HRTO File No. 2013-161419-I

In the matter of an application under section 34 of the Human Rights Code to the Human Rights Tribunal of Ontario

THE ASSOCIATION OF ONTARIO MIDWIVES ACTING ON BEHALF OF COMPLAINANT ONTARIO MIDWIVES ("AOM")

Applicant

HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO, AS REPRESENTED BY THE MINISTRY OF HEALTH AND LONG TERM CARE ("MOHLTC")

Respondent

FINAL SUBMISSION OF THE ASSOCIATION OF ONTARIO MIDWIVES

PART B – LEGAL AND REMEDIAL RELIEF SUBMISSIONS

April 27, 2017

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PART I: LEGAL SUBMISSIONS

A. Introduction

1. The midwives submit that from 1994 to the present the respondent Ministry has violated their right to equal treatment without discrimination on the basis of sex under the *Human Rights Code*, and in particular under sections 3, 5, 9, 11 and 12 by:

   (a) Failing to take proactive steps to prevent an inequitable compensation and funding system for midwives in Ontario, an historically disadvantaged and almost exclusively female profession vulnerable to compensation and funding discrimination;

   (b) Establishing and maintaining an inequitable compensation and funding system for midwives in Ontario;

   (c) Providing unequal and discriminatory compensation and funding to midwives in Ontario which served to undervalue their work and contributions and perpetuate the stereotypes and prejudices they faced and continue to face;

   (d) Actively refusing to take any reasonable steps to investigate and remedy systemic gender discrimination in compensation when the issue was squarely raised by midwives in Ontario over the years; and

   (e) Failing to take steps to address within the Ministry's powers the gendered integration barriers midwives in Ontario faced.

2. The midwives further submit that their sex was and continues to be a factor in the above-noted adverse treatment.

3. The key legal provisions, principles and jurisprudence relied upon by the applicant include the following:

B. The *Code's* Preamble Acknowledges the Public Policy Nature of Human Rights and Need to Create Climate of Understanding, Respect and Recognition

4. The *Code*'s preamble identifies that it is concerned with achieving substantive equality in a manner that ensures that all individuals have the capacity for equal inclusion and participation in society. The *Code's* Preamble states as follows:

   Whereas ***it is public policy in Ontario to recognize the dignity and worth of every person and to provide for equal rights and opportunities without discrimination that is contrary to law, and having as its aim the creation of a climate of understanding and mutual respect for the dignity and worth of each person so that each person feels a part of the community and able to contribute fully*** *to the development and well-being of the community and the Province … (Emphasis added)*

5. The Preamble further recognizes that these principles are confirmed in various laws including the *Code:*

   "And Whereas these principles have been confirmed in Ontario by a number of enactments of the Legislature and it is desirable to revise and extend the protection of human rights in Ontario…"

6. As recognized by this Tribunal in its Interim Decision, a purposive approach to *Code* compliance aims to ensure access to those who seek its protection:

   "human rights legislation must be given fair, large and liberal meaning and read in a purposive way which will best achieve its objects*. It is also important to remember that the principle of a purposive approach relates both to* ***the goals of achieving substantive equality and eliminating discrimination as well as to reading the Code in a manner that ensures access to those who seek its protection****".*[1] (Emphasis added).

C. Section 5 - Right to Equal Treatment With Respect to Employment and Pay Without Discrimination Based on Sex

1. Introduction

7. Section 5 of the *Code* provides that:

   Every person has a right to equal treatment with respect to employment without discrimination because of… sex…

8. The MOHLTC's actions and inactions, policies and practices over the last 20 plus years have resulted in systemic employment discrimination against Ontario midwives with respect to their compensation. This discrimination is on the ground

1 *AOM v. Ontario (Health and Long Term Care)* 2014 HRTO 1370 (CanLii) para. 35 (J1).

of sex, as the midwives' sex and the gendered nature of their work, is a factor in the unequal compensation provided by the Ministry for the midwives' work.

9. The Tribunal's Interim Decision already establishes that systemic gender discrimination in compensation is covered by s. 5 of the *Code.*

2. Recognized Human Right to Substantive Compensation Equality

10. Sex-based pay or compensation discrimination has been found to be a violation of the right to equal treatment in employment under human rights laws. The existence of the separate *Pay Equity Act* does not take away from the quasi-constitutional obligations under the *Human Rights Code* to ensure that women do not receive unequal treatment with respect to compensation.[2]

11. The right to be free from sex-based discrimination in compensation – the right to pay equity – is a fundamental human right guaranteed by the *Human Rights Code* and the *Pay Equity Act*.[3]

12. As noted by Mr. Justice Evans in the Federal Court decision in *Public Service Alliance of Canada v. Treasury Board,* [1999] FCJ No 1531 (para. 122), a human rights tribunal must take a broad and liberal approach to its statutory mandate to eliminate systemic gender discrimination in compensation between male and female work. See also decision of Pay Equity Hearings Tribunal in *ONA v. Haldimand Norfolk* (1991), 2 PER 105, which also called for such an interpretation.[4]

13. There are two major Ontario laws which ensure that women's work is paid free from sex-based discrimination – Ontario's *Pay Equity Act* ("*PEA")* and the *Human Rights Code* – the two laws which the MOHLTC has stated are its "internal human rights policies" relevant to this application.

14. While historically, the *Pay Equity Act* has been the major focus of pay equity enforcement, increasingly Ontario women are also looking to the *Human Rights Code*.

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2 *Nishimura* v. Ontario (*Human Rights*) [S.C. Ont. 11 C.H.R.R. D/246] (J21), *Reid v. Truro (Town) 2009 NSHRC 2* (J22)*, Canada Safeway Limited v. Saskatchewan (Human Rights Commission)* (1999) 34 CHRR D/409 (J23) and *CUPE v. Local 1999 v. Lakeridge Health Corp.* 2012 O.J. No. 2451 (J24).

3 *Campe v. Borland Canada, 2010 HRTO 1257* (J25) and *Morin v Brink's Canada Limited,* 1995 Canlii 879 (J26), *Sacco v. John Howard Society of Peel Halton Dufferin 2012* 1185 (J27) and 2251 (J28).

4 *ONA v. Haldimand Norfolk (No. 6)* and *ONA v. Women's College Hospital (No.4)* (1992) 3 P. E. R. 61 (J3).

15. The recognition of these dual paths for enforcement is reflected in the jurisprudence of the Pay Equity Hearings Tribunal, HRTO, and the Divisional Court.[5]

16. The *Pay Equity Act* preamble sets out the recognition by the Ontario Legislature that there is "systemic gender discrimination in compensation" in Ontario experienced by those doing women's work which in context of the *Pay Equity Act* are the female job classes in employer establishments.

17. Accordingly, it is recognized in Ontario law that "it is desirable that affirmative action be taken to redress gender discrimination in the compensation of employees employed in female job classes in Ontario." See Preamble, *Pay Equity Act*. While this law does not apply directly to Ontario midwives, it reflects the public policy in Ontario that gender discrimination in the compensation of work by female-dominated professions should be redressed through affirmative measures.

18. The *Code* is no less a powerful instrument than the *Pay Equity Act* for redressing systemic gender discrimination in compensation. In fact, the AOM submits it is more powerful as it has no restrictions or limitations and acts to address all aspects of the actions of the MOHLTC which contribute to systemic gender discrimination. This means that it provides for broader remedial orders to address systemic factors which are contributing to the systemic gender discrimination in compensation.

19. The Code and *PEA* are complementary equality mechanisms which implement the Legislature's goal of redressing systemic gender discrimination in the compensation of women's work in Ontario.

20. As stated by Nova Scotia Human Rights Tribunal in *Reid et al. v. Town of Truro 2009, NSHRC-2*: ""common sense dictates" that complaints of women of a violation of their right to equal pay for work of equal value" in relation to men "come under the umbrella of section 5(1)(d)(m) of the Act which provides no discrimination in employment on grounds of "sex". (See paras. 7 and 92)

21. The Supreme Court of Canada in *Newfoundland (Attorney General) v. N.A.P.E.,*[6] also clearly concluded that systemic gender discrimination in compensation is sex-based discrimination contrary to the equality provisions in section 15(1) of the *Canadian Charter of Rights and Freedoms* ("*Charter*").

22. Systemic gender discrimination in compensation is an ongoing, pervasive factor affecting the compensation of women in Ontario. This fact has been established

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5 See *Canadian Union of Public Employees Local 1999 v. Lakeridge Health Corporation,* 2012 ONSC 2051 (J24) and *Nishimura v. Ontario (Human Rights Commission),*1989 CanLII 4317 (ON SC) (Ont. Div. Ct.) (J21).

6 *Newfoundland (Attorney General) v. N.A.P.E.,* [1988] 2 SCR 204 (J17).

consistently in Ontario starting with the Green Paper, the *Pay Equity Act* itself, the Predominantly Female Sector studies and report, the subsequent legislative history documents, the jurisprudence of the Supreme Court of Canada and the Canadian Human Rights Tribunal, the Pay Equity Hearings Tribunal jurisprudence, particularly *ONA v. Haldimand Norfolk (No. 6)* and *ONA v. Women's College Hospital (No.4).*[7]

23. This Tribunal's Interim Decision addressed the unique nature of a claim of systemic gender discrimination in compensation under the *Human Rights Code*:

> *[29]* ***The nature of systemic gender-based discrimination is in some respects unique as a form of discrimination, and has been recognized as such in academic literature, reports and jurisprudence.*** See, for example, Abella, Rosalie S., R*eport of the Commission on Equality in Employment. Ottawa: Minister of Supply and Services Canada, 1984*; Ontario Human Rights Commission, *Policy and Guidelines on Racism and Racial Discrimination*, www.ohrc.on.ca; *CN v. Canada (Canadian Human Rights Commission)* 1987 CanLII 109 (SCC), [1987] 1 S.C.R. 1114 ("*Action Travail des Femmes*"); *Public Service Alliance of Canada v. Canada (Treasury Board)* 1999 CanLII 9380 (FC), [1999/ F.C.J. No. 1531 ("PSAC"); Grange v. Toronto (City), 2014 HRTO 633 (CanLII).
>
> *[30]* ***In Action Travail des Femmes, the Supreme Court of Canada adopted the concept of systemic discrimination as developed in the Abella report.*** *At pp. 1138-9, the Court stated:*
>
> *A thorough study of "systemic discrimination" in Canada is to be found in the Abella Report on equality in employment. The terms of reference of the Royal Commission instructed it "to inquire into the most efficient, effective and equitable means of promoting employment opportunities, eliminating systemic discrimination and assisting individuals to compete for employment opportunities on an equal basis. (Order in Council P.C. 1983-1924 of 24 June 1983). Although Judge* ***Abella chose not to offer a precise definition of systemic discrimination, the essentials may be gleaned from the following comments****, found at p. 2 of the Abella Report:*
>
> ***Discrimination ... means practices or attitudes that have, whether by design or impact, the effect of limiting an Individual's or a group's right to the opportunities generally available because of attributed rather than actual characteristics …***
>
> ***<u>It is not a question of whether this discrimination is motivated by an intentional desire to obstruct someone's potential, or whether it is the accidental by-product of innocently motivated practices or systems</u>. If the***

7 *ONA v. Haldimand Norfolk (No. 6), 2 PER 105* (J5) and *ONA v. Women's College Hospital (No.4)* (1992) 3 P. E. R. 61 (J3).

barrier is affecting certain groups in a disproportionate/y negative way, it is a signal that the practices that lead to this adverse impact may be discriminatory.

This is why it is important to look at the results of a system ....

In other words, systemic discrimination in an employment context is discrimination that results from the simple operation of established procedures of recruitment, hiring and promotion, none of which is necessarily designed to promote discrimination. The discrimination is then reinforced by the very exclusion of the disadvantaged group because the exclusion fosters the belief, both within and outside the group, that the exclusion is the result of "natural" forces, for example, that women "just can't do the job" *(see the Abella Report, pp.9-10).*

*[31] In PSAC, J***ustice Evans discussed the particular nature of systemic gender-based wage discrimination, and how it must be understood through an examination of historical patterns** *(at paras. 117-118):*

(....) the policy motivating the enactment of the principle of equal pay for work of equal value is the elimination from the workplace of sex-based wage discrimination. ***The kind of discrimination at issue here is systemic in nature: that is, it is the result of the application over time of wage policies and practices that have tended either to ignore, or to undervalue work typically performed by women****.*

In order to understand the extent of such discrimination in a particular employment context it is important to be able to view as comprehensively as possible the pay practices and policies of the employer as they affect the wages of men and women. *(emphasis added)*

[32] This perspective was also affirmed in Public Service Alliance of Canada v. Canada (Department of National Defence)[8]*, ("PSAC/DND"):*

Systemic discrimination is a continuing phenomenon which has its roots deep in history and in societal attitudes. It cannot be isolated to a single action or statement. By its very nature, it extends over time.

[33] ***Systemic claims are about the operation and impact of polices, practices and systems over time, often a long period of lime. They will necessarily involve an examination of the interrelationships between actions (or inaction), attitudes and established organizational structures. A human rights application alleging gender-based systemic discrimination cannot be understood or assessed through a compartmentalized view of***

8 *Public Service Alliance of Canada v. Canada (Department of National Defence)*, 1996 CanLII 4067 (FCA), [1996] 3 F. C. 789 (J4).

***the claim**. Whether or not the applicant will be able to establish a violation of the Code remains to be seen. However, the applicant has filed an Application on behalf of over 500 individuals, particularized it in detail, and provided a clear theory) that links the events to a claim of gender-based systemic discrimination. The applicant is entitled to have its claim understood, considered, analyzed and decided in a complete, sophisticated and comprehensive way. (emphasis added)*

24. It well-established that systemic gender discrimination in compensation is caused by an amalgam of institutional practices, policies, and societal and institutional prejudices which disadvantage women. As stated by the Pay Equity Hearings Tribunal in *ONA v. Haldimand Norfolk (No.6)* (1991)[9] at para. 9:

It is increasingly acknowledged that the persistence of systemic wage discrimination acts as a barrier to the full and equal participation of women in the workforce.

25. The Supreme Court of Canada in *Janzen v. Platy Enterprises Limited* cited with approval from *Bell v. Ladas* [(1980), 1 C.H.R.R. D/155 at D/156][10] in addressing related issues of sexual harassment and pay discrimination:

***The evil to be remedied is the utilization of economic power or authority so as to restrict a woman's guaranteed and equal access to the workplace and all of its benefits** ... Where a woman's equal access is denied or when terms or conditions differ when compared to male employees, the woman is being discriminated against. [1989] 1.S.C.R. 1252 at 1277]*

***One such benefit is fair wages. A fair wage is important to the well-being of workers, not only in meeting the necessities of life, but in guaranteeing a sense of dignity and of recognition for the value of the work they perform.** This has relevance in the context of pay equity. The Act requires Employers to remedy pay discrimination by identifying and redressing the wage gap through a pay equity plan. Where the Employer's employees are unionized, these obligations must be undertaken in conjunction with the bargaining agent. (emphasis added)*

At para. 10:

The Pay Equity Act, 1987 acknowledges that wage discrimination in women's salaries has been systemic**. **The Act does not seek to lay blame upon employers or unions for historical wage discrimination, but rather provides a framework for redressing that wage discrimination. Thus, motive and intent are unhelpful in assessing whether these parties have met their obligations under the Act; the goal is not to punish wrongdoers

9 *ONA v. Haldimand Norfolk (No.6)* (1991), 2 P.E.R. 105 at para. 9 (J2).

10 *Bell v. Ladas (1980)*, 1 C.H.R.R. D/155 at D/156

but rather to provide an effective remedy for wage discrimination. *[See Re: Ontario Human Rights Commission v. Simpson Sears Ltd., [1985] 2 S. C. R. at p.547, see also Action Travail des Femmes v. C. N. R. Co., [1987] 1 S. C. R. 1114] (emphasis added)*

26. In *Haldimand Norfolk (No.6)* (1991)[11], the Pay Equity Hearings Tribunal concluded as follows concerning the influence of systemic factors contributing to women's unequal economic status and pay:

Compensation practices have reflected long standing historical social and economic relations in which men were the "bread winners" and women the "at home care givers". When women entered the work force in large numbers, compensation systems continued to reflect that unequal economic status. [Evidence of Dr. Armstrong, Dr. Fay, Dr. Ames] Women's work differs from men's work, both historically and today. Women work predominantly in the clerical, retail and service sectors and men continue to dominate the managerial, industrial and financial sectors. More importantly, however, for pay equity purposes, the skill, effort, responsibility and working conditions required for women's work differ from men's work. Many pay practices have failed to record or to value these differences. Deeply held attitudes meant the gender of a job class was viewed in the assessment of its value; if it was "women's work", it often led people, without any conscious decision making, to give less value to the work. *(para. 18 emphasis added**)***

Haldimand-Norfolk (No.6)[12] Tribunal (at paras.18-19):

Traditional job evaluation often reinforced and perpetuated these attitudes, largely rewarding the skills and job content characteristics of male work and ignoring or giving less value to the skills and job content requirements of women's work. *Originally, job evaluation was designed and applied in industrial and manufacturing workplaces, and to managerial positions.* ***When these systems were applied to workplaces in the health, service and office sectors, few changes were made to the underlying assumptions with which the value of jobs were assessed.[Evidence of Dr. Armstrong, Mr. Delaney] The skills, ability and experience of women in these jobs were not recognized, leading to an inaccurate and inadequate appraisal of the value of their work, and the resultant wages paid to them. Studies have demonstrated that the sex of the job incumbent has been a factor contributing to the traditional placement of the job within the hierarchy of the workplace in both wages and status.*** *[Shepela and Viviano "Some Psychological Factors Affecting Job Segregation and Wages" in Remick Comparable Worth and Wage Discrimination, Temple University Press,*

11 *ONA v. Haldimand Norfolk (No.6)* (1991), 2 P.E.R. 105 (J2).

12 *ONA v. Haldimand Norfolk (No.6)* (1991), 2 P.E.R. 105, at paras 18-19 (J2).

Philadelphia at p.47] Steinberg and Haignere conclude that ***traditional job evaluation methodologies created pervasive salary inequities by lowering the value of a characteristic or activity of work simply through its association as women's work. They conclude that this is a reflection of cultural and social stereotyping of the work traditionally done by women and the value attached to it. They found many job related skills are not treated as skills by evaluators, but rather as qualities "intrinsic to being a woman" and therefore not compensable.*** *[R. Steinberg and L. Haignere, "Equitable Compensation: Methodological Criteria for Comparable Worth", in C. Bose and G. Spitze Ingredients for Women's Employment Policy, State University of New York, 1987 at p.163]* ***Many compensation systems have made invisible the skills and responsibility required in women's work. These skills were associated with women's work in the home; patience and effective personal relations in raising and nurturing children, or care giving for ill or aging family members. Gender bias is embedded in conventional skill definitions of job complexity and human capital characteristics****.[Ronnie Steinberg, "Social Construction of Skill" in Work and Occupations May 1990, State University of New York Press at p.183] Those skills were invisible in job evaluation and were considered natural attributes, of women as opposed to skills required on the job. (para. 18-19 emphasis added)*

27. The Pay Equity Hearings Tribunal's above findings with respect to compensation discrimination are also mirrored in decisions under section 11 of the *Canadian Human Rights Act* which requires equal pay for work of equal value. Mr. Justice Evans in the *Public Service Alliance of Canada v. Treasury Board*[13] decision echoed the systemic nature of the discrimination and the need to examine compensation practices to understand the extent of such discrimination in a particular workplace:

[95] …systemic wage differences between men and women performing work of equal value, differences that are attributable in part to historic patterns of job segregation. …

[117] ...the policy motivating the enactment of the principle of equal pay for work of equal value is the elimination from the workplace of sex-based wage discrimination. The kind of discrimination at issue here is systemic in nature: that is, it is the result of the application over time of wage policies and practices that have tended either to ignore, or to undervalue work typically performed by women.

[118] ***In order to understand the extent of such discrimination in a particular employment context it is important to be able to view as comprehensively as possible the pay practices and policies of the employer as they affect the wages of men and women.*** *(Emphasis added)*

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13 *Public Service Alliance of Canada v. Canada (Treasury Board) 1999 CanLII 9380 (FC), [1999/ F.C.J. No. 1531* (J5).

28. Mr. Justice Evans also highlighted the subtle nature of systemic discrimination claims:

> *130* ***The concept of systemic discrimination****, the mischief at which section 11 is primarily aimed,* ***can be difficult to grasp.*** *As this case clearly shows,* ***the elucidation and application of the principle of equal pay for work of equal value calls for the kind of multi-disciplinary study in which the Tribunal engaged.*** *(Emphasis added)*

29. The Canadian Human Rights Tribunal in *Public Services Alliance of Canada v. Treasury Board, File T.D.491*[14], dated March 19, 1991, also emphasized the subtle and historical nature of systemic discrimination as follows:

> ***The concept of systemic discrimination****, on the other hand,* ***emphasizes the most subtle forms of discrimination****, as indicated by the judgement of Dickson, C.J. in CN v. Canada (Human Rights Commission),*[15]*.* ***It recognizes that long-standing social and cultural mores carry within them value assumptions that contribute to discrimination in ways that are substantially or entirely hidden and unconscious. Thus, the historical experience which has tended to undervalue the work of women may be perpetuated through assumptions that certain types of work historically performed by women are inherently less valuable than certain types of work historically performed by men.*** (Emphasis added)

30. The failure to ensure women's work is paid proportionately equally on the basis of skill, effort, responsibility and working conditions with men's work is also a violation of the right to equal pay for work of equal value guaranteed by ILO Convention 100 and the right to non-discrimination in employment and occupation set out in ILO Convention 111.[16]

31. In addition to the approach of comparing female work to specific male comparators in order to identify gender discrimination in compensation, such discrimination can also be identified by determining whether the compensation for an occupation or industry is lower than it would have been because of gender considerations. This includes looking at the feminized nature of the work performed, e.g. caring work as described by Dr. Armstrong in her expert report.[17]

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14 *Public Services Alliance of Canada v. Treasury Board, File T.D.491* (J30).

15 *CN v. Canada (Human Rights Commission), [1987] 1 S.C.R. 1114, at paras 1138-9* (J6).

16 C100 – Equal Remuneration Convention, 1951 (No. 100), 29 June 1951, Geneva, 34th ILO Session (entered into force 23 May 1953); C111 – Discrimination (Employment and Occupation) Convention, 1958 (No. 111), 25 June 1958, Geneva, 42nd ILO Session (entered into force 15 June 1960)

17 See Australian Municipal, Administrative, Clerical and Services Union and others Australian Business Industrial, February 1, 2012 (AM2011/50) [2012] FWAFB 1000 and Australian

3. Comparison with *Pay Equity Act* Obligations

32. To provide context for considering the interpretation of the Code's provisions in this application, it is useful to consider the obligation to provide employment free of systemic gender discrimination in compensation under the *Pay Equity Act,* and in particular, the obligations of the MOHTLC under that *Act* for its own employees and the obligations of the Community Health Centres it funds under that *Act.*

33. The MOHLTC recognizes the relevance of considering analogies to the approach in the *Pay Equity Act* in its Appendix para. 32 where it cites to the *PEA* definition of a male job class for the definition of a male job for *Code* comparison purposes.

34. The Applicant agrees that the Tribunal, where appropriate can consider the applicability of provisions of the *Pay Equity Act,* pay equity practices established to comply with that *Act,* and Pay Equity Hearings Tribunal jurisprudence.

35. The *Pay Equity Act,* in both its legislative intent and effect, is human rights legislation designed to provide a proactive remedy for the elimination of systemic gender discrimination in the compensation of female job classes in Ontario.

36. Under the *Pay Equity Act,* employers are pro-actively responsible for ensuring that they establish and maintain compensation practices which provide for pay equity. The *Act* requires employers to first determine “whether pay equity exists” for the female job classes in their establishment through comparing the skill, effort, responsibility and working conditions (“SERW”) of their work and pay to the SERW and pay of male job classes or their proxy equivalent using a gender neutral comparison system

37. Those obligations started as of January 1, 1988, the effective date of the *Pay Equity Act.* For the Ontario Government, the effect of this legislation meant that it was required to post a pay equity plan as of January 1, 1990 and make any necessary pay equity adjustments to establish pay equity. The obligation to maintain pay equity requires that all compensation practices since January 1, 1998 must continue to provide for pay equity.

38. The MOHLTC has pro-active obligations to redress systemic gender discrimination in compensation and these obligations require that it monitor compensation and retain sufficient records to do so. See Pay Equity Commission’s *2012 Guide to the Pay Equity Act.*

39. Under the *Pay Equity Act*, the MOHLTC and other employers are not able to argue that:

Municipal, Administrative, Clerical and Services Union and others, [2011] FWAFB 2700 May 16, 2011 (J31).

(a) they don't have to do anything until someone complains;

(b) there is a time limit for complaints of non-compliance;

(c) they are prejudiced in finding documents or witnesses and/or there is any inability to pay accumulated pay equity adjustments; or

(d) they do not have enough money to pay.

40. See decision of the Pay Equity Hearings Tribunal dated October 13, 2000 in *SEIU v. Kensington Village*[18] which states that inability to pay for adjustments is not a defence. As well, the Pay Equity Commission's *2012 Guide to the Pay Equity Act* states at p. 94, in response to the question "What is the timeframe for making a complaint?" that: "There are no time limits. A complaint can be made for any period during which the *Act* has been in effect."[19] The *Act* has been in effect since January 1, 1988.

