Court File No. 131/19

ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)

B E T W E E N:

HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO AS REPRESENTED BY THE MINISTER OF HEALTH AND LONG-TERM CARE

Applicant

and

ASSOCIATION OF ONTARIO MIDWIVES and the HUMAN RIGHTS TRIBUNAL OF ONTARIO

Respondents

APPLICATION UNDER the *Judicial Review Procedure Act,* R.S.O. 1990, c.J.1, as amended

IN THE MATTER OF a decision of the Human Rights Tribunal of Ontario dated September 24, 2018 and a decision of the Human Rights Tribunal of Ontario dated February 19, 2020

FACTUM OF THE RESPONDENT, ASSOCIATION OF ONTARIO MIDWIVES

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PART I: OVERVIEW

1. This case is about the systemic gender discrimination in compensation experienced by Ontario midwives since 2005 and the appropriate remedial relief to remedy that discrimination.

2. On November 27, 2013, the Association of Ontario Midwives (AOM) filed an application under s. 34 of the *Human Rights Code* (*Code*) on behalf of now more than 1000 midwives. The application alleged that the Ministry of Health and Long Term Care's (MOH's) compensation setting practices for this almost exclusively female profession "perpetuated and condoned" systemic gender discrimination in compensation and failed to provide "sex-based equal treatment with respect to employment and contracts", thereby violating midwives' fundamental human right to pay equity, contrary to ss. 3, 5, 9, 11 and 12 of the *Code*.

> *AOM v Ontario (Health and Long-Term Care)*, 2014 HRTO 1370, [2, 25] R62 [2014 Decision]; Updated List of Complainant Midwives (Aug 8/19), RR T38, p. 1958-79, RC V4 T32 R3038; Application under s. 34 of the *Code* (AOM Application), para. 1-2, 62, 65 (Sch. A), TR T2(1), p 162, 176-79, RC V2 T19 R2

3. Systemic gender discrimination in compensation (SGDC) is an ongoing, pervasive factor affecting the compensation of women in Ontario. It is caused by an amalgam of institutional practices, policies, and historical, societal, and institutional prejudices which disadvantage women by rendering "invisible" and undercompensating their labour. Systemic factors have led to occupational sex segregation in the labour market, where women are concentrated into different jobs than men, which are less paid and less valued than male-dominated jobs. The more female-predominant the jobs, the more closely associated they are with "women's work", the deeper the effects of SGDC and the lower the pay. In the words of MOH expert Dr. John Kervin, occupational segregation is "the mother of all problems women face."

> *AOM v. Ontario (Ministry of Long-Term Care)*, 2018 HRTO 1335 [247, 232] R64 [Liability Decision], citing to Pay Equity Hearings Tribunal decision in

Haldimand-Norfolk (1991), 2 PER 105 [18-19]; J. Kervin & S. Reid, "Job Gender and Job Devaluation in Fifteen Organizations," TR T345, Ex 279, p 42928, RC V5 T77 R2092; *Centrale des Syndicats de Quebec*, 2018 SCC 18, para 2-3, 34; Transcript of Dr. Kervin (Mar 27/17), TR T398, p. 67869, RC V4 T56 R2216 [Kervin Trans]; Final Report and Recommendations of the Gender Wage Gap Strategy Steering Committee, TR T151(29), p. 30662-66, RC V5 T63 R1580 [GWG Report]; MOL, "Closing the Gender Wage Gap: A Background Paper," (Oct/15), TR T214, Ex. 148, p. 30293-96, RC V4 T62 R1577 [Background Paper]

4. The problem of SGDC has been studied extensively by governments and academics for over five decades with AOM expert Dr. Pat Armstrong leading the way. In the late 1980's and early 1990's, the province sought to address SGDC by legislating under the *Pay Equity Act(PEA*) proactive duties on employers, including the MOH, to ensure their compensation practices were free of SGDC. To identify and remedy SGDC, comparisons are undertaken between female and male dominated jobs and pay, using an objective, gender-sensitive mechanism to assess the value of the work based on the skill, effort, responsibility and working conditions (SERW) of the job.

Transcript of Dr. Pat Armstrong (Mar 20/17), TR T393, p. 67032-33, RC V4 T54 R2211 [Armstrong Trans]; P. Armstrong, "Pay Equity in Predominantly Female Establishments: Health Care Sector" in Report to Min. of Labour by the Ontario Pay Equity Commission (Sept/88), TR T324, Ex 258 p 40437-590, RC V5 T66 R2058; Dr. Armstrong Expert Reports (Mar 3/15 & Jan 11/17), TR T320, Ex 254, p. 40173-320, RC V2 T13 R2054; GWG Report, TR T151(29), p 30663-68, RC V5 T63 R1580; Background Paper, TR T214, Ex 148, p 30269, RC V5 T62 R1577

5. At the same time as pay equity policies and legislation were being developed and enacted, midwives were preparing to take "their place in the health care system" and join predominantly male physicians as regulated primary health care providers. The AOM and the MOH recognized the historic sex-based disadvantage and unequal treatment of midwives within the health sector and their acute vulnerability to SGDC as a predominantly female profession. Indeed, midwives are associated with a "gender trifecta" insofar as they are "occupationally segregated by gender, they are predominantly women, providing reproductive care to women and their newborns, in an area of health care that was

once dominated by male physicians." As a result, in 1993 the parties agreed on a compensation setting tool that incorporated equitable principles and a methodology which "embodied the values of understanding, mutual respect and dignity, the rights of midwives to realize equal treatment without discrimination, and the duty of the MOH to develop compensation practices and policies which proactively incorporate an awareness of their obligations under the *Code*" ("Equity Tool"). The Equity Tool used an evidence-based, collaborative methodology with a gender sensitive lens and a comparison of SERW to relatively position midwives between senior nurses (now nurse practitioners) (NPs) and male predominant family physicians employed at Community Health Centre (CHC). The Equity Tool "made visible" midwives' work and set their compensation in accordance with their SERW to reflect their overlapping scope of practice with CHC physicians, their male comparator, while also ensuring they were not aligned too closely to female predominant nursing work, "obscuring the ways in which they are like physicians." The parties applied the Equity Tool to ensure the MOH discharged its *Code* obligations and midwives were paid fairly once a regulated health profession in 1994.

> Liability Decision, [2 , 4, 18, 99, 282, 300, 302-03, 320] (noting, "it is important to acknowledge there is one male midwife" and midwives and their clients "may self-identify as transgender or gender non-conforming"); *AOM v Ontario (MOH)*, 2020 HRTO 165, [4] R3510 [Remedial Decision]

6. However, starting in 2005 the MOH gradually abandoned these funding principles. By 2010, the MOH had unilaterally abandoned the Equity Tool and CHC physician comparators, without adopting any *Code* compliant compensation tool or process in its place or taking any proactive steps to monitor and ensure midwifery pay was free of sex discrimination. When midwives raised their concerns about an increasing discriminatory pay gap between themselves and CHC physicians, the MOH refused to take these concerns seriously and failed to investigate whether their pay actually reflected their SERW and their overlapping scope of practice with CHC physicians. In 2010, when the parties finally conducted the first joint compensation study since

1993 (Courtyard report), the study using the Equity Tool recommended a 20% equitable adjustment to midwives' compensation. The MOH responded to this report by abandoning the joint process, rejecting the recommendations, and instead imposing a policy of compensation restraint which froze midwives' pay at inequitable levels.

7. When the AOM filed a human rights complaint in 2013, the MOH brought a motion to dismiss allegations of discrimination based on the *Code's* limitation period. On September 17, 2014, the Tribunal dismissed this motion, finding that "the MOH had taken a compartmentalized approach to the history of compensation negotiations with the AOM, mischaracterizing the allegations and ignoring the systemic dimensions of the Application". The Tribunal warned the MOH that the AOM's claim must be "understood, considered, analyzed and decided in a complete, sophisticated and comprehensive way".

Liability Decision, [8]; 2014 Decision, [6, 24, 27, 28, 33, 46]

8. Following 50 hearing and special examiner days, the Tribunal issued its decision on liability on September 24, 2018. The Tribunal found that the MOH's actions and inaction from 2005 onwards contributed to a series of adverse gender impacts on midwives, including an ever-increasing discriminatory compensation gap with CHC physicians. The Tribunal concluded, based on the testimony of 45 witnesses, including 10 experts, and an evidentiary record of over 69,000 pages, that gender was more likely than not a factor in the midwives' adverse treatment. Without a *Code* compliant compensation process to set and monitor midwifery pay in relation to the value and pay of CHC physicians – their male-identified comparators and proxy for male work – midwives' compensation was "exposed to the well-known effects of gender discrimination on women's compensation" The Tribunal deferred the remedial issues and recommended the parties engage in collaborative negotiations guided by their Equity Tool and the findings to determine the appropriate relief. The MOH declined to do so and filed for judicial review. After further

submissions from the parties, the Tribunal issued its Remedial Decision on February 19, 2020. The Tribunal ordered the MOH to implement the Courtyard recommended 20% equity adjustment back to April 1, 2011, as it was the best evidence of what midwifery compensation would have been but for the discrimination. Future compliance remedies were also ordered to ensure that midwifery compensation remained free of SGDC from the date of application forward.

> Liability Decision, [7-17, 85, 323, 325-28]; Remedial Decision, [186, 189, 192]; AOM Final Submission Part A – Evidence (Apr 27/17), RR T1, p 1-349, RC V3 T21 R3001 [AOM Final Submissions (Part A)]; AOM Final Submission Part B – Legal and Remedial Relief Submissions (Apr 27/17), RR T2 p 350-452, RC V3 T22 R3002 [AOM Final Submissions (Part B)]

9. The MOH seeks to quash the Tribunal's Liability and Remedial Decisions. It in effect asks this Court to engage in a wholesale reassessment of the extensive evidentiary record before the Tribunal, notwithstanding clear direction from the Supreme Court of Canada (SCC) that it is the Tribunal's role to evaluate the evidence, make findings of fact, and draw inferences from those facts, and "absent exceptional circumstances" the reviewing court should not intervene. Even more deference to the Tribunal's decision-making is required where, as here, the *Code* prescribes a standard of review of patent unreasonableness. The AOM submits that the Tribunal's decisions are carefully reasoned and ought to be upheld. The Tribunal consistently warned the MOH that it "inaccurately describes" and "mischaracterizes" the claim and "ignores" its systemic dimension". Before this Court, the MOH continues its effort to "degender" or "delink" the midwifery compensation setting process from its gendered connections, despite the overwhelming evidence to the contrary. The MOH's adoption of a "gender-avoidant" rather than "gender-sensitive" lens, contrary to established human rights jurisprudence, skews its legal analysis and framing of the evidence. The application ought to be dismissed with costs.

> 2014 Decision, [24, 28]; Liability Decision, [246]

PART II: FACTS

A. The Midwifery Gender Trifecta and History of Prejudice and Disadvantage

10. ***Gender trifecta.*** Midwives are the most exclusively female and sex-segregated profession in Ontario. The Tribunal found that midwifery is so clearly identified with and inseparable from gender that the profession itself takes on the protected characteristic of sex, and the *Code*'s s. 12 is engaged because of the association of midwives with women and women's reproductive care:

> Midwifery and nursing have always been strongly identified with women's work: that was true at the time of regulation and remains true today. … midwifery [is] a gender "trifecta" of services provided by women, for women, in relation to women's reproductive health.
>
> Liability Decision, [61, 242]

11. ***Historic and ongoing systemic gender disadvantages.*** The Tribunal ruled the "AOM's claims about gender-based discrimination cannot be fully understood without considering the history of midwifery in Ontario and the importance of the Task Force to the development of the midwifery program". As sex segregated professionals, midwives have long experienced systemic gender disadvantages, including the denigration and devaluation of their work and its contributions to women, their families and the health system, in contrast to systemic advantages afforded to the male predominant medical profession.

> Liability Decision, [67, 78-79]

12. ***Task Force Report.*** In 1985 Ontario appointed a Task Force on the Implementation of Midwifery to study and make recommendations for establishing midwifery as a regulated health profession. In 1987, the Task Force report set out an extensive history of midwifery, not disputed by the MOH, which revealed that as of 1865 "midwives were the primary maternity care providers in Ontario". However, midwives were largely replaced by male predominant physicians supported by nurses when, in 1865, they lost their exemption to practice under the *Medicine Act*. The Task Force

found this exclusion from the regulated health system "served to perpetuate stereotypes and prejudices about midwives", including the opposition to planned home birth as unsafe, which "originated with or were repeated by the male-dominated profession of physicians and some by the nursing profession". Among the negative stereotypes were that midwives were "under-educated, lacked modern medical knowledge, were quacks, charlatans, outdated and dangerous to the health of women and their babies".

> Liability Decision, [25, 64-65, 77]; Midwifery Funding Work Group, "Ontario Midwifery Program Framework," (Sept/93), TR T201(26), Ex 135 (Davey Aff.), p 22912-22, AC V3 T86 R1280 [MWG OMP Framework]; MOH Cabinet Document, "Ontario Midwifery Program: Framework Document," (Sept/93), TR T201(31), Ex 135 (Joint Book of Cabinet Documents), p 22936, AC V3 T85 R1284 [MOH OMP Framework]; Report of the Task Force on the Implementation of Midwifery in Ontario (1987), TR T201(4), Ex 135, p 22256-70, RC V4 T61 R1257 [Task Force Report]; Dr. Ivy Bourgeault Expert Reports (Mar 30/15 & Jan 23/17), para 91, TR T331, Ex 265, p 40884, RC V2 T14 R2065 [Dr. Bourgeault Expert Reports]; Affidavit of Vicky Van Wagner (Jul 29/16), para 82-89, 215-218, TR T88(1), Ex. 22, p 4352, 4404-05, RC V1 T6 R191; Dr. Bourgeault, *Push! The Struggle for Midwifery in Ontario* (2006), TR T337(1), Ex 271, p 41812-13, RC V5 T78 R2071; V. Van Wagner, *With Women: Community Midwifery in Ontario*, (M.A. Thesis, 1991), TR T151(8), Ex 85 (Johnson Aff.), p 14222-344, RC V5 T79 R723 [Van Wagner, *Community Midwifery*]; Appendix 7 to AOM Final Submissions dated April 27, 2017 (History of Midwifery to 1992 – Suppression, Re-Emergence and Regulation of Midwifery – Female-Dominant Profession), para 13-24, RR, V3, T7, p 739-41, RC V4 T24 R3010 [Appendix 7]

13. Pre-regulation midwives provided maternity care at a time when the majority of births were performed by obstetricians, as opposed to family physicians. Notably, "family physicians were withdrawing from delivering babies because of the demands on their skills, practices and time, including the onerous on-call responsibilities, which significantly undermined worklife balance". The autonomous model of care and the overlapping scope of practice that midwives shared with physicians were not very well understood at this time. Midwives "also faced several structural disadvantages… including limits on scope of practice, no access to hospital privileges, no government funding, no funded education system, no funded regulatory system and resulting exposure to prosecution. The work was precarious and low paid".

Liability Decision, [53, 69]; Appendix 7, para 6-9, 13-24, RR, V3, T7, p 73-41, RC V4 T24 R3010; Van Wagner Aff., para 77, 82-89, TR T88(1), Ex 22, p 4369, RC V1 T6 R191; Affidavit of Jane Kilthei (Jul 28/16), para 68, TR T67(1), Ex. 1, p. 2129, RC V1 T1 R68 [Kilthei Aff.]; Van Wagner, *Community Midwifery*, TR T151(8), Ex 85 (Johnson Aff.), p. 14222-344, RC V5 T79 R723

14. The Task Force recognized that the male dominated physician led structure of Ontario maternity care had not sufficiently met the needs of all women and called on government to establish midwifery as a government funded and regulated health profession. The Task Force stressed that "midwifery is an autonomous profession, not a specialty of nursing" and a midwife "is expected to have diagnostic skills relating to both mother and baby that are at one level similar to the obstetrician". It recommended that midwives' remuneration should fall between a nurse and primary care physician, noting that "nursing salaries would be inappropriate for midwives because of the nature of the midwives' level of responsibility, the difficulty of their work and the greater (and less predictable) demands of her time".

Liability Decision, [71]; Task Force Report, p 167, TR T201(4), Ex. 135, p 22408, RC V4 T61 R1257; Van Wagner Aff., para 106, TR T88, Ex 22, p 4375-78, RC V1 T6 R191

B. Gender Factor in Development of Equity Tool and OMP Framework

1. Decision-Making "Imbued with Gender"

15. Contrary to the MOH's assertion, the history leading up to the 1993 funding principles, the OMP Framework and the setting of midwifery compensation showed a decision-making process "imbued with gender" and a proactive effort by the parties to prevent sex discrimination in the compensation-setting of midwives. The funding principles "worked against the prevailing stereotypes about midwifery work and its association with women" and ensured that midwives' compensation was aligned with predominantly male CHC physician comparators as opposed to "exclusively female-dominated health care professions".

Liability Decision, [281]; MOH Factum, [85]

2. Connection to Developments in Pay Equity and Eliminating SGDC

16. During this same period, the government released the *Green Paper on Pay Equity* in 1985 which committed to enacting a law which recognized that women working in female dominated professions including health care were being paid less than the value of their work warranted. The Task Force's 1987 findings came in the same year the Legislature passed the *PEA* covering public and private sector employees. The *Act* explicitly recognized that affirmative action needed to be taken to redress SGDC of women's work in Ontario. These pay equity developments occurred while midwives were working with the MOH and the MOH Women's Health Bureau (WHB) to implement midwifery funding without discrimination. In 1993 *PEA* amendments permitted predominantly female workplaces like CHCs to use the proxy comparison method allowing CHC female job classes to compare to female job classes in larger local health units as a proxy for male work as the latter had already achieved pay equity adjusted rates with male comparators. The resulting proxy pay equity adjustments were MOH funded.

> Liability Decision, [81-82]; Ministry of Labour, *Green Paper on Pay Equity* (1985), TR T203 Ex. 137, p 25571-770, RC V5 T65 R1534 [Gre; Appendix 7, para 31, 38, 107-09 RR T10, p 743, 745, 760-61 RC V4 T24 R3010; *Pay Equity Act*, RSO 1990, c P7, eff. Jan 1, 1988; Van Wagner Aff., para 95-96, 107, TR T88(1), Ex 22, p 4373, RC V1 T6 R191; Transcript of Vicki Van Wagner (Sept 16/16), TR T359(1), p 60507-08, RC V4 T35 R2177 [Van Wagner Trans (Sept 16/16)]; Transcript of Margaret Anne McHugh (Feb 21/17), TR T389(1), p 66659, RC V4 T52 R2207 [McHugh Trans]; South East Ottawa Community Services Pay Equity Plan, TR T201(234), Ex 135, p 24677-79, RC V5 T68 R1487

3. Interim Regulatory Council of Midwives and MOH Women's Health Bureau

17. In 1991, Ontario enacted the *Regulated Health Professionals Act* which included midwives and passed the *Midwifery Act* which now authorized an autonomous midwifery scope of practice. The government also established the Midwifery Education Program (MEP), a highly regarded and very competitive academic program which provided for a specialist intensive professional baccalaureate degree with extensive clinical training; one year of postgraduate mentoring and

practice; ongoing education and upgrading as required by extensive standards, guidelines and protocols of the College of Midwives of Ontario (CMO).

> Liability Decision, [48]; Appendix 7, para. 54, RR T10, p. 747-48, RC V4 T24 R3010; Van Wagner Aff., para 136-43, TR T88, Ex 22, p 4384-85, RC V4 T35 R191; Task Force Report, TR Tab 201 Ex 135 p 22256-670, RC V4 T61 R1257; Bill 43 Hansard, TR T67(27), Ex 1, p 3292, RC V6 T97 R94

18. In 1992, the Interim Regulatory Council of Midwives (IRCM) set out its recommended model of practice and payment in a report to the WHB – the policy lead for developing the OMP. The IRCM "recognized the importance of ensuring that midwives are paid equitably among the health care professions… and that "midwives be fairly paid in keeping with their role as primary care providers". The IRCM "recommended an "equitable formula" for midwifery funding to support the autonomous model of care and that compensation for midwives fall between that of a senior nurse and a family physician" and "reflect midwives' level of skill and responsibility as a primary care provider, education at a baccalaureate level, the realities of working on call and the intensive nature of midwifery care".

> Liability Decision, [86]; Report and Recommendations to the IRCM by the Models of Practice and Payment Committee (Jun 19/92), TR T67(45), Ex 1, p. 3548, 3555, 3561-64, RC V5 T69 R112 [IRCM Report]; AOM Final Submissions (Part A), para 458-59, RR T1, p 124, RC V4 T24 R3001

19. Contrary to the MOH's assertion, the evidentiary record leading up to regulation shows that the MOH and the WHB were very familiar with: 1) the position of midwives as an exclusively female profession subject to prejudice and disadvantage, 2) the opposition of the male dominated medical profession to their regulation as autonomous primary care providers, and 3) the misunderstandings about the nature of their work and its safety. The Task Force, followed by the IRCM, established the term "equitable compensation" to describe the proper positioning of midwives between senior nurses and family physicians.

> Liability Decision, [89]; Transcript of Martha Forestell (Mar 24/17), TR, T397, p 67773, 67776, 67792, RC V4 T57 R2215 [Forestell Trans]; McHugh Trans (Feb 21/17), TR, T389, p 66463-65, RC V4 T52 R2207; Appendix 7, para 41,

RR T10, p 745, RC V4 T24 R3010; AOM Reply Submissions (Part A) (Jun 6/17), para 282-93 RR T24, p 1595-98, RC V?4 T29 R3024

20. In 1993, the WHB Midwifery Implementation Coordinator, Margaret McHugh, developed an "Options Paper" to inform the government's OMP framework. Contrary to MOH's denial of any "pay equity" analysis at this time, the Options Paper, approved by the Assistant Deputy Minister, emphasized the "necessity" of establishing "a fair and equitable pay level [for midwives] **based on pay equity**, reflecting responsibilities, working conditions and level of education". Ms. McHugh testified that she did "not recall anyone [in the MOH] "pushing back" on the issue of pay equity". She understood "pay equity" to mean that:

> …**women had historically been underpaid and their work had been undervalued and if we were going to establish a brand new, female, exclusive almost profession, that we had to ensure that profession was not going to be discriminated against or that there would not be bias against their payment method just by looking at other female professions and going "Oh well, you know, you should be paid a small amount as you're women."** So we had to make sure that that happened. It didn't necessarily mean that we were going to do a formal pay equity assessment under the [Pay Equity] Act. It meant that **we were going to make sure that we were not underpaying midwives, that they were fairly and equitably paid according to their skills and experience and education, and not according to somebody's picking out something. It was going to be evidence-based**. (Emph. added)
>
> Liability Decision, [91-98]; McHugh, "Midwifery Payment – An Options Paper," (1992), TR T201, Ex 135, p 22730, RC V6 T98 R1260 [Options Paper]; McHugh Trans (Feb 21/17), TR, T389, p 66463, RC V4 T52 R2207

21. As noted by the Tribunal, "In 1993, the parties were aware of the pervasive nature of systemic discrimination in compensation, the stereotypes associated with women's work and the necessity to ensure that women are paid by reference to objective factors like SERW".

> Liability Decision, [274]; Remedial Decision, [5]

C. The 1993 Equity Funding Principles and Agreement

1. Gender-Sensitive, Proactive and Inclusive Human Rights Template

22. Based on the extensive evidence summarized below and contrary to the MOH denial of any link to gender or pay equity, the Tribunal found that "the MOH was fully engaged as a partner in the 1993 agreement which is a template for a gender-sensitive, inclusive, human rights approach to proactively dealing with the effects of gender discrimination in women's compensation".

Liability Decision, [320]

2. Joint Working Group and Morton Report

23. In 1993, the MOH and AOM formed a joint working group, led by AOM President Jane Kilthei and MOH manager Sue Davey, to determine an "appropriate and fair compensation level" for midwives. The MOH retained Robert Morton and his firm as "compensation specialists" to assist the joint working group. Contrary to MOH [164], Mr. Morton testified that, while not a "pay equity specialist", he was generally aware of the *PEA* and its required analysis of the SERW of male and female positions and considered it a "clear demarcation of the things one would generally look at in a compensation exercise". While the Morton process "did not constitute a comprehensive and statistically valid job evaluation, it provided a framework for the Work Group to systematically and carefully examine comparator positions relative to the profession of midwifery."

> Liability Decision, [99-101, 106-07]; Morton Trans (Dec 1/16), TR T381, p 64610, RC V4 T49 R2199; MOH, "Primary Position Comparisons [between Midwives, Nurses and Physicians]," TR T67(62), Ex 1 (Kilthei Aff.), p 3667-74, RC V6 T95 R129 [Primary Position Comparisons]; R. Morton et al., "Compensation for Midwives in Ontario: Summary Report Prepared for the Midwifery Work Group" (Jul 23/93), TR T201(24), Ex 135 (Davey Aff.), p 22852-53, AC V3 T84 R1277 [Morton Report]

24. Indeed, the consultants engaged in "systematic and careful research into how the profession of midwifery compared to related health professions with respect to the dimensions [of SERW]",

surveying "25 consumers, midwives, nurses, physicians and educators…to establish perceived similarities and differences between related jobs and that of Midwifery" in order to inform the relative positioning of midwifery job requirements and compensation. As a result, the parties agreed senior nurses (now NPs) and CHC physicians were the appropriate comparators and adopted an equitable formula for positioning midwives between those comparators.. CHC comparators were chosen as CHCs shared the same community-based health care approach as midwives and the same MOH department headed by Davey and later Laura Pinkney was responsible for setting the compensation of CHC physicians, nurses and midwives. With respect to the gender of the comparators, nurses were clearly female predominant and were used as comparators to ensure that midwifery compensation was not too low. The evidence showed that Ontario's family physicians at the time of this working group were clearly male predominant, had been so for many years and continue to be as of 2013. CHC physicians were also male predominant at this time. See Appendix 1 to this factum, Chart - Male Predominance of Ontario Physicians – 1978-2013 [Appendix 1].

> Liability Decision, [89, 103]; Morton Report, TR T201(24), Ex 135 (Davey Aff.), p 22852-54, p 22876-77, AC V3 T84 R1277; Kilthei Aff., para 226-231, 237-239, 276, TR T67(1), Ex 1, p 2170-03, 2182 RC V1 T1 R68; MOH Principles of Funding (1993), TR T298, Ex 232, p 38825-26, RC V6 T104 R2032; AOM Funding Committee, "Midwives Compensation: Comparing Midwives with CHC Primary Care Nurses and Physicians" (Jul 22/93), TR T67(67), Ex. 1, p 3715, RC V5 T76 R134; Transcript of Sue Davey (Oct 20/16), TR T372, p 62974, RC V4 T44 R2190 [Davey Trans (Oct 20/16)]; AOM Final Submissions (Part A), para 487, 756-92, RR T1, p 135, 218-226 RC V3 T21 R3001

25. "Appropriate and fair" compensation was based on the Task Force and IRCM principles:

> "**Appropriate"** was defined as setting a range that **reflected the relative skill, effort, responsibility, and working conditions for midwives in comparison to related health care professions.** "**Fairness" was defined as a salary level which, not only considered the above factors, but also the general context in which compensation was to occur**. This comparison was paramount since **fairness can only be determined in relation to levels of pay for professionals working in the same economic market**. … (Emph added)

26. The parties derived an "appropriate and fair salary" range for midwives based on salary data for health care and social services professions which "enabled the Work Group to consider the "market value" of the various positions", with primary comparisons made with CHC nurses and physicians. Contrary to the MOH [45-46] assertions, the joint working group documents specifically connected "pay equity" with their SERW factor analysis comparing midwives, and CHC nurses and physicians stating it was:

> … those specified in legislation, (i.e. the Pay Equity Act) that is [SERW]. They are considered an industry standard in many countries and were recently used by the Ontario government to determine pay equity across all job classes in the Ontario Public Service.
>
> Liability Decision, [103-4]; Morton Report, TR T201(24), Ex 135 (Davey Aff.), p 22853-54, 22876-77, AC V3 T84 R1277; Primary Position Comparisons, TR T67(62), Ex 1 (Kilthei Aff.), p 3667-74, RC V6 T95 R129; Kilthei Aff., para 215, 218, 224-226, TR T67(1), Ex 1, p 2168-71, RC V1 T1 R68

27. Also contrary to the MOH, the Tribunal found the process was accurately described as a "pay equity exercise" relying on the AOM documentation and hearing evidence and Ms. Kilthei's testimony about the central importance of addressing the equitable positioning of midwives:

> Well, we were certainly familiar with the skill, effort, responsibility, working conditions formula that was used in pay equity analysis, and it's hard to separate it out because for us, the issue of equity, equity for women, **equity for midwives was the water we swam in…**, it's the a metaphor of a fish is not going to be talking about water... for us, I guess it would be **the air we breathe**. (Emph. Added)
>
> Transcript of Jane Kilthei (Sept 14/16), TR T357, p 60087-89, RC V4 T33 R2175; [Kilthei Trans (Sept 14/16)]; Kilthei Aff., para 237-39, 248-50, TR T67, Ex 1, p. 2173, 2176, RC V1 T1 R68; Liability Decision, [110, 119, 278]; Van Wagner Aff., para 95-99, TR T88, Ex 22, p 4373-74, RC V1 T6 R191; MOH Factum, [46, 146]

28. The parties agreed to a salary range of $55,000 to $77,000 as the equitable positioning of the midwife between the CHC senior nurse and family physician. The compensation gap between the most experienced midwife and the lowest paid CHC physician (non-underserviced range) earning $80,0000

was $3,000. Midwives would be paid 90% of that rate. This did not take into account the on-call allowance paid to CHC physicians of about $5,000 annually. A $21,000 difference in pay was considered appropriate between the most senior midwife and the most experienced CHC Senior Primary Care Nurse which had a range of $42,000 to $56,000.

> Liability Decision, [28-29]; Morton Report (Aug 3/93), TR T201(24), Ex 135 (Davey Aff.), p 22852, AC V3 T84 R1277; Davey Trans (Oct 21/16), TR, T373, p 63087-88, 63107, 63132-33, AC V2 T30 R2191; Kilthei Trans (Sept 15/16), TR T358, p. 60368, RC V4 T34 R2176; AOM Final Submissions (Part A), para. 813-815, RR T1, p. 233, RC V3 T21 R3001; Hay Health Care Group, "AOM: Compensation Review," (Feb/04), TR T132(67), Ex 66, p 11867, RC V2 T18 R621 [Hay Report (2004)]; AOM, "How Much Should Midwives be Paid? The Issue of Equity" (April 1993), TR T67(53), Ex 1 (Kilthei Aff.), p 3629, RC V5 T64 R120; See Appendix 1 chart – Compensation Gap between Midwives and Comparators – 1992 to 2013

29. The Tribunal found that this midwifery compensation and relative positioning was free of sex discrimination. Prior to regulation, it is estimated that a full-time midwife earned about $20,000 annually. The Tribunal noted the "power" of the parties' 1993 Tool which lead to a *Code* compliant compensation $57,000 higher than what an experienced midwife earned prior to regulation. The Tribunal found that the history of this working group and the Morton Report:

> … demonstrates the methodology that the AOM and the MOH developed to "make visible" the work of midwives and set their compensation in accordance with their SERW. It also demonstrates the commitment of the AOM and MOH to an ongoing and collaborative working relationship.
>
> Liability Decision, [99, 111]

3. Ontario Midwifery Program Framework and 1993 Cabinet Submission

30. The joint working group developed the "Ontario Midwifery Program Framework" which formed the basis for the 1993 Cabinet Submission. The key provisions are:

(a) **Compensation Model:** Midwives to be paid a "salary" of $55,000 to $77,000 rather than fee for service to support the model of practice and be compatible with the community health approach to the program and service delivery."

(b) **Model of Practice:** Midwifery's model of care based on providing women and their families with continuity of care, informed choice and choice of birthplace. "The midwife unlike others in the current system, is on call 24 hours-a-day, works a nominal work week of 43 hours, travels to the woman's home to provide labour and postpartum care and follows the woman to her choice of birthplace".

(c) **Midwifery Funding:** Midwives will work in Midwifery Practice Groups, (MPGs) and receive funding from the MOH for compensation, benefits, and the "expenses associated with practice" paid to MPGs. The MOH controls the number and location of midwifery practice groups and the courses of care allotted to those groups. To work in the funding health care system, it is necessary to work in a MOH funded MPG.

(d) **Practice Caseload Expectations:** "In a typical practice group, each midwife working full time would provide a complete course of care throughout pregnancy, labour and birth, to 6 weeks post-partum for 40 women and their newborns. Additionally, each midwife would be the secondary caregiver to another 40 women and their newborns. The model of practice requires two registered midwives to attend each birth."

> Liability Decision, [112-6]; MWG OMP Framework, TR T201(26), Ex. 135 (Davey Aff.), p 22912-22922, AC V3 T86 R1280; Kilthei Aff., para. 85, 284, 320-324, TR T67, Ex. 1, p. 2185, 2202-2203, RC V1 T1 R68; MOH OMP Framework, TR T201(31), Ex. 135 (Joint Book of Cabinet Documents), p 22935-70, AC V3 T85, R1284

31. Contrary to MOH [163], the Framework documents addressed the issue of "equity":

(a) The Program established an "equitable funding mechanism" to support the integration of midwives and their unique model of care into the funded health care system for midwives. This included the setting of compensation between the CHC Nurses and Physicians.

(b) A "compensation specialist" assisted the joint working group to "ensure that an appropriate and fair compensation level was established. An appropriate salary level would reflect the relative SERW for midwives in comparison to other health care professionals.

> Liability Decision, [114]; MOH OMP Framework, TR T201(31), Ex 135 (Joint Book of Cabinet Documents), p 22947-48, AC V3 T85 R1284

32. The Cabinet submission noted the likely objections of physicians and nurses to midwifery pay based on their limited understanding of the regulated midwifery role. As the Tribunal found:

> The model of practice adopted in Ontario is not a specialty of nursing nor do midwives work under the supervision of a physician. As specialists in normal pregnancy, they are as autonomous and responsible as physicians for the services they provide within their scope of practice. Nurses also play a key role in the

> maternity health-care system. However, they are not primary care providers through the pregnancy, birth and postpartum period. A woman does not require a referral from a physician to hire a midwife. If she chooses a midwife, she will not see a physician for obstetrical care unless there are complications which require a consult or transfer of care to a physician who specializes in obstetrics.
>
> Liability Decision, [51, 75]; MOH OMP Framework, TR T201(31), Ex 135 (Joint Book of Cabinet Documents), p 22953, AC V3 T85 R1284

4. Summary - The 1993 Compensation Benchmarks or Equity Tool

33. The above facts show, contrary to MOH [154], the evidence-based, gender-sensitive methodology used by the parties (Equity Tool). Contrary to MOH [46, 146], these compensation benchmarks are clearly reflected in the Morton report, the parties joint OMP Framework, and the 1993 Cabinet Submission. They contain the following key elements:

(a) **Taking a "proactive" approach informed by a "gender lens":** The 1993 agreement was "informed by a gender lens that gave full effect[ ] to what Justice Dickson in *Action Travail des Femmes*, described as "rights of vital importance" which were not enfeebled by ignoring the adverse impacts of gender on women's compensation".

(b) **Collaborative and Regular Negotiations between the parties:** The Cabinet Submission noted the importance of the parties' "cooperative negotiations" which relied on the AOM expertise to develop a fair compensation system.

(c) **Evidence-based methodology based on a SERW pay equity analysis:** The Tribunal found that these principles included the "necessity to ensure that women are paid by reference to objective factors like SERW" "which overlapped to some extent with pay equity principles and other evidence-based methodologies"

(d) **Use of a "male comparator", the CHC physician:** The Tribunal connected the role of a male comparator to a *Code* compliant process, noting that "comparison with work historically done by men was a significant factor in overcoming stereotypes which would have undoubtedly affected the initial compensation levels set for midwives". Comparisons to CHC physicians were made to ensure that compensation corresponded with the work itself and not the gender of the worker. The fact there were both men and women CHC physicians did not "alter the nature of the principle, its effect or ongoing relevance to maintaining compensation levels for midwives."

(e) **Relative positioning of midwives in the CHC Physician/Nurse hierarchy:** The "relative positioning" ascertained objectively where midwives fit in the CHC hierarchy ensuring midwives were placed fairly below physician pay but not too close to nursing work. Such flexible positioning was not based on a fixed percentage relationship with the physician.

(f) **Comparisons to the "same economic market":** The Morton report defined fairness as the "general context in which compensation occurs" and professionals working in the "same economic market" -also endorsed by the 1993 Cabinet Submission.

(g) **Positional bargaining after SERW Analysis Allowed:** Positional bargaining was legitimate in circumstances where the parties had already "made visible" the work of midwives through an evidence- based, gender-sensitive, SERW comparative analysis.

(h) **Closure of any unfair compensation gap:** The parties took action to close the substantial compensation gap which had developed between midwives and CHC physicians.

(i) **Fiscal constraints considered after equity achieved:** ADM Porter noted that midwifery was regulated and compensated in the context of "severe fiscal restraint. The 1993 *Social Contract Act* ensured that midwives' salary was reduced only after equity was achieved.

(j) **Proactive and regular joint monitoring to ensure equitable funding:** The 1993 process established a Program Quality Committee to monitor the ongoing implementation of the OMP Framework which included provision for the equitable compensation of midwives. A COLA provision required regular cost of living increases as determined by the MOH.

> Liability Decision, [26, 34, 98, 274, 277, 282, 287, 290, 301, 303]; Remedial Decision, [5, 17]; Kilthei Aff., para 191-93, 252, 235-36, 322 TR T67(1), Ex. 1, p 2162, 2173, 2176, 2202, RC V1 T1 R68; MOH OMP Framework, TR T201(31), Ex 135 (Joint Book of Cabinet Documents), p 22936, 22942, 22947 AC V3 R1284; Morton Report, TR T201, Ex 135 (Davey Aff.), p 22853, AC V3 T84 R1277; Transcript of Jodey Porter (Feb 21/17), TR, T389, p 66605, RC V4 T53 R2207; MWG OMP Framework, TR T201(26), Ex. 135 (Davey Aff.), p 22920, AC V3 T86 R1280

D. Regulation – 1994 to 2005

1. Midwifery Compensation

34. On January 1, 1994, midwives became a regulated health profession and joined physicians as primary care providers in the province. For the first time in Canada, pregnant women could choose a publicly funded midwife to provide care for themselves and their newborns. The Tribunal describes the important health role midwives play:

> Registered midwives are **autonomous primary health-care providers who are specialists in providing comprehensive around-the-clock, on-call, care for women with low-risk pregnancies and their newborns until six weeks of age. Along with family physicians and obstetrician-gynecologists, they provide**

> **primary care in Ontario's maternity health-care system.** As well, **like paediatricians and family physicians, they provide primary health care to newborn infants up to 6 weeks of age.** The knowledge and skills of midwives overlap with a number of professional scopes of practice, including family physicians, obstetricians, pediatricians, nurse practitioners, registered nurses and registered practical nurses, social workers and counsellors.

