C. 566 (CA) at 592.

³⁴ J. Fudge, “The Paradoxes of Pay Equity: Reflections on the Law and the Market in *Bell Canada* and the *Public Service Alliance of Canada*” (2000) 12 C.J.W.L. 313 at 330 [hereinafter Fudge].

education savings plans: they are investments made by one generation for the benefit of the next.”³⁵

One of the main sources of delay is the non-substantive litigation that arises over the ambiguity of certain key terms in the legislation, including “establishment” and “occupational group.” Further delay stems from litigation surrounding such matters as the timing of corrective payouts, the methods of comparing worth, and the institutional independence of the Tribunal. Some employers have litigated all of these matters and more.

Canada Post, for example, has challenged almost every aspect of the investigation, data compilation, job evaluation and wage adjustment processes of the pay equity complaint in which it is named. It has gone so far as to adduce comprehensive volumes of evidence on the dangers family pets pose to letter carriers. Accordingly, it comes as little surprise that *Canada Post* has the dubious distinction of having seen more hours before a Tribunal than any other case in federal history.

Unfortunately, *Canada Post* is not alone in its excess. Although less than 8 per cent of all cases before tribunals or courts involve pay equity issues, the Commission spends one half of its legal services budget on pay equity cases.

Delays, such as those found in the *Canada Post* case among others, are incredibly daunting and function as a compelling deterrent to filing a pay equity complaint. They effectively preclude individual employees from bringing claims and from reaping the benefits of pay equity to which they are clearly entitled under human rights law.

As such, it is necessary to limit the excess delay and litigation that results from the current complaint-based legislation. In order to do so, it is NAWL’s position that the new proactive pay equity provisions must not only be clear and unambiguous, but also provide incentives for compliance and mechanisms for enforcing non-compliance.

3.3 Ambiguous Terminology

Under the current federal pay equity scheme, one of the main sources of delay is the ambiguity of certain key terms in the legislation. Judy Fudge is not overstating the matter when she notes that the vagueness of the federal pay equity legislation is “its most devastating flaw.”³⁶ Indeed, parties have litigated for years and years over such an outwardly simple word as “establishment.”

³⁵ [2000] F.C.J. No. 947 (TD) at 1. See also *Bell Canada v. Canadian Telephone Employees Assn.* [2000] F.C.J. No. 1094 (TD), where Pinard J. quotes the Canadian Human Rights Tribunal, who noted that “Bell has been intimately involved in this ‘pay equity’ process for some time” and *Northwest Territories v. Public Service Alliance of Canada* [2001] 3 F.C. 566 (CA), where Létourneau J.A. notes at 592, “Need it be repeated that the complaint was first laid in March 1989 and that, twelve years later and after four judicial review proceedings (all brought by the appellant [G.N.W.T.]), the case still has to be completed on its merits.”

³⁶ Fudge, *supra* note 34 at 325.

Section 11(1) of the *CHRA* pronounces as discriminatory any difference in wages between male and female employees who are performing work of equal value and are employed in the “same establishment.” The simple phrase – “same establishment” – has resulted in seemingly endless debates about its meaning, some of which have delayed pay equity cases for upwards of eight years.³⁷

In wage discrimination complaints against Air Canada and Canadian Airlines, for example, the airlines argued that flight attendants, cockpit staff and ground crew all work in different establishments and, as such, cannot have their wages compared. In July 2001, after a three-year investigation, a two-year hearing, and a Tribunal decision on the matter, the Federal Court of Canada affirmed that the three employee groups did not form a single establishment.³⁸ In doing so, the court noted that the word “establishment” refers to employees subject to a common personnel and wage policy, and that collective agreements may be considered in determining whether there is such a common policy.

There has also been confusion over the phrase “occupational groups,” which is the category for analysis in comparing wages according to the *Equal Wage Guidelines*. For example, in *Canada (Attorney General) v. Public Service Alliance of Canada*,³⁹ Evans J. held that the phrase “occupational groups” in section 15 of the *Guidelines* refers to the groups identified in sections 12 and 13 as predominantly male or female, and not does not require the Tribunal to base its decision on predominantly male occupational groups. However, other decisions have suggested different interpretations, resulting in much confusion over the definition of an “occupational group.”

Because they have been subject to such lengthy debate and consideration, terms such as “establishment” and “occupational groups” must be clearly identified in the new federal legislation.

3.4 Unspecified Methodology

Another source of litigation and delay in the current federal pay equity scheme is the fact that the process of determining whether and to what extent an employer is violating the right to pay equity includes several stages of data collection and analysis, the methodology for which is not laid out in the legislation. Specifically, there has been extensive debate about the methodology to be used for job evaluation, job comparison, wage adjustments, and the timing of corrective payments.

There is a lot of ambiguity over the appropriate standards for measuring the gender neutrality of a job evaluation system, including to what extent the system weighs male

³⁷ What constitutes an employer’s “establishment” was also subject to a great deal of litigation early on in Ontario’s experience under the *Pay Equity Act*.

³⁸ *Canadian Union of Public Employees (Airline Division) v. Canadian Airlines International Ltd.*, [2001] F.C.J. No. 1258 (Fed. T.D.).

³⁹ *Canada (Attorney General) v. Public Service Alliance of Canada*, [1999] F.C.J. No. 1531 (Fed. T.D.).

and female-predominant work in a fair and balanced manner. There is also some question about the appropriate standards for determining whether a job evaluation system is reliable enough to be used for measuring the existence of wage discrimination.