4. Independent Contractors for other purposes can be in "Employment Relationship" under the *Code*

41. It is clearly established by the Human Rights Tribunal of Ontario that the term "with respect to employment" encompasses a broad range of relationships relating to employment. Protection is not limited to "employment" relationships in the traditional sense, so long as there is some nexus or link in the chain of discrimination between the respondent and the complainant.[20]The *Code*'s protections extend to preventing unequal treatment on the basis of sex to independent contractors and subcontractors. This is particularly so where, as is the case with the midwives, the person is dependent on the respondent and must work within MOHLTC fiscal constraints in order to provide midwifery services. An entity responsible for a person being treated unequally will therefore be held liable under the Code even if the entity is not the person's direct employer.[21]

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18 *Kensington Village,* [2000] OPED No. 6 (J32).

19 See *Pay Equity Commission 2012 Guide to the Pay Equity Act* p. 94.

20 *Toronto (Metropolitan) Commissioners of Police v. Ontario Human Rights Commission*, [1979] O.J. No. 4459 (J33) For example, *Davey v. Ontario (Health and Long-Term Care)* 2013, HRTO 419 (J34); P*ayne v. Otsuka Pharmaceuticals Co Ltd.* (2001), 41 C.H.R.R. D/52 (J35); *Garofalo v. Cavalier Hair Stylists Shop Inc.*, 2013 HRTO 170 (J36); and *Dopelhamer v. Workplace Safety and Insurance Board*, 2010 HRTO 765 (J37).

21 *Davey v. Ontario (Health and Long-Term Care),* 2013 HRTO 419 (J34), *Garofalo v. Cavalier Hair Stylists Shop Inc.,* 2013 HRTO 170 (J36), and *Srouji v. Direct IME*, 2012 HRTO 449, *Dopelhamer v. Workplace Safety and Insurance Board*, 2010 HRTO 765 (J37), *Halliday v. Van Toen Innovations Incorporated*, 2013 HRTO 583 (J38) and *Shinozaki v. Hotlomi Spa*, 2013 HRTO 1027 (J39).

42. Justice Abella in *McCormick v. Fasken Martineau Dumoulin LLP,*[22] addressed both the context of "employment" as a specific protected context and its application to independent contractors:

[19] The Code achieves those purposes by prohibiting discrimination in specific contexts. One of those contexts is "employment".

[22] The jurisprudence confirms that there should be an expansive approach to the definition of "employment" under the Code. Independent contractors, for example, have been found to be employees for purposes of human rights legislation, even though they would not be considered employees in other legal contexts. …[23]

D. Section 3 - Right to Contract on Equal Terms Without Discrimination Based on Sex

43. Section 3 of the Code provides that:

Every person having legal capacity has a right to contract on equal terms without discrimination because of … sex …

44. The unequal treatment of an independent contractor is considered to be a violation of the right to contract on equal terms. Contractual terms which result in discrimination will violate section 3 of the *Code*. *Davey v. Ontario (Health and Long-Term Care).*[24]

45. The Tribunal in the Interim Decision rejected the MOHLTC argument that the case was only about "unfair contracts" which were expired:

[27] Also, as noted earlier, the applicant seeks relief extending beyond remuneration for the alleged inequitable compensation structure and rates. It seeks a declaration of a Code violation, damages for injury to dignity and self-respect, as well as an order for future compliance, to ensure that the alleged discriminatory policies and practices, inequitable compensation, and injury does not reoccur. These remedies are significant aspects of the Application, and are not properly recognized by characterizing the claim as simply a complaint about compensation for a series of unfair contracts.

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22 *McCormick v. Fasken Martineau Dumoulin LLP*, [2014] 2 SCR 108 (J40).

23 *Canadian Pacific Ltd. v. Canada (Human Rights Commission), [1991] 1 F.C. 571 (C.A.)* (J41)*; Pannu v. Prestige Cab Ltd. (1986), 73 A.R. 166 (C.A.)* (J42)*; Yu v. Shell Canada Ltd. (2004), 49 C.H.R.R. D/56 (B.C.H.R.T.I* (J43). *See also Canada (Attorney General) v. Rosin, [1991] 1 F.C. 391 (C.A.)* (J44)*; Mans v. British Columbia Council of Licensed Practical Nurses (1990), 14 C.H.R.R. D/221 (B.C.C.H.R.)* (J45).

24 *Davey v. Ontario (Health and Long-Term Care)*, 2013 HRTO 419 (J34).

[28] In addition, viewing the claim in the way advanced by the respondent ignores the systemic dimension of the Application. The claim of systemic, gender-based discrimination is central to the Application, and therefore to a complete and proper analysis of its merits.

46. The Tribunal's Interim Decision emphasized the need to employ a broad and comprehensive lens when viewing the actions of the MOHLTC:

[37] Alleged incidents, along with particulars of ***historical practices, policies and attitudes, must be viewed comprehensively and in aggregate. It is this interwoven amalgam of conduct, actions, inaction, policies, practices, systems and attitudes which is alleged to result in differential treatment and discriminatory impact.*** *The connections between incidents may not always be obvious and may not be purely linear or continuous. But together, the interconnected web is what constitutes the series of incidents. (Emphasis added)*

47. The Tribunal's Interim Decision also held that systemic gender discrimination in compensation is a recognized phenomenon at the time of the *Code* reforms:

[52) The Code does not define the word "series." In my view, there is no reason to place a meaning on the word that would require, in all cases, regardless of context, a linear, continuous connection between all allegations. There is no basis for presuming the Legislature intended such an approach when it enacted section 34(1)(b). Quite the opposite; ***the concept of a "series of incidents" as comprising the whole of a claim is entirely consistent with the Legislature recognizing the unique nature of systemic discrimination*** *(as well as other types of human rights claims),* ***and that it intended that such claims could be brought and adjudicated in their full and proper context.***

[53] ***At the time the amendments were introduced the concept of systemic discrimination was well-established and understood.*** *Also, the Pay Equity Act was passed in 1987 to redress systemic issues of gender discrimination in compensation of employees in female job classes. In this light****, it seems clear that the words "series of incidents" in section 34(1)(b) are capable of encompassing applications such as the one before me (and arguably specifically intended to do so****). There may be a series of incidents, events, practices, that extend over a long period of time, which together form the claim of systemic discrimination. And that claim can be advanced, and will be considered timely, so long as it is brought within one year of the latest incident. (Emphasis added)*

48. In the context of systemic discrimination, it is the obligation holders under the *Code* who are responsible for monitoring their institutional structures, policies and practices and their impacts on protected groups. Since the cumulative effect of such “incidents” is what causes systemic discrimination, obligation holders must be held accountable and this is what the Interim Decision ruled.

E. Section 11(1) Constructive or Indirect Discrimination

49. Constructive or indirect discrimination is described in s. 11(1) of the Code which states:

> *11.(1)* ***A right of a person under Part I is infringed where a requirement, qualification or factor exists that is not discrimination on a prohibited ground but that results in the exclusion, restriction or preference of a group of persons who are identified by a prohibited ground of discrimination*** *and of whom the person is a member, except where,*
>
> *(a) the requirement, qualification or factor is reasonable and bona fide in the circumstances; or*
>
> *(b) it is declared in this Act, other than in section 17, that to discriminate because of such ground is not an infringement of a right. (Emphasis added)*

50. Actions which are not discrimination on their face but which adversely impact on women will constitute an infringement of Part 1 of the *Code*.[25]

51. In *Hogan v Ontario (Health and Long-Term Care)*[26], 2006 HRTO 32 (CanLII), the Tribunal noted as follows (para. 97):

> *"Section 11 is unique to Ontario.* ***What the Legislature states in section 11 is this: if one introduces a rule that is neutral on its face, as long as it has an adverse impact on an individual or group who are identified by a prohibited ground and of whom the individual or group is a member, there is an infringement of the corresponding right: constructive discrimination if you will.***
>
> *Thus, to establish a prima facie case, the complainant need only show that he or she falls within a prohibited ground, and sustained adverse impact by the requirement. If the complainant does so, the burden shifts to the respondent to establish, on the balance, that the rule is reasonable and bona fide in the circumstances or that it is declared in the Code, except section 17, that such acts are not deemed to be discriminatory." (Emphasis added)*

52. The focus remains on whether the applicant is able to provide a sufficient linkage between her association with a protected ground and the adverse treatment in question.

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25 Re: *Ontario Human Rights Commission and Simpson Sears Ltd. (1985) 2 S.C.R. 536* (J46)*; British Columbia (Public Service Employee Relations Commission) v. B. C. Government and Service Employees Union (BCGEU* [1999] 3 S.C.R.3 and *Andrews v. Law Society of British Columbia,* (1989) 1 S.C.R 143 (J47).

26 *Hogan v Ontario (Health and Long-Term Care)*, 2006 HRTO 32 (CanLII), at para. 97 (J49).

F. Section 9 – Infringing Right Directly or Indirectly

53. Section 9 of the *Code* provides that:

> *No person shall infringe or do, directly or indirectly, anything that infringes a right under this Part.*

54. A party will be found to infringe any provision of the *Code* whether their action is taken directly or indirectly: *Forrester v. Peel (Regional Municipality) Police Services Board*[27] and *D. M. v. Ontario (Ministry of Health and Long Term Care.*[28]

G. Section 12 - Prohibition against Associational Discrimination

55. Section 12 of the Code prohibits discrimination because of association and provides that:

> *A right under Part I is infringed where the discrimination is because of relationship, association or dealings with a person or persons identified by a prohibited ground of discrimination.*

56. Discrimination because of association with women who are persons identified by a prohibited ground of discrimination constitutes discrimination within the meaning of s.12.

57. Where an entity is so imbued with the identity or character of its membership, or so clearly representative of a group that is identified by a prohibited ground under the Code, that they cannot be separated from them, the entity itself takes on the protected characteristic.[29]

H. The Obligation to be Pro-Active and Prevent Discrimination

58. It is well-established in human rights jurisprudence that quasi-constitutional legislation such as the *Human Rights Code* is intended to *transform* social relations and institutions to secure *substantive equality* in practice. As stated by the Supreme Court of Canada, the "heart of the equality question" under human rights statutes is "the goal of transformation" which requires "an examination of the way institutions and relations must be changed in order to make them

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27 *Forrester v. Peel (Regional Municipality) Police Services Board*, 2006 HRTO 13 (J50).

28 *D. M. v. Ontario (Ministry of Health and Long Term Care)*, 2013 HRTO 1034 (J51).

29 *Brillinger v. Brockie [1999] O.H.R.B.I.D. No.12* (J52).

available, accessible, meaningful and rewarding for the many diverse groups of which our society is composed."[30]

59. The *Code* seeks to secure substantive equality by:

(1) enshrining ***positive entitlements*** **to equal treatment** without discrimination in the social areas of services, goods and facilities; occupancy of accommodation; contracts; employment; and vocational associations;[31] and

(2) imposing ***proactive*** **legal obligations** on respondent stakeholders in these same designated social areas – service providers, landlords, employers, contracting parties and vocational associations – to ensure that their institutions and relations provide for substantive equality in practice.[32]

60. The proactive obligations that attach under the *Code* mean that respondents have a continuing legal obligation to *proactively* secure conditions of substantive equality even in the absence of a formal complaint under the *Code*.[33] As reviewed below, this proactive obligation extends to the actual *design* and *implementation* of programs, policies, standards, and even government funding mechanisms, to ensure they promote substantive equality and prevent discriminatory effects.[34]

61. In the employment context, the Supreme Court of Canada in *Meiorin*, [1999] 3 SCR 3 emphasized the proactive obligation on employers to design upfront workplace standards that are non-discriminatory (para 68):

Employers designing workplace standards owe an obligation to be aware of both the differences between individuals, and differences that characterize groups of individuals. They must build conceptions of equality into workplace standards. By enacting human rights statutes and providing that they are applicable to the workplace, the legislatures have determined that the standards governing the performance of work should be designed to reflect all members of society, in so far as this is reasonably possible. *Courts and tribunals must bear this in mind when confronted with a claim of*

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30 *British Columbia (Public Service Employee Relations Commission v. BCGSEU*, [1999] 3 SCR 3 ("*Meiorin"*) at para. 41; *Action Travail des Femmes*, [1987] 1 SCR 1114 at 1139, 1143-1145 (J6).

31 *Human Rights Code*, ss. 1-7.

32 *Meiorin,* [1999] 3 SCR 3 para. 68; *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 SCR 868, para. 19; *Ross v. New Brunswick School District No. 15,* [1996] 1 SCR 825, para. 54. See also *Eldridge v. B.C. (AG)*, [1997] 3 SCR 624 para. 78 and 79 (and the human rights cases cited therein) (J54).

33 *Meiorin,* [1999] 3 SCR 3 para. 68; *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 SCR 868, para. 19; *Ross v. New Brunswick School District No. 15,* [1996] 1 SCR 825, para. 54.

34 For funding mechanisms, see *Caring Society Canada*, 2016 CHRT 2 (J56).

employment-related discrimination. To the extent that a standard unnecessarily fails to reflect the differences among individuals, it runs afoul of the prohibitions contained in the various human rights statutes and must be replaced. The standard itself is required to provide for individual accommodation, if reasonably possible. A standard that allows for such accommodation may be only slightly different from the existing standard but it is a different standard nonetheless. (Emphasis added; underlining in original)

62. Similarly, the Court in *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 SCR 868 ("*Grismer*") stated the following (para. 19):

*"**Employers and others governed by human rights legislation are now required in all cases to accommodate the characteristics of affected groups within their standards, rather than maintaining discriminatory standards supplemented by accommodation for those who cannot meet them**. **Incorporating accommodation into the standard itself ensures that each person is assessed according to her or his own personal abilities, instead of being judged against presumed group characteristics**. Such characteristics are frequently based on bias and historical prejudice and cannot form the basis of reasonably necessary standards. (Emphasis added; underlining in original)*

63. The proactive obligation to prevent discrimination includes taking positive steps to remove systemic barriers to the full participation of a *Code*-protected group, including discriminatory barriers in practices, policies, and funding decisions which are seemingly neutral on their face.

64. As stated by the Supreme Court in *Moore v. British Columbia (Education)*, [2012] 3 SCR 360, a case regarding the discriminatory decision of the British Columbia government to cut funding to a special needs education program:

*[60] The inquiry is into whether there is discrimination, period. **The question in every case is the same: does the practice result in the claimant suffering arbitrary — or unjustified — barriers on the basis of his or her membership in a protected group**. Where it does, discrimination will be established.*

*[61] It is true that before Meiorin and British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights), [1999] 3 S.C.R. 868 ("Grismer"), different remedial approaches had been applied for direct versus adverse impact discrimination. But in Meiorin, McLachlin J. observed that **since few rules are framed in directly discriminatory terms, the human rights issue will generally be whether the claimant has suffered adverse effects**. Insightfully, she commented that **upholding a remedial distinction between direct and adverse effect discrimination "may, in practice, serve to legitimize systemic discrimination"** (para. 39). **The Meiorin/Grismer approach imposed a unified remedial theory with two aspects: the removal***

of arbitrary barriers to participation by a group, and the requirement to take positive steps to remedy the adverse impact of neutral practices. *(Emphasis added)*[35]

65. Recently, the Supreme Court in *McCormick v. Fasken Martineau Dumoulin LLP*, [2014] 2 SCR 108 again reiterated the importance of human rights legislation and the need to take **preventative action** to protect vulnerable groups from discrimination:

[17] The Code is quasi-constitutional legislation that attracts a generous interpretation to permit the achievement of its broad public purposes: Winnipeg School Division No. 1 v. Craton, [1985] 2 S.C.R. 150; Ontario Human Rights Commission v. Simpsons-Sears Ltd., [1985] 2 S.C.R. 536, at p. 547, per McIntyre J.; Canadian National Railway Co. v. Canada (Canadian Human Rights Commission), [1987] 1 S.C.R. 1114, at pp. 1133-36; Council of Canadians with Disabilities v. VIA Rail Canada Inc., [2007] 1 S.C.R. 650.

[18] Those purposes include the ***prevention*** ***of arbitrary disadvantage or exclusion based on enumerated grounds, so that individuals deemed to be vulnerable by virtue of a group characteristic can be protected from discrimination.*** *(emphasis added)*[36]

66. Similarly, Chief Justice Dickson in *CN v. Canada (Canadian Human Rights Commission), (Action des Travaille des Femme),* [1987] 1 SCR 1114, emphasized the importance of employers take positive steps to create a workplace climate conducive to preventing discriminatory practices and attitudes:

To combat systemic discrimination, it is essential to create a climate in which both negative practices and negative attitudes can be challenged and discouraged.[37]

67. The Tribunal cited a passage from the *Action des Travaille des Femme* decision in its Interim Decision on the obligation under human rights legislation to **prevent** discrimination and not just to react to discrimination once proven to have occurred:

"… I recognize that in the construction of such legislation the words of the Act must be given their plain meaning, but it is equally important that the rights enunciated be given their full recognition and effect. We should not search for ways and means to minimize those rights and to enfeeble their proper impact. …The purposes of the Act would appear to be patently obvious, in light of the

35 *Moore v British Columbia (Education)*, [2012] 3 SCR 360

36 *McCormick v. Fasken Martineau Dumoulin LLP*, [2014] 2 SCR 108

37 *CN v. Canada (Canadian Human Rights Commission), (Action des Travaille des Femme),* [1987] 1 SCR 1114

powerful language of s. 2. ***In order to promote the goal of equal opportunity for each individual to achieve "the life that he or she is able and wishes to have", the Act seeks to prevent all "discriminatory practices" based, inter alia, on sex.*** *(at pp. 1133-34, (emphasis added)*

See also Ontario Human Rights Commission v. Simpsons-Sears Ltd., 1985 CanLII 18 (SCC), [1985] 2 S.C.R. 536 ("O'Malley"), at pp.546-47.

68. Obligation holders under human rights law thus have a pro-active obligation to act to prevent and eradicate discrimination without waiting for complaints. They must ensure that programs, policies, and standards are designed for equality from the outset.

69. A recent example of a government failing to proactively prevent discrimination in the provision of a service, by failing to incorporate a substantive equality analysis in the design of the funding of its service from the outset, is found in the Canadian Human Rights Tribunal decision, *First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada ("Caring Society Canada"*).[38] In that case, the Canadian Human Rights Tribunal (CHRT) found that the federal government's method of funding child welfare services for First Nations children on-reserve and in the Yukon discriminated on the basis of race and/or national/ethnic origin by providing inequitable and insufficient funding for child welfare services contrary to s. 5 of the *Canadian Human Rights Act.*

70. Significantly, the CHRT found that the Ministry of Aboriginal Affairs and Northern Development Canada ("AANDC") had failed to meet its positive obligation to ensure that its funding of child welfare services did not perpetuate the historical disadvantages endured by Indigenous peoples. As stated by the CHRT:[39]

[403] In providing the benefit of the [First Nations Child and Family Services ("FNCFS")] Program and the other related provincial/territorial agreements, AANDC ***is obliged to ensure that its involvement in the provision of child and family services does not perpetuate the historical disadvantages endured by Aboriginal peoples.*** *If AANDC's conduct widens the gap between First Nations and the rest of Canadian society rather than narrowing it, then it is discriminatory (see A at para. 332; and, Eldridge at para. 73).*

[404] ***The evidence in this case not only indicates various adverse effects on First Nations children and families by the application of AANDC's FNCFS Program, corresponding funding formulas and other related provincial/territorial agreements, but also that these adverse effects***

38 *Caring Society Canada*, 2016 CHRT 2 (J56).

39 *Caring Society Canada*, 2016 CHRT 2, para. 403-404 (J56).

perpetuate historical disadvantages suffered by Aboriginal peoples*, mainly as a result of the Residential Schools system. (Emphasis added)*

71. Notably, the CHRT found that the child welfare services program and its corresponding funding formulas were based on flawed designs and assumptions which, among other things, "ignore[d] the real child welfare situation in many First Nations' communities on reserve";[40] "create[d] incentives to remove children from their homes and communities";[41] and "fail[ed] to consider the actual service needs of First Nations children and families, which are often higher than those off reserve."[42] These flawed and discriminatory funding formulas resulted in First Nations children receiving 22% to 37% less funding than children in provincial systems.

72. The CHRT further found that the federal government's funding formulas had "not been significantly updated since the mid-1990's resulting in underfunding" of First Nations child welfare services,[43] and had "not been consistently updated in an effort to keep it current with child welfare legislation and practices of the applicable provinces".[44] The CHRT found that the federal government "was aware of these shortcomings" for many years, did nothing to correct them, and in fact had perpetuated them.[45] The Tribunal ordered the federal government to immediately cease its discriminatory practices, reform its child welfare policies and compensate the First Nations families affected by the discriminatory practices since 2006.

73. What is clear from the CHRT's analysis in *Caring Society Canada* is that obligation holders under human rights law have a proactive obligation to act to prevent and eradicate discrimination, and that this requires that they ensure that programs, policies, and funding formulas are designed from the outset based on a substantive equality analysis and are regularly reviewed and updated.

74. Thus, human rights jurisprudence has long focused on the proactive obligations on those responsible for providing equality to protected groups, like the Government here, to protect women, the racialized, those with disabilities and all other *Code* covered groups from having to experience discrimination.

75. Such jurisprudence is directly at odds with the Government position here that it can wait to see after a long hearing whether the midwives have proven that Ministry conduct constitutes sex discrimination before acting.

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40 *Caring Society Canada*, 2016 CHRT 2, para. 384 (J56).

41 *Caring Society Canada*, 2016 CHRT 2, para. 384 (J56).

42 *Caring Society Canada*, 2016 CHRT 2, para. 388 (J56).

43 *Caring Society Canada*, 2016 CHRT 2, para. 385 (J56).

44 *Caring Society Canada*, 2016 CHRT 2, para. 387 (J56).

45 *Caring Society Canada*, 2016 CHRT 2, para. 386 (J56).

76. The proactive obligation on government to achieve substantive equality is also reflected in the Supreme Court's jurisprudence under s. 15 of the *Charter*. As stated by the Court in *Eaton v. Brant County Board of Education*, [1997] 1 SCR 241, para. 66: "… the purpose of s. 15(1) of the *Charter* is not only to **prevent discrimination** by the attribution of stereotypical characteristics to individuals, but also to **ameliorate the position of groups within Canadian society who have suffered disadvantage** by exclusion from mainstream society as has been the case with disabled persons."[46]

77. The Court in *R. v. Kapp*, [2008] 2 SCR 483[47] similarly stated:

> *[25] The central purpose of combatting discrimination, as discussed, underlies both s. 15(1) and s. 15(2).* ***Under s. 15(1), the focus is on preventing governments from making distinctions based on the enumerated or analogous grounds that: have the effect of perpetuating group disadvantage and prejudice; or impose disadvantage on the basis of stereotyping. Under s. 15(2), the focus is on enabling governments to pro-actively combat existing discrimination through affirmative measures.*** *(Emphasis added)*

78. While the Supreme Court's jurisprudence under s. 15 of the *Charter* has consistently left open the question of "whether the *Charter* might impose positive obligations on the legislatures or Parliament such that a *failure to legislate* could be challenged under the *Charter*", the Court has made clear that where a government has chosen to legislate or act, it must do so in full compliance with the s. 15 *Charter* right to substantive equality.[48] Indeed, in *Eldridge v. B.C. (AG)*, [1997] 3 SCR 624, the Court responded to the argument that "governments should be entitled to provide benefits to the general population without ensuring that disadvantaged members of society have the resources to take full advantage of those benefits" as follows:

> *"[73] In my view, this position bespeaks a thin and impoverished vision of s. 15(1). It is belied, more importantly, by the thrust of this Court's equality jurisprudence.* ***It has been suggested that s. 15(1) of the Charter does not oblige the state to take positive actions, such as provide services to ameliorate the symptoms of systemic or general inequality … . Whether or not this is true in all cases, and I do not purport to decide the matter here, the question raised in the present case if of a wholly different order. This Court has repeatedly held that once the state does provide a benefit, it is obliged to do so in a non-discriminatory manner…. In many circumstances, it will require the government to take positive action, for example by***

46 *Eaton v. Brant County Board of Education*, [1997] 1 SCR 241, para. 66

47 *R. v. Kapp*, [2008] 2 SCR 483

48 *Vriend v. Alberta*, [1998] 1 SCR 493, para. 64 (and cases cited therein).

extending the scope of a benefit to a previously excluded class of persons."[49]

79. Notably, the Court went on to note that duty to take positive steps to prevent discrimination was well-established in human rights code jurisprudence:[50]

> *[78]* ***The principle that discrimination can accrue from a failure to take positive steps to ensure that disadvantaged groups benefit equally from services offered to the general public is widely accepted in the human rights field.*** *In Re Saskatchewan Human Rights Commission and Canadian Odeon Theatres Ltd. (1985), 18 D.L.R. (4th) 93 (Sask. C.A.), leave to appeal refused, [1985] 1 S.C.R. vi, the court found that the failure of a theatre to provide a disabled person a choice of place from which to view a film comparable to that offered to the general public was discriminatory. Similarly, in Howard v. University of British Columbia (1993), 18 C.H.R.R. D/353, it was held that the university was obligated to provide a deaf student with a sign language interpreter for his classes. "[W]ithout interpreters", the Human Rights Council held, at p. D/358, "the complainant did not have meaningful access to the service". And in Centre de la communauté sourde du Montréal métropolitain inc. v. Régie du logement, [1996] R.J.Q. 1776, the Quebec Tribunal des droits de la personne determined that a rent review tribunal must accommodate a deaf litigant by providing sign language interpretation. Moreover, the principle underlying all of these cases was affirmed in Haig, supra, where a majority of this Court wrote, at p. 1041, that "**a government may be required to take positive steps to ensure the equality of people or groups who come within the scope of s. 15**".*
>
> *[79]* ***It is also a cornerstone of human rights jurisprudence, of course, that the duty to take positive action to ensure that members of disadvantaged groups benefit equally from services offered to the general public is subject to the principle of reasonable accommodation.*** *The obligation to make reasonable accommodation for those adversely affected by a facially neutral policy or rule extends only to the point of "undue hardship"; see Simpsons -Sears, supra, and Central Alberta Dairy Pool, supra. In my view, in s. 15(1) cases this principle is best addressed as a component of the s. 1analysis. Reasonable accommodation, in this context, is generally equivalent to the concept of "reasonable limits". It should not be employed to restrict the ambit of s. 15(1). (Emphasis added)*

80. The AOM notes that in this case the question is not whether there was a positive obligation on the government to legislate in the area of human rights and pay equity. The government already has legislated and its well-established that the legislation, in this case the *Human Rights Code*, imposes proactive legal

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49 *Eldridge v. B.C. (AG)*, [1997] 3 SCR 624, para. 72 (J54).