Liability Decision, [1, 5, 47]

35. On January 1, 1994, 67 midwives started providing funded midwifery services based on the compensation set by the Equity Tool. The compensation of midwives remained frozen until April 1, 2005, while the compensation of the male comparator physician remained frozen until 2003. In 1999 midwives moved from a dependent contractor to an independent contractor model with the MOH setting compensation on a course of care fee model as a primary and second attendant with separate operational and special expenses paid to the MPG. A course of care was "defined as the provision of services to a woman for a period of 12 or more weeks during pregnancy, labour and birth and for up to six weeks postpartum for the woman and newborn… includes prenatal visits, attendance at the birth, postpartum visits, 24 hour access to midwifery services and practice administration". Additional funding or "case load variables" is provided for work outside the course of care such as management activities related to midwifery practices and work on hospital committees.

Liability Decision, [1, 18, 57, 122, 125, 165]

36. While the MOH has the power to set the compensation of midwives unilaterally, it has, for the most part negotiated with the AOM. The first agreement was achieved in 1993. New agreements followed in 1999, 2005, 2009, 2013 and 2017. The 2017 Agreement was reached "without prejudice to the issues in this Application".

Liability Decision, [56]

2. Integration into Health System with Autonomous Primary Care Model

37. Ontario midwives have a similar scope of practice with family physicians for providing care for

low risk pregnancies, with both referring high risk pregnancies to obstetricians. Family physicians provide such care through a physician/nurse model and midwives have a different "specialist" model of care:

> … with three primary components: continuity, informed choice and choice of birthplace. A woman receives continuity of care from the same midwife throughout her pregnancy (pre-partum) during birth (intra-partum) and for six weeks after birth (post-partum) during which time the midwife provides care for the woman and her baby.
>
> College of Midwives Practice Standard, Midwifery Model of Care (2013), TR T305, Ex 239, p 39463-64, RC V5 T72 R2039

38. Maternity and newborn care is generally divided into three phases, pregnancy, intrapartum (delivery) and postpartum care. Midwives provide care for all three phases in low risk pregnancies which are estimated to be 70-80% of Ontario births in Ontario. These low risk births and newborn care are in the scopes of practice of both physician and midwives and are estimated to be 70-80% of births. Midwives are the only obstetrical care providers who attend births at home or in out of hospital birthing centres. CHC physicians with few exceptions do not provide intrapartum care. CHCs provide pregnancy care to low risk women through a shared physician/nurse and NP/nurse model assisted where appropriate by other health professionals and also transfer care to an obstetrician for high risk complications or surgery or at 28 weeks for the balance of maternity care.

> Ontario Emergency Care Expert Panel, "Maternity Care in Ontario 2006" (2006), TR T91, Ex 25, p 6985, RC V5 T73 R270 [Maternity Care in ON (2006)]; Kilthei Aff., para 31, TR T67(1), Ex 1, p 2121, RC V1 T1 R68;Transcript of Dr. David Price (Apr 4/17), TR, T402, p. 68678-79, RC V4 T55 R2220 [Price Trans]; Dr. David Price Expert Report (Nov 10/14), TR T354(3), Ex. 288 (Price Aff.), p 49964, AC V1 T354(2) R2170 [Dr. Price Expert Report]; AOM Final Submissions (Part A), para 396, RR T1, p. 107, RC V3 T21 R3001

39. The Tribunal found Appendix 8 of the AOM's Submissions – "Life and Work of a Midwife – A Demanding and Skillful Job" contains an uncontested summary of midwifery work. This Appendix contains testimony from midwife witnesses which covered: clinical work, labour and

birth, on call, adaptability, advocating for a client, teaching and mentoring, administrative tasks, hospital and maternity care administrative work including managing practices, comparison to physicians and nurses, physical demands and impact of practice demands on family and relationships.

> Liability Decision, [49]; Appendix 8 to AOM Final Submissions, April 27, 2017 (The Life and Work of a Midwife – A Demanding and Skillful Job), RR T11, p 764-79, RC V4 T25 R3011 [Appendix 8]

40. Contrary to MOH [4], high risk obstetricians working with nurses continue to perform the majority of low risk births due to an ongoing shortage of midwives, the decision of most family physicians to no longer perform obstetrical services and the need to have obstetricians available in Ontario communities for high risk pregnancies. Ministry witnesses testified that the Ministry's health reform objective of "right provider, right care" led to expanding the midwifery program to reduce the number of high risk obstetricians performing low risk births and encouraging family physicians to return to intrapartum care. Obstetricians do not provide newborn care.

> Liability Decision, [53, 70, 112]; Affidavit of Katrina Kilroy (Jul 28/16), para 113, 129, TR T157, Ex 91, p. 16060, 16064, RC V1 T2 R867 [Kilroy Aff.]; AOM Final Submissions (Part A), para. 31, 337, 395, RR T1, p 20, 95, 106 RC V3 T21 R3001; OMP Minister's Office Foundation Briefing – MOHLTC Slide Deck for Min Deb Matthews, TR T248(1), Ex 182, p 35731, 35737, RC V5 T74 R1942; Price Trans (Apr 4/17), TR, T402, p 68678-79, 68689, RC V4 T55 R2220; Dr. Price Expert Report TR T354(3), Ex 288 (Price Aff.), p 49964, AC V1 T354(2) R2170; Davey Trans (Oct 21/16), TR, T373, p. 63203-63210, AC V2 T30 R2191; ; Transcript of Nancy Naylor (Nov 3/16), TR, T376, p. 63648-49, RC V4 T47 R2194 [Naylor Trans]; See also AOM Final Submissions (Part A), para 442-49, RR T1, p. 121-22, RC V3 T21 R3001

3. Ongoing Shortage of Obstetrical Providers

41. As the Tribunal noted, midwives mentor midwifery graduates each year, thus contributing to expanding the midwifery workforce to meet the increasing unmet demand for midwifery care. From 1994 to 2005, there continued to be an ongoing shortage of midwives, family physicians and other

obstetrical care providers as documented in the 1999 McKendry report. Midwifery attrition varied from 2% to 7% between 1994 and 2005-2006. This report also highlighted the overlapping services provided by physicians, midwives and NPs and led to the MOH developing a Health Human Resource Strategy.

> Liability Decision, [48, 54, 70]; R McKendry, "Physicians for Ontario: Too Many? Too Few? For 2000 and Beyond" (Toronto: MOHLT, 1999), TR T212(28), Ex 146, p 29806-07, 29814, 29836, 29882, 29884 , AC V3 T81 R1571 [McKendry Report]; Scarth Aff., para 69, TR T253(1), Ex 187, p 36748, AC V1 T12 R1948; Attrition from the CMO (Table), TR T253(17), Ex 187 (Scarth Aff.), p 37030, AC V3 T62 R1964; Davey Trans (Oct 20/16), TR, T372(1), p 62874-75, AC V2 T28 R2190; Davey Trans (Oct 21/16), TR, T373(1), p.63203-10, AC V2 T29 R2191

4. MOH Increases CHC Physician Compensation.

42. Davey testified family physicians needed to be incentivized through compensation to provide certain preventative care, as "left on their own"… they weren't doing it". Physicians were choosing specialties over the lower MOH family physician pay. As a result, the MOH started to substantially increase the compensation paid non CHC family physicians. These increases while the MOH continued freezing CHC physician pay contributed to CHC's having difficulty recruiting and retaining physicians as noted in a 2001 CHC strategic review.

> Davey Trans (Nov 1/16), TR, T374, p 63322, 63321-23, 03, 63431-34, AC V2 T29 R2192; Transcript of Laura Pinkney (Nov 4/16), TR, T377, p 63965-67, RC V4 T48 R2195 [Pinkney Trans (Nov 4/16)]; Transcript of David Thornley (Dec 1/16), TR, T381 p 64664-66, AC V2 T381 R2199 [Thornley Trans]; "Implementing the Primary Care Incentives in the 2004-08 Agreement between the MOH and the OMA," TR T224(210), Ex 158 (Pinkney Aff.), p. 32685-91, RC, V5 T75 R1797

43. Accordingly, the MOH increased CHC physician compensation as of April 1, 2003. The salary of the CHC (non-underservice) physician (the male comparator) increased to $106,216 and then to $110,599 when the 2003 retroactive OMA adjustment was later received. With the top level midwife still paid $77,000, the compensation gap was now over $33,000 rather than the $3,000 gap at regulation. CHC NPs at top level were now earning $80,000, $3,000 more than the top midwife. The MOH stated

it would not consider reviewing midwifery compensation until the completion of an OMP evaluation. This evaluation highlighted the objective of ensuring "an equitable funding mechanism" and showed the excellent health outcomes achieved by now 230 midwives and midwifery's many contributions to the MOH's health reform objectives. It also noted substantial unmet health system and consumer demand". The attrition rate for midwives was 3%. CHC physicians received increases without a study validating their health outcomes.

> Davey Trans (Nov 1/16), TR, T374, p 63353, 63374, RC V4 T46 R2192; Hay Report (2004), TR T132(67), Ex 66, p 11868, 11871, RC V2 T18 R621; AOM Final Submissions (Part A), para 900-01, RR T1, p 259, RC V3 T21 R3001; Davey Aff., para 188, TR T201(1), Ex 135, p. 22239, AC V1 T4 R1254; Courtyard Report, TR T224(97), Ex 158 (Pinkney Aff.), p 31920, AC V3 T69 R1686; Transcript of Remi Ejiwunmi (Sept 28/16), TR, T363, p 61272-73, RC V4 T36 R2181; Draft OMP Program Evaluation Results, TR T201(154), Ex 135, p 23911, RC V? T? R1407; "OMP Program Evaluation Conclusions Summary" (Dec 30/03), TR T201(155), Ex 135, p 23925, RC V6 T101 R1408; Scarth Aff., para 68, TR T253(1), Ex 187, p 36748, AC V1 T12 R1948; Attrition from the CMO (Table), TR T253(17), Ex 187 (Scarth Aff.), p 37030, AC V3 T62 R1964

5. AOM Commissioned 2004 Hay Compensation Report

44. The AOM retained the Hay Group in 2003 to conduct a compensation review. Hay issued an updated 2004 report to incorporate the above-noted April 1, 2003 adjustment to CHC Physician compensation. This report prepared by Moshe Greengarten confirmed the appropriateness of the Morton comparison analysis which he testified was a "reasonable, internal "equity structure for the midwives as compared to other health care professionals." The report highlights the midwives' more onerous 24/7 schedule required by its model of care compared to other health care comparators. Greengarten testified to the importance of fair and appropriate compensation in attracting and retaining midwives, recognizing "the particular stresses" facing midwives. The report found that the midwifery on call requirement amounts to an average of 110 hours per course of care with midwives working 44 hours weekly compared to 36 hours for CHC physicians. Hay recommended an adjustment to

midwifery compensation to bring the top level full time midwife to an annual compensation of $108,800, a proposed increase of $31,800.

> Hay Report (2004), TR T132(67), Ex 66, p. 11871, 11878,11863-64, 11868, 11878, RC V2 T18 R621; Transcript of Moshe Greengarten (Oct 13/16), p. 14, TR T369(2), p N/A, RC V4 T41 R2187.1 [Greengarten Trans]; Greengarten Aff., TR T190, Ex 124, p 19384 RC V1 T10 R1143

6. 2005 AOM -MOH Agreement

45. The AOM relied on the Hay report "which validated the ongoing relevance of the Morton principles" in its MOH negotiations. The Tribunal found the MOH worked in a joint process with the AOM and considered both the Morton and Hay reports which applied an evidence-based methodology to relatively position midwives appropriately between the CHC NP and physician. The parties negotiated a new contract which covered April 1, 2005 to March 31, 2008 and provided for substantial year 1 adjustments to the course of care fees of 20% to 29%, depending on the grid step with a top rate now of $92,600 which included a retention incentive. Year 2 and 3 increases were held to 1% and 2% with no step movements which lead to an annual top-level compensation of $96,400 in year 3. The Tribunal found this agreement did not violate the *Code* as the MOH compensation-setting had sufficient connection to the 1993 principles that there was "insufficient evidence of adverse impact connected to gender". The AOM was told by the MOH it would have to wait for further adjustments to address fully the years of being frozen given fiscal restraints.

> Liability Decision, [164, 287, 292]; Kilroy Aff., para 182-86, 246-51, TR T157, Ex. 91, p. 16077-16079; 16091-92 RC V1 T2 R867

E. 2005-2010 – Gradual Loss of Equity Tool and Increasing Compensation Gaps

46. As noted above, the Tribunal found that there is "sufficient evidence from which to infer that midwives experienced adverse treatment and that sex is more likely than not a factor in the treatment they experienced and the compensation gap that has developed between midwives and physicians since

2005." As described below, the Tribunal found the MOH gradually and then by 2010 fully abandoned any connection to the Equity Tool while providing, without any *Code* lens, substantial compensation increases to the CHC physicians thus leading to a substantial compensation gap with midwives and a too close positioning to NPs. (See Appendix 1 for the compensation data and gaps from 2005 to 2015.)

Liability Decision, [133-142, 294, 297, 324]

1. OMA Representation and Primary Care Provider Alignment Process

47. As a result of OMA representation, CHC physicians now received the regular annual and in year compensation percentage increases paid to all male predominant Ontario physicians. As well, the 2004-2008 OMA-MOH agreement required the MOH to implement a "harmonization and alignment" process to "prevent a gap between what a physician was earning and what they would expect in another compensation model" and to ensure that all primary care physicians were paid similar compensation for similar work, even though in different compensation models.

Liability Decision [131,139-141]; 2004 Physician Services Framework Agreement between MOH & OMA, Art. 9, TR T178(10), Ex 122, p 18576, RC V5 T87 R1039 [2004 OMA Agreement]

48. This "elaborate process to determine fair and appropriate compensation" as part of the MOH's Primary Health Care Renewal Strategy was led by Sue Davey working with the OMA. From 2004 to 2010, this process resulted in CHC physicians receiving significant compensation adjustments, a signing bonus, incentive payments and other benefits. While midwives were also key to that Strategy, Ms. Davey claimed that "it didn't come up" to carry out such an alignment for them. In 2009, with the CHCs still experiencing some recruitment/retention and incentive implementation issues, the MOH negotiated with the OMA to return CHC physicians to a fully salaried model which added into their salary the approximately $38,000 annual value of the harmonization incentives and bonuses flowing from the OMA agreement since 2005.

> Davey Trans (Nov 1/16), TR T374(1), p. 63338-42, 63346, RC V4 T46 R2192; 2004 MOH-OMA Framework Negotiations, TR T209, Ex 143, p 27442-85, 27490, 27505-06, RC V5 T86 R1540; Thornley Trans (Dec 1/16), TR T381, p 64664-65, AC V2, T53, R2199; AOM Final Submissions (Part A), para 866, 1005, RR T1, p 248, 279, RC V3 T21 R3001; See Appendix 5 to AOM Final Submissions, Part IV, RR V2 T4, p 599-620, RC V3 T23 R3008; Update on CHC Physician Compensation for PHC Executive (March 2/10), TR T224, Ex 158 (Pinkney Aff.) p 3281-85, RC V5 T84 R1803; 2008 Agreement between OMA & MOH, Art 5.13, TR T178(14), Ex 112 (Stadelbauer Aff.), p 18714, RC V5 T88 R1043 [2008 OMA Agreement]

2. Ongoing Excellent Outcomes, Unmet Demand and Attrition Concerns

49. As CHC physicians received substantial compensation adjustments, the Tribunal noted:

> … the midwifery program has been delivering excellent outcomes and high rates of satisfaction since regulation. Demand for midwifery services has always exceeded the supply of midwives. The MOH values the midwifery program and continues to make investments to expand access to service across the province even during period of financial restraint.
>
> Liability Decision, [54]; Expert Reports of Dr. Bourgeault, para 91, TR T331, Ex 265, p 40881-82, RC V2 T14 R2065

50. The 2006 report of the Ontario Maternity Care Expert Panel (OMCEP) documented a growing demand for maternity care and the "dramatic withdrawal of family physicians from birth care in recent years." Since regulation, 108 midwives had left the profession which was significant given the shortage of midwives compared to demand. A separate paper on midwifery attrition detailed the reasons, including the onerous nature of the profession. The OMCEP report called for the need to attract, support and retain maternity care providers and to ensure all provider groups were valued and respected. The Tribunal highlighted the importance of midwives:

> As a result of the investments made by the MOH and the ongoing work of practising midwives to mentor, train and support each new graduate, the number of midwives has been growing year over year. Since regulation their scope of practice has been expanded to take advantage of their remarkable skill set and to respond to changing health care priorities, underserviced communities and vulnerable patient populations.
>
> Liability Decision, [54]; Ontario Maternity Care Expert Panel, 2006, TR T91, Ex 25, p 7056, RC V5 T73 R270; Appendix 15 to AOM Final Submissions, para

15, RR V2, T17, p 856, RC V4 T26 R3017; C. Cameron, "Becoming and Being a Midwife: a Theoretical Analysis of Why Midwives Leave the Profession" (2011), TR T110(4), Ex 44 (Cameron Aff.), p 9501, RC V5 T89 R348**;** Ontario Maternity Care Expert Panel Executive Report, 2006, TR T151(115), Ex 85 (Johnson Aff.), p 15626, RC V6 T103 R830

51. Despite their importance to MOH maternity care strategies, "paying midwives higher was never deemed necessary for improving recruitment and retention".

OMP Evaluation (2002-2003), TR T132(85), Ex 66, p 11998-12007, RC V6 T96 R639; Davey Trans (Oct 21/16), TR, T373(1), p 63206-10, AC V2 T28 R2191

3. Midwives Continue to Experience Negative Gender Effects

52. Contrary to the MOH's assertion that "many of the historical barriers experienced by midwives were removed as a result of regulation," the Tribunal found no evidence that these attitudes "disappeared" and to the "contrary, some of the AOM witnesses testified about the challenges to integration and to their personal and professional integrity, which they attributed to resistance from the male-dominated medical profession which either did not support licensing midwifery at all, or advocated for midwives to serve under the supervision of a physician".

Liability Decision, [64, 76]; Kilthei Aff., para 95-96, TR T67(1), Ex 1, p 2135-40, RC V1 T1 R68; Van Wagner Aff., para 215-218, TR T88(1), Ex 22, p 4404-05, RC V1 T6 R191; Affidavit of Bobbi Soderstrom (Jul/16), para 86-88, TR T98(1), Ex. 32, p. 7954, RC V1 T5 R278; Affidavit of Remi Ejiwunmi (Jul 27/16), para 27-38, TR T132, Ex 66, p 11302-03 RC V1 T7 R555; AOM Final Submission (Part A), para 637-638, RR V1 T1, p. 178, RC V3 T21 R3001

53. An example of this is that midwives continued to hear doctors' complaints that midwives were paid more than them to deliver a baby comparing the single OHIP delivery code, (after nurse had managed the labour) to a midwives' entire course of care fee covering their on call 24/7 responsibilities without nursing support over the entire course of the pregnancy up to 6 weeks after birth and including newborn care. This trope makes invisible midwifery and nursing work, overstates physician work, ignores other fee codes physicians are entitled to and was refuted at length in hearing evidence. The 1993 Cabinet Submission criticized the complaint as ignoring the different care models and the

"associated system costs and health outcomes". Yet this misleading comparison continued into the testimony of MOH witness Frederika Scarth and the MOH factum. The Tribunal also heard evidence from representative complainant midwives about the negative effects they experienced to their dignity and well-being as a result of the MOH pay practices.

> Transcript of Katrina Kilroy (Oct 6/16), TR T366, p 61852-53, RC V4 T37 R2184 [Kilroy Trans]; Transcript of Elizabeth Brandeis (Oct 7/16), TR T367, Ex 192, p. 62110-11, RC V4 T39 R2185 [Brandeis Trans]; AOM Final Submissions (Part A) para 271-318, 650, 651, RR V1 T1, p 81-90, 182, RC V3 T21 R3001; AOM Reply Submissions (Part A), para 383-92, RR V4 T24, p 1625-30, RC V4 T29 R3024; Dr. Bourgeault Expert Reports, para 91, 68-69, TR T331, Ex 265, p 40881-84, 40915-16, RC V2 T14 R2065; MOH OMP Framework, TR T201(31), Ex 135 (Jt Book of Cabinet Documents), p 22940-41, AC V3 T85, R1284; Scarth Aff, para 72-73, 75, TR T253, Ex 187, p 36749, AC V1 T12, R1948; Transcript of Frederika Scarth (Dec 9/16),TR T385, p 65617, 65627-35, 65641-49, 65660, 65663-64, RC V4 T51 R2203

54. Contrary to the MOH factum, the Tribunal had also before it substantial evidence supported by over 40 years of Ontario government reports, Supreme Court of Canada jurisprudence, Pay Equity Hearings Tribunal decisions and provisions of Ontario's *PEA* which establish that SGDC has been and continues to be a widespread human rights compliance issue in Ontario. The government's research states that "women in health occupations experience the widest gender wage gap at 46.7% or $43,582, noting that occupational segregation is "based on social or cultural norms and beliefs that under-value women's work." The Tribunal summarized this as follows:

> There is a social context for this claim. The negative effects of gender on the compensation of sex-segregated workers are well known. The Government of Ontario has taken a number of steps to recognize and combat the gender wage gap.
>
> 2014 Decision, [29]; Liability Decision, [252]; Green Paper, TR T203, Ex 137, p 5967-5990, RC V5 T65 R1534; P. Armstrong, "Pay Equity in Predominately Female Establishments: Health Care Sector" (Sept/88), TR T324, Ex 258, p 40437-591, RC V5 T66 R2058 [Armstrong Paper]; MOL, Closing the Gender Wage Gap: A Background Paper, Oct/15, TR T214, Ex 148(1), p 30259-314, RC V4 T62 R1577 [Background Paper]; *Québec (AG) v Alliance du personnel professionnel et technique de la santé et des services sociaux*, 2018 SCC 17 [*Québec v. Alliance*]; See also *Queensway Nursing Home v Group of*

> *Confidential Employees*, 2010 CanLII 56873 (ON PEHT); *Ontario Nurses' Association v Participating Nursing Homes*, 2016 CanLII 2675 (ON PEHT); AOM Final Submissions (Part A), para 498, 516, 1005, RR V1 T1, p 137, 140-141, 297, RC V3 T21, R3001; Refining a Gender-Based Analysis for Ontario's Primary Care Reform Strategy: ECHO Report (March, 2011), TR T217, Ex 151 (Naylor Aff.), p 30488-544, RC V6 T90 R1580

55. The Tribunal also heard specific evidence about the ongoing increasing compensation gap between midwives and their male comparator over this period of time. See Appendix 1 Chart.

4. AOM Equity Requests, 2008-2011 Agreement and Commitment to Study

56. Since 2005, the AOM repeatedly raised that it was falling behind its male comparator, the CHC physician and was being paid too closely to nurses. With the 2005 agreement expiring on March 31, 2008, the 2008 contract negotiations provided the first opportunity to address the inequity. The MOH delayed those negotiations to October 2008 after completing the OMA negotiations during the financial crisis. The 2008 contract was finalized with the May 6, 2009 Memorandum of Agreement (2009 MOU). In light of ongoing fiscal restraints, the MOH held midwifery increases to 2% each year till the March 31, 2011 expiry date. The 2010 Courtyard report found that:

> Delays on the Ministry's part in negotiating the 2008 contract led to it being settled just after the economic downturn and after the Ontario Medical Association and the Ontario Nurses Association settled multi-year contracts with the Ontario Government with income increases averaging 3% annually. The midwives settled for more modest increases and without any adjustment to reflect what they saw as historic inequities.
>
> Liability Decision, [157, 175]; Remedial Decision, [27]; Memorandum of Understanding between AOM and MOH (May 7/09), Art. 7, TR T157, Ex. 91 (Kilroy Aff.) p 16457, RC V5 T70 R904 [2009 MOU]; 2008 OMA Agreement, TR T178(14), Ex 112, (Stadelbauer Aff.) p 18706-18741, RC V5 T88 R1043; Compensation Review of Midwifery Prepared on Behalf of MOH, AOM, September 2010, TR T224(97), Ex. 158 (Pinkney Aff.), p 31882, 31912 AC V3 T69 R1686 [Courtyard Report]

57. By giving up on other issues, the AOM persuaded the MOH to include in the 2009-2011 contract an obligation that the parties would retain an objective independent third party to conduct a joint non-

binding "compensation review of midwifery services." The report, with a completion date of June 30, 2010 was to inform the negotiations leading to the next 2011 contract. The MOU noted the OMP objective to "provide equitable funding mechanisms that support the integration of midwifery services into the funded provincial health care system". This would be the first joint compensation study of the parties since 1993. Article 7.2 called for the consultant to:

> … produce a report that suggests the "appropriate "total compensation" for midwifery services based on available evidence which will include but not be limited to: comparable relevant and historical compensation levels and factors of nurses, doctors and other relevant health care providers; comparable and relevant midwifery models in other jurisdictions; and the initial 1993 Morton Compensation report and the February 2004 Hay compensation review report.
>
> "Total compensation" "means" "Course of care fees (includes: operational, on-call, secondary care, retention, experience fee and rural and remote supplements); and all benefits or equivalent funding.
>
> Liability Decision, [38, 39]; 2009 MOU, Art. 3, 7, TR T157, Ex 91 (Kilroy Aff.) p 16452, 16454-55, RC V5 T70 R904; Request for Services (Jun 8/ 10), TR T194(5), Ex 128 (Ronson Aff.), p 20186, RC V5 T71 R1170

5. Absence of Gender Lens or Proactive Code Compliance Tool

58. Laura Pinkney, the MOH manager leading the compensation setting, testified she:

(a) Was not familiar with the term "occupational sex segregation" or with the concept of systemic gender discrimination in compensation for women"

(b) Was not aware that 80.1% of those in health occupations are women;

(c) Was never trained in identifying systemic gender discrimination;

(d) Did not apply any policy aimed at identifying whether there was any systemic gender discrimination in midwifery compensation;

(e) Did not apply any process to assess whether midwifery compensation was *Code* compliant;

(f) Did not have any training in gender based analysis or human rights based analysis; and

(g) Had never considered in her decision-making that midwives were predominantly women

Pinkney Trans (Nov 4/16), TR T377, p 63804, 63815-16, RC V4 T48 R2195;
AOM Final Submissions (Part A), para 114, RR V1 T1, p. 44, RC V3 T21 R3001

6. Ongoing Persistence of Physicians' Association with Male Work

59. As highlighted in Appendix 1, family physicians remained male predominant through this period. From 2005 to 2010, their male predominance ranged from 64% to 60%. All the Ontario physicians represented by the OMA also remained male predominant throughout this period ranging from 68.4 to 64.1% in 2010. This was despite the growing number of female physicians in their ranks. The Tribunal acknowledged the growing female predominance of CHC family physicians but stated they remained an appropriate "male comparator" or proxy for male work as result of the above history and the fact their compensation was tied to the male predominant family physician. The Tribunal noted:

> CHC physicians are family physicians who work in a particular setting. This was recognized by the MOH and the OMA who have worked to harmonize the compensation of pre-dominantly female physicians with their peers. The fact that CHC family physicians are now pre-dominantly female does not affect the underlying premise of the 1993 principles and comparisons.
>
> Liability Decision, [142, 277, 284]; CIHI Physicians, by speciality and gender, and percentage distribution, by gender, Canada (1978-2014) Counts, TR T88, Ex. 22 (Van Wagner Aff.), p 5821, R208, RC V6 T91 R208 [CIHI Physician Counts]

60. The Tribunal also noted that, before they received their first increases in 2003, CHC physicians were the most female dominated and most undercompensated group of physicians in Ontario. It was only when they became part of the predominantly male OMA negotiation framework that they were aligned with other physicians which accelerated their compensation increases.

> Liability Decision, [142]

7. Increasing Compensation Gap and Closer Pay to Nurse Practitioners

61. The Tribunal found that there was an "increasingly significant" compensation gap between midwives and their male comparator, the CHC physician. The male comparator salary had risen from

$117,669 in 2005 to $168,856 in April 1, 2010 with its new adjusted salary (replacing incentives) and then to $175,779 by October 1, 2010 with OMA increases. During the same period the top-level midwife's compensation increased from $92,600 in 2005 to $104,847 (as set out in Courtyard). As of 2010, the top level CHC NP was earning $89,203. See Appendix 1 Chart.

> Liability Decision, [294]; See also Corrected Mackenzie Spreadsheet (Feb 9/17), TR T296, p 38725, RC V2 T16 R2030; Courtyard Report, sec 1.5, 4.7, TR T224(97), Ex. 158 (Pinkney Aff.), p. 31880, 31904-06, AC V3 T69 R1686

62. Relying on the above evidence, the Tribunal found that the substantial CHC physician increases were the result of three factors: OMA representation; the harmonization of CHC physicians with other primary care family physicians, and to "remedy the recruitment and retention problems which CHCs were still experiencing". The Tribunal rejected the MOH position that the increases were paid as a result of any SERW analysis of their work.

> Liability Decision, [203]; Remedial Decision, [65]; S.O. 2010, c 1, Sch 24 ["*Compensation Restraint Act*"]; Memorandum from MOH, Senior Administrators, Transfer Payment Agencies Regarding Compensation Restraints (Apr 22/10), RC T178(47), Ex 112, p. 19087, RC V6 T93 R1076; 2008 OMA Agreement, Art. 3-5, TR T178(14), Ex 112 (Stadelbauer Aff.), p 18708-14, RC V5 T88 R1043; Corrected Mackenzie Spreadsheet (Feb 9/17), TR T296, p 38725, RC V2 T16 R2030

8. Ontario Compensation Restraints

63. In March 2010, the government introduced the *Public Sector Compensation Restraint to Protect Public Services Act, 2010* freezing public sector compensation structures for two years. Section 12(3) provides that "nothing in this Act shall be interpreted or applied so as to reduce any right or entitlement under the *Human Rights Code* or the *Pay Equity Act"*. The MOH refused the AOM's request to apply this exemption and froze midwifery compensation as of April 1, 2011. The CHC physicians pay continued to increase till 2012 since the restraint law exempted bargaining contracts until they expired.

> Liability Decision, [203]; Remedial Decision, [65]; S.O. 2010, c 1, Sch 24 ["*Compensation Restraint Act*"]; Memorandum from MOH, Senior

> Administrators, Transfer Payment Agencies Regarding Compensation Restraints (Apr 22/10), RC T178(47), Ex 112, p. 19087, RC V6 T93 R1076; 2008 OMA Agreement, Art. 3-5, TR T178(14), Ex 112 (Stadelbauer Aff.), p 18708-14, RC V5 T88 R1043; Corrected Mackenzie Spreadsheet (Feb 9/17), TR T296, p 38725, RC V2 T16 R2030

F. The Courtyard Compensation Review and Report

1. Best Evidence

64. The Tribunal held that the Courtyard recommendation of a one-time 20% "equity adjustment" to address past inequities was the best evidence of what would have happened if the midwives had not been deprived of a *Code* compliant compensation setting process. The Tribunal held that:

> Courtyard illustrates how midwives gradually shifted out of alignment with their comparators after the 2005 agreement was achieved. Courtyard represents the best evidence of both the consequences of losing the benchmarks, and what compensation losses flow from reinstating them. While Courtyard recommended an "equity" adjustment of 20% for midwives at each of the 6 levels as of April 1, 2011, it is equally important that Courtyard reinstated the methodology of aligning midwives between their comparators and recommended regular negotiations going forward on that basis.
>
> Remedial Decision, [122]

2. Courtyard Process and Joint Advisory Working Group

65. The Courtyard Group responded successfully to the June 2010 Request for Services and commenced meetings with the parties' joint committee on July, 27, 2010. The parties considered the Morton and Hay Report principles as directed by the 2009 MOU and the MOH Request for Services forwarded to Courtyard which stated that the:

> …current compensation framework for midwives is based on a compensation review report that was conducted in February, 2004. … Two reports were previously commissioned to review the compensation for midwifery services: the Morton Compensation Report in 1993 and Hay Compensation Report" which was presented to the MOH in 2004 along with a compensation increase request.
>
> Request for Services (Jun 8/10), TR 194(4), Ex 128 (Ronson Aff.), p 20185-86 RC V5 T71 R1170

66. The Courtyard process and detailed 53-page report discussed below generally followed the 1993 joint working group process and Equity Tool to recommend a fair and appropriate compensation for midwives.

Remedial Decision [127-128] R3510

(a) **Joint, Collaborative Nature of Evidence-Based Study** The working group meetings proceeded as a "collaborative" "iterative", and "constructive" process."

Liability Decision, [41, 193, 312];Remedial Decision, [37, 123-125, 141-142]; Courtyard Report, sec. 2, 4, TR T224(97), Ex 158 (Pinkney Aff.), p 31884-85, 31889, AC V3 T69 R1686; Kilroy Aff., para 217-233, TR T157, Ex 91, p 16086-89, RC V1 T2 R867; Affidavit of John Ronson (Jul 26/19), see e.g. para 32-54, TR T194, Ex. 128, p. 20092-97 RC V1 T8 TR R1166 [Ronson Aff.]; Ronson Trans (Oct 14/16), TR T370, p. 62698-700, AC V2 T51 TR Tab 370 p. 62632 R2188; Request for Services, TR 194(4), Ex 128 (Ronson Aff.), p 20186 RC V5 T71 R1170

(b) **Assisted by Independent Compensation Specialist:** Courtyard's RFP sets out the qualifications of lead John Ronson supported by Gia Marasco. Like Morton, Ronson was not a pay equity specialist but rather a management consultant/lawyer with lengthy experience in health care reform, policy and management.

Liability Decision, [185]; Memorandum of Understanding between AOM and MOH (May 7/09), Art. 7.1, TR T157(37), Ex 91 (Kilroy Aff.), p 16454, RC V5 T70 R904 [2009 MOU]; Proposal by Courtyard Group re: Compensation Review, TR T178(39), Ex 112 (Stadelbauer Aff.), p 18961-71, RC V6 T100 R1069 [Courtyard Proposal]; Ronson Trans (Oct 14/16), TR T370, p 62687-88, AC V2 T51 R2188

(c) **Objective Fair and Appropriate Compensation:** Like the Morton process, the review was to recommend an "appropriate 'total compensation' package. This recommendation was guided by the following evaluation questions: 1) Does the current compensation model reflect the current scope of work performed? 2) Does the current compensation model reflect the volume/complexity of work performed? 3) Does the current compensation model reflect the cost of doing the work? 4) What is the value of benefits, or equivalent funding received by midwives? 5) Does the current compensation model reflect the experience and training of midwives? 6) Is the current compensation model comparable to other professions performing similar work? 7) Does the current compensation model reflect adherence to best practice guidelines and the achievement of the Ministry's policy objectives? 8) What market trends should be taken into consideration? Have compensation increases remained aligned with economic growth in Ontario?

Liability Decision, [188-189]; Remedial Decision, [124]; 2009 MOU, Art. 7.1, TR T157(37), Ex 91 (Kilroy Aff.), p 16455, RC V5 T70 R904; Courtyard Report,

s. 2, TR T224(97), Ex 158 (Pinkney Aff.), p 31884, AC V3 T69 R1686; Ronson Aff., para 36-37, TR T194, Ex 128, p 20093, RC V1 T8 R1166; Ronson Trans (Oct 14/16), TR T370, p 62702-03, AC V2 T51 R2188

(d) **Evidence-Based Methodology and Work Valuation:** Courtyard established a comprehensive evidence-based framework flowing from the evaluation questions and relying on established compensation practices. This methodology included frequent meetings, email communications, review of background documents and date, stakeholder interviews, data analysis and cross-Canada jurisdictional review.

Liability Decision, [188-90, 192, 194]; Remedial Decision, [125, 128]; 2009 MOU, Art 7.2, TR T157(37), Ex 91 (Kilroy Aff.), p 16455, RC V5 T70 R904; Courtyard Report, TR T224(97), Ex 158 (Pinkney Aff.), p 31884-86, 31916, AC V3 T69 R1686; Courtyard Proposal, TR T178(39), Ex 112 (Stadelbauer Aff.), p. 18954-960, RC V6 T100 R1069

(e) **History of Midwifery Considered:** The report reflects its contextual understanding and analysis of midwifery history and compensation setting. Despite the MOH [51,159] critique that words sex or pay equity are absent, it was guided by a search for a recommendation which was "equitable" in a context of midwives are an almost exclusive female sex segregated profession. Courtyard noted the original Morton model was based, amongst other things, on "ensuring pay is equitable compared to other professions performing similar work" -in other words, pay equity.

Ronson Trans (Oct 14/16), TR T370, p 62715, 62734-36, AC V2 T51 R2188; Kilroy Aff., para 228-231, TR T157, Ex 91, p. 16088, RC V1 T2 R867; Kilroy Trans (Oct 6/16), TR T366, p 61842-46, 61851, 61965-69, RC V4 T37 R2184; Kilroy Trans (Oct 7/16), TR T367, p 62049-62050, 62078, RC V4 T38 R2185; Affidavit of Kelly Stadelbauer (Jul 29/16), para 140-141, TR T178, Ex 112, p. 18145, RC V1 T3 R1030 [Stadelbauer Aff.]; Courtyard Report, s. 1.5, TR T224(97), Ex 158 (Pinkney Aff.), p 31880, AC V3 T69 R1686

(f) **Considered Public Policy and Health Reform Objectives:** Contrary to MOH [162], Courtyard specifically addresses the alignment of the compensation model to MOH public policy and objectives, concluding that the model minimizes unnecessary interventions, ensures access to 24/7 care, provides care close to home, ensures access in remote and rural areas, optimizes the use of health human resources and provides retention incentives. The report also addresses the appropriateness of compensation in light of Ontario's maternal care context, the midwifery's contributions improved health outcomes.

Courtyard Report, s. 1-4.1, TR T224(97), Ex 158 (Pinkney Aff.), p 31874-31909, AC V3 T69 R1686

(g) **Adopted the 1993 Equity Tool - Relative Positioning of Midwife:** Courtyard found that the 1993 equity principles were not outdated but rather had been reinforced over the years stating: "The compensation model principles established in the Morton report of 1994, which have evolved somewhat since that time, appear to have served the public, the

profession and the Ministry very well. There appears to be no appetite or need to change the fundamental model of compensation."

Courtyard Report, sec. 5, TR T224(97), Ex 158 (Pinkney Aff.), p 31911, AC V3 T69 R1686; Transcript of Kelly Stadelbauer (Oct 14/16), TR T370, p 62680, RC V4 T42 R2188 [Stadelbauer Trans (Oct 14/16)]

(h) **CHC Physician as Male Comparator:** While Courtyard did not refer to CHC physician directly as a male comparator, as noted in Appendix 1 to this factum, in 2010 family physicians were 60% male predominant and all Ontario physicians were 64.1% male.

