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A Case for Canadian Pay Equity Reform

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A Case for Canadian Pay Equity Reform

Abstract

Pay equity must be separated from collective bargaining. An examination of the history of fair pay in unionized workplaces—and the current legal remedies available for pay discrimination—prove that the current strategies to remedy the significant gender pay gap are unsuccessful. Two significant issues hinder pay equity. Pay equity is still subject to collective bargaining in unionized workplaces. The *Public Sector Equitable Compensation Act (PSECA)* has undermined pay equity. The *PSECA* embodies the dangers of subjecting pay equity issues to collective bargaining. Canada is taking a regressive approach that disregards the importance of pay equity, despite the known benefits to female workers when pay equity and collective bargaining are separated.

This article is helpful for readers seeking to learn more about:

- gender pay gap, pay equity, sexism, discrimination, collective bargaining, gender equality

Topics in this article include:

- labour law, unions, public sector, negotiations, bargaining

Authorities cited in this article include:

- *Public Sector Equitable Compensation Act*, SC 2009, c 2
- *Pay Equity Act*, RSO 1990, c P7
- *Canadian Human Rights Act*, RSC 1985, c H-6

Keywords

Pay equity, collective bargaining, gender pay gap, sexism, discrimination, collective bargaining, gender equality, labour law, unions, public sector, negotiations, bargaining, seniority

A CASE FOR CANADIAN PAY EQUITY REFORM

SYDNEY KRUTH*

INTRODUCTION

Gender pay gaps are a persistent feature in world labour markets and are well documented in Canadian workplaces. In 2013, Canada's gender pay gap was the eighth largest among the 34 member countries of the Organisation for Economic Co-operation and Development (OECD).¹ Statistics Canada's latest Canadian labour market survey indicates that, in 2011, women's average annual earnings equaled approximately 67 per cent of men's annual average earnings.² The disparity between male and female earnings has increased since 2009, when women earned approximately 69 per cent of what men earned annually.³ Additionally, women's average annual earnings decreased by 1.5 per cent since 2010, while men's earnings remain constant.⁴ In total, the Canadian gender pay gap has improved by a mere 6.6 per cent over the past 20 years.⁵

In 2013, the hourly pay gap between Canadian male and female workers was 14 per cent.⁶ Mary Cornish and Jennifer Quito note, however, this statistic obscures the fact that women are far more likely than men to be engaged in precarious work, and that the majority of part-time workers are women.⁷ In 2013, 66 per cent of part-time workers were women, whereas men held a mere 34 per cent of part-time jobs.⁸ During the same

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¹ "Gender wage gap" *Gender Equality*, online: OECD
<<http://www.oecd.org/gender/data/genderwagegap.htm>>.

² Statistics Canada. *Table 202-0102 Average female and male earnings, and female-to-male earnings ratio, by work activity, 2011 constant dollars, annual*, (Ottawa: StatCan, 27 June 2013) (CANSIM).

³ *Ibid.*

⁴ *Ibid.*

⁵ *Ibid.*

⁶ Statistics Canada. *Table 282-0069 - Labour force survey estimates (LFS), wages of employees by type of work, National Occupational Classification for Statistics (NOC-S), sex and age group, unadjusted for seasonality, annual (current dollars unless otherwise noted)*, (Ottawa: StatCan 5 December 2014) (CANSIM).

⁷ Mary Cornish and Jennifer Quito, "Where to Go for Pay Equity: Canadian Remedies for Gender Pay Discrimination" (Paper delivered at the National Administrative Law, Labour and Employment Law Conference, Ottawa 29-30 November 2013), online: Cazalluzzo <www.cazalluzzo.com> at 3 [Cornish & Quito].

⁸ Statistics Canada, *Table 282-0002 - Labour force survey estimates (LFS)", by sex and detailed age group, annual (persons unless otherwise noted)*, (Ottawa: StatCan, 10 January 2014) (CANSIM).

period, 44 per cent of full-time workers were women, while 56 per cent were men. These statistics, therefore, indicate that women are far more likely than men to be multiple jobholders.

Women are also more likely than men to hold minimum wage positions; for example, while women comprised 50 per cent of the Ontario workplace in 2012, women represented 58 per cent of minimum wage-workers.⁹ In 2011, 18 per cent of Canadian families with a female main earner qualified as low income. Only 8 per cent of families with a male major income earner were in the low income category.¹⁰ It is thus indisputable that the gendered nature of Canadian poverty is inextricable from current gendered wage disparities in the Canadian workforce.

The continued gap between the earnings of Canadian women and men is surprising, particularly in light of the fact that a greater percentage of women than men now hold post-secondary degrees and that women's participation in the workplace is at an all-time high.¹¹ According to pay equity scholar Pat Armstrong, "the size and persistence of the wage gap clearly indicates that the problem does not stem simply from individual women and their capacities or from the practices of a few employers. Women as a group face a common set of practices that disadvantage them in the labour force."¹² These systemic practices encompass both the failure of provincial governments to implement employment pay equity laws and the lack of accommodation of women's care responsibilities.¹³

In the 1960s, women began to question the ways in which they were disadvantaged in the labour force, especially with respect to the significant disparity between men's and women's wages. Women were particularly concerned with the continual devaluation of their work compared to men's, which manifested in lower pay, less access to benefits, and the exclusion of women from the bargaining table in unionized contexts. The federal and provincial governments gradually responded to these concerns in two ways: first, through recognition of women's equality with the passage of human rights legislation and, second, through the implementation of both proactive and complaints-based legislation aimed at entrenching the principle of equal pay for work of equal value.

Women have had a complex, and sometimes fraught, relationship with unions in their efforts to achieve equality in the workplace. Since unionized workers receive, on

⁹ See Ontario, Ministry of Labour, *2014 Minimum Wage Advisory Panel Report and Recommendations to the Minister* (Toronto: Ministry of Labour, 2014) at 12.

¹⁰ Statistics Canada. *Table 202-0803 - Persons in low income families, by age and sex of major income earner, annual* (Ottawa: StatCan, 27 June 2014) (CANSIM).

¹¹ "Learning- Educational Attainment Summary" Employment and Social Development Canada (April 2014), online: Employment and Social Development Canada <<http://www.esdc.gc.ca>>.