50 *Eldridge v. B.C. (AG)*, [1997] 3 SCR 624, para. 78-79 (J54).

obligations to prevent discrimination against protected vulnerable groups. The question, rather, is whether the MOHLTC has fulfilled its human rights obligations as prescribed under the *Code*, including the proactive obligation to ensure substantive equality in the compensation and funding of midwives.

81. Finally, the proactive nature of human rights obligations under the *Code* is reflected in the Ontario Human Rights Commission's (OHRC) policies and guidelines, which are often cited by the Tribunal in its decision-making. Indeed, in its Interim Decision (para. 29), this Tribunal cited to the OHRC's Policy and Guidelines on Racism and Discrimination: www.ohrc.on.ca The Guidelines refer to the proactive obligations of obligation holders to identify and eradicate systemic discrimination. In the context of racial discrimination, which is equally applicable to gender discrimination, the OHRC's *Policy and Guidelines on Racism and Racial Discrimination*[51] states:

> *Racial discrimination can result from individual behaviour as well as because of* ***the unintended and often unconscious consequences of a discriminatory system.*** *This is known as systemic discrimination.*
>
> *Systemic discrimination can be described as patterns of behaviour, policies or practices that are part of the structures of an organization, and which create or perpetuate disadvantage for racialized persons.*
>
> *The Commission is very concerned about systemic discrimination. Assessing and tackling systemic discrimination can be complex.* ***Nevertheless, the Commission expects organizations to be aware that their "normal way of doing things" may be having a negative impact on racialized persons.*** *(emphasis added)*

82. This Tribunal in *Grange v. Toronto (City)*, 2014 HRTO 633, also relied on the Commission's above-noted definition of systemic discrimination.

83. The Commission in its policy and guidelines sets out three considerations that will help both it and organizations identify and address systemic discrimination:

    (1) numerical data;

    (2) policies, practices and decision-making processes; and

    (3) organization culture.

84. The Commission states:

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51 Ontario Human Rights Commission, *Policy and Guidelines on Racism and Racial Discrimination*, 2005

Organizations must ensure that they are not unconsciously engaging in systemic discrimination. ***This takes vigilance and a willingness to monitor and review numerical data, policies, practices and decision-making processes and organizational culture. It is not acceptable from a human rights perspective for an organization to choose to remain unaware of systemic discrimination or to fail to act when a problem comes to its attention****.* (emphasis added)[52]

85. The Commission also highlights in its policy and guidelines that it is the responsibility of the obligation holders under the Code to have the *necessary institutional mechanisms*, including record keeping, in place to ensure they are not engaging in discrimination. For example, the Commission in its *Policy on preventing discrimination because of gender identity and gender expression,* states that:

Organizations and institutions have a ***positive obligation*** *to make sure they are not engaging in systemic discrimination.* ***They should prevent barriers by designing policies and practices inclusively up front****. They should also review their systems and organizational culture regularly and remove barriers where they exist.*[53] (emphasis added)

86. Jurisprudence and research has also recognized that systemic discrimination by its nature is not generally plain and obvious to those who suffer from it. Rather it is often hidden and embedded in often seemingly neutral institutional policies, practices and prejudices. In order to combat systemic discrimination, it is essential to examine past patterns of discrimination and to eliminate those patterns in order to prevent the same type of discrimination in the future.[54] The *Alsaigh* HRTO Tribunal decision recognized the need "to be sensitive to the patterned nuances of systemic discrimination." [55]

87. The MOHLTC acknowledged the key role that the *Pay Equity Act,* the *Human Rights Code* and its Guidelines played as its “Internal Human Rights Policies”, in its December 4, 2014 Response to AOM Request for Missing Information from MOHLTC Form 2. The Ministry’s response to section 13 “Internal Human Rights Policies” is as follows:

Section 13 – Internal Human Rights Policies a) Do you have a policy related to the type of discrimination alleged in the Application? b) Do you have a complaint process to deal with discrimination and harassment? If there is a policy

52 Ontario Human Rights Commission, A policy primer: Guide to Developing Human Rights Policies and Procedures. Revised December 2013

53 Ontario Human Rights Commission, A policy primer: Guide to Developing Human Rights Policies and Procedures. Revised December 2013

54 *Action Travail des Femmes v. Canadian National Railway* (1987), 40 D.L.R. (4th) 193 (S.C.C.),

55 *AlSaigh v. University of Ottawa*, 2012 HRTO 2

and complaints process, they are required to be attached to the Response. c) Did the applicant make an internal complaint under the complaints process and if so attach a copy. d) What as the result of the internal complaint and attach a copy of the decision.

Response: The respondent's relevant policies are the Pay Equity Act*, RSO 1990, c. P.7* ***and the Human Rights Code****, ROS 1990, c. H.19. The applicant made an application under the Human Rights Code which is currently proceeding.*

Section 30 of the Human Rights Code authorizes the Ontario Human Rights Commission *["OHRC"]* ***to prepare, approve and publish human rights policies to provide guidance on interpreting provisions of the Code.*** *According to the OHRC's website, the OHRC's policies and guidelines "set standards for how individuals, employers, service providers and policy-makers should act to ensure compliance with the Code. They represent the OHRC's interpretation of the Code at the time of publication. Also, they advance a progressive understanding of the rights set out in the Code."* ***The OHRC has not published any policies or guidelines in relation to pay equity.*** *(Emphasis added)*

88. The Commission's policies and guidelines have persuasive status under the *Code* and should be relied on by the Tribunal and by organizations when determining whether human rights obligations have been met.

89. The AOM notes that the Government of Ontario's recent anti-racism plan, titled **"**A Better Way Forward: Ontario's 3-year Anti Racism Strategic Plan",[56] issued in March 2017, is an example of a proactive approach to preventing discrimination consistent with its obligations under the *Code*. The strategic plan emphasizes that the need to acknowledge that racism exists and its impacts on all families. It notes that "[p]rejudice runs deep through our shared history" and that "prejudices have shaped the policies, practices and procedures of institutions we use every day" and the need to take concrete action to build a more equitable province.[57] The 3-year Anti-Racism Strategic Plan also emphasizes the need for planning based on a substantive equality lens: "Anti racism is about taking proactive steps to fight racial inequity".

"Anti-racism is about taking proactive steps to fight racial inequity. It's different from other approaches that focus on multiculturalism or diversity because it acknowledges that systemic racism exists and actively confronts the unequal power dynamic between groups and the structures that sustain it.

56 Ontario, A Better Way Forward: Ontario's 3-Year Anti-Racism Strategic Plan, 2016

57 Ontario, A Better Way Forward: Ontario's 3-Year Anti-Racism Strategic Plan, 2016, p. 3.

Anti-racism involves consistently assessing structures, policies and programs, and through monitoring outcomes, ensuring they are fair and equitable for everyone."[58]

90. Preventing and eradicating sexism, including sex discrimination in compensation and funding, requires a similar proactive, comprehensive approach with a whole of government approach, systemic focus, removal of barriers, inclusive process, transparent evidence based approach and sustainability, and an impact assessment framework.

I. Duty to Take Reasonable Steps to Address Human Rights Concern

91. In addition to the proactive obligations to prevent discrimination and to design policies, practices and standards with a substantive equality analysis from the outset, human rights legislation also imposes a positive duty on obligation holders such as the MOHLTC to investigate a complaint of discrimination where, as here, a complaint of discrimination has been made.[59]

92. Indeed, there is a proactive duty on the MOHLTC to take reasonable steps to address allegations of discrimination and a failure to do so may itself result in liability under the *Code.*[60] This includes acting promptly, taking a complaint seriously, having a complaint mechanism in place and communicating actions to the person or entity which complained.

93. In the employment context, this duty flows from the employer's general obligation under s. 5(1) of the *Code* to provide a discrimination-free workplace. Specifically, the duty is a "means" by which the employer ensures that it is achieving the Code-mandated "ends" of providing a discrimination-free work environment. The Tribunal has explained the rationale as follows:[61]

"It would make the protection under subsection 5(1) to a discrimination-free work environment a hollow one if an employer could sit idly when a complaint of discrimination was made and not have to investigate it. If that were so, how could it determine if a discriminatory act occurred or a poisoned work environment existed?" *(Emphasis added)*

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58 Ontario, A Better Way Forward: Ontario's 3-Year Anti-Racism Strategic Plan, 2016, p. 11

59 *Laskowska v Marineland of Canada Inc.*, 2005 HRTO 30 at para 51.

60 *Moffatt v. Kinark Child and Family Services*, [1998] O.H.R.B.I.D. No. 19, *Laskowska v. Marineland of Canada Inc.*, 2005 HRTO 30; *Abdallah v. Thames Valley District School Board*, 2008 HRTO 230 (CanLII), 2008 HRTO 230 (CanLII), at para. 87.

61 *Laskowska v Marineland of Canada Inc.*, 2005 HRTO 30 at para 53.

94. The duty to investigate is part of a larger proactive obligation to "take reasonable steps to respond to and address" a complaint of discrimination.[62] The Tribunal in *Laskowska v Marineland of Canada Inc*, 2005 HRTO 30 at para 59 sets out the following criteria to assess the "reasonableness" of the employer's response:

> ***"(1) Awareness of issues of discrimination/harassment, Policy, Complaint Mechanism and Training:*** *Was there an awareness of issues of discrimination and harassment in the workplace at the time of the incident?*[63] *Was there a suitable anti-discrimination/harassment policy? Was there a proper complaint mechanism in place? Was adequate training given to management and employees;*
>
> ***(2) Post-Complaint: Seriousness, Promptness, Taking Care of its Employee, Investigation and Action:*** *Once an internal complaint was made, did the employer treat it seriously? Did it deal with the matter promptly and sensitively? Did it reasonably investigate and act; and*
>
> ***(3) Resolution of the Complaint (including providing the Complainant with a Healthy Work Environment) and Communication:*** *Did the employer provide a reasonable resolution in the circumstances? If the complainant chose to return to work, could the employer provide her/him with a healthy, discrimination-free work environment? Did it communicate its findings and actions to the complainant?" (Emphasis added)*

95. Furthermore, the *Code* imposes a positive obligation to take necessary steps to *accommodate* a *Code* protected ground such as sex. Recent jurisprudence of this Tribunal and the Ontario Court of Appeal confirm that a breach of the procedural duty component of the duty to accommodate is *itself* an affront to the dignity of the rights holder and can attract an award of damages.[64] A failure to take any or insufficient steps can constitute a breach of the procedural duty to accommodate, even where an accommodation would have caused undue hardship.

96. In Ontario, the procedural duty to accommodate and ensure substantive equality was reviewed by this Tribunal in *P.L. v. ADGA Group Consultants Inc.* ("*ADGA*"),[65] a case involving the termination of an employee with bipolar disorder. In *ADGA*, the Tribunal found based on the Supreme Court's decisions

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62 *Falodun v. Andorra Building Maintenance Ltd.*, 2014 HRTO 322 at para 62 ["Falodun"]. See also *Naidu v. Whitby Mental Health Centre*, 2011 HRTO 1279 at para 191 ["Naidu"].

63 Note: this means knowledge about workplace discrimination in the abstract, not in the specific workplace.

64 *Lane v. ADGA Group Consultants Inc.*, 2007 HRTO 34; *Fair v. Hamilton-Wentworth District School Board*, 2016 ONCA 421; *Lee v. Kawartha Pine Ridge District School Board*, 2014 HRTO 1212 (CanLII)

65 *Lane v. ADGA Group Consultants Inc.*, 2007 HRTO 34 (CanLII)("ADGA HRTO").

in *Meiorin* and *Grismer*, that a procedural failure could result in a finding of discrimination:

> *I accept [the approach in Meiorin and Grismer] and hold that* ***the failure to meet the procedural dimensions of the duty to accommodate is a form of discrimination. It denies the affected person the benefit of what the law requires: a recognition of the obligation not to discriminate and to act in such a way as to ensure that discrimination does not take place.*** *That does not mean that an employer is necessarily precluded from adducing ex post facto justifications of a failure to accommodate based on what a proper assessment of the situation at the time would have revealed. However,* ***when the failure to conduct an appropriate assessment has its own adverse consequences, there exists discrimination for which the Complainant has an independent right to a remedy****.*[66] *(Emphasis added)*

97. Upon judicial review, the Divisional Court upheld the Tribunal's conclusion that the duty to accommodate included two separate and actionable components – process and substance.[67] The Divisional Court stated as follows:

> *A failure to give any thought or consideration to the issue of accommodation, including what, if any, steps could be taken constitutes a failure to satisfy the "procedural" duty to accommodate.*[68]

98. *ADGA* has been followed extensively in Ontario, including most recently by the Ontario Court of Appeal.[69] The Tribunal has found that a procedural breach of the human right duty will warrant an award of damages, even in situations where no substantive breach is found to have occurred.[70]

99. In *Lee and Kawartha Pine Ridge*, 2014 HRTO 1212, the Tribunal confirmed that the duty to accommodate contains an independent procedural component, the

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66 ADGA (HRTO), supra, at paras 149 – 50.

67 ADGA Group Consultants Inc. v. Lane, 2008 CanLII 39605 (ON SCDC) at para. 104 ("ADGA ONSC").

68 ADGA Group Consultants Inc. v. Lane, 2008 CanLII 39605, at para. 107.

69 For example, see: Lee v. Kawartha Pine Ridge District School Board, 2014 HRTO 1212 (CanLII); Campbell v. Revera Retirement LP, [2014] O.J. No. 285 9 (Div. Ct.); University of Waterloo, 2013 HRTO 1161 (CanLII); Corrigan v. Corporation of the City of Mississauga, 2015 ONSC 236 (CanLII); Metropolitan Toronto Condominium Corporation No. 946 v. J.V.M., 2008 CanLII 69581 (ON SC) at paras. 89 - 90; Fair v. Hamilton-Wentworth District School Board, 2016 ONCA 421 at para. 51.

70 Campbell v. Revera Retirement LP, [2014] O.J. No. 285 9 (Div. Ct.), see paras 9 – 11 and 22 where a damages award of $5,000 was upheld even though the complainant could not be accommodated in the end; McKee v. Imperial Irrigation, 2010 HRTO 1598 (CanLII) at paras 37 – 38, ($2,000 award); Ouji v. APLUS Institute, 2010 HRTO 1389 (CanLII) at paras. 32 and 52 ($7,500 for injury to dignity, feelings and self-respect in relation to procedural breach).

breach of which can result in remedies.[71] Vice-Chair Hart found that procedural breaches are not merely technical failings on the part of an employer -- they can undermine the dignity and self-worth of employees with disabilities:[72]

*"… **One of the ways that disadvantaged and marginalized groups experience discrimination is by being ignored or disregarded, which results in members of these groups not being seen and being rendered invisible.** In my view, **in the context of a request for Code-related accommodation, ignoring or failing to consider an employee's stated needs is an emanation of this form of discrimination. To ignore, disregard or fail to adequately consider and assess a request for accommodation under the Code** or, more particularly in the context of such a request made by a person with a disability, to ignore, disregard or fail to adequately consider or follow up on medical documentation provided in support of an accommodation request, **inherently has a negative impact on the dignity interests of a person identified by a protected Code characteristic by causing that person to experience discrimination by being ignored, disregarded or rendered invisible**.[73] (Emphasis added.)*

100. Vice-Chair Hart makes clear that a procedural breach may, on its own, form the basis for a finding that an employee has been discriminated against:

*"It is correct to observe that a violation of the "duty to accommodate" is not a violation of the Code. Rather, from a substantive perspective, the correct way to frame the issue is that it is a violation of s. 5 of the Code to discriminate against an employee because of disability if that person's disability-related needs can be accommodated without causing undue hardship to the employer. **Similarly, from a procedural perspective and as expressed by the adjudicator in ADGA and upheld by the Divisional Court, it is a violation of s. 5 of the Code to discriminate against an employee because of disability by failing to take appropriate steps to assess the employee's disability-related needs."**[74] (Emphasis added)*

101. The Ontario Court of Appeal endorsed both *Lee* and *ADGA* in *Fair v. Hamilton-Wentworth District School Board.*[75] In doing so, the Ontario Court of Appeal found that "a failure to take appropriate steps to assess the needs of an employee with a disability will violate section 5 of the *Human Rights Code*".

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71 Lee v. Kawartha Pine Ridge District School Board, 2014 HRTO 1212 (CanLII) at paras 88-97 ("Lee").

72 Lee v. Kawartha Pine Ridge District School Board 2014 HRTO 1212at para 93

73 Lee v. Kawartha Pine Ridge District School Board 2014 HRTO 1212, para. 96.

74 Lee v. Kawartha Pine Ridge District School Board 2014 HRTO 1212, para 95.

75 Fair v. Hamilton-Wentworth District School Board, 2016 ONCA 421 ("Fair") at para. 51. The ONCA dismissed an appeal challenging 2012 HRTO 350 (CanLII), particularly at paras. 27–32 and 40, and 2014 ONSC 2411, particularly at paras. 38 and 39.

102. The analysis in *Lee* is grounded in a belief that the failure to take the necessary procedural steps is not neutral in its effects and can itself cause harm and frustrate the goals of human rights legislation. Vulnerable groups in society that the *Code* seeks to protect have been historically disadvantaged by having their concerns ignored or rendered invisible. Thus, a failure to take the necessary steps to accommodate difference is itself a continuation of this systemic discrimination.

103. The AOM submits that women, like people with disabilities, have an independent procedural right under the *Code* which requires their employer, in the case the MOHLTC, to take the appropriate steps to assess their gender-related needs. In the context of compensation discrimination, this procedural right includes a right to a mechanism which will analyze whether their work is pay equity compliant. This right is independent of whether pay discrimination can be proved. The pay equity human rights comparison process and gender inclusive compensation setting is a human right in and of itself.

J. Duty to Apply Gender-Based Analysis (Lens)

104. A gender based and inclusive lens or analysis (GBA) is not only an appropriate policy process but also a necessary human rights equality tool or mechanism to meet a compensation setters *Code* obligations.

105. As Dr. Armstrong and Dr. Bourgeault testified, the need for the compensation setter to conduct a gender-based analysis of the compensation of midwifery work is a necessary mechanism to identify and redress systemic gender discrimination in compensation of women`s work require a pro-active gender based analysis by the Ministry.

106. **Gender-based analysis is a well-recognized gender equality tool** which has its roots in Canada and international gender equality standards and commitments and is independent of the specific requirements of a particular human rights law.

107. **Canada created the Federal Plan for Gender Equality which is a gender based** analysis public policy tool. It incorporated the understandings and mechanisms necessary to implement Canada`s international gender equality commitments which included the UN Convention on Elimination of Discrimination against Women (CEDAW) and ILO commitments such as Convention 100 Equal Remuneration for Work of Equal Value.[76]

76 "Setting the Stage for the Next Century: The Federal Plan for Gender Equality" (1995), Exhibit 156.

108. Gender based analysis is also well recognized as a method for implementing legal human rights obligations. As stated by the federal Auditor General in her study of the implementation of the Federal Plan for Gender Equality:

The Gender-based analysis can support gender equality obligations

1.13 Implementing gender-based analysis can help the government meet its legal obligations under the Canadian Charter of Rights and Freedoms. The Charter sets a standard for gender equality to which all levels of government must adhere in their legislation and programs. The implementation of GBA can also support the gender-equality principles stated in the Canadian Human Rights Act and in the Constitution Act, 1982, relating to Aboriginal treaty rights.

…..

Responsibility for gender-based analysis within the federal government

1.14 Within the federal government, Status of Women Canada (SWC) leads the process of implementing the 1995 Federal Plan for Gender Equality…..

1.15 Departments and agencies, under the 1995 Plan, are responsible for thoroughly analyzing their proposed policies and programs; conducting GBA; and including consideration of gender impacts in their legislation, policy, and program analyses.

1.16 The central agencies—the Treasury Board of Canada Secretariat (TBS), the Privy Council Office (PCO), and the Department of Finance Canada—play a challenge role of ensuring that federal departments take into account all relevant factors, including gender impacts, in the development of policies, programs, and proposals being submitted for consideration to Treasury Board, Cabinet, and the Minister of Finance.[77]

109. The Federal Government's gender based analysis tool is "GBA+ Gender-Based Analysis Plus" framework prepared by Status of Women Canada, which states:.

WHAT IS GBA+?

Gender-Based Analysis+ (GBA+) is a method for examining the intersection of sex and gender with other identity factors. When applied to government work, GBA+ can aid us in understanding how Canadian women and men experience public policy.

77 "Office of the Auditor General of Canada, 2009 Spring Report of the Auditor General of Canada. (Ottawa, 2009-05-01)" (Exhibit 182, Tab 18)

Government policies, programs and legislation can have significant impacts on people's lives, but without the proper tools, decision-makers and policy analysts are unable to identify and analyze these effects.

***GBA+** provides this critical information by pointing out differences between women and men, as well as among diverse groups of the same gender. **GBA+** ensures that the impacts and potential impacts of policies and programs can be identified and have fair and intended results across the population.*[78]

110. The Canadian Human Rights Commission also uses a similar tool, the Commission's Gender Integration Framework. As stated in that Framework,

The Commission's Gender Integration Framework strengthens and promotes our commitment to gender equality by ensuring that we systematically assess the differential impacts on women and men of our policies, programs and decisions. It also ensures that we consider any adverse impacts produced by other intersecting grounds. We are thereby moving gender analysis into the mainstream of our daily work.

1.2 What is Gender Integration?

Gender integration is the process of promoting gender equality by making the consideration of women's and men's lived experience an integral part of our work. Its aim is to ensure that women and men benefit equally and inequality is not perpetuated.

Gender integration is required at all levels and stages of our work, including decision-making, policy, and program development. It is not meant to replace or exclude other types of analysis. Rather, it aims to ensure that gender factors are an integral part of all processes, not just an afterthought. [79]

K. No Legal Requirement for Comparator Group

111. Recent equality rights jurisprudence has definitely moved away from a requirement of a comparator group. In *Withler v. Canada (AG)*, [2011] 1 SCR 396, the Supreme Court of Canada rejected the requirement for a comparator in in the context of s. 15 of the *Charter*. The Court emphasized that a comparator group approach may substitute a formal equality "treat likes alike" for a substantive equality analysis, that the use of mirror comparator groups may mean that the definition of the comparator group determines the substantive

78 The Federal Government's GBA+ Gender-Based Analysis Plus framework prepared by Status of Women Canada, 2012.

79 Canadian Human Rights Commission Gender Integration Framework (GIF)

quality analysis and outcome, and that finding the "right" comparator group places an unfair burden on claimants (see para. 55-60).[80]

112. The same concern about comparators has also been articulated in human rights code jurisprudence. In *Moore v. British Columbia (Education),* [2012] 3 SCR 360, the Supreme Court of Canada again raised the concern about comparator groups, this time in the context of a discrimination claim under B.C.'s *Human Rights Code*. The Court found that the province and school district had discriminated against a child (Jeffrey Moore) with severe dyslexia when they closed a Diagnostic Centre that was necessary for the child's remediation. In short, the respondents discriminated against the child on the basis of his disability by denying him a service customarily available to the public.[81]

113. Justice Abella addressed the question of whether the "service" for the purpose of the analysis under the Code was special education or education generally. She rejected the more narrow view, which characterized the service as special education, in part because it signaled a descent into formalism:

> *[30]* ***To define "special education" as the service at issue also risks descending into the kind of "separate but equal" approach*** *which was majestically discarded in Brown v. Board of Education of Topeka, 347 U.S. 483 (1954).* ***Comparing Jeffrey only with other special needs students would mean that the District could cut all special needs programs and yet be immune from a claim of discrimination. It is not a question of who else is or is not experiencing similar barriers. This formalism was one of the potential dangers of comparator groups identified in Withler v. Canada (AG)****, [2011] 1 S.C.R. 396*.
>
> *[31]* ***If Jeffrey is compared only to other special needs students, full consideration cannot be given to whether he had genuine access to the education that all students in British Columbia are entitled to. This****, as Rowles J.A. noted,* ***"risks perpetuating the very disadvantage and exclusion from mainstream society the Code is intended to remedy."*** *(Emphasis added)*

114. The Ontario Divisional Court has similarly rejected the need for a comparator group under Ontario's *Human Rights Code* in the disability discrimination context. In *ADGA Group Consultants Inc. v. Lane*, 2008 CanLii 39605, at para 86-97, the Divisional Court rejected the need for a comparator where an employee with a disability was terminated. In that case, the employer had argued that the appropriate comparator was a probationary employee, as the applicant was terminated 10 days after he was hired. The Divisional Court found that "it is not necessary or appropriate to have to establish a comparator group", as "[o]nce it

80 *Withler v. Canada (AG)*, [2011] 1 SCR 396, at paras. 55-60

81 *Moore v. British Columbia (Education),* [2012] 3 SCR 360

is established that the termination of the employee was because of, or in part because of, the disability, the claimant has established a prima facie case of discrimination"[82]. (para. 95 & 96)

115. Finally, the Canadian Human Rights Tribunal in *First Nations Child and Family Caring Society of Canada v. Canada (Minister of Indian Affairs and Northern Development)*, [2016] CHRT 2 rejected the need for a comparator in the context of the human rights complaint against the federal government relating to its inequitable funding of child welfare services to First Nations. The CHRT found that the federal government had discriminated against First Nations children on-reserve and in the Yukon, on the basis of their race and/or national or ethnic origin, by providing inequitable and insufficient funding for child welfare services contrary to s. 5 of the *CHRA.* The Tribunal ordered the respondent Ministry to immediately cease its discriminatory funding methods and practices, to reform its child welfare policies, and to meaningfully implement "Jordan's Principle" (the principle that Indigenous children living on reserve ought to be provided with the same essential services as non-Indigenous children).