Liability Decision, [277, 284]; CIHI Physicians, by speciality and gender, and percentage distribution by gender (1978-2014), TR T88(17), Ex 22 (Van Wagner Aff.), p 5821, R208, RC V6 T91 R208

(i) **Comparisons of Comparators' Scope of Practice and Work Differences:** Courtyard analyzed the occupational differences between midwives, physicians and NPs. Courtyard analyzed the "scope and model of care" of the three comparators, noting that midwives were the only maternity care providers that are "guaranteed to provide intrapartum care upon graduation and registration". Courtyard also highlights the increasing scope of practice of midwives including more controlled acts and medications as well as increasing complexity with more hospital births, more complicated labour and pain techniques and increase in non-clinical services. The decline of family physicians practising obstetrics with the perception it is "too disruptive of personal life" was also stated. As the Tribunal noted, Ronson testified that he took into account the different educational requirements between midwives and CHC physicians and "he was struck by the significance of the clinical training received by midwives".

Remedial Decision, [141]; Courtyard Report, s. 1-4, TR T224(97), Ex 158 (Pinkney Aff.), p 31874-909, AC V3 T69 R1686; Ronson Aff., para 73-80, TR T194, Ex. 128, p. 20102-05, RC V1 T8 R1166; Ronson Trans (Oct 14/16), TR T370, p 62722, RC V4 T43 R2188

(j) **Increasing Compensation Gap between Midwives and Male Comparator:** Courtyard found a significant compensation gap with the CHC male comparator now earning $181,233 and the top midwife earning $104,847, a pay gap not including benefits of about $76,000, up from $3,000 at the time of regulation.

Courtyard Report, sec. 4.7, TR T224(97), Ex 158 (Pinkney Aff.), p 31904, AC V3 T69 R1686

(k) **Avoiding Too Close Positioning to Nurse Practitioners:** The top midwife now earned only about $15,000 more than the top CHC NP with hospital NPs earning up to $120,000. At regulation, the top midwife earned $22,000 more than the top nurse. Courtyard found that the NP "at the bottom end of the compensation range are now paid the same as the lowest level midwife; and in some practice settings such as hospitals they may be paid significantly more". The 20% equity adjustment provided more appropriate distance

between midwifery and CHC NP compensation in line with the Tribunal's finding that too close an alignment with nurses "can easily be construed as natural and appropriate, obscuring the ways in which they are like physicians."

Liability Decision, [302]; Courtyard Report, sec. 4.7, 5, TR T224(97), Ex 158 (Pinkney Aff.), p 31904, 31911, 31921, AC V3 T69 R1686

(l) **Recruitment and Retention Analysis:** The report noted in justifying its recommendation that there was a continuing and "increasing" unmet demand for midwifery services with "over 7500 women requesting midwifery services" in 2009 to 2010 who were "denied service due to capacity limits".

Courtyard Report, sec. 4.3, 5, TR T224(97), Ex 158 (Pinkney Aff.), p 31896, 31910, AC V3 T69 R1686

(m) **Assessment Primarily of Same Labour Market and Economic Growth:** Courtyard found that increases for midwives since 1994" fell well below those of salaried health and social assistance employees as well as public sector salaries in health and social services" since 1994. Courtyard considered the compensation evidence relating to Alberta and British Columbia midwives, (only two midwifery programs large enough to serve as comparators'). However, like the Morton report, the primary comparison was to Ontario comparators the same economic market of midwives.

Remedial Decision, [137]; Courtyard Report, s. 3, 4.7-5, TR T224(97), Ex 158 (Pinkney Aff.), p. 31885-88, 31908-12, AC V3 T69 R1686

(n) **Assessment** of **Proactive Monitoring and Regular Negotiations:** Courtyard found that intermittent and irregular negotiations "hurt the compensation of midwives" and contributed to the need for the review. "There were no true negotiations between 1994 and 2005 and no compensation increases. There was a new contract in 2005 and another in 2008 and there now appears to be a pattern established of regular negotiations. This is critical".

Courtyard Report, sec. 5, TR T224(97), Ex 158 (Pinkney Aff.), p 31912, AC V3 T69 R1686

(o) **Overall Assessment of What is Fair Considering Parties' Positions:** Ronson testified he weighed all the evidence and responses of the parties and arrived at what he thought was a "fair", "one time "equity adjustment' to midwifery compensation" to address past inequities. As the MOH noted, Ronson used the term equity in the sense of "equitable remedies" and recognized that neither party would likely be happy with the result. This is similar to the Morton process of positional bargaining which occurred only after the evidence-based methodology was completed.

Liability Decision, [191]; Courtyard Report, s. 5, TR T224(97), Ex 158 (Pinkney Aff.), p 31913, AC V3 T69 R1686; Ronson Trans (Oct 14/16), TR T370, p 62714-15, 62734-36, AC V2 T51 R2188; MOH Factum, [161]

(p) **Addressing MOH Questions:** Ronson testified the MOH raised some questions when it obtained the draft recommendations and he addressed those issues in the final report. Once it was released, he did not hear further from the MOH. The MOH questions were found by the Tribunal to be "minor". Ronson also testified that the issues raised by the MOH at that time did not change his 20% equity recommendation.

> Liability Decision [193-195, 306]; Remedial Decision, [136-138]; Ronson Trans (Oct 14/16), TR T370, p. 62717-19 AC V2 T51 R2188

3. Courtyard Report Recommendations -Repositioning Midwives

67. Accordingly, the Courtyard report recommended that the MOH provide:

> A one-time equity adjustment to midwifery compensation (i.e. experience fee, retention fee, secondary care fee, on-call fee) that would raise the income of midwives at each experience level by 20% effective April 1, 2011. This would restore midwives to their historic position of being compensation at a level between that of nurse practitioners and family physicians. While not completely consistent with the original Morton principles (which would push the upper limits of compensation for experience[d] midwives even higher) we believe such an adjustment is fair in all the circumstances. Benefits allowances should remain at 20% of income, but will increase correspondingly.
>
> Courtyard Report, sec. 5, TR T224(97), Ex 158 (Pinkney Aff.), p 31913, AC V3 T69 R1686

68. This 20% equity adjustment, if implemented, would have increased the pay of midwives to around $125,000 and increased their benefits which are a 20% ratio of pay. Midwives would have been paid about $56,000 less than the lowest paid CHC physician and $36,000 more than the CHC NP. (See Appendix 1 Chart.)

G. MOH Response – Rejection and Compensation Freeze until March 31, 2017

69. Ms. Pinkney who did not participate in the process stated the MOH was "shocked" by the recommendation. The Tribunal stated:

> The lack of proactivity in the monitoring of compensation levels for midwives is most evident in the lack of regular negotiations between the AOM and the MOH and the long gap between joint compensation studies. Those gaps explain in part the reaction of the MOH to Courtyard's findings. Midwives were not shocked by Courtyard's findings – in fact, quite the contrary. They had

> maintained continuity with the original funding principles in their preparations for each round of negotiation and therefore could see the compensation gap widening and took steps to redress it in the 2008 negotiations.
>
> The loss of the benchmarks also prevented the MOH from fully appreciating the significance of the findings and recommendations made by Courtyard: an independent consultant, working in collaboration with both parties, using the parties' original funding principles as a guide, found that a group of sex segregated workers required an increase of 20% to bring their compensation up to a fair and appropriate level.
>
> Liability Decision, [186-200, 318]; Remedial Decision, [37]

70. The MOH responded by telling the AOM that the report could not be considered or implemented as midwifery compensation was frozen pursuant to the restraint policy aligned with the *Compensation Restraint Act.* Courtyard was never notified that such a freeze would apply. The MOH refused the AOM's request to apply the exemption for equity adjustments in the *Act* on the assertion that the *PEA* did not apply to midwives and the *Code* did not apply as their comparators were perceived by MOH as female. At the same time, the MOH would not apply the *PEA* principles to midwifery compensation. As the Tribunal noted, in November 2010 the MOH internally "advert to an "outside risk" that the AOM could bring an "equity issue forward" under the Code" but that NPs were female dominated and the "relationship between midwives and obstetricians was not clear". The Tribunal found that the MOH "without examining the gender implications" failed to "fully consider the exemption under the [wage restraint] legislation (and presumably for the policy) for human rights entitlements". The MOH also rejected the AOM's position that they were willing to be subject to compensation restraints once the 20% equity adjustment had been made. Midwifery compensation remained frozen until April 1, 2017.

> Liability Decision [196, 207-08, 303, 307]; *Compensation Restraint Act*, ss. 12(3); Pinkney Aff., para. 112-14, 118-19 TR T224, Ex 158, p 30965-67, AC V1 T11 R1588; Pinkney Trans (Nov 4/16), TR T377, p. 63785-87, 63791-92, 63817-20, AC V2 T46 R2195; Ronson Trans (Oct 14/16), TR T370, p. 62723, AC V2 T51 R2188; Stadelbauer Aff., para 159-62, 165, 241, 262, TR T178, Ex 112, p 18149-50, 18166, 18171, RC V1 T3 R1030; Kilroy Aff., para 248-49, 257, TR T157, Ex. 91, p 16092, 16095-96, RC V1 T2 R867; AOM Final Submissions (Part A), para 410, RR T1, p 109-10, RC V3 T21 R3001

1. MOH Improperly Rejected Courtyard and Failed to Repair Perceived Deficiencies

71. The AOM pursued the MOH to consider and implement the Courtyard report. The Tribunal found that "when the Courtyard report was released, the MOH disagreed with the findings and methodology, despite having been a full and active participant". The Tribunal found:

> ..the MOH made explicit that the 1993 principles and methodology no longer informed the compensation practices of the MOH. The MOH unilaterally determined that CHC physicians were not appropriate comparators for midwives. The MOH did not conduct a study to validate that assumption which flies in the face of the 1993 agreement, to which the MOH was a party, and the Hay Group and Courtyard reports which confirmed the ongoing relevance of that comparator.
>
> Liability Decision, [297]; Remedial Decision, [7]; Kilroy Aff., para 228-231, TR T157, Ex 91, p 16088, RC V1 T2 R867; Stadelbauer Aff., para 140-141, TR T178, Ex 112, p 18145, RC V1 T3 R1030

72. The concerns raised later by the MOH as fundamental to its criticism of the Courtyard Report were not raised at the time of the working group process. These included Courtyard's reliance on the CHC Physician comparison, the adoption of relative positioning equity principles set out in the Morton and Hay reports, its inconsistency with compensation restraint policy, the MOH recalculation of the compensation of midwives to include many expenses and grants. The Tribunal found that the MOH focus on the extensive differences between midwives and physicians "is inconsistent with its promotion of midwives as equally competent providers of low-risk maternity care, along with family physicians and obstetricians".

> Remedial Decision, [34, 141]

73. Contrary to the MOH [151-152] description of physicians' exclusive and non-substitutable scope of practice, the evidence showed otherwise:

(a) **Overlapping Scope of Practice:** A CHC physician testified that new clients were often assigned randomly to physicians or NPs and many never see a physician. NP led

community clinics provide health care similar to that of CHCs. Midwives, NPs and other CHC health professions provide care for vulnerable clients including refugees. The Tribunal heard evidence of the complexity, diversity and vulnerability of midwifery clients served by midwives.

(b) **Substitutability:** Contrary to MOH [142], family physicians or obstetricians cannot substitute for midwives and provide midwifery care as not qualified under the *Midwifery Act.* As well, CHC physicians and most family physicians would need to have additional training and permission from regulator to perform intrapartum care.

(c) **Risk Comparison:** Further to MOH [4], while midwives do provide care to 'heathy clients with low risk pregnancies, this statement does not fully capture the need for midwives to be skilled in identifying and managing complications and emergencies, including managing most postpartum hemorrhages, miscarriages, stillbirths, or babies who survive birth and then die. Intrapartum care poses the most risk in maternity care and physicians who provide it, like midwives, have significantly higher professional liability insurance rates that those who do not provide it to reflect the lower risk. In light of this, the reference in the MOH's Factum [14] that caring for women in pregnancy is "routine" is an example of the devaluation of midwifery work.

Price Trans (Apr 4/17), TR T402(1), p. 68685-87, 68723, RC V4 T55 R2220; Agnew Aff., para 25-28, 67-69, 70-74, 93 TR T195, Ex 129, p 20521-22, 20530-31, 20535, RC V1 T4 R1211; Transcript of Mary Rose Macdonald (Nov 9/16), TR T379(1), p 64312-13, 64320, 64322, RC V4 T58 R2197; Transcript of Theresa Agnew (Oct 18/16), TR T371, p 62792 RC V4 T59 R2189; Macdonald Aff., para 18, TR T235, p. 33932-33, AC V1 T7 R1820; Van Wagner Aff., para 214, TR T88, Ex 22, p 4404 RC V1 T6 R191; Kilthei Aff., para 30-32, 229, TR T67, Ex 1, p 2121, 2171, RC V1 T1 R68; Kilroy Aff., para 44, 82-89, 113-16, 279-281, 332, TR T157, Ex 91 p. 16050, 16056-57, 16060-61, 16103-04, 16116, RC V1 T2 R867; Transcript of Dr. Tara Kiran (Nov 10/16), TR T380, p 64576-77, RC V4 T60 R2198; Appendix 8, para 14-16, 36-39, RR V2 T11, p 767-68, 773-74, RC V4 T25 R3011; Silverman Aff., para 36, TR T199, Ex 133, p 22044, RC V1 T9 R1251; Appendix 17 to AOM Final Submissions, April 27, 201 (The Erroneous "Substitution" Arguments Made by MOHLTC Experts), para 11-18, RR V2 T19, p. 878-881, RC V4 T28 R3019; McKendry Report, TR T212, Ex 146, p. 28906, AC V3 T81 R1571

2. MOH Failure to Take Seriously, Investigate and Address AOM Allegations of Inequitable Compensation

74. The Tribunal found that the Courtyard report is "sufficiently compelling for the MOH to realize that the AOM's claim of gender discrimination may have some validity … Contrary to the Commission's policies, there is no evidence that the MOH took reasonable steps to understand and

evaluate the allegations of discrimination". Contrary to the evidence, the MOH [173-174] argues it cannot be held accountable as it was not aware the AOM was raising a human rights issue until November 27, 2013. The Tribunal found the AOM "strongly advocated for the implementation of the Courtyard report, promoting the recommendation as a pay equity adjustment for midwives". The AOM in many meetings and communications repeatedly asked the MOH to address their pay inequity taking the position that "midwives are not willing to accept that the pay equity gap, experienced as a female dominated profession, providing care to women has no remedy".

> Liability Decision, [31, 45, 210, 307-08]; Remedial Decision, [31, 131]; Letter (Apr 23/13) from Lisa Weston, AOM President to Melissa Farrell, Director of Primary Care, MOH, TR, T176(36), Ex 110 (Brandeis Aff.), p 17968, RC V5 T81 R1015

75. From October 2010 to Spring 2013, the MOH continued to freeze the compensation of midwives while still saying it would discuss the Courtyard deficiencies. The parties used various means to resolve the impasse including meetings with top level bureaucrats and the Minister who directed that the issue be addressed through the parties' Midwifery Contracts and Funding Advisory Committee. (MCFAC). The MOH generally responded by saying Courtyard was not a pay equity analysis and ADM Nancy Naylor testified that any difference in compensation between midwives and CHC physicians "is a result of occupational status and other factors other than gender". The MOH admitted it never did an analysis of the relative positioning of midwives, physicians and NPs. since 1993.

> Naylor Trans (Nov 3/16), TR T376, p 63712-13, RC V4 T47R2194; Pinkney Trans (Nov 4/16), TR, T377, p 63809, RC V4 T48 R2195; Davey Trans (Oct 21/16), TR, T373, p 63128-32, AC V2 T29 R2191

76. The Tribunal found that the MOH "did not conduct a compensation study of its own or lead expert evidence for the purpose of validating its compensation practices" and obtaining a new recommendation based on correcting the perceived Courtyard "flaws". The MOH did not have in place any *Code* process and gender lens to assess whether its compensation setting was *Code* compliant.

Furthermore, evidence showed that the MOH was concerned that any attempt to conduct such a study might lead to a greater recommended adjustment than the Courtyard 20%, stating in internal documents "[t]here is merit to the claim that midwives deserve a significant increase after several years of either no or minimal compensation increases".

> Brandeis Trans (Oct 7/16), TR T367, p 62201-02, RC V4 T39 R2185; Pinkney Trans (Dec 2/16), TR T382, p 64927-28, RC V4 T50 R2200

77. The MOH "admits, contrary to OHRC policies, that it has taken no proactive steps to monitor the compensation of midwives for the impact of gender discrimination on the fairness of their compensation." The Tribunal noted that "[b]y contrast, the MOH has continued to monitor compensation for CHC physicians for evidence of recruitment and retention issues and to ensure that their compensation is fair and aligned with other physicians". The Tribunal, at AOM request:

> …considered the OHRC policies, particularly those which describe systemic discrimination. In the employment context, the policies of the OHRC affirm that employers and organizations like the MOH have the primary obligation to make sure their workplace is free from discrimination and that they are expected to act proactively to ensure that human rights are respected. In addition, where human rights complaints arise, they must respond to allegations of human rights violations in a timely and effective manner.
>
> Liability Decision, [244, 315]

78. In response to the AOM's Application, the MOH relied on the *Code*, *PEA* and the OHRC policies as the relevant government policies. As well, the Tribunal noted that the MOH as an "employer is subject to the terms of the *Pay Equity Act* and better positioned than other small employers…in determining how to achieve compensation which is free from discrimination. There is also nothing new about the concept of a "gender-based analysis" or gender lens in setting government policy".

> Liability Decision, [321]

79. In May 2011, the MOH offered the AOM a small increase of two zero years and 2% plus a 3% quality improvement incentive conditional upon midwives not pursuing their equity claim.

This offer was not accepted by the AOM and withdrawn by the MOH. As the Tribunal noted, the MOH Minister rejected the AOM request with a dismissive statement that midwifery compensation was "pretty good for a four-year degree".

> Liability Decision, [210, 214]; Stadelbauer Trans (Oct 14/16), TR T368, p 62407-08, 62410 RC V4 T42 R2188; Stadelbauer Aff., para 196, TR, T178, Ex 112. p 18155-56, RC V1 T3 R1030; Kilroy Aff., para 252(b) TR T157, Ex 91, p 16093, RC V1 T2 R867; Kilroy Trans (Oct 6/16), TR T366, p 61864-65, RC V4 T37 R2184

80. In 2012, the MOH reduced the CHC physician salary along with other physicians' compensation as follows: 1.37% (Jan 1/13), .5% (Apr 1/13), and 2.65% June 1, 2015. This reduced compensation still left a very significant compensation gap between midwives and their CHC comparator. For example, in 2012, the CHC male comparator earned $185,974 and the top midwife earned $104,847, leaving a gap of $81,127. Contrary to MOH [199], the Tribunal reasonably did not reduce the 20% equity adjustment as midwives received no increase when the MOH extended their contract in March 2011 and therefore had "already done their part for compensation restraint".

> Remedial Decision, [144, 310]; Mackenzie Spreadsheet (Feb 9/17), TR T296, p 38725, RC V2 T16 R2030; Spreadsheet of CHC Salary Scales (2004-13), TR T209, Ex 143(51), p 27511-12, RC V5 T67 R1540; AOM Remedial Submission, Appendix B (May 13/19), RR T35, p 1917-18, RC V4 T31 R3035; Stadelbauer Aff, para 203, TR T178, Ex 112 p 18158, RC V1 T3 R1030

81. In an April 29, 2013 joint meeting, in response to the AOM referring to the "gender component to how midwives are compensated-pay equity," MOH ADM Susan Fitzpatrick said: "this is not to be expressed as a pay equity issue…" and "if you compared yourself to a support worker, they would probably say yours is a very good compensation." In a final letter to the Minister of Health, the AOM wrote that there had been "no meaningful conversation about" their equity request and "as an almost exclusively female-dominated profession providing care to women, midwives are experiencing systemic gender based discrimination with respect to our contract and this discrimination has resulted in a significant and growing compensation gap." A letter to Premier Kathleen Wynne on the same date

warned that midwives would take legal action. This action was then approved by the AOM membership, counsel were retained and the detailed AOM Application with extensive documentation was filed on November 27, 2013.

> Remedial Decision, [144, 310]; Affidavit of Elizabeth Brandeis (Jul 27/16), para 108-115, TR T176, Ex 110, p 17715-16, RC V2 T12 R979; Letter (May 27/13) from AOM's Lisa Weston and Juana Berinstein to Deb Matthews, Minister of Health, TR T176(41), Ex 110 (Brandeis Aff.), p 17992, RC V5 T82 R1020; Letter (May 27/13) from AOM's Lisa Weston and Juana Berinstein to Premier Wynne, TR T176(40), Ex 110 (Brandeis Aff.), p 17991, RC V5 T83 R1019; AOM Application, TR T2, p. 153-308, RC V2 T2 R2; List of Important Documents (AOM Application), TR T353, Ex 287, p 49914-25, RC V2 T20 R2166

H. Tribunal's Liability and Remedial Decisions

82. The Tribunal found "on the balance of probabilities and on the totality of the evidence, that there is sufficient evidence from which to infer that midwives experienced adverse treatment and that sex is more likely than not a factor in the treatment they experienced and the compensation gap that has developed between midwives and CHC physicians since 2005". The Tribunal stated:

> After 2005, and particularly the period following the release of the Courtyard report, **the MOH unilaterally withdr[ew] from the principles established at regulation which protected the compensation of midwives from the effects of gender discrimination. In 1993, the parties were aware of the pervasive nature of discrimination in compensation, the stereotypes associated with women's work and the necessity to ensure that women are paid by reference to objective factors like SERW. The MOH's failure to maintain a perspective consistent with the principles set out in the *Code* in negotiations with the AOM and the Courtyard report created a series of consequences**, when considered together, **constitute discrimination under the *Code***. …
>
> **Midwives have, since 2010, attempted to negotiate in a context where the MOH no longer abides by the foundational principles established in 1993 or recognizes the effects of gender on compensation. This perpetuates the historic disadvantaged midwives have experienced as sex-segregated workers. It also undermines the dignity of midwives who now find themselves having to explain why they should be compared to physicians for compensation purposes more than 20 years after this principle was established.** It is a denial of substantive equality that midwives must negotiate in a context where there is no recognition of the potential negative impact of

gender on their compensation. … [Emph. added.]

Liability Decision [234, 236, 242, 274, 322, 324]; violations of *Code*, ss. 3, 5 12

83. In addition to abandoning the Equity Tool that was designed to prevent the well-known effects of SGDC on midwifery compensation without adopting any *Code* compliant tool in its place, the MOH: unfairly positioned midwives' pay too closely to other predominantly female professions (nurses and midwives from other provinces) at the same time as affording CHC physicians a relative alignment process with other male predominant primary care providers; denied midwives regular negotiations and compensation studies (in contrast to the bargaining processes afforded to the OMA); failed to take any proactive steps to monitor and ensure midwifery pay was free of SGDC; permitted a substantial pay equity gap to emerge between midwives and CHC physicians; failed to take reasonable steps to investigate the midwives' allegations of discrimination; and instead withdrew its support for the Courtyard process (in response to the recommended 20% equitable pay increase) and froze midwifery pay (despite exemptions under the wage restraint legislation and policy for human rights entitlements).

Liability Decision, [27, 37, 42-45, 62, 97, 99, 139-142, 173-177, 182, 191, 206, 300-311, 316, 318], Remedial Decision, [7, 20, 30, 36, 102, 118]

84. The Tribunal rejected the MOH's allegedly "non-discriminatory" explanations for the adverse treatment, including its argument that the pay gap was due to occupational differences and market forces (both of which were themselves connected to gender). The Tribunal ultimately found the MOH "failed to adequately explain its methodology for setting compensation for midwives", had no *Code* compliant mechanism in place to assess for SGDC, and tendered no expert evidence or compensation study to establish that its compensation practices were free of SGDC.

Liability Decision, [15, 267, 303, 318]; Remedial Decision, [36, 58-59, 102, 118-120]

85. In its Remedial Decision, the Tribunal ordered the MOH to implement the recommended

20% adjustment as of April 1, 2011 on the basis that the Courtyard report "represents the best evidence" of compensation losses. It awarded eligible midwives damages of $7,500 for injury to dignity, feelings, and self-respect. Further, the Tribunal made several orders to promote ongoing *Code* compliance, which included, *inter alia,* directing the MOH to "reinstate the lost compensation benchmarks", identify an appropriate physician comparator, and "address the need for ongoing comparison with male work or proxies for male work in future compensation studies."

Remedial Decision, [9-11, 184, 187-192, 205] R3510

PART III: ISSUES & LEGAL SUBMISSIONS

86. This application raises five issues: (1) Post-*Vavilov,* what is the correct interpretation of the "patent unreasonableness" standard under s. 45.8 of the *Code*? Were the Tribunal's findings that: (2) midwives experienced adverse treatment; (3) sex was a factor in that adverse treatment; (4) the MOH had failed to establish a non-discriminatory explanation for that adverse treatment; and (5) the remedial relief ordered was appropriate, patently unreasonable?

A. Standard of Review: Patent Unreasonableness

87. As the subject-matter expert in human rights and sex-based discrimination, the Tribunal's decisions are entitled to substantial deference. This is also prescribed by the legislature: s. 45.8 of the *Code* states that the Tribunal's decision is "final" and "shall not be altered or set aside …unless [it] is *patently unreasonable*". After *Dunsmuir*, courts interpreted this legislated standard as an especially deferential form of "reasonableness". However, since *Vavilov*, reviewing courts ought to accord greater weight to legislative intent. Accordingly, where, as here, the applicable standard of review is expressly prescribed, the reviewing court must "respect that designation".

Code, s 45.8 [emph. added]; *Shaw v Phipps*, 2012 ONCA 155, para 10 [*Shaw*]; *Canada v Vavilov*, 2019 SCC 65 para 34-35 [*Vavilov*]

88. The AOM submits that in the wake of *Vavilov,* and consistent with legislative intent, the standard of patent unreasonableness applies in this case. The Tribunal's decisions ought to be upheld as they are not "openly, clearly [or] evidently unreasonable" nor do they "border on the absurd". While the MOH relies on the Ontario Court of Appeal's 2012 decision in *Shaw v. Phipps* to argue that a reasonableness standard applies, the SCC in *Vavilov* expressly cautions that past precedents have "less precedential force" particularly in the face of a legislated standard of review.

> *Vavilov*, para 143; *West Fraser Mills Ltd. v BC (Workers' Compensation Appeal Tribunal),* 2018 SCC 22, para 28, 32; *BC Workers' Compensation Appeal Tribunal) v Fraser Authority*, 2016 SCC 25, para 48 [*Fraser Authority*]; *Canada v Southam Inc*, [1997] 1 SCR 748 para 55-57, 60; *Shaw*, para 10

89. Alternatively, should reasonableness review apply, the Court in *Vavilov* makes clear that it is anchored "in judicial restraint and respect[for] the distinct role of administrative decision makers". The Tribunal's reasons are "not to be assessed against a standard of perfection". They need not "respond to every argument or line of possible analysis" or include all "jurisprudence or other details the reviewing judge would have preferred". Nor must they make "an explicit finding on each constituent element, however subordinate, leading to [the Tribunal's] conclusion." A decision is reasonable where the reasoning process is "transparent, intelligible and justified" and the outcome is one that "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law". The SCC also cautions that courts must "tread lightly" in areas within the purview of the Tribunal: "It is the Tribunal's task to evaluate the evidence, find the facts and draw reasonable inferences from the facts", and to interpret the *Code* "in ways that make practical and legal sense in the case before it, guided by the applicable jurisprudence". Such findings and reasonings should not be interfered with "absent exceptional circumstances."

> *Vavilov*, para 15, 18, 75, 86; 91-94, 100, 125, 128; *Dunsmuir v New Brunswick*, 2008 SCC 9 para 47; *Stewart v Elk Valley Coal*, 2017 SCC 30, para 20-22, 27

B. Tribunal Applied Correct Test For Discrimination

90. The parties agree the Tribunal correctly stated the well-established three-part test for discrimination and the burden of proof. A complainant must demonstrate on a balance of probabilities that: (1) they have a characteristic protected from discrimination under the *Code*; (2) they experienced an adverse impact with respect to a protected social area (here, employment and contract); and (3) that the protected characteristic was *a* factor in the adverse impact. While the MOH agrees on the test, as detailed below, it relies on dated case law to impose additional evidentiary burdens on the complainant midwives.[1]

> Liability Decision [249]; MOH Factum [64]; *Moore v. British Columbia*, [2012] 3 SCR 360 [*Moore*], para. 33; *Elk Valley*, para 24

91. There is no dispute that the first element of the test is met in this case. As stated by the Tribunal, midwifery has "always been strongly identified with women's work"; it represents "a gender "trifecta" of services provided by women, for women, in relation to women's reproductive health". At issue is whether the Tribunal's application of the second and third elements of the test to the evidence before it was patently unreasonable. The AOM submits that the Tribunal's finding that a *prima facie* case of discrimination was established and that the MOH had failed to rebut that case is amply supported by the evidentiary record. There is no basis to set its factual findings aside.

> Liability Decision, [61]; MOH Factum [76]; *Elk Valley*, para 5, 20-22

[1] *Ontario (Disability Support Program) v. Tranchemontagne*, 2010 ONCA 593 (the SCC has not adopted *Tranchemontagne*'s framing of the *prima facie* test which, contrary to SCC jurisprudence, imposes elements of the test under s. 15 of the *Charter)*; *McGill University Health Centre v. Syndicat des employés de l'Hôpital général de Montréal,* 2007 SCC 4, para 49 & 56 and *Moore*, para 59 (requirement for *arbitrary* disadvantage is no longer part of the test). The MOH also relies on the *prima facie* test under the *Québec Charter*, notwithstanding its distinct language: *Quebec (Commission des droits de la personne et des droits de la jeunesse) v Bombardier Inc*, 2015 SCC 39 [*Bombardier*], para 34-35

C. Tribunal's Finding Of Adverse Impacts Reasonable

1. Evidence Establishes Adverse Treatment More Likely Than Not

92. In a carefully reasoned decision, the Tribunal reviewed the MOH's acts, omissions, policies and practices which adversely impacted midwives and their compensation. Emphasizing that systemic discrimination cases must be "considered, analyzed and decided in a complete, sophisticated and comprehensive way," the Tribunal reviewed the extensive evidence of the "cumulative effects of [MOH] policies and conduct on the compensation of midwives". The Tribunal found the adverse treatment of midwives comprised the following:

(a) MOH unilaterally abandoned the Equity Tool and failed to use a "proactive prevention" approach and gender lens to ensure its compensation setting was free from the well-known effects of SGDC. Midwives were "disadvantaged by the failure of the MOH to recognize the role of gender in their compensation" and the necessity to consider the discriminatory effects of its policies and practices on midwives as sex-segregated workers.

2014 Decision, [33]; Liability Decision, [274-273, 315-322]; Remedial Decision, [187-188, 191]

(b) MOH unilaterally abandoned CHC physicians as the appropriate comparator, and by 2010 repudiated the principle of comparison with physicians altogether notwithstanding: (1) their clear overlapping scope of practice with midwives; (2) the MOH promoting midwives as equally competent providers of low-risk maternity care, along with family physicians and obstetricians; and (3) the need for a physician comparator which is closely associated with "male work" in order to keep "midwives from slipping back into a place where the objective evaluation of their SERW is at risk of being replaced by stereotypic attitudes about women's work". Moreover, the MOH did not replace the Equity Tool with an alternative *Code* compliant methodology for setting midwives' compensation.

Liability Decision, [284]; Remedial Decision, [6, 20, 34]

(c) MOH subjected midwives to a compensation process which positioned them too closely to predominantly female nursing work and midwives in other provinces, notwithstanding the parties' recognition under the Equity Tool that this would unfairly obscure the value of midwifery work, the latter of which was "affected by prevailing gender stereotypes". During the same period, the MOH afforded CHC physicians a relative alignment process with other predominantly male primary care providers and the medical profession more generally, which generated substantial pay increases despite fiscal restraints.

Liability Decision, [27, 37, 62, 139-142, 300-302, 316], Remedial Decision, [20]

(d) MOH did not afford midwives regular negotiations and joint compensation studies, unlike the bargaining processes afforded to CHC physicians through their connection to the male predominant membership and leadership of the OMA. Indeed, between 1993 and 2010, the MOH failed to conduct a joint compensation study to "make visible" the work of midwives and set "fair and appropriate" compensation that reflects their relative SERW and overlapping scope of practice with CHC physicians.

Liability Decision, [42, 97, 99, 318]

(e) MOH failed to take proactive steps to monitor midwifery compensation for the impact of SGDC and align midwives with other primary care providers. At the same time the MOH proactively monitored and increased CHC physician compensation to ensure that CHC physicians had compensation equity with other family physicians and that CHC physicians' recruitment and retention issues were addressed. The MOH failed to scrutinize how the increases it paid to CHC physicians "resulted in a shifting alignment between midwives and their comparators" and refused to "validate" whether midwives' compensation was in fact free of sex discrimination despite changes in the compensation of their comparators.

Liability Decision, [126, 139-142, 277, 297, 312, 316]; Remedial Decision, [6, 36, 118]

(f) MOH permitted an inequitable compensation gap to increase between midwives and their CHC physician comparator – their proxy for male work. The MOH attempted to justify the compensation gap on occupational differences and market factors, including the greater bargaining strength of CHC physicians, without: examining the gender implications of that approach, including the connection between midwifery and gender, and the gender of their comparators; or being informed of the effects of gender on compensation of sex-segregated profession of midwives and the "structural embeddedness of medical dominance and caring dilemma associated with midwifery work… and inherent conflict between the model of care and taking job action to address pay inequities".

Liability Decision, [267, 303, 318]; Remedial Decision, [36, 102, 118]

(g) MOH improperly rejected the results of the joint Courtyard process – "despite having been a full and active participant" – and failed to "repair any perceived deficiencies in the Courtyard report" even though they "were easily remedied by providing further guidance to the consultants". The MOH then refused to conduct its own compensation study "to validate whether midwives remained fairly compensated".

Liability Decision, [99, 305, 307]; Remedial Decision, [7, 36, 118]

(h) Contrary to established human rights jurisprudence and the OHRC's policies, the MOH failed to take seriously and take reasonable steps to investigate midwives' allegations of discrimination, including their concerns that they were falling behind their comparators. The MOH failed to investigate these concerns even in the face of Courtyard's recommendation of a 20% "equity adjustment" to midwifery compensation.

Liability Decision, [45, 173-177, 191, 206, 304, 307-309]

(i) MOH instead imposed compensation restraint on midwives in 2010 in the absence of first applying a GBA and the Equity Tool to ensure *Code* compliance. Moreover, the MOH failed to "more fully consider the exemption… for human rights entitlements" under the wage restraint legislation and policy for midwives as a sex-segregated profession.

Liability Decision, [43-44, 182, 307, 310-311]; Remedial Decision, [30]

93. The Tribunal's factual findings above were reasonable and amply supported by the evidence and are entitled to significant deference.

Liability Decision, [251]; *Elk Valley*, [5, 20-22]; *Shaw,* para 25; *Fraser Authority*, para 48

2. MOH Misapprehends Systemic Nature Of Sex Discrimination Claim

94. Before this Court the MOH advances the same decontextualized, compartmentalized, formalistic arguments in defence of its discriminatory treatment of midwives that were rejected by the Tribunal. The MOH argues that paying midwives less than CHC physicians does not adversely affect them because they are different. Aside from being overly formalistic and simplistic, the MOH's submissions fundamentally misapprehend the Tribunal's findings with respect to the adverse effects of SGDC on midwives.

MOH Factum, [78-80, 83]; Liability Decision, [246]; Remedial Decision, [53]

95. As noted by the Tribunal, systemic discrimination, and SGDC in particular, is often subtle and hidden and requires a comprehensive, sophisticated analysis of its effects on complainants. The SCC describes systemic discrimination as "discrimination that results from the simple operation of established procedures…none of which is necessarily designed to promote discrimination", and the hallmark of which is its "structural and largely invisible nature".

Liability Decision, [311]; 2014 Decision, [30-33, 37]; *CN v. Canada (Cdn Human Rights Commission)*, [1987] 1 SCR 1114 [*Action de Travail]* p 1138-39; *BC v BCGSEU*, [1999] 3 SCR 3 para 41 [*Meiorin*], quoting with approval S Day & G Brodsky, "The Duty to Accommodate: Who Will Benefit?" (1996) 75 Can

> Bar Rev 433; M Eberts & K Stanton "The Disappearance of the Four Equality Rights and Systemic Discrimination from Canadian Equality Jurisprudence" (2018) 38:1 NJCL 89 p 94-95; Canada, Human Resources and Skills Development Canada, *Report of the Commission on Equality in Employment* (Ottawa: Justice Abella, Commissioner, 1984) p 2, 9-10 [Abella Report]; M Minow, *Making All the Difference: Inclusion, Exclusion and American Law* (Ithaca: Cornell University Press, 1990) p 110-12; Watson Hamilton & Koshan, "Adverse Impact: The Supreme Court's Approach to Adverse Effects Discrimination under S. 15 of the Charter" (2015) 19:2 Rev Const'l Stud 191

96. The Tribunal describes SGDC as arising from "deeply held attitudes… about women's work" which lead employers and compensation-setters "to give less value to the work", often "without conscious decision-making". These unconscious attitudes are often hidden and embedded in seemingly neutral compensation policies and practices. For example, "traditional job evaluation", without a gender-based analysis, can reinforce and perpetuate these attitudes, "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". As stated by Justice Evans in *PSAC*, "systemic discrimination is the result of the ongoing application of wage policies and practices that tend to either ignore or undervalue work typically performed by women." Evans J. emphasizes that: "to understand the extent of such discrimination…it is important to examine the pay practices of the employer as they affect the wages of men and women" as "comprehensively as possible."

> Liability Decision, [247]; *Haldimand Norfolk*, (1991) 2 PER 105, para 18-19; *Canada (AG) v Public Service Alliance of Canada,* [2000] 1 FC 146, para 117-18; *CSQ*, para 2-3, 34

97. The MOH's seemingly "neutral" compensation policies and practices thus must be analyzed contextually, "in a complete, sophisticated and comprehensive way", to understand their adverse effects over time on this almost exclusively female profession. The MOH's compartmentalized approach of focusing on the "single action" of paying midwives less than CHC physicians because they are allegedly "different" is contrary to the jurisprudence. The Tribunal states: "It is [the] interwoven amalgam of conduct, actions, inaction, policies, practices, systems

and attitudes which [results] in differential treatment and discriminatory impact".