Similarly, there is confusion over the methods to be used in comparing the worth and wages of male- and female-predominant work (i.e. whether to use a direct comparison versus averaging formula approach), as well as the statistical techniques that should be used to identify wage discrimination. It is also very difficult to find a method that will adequately determine the wage adjustments that need to be done in order to redress pay discrimination. For example, in the *Treasury Board* case, parties found common ground on the relative value of thousands of different jobs, but were unable to agree on a method of translating those results into wage adjustments; it took almost 7 years for the Tribunal to hear evidence, weigh the case and issue rulings on this matter.⁴⁰ Similar problems existed in the *Bell Canada* and *GNWT* cases.

There is also a lot of ambiguity over the start date for payments compensating for wage discrimination, whether the Tribunal can grant retroactive awards, and whether these payments should be based on calculations of simple or compound interest.⁴¹

3.5 Institutional Independence and Impartiality

Another issue that has caused extensive delays in the pay equity cases under the current model is the institutional independence and impartiality of the Canadian Human Rights Commission and Tribunal. Indeed, Bell Canada's contention that the Tribunal lacked institutional independence and impartiality held up several cases that were before the Tribunal for years.

Bell Canada argued that the statutory scheme underlying the Tribunal did not provide the Tribunal members with sufficient security of tenure or financial security.⁴² Specifically, Bell Canada noted that where a term of appointment ends in the middle of a case, the Chairperson has the discretion to extend it or not. In addition, Bell maintained that it was problematic that the remuneration of Tribunal members is fixed by the Commission, which is a party to all proceedings before the Tribunal.⁴³

⁴⁰ See *Time for Action*, *supra* note 31 at 6.

⁴¹ See e.g. *Public Service Alliance of Canada v. Canada (Department of National Defence)*, [1996] F.C.J. No. 842 (Fed. C.A.), where Hugessen J.A. found that the Tribunal may grant retroactive awards and the difficulty in assessing with certainty the precise amount of past damages does not preclude an award where a complainant has suffered damages.

⁴² See *Bell Canada v. Canadian Telephone Employees Association*, [1998] F.C.J. No. 313 (Fed. T.D.).

⁴³ Bell Canada raised similar arguments in *Bell Canada v. Canada (Human Rights Commission)*, [2001] F.C.J. No. 1747 (Fed. T.D.) and in *Bell Canada v. Communications, Energy and Paperworkers Union*, [1997] F.C.J. No. 207 (Fed. T.D.).

In 1998, McGillis J. agreed with Bell Canada, holding that a fully informed and reasonable person would have a reasonable apprehension of bias on the part of the Tribunal and that, accordingly, the proceedings before the Tribunal are quashed.⁴⁴

In May 2001, the Federal Court of Appeal overturned this decision, noting that the overlap of the Commission's enforcement and guideline-making functions do not result in a reasonable apprehension of bias.⁴⁵ In addition, the Court of Appeal noted that the Chairperson is sufficiently insulated from the executive so as not to give rise to the reasonable apprehension that she or he would abuse the power of the position and act contrary to the best interests of the Tribunal. The Court added that if the Chairperson removed a Tribunal member on a capricious basis, that action would be subject to review.

Ultimately, although the Court of Appeal decision allowed the backlog of cases to proceed, damage was already done. Not only was the *Bell Canada* case delayed for several years, but so too were many other cases.

Although the *Bell Canada* case has resumed before the Tribunal, the question of the Tribunal's institutional independence has not been put to rest. In December 2001, the Supreme Court of Canada granted Bell Canada leave to appeal the Federal Court of Appeal's decision on the question of the Tribunal's independence and impartiality. The parties are scheduled to appear before the Supreme Court on January 24, 2003.

Bell Canada has not been the only party embroiled in a pay equity dispute to bring a claim of institutional bias. The question of whether there is a reasonable apprehension of bias on the part of the Commission arose in *Northwest Territories v. Public Service Alliance of Canada*.⁴⁶ In that case, Marceau J.A. found that, because the actions of investigators are preliminary and neither bear on the validity of the complaint nor affect the rights of the parties, there is no reasonable apprehension of bias with respect to their activities. In addition, Marceau J.A. noted that the mere membership of one investigator in the Public Service Alliance of Canada was not enough to establish a reasonable apprehension of bias.

Questions surrounding institutional independence, impartiality and bias continue to resurface and paralyze the progress of those pay equity complaints currently before the Tribunal. It is necessary that the new pay equity legislation resolve this issue so that pay equity will not be sidetracked in this way in the future.

⁴⁴ *Bell Canada v. Canadian Telephone Employees Association*, [1998] F.C.J. No. 313 (Fed. T.D.).

⁴⁵ *Bell Canada v. Canadian Telephone Employees Association*, [2001] F.C.J. No. 776 (Fed. C.A.). See also *Northwest Territories v. Public Service Alliance of Canada*, [2001] F.C.J. No. 791 (Fed. C.A.).

⁴⁶ *Northwest Territories v. Public Service Alliance of Canada*, [1997] F.C.J. No. 143 (Fed. C.A.).

3.6 Disclosure Requirements

A fair amount of litigation in pay equity disputes has arisen over the issue of disclosure.⁴⁷ Generally, employers have refused to disclose the full extent of information that is necessary for unions to be able to negotiate a pay equity plan properly or bring forth an effective pay equity complaint. This issue arose in *Public Service Alliance of Canada v. Northwest Territories*⁴⁸ and *Bell Canada v. Canadian Telephone Employees Association*.⁴⁹ Accordingly, it is necessary that the new federal pay equity legislation clearly outline the nature and extent of the employer's disclosure obligations.