116. The CHRT rejected the respondent Ministry's position that comparison was an essential part of the analysis under human rights legislation. The respondent Ministry submitted that the complainants had not advanced any evidence regarding provincial or territorial funding models or child welfare budgets, as compared to the federal government. It claimed that only if provincial/territorial information was established, could the CHRT determine if there was a difference in funding and whether that difference amounted to discrimination. The CHRT unequivocally rejected this approach, noting that the Federal Court of Appeal has confirmed the reduced role of comparator groups in *Canada (Attorney General) v. Canadian Human Rights Commission*, 2013 FCA 75. The CHRT stated:[83]

> …***while the use of comparative evidence may be useful in analyzing a claim of discrimination, it is not determinative of the issue.*** *In fact, as the Supreme Court noted in Withler, at paragraph 59: "finding a mirror comparator group may be impossible, as* ***the essence of an individual's or group's equality claim may be that, in light of their distinct needs and circumstances, no one is like them for the purposes of comparison****."*
>
> ***Rather, the full context of the case and all relevant evidence, including any comparative evidence, must be considered.*** *(Emphasis added)*

82 *ADGA Group Consultants Inc. v. Lane*, 2008 CanLii 39605

83 *Caring Society of Canada v. Canada (Minister of Indian Affairs and Northern Development)*, [2016] CHRT 2, para. 325-326 (J56).

117. While the CHRT did make note of some comparative evidence in finding discrimination in that case, the tribunal also based its finding of discrimination on adverse impacts that were not characterized as comparative. These included:[84]

(a) "The design and application of the Directive 20-1 funding formula, which provides funding based on flawed assumptions about children in care and population thresholds that do not accurately reflect the service needs of many on-reserve communities. …

(b) The current structure and implementation of the EPFA [Enhanced Prevention Focused Approach] funding formula, which perpetuates incentives to remove children from their homes and incorporates the flawed assumptions of Directive 20-1 in determining funding for operations and prevention, and perpetuating the adverse impacts of Directive 20-1 in many on-reserve communities.

(c) The failure to adjust Directive 20-1 funding levels, since 1995; along with funding levels under the EPFA, since its implementation, to account for inflation/cost of living;

(d) The failure to coordinate the [First Nations Child and Family Services] Program and other related provincial/territorial agreements with other federal departments and government programs and services for First Nations on reserve, resulting in service gaps, delays and denials for First Nations children and families.

(e) The narrow definition and inadequate implementation of Jordan's Principle, resulting in service gaps, delays and denials for First Nations children."

L. International Human Rights Standards

118. Finally, the AOM submits that Ontario's human rights obligations ought to be informed by international human rights standards under international legal instruments of which Canada is a signatory.

119. Canada and Ontario's obligations are summarized in the federal 2004 Pay Equity Task Force Report which relied on a commissioned research report, *Canada's International and Domestic Human Rights Obligations to Ensure Pay Equity:*

84 *Caring Society of Canada v. Canada (Minister of Indian Affairs and Northern Development)*, [2016] CHRT 2, para. 458 (J56).

Obligations to Design an Effective, Enforceable and Proactive Federal Pay Equity Law.[85]

120. The Task Force report summarized the obligations, to improve the condition of women, the signatory Canada committed to[86]:

(a) Enact and enforce legislation to guarantee the rights of women and men to equal pay for equal work or work of equal value.

(b) Safeguard and promote respect for basic workers' rights, including equal remuneration for men and women for work of equal value and non-discrimination in employment, fully implementing the conventions of the International Labour Organization in the case of States party to those conventions.

(c) Increase efforts to close the gap between women's and men's pay, take steps to implement the principle of equal remuneration for equal work of equal value by strengthening legislation, including compliance with international labour laws and standards, and encourage job-evaluation schemes with gender-neutral criteria.

(d) In addition to urging governments to take action on the objectives articulated in the *Beijing Declaration* and the *Platform for Action*, the Conference called on employers, trade unions and the institutions of civil society to play a role in the achievement of these objectives, and enumerated detailed steps which organizations and institutions could take to assist in the elimination of discrimination against women. The documents referred to collective bargaining and adjudicative mechanisms as important supports in the removal of discriminatory barriers for women in their employment.

121. The Task Force commissioned research report stated: "International human rights instruments and domestic equality jurisprudence both recognize that achieving equality requires transforming entrenched patterns of remuneration to develop gender inclusive pay practices. In order to strengthen pay equity legislation it is necessary to tailor new legislation to address the systemic nature of the pay inequity problem and to require transformation at a

85 Elizabeth Shilton, Mary Cornish and Fay Faraday, *International and Domestic Human Rights Obligations to Ensure Pay Equity: Obligations to Design an Effective, Enforceable and Proactive Federal Pay Equity Law, Research Report for the 2004 Federal Pay Equity Task Force* .

86 "Equity: A New Approach to a Fundamental Right. Pay Equity Task Force Final Report (2004)" Joint Book of Official Reports (Exhibit 290, Tab 7) at p. 77

systemic level. Only a legislative scheme that is comprehensive and proactive can effectively strike at the systemic nature of wage discrimination.[87]"

122. The Task Force Report acknowledges that historically Canada has responded to its international law obligation of eliminating sex based discrimination in employment by enacting domestic equal pay legislation. The Report also cites that the phrase "equal pay for work of equal value" was taken to represent a broader concept[88]. The Report cites "the language of *gender inclusivity* may enhance the ability to properly value women's work by expressly acknowledging that work relationships and institutions are gendered and that these gendered relationships must be given full remuneration for their value. Pay equity does not erase gender; it only seeks to eradicate discrimination.[89]"

123. The Task Force Report noting the status of human rights legislation as having a "quasi-constitutional status:

(a) Makes it clear that pay equity is fundamental right: "the characterization of pay equity legislation as human right legislation makes clear in essence that equal pay for work of equal value is a fundamental right and that wage anomalies which are attributable to gender are instances of systemic discrimination"

(b) The quasi-constitutional status: "The "quasi-constitutional" status which has been accorded to human rights legislation would further underline the fundamental character of women's right to equality in the workplace".

(c) Society's fundamental value: "if we If we characterize human rights legislation as a statement of a society's fundamental values, it follows that these rights cannot be waived or compromised through other kinds of social or economic transactions."

(d) Protect from bargaining pressures and compromises: "putting pay equity on the bargaining table along with many other bargaining priorities means exposing the rights of groups defined as vulnerable in a process where there may be significant pressure to compromise…However, assigning pay equity to that legislative category in which fundamental human rights have been addressed would make clear that this issue should not be

[87] "Equity: A New Approach to a Fundamental Right. Pay Equity Task Force Final Report (2004)" Joint Book of Official Reports (Exhibit 290, Tab 7) at p. 313

[88] "Equity: A New Approach to a Fundamental Right. Pay Equity Task Force Final Report (2004)" Joint Book of Official Reports (Exhibit 290, Tab 7) at p. 52 to 54.

[89] "Equity: A New Approach to a Fundamental Right. Pay Equity Task Force Final Report (2004)" Joint Book of Official Reports (Exhibit 290, Tab 7) at p.277

subject to the same kinds of pressures which attend other bargaining issues.[90]"

M. Further Proposed Considerations For Identifying, Preventing and Eliminating Systemic Discrimination in Compensation

1. Introduction

124. This is the first time the Human Rights Tribunal is addressing the specific steps which compensation setters who are covered solely by the *Code* should consider and apply to ensure that the compensation and funding they are setting is free of sex bias. While there are specific rules set out in the *Pay Equity Act* for determining whether there is systemic gender compensation discrimination being practiced by employers in Ontario, these rules do not govern under the *Code* although depending on the claim, they may provide helpful guidance.

125. The AOM submits that the considerations adopted by the Tribunal should provide effective but practical guidance to obligation holders under the *Code.* While this case is based on a unique set of facts where the MOHLTC had initially adopted an equity measuring stick which it then failed to keep, such an existing equity tool may not always be present. In addition, there are additional equality promoting steps which need to be undertaken in this proceeding aside from ongoing use of the original equity comparator tool.

126. Unlike the *Pay Equity Act,* the *Human Rights Code* provides protection against employment and compensation discrimination for all grounds covered by the *Code*, including grounds such as disability, race, ethnicity, religion, gender orientation and family status.

127. As a result, the Tribunal in considering this application, may also take into account the need for such considerations to be adaptable to other *Code* grounds which will also have their own unique considerations (eg. race and disability) and include intersectional analyses.

2. Proposed Considerations

128. Accordingly, the AOM submits that compliance with the *Human Rights Code* and right to be free from sex discrimination in employment and compensation should include the following principles to be followed by compensation setters:

[90] "Equity: A New Approach to a Fundamental Right. Pay Equity Task Force Final Report (2004)" Joint Book of Official Reports (Exhibit 290, Tab 7) at p.146-149

(a) Is the compensation/funding being set for a disadvantaged group protected under the *Code;* If so, consider the historical and current contextual considerations which have contributed to that group's disadvantage and which may affect compensation/funding setting;

(b) Consider what systematic mechanisms need to be put in place to ensure that each decision to compensate or fund, is free of *Code* grounds of discrimination;

(c) Ensure that a human rights-inclusive and sensitive lens and impact assessment is embedded in compensation/funding mechanisms;

(d) Consider what measuring sticks can be used to ensure an equitable result for *Code*-protected disadvantaged groups;

(e) Consider how to implement a valuing process which looks at the skill effort responsibility and working conditions. (SERW);

(f) Consider whether a specific comparison process is required;

(g) Consider whether need for male comparator or proxy for male work;

(h) Ensure any valuing comparison process is free of bias related to *Code* grounds;

(i) Embed a process of regular monitoring process is embedded in the compensation setting and funding process;

(j) Embed process to consult/negotiate and interact with the disadvantaged group whose compensation and funding is being set in all the processes above; and

(k) Consider specific principles necessary in context of government compensation setting including gender inclusive budgeting and fiscal policies

PART II: PRIMA FACIE CASE OF DISCRIMINATION ESTABLISHED

A. Introduction

129. The Midwives submit that they have established a *prima facie* case of discrimination under the *Code*, and indeed had done so even before the hearing of evidence started based on the agreed facts and documents submitted in advance of the hearing. As detailed below, this *prima facie* case of discrimination

has only been confirmed and amplified by the many days of evidence heard by the Tribunal during this hearing.

130. Consistent with this Tribunal's Interim Decision, the AOM and the over 800 complainants are entitled to have their complaint of discrimination "understood, considered, analyzed and decided in a complete, sophisticated and comprehensive way". The Tribunal ruled against the MOHLTC's "compartmentalized view of the claim" which focused on the making and expiry of "contracts" over the years since 1994.

131. A comprehensive review and analysis of the evidence and applicable human rights legal principles clearly establish a *prima facie* case of discrimination in this case, as detailed in the submissions that follow.

B. Midwives Are Members of Group Protected By *Code*: Sex

132. The first leg of the *prima facie* discrimination test is met. There is no dispute that midwives are members of protected group under Ontario's *Human Rights Code*; namely, sex.

133. Midwives are women. Approximately 99.9% of Ontario's registered midwives are women or transgender persons.[91] It is the most exclusively female-dominated and sex segregated health care profession in Ontario.[92]

C. Midwives Have Been and Continue to Be Subjected To Adverse Treatment

1. Introduction

134. The second leg of the *prima facie* discrimination test is also met. The AOM submits that the evidence set out in Part I of these submissions establishes substantial, ongoing and harmful adverse impacts experienced by midwives as a result of the MOHLTC funding and compensation systems, policies, practices, actions, and inactions which perpetuated and condoned sex based discrimination with respect to their employment in providing midwifery services for the MOHLTC.

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91 There has only been one male registered as a midwife at any time: one from 1994 to 1997, and another since 2013 (i.e., two males in total).

92 Health Professions Database 2010 Stat Book, Table 2- Regulated Health Professionals by Sex – 2010 and Joint Book of Official Reports (Exhibit 290, Tab 77)

135. The above-noted adverse impacts and unequal treatment by the MOHLTC have continued on an ongoing basis since 1994 to the present, including as particularized in Appendix 5, Overview Summary by Chronological Eras since 1994 and the details of inequitable treatment set out throughout the Part A Evidence Submission.

136. These adverse impacts and resulting unequal treatment include:

(a) Failing to take proactive steps to prevent an inequitable compensation and funding system for Ontario's midwives, an historically disadvantaged and almost exclusively female profession vulnerable to compensation and funding discrimination;

(b) Establishing and maintaining an inequitable compensation and funding system for Ontario's midwives;

(c) Providing unequal and discriminatory compensation and funding to Ontario's midwives which served to undervalue their work and contributions and perpetuate the stereotypes and prejudices they faced and continue to face;

(d) Actively refusing to take any reasonable steps to investigate and remedy systemic gender discrimination in compensation when the issue was squarely raised by midwives over the years; and

(e) Failing to take steps within the Ministry's powers to address the gendered integration barriers midwives faced.

137. Each category of adverse treatment is reviewed in detail below.

2. Failure to Take Proactive Steps To Prevent Inequitable Compensation And Funding of Midwives

138. The Ministry has failed to take proactive steps to prevent an inequitable compensation and funding system for Ontario's midwives, an historically disadvantaged and almost exclusively female profession vulnerable to compensation and funding discrimination.

139. As detailed above, obligation holders such as the Ministry have a *proactive* legal obligation under the *Code* to *prevent* discrimination by ensuring that their practices, policies, standards and funding mechanisms are from the outset designed from a substantive equality analysis.[93]

93 *Meiorin,* [1999] 3 SCR 3 para. 68; *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 SCR 868, para. 19; *Eldridge v. B.C. (AG)*, [1997] 3

140. This proactive legal obligation to prevent discrimination is absolutely critical when dealing with an historically disadvantaged and vulnerable group.

141. In the context of systemic gender discrimination in compensation, predominantly female work and workplaces are one such historical disadvantaged group.

142. They are the most extreme sex segregated profession with 99.9 % of midwives being women, working with women for a service associated with women's health. The AOM submits that the expert evidence of Dr. Armstrong establishes that this highly close connection to women increases and exacerbates the disadvantages women experience because of their "gender" connection.

143. This "gendered trifecta" makes midwives particularly vulnerable to sex based systemic gender discrimination in compensation. The evidence and jurisprudence establish that the sex segregation of jobs, work, workplaces and industry leads to women such as midwives in predominantly female workplaces to suffer from significant disadvantages, prejudices and stereotypes. As a result, they are particularly vulnerable to gender-based discrimination in compensation because of the extreme gendered segregation under which they work.

144. The Part A Evidence section of this submission has extensive evidences of such disadvantages, prejudices and stereotypes.

145. The vulnerability of women like midwives to sex based discrimination in compensation was confirmed by Mr. Justice O'Leary in *SEIU Local 204 v. Attorney General of Ontario,* 1997

> *"[51] Women who work in predominantly female workplaces are particularly vulnerable to sex-based discrimination in compensation because they perform work which is most stereotypically identified as being "women's work" and which, accordingly, is most undervalued in comparison with work performed by men. That portion of the wage gap that is attributable to systemic sex discrimination is widest in predominantly female workplaces, and the women who work in these workplaces are among the most disadvantaged by sex-based discrimination in compensation, both as compared with men and as compared with other working women.*
>
> *[52] The Pay Equity Act contained as one of its original commitments the development of a pay equity remedy which could redress systemic discrimination in compensation for this most disadvantaged group of women. The proxy comparison method was enacted in 1993, after careful study and consideration, to carry out that commitment embodied in the original Act."*

SCR 624 para. 78 and 79 (and the human rights cases cited therein); *Action des Travaille des Femme),* [1987] 1 SCR 1114 (J6). p. 1133-34; *First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada ("Caring Society Canada"*), 2016 CHRT 2 (J56).

146. As established in Part I above of this submission, there is a legal requirement in these particular circumstances facing vulnerable midwives subject to historical and ongoing prejudice, stereotypes and barriers to have a gender inclusive framework system in place to prevent, identify and rectify systemic gender discrimination in compensation.

147. The MOHLTC concedes that no such process was in place at any time. While we believe a rough process was in place at time of regulation, the MOHLTC deny that process was in place even then.

148. Pursuant to the above-noted *Caring Society* decision, the MOHLTC here by their actions and omissions "perpetuated" the "historical disadvantages" of midwives. The funding processes applied to midwives were flawed and discriminatory and failed to take into account the skills, effort, responsibility and working conditions of midwives while having systems in place to provide ever increasing (until very recently) compensation for CHC physicians.

149. Systemic Gender Discrimination in Compensation (SGDC) is unique in its operation and its mechanisms as the Tribunal in its Interim Decision recognized. Here, the MOHLTC has perpetuated and condoned SGDC with its gender blind, unaware and unprincipled compensation setting processes.

150. Systemic discrimination in compensation accumulates over time as the impact and interaction of MOHLTC policies, practices and inactions mount. The failure of the MOHLTC to monitor and act in a gender inclusive fashion on an ongoing basis, most of the time freezing midwifery compensation, rendered invisible and undervalued their important and highly skill work and its contributions to the health care system.

151. Consistent with the *Eldrige* and *Meiorin* decisions referred to above, the MOHLTC had an obligation to build into its compensation processes a "culture of equality" from the outset rather than waiting for women to complain. Athough here, even when midwives complain, there is no effective response. The failure of the MOHLTC to do this speaks of in Mr. Justice Laforest's words in *Eldridge:* an “impoverished view of equality”[94]

152. As the Commission stated above in its Guideline, "It is not acceptable from a human rights perspective for an organization to choose to remain unaware of systemic discrimination or to fail to act when a problem comes to its attention." The evidence clearly shows that the MOHLTC adopted a gender blind approach of ignoring midwives gendered circumstances.

153. To treat women who are systemically exposed to prejudice and undervaluation equally it is necessary to take different measures or accommodation measures.

94 *Eldridge v. B.C. (AG)*, [1997] 3 SCR 624 at p.73 (J54).

154. As well, the Tribunal's interim decision says systemic discrimination includes actions and "inactions". As the Pay Equity Task Force report stated,

"Given the widespread occupational segregation in the labour market and the fact that women's jobs were very different from men's jobs in terms of requirements ,a way to compare men's and women's jobs using a common basis for measurement had to be found".

"To meet the needs of pay equity implementation, the field of knowledge regarding non-discriminatory evaluation criteria developed gradually based on empirical research and case law."

"Today, gender neutral job evaluation is increasingly becoming the preferred approach to achieving pay equity. It is one of the measures recommended in the Beijing Platform." [95]

155. The Federal Task Force citing the Shilton et al research report stated:

It is our opinion that the language of "gender inclusivity" may enhance the ability to properly value women's work by expressly acknowledging that work relationships and institutions are gendered and that these gendered relationships must be given full remuneration for their value" see p 55 Shilton et all cited at p. 277 of Task Force report

156. The Task Force stated:

"In our view, the word inclusive should be used to reflect more accurately the recommended evaluation practices in pay equity which are intended to include gender differences rather than ignore them. It is a matter of transforming standards and criteria to reflect fully the diversity of the workplace. We suggest that the documents and guides created for the new federal pay equity legislation emphasize the inclusiveness of criteria and practice rather than their neutrality. Inclusiveness must be reflected in the evaluation method, tools and process and must be verified at every stage.

157. Here, the evidence is clear that the MOHLTC did nothing to after the initial compensation setting in 1993 to address systemic gender discrimination in compensation. In fact, it has aggressively asserted that it did not engage in any pay equity analysis in 1993 either. This inaction confirms its violation of the *Code.*

95 "2004 Pay Equity Task Force Report" (Exhibit 279, Tab 45) at p. 275.

3. Failure to Use Gender Lens To Ensure Code Compliance without Waiting for Complaints

158. MOHLTC has admitted it did not use a gender lens, did not engage in any gender based analysis and never did pay equity/human rights analysis.[96] The MOHLTC ignored the gendered nature of midwives and midwifery and thereby failed to address their unique and gendered circumstances, including the extent which their work was subjected to stereotyping and prejudice.

159. Ministry compensation and funding setting practices including their budgeting policies and practices therefore did not have any human rights impact assessments embedded in them.

160. Even when midwives complained, they were met with a complete lack of understanding of how to address their equitable claims.

161. It is clear that the MOHLTC did not meet its obligation to create climate and systems where undervaluing and undercompensating midwives are challenged and eliminated and historical disadvantages not perpetuated or condoned. Freezing midwifery compensation while comparator received substantial increases only served to exacerbate the midwifery disadvantages and reinforce the validity of paying them substantially less.

4. Failure to Have in Place and Apply Procedural and Substantive Mechanisms to Prevent and Redress Claims for Gender Equitable Compensation and Funding

162. The MOHLTC did not have any mechanism in place to afford a compensation setting process which identifies and remedies any sex discrimination which may exist. Such a mechanism makes clear that the compensation setter takes seriously the issues and has a process to investigate and realize the human right at issue. As well, the Ministry had no complaint or investigative process in place to consider effectively the AOM's claims for equitable compensation and place them in their gendered and *Code* context.

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96 See the following reports of the Federal Auditor General with respect to the need for a Gender Based Analysis: Report of Auditor General of Canada to the House of Commons, Chapter 1 – Gender-Based Analysis (Spring 2009), (Exhibit 157); “Gender-Based Analysis” of the Spring 2009 Report of the Auditor General of Canada, Presented by the Privy Council Office, the Treasury Board of Canada Secretariat, and Status Of Women Canada (October 16, 2009)", Government Documents – Melissa Farrell, (Exhibit 182, Tab 118); "Reports of the Auditor General of Canada, Report 1: Implementing Gender-Based Analysis (Fall 2015)", Government Documents – Melissa Farrell, (Exhibit 182, Tab 120),

163. While the MOHLTC has the responsibility with its own female job classes to engage in an ongoing procedural and substantive process to monitor compensation and pay under the *Pay Equity Act,* it completely ignored such a process for the predominantly female profession of midwives for whom it is responsible to set compensation.

5. Failure to Create Climate where Gender Stereotypes and Undervaluing are Challenged and Mitigated Against.

164. The MOHLTC failure to take any action exposed midwives to ongoing discriminatory pay and conditions of work. As the pay was frozen for many years and then only increased somewhat, the midwives lower and inequitable pay became the status quo and large scale changes to that pay were greatly resisted by the MOHLTC as being unreasonable claims by the AOM.

165. As there was no human rights impact assessment perspective adopted by the MOHLTC, there was no climate created where the AOM claims and the gender stereotyping and undervaluing could be challenged and addressed.

6. Created and Perpetuated an Inequitable Compensation and Funding System for Midwives

166. From 1994 to the present, the MOHLTC has established, maintained and perpetuated a gendered and inequitable compensation and funding system for Ontario's midwives. This system was reinforced by budgeting and policy making process which failed to take special measures to make visible and value midwifery work in a way appropriately relative to comparable work associated with men, such as the CHC physician.

167. **Acting in "Gender Blind" way is a form of Discrimination:** Saying that you did not take sex into account is a form of choosing to be unaware of the patterns of discrimination and disadvantages which are operating for disadvantaged groups.