2014 Decision, [33, 37]; Liability Decision, [246, 273, 312]; Remedial Decision, [53]; *PSAC v. Canada (DND),* [1996] 3 FC 789, para 16*; CSQ*, para 25-29

98. Further, there is no dispute that physicians and midwives "are different". The AOM has never sought compensation equivalent to what is paid to family physicians. Indeed, as noted by the Tribunal, the differences between midwives and physicians were acknowledged and *equitably valued* by the parties when setting compensation in 1993. The adverse treatment in this case arises from, *inter alia*, the failure of the MOH to continue to measure those differences in a manner that is equitable and free of sex-based discrimination. Significantly, midwives "no longer have a methodology to rely on in their negotiations with the MOH which ensures that their compensation is aligned with their SERW", something the SCC has referred to as a "benefit[] routinely enjoyed by men – namely, compensation tied to the value of their work". As the Tribunal held, these failures occurred in a context where the legislature expressly "acknowledges the existence of systemic gender discrimination in the compensation of employees in female job classes and the necessity for affirmative action to redress that discrimination".

Liability Decision, [232, 302, 312]; *Québec v* Alliance, para 38; *Pay Equity Act*

3. Duty To Proactively Prevent Discrimination Well-Established

99. Contrary to established jurisprudence, the MOH argues that its failure to take proactive steps to prevent discrimination in midwives' compensation cannot constitute adverse treatment.

MOH Factum, [81-82, 84, 184-196]

100. As quasi-constitutional legislation, the *Code* must be interpreted liberally and purposively to ensure it fulfills its objectives. *Code* rights must "be given their full recognition and effect" and courts "should not search for ways and means to minimize those rights and to enfeeble their proper impact". It is well-established that the *Code* does not merely require that discrimination, once

identified, be remedied. Rather, the *Code* places a proactive duty on respondents "to *prevent* all "discriminatory practices" based, *inter alia*, on sex". As stated by the Tribunal:

> Like all human rights legislation, **the *Code* is directed at achieving substantive equality and enshrines positive rights, not just access to a remedy** where a breach can be found. …
>
> [T]**he *Code* is not solely reactive and complaint-based but "intended to transform social relations and institutions to secure substantive equality in practice." The requirement to act proactively, monitor workplace culture and systems, take preventative measures to ensure equality, identify and remove barriers, take positive steps to identify and remedy the adverse effects of practices and policies that appear neutral on their face, is well-documented** in the cases and [OHRC] policies.… **it would diminish the fundamental nature of the rights and protections enshrined in the *Code* to have the right to have discrimination remedied but not prevented**.
>
> *Action de Travail*, p. 1134; Liability Decision, [229-230]; *Meiorin*, para 39-42, 68; *BC (Supt. of Motor Vehicles) v. British Columbia*, [1999] 3 SCR 868 para 19 [*Grismer*]; *Ross v New Brunswick School District No. 15*, [1996] 1 SCR 825, para 54; *Eldridge v BC (AG)*, [1997] 3 SCR 624 para 73, 78-79; M. Cornish, F. Faraday, J. Borowy, *Enforcing Human Rights in Ontario* (Aurora: Canada Law Book, 2009) p 38; *Lane v ADGA Group Consultants*, 2007 HRTO 34 para 164; *Lepofsky v. Toronto Transit Commission*, 2007 HRTO 41; *deSousa v. Gauthier*, 2002 CanLII 46506 [*DeGuire*]; *Abbey v Ontario*, 2016 HRTO 787, para 194

101. The MOH has a positive and continuing legal duty under the *Code* to *proactively* secure conditions of substantive equality even in the absence of a formal human rights complaint. This proactive duty extends to the actual *design* and *implementation* of its compensation and funding policies to ensure they *promote* substantive equality and *prevent* discriminatory effects *from the outset*. As stated by the SCC, the "heart of the equality question" under human rights legislation is "the goal of transformation" which requires "an examination of the way institutions and relations must be changed in order to make them available, accessible, meaningful and rewarding for the many diverse groups of which our society is composed." In the employment context, this means that employers must take positive steps to design workplace standards from the outset that are inclusive and non-discriminatory. As stated by the SCC in *Meiorin*, employers "must build

conceptions of equality into workplace standards".

> *Meiorin,* para. 41, 68; *Grismer*, para 19; *Ross v. New Brunswick School District No. 15,* [1996] 1 SCR 825, para 54; *First Nations Child and Family Caring Society of Canada et al. v. AG*, 2016 CHRT 2 para 384-388, 403-404 [*Caring Society CHRT*]; *Moore*, para 43-48; *Action de Travail*, p. 1139, 1143-45

102. Indeed, the OHRC's policies make clear that it "takes vigilance and a willingness to monitor and review numerical data, policies, practices and decision-making processes and organizational culture" to ensure that an organization such as the MOH is "not unconsciously engaging in systemic discrimination". The OHRC policies further provide that "[i]t 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." As noted by the Tribunal, "the reason the [OHRC] publishes policies to guide employers in their obligations under the *Code* is that the probability of compliance is reduced without proactive action."

> OHRC (2013), "A policy primer: Guide to Developing Human Rights Policies and Procedures" p. 2-4, 6-8; OHRC (2005), "Policy & Guidelines on Racism & Racial Discrimination", p. 33; Liability Decision, [317-318]

103. SGDC has been analyzed in government reports and jurisprudence for decades. The problem and the solution (proactive monitoring of compensation practices for the pervasive effects of SGDC using a gender-based SERW analysis with male comparators) have been well known for over 35 years. Ontario's *Pay Equity Act*, which applies to the government's compensation setting for its employees, makes clear there is a proactive duty on the MOH to monitor compensation for the negative effects of gender discrimination for predominantly female workers. As the Tribunal noted, the *Pay Equity Act* and the *Code* are two different laws both aimed at preventing and redressing SGDC. Since as early as 1989, it has been clear that the *Code*'s proactive protections against sex discrimination are broad and extend to SGDC.

> *Quebec v. Alliance*, para 6-9; *CSQ*, para 2-4, 6, 24; *ONA v. PNH*, para 6-13; *Pay Equity Act*, Preamble, ss. 4, 7; *Nishimura v. Ontario (Human Rights*

Commission), 1989 CanLII 4317 (ON SC) (Div. Ct.); Liability Decision, [81, 82, 232-233, 265] Abella Report, p. 2-5, 9-10, 24-32, 232-254

104. Central to the Tribunal's liability finding was the MOH's admission that it had taken "no proactive steps" to monitor the compensation of midwives for the impact of gender discrimination on the fairness of their compensation. Consistent with the well-established jurisprudence, OHRC policies, and extensive evidence before it, the Tribunal found that the MOH "must take steps which are effective and proportional to its obligations under the *Code* to both prevent and remedy discrimination." The Tribunal found that the MOH's inaction on monitoring the compensation of midwives was in stark contrast to evidence that the MOH had proactively "continued to monitor compensation for CHC physicians for evidence of recruitment and retention issues and to ensure that their compensation is fair and aligned with other physicians."

Liability Decision, [315, 317-18]

105. The Tribunal's findings in this regard are reasonable. Indeed, they are consistent with the SCC's decision in *Moore* and the Canadian Human Rights Tribunal's (CHRT's) decision in *Caring Society*, two cases concerning systemic discrimination in government funding policies. In *Moore*, the SCC found that a "crucial" element of a school district's discriminatory funding policy was its failure to proactively *prevent* discrimination against special needs students by conducting, *prior* to adopting its impugned funding policy, "a needs-based analysis", as well as considering alternative measures and *assessing* the discriminatory effect of the impugned measure *before* implementing it. In *Caring Society,* the CHRT found that the federal government's child welfare services funding formulas were not proactively designed using a substantive equality analysis but rather were based on flawed designs and assumptions which, among other things, had discriminatory effects on Indigenous children living on reserves. The CHRT further found that the adverse effects persisted as a result of the federal government's failure to regularly monitor and update its funding policies.

Moore, para 4, 46-48, 52; *Caring Society CHRT*, para 384-388; *Code*, s. 45.5

106. *Moore* and *Caring Society* make clear that governments have a proactive human rights duty to prevent discrimination, including by ensuring their funding policies, programs and formulas are designed from the outset based on a substantive equality analysis and are regularly monitored and updated. Such jurisprudence is directly at odds with the MOH's position that it can wait until midwives – a deeply sex-segregated profession that is highly susceptible to SGDC – have proven that the MOH's conduct constitutes sex discrimination before acting. As the Tribunal noted, "it would diminish the fundamental nature of the rights and protections enshrined in the *Code* to have the right to have discrimination remedied but not prevented".

Liability Decision, [309]

107. Finally, it is also well-established that the *Code* imposes a related duty on the MOH to investigate a complaint of discrimination where, as here, one has been made. This includes a duty to take reasonable steps to address allegations of discrimination, including acting promptly, taking a complaint seriously, having a complaint mechanism in place and communicating actions to the complainant. The jurisprudence emphasizes that "if an employer could sit idly when a complaint of discrimination was made and not have to investigate it", it would render the *Code's* protection from discrimination "a hollow one". Where obligation holders fail to investigate human rights complaints, it "can cause or exacerbate the harm of discrimination" and they do so at their peril.

Laskowska v Marineland of Canada, 2005 HRTO 30 para 30, 51, 53, 59; *Hamilton-Wentworth District School Board v Fair*, 2016 ONCA 421 para 27-32, 40, 51; *Lee v Kawartha Pine Ridge District School Board*, 2014 HRTO 1212 para 93-96; *Lane v ADGA Group Consultants*, 2007 HRTO 34 para 149-150, upheld on JR, 2008 CanLII 39605 para 104, 107; *Campbell v. Revera Retirement LP*, [2014] OJ No. 285 9 (Div. Ct); *Moffatt v Kinark Child & Family Services*, [1998] OHRBID No 19; *Abdallah v Thames Valley District School Board*, 2008 HRTO 230 para 87; *Falodun v Andorra Building Maintenance Ltd*, 2014 HRTO 322 para 62; *Naidu v Whitby Mental Health Centre*, 2011 HRTO 1279 para 191; *Scaduto v Insurance Search Bureau*, 2014 HRTO 250 para 78, 82

108. The Tribunal's finding that the MOH's failure to take reasonable steps to respond to the AOM's pay equity concerns compounded the adverse impacts experienced by midwives was reasonable and consistent with the jurisprudence. Prior to the Courtyard report, "the AOM was raising concerns about inequitable compensation paid to a group of almost exclusively female workers". When the Courtyard report was issued it was "sufficiently compelling" to trigger the MOH's duty to inquire into the AOM's claim of sex discrimination. Contrary to the case law and OHRC policies, the MOH took no reasonable steps "to understand and evaluate the allegations of discrimination". The Tribunal reasonably concluded that "[t]he failure by the MOH to take reasonable steps to inquire into the AOM's allegations, repair any perceived deficiencies in the Courtyard report, and more fully consider the exemption under the [wage restraint] legislation (and … policy) for human rights entitlements are important indicators of adverse impact."

Liability Decision, [304, 307-309]

D. Tribunal's Finding That Sex Was A Factor In Adverse Treatment Reasonable

109. The Tribunal's conclusion based on the extensive evidentiary record that sex was *a* factor in the adverse treatment – the third step of the *prima facie* test – was likewise reasonable. While the MOH asserts that the adverse treatment must be *because* of sex or *based* on sex, as noted by the Tribunal, "those phrases have not been interpreted as a requirement to prove that the ground is the only or predominant factor or that there is a 'causal' connection between the two". The SCC makes clear the test merely requires proof of "a simple connection" between the midwives' gender and their adverse treatment. Neither "a close relationship" nor "a causal connection" is required "since human rights jurisprudence focuses on the discriminatory *effects* of conduct rather than on the existence of an intention to discriminate or of direct causes".

Remedial Decision, [58]; MOH Factum, [84, 130]; Liability Decision, [254-255]; *Bombardier*, para 49, 51, 56; *Elk Valley*, para 24, 42

110. Indeed, discriminatory *intent* on the part of the MOH is not required in order to establish gender was a factor in the adverse treatment of midwives:

> "To… hold that intent is a required element of discrimination under the *Code* would… place a virtually insuperable barrier in the way of a complainant seeking a remedy. It would be extremely difficult in most circumstances to prove motive, and **motive would be easy to cloak in the formation of rules which, though imposing equal standards, could create… injustice and discrimination** by the equal treatment of those who are unequal."
>
> *Ont. Human Rights Commission v. Simpsons-Sears Ltd.*, [1985] 2 SCR 536 p. 549 [*O'Malley*] [emph. added.]; *Elk Valley*, para 24; *Bombardier*, para 40-41

111. It follows that, contrary to the MOH's suggestion, proof of arbitrary (or stereotypical) decision-making is not required. As stated by the SCC in *Elk Valley*:

> The existence of arbitrariness or stereotyping is not a stand-alone requirement for proving *prima facie* discrimination. Requiring otherwise would **improperly focus on "whether a discriminatory *attitude* exists, not a discriminatory impact", the focus of the discrimination inquiry**.
>
> MOH Factum, [7, 86, 130, 133, 163]; *Elk Valley*, para 45[emph. added]; *Quebec v. A*, [2013] 1 SCR 61, para 327; Liability Decision, [253]

112. It also follows that the fact that a particular MOH decision-maker or document did not expressly refer to "gender", "sex", "pay equity" or "male comparator" does not end the inquiry into whether gender was nevertheless a factor in the adverse treatment. Systemic discrimination "is not usually practiced overtly or even intentionally", but rather, it results from the operation of seemingly neutral policies and practices that have unintended discriminatory effects.

> *Caring Society CHRT*, para 26; *Bombardier*, para 1; Liability Decision, [253]; *Meiorin*, para 39; 2014 Decision, [33]; see eg, MOH Factum, [146-147, 159]

113. The Tribunal found that sex was more likely than not a factor in the MOH's adverse treatment of midwives based on the following facts, each of which underscores the gendered nature of the adverse treatment:[2]

[2] Liability Decision, [273-282, 284, 292, 294-322]; Remedial Decision, [8, 59]

(a) "Midwifery is a profession imbued with gender" and "strongly identified with women's work". Midwives work in an environment in which medical dominance is structurally embedded and in which the historically male dominated medical profession continues to be advantaged by its association with "male work".

Liability Decision, [61-62, 267, 275]

(b) In 1993, "the parties were aware of the pervasive nature of systemic discrimination in compensation, the stereotypes associated with women's work and the necessity to ensure that women are paid by reference to objective factors like SERW". They expressly recognized that "midwives are sex-segregated workers, and as a result, they are vulnerable to the forces of gender discrimination on their compensation".

Liability Decision, [274, 276]; Remedial Decision, [8]

(c) Gender was a *significant* factor in the parties' development of the 1993 principles and the OMP Framework. The parties adopted compensation principles rooted in gender equality which recognized the level of skill, education, training, autonomy and responsibility inherent in the work of midwives, to ensure that midwives were paid "equitably" using "an evidence-based methodology" and "equitable formula" that "worked against the prevailing stereotypes about midwifery work and its association with women". It embodied what "fair and appropriate" compensation is "in relation to the gendered nature of midwifery work".

Liability Decision, [275, 281, 300]; Remedial Decision, [8]

(d) The parties further adopted "[t]he principle that compensation for midwives should reflect the overlapping scope of practice of the family physician" – a principle that "is based on a male comparator" in order "to ensure that midwives' compensation was not negatively affected by traditional assumptions and stereotypes about the value of "women's work". As noted by the Tribunal, "[f]amily physicians were male-dominated at the time" of regulation and in 2013 "they were more than 50% male". Comparing midwives' work to "work historically done by men" ensured "that their compensation corresponded with the work itself and not the gender of the person doing the work" and made "visible the overlapping scope of practice that midwives share with a historically male profession". Moreover, it ensured that midwives were not too closely aligned with exclusively female-dominated health care professions, who were themselves vulnerable to SGDC.

Liability Decision, [51, 61, 71, 29, 247, 252, 277, 281-282]; Remedial Decision, [8]

(e) The joint working group process in 1993 which among other things positioned midwives between CHC nurses (predominantly female) and physicians (predominantly male and associated with historically male work) was reasonably viewed by the AOM and midwives as a "pay equity exercise".

Liability Decision, [280-281]

(f) By 2010, the MOH had abandoned the "gender-sensitive, inclusive, human rights approach to proactively dealing with the effects of gender discrimination" in midwives' compensation that it had originally adopted in 1993. The MOH had replaced the equitable compensation formula with nothing "other than "looking" at other health care professions" (mostly female predominant) "and conducting a jurisdictional scan of other midwifery programs across the country" (also female predominant).

Liability Decision, [300, 320]

(g) The MOH's response to the 2010 Courtyard report marked "a significant departure" from the 1993 principles that the parties had "agreed upon for establishing appropriate and fair compensation levels". The MOH unilaterally asserted that: (1) "the 1993 principles and methodology no longer informed the compensation practices of the MOH"; and (2) "CHC physicians were not appropriate comparators for midwives", despite not conducting "a study to validate that assumption which flies in the face of the 1993 agreement and the [2004] Hay Group and [2010] Courtyard reports which confirmed the ongoing relevance of that comparator". The MOH did not raise this issue during the joint Courtyard process, including when providing feedback on drafts of the report, and only arrived at this conclusion *after* the Courtyard report was released.

Liability Decision, [287, 293, 295-97, 299]

(h) Disadvantageous perceptions of and stereotypical attitudes toward midwives, the value of their work and autonomous model of practice, continued to persist post-regulation. This was evident in the Minister of Health's statement in response to the 2010 Courtyard report's recommended "equity adjustment" for midwives that the current compensation for midwives "was pretty good for a four-year degree". It is also evident in the MOH continuing to assert that midwives are paid more than physicians to deliver babies based merely on fee codes, making invisible aspects of midwifery work not done by physicians.

Liability Decision, [68-69, 76, 210, 302]; MOH [FN 32]; see also para 52-53 above

(i) By 2010, midwives "no longer [had] a methodology to rely on in their negotiations with the MOH which ensures that their compensation is aligned with their SERW", a "benefit routinely enjoyed by men". "Given the association of the work of midwives with women's work", the close alignment they now shared with nurses was easily construed as natural and appropriate, obscuring the ways in which they were like physicians. Midwives "now find themselves having to explain why they should be compared to physicians for compensation purposes more than 20 years after this principle was established" and must negotiate "in a context where there is no recognition of the potential negative impact of gender on their compensation.

Liability Decision, [302, 322]; *Québec v. Alliance*, para 38

114. As is evident from the foregoing, and as stated by the SCC, the question of whether gender was factor in the adverse treatment of midwives "is essentially a question of fact for the Tribunal

to determine". Moreover, as stated by the ONCA in *Pieters*: "[r]elatively "little affirmative evidence" is required before the inference of discrimination is permitted"; "the standard of proof requires only that the inference be more probable than not."

> *Elk Valley*, para 9, 20, 39, 46; *Peel Law Association v Pieters*, 2013 ONCA 396 [*Pieters*], para 73

115. The Tribunal's inference that midwives' gender was more likely than not a factor in the adverse treatment was reasonable. Indeed, as set out above, the entire amalgam of the MOH's actions, inaction, policies, practices, and attitudes toward midwives, their compensation, and their male-identified comparators, is connected to gender. It is reasonable to infer that gender was a factor, whether intentional or not, in the MOH's adverse treatment of midwives when a sex segregated profession that is particularly susceptible to SGDC is denied the very mechanisms the parties previously agreed were necessary to set compensation free of SGDC – an objective SERW and gender-based analysis of the value of midwives' work in comparison to a male-identified comparator – and is instead compared to predominantly female nurses and midwives in other provinces, as a pay gap with the male-identified comparator increases. The pervasive theme in these facts is gender.

116. The connection with gender is also evident in Courtyard's finding of an "inequitable" pay gap between midwives and CHC physicians. Significantly, Courtyard was a joint study undertaken by the parties, "presumably in good faith", to "develop the *objective criteria necessary to evaluate the fairness of compensation paid to midwives*". Courtyard "illustrates how midwives gradually shifted out of alignment with their comparators" after the 2005 agreement was achieved. Among other things, the joint study "recommended an *equity* adjustment of 20% for midwives and the reinstatement of "the methodology of aligning midwives between their comparators", which had previously ensured midwives were paid at "objectively rational, fair and appropriate" levels. It is

important to emphasize that Courtyard "was an iterative process and the MOH had every opportunity to participate through the steering committee and review of draft reports", and indeed the MOH's comments on the draft report were incorporated into the final product. The report "represents the best evidence of both the consequences of losing the benchmarks, and what compensation losses flow from reinstating them." It was reasonable for the Tribunal to conclude that sex was more likely than not a factor in this "inequitable" compensation gap.

> Liability Decision, [182-198] [emph. added]; Remedial Decision, [121-122, 124, 127-128, 141, 156]; See AOM calculations of pay gap, Appendix B to AOM Remedial Submissions, (May 13/19), RR T35, p 1915-16, RC V4 T31 R3035

117. As is clear from the foregoing, and contrary to the MOH's assertion, the Tribunal did not presume sex was a factor based "*solely*" on "a social context of discrimination" against women in general. Notably, the Tribunal specifically found based on the extensive evidence it heard on the history and ongoing prejudices, stereotyping and barriers midwives faced, that the claimants in this case "are sex-segregated workers", "vulnerable to the forces of gender discrimination on their compensation", and continue to "require an evidence-based methodology for establishing the value of their work". These findings are not only grounded in the evidence but are also consistent with the jurisprudence and legislative policy of this province.

> MOH Factum, [89]; *Bombardier*, para 88; Liability Decision, [81, 252]; Remedial Decision, [8, 34, 101]; *CSQ*, para 2-10, 29, 34; *Québec v. Alliance*, para 6-9, 38; *ONA v Participating Nursing Homes*, 2019 ONSC 2168 [*ONA v PNH*], para 8, 70, 79; *PNH v ONA*, 2019 ONSC 2772 para 3-4, 26-28; Green Paper, RC T203, Ex. 137, p. 25575-76, RC V5 T65 R1534; Background Paper, TR T214, Ex. 148, p. 30291-305, RC V4 T62 R1577; AOM Final Submissions (Part A), RR V1 T1, p. 169-181, RC V3 T21 R3001; *Shaw*, para 33-36

118. ***Occupational status gendered.*** Finally, the MOH's assertion that the adverse treatment was based on occupational status, not gender, is contrary to the evidence and established jurisprudence. The expert evidence from both parties, as well as the government's own reports, established that occupational status is highly gendered and that SGDC is firmly tied to occupations

that are sex segregated and associated with traditional women's work. Midwifery is particularly susceptible to SGDC as the most exclusively female-dominated and sex segregated health care profession in Ontario. In recent pay equity jurisprudence, the SCC underscored the "occupational sex segregation in the labour market" and rejected the government's assertion that the adverse treatment of women working in sex segregated workplaces was based on their *locus* of employment as opposed to their gender. The SCC rejected such formalistic logic as wrong in law and emphasized the importance of a contextual analysis which does not "ignore the gender-driven bases" for distinctions.[3] Ultimately, 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. Indeed, the evidence and jurisprudence establish the deep interconnectedness of gender and occupational status, and the advantages or disadvantages that attach to occupations depending on whether they are male or female predominant.

> Dr. Armstrong Report (March 3/15), para 62-63, TR T320(1), Ex. 254, p. 40270-71, RC V2 T13 R2054; Dr. Bourgeault Expert Report (March 30/ 15), para. 7, 38-52 TR T331(1), Ex. 265, p. 40845, 40858-65, RC V2 T14 R2065; Durber Expert Reports, para. 64-74, TR T260(1), Ex 194, p 37426-30, RC, V2 T15 R1994; Kervin Trans (Mar 27/17), TR T398, p 67868-69, AC V2 T37 R2216; GWG Report, TR T151(29), p 30662-66, 30293-96, RC V4 T62 R1580; ECHO Report, TR T217, Ex 151 (Naylor Aff.), p 30409-30708, RC V6 T90, R1580; Green Paper, TR T203, Ex 137, p 5967-90, RC V5 T65 R1534; *CSQ*, para 2-4, 25-29, 34; *ONA v. PNH*, para 60-61; *Assn. of Justices of the Peace of Ontario v Ontario*, 2008 CanLII 26258, para 106-108 (court rejects similar "occupational status" argument); *Moore*, para 30-31; Liability Decision, [252, 314]; Remedial Decision, [8, 34]; Health Professions Database 2010 Stat Book, Table 2- Regulated Health Professionals by Sex, TR T250(1), Ex 184, p 36341, RC V6 T99 R1944

[3] The SCC compared this type of reasoning to the 1979 SCC decision in *Bliss v. Canada*, which found that "legislation excluding pregnant women from unemployment benefits did not discriminate on the basis of sex, but on the basis of pregnancy". *CSQ*, para 25-29

E. MOH's Explanations Do Not Rebut *Prima Facie* Case Of Discrimination

119. Before the Tribunal, the MOH attempted to refute the second and third elements of the *prima facie* case of discrimination based on the evidence. At no time did the MOH advance any statutory defences, for example, that its actions were reasonable and bona fide in the circumstances or that it had accommodated midwives up to the point of undue hardship.

Liability Decision, [238]; *Code*, s. 11(1)(a); *Meiorin*, para 54, 65

1. Evidential Burden On MOH To Disprove *Prima Facie* Case

120. In its reasons, the Tribunal observed that: "once a *prima facie* case is established, the evidential burden shifts to the respondent to prove a credible, non-discriminatory explanation which rebuts the *prima facie* case; the evidential burden shifts back to the applicant to prove that the respondent's explanation is pre-textual". The Tribunal further noted that:

> … **The evidence of the MOH is not presumed to be credible.** In addition, **the MOH cannot rebut the evidence and arguments of the AOM by suggesting that possible alternative explanations might exist for the AOM's allegations, which the AOM must then prove to be pre-textual. The Tribunal must have some basis for finding that the explanations offered by the MOH are reliable enough to rebut the evidence** of the AOM.
>
> Liability Decision, [258, 260] [emph. added]

121. The MOH relies on *Pieters* to argue that the AOM failed to prove that the MOH's rebuttal evidence was "false or a pretext". As detailed below, the Tribunal clearly found the MOH's explanations to be "inadequate" as they were themselves "gendered" and did not "rebut the *prima facie* case". The AOM also cautions against a rigid application of the "false or a pretext" dicta from *Pieters* for the following reasons. First, the threshold in *Pieters* was articulated in the context of a *direct* discrimination case, involving an incident of adverse conduct (carding) on the basis of

of race, where "the outcome depend[ed] on the respondent's *state of mind*".[4] In contrast, systemic discrimination cases focus on "the operation and impact of policies, practices and systems over time", not on a respondent's "state of mind". Second, as noted in *Pieters*, even if there is an evidential burden that a complainant must demonstrate that a respondent's explanations are "false or a pretext", the Court expressly rejects the requirement that a complainant must "eliminat[e] every conceivable possibility before an inference of discrimination may be made".

Pieters, para 72, 74, 92; 2014 Decision, [33, 45-47]

122. Finally, as noted by the Tribunal, there is no strict requirement that the AOM prove each of the MOH's explanations are "false or a pretext" in order to succeed with the discrimination claim: "there may be many reasons" for the MOH's acts and omissions and "[i]t is not essential that the connection between the prohibited ground of discrimination and the impugned [acts and omissions] be an exclusive one." Indeed, in *Moore* "the *sole* reason" for the adverse treatment of special needs students was "financial". Yet, disability was still found to be a factor and a *prima facie* case of discrimination was made out. Here, the MOH's reasons for the adverse treatment of midwives – including the CHC physician's "occupational differences", bargaining power, or recruitment and retention issues – do not negate the fact that gender was *also* a factor in the adverse effects experienced by midwives. Furthermore, the Tribunal held that those reasons were themselves not "neutral" but rather connected to gender, and the MOH's failure to apply a gender lens in setting compensation left midwives exposed to SGDC.

Bombardier, para 41, 44-45, 52; *Pieters*, para 73; Liability Decision, [256, 323];

[4] None of the cases relied on by the MOH apply the *Pieters* threshold to a claim of systemic discrimination but rather direct discrimination (eg employment terminations, hiring, and denial of housing allowance): *Cieslinski v Aon Reed Stenhouse*, 2015 HRTO 644; *Rutledge v The Travel Corporation*, 2013 HRTO 1634; *Clennon v Toronto East General Hospital*, 2009 HRTO 1242; *Bennie v Toronto (City)*, 2017 HRTO 508; *Koitsis v Ajax Automobile (2008)*, 2016 HRTO 1628; *Faghihi v 2204159 Ontario Inc cob The Black Swan*, 2016 HRTO 1109

Moore, para 45-46

2. MOH's Explanations Fail To Establish Sex Not A Factor

123. Ultimately, the Tribunal found that the MOH's explanations, including its criticisms of the Courtyard report and emphasis on CHC physician's occupational differences, bargaining strength, and recruitment and retention issues, were "inadequate" and "gendered" and did not rebut the substantial evidence which showed that sex was a factor in the adverse treatment of midwives.

Liability Decision, [290, 299]; Remedial Decision, [58]

124. ***Criticisms of Courtyard minor.*** The Tribunal gave thorough reasons for rejecting the MOH's criticisms of the Courtyard report. The evidence demonstrated that the alleged deficiencies were "minor" and could have been easily addressed had the MOH "provided further guidance to the consultants" instead of unilaterally withdrawing from the joint process. Notably, the MOH "did not undertake a different study to validate its impressions of Courtyard" or take any "reasonable steps to understand and evaluate the [AOM's] allegations of discrimination". Moreover, the Tribunal reasonably concluded that the MOH's abandonment of the benchmarks "prevented [it] from fully appreciating the significance of the findings and recommendations made by Courtyard: an independent consultant, working in collaboration with both parties, using the parties' original funding principles as a guide," concluded that this "group of sex-segregated workers required an increase of 20% to bring their compensation up to a fair and appropriate level."

Liability Decision, [301, 304-306]; Remedial Decision, [37, 132-137, 155]

125. ***Occupational differences.*** With respect to the MOH's assertion that occupational differences, not gender, explain the compensation gap between midwives and CHC physicians, the Tribunal found that there was "no evidence that compensation for physicians is tied to their SERW". Moreover, any perceived occupational differences must be accurately – and equitably – assessed by applying an objective, gender-sensitive evaluation mechanism to analyze and compare

the SERW and compensation of predominantly female workers with comparable male work. Such an analysis protects against the systemic undervaluing of midwifery work on account of gender. This is precisely the mechanism the MOH refused to apply.

> Liability Decision, [141, 274, 277, 302, 314]; *Quebec v. Alliance*, para 6-9, 29, 38; *ONA v. PNH*, para 70, 79; *PNH v. ONA*, para. 4, 13, 15, 26-28; *CSQ*, para 2-10, 24, 29, 34

126. Indeed, instead of applying a gender-sensitive evaluation mechanism, the MOH asserted that CHC physicians were no longer appropriate comparators because of alleged occupational differences that arose since 1993. Yet, as found by the Tribunal, the MOH did not lead any expert evidence or study to rebut "the ongoing relevance of the comparison" which was validated in the 1993 Morton report, 2004 Hay report and again in the 2010 Courtyard report. Aside from obstetricians, midwives and family physicians are the *only* two professions that provide "comparable" and "equally competent" obstetrical care to women with normal pregnancies. Moreover, the evidence establishes that comparing midwives to nurse practitioners and midwives from other provinces risks perpetuating SGDC by comparing highly sex-segregated professions with each other. In the face of this evidence, the Tribunal's finding of fact that CHC physicians are appropriate comparators is reasonable.

> Liability Decision, [299]; *Moore*, para 31

127. ***CHC physician proxy for male work.*** The MOH further argues that denying midwives physician comparators is not connected to sex because CHC physicians were predominantly female as of 2004. It is well-established that substantive equality requires a contextual inquiry that goes "beyond the façade of similarities and differences" and takes "full account of social, political, economic and historical factors" concerning groups. Medicine has historically been practiced by men and remains "strongly identified with men's work". In 2005, women represented merely "31.6% of the medical profession and 36% of family practitioners generally". Ontario physicians

as of 2010 were still 65.1% male. Female physicians work within and benefit from the established attitudes and place of privilege in the health care hierarchy that was "developed and controlled by men for men for over a hundred years".[5] Indeed, following the alignment of CHC physician pay with other primary care physicians who were predominantly male (60% male in 2010), the former became a proxy for male work. As the Tribunal found, the fact that CHC family physicians are now predominantly female does not affect the underlying premise of the benchmarks.

> *Withler v Canada*, [2011] 1 SCR 396 para 39; Liability Decision, [62, 123, 277, 283-285]; *Caring Society*, 2012 FC 445 para 331, 338; *Caring Society*, 2013 FCA 75 para 16-19; Remedial Decision, [101-102]; *CSQ*, para 2-10, 24, 29, 34; *ONA v PNH*, para 8, 11-12, 19, 70, 79; CIHI Physician Counts, TR T88(17), Ex 22 (Van Wagner Aff.), p 5821, RC V6 T91 R208

128. ***Market factors connected to gender.*** Significantly, the Tribunal found that compensation increases were paid to CHC physicians not because of occupational differences but because of two primary reasons, both of which were connected to gender: (1) the recruitment and retention issues for CHC physicians who "were the most female dominated and most undercompensated group of physicians in Ontario" (and indeed whose "inequitable" compensation gap with their physician peers had increased throughout the 1990's and early 2000's as they became more female predominant); and (2) the harmonization of CHC physician compensation with other primary care physicians after they obtained representation from the OMA. Notably, the OMA – a bargaining agent for a medical profession that is "still strongly identified with men's work" – was able to secure for predominantly female CHC physicians an alignment process that paid them "similar compensation" as other male predominant primary care family physicians on the basis that they were doing "similar jobs". In contrast, as noted by the Tribunal, "[t]he bargaining strength of midwives depends in large part on the MOH recognizing the connection between midwifery and

[5] Liability Decision, [65]; [123]; Appendix 7, para 24, RR, V3, T7, p. 741, RC V4 T24 R3010

gender and being informed about the effects of gender on the compensation of sex-segregated workers". The evidence established that the MOH's so-called "non-discriminatory" explanations of recruitment, retention and bargaining strength were not neutral but in fact connected to gender.

> Liability Decision, [62, 134, 137, 139-142, 303, 314]; *CSQ*, para 2-3; see also Appendix 16 to AOM Final Submissions, dated April 27, 2017 (Use of Bargaining Strength As Justification for Significantly Lower Pay Reflective of Gender Bias), para 11-12, RR V2 T18, p. 861, RC V4 T27 R3018

129. ***MOH's explanations inadequate.*** Ultimately, the Tribunal found that the MOH's explanations were gender-insensitive and inadequate. The MOH focused its evidence on the reasons it paid increases to physicians and nurse practitioners without (1) scrutinizing how those increases "resulted in a shifting alignment between midwives and their comparators"; (2) explaining "how it maintained the benchmarks with midwives"; and (3) attempting "to validate whether midwives remained fairly compensated despite changes in the compensation of their comparators". The Tribunal found "on the totality of the evidence, that while the MOH gave reasons for increasing physician compensation, it *failed to adequately explain* its methodology for setting compensation for midwives after the 2005 agreement", including how it set midwives' compensation free of sex discrimination. As stated by the Tribunal:

> … it is the obligation of the MOH to ensure that its practices do not contravene the *Code*. **If the MOH takes no steps to monitor the compensation it pays to sex-segregated workers, it has no basis for explaining how it determined that gender was not a relevant factor in what those workers were paid.**
>
> Remedial Decision, [36, 58-59, 118] [emph. added]

130. Indeed, the MOH did not retain a single expert "to conduct a study of midwives' work and pay" or "to validate how its seemingly reasonable explanations would be weighted in a compensation study" despite having ample opportunity to conduct such a study and despite the MOH's own experts agreeing that such a study "would be useful". As stated by the Tribunal:

> In a context **where midwives have had their compensation set by comparison**

> **to CHC physicians, especially where that comparator is linked to the sex-segregated nature of their work, the MOH can only partly defend what it pays to midwives by explaining why it gave increases to CHC physicians. An expert would weigh those explanations and the impact of those decisions on the alignment between midwives and CHC physicians and validate, one way or the other, whether midwives remained appropriately paid** despite increases paid to CHC physicians.
>
> Remedial Decision, [119, 120] [emph. added]

131. Contrary to the MOH's assertions, the Tribunal did *not* reverse the burden of proof. The midwives successfully established a *prima facie* case of discrimination and the evidential burden shifted to the MOH to provide a credible, reliable explanation for why sex was not a factor in the adverse treatment of midwives. The MOH did not meet this burden. It could have easily tendered a gender-based study of its compensation practices. This would have been "an explanation that could have been very easily given". The MOH's failure to provide such a study reasonably resulted in an adverse inference drawn by the Tribunal. The MOH chose to deny "the relevance of gender to setting compensation for midwives as an almost exclusively female profession", notwithstanding the parties' own recognition of its relevance in 1993 and the substantial evidence of its continuing relevance and the importance of not taking a "gender insensitive" approach when setting compensation for a highly sex segregated profession like midwifery.

> MOH Factum, [6, 69, 121, 155, 156], *Pieters*, para 97; Remedial Decision, [58, 120, 186]; See para 113 above (list of gendered nature of impacts); *Pay Equity Act*, Preamble; *Quebec v. Alliance*, para 6-9, 29; *CSQ*, para 2-4, 24, 29, 34

132. The Tribunal's reasons for concluding that the MOH's explanations were inadequate and themselves connected to gender were transparent, intelligible and justified and should be upheld. The MOH asks this Court to engage in a wholesale reassessment of the evidentiary record before the Tribunal. This request is inappropriate and ought to be rejected. As stated by the SCC:

> **At best… this is simply another view of the evidence and the factual inferences to be drawn from it. It does not establish that the conclusion of the Tribunal** [that a prohibited ground was a factor in the adverse treatment]

> **was unsupported by the evidence and unreasonable**. … the role of the reviewing courts is to determine whether a tribunal's decision falls within a range of acceptable outcomes, not to reassess the evidence. **To make findings and draw inferences from the evidence is the role of the Tribunal.**
>
> *Elk Valley*, para 41[emph. added]

F. Tribunal's Remedial Decision Reasonable

133. The remedies ordered by the Tribunal were also reasonable. Section 45.2 of the *Code* "provides the Tribunal with broad remedial discretion to order remedies that are fair, effective and responsive to the circumstances of this case". The Tribunal gave a reasoned analysis of why a purely prospective remedy was not appropriate: there was "no substantial change" in, or "good faith" or "reasonable reliance" by the MOH on, human rights law, including the well-established principle that "compensation-setters are ultimately responsible for ensuring that their practices comply with the *Code*"; a "retroactive remedy for lost income would not encroach on the legislative role of the government"; and a "purely prospective remedy would constitute a "hollow victory" and "leave midwives without a remedy with respect to their compensation losses". The Tribunal emphasized "[t]here is nothing new" about the principle that "compensation-setters are ultimately responsible for ensuring that their practices comply with the *Code*".

