



Association of  
Ontario **Midwives**  
*Delivering what matters.*

# BRIEFING FOR RELEASE OF AOM V. MOHLTC HRTO DECISION

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## Purpose of Briefing:

- Provide **brief overview** of the legal case made by the AOM and the Respondent Government before the HRTO, the current context and next steps in the case with decision being released on September 24, 2018
- Highlight **possible implications** for work dominated by female or other equity seeking groups, for the health care sector and for other public and private sector work

# “Gender Trifecta”



“We can no longer allow the compensation of midwives to be discounted simply because we are **women, caring for women, for a woman’s experience of pregnancy and birth.**”

- Mary Ann Leslie, Registered Midwife

# Midwives

- Midwives working in Ontario have taken on a major pay equity struggle
- With the largest membership in Canada and a strong history of social activism, hope case will promote equality rights for all equity seeking groups
- Midwives undervalued and underpaid internationally, according to World Health Organization study (2016)

# Current Ontario Context

- Human rights and democracy rights under
- The right to compensation and working conditions free of discrimination is a basic human right essential to free and democratic society and guaranteed by *Human Rights Code, Pay Equity Act and Charter*
- Ford Government is calling for “fiscal discipline” and cleaning up of “fiscal house” which is same mantra challenged by AOM in this case as inequitable

# Midwifery Pay Equity Gap

Midwifery  
compensation



Pay  
equity  
gap for  
midwives  
is at least  
48%

“... it is clear that the compensation of the midwife is not fair and equitable. It is my opinion that sex bias is operating in the unequal compensation being received by midwives.”

- Paul Durber

To access the Durber report:

[https://www.ontariomidwives.ca/sites/default/files/Durber%20Report%20-Examining%20the%20Issue%20of%20Equitable%20Compn%20for%20ONs%20Midwives%20Nov%20%2024%202013%20\(C0928577xA0E3A\).pdf](https://www.ontariomidwives.ca/sites/default/files/Durber%20Report%20-Examining%20the%20Issue%20of%20Equitable%20Compn%20for%20ONs%20Midwives%20Nov%20%2024%202013%20(C0928577xA0E3A).pdf)

# Ontario Midwives' Legal Action



Ontario

Human Rights Tribunal of Ontario

AOM  
Application  
Filed: Nov.  
27, 2013

Interim  
Decision:  
Sept. 17,  
2014

Decision:  
Sept. 24,  
2018

Preliminary  
Hearings:  
Doc Prod'n,  
Affidavits  
exchanged,  
2014 - 2016

Hearings:  
Oct. 2016  
- June  
9, 2017

# AOM Application

- Filed November 27, 2013
- Alleged systemic discrimination in pay and funding by MOHLTC
- Midwives claim that from 1994 to 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



# Midwives and AOM ED Witnesses



# Four Expert Witnesses



Dr. Pat Armstrong, Dr. Ivy Bourgeault, Paul Durber, Hugh Mackenzie

## Three additional witnesses:

**Robert Morton,**  
involved in rough  
pay equity analysis  
of midwifery work  
conducted in 1994

**Theresa Agnew,**  
Nurse Practitioner

**Moshe Greengarten,**  
involved in analysis  
of midwifery work  
through the Hay  
Group

# MOHLTC Witnesses

MOHLTC staff  
(past and present):

Susan Davey  
Nancy Naylor  
Fredrika Scarth  
Melissa Farrell  
Laura Pinkney  
David Thornley

CHC family physicians:

Dr. Tara Kiran  
Dr. Susan Woolhouse  
Dr. Nicole Nitti  
Dr. Mary Rose Macdonald

# MOHLTC Expert Witnesses

Bob Bass

Dr. Richard  
Chaykowski

Dr. John  
Kervin

Dr. Lisa  
Graves

Dr. David  
Price

# Gender Trifecta: Midwives and Sex and Gender

- Midwifery is a **uniquely gendered** profession
- the **most sex segregated** health care profession with the highest female predominance at 99.9%
- also **associated with women** as their clients (and trans people)
- and **associated with women's** (and trans people's) **health care needs** – pregnancy and labour - which together results in the "**gendered trifecta**" of disadvantage
- The gendered trifecta exacerbates the undervaluation of midwifery work—women, providing care to women, for a health care matter associated with women