3.7 Other Sources of Litigation

Beyond the problems described above, there have been many other sources of litigation as pay equity complaints wind their way through the system. These include questions about:

- the timeliness of a complaint;⁵⁰
- the extent to which complainants must exhaust grievance or review procedures otherwise reasonably available before filing a complaint;⁵¹
- whether a complaint has been brought in bad faith;⁵²
- the right of unions to file complaints;⁵³
- the right of investigators to note new issues as they arise during investigation;
- the amendment of complaint particulars;⁵⁴
- the binding nature of the *Equal Wage Guidelines*;⁵⁵
- the retention of a particular law firm to represent the Commission;
- the fairness of the Commission's investigation methods;⁵⁶
- whether the Tribunal should be the primary interpreter of the *CHRA*;
- the applicability of the *CHRA* to certain governments;⁵⁷

⁴⁷ The nature of the disclosure employers must make in the course of pay equity negotiations was an issue that also spawned extensive litigation early in the history of the Ontario *Pay Equity Act*. A Tribunal ruling eventually set out the nature and extent of disclosure that was required.

⁴⁸ [2001] F.C.J. No. 1374 (Fed. C.A.), [2000] F.C.J. No. 1646 (Fed. T.D.).

⁴⁹ [2000] F.C.J. No. 947 (Fed. T.D.).

⁵⁰ See e.g. *Bell Canada v. Canadian Telephone Employees Association*, [2000] F.C.J. No. 1094 (Fed. T.D.) and *Bell Canada v. Canadian Telephone Employees Association*, [1997] F.C.J. No. 207 (Fed. T.D.).

⁵¹ See e.g. *Canada Post Corp. v. Canada (Canadian Human Rights Commission)*, [1999] F.C.J. No. 705 (Fed. C.A.) aff'g [1997] F.C.J. No. 578 (Fed. T.D.).

⁵² See e.g. *Canada Post Corp. v. Canada (Canadian Human Rights Commission)*, [1999] F.C.J. No. 705 (Fed. C.A.) aff'g [1997] F.C.J. No. 578 (Fed. T.D.).

⁵³ See e.g. *Bell Canada v. Canadian Telephone Employees Association*, [2000] F.C.J. No. 1094 (Fed. T.D.).

⁵⁴ See e.g. *Bell Canada v. Canadian Telephone Employees Association*, [2000] F.C.J. No. 1094 (Fed. T.D.).

⁵⁵ See e.g. *Northwest Territories v. Public Service Alliance of Canada*, [2001] F.C.J. No. 791 (Fed. C.A.).

⁵⁶ See e.g. *Bell Canada v. Canadian Telephone Employees Association*, [1997] F.C.J. No. 207 (Fed. T.D.).

- the authority of Commission to send just one portion of a complaint to the Tribunal;⁵⁸ and
- the location of Tribunal hearings.

3.8 Lack of Enforcement

Another major problem with the current federal pay equity scheme is there are no effective enforcement mechanisms. In other words, there is no method of regulating or auditing employers who are not complying with the pay equity provisions. Rather, enforcement rests squarely on the shoulders of the employees themselves or, if they are fortunate, their unions. As discussed above, it is almost impossible for individual employees to follow through with pay equity complaints; the cost and time frame involved is simply too daunting. Even where employees are unionized and the union brings a complaint on their behalf, enforcement is still a long time coming. It will likely be well over ten years before the complaint works its way through the system and becomes even close to being enforced. Thus, it is fair to state that pay equity is not effectively enforced under the current legislative scheme.

3.9 Lack of Funding

One factor that contributes to the lack of enforcement of pay equity wage adjustments is the lack of federal resources allocated to the matter. Broader public sector employers receive virtually all their funding from government. In addition, they are highly regulated by the government in terms of the nature and level of service they provide.⁵⁹ It follows that, without additional government funding, they are unable to make the appropriate wage adjustments and corrective payments that pay equity demands. This lack of federal financial support severely detracts from compliance with the pay equity provisions and, as such, seriously undermines the effectiveness of the legislation.

3.10 Individualized Response to Systemic Problem

One factor that underlies many of the above problems is the fact that pay equity is a systemic problem, and the current federal pay equity provisions deal with pay equity on an individualized basis. The disconnect between the systemic nature of discrimination in the workplace and the specific nature of the federal government's case-by-case approach to pay equity is striking. Indeed, conceptualized in this way, it is no surprise that the federal pay equity provisions are completely ineffective in dealing with the endemic problem of wage discrimination.

⁵⁷ See e.g. *Northwest Territories v. Public Service Alliance of Canada*, [1997] F.C.J. No. 143 (Fed. C.A.), aff'g [1996] F.C.J. No. 727 (Fed. T.D.).

⁵⁸ See *Northwest Territories v. Public Service Alliance of Canada*, [1999] F.C.J. No. 1970 (Fed. T.D.).

⁵⁹ This is also a major problem in Ontario as the Ontario *Pay Equity Act* does not expressly commit the provincial government to funding pay equity in the broader public sector.

The federal government itself has noted that a systemic approach is the only appropriate option when dealing with systemic problems. In the context of the 1995 *Employment Equity Act (EEA)*,⁶⁰ the federal government recognized that complaint-based models are ineffective in eradicating the subtle and persistent presence of systemic discrimination. In the *EEA*, the federal government outlined clear steps and timelines for the removal of barriers to hiring underrepresented groups, with the intention of securing the fair treatment and representation of all groups, as well as undermining systemic discrimination in the workplace.⁶¹ Furthermore, the federal government ensured conformity with the *EEA* mandate not by requiring the filing of individual grievances, but rather by organizing proactive CHRC audits.