> Remedial Decision, [50-68, 95, 104, 184-192, 205]; *Code*, s. 45.2; *Québec v. Alliance*, para 8, 36-37

134. With respect to implementing the Courtyard recommendations, the Tribunal noted that "any assessment of lost income, even based on the best available evidence, will nevertheless be an estimate" and that the "*Code* does not prescribe a process for establishing a specific level of compensation in a case such as this". The Tribunal concluded that implementing Courtyard, "combined with the orders made to promote compliance with the *Code*", would "bring the parties as close as possible" to "the place they would have been but for the discrimination".

> Remedial Decision, [41, 112]; *Walden v. Canada*, 2010 FC 1135, para 67

135. Finally, contrary to the MOH's assertion, the Tribunal's did not order the MOH "to maintain the comparison with CHC physicians "for all future negotiations, unless the AOM agrees otherwise". Rather, the Tribunal emphasized that the MOH "remains free to negotiate compensation with the AOM or set compensation unilaterally where they reach an impasse, so long as its actions comply with the *Code.*" Indeed, while the joint study ordered by the Tribunal must include "the comparators set out in the Courtyard report" and "any other comparators deemed appropriate by the parties and the compensation expert", it will merely "inform the negotiations between the parties" and is non-binding.

MOH Factum, [198]; Remedial Decision, [64, 189(a) and (f)]

PART IV: ORDERS & RELIEF REQUESTED

136. For the foregoing reasons, this application ought to be dismissed and the Tribunal's decisions upheld as reasonable. The AOM further seeks its costs on this application.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 31st DAY OF MARCH 2020

Mary Cornish / Adrienne Telford / Lara Koerner Yeo, Counsel for the AOM

Court File No. 131/19

ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)

B E T W E E N:

HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO AS REPRESENTED BY THE MINISTER OF HEALTH AND LONG-TERM CARE

Applicant

and

ASSOCIATION OF ONTARIO MIDWIVES and the HUMAN RIGHTS TRIBUNAL OF ONTARIO

Respondents

APPLICATION UNDER the *Judicial Review Procedure Act,* R.S.O. 1990, c.J.1, as amended

IN THE MATTER OF a decision of the Human Rights Tribunal of Ontario dated September 24, 2018 and a decision of the Human Rights Tribunal of Ontario dated February 19, 2020

CERTIFICATE OF ESTIMATE OF TIME REQUIRED

I estimate that seven hours will be needed for my responding oral argument to the application.

Mary Cornish / Adrienne Telford / Lara Koerner Yeo, Counsel for the AOM

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SCHEDULE "A"

LIST OF AUTHORITIES

Tab	Authority
1.	Abbey v. Ontario (Community and Social Services), 2016 HRTO 787
2.	Abdallah v. Thames Valley District School Board, 2008 HRTO 230
3.	Association of Justices of the Peace of Ontario v. Ontario (Attorney General), 2008 CanLII 26258
4.	Bennie v. Toronto (City), 2017 HRTO 508
5.	British Columbia (Public Service Employee Relations Commission) v. BCGSEU, [1999] 3 SCR 3
6.	British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights), [1999] 3 SCR 868
7.	British Columbia (Workers' Compensation Appeal Tribunal) v. Fraser Health Authority, 2016 SCC 25
8.	Campbell v. Revera Retirement LP, 2014 ONSC 3233
9.	Canada (Director of Investigation and Research) v. Southam Inc., [1997] 1 SCR 748
10.	Canada (Minister of Citizenship and Immigration) v. Vavilov, 2019 SCC 65
11.	Canadian National Railway Co. v. Canada (Canadian Human Rights Commission), [1987] 1 SCR 1114
12.	Centrale des Syndicats du Québec v. Quebec (Attorney General), 2018 SCC 18
13.	Clennon v. Toronto East General Hospital, 2009 HRTO 1242
14.	DeSousa v. Gauthier, 2002 CanLII 46506
15.	Dunsmuir v. New Brunswick, 2008 SCC 9
16.	Eldridge v. British Columbia (Attorney General), [1997] 3 SCR 624
17.	Faghihi v. Black Swan Pub and Grill, 2016 HRTO 1109

Tab	Authority
18.	Falodun v. Andorra Building Maintenance Ltd., 2014 HRTO 322
19.	First Nations Child and Family Caring Society of Canada v. Canada (Attorney General), 2016 CHRT 2
	A. Canada (Human Rights Commission) v. Canada (Attorney General), 2012 FC 445
	B. Canada (Attorney General) v. Canada (Human Rights Commission), 2013 FCA 75
20.	Hamilton-Wentworth District School Board v. Fair, 2016 ONCA 421
21.	Koitsis v. Ajax Automobile (2008) Inc., 2016 HRTO 1628
22.	Lane v. ADGA Group Consultants Inc., 2007 HRTO 34
	A. ADGA Group Consultants Inc. v. Lane, 2008 CanLII 39605 (ON SCDC)
23.	Laskowska v. Marineland of Canada Inc., 2005 HRTO 30
24.	Lee v. Kawartha Pine Ridge District School Board, 2014 HRTO 1212
25.	Lepofsky v. TTC, 2007 HRTO 41
26.	McGill University Health Centre (Montreal General Hospital) v. Syndicat des Employés de l'Hôpital Général de Montréal, 2007 SCC 4
27.	Moffat v. Kinark Child and Family Services, [1998] OHRBID No. 19
28.	Moore v. British Columbia (Education), 2012 SCC 61
29.	Naidu v. Whitby Mental Health Centre, 2011 HRTO 1279
30.	Nishimura v. Ontario (Human Rights Commission), 70 OR (2d) 347 (Div. Ct.)
31.	ONA v. Haldimand-Norfolk (Municipality), 1991 3 PER 10
32.	Ontario (Disability Support Program) v. Tranchemontagne, 2010 ONCA 593
33.	Ontario (Human Rights Commission), v. Simpsons Spears Ltd., [1985] 2 SCR 536
34.	Ontario Nurses' Association v Participating Nursing Homes, 2016 CanLII 2675 (ON PEHT)

Tab Authority

A. Ontario Nurses' Association v. Participating Nursing Homes, 2019 ONSC 2168

B. Participating Nursing Homes v. Ontario Nurses' Association, 2019 ONSC 2772

35. Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324, 2003 SCC 42

36. Peel Law Association v. Pieters, 2013 ONCA 396

37. Public Service Alliance of Canada v. Canada (Department of National Defence) (C.A.), [1996] 3 FC 789

38. Public Service Alliance of Canada v. Canada (Treasury Board), [1999] FCJ No 1531

39. Québec (Attorney General) v. Alliance du Personnel Professionnel et Technique de la Santé et des Services Sociaux, 2018 SCC 17

40. Québec (Attorney General) v. A, 2013 SCC 5

41. Québec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center), 2015 SCC 39

42. Queensway Nursing Home v. Group of Confidential Employees, 2010 CanLII 56873 (ON PEHT)

43. Ross v. New Brunswick School District No. 15, [1996] 1 SCR 825

44. Rutledge v. The Travel Corporation (Canada), 2013 HRTO 1634

45. Scaduto v. Insurance Search Bureau, 2014 HRTO 250

46. Shaw v. Phipps, 2012 ONCA 155

47. Stewart v. Elk Valley Coal Corp., 2017 SCC 30

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

49. West Fraser Mills Ltd. v. British Columbia (Workers' Compensation Appeal Tribunal), 2018 SCC 22

50. Withler v. Canada (AG), 2011 SCC 12

Tab Authority

Secondary Sources

51. Canada, Human Resources and Skills Development Canada, Report of the Commission on Equality in Employment (Ottawa: Justice Abella, Commissioner, 1984)

52. J. Watson Hamilton & J. Koshan "Adverse Impact: The Supreme Court's Approach to Adverse Effects Discrimination under Section 15 of the Charter" (2015) 19:2 Rev Const'l Stud 191

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57. Ontario Human Rights Commission (2005), "Policy and Guidelines on Racism and Racial Discrimination"

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY - LAWS

1. **Pay Equity Act, R.S.O. 1990, c. P.7**

Preamble

Whereas it is desirable that affirmative action be taken to redress gender discrimination in the compensation of employees employed in female job classes in Ontario;

Therefore, Her Majesty, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:

PART I
GENERAL

Interpretation, posting and miscellaneous

Definitions

1 (1) In this Act,

"bargaining agent" means a trade union as defined in the Labour Relations Act that has the status of exclusive bargaining agent under that Act in respect of any bargaining unit or units in an establishment and includes an organization representing employees to whom this Act applies where such organization has exclusive bargaining rights under any other Act in respect of such employees; ("agent négociateur")

"collective agreement" means an agreement in writing between an employer and a bargaining agent covering terms and conditions of employment; ("convention collective")

"Commission" means the Pay Equity Commission of Ontario established by this Act; ("Commission")

"compensation" means all payments and benefits paid or provided to or for the benefit of a person who performs functions that entitle the person to be paid a fixed or ascertainable amount; ("rétribution")

"effective date" means the 1st day of January, 1988; ("date d'entrée en vigueur")

"employee" does not include a student employed for his or her vacation period; ("employé")

"establishment" means all of the employees of an employer employed in a geographic division or in such geographic divisions as are agreed upon under section 14 or decided upon under section 15; ("établissement")

"female job class" means, except where there has been a decision that a job class is a male job class as described in clause (b) of the definition of "male job class",

(a) a job class in which 60 per cent or more of the members are female,

(b) a job class that a review officer or the Hearings Tribunal decides is a female job class or a job class that the employer, with the agreement of the bargaining agent, if any, for the employees of the employer, decides is a female job class; (“catégorie d’emplois à prédominance féminine”)

“geographic division” means a geographic area prescribed under the Territorial Division Act, 2002; (“zone géographique”)

“Hearings Tribunal” means the Pay Equity Hearings Tribunal established by this Act; (“Tribunal”)

“job class” means those positions in an establishment that have similar duties and responsibilities and require similar qualifications, are filled by similar recruiting procedures and have the same compensation schedule, salary grade or range of salary rates; (“catégorie d’emplois”)

“job rate” means the highest rate of compensation for a job class; (“taux de catégorie”)

“job-to-job method of comparison” means the method of determining whether pay equity exists that is set out in section 6; (“méthode de comparaison d’un emploi à l’autre”)

“male job class” means, except where there has been a decision that a job class is a female job class as described in clause (b) of the definition of “female job class”,

(a) a job class in which 70 per cent or more of the members are male, or

(b) a job class that a review officer or the Hearings Tribunal decides is a male job class or a job class that the employer, with the agreement of the bargaining agent, if any, for the employees of the employer, decides is a male job class; (“catégorie d’emplois à prédominance masculine”)

“Minister” means the Minister of Labour; (“ministre”)

“pay equity plan” means,

(a) a document as described in section 13, for a plan being prepared under Part II, or

(b) a document as described in section 21.6, for a plan being prepared or revised under Part III.1; (“programme d’équité salariale”)

“private sector” means all of the employers who are not in the public sector; (“secteur privé”)

“proportional value method of comparison” means the method of determining whether pay equity exists that is described in Part III.1; (“méthode de comparaison de la valeur proportionnelle”)

“public sector” means all of the employers who are referred to in the Schedule; (“secteur public”)

“regulations” means the regulations made under this Act; (“règlements”)

"review officer" means a person designated as a review officer under subsection 34 (1). ("agent de révision") R.S.O. 1990, c. P.7, s. 1 (1); 1993, c. 4, s. 1; 1996, c. 1, Sched. J, s. 1; 1997, c. 26, Sched.; 2000, c. 5, s. 19; 2002, c. 17, Sched. C, s. 20 (1).

Posting

(2) Where this Act requires that a document be posted in the workplace, the employer shall post a copy of the document in prominent places in each workplace for the establishment to which the document relates in such a manner that it may be read by all of the employees in the workplace. R.S.O. 1990, c. P.7, s. 1 (2).

Idem

(3) The employer shall provide a copy of every document posted in the workplace under this Act,

(a) to the bargaining agent, if any, that represents the employees who are affected by the document;

(b) to any employee who requests a copy of the document, if the employee is not represented by a bargaining agent and the employee is affected by the document. R.S.O. 1990, c. P.7, s. 1 (3).

Calculation of number of employees

(4) If Part II or III applies to an employer, a reference in this Act to the number of employees of the employer shall be deemed to be a reference to the average number of employees employed in Ontario by the employer during the twelve-month period preceding the effective date or during the period from the day the first employee commenced employment in Ontario with the employer until the effective date, whichever period is shorter. R.S.O. 1990, c. P.7, s. 1 (4).

Decisions re job classes

(5) In deciding or agreeing whether a job class is a female job class or a male job class, regard shall be had to the historical incumbency of the job class, gender stereotypes of fields of work and such other criteria as may be prescribed by the regulations. R.S.O. 1990, c. P.7, s. 1 (5).

One-member job classes

(6) A job class may consist of only one position if it is unique in the establishment because its duties, responsibilities, qualifications, recruiting procedures or compensation schedule, salary grade or range of salary rates are not similar to those of any other position in the establishment. R.S.O. 1990, c. P.7, s. 1 (6).

Disabled, etc., not to be classed separately

(7) A position shall not be assigned to a job class different than that of other positions in the same establishment that have similar duties and responsibilities, require similar qualifications, are filled by similar recruiting procedures and have the same compensation schedule, salary grade or range of salary rates only because the needs of the occupant of the position have been

accommodated for the purpose of complying with the Human Rights Code. R.S.O. 1990, c. P.7, s. 1 (7).

Crown as employer

1.1 (1) For the purposes of this Act, the Crown is not the employer of a person unless the person,

(a) is a public servant employed under Part III of the Public Service of Ontario Act, 2006; or

(b) is employed by a body prescribed in the regulations. 2006, c. 35, Sched. C, s. 107 (1).

Plans posted before Dec. 18, 1991

(2) If the Crown and a bargaining agent have agreed that the Crown is the employer of the employees represented by the bargaining agent and a pay equity plan in accordance with that agreement was posted before the 18th day of December, 1991, the Crown shall be deemed to be the employer of those employees. 1993, c. 4, s. 2.

Same

(3) If the Crown posted a pay equity plan before the 18th day of December, 1991 for employees who are not represented by a bargaining agent, the Crown shall be deemed to be the employer of those employees. 1993, c. 4, s. 2.

Application

(4) This section does not apply,

(a) if a determination that the Crown is the employer was made by the Hearings Tribunal before the 18th day of December, 1991; or

(b) if an application respecting a proceeding in which the Crown's status as an employer is an issue was filed with the Hearings Tribunal before the 18th day of December, 1991. 1993, c. 4, s. 2.

Same

(5) This section, except for subsections (2) and (3), does not apply to determine the identity of the employer of an individual if a pay equity plan applicable to that individual prepared in accordance with a review officer's order was posted before the 18th day of December, 1991. 1993, c. 4, s. 2.

Combined establishments

2 (1) Two or more employers and the bargaining agent or agents for their employees, who come together to negotiate a central agreement, may agree that, for the purposes of a pay equity plan, all the employees constitute a single establishment and the employers shall be considered to be a single employer.

Idem

(2) Two or more employers who are municipalities in the same geographic division and the bargaining agent or agents for their employees or, if there is no bargaining agent, the employees, may agree that, for the purposes of a pay equity plan, all the employees constitute a single establishment and the employers shall be considered to be a single employer.

Employers to implement plans

(3) Despite the fact that the employees of two or more employers are considered to be one establishment under subsection (1) or (2), each employer is responsible for implementing and maintaining the pay equity plan with respect to the employer's employees. R.S.O. 1990, c. P.7, s. 2.

Application

3 (1) This Act applies to all employers in the private sector in Ontario who employ ten or more employees, all employers in the public sector, the employees of employers to whom this Act applies and to their bargaining agents, if any.

Idem

(2) If at any time after the coming into force of this Act an employer employs ten or more employees in Ontario, this Act applies with respect to the employer although the number of employees is subsequently reduced to fewer than ten. R.S.O. 1990, c. P.7, s. 3.

Purpose

4 (1) The purpose of this Act is to redress systemic gender discrimination in compensation for work performed by employees in female job classes.

Identification of systemic gender discrimination

(2) Systemic gender discrimination in compensation shall be identified by undertaking comparisons between each female job class in an establishment and the male job classes in the establishment in terms of compensation and in terms of the value of the work performed. R.S.O. 1990, c. P.7, s. 4.

Value determination

5 (1) For the purposes of this Act, the criterion to be applied in determining value of work shall be a composite of the skill, effort and responsibility normally required in the performance of the work and the conditions under which it is normally performed.

Idem, disabled employees, etc.

(2) The fact that an employee's needs have been accommodated for the purpose of complying with the Human Rights Code shall not be considered in determining the value of work performed. R.S.O. 1990, c. P.7, s. 5.

Achievement of pay equity

5.1 (1) For the purposes of this Act, pay equity is achieved in an establishment when every female job class in the establishment has been compared to a job class or job classes under the job-to-job method of comparison or the proportional value method of comparison and any adjustment to the job rate of each female job class that is indicated by the comparison has been made. 1996, c. 1, Sched. J, s. 2.

Deemed compliance

(2) A pay equity plan that used the proportional value method of comparison shall be deemed to have complied with section 6, as it reads immediately before this section comes into force,

(a) from the date on which the plan is posted if it is posted before Part III.1 comes into force by an employer to whom Part II applies; or

(b) from the date on which the plan is prepared if it is prepared before Part III.1 comes into force by an employer to whom Part III applies. 1993, c. 4, s. 3.

Achievement of pay equity

6 (1) For the purposes of this Act, pay equity is achieved under the job-to-job method of comparison when the job rate for the female job class that is the subject of the comparison is at least equal to the job rate for a male job class in the same establishment where the work performed in the two job classes is of equal or comparable value. R.S.O. 1990, c. P.7, s. 6 (1); 1993, c. 4, s. 4 (1).

Idem

(2) Where there is no male job class with which to make a comparison for the purposes of subsection (1), pay equity is achieved when the job rate for the female job class that is the subject of the comparison is at least equal to the job rate of a male job class in the same establishment that at the time of comparison had a higher job rate but performs work of lower value than the female job class.

Basis of comparison

(3) If more than one comparison is possible between a female job class in an establishment and male job classes in the same establishment, pay equity is achieved when the job rate for the female job class is at least as great as the job rate for the male job class,

(a) with the lowest job rate, if the work performed in both job classes is of equal or comparable value; or

(b) with the highest job rate, if the work performed in the male job class is of less value. R.S.O. 1990, c. P.7, s. 6 (2, 3).

Idem

(4) Comparisons under the job-to-job method of comparison,

(a) for job classes inside a bargaining unit, shall be made between job classes in the bargaining unit; and

(b) for job classes outside any bargaining unit, shall be made between job classes that are outside any bargaining unit. R.S.O. 1990, c. P.7, s. 6 (4); 1993, c. 4, s. 4 (2).

Idem

(5) If, after applying subsection (4), no male job class is found in which the work performed is of equal or comparable value to that of the female job class that is the subject of the comparison, the female job class shall be compared to male job classes throughout the establishment.

Groups of jobs

(6) An employer may treat job classes that are arranged in a group of jobs as one female job class if 60 per cent or more of the employees in the group are female.

Idem

(7) An employer shall treat job classes that are arranged in a group of jobs as one female job class if a review officer or the Hearings Tribunal decides that the group should be treated as one female job class.

Idem

(8) An employer may, with the agreement of the bargaining agent, if any, for the employees of the employer, decide to treat job classes that are arranged in a group of jobs as one female job class.

Job rate, value of work

(9) Where a group of jobs is being treated as a female job class, the job rate of the individual job class within the group that has the greatest number of employees is the job rate for the group and the value of the work performed by that individual job class is the value of the work performed by the group.

Definition

(10) In this section,

"group of jobs" means a series of job classes that bear a relationship to each other because of the nature of the work required to perform the work of each job class in the series and that are organized in successive levels. R.S.O. 1990, c. P.7, s. 6 (5-10).

Pay equity required

7 (1) Every employer shall establish and maintain compensation practices that provide for pay equity in every establishment of the employer.

Idem

(2) No employer or bargaining agent shall bargain for or agree to compensation practices that, if adopted, would cause a contravention of subsection (1). R.S.O. 1990, c. P.7, s. 7.

Posting of notice

7.1 (1) Every employer to whom Part III applies and any other employer who is directed to do so by the Pay Equity Office shall post in the employer's workplace a notice setting out,

(a) the employer's obligation to establish and maintain compensation practices that provide for pay equity; and

(b) the manner in which an employee may file a complaint or objection under this Act.

Language

(2) The notice shall be in English and the language other than English that is understood by the greatest number of employees in the workplace.

Form of notice

(3) The notice shall be in a form made available to employers by the Pay Equity Office. 1993, c. 4, s. 5.

Exceptions

8 (1) This Act does not apply so as to prevent differences in compensation between a female job class and a male job class if the employer is able to show that the difference is the result of,

(a) a formal seniority system that does not discriminate on the basis of gender;

(b) a temporary employee training or development assignment that is equally available to male and female employees and that leads to career advancement for those involved in the program;

(c) a merit compensation plan that is based on formal performance ratings and that has been brought to the attention of the employees and that does not discriminate on the basis of gender;

(d) the personnel practice known as red-circling, where, based on a gender-neutral re-evaluation process, the value of a position has been down-graded and the compensation of the incumbent employee has been frozen or his or her increases in compensation have been curtailed until the compensation for the down-graded position is equivalent to or greater than the compensation payable to the incumbent; or

(e) a skills shortage that is causing a temporary inflation in compensation because the employer is encountering difficulties in recruiting employees with the requisite skills for positions in the job class.

Idem

(2) After pay equity has been achieved in an establishment, this Act does not apply so as to prevent differences in compensation between a female job class and a male job class if the employer is able to show that the difference is the result of differences in bargaining strength.

Idem

(3) A position that an employer designates as a position that provides employment on a casual basis may be excluded in determining whether a job class is a female job class or a male job class and need not be included in compensation adjustments under a pay equity plan.

Idem

(4) A position shall not be designated under subsection (3) if,

(a) the work is performed for at least one-third of the normal work period that applies to similar full-time work;

(b) the work is performed on a seasonal basis in the same position for the same employer; or

(c) the work is performed on a regular and continuing basis, although for less than one-third of the normal work period that applies to similar full-time work. R.S.O. 1990, c. P.7, s. 8.

Limitation re maintaining pay equity

(5) The requirement that an employer maintain pay equity for a female job class is subject to such limitations as may be prescribed in the regulations. 1993, c. 4, s. 6.

Reduction, intimidation, adjustments
Reduction of compensation prohibited

9 (1) An employer shall not reduce the compensation payable to any employee or reduce the rate of compensation for any position in order to achieve pay equity.

Intimidation prohibited

(2) No employer, employee or bargaining agent and no one acting on behalf of an employer, employee or bargaining agent shall intimidate, coerce or penalize, or discriminate against, a person,

(a) because the person may participate, or is participating, in a proceeding under this Act;

(b) because the person has made, or may make, a disclosure required in a proceeding under this Act;

(c) because the person is exercising, or may exercise, any right under this Act; or

(d) because the person has acted or may act in compliance with this Act, the regulations or an order made under this Act or has sought or may seek the enforcement of this Act, the regulations or an order made under this Act.

Compensation adjustments

(3) Where, to achieve pay equity, it is necessary to increase the rate of compensation for a job class, all positions in the job class shall receive the same adjustment in dollar terms. R.S.O. 1990, c. P.7, s. 9.

PART II
IMPLEMENTATION: PUBLIC SECTOR AND LARGE PRIVATE SECTOR EMPLOYERS

Definition

10 In this Part,

"mandatory posting date" means,

(a) the second anniversary of the effective date, in respect of employers in the public sector and in respect of employers in the private sector who have at least 500 employees on the effective date,

(b) the third anniversary of the effective date, in respect of employers in the private sector who have at least 100 but fewer than 500 employees on the effective date,

(c) the fourth anniversary of the effective date, in respect of employers in the private sector who have at least fifty but fewer than 100 employees on the effective date and who have posted a notice under section 20, and

(d) the fifth anniversary of the effective date, in respect of employers in the private sector who have at least ten but fewer than fifty employees on the effective date and who have posted a notice under section 20. R.S.O. 1990, c. P.7, s. 10.

Application

11 (1) This Part applies to all employers in the public sector, all employers in the private sector who, on the effective date, employ 100 or more employees and those employers in the private sector who post a notice under section 20.

Idem

(2) This Part does not apply to an employer who does not have employees on the effective date. R.S.O. 1990, c. P.7, s. 11.

Same

(3) Despite subsection (2), sections 13.1, 14.1 and 14.2 apply to public sector employers that did not have employees on the effective date but that had employees on July 1, 1993. 1994, c. 27, s. 121 (1).

Comparison of job classes

12 Before the mandatory posting date, every employer to whom this Part applies shall, using a gender-neutral comparison system, compare the female job classes in each establishment of the employer with the male job classes in the same establishment to determine whether pay equity exists for each female job class. R.S.O. 1990, c. P.7, s. 12.

Pay equity plans required

13 (1) Documents, to be known as pay equity plans, shall be prepared in accordance with this Part to provide for pay equity for the female job classes in each establishment of every employer to whom this Part applies and, without restricting the generality of the foregoing,

(a) shall identify the establishment to which the plan applies; and

(b) shall identify all job classes which formed the basis of the comparisons under section 12.

Idem

(2) If both female job classes and male job classes exist in an establishment, every pay equity plan for the establishment,

(a) shall describe the gender-neutral comparison system used for the purposes of section 12;

(b) shall set out the results of the comparisons carried out under section 12;

(c) shall identify all positions and job classes in which differences in compensation are permitted by subsection 8 (1) or (3) and give the reasons for relying on such subsection;

(d) shall, with respect to all female job classes for which pay equity does not exist according to the comparisons under section 12, describe how the compensation in those job classes will be adjusted to achieve pay equity; and

(e) shall set out the date on which the first adjustments in compensation will be made under the plan, which date shall not be later than,

(i) the second anniversary of the effective date, in respect of employers in the public sector,

(ii) the third anniversary of the effective date, in respect of employers in the private sector who have at least 500 employees on the effective date,

(iii) the fourth anniversary of the effective date, in respect of employers in the private sector who have at least 100 but fewer than 500 employees on the effective date,

(iv) the fifth anniversary of the effective date, in respect of employers in the private sector who have at least fifty but fewer than 100 employees on the effective date and who have posted a notice under section 20, and

(v) the sixth anniversary of the effective date, in respect of employers in the private sector who have at least ten but fewer than fifty employees on the effective date and who have posted a notice under section 20.

Idem

(3) A pay equity plan shall provide that the female job class or classes that have, at any time during the implementation of the plan, the lowest job rate shall receive increases in rates of compensation under the plan that are greater than the increases under the plan for other female job classes until such time as the job rate for the female job class or classes receiving the greater increases is equal to the lesser of,

(a) the job rate required to achieve pay equity; and

(b) the job rate of the female job class or classes entitled to receive an adjustment under the plan with the next lowest job rate.

Minimum adjustments

(4) The first adjustments in compensation under a pay equity plan are payable as of the date provided for in clause (2) (e) and shall be such that the combined compensation payable under all pay equity plans of the employer during the twelve-month period following the first adjustments shall be increased by an amount that is not less than the lesser of,

(a) 1 per cent of the employer's payroll during the twelve-month period preceding the first adjustments; and

(b) the amount required to achieve pay equity.

Idem

(5) Adjustments shall be made in compensation under a pay equity plan on each anniversary of the first adjustments in compensation under the plan and shall be such that during the twelve-month period following each anniversary the combined compensation payable under all pay equity plans of the employer shall be increased by an amount that is not less than the lesser of,

(a) 1 per cent of the employer's payroll during the twelve-month period preceding the anniversary; and

(b) the amount required to achieve pay equity.

Maximum adjustments

(6) Except for the purpose of making retroactive adjustments in compensation under a pay equity plan or unless required to do so by an order described in clause 36 (g), nothing in this Act requires an employer to increase compensation payable under the pay equity plans of the employer during a twelve-month period in an amount greater than 1 per cent of the employer's payroll during the preceding twelve-month period. R.S.O. 1990, c. P.7, s. 13 (1-6).

Exception

(7) Despite subsection (6), pay equity plans in the public sector shall provide for adjustments in compensation such that the plan will be fully implemented not later than the 1st day of January, 1998.

Transition, application

(7.1) Subsections (7.2) and (7.3) apply with respect to an employer in the public sector who has set out in a pay equity plan that was posted or in another agreement that was made before this subsection comes into force a schedule of compensation adjustments for achieving pay equity.

Same, bargaining agent

(7.2) If the employees to whom the plan or agreement applies are represented by a bargaining agent, the employer is not bound by the schedule set out in it if the employer gives written notice to the bargaining agent that the employer wishes to enter into negotiations concerning a replacement schedule.

Same, no bargaining agent

(7.3) The employer is not bound by the schedule set out in the plan or agreement if the employees to whom it applies are not represented by a bargaining agent. 1993, c. 4, s. 7 (1).

Definition

(8) In this section,

"payroll" means the total of all wages and salaries payable to the employees in Ontario of the employer.

Pay equity plan binding

(9) A pay equity plan that is approved under this Part binds the employer and the employees to whom the plan applies and their bargaining agent, if any.

Plan to prevail

(10) A pay equity plan that is approved under this Part prevails over all relevant collective agreements and the adjustments to rates of compensation required by the plan shall be deemed to be incorporated into and form part of the relevant collective agreements.

Deemed compliance

(11) Every employer who prepares and implements a pay equity plan under this Part shall be deemed not to be in contravention of subsection 7 (1) with respect to those employees covered by the plan or plans that apply to the employees but only with respect to those compensation practices that existed immediately before the effective date. R.S.O. 1990, c. P.7, s. 13 (8-11).

Application

(12) If a pay equity plan is amended under section 14.1 or 14.2, subsections (9), (10) and (11) apply, with necessary modifications, to the amended plan. 1993, c. 4, s. 7 (2).

Sale of a business

13.1 (1) If an employer who is bound by a pay equity plan sells a business, the purchaser shall make any compensation adjustments that were to be made under the plan in respect of those positions in the business that are maintained by the purchaser and shall do so on the date on which the adjustments were to be made under the plan.

Plan no longer appropriate

(2) If, because of the sale, the seller's plan or the purchaser's plan is no longer appropriate, the seller or the purchaser, as the case may be, shall,

(a) in the case of employees represented by a bargaining agent, enter into negotiations with a view to agreeing on a new plan; and

(b) in the case of employees not represented by a bargaining agent, prepare a new plan. 1993, c. 4, s. 8.

Same

(3) Clause 14 (2) (a), subsections 14.1 (1) to (6) and 14.2 (1) and (2) apply, with necessary modifications, to the negotiation or preparation of a new plan. 1997, c. 21, s. 4 (1).

(4) Repealed: 1997, c. 21, s. 4 (1).

Application to certain events

(4.1) This section applies with respect to an occurrence described in sections 3 to 10 of the Public Sector Labour Relations Transition Act, 1997. For the purposes of this section, the occurrence shall be deemed to be the sale of a business, each of the predecessor employers shall be deemed to be a seller and the successor employer shall be deemed to be the purchaser. 1997, c. 21, s. 4 (2).

Definitions

(5) In this section,

"business" includes a part or parts thereof; ("entreprise")

"sells" includes leases, transfers and any other manner of disposition. ("vend") 1993, c. 4, s. 8.

Application of s. 13.1 in other circumstances

13.2 Section 13.1 applies with respect to an event to which the Public Sector Labour Relations Transition Act, 1997 applies in accordance with the Local Health System Integration Act, 2006. 2006, c. 4, s. 50 (1).

Establishments with bargaining units

14 (1) In an establishment in which any of the employees are represented by a bargaining agent, there shall be a pay equity plan for each bargaining unit and a pay equity plan for that part of the establishment that is not in any bargaining unit.

Bargaining unit plans

(2) The employer and the bargaining agent for a bargaining unit shall negotiate in good faith and endeavour to agree, before the mandatory posting date, on,

(a) the gender-neutral comparison system used for the purposes of section 12; and

(b) a pay equity plan for the bargaining unit.

Idem

(3) As part of the negotiations required by subsection (2), the employer and the bargaining agent may agree, for the purposes of the pay equity plan,

(a) that the establishment of the employer includes two or more geographic divisions; and

(b) that a job class is a female job class or a male job class.

Posting of plan

(4) When an employer and a bargaining agent agree on a pay equity plan, they shall execute the agreement and, on or before the mandatory posting date, the employer shall post a copy of the plan in the workplace.

Deemed approval and first adjustments

(5) When a pay equity plan has been executed by an employer and a bargaining agent, the plan shall be deemed to have been approved by the Commission and, on the day provided for in the plan, the employer shall make the first adjustments in compensation required to achieve pay equity.

Failure to agree

(6) Where an employer and a bargaining agent fail to agree on a pay equity plan by the mandatory posting date, the employer, forthwith after that date, shall give notice of the failure to the Commission.

Idem

(7) Subsection (6) does not prevent the bargaining agent from notifying the Commission of a failure to agree on a pay equity plan by the mandatory posting date.

Non-bargaining unit plan

(8) An employer shall prepare a pay equity plan for that part of the employer's establishment that is outside any bargaining unit in the establishment and, on or before the mandatory posting date, shall post a copy of the plan in the workplace.

Idem

(9) Subsections 15 (2) to (8) apply to a pay equity plan described in subsection (8). R.S.O. 1990, c. P.7, s. 14.

Changed circumstances

14.1 (1) If, in an establishment in which any of the employees are represented by a bargaining agent, the employer or the bargaining agent is of the view that because of changed circumstances in the establishment the pay equity plan for the bargaining unit is no longer appropriate, the employer or the bargaining agent, as the case may be, may by giving written notice require the other to enter into negotiations concerning the amendment of the plan.

Application of s. 14

(2) Clause 14 (2) (b) and subsections 14 (3), (4) and (5) apply, with necessary modifications, to the negotiations and to any amendment of the plan that is agreed upon.

Failure to agree

(3) If the employer and the bargaining agent do not agree on an amendment before the expiry of 120 days from the date on which notice to enter into negotiations is given, the employer shall give notice of the failure to the Commission.

Same

(4) Subsection (3) does not prevent the bargaining agent from notifying the Commission of a failure to agree on an amendment by the date referred to in that subsection.

Non-bargaining unit plan

(5) If the employer is of the view that, because of changed circumstances in the establishment, the pay equity plan for that part of the establishment that is outside any bargaining unit is no longer appropriate, the employer may amend the plan and post in the workplace a copy of the amended plan with the amendments clearly indicated.

Same

(6) Subsection 15 (2) and subsections 15 (4) to (8) apply, with necessary modifications, in respect of an amended plan described in subsection (5).

Adjustments

(7) If a plan is amended under this section, the compensation adjustment for each position to which the amended plan applies shall not be less than the adjustment that would have been made under the plan before it was amended. 1993, c. 4, s. 9.

Changed circumstances, no bargaining units

14.2 (1) In an establishment where no employee is represented by a bargaining agent, if the employer is of the view that because of changed circumstances in the establishment the pay equity plan for the establishment is no longer appropriate, the employer may amend the plan and post in the workplace a copy of the amended plan with the amendments clearly indicated.

Application of s. 15

(2) Subsections 15 (2) to (8) apply, with necessary modifications, in respect of the amended plan.

Adjustments

(3) If a plan is amended under this section, the compensation adjustment for each position to which the amended plan applies shall not be less than the adjustment that would have been made under the plan before it was amended. 1993, c. 4, s. 9.

Establishments without bargaining units

15 (1) In an establishment where no employee is represented by a bargaining agent, the employer shall prepare a pay equity plan for the employer's establishment and the employer, on or before the mandatory posting date, shall post a copy of the plan in the workplace.

Idem

(2) For the purposes of a pay equity plan required by this section or subsection 14 (8), the employer may decide,

(a) that the establishment of the employer includes two or more geographic divisions; and

(b) that a job class is a female job class or a male job class.

Idem

(3) An agreement under section 14 between an employer and a bargaining agent shall not affect any pay equity plan required by this section or subsection 14 (8). R.S.O. 1990, c. P.7, s. 15 (1-3).

Employee review

(4) The employees to whom a pay equity plan required by this section or subsection 14 (8) applies shall have until the ninetieth day after the date on which the copy of the plan is posted to review and submit comments to the employer on the plan. R.S.O. 1990, c. P.7, s. 15 (4); 1993, c. 4, s. 10.

Changes

(5) If as a result of comments received during the review period referred to in subsection (4), the employer is of the opinion that a pay equity plan should be changed, the employer may change the plan.

Posting of notice

(6) Not later than seven days after the end of the review period referred to in subsection (4), the employer shall post in the workplace a notice stating whether the pay equity plan has been amended under this section and, if the plan has been amended, the employer shall also post a copy of the amended plan with the amendments clearly indicated.

Objections

(7) Any employee or group of employees to whom a pay equity plan applies, within thirty days following a posting in respect of the plan under subsection (6), may file a notice of objection with the Commission whether or not the employee or group of employees has submitted comments to the employer under subsection (4).

Deemed approval and first adjustments

(8) If no objection in respect of a pay equity plan is filed with the Commission under subsection (7), the plan shall be deemed to have been approved by the Commission and, on the day

provided for in the plan, the employer shall make the first adjustments in compensation required to achieve pay equity. R.S.O. 1990, c. P.7, s. 15 (5-8).

Investigation by review officer

16 (1) If the Commission,

(a) is advised by an employer or a bargaining agent that no agreement has been reached on a pay equity plan or an amendment to a pay equity plan; or

(b) receives a notice of objection to a pay equity plan for employees who are not represented by a bargaining agent or a notice of objection to an amendment of such a plan,

a review officer shall investigate the matter and endeavour to effect a settlement. R.S.O. 1990, c. P.7, s. 16 (1); 1993, c. 4, s. 11.

Orders by review officer

(2) If the review officer is unable to effect a settlement as provided for in subsection (1), he or she shall by order decide all outstanding matters.

Posting of plan

(3) Where a review officer effects a settlement under subsection (1) or makes an order under subsection (2), the employer shall forthwith post in the workplace a copy of the pay equity plan that reflects the settlement or order.

Objections

(4) Where a pay equity plan has been posted under subsection (3), objections with respect to the plan may be filed with the Commission within thirty days of the posting as follows:

1. If the plan relates to a bargaining unit, objections may be filed only if the review officer has made an order under subsection (2) and only the employer or the bargaining agent for the bargaining unit may file objections.

2. If the plan does not relate to a bargaining unit and a review officer effected a settlement under subsection (1) with the agreement of the objector who filed the objection under subsection 15 (7), only an employee or group of employees to whom the plan applies, other than the objector, may file an objection.