# Gender Permeates Health Occupations

- well-established research, jurisprudence and government documentation which recognizes the occupational sex stratification of Ontario's health
- women constitute 80% of health care workforce and on average earn 46.7% less or \$43,582 dollars less than men in that workforce
- Experts Paul Durber, Dr. Pat Armstrong and Dr. Ivy Bourgeault testified to fact that sex and gender permeate Ontario's Health and the maternal and newborn care system

# Midwifery Work

- autonomous primary health-care providers who are specialists in providing comprehensive around-the-clock, on-call, perinatal care for women and transgender people
- Along with family physicians and obstetricians, they provide primary maternity care in Ontario
- As well, like pediatricians and family physicians, they provide primary health care to newborn infants up to 6 weeks.
- The knowledge and skills of midwives overlap a number of professional scopes of practice, including family physicians, obstetricians, pediatricians, nurse practitioners, registered nurses and registered practical nurses, social workers and counsellors



# Summary of AOM Allegations

- AOM alleges discrimination occurred because of MOHLTC:
  - (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;

# Summary of AOM Allegations

(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.

# Summary of AOM Allegations

- 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 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.

# Contractors Covered by Code

- MOHLTC does not dispute midwives as contractors are covered by the Code.
- Code 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.
- An entity responsible for a person being treated unequally will be held liable under the Code even if the entity is not the person's direct employer
- Here MOHLTC agrees it sets the compensation and funding of midwives and sets the terms of their contracts in "consultation " and/or "negotiation" with AOM.
- Midwives are dependent on MOHLTC for work and subject to Code requirements must work within MOHLTC constraints in order to provide midwifery services.

# No Dispute that Midwives and CHC Physicians do Different Work

- This has never been disputed by AOM. However, **the fact that it is different does not address whether midwives work is undervalued and underpaid because of factors linked to their sex.**
- Pay equity - the right to equal pay for work of equal value recognizes that men's work and women's work is often different and requires such different work to be assessed usually by the technique of comparing the work based on **Skill, Effort, Responsibility and Working Conditions (SERW)**
- The AOM has claims that midwives' compensation and funding suffers from a gender penalty because of their sex and the way in which their compensation and funding is set which has adverse gender impacts on them and this is reflected in the fact that they are paid vastly less than their 91% proportional value to the CHC Physician using a pay equity/human rights skills effort, responsibility and working conditions (SERW) analysis.

# CHC Physicians Are Valid Comparator of Work Associated with Men

- The 2013 Application, Durber Report and Armstrong and Bourgeault reports acknowledged that CHC employed physicians in numbers had becoming increasingly female.
- Yet CHC Physician compensation increases since 2003 are a result of the association of their work with the male predominant primary care physicians and their association with and representation by the Ontario Medical Association (OMA) which represents all Ontario physicians who continue to be predominantly male.
- Physicians in Ontario are at the top of the health pay professional hierarchy

# Labour Market Conditions for Midwives and CHC Physicians Produce Unequal, Gendered Outcomes

- Ontario's gendered health labour market generates a gender pay gap for the female dominated occupations which perform the majority of public services
- The Ministry analysis fails to address the specific gender impacts for midwives and physicians in that health care labour market which disadvantage midwives and other female dominated occupations such as nurse practitioners and advantage the male predominant physician occupation.

# Labour Shortage Rationale Applied Inequitably

- The Ministry's characterization of the labour shortage of CHC physicians as the reason for its increases to CHC physician pay from 2003 to 2012 is evidence of this unequal and gendered decision-making process when there has been an extreme shortage of midwives since 1994 and the shortage is ongoing.
- The labour market conditions which generated the CHC physician pay increases were created by the Ministry when they substantially increased primary care physicians' pay.
- While the Government has recognized through its 1985 Green Paper, its 1987 Pay Equity Act and its ongoing closing the gender pay gap initiatives that market conditions can perpetuate gender inequities, there seems to be a complete disconnect between those understandings and its actions with respect to midwives.
- There is a need for human rights mechanisms to tackle this discrimination.