¹² *Ibid.*

¹³ Mary Cornish, "10 Ways to Close Ontario's Gender Pay Gap" (April 2013), online: Canadian Centre for Policy Alternatives <<http://www.policyalternatives.ca>> at 9-10 [Cornish].

average, \$5.11 per hour more in wages than non-unionized workers,¹⁴ unionized women make substantially more than their non-unionized counterparts. Additionally, when legislation requires employers to negotiate with unions in the creation and implementation of pay equity plans, women are more likely to receive pay equity adjustments compared to jurisdictions where no such obligation is imposed.¹⁵

On the other hand, unions have also contributed to the entrenchment of traditionally gendered work. Unions have a predominantly male history: factory workers sacrificed the right to industrial action in exchange for exclusive representation by agents who had the power to negotiate with employers for better wages and working conditions. During these negotiations, the rights of female workers were not a priority on the agendas of the unions. Instead, for most of the twentieth century, unions emphasized the attainment of the breadwinner wage for male workers, along with a fairer distribution of wages and benefits within male-dominated workplaces. There is no question that unions have undergone significant policy and leadership changes throughout the latter part of the century. Beginning in the 1970s, feminist trade unionists sought to forge relationships with women's movement organizations, resulting in unions' realization that the struggle for economic and social equality would require significantly more than mere engagement "at the point of production."¹⁶ However, despite a growing awareness of the need to pursue gender equality on the part of unions, private sector women continue to receive little protection from union coverage, as union membership is still concentrated among men working in the private sector and women employed in the public sector.¹⁷

A fundamental component of Canadian pay equity legislation is the requirement that employers engage in consultation with unions over pay equity issues. The Ontario *Pay Equity Act (PEA)*, for example, stipulates that all public sector and large private sector employers negotiate every aspect of the pay equity process with the appropriate bargaining agent.¹⁸ Additionally, the parties must conduct all bargaining in good faith.¹⁹ The recently enacted *Public Sector Equitable Compensation Act (PSECA)*, which applies to federal workers, requires that pay equity considerations be addressed through

¹⁴ *Ibid* at 15.

¹⁵ Mary Cornish and Fay Faraday, "A Framework for Action on Pay Equity in Ontario: Contributing to Ontario's Future" (November 2008), online: Equal Pay Coalition <<http://www.equalpaycoalition.org>> at 17.

¹⁶ Jan Kainer, "Gendering Union Renewal: Women's Contributions to Labour Movement Revitalization" in Janice R Foley & Patricia M Baker, eds, *Unions, Equity, and the Path to Renewal* (Vancouver: UBC Press, 2009) 15 at 15.

¹⁷ Andrew Jackson, "Gender Inequality and Precarious Work: Exploring the Impact of Unions Through the Gender and Work Database" (Paper delivered at the Gender & Work: Knowledge Production in Practice Conference, York University, 1 October 2004), [unpublished, archived at The Gender and Work Database] at 2-3 [Jackson].

¹⁸ *Pay Equity Act*, RSO 1990, c P7 s 14(1-9) [PEA].

¹⁹ *Ibid*, s 14(2).

the collective bargaining process within the term of the collective agreement.²⁰ The *PSECA* represents a serious, and problematic, modification to the previous regime governing pay equity issues in the federal sector. Given that the majority of female union membership is concentrated in the public sector, the *PSECA* carries the potential to further undermine women's access to equal wages within the unionized context.

This paper will canvass two issues related to pay equity. First, this paper will argue that pay equity should be divorced from collective bargaining. Pay equity has been recognized as a fundamental human right both domestically and internationally. To allow pay equity to be subject to collective bargaining, which necessarily involves compromise and concessions, undermines its quasi-constitutional status. Second, this paper will examine the federal government's regressive approach to pay equity through the *PSECA*.

After addressing the historical origins of pay equity, this paper will outline the patchwork of legal remedies currently available to combat discrimination in pay. The role of unions in pay equity initiatives will then be evaluated, with particular emphasis on union efficiency in negotiating pay equity issues. Lastly, through an extensive analysis of the *PSECA*, this paper will examine the implications of conflating collective bargaining and pay equity. This new legislation embodies the dangers of allowing pay equity issues to be subject to bargaining, which carries serious consequences for women, who are just beginning to attain gender parity within the workforce. While the *PSECA* is illustrative of the dangers inherent in allowing pay equity to be subject to collective bargaining, it is also indicative of a governmental failure to respect the fundamental importance of pay equity itself. Indeed, this paper will argue that the *PSECA*'s endorsement of "equitable compensation," rather than pay equity, removes all substance from the notion of pay equity.

I. PAY EQUITY: HISTORICAL CONTEXT

The negotiation of fair pay is at the core of what unions aim to accomplish. However, a commitment to fair pay has not always meant a commitment to pay equity or gender equality; union fair pay practices initially applied to men alone. Fair pay did not truly become a women's right in the unionized context until the 1980s.²¹ Scholars have proposed that the persistence of the wage gap can be partially attributed to union bargaining methods that consistently placed the needs of men ahead of women. Anne Forrest points to the early bargaining agendas of industrial unions such as United Auto Workers and United Steel Workers of America, which prioritized justice for working

²⁰ *Public Sector Equitable Compensation Act*, SC 2009, c 2, s 394, ss 12 -15 [*PSECA*].

²¹ Anne Forrest, "Bargaining Against the Past: Fair Pay, Union Practice, and the Gender Pay Gap" in Gerald Hunt & David Rayside, eds, *Equity, Diversity, and Canadian Labour* (Toronto: University of Toronto Press, 2007) 49 at 52 [Forrest, "Gender Pay Gap"].

class men, including attaining breadwinner wages and a more equitable distribution of wages within the workplace.²² This mode of industrial bargaining both aided and penalized women in the union sector, who “benefitted from the union preference for across-the-board, cents-per-hour wage increases that raised the wages of the lowest paid disproportionately” but were also subject to “collective agreements that reserved better-paying jobs for men, undervalued jobs performed primarily by women, and prescribed lower ‘female’ wage rates for jobs performed by both women and men.”²³ These economic realities resulted in both an overall wage increase for unionized women when compared to women in the non-union sector in the 1970s and a gender wage gap that was more pronounced in the unionized context than in the non-union sector.²⁴

The current model of industrial relations emerged as a result of the post-war crisis in men’s labour. Hallmarks of Canadian labour management relations include strict regulation of the right to organize, restrictions on the right to strike, and a decentralized approach to collective bargaining. These foundational principles stabilized workplaces that were experiencing a large influx of male labour after World War II, and also ousted wartime industrial unionism, which had been characterized as containing “strong elements of rank-and-file militancy that threatened managerial prerogatives.”²⁵ The implementation of modern industrial relations policy provided men with the option of exercising their collective bargaining rights through the union of their choice. The rights of female workers were not a predominant consideration of unions, and employers had no interest in challenging the status quo: as “long as women were not ‘real’ workers, employers could legitimately underpay women and traditional women’s work in relation to men and ‘men’s work’.”²⁶ Employers or unions had no economic incentive to challenge laws that limited women’s access to unemployment benefits or allowed women to be paid a lower minimum wage than men. This resulted in a gender bias that became entrenched in Canada’s industrial relations system for several decades after World War II.

It was not until the 1960s that female workers, spurred by second wave feminism, began to challenge institutional gender biases, including the persistent trend of wage gaps between men and women in unionized workplaces. Women were increasingly frustrated with a brand of industrial relations that “presented unionism as gender-neutral in principle, [and] they exposed it as a masculine institution in

²² *Ibid.*

²³ *Ibid.*

²⁴ Wayne Simpson, “The Impact of Unions on the Structure of Canadian Wages: An Empirical Analysis of Microdata” (1985) 18:1 *Can J Economics* 164 at 168.

²⁵ Don Wells, “The Impact of the Postwar Compromise on Canadian Unionism: The Formation of an Auto Worker Local in the 1950s” (1995) 36 *Labour/Le Travail* 147 at 151.