7. Provision of Unequal and Discriminatory Compensation and Funding to Midwives

168. The human right to substantive equality in compensation and funding requires that women's work be valued.

8. CHC Physician Comparator Not Necessary to Show Discrimination

169. While there is a clear comparator in this case (the CHC physicians) which the AOM submits is associated with male compensation and valuing, the AOM submits that a comparator is *not* strictly necessary in a substantive equality analysis under the *Code*. Indeed, the evidence demonstrates unequal and discriminatory treatment of midwives irrespective of the MOHLTC's more favourable treatment of CHC physicians and their work and of the gender of those physicians. This unequal treatment was alleged in the AOM's Application Schedule A and in particular, paragraph 62 of that Application referred to below.

170. As noted earlier in Part I of this Part B, recent equality rights jurisprudence has definitely moved away from a requirement of a comparator group. In *Withler v. Canada (AG)*, [2011] 1 SCR 396, the Supreme Court of Canada rejected the requirement for a comparator in in the context of s. 15 of the *Charter*. The Court emphasized that a comparator group approach may substitute a formal equality "treat likes alike" for a substantive equality analysis, that the use of mirror comparator groups may mean that the definition of the comparator group determines the substantive quality analysis and outcome, and that finding the "right" comparator group places an unfair burden on claimants (see para. 55-60).

171. The same concern about comparators has also been articulated in human rights code jurisprudence. In *Moore v. British Columbia (Education),* [2012] 3 SCR 360, the Supreme Court of Canada again raised the concern about comparator groups, this time in the context of a discrimination claim under B.C.'s *Human Rights Code*. The Court found that the province and school district had discriminated against a child (Jeffrey Moore) with severe dyslexia when they closed a Diagnostic Centre that was necessary for the child's remediation. In short, the respondents discriminated against the child on the basis of his disability by denying him a service customarily available to the public.

172. Justice Abella addressed the question of whether the "service" for the purpose of the analysis under the Code was special education or education generally. She rejected the more narrow view, which characterized the service as special education, in part because it signaled a descent into formalism:

> *[30]* ***To define "special education" as the service at issue also risks descending into the kind of "separate but equal" approach*** *which was majestically discarded in Brown v. Board of Education of Topeka, 347 U.S. 483 (1954).* ***Comparing Jeffrey only with other special needs students would mean that the District could cut all special needs programs and yet be immune from a claim of discrimination. It is not a question of who else is or is not experiencing similar barriers. This formalism was one of the potential dangers of comparator groups identified in Withler v. Canada (AG)****, [2011] 1 S.C.R. 396.*

[31] ***If Jeffrey is compared only to other special needs students, full consideration cannot be given to whether he had genuine access to the education that all students in British Columbia are entitled to. This****, as Rowles J.A. noted,* ***"risks perpetuating the very disadvantage and exclusion from mainstream society the Code is intended to remedy."*** *(Emphasis added)*

173. The Ontario Divisional Court has similarly rejected the need for a comparator group under Ontario's *Human Rights Code* in the disability discrimination context. In *ADGA Group Consultants Inc. v. Lane*, 2008 CanLii 39605, at para 86-97, the Divisional Court rejected the need for a comparator where an employee with a disability was terminated. In that case, the employer had argued that the appropriate comparator was a probationary employee, as the applicant was terminated 10 days after he was hired. The Divisional Court found that "it is not necessary or appropriate to have to establish a comparator group", as "[o]nce it is established that the termination of the employee was because of, or in part because of, the disability, the claimant has established a prima facie case of discrimination". (para. 95 & 96)

174. Finally, the Canadian Human Rights Tribunal in *First Nations Child and Family Caring Society of Canada v. Canada (Minister of Indian Affairs and Northern Development)*, [2016] CHRT 2 rejected the need for a comparator in the context of the human rights complaint against the federal government relating to its inequitable funding of child welfare services to First Nations. The CHRT found that the federal government had discriminated against First Nations children on-reserve and in the Yukon, on the basis of their race and/or national or ethnic origin, by providing inequitable and insufficient funding for child welfare services contrary to s. 5 of the *CHRA.* The Tribunal ordered the respondent Ministry to immediately cease its discriminatory funding methods and practices, to reform its child welfare policies, and to meaningfully implement "Jordan's Principle" (the principle that Indigenous children living on reserve ought to be provided with the same essential services as non-Indigenous children).

175. The CHRT rejected the respondent Ministry's position that comparison was an essential part of the analysis under human rights legislation. The respondent Ministry submitted that the complainants had not advanced any evidence regarding provincial or territorial funding models or child welfare budgets, as compared to the federal government. It claimed that only if provincial/territorial information was established, could the CHRT determine if there was a difference in funding and whether that difference amounted to discrimination. The CHRT unequivocally rejected this approach, noting that the Federal Court of Appeal has confirmed the reduced role of comparator groups in *Canada (Attorney General) v. Canadian Human Rights Commission*, 2013 FCA 75. The CHRT stated:[97]

97 *Caring Society of Canada v. Canada (Minister of Indian Affairs and Northern Development)*, [2016] CHRT 2, para. 325-326 (J56).

> *…**while the use of comparative evidence may be useful in analyzing a claim of discrimination, it is not determinative of the issue.** In fact, as the Supreme Court noted in Withler, at paragraph 59: "finding a mirror comparator group may be impossible, as **the essence of an individual's or group's equality claim may be that, in light of their distinct needs and circumstances, no one is like them for the purposes of comparison**."*
>
> ***Rather, the full context of the case and all relevant evidence, including any comparative evidence, must be considered.** (Emphasis added)*

176. While the CHRT did make note of some comparative evidence in finding discrimination in that case, the tribunal also based its finding of discrimination on adverse impacts that were not characterized as comparative. These included:[98]

- "The design and application of the Directive 20-1 funding formula, which provides funding based on flawed assumptions about children in care and population thresholds that do not accurately reflect the service needs of many on-reserve communities. …
- The current structure and implementation of the EPFA [Enhanced Prevention Focused Approach] funding formula, which perpetuates incentives to remove children from their homes and incorporates the flawed assumptions of Directive 20-1 in determining funding for operations and prevention, and perpetuating the adverse impacts of Directive 20-1 in many on-reserve communities.
- The failure to adjust Directive 20-1 funding levels, since 1995; along with funding levels under the EPFA, since its implementation, to account for inflation/cost of living;
- The failure to coordinate the [First Nations Child and Family Services] Program and other related provincial/territorial agreements with other federal departments and government programs and services for First Nations on reserve, resulting in service gaps, delays and denials for First Nations children and families.
- The narrow definition and inadequate implementation of Jordan's Principle, resulting in service gaps, delays and denials for First Nations children."

177. The AOM submits that the above jurisprudence establishes that while comparisons of various kinds (eg. to CHC physicians and CHC Nurse Practitioners) may be helpful, the discrimination analysis under the *Code* is not determined only by those comparisons. Nor should the Tribunal allow its analysis

98 *Caring Society of Canada v. Canada (Minister of Indian Affairs and Northern Development)*, [2016] CHRT 2, para. 458 (J56).

to be determined entirely by the choice of comparator group. A single-minded inquiry into whether CHC physicians are a perfect "male comparator" for midwives, or whether they appropriately constitute a "male job class", would descend into a search for the perfect mirror comparator group, an approach that the Supreme Court of Canada has rejected.

178. Rather, the Tribunal must base its decision on the totality of the evidence, including adverse impacts on midwives that cannot be characterized as comparative, in order to determine whether midwives have been denied their right to equal treatment with respect to employment and contracts without discrimination because of sex.

179. This evidence includes the MOHLTC's consistent failure to proactively monitor the work and pay of midwives or the refusal to even attempt to ensure that the compensation and funding of midwives was equitable.

9. Active Refusal to Investigate and Remedy Systemic Gender Discrimination Raised by Midwives

180. In addition to all of the foregoing, the MOHLTC's has *actively refused* to investigate and remedy systemic gender discrimination in the midwives' compensation and funding, even when it was repeatedly raised by the AOM over the course of many years.

181. The MOHLTC inaction and active refusal to investigate and remedy systemic discrimination against midwives directly violates its positive duty to investigate complaints of discrimination, to take reasonable steps to address allegations of discrimination, including taking reasonable steps to assess and accommodate the midwives' gender-related needs.

182. The fact that midwives have been raising the issue of gender discrimination in their compensation and funding for such a long period of time is even more concerning. As noted by this Tribunal, if an obligation holder "could sit idly when a complaint of discrimination [is] made and not have to investigate it", it would render the human rights protection under the *Code* "a hollow one".[99] Here, the MOHLTC has sat idly for over two decades in the face of the midwives' complaint of discrimination.

183. Furthermore, the MOHLTC's inaction and active refusal to take action is a breach of the procedural duty to accommodate and is itself discriminatory. As stated by the Tribunal in *ADGA*:

99 *Laskowska v Marineland of Canada Inc.*, 2005 HRTO 30 at para 53.

> … ***the failure to meet the procedural dimensions of the duty to accommodate is a form of discrimination****. It denies the affected person the benefit of what the law requires: a recognition of the obligation not to discriminate and to act in such a way as to ensure that discrimination does not take place. …* ***when the failure to conduct an appropriate assessment has its own adverse consequences, there exists discrimination for which the Complainant has an independent right to a remedy****.*[100] *(Emphasis added)*

184. Indeed, the MOHLTC's inaction is itself discriminatory and an affront to the dignity of midwives. As noted by the Tribunal in *Lee and Kawartha Pine Ridge*, the failure of an obligation holder to turn their minds to, and take the necessary procedural steps to accommodate *Code*-related needs, is rooted in and perpetuates systemic discrimination against the disadvantaged group:

> *"…* ***One of the ways that disadvantaged and marginalized groups experience discrimination is by being ignored or disregarded, which results in members of these groups not being seen and being rendered invisible.*** *In my view, i****n the context of a request for Code-related accommodation, ignoring or failing to consider an employee's stated needs is an emanation of this form of discrimination. To ignore, disregard or fail to adequately consider and assess a request for accommodation under the Code or, more particularly in the context of such a request made by a person with a disability, to ignore, disregard or fail to adequately consider or follow up on medical documentation provided in support of an accommodation request, inherently has a negative impact on the dignity interests of a person identified by a protected Code characteristic by causing that person to experience discrimination by being ignored, disregarded or rendered invisible.***[101] *(Emphasis added.)*

185. In this case, the MOHLTC has actively ignored and attempted to render invisible not only the full value of midwives' work and their contributions but also the human rights concerns of midwives. This ignorance and inaction is detailed extensively in the above noted evidentiary submission and the Appendices. This includes Appendix 5 – the Overview Summary of Chronological Eras from 1994 which details the adverse treatment and impacts over the eras since 1994.

186. This included MOHLTC applying compensation restraint legislation covering only "employees" under the *Public Sector Compensation Restraints Act, 2010* to freeze the midwives' pay while denying it had any obligation to provide pay equity to midwives as they were independent contractors and not covered by the *Pay Equity Act*.

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100 ADGA Group Consultants Inc. v. Lane, 2008 CanLII 39605 at paras 149 – 50.

101 Lee v. Kawartha Pine Ridge District School Board 2014 HRTO 1212, para. 96.

187. While the MOHLTC conceded that midwives were not technically covered by the restraint legislation, it nevertheless applied the spirit of the restraint measures to midwives.

188. Furthermore, even though the restraint legislation made an exception for cases of pay equity adjustments, the MOHLTC expressly refused the AOM's request that it apply this exception to midwives who were seeking a pay equity adjustment to their compensation. The MOHLTC instead asserted that the midwives were not entitled to the exemption because: (1) they did not fall under the *Pay Equity Act*; and (2) there was no finding of a violation under the *Code* and therefore pay equity adjustment owing.

189. As noted by this Tribunal, both the 2010 restraint legislation and the 2012 restraint policy issued by the government use the terms "any **right or entitlement** under the *Human Rights Code* or *Pay Equity Act*". (see section 12(3), 17(1), 17(2) and 17(3) of the *Public Sector Compensation Restraints Act, 2010*). Section 12(3) states:

> *"Nothing in this Act shall be interpreted or applied* ***so as to reduce any right or entitlement under the Human Rights Code or Pay Equity Act****." (Emphasis added)*

190. There was no requirement under the legislation for an express finding of *Code* violation or an order for a pay equity adjustment by the Tribunal to qualify for the restraint exemption. To hold otherwise would lead to an absurd result where the government can evade its proactive human rights obligations under the *Code* until such time as a discrimination claim is proven before the Tribunal. As reviewed above, this position is contrary to the well-established human rights jurisprudence on the proactive legal obligations imposed on human rights respondents.

191. The MOHLTC's refusal to exempt midwives from restraint laws and policies in order to ensure midwifery compensation is free of sex-based discrimination, even though such laws and policies provided an exemption for pay equity adjustments has a significant adverse effect on midwives since they were frozen at compensation levels that were not pay equity compliant.

10. Failure to Address Gendered Integration Barriers Faced by Midwives

192. Finally, the proactive obligation to prevent and eradicate sex discrimination includes the duty to identify and remove systemic barriers to the full inclusion and participation of women in society, including with respect to their work and

services.[102] One of the key purposes of the Ontario Midwifery Program was the equitable integration of midwifery into the health care system. The evidence discloses that 20 years later midwives still face substantial barriers.

11. Adverse Treatment is Found in Fact that MOHLTC engaged in all the unlawful actions alleged by the AOM in paragraph 62 of Schedule A to its November 27, 2013 Application.

193. The AOM submits that the evidence set out in the Part A submission describing the evidence provides the foundational support to conclude that the MOHLTC engaged in the discriminatory acts described in paragraph 62 of Schedule A to its November, 2013 application.

194. Thus, in our submission, the AOM has overwhelmingly proven that midwives have suffered adverse gender impacts.

D. Sex Is a Factor In Midwives' Adverse Treatment

1. Sex More Likely Than Not a Factor In Adverse Treatment

195. The final leg of the *prima facie* discrimination test is also met: sex is more likely than not a factor in the adverse treatment of midwives.

196. As stated by the Supreme Court of Canada in *Bombardier* (reviewed above), the final leg of the *prima facie* test merely requires proof of "a simple connection" or factor rather than of a “causal connection” between the prohibited ground (sex) and the adverse treatment.[103]

197. As stated recently by this Tribunal, the midwives must prove "that there is simply a *connection* between the prohibited ground [of sex] and the adverse

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102 *Human Rights Code*, Preamble; *British Columbia (Public Service Employee Relations Commission v. BCGSEU*, [1999] 3 SCR 3 ("*Meiorin"*) at para. 41-42; *Action Travail des Femmes*, [1987] 1 SCR 1114 (J6) at 1139; *Caring Society Canada*, 2016 CHRT 2 (J56); *Moore v. British Columbia (Education)*, [2012] 3 SCR 360 para. 30, 60-61.

103 *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center)*, [2015] 2 SCR 789, para. 56.

treatment".[104] Neither "a close relationship" nor "a *causal* connection" between sex and the adverse treatment need be established.[105]

198. This ""“connection” or “factor” must be proven on a balance of probabilities.[106]

199. Finally, there is no requirement that the adverse treatment on the basis of sex be intentional. As stated recently by this Tribunal: "it is well established that intent is not required to establish discrimination" under the *Code*.[107] Indeed, in *Caring Society*, the CHRT emphasized that there may be many different reasons for a respondent's acts and that discrimination is not usually practiced overtly or intentionally and so “direct evidence of discrimination or proof of intent is not required to establish a discriminatory practice”.[108]

200. The evidence clearly establishes that sex is a factor in the MOHLTC's adverse treatment of midwives in Ontario.

201. The Part A Evidence section of this submission details how sex and gender permeates the occupations in the health care sector, particularly that of midwives and their gendered trifecta.

202. As detailed above, the Ontario Government both through the *Pay Equity Act*, its policy statements and official documents and Pay Equity Hearings Tribunal decisions have established that Ontario women in general, particularly those in sex segregated work traditionally associated with "women's work" experience systemic undervaluation of their work and pay.

203. The specific factors here in this case for midwives which contribute to the connection of sex and gender with midwifery compensation both prior to regulation and thereafter to the present date include the following:

    (a) Midwives are a protected group. Midwives are the most highly female and sex segregated health care profession at 99.9% female.

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104 *Sandhu v. Regional Municipality of Peel Police Services Board*, 2017 HRTO 445, para. 132, citing *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center)*, [2015] 2 SCR 789, para. 43-52.

105 *Sandhu v. Regional Municipality of Peel Police Services Board*, 2017 HRTO 445, para. 132, citing *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center)*, [2015] 2 SCR 789 para. 43-52.

106 *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center)*, [2015] 2 SCR 789, para. 56.

107 *Sandhu v. Regional Municipality of Peel Police Services Board*, 2017 HRTO 445, para. 132, citing *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center)*, [2015] 2 SCR 789 para.40-41.

108 *Caring Society*, 2016 CHRT 2, para. 26 (J56).

(b) Midwife means “with women”. Midwives provide health care services for women. Midwives are closely associated with the women for whom they provide midwifery services. Midwives provide such services in relation to a biologically female experience of pregnancy and birth.

(c) Midwives are closely associated with women’s health care. The Task Force on Implementation of Midwifery (TFIMO) and other Government reports have documented the concerns of women with respect to their health care and requirement for gender-sensitive proactive approach.

(d) The Government's own documents, including the TFIMO, the regulation process documents referred to in the AOM Overview Summary and Cabinet and government documents since recognize midwifery as a female dominated profession doing women's work for women with respect to women's health care.

(e) Work and occupations associated closely with women is vulnerable to systemic undervaluation and underpayment – a gender penalty or discount. This is well documented in the Government's 1986 Green Pay on Pay Equity which lead to the *Pay Equity Act;* the preamble to the *Pay Equity Act*, recent Government statements, academic research, the Durber, Armstrong and Bourgeault expert reports, Pay Equity Commission documents, recent Government ministerial statements and mandates, the Gender Wage Gap Review consultation documents and human rights jurisprudence.

(f) Gender is also recognized to advantage work performed by or associated with men which is consistently paid more on average than work performed by women.

(g) Midwives have been subjected to historical stereotyping and prejudices with respect to the value and contributions of their work, including their exclusion from the health care system for almost a century. The Government recognized this gendered context and disadvantage when it put the MOHLTC Women's Health Bureau initially in the lead in the developing the new funded system and developed a process design to equitably integrate the female dominated profession of midwives into the funded system.

(h) Government recognized on regulation the gendered context of health care and the power of the male dominated medical profession to resist midwifery integration; Government documents recognize the ongoing barriers midwives face particularly with respect to barriers they face in hospitals to practising to their full scope of practice.

(i) Physicians continue to restrict midwives in their practice in order to secure more intrapartum and other maternity care work for physicians.

(j) The evidence shows that midwives continue to be subjected to sex-based prejudice, barriers and disadvantages.

(k) Midwives have been subjected to adverse treatment in their compensation treatment since 1994 with their compensation frozen over many years, the failure to provide them with the same compensation setting mechanisms as provided for male dominated physician work and the refusal to monitor and apply a human rights sex/gender lens to ensure that the original rough pay equity analysis and positioning of their work in the male dominated health care hierarchy was continued.

(l) The historical incumbency of CHC physician prior to 1993 draws from a heavily dominated physician pool. The CHC physician male comparator was male predominant at the time of the original 1993 Work Group analysis and the AOM expert reports clearly establish the male dominance of the compensation setting mechanisms used to set CHC physician work after that date, even though more women entered the position.

(m) In any event, alternatively, it is also established as a precedent through Ontario's *Pay Equity Act* and relying on the expert evidence of Dr. Pat Armstrong that it may be necessary to use a female predominant job with identified equitable pay as a proxy measuring stick for male work in predominantly female workplaces who which do not have sufficient numbers of male comparators to use the job to job comparison method or the proportional value comparison methods. This method which looks at comparators outside the establishment known as the proxy comparison method is the legislative choice upheld by Mr. Justice O'Leary as a necessary tool to identify discrimination in the 1997 Court decision *SEIU Local 204 v. Attorney Gen (Ont).*

(n) The evidence shows a history over the last nearly 20 years of constantly freezing midwifery pay or giving small adjustments while at the same time going to great lengths to increase the compensation of the CHC physician and other work. These actions were carried out by the same Branch which administered and set the compensation for both positions.

(o) Subsequent to the roughly gender-sensitive process which was used to establish midwifery compensation in the gendered health care hierarchy, thereafter, the MOHLTC continued to make the decisions about midwifery compensation but did so without any reference to equitable considerations or to any systematic analysis of the SERW and pay of the work relative to the original male comparator.

(p) With the OMP a constantly expanding program because of the shortage of midwives and the constant influx of new registrants to meet that consumer demand, the Government relied on continuing the underpayment of midwifery work in order to finance expansion of the service. CHC

physicians were not expected to similarly finance the expansion of the CHC Centres.

(q) Finally, the Durber analysis reveals the extent of the undervaluation and therefore adverse treatment of midwifery work as result of the evidence based human rights/pay relative position of midwifery between the CHC physician and the Nurse Practitioner.

204. Cabinet documents and government evaluations during the period when midwives compensation was frozen show:

(a) Midwives were and are in high demand and there was and is an extreme shortage of midwives which will continue for years to come;

(b) Midwifery attrition both within the MEP and afterward in practice has been a significant concern:

(c) The outcomes produced by midwifery care are highly effective from a clinical and health system perspective;

(d) The use of midwives was cost effective to the Government;

(e) The OMP was highly consistent with the Government's primary health care reform initiatives as a managed health care service where services could be targeted by the Government to specific geographic areas and needs around the province: and

(f) The consumers of midwifery services valued the service and wanted more midwives.

205. The compensation of midwives over this period was not decided through any evaluation process or pay equity/human rights analysis to ensure it was gender equitable.

206. When the MOHLTC started getting very specific demands from the AOM in November 2000 forward that the MOHLTC should provide equitable compensation back to 1994, the MOHLTC failed to address that request, even though it funded a Hay Report for the CHCs which was subsequently used to increase the compensation of CHC physicians. When the AOM went out and also contracted Hay to do a compensation report, the MOHTLC did not act on that report, neither when it was done in 2003 nor when it was updated in 2004. It was not until the midwives mounted a public campaign backed by midwifery consumers leading to a demonstration in December 2004, that the OMP agreed to provide more funding which could in part be used to increase the compensation of midwives.

207. The MOHLTC continued to advise the midwives that it did not have sufficient funding in the budget to address the claim of inequitable compensation. Unlike

the situation for pay equity adjustments required under the Pay Equity Act, the MOHLTC did not consider that the adjustments necessary to ensure a gender equitable compensation structure should be funded separately as a human rights remedy. Instead, the Government viewed the AOM's claims for equitable compensation as a regular wage increase which it declined to provide even though at the same time it was providing adjustments to the CHC physicians and other male work in the Ontario. For a review of some of the adjustments paid to CHC physicians and midwives, see Appendix 5.

208. If the midwives were employed in a hospital or in a Community Health Centre, the Pay Equity Act would be applicable to them and they would clearly be a female job class which would need to be proactively assessed on the basis of the skill, effort, responsibility and working conditions relative to other male dominated work or the proxy for that work. Midwives were not "employed" in order to meet client needs and yet are denied pay equity human rights protection by the Ministry as a result of that status.

2. Response to Adverse Treatment Based on "Occupational Status" - Not Sex

209. The MOHLTC stated in its Opening Statement that midwives' adverse treatment – including their unequal compensation and funding as compared to CHC physicians relates to their "occupational status", and not sex. The AOM responds as follows:

210. First, the fact that the adverse treatment is *based* on the midwives' occupational status does not preclude the fact that sex was also a contributing factor. As detailed above, sex need only be a factor in the adverse treatment, not the sole factor.

211. Second, and importantly, the expert evidence of Dr. Armstrong, Dr. Bourgeault and Mr. Durber, along with the jurisprudence cited above, firmly establish that systemic gender discrimination in compensation is linked firmly to occupational segregation and occupations associated with traditional women's work.

212. The status of occupations or jobs are highly gendered. It is therefore no answer to a sex-based human rights claim to say that the difference in treatment is based on the midwives' occupational status. This is particularly true when midwifery is the most exclusively female-dominated and sex segregated health care profession in Ontario.[109]

109 "Health Professions Database 2010 Stat Book", Affidavit of Fredrika Scarth, (Exhibit 184), Tab 2 Table 2- Regulated Health Professionals by Sex – 2010.

213. Furthermore, the assertion that the difference in treatment is based on difference in occupational factors, including education, scope of practice, etc., is also no answer to the midwives' discrimination claim. Perceived differences in occupational factors must be accurately – and equitably – assessed by applying a gender inclusive evaluation mechanism to analyze the skills, effort, responsibility and working conditions (SERW).[110] This is precisely the mechanism which the MOHLTC has refused to apply.

214. It is also precisely the mechanism applied by Mr. Durber when he carried out a comprehensive, gender inclusive systemic pay equity comparison of the SERW of Ontario's registered midwives relative to the CHC family physician and the CHC nurse practitioner, from 1994 to the present. Mr. Durber found based on a human rights analysis that sex bias was operating in the setting of the midwives' compensation and funding by the Ministry.

215. In short, the accurate and equitable evaluation of so-called "occupational differences" among midwives, CHC family physicians and CHC nurse practitioners demonstrates a clear sex-based bias against, and systemic undervaluing of, midwives and their work.