# Midwives Treated Inequitably for Gendered Model of Care

- Midwives perform a model of care which is geared to achieve gender equity in maternal and newborn care for Ontario women. The midwifery model of care with its requirement for continuity of care, choice of birthplace and empowerment of women's decision-making has meant that they are characterized as independent contractors and therefore denied protection under *Pay Equity Act* and more vulnerable to Government decision-making.

# Pay Equity Act, Human Rights Code and Charter of Rights and Freedoms

- Pay Equity Act, Human Rights Code and Charter are all **complementary mechanisms** for achieving equity in compensation for equality seeking groups.
- Under Code, **if adverse impacts are connected to sex/gender it is unlawful**. It does not need to be only factor affecting the impact.

# Pay Equity is a Fundamental Human Right

- 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.
- 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.

# International Human Right

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.

# Code Requires Preventing Discrimination

- The Code has two purposes:
  - first, to provide a means for redress to persons whose human rights have been violated; and
  - second, to operate proactively to prevent and eliminate discrimination.
- This means that the Code enshrines not simply reactive rights of enforcement but also proactive obligations of compliance.
- Just as individuals have the legal right not to suffer discrimination in relation to services, accommodation, employment, contracts and vocational associations, those persons and organizations who operate in these social areas have a corresponding legal duty not to discriminate.
- Service providers, landlords, employers, contracting parties and vocational associations are "duty holders" who are under a proactive obligation to comply with human rights standards even in the absence of litigation or a formal complaint.

# Obligation to be “Aware”

- As stated by the OHRC in its "Guidelines to developing human rights policies and procedures": “Under the Code, employers, service providers and housing providers have the ultimate responsibility for ensuring a healthy and inclusive environment, and for preventing and addressing discrimination and harassment. They must make sure their organizations are free from discriminatory or harassing behaviour. ...”
- Organizations have an obligation to be aware of whether their policies, practices and programs are having an adverse impact or result in systemic discrimination based on a Code ground. Whether or not a formal complaint has been made, organizations must acknowledge and address potential human rights issues.”
- This "obligation to be aware" is what a gender lens and human rights impact assessment approach is all about.

# Setting Pay for Highly Female Work

- Dr. Pat Amrstrong and Paul Durber testified It is well established that an appropriate method for preventing sex discrimination in compensation is by conducting a pay equity/human rights analysis.
- Such an analysis ensures that the funding and compensation setter sets funding and compensation free of discrimination.
- It is difficult to understand how a funding and compensation setter could discharge that Code obligation without such a gender based analysis which includes
  - not only a skill, effort, responsibility and working conditions analysis
  - but also an analysis of the systems, policies, practices, including budgets and bargaining processes which contribute the compensation of funding of women's and men's work for which the obligation holder is responsible.
- It is this process which ensures adverse impacts of sex are cleansed from compensation and funding.

# Systemic Gender Discrimination in Compensation

- systemic gender discrimination in compensation is an ongoing, pervasive factor affecting the compensation of women in Ontario. This fact has been established consistently in Ontario starting with the Green Paper, the Pay Equity Act itself, the Predominantly Female Sector studies and reports, 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



# Pay Equity Tools

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.

# Durber Pay Equity Report

- The only full pay equity job evaluation before the Tribunal was carried out by Paul Durber and filed with the November, 2013 Application.
- Durber conducted a comprehensive gender sensitive equity/human rights analysis of the positions of midwife, CHC physician and Nurse Practitioner in order to determine their relative positioning value and pay free of sex bias.
- This was done as a result of the Ministry failing to carry out its Code obligations to ensure its compensation and funding setting was and is free of sex bias.
- Positioning midwives in the hierarchy between nurse practitioners and CHC physicians was the equity tool used by the NDP Government in 1993 when it did a rough pay equity analysis to set the compensation of midwives on regulation.
- Midwives at time of regulation were recognized to be a profession which has been suppressed and subject to stereotypes, prejudice and disadvantages, particularly relative to physicians.