²⁶ Forrest, “Gender Pay Gap”, *supra* note 21 at 53.

practice.”²⁷ Women’s organizations lobbied the government for change, which led to the passage of equal pay legislation by most provinces and the federal government.²⁸ Such legislation typically added provisions to already enacted employment standards legislation.²⁹ Equal pay for work of equal value was recognized as a fundamental right in Canada in the mid-1980s, with provinces such as Manitoba, passing proactive pay equity legislation.³⁰ Ontario followed suit in 1989 with the implementation of the *PEA*, which places a “positive obligation on each employer who has more than ten employees to ensure that its own compensation policies are not discriminatory and lays out clear methodological and procedural requirements for achieving a non-discriminatory wage structure.”³¹

Canada ratified a variety of international laws recognizing pay equity, including the United Nations *International Covenant on Economic, Social and Cultural Rights* in 1976. This multi-lateral treaty requires “remuneration which provides all workers, as a minimum, with...fair wages and equal remuneration for work of equal value without distinction of any kind.”³² Canada also ratified the *Convention on the Elimination of All Forms of Discrimination Against Women* in 1981, which addresses wage discrimination and recognizes women’s “right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work.”³³ These international human rights instruments designate pay equity as a fundamental human right and require pay equity legislation to be sufficiently robust to ensure access to this right.

Canada initially took its commitment to implement the measures required by these conventions seriously, as reflected in the passage of pay equity legislation. However, as will be discussed below, it has become increasingly evident that Canada is now shirking its international obligations to ensure that the principle of pay equity is not undermined. The passage of the *PSECA*³⁴ is of particular concern, as it is indicative of the current government’s regressive approach to the rights of Canadian women.

²⁷ Pamela Sugiman, *Labour's Dilemma: The Gender Politics of Auto Workers in Canada, 1937-1979* (Toronto: University of Toronto Press, 1994) at 63.

²⁸ Canada, Department of Justice, *Pay Equity: A New Approach to a Fundamental Right*, (Ottawa: Pay Equity Task Force Final Report, 2004) at 50 [Task Force Report].

²⁹ *Ibid.*

³⁰ See *The Pay Equity Act*, CCSM 1985, c P13.

³¹ Task Force Report, *supra* note 28 at 69.

³² *International Covenant on Economic, Social and Cultural Rights*, GA Res 2200A(XXI), 16 December 1966, (entered into force 3 January 1976, accession by Canada 19 May 1976), Article 7.

³³ *Convention on the Elimination of All Forms of Discrimination Against Women*, 3 September 1981, 1249 UNTS 13 (entered into force 3 September 1981, accession by Canada 10 December 1981), Article 11.

³⁴ *Supra* note 20.

II. PAY EQUITY: LEGAL REMEDIES

In general, legal remedies to pay discrimination in Canada can be grouped into four categories: laws that guarantee equal pay for equal work; laws that require equal pay for work of equal value; human rights legislation that prohibits unequal treatment in employment; and the guarantee of gender equality in section 15 of the *Canadian Charter of Rights and Freedoms*.³⁵

Equal Pay for Equal Work

Equal pay for equal work laws, including sections 7 and 10 of the *Canadian Human Rights Act*,³⁶ and section 43 of Ontario's *Employment Standards Act*,³⁷ stipulate that women must be paid an equal wage for equal work as performed by men. These laws are typically complaint based and are narrowly applied to remedy discrepancies within specific occupational groups. Equal pay is deemed to be achieved when women and men are paid the same wage for the same, or substantially similar, work.

Equal pay for equal work laws are problematic as they do little to address systemic discrimination in pay. Certain female dominated occupations are consistently undervalued. This is because equal pay for equal work laws have inherently limited reach. These laws address inequality formulaically by aiming to eliminate discrimination in pay between the sexes for the same kind of work. While the advent of equal pay for equal work laws represented a significant development in the fight for gender equality in the workplace, such laws now work in tandem with equal pay for work of equal value legislation in order to more effectively address systemic issues that give rise to the gendered pay gap. As outlined above, traditionally women have been predominantly employed in education, healthcare, and service industries, a segregation that has led to the need to meaningfully ensure that women's work is being adequately valued. Equal pay for work of equal value legislation ostensibly provides female employees with the assurance that their work will not be undervalued. Equal pay for equal work legislation guarantees that identical workers will not be treated unequally on the basis of gender. While these two modes of remedying pay discrimination work best in tandem, the reality is that equal pay for equal work laws continue to be more accessible than pay equity laws, as they apply to both the public and private sectors. Several provinces have not passed pay equity legislation, which means that pay equity laws do not cover many Canadians working in the private sector.³⁸

³⁵ Cornish & Quinto, *supra* note 7 at 4.

³⁶ *Canadian Human Rights Act*, RSC 1985, c H-6 [CHRA].

³⁷ *Employment Standards Act*, 2000, SO 2000, c 41.

³⁸ Including Alberta, Saskatchewan, Newfoundland and Labrador, and British Columbia.

Equal Pay for Work of Equal Value

Equal pay for work of equal value laws, also known as laws mandating pay equity, ensure that women receive equal pay for work of a similar value as compared with an equivalent male group. In other words, equal pay legislation involves comparing “apples to apples,” or wages paid to women compared to wages paid for men for the same job, while equal pay for work of equal value legislation involves comparing “apples to oranges,” or wages paid to men for one job compared to wages paid to women for a comparable job. Equal pay for work of equal value legislation is founded on the proposition that it is possible to engage in a meaningful comparison of “apples to oranges.” These laws include section 11 of the *Canadian Human Rights Act* (*CHRA*),³⁹ and the Ontario *PEA*.⁴⁰ The pay equity provision of the *CHRA* is complaint based, while the *PEA* requires proactive compliance on the part of employers. Both laws require employers to achieve and maintain pay equity through the use of a gender-neutral comparison system that assesses the relative value of male and female job classes.

Under the *PEA*, male dominated job classes are defined as jobs comprising 70 per cent or more male workers, while female dominated job classes are jobs held by 60 per cent or more female workers.⁴¹ Employers compare the work done by comparable male and female job classes within each “establishment.” An establishment is understood to be a specific geographic area in which the workplace is located.⁴² However, in the federal unionized context, the establishment has been defined as the bargaining unit.⁴³

There are three methods of evaluation under the *PEA*. The *PEA* places the onus on employers to design a gender-neutral comparison system that evaluates jobs on the basis of several criteria, including skill, effort, responsibility, and working conditions. After designing a gender-neutral comparison system, employers undertake one of three types of comparison: direct, proportional value, or proxy. Firstly, under the direct model of comparison, a female job class is compared to a male job class with similar scores on the gender-neutral comparison system. The employer then compares the female job class to the male job class with the lowest pay. If the female job class is paid less than the comparator, the employer is required to make up the difference.⁴⁴

Secondly, the proportional-value method of comparison is used when a comparable male job class is not available within the establishment. This mode of

³⁹ *CHRA*, *supra* note 36.

⁴⁰ *PEA*, *supra* note 18.

⁴¹ Ontario, Ontario Pay Equity Commission, *A Guide to Interpreting Ontario's Pay Equity Act*, (Ontario: Pay Equity Office, 2012) at 37.

⁴² *PEA*, *supra* note 18, s 1(1).

⁴³ Task Force Report, *supra* note 28 at 444.