216. Notably, Ontario advanced a similar "occupational status" argument which was rejected by Justice Strathy (as he then was) in *Association of Justices of the Peace of Ontario v. Ontario (Attorney General)*, 2008 CanLII 26258 (ON SC), para. 106-108. In that case Ontario argued unsuccessfully that imposing mandatory retirement at age 70 on Justices of the Peace in Ontario was not discriminatory under s. 15 of the *Charter* because the adverse treatment was on the basis of their occupational status, not age. The government relied in part on Professor Chaykowski's evidence in this regard. Justice Strathy rejected the argument, finding instead that the discriminatory treatment was based on age, not occupational status.

> *[108] The choice of the appropriate comparator group is, of course, fundamental to the s. 15 analysis: see Law, at para. 88; Attorney General Ontario v. Human Rights Commission, at para. 52. However,* ***the challenged distinction in this case is made on the basis of age, not occupational status. The impugned provisions of the Justices of the Peace Act clearly draw a formal distinction between the applicants and their colleagues based on the personal characteristic of age, an enumerated ground.*** *The appropriate comparator group in this case is justices of the peace under the age of 70: Addy v. Canada, 1985 CanLII 3130 (FC), [1985] F.C.J. No. 159, 22 D.L.R. (4th) 52 (T.D.). [page53]* ***While the applicants do mention that they are offended by being retired at age 70 when provincial judges working in the same court houses are***

110 As detailed above, SERW is the internationally recognized criteria for considering the value of women's work. These criteria have been embedded in Ontario's *Pay Equity Act,* the *Canadian Human Rights Act*, and the ILO *Convention 100.*

permitted to work to 75, this evidence must be put in its overall context, in which the applicants express the many negative effects of their mandatory retirement. It does not, in and of itself, indicate that the claim is based on occupational status, particularly where the legislation makes an explicit distinction based on age. (Emphasis added)

217. In light of the highly gendered nature of midwifery work, it is undeniable that sex is a factor in the adverse treatment, including in the biased evaluation of the value of their work and occupational status and factors.

3. Response to Adverse Treatment Based on "Market Factors" - Not Sex

218. Market factors have been clearly established as gendered and need to be assessed for gender bias. They cannot just be applied without such considerations. [111]

E. *Prima Facie* case of Associational Discrimination Established under s. 12 of *Code*

219. In addition to a *prima facie* case of discrimination in employment and contracts contrary to ss. 5 and 3 of the *Code* being established, the AOM also submits that the MOHLTC has *prima facie* discriminated against midwives on the basis of their association with women and their health care.

220. Section 12 of the *Code* reads:

A right under Part I is infringed where the discrimination is because of relationship, association or dealings with a person or persons identified by a prohibited ground of discrimination.

221. Discrimination because of association with women who are persons identified by a prohibited ground of discrimination constitutes discrimination within the meaning of s.12.

222. This Tribunal recently found in *Sandhu v. Peel Police Services Board*, 2017 HRTO 445, that police work focused on "South Asian issues" was "not highly regarded with the [Peel Police] Service."[112]

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111 See Appendix 16, titled " Use of Bargaining Strength As Justification for Significantly Lower Pay Reflective of Gender Bias"

223. While analyzed in the context of an employment discrimination claim under s. 5 of the *Code*, the Tribunal nevertheless found that the undervaluing of police work associated with "South Asian issues" was a factor in the employer denying the applicant a promotion opportunity. The applicant was South Asian and had been consistently "posted in portfolios primarily addressing South Asian issues".[113] The Tribunal found that the work and experience the applicant gained in these South Asian-focused portfolios ("South Asian Intelligence and Diversity Relations") was considered less valuable within the police service.[114] The Tribunal concluded:[115]

> *103] Overall, based on the evidence,* ***I accept that the work in South Asian Intelligence and Diversity Relations was generally considered less valuable, and less as "real" police work, within the Service. I also accept that this attitude developed, at least in part, due to its connection with the South Asian community.*** *Though the evidence before me was consistent that the work done was in fact quite important to the work of the Service, I also accept that the work was not considered real police work.*

224. While the *Sandhu* case was framed as an employment discrimination claim under s. 5 of the *Code*, it could have also been brought as an associational discrimination claim under s. 12, on the basis of race.

225. With respect to midwives, their work is likewise considered "less valuable" on the basis of its association with a prohibited ground. Here, the prohibited ground midwives are associated with is sex (i.e., women), as opposed to South Asians (i.e., race).

226. Midwives work with women, for a woman-centred health care experience of pregnancy and childbirth, from within a model of care that is feminist in origin, and which seeks to engender healthcare.

227. Midwives are associated with women not only as their clients, but through the type of service they deliver (pre- natal, intrapartum and post-natal care) which is perceived as a women's health care experience. Further, this is done through a model of care that arose from feminist movements towards engendering healthcare to provide informed choice and continuity of care to the expectant mother.

228. This may be contrasted with a female predominant group like nurses who provide care to both men and women, for a healthcare experience that does not have gendered aspects, like diabetes treatment, from within a medicalized model that

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112 *Sandhu v. Regional Municipality of Peel Police Services Board*, 2017 HRTO 445, para. 5.

113 *Sandhu v. Regional Municipality of Peel Police Services Board*, 2017 HRTO 445, para. 5.

114 *Sandhu v. Regional Municipality of Peel Police Services Board*, 2017 HRTO 445, para. 91-103.

115 *Sandhu v. Regional Municipality of Peel Police Services Board*, 2017 HRTO 445, para 103.

still posits the male-dominated physician at the top of the decision-making hierarchy.

229. It is submitted that this close association with women has resulted in a consistent devaluing of the work and services provided by midwives by the MOHLTC, contrary to s. 12 of the *Code*.

F. Conclusion: *Prima Facie* Discrimination Established

230. For all of the foregoing evidence and reasons, the midwives have clearly established on the balance of probabilities a *prima facie* case of discrimination on the prohibited ground of sex, contrary to ss. 3, 5 and 12 of the *Code*. As a result, the onus has shifted to the MOHLTC to show that its actions are free of sex-based discrimination.

G. Defences To Discrimination Must Be Interpreted Narrowly

231. Human rights legislation is fundamental, quasi-constitutional legislation, which has as its overriding purpose the prevention and elimination of discrimination. As such, courts have consistently held that protections conferred by human rights legislation should be interpreted broadly, applying a purposive approach, while "defences to discrimination under the Code must be narrowly construed so that the larger objects of the Code are not frustrated."[116]

232. The specific statutory defences to discrimination under sections 5, 3 and 12 do not apply in this case.[117] These include the defences under section 14 (special programs), section 18 (special interest organizations), section 19 (separate school rights), section 22 (insurance contracts), and section 24 (special employment).

233. Moreover, the MOHLTC has not plead the general defence of a *bona fide* occupational requirement ("BFOR") set out in section 11 of the *Code*.

234. In this case the MOHLTC has not even taken the steps to accommodate the gender-specific needs of midwives when it comes to the compensation and funding of their work, including their particular vulnerability to sex-based pay

116 *O'Malley v. Simpson Sears Ltd.*, [1985] 2 SCR 536 at p. 547; *Meiorin*, [1997] 3 SCR 3, at para. 44 & 50; *Zurich Insurance Co. v. Ontario (Human Rights Commission)*, [1992] 2 SCR 321 at p.339 (para. 57-58).

117 *Human Rights Code*, RSO 1990, c. H. 19, s. 14 (special programs), s. 18 (special interest organizations), s. 19 (separate school rights), s. 22 (insurance contracts), s. 24 (special employment).

discrimination, the highly gender-segregated nature of their profession, and the need for a gender based analysis in setting their compensation and funding.

H. Only Defence is Credible Proof that Difference in Pay has no Connection to Sex

235. Thus, it appears that the only defence available to the MOHLTC in this case is the general defence of a credible non-discriminatory explanation for the adverse treatment.

236. The AOM submits that any credible, non-discriminatory justifications advanced by the MOHLTC must be consistent with the *Code.* In the context of systemic gender discrimination in compensation, this requires that the non-discriminatory justifications be based on the application and implementation of a gender based inclusive analysis or lens.

237. There is a high onus on the compensation setter to show all justifications were arrived at based on this analysis and applied equitably to comparators.

238. Furthermore, the AOM submits that merely suggesting a rational alternative explanation is not sufficient. As long as a prohibited ground (here, sex) was more likely than not a factor (intentional or not) in the adverse treatment, discrimination is made out and it matters not that, in addition to the prohibited ground, there were other non-discriminatory explanations for the adverse treatment. Thus, the MOHLTC must establish that on the balance of probabilities there was no discriminatory taint; in other words, that sex was not a factor in the adverse treatment. As noted by the Tribunal in *Persaud*:[118]

> ***"… 2) It is not sufficient to rebut an inference of discrimination that the respondent is able to suggest just any rational alternative explanation. The respondent must offer an explanation which is credible on all the evidence****. …*
>
> *4)* ***There is no requirement that the respondents' conduct, to be found discriminatory, must be consistent with the allegation of discrimination and inconsistent with any other rational explanation.***
>
> *5)* ***The ultimate issue is whether an inference of discrimination is more probable from the evidence than the actual explanations offered by the respondent*** *…" (Emphasis added)*

118 *Persaud v Toronto District School Board,* 2009 HRTO 1721, para. 182.

239. In *Sandhu*, this Tribunal recently found that the Peel Police Service racially discriminated against an employee when it denied him an opportunity for a promotion.[119] The Tribunal found that race was a factor in the denial of the employment opportunity, and therefore was contrary to the *Code.* Notably, the Tribunal accepted the Peel Police Service's evidence that there was no intent on the part of the decision-makers to discriminate against the applicant; that the reason the applicant was denied the opportunity for promotion to Inspect was not because he was South Asian but rather because "his work history" in "Diversity and South Asian Intelligence" did not provide him with the necessary skills; and that the even though the "South Asian portfolios were generally devalued in the Service", the decision-makers themselves "did not share such negative views" and in fact held the view that "the applicant's "instrumental" work had "continually reflected very well on the Peel Regional Police"…".[120]

240. The *Sandhu* Tribunal still found "that their decision was nonetheless based on the fact that they ultimately did not give much value to [the applicant's] work [on the South Asian portfolios] as a qualification for promotion".[121] Accordingly, the Tribunal concluded that, notwithstanding these other non-discriminatory justifications for the adverse treatment, "that the failure to recommend the applicant for promotion … was **in part** due to his race, ancestry, place of origin, and/or ethnic origin, and as such was contrary to s.5(1) of the Code."[122] (Emphasis added)

241. The AOM reserves the right to respond to the MOHLTC's submissions that sex is not connected in any to the compensation of midwives.

PART III: AOM REQUESTS FOR REMEDIAL RELIEF ORDERS

A. Summary of Claims

242. As a result of the above-noted unequal treatment, Ontario's registered midwives

(a) have incurred large economic losses and other damages requiring compensation and restitution;

[119] *Sandhu*, 2017 HRTO 445, para. 156.

[120] *Sandhu*, 2017 HRTO 445, para. 105, 133-136.

[121] *Sandu*, 2017 HRTO 445, para. 136.

[122] *Sandhu*, 2017 HRTO 445, para. 156.

(b) have suffered injury to their dignity, feelings and self-respect requiring further compensation;

(c) require public interest future compliance remedies to ensure such discrimination, losses and injury will not reoccur.

B. The *Code* Provisions

243. This application has been filed under section 34 of the *Code.* Accordingly, section 45.2(1) of the *Code* provides that the Tribunal has the following remedial powers to address *Code* violations in these circumstances:

45.2 (1) On an application under section 34, the Tribunal may make one or more of the following orders if the Tribunal determines that a party to the application has infringed a right under Part I of another party to the application:

1. An order directing the party who infringed the right to pay monetary compensation to the party whose right was infringed for loss arising out of the infringement, including compensation for injury to dignity, feelings and self-respect.

2. An order directing the party who infringed the right to make restitution to the party whose right was infringed, other than through monetary compensation, for loss arising out of the infringement, including restitution for injury to dignity, feelings and self-respect.

3. An order directing any party to the application to do anything that, in the opinion of the Tribunal, the party ought to do to promote compliance with this Act. 2

Orders under par. 3 of subs. (1)

45.2 (2) For greater certainty, an order under paragraph 3 of subsection

(a) may direct a person to do anything with respect to future practices; and

(b) may be made even if no order under that paragraph was requested.

C. Jurisprudence re Remedial Relief

244. The CHRT in *Caring Society* is an important precedent for a human rights tribunal ordering systemic remedies to meaningfully rectify and eliminate

longstanding systemic discrimination on the part of government. The CHRT emphasized the importance of giving a fair, large and liberal interpretation to its remedial powers in furtherance of the human rights legislation's objects: [123]

> *[469]* ***It is also important to reiterate that the CHRA gives rise to rights of vital importance. Those rights must be given full recognition and effect through the Act. In crafting remedies under the CHRA, the Tribunal's powers*** *under section 53(2)* ***must be given such fair, large and liberal interpretation as will best ensure the objects of the Act are obtained. Applying a purposive approach, remedies under the CHRA should be effective in promoting the right being protected and meaningful in vindicating the rights and freedoms of the victim of discrimination*** *(see CN v. Canada (Canadian Human Rights Commission), [1987] 1 SCR 1114 at p. 1134; and, Doucet-Boudreau at paras. 25 and 55). (emphasis added)*

245. In the *Caring Society* case, the CHRT ordered the federal government to not only to cease its discriminatory practices immediately, but also to comprehensively reform the First Nations Child and Family Services (FNCFS) Program and policies in accordance with the CHRT's findings.[124] The federal government was also ordered to cease applying a narrow definition of Jordan's Principle, and to take measures to immediately implement the full meaning and scope of the principle.

246. Notably, the CHRT disagreed with the federal government's position that "while the Tribunal may order amendments to policy and provide guidance on the shape of amendments, it cannot prescribe the specific policy that must be adopted".[125] The Tribunal instead found that "more than funding, there is a need to refocus the policy of the program to respect human rights principles and sound social work practice".[126] That said, the CHRT reserved its decision with respect to the specific remedy on policy pending the opportunity to ask clarifying questions of the parties.[127]

247. The CHRT retained jurisdiction to supervise the federal government's implementation and actions in response to the CHRT's decision. The CHRT also retained jurisdiction "to seek further clarification from the parties on the actual relief sought, including how the requested immediate and long-term reforms can best be implemented on a practical, meaningful and effective basis."[128]

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[123] *Caring Society*, 2016 CHRT 2, para. 469 (J56).

[124] *Caring Society*, 2016 CHRT 2, para. 474 et seq., esp. para. 481483 (J56).

[125] *Caring Society*, 2016 CHRT 2, para 480 (J56).

[126] *Caring Society*, 2016 CHRT 2, para 482 (J56).

[127] *Caring Society*, 2016 CHRT 2, para 483 (J56).

[128] *Caring Society*, 2016 CHRT 2, para 483 (J56).

248. Since the CHRT issued its decision in January 2016, the tribunal has issued a series of further remedial orders, described as follows:

> *"In 2016 CHRT 10 (CanLII), the Panel ordered INAC to immediately take measures to address the assumptions and flaws in its funding formulas, including all the underlined items at paragraphs 20 and 23 of that ruling. INAC was to provide a comprehensive report explaining how those flaws and assumptions are being addressed in the short term to provide immediate relief to First Nations on reserve. The Panel's order also required INAC to provide detailed information on budget allocations for each FNCFS Agency and timelines for when those allocations will be rolled-out, including detailed calculations of the amounts received by each agency in 2015-2016; the data relied upon to make those calculations; and, the amounts each has or will receive in 2016-2017, along with a detailed calculation of any adjustments made as a result of immediate action taken to address the findings in the Decision (see 2016 CHRT 10 at paras. 20-25).*[129]*"*

249. Similarly, the importance of remedial relief for complainants was emphasized in in *Walden v Canada (Social Development)*, a case concerning the federal government's sex discrimination against a predominantly female job class.[130] In *Walden*, the federal government's discriminatory job classification was found to have resulted in less pay, fewer professional development opportunities, and fewer employment benefits for group of medical adjudicators who were predominantly female nurses working alongside a group of medical advisors who were predominantly male doctors.[131] Upon judicial review, both the Federal Court and Federal Court of Appeal emphasized that difficulty in assessing the quantum of damages (i.e. lost income) is an insufficient basis to deny a remedy to complainants who have been subjected to discrimination.[132] Both courts emphasized that once liability on the part of the government respondent is found, the Tribunal "has the duty to assess the lost income or wage loss on the material before it, or refer the issue back to the parties to prepare better evidence on what the wage loss would have been but for the discriminatory practice".[133]

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[129] *Caring Society*, 2016 CHRT 16, para 19 (J56), citing to *Caring Society*, 2016 CHRT 10, para. 20-25.

[130] See: *Walden v Canada (Social Development)*, 2011 FCA 202 [*Walden* FCA]; *Walden v Canada (Social Development)*, 2010 FC 1135 [*Walden* FC]; *Walden v Canada (Social Development)*, 2009 CHRT 16

131 *Canada (Attorney General) v Walden*, 2010 FC 490.

132 *Walden* FC, *supra* note 1 at para 61.

133 *Walden* FC at para 67; *Walden* FCA, para 16.

PART IV: REQUEST FOR MONETARY COMPENSATION AND RESTITUTION/DAMAGES

A. Compensation Claims

250. The applicant seeks the following monetary adjustments to compensation/funding and restitution on behalf of Ontario midwives:

(a) An order that the Ministry shall adjust the compensation/funding of midwives to reflect the Durber pay equity/human rights analysis which concludes that midwives currently should be paid 91% of the compensation paid to CHC physicians to reflect their proportional 91% equitable value and thereby eliminate sex bias in their compensation.

(b) An order that the Ministry shall pay to the complainant midwives all retroactive compensation and funding back to the date they would have been entitled to such compensation as if the *Code* had not been violated in order to rectify their unequal treatment.

A) These retroactive adjustments will be based on the Durber proportional value relationships for the periods back to 1997 which are set out in the Part A submission.

B) an order that an accounting will be directed to determine the specific retroactive adjustments owing to each midwife in order to make her whole for the discriminatory compensation payments made to her since she commenced practising.

(c) An order that the Ministry shall also locate and pay to all midwives who performed midwifery services for the MOHLTC the necessary compensation to rectify their economic losses as well; (and not just the complainant midwives) back to the date they would have been entitled to such compensation as if the *Code* had not been violated in order to rectify the unequal compensation they received.

(d) The AOM requests all necessary directions to ensure that the Ministry provide the necessary information to the AOM so that it can monitor and ensure that all appropriate compensation adjustments including retroactive compensation payments are paid appropriately;

(e) The AOM requests that these adjustments and payments be made within 4 months from the date of the decision.

(f) An order to ensure that midwives' ongoing compensation is free from sex-based discrimination in accordance to the *Human Rights Code.*

B. Retroactivity Calculations

251. With respect to the retroactivity calculations, the Part A submissions which address Mr. Hugh Mackenzie's reports, set out his updated estimates of the value of those retroactivity amounts. This provides a general sense of the total amounts owing. Any actual retroactivity award would need to be calculated based on an individualized analysis of the compensation and funding adjustments billed by each midwife who has worked under the Ministry's discriminatory compensation-setting regime.

C. Retroactive Compensation Adjustments Must Flow to Remedy These Human Rights Violations and to Not Reward Non Compliance

252. The Tribunal's Interim Decision left open the ability of the MOHLTC to make the argument that the Tribunal should exercise its remedial discretion not to order any compensation owing prior to one year prior to the filing of the Application, namely November 23, 2012 in light of alleged delay by the AOM in filing this Application and the expiry of previous contractual arrangements.

253. The AOM claim now is back to January 1, 1997 which is the date Mr. Durber has established is the first human rights/pay equity adjustment owing as a result of the increased SERW on the part of the midwives who had now practised for three years since regulation. Ever since January 1, 1997, the MOHLTC has neglected to close the midwifery gender pay gap and has instead chosen to spend substantial public funds on the comparator CHC physician and other issues.

254. The facts as set out in Appendix 5 Overview Summary of Evidence by Chronological Eras show an abundance of evidence that the AOM has clearly articulated the requirement for equitable compensation for the predominantly female profession of midwifery since the late 1990's. The first recorded written AOM claim for a specific equity adjustment happened in November, 2000. Since that time, as more and more specific requests were made for equity, they were met with repeated refusals and decisions to not make the gender equitable compensation of midwives a Ministry priority in budgeting and policy.

255. Human rights principles encourage efforts to resolve disputes internally and collaboratively before pursuing adversarial litigation. Here the AOM engaged in the processes which the MOHLTC had set up - that is the discussions with the AOM which culminated in the JMAC Terms of Reference in 2010 and the MCFAC Terms of Reference in 2012 and participation in the Courtyard Compensation Review in 2010. Both of these bodies were mandated to discuss disputes between the parties. Here the MOHLTC encouraged the AOM to resolve disputes internally. The MOHLTC was never under any illusion that the midwives were giving up any human rights claims as a result.

256. A November 2010, internal Ministry document addressing the negotiations with the AOM shows that the MOHLTC had identified a *Human Rights Code* risk and that they were still trying to address the issue in the negotiation process:

While not mentioned by AOM, there is an outside risk they could bring an equity issue forward under the Human Rights Code, but NPs are a female dominated group as well, and the argument to compare Midwives scope of practice to Obstetricians is not clear.[134]

257. The *Human Rights Code* Preamble makes it clear that it is "public policy in Ontario to recognize the dignity and worth of every person and to provide for equal rights and opportunities without discrimination that is contrary to law, and having as its aim the creation of a climate of understanding and mutual respect for the dignity and worth of each person so that each person feels a part of the community and able to contribute fully to the development and well-being of the community and the Province." This means encouraging the collaborative resolution of disputes.

258. The British Columbia Human Rights Tribunal in *Penner v. B.C. (Ministry of Public Safety and Solicitor General)*, 2005 BCHRT, 465 at para. 11 has noted the importance of encouraging the use of internal resolution processes before the intervention of Tribunal dispute resolution processes.

259. In this context, there is no basis for permitting the MOHLTC to delay and deny this human rights claim and then to argue it should not be responsible for rectifying it due to that delay and the costs of the cumulative retroactive payments required to rectify the midwifery economic losses over the years. Otherwise, it would encourage respondents to get complainants to engage in such processes with the purpose of eliminating liability for each day they engaged in the process.

260. It is the midwives who have suffered the prejudice as a result of the delays by having to provide midwifery services for discriminatory pay.

261. The AOM acted with due diligence in pursuing the rights of midwives. It frustrates the purpose of the *Code* to deny midwives access to *Code* retroactive compensation for the period prior to November 27, 2012 because they engaged in good faith efforts to resolve their claims.

262. As pleaded by the AOM, even as late as January, 2013, the Minister of Health and Long Term Care was advising the AOM that the MCFAC was the process where "conversations regarding fair compensation will take place." At the

134 Various Emails between A. Lambert, S. Raja, S. Ball, N.Patton copying A. Lopez, A. Ilgazl dated November 8, 2010 to November 9, 2010 re: Agenda for Meeting with ADM attaching Presentation by Negotiations Branch dated November 8, 2010 re: Ontario Midwifery Program, Government Documents to Laura Pinkney, Volume III, (Exhibit 160) at p. 4.

MCFAC Negotiation meeting on April 29, 2013, Ministry ADM Fitzpatrick told the AOM with respect to their request for equitable pay "You're going to have to wait". When that occurred the AOM proceeded to file its complaint within 6 months, once expert reports were obtained.

263. The MOHLTC is not immunized from *Code* compliance by securing the agreement of the AOM to funding contracts. In fact, it is improper to seek the agreement of a person to such a discriminatory arrangement.

264. It is well-established that the *Code* is for the general benefit of the community and its members and cannot be waived by a contract or collective agreement. [135]The MOHLTC cannot "contract out" of its obligation to pay compensation to midwives free of sex-based discrimination.

265. This is clearly demonstrated in the context of the *Pay Equity Act* where the Divisional Court in *Re Ontario Northland (J.R.) (1993)*, 4 P.E.R. 19 , 1993 CanLII 5424[136] affirmed that there is no right to contract out in collective agreements from *Pay Equity Act* obligations. Employers remain liable under the Pay Equity Act for pay equity adjustments regardless of whether a collective agreement was signed with the bargaining agent agreeing to wages which are not pay equity compliant.

266. In addressing the issue of retroactive compensation, it is also important to consider that the MOHLTC had a proactive obligation since 1994 to make visible and value the work of midwives and ensure that the compensation and funding it set was and is free of systemic gender discrimination in compensation. This required the MOHLTC over the years since 1994 to do compensation analysis and comparisons and to consider if its practices were causing systemic gender discrimination. That included keeping records and documentation with respect to the work and at least the comparators which were originally used in the Morton report. If that had been done, the MOHLTC could have factored in to its budget deliberations its obligations each year to ensure funding was available to meet the *Code*'s requirements.

267. Given the Ministry's ongoing failure to promptly and properly investigate the AOM's claim that its compensation funding for midwives and its processes and mechanisms for negotiations is inequitable and to have in place a pay equity compliance mechanism, the Ministry should be required to make the necessary retroactive payments to put the midwives in the position that they would have been if the Ministry had properly considered and address its *Human Rights Code* obligations when it set their compensation/funding and had taken the necessary corrective action.