3. If the plan does not relate to a bargaining unit and a review officer has made an order under subsection (2), the employer or any employee or group of employees to whom the plan applies may file an objection.

Deemed approval and first adjustments

(5) If a review officer effects a settlement of a pay equity plan for a bargaining unit under subsection (1) or, if in any other case, no objection in respect of a pay equity plan is filed with the Commission in accordance with subsection (4), the plan shall be deemed to have been

approved by the Commission and, on the day provided for in the plan, the employer shall make the first adjustments in compensation required to achieve pay equity.

Idem

(6) Where adjustments in compensation are made after the day provided for in the pay equity plan, the employer shall make the adjustments retroactive to that date. R.S.O. 1990, c. P.7, s. 16 (2-6).

Settling of plan

17 (1) If the Commission receives a notice of objection under subsection 16 (4), the Hearings Tribunal shall hold a hearing and, in its decision, shall settle the pay equity plan to which the objection relates.

Posting of plan

(2) Forthwith after receiving the decision of the Hearings Tribunal, the employer shall post a copy of the decision in the workplace and, on the day provided for in the plan, shall make the first adjustments in compensation required to achieve pay equity.

Idem

(3) Where adjustments in compensation are made after the day provided for in a pay equity plan, the employer shall make the adjustments retroactive to that date. R.S.O. 1990, c. P.7, s. 17.

Part III (ss. 18-21) Repealed: R.S.O. 1990, c. P.7, s. 21 (2).

18.-21 Repealed: R.S.O. 1990, c. P.7, s. 21 (2).

PART III.1
PROPORTIONAL VALUE METHOD OF COMPARISON

Application

21.1 (1) This Part applies to employers to whom Part II applies and to public sector employers that did not have employees on the effective date but that had employees on July 1, 1993.

Transition, deemed plan

(2) A plan for the achievement of pay equity shall be deemed to be a pay equity plan if it was prepared by a public sector employer described in subsection (1) before the coming into force of this subsection as if this Part applied to the employer. 1994, c. 27, s. 121 (2).

Proportional method required

21.2 (1) If a female job class within an employer's establishment cannot be compared to a male job class in the establishment using the job-to-job method of comparison, the employer shall use the proportional value method of comparison to make a comparison for that female job class.

Adjustments

(2) If an employer uses the proportional value method of comparison to make a comparison for a female job class that can be compared to a male job class using the job-to-job method of comparison, the compensation adjustment made for members of that female job class shall not be less than the adjustment that is indicated under the job-to-job method.

Exception, Part II

(3) Subsection (2) does not apply to an employer to whom Part II applies if the employer prepared a pay equity plan using the proportional value method of comparison and posted it before the coming into force of this Part. However, subsection (2) does apply if the employer has also posted a pay equity plan using the job-to-job method of comparison.

Exception, Part III

(4) Subsection (2) does not apply to an employer to whom Part III applies if the employer prepared a pay equity plan using the proportional value method of comparison before the coming into force of this Part. However, subsection (2) does apply if the employer has also prepared a pay equity plan using the job-to-job method of comparison.

Notice

(5) If a female job class within an employer's establishment cannot be compared to a male job class within the establishment under either the job-to-job method of comparison or the proportional value method of comparison, the employer shall notify the Pay Equity Office.

Investigation and complaints

(6) If notice is given under subsection (5),

(a) section 16 applies, with necessary modifications, as if the review officer had received advice under clause 16 (1) (a) or a notice under clause 16 (1) (b);

(b) section 22 applies, with necessary modifications, as if a person had filed a complaint with the Commission concerning whether the job-to-job method or the proportional value method of comparison can be used in the circumstances;

(c) section 23 applies, with necessary modifications, as if the Commission had received a complaint concerning whether the job-to-job method or the proportional value method can be used in the circumstances;

(d) subsection 24 (1) applies. 1993, c. 4, s. 12.

Proportional value comparison method

21.3 (1) Pay equity is achieved for a female job class under the proportional value method of comparison,

(a) when the class is compared with a representative male job class or representative group of male job classes in accordance with this section; and

(b) when the job rate for the class bears the same relationship to the value of the work performed in the class as the job rate for the male job class bears to the value of the work performed in that class or as the job rates for the male job classes bear to the value of the work performed in those classes, as the case may be.

Comparisons required

(2) Comparisons required by this section,

(a) for job classes inside a bargaining unit shall be made between job classes in the unit; and

(b) for job classes outside any bargaining unit shall be made between job classes that are outside any bargaining unit.

Same

(3) If, after applying subsection (2), no representative male job class or classes is found to compare to the female job class, the female job class shall be compared to a representative male job class elsewhere in the establishment or to a representative group of male job classes throughout the establishment.

Comparison system

(4) The comparisons shall be carried out using a gender-neutral comparison system.

Group of jobs

(5) Subsections 6 (6) to (10) apply, with necessary modifications, to the proportional value method of comparison. 1993, c. 4, s. 12.

Amended pay equity plans

21.4 (1) If a pay equity plan prepared under Part II for an establishment does not achieve pay equity for all the female job classes at the establishment, the employer shall amend the plan to the extent necessary to achieve pay equity in accordance with this Part.

Same

(2) Subject to subsection 21.2 (2), an employer may, with the agreement of the bargaining agent, if any, replace a pay equity plan prepared under Part II with another plan prepared under this Part using the proportional value method of comparison. 1993, c. 4, s. 12.

Plan binding

21.5 (1) A pay equity plan prepared or amended under this Part binds the employer and the employees to whom the plan applies and their bargaining agent, if any.

Plan to prevail

(2) A pay equity plan prepared or amended under this Part prevails over all relevant collective agreements and the adjustments to rates of compensation required by the plan shall be deemed to be incorporated into and form part of the relevant collective agreements. 1993, c. 4, s. 12.

Contents of plans

21.6 (1) A pay equity plan prepared or amended under this Part must contain the information required by this section.

Same

(2) Subsections 13 (1) and (2) apply, with necessary modifications, with respect to a pay equity plan prepared or amended under this Part.

Method of comparison

(3) The plan must,

(a) state, for each female job class, what method of comparison has been used to determine whether pay equity exists;

(b) describe the methodology used for the calculations required by the proportional value method of comparison; and

(c) describe any amendments to be made to the pay equity plan prepared under Part II. 1993, c. 4, s. 12.

Requirement to post plans

21.7 The employer shall post a copy of each pay equity plan prepared or amended under this Part in the workplace not later than six months after this section comes into force. 1993, c. 4, s. 12.

Bargaining unit employees

21.8 Sections 14, 16 and 17 apply, with necessary modifications, with respect to a pay equity plan that is prepared or amended under this Part for employees in a bargaining unit. 1993, c. 4, s. 12.

Non-bargaining unit employees

21.9 (1) This section applies with respect to pay equity plans prepared or amended under this Part for employees who are not in a bargaining unit.

Review period

(2) Employees shall have until the ninetieth day after the plan is posted to review it and submit comments to the employer on the plan or, if the plan is an amended plan, the amendments to the plan. 1993, c. 4, s. 12.

Same

(2.1) For a plan described in subsection 21.1 (2) that is posted before this subsection comes into force, employees shall have until the ninetieth day after this subsection comes into force to review the plan and submit comments on it. 1994, c. 27, s. 121 (3).

Application of certain provisions

(3) Subsections 15 (2), (3) and (5) to (8) and sections 16 and 17 apply, with necessary modifications, with respect to the plan. 1993, c. 4, s. 12.

Date of first compensation adjustments

21.10 (1) If a pay equity plan is prepared or amended under this Part, the employer shall make the first adjustments in compensation in respect of the new or amended portions of the plan,

(a) in the case of employers in the private sector with 100 or more employees, effective as of the 1st day of January, 1993;

(b) in the case of employers in the public sector, effective as of the 1st day of January, 1993;

(c) in the case of employers in the private sector with at least fifty but fewer than 100 employees, effective as of the 1st day of January, 1993;

(d) in the case of employers in the private sector with at least ten but fewer than fifty employees, on or before the 1st day of January, 1994.

Same

(2) An employer described in clause (1) (a), (b) or (c) shall make the first payment in respect of the first adjustment within six months after the coming into force of this Part. 1993, c. 4, s. 12.

Same

(2.1) A public sector employer that did not have employees on the effective date but that had employees on July 1, 1993 shall make the first payment in respect of the first adjustment within six months after the coming into force of this subsection. 1994, c. 27, s. 121 (4).

Application of certain provisions

(3) Subsections 13 (3) to (8) apply, with necessary modifications, to compensation payable under a pay equity plan prepared or amended under this Part.

Deemed compliance

(4) Every employer who prepares or amends a pay equity plan under this Part and implements it shall be deemed not to be in contravention of subsection 7 (1) with respect to those employees covered by the plan or plans that apply to the employees but only with respect to those compensation practices that existed immediately before the 1st day of January, 1993. 1993, c. 4, s. 12.

Credit for payments

(5) A payment made under a plan described in subsection 21.1 (2) before this subsection comes into force shall be taken into account in determining whether the employer has complied with this Act. 1994, c. 27, s. 121 (4).

Part III.2 (ss. 21.11-21.23) Repealed: 1996, c. 1, Sched. J, s. 4.

21.11-21.23 Repealed: 1996, c. 1, Sched. J, s. 4.

PART IV
ENFORCEMENT

Complaints

22 (1) Any employer, employee or group of employees, or the bargaining agent, if any, representing the employee or group of employees, may file a complaint with the Commission complaining that there has been a contravention of this Act, the regulations or an order of the Commission.

Idem

(2) Any employee or group of employees, or the bargaining agent, if any, representing the employee or group of employees, may file a complaint with the Commission complaining with respect to a pay equity plan that applies to the employee or group of employees that,

(a) the plan is not being implemented according to its terms; or

(b) because of changed circumstances in the establishment, the plan is not appropriate for the female job class to which the employee or group of employees belongs.

Combining of complaints

(3) The Hearings Tribunal may combine two or more complaints and deal with them in one proceeding if the complaints,

(a) are made against the same person and bring into question the same or a similar issue; or

(b) have questions of law or fact in common. R.S.O. 1990, c. P.7, s. 22.

Investigation of complaints

23 (1) Subject to subsection (2), when the Commission receives a complaint, a review officer shall investigate the complaint and may endeavour to effect a settlement.

Idem

(2) The review officer shall notify the parties and the Hearings Tribunal as soon as he or she decides that a settlement cannot be effected and that he or she will not be making an order under subsection 24 (3).

Decision to not deal with complaint

(3) A review officer may decide that a complaint should not be considered if the review officer is of the opinion that,

(a) the subject-matter of the complaint is trivial, frivolous, vexatious or made in bad faith; or

(b) the complaint is not within the jurisdiction of the Commission.

Hearing before Tribunal

(4) The review officer shall notify the complainant of his or her decision under subsection (3) and the complainant may request a hearing before the Hearings Tribunal with respect to the decision. R.S.O. 1990, c. P.7, s. 23.

Orders by review officers

24 (1) Where a review officer is of the opinion that a pay equity plan is not being prepared as required by Part II or III.1, the review officer may order the employer and the bargaining agent, if any, to take such steps as are set out in the order to prepare the plan. R.S.O. 1990, c. P.7, s. 24 (1); 1993, c. 4, s. 14 (1); 1996, c. 1, Sched. J, s. 5 (1).

Idem

(2) Where a review officer is of the opinion that a pay equity plan is not being implemented according to its terms, the review officer may order the employer to take such steps as are set out in the order to implement the plan. R.S.O. 1990, c. P.7, s. 24 (2).

Same

(2.1) If a review officer is of the opinion that because of changed circumstances a pay equity plan is no longer appropriate, the officer may order the employer to amend the plan in such manner as is set out in the order or to take such steps with a view to amending the plan as are set out in the order. 1993, c. 4, s. 14 (2).

Same

(3) If a review officer is of the opinion that there has been a contravention of this Act by an employer, employee or bargaining agent, the officer may order the employer, employee or bargaining agent to take such steps to comply with the Act as are set out in the order. 1993, c. 4, s. 14 (3).

Idem

(4) An order under subsection (1) may provide for a mandatory posting date that is later than the one provided in section 10 or a posting date that is later than the one provided under section 21.7. R.S.O. 1990, c. P.7, s. 24 (4); 1993, c. 4, s. 14 (4); 1996, c. 1, Sched. J, s. 5 (2).

Reference to Tribunal

(5) Where an employer or a bargaining agent fails to comply with an order under this section, a review officer may refer the matter to the Hearings Tribunal. R.S.O. 1990, c. P.7, s. 24 (5).

Same

(5.1) The Pay Equity Office shall be deemed to be the applicant for a reference under subsection (5).

Same

(5.2) On a reference under subsection (5), the Hearings Tribunal shall not consider the merits of the order that is the subject of the reference.

Burden of proving compliance

(5.3) On a reference under subsection (5), the person against whom the order was made has the burden of proving that he, she or it has complied with the order. 1993, c. 4, s. 14 (5).

Hearing before Tribunal

(6) An employer or bargaining agent named in an order under this section may request a hearing before the Hearings Tribunal with respect to the order, and, where the order was made following a complaint but the complaint has not been settled, the complainant may also request a hearing. R.S.O. 1990, c. P.7, s. 24 (6).

Hearings

25 (1) The Hearings Tribunal shall hold a hearing,

(a) if a review officer is unable to effect a settlement of a complaint and has not made an order under subsection 24 (3);

(b) if a request for a hearing, as described in subsection 23 (4) or 24 (6), is received by the Hearings Tribunal; or

(c) if a review officer refers a matter to the Hearings Tribunal under subsection 24 (5). R.S.O. 1990, c. P.7, s. 25 (1).

Reference stayed

(1.1) A reference under subsection 24 (5) respecting an order shall not proceed if the Hearings Tribunal has confirmed, varied or revoked the order following a hearing requested under subsection 23 (4) or 24 (6). 1993, c. 4, s. 15 (1).

Orders

(2) The Hearings Tribunal shall decide the issue that is before it for a hearing and, without restricting the generality of the foregoing, the Hearings Tribunal,

(a) where it finds that an employer or a bargaining agent has failed to comply with Part II or III.1, may order that a review officer prepare a pay equity plan for the employer's establishment and that the employer and the bargaining agent, if any, or either of them, pay all of the costs of preparing the plan;

(b) where it finds that an employer has contravened subsection 9 (2) by dismissing, suspending or otherwise penalizing an employee, may order the employer to reinstate the employee, restore the employee's compensation to the same level as before the contravention and pay the employee the amount of all compensation lost because of the contravention;

(c) where it finds that an employer has contravened subsection 9 (1) by reducing compensation, or has failed to make an adjustment in accordance with subsection 21.2 (2), may order the employer to adjust the compensation of all employees affected to the rate to which they would have been entitled but for the reduction in compensation and to pay compensation equal to the amount lost because of the reduction;

(d) may confirm, vary or revoke orders of review officers;

(e) may, for the female job class that is the subject of the complaint or reference, order adjustments in compensation in order to achieve pay equity, where the Hearings Tribunal finds that there has been a contravention of subsection 7 (1);

(e.1) may determine whether a sale of a business has occurred;

(f) may order that the pay equity plan be revised in such manner as the Hearings Tribunal considers appropriate, where it finds that the plan is not appropriate for the female job class that is the subject of the complaint or reference because there has been a change of circumstances in the establishment; and

(g) may order a party to a proceeding to take such action or refrain from such action as in the opinion of the Hearings Tribunal is required in the circumstances. R.S.O. 1990, c. P.7, s. 25 (2); 1993, c. 4, s. 15 (2-4); 1996, c. 1, Sched. J, s. 6 (1).

Idem

(3) An order under clause (2) (a) may provide that a review officer may retain the services of such experts as the review officer considers necessary to prepare a pay equity plan. R.S.O. 1990, c. P.7, s. 25 (3).

Application of Parts II, III.1 and III.2

(4) Parts II and III.1, apply with necessary modifications to a pay equity plan prepared under clause (2) (a) but,

(a) the order of the Hearings Tribunal may provide for a mandatory posting date that is later than the one provided in section 10 or a posting date that is later than the one provided under section 21.7;

(b) the order of the Hearings Tribunal shall not provide for a compensation adjustment date that is different than the relevant date set out in clause 13 (2) (e) or a date that is later than the one provided under section 21.10;

(c) the review officer shall perform the duties of the employer and the bargaining agent, if any;

(d) when the review officer posts the plan in the workplace as subsection 14 (4) or 15 (6) provides, the employer, the bargaining agent (if the plan relates to a bargaining unit), or any employee or group of employees to whom the plan applies (if the plan does not relate to a bargaining unit) may file an objection with the Hearings Tribunal; and

(e) an objection under clause (d) shall be dealt with by the Hearings Tribunal under section 17. R.S.O. 1990, c. P.7, s. 25 (4); 1993, c. 4, s. 15 (5-7); 1996, c. 1, Sched. J, s. 6 (2-4).

Same

(4.1) Despite subsection (4), section 16 does not apply with respect to a pay equity plan prepared under clause (2) (a). 1993, c. 4, s. 15 (8).

Retroactive compensation adjustments

(5) An order under clause (2) (e) may be retroactive to the day of the contravention of subsection 7 (1).

Idem

(6) An order under clause (2) (f) may provide that adjustments in compensation resulting from the revision of the pay equity plan be made retroactive to the day of the change in circumstances that gave rise to the order. R.S.O. 1990, c. P.7, s. 25 (5, 6).

Burden of proof

(7) In a hearing before the Hearings Tribunal, a person who is alleged to have contravened subsection 9 (2) has the burden of proving that he, she or it did not contravene the subsection. 1993, c. 4, s. 15 (9).

Settlements

25.1 (1) The parties to a matter in respect of which the Hearings Tribunal is required to hold a hearing may settle the matter in writing.

Binding effect

(2) A settlement under subsection (1) binds the parties to it.

Bargaining unit employees

(3) If a bargaining agent is a party to a settlement under subsection (1), the settlement also binds the employees who are represented by the bargaining agent.

Complaint

(4) A party to the settlement may file with the Hearings Tribunal a complaint that the settlement is not being complied with.

Hearing

(5) The Hearings Tribunal shall hold a hearing respecting the complaint.

Finding

(6) If the Hearings Tribunal finds that a party is not complying with the settlement, it may order the party to take such steps as it may specify to come into compliance or to rectify the failure to comply. 1993, c. 4, s. 16.

Offences and penalties

26 (1) Every person who contravenes or fails to comply with subsection 9 (2) or subsection 35 (5) or an order of the Hearings Tribunal is guilty of an offence and on conviction is liable to a fine of not more than $5,000, in the case of an individual, and not more than $50,000, in any other case.

Parties

(2) If a corporation or bargaining agent contravenes or fails to comply with subsection 9 (2) or subsection 35 (5) or an order of the Hearings Tribunal, every officer, official or agent thereof who authorizes, permits or acquiesces in the contravention is a party to and guilty of the offence and, on conviction, is liable to the penalty provided for the offence whether or not the corporation or bargaining agent has been prosecuted or convicted. R.S.O. 1990, c. P.7, s. 26 (1, 2).

Confidentiality

(2.1) Every person who uses information obtained under Part III.2 other than for the purposes of this Act is guilty of an offence and on conviction is liable to a fine of not more than $5,000 in the case of an individual, and not more than $50,000 in any other case.

Parties

(2.2) If a corporation or bargaining agent contravenes subsection (2.1), every officer, official or agent of the corporation or bargaining agent who authorizes, permits or acquiesces in the contravention is party to and guilty of the offence and, on conviction, is liable to the penalty provided for the offence whether or not the corporation or bargaining agent has been prosecuted or convicted. 1996, c. 1, Sched. J, s. 7.

Prosecution against bargaining agent

(3) A prosecution for an offence under this Act may be instituted against a bargaining agent in its own name.

Consent

(4) No prosecution for an offence under this Act shall be instituted except with the consent in writing of the Hearings Tribunal. R.S.O. 1990, c. P.7, s. 26 (3, 4).

PART V
ADMINISTRATION

Commission continued

27 (1) The commission known in English as the Pay Equity Commission of Ontario and in French as Commission de l'équité salariale de l'Ontario is continued. R.S.O. 1990, c. P.7, s. 27 (1).

Idem

(2) The Commission shall consist of the Pay Equity Hearings Tribunal and the Pay Equity Office. R.S.O. 1990, c. P.7, s. 27 (2).

Employees

(3) Such employees as are necessary for the proper conduct of the Commission's work may be appointed under Part III of the Public Service of Ontario Act, 2006 to serve in the Pay Equity Office. R.S.O. 1990, c. P.7, s. 27 (3); 2006, c. 35, Sched. C, s. 107 (2).

Services of ministries, etc.

(4) The Commission shall, if appropriate, use the services and facilities of a ministry, board, commission or agency of the Government of Ontario. R.S.O. 1990, c. P.7, s. 27 (4).

Hearings Tribunal

28 (1) The Hearings Tribunal shall be composed of a presiding officer, one or more deputy presiding officers and as many other members equal in number representative of employers and employees respectively as the Lieutenant Governor in Council considers proper, all of whom shall be appointed by the Lieutenant Governor in Council. R.S.O. 1990, c. P.7, s. 28 (1).

Alternate presiding officer

(2) The Lieutenant Governor in Council shall designate one of the deputy presiding officers to be alternate presiding officer and the person so designated, in the absence of the presiding officer or if the presiding officer is unable to act, shall have all of the powers of the presiding officer. R.S.O. 1990, c. P.7, s. 28 (2).

Remuneration and expenses

(3) The members of the Hearings Tribunal who are not public servants employed under Part III of the Public Service of Ontario Act, 2006 shall be paid such remuneration as may be fixed by the Lieutenant Governor in Council and, subject to the approval of Management Board of Cabinet, the reasonable expenses incurred by them in the course of their duties under this Act. R.S.O. 1990, c. P.7, s. 28 (3); 2006, c. 35, Sched. C, s. 107 (3).

Resignation of member

(4) Where a member of the Hearings Tribunal resigns, he or she may carry out and complete any duties or responsibilities and exercise any powers that he or she would have had if he or she had not ceased to be a member, in connection with any matter in respect of which there was any proceeding in which he or she participated as a member of the Hearings Tribunal. R.S.O. 1990, c. P.7, s. 28 (4).

Powers and duties of Tribunal

29 (1) The Hearings Tribunal may exercise such powers and shall perform such duties as are conferred or imposed upon it by this Act or the regulations. R.S.O. 1990, c. P.7, s. 29 (1).

Idem

(2) Without limiting the generality of subsection (1), the Hearings Tribunal,

(a) may decide in an order made under subsection 17 (1) or clause 25 (2) (a) that any job class is a female job class or a male job class;

(b) may make rules for the conduct and management of its affairs and for the practice and procedure to be observed in matters before it;

(c) may require that any person seeking a determination of any matter by the Hearings Tribunal shall give written notice, in such form and manner as the Hearings Tribunal specifies, to the persons that the Hearings Tribunal specifies;

(d) may, upon the request of the parties or on its own initiative, convene one or more pre-hearing conferences;

(e) may order a party to disclose such evidence and to produce such documents and other things as the Tribunal may specify before the commencement of a hearing;

(f) may authorize the presiding officer or a deputy presiding officer to exercise the powers of the Tribunal under clause (d) or (e); and

(g) may in a hearing admit such oral or written evidence as it, in its discretion, considers proper, whether admissible in a court of law or not. R.S.O. 1990, c. P.7, s. 29 (2); 1993, c. 4, s. 17.

Panels

(3) The presiding officer may establish panels of the Hearings Tribunal and it may sit in two or more panels simultaneously so long as a quorum of the Hearings Tribunal is present on each panel.

Quorum

(4) The presiding officer or a deputy presiding officer, one member representative of employers and one member representative of employees constitute a quorum and are sufficient for the exercise of all the jurisdiction and powers of the Hearings Tribunal.

Decisions

(5) The decision of the majority of the members of the Hearings Tribunal present and constituting a quorum is the decision of the Hearings Tribunal, but, if there is no majority, the decision of the presiding officer or deputy presiding officer governs. R.S.O. 1990, c. P.7, s. 29 (3-5).

Death or incapacity of member

29.1 (1) If, after a panel of the Hearings Tribunal begins holding a hearing respecting a matter but before it reaches a decision on all the issues before it, the presiding officer or deputy presiding officer dies or becomes incapacitated, another panel of the Tribunal shall decide whether,

(a) the hearing should continue but with the member who died or became incapacitated having been replaced by a presiding officer or deputy presiding officer; or

(b) a new hearing should be held before another panel.

Same

(2) If, after a panel of the Hearings Tribunal begins holding a hearing respecting a matter and before it reaches a decision on all the issues before it, a member who is a representative of employers or employees dies or becomes incapacitated, another panel of the Tribunal shall decide whether,

(a) the hearing should continue but with the member who died or became incapacitated having been replaced by another representative of employers or employees, as the case may be;

(b) the hearing should continue but with the members who are representative of employers and employees having been replaced by other representatives of employers and employees;

(c) the hearing should continue without representatives of either employers or employees; or

(d) a new hearing should be held before another panel.

Panels

(3) If it is decided that there should be a new hearing before another panel, that panel may include a member of the panel one of whose members died or became incapacitated.

Severable matters

(4) A panel that decides that there should be a new hearing under clause (1) (b) or (2) (d) may, if the previous panel had reached a decision respecting some of the issues before it, direct that any decision respecting those issues stands and that the new panel should consider only the issues that remain outstanding.

Hearing

(5) Before making a decision under subsection (1) or (2), the panel shall hold a hearing.

One-person quorum

(6) If it is decided that a hearing should continue under clause (2) (c), the presiding officer or deputy presiding officer, as the case may be, shall constitute a quorum and shall resume the hearing without the other member.

New panel

(7) If a new hearing is held under this section, subsections 29 (4) and (5) apply, with necessary modifications. 1993, c. 4, s. 18.

Exclusive jurisdiction

30 (1) The Hearings Tribunal has exclusive jurisdiction to exercise the powers conferred upon it by or under this Act and to determine all questions of fact or law that arise in any matter before it and the action or decision of the Hearings Tribunal thereon is final and conclusive for all purposes.

Reconsideration of decisions, etc.

(2) The Hearings Tribunal may at any time, if it considers it advisable to do so, reconsider a decision or order made by it and vary or revoke the decision or order. R.S.O. 1990, c. P.7, s. 30.

Testimony in civil proceedings

31 Except with the consent of the Hearings Tribunal, no member of the Hearings Tribunal, employee of the Commission or person whose services have been contracted for by the Commission shall be required to testify in any civil proceeding, in any proceeding before the Hearings Tribunal or in any proceeding before any other tribunal respecting information obtained in the discharge of their duties or while acting within the scope of their employment under this Act. R.S.O. 1990, c. P.7, s. 31.

Parties to proceedings

Definition

32 (0.1) In this section,

"representative" means, in respect of a proceeding under this Act, a person authorized under the Law Society Act to represent a person or persons in that proceeding. 2006, c. 21, Sched. C, s. 127 (1).

Parties to proceedings

(1) Where a hearing is held before the Hearings Tribunal or where a review officer investigates for the purposes of effecting a settlement of an objection or complaint, the parties to the proceeding are,

(a) the employer;

(b) the objector or complainant;

(c) the bargaining agent (if the pay equity plan relates to a bargaining unit) or the employees to whom the plan relates (if the plan does not relate to a bargaining unit); and

(d) any other persons entitled by law to be parties. R.S.O. 1990, c. P.7, s. 32 (1); 1993, c. 4, s. 19 (1).

Same

(1.1) The Hearings Tribunal or a review officer may require an employer to post a notice relating to this Act in a workplace. 1993, c. 4, s. 19 (2).

Notice

(2) Where the Hearings Tribunal or a review officer requires that a notice be given by the employer to employees, the employer shall post the notice in the workplace and such notice shall be deemed to have been sufficiently given to all employees in the workplace when it is so posted. R.S.O. 1990, c. P.7, s. 32 (2).

Same

(2.1) If the Hearings Tribunal is satisfied that a notice required to be posted under subsection (1.1) has not been posted, the Tribunal may order a review officer to enter the workplace and post the notice. 1993, c. 4, s. 19 (2).

Representation

(3) An employee or a group of employees may appoint a representative to represent the employee or group of employees before the Hearings Tribunal or before a review officer. 2006, c. 21, Sched. C, s. 127 (2).

Idem

(4) Where an employee or group of employees advises the Hearings Tribunal or the Pay Equity Office in writing that the employee or group of employees wishes to remain anonymous, the representative of the employee or group of employees shall be the party to the proceeding before the Hearings Tribunal or review officer and not the employee or group of employees. R.S.O. 1990, c. P.7, s. 32 (4); 1993, c. 4, s. 19 (3); 2006, c. 21, Sched. C, s. 127 (3).

Idem

(5) Where subsection (4) applies, the representative, in the representative's name, may take all actions that an employee may take under this Act including the filing of objections under Part II and the filing of complaints under Part IV. R.S.O. 1990, c. P.7, s. 32 (5); 2006, c. 21, Sched. C, s. 127 (4).

Pay Equity Office

33 (1) The Pay Equity Office is responsible for the enforcement of this Act. R.S.O. 1990, c. P.7, s. 33 (1); 1993, c. 4, s. 20 (1).

Idem

(2) Without limiting the generality of subsection (1), the Pay Equity Office,

(a) may conduct research and produce papers concerning any aspect of pay equity and related subjects and make recommendations to the Minister in connection therewith;

(b) may conduct public education programs and provide information concerning any aspect of pay equity and related subjects;

(c) shall provide support services to the Hearings Tribunal;

(d) shall conduct such studies as the Minister requires and make reports and recommendations in relation thereto;

(e) shall conduct a study with respect to systemic gender discrimination in compensation for work performed, in sectors of the economy where employment has traditionally been predominantly female, by female job classes in establishments that have no appropriate male job classes for the purpose of comparison under section 5 and, within one year of the effective date, shall make reports and recommendations to the Minister in relation to redressing such discrimination; and

(f) shall prepare and make available to employers a form of notice to be posted under subsection 7.1 (1). R.S.O. 1990, c. P.7, s. 33 (2); 1993, c. 4, s. 20 (2).

Chief administrative officer

(3) The Lieutenant Governor in Council shall appoint a person to be the head of the Pay Equity Office and that person shall be the chief administrative officer of the Commission.

Minister may require studies, etc.

(4) The Minister may require the Pay Equity Office to conduct such studies related to pay equity as are set out in a request to the head of the Office and to make reports and recommendations in relation thereto.

Annual report

(5) The head of the Pay Equity Office shall prepare an annual report on the Commission, provide it to the Minister no later than 90 days after the end of the Commission's fiscal year and make it available to the public. 2017, c. 34, Sched. 46, s. 47.

Same

(6) The head of the Pay Equity Office shall comply with such directives as may be issued by the Management Board of Cabinet with respect to,

(a) the form and content of the annual report; and

(b) when and how to make it available to the public. 2017, c. 34, Sched. 46, s. 47.

Same

(7) The head of the Pay Equity Office shall include such additional content in the annual report as the Minister may require. 2017, c. 34, Sched. 46, s. 47.

Tabling of annual report

(8) The Minister shall table the annual report in the Assembly and shall comply with such directives as may be issued by the Management Board of Cabinet with respect to when to table it. 2017, c. 34, Sched. 46, s. 47.

Review officers

34 (1) The head of the Pay Equity Office shall designate one or more employees of the Office to be review officers.

Review officers, duties

(2) Review officers shall monitor the preparation and implementation of pay equity plans, shall investigate objections and complaints filed with the Commission, may attempt to effect settlements and shall take such other action as is set out in this Act or in an order of the Hearings Tribunal.

Powers

(3) A review officer, for the purpose of carrying out his or her duties,

(a) may enter any place at any reasonable time;

(b) may request the production for inspection of documents or things that may be relevant to the carrying out of the duties;

(c) upon giving a receipt therefor, may remove from a place documents or things produced pursuant to a request under clause (b) for the purpose of making copies or extracts and shall promptly return them to the person who produced them;

(d) may question a person on matters that are or may be relevant to the carrying out of the duties subject to the person's right to have counsel or some other representative present during the examination; and

(e) may provide in an order made under subsection 16 (2) or 24 (1) that any job class is a female job class or a male job class.

Procedure

(4) The Statutory Powers Procedure Act does not apply to a review officer and he or she is not required to hold a hearing before making an order authorized by this Act. R.S.O. 1990, c. P.7, s. 34.

Warrants

35 (1) A person shall not exercise a power of entry conferred by this Act to enter a place that is being used as a dwelling without the consent of the occupier except under the authority of a warrant issued under this section.

Warrant for search

(2) Where a justice of the peace is satisfied on evidence upon oath that there are in a place documents or things that there is reasonable ground to believe will afford evidence relevant to the carrying out of a review officer's duties under this Act, the justice of the peace may issue a warrant in the prescribed form authorizing the review officer named in the warrant to search the place for any such documents or things and to remove them for the purposes of making copies or extracts and they shall be returned promptly to the place from which they were removed.

Warrant for entry

(3) Where a justice of the peace is satisfied on evidence upon oath that there is reasonable ground to believe it is necessary that a place being used as a dwelling or to which entry has been denied be entered so that a review officer may carry out his or her duties under this Act, the justice of the peace may issue a warrant in the prescribed form authorizing such entry by the review officer named in the warrant.

Execution and expiry of warrant

(4) A warrant issued under this section,

(a) shall specify the hours and days during which it may be executed; and

(b) shall name a date on which it expires, which date shall not be later than fifteen days after its issue.

Obstruction

(5) No person shall hinder, obstruct or interfere with a review officer in the execution of a warrant or otherwise impede a review officer in carrying out his or her duties under this Act.

Idem

(6) Subsection (5) is not contravened where a person refuses to produce documents or things, unless a warrant has been issued under subsection (2).

Admissibility of copies

(7) Copies of, or extracts from, documents and things removed from premises under this Act and certified as being true copies of, or extracts from, the originals by the person who made them are admissible in evidence to the same extent as, and have the same evidentiary value as, the documents or things of which they are copies or extracts. R.S.O. 1990, c. P.7, s. 35.

PART VI
REGULATIONS AND MISCELLANEOUS

Regulations

36 (1) The Lieutenant Governor in Council may make regulations,

(a) prescribing forms and notices and providing for their use;

(b) prescribing methods for determining the historical incumbency of a job class;

(c) prescribing criteria that shall be taken into account in deciding whether a job class is a female job class or a male job class;

(c.1) prescribing bodies for the purposes of clause 1.1 (1) (b);

(d) prescribing the method of valuing any form of compensation;

(e) prescribing criteria that shall be taken into account in determining whether work performed in two job classes is of equal or comparable value;

(f) prescribing criteria that shall be taken into account in deciding whether or not a difference in compensation between a female job class and a male job class is a difference that is permitted by subsection 8 (1) or (2);

(f.1) prescribing limitations on the requirement that an employer maintain pay equity for a female job class;

(g) permitting the Hearings Tribunal, on the application of an employer and in accordance with such criteria as may be prescribed in the regulations, to change the mandatory posting date and the dates for adjustments in compensation to dates later than those set out in Part II and to vary the minimum adjustments in compensation required by that Part, subject to such conditions as the Hearings Tribunal may impose in its order granting the application;

(g.1) prescribing one or more methods of comparing male and female job classes as proportional value methods of comparison;

(h) amending the Appendix to the Schedule and providing that the mandatory posting date for an entity included in the Appendix by amendment is the date set out in the regulations. R.S.O. 1990, c. P.7, s. 36; 1993, c. 4, s. 21 (1, 2); 1996, c. 1, Sched. J, s. 8; 2006, c. 35, Sched. C, s. 107 (4).

Retroactivity

(2) A regulation made under clause (1) (f.1) is, if it so provides, effective with reference to a period before it was filed. 1993, c. 4, s. 21 (3).

Review of Act

37 (1) Seven years after the effective date, the Lieutenant Governor in Council shall appoint a person who shall undertake a comprehensive review of this Act and its operation.

Report to Minister

(2) The person appointed under subsection (1) shall prepare a report on his or her findings and shall submit the report to the Minister.

Idem

(3) The Minister shall table the report before the Assembly if it is in session or, if not, at the next session. R.S.O. 1990, c. P.7, s. 37.

Crown bound

38 This Act binds the Crown in right of Ontario. R.S.O. 1990, c. P.7, s. 38.

SCHEDULE

1 The public sector in Ontario consists of,

(a) the Crown in right of Ontario, every agency thereof, and every authority, board, commission, corporation, office or organization of persons a majority of whose directors, members or officers are appointed or chosen by or under the authority of the Lieutenant Governor in Council or a member of the Executive Council;

(b) the corporation of every municipality in Ontario, every local board as defined by the Municipal Affairs Act, and every authority, board, commission, corporation, office or organization of persons whose members or officers are appointed or chosen by or under the authority of the council of the corporation of a municipality in Ontario;

(c) every board as defined in the Education Act, and every college, university or post-secondary school educational institution in Ontario the majority of the capital or annual operating funds of which are received from the Crown;

(d) every hospital referred to in the list of hospitals and their grades and classifications maintained by the Minister of Health and Long-Term Care under the Public Hospitals Act and every private hospital operated under the authority of a licence issued under the Private Hospitals Act;

Note: On a day to be named by proclamation of the Lieutenant Governor, clause 1 (d) of the Schedule to the Act is repealed and the following substituted: (See: 2017, c. 25, Sched. 9, s. 108)

(d) every hospital referred to in the list of hospitals and their grades and classifications maintained by the Minister of Health and Long-Term Care under the Public Hospitals Act and every community health facility within the meaning of the Oversight of Health Facilities and Devices Act, 2017 that was formerly licensed under the Private Hospitals Act;

(e) every corporation with share capital, at least 90 per cent of the issued shares of which are beneficially held by or for an employer or employers described in clauses (a) to (d), and every wholly-owned subsidiary thereof;

(f) every corporation without share capital, the majority of whose members or officers are members of, or are appointed or chosen by or under the authority of, an employer or employers described in clauses (a) to (d), and every wholly-owned subsidiary thereof;

(g) every board of health under the Health Protection and Promotion Act, and every board of health under an Act of the Legislature that establishes or continues a regional municipality;

(h) the Office of the Lieutenant Governor of Ontario, the Office of the Assembly, members of the Assembly, the Office of the Ombudsman and the Auditor General; and

(i) any authority, board, commission, corporation, office, person or organization of persons, or any class of authorities, boards, commissions, corporations, offices, persons or organizations of persons, set out in the Appendix to this Schedule or added to the Appendix by the regulations made under this Act.

2 Repealed: 2002, c. 17, Sched. C, s. 21.

APPENDIX

Ministry of the Attorney General

1 Community legal clinics that receive funding from the legal aid plan established under the Legal Aid Act.

2 Supervised access centres that receive funding from the Ministry of the Attorney General.

Ministry of Citizenship, Culture and Recreation

1 Organizations providing services for immigrants and refugees that receive funding through the Newcomer Settlement Program of the Ministry of Citizenship, Culture and Recreation.