⁴⁴ Cornish & Quito, *supra* note 7 at 10-11.

analysis indirectly compares male and female job classes by evaluating the relationship between compensation and work performance in male job classes. The proportional value approach to pay equity requires regression analysis of wages. Once a proportional class score is assigned to male job classes, the same analysis must be conducted for female classes. Pay equity is achieved when the relationship between performance and compensation is the same for all job classes within the same establishment.⁴⁵

Thirdly, the proxy method of comparison applies exclusively to the public sector. It is used when there is no male comparator available within the establishment. Under the proxy method, the employer will choose a comparable female job class in another organization that has achieved pay equity as the appropriate comparator.⁴⁶

Significantly, the *PEA* requires not only the implementation of pay equity, but also an effort to ensure compliance with the legislation, once pay equity has been reached in the workplace. Under the *PEA*, any subsequent changes in compensation practices are required to adhere to *PEA* guidelines. Both employers and bargaining agents are expected to ensure that pay gaps between job classes do not grow.⁴⁷ For “changes in circumstances” that have the effect of rendering a once viable pay equity plan non-compliant, the legislation requires that employers publicly circulate an amended plan to all affected employees that brings wages back into compliance.⁴⁸ In unionized workplaces, changing circumstances give rise to an obligation on the part of the employer to negotiate planned changes with the bargaining agent.⁴⁹

The Pay Equity Commission has recommended that a maintenance committee be established in all bargaining units as a means of monitoring change within the establishment.⁵⁰ Maintenance committees would be given the task of reviewing compensation practices on a yearly basis, in order to determine whether or not pay equity has been maintained. The International Labour Organization’s (ILO) Job Evaluation Guide regards the use of committee processes in ensuring pay equity, as a means to encourage female workers to become involved in the implementation of pay equity, and of achieving gender inclusiveness.⁵¹

However, legislation surrounding equal pay for equal work of equal value has not been evenly implemented across Canada. Several provinces have not passed laws equivalent to the *PEA*; this means those workers who do not fall under federal

⁴⁵ Ontario Pay Equity, “Proportional Value Method of Job Comparison”, online: Pay Equity Ontario <<http://payequityontario.com/>>.

⁴⁶ Cornish & Quito, *supra* note 7 at 11.

⁴⁷ *Canadian Union of Public Employees, Local 1776 v Brampton Public Library*, [1994] OPEd No. 37 (ON PEHT).

⁴⁸ *PEA*, *supra* note 18 ss 14 (1-7).

⁴⁹ *BICC Phillips Incorporated v Group of Employees*, [1997] OPEd No. 16 (ON PEHT).

⁵⁰ Task Force Report, *supra* note 28 at 377.

⁵¹ International Labour Office, “Promoting Equity: Gender-Neutral Job Evaluation for Equal Pay: A Step-by-Step Guide” (2008), online: International Labour Organization <<http://www.ilo.org>>.

jurisdiction only have access to human rights legislation when seeking remedies for unequal pay.⁵² Moreover, several of the pay equity statutes limit the types of comparison that can be conducted between job classes and do not allow for proportional value or indirect comparisons.⁵³ This is problematic due to the gendered nature of occupational segregation, and the frequent lack of equivalent job classes within an establishment.

While the *PEA* requires proactive compliance on the part of employers, the *CHRA*, which applied to all federal employees until the enactment of the *PSECA* discussed below, was a complaint-based system of maintaining pay equity. Section 11 of the *CHRA* states that 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.”⁵⁴ For the Canadian Human Rights Commission to commence an investigation on the basis of a breach of this provision, an employee or union was required to submit a complaint. The Commission would then assess that complaint to determine whether the complaint required referral to the Canadian Human Rights Tribunal.⁵⁵

Human Rights Legislation and Pay Equity

Human rights legislation also prohibits unequal treatment in employment. Sections 7 and 10 of the *CHRA*,⁵⁶ and section 5 of Ontario’s *Human Rights Code*,⁵⁷ prohibit discrimination in employment. This prohibition encompasses discrimination in wages. Human rights tribunals have acknowledged that they have the jurisdiction to address pay equity complaints: in *Lockhart v New Minas (Village)*,⁵⁸ the Nova Scotia Human Rights Board of Inquiry stated that “if one accepts pay equity as a human right it seems to follow that the violation of the principle of pay equity may constitute sex discrimination either under the general no-discrimination provision for an employment relationship, or if present, under an express provision dealing with equal pay for work of equal value.”⁵⁹

⁵² Alberta, Saskatchewan, Newfoundland and Labrador, British Columbia, and Nunavut do not have laws that recognize women’s right to equal pay for work of equal value.

⁵³ Only the federal, Quebec and Ontario statutes allow for proportional value and indirect comparisons.

⁵⁴ *CHRA*, *supra* note 36.

⁵⁵ Treasury Board of Canada Secretariat, “The Public Equitable Compensation Act and the Reform of Pay Equity: Section II - Evolution of the Pay Equity Legislative Framework in Canada” (5 February 2013), online: Treasury Board of Canada Secretariat <<http://www.tbs-sct.gc.ca>> [Evolution of Pay Equity].

⁵⁶ *CHRA*, *supra* note 36.

⁵⁷ *Human Rights Code*, RSO 1990, c H-19.

⁵⁸ [2008] NSHRBID No. 3.

⁵⁹ *Ibid.* See also *Nishimura v Ontario (Human Rights Commission)*, 70 OR (2d) 347 (Div Ct), where the Ontario Divisional Court ruled that the Ontario Human Rights Tribunal has the jurisdiction to address pay equality issues not falling under the purview of the *PEA*.

The *Charter* and Pay Equity

The Ontario Superior Court of Justice's interpretation of section 15 of the *Canadian Charter of Rights and Freedoms*⁶⁰ requires the federal government to comply with gender equality and to protect pay equity gains. The *Charter* has been used as a remedy in several pay equity cases, including *SEIU Local 204 v Ontario (Attorney General)*,⁶¹ which involved a union challenge to the Progressive Conservative Ontario Government's repeal of the proxy method of pay comparison through the implementation of the *Savings and Restructuring Act, 1996*.⁶² Justice O'Leary of the Ontario Superior Court of Justice determined that section 15 of the *Charter* had been breached,⁶³ and the Ontario Government was required to fund proxy pay equity adjustments for the affected job classes, which amounted to a payout of more than \$150 million.⁶⁴

The recently introduced *PSECA* has also been challenged on *Charter* grounds, which are discussed in the following section.

III. THE ROLE OF UNIONS IN PAY EQUITY INITIATIVES

Collective bargaining has been a key factor in improving the economic status of Canadian workers, which is demonstrated by the higher average wages of female unionized workers over their non-unionized counterparts.⁶⁵ While unions have made strides in the representation of women's interests, approaches to pay equity have remained inconsistent, and have been met with varying degrees of success. The hesitancy with which unions have approached pay equity issues may be linked to the egalitarian nature of unions, wherein union solidarity is understood as the pursuit of common goals to improve the working conditions of all workers. Pay equity is therefore divisive in that it affects only a portion of workers,⁶⁶ and so is perceived as having the potential to undermine solidarity.⁶⁷

In Canada, provincial pay equity initiatives require that employers negotiate pay equity plans with certified bargaining agents. Under the *PEA*, the entirety of the pay equity process is to be negotiated between union and management in good faith.⁶⁸ The early decisions of the Pay Equity Hearings Tribunal emphasized that employers must

⁶⁰ *The Constitution Act, 1982*, Schedule B to the *Canada Act 1982* (UK), 1983, c 11.