# Ministry Conduct

- Since 1993, the evidence clearly establishes that the MOHLTC did not ever again engage in a gender equality promoting process with the AOM. As well, the evidence establishes that the MOHLTC did not have in place, nor did it develop, implement or apply any type of gender inclusive system(s), framework, policies, or processes to address human rights impacts for midwives as a vulnerable female profession subject to ongoing stereotypes and prejudices

# Ministry Attempt to “De-Gender” Actions

- The Ministry through evidence and arguments tried to "degender" and "decontextualize" its decision-making
- This was done to avoid examination of the gendered contextual facts it was actually facing and the adverse gender impacts its systems, policies and practices were creating for the complainant midwives - a vulnerable group with a history of systemic prejudice and exclusion from the health care system.

# Importance of Gender and Equity Lens and Impact Assessments

- Ministry actions show importance of the use of a gender or equity lens and human rights impact assessments in order for respondents like the Ministry with Code obligations to be able to properly embed Code compliance in their decision-making affecting protecting Code groups.
- Such equality promoting analytical tools permit respondents to show, where justified, that their actions are free of Code discrimination

# Ministry Refusal to do a Pay Equity Analysis

- The Ministry refused to do its own pay equity analysis or ask its experts to carry out such an analysis although those experts agreed one was needed.
- Ministry stated not required to do one unless it was ordered to do so after a finding of discrimination by the Tribunal.
- As a result, the MOHLTC focused its evidence on attacking the Durber report.
- Durber's pay equity analysis was recently adopted by Arbitrator M. Flynn in the May, 2018 arbitration decision of CUPW v. Canada Post re: rural and suburban mail carriers.

# Investing in Midwifery Infrastructure and Expansion is not a Defence

- The MOHLTC asserts that it properly values midwives because of its investments in the Ontario Midwifery Program and the number of midwives practising in Ontario.
- This is no defence to systemic gender discrimination in compensation
- It is sexist to suggest that midwives should be happy with getting more midwifery positions or getting midwifery equipment while their request for equitable compensation is ignored
- The MOHLTC has an independent obligation to ensure that its compensation and funding complies with the Human Rights Code regardless of how much money it spends on expanding the number midwives

# MOHLTC Response

- MOHLTC responded to application by denying all allegations
- MOHLTC also brought motion (which they lost) in 2014 to dismiss the application for all matters prior to one year before application
- Tribunal Chair Michael Gottheil issued interim decision in September, 2014 denying MOHLTC motion and ordering case to move forward



# Ministry Defence

- While much is made by Ministry about how much more valuable the work of physicians and their education, costs of training, scope of practice and other matters, the MOHLTC takes the position that it does not set compensation taking into account "provider" interests (which would include the interests of CHC physicians) but only patient interests and health system requirements
- The MOHLTC initial response said the difference in compensation is not based on sex but on 16 different reasons.

# Ministry Defence

- While differences in scope, education and work were taken into account by the Joint Work Group SERW process and the Morton report, the Ministry in final submission took position that two factors drove the substantially higher compensation setting of CHC physicians - fiscal restraints (1994-2003) and (2012 onwards) and recruitment and retention issues from 2003-2012. The Ministry does not assert that the differences in compensation over this period between the two jobs arise from circumstances relating to the value of midwifery work or other matters related to midwifery or in fact to matters relating to the value of physician work

# Fiscal Restraints as Defence

- Government Priorities Must be Developed and Assessed for Code Compliance
- MOHTLC says government compensation actions reflected its priorities and fiscal restraint policies which did not provide for midwifery compensation increases during period of compensation freezes and which provided for low increases where any occurred.
- Without a gender and equity lens informing both those priorities and the impact of those priorities on the compensation setting of a highly gendered health care professional hierarchy, vulnerable and Code protected groups like the midwives are disadvantaged.
- The MOHLTC agrees it did not have in place at any time a consistent and equitable mechanism for compensation setting for midwives and their comparator CHC physician.
- human rights impact assessment policies to determine whether its budgeting was free of Code discrimination.
- As a result, it was not in position to set aside money for Code required adjustments which is what is required to be done if the Ministry is required to make or fund adjustments under the Pay Equity Act.

# Freezing Women's Pay Continues Privileged Position in Hierarchy of Male Dominated Work

- Applying fiscal and compensation restraints through budgeting and policy rules which do not take into account the highly gendered and unequal professional health care hierarchy means that those who have been accorded privilege and power in the past continue to exercise such privilege and power because even if everyone is frozen equally, the disadvantaged groups are still behind the starting line.