It is systemic discrimination, more than individual acts of sexism or racism, which undermines the actualization of pay equity. In the *EEA*, the government recognized that a complaint-based system was insufficient to deal with systemic discrimination in employment matters. NAWL maintains that a complaint-based model is similarly insufficient to deal with the systemic discrimination that underlies violations of pay equity.

4. THE NEED FOR REFORM

The Canadian government has an obligation to uphold human rights beyond mere lip service. The Supreme Court of Canada has made it clear that the *Charter* is to be construed as covering not only the written letter of the law, but also its effect. In light of this, in the *Guide to Gender Equality Analysis*, the Department of Justice notes that legislative drafters must look beyond the language and wording of the legislation to the actual effects of the law or policy on women.

Accordingly, when evaluating and reformulating pay equity legislation, it is important to look at the current legislation not merely in principle but in action. In principle, the spirit of the current legislation is in the right place. In reality, however, the legislation is virtually toothless for women experiencing an infringement of their right to pay equity. As such, it is necessary to reconstitute the legislation with a mind to giving it more substantive effect. Specifically, it is important to ensure that the new federal pay equity provisions minimize the delay and litigation that have resulted from the current complaint-based legislation and have acted as a barrier to the realization of pay equity for the majority of affected women.

As the CHRC notes, “[t]he Commission’s experience has been that once major pay equity cases at the investigation and litigation stages start getting tied up in procedural arguments, it becomes increasingly difficult to return the focus to substantive issues

⁶⁰ *Employment Equity Act*, S.C. 1995, c. 44.

⁶¹ See *Time for Action*, *supra* note 31 at 5.

related to possible wage discrimination. Technical disputes multiply, months and years pass, positions harden, and frustrations mount.”⁶²

Accordingly, it is NAWL’s position that the new pay equity legislation must address these technical issues, making the pay equity provisions clear and unambiguous so that employees can receive the wage corrections they deserve in a timely and effective manner. A comprehensive proactive legislative pay equity scheme will keep pay equity disputes focused on substance of the matter at hand: wage discrimination.

Sheila Finestone prefaces *The Federal Plan*: “Canada and its people remain committed not only to the principle of gender equality but also to action that makes this equality reality.”⁶³ In order to make pay equity a reality, it is NAWL’s position that the federal government must enact comprehensive proactive legislation that mandates equal pay for work of equal value.

5. STRENGTHS OF THE EXISTING MODELS IN ONTARIO AND QUÉBEC

Some of the problems associated with the current federal pay equity provisions have been resolved or diminished in other jurisdictions within Canada, particularly in Ontario and Québec. As such, it is useful to survey the strengths of the pay equity legislation in these two provinces.

The pay equity provisions in Ontario and Québec have three main strengths: (1) they are comprehensive and proactive; (2) they are enforced by separate and independent specialized commissions; and (3) they grant unions a direct role in negotiation and enforcement. It is instructive to consider the strengths briefly in turn.

5.1 Comprehensive and Proactive

The fact that the Ontario and Québec legislation is proactive and comprehensive ensures broader access to pay equity. Pay equity enforcement can happen on a more global basis, rather than on a piecemeal workplace-by-workplace basis, which depends on individuals being sufficiently brave and persistent to file a complaint. A comprehensive and proactive legislative scheme is particularly important for non-unionized women, who frequently lack information about what other workers are being paid and who have a lesser chance of achieving pay equity in a complaint-based system. In Québec, the legislation also provides for part-time employees, making the pay equity provisions that much more comprehensive.

Proactive legislation also cuts down on the culture of resistance to pay equity. In both Ontario and Québec, proactive legislation has been instrumental in enabling unions to get

⁶² *Time for Action*, *supra* note 31 at 8.

⁶³ See *The Federal Plan*, *supra* note 7.

employers to the table to develop pay equity plans. Employers are more ready to go through the process, even if they are not keen to do so, because they know that they must ultimately comply with the provisions. In Ontario, the public-sector deadlines and the fact that employers are obligated to devote at least 1 per cent of payroll per year towards achieving pay equity have particularly motivated compliance among employers. In Québec, legislators have also facilitated compliance by including a requirement of good faith in the pay equity provisions.

Proactive legislation also improves compliance because it levels the playing field between employers. Many employers will not want to increase wages if they do not think their competitors will follow suit. Proactive pay equity legislation ensures that all employers are subject to the same requirements and no one gains a competitive advantage by dodging a complaint.

5.2 Enforcement by an Independent Specialized Commission

One of the major strengths of the Ontario and Québec pay equity provisions is that the law has been enforced by separate and independent specialized commissions. Pay equity is a specialized area of employment/labour law and human rights law. As a result, it requires a special expertise.

The Ontario Pay Equity Office has accumulated this type of high-level expertise, one product of which is the number of guides and precedents that it has developed to help women and unions negotiate pay equity plans. The Office has also developed a number of gender-neutral job comparison system precedents that are tailored to different kinds of workplaces, including large and small public- and private-sector workplaces. The comparison system precedents involve gender-neutral questionnaires for collecting information about job classes, as well as guides on how to evaluate jobs in a gender-neutral way. In addition, the Office has developed lists of skills associated with female-predominant jobs to guide employees and unions as they fill out job evaluation questionnaires, so as to minimize the amount that employees and unions overlook valuable skills.