⁶¹ (1997), 35 OR (3d) 508 (Sup Ct).

⁶² *Ibid.*

⁶³ *Ibid.*

⁶⁴ Cornish & Quito, *supra* note 7 at 23.

⁶⁵ Cornish, *supra* note 13 at 10.

⁶⁶ Pay equity is generally perceived as a 'women's' issue, however, it has been suggested that eliminating the pay gap will serve to stimulate the economy, making pay equity an issue for everyone.

⁶⁷ Pat Armstrong, Mary Cornish and Elizabeth Millar, "Pay Equity: Complexity and Contradiction in Legal Rights and Social Processes" in Wallace Clement & Leah Vosko, eds, *Changing Canada: Political Economy as Transformation* (Montreal: McGill-Queen's University Press, 2003) 161 at 169.

⁶⁸ *Ibid* at 177.

disclose all information pertinent to pay equity in order for this good faith obligation to be met.⁶⁹

The rationale underpinning the requirement that employers must bargain pay equity with the unions is tied directly to the majoritarian and exclusive nature of labour relations in Canada. Under the Ontario *Labour Relations Act*, for example, a union is the sole bargaining agent for a bargaining unit, and the employer is required to bargain in good faith with the union regarding work conditions.⁷⁰ Therefore, employers cannot set wages in a workplace without having negotiated with the exclusive bargaining agent. While the Pay Equity Tribunal has noted that general collective bargaining and collective bargaining on pay equity need not happen simultaneously,⁷¹ the Ontario *Pay Equity Act* does not permit employers to set pay equity compliant wages without negotiation with the union.⁷² Under s. 7(2) of the *PEA*, the bargaining agent has an additional legal obligation to proactively ensure that any agreed-upon compensation achieves pay equity.⁷³ Therefore, in order to meet this obligation, “the bargaining agent must be entitled to assess whether an employer’s wage proposal complies with the *PEA* and to negotiate in order to ensure that pay equity is achieved and maintained.”⁷⁴

Union efficiency in bargaining pay equity issues has been mixed. Jan Kainer, who studied pay equity implementation in Ontario’s private sector, found that unions “did not exploit the potential presented by pay equity to raise wages . . . what resulted instead, is that the pay equity plans negotiated reinforced the part-time workforce as a separate group. Pay equity maintained the division within the internal labour force between a large lower-paid, flexible part-time category, and a dwindling full-time, but higher-paid permanent workforce.”⁷⁵ In the American context, Joan Acker addressed pay equity legislation and argued that the frequency of intra- and inter-union and union-management conflict over the issue served to subsume and marginalize women’s interests during the process of bargaining for pay equity.⁷⁶

Conversely, some scholars have argued that unions have played a positive role in bargaining for pay equity, including Susan Hart, who studied union negotiations of pay equity in Ontario and Newfoundland in the late 1980s in the wake of the passage of

⁶⁹ *Ibid.*

⁷⁰ *Labour Relations Act*, 1995, SO 1995, c 1 [LRA].

⁷¹ Jan Borowy, Mary Cornish, Andrew MacIsaac & Ryan White "Trade Union Guide to Enforcing Pay Equity" (Paper delivered at the 'Achieving and Maintaining Pay Equity' Ontario Federation of Labour Seminar, 29 September 2010) online: Cavalluzzo Publications <www.cavalluzzo.com/resources> [Enforcing Equity].

⁷² *Ibid.*

⁷³ *PEA*, *supra* note 18.

⁷⁴ Borowy, *supra* note 71 at 10.

⁷⁵ Jan Kainer, “Pay Equity and Part-Time Work: An Analysis of Pay Equity Negotiations in Ontario Supermarkets” (1998) 18:1 *Canadian Woman Studies* 47 at 49.

⁷⁶ Joan Acker, *Doing Comparable Worth: Gender, Class and Pay Equity* (Philadelphia: Temple University Press, 1989).

provincial pay equity laws.⁷⁷ Hart found that the unions were the most effective means of representing women's interests during the bargaining process, as they used "not only conventional bargaining techniques but also . . . the key tools of gender analysis and expertise in pay equity methodology, developed primarily through their negotiators' formal links with internal equality structures and knowledge of equality policies, combined with women's networking inside and outside the labour movement."⁷⁸ Thus, it is fair to conclude that unions are far more likely to effectively advance women's interests in bargaining when they have an appreciation of the ways in which work may be segregated along gendered lines, and when women are given a prominent role in conducting negotiations.

The actual negotiation of pay equity may require that a wide variety of issues be addressed, including the composition of job evaluation committees or questionnaires, the designation of a gender-neutral job evaluation system, and the calculation of wage adjustments, which, as addressed above, is an extremely complex and technical process.⁷⁹ As Hart has argued, it appears that the most effective union negotiators have a nuanced understanding of the systemic discrimination that pay equity legislation is designed to remedy. For example, in the Ontario Public Sector Employees' Union negotiation of the Ontario Public Service pay equity plan with the Ontario government, the union's chief negotiator observed that "we fought over every word, every letter, every comma, every period, the order of them, the way in which they were stated. . . We wanted to get at nursing attributes or qualities . . . as strong as we could . . . when you get to the end of the day, it translates into points and money."⁸⁰ True gains in equity bargaining will be made only when bargaining agents are thus attuned to forms of discrimination that pay equity legislation is designed to alleviate. Unfortunately, this level of awareness is rare, and thus represents one of the reasons that pay equity issues should be removed from the process of collective bargaining entirely.

IV. PAY EQUITY AND COLLECTIVE BARGAINING

Canada's adherence to the Wagner model of labour relations has resulted in a highly decentralized system of collective bargaining, wherein employers largely bargain autonomously, and few bargaining structures exist that involve more than one union or one employer.⁸¹ In addition, while labour relations boards have expressed a preference for bargaining units including all employees of an employer,⁸² in reality, few "all employee" units exist. This scarcity is largely reflective of the reluctance of labour

⁷⁷ Susan M Hart, "Unions and Pay Equity Bargaining in Canada" (2002) 57: 4 RI 609 at 613 [Hart].

⁷⁸ *Ibid* at 623.

⁷⁹ See, for example, Hart's descriptions of the process of bargaining for pay equity, *ibid*.

⁸⁰ *Ibid* at 617-18.

⁸¹ Task Force Report, *supra* note 28 at 439.

⁸² *Metroland Printing, Publishing and Distributing Ltd.*, [2003] 90 CLRBR (2d) 97.

relations boards to deny employees access to collective bargaining, and their willingness to recognize smaller units on the basis of community of interest.⁸³ Many workplaces are composed of several bargaining units, or a mix of bargaining units and employees who have no access to collective bargaining.