# Ministry Actions Sustained Rather than Eliminated Pay Discrimination

- While MOHLTC repeatedly states that its actions were not based on sex, it is unable to state that unless it actually considered the gender-related implications of its actions in decision-making. Only then would it be able to say and prove that any rational or credible justification of its actions did not constitute an adverse gender impact.

# Tribunal Interim Ruling on Systemic Discrimination

- The Tribunal found that the MOHLTC mischaracterized the claim and that the AOM had clearly filed a particularized claim of systemic discrimination.
- “[33] Systemic claims are about the operation and impact of policies, practices and systems over time, often a long period of time. 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 the claim. “

# Ontario Midwives: The **HERstory**....



*We were very aware that there was pay equity legislation, that we were dealing with a government that was committed to equity issues, and that there were a lot of those equity issues to be addressed in health care.*

**Jane Kilthei, former Ontario midwife  
AOM Past-Pres. (1992-4)**



# The HERstory....



*In Canada, our history is quite different and it leads to a very different relationship between the government and midwifery and medicine and midwifery, which is that midwifery was virtually eliminated. It was certainly legislated against. It became either illegal or alegal to practice midwifery.*

**Vicki Van Wagner, RM**





# The HERstory....



*I mean, imagine going into your workplace every morning knowing that you don't really belong there and that people don't really want you there. Imagine what that would feel like. It's like you have to put a flak jacket on at 8 o'clock every morning, and that's what it really felt like to people.*

**Carol Cameron, RM**  
**AOM Past-Pres. (1996-96)**



# The HERstory....



*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 [midwives] you guys are worth it.*

**Maureen Silverman, RM  
Injury to Dignity witness**



# Gendered Healthcare



*Well, certainly when I began nursing in the '80s at the Hospital For Sick Children, if a physician came into the nursing station, the nurses were expected to stand up and give the physician their chair.*



Theresa Agnew, RN





*This case is about occupational status, not sex. Midwives being paid less than doctors is not an arbitrary difference. Doctors are paid for all the different work they do which is much more valuable than that of midwives.*

**3 differences:** *work, labour markets, health human resources challenges.*



Courtney Harris, MOHLTC opening statements

# MOHLTC Expert Evidence

- The AOM argued that all statements set out in these three MOHLTC expert reports of Bob Bass, Dr. John Kervin and Dr. Richard Chaykowski which opine on the justifications for the different treatment and pay of midwives and CHC Physicians should not to be relied upon.
- AOM took position throughout this proceeding that the Ministry was wasting the time of the Tribunal and AOM by filing expert reports which speculated about the MOHLTC's decision-making and reasons for the compensation differences when they acknowledged they had no knowledge of the decision-making

# Why should we?!

And so if, in fact, there was any obligation to ensure that the midwives' compensation was free of systemic gender discrimination, is it fair to say that in your involvement with the program from 1994 to 2006, you took no steps to make sure that there was no systemic discrimination in the compensation on the basis of sex?



**Mary Cornish**  
AOM lawyer

That's correct. We didn't,  
**we did not** take any steps  
to do that.



**Sue Davey**  
MOHLTC

# Proposed Considerations for Pay Equity Compliance under the Code

- This is first time the Tribunal has considered how to enforce the right to pay free of discrimination under the Code.
- While for midwives, Government had already chosen equity measure – comparison with CHC physicians, for others often no clear equity measure

# Proposed Compensation Setting Principles:

- (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;



# Proposed Compensation Setting Principles

- (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;

# AOM Remedial Requests

- 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;
- (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.

# Compensation Remedies

- The AOM is seeking the following monetary adjustments to compensation/funding and restitution on behalf of Ontario midwives:
  - 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.
  - 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.
- These retroactive adjustments will be based on the Durber proportional value relationships for the periods back to 1997

# Compensation Remedies

- 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.
- 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.
- 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;
- The AOM requests that these adjustments and payments be made within 4 months from the date of the decision.
- An order to ensure that midwives' ongoing compensation is free from sex-based discrimination in accordance to the Human Rights Code.