Of course, having a specialized Commission also means that review officers and tribunal adjudicators have a high level of expertise in the area and are able to develop consistent and high quality jurisprudence.

5.3 Granting Unions a Direct Role in Negotiation and Enforcement

Another major strength of the Ontario and Québec pay equity provisions is the fact that unions play an important role in negotiating and implementing pay equity. Indeed, giving unions a direct role in the negotiation and enforcement of the provisions is one of the keys that has made the legislation successful.

Unions assist in the development of initial pay equity plans, negotiate amendments to plans in light of changed circumstances, and follow up in order to enforce maintenance and ensure that wage adjustments are paid out. Directly involved throughout the process, unions also have the authority to file complaints with the Commission, call on the services of a review officer, or request a hearing before the Tribunal.

Although unions are involved in pay equity negotiations in Ontario and Québec, pay equity negotiations are conducted separately from regular collective bargaining. This is important because pay equity must not become subject to the tradeoffs and compromises of collective bargaining. Pay equity, as anti-discrimination law, is a matter of fundamental human rights, and should not be subject to tradeoffs in bargaining. Further, where pay equity issues remain in a separate sphere, the interests of women are not pitted against those of men, thereby reducing the potential for internal union conflict.

6. NAWL'S RECOMMENDATION FOR A COMPREHENSIVE PROACTIVE PAY EQUITY MODEL

Although the federal government should replicate some aspects of the Ontario and Québec provisions in the new pay equity legislation, the government can improve upon the existing provincial provisions as well. Specifically, the new legislation needs to increase compliance, strengthen enforcement, improve access to enforcement and ensure that women get the money that is owed to them.

To this end, it is NAWL's position that the new federal pay equity legislation should consist of the following elements.

6.1 An Affirmation of Pay Equity as a Fundamental Human Right

The new federal pay equity legislation must emphasize the fact that pay equity is a matter of fundamental human rights. The law must be clear that pay equity is the right to employment free of discrimination, and it can neither be abandoned on the basis of expense nor traded-off during negotiations. The legislation must also expressly recognize that racialized women face additional discrimination and confront a graver form of economic disadvantage than their non-racialized counterparts.

NAWL recommends that future legislation on pay equity be preceded by a preamble specifically acknowledging Canada's obligations under international law and the *Canadian Charter of Rights and Freedoms* to achieve women's equality in the workplace. The Preamble should be a statement of principle that provides a human rights framework to guide interpretations of the pay equity provisions and situates pay equity as an important aspect of the federal government's broader obligation to realize gender equality. It should include a reference to the overall objectives of upholding human rights and promoting women's equality in the workplace, and it should refer to the federal government's desire to achieve this objective through various laws and programs,

such as the *Canadian Human Rights Act* and the *Employment Equity Act*. Pay equity should be cast as one specific way in which the government has tried to ensure the realization of women's equality in the workplace. It is NAWL's position that such a preamble is necessary to provide a useful interpretive framework for the analysis and application of the legislation.

In addition to the preamble, NAWL urges that the new federal pay equity legislation include provisions within the text of the legislation itself that affirm that pay equity is a fundamental human right with quasi-constitutional status and, therefore, must be interpreted in a liberal and purposive manner. In addition, the legislation should include a primacy clause, as a further reflection of the fact that pay equity is a fundamental human right.

NAWL also recommends that the new federal pay equity legislation expressly recognize the fact that racialized women face additional forms of discrimination and confront graver forms of economic disadvantage than non-racialized women. It must proclaim as one of its objectives the prevention and elimination of racial discrimination in pay. The government must expressly commit itself to promoting equality in the workplace for racialized persons.

To ensure that the principles of pay equity benefit all those groups who have historically been subjected to pay discrimination, including racialized minorities, NAWL urges that the Task Force specifically study occupational segregation by "race," colour and ethnicity, as well as the devaluation of the labour of racialized persons. It is important to consider how traditional pay equity mechanisms can be used to identify and remedy racial discrimination in pay. It is also important to consider the interaction between anti-discrimination legislation, employment equity and pay equity, and propose a proactive, comprehensive approach that seeks to address effectively the problem of racism in the labour market.

6.2 Unambiguous, Comprehensive and Proactive Coverage

The new federal pay equity legislation must be comprehensive and proactive in order to ensure broader access to pay equity for all women, including non-unionized and racialized women. The legislation must make it clear that pay equity is prescribed for all workers across all workplaces, regardless of the nature of the work, when the workplace came into being, or any subsequent changes in ownership. In addition, the legislation must guarantee that pay equity will be enforced proactively on global rather than case-by-case basis.

6.2.1 Unambiguous Language

In order for the pay equity provisions to be enforced, they must first be understood. Indeed, one of the most severe problems with the existing pay equity legislation is its

paralyzing lack of clarity. In order to avoid the endless litigation in which pay equity complainants and their employers are currently embroiled, it is imperative that the language in the new legislation be consistently clear and unambiguous, particularly with respect to those phrases and concepts that have been in dispute in the past, including “establishment” and “occupational groups.”

6.2.2 Comprehensive Coverage

It is NAWL’s position that the new federal pay equity legislation must cover all workers, including part-time, casual, seasonal and contractual workers. Pay equity legislation must apply when employers have “contracted out” work to other employers, and it must also apply to employers falling under the Federal Contractor’s Program.