The federal Pay Equity Task Force has argued that the “continuing significance of the ‘community of interest’ criterion in defining bargaining units . . . appears in some sense to have reinforced occupational segregation for women.”⁸⁴ While collective bargaining may have flattened wage differences within groups of unionized workers by placing previously disadvantaged workers in a more favourable position, a high level of occupational segregation within Canada has undermined this purpose. Additionally, gender divisions that may result from the delineation of bargaining units and discriminatory hiring practices are further reinforced by promotional and layoff rights, which are set by seniority district.⁸⁵ Women may have little incentive to move from a low-paid position in a female dominated bargaining unit to a better-paid job in a male dominated unit when they know that they will be required to take the lowest-paying job in that district.

There are two different views regarding whether and how collective bargaining and the mechanisms for attaining pay equity should intersect. One view is that pay equity and collective bargaining function best in tandem, a position that is endorsed by Paul Weiler. Pay equity is therefore framed as the product of a dialogue between the bargaining unit and the employer, and is affected by market conditions and the bargaining strength of the parties. Weiler maintains that the bargaining unit serves as the most appropriate forum for making pay equity comparisons. He argues that it would be “a misdirection of public policy and of enforcement efforts to ignore the legal and practical realities that wages are set at the bargaining unit level for unionized employees.”⁸⁶ This position was held by the Canadian Human Rights Tribunal, who, in *CUPE v Canadian Airlines International*, determined that individual bargaining units were best suited to the definition of “establishment” set out in the *Equal Wage Guidelines*.⁸⁷

Within this view, resolving pay equity issues outside of the context of collective bargaining is seen as weakening labour relations in two ways. Firstly, it skews the balance of industrial power by imposing an unfair burden on employers, who are required to sustain the cost of ensuring compliance with equity legislation even though such compliance has not been the subject of bargaining. Secondly, it allows for non-

⁸³ Task Force Report, *supra* note 28 at 439.

⁸⁴ *Ibid* at 440.

⁸⁵ Anne Forrest, “Bargaining for Economic Equality: A Path to Union Renewal, Then and Now” in Janice R Foley & Patricia Louise Baker eds, *Unions, Equity, and the Path to Renewal* (Vancouver: UBC Press, 2009) 97 at 110 [Forrest, “Economic Equality”].

⁸⁶ Task Force Report, *supra* note 28 at 446.

⁸⁷ (1998) 34 CHRR D/442.

unionized individuals and for individuals belonging to unions, who do not use economic weapons when bargaining, to reap the benefits associated with pay equity, without incurring any costs.

A second view, and the position endorsed by this paper, is that mechanisms used to gain pay equity and collective bargaining should be kept separate. This position rejects the bargaining unit as the appropriate venue for pay equity comparisons. As discussed above, the current structure of collective bargaining is highly decentralized and fragmented, with a distinct lack of “all-employee” bargaining units. This structure does not encourage or facilitate the adoption of comprehensive workplace policies, and also has the effect of reinforcing gender segregation.

Job segregation by gender is as prevalent within unionized workforces as the non-unionized sector.⁸⁸ Anne Forrest has argued that, within unions, wages reflect both a male and industrial bias. Higher value is accorded to “formal qualifications and job-specific training over education; physical effort and strength over mental effort and endurance; responsibility for capital equipment and product over the stress of working with vulnerable populations; and the dirt and grease of factories, mines, and construction sites over the tears, urine, and feces common in ‘women’s work.’”⁸⁹ The majority of Canadian women continue to work in distinctly “gendered” occupations, with approximately 67 per cent of women engaging in traditional “women’s work” including teaching, nursing, clerical, administrative, sales, and service jobs.⁹⁰

Traditionally, equal pay for equal work wage bargaining protects women when their jobs are substantially similar to a male-dominated job within the same establishment, which, as discussed above, is understood to mean a bargaining unit. Labour relations boards certify unions according to “community of interest,” which inevitably carries a gendered element. As Forrest notes, “depending on the jurisdiction, one or all of blue-collar/manual, office/clerical, professional, sales, security, part-time, casual, contractually limited, self-employed, and home workers are routinely separated from each other.”⁹¹ While gender inclusive broader-based bargaining can have the potential to narrow the gender wage gap,⁹² these types of bargaining structures are rare in Canada due to the public policy prioritization of decentralized bargaining and union preference for bargaining that links “like with like . . . men’s work with men’s work and women’s with women’s.”⁹³ Therefore, as bargaining units are still largely segregated

⁸⁸ Jackson, *supra* note 17 at 2-3.

⁸⁹ Forrest, “Gender Pay Gap”, *supra* note 21 at 63.

⁹⁰ Canada, Status of Women Canada, *Women in Canada at a Glance: Statistical Highlights*, (Ottawa: Status of Women Canada, 2013) <www.swc-cfc.gc.ca>.

⁹¹ Forrest, “Economic Equality”, *supra* note 85 at 110.

⁹² See, for example, Michael Kidd & Michael Shannon, “The Gender Wage Gap: A Comparison of Australia and Canada” (1996) 49: 4 *Indus & Lab Rel Rev* 729.

⁹³ Forrest, “Economic Equality”, *supra* note 85 at 111.

along gendered lines, women continue to encounter significant barriers to attaining equal pay under the equal pay for work of equal value model.

More significantly, given that collective bargaining inherently involves compromise, it is an inappropriate tool to address the fundamental rights of workers. This position regards pay equity as a fundamental right, and deems pay equity legislation to be more akin to human rights legislation than labour legislation. The Pay Equity Task Force puts it simply: “Though the setting of wages is an industrial relations matter, and negotiation of compensation has been central to the institution of collective bargaining, the issue which lies at the heart of any discussion of pay equity is whether there has been discrimination on the basis of gender in the wage-setting process.”⁹⁴ Therefore, pay equity legislation is seen as providing redress in situations where employers are engaging in gendered discrimination, rather than as a product of the give and take of collective bargaining.

It is worth noting that the complex and deeply quantitative approach required in the evaluation of pay equity means that the negotiation of pay equity can occupy a significant portion of the collective bargaining process. Parties often express frustration at the “apparently insurmountable” technical aspects of implementing pay equity within the workplace.⁹⁵ This issue clearly detracts from other bargaining concerns.

In light of these significant barriers, the Pay Equity Task Force has recommended that the federal government enact new, stand-alone pay equity legislation, where the process for achieving pay equity is separated from collective bargaining.⁹⁶ Replicating the bargaining unit as the “basic constituency for considering issues of pay equity carries with it the risk of replicating . . . the occupational segregation and obliviousness to the gendered nature of work which is at the heart of the problem of wage discrimination.”⁹⁷ Furthermore, allowing pay equity to be subject to collective bargaining undermines the fundamental, rights-based nature of pay equity. Instead of requiring the convergence of equity considerations and collective bargaining, employers alone should be obliged to proactively ensure that gender-based discrimination gaps are remedied, and to implement pay equity plans for the ongoing maintenance of pay equity obligations. As the Pay Equity Task Force notes, one of the arguments raised by proponents of making pay equity subject to collective bargaining is that a stand-alone employer obligation would place an unfair burden on employers.⁹⁸ While a model requiring employers to proactively work to eliminate wage differentials between women and men may impose a higher burden upon employers, this burden is required by law: recent judicial decisions have established that the government and

⁹⁴ Task Force Report, *supra* note 28 at 446.