2 A native friendship centre, being an employer that is a not-for-profit corporation established to assist in improving the quality of life of urban and migrating native people.

3 The Art Gallery of Ontario.

4 CJRT-FM Inc.

5 Royal Botanical Gardens.

6 Community information centres.

7 The Northern Ontario Library Service Board.

8 The Southern Ontario Library Service Board.

Ministry of Community and Social Services

Ministry of Children and Youth Services

1 Any corporation or organization of persons, other than one that has no employees other than employees who directly or indirectly control it, that,

(a) operates a children's residence under the authority of a licence issued under subsection 254 (3) of the Child, Youth and Family Services Act, 2017;

(b) provides residential care under the authority of a licence issued under subsection 254 (3) of the Child, Youth and Family Services Act, 2017 unless the provider is a foster parent;

(c) Repealed: 2007, c. 8, s. 223 (1).

(d) provides counselling services if the provision of those services is funded under the General Welfare Assistance Act (R.S.O. 1990, c. G.6);

(e) provides counselling services if the provision of those services is funded under the Ministry of Community and Social Services Act (R.S.O. 1990, c. M.20);

(f) operates a hostel providing services if the provision of those services is funded under the General Welfare Assistance Act (R.S.O. 1990, c. G.6);

(g) provides community services for adults if the provision of those services is funded by the Ministry of Community and Social Services under the Ministry of Community and Social Services Act (R.S.O. 1990, c. M.20);

(h) provides vocational rehabilitation services if the provision of those services is funded under the Vocational Rehabilitation Services Act (R.S.O. 1990, c. V.5);

(i) operates a workshop under the Vocational Rehabilitation Services Act (R.S.O. 1990, c. V.5);

(j) operates a supported employment program, being a program established under subclause 5 (i) (ii) of the Vocational Rehabilitation Services Act (R.S.O. 1990, c. V.5) that provides individualized training and support for a disabled person to enable him or her to obtain and retain employment;

(k) provides services funded under the Services and Supports to Promote the Social Inclusion of Persons with Developmental Disabilities Act, 2008 (S.O. 2008, c. 14);

(l) provides the services of homemakers or nurses if the provision of those services is funded under the Homemakers and Nurses Services Act (R.S.O. 1990, c. H.10);

(m) Repealed: 2001, c. 13, s. 23 (2).

(n) operates a child care centre or is a home child care agency within the meaning of the Child Care and Early Years Act, 2014;

(o) operates programs providing services to child care centres funded under the Child Care and Early Years Act, 2014;

(p) operates a program that receives a payment under the Seniors Active Living Centres Act, 2017;

(q) provides services for young persons under Part VI of the Child, Youth and Family Services Act, 2017 or under an agreement with the Ministry of Children and Youth Services;

(r) provides children's services funded or purchased by the Ministry of Children and Youth Services or the Ministry of Community and Social Services under the Child, Youth and Family Services Act, 2017;

(s) operates a childcare resource centre, being an employer providing services to persons providing care to young children and receiving funding under the Ministry of Community and Social Services Act (R.S.O. 1990, c. M.20);

(t) provides a service funded under or provided under the authority of a licence issued under the Child, Youth and Family Services Act, 2017.

2 Societies, as defined in the Child, Youth and Family Services Act, 2017.

3, 4 Repealed: 2007, c. 8, s. 223 (1).

5 District Welfare Administration Boards operating under the District Welfare Administration Boards Act (R.S.O. 1990, c. D.15).

Ministry of Economic Development, Trade and Tourism

1 Metropolitan Toronto Convention Centre.

2 The St. Clair Parkway Commission.

Ministry of Education and Training

1 Algoma College.

2 Assumption University.

3 Brescia College.

4 Canterbury College.

4.1 Centre franco-ontarien de ressources pédagogiques.

5 Collège dominicain de philosophie et de théologie.

6 Concordia Lutheran Seminary.

7 Conrad Grebel College.

8 Hearst College.

9 Holy Redeemer College.

10 Huntington University.

11 Huron College.

12 Iona College.

13 King’s College.

14 Knox College.

15 L’Université de Sudbury.

16 McMaster Divinity College.

17 Nipissing College.

18 Queen’s Theological College.

19 Regis College.

20 Renison College.

21 St. Augustine's Seminary.

22 St. Paul's United College.

23 St. Paul University.

24 St. Peter's Seminary.

25 The University of St. Jerome's College.

26 The University of St. Michael's College.

27 Thorneloe University.

28 Trinity College.

29 Victoria University.

30 Waterloo Lutheran Seminary.

31 Wycliffe College.

32 Youth employment centres providing community-based vocational planning and counselling that receive funding from the Ministry of Education and Training.

Ministry of Health and Long-Term Care

1 Any corporation or organization of persons, other than one that has no employees other than employees who directly or indirectly control it, that operates or provides,

(a) an ambulance service, under the authority of a licence issued under the Ambulance Act (R.S.O. 1990, c. A.19);

(b) a long-term care home under the authority of a licence issued, or an approval granted, under the Long-Term Care Homes Act, 2007 but, for greater certainty, only in respect of its long-term care home beds with respect to which funding is received from the Province of Ontario or a local health integration network as defined in section 2 of the Local Health System Integration Act, 2006;

(c) a laboratory or a specimen collection centre, under the authority of a licence issued under the Laboratory and Specimen Collection Centre Licensing Act (R.S.O. 1990, c. L.1);

(d) a psychiatric facility within the meaning of the Mental Health Act (R.S.O. 1990, c. M.7), the operation of which is funded in whole or in part by the Ministry of Health and Long-Term Care or a local health integration network as defined in section 2 of the Local Health System Integration Act, 2006;

(e) a home for special care established, approved or licensed under the Homes for Special Care Act (R.S.O. 1990, c. H.2);

(f) a home care facility within the meaning of the General Regulation made under the Health Insurance Act (R.S.O. 1990, c. H.6) or a facility which, by arrangement with any such home care facility,

(i) provides nursing, physiotherapy, occupational therapy, speech therapy, nutritional counselling, social work, homemaking or other services to persons in their homes that are insured home care services under the General Regulation made under the Health Insurance Act (R.S.O. 1990, c. H.6), and

(ii) is entitled to payment from the home care facility for or in respect of supplying such services;

(g) a rehabilitation centre or a crippled children's centre listed in the relevant Schedule to the General Regulation made under the Health Insurance Act (R.S.O. 1990, c. H.6);

(h) a detoxification centre that receives funding from the Ministry of Health and Long-Term Care or a local health integration network as defined in section 2 of the Local Health System Integration Act, 2006;

(h.1) services relating to addiction if the provider of the services receives funding from the Ministry of Health and Long-Term Care or a local health integration network as defined in section 2 of the Local Health System Integration Act, 2006;

(i) an adult community mental health service the operation of which is, pursuant to an agreement in writing, funded in whole or in part by the Ministry of Health and Long-Term Care or a local health integration network as defined in section 2 of the Local Health System Integration Act, 2006;

(j) a placement service the operation of which is, pursuant to a "Placement Co-ordination Service Agreement" or other agreement in writing, funded in whole or in part by the Ministry of Health and Long-Term Care or a local health integration network as defined in section 2 of the Local Health System Integration Act, 2006.

2 Repealed: 2006, c. 4, s. 50 (3).

3 A laundry that is operated exclusively for one or more than one hospital.

4 Hospital Food Services-Ontario Inc.

5 Repealed: O. Reg. 395/93, s. 8 (4).

6 Alcoholism and Drug Addiction Research Foundation.

7 The Canadian Red Cross Society in respect of its operations in Ontario.

8 The Hospital Council of Metropolitan Toronto.

9 The Hospital Medical Records Institute.

10 The Ontario Cancer Institute.

11 The Ontario Cancer Treatment and Research Foundation.

12 Repealed: 2017, c. 25, Sched. 8, s. 2.

13 Michener Institute for Applied Health Sciences.

14 A community health centre, being an employer,

(a) who provides primary health services primarily to,

(i) a group or groups of individuals who, because of culture, sex, language, socio-economic factors or geographic isolation, would be unlikely to receive some or all of those services from other sources, or

(ii) a group or groups of individuals who, because of age, sex, socio-economic factors or environmental factors, are more likely to be in need of some or all of those services than other individuals; and

(b) who receives funding from the Ministry of Health and Long-Term Care or a local health integration network as defined in section 2 of the Local Health System Integration Act, 2006 in accordance with the number or type of services provided.

15 A comprehensive health organization, being a not-for-profit corporation that,

(a) provides or arranges for the provision of comprehensive health care services for individuals who are enrolled as members of the patient roster of the corporation; and

(b) receives funding from the Ministry of Health and Long-Term Care or a local health integration network as defined in section 2 of the Local Health System Integration Act, 2006 in accordance with the number of individuals on the roster.

Ministry of Labour

1 Pay Equity Advocacy and Legal Services.

2 A help centre, being an employer providing employment and vocational counselling services to adults that receives funding from the Ontario Help Centre Program of the Ministry of Labour.

Ministry of Municipal Affairs and Housing

1 Any authority, board, commission, corporation, office, person or organization of persons which operates or provides,

(a) the collection, removal and disposal of garbage and other refuse for a municipality;

(b) the operation and maintenance of buses for the conveyance of passengers under an agreement with a municipality.

2 Ontario Municipal Employees Retirement Board.

3 Toronto District Heating Corporation.

Ministry of Natural Resources

1 Conservation Authorities established under the Conservation Authorities Act (R.S.O. 1990, c. C.27).

Ministry of the Solicitor General and Correctional Services

1 Any agency, corporation or organization of persons, other than one that has no employees other than employees who directly or indirectly control it, that, under funding from the Ministry of the Solicitor General and Correctional Services,

(a) provides community residential or non-residential services; or

(b) supervises persons who have been convicted of or been found guilty of a criminal provincial offence or who have been accused of a criminal or provincial offence.

2 Sexual assault centres.

Office Responsible for Women's Issues

1 Any corporation or organization of persons, other than one that has no employees other than employees who directly or indirectly control it, that receives funding from the program administered by the Office Responsible for Women's Issues and known as Women's Centres Program: Investing in Women's Futures and that provides counselling, referral or information services for women.

PROXY PROVISIONS

1(1) Definitions - In this Act,

"pay equity plan" means

(...)

(c) a document as described in section 21.18, for a plan being prepared under Part III.2. ("programme d'équité salariale")

"proxy method of comparison" means

the method of determining whether pay equity exists that is described in Part III.2. ("méthode de comparaison avec des organisations de l'extérieur")

Achievement of pay equity

5.1 (1) For the purposes of this Act, pay equity is achieved in an establishment when every female job class in the establishment has been compared to a job class or job classes under the job-to-job method of comparison, the proportional value method of comparison or, in the case of an employer to whom Part III.2 applies, the proxy method of comparison, and any adjustment to the job rate of each female class that is indicated by the comparison has been made.

PART III.2

PROXY METHOD OF COMPARISON

Definitions

21.11 (1) In this Part,

"key female job class" means,

(a) the female job class in a seeking employer's establishment having the greatest number of employees in that establishment, or

(b) any other female job class in the establishment whose duties are essential to the delivery of the service provided by the employer; ("catégorie clé d'emplois à prédominance féminine")

"pay equity job rate" means,

(a) in relation to a female job class in a proxy establishment, the job rate that would be required for that class if pay equity were to be achieved for the class as of the 1st day of January, 1994, and

(b) in relation to a key female job class of the seeking employer, the job rate that would be required for that class if the job rate were to bear the same relationship to the value of the work performed in that class as the pay equity job rates for the female job classes in the proxy establishment with which the key female job class is compared bear to the value of the work performed in those female job classes in the proxy establishment; ("taux de catégorie relatif à l'équité salariale")

"potential proxy employer" means,

in relation to a seeking employer, an employer of a potential proxy establishment for that seeking employer; ("employeur éventuel de l'extérieur")

"potential proxy establishment" means,

in relation to a seeking employer, an establishment that is eligible to be selected as the proxy establishment for that seeking employer; ("établissement éventuel de l'extérieur")

"proxy employer" means,

an employer of a proxy establishment; ("employeur de l'extérieur")

"proxy establishment" means,

an establishment whose female job classes are compared with female job classes of a seeking employer using the proxy method of comparison; ("établissement de l'extérieur")

"seeking employer" means,

an employer in respect of whom a review officer has issued an order under subsection 21.12 (2). ("employeur intéressé)

Proxy's information to be used

(2) For the purposes of the definition of "pay equity job rate", the pay equity job rate for a female job class of the proxy establishment is the rate indicated by the proxy employer for that class under paragraph 2 of subsection 21.17(1).

Deemed increase in pay equity job rate

(3) If the job rate for a female job class of the seeking employer is increased by a percentage or dollar amount, and the increase is not made for the purpose of achieving pay equity, the pay equity job rate for any job class with which that female job class was compared shall be deemed to have been increased by the same percentage or dollar amount, as the case may be.

Application

21.22 (1) This Part applies to those employers who are declared, by order of a review officer, to be seeking employers for the purposes of this Part.

Order re seeking employer

(2) A review officer may make an order declaring an employer to be a seeking employer if the employer has given notice to the Pay Equity Office under subsection 21.2 (5) and if the review officer finds,

(a) that the employer is a public sector employer; and

(b) that there is any female job class within the employer's establishment that cannot be compared to a male job class within the establishment under either the job-to-job method of comparison or the proportional value method of comparison.

Reference to Hearings Tribunal

(3) Subsections 24 (5) and (6) apply, with necessary modifications, to an order made under subsection (2).

Systemic gender discrimination

21.13 For the purposes of this Part and despite subsection 4(2), systemic gender discrimination in compensation shall be identified by undertaking comparisons, in terms of compensation and in terms of the value of the work performed, using the proxy method of comparison,

(a) between each key female job class in the seeking employer's establishment and female job classes in a proxy establishment; and

(b) between the female job classes in the seeking employer's establishment that are not key female job classes and the key female job classes in that establishment.

Proxy method required

21.14(1) A seeking employer shall use the proxy method of comparison for all female job classes in an establishment.

Proxy establishment

(2) The seeking employer shall select the proxy establishment to be used for the purposes of the proxy method of comparison in accordance with the regulations.

Proxy method described

21.15(1) Pay equity is achieved for a female job class in an establishment of a seeking employer under the proxy method of comparison,

(a) in the case of a key female job class,

(i) when the class is compared with those female job classes in a proxy establishment whose duties and responsibilities are similar to those of the key female job class, and

(ii) when the job rate for the class bears the same relationship to the value of the work performed in the class as the pay equity job rates for the female job classes in the proxy establishment bear to the value of the work performed in those classes; and

(b) in the case of any other female job class,

(i) when the class has been compared with the key female job classes in the establishment of the seeking employer, and

(ii) when the job rate for the class bears the same relationship to the value of the work performed in the class as the pay equity job rates for the key female job classes bear to the value of the work performed in those classes.

Comparison methods

(2) The comparisons referred to in subsection (1) shall be carried out using the proportional value method of comparison,

(a) in the case of a comparison under clause (1)(a), as if the female job classes in the proxy establishment were male job classes of the seeking employer; and

(b) in the case of a comparison under clause (1)(b), as if the key female job classes of the seeking employer were male job classes of the seeking employer.

Comparison system

(3) The comparisons shall be carried out using a gender-neutral comparison system.

Bargaining unit

(4) Comparisons under this section for a key female job class in a bargaining unit of the seeking employer shall be made with job classes in a bargaining unit of the proxy establishment unless the seeking employer and the bargaining agent for the employees in the key female job class agree otherwise.

If no classes similar

(5) For the purpose of making comparisons under clause (1)(a), if there is no female job class in the proxy establishment whose duties and responsibilities are similar to those of the key female job class of the seeking employer, the comparison shall be made with a group of female job classes in the proxy establishment selected by the proxy employer in accordance with subsections 21.17 (4) to (6).

Group of jobs

(6) Subsections 6 (6) to (10) apply, with necessary modifications, to the proxy method of comparison.

Combined establishments

21.16(1) Two or more seeking employers agree that, for the purposes of a pay equity plan under this Part, all their employees constitute a single establishment,

(a) if the seeking employers are in the same geographic division; or

(b) if the seeking employers are otherwise entitled to agree under section 2,and the employers shall be considered to be a single employer.

Limitations

(2) The circumstances in which seeking employers may enter into an agreement under clause (1)(a) may be limited by regulation.

Exception

(3) If any of the employees to be covered by a plan referred to in subsection (1) have a bargaining agent, an agreement made under that subsection is not effective unless the bargaining agent joins the agreement.

Employers to implement plans

(4) Even though the employees of two or more seeking employers are considered to be one establishment under subsection (1), each employer is responsible for implementing and maintaining the pay equity plan with respect to that employer's employees.

Obtaining information from potential proxy employers

21.17(1) For the purpose of making a comparison for a key female job class using the proxy method, a seeking employer may request any potential proxy employer to provide it with the following information relating to a potential proxy establishment of the potential proxy employer:

1. Information about the duties and responsibilities of each female job class in the potential proxy establishment whose duties and responsibilities are similar to those of the key female job class of the seeking employer.

2. The pay equity job rate for each female job class in the potential proxy establishment referred to in paragraph 1.

3. The total cost of benefits provided to or for the benefit of the employees of the potential proxy establishment, expressed as a percentage of the total amount of all wages and salaries paid to those employees.

4. Such other information as may be prescribed in the regulations.

Request

(2) The potential proxy employer shall provide the requested information if,

(a) the request is made in writing;

(b) the request is accompanied by a copy of the order issued under subsection 21.12 (2);

(c) the request is accompanied by an organization chart showing the reporting relationships for all job classes of the seeking employer;

(d) the request contains a detailed description, in a form approved by the Commission, of the duties and responsibilities of the key female job class of the seeking employer that is to be compared using the proxy method;

(e) the request contains such additional information as may be prescribed in the regulations;

(f) the request is signed by the employer or a partner of the employer, or, if the employer is a corporation, if the request is accompanied by a copy of a resolution of the corporation's board of directors resolving that the corporation make the request and by a certificate of an officer of the corporation certifying that the copy is a true copy; and

(g) if the members of the key female job class of the seeking employer have a bargaining agent,

(i) the request is signed by the bargaining agent, and

(ii) it indicates whether the seeking employer and the bargaining agent have agreed that the class may be compared to job classes that are not in a bargaining unit of the establishment that is selected as the proxy establishment.

Response time

(3) An employer who is required to provide information under subsection (2) shall do so within sixty days after receiving the request.

If no classes similar

(4) If there is no female job class in the potential proxy establishment whose duties and responsibilities are similar to those of the key female job class of the seeking employer, the potential proxy employer shall provide the information for a group of female job classes in the potential proxy establishment selected by the potential proxy employer inaccordance with subsections (5) and (6).

Representative range

(5) Subject to subsection (6), the group of female job classes selected under subsection (4) shall consist of classes whose pay equity job rates are representative of the range of pay equity job rates in the potential proxy establishment.

Bargaining unit

(6) If the key female job class referred to in subsection (4) is in a bargaining unit, the group of classes selected by the potential proxy employer must be in a bargaining unit of that employer unless the seeking employer and the bargaining agent for the employees in the key female job class have agreed that the class may be compared to job classes that are not in a bargaining unit of the establishment that is selected as the proxy establishment.

Confidentiality

(7) The seeking employer, an employee of the seeking employer or a bargaining agent for such an employee shall use the information provided by a potential proxy employer only for the purposes of this Act.

Offence

(8) Every person who contravenes subsection (7) is guilty of an offence and on conviction is liable to a fine of not more than $5,000 in the case of an individual, and not more that $50,000 in any other case.

Parties to an offence

(9) If a corporation or bargaining agent contravenes subsection (7), every officer, official or agent of the corporation or bargaining agent who authorizes, permits or acquiesces in the contravention is party to and guilty of the offence and, on conviction, is liable to the penalty provided for the offence whether or not the corporation or bargaining agent has been prosecuted or convicted.

Bargaining agent

(10) A prosecution for an offence created by subsection (8) may be instituted against a bargaining agent in its own name.

Consent

(11) No prosecution for an offence created by subsection (8) shall be instituted except with the consent in writing of the Hearings Tribunal.

Pay equity plan

21.18(1) Every seeking employer shall prepare a pay equity plan to provide for pay equity using the proxy method of comparison.

Contents

(2) The plan must do the following:

1. Identify the establishment to which the plan applies.

2. Identify the key female job classes of the seeking employer.

3. Identify the proxy employer and the proxy establishment.

4. Identify the female job classes in the proxy establishment with which the key female job classes of the seeking employer were compared and set out their pay equity job rates.

5. Identify the female job classes in the seeking employer that are not key female job classes and that were compared with the key female job classes.

6. Describe the gender-neutral comparison system used for the purpose of making the comparisons.

7. Describe the methodology used for the calculations required by the comparisons.

8. Set out the value of the work performed in each job class that was compared with another job class.

9. Set out the results of the comparisons.

10. Identify all positions that are excluded in determining whether a job class is a female job class or a male job class and that are not to be included in any compensation adjustments under the plan by virtue of subsection 8(3), and set out the reasons for relying on that subsection.

11. With respect to all female job classes for which pay equity does not exist according to the comparisons, indicate how the compensation in those job classes will be adjusted to achieve pay equity.

12. Set out the date on which the first adjustments in compensation will be made under the plan, which date shall be not later than one year after this section comes into force.

Plan binding

(3) A pay equity plan prepared under this Part binds the employer and the employees to whom the plan applies and their bargaining agent, if any.

Plan to prevail

(4) A pay equity plan prepared under this Part prevails over all relevant collective agreements and the adjustments to rates of compensation required by the plan shall be deemed to be incorporated into and form part of the relevant collective agreements.

Requirement to post plan

21.19 An employer required to prepare a pay equity plan under this Part shall post a copy of it in the workplace within six months after this section comes into force.

Bargaining unit employees

21.20 Sections 14, 16 and 17 apply, with necessary modifications, with respect to a pay equity plan that is prepared under this Part for employees in a bargaining unit.

Non-bargaining unit employees

21.21(1) This section applies with respect to pay equity plans prepared under this Part for employees who are not in a bargaining unit.

Review period

(2) The employees shall have until the ninetieth day after the plan is posted to review it and submit comments to the employer on the plan.

Application of certain provisions

(3) Subsections 14(1) and 15(2), (3) and (5) to (8) and sections 16 and 17 apply, with necessary modifications, with respect to the plan.

Compensation adjustments

21.22(1) A seeking employer shall make the first adjustments in compensation in respect of a pay equity plan prepared under this Part effective as of the 1st day of January, 1994.

Application of certain provisions

(2) Subsections 13(3) to (6) and (8) apply, with necessary modifications, with respect to the plan.

Deemed increase in pay equity job rate

(3) Despite subsections 13(3) to (6), a seeking employer shall increase the job rate for a female job class for which pay equity has not been achieved by the dollar amount of any deemed increase in the pay equity job rate for the job class with which the female job class of the seeking employer was compared that is required by subsection 21.11(3). This increase shall be made before any adjustments required by subsection 13(3), (4) or (5) are made.

Deemed compliance

(4) Every employer who prepares and implements a pay equity plan under this Part shall be deemed not to be in contravention of subsection 7(1) with respect to those employees covered by the plan or plans that apply to the employees but only with respect to those compensation practices that existed immediately before the 1st day of January, 1994.

Orders for information

21.23(1) A review officer or the Hearings Tribunal may order,

(a) a proxy employer or a potential proxy employer to provide to a seeking employer any information that the proxy employer or potential proxy employer is required to provide by this Act or the regulations;

(b) a seeking employer to provide to a proxy employer or a potential proxy employer any information that the seeking employer is required to provide by this Act or the regulations.

Compliance

(2) An employer or a bargaining agent shall comply with an order issued under subsection (1) within the time indicated in the order.

Reference to Hearings Tribunal

(3) Subsections 24(5) and (6) apply, with necessary modifications, to an order issued by a review officer under subsection (1).

Orders by Review Officers

24(1) Where a review officer is of the opinion that a pay equity plan is not being prepared as required by Part II, III.1 or Part III.2, the review officer may order the employer and the bargaining agent, if any, to take such steps as are set out in the order to prepare the plan.

Idem

(4) An order under subsection (1) may provide for a mandatory posting date that is later than the one provided in section 10 or a posting date that is later than the one provided under section 21.7 or 21.19.

Orders

25(2)

(a) where it finds that an employer or a bargaining agent has failed to comply with Part II, III.1 or III.2, may order that a review officer prepare a pay equity plan for the employer's establishment and that the employer and the bargaining agent, if any, or either of them, pay all of the costs of preparing the plan;

Application of Parts II, III.1 and III.2

25(4) Parts II, III.1 and III.2 apply with necessary modifications to a pay equity plan prepared under clause (2)

(a) but,

(a) the order of the Hearings Tribunal may provide for a mandatory posting date that is later than the one provided in section 10 or a posting date that is later than the one provided under section 21.7 or 21.19;

(b) the order of the Hearings Tribunal shall not provide for a compensation adjustment date that is different than the relevant date set out in clause 13(2)(e) or a date that is later than the one provided under section 21.10 or 21.22;

Regulations

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(...)

(g.2) governing the selection of an establishment as the proxy establishment for a seeking employer under Part III.2;

(g.3) limiting the circumstances in which seeking employers may make agreements under clause 21.16(1)(a);

(g.4) prescribing information for the purpose of paragraph 4 of subsection 21.17(1);

(g.5) prescribing information for the purpose of clause 21.17(2)(e);

2. **Human Rights Code, RSO 1990, c H.19**

PART I - FREEDOM FROM DISCRIMINATION

Services

1 Every person has a right to equal treatment with respect to services, goods and facilities, without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, marital status, family status or disability. R.S.O. 1990, c. H.19, s. 1; 1999, c. 6, s. 28 (1); 2001, c. 32, s. 27 (1); 2005, c. 5, s. 32 (1); 2012, c. 7, s. 1.

Accommodation

2 (1) Every person has a right to equal treatment with respect to the occupancy of accommodation, without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, marital status, family status, disability or the receipt of public assistance. R.S.O. 1990, c. H.19, s. 2 (1); 1999, c. 6, s. 28 (2); 2001, c. 32, s. 27 (1); 2005, c. 5, s. 32 (2); 2012, c. 7, s. 2 (1).

Harassment in accommodation

(2) Every person who occupies accommodation has a right to freedom from harassment by the landlord or agent of the landlord or by an occupant of the same building because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sexual orientation, gender identity, gender expression, age, marital status, family status, disability or the receipt of public assistance. R.S.O. 1990, c. H.19, s. 2 (2); 1999, c. 6, s. 28 (3); 2001, c. 32, s. 27 (1); 2005, c. 5, s. 32 (3); 2012, c. 7, s. 2 (2).

Contracts

3 Every person having legal capacity has a right to contract on equal terms without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, marital status, family status or disability. R.S.O. 1990, c. H.19, s. 3; 1999, c. 6, s. 28 (4); 2001, c. 32, s. 27 (1); 2005, c. 5, s. 32 (4); 2012, c. 7, s. 3.

Accommodation of person under eighteen

4 (1) Every sixteen or seventeen year old person who has withdrawn from parental control has a right to equal treatment with respect to occupancy of and contracting for accommodation without discrimination because the person is less than eighteen years old. R.S.O. 1990, c. H.19, s. 4 (1).

Idem

(2) A contract for accommodation entered into by a sixteen or seventeen year old person who has withdrawn from parental control is enforceable against that person as if the person were eighteen years old. R.S.O. 1990, c. H.19, s. 4 (2).

Employment

5 (1) Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, record of offences, marital status, family status or disability. R.S.O. 1990, c. H.19, s. 5 (1); 1999, c. 6, s. 28 (5); 2001, c. 32, s. 27 (1); 2005, c. 5, s. 32 (5); 2012, c. 7, s. 4 (1).

Harassment in employment

(2) Every person who is an employee has a right to freedom from harassment in the workplace by the employer or agent of the employer or by another employee because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sexual orientation, gender identity, gender expression, age, record of offences, marital status, family status or disability. R.S.O. 1990, c. H.19, s. 5 (2); 1999, c. 6, s. 28 (6); 2001, c. 32, s. 27 (1); 2005, c. 5, s. 32 (6); 2012, c. 7, s. 4 (2).

Vocational associations

6 Every person has a right to equal treatment with respect to membership in any trade union, trade or occupational association or self-governing profession without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, marital status, family status or disability. R.S.O. 1990, c. H.19, s. 6; 1999, c. 6, s. 28 (7); 2001, c. 32, s. 27 (1); 2005, c. 5, s. 32 (7); 2012, c. 7, s. 5.

Sexual harassment
Harassment because of sex in accommodation

7 (1) Every person who occupies accommodation has a right to freedom from harassment because of sex, sexual orientation, gender identity or gender expression by the landlord or agent of the landlord or by an occupant of the same building. R.S.O. 1990, c. H.19, s. 7 (1); 2012, c. 7, s. 6 (1).

Harassment because of sex in workplaces

(2) Every person who is an employee has a right to freedom from harassment in the workplace because of sex, sexual orientation, gender identity or gender expression by his or her employer or agent of the employer or by another employee. R.S.O. 1990, c. H.19, s. 7 (2); 2012, c. 7, s. 6 (2).

Sexual solicitation by a person in position to confer benefit, etc.

(3) Every person has a right to be free from,

(a) a sexual solicitation or advance made by a person in a position to confer, grant or deny a benefit or advancement to the person where the person making the solicitation or advance knows or ought reasonably to know that it is unwelcome; or

(b) a reprisal or a threat of reprisal for the rejection of a sexual solicitation or advance where the reprisal is made or threatened by a person in a position to confer, grant or deny a benefit or advancement to the person. R.S.O. 1990, c. H.19, s. 7 (3).

Reprisals

8 Every person has a right to claim and enforce his or her rights under this Act, to institute and participate in proceedings under this Act and to refuse to infringe a right of another person under this Act, without reprisal or threat of reprisal for so doing. R.S.O. 1990, c. H.19, s. 8.

Infringement prohibited

9 No person shall infringe or do, directly or indirectly, anything that infringes a right under this Part. R.S.O. 1990, c. H.19, s. 9.

PART II - INTERPRETATION AND APPLICATION

Definitions re: Parts I and II

10 (1) In Part I and in this Part,

"age" means an age that is 18 years or more; ("âge")

"disability" means,

(a) any degree of physical disability, infirmity, malformation or disfigurement that is caused by bodily injury, birth defect or illness and, without limiting the generality of the foregoing, includes diabetes mellitus, epilepsy, a brain injury, any degree of paralysis, amputation, lack of physical co-ordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment, or physical reliance on a guide dog or other animal or on a wheelchair or other remedial appliance or device,

(b) a condition of mental impairment or a developmental disability,

(c) a learning disability, or a dysfunction in one or more of the processes involved in understanding or using symbols or spoken language,

(d) a mental disorder, or

(e) an injury or disability for which benefits were claimed or received under the insurance plan established under the *Workplace Safety and Insurance Act, 1997*; ("handicap")

"equal" means subject to all requirements, qualifications and considerations that are not a prohibited ground of discrimination; ("égal")

"family status" means the status of being in a parent and child relationship; ("état familial")

"group insurance" means insurance whereby the lives or well-being or the lives and well-being of a number of persons are insured severally under a single contract between an insurer and an association or an employer or other person; ("assurance-groupe")

"harassment" means engaging in a course of vexatious comment or conduct that is known or ought reasonably to be known to be unwelcome; ("harcèlement")

"marital status" means the status of being married, single, widowed, divorced or separated and includes the status of living with a person in a conjugal relationship outside marriage; ("état matrimonial")

"record of offences" means a conviction for,

(a) an offence in respect of which a pardon has been granted under the *Criminal Records Act* (Canada) and has not been revoked, or

(b) an offence in respect of any provincial enactment; ("casier judiciaire")

"services" does not include a levy, fee, tax or periodic payment imposed by law; ("services")

"spouse" means the person to whom a person is married or with whom the person is living in a conjugal relationship outside marriage. ("conjoint") R.S.O. 1990, c. H.19, s. 10 (1); 1993, c. 27, Sched.; 1997, c. 16, s. 8; 1999, c. 6, s. 28 (8); 2001, c. 13, s. 19; 2001, c. 32, s. 27 (2, 3); 2005, c. 5, s. 32 (8-10); 2005, c. 29, s. 1 (1).

Pregnancy

(2) The right to equal treatment without discrimination because of sex includes the right to equal treatment without discrimination because a woman is or may become pregnant. R.S.O. 1990, c. H.19, s. 10 (2).

Past and presumed disabilities

(3) The right to equal treatment without discrimination because of disability includes the right to equal treatment without discrimination because a person has or has had a disability or is believed to have or to have had a disability. 2001, c. 32, s. 27 (4).

Constructive discrimination

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. R.S.O. 1990, c. H.19, s. 11 (1).

Idem

(2) The Tribunal or a court shall not find that a requirement, qualification or factor is reasonable and *bona fide* in the circumstances unless it is satisfied that the needs of the group of which the person is a member cannot be accommodated without undue hardship on the person responsible for accommodating those needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any. R.S.O. 1990, c. H.19, s. 11 (2); 1994, c. 27, s. 65 (1); 2002, c. 18, Sched. C, s. 2 (1); 2009, c. 33, Sched. 2, s. 35 (1).

Idem

(3) The Tribunal or a court shall consider any standards prescribed by the regulations for assessing what is undue hardship. R.S.O. 1990, c. H.19, s. 11 (3); 1994, c. 27, s. 65 (2); 2002, c. 18, Sched. C, s. 2 (2); 2009, c. 33, Sched. 2, s. 35 (2).

Discrimination because of association

12 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. R.S.O. 1990, c. H.19, s. 12.

Announced intention to discriminate

13 (1) A right under Part I is infringed by a person who publishes or displays before the public or causes the publication or display before the public of any notice, sign, symbol, emblem, or other similar representation that indicates the intention of the person to infringe a right under Part I or that is intended by the person to incite the infringement of a right under Part I. R.S.O. 1990, c. H.19, s. 13 (1).

Opinion

(2) Subsection (1) shall not interfere with freedom of expression of opinion. R.S.O. 1990, c. H.19, s. 13 (2).

Special programs

14 (1) A right under Part I is not infringed by the implementation of a special program designed to relieve hardship or economic disadvantage or to assist disadvantaged persons or groups to achieve or attempt to achieve equal opportunity or that is likely to contribute to the elimination of the infringement of rights under Part I. R.S.O. 1990, c. H.19, s. 14 (1).

Application to Commission

(2) A person may apply to the Commission for a designation of a program as a special program for the purposes of subsection (1). 2006, c. 30, s. 1.

Designation by Commission

(3) Upon receipt of an application, the Commission may,

(a) designate the program as a special program if, in its opinion, the program meets the requirements of subsection (1); or

(b) designate the program as a special program on the condition that the program make such modifications as are specified in the designation in order to meet the requirements of subsection (1). 2006, c. 30, s. 1.

Inquiries initiated by Commission

(4) The Commission may, on its own initiative, inquire into one or more programs to determine whether the programs are special programs for the purposes of subsection (1). 2006, c. 30, s. 1.

End of inquiry

(5) At the conclusion of an inquiry under subsection (4), the Commission may designate as a special program any of the programs under inquiry if, in its opinion, the programs meet the requirements of subsection (1). 2006, c. 30, s. 1.

Expiry of designation

(6) A designation under subsection (3) or (5) expires five years after the day it is issued or at such earlier time as may be specified by the Commission. 2006, c. 30, s. 1.

Renewal of designation

(7) If an application for renewal of a designation of a program as a special program is made to the Commission before its expiry under subsection (6), the Commission may,

(a) renew the designation if, in its opinion, the program continues to meet the requirements of subsection (1); or

(b) renew the designation on the condition that the program make such modifications as are specified in the designation in order to meet the requirements of subsection (1). 2006, c. 30, s. 1.

Effect of designation, etc.

(8) In a proceeding,

(a) evidence that a program has been designated as a special program under this section is proof, in the absence of evidence to the contrary, that the program is a special program for the purposes of subsection (1); and

(b) evidence that the Commission has considered and refused to designate a program as a special program under this section is proof, in the absence of evidence to the contrary, that the program is not a special program for the purposes of subsection (1). 2006, c. 30, s. 1.

Crown programs

(9) Subsections (2) to (8) do not apply to a program implemented by the Crown or an agency of the Crown. 2006, c. 30, s. 1.

Tribunal finding

(10) For the purposes of a proceeding before the Tribunal, the Tribunal may make a finding that a program meets the requirements of a special program under subsection (1), even though the program has not been designated as a special program by the Commission under this section, subject to clause (8) (b). 2006, c. 30, s. 1.

14.1 Repealed: 1995, c. 4, s. 3 (1).

Age sixty-five or over

15 A right under Part I to non-discrimination because of age is not infringed where an age of sixty-five years or over is a requirement, qualification or consideration for preferential treatment. R.S.O. 1990, c. H.19, s. 15.

Canadian Citizenship

16 (1) A right under Part I to non-discrimination because of citizenship is not infringed where Canadian citizenship is a requirement, qualification or consideration imposed or authorized by law. R.S.O. 1990, c. H.19, s. 16 (1).

Idem

(2) A right under Part I to non-discrimination because of citizenship is not infringed where Canadian citizenship or lawful admission to Canada for permanent residence is a requirement, qualification or consideration adopted for the purpose of fostering and developing participation in cultural, educational, trade union or athletic activities by Canadian citizens or persons lawfully admitted to Canada for permanent residence. R.S.O. 1990, c. H.19, s. 16 (2).

Idem

(3) A right under Part I to non-discrimination because of citizenship is not infringed where Canadian citizenship or domicile in Canada with the intention to obtain Canadian citizenship is a requirement, qualification or consideration adopted by an organization or enterprise for the holder of chief or senior executive positions. R.S.O. 1990, c. H.19, s. 16 (3).

Disability

17 (1) A right of a person under this Act is not infringed for the reason only that the person is incapable of performing or fulfilling the essential duties or requirements attending the exercise of the right because of disability. R.S.O. 1990, c. H.19, s. 17 (1); 2001, c. 32, s. 27 (5).

Accommodation

(2) No tribunal or court shall find a person incapable unless it is satisfied that the needs of the person cannot be accommodated without undue hardship on the person responsible for accommodating those needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any. R.S.O. 1990, c. H.19, s. 17 (2); 1994, c. 27, s. 65 (2); 2002, c. 18, Sched. C, s. 3 (1); 2006, c. 30, s. 2 (1).

Determining if undue hardship

(3) In determining for the purposes of subsection (2) whether there would be undue hardship, a tribunal or court shall consider any standards prescribed by the regulations. 2006, c. 30, s. 2 (2).

(4) Repealed: 2006, c. 30, s. 2 (3).