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135 See Ontario Human Rights Commission v. Etobicoke [1982], 1 SCR 202 and Steve Vitricek v. 642518 Canada Inc. (Algonquin Careers Academy) and Des Soye 2010 HRTO 757 Can LII.

136 *Re Ontario Northland (J.R.) (1993)*, 4 P.E.R. 19 , 1993 CanLII 5424

PART V: CLAIM FOR INJURY TO DIGNITY FEELINGS AND SELF-RESPECT COMPENSATION

A. Introduction

268. Under s. 45.2 (1) of the *Human Rights Code*, the Tribunal can make an order directing the Government to pay monetary compensation to the complainant midwives whose rights were infringed, for losses including compensation for injury to dignity, feelings and self-respect.

269. The applicant seeks that the Ministry shall pay to the complainant midwives appropriate compensation commensurate with the significant, persistent and ongoing injury to their dignity, feelings and self-respect arising from the above-noted Code violations.

270. The midwives have experienced prolonged injury to their dignity, feelings and self-respect as a result of the serious and persistent Ministry conduct detailed in this application, which resulted in midwives being underpaid for their services because of their gender, the gender of their clients and the gendered nature of their work. The Ministry's failure to investigate and address the complaint also exacerbated the injury to dignity, feelings and self-respect experienced by midwives, thus warranting additional compensation. The effects experienced by the complainant midwives are particularly serious and include the following: humiliation; hurt feelings; loss of self-respect and confidence; loss of dignity; loss of self-esteem; loss of confidence; the experience of victimization and vulnerability.

B. Representative Witness Complainants and their Testimony

271. The use of representative witnesses for assessing injury to dignity damages in wage discrimination cases have been found to be appropriate. In *Walden v Canada (Social Development)*,[137] the Court overturned a decision of the Canadian Human Rights Tribunal in *Walden v Canada (Social Development)*,[138] where the decision maker had only awarded pain and suffering damages to the two (2) representative individuals who had testified, and no one else in the job class, holding that evidence of the pain and suffering of each individual in the job class was required for these types of damages to be awarded.

137 *Walden v Canada (Social Development)*, 2010 FC 1135.

138 *Walden v Canada (Social Development)*, 2009 CHRT 16.

272. The Federal Court disagreed with this approach, stating that the Tribunal's post hoc demand for individual evidence from each of the complainants breached procedural fairness. Further, the Court stated:

> *The Attorney General argues that the Tribunal rightly concluded that awards of pain and suffering cannot be made en masse based on representative evidence, but, rather, must be made based on evidence of individual complainants.*
>
> *I disagree. The Tribunal held that it could not award pain and suffering damages without evidence that spoke to the pain and suffering of individual claimants. This does not, however, mean that it necessarily required direct evidence from each individual. As the Commission noted, the Tribunal is empowered to accept evidence of various forms, including hearsay. Therefore the Tribunal could find that evidence from some individuals could be used to determine pain and suffering of a group.* [139]

273. The Court then ordered that this issue be sent back to the Tribunal. This case was appealed on other grounds to the Federal Court of Appeal.[140] After the appeal, the parties settled the issue of pain and suffering damages on an order on consent on October 26, 2011, which, to our knowledge, has not been reported. A Memorandum of Agreement was then struck between the parties awarding $16,500 to individuals who performed eligible work during the eligible period. This Memorandum of Agreement also awarded members who had worked the equivalent of six (6) months during a certain period additional pain and suffering damages of $2,000, above and beyond any sums outlined in the Pain and Suffering order of October 26, 2011, the details of which are unknown.[141]

274. Given the large number of complainants in this case, the Applicant put forward the testimony of five (5) witnesses as representative of the injury to dignity damages suffered. These individuals varied in terms of the amount of time they have been practising; their designation as a partner or an associate; their involvement with the AOM; their family status; former careers; and practice location in an urban or rural setting. At the same time, the AOM also relies as well on the testimony of its other midwifery witnesses who gave evidence about injury to dignity issues which are reflected throughout the main submission and the appendices.

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139 *Walden v Canada (Social Development)*, 2010 FC 1135 at para. 71-73.

140 *Walden v Canada (Social Development)*, 2011 FCA 202.

141 *Walden v. Attorney General of Canada (representing the Treasury Board of Canada and Human Resources and Skills Development Canada), Memorandum of Agreement https://www.pipsc.ca/portal/page/portal/website/groups/sh/pdfs/walden-mou0712.en.pdf*

275. The Tribunal heard the testimony of Maureen Silverman in person on October 18, 2017. The MOHLTC did not cross examine her. The remaining testimonies of Jacqueline Whitehead, Nicole Roach, Daya Lye and Rebecca Carson where heard on March 9 and 10, 2017 by way of special examiner. MOHLTC counsel cross examined them, mainly on the financial information they were required to produce by the MOHLTC as well as their on call arrangements.

276. **Maureen Silverman** has been practising midwifery since 1999 and is a partner in Family Care Midwives, located in York Region. This practice is described as serving a suburban and urban population She has always worked full time and raised four (4) children while working as a midwife. Ms. Silverman was a member of the AOM Board of Directors from 2001-2005 and then from 2015-2016. Prior to becoming a midwife, Ms. Silverman was a Childbirth Educator.[142]

277. **Jacqueline Whitehead** began practicing midwifery since 2007 and is a partner at the Midwifery Collective of Ottawa, located in Ottawa, Ontario. Ms. Whitehead has always practised full time and was an AOM Board member from 2012-2016. Ms. Whitehead has three (3) children, three (3) stepchildren and seven (7) grandchildren. Prior to becoming a midwife, Ms. Whitehead worked as an accountant.[143]

278. **Nicole Roach** has been working as a midwife since 1998. She has worked full time for the majority of her career with the exception of the times that she went on maternity leave, and a period of time in which she worked at a less than full-time caseload due to childcare issues. Ms. Roach has two (2) children. Ms. Roach is currently a partner at St. Jacob's Midwives, which serves many communities in the Waterloo Region and a past AOM Board Member. Her practice services rural, suburban and urban populations and has a large clientele from the low German- speaking Mennonite community.[144]

279. **Daya Lye** began practising midwifery in 2011 and practised full time in Brantford, Ontario until the birth of her first child in the fall of 2012. She then returned to practising midwifery at a 50-75% caseload at Renaissance Midwifery in the Niagara region until the birth of her second child in March of 2015. Ms. Lye is no longer registered as a midwife and testified that the outcome of this case will have an impact on her decision to return to practice.[145]

280. **Rebecca Carson** has been practising midwifery since 2005. She is a partner at Family Care Midwifery in Guelph Ontario and a member of the AOM Board. Ms. Carson's practice serves clients such as older Mennonite families, rural and

142 Affidavit of Maureen Silverman, (Exhibit 133).

143 Affidavit of Jacqueline Whitehead, (Exhibit 235).

144 Affidavit of Nicole Roach, (Exhibit 241).

145 Affidavit of Daya Lye (Exhibit 246); Testimony of Daya Lye, Transcript, March 9, 2017.

farming families, and families that reside in Guelph. Ms. Carson has three (3) school-age children.[146]

281. The representative nature of these individuals, coupled with their shared experience of inequitable pay from the MOHLTC, provides a consistent, comprehensive and yet textured set of evidence on which the Tribunal may base its decision on the injury to dignity damages owing to the over 800 complainant midwives.

C. Central Importance of Being a Midwife to the Complainants' Lives

282. As highlighted by the Supreme Court of Canada in *NAPE*,[147] the conditions in which a person works are highly significant in shaping the psychological, emotional and physical elements of a person's dignity and self-respect. This is because a person's employment is an essential component of their sense of identity, self-worth and emotional well-being. As stated by the Court:

> *For many people what they do for a living, and the respect (or lack of it) with which their work is regarded by the community, is a large part of who they are. Low pay often denotes low status jobs, exacting a price in dignity as well as dollars.*[148]

283. The Court in *NAPE* also commented on the adverse impact of government actions which derogate from the human right to pay equity:

> *"The value placed on a person's work is more than a matter of dollars and cents. The female hospital workers were being told that they did not deserve equal pay despite making a contribution of equal value. As Dickson C.J. observed in Reference re Public Service Employees Relations Act (Alberta) [1987] 1 S.C.R. 313 (S.C.C.) dissenting at p. 368:*
>
> *Work is one of the most fundamental aspects in a person's life providing the individual with a means of financial support and, as importantly, a contributory role in society.* ***A person's employment is an essential component of his or her sense of identity, self-worth and emotional well-being.*** *Accordingly, the conditions in which a person works are highly significant in shaping the whole compendium of psychological, emotional and physical elements of a person's dignity and self- respect. (Emphasis added)*[149]

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146 Affidavit of Rebecca Carson, (Exhibit 248).

147 Newfoundland (Treasury Board) v. N.A.P.E., 2004 SCC 66 at para.40 (J17).

148 Newfoundland (Treasury Board) v. N.A.P.E., 2004 SCC 66 at para.48 (J17).

149 Newfoundland (Treasury Board) v. N.A.P.E., 2004 SCC 66 at para.40 (J17).

284. While the importance of work to one's life may be true in most any work situation, the evidence in this case demonstrates that the 'work' identity of being a midwife disproportionally shapes the psychological, emotional, and physical elements of the individuals in this profession, such that there is no meaningful distinction between the individual as a person, and the individual as a midwife. The identity of being a midwife is all encompassing. As stated by Ms. Whitehead:

It's probably -- I would say it's my very being. Being a midwife really describes who I am and what I do. You know, that first sentence, "I eat, live and breathe midwifery," there is never a really downtime from being a midwife. It's a vocation. It's my whole -- it's my whole self.[150]

285. Ms. Silverman noted:

Midwifery is not a "job", it is the way I live my life… Every part of my day is structured so that I can drop anything I am doing, any time of the day or night, to attend a client in labour.[151]

While Ms. Roach described that:

I think that my identity as a midwife is all-encompassing. It goes back to why I became a midwife. I believe it's an essential part of my identity.[152]

286. Ms. Carson added:

I would say that midwifery is the first thing about me. It is the -- it is the main part of who I am. It affects every aspect of my life. It's the first thing people know about me…. It also means that everybody knows that that's the priority I'm going to place on everything…. It means that I'm not available to meet anybody else's needs because the needs that I am going to meet, that I am going to prioritize are going to be my client's needs always. It's always first. When my son broke his arm, I didn't go to the hospital with him. When my kids are sick, I'm not home with them. When my partner's aunt dies, I don't go to the funeral because I have to do this work. This is the work that I do.[153]

…..

When I put my heart and soul into my work as a midwife, and when my primary identity is infused by my status as a midwife, the MOHLTC's treatment is a direct affront to my dignity as a person. It makes me feel like

150 Testimony of Jacqueline Whitehead, Transcript, March 9, 2017, at pp. 19.

151 Affidavit of Maureen Silverman, (Exhibit 133), at paras. 4-6.

152 Testimony of Nicole Roach, Transcript, March 9, 2017, at pp. 11.

153 Testimony of Rebecca Carson, Transcript, March 10, 2017.

the financial sacrifices that my family is making and the physical and emotional toll of my job are not worth it.[154]

287. The above evidence underscores that the injury to dignity experienced by the complainants in relation to their work as a midwife will be particularly grave and serious since their self-identity is primarily, if not exclusively, defined by their work.

288. As such, any harm experienced by the complainants as midwives goes to the core of their identity and who they are as individuals. It is not a compartmentalized 'work' aspect of self. It also means that midwives are particularly vulnerable to the actions of the MOHLTC since its actions, as their funder and otherwise, can affect the very core of the complainants' self-worth.

D. Criteria for Injury to Dignity Claims

289. The Tribunal has applied two criteria in making the global evaluation of the appropriate damages for injury to dignity, feelings and self-respect: the objective seriousness of the conduct and the effect on the person who experiences the discrimination. Relevant considerations regarding the effect of the treatment on the person include:

- Humiliation experienced by the complainant
- Hurt feelings experienced by the complainant
- A complainant's loss of self-respect
- A complainant's loss of dignity
- A complainant's loss of self-esteem
- A complainant's loss of confidence
- The experience of victimization
- Vulnerability of the complainant
- The seriousness, frequency and duration of the offensive treatment

290. The more prolonged the discrimination, the greater the injury.[155]

E. Vulnerability of the Complainants

291. A key factor in the jurisprudence is the vulnerability of the complainant. The evidence provided throughout this case demonstrates that midwives are particularly vulnerable to the MOHLTC due to its role as the exclusive funder of midwifery services; the caring dilemma or "compassion traps in the words of Dr.

154 Affidavit of Rebecca Carson, (Exhibit 248), at para. 54.

155 *Arunachalam v. Best Buy Canada* 2010 HRTO 1880, at paras. 52-54.

Armstrong, experienced by midwives; and the financial need for midwives to continuously subject themselves to the MOHLTC's treatment in order to maintain and purchase the supports needed (such as child and elder care and assistance with other household work) to sustain the heavy and demanding on call burden of the work.

292. In describing her treatment by the government, Ms. Roach stated:

> *I just take the treatment from the government because, I mean, what else can I do? I can't have another job. I can't find another midwifery funder. It's just the Ministry. I really have no choice. If I want to be a midwife, if I want to provide this kind of care, I just have to take it, and that is just is not -- it doesn't feel good.*[156]

293. Ms. Whitehead also explained that vulnerability is present due to the fact that midwives experience a "caring dilemma" in which they feel a tension between exerting their right to equal pay for work of equal value and not compromising client care:

> *I want to ensure that women do not have the experiences that I had. I want to make sure that they have informed choice. This is why I continue in this profession despite the lack of equitable pay. I have heard this described as the "caring dilemma" and I find that this phrase resonates with me.*
>
> *I work extremely hard to provide excellent care to my clients. I would not do anything to jeopardize their care like withdraw my services to make a stance against my inappropriate pay. I feel that the MOHLTC has taken advantage of this, knowing that I as a midwife will continue to work despite my inequitable pay because I do not want my clients to suffer.*
>
> *This makes me feel that I am caught between doing the work that I love, and that provides positive health outcomes that are actually a benefit to the MOHLTC, and getting paid equitably. I should not have to make this choice every day, but I do, always in favour of my client's well-being.*[157]

294. Midwives also experience vulnerability in relation to the government due to the frequency in which they are subject to its treatment, and the effect that this has on their families.

295. In terms of frequency, one of the ways that midwives experience discrimination is through the inequitable payment of every course of care. As independent contractors, midwives are not obligated to deliver a certain number of courses of care to the MOHLTC.

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156 Testimony of Nicole Roach, Transcript, March 9, 2017, at pp. 134-135.

157 Affidavit of Jacqueline Whitehead, (Exhibit 235), at paras. 26-28.

296. However, the inequitable payment structure of each course of care means that midwives get paid less for their work, and thus, must work *more* in order to make enough money to support themselves and their families, especially given the high lifestyle costs, such as night time and weekend child care costs, or owning two cars per family that are associated with the onerous on-call/off-call obligations of this work.

297. As such, the compensation structure set up and maintained by the MOHLTC is one where midwives subject themselves to more *frequent* discrimination through every additional course of care they work in order to have the ability to support themselves and their families. This is a prime marker of vulnerability. A salient example of this was provided by Ms. Lye, who described working as a midwife while pregnant. She stated:

> *Living apart from my husband while I was pregnant with our first child was difficult for me, in a practical sense and also emotionally. Working long hours, on my feet much of the time, often without breaks even to use the washroom or eat, was difficult and often exhausting. When I returned home from a hospital birth my feet and legs would ache and I'd be tired and hungry. If I had been adequately compensated for each course of care that I worked, I may have chosen to work less and not put such a strain on myself when I was pregnant.*
>
> *Living alone part of the time required me to do all my own grocery shopping and cooking, and I struggled to have the time and energy to prepare adequately healthy meals for myself, especially in the later months of my pregnancy. In addition to this I was on call for weeks at a time, and therefore often unable to visit my husband or family and obtain support from then.*
>
> *If I had been adequately compensated for each course of care that I worked I may have chosen to purchase a food delivery plan or pay to facilitate my husband or family to visit me when I required this support. Instead I had to ask my mother to visit me to cook food on some occasions and go without seeing my husband for long stretches of time.*[158]

298. Ms. Silverman also provided evidence about the impact of inequitable pay at the other end of the spectrum when close to retirement age. She stated:

> *I feel hurt and disillusioned that my life's work has not provided me with an equitable salary. After 17 years, I am approaching the age of retirement without the financial means to retire; therefore I feel vulnerable and unable to make a decision to work less. I am very anxious about my future and whether I will be able to afford to retire, or even just to work less. This anxiety leads me to work more.*

158 Affidavit of Daya Lye, (Exhibit 246), at paras. 36-38.

I am fearful that an accident or illness will put a stop to everything and I am ill-prepared for this to happen. If I had received a fair and equitable salary throughout all these 17 years, I would have been able to save more money for retirement.

Now that I have health issues, which are compounded by shift work with its inherent lack of sleep, lack of access to healthy nutrition during long, unpredictable hours of work, and lack of exercise, it is even more critical that I be able to change my lifestyle. However I fear that I am unable to change this lifestyle because the underpayment of my work means both that I have to work harder to gain an income and also that that I have lower savings to rely on so that I can cut down on work.[159]

F. The Impact of MOHTLC's Systemic Unlawful Conduct Towards Midwives

299. Within this context of vulnerability, the MOHLTC underpaid midwives, failed to adequately support their integration into hospitals and failed to provide them with a fair bargaining process, amongst other things. As stated by Ms. Silverman:

Compensating me appropriately for my work is the primary way that the Ministry could demonstrate how much it values me for the work I do. When this is not done, I know that I am not valued by the MOHLTC.[160]

Being underpaid has taken an emotional toll. I feel more vulnerable to illness and experience effects of victimization such as self-doubt, suspicion of being judged and anxiety. There's always a feeling that I need to defend my management decisions.[161]

The government's actions of not paying me appropriately are deeply humiliating and disrespectful. It makes it difficult to feel proud about being a midwife when I perceive that others don't value my work. By underpaying midwives, the government is basically saying to me that they don't value my work or care about my health and they don't care about the health of my family, either.[162]

300. As stated by Ms. Carson in relation to a neighbour learning about what she receives as compensation from MOHLTC:

When my partner told me their conversation, I burst into tears. I was embarrassed to admit that I work this hard for what I am paid and I felt ashamed

159 Affidavit of Maureen Silverman, (Exhibit 133) at paras. 28-30.

160 Affidavit of Maureen Silverman, (Exhibit 133), at para. 18.

161 Affidavit of Maureen Silverman, (Exhibit 133), at para. 31.

162 Affidavit of Maureen Silverman, (Exhibit 133), at para. 34.

that others in the community also recognized how little I was paid for the work that I do.[163]

I have the responsibility to provide for my spouse and three children and I cannot comfortably provide for our basic needs. Not being appropriately compensated by the MOHLTC makes me feel devalued.[164]

She later testified that she felt "stupid" for having made the decision to become a midwife.[165]

301. Ms. Lye described similar sentiments, stating:

> *And I regretted my choice to become a midwife. I felt like it was my fault for choosing such an undervalued profession.*[166]
>
> *…*
>
> *I felt additional embarrassment, knowing that the MOHLTC knew about our pay equity concerns and yet, would do nothing about it. I felt like I, as a midwife, was not good enough and not valorised enough for the MOHLTC to feel that it had to do anything to provide me with fair pay.*[167]

302. Ms. Roach in turn, stated:

> *I think what's so difficult with this case, and I think what's so hurtful -- so very hurtful is that so much of what we do appears to be invisible, unseen and undervalued. It's not valued.*[168]

303. The witnesses also provided evidence about the ways in which the inequitable pay of the MOHTLC affected their relationships with their families. As stated by Ms. Roach:

> *It's incredibly embarrassing to think that I'm a professional and I can't provide adequately for my family, that I have to tell them to make do, tell my children to make do. I feel like I failed my family. But they didn't choose to be a midwife. I chose to be a midwife and they have to deal with what's going on. They have to deal with my inequitable payment.*

163 Affidavit of Rebecca Carson, (Exhibit 248), at paras. 37.

164 Affidavit of Rebecca Carson, (Exhibit 248), at paras. 33-34.

165 Testimony of Rebecca Carson, Transcript, March 10, 2017, at pp. 78-79.

166 Testimony of Daya Lye, Transcript, March 10, 2017, at p. 22-23.

167 Affidavit of Daya Lye, (Exhibit 246), at para. 72.

168 Testimony of Nicole Roach, Transcript, March 9, 2017, at pp. 20-21.

They have to deal with the stress of me being unavailable for them. I hate having to pass that burden onto them.[169]

304. When Ms. Lye was asked to describe what impact the Ministry's treatment had on her as a mother and caregiver of two (2) young children, she replied:

There were a lot of stresses while I was pregnant. So, I worried about that effect on my children. And so when I went back to work in 2014, when my daughter was small, just over a year, I really felt that the stress for my family of trying to maintain a lifestyle that would make it possible for me to be in that role really came out in terms of a lot of family conflict. And so that's something that my daughter witnessed was family conflict based on that, and that there was really -- it had a really negative impact because I felt like I wasn't -- not only was my work not being recognized adequately or wasn't being paid fairly, I wasn't -- I just didn't have enough money. We didn't have enough money to do the things that I felt like I needed to do to care well for my daughter and also do my job.[170]

305. Ms. Carson, in referring to the personal financial liability she carries as a practice partner and the effect of the MOHLTC's payment for her work as a midwife gave the following evidence:

Yes. So, it is a job that I find meaningful, and it is work that I find important. However, it is really difficult to make those sacrifices when you are not compensated for what that requires and what that means in my life. And to be underpaid for that responsibility, to carry that liability that could ruin my life, my family's life, and to still feel like there is still not enough money to be able to save for an adequate retirement, to be able to have confidence that I would be able to put my kids through school if they wanted to go to school, to feel like those on-call demands and the responsibilities that I carry have played such a demand on my family and have had impact on my partner's ability to earn income, have completely formed her career trajectory.[171]

G. Impact of Lack of MOHLTC Support for Addressing Integration Barriers and Prejudices and Stereotypes

306. A particularly salient area in which the midwives experienced injury to dignity was in relation to the MOHLTC's failure to protect and support their equitable

169 Testimony of Nicole Roach, Transcript, March 9, 2017, at pp. 122.

170 Testimony of Daya Lye, Transcript, March 9, 2017, pp. 26-27.

171 Testimony of Rebecca Carson, Transcript, March 10, 2017.

integration into hospitals given the discriminatory barriers they were facing as a previously suppressed predominantly female profession.

307. As stated in other sections of this submission, midwives encountered many prejudices and stereotypes when coming into contact with other health care providers while working in the hospital setting. As but one example, Ms. Whitehead testified that she was asked by a hospital medical resident if she, as a midwife, ate placentas,[172] and the other representative midwives testified to similar degrading treatment by hospital staff, including physicians.

308. The MOHLTC had a role to play when midwifery was regulated and onwards, to ensure that midwives were appropriately integrated into the hospital setting. By failing to do so, and by paying midwives inequitably in comparison to their healthcare comparators, the MOHLTC set the tone by which others felt entitled to treat midwives with disrespect and worse. The failure of the MOHLTC to ensure proper integration was thus a cause of the injury to dignity suffered by midwives in the hospital setting and elsewhere.

309. This causal effect was commented on by Ms. Lye, who stated:

> *I really felt that, if I was undervalued by the Ministry of Health, so many things flowed from that, that they were setting the tone. If they didn't have to value our work appropriately, that other health care providers or even other clients or other patients that nobody else in that setting had to value us appropriately either.*[173]

310. Ms. Whitehead's testimony also supported this link, stating, in relation to stereotypes about midwives:

> *…I hear them when I go to work at the hospital, that the impact of not being paid adequately gets reflected in how people get treated, how I get treated, how other midwives at the hospital get treated.*
> *…*
> *As I said before, what you value, you pay for. So, if you don't value midwives, it gives permission to others to not value midwives.*[174]

311. Ms. Silverman's statements echoed the above, as follows:

> *If the MOHLTC promoted this, and appropriately rewarded midwives with financial compensation for their hard work and excellent outcomes, then other care providers would begin to value midwives more. Instead, the current message to other care providers is that midwives must be less competent, or*

172 Testimony of Jacqueline Whitehead, Transcript, March 9, 2017, at p. 33.

173 Testimony of Daya Lye, Transcript, March 9, 2017, at p. 31-32.

174 Testimony of Jacqueline Whitehead, Transcript, March 9, 2017, at pp. 29-30, 32.

midwifery is less important, because our salaries are so low. It's harder for me to value myself when I always have to prove that I should be valued.[175]

…Knowing that the MOHTLC has not stepped in to protect midwives and that it has not proactively assisted in securing equitable treatment for us at government funded hospitals was upsetting to me. If made me feel less worthy than my colleagues. It is very demoralizing to work in this kind of environment.[176]

312. Thus, the effect of the MOHLTC's failure to protect midwives in the hospital setting is further feelings of devaluation by midwives, which are layered on top of the abuse they suffer in the hospital. As such, for midwives, the injury to dignity they experience in the hospital is compounded in nature, and further extends to the clients of midwives, as explained by Ms. Roach:

The MOHTLC's failure to take proactive steps to encourage the integration of midwives in hospitals, given our history as a vulnerable profession that was excluded from these spaces for such a long time shows me that the government does not value our work. It shows me that the government will turn a blind eye to how this negative treatment towards midwives also translates into negative treatment for our clients.[177]

H. The Effects of the MOHLTC's Failure to Negotiate with the AOM on a Consistent and Timely Basis

313. The representative midwives, like the complainants in this case, were advised of the status of contract negotiations by the AOM, and in some cases, the Transfer Payment Agency. The comparative treatment of the AOM by the MOHLTC in comparison to its consistent and timely negotiations with the OMA again highlighted the relative value of midwives to the MOHLTC in comparison to physicians, which also caused injury to dignity.