# Retroactive Compensation

- The AOM requests retroactive compensation to 1997 based on the evidence and expert reports of Paul Durber and Hugh Mackenzie.
- Limiting the remedy to a prospective one as MOHLTC argues would not address or remedy in any meaningful way the substantial damage to the dignity interests that midwives have had to endure over the years. Moreover, it would sanction the Ministry's delay and repeat refusal to take the midwives' human rights concerns seriously

# Injury to Dignity Remedies

- The AOM seeks an order under section 45.2(1) 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. These violations flow from the serious and persistent Ministry Code misconduct 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.

# Injury to Dignity Claim

- The AOM requests \$7,500 for each year of discriminatory compensation and funding experienced by a complainant midwife.
- This request recognizes the need to tailor the remedy to address the fact that some of the over 800 complainants have lived with this discrimination and its impact on their lives for 20 years and some for just a year or so as new registrants.
- The Ministry argues there should be no order or alternatively it should be limited to a total of \$5,000 for each midwife. It argues effectively there is an exemption in the Code for making any injury to dignity order where the Ministry is administering a public program in good faith.
- No such exemption exists. Instead, the Ministry, with its obligation to be a defender of the human rights of Ontarians, has a special duty to ensure that its exercise of that duty does not violate the Human Rights Code rights of those it impacts.

# Future Compliance Remedies

- To prevent similar discrimination from happening in the future, the AOM requested the following relief.
- (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.



# Request for Gender Equitable Bargaining 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.

# Request for Gender Equitable Bargaining System

- (e) In light of 2017 agreements which were reached subject to this pending proceeding and without prejudice to this proceeding, 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".

# Claim for 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.

# Pay Equity Process

- (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.

# Adoption of Gender Inclusive Budgeting and Policy Lens

- (I) 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.

# 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.

# Educating Government and Ministry Officials Concerning Decision

- 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.

# Actions to Ensure Gender Equitable Integration of Midwifery in Health Care System

- 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.
- 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.



# Tribunal to Remain Seized to Monitor and Ensure Compliance with Tribunal Orders/Directions

- 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.

# A Human Rights Violation Requires An Expeditious and Effective Remedy

- *The Ministry has asked to be given 12 months to consider what actions need to be taken if Tribunal finds it has violated the Code to implement a new compensation process.*
- *The AOM argued that the Ministry has shown that it cannot be trusted to do what is right. It is clear that it does not know what is right.*
- *Midwives have waited long enough to have their systemic discrimination redressed and should not be exposed to any further harm*

# Importance of Decision

- Success will mean a landmark decision and a precedent-setting case that will change how vulnerable female dominated workers are compensated.
- Dismissal of case will raise serious questions about the ability of protected groups under the Code to seek effective human rights redress.

# Importance of Successful Decision

- confirm governments and organizations have proactive responsible to ensure equity and HR Code compliance
- may include requiring government and other decision-makers to perform human rights impact assessments in their decision-making
- would likely affect work dominated not only by women but also other equity seeking groups covered by the Code
- implications not only for health care and other public sector work but also like private sector Code obligations
- could affect interpretation of other Code areas, including services and accommodation
- could expand use of the Human Rights Code and systemic discrimination complaints to protect disadvantaged groups.

# What Happens Next

- Decision expected Monday September 24
- AOM Media Conference scheduled for Thursday September 27
- Rally at Queen' Park (regardless of outcome) on Thursday September 27 from 12:15 to 2:00 pm
- For updates, check [www.ontariomidwives.ca](http://www.ontariomidwives.ca) and <https://midwivesoverdue.com/>

# Enforcement of Decision

- AOM has asked Tribunal to monitor enforcement
- No automatic stay of decision if Government applies for judicial review

## **Possible Judicial Review**

- Unsuccessful party has right to apply for judicial review of decision
- Grounds for review are serious error of law by Tribunal

# Ending Discrimination Requires Government Leadership and Rule of Law

- Ending discrimination requires leadership to drive the necessary proactive and inclusive actions at all levels of institutions to transform practices to deliver human rights and pay equity
- Here this means leadership by Premier Doug Ford, Minister of Health Christine Elliott and Attorney General Caroline Mulroney and President of Treasury Board, Peter Bethlenfalvy

Videos, blog posts, news and more!

PAY EQUITY IS

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<https://midwivesoverdue.com/>