Canadian women are more likely than men to be in part-time or casual work, with 70 per cent of part-time workers being women, which is 30 per cent of all working women. Racialized women and disabled women also make up a disproportionate segment of the part-time workforce. To a large extent, these women are already segregated by gender, racialization and disability into a particular sector or type of work. Accordingly, it is important that their part-time status does not exclude them from the ambit of the new federal pay equity legislation by virtue of a narrow interpretation of what constitutes an “employee” for the purposes of pay equity.⁶⁴

To this end, the new federal pay equity legislation must include a clear definition of the term “employee” that explicitly includes part-time, casual, seasonal and contractual workers. Indeed, NAWL considers that the basic mechanism to achieve the object of pay equity legislation must subject all female-dominated groups within a workforce to a review and comparison of value. All positions integral to the work of the employer must be included in the pay equity process. Only volunteers and the most casual of independent contractual workers are to be excluded from the process.

In jurisdictions where pay equity legislation is in place, some employers have contracted out work to other employers the services of members of their workforce in order to avoid the increases in remuneration required under the pay equity regime.⁶⁵ It is NAWL’s position that pay equity legislation must bind those employers who contract out work in order to defeat the purposes of a pay equity regime. The new federal pay equity legislation must be clear that contracting out work is an ineffective means of relieving employers of their responsibilities under the legislation.

In addition, the legislation must clearly state that employers are required to bargain in good faith, and that unilaterally contracting out work to avoid obligations under a pay equity regime is a measure of bad faith.

⁶⁴ See e.g. *Wellington (County) v. Butler*, [2001] O.J. No. 4219.

⁶⁵ *Dartmouth (City) v. Nova Scotia (Pay Equity Commission)*, [1994] N.S.J. No. 438.

Finally, NAWL considers that pay equity legislation must cover all employers falling under the Federal Contractor's Program. The same logic that was used to extend employment equity obligations to employers under this Program should be used to extend pay equity obligations. Indeed, the federal government should not contract with employers that are not ready to ensure that they will not be reproducing discriminatory pay practices against women.

In conclusion, the greater the coverage of pay equity obligations, the greater the influence of pay equity principles in Canadian society. Comprehensive federal pay equity legislation must serve as a model for all employers in Canada.

6.2.3 Proactive Mechanisms

The new legislation must expressly require that employers take the initiative in assessing pay equity issues and making the appropriate wage adjustments. It must emphasize that pay equity does not hinge on the complaints of individual employees, but rather is a responsibility that all employers must automatically bear.

In addition, the legislation must include straightforward language stating that employers that come into existence after the federal pay equity provisions come into force are required to comply with the act immediately, including by posting a pay equity plan, negotiating in good faith and conducting job comparisons and evaluations.

Indeed, it is NAWL's position that one key aspect of the new proactive pay equity legislation must be the imposition of a proactive obligation for every federal sector employer to review pay practices and work with unions and employees to develop a pay equity plan.

The pay equity plan must:

- identify the establishment to which the plan applies;
- identify all of the job classes and note which are male and female;
- describe the gender neutral comparison system that has been used;
- set out the results of the job comparisons;
- identify which job classes are entitled to pay equity adjustments; and
- set out a payment schedule for pay equity adjustments.

The new legislation should require that an employer's pay equity plan must define the criteria for job evaluations and comparisons, as well as the timing and amount of any wage adjustments. In addition, the plan must specify that "pay" includes all benefits.

A pay equity plan must also put forth the provisions necessary for the ongoing maintenance of pay equity, even in the event of a sale or transfer of ownership or control of the business. The plans must also mandate the development of a pay equity program,

which would include the periodic review of pay practices and the posting of the results of such reviews.

In addition, the federal legislation must require that pay equity plans include a section setting out the rights of employees and unions to complain to the pay equity commission with respect to any problems in the plan.

The legislation should provide that employers post plans in the workplace so all employees, including non-unionized employees, have access to the plans. However, the legislation should be clear that the posting of a plan should not preclude pay equity complaints.

Employers must also be subject to an ongoing obligation to report to employees and bargaining agents on the maintenance of pay equity. The new federal legislation must plainly state that employees and bargaining agents have an ongoing right to access pay equity information.

Indeed, in order to negotiate in good faith with respect to pay equity, unions and employees need access to a lot of documents and information about the workplace. As such, it is NAWL's position that the new federal legislation must include express provisions setting out the employer's obligation to disclose all documents relevant to pay equity negotiations. Without in any way limiting that obligation, the legislation should also list specific types of documents that are subject to disclosure. In addition, in light of obligations to maintain pay equity, the legislation should highlight the fact that this is a continuing obligation.

6.3 Effective Methodology

6.3.1 Job Evaluation

The main characteristic of job evaluation systems is their adaptability both to the environment in which they are being used and to the values of people applying them.

Any job evaluation system, whether a sophisticated point-factor system or a simpler job comparison system, may be biased at various levels, including in its design and in the way it is implemented. It can be biased in:

- the language used to define the evaluation factors;
- the wording of job questionnaires;
- the type of factors used to assess the value of jobs;
- the point ratio assigned to each factor;
- the method used to translate the value assigned to each job level into wages;
- the process used to apply the system;
- the method used to calculate pay differentials; and
- the method used to adjust salaries.

In order to limit the risks of bias in the design and implementation of job evaluation systems selected by employers, the new pay equity legislation must include, in addition to the four criteria already identified in Section 11 of the present legislation, a series of prescriptions to frame both the design and the application of the job evaluation systems.