⁹⁵ Hart, *supra* note 71 at 618.

⁹⁶ Task Force Report, *supra* note 28 at 461.

⁹⁷ *Ibid* at 462.

⁹⁸ *Ibid* at 449.

employers have a proactive obligation to work to eliminate discriminatory workplace practices.⁹⁹

Provincial legislation dealing with occupational health and safety matters serves as an example of how the employer obligation model may work in practice. Occupational health and safety legislation encourages employers to proactively work to ensure that significant policy concerns related to worker safety are addressed. For example, the Ontario *Occupational Health and Safety Act* imposes a mix of general and specific duties upon employers, ranging from requiring employers to take all reasonable precautions to protect the health and safety of workers, to mandating that employers develop and implement occupational health and safety program and policy.¹⁰⁰ Pay equity, like safety, is a fundamental right of employees and, as such, should be dealt with in a fashion that requires employers to work to eliminate discrimination before it arises. The creation of an employer obligation to implement pay equity plans would ensure that all employees, including non-unionized employees, are guaranteed equal pay for equal work of equal value.

Envisioning a New Role for Unions

The above discussion is not to suggest that unions should not have a role in the process of attaining pay equity. Trade unions have a well-established history of championing equality in the workplace, and have made efforts to address gender discrimination by challenging workplace policies and undertaking human rights litigation on behalf of female employees. The Pay Equity Task Force suggested “where there are unionized employees in the workplace, the trade union or unions representing those employees should be a vehicle for the selection of representatives of unionized workers in the pay equity process and for the dissemination of information about pay equity issues.”¹⁰¹ Therefore, while collective bargaining is not the appropriate forum for the determination of pay equity issues, unions can still play a valuable role in promoting access to pay equity for the employees they represent.

Indeed, unions would have a significant role to play if pay equity legislation similar to occupational health and safety legislation was enacted, as outlined above. Union members should form an important component of pay equity committees, which would be similar in composition and scope to occupational health and safety committees. Such a forum would allow unions and employers to work together, in a process that is distinct from collective bargaining, to ensure that pay equity is attained within the workplace.

⁹⁹ *British Columbia (Public Service Employee Relations Commission) v British Columbia Government and Service Employees Union (Meiorin Grievance)*, [1999] 3 SCR 3.

¹⁰⁰ *Occupational Health and Safety Act*, RSO 1990, C 0.1, s 25.

¹⁰¹ Task Force Report, *supra* note 28 at 452.

Unions also have a legal duty of fair representation, which is a component of collective bargaining legislation.¹⁰² While the relationship between the duty of fair representation and human rights principles remains somewhat unclear, some labour relations boards have attempted to address the ways in which unions should approach human rights issues that arise in the course of their representation of a bargaining unit.¹⁰³ This interpretation of the duty of fair representation within the human rights context envisages a proactive duty being placed on the union requiring the union to refrain from perpetuating discrimination in its actions. This interpretation also suggests that unions may be required to promote access to pay equity (even in contexts where it is not a matter for collective bargaining).¹⁰⁴ Therefore, while unions must not be used alone to achieve pay equity, they can nonetheless be an integral part of the battle for reducing the gender based wage gap in Canada.

Public Sector Equitable Compensation Act

The *Public Sector Equitable Compensation Act* is part of the omnibus Budget Implementation Act (Bill C-10), which was tabled on February 7, 2009. The *PSECA* replaces the term “pay equity” with “equitable compensation” and introduces new legislative criteria for evaluating “equitable compensation.” While section 11 of the *Canadian Human Rights Act* outlines the criteria that an employer must follow when assessing the value of work for equal pay for work of equal value considerations,¹⁰⁵ the *PSECA* further adds to these criteria, making it far more difficult for women to obtain equal compensation. For example, the *PSECA* specifically provides that the value of the work performed is to be assessed according to “the employer’s recruitment and retention needs in respect of employees in that job group or job class, taking into account the qualifications required to perform the work and the market forces operating in respect of employees with those qualifications.”¹⁰⁶ This is deeply problematic because it continues to allow employers to place a higher value on male-dominated jobs, and to pay male workers a higher salary than female workers performing work of equal skill and effort, through the rationale that market forces dictate the value of work performed.¹⁰⁷

The *PSECA* also limits access to “equitable compensation” to female dominated job groups, which are defined as groups consisting of 70 per cent or more female workers. Under the *Canadian Human Rights Act*, access to pay equity was limited to female dominated job groups that met a threshold of 55 per cent or more female

¹⁰² See, for example, s. 74 of the Ontario *LRA*, *supra* note 70.

¹⁰³ *H(K) v CEP, Local 1-S* (1997), 98 CLLC 220-020.

¹⁰⁴ Task Force Report, *supra* note 28 at 456.

¹⁰⁵ *CHRA*, *supra* note 36.

¹⁰⁶ *PSECA*, *supra* note 20, s 4 (1).

¹⁰⁷ Letter from various Canadian scholars to Prime Minister Stephen Harper (23 February 2009) Equality Rights Central <<http://erc.paulappleby.com>> [Harper letter].

employees.¹⁰⁸ The process for attaining equitable compensation in the federal sector is also modified: employers and unions are jointly responsible for compliance under the *PSECA*, wherein equitable compensation is negotiated in conjunction with other collective bargaining issues, rather than in a process separate from bargaining.¹⁰⁹ Indeed, by identifying collective bargaining as the appropriate forum to attain equitable compensation, this legislation has the very effect that the Pay Equity Task Force warned against—pay equity is rendered a benefit that must be bargained for, and consequently may be bargained away.

While the *PSECA* does provide an avenue of recourse to employees if pay equity is not achieved through the collective bargaining process, in that individual workers are permitted to file a complaint with the Public Service Labour Relations Board, it removes the right of federal employees to claim protection for pay equity violations under the *Canadian Human Rights Act*. Additionally, individual employees must file complaints with the Public Service Labour Relations Board without union support, and a \$50,000 fine will be imposed on any union that assists members in filing a pay equity complaint.¹¹⁰ One criticism of the individual complaint procedure is that it amounts to a meaningless enforcement mechanism; given that “complaints about pay equity are, by definition, group complaints . . . Individual female public servants, without help from the Commission or their unions, will not have access to the information about pay rates and job descriptions that is necessary to make an ‘equitable compensation’ complaint.”¹¹¹

The *PSECA* has been framed by the federal government as remedying several issues with the complaints-based system of legislating pay equity under the *CHRA*. Firstly, the government has emphasized the fact that “allegations of human rights violations tend...to generate a defensive reaction and lead to litigation and delays.”¹¹² Secondly,

the complaints-based approach produces uneven implementation, since employers not targeted by complaints often choose to keep a low profile and refrain from taking any initiatives on pay equity. This problem is exacerbated by the fact that it takes significant knowledge and resources to mount major pay equity complaints, which generally means they are only filed by unions. The end result is that people performing female-predominant work in non-unionized, federally-regulated settings have benefitted little from the federal pay equity provisions.¹¹³

¹⁰⁸ *Ibid.*

¹⁰⁹ *Ibid.*

¹¹⁰ Cornish & Quito, *supra* note 7 at 4.

¹¹¹ Harper Letter, *supra* note 107.