314. Ms. Lye testified as follows on this issue:

And so, for instance, when the Ministry refused to negotiate with my representatives, the Association of Ontario Midwives, but I knew that they were sitting down and negotiating with the Ontario Medical Association just hearing that on the news because I'm kind of news junky and would listen to it and read all the time, I knew that that was happening. It felt like the people who were in charge, the Ministry of Health and Long-Term Care, who are in some way like

175 Testimony of Maureen Silverman, Transcript, October 18, 2016, at para. 42.

176 Testimony of Maureen Silverman, Transcript, October 18, 2016, at para. 44.

177 Affidavit of Nicole Roach, (Exhibit 241), at para. 72.

are our mutual boss, just didn't care about us and just didn't value us the same way.[178]

....

And so it really took away my confidence in myself. It's like -- and then also it was at a time, it was in the fall then, that the Association of Ontario Midwives was actually struggling specifically about pay equity. And obviously that was something that I felt was important and it was like being in an argument with somebody who wouldn't look at us, the fact that they wouldn't negotiate with us, like arguing with somebody and begging them just to notice you and they won't even notice you. I really felt invisible because of that…[179]

315. The impact of such treatment was also commented on by Ms. Whitehead in her testimony:

I think one of the things that's most frustrating is the inability to sit down with the Ministry and have any kind of meaningful negotiation. It has been probably one of the most frustrating things for me over the course of my career. It's incredibly insulting. I don't want to feel this way. I don't want to feel like I'm being insulted, but I can't make sense of it any other way. I can't understand why there can't be a respectful negotiations process, not calling it negotiations, or just all the varying ways it's been ignored, dismissed, put off.[180]

36. A similar sentiment was expressed by Ms. Silverman, who gave the following evidence:

The fact that we weren't getting anywhere with them, and finally at one point there was some compensation that was to be promised and it didn't turn out to be as much as we had hoped and it just, you know, all of those experiences just felt like salt being poured onto a wound. It's like it's already open. It's already stinging and now you're just going to add more. And that's kind of how it went from 2005 on, just adding more and more salt to the wound as the behaviours never changed in terms of how the negotiations went.[181]

I. Summary Remarks Regarding the Evidence Heard

316. As seen from the above, midwives described how they were particularly vulnerable to the MOHLTC due to its role as their sole funder, the caring

178 Testimony of Daya Lye, Transcript, March 9, 2017, at pp. 21-22.

179 Testimony of Daya Lye, Transcript, March 9, 2017. at p. 22

180 Testimony of Jacqueline Whitehead, Transcript, March 9, 2017, at p. 36.

181 Testimony of Maureen Silverman, Transcript, October 18, 2016, at p. 71.

dilemma, and the frequency at which they are subject to its discriminatory treatment.

317. Within this context of vulnerability, midwives experienced feelings such as embarrassment, frustration, loss of confidence, hurt, disillusionment, emotional toll, demoralization, disrespect, feelings of being "less than", and insult, as a result of the MOHLTC's treatment of them in relation to their pay, hospital integration issues and negotiating matters.

318. And yet as comprehensive as the above account has been, the injury to dignity felt by the midwives is perhaps best captured by one of the final statements of Ms. Silverman in her testimony:

> *…I would say the ultimate insult is really having to be here today. This is not the way that it should have played out. I feel that the Ministry had a responsibility to ensure that we were paid equitably and paid adequately. And basically by being here today, it feels like it's kind of like my eyes are open, it's like the Ministry really doesn't feel like you guys are worth it.*
>
> *Q. When you say "you guys" you're referring to?*
>
> *A. Midwives. Me. Otherwise, why would it be brought to this point. Midwives shouldn't have had to come to this table, the Human Rights table, to have our -- to have our voices heard.*[182]

J. Remedy Requested

319. The above evidence relating to the personal experience of witnesses regarding their treatment by the MOHLTC was not a focus of cross-examination. Instead, the MOHLTC focussed its examinations on the tax returns of the representative injury to dignity witnesses, as well as their on-call/off-call schedules for 2015 and 2016, and the financial statements of their midwifery practice groups. As such, the statements provided by the witnesses regarding the injury to dignity that they experienced remain generally unchallenged.

320. Monetary compensation as a remedy for injury to dignity, feelings and self-respect recognizes that the injury to a person who experiences discrimination can be psychological in nature, and engages more than quantifiable losses such as lost wages. Damages under the *Code* must not be so low as to trivialize the social importance of the Code by effectively creating a license fee to discriminate, particularly when the offender is the state.

182 Testimony of Maureen Silverman, Transcript, October 18, 2016, at pp. 73-74.

321. Failure to pay equitable compensation and recognize the professional expertise of women will justify a significant order for compensation for injury to dignity, feelings and self-respect. See *Walden v. Canada.*[183]

322. In considering what damages should accrue to the complainants, special consideration should be given to the uniqueness of a systemic wage-discrimination case such as this one.

323. The AOM submits that the appropriate way to acknowledge the injury to dignity felt by the complainant midwives through the period of time in which they provided midwifery services to the MOHLTC is to award damages of $7,500 for every year in which complainants received inequitable and discriminatory compensation from the MOHLTC for midwifery services billed to the MOHTLC.

324. While the $7,500 claimed per year is a modest amount for a year of experiencing discrimination, a yearly measure does recognize that some midwives have experienced this injury to dignity for as much as 20 years back to 1997, the date of commencement of the AOM requested relief.

325. The AOM submits that systemic discrimination cases warrant higher damage awards. Such was indicated by Tribunal in *Umac* v. *Custom Black Inc.*,[184] a case that involved non-systemic wage discrimination by a small employer. In justifying an injury to dignity award of only $2,000.00, the Tribunal stated:

> *107] … But this is not a case involving systemic discrimination. The facts in this case were unique to the applicant's situation. The evidence of discrimination in this case was subtle based mainly on misperceptions of the applicant's skill level. The respondent did not display any ill will toward him. The other allegations of discrimination raised by the applicant were not established because they were either untimely or the evidence did not support a finding of discrimination.*
>
> *[108] There was little by way of evidence lead by the applicant to demonstrate how the alleged breach of the Code caused any injury to his dignity, feelings or self-respect. I accept that he was upset and personally affected by the fact that other employees were earning more than he did in the workplace. I also accept that he experienced hurt feelings, lower self-esteem and lost confidence because the respondent undervalued his contribution to the workplace.*
>
> *[109] An order in damages in the amount of $2,000.00 is appropriate to address this breach of the Code.*[185]

183 *Walden v. Canada (Social Development)* 2009 CHRT 15 (Canlii).

184 *Umac* v. *Custom Black Inc.*, 2015 HRTO 1299 (CanLII).

185 *Umac* v. *Custom Black Inc.*, 2015 HRTO 1299 (CanLII) paras. 107-109.

326. In contrast to the facts in *Umac*, the Tribunal has been presented with comprehensive and unchallenged evidence of the injury to dignity experienced by the midwives through several witnesses including, but not limited to the representative witnesses. For the above reasons, the damages awarded in this case should be higher than that of *Umac* and should be tailored to reflect the years of discriminatory pay.

327. The award granted by this Tribunal should reflect the ongoing nature of the *Code* violation experienced by midwives given its frequent and lengthy manifestation every time she gets paid, or experiences a hospital integration issue or experiences injury to dignity due to the lack of an equitable bargaining structure.

328. In relation to inequitable pay, the Tribunal in *Garrie* v. *Janus Joan Inc.*, found that an employer had engaged in a discriminatory pay practice for more than ten (10) years to an individual with a developmental disability. This case confirmed that each payment to the individual by the employer was a "series" of incidents, such that the discriminatory treatment took place over a considerable length of time, and at a high frequency. In assessing injury to dignity damages, the Tribunal held that the discriminatory pay practice was a serious violation of the *Code*, which had resulted in emotional difficulties for a person who was vulnerable to exploitation from employers.[186]

329. In *Garrie,* the adjudicator noted the paucity of cases that directly address the issue of awards for monetary damages for injury to dignity in the context of wage discrimination and advised that the only other recent case that he was aware of was that of the British Columbia Human Rights Tribunal (BCHRT), where the decision-maker ordered the respondents to pay each complainant $10,000.[187]

330. However, the Tribunal in *Garrie* found the BCHRT decision was too low to reflect the objective seriousness of paying workers less because of their *Code* related personal characteristics, and awarded the complainant $25,000 for injury to dignity damages, which works out to roughly $2,500 per year of work.[188]

331. We submit that the damage awards in the current case should be higher than those in *Umac* and *Garrie* due to a key distinguishing feature. Simply put, unlike the claimants in *Umac* and *Garrie*, the midwives complainants experienced injury to dignity as a result of a comprehensive set of discriminatory and systemic employment, fiscal, budgeting and practices and policies of the MOHLTC, which contributed to their discriminatory compensation and funding. This included, amongst other matters, their experience of a marginalized and inequitable compensation and funding setting system and the comprehensive set of unlawful

186 Garrie v. Janus Joan Inc., 2014 HRTO 272 (CanLII), paras. 101-102.

187 *C.S.W.U. Local 1611 v. SELI Canada and others (No. 8)*, 2008 BCHRT 436 (CanLII).

188 Garrie v. Janus Joan Inc., 2014 HRTO 272 (CanLII), para. 106.

actions proved in this case which were detailed in paragraph 62 of the AOM application as noted above.

332. As a result, the midwife complainants can be viewed as having multiple stand-alone, and yet linked claims for injury to dignity damages. It consequently stands to reason that any damage award that addresses injury to dignity across multiple areas, as in the current case, must certainly be higher than those that address only one such aspect, as in *Umac* and *Garrie*. For this reason, the damages awards in the current case must be higher than those in *Umac* and *Garrie*, to reflect the multiple and different injury to dignity harms experienced by the complainant midwives.

333. Given the novelty of the systemic nature of this case, as well as the multiple grounds on which the injury to dignity was experienced, it is instructive to examine the Tribunal's decisions regarding work-related injury to dignity claims across a broad spectrum of grounds.

334. In *Defina v. Lithocolor Services Ltd.*,[189] the applicant alleged that she was terminated as a result of discrimination on the basis of a disability, as a result of menial labour being assigned to her because of her sex that had no connection to her role as a pre-press manager. She had been with the employer for less than two months. The Tribunal dismissed the allegation of sex discrimination but found that disability was a factor in her termination. The Tribunal cited the factors outlined above from *Arunachalam* and *Sanford* and awarded the applicant $15,000 for injury to dignity, feelings and self-respect.

335. In *O'Brien v. Organic Bakery Works Inc.*,[190] the applicant had been employed for seven months and was precluded from returning to work after a work injury and laid off. As a result, he became depressed. He testified that he had a new baby at the time, his spouse was on maternity leave, and they had to attend a food bank. The adjudicator reviewed the Tribunal's awards for disability-related discrimination involving a termination. She agreed with the applicant that the range of awards was generally $10,000 to $20,000 and noted that where $15,000 to $20,000 had been awarded, the cases have involved multiple breaches or conduct occurring over a longer period of time, or evidence of significant psychological or emotional consequences (in some cases with medical evidence). The applicant was awarded a total of $13,000.

336. In *Nemati v. Women's Support Network of York Region,*[191] the HRTO found the complainant had been discriminated against by her employer and unfairly terminated on the basis of ancestry and ethnic origin. While the Tribunal didn't find there was enough of nexus between the complainant's claim that her work

189 *Defina v. Lithocolor Services Ltd.*, 2012 HRTO 1768.

190 *O'Brien v. Organic Bakery Works Inc.*, 2012 HRTO 457.

191 *Nemati v. Women's Support Network of York Region,* 2010 HRTO 327.

was consistently undervalued and the prohibited ground, it did find that her termination was the result of her being more severely disciplined than other workers. The Tribunal found that the applicant suffered considerable loss of self-respect, dignity, and confidence and awarded her $10,000.

337. Finally, in *Whale v Keele North Recycling,*[192] the HRTO found the complainant had been discriminated against and fired by the respondent on the basis of her sex. The complainant was hired, along with her male fiancé, as a general labourer at a recycling facility but was not asked to return for further shifts after the president discovered her presence. The Tribunal found that, though she was competent and qualified, she was dismissed because she was a woman. She was awarded $10,000 for injury to dignity, feelings and self-respect.

338. Given the range of damage awards of $10,000 to $15,000 in work-related discrimination cases and the systemic, long-term, and multi-faceted ways in which the midwives experienced discrimination at the hands of the MOHLTC, we submit that a damage award of $7,500 per midwife for every year in which she billed courses of care to the MOHLTC for midwifery services is more than reasonable.

339. This award is suitable both in quantum and in structure, as it addresses the injury to dignity experienced by the midwife complainants on a yearly basis, and correctly awards more damages to midwives who have been practising the longest, in acknowledgment of their exposed subjection to discriminatory treatment.

340. A damage award of $7,500 per midwife, per year in which midwifery services were provided strikes the correct balance for both the MOHLTC and the complainant. It is not so high as to be punitive in nature to the funder of compensation, and yet it is not so low that it does not recognize the multi-layered harm experienced by midwives.

341. As such, we respectfully request that the Tribunal order the MOHTLC to pay no later than 2 months subsequent to the Tribunal's decision the sum of $7,500 in damages for injury to dignity for every midwife complainant for every year in which she billed for midwifery services to the MOHTLC.

PART VI: CLAIM FOR INTEREST

342. The AOM has requested interest on the monetary amounts owing in this matter:

192 *Whale v Keele North Recycling,* 2011 HRTO 1724.

1. Jurisprudence

343. In order to properly compensate complainants for their losses, interest is directed by the Tribunal to be paid.

344. The Tribunal in *Despres v. The Crossbar Inc.* held that the applicant was entitled to interest on both the monetary awards ordered and this can be calculated in accordance with sections 127 and 128 of the Courts of Justice Act (CJA). The Tribunal has held that its broad remedial powers include determining the appropriate approach to pre-judgment and post-judgment interest. [193]

345. The Tribunal has ordered interest on general damages running from the date of the *Code* violations – that is the "date on which the cause of action arose" which in the case of a wrongful dismissal was the date of the dismissal. In *Pchelkina v. Tomsons,* the Tribunal noted in this decision that the interest on special damages runs from a later date, usually on payments for lost salary run from the date such payments were due. [194]

2. Request

346. The applicant requests an order that the MOHLTC shall pay interest on all monies owing as set out above up to the date of decision, calculated in accordance with sections 128 and 129 of the *Courts of Justice Act*, R.S.O.1990, c.43 and the *Hallowell House Limited* [195] decision principles.

PART VII: REQUESTED REMEDIES TO ENSURE FUTURE COMPLIANCE WITH THE CODE

[193] Despres v. The Crossbar Inc., 2015 HRTO 1624 (CanLII) , paras. 37-41 and Bali v. Madhavji, 2014 HRTO 1683 (CanLII) paras. 21-25. and Pcelkina v. Thomsons.

[194] *Courts of Justice Act*, R.S.O, 1990, c. C.43, s. 128 (1) as amended; *Szabo v. Poley*, 2007 HRTO 37 (CanLII) at para. 31.

195 *Hallowell House Limited* [1980] OLRB Rep. January 35

A. Introduction

347. To prevent similar discrimination from happening in the future, the applicant seeks remedies set out below.

B. Jurisprudence Re Future Compliance Remedial Directions

348. The Tribunal has addressed the purpose and scope of its powers in a number of decisions.

349. In *Frolov v. Mosregion Investment Corporation*, the Tribunal states that it is empowered to direct any party to do anything that in the Tribunal's opinion the party ought to do to promote compliance with the *Code*[196]. It was also found that it is well-established in human rights law that any order intended to promote *Code* rights and policy should remedial as held in *Giguere v. Popeye Restaurant* :[197] "should be reflective of the facts in the case, should be remedial, not punitive and should focus on **ensuring that the key objects of the Code, to eradicate discrimination and to ensure future compliance,** are achieved in the particular circumstances". (Emphasis added)

350. The Tribunal is particularly concerned to ensure that systems, processes and training are in place to ensure the unlawful discrimination does not reoccur, particularly where systemic discrimination violations are found.

351. In *Lane v. ADGA Group Consultants Inc.* the Tribunal found the Respondent's "lack of awareness of its responsibilities under the *Code* as an employer was particularly egregious. There were no workplace policies in place on dealing with persons with disabilities. **Moreover, senior management were singularly oblivious to those obligations**." This is similar to the Ministry here being profoundly unaware and unconcerned about meeting its *Code* responsibilities.

352. In the ADGA decision the Tribunal held that this " unawareness on the Respondent's part justified the other party seeking a broad range public interest remedies to ensure the principles of the Code were upheld and future discrimination of this nature was avoided[198]. In *Dubé v. CTS Canadian Career*

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[196] *Frolov v. Mosregion Investment Corporation,* 2010 HRTO 1789**,** para. 109

[197] *Giguere v. Popeye Restaurant*, 2008 HRTO 2, para. 91.

[198] *Lane v. ADGA Group Consultants Inc.*, 2007 HRTO 34 para. 164

College the Tribunal found "training and awareness raising" to be two important objectives for remedies of future compliance.[199]

353. In promoting the remedial the nature of the *Code* the Tribunal in *Chaudhry v. Choice Taxi of Cornwall Inc***.** directed the respondents to hire a human rights professional to review their policies to ensure future compliance with the *Code*[200]. In *Smith v. The Rover's Rest* the Tribunal ordered the respondent to specifically retain a consultant with expertise in gender discrimination and sexual harassment to provide *Code* related training[201].

C. Future Compliance Remedial Directions Requested

1. Future Compensation/Funding to Be Set In Compliance with *Code* and Decision

354. The AOM requests the following directions:

(a) The MOHLTC will in the future set the compensation/funding for midwives in accordance with the requirements of the *Human Rights Code* and consistent with the Tribunal's findings and directions, including the analysis provided by experts Paul Durber, Hugh Mackenzie, Dr. Pat Armstrong and Dr. Ivy Bourgeault.

(b) The MOHLTC will apply the above-noted requirements in the following situations:

i. The MOHLTC's compensation/funding setting for the Aboriginal Midwifery Program (AMP) which has been implemented by the MOHLTC since the application.

ii.The Alternative Midwifery Funding (AMF) arrangements that are being developed by the MOHLTC working with the AOM to enable midwives to practice in innovative ways to meet specific community needs and/or to practice in alternate ways to accommodate midwives with a disability.

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[199] *Dubé v. CTS Canadian Career College*, 2010 HRTO 713 para. 85

[200] Chaudhry v. Choice Taxi of Cornwall Inc., 2013 HRTO 756, para. 24 and *Wedley v. Northview Co-operative Homes Inc.,* 2008 HRTO 13 para. 89

[201] *Smith v. The Rover's Rest*, 2013 HRTO 700, para. 139.

Note: Far North Funding arrangements are being developed by the MOHLTC for the purpose of enhancing and expanding the sustainability of midwifery services to remote and isolated Indigenous communities where the need is great and urgent. Currently, only one far northern community, Attawapiskat, has access to midwifery care, provided by Neepeeshowan Midwives: however growth in midwifery services in the Far North is anticipated.

iii. Where midwives working in the AMP, AMF or Far North are funded as employees or health care organizations, the Ministry will fund an evaluation process to ensure the compensation/fees are set in accordance with the Code. The Ministry will include the AOM as a joint partner in setting the terms of the any equity job evaluation that the Ministry conducts that involves the compensation/fees of midwives.

2. Gender Equitable Bargaining and Negotiation System

(c) The Ministry, in collaborative negotiations with the AOM, will set up and follow an equitable compensation bargaining structure for midwives, with the AOM similar to that provided by the Ministry for the bargaining with the Ontario Medical Association of physician compensation, including for CHC physicians. This will include a process of binding arbitration as the Premier and MOHLTC have recently committed to the OMA. The bargaining structure will take into consideration the changes made to the OMA and Ministry structures agreed to in 2017.

(d) Midwives, like physicians are not able to engage in strike or withdrawal of care to clients, as it would be unethical and also in contravention of the expectations of professional conduct specified by the College of Midwives of Ontario. Binding arbitration is a necessary equality promoting protection for them.

(e) In light of anticipated new tentative 2017 agreements which were reached subject to this pending proceeding and without prejudice to this proceeding and which are still in the process of final ratification by the Government, a direction that the parties engage in a further facilitated process, with accountability and appropriate timelines back to the Tribunal, that enable for amendments to be made to the agreements to ensure that they reflect the appropriate remedial relief for the *Code* violations in this proceeding and also ensure that the midwifery bargaining system is appropriately "equitable" and "similar to that engaged in by the MOHLTC with the OMA".

(f) A direction that the Tribunal will appoint the current jointly agreed upon facilitator, Elaine Todres, to facilitate that process, with all costs paid for by the Ministry.

3. Regular Human Rights/Pay Equity Evaluation Process

(g) The Ministry will establish regular human rights/pay equity evaluation processes with the government accountable for implementing the results and subject to review and monitoring by Mr. Durber, or if one can be agreed upon by the AOM and Tribunal another independent third party with expertise in human rights and pay equity. Where agreement cannot be reached, adjudication of the necessary *Human Rights Code* compliant compensation will be made by such third party. All such third party fees and costs to be paid by the Ministry.

(h) In addition to the evaluation process for registered midwives working under the TPA-MPG template contract, evaluation processes must also address midwives working in AMP and AMF models. This will be inclusive of midwives working in AMF and AMP and which also takes into account midwives working in the far north serving Indigenous communities (as their comparator must take into account incentives specific to the far north and physicians working in the far north given that there are no Community Health Centres operating in the far north).

(i) The Ministry and the AOM will use the New Zealand Equitable Job Evaluation System and Paul Durber as an independent consultant to assist the parties in this process.

(j) To ensure that the compensation/ funding of midwives is maintained free of gender bias, 12 months prior to the expiry of the new contract in March 31, 2020, the AOM and the MOHLTC will meet and negotiate in good faith a human rights/pay equity analysis of midwives, CHC physicians and Nurse practitioners using the New Zealand Equitable Job Evaluation System. This analysis will take place separately from the negotiations for the new contract agreements for the period April 1, 2020 onwards. The results of this analysis will take effect as of April 1, 2020 which is the start date for the next contract if the tentative agreement is ratified which runs from April 1, 2017 to March 31, 2020.

(k) The above noted human rights/equity analysis will then take place as set out above every three years thereafter in order to ensure a proper equitable compensation is maintained free of gender bias.

4. Adoption of Gender Inclusive Budgeting and Policy Lens

(l) The Ministry will adopt and implement a sex- and gender-based and gender inclusive analysis to the budgeting for and setting of all midwifery compensation and funding the comparator health care professions, the CHC physician and CHC Nurse Practitioners to ensure such processes are free of sex bias. This process will include a human rights impact assessment to ensure compliance with the *Human Rights Code.*

5. Appropriate Human Rights Training

(m) Ministry staff will complete as a starting step, the Ontario Human Rights Commission's online training Human Rights 101 or equivalent training on basic principles of human rights and confirming to the applicant's counsel that this has been done within 60 days of the decision.

(n) The Ministry will retain Mr. Durber who will:

i. Assist with the review and revision of the Ministry's compensation funding and bargaining policies and that revised policies will be distributed to appropriate Ministry employees.

ii. train MOHLTC employees up to the Deputy Minister involved in the setting of midwifery compensation with respect to the revised policies, the *Code* and how to provide, achieve and maintain pay equity, including for midwives working in AMP and AMF models.

iii. Similarly train Ministry of Finance employees who handle midwifery funding.

6. Educating Government and Ministry Officials Concerning Decision

(o) The Ministry will communicate to all appropriate Ministry staff, to Ministry of Finance and Ministry of Government Services staff, to midwifery Transfer Payment Agencies and to appropriate health care professional stakeholders, including those who will be in receipt of AMF, AMP or Far North funding to employ or retain midwives in their health care organizations, and who work with midwives a summary of the decision of the Tribunal, such summary to be approved by the Applicant and the Tribunal.

7. Actions to Ensure Gender Equitable Integration of Midwifery in Health Care System

(p) The MOHLTC is directed to take all reasonable measures within its powers and influence to ensure the equitable integration of midwives in the health care system and to facilitate the removal of barriers to that integration, including those arising in the hospital context.

(q) The MOHLTC is directed to undertake a review of the *Public Hospitals Act* to ensure that the provisions in the Act with respect to privileging and representation on the medical advisory committees provide equal treatment to the female dominated profession of midwifery as compared to physicians.

8. Tribunal to Remain Seized to Monitor and Ensure Compliance with Tribunal Orders/Directions

(r) In light of the wide ranging and ongoing nature of the necessary remedial relief in this matter, the AOM requests that Tribunal Vice Chair Reaume remained seized of this matter in order to monitor and ensure ongoing compliance with the Tribunal's orders and directions.