These prescriptions must include the following:

- the setting of pay equity committees, including a balanced representation of both men and women;
- the involvement of the pay equity committee members in the assessment of the selected system and in its implementation;
- the training of committee members and those involved in the process so that they understand how the job evaluation system works and how results can be biased on the basis of sex;
- the identification of job categories being compared with the clarification of gender representation;
- the analysis of information on the impact of the classification results by gender; and
- the requirement to make results known to the workforce and to explain how they have been arrived at.

6.3.2 Wage Adjustment

Wage adjustments that are required as a result of the implementation of a pay equity program must be established by comparing the wages of female-dominated categories to the wages of male-dominated categories. The calculation must be made using recognized regression analyses methods. If the compensation system of the employer includes both salary scales and fixed salaries, the regression analyses must recognize the impact of the two approaches.

Wage differentials must not be eliminated by decreasing the wages of male dominated categories.

In addition, wage calculations must include basic salaries as well as fringe benefits, including pension plans, various leaves and other benefits such as parking, meal and car allowances, and uniforms.

6.3.3 Timing of Corrective Payments

Corrective payments that arise from the initial implementation of a pay equity program must be effective at a specific date set in the new pay equity legislation. The legislation

must include a minimum percentage of payroll to be devoted each year towards pay equity.

If the spreading of corrective payment is required, payment schedules must be established in consultation with the pay equity committee members, with a time limit specified in the new pay equity legislation. Each payment must be equal and made on an annual basis.

Corrective payments resulting from maintenance adjustments must be retroactive to the date the changes in worker responsibilities became effective.

6.4 Strong and Accessible Monitoring and Enforcement Mechanisms

If employers' present unwillingness to comply with pay equity provisions is any indication, a new pay equity legislative regime may only be as effective as its means of monitoring and enforcement. As such, it is NAWL's position that the new pay equity legislation must provide for strong and accessible monitoring and enforcement mechanisms.

6.4.1 Proactive Deadlines

The first step in monitoring and enforcing pay equity is setting timelines for its implementation. NAWL urges that there must be proactive deadlines for achieving pay equity in both the public and private sectors. The new pay equity legislation must include not only a minimum percentage of payroll that must be devoted each year towards pay equity, but also an end date by which full pay equity must be achieved.

6.4.2 Random Inspections

As noted above, the new pay equity legislation must require that employers develop and post a pay equity plan. As a part of a monitoring and enforcement regime, it is NAWL's position that a pay equity commission conduct regular random testing to measure employers' level of compliance with their plan. Such testing would be conducted along the lines of that done under the employment equity scheme. Essentially, each year a certain number of employers in different sectors would be randomly inspected to determine the extent to which they had complied with pay equity requirements. Inspections would include investigation into the extent that pay equity adjustments had been paid out or were still owing, and the extent to which pay equity plans had been followed or amended.

In order to give teeth to the monitoring mechanisms, it is NAWL's position that the legislation must also grant the Commission the authority to initiate investigations and

conduct audits in those cases where plans do not appear to provide true pay equity or maintain pay equity properly.⁶⁶

6.4.3 Interest Awards

In order to deter employers from delaying wage adjustment payments and to compensate employees when employers do delay, NAWL urges that the new federal legislation expressly grant the pay equity tribunal the authority to make awards of interest. In addition, if there is a minimum percentage of payroll that must be devoted each year towards pay equity, the legislation must make clear that any interest payments are in addition to this minimum percentage.

6.4.4 A Separate and Independent Specialized Commission

Pay equity is a specialized area of employment and human rights law. Accordingly, NAWL maintains that the new federal legislation must ensure that pay equity will be monitored and enforced by a separate and independent specialized commission.

The new legislation must charge the specialized commission with education and research, as well as monitoring and audits. The commission must also have the authority to initiate complaints.

In addition, it is important that employers, bargaining agents and employees have the right to make applications directly to a hearings tribunal.⁶⁷ NAWL considers that the tribunal must be comprised of individuals with appropriately specialized knowledge. The hearings tribunal could include a voluntary mediation service; however, if the parties do not wish to mediate, there should be no pressure to do so, and they should be able to take their complaint directly to a hearing. It is NAWL's position that there should not be any automatic requirement for mediation.

For those parties who do wish to enter mediation, in order to facilitate this process, the legislation should provide for a separate advocacy service that can provide advice and support to employees and unions that are trying to enforce their pay equity rights. The

⁶⁶ It is important to note that although the Ontario legislation imposes a proactive obligation to make a pay equity plan and maintain pay equity, this does not mean that all employers comply with the *Pay Equity Act*. In 1997-1998, 40% of large private sector employers (employers with over 100 employees) had not prepared pay equity plans despite the fact that they were required to do so by 1991-1993. For employers with less than fifty employees, only 20% had taken any steps towards compliance with the *Act*. Thus, it is clear that union vigilance is an insufficient means of monitoring compliance. As such, the new federal legislation must grant the Commission the authority to conduct audits and enforce pay equity plans.

⁶⁷ Under the Ontario *Pay Equity Act*, it is mandatory that a complaint be investigated by a review officer before a matter can proceed to the Tribunal. Because it is difficult to get review officers to make orders, this requirement makes it difficult to get before the Tribunal and slows down enforcement considerably.

legislation should also emphasize that it is very important that human rights are not bargained away in mediation.

In addition, the legislation must not leave any question about the institutional independence and impartiality of the tribunal. The legislation must make it clear in both form and function that the commission and the tribunal are completely separate.