¹¹² Evolution of Pay Equity, *supra* note 55.

¹¹³ *Ibid.*

The new measures implemented by the *PSECA* are ostensibly designed to streamline and shorten litigation, and to provide a mechanism for the maintenance of pay equity within the federal sector. By allowing parties to bargain over pay equity, theoretically, employers are more likely to be held accountable to their pay equity obligations, and the government can better predict its compensation budget. As the Treasury Board of Canada's website states, under the old regime, the government was "exposed to infrequent, but potentially very large, pay equity settlements or awards with significant payouts and wage adjustments" making it "impossible for federal public sector employers to accurately predict and manage their pay equity obligations and . . . their compensation budget."¹¹⁴

The *PSECA* removes all substance from the notion of pay equity. Indeed, the "equitable compensation" that the *PSECA* purports to endorse is not a legally recognized concept. Thus, while "pay equity" and "equitable compensation" might appear to be interchangeable terms, in this context, semantics matter. As noted above, pay equity is recognized as a fundamental human right, which is defined and enshrined in both the *Convention on the Elimination of All Forms of Discrimination Against Women* and the *International Covenant on Economic, Social, and Cultural Rights*, treaties that have been ratified by Canada.¹¹⁵ "Equitable compensation," on the other hand, is not recognized domestically or internationally, or within the *Act* itself. Therefore, instead of implementing the proactive pay equity legislation recommended by the Pay Equity Task Force in 2004, the *PSECA* introduces a model of negotiated equitable compensation.

Unlike the *PEA*, the *PSECA* places no proactive obligation on bargaining agents to identify and correct wage inequalities. Rather, a complainant is required to establish both the existence of a job class reaching the stringent 70 per cent standard, as well as the existence of a disparity between job classes before redress will be available. In addition, the complainant will be required to meet this threshold without union aid. Under the *PSECA*, employers and unions are made jointly responsible for ensuring that federal workers receive equitable compensation, despite the fact that unions have "no control over the federal purse."¹¹⁶ The *PSECA* does not divorce the negotiation of pay equity issues from the negotiation of other interests, as other pay equity legislation does, a fact which places unions in the uncomfortable position of negotiating what have been deemed to be fundamental equality rights. Indeed, critics of the legislation have observed that it has the potential to open unions to duty of fair representation complaints under the *Public Services Labour Relations Act*.¹¹⁷

¹¹⁴ *Ibid.*

¹¹⁵ *Supra* notes 32 and 33.

¹¹⁶ Harper Letter, *supra* note 107.

¹¹⁷ Cornish & Quito, *supra* note 7 at 26.

There are several challenges made against the *PSECA* on the grounds that it is contrary to the *Charter*, and that it is not compatible with international human rights law. In *Newfoundland and Labrador Association of Public Employees v Government of Newfoundland and Labrador*, the Supreme Court of Canada asserted that section 15 of the *Charter* guarantees women equal pay for work of equal value.¹¹⁸ Under the *PSECA*, however, “market forces” are recognized as a factor that can negate this right.¹¹⁹ In *Winnipeg School Division No. 1 v Craton*,¹²⁰ the Supreme Court adopted the fundamental precept that human rights cannot be negotiated. It is well established in law that a union cannot negotiate a right that falls below the basic floor of rights contained in human rights legislation.

Several unions, including the Professional Institute of the Public Service of Canada and the Public Service Alliance of Canada, have challenged the constitutional validity of the *PSECA*.¹²¹ These applications have alleged that the *PSECA* breaches the *Charter* on several grounds. Specifically, they argue that the *PSECA* violates sections 2(b) and 2(d) by prohibiting unions from advising members on the process of making pay equity complaints, as well as section 15 by denying employees access to the Canadian Human Rights Commission and union support, effectively rendering the complaint process meaningless.

The *PSECA*'s inclusion of market forces as a factor that employers can legitimately consider when making equity adjustments is argued to further violate section 15 for two reasons: (i) market forces are deemed to be the “primary cause and common rationalization for wage discrimination,”¹²² and (ii) recognition of such forces as a factor that can affect access to wage equality perpetuates discrimination in employment on the basis of gender.¹²³ The change to the threshold for defining job classes as “female predominant” will inevitably result in restricting certain classes from accessing equitable compensation, even though such classes may have been able to previously assert their rights under the *Canadian Human Rights Act*.¹²⁴

¹¹⁸ 2004 SCC 66.

¹¹⁹ *PSECA*, *supra* note 20, s 4 (1).

¹²⁰ [1985] 2 SCR 150 at para 8.

¹²¹ Cornish & Quito, *supra* note 7 at 26.

¹²² *Ibid.*

¹²³ *Professional Institute of the Public Service of Canada v Canada (Attorney General)*, 2014 ONSC 965; *Gordon, Ducharme, Adam, Stein, Aylward, McKenzie, and Public Service Alliance of Canada v Canada (Attorney General)* (Notice of Application by Applicant) (27 April 2009), CV-09-37731, online: Equality Rights Central <<http://www.erc.paulappleby.com>>.

¹²⁴ Cornish & Quito, *supra* note 7 at 27.

CONCLUSION

This paper has provided a comprehensive overview of the history of pay equity legislation in Canada, and of the various legal remedies available to combat the still prevalent wage gap between male and female workers. It is clear that current strategies to remedy the significant wage gap in Canadian workplaces between male and female workers are falling short. Indeed, as outlined in the introduction of this paper, the wage gap has been reduced by a mere 6.6 per cent over the past 20 years, and still hovers around a problematic 70 per cent. This paper has outlined two current issues that may be hindering progress in attaining wage parity in the workplace. First, pay equity is still subject to collective bargaining within unionized workplaces. It has become evident that unions are not well suited to negotiate the complexities of implementing pay equity, due to the inherent compromises that collective bargaining entails. Courts have recognized that pay equity is a fundamental human right that cannot be bargained away. Rather than making pay equity subject to collective bargaining, this paper proposes that new, stand-alone legislation be enacted separating pay equity and collective bargaining. Such legislation would impose a proactive obligation upon employers to establish and implement pay equity plans. Occupational health and safety legislation may serve as a useful model for legislative reforms in the area of pay equity. Rather than making pay equity subject to collective bargaining, it would be more appropriately dealt with through independent committees, comprising both union and management representatives.

Second, the recent passage of the *PSECA* has further undermined the status of pay equity. The *PSECA* is problematic for a number of reasons, including the fact that it has legally recognized the ability of employers to take market forces into consideration when approaching pay equity issues, it has reconceptualized what constitutes female dominated job groups, it has endorsed collective bargaining as the appropriate forum to deal with pay equity, it eliminated the ability of employees to claim recourse for pay equity violations under the *Canadian Human Rights Act*, and it introduced the term “equitable compensation” instead of pay equity. Given the fact that the majority of unionized women work in the public sector, the *PSECA* has the potential to further undermine efforts of women to gain equal compensation. While this paper has argued that distinct processes for dealing with pay equity and collective bargaining will benefit female workers to the greatest extent, Canada’s approach to pay equity appears to be going in the opposite direction. The *PSECA* appears to be indicative of a worrying trend to disregard the importance of pay equity to female workers.