Under the new federal legislation, the tribunal adjudicators should be appointed for relatively long-term appointments in order to ensure institutional independence and allow for the maximum development of expertise. Longer appointments also facilitate getting a hearing date because the tribunal does not have to worry about which adjudicators will be reappointed.⁶⁸ It is NAWL's position that adjudicators must be appointed for approximately 7-year terms.⁶⁹

NAWL also notes that the determination of the workplace establishment must be a decision within the jurisdiction of the pay equity tribunal.

6.4.5 Accessibility

It is NAWL's position that the new federal pay equity legislation should also include a commitment to creating and funding some sort of consulting and advocacy body to assist non-unionized women in enforcing their rights to pay equity. This body should be able to provide women with information and education about pay equity, as well as legal advice and support where there is an infringement of a woman's right to pay equity. One such body, PEALS, operated in Ontario before the provincial government cut its funding. NAWL urges that the new pay equity provisions mandate the creation and permanent funding of a similar body.

6.5 Participation of Unions in Negotiation and Enforcement

The new federal legislation must also make clear that unions will play an important role in negotiating and implementing pay equity. Unions must have the authority not only to negotiate amendments to plans in light of changed circumstances, but also to follow up in order to enforce maintenance and ensure that wage adjustments are paid out. More specifically, it is NAWL's position that unions must have the express authority to file a complaint with the pay equity commission, call on the services of a review officer or request a hearing before the tribunal.

⁶⁸ This has been a problem at the Ontario Tribunal because of the extremely short tenure for which chairs are appointed.

⁶⁹ See *Promoting Equality*, *supra* note 16 at Recommendation 112.

6.6 Separation from Collective Bargaining

Although it is imperative that unions play an important role in the pay equity process, the new federal pay equity provisions must clearly state that pay equity negotiations must be conducted separately from collective bargaining. The legislation must emphasize that pay equity, as anti-discrimination law, is a matter of fundamental human rights and, as such, cannot be subject to trade-offs in negotiations. There is a risk that unions will bargain away pay equity entitlements in exchange for other concessions, particularly concessions that may popularly benefit the entire employee group. NAWL urges that the new pay equity legislation include strong language that pay equity cannot be bargained away or contracted around. Pay equity is a fundamental human right and is not subject to compromise.

6.7 Funding for Pay Equity

To the extent that there is a broader public sector in the federal jurisdiction, the new federal legislation must expressly commit the federal government to funding pay equity wage adjustments in that sector. In addition, as noted above, the federal government must commit funding to an independent pay equity tribunal and commission, as well as a consulting and advocacy body to assist non-unionized, racialized and otherwise marginalized women in the enforcement of their rights to pay equity. The legislation must also dedicate funding to education in the workplace, as discussed below.

6.8 Education and Publicity

Key components of a proactive pay equity scheme are education and publicity. Both education and publicity are crucial to the successful implementation of a pay equity regime in several aspects. To begin, it is important to educate employers and employees on the concept of pay equity. All employers and employees – male and female – should have an understanding about the meaning of “pay equity,” the content of the pay equity provisions and the rights of employees’ to pay equity. It is also crucial to educate women, particularly those in non-unionized settings, about their rights and entitlements under the pay equity provisions and how to go about enforcing those rights and entitlements.

In addition, as Young notes in *Pay Equity: A Fundamental Human Right*, it is important to use publicity and educational campaigns to communicate to the general public in plain and unequivocal terms the fundamental link between pay equity and women’s substantive equality. If the general public understands the importance of pay equity to women’s equality generally, it is more likely to be supportive of government initiatives and judicial decisions that uphold pay equity ideals. Moreover, as Young points out, “[e]mphasis that pay equity is a fundamental right... creates a political and social climate that supports indirectly, and subtly, judicial conclusions in the same vein.”⁷⁰

⁷⁰ Young, *supra* note 1 at 32.

Finally, in an effort to be truly proactive in nature, the legislation should include a statement about the importance of educating employers and employees, and indeed the general public, on sexism and racism in the workplace. As noted above, pay equity must be understood and realized within the wider context of anti-discrimination and human rights law and within the broader spheres of sexism, racism and other forms of discrimination. Only when sexism, racism and other forms of discrimination are eliminated from the workplace will equality in the workplace, whether in the form of employment equity or pay equity, truly be realized.

As such, it is NAWL's position that the new federal pay equity legislation clearly state that education is a crucial component of a proactive pay equity scheme.

6.9 Comprehensive Approach

NAWL urges that the new federal pay equity legislation acknowledges that pay equity fits into a broader context and cannot alone remedy the inequalities that confront women in the workplace on a daily basis. While adopting proactive pay equity legislation is essential for ensuring women's equality in the workplace, it is not sufficient. Indeed, pay discrimination is just one aspect of a larger picture that requires different forms of government intervention. Accordingly, it is NAWL's position that the federal government adopt a comprehensive approach to improving workplaces for women. Specifically, we recommend that pay equity legislative reform be conducted in tandem with an increase in the federal minimum wage, the implementation of universal childcare, the implementation of workplace policies that accommodate women's needs such as flexible work time, facilitated access to unionization, improved employment equity legislation and policies, and the effective upholding of human rights in the workplace.

The federal government must adopt laws and policies that effectively acknowledge and address the realities of women's lives, and promote a multi-pronged approach towards the substantive equality of women. Failing such action, discrimination in the workplace will continue to undermine women's equality, and the government will make itself vulnerable to *Charter* challenges and denunciations in the international community. For this reason, NAWL recommends that the government act in a diligent and responsible manner by adopting strong proactive pay equity legislation that protects and promotes the equality rights of all women.