Special interest organizations

18 The rights under Part I to equal treatment with respect to services and facilities, with or without accommodation, are not infringed where membership or participation in a religious, philanthropic, educational, fraternal or social institution or organization that is primarily engaged in serving the interests of persons identified by a prohibited ground of discrimination is restricted to persons who are similarly identified. R.S.O. 1990, c. H.19, s. 18; 2006, c. 19, Sched. B, s. 10.

Solemnization of marriage by religious officials

18.1 (1) The rights under Part I to equal treatment with respect to services and facilities are not infringed where a person registered under section 20 of the *Marriage Act* refuses to solemnize a marriage, to allow a sacred place to be used for solemnizing a marriage or for an event related to the solemnization of a marriage, or to otherwise assist in the solemnization of a marriage, if to solemnize the marriage, allow the sacred place to be used or otherwise assist would be contrary to,

(a) the person's religious beliefs; or

(b) the doctrines, rites, usages or customs of the religious body to which the person belongs. 2005, c. 5, s. 32 (11).

Same

(2) Nothing in subsection (1) limits the application of section 18. 2005, c. 5, s. 32 (11).

Definition

(3) In this section,

"sacred place" includes a place of worship and any ancillary or accessory facilities. 2005, c. 5, s. 32 (11).

Separate school rights preserved

19 (1) This Act shall not be construed to adversely affect any right or privilege respecting separate schools enjoyed by separate school boards or their supporters under the *Constitution Act, 1867* and the *Education Act*. R.S.O. 1990, c. H.19, s. 19 (1).

Duties of teachers

(2) This Act does not apply to affect the application of the *Education Act* with respect to the duties of teachers. R.S.O. 1990, c. H.19, s. 19 (2).

Restriction of facilities by sex

20 (1) The right under section 1 to equal treatment with respect to services and facilities without discrimination because of sex is not infringed where the use of the services or facilities is restricted to persons of the same sex on the ground of public decency. R.S.O. 1990, c. H.19, s. 20 (1).

Minimum drinking age

(2) The right under section 1 to equal treatment with respect to services, goods and facilities without discrimination because of age is not infringed by the provisions of the *Liquor Licence Act* and the regulations under it relating to providing for and enforcing a minimum drinking age of nineteen years. R.S.O. 1990, c. H.19, s. 20 (2).

Note: On a day to be named by proclamation of the Lieutenant Governor, subsection 20 (2) of the Code is amended by striking out "*Liquor Licence Act*" and substituting "*Liquor Licence and Control Act, 2019*". (See: 2019, c. 15, Sched. 1, s. 95)

Recreational clubs

(3) The right under section 1 to equal treatment with respect to services and facilities is not infringed where a recreational club restricts or qualifies access to its services or facilities or gives preferences with respect to membership dues and other fees because of age, sex, marital status or family status. R.S.O. 1990, c. H.19, s. 20 (3); 1999, c. 6, s. 28 (9); 2005, c. 5, s. 32 (12).

Young persons and certain products

(4) The right under section 1 to equal treatment with respect to goods without discrimination because of age is not infringed by the provisions of the *Smoke-Free Ontario Act, 2017* and the regulations under it relating to selling or supplying anything to which that Act applies to persons who are, or who appear to be, under the age of 19 years or 25 years, as the case may be. 2017, c. 26, Sched. 3, s. 26.

(5) Repealed: 2017, c. 26, Sched. 3, s. 26.

Residential accommodation
Shared accommodation

21 (1) The right under section 2 to equal treatment with respect to the occupancy of residential accommodation without discrimination is not infringed by discrimination where the residential accommodation is in a dwelling in which the owner or his or her family reside if the occupant or occupants of the residential accommodation are required to share a bathroom or kitchen facility with the owner or family of the owner. R.S.O. 1990, c. H.19, s. 21 (1).

Restrictions on accommodation, sex

(2) The right under section 2 to equal treatment with respect to the occupancy of residential accommodation without discrimination because of sex is not infringed by discrimination on that ground where the occupancy of all the residential accommodation in the building, other than the accommodation, if any, of the owner or family of the owner, is restricted to persons who are of the same sex. R.S.O. 1990, c. H.19, s. 21 (2).

Prescribing business practices

(3) The right under section 2 to equal treatment with respect to the occupancy of residential accommodation without discrimination is not infringed if a landlord uses in the manner prescribed under this Act income information, credit checks, credit references, rental history, guarantees or other similar business practices which are prescribed in the regulations made under this Act in selecting prospective tenants. 1997, c. 24, s. 212 (1).

Restrictions for insurance contracts, etc.

22 The right under sections 1 and 3 to equal treatment with respect to services and to contract on equal terms, without discrimination because of age, sex, marital status, family status or disability, is not infringed where a contract of automobile, life, accident or sickness or disability insurance or a contract of group insurance between an insurer and an association or person other than an employer, or a life annuity, differentiates or makes a distinction, exclusion or preference on reasonable and *bona fide* grounds because of age, sex, marital status, family status or disability. R.S.O. 1990, c. H.19, s. 22; 1999, c. 6, s. 28 (10); 2001, c. 32, s. 27 (5); 2005, c. 5, s. 32 (13).

Employment

23 (1) The right under section 5 to equal treatment with respect to employment is infringed where an invitation to apply for employment or an advertisement in connection with employment is published or displayed that directly or indirectly classifies or indicates qualifications by a prohibited ground of discrimination. R.S.O. 1990, c. H.19, s. 23 (1).

Application for employment

(2) The right under section 5 to equal treatment with respect to employment is infringed where a form of application for employment is used or a written or oral inquiry is made of an applicant that directly or indirectly classifies or indicates qualifications by a prohibited ground of discrimination. R.S.O. 1990, c. H.19, s. 23 (2).

Questions at interview

(3) Nothing in subsection (2) precludes the asking of questions at a personal employment interview concerning a prohibited ground of discrimination where discrimination on such ground is permitted under this Act. R.S.O. 1990, c. H.19, s. 23 (3).

Employment agencies

(4) The right under section 5 to equal treatment with respect to employment is infringed where an employment agency discriminates against a person because of a prohibited ground of discrimination in receiving, classifying, disposing of or otherwise acting upon applications for its services or in referring an applicant or applicants to an employer or agent of an employer. R.S.O. 1990, c. H.19, s. 23 (4).

Special employment

24 (1) The right under section 5 to equal treatment with respect to employment is not infringed where,

(a) a religious, philanthropic, educational, fraternal or social institution or organization that is primarily engaged in serving the interests of persons identified by their race, ancestry, place of origin, colour, ethnic origin, creed, sex, age, marital status or disability employs only, or gives preference in employment to, persons similarly identified if the qualification is a reasonable and *bona fide* qualification because of the nature of the employment;

(b) the discrimination in employment is for reasons of age, sex, record of offences or marital status if the age, sex, record of offences or marital status of the applicant is a reasonable and *bona fide* qualification because of the nature of the employment;

(c) an individual person refuses to employ another for reasons of any prohibited ground of discrimination in section 5, where the primary duty of the employment is attending to the medical or personal needs of the person or of an ill child or an aged, infirm or ill spouse or other relative of the person;

(d) an employer grants or withholds employment or advancement in employment to a person who is the spouse, child or parent of the employer or an employee;

(e) a judge or master is required to retire or cease to continue in office on reaching a specified age under the *Courts of Justice Act*;

(f) a case management master is required to retire on reaching a specified age under the *Courts of Justice Act*;

(g) the term of reappointment of a case management master expires on the case management master reaching a specified age under the *Courts of Justice Act*; or

(h) a justice of the peace is required to retire on reaching a specified age under the *Justices of the Peace Act*. R.S.O. 1990, c. H.19, s. 24 (1); 1999, c. 6, s. 28 (11); 2001, c. 32, s. 27 (5); 2005, c. 5, s. 32 (14); 2005, c. 29, s. 1 (2); 2016, c. 23, s. 54.

Reasonable accommodation

(2) No tribunal or court shall find that a qualification under clause (1) (b) is reasonable and *bona fide* unless it is satisfied that the circumstances of the person cannot be accommodated without undue hardship on the person responsible for accommodating those circumstances considering the cost, outside sources of funding, if any, and health and safety requirements, if any. R.S.O. 1990, c. H.19, s. 24 (2); 1994, c. 27, s. 65 (4); 2002, c. 18, Sched. C, s. 4 (1); 2006, c. 30, s. 3 (1).

Determining if undue hardship

(3) In determining for the purposes of subsection (2) whether there would be undue hardship, a tribunal or court shall consider any standards prescribed by the regulations. 2006, c. 30, s. 3 (2).

Same

(4) Clauses 24 (1) (e), (f), (g) and (h) shall not be interpreted to suggest that a judge, master, case management master or justice of the peace is an employee for the purposes of this Act or any other Act or law. 2005, c. 29, s. 1 (3).

24.1 Repealed: 1995, c. 4, s. 3 (2).

Employee benefit and pension plans

25 (1) The right under section 5 to equal treatment with respect to employment is infringed where employment is denied or made conditional because a term or condition of employment requires enrolment in an employee benefit, pension or superannuation plan or fund or a contract of group insurance between an insurer and an employer, that makes a distinction, preference or exclusion on a prohibited ground of discrimination. R.S.O. 1990, c. H.19, s. 25 (1).

Same

(2) The right under section 5 to equal treatment with respect to employment without discrimination because of sex, marital status or family status is not infringed by an employee superannuation or pension plan or fund or a contract of group insurance between an insurer and an employer that complies with the *Employment Standards Act, 2000* and the regulations thereunder. R.S.O. 1990, c. H.19, s. 25 (2); 1999, c. 6, s. 28 (12); 2005, c. 5, s. 32 (15); 2005, c. 29, s. 1 (4).

Same

(2.1) The right under section 5 to equal treatment with respect to employment without discrimination because of age is not infringed by an employee benefit, pension, superannuation or group insurance plan or fund that complies with the *Employment Standards Act, 2000* and the regulations thereunder. 2005, c. 29, s. 1 (5).

Same

(2.2) Subsection (2.1) applies whether or not a plan or fund is the subject of a contract of insurance between an insurer and an employer. 2005, c. 29, s. 1 (5).

Same

(2.3) For greater certainty, subsections (2) and (2.1) apply whether or not "age", "sex" or "marital status" in the *Employment Standards Act, 2000* or the regulations under it have the same meaning as those terms have in this Act. 2005, c. 29, s. 1 (5).

Same

(3) The right under section 5 to equal treatment with respect to employment without discrimination because of disability is not infringed,

(a) where a reasonable and *bona fide* distinction, exclusion or preference is made in an employee disability or life insurance plan or benefit because of a pre-existing disability that substantially increases the risk;

(b) where a reasonable and *bona fide* distinction, exclusion or preference is made on the ground of a pre-existing disability in respect of an employee-pay-all or participant-pay-all benefit in an employee benefit, pension or superannuation plan or fund or a contract of group insurance between an insurer and an employer or in respect of a plan, fund or policy that is offered by an employer to employees if they are fewer than twenty-five in number. R.S.O. 1990, c. H.19, s. 25 (3); 2001, c. 32, s. 27 (5).

Compensation

(4) An employer shall pay to an employee who is excluded because of a disability from an employee benefit, pension or superannuation plan or fund or a contract of group insurance between an insurer and the employer compensation equivalent to the contribution that the employer would make thereto on behalf of an employee who does not have a disability. R.S.O. 1990, c. H.19, s. 25 (4); 2001, c. 32, s. 27 (5).

Discrimination in employment under government contracts

26 (1) It shall be deemed to be a condition of every contract entered into by or on behalf of the Crown or any agency thereof and of every subcontract entered into in the performance thereof

that no right under section 5 will be infringed in the course of performing the contract. R.S.O. 1990, c. H.19, s. 26 (1).

Idem: government grants and loans

(2) It shall be deemed to be a condition of every grant, contribution, loan or guarantee made by or on behalf of the Crown or any agency thereof that no right under section 5 will be infringed in the course of carrying out the purposes for which the grant, contribution, loan or guarantee was made. R.S.O. 1990, c. H.19, s. 26 (2).

Sanction

(3) Where an infringement of a right under section 5 is found by the Tribunal upon a complaint and constitutes a breach of a condition under this section, the breach of condition is sufficient grounds for cancellation of the contract, grant, contribution, loan or guarantee and refusal to enter into any further contract with or make any further grant, contribution, loan or guarantee to the same person. R.S.O. 1990, c. H.19, s. 26 (3); 2002, c. 18, Sched. C, s. 5.

The Commission

27 (1) The Ontario Human Rights Commission is continued under the name Ontario Human Rights Commission in English and Commission ontarienne des droits de la personne in French. 2006, c. 30, s. 4.

Composition

(2) The Commission shall be composed of such persons as are appointed by the Lieutenant Governor in Council. 2006, c. 30, s. 4.

Appointment

(3) Every person appointed to the Commission shall have knowledge, experience or training with respect to human rights law and issues. 2006, c. 30, s. 4.

Criteria

(4) In the appointment of persons to the Commission under subsection (2), the importance of reflecting, in the composition of the Commission as a whole, the diversity of Ontario's population shall be recognized. 2006, c. 30, s. 4.

Functions of Commission

29 The functions of the Commission are to promote and advance respect for human rights in Ontario, to protect human rights in Ontario and, recognizing that it is in the public interest to do so and that it is the Commission's duty to protect the public interest, to identify and promote the elimination of discriminatory practices and, more specifically,

(a) to forward the policy that the dignity and worth of every person be recognized and that equal rights and opportunities be provided without discrimination that is contrary to law;

(b) to develop and conduct programs of public information and education to,

(i) promote awareness and understanding of, respect for and compliance with this Act, and

(ii) prevent and eliminate discriminatory practices that infringe rights under Part I;

(c) to undertake, direct and encourage research into discriminatory practices and to make recommendations designed to prevent and eliminate such discriminatory practices;

(d) to examine and review any statute or regulation, and any program or policy made by or under a statute, and make recommendations on any provision, program or policy that in its opinion is inconsistent with the intent of this Act;

(e) to initiate reviews and inquiries into incidents of tension or conflict, or conditions that lead or may lead to incidents of tension or conflict, in a community, institution, industry or sector of the economy, and to make recommendations, and encourage and co-ordinate plans, programs and activities, to reduce or prevent such incidents or sources of tension or conflict;

(f) to promote, assist and encourage public, municipal or private agencies, organizations, groups or persons to engage in programs to alleviate tensions and conflicts based upon identification by a prohibited ground of discrimination;

(g) to designate programs as special programs in accordance with section 14;

(h) to approve policies under section 30;

(i) to make applications to the Tribunal under section 35;

(j) to report to the people of Ontario on the state of human rights in Ontario and on its affairs;

(k) to perform the functions assigned to the Commission under this or any other Act. 2006, c. 30, s. 4.

Commission policies

30 The Commission may approve policies prepared and published by the Commission to provide guidance in the application of Parts I and II. 2006, c. 30, s. 4.

Inquiries

31 (1) The Commission may conduct an inquiry under this section for the purpose of carrying out its functions under this Act if the Commission believes it is in the public interest to do so. 2006, c. 30, s. 4.

Conduct of inquiry

(2) An inquiry may be conducted under this section by any person who is appointed by the Commission to carry out inquiries under this section. 2006, c. 30, s. 4.

Production of certificate

(3) A person conducting an inquiry under this section shall produce proof of their appointment upon request. 2006, c. 30, s. 4.

Entry

(4) A person conducting an inquiry under this section may, without warrant, enter any lands or any building, structure or premises where the person has reason to believe there may be documents, things or information relevant to the inquiry. 2006, c. 30, s. 4.

Time of entry

(5) The power to enter a place under subsection (4) may be exercised only during the place's regular business hours or, if it does not have regular business hours, during daylight hours. 2006, c. 30, s. 4.

Dwellings

(6) A person conducting an inquiry under this section shall not enter into a place or part of a place that is a dwelling without the consent of the occupant. 2006, c. 30, s. 4.

Powers on inquiry

(7) A person conducting an inquiry may,

(a) request the production for inspection and examination of documents or things that are or may be relevant to the inquiry;

(b) upon giving a receipt for it, remove from a place documents produced in response to a request under clause (a) for the purpose of making copies or extracts;

(c) question a person on matters that are or may be relevant to the inquiry, subject to the person's right to have counsel or a personal representative present during such questioning and exclude from the questioning any person who may be adverse in interest to the inquiry;

(d) use any data storage, processing or retrieval device or system used in carrying on business in the place in order to produce a document in readable form;

(e) take measurements or record by any means the physical dimensions of a place;

(f) take photographs, video recordings or other visual or audio recordings of the interior or exterior of a place; and

(g) require that a place or part thereof not be disturbed for a reasonable period of time for the purposes of carrying out an examination, inquiry or test. 2006, c. 30, s. 4.

Written demand

(8) A demand that a document or thing be produced must be in writing and must include a statement of the nature of the document or thing required. 2006, c. 30, s. 4.

Assistance

(9) A person conducting an inquiry may be accompanied by any person who has special, expert or professional knowledge and who may be of assistance in carrying out the inquiry. 2006, c. 30, s. 4.

Use of force prohibited

(10) A person conducting an inquiry shall not use force to enter and search premises under this section. 2006, c. 30, s. 4.

Obligation to produce and assist

(11) A person who is requested to produce a document or thing under clause (7) (a) shall produce it and shall, on request by the person conducting the inquiry, provide any assistance that is reasonably necessary, including assistance in using any data storage, processing or retrieval device or system, to produce a document in readable form. 2006, c. 30, s. 4.

Return of removed things

(12) A person conducting an inquiry who removes any document or thing from a place under clause (7) (b) shall,

(a) make it available to the person from whom it was removed, on request, at a time and place convenient for both that person and the person conducting the inquiry; and

(b) return it to the person from whom it was removed within a reasonable time. 2006, c. 30, s. 4.

Admissibility of copies

(13) A copy of a document certified by a person conducting an inquiry to be a true copy of the original is admissible in evidence to the same extent as the original and has the same evidentiary value. 2006, c. 30, s. 4.

Obstruction

(14) No person shall obstruct or interfere with a person conducting an inquiry under this section. 2006, c. 30, s. 4.

PART IV - HUMAN RIGHTS TRIBUNAL OF ONTARIO

Tribunal

32 (1) The Tribunal known as the Human Rights Tribunal of Ontario in English and Tribunal des droits de la personne de l'Ontario in French is continued. 2006, c. 30, s. 5.

Composition

(2) The Tribunal shall be composed of such members as are appointed by the Lieutenant Governor in Council in accordance with the selection process described in subsection (3). 2006, c. 30, s. 5.

Selection process

(3) The selection process for the appointment of members of the Tribunal shall be a competitive process and the criteria to be applied in assessing candidates shall include the following:

1. Experience, knowledge or training with respect to human rights law and issues.
2. Aptitude for impartial adjudication.
3. Aptitude for applying the alternative adjudicative practices and procedures that may be set out in the Tribunal rules. 2006, c. 30, s. 5.

Remuneration

(4) The members of the Tribunal shall be paid such remuneration and allowance for expenses as are fixed by the Lieutenant Governor in Council. 2006, c. 30, s. 5.

Term of office

(5) A member of the Tribunal shall be appointed for such term as may be specified by the Lieutenant Governor in Council. 2006, c. 30, s. 5.

Chair, vice-chair

(6) The Lieutenant Governor in Council shall appoint a chair and may appoint one or more vice-chairs of the Tribunal from among the members of the Tribunal. 2006, c. 30, s. 5.

Alternate chair

(7) The Lieutenant Governor in Council shall designate one of the vice-chairs to be the alternate chair. 2006, c. 30, s. 5.

Same

(8) If the chair is unable to act, the alternate chair shall perform the duties of the chair and, for this purpose, has all the powers of the chair. 2006, c. 30, s. 5.

Employees

(9) The Tribunal may appoint such employees as it considers necessary for the proper conduct of its affairs and the employees shall be appointed under Part III of the *Public Service of Ontario Act, 2006*. 2006, c. 30, s. 5; 2006, c. 35, Sched. C, s. 132 (6).

Evidence obtained in course of proceeding

(10) A member or employee of the Tribunal shall not be required to give testimony in a civil suit or any proceeding as to information obtained in the course of a proceeding before the Tribunal. 2006, c. 30, s. 5.

Same

(11) Despite subsection (10), an employee of the Tribunal may be required to give testimony in a proceeding before the Tribunal in the circumstances prescribed by the Tribunal rules. 2006, c. 30, s. 5.

Panels

33 (1) The chair of the Tribunal may appoint panels composed of one or more members of the Tribunal to exercise and perform the powers and duties of the Tribunal. 2006, c. 30, s. 5.

Person designated to preside over panel

(2) If a panel of the Tribunal holds a hearing, the chair of the Tribunal shall designate one member of the panel to preside over the hearing. 2006, c. 30, s. 5.

Reassignment of panel

(3) If a panel of the Tribunal is unable for any reason to exercise or perform the powers or duties of the Tribunal, the chair of the Tribunal may assign another panel in its place. 2006, c. 30, s. 5.

Application by person

34 (1) If a person believes that any of his or her rights under Part I have been infringed, the person may apply to the Tribunal for an order under section 45.2,

(a) within one year after the incident to which the application relates; or

(b) if there was a series of incidents, within one year after the last incident in the series. 2006, c. 30, s. 5.

Late applications

(2) A person may apply under subsection (1) after the expiry of the time limit under that subsection if the Tribunal is satisfied that the delay was incurred in good faith and no substantial prejudice will result to any person affected by the delay. 2006, c. 30, s. 5.

Form

(3) An application under subsection (1) shall be in a form approved by the Tribunal. 2006, c. 30, s. 5.

Two or more persons

(4) Two or more persons who are each entitled to make an application under subsection (1) may file the applications jointly, subject to any provision in the Tribunal rules that authorizes the Tribunal to direct that one or more of the applications be considered in a separate proceeding. 2006, c. 30, s. 5.

Application on behalf of another

(5) A person or organization, other than the Commission, may apply on behalf of another person to the Tribunal for an order under section 45.2 if the other person,

(a) would have been entitled to bring an application under subsection (1); and

(b) consents to the application. 2006, c. 30, s. 5.

Participation in proceedings

(6) If a person or organization makes an application on behalf of another person, the person or organization may participate in the proceeding in accordance with the Tribunal rules. 2006, c. 30, s. 5.

Consent form

(7) A consent under clause (5) (b) shall be in a form specified in the Tribunal rules. 2006, c. 30, s. 5.

Time of application

(8) An application under subsection (5) shall be made within the time period required for making an application under subsection (1). 2006, c. 30, s. 5.

Application

(9) Subsections (2) and (3) apply to an application made under subsection (5). 2006, c. 30, s. 5.

Withdrawal of application

(10) An application under subsection (5) may be withdrawn by the person on behalf of whom the application is made in accordance with the Tribunal rules. 2006, c. 30, s. 5.

Where application barred

(11) A person who believes that one of his or her rights under Part I has been infringed may not make an application under subsection (1) with respect to that right if,

(a) a civil proceeding has been commenced in a court in which the person is seeking an order under section 46.1 with respect to the alleged infringement and the proceeding has not been finally determined or withdrawn; or

(b) a court has finally determined the issue of whether the right has been infringed or the matter has been settled. 2006, c. 30, s. 5.

Final determination

(12) For the purpose of subsection (11), a proceeding or issue has not been finally determined if a right of appeal exists and the time for appealing has not expired. 2006, c. 30, s. 5.

Application by Commission

35 (1) The Commission may apply to the Tribunal for an order under section 45.3 if the Commission is of the opinion that,

(a) it is in the public interest to make an application; and

(b) an order under section 45.3 could provide an appropriate remedy. 2006, c. 30, s. 5.

Form

(2) An application under subsection (1) shall be in a form approved by the Tribunal. 2006, c. 30, s. 5.

Effect of application

(3) An application made by the Commission does not affect the right of a person to make an application under section 34 in respect of the same matter. 2006, c. 30, s. 5.

Applications dealt with together

(4) If a person or organization makes an application under section 34 and the Commission makes an application under this section in respect of the same matter, the two applications shall be dealt with together in the same proceeding unless the Tribunal determines otherwise. 2006, c. 30, s. 5.

Parties

36 The parties to an application under section 34 or 35 are the following:

1. In the case of an application under subsection 34 (1), the person who made the application.

2. In the case of an application under subsection 34 (5), the person on behalf of whom the application is made.

3. In the case of an application under section 35, the Commission.

4. Any person against whom an order is sought in the application.

5. Any other person or the Commission, if they are added as a party by the Tribunal. 2006, c. 30, s. 5.

Intervention by Commission

37 (1) The Commission may intervene in an application under section 34 on such terms as the Tribunal may determine having regard to the role and mandate of the Commission under this Act. 2006, c. 30, s. 5.

Intervention as a party

(2) The Commission may intervene as a party to an application under section 34 if the person or organization who made the application consents to the intervention as a party. 2006, c. 30, s. 5.

Disclosure of information to Commission

38 Despite anything in the *Freedom of Information and Protection of Privacy Act*, at the request of the Commission, the Tribunal shall disclose to the Commission copies of applications and responses filed with the Tribunal and may disclose to the Commission other documents in its custody or in its control. 2006, c. 30, s. 5.

Powers of Tribunal

39 The Tribunal has the jurisdiction to exercise the powers conferred on it by or under this Act and to determine all questions of fact or law that arise in any application before it. 2006, c. 30, s. 5.

Disposition of applications

40 The Tribunal shall dispose of applications made under this Part by adopting the procedures and practices provided for in its rules or otherwise available to the Tribunal which, in its opinion, offer the best opportunity for a fair, just and expeditious resolution of the merits of the applications. 2006, c. 30, s. 5.

Interpretation of Part and rules
41 This Part and the Tribunal rules shall be liberally construed to permit the Tribunal to adopt practices and procedures, including alternatives to traditional adjudicative or adversarial procedures that, in the opinion of the Tribunal, will facilitate fair, just and expeditious resolutions of the merits of the matters before it. 2006, c. 30, s. 5.

41.1 Repealed: 1995, c. 4, s. 3 (3).

Statutory Powers Procedure Act

42 (1) The provisions of the *Statutory Powers Procedure Act* apply to a proceeding before the Tribunal unless they conflict with a provision of this Act, the regulations or the Tribunal rules. 2006, c. 30, s. 5.

Conflict

(2) Despite section 32 of the *Statutory Powers Procedure Act*, this Act, the regulations and the Tribunal rules prevail over the provisions of that Act with which they conflict. 2006, c. 30, s. 5.

Tribunal rules

43 (1) The Tribunal may make rules governing the practice and procedure before it. 2006, c. 30, s. 5.

Required practices and procedures

(2) The rules shall ensure that the following requirements are met with respect to any proceeding before the Tribunal:

1. An application that is within the jurisdiction of the Tribunal shall not be finally disposed of without affording the parties an opportunity to make oral submissions in accordance with the rules.

2. An application may not be finally disposed of without written reasons. 2006, c. 30, s. 5.

Same

(3) Without limiting the generality of subsection (1), the Tribunal rules may,

(a) provide for and require the use of hearings or of practices and procedures that are provided for under the *Statutory Powers Procedure Act* or that are alternatives to traditional adjudicative or adversarial procedures;

(b) authorize the Tribunal to,

(i) define or narrow the issues required to dispose of an application and limit the evidence and submissions of the parties on such issues, and

(ii) determine the order in which the issues and evidence in a proceeding will be presented;

(c) authorize the Tribunal to conduct examinations in chief or cross-examinations of a witness;

(d) prescribe the stages of its processes at which preliminary, procedural or interlocutory matters will be determined;

(e) authorize the Tribunal to make or cause to be made such examinations of records and such other inquiries as it considers necessary in the circumstances;

(f) authorize the Tribunal to require a party to a proceeding or another person to,

(i) produce any document, information or thing and provide such assistance as is reasonably necessary, including using any data storage, processing or retrieval device or system, to produce the information in any form,

(ii) provide a statement or oral or affidavit evidence, or

(iii) in the case of a party to the proceeding, adduce evidence or produce witnesses who are reasonably within the party's control; and

(g) govern any matter prescribed by the regulations. 2006, c. 30, s. 5.

General or particular

(4) The rules may be of general or particular application. 2006, c. 30, s. 5.

Consistency

(5) The rules shall be consistent with this Part. 2006, c. 30, s. 5.

Not a regulation

(6) The rules made under this section are not regulations for the purposes of Part III of the *Legislation Act, 2006*. 2006, c. 30, ss. 5, 11.

Public consultations

(7) The Tribunal shall hold public consultations before making a rule under this section. 2006, c. 30, s. 5.

Failure to comply with rules

(8) Failure on the part of the Tribunal to comply with the practices and procedures required by the rules or the exercise of a discretion under the rules by the Tribunal in a particular manner is not a ground for setting aside a decision of the Tribunal on an application for judicial review or any other form of relief, unless the failure or the exercise of a discretion caused a substantial wrong which affected the final disposition of the matter. 2006, c. 30, s. 5.

Adverse inference

(9) The Tribunal may draw an adverse inference from the failure of a party to comply, in whole or in part, with an order of the Tribunal for the party to do anything under a rule made under clause (3) (f). 2006, c. 30, s. 5.

Tribunal inquiry

44 (1) At the request of a party to an application under this Part, the Tribunal may appoint a person to conduct an inquiry under this section if the Tribunal is satisfied that,

(a) an inquiry is required in order to obtain evidence;

(b) the evidence obtained may assist in achieving a fair, just and expeditious resolution of the merits of the application; and

(c) it is appropriate to do so in the circumstances. 2006, c. 30, s. 5.

Production of certificate

(2) A person conducting an inquiry under this section shall produce proof of their appointment upon request. 2006, c. 30, s. 5.

Entry

(3) A person conducting an inquiry under this section may, without warrant, enter any lands or any building, structure or premises where the person has reason to believe there may be evidence relevant to the application. 2006, c. 30, s. 5.

Time of entry

(4) The power to enter a place under subsection (3) may be exercised only during the place's regular business hours or, if it does not have regular business hours, during daylight hours. 2006, c. 30, s. 5.

Dwellings

(5) A person conducting an inquiry shall not enter into a place or part of a place that is a dwelling without the consent of the occupant. 2006, c. 30, s. 5.

Powers on inquiry

(6) A person conducting an inquiry may,

(a) request the production for inspection and examination of documents or things that are or may be relevant to the inquiry;

(b) upon giving a receipt for it, remove from a place documents produced in response to a request under clause (a) for the purpose of making copies or extracts;

(c) question a person on matters that are or may be relevant to the inquiry, subject to the person's right to have counsel or a personal representative present during such questioning and exclude from the questioning any person who may be adverse in interest to the inquiry;

(d) use any data storage, processing or retrieval device or system used in carrying on business in the place in order to produce a document in readable form;

(e) take measurements or record by any means the physical dimensions of a place;

(f) take photographs, video recordings or other visual or audio recordings of the interior or exterior of a place; and

(g) require that a place or part thereof not be disturbed for a reasonable period of time for the purposes of carrying out an examination, inquiry or test. 2006, c. 30, s. 5.

Written demand

(7) A demand that a document or thing be produced must be in writing and must include a statement of the nature of the document or thing required. 2006, c. 30, s. 5.

Assistance

(8) A person conducting an inquiry may be accompanied by any person who has special, expert or professional knowledge and who may be of assistance in carrying out the inquiry. 2006, c. 30, s. 5.

Use of force prohibited

(9) A person conducting an inquiry shall not use force to enter and search premises under this section. 2006, c. 30, s. 5.

Obligation to produce and assist

(10) A person who is requested to produce a document or thing under clause (6) (a) shall produce it and shall, on request by the person conducting the inquiry, provide any assistance that is reasonably necessary, including assistance in using any data storage, processing or retrieval device or system, to produce a document in readable form. 2006, c. 30, s. 5.

Return of removed things

(11) A person conducting an inquiry who removes any document or thing from a place under clause (6) (b) shall,

(a) make it available to the person from whom it was removed, on request, at a time and place convenient for both that person and the person conducting the inquiry; and

(b) return it to the person from whom it was removed within a reasonable time. 2006, c. 30, s. 5.

Admissibility of copies

(12) A copy of a document certified by a person conducting an inquiry to be a true copy of the original is admissible in evidence to the same extent as the original and has the same evidentiary value. 2006, c. 30, s. 5.

Obstruction

(13) No person shall obstruct or interfere with a person conducting an inquiry under this section. 2006, c. 30, s. 5.

Inquiry report

(14) A person conducting an inquiry shall prepare a report and submit it to the Tribunal and the parties to the application that gave rise to the inquiry in accordance with the Tribunal rules. 2006, c. 30, s. 5.

Transfer of inquiry to Commission

(15) The Commission may, at the request of the Tribunal, appoint a person to conduct an inquiry under this section and the person so appointed has all of the powers of a person appointed by the Tribunal under this section and shall report to the Tribunal in accordance with subsection (14). 2006, c. 30, s. 5.

Deferral of application

45 The Tribunal may defer an application in accordance with the Tribunal rules. 2006, c. 30, s. 5.

Dismissal in accordance with rules

45.1 The Tribunal may dismiss an application, in whole or in part, in accordance with its rules if the Tribunal is of the opinion that another proceeding has appropriately dealt with the substance of the application. 2006, c. 30, s. 5.

Orders of Tribunal: applications under s. 34

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. 2006, c. 30, s. 5.

Orders under par. 3 of subs. (1)

(2) For greater certainty, an order under paragraph 3 of subsection (1),

(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. 2006, c. 30, s. 5.

Orders of Tribunal: applications under s. 35

45.3 (1) If, on an application under section 35, the Tribunal determines that any one or more of the parties to the application have infringed a right under Part I, the Tribunal may make 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. 2006, c. 30, s. 5.

Same

(2) For greater certainty, an order under subsection (1) may direct a person to do anything with respect to future practices. 2006, c. 30, s. 5.

Matters referred to Commission

45.4 (1) The Tribunal may refer any matters arising out of a proceeding before it to the Commission if, in the Tribunal's opinion, they are matters of public interest or are otherwise of interest to the Commission. 2006, c. 30, s. 5.

Same

(2) The Commission may, in its discretion, decide whether to deal with a matter referred to it by the Tribunal. 2006, c. 30, s. 5.

Documents published by Commission

45.5 (1) In a proceeding under this Part, the Tribunal may consider policies approved by the Commission under section 30. 2006, c. 30, s. 5.

Same

(2) Despite subsection (1), the Tribunal shall consider a policy approved by the Commission under section 30 in a proceeding under this Part if a party to the proceeding or an intervenor requests that it do so. 2006, c. 30, s. 5.

Stated case to Divisional court

45.6 (1) If the Tribunal makes a final decision or order in a proceeding in which the Commission was a party or an intervenor, and the Commission believes that the decision or order is not consistent with a policy that has been approved by the Commission under section 30, the Commission may apply to the Tribunal to have the Tribunal state a case to the Divisional Court. 2006, c. 30, s. 5.

Same

(2) If the Tribunal determines that the application of the Commission relates to a question of law and that it is appropriate to do so, it may state the case in writing for the opinion of the Divisional Court upon the question of law. 2006, c. 30, s. 5.

Parties

(3) The parties to a stated case under this section are the parties to the proceeding referred to in subsection (1) and, if the Commission was an intervenor in that proceeding, the Commission. 2006, c. 30, s. 5.

Submissions by Tribunal

(4) The Divisional Court may hear submissions from the Tribunal. 2006, c. 30, s. 5.

Powers of Divisional Court

(5) The Divisional Court shall hear and determine the stated case. 2006, c. 30, s. 5.

No stay

(6) Unless otherwise ordered by the Tribunal or the Divisional Court, an application by the Commission under subsection (1) or the stating of a case to the Divisional Court under subsection (2) does not operate as a stay of the final decision or order of the Tribunal. 2006, c. 30, s. 5.

Reconsideration of Tribunal decision

(7) Within 30 days of receipt of the decision of the Divisional Court, any party to the stated case proceeding may apply to the Tribunal for a reconsideration of its original decision or order in accordance with section 45.7. 2006, c. 30, s. 5.

Reconsideration of Tribunal decision

45.7 (1) Any party to a proceeding before the Tribunal may request that the Tribunal reconsider its decision in accordance with the Tribunal rules. 2006, c. 30, s. 5.

Same

(2) Upon request under subsection (1) or on its own motion, the Tribunal may reconsider its decision in accordance with its rules. 2006, c. 30, s. 5.

Decisions final

45.8 Subject to section 45.7 of this Act, section 21.1 of the *Statutory Powers Procedure Act* and the Tribunal rules, a decision of the Tribunal is final and not subject to appeal and shall not be altered or set aside in an application for judicial review or in any other proceeding unless the decision is patently unreasonable. 2006, c. 30, s. 5; 2009, c. 33, Sched. 2, s. 35 (3).

Settlements

45.9 (1) If a settlement of an application made under section 34 or 35 is agreed to in writing and signed by the parties, the settlement is binding on the parties. 2006, c. 30, s. 5.

Consent order

(2) If a settlement of an application made under section 34 or 35 is agreed to in writing and signed by the parties, the Tribunal may, on the joint motion of the parties, make an order requiring compliance with the settlement or any part of the settlement. 2006, c. 30, s. 5.

Application where contravention

(3) If a settlement of an application made under section 34 or 35 is agreed to in writing and signed by the parties, a party who believes that another party has contravened the settlement may make an application to the Tribunal for an order under subsection (8),

(a) within six months after the contravention to which the application relates; or

(b) if there was a series of contraventions, within six months after the last contravention in the series. 2006, c. 30, s. 5.

Late applications

(4) A person may apply under subsection (3) after the expiry of the time limit under that subsection if the Tribunal is satisfied that the delay was incurred in good faith and no substantial prejudice will result to any person affected by the delay. 2006, c. 30, s. 5.

Form of application

(5) An application under subsection (3) shall be in a form approved by the Tribunal. 2006, c. 30, s. 5.

Parties

(6) Subject to the Tribunal rules, the parties to an application under subsection (3) are the following:

1. The parties to the settlement.

2. Any other person or the Commission, if they are added as a party by the Tribunal. 2006, c. 30, s. 5.

Intervention by Commission

(7) Section 37 applies with necessary modifications to an application under subsection (3). 2006, c. 30, s. 5.

Order

(8) If, on an application under subsection (3), the Tribunal determines that a party has contravened the settlement, the Tribunal may make any order that it considers appropriate to remedy the contravention. 2006, c. 30, s. 5.

45.10 Repealed: 2017, c. 34, Sched. 46, s. 20 (1).**Definitions, general**

46 In this Act,

"Commission" means the Ontario Human Rights Commission; ("Commission")

"Minister" means the member of the Executive Council to whom the powers and duties of the Minister under this Act are assigned by the Lieutenant Governor in Council; ("ministre")

"person" in addition to the extended meaning given it by Part VI (Interpretation) of the *Legislation Act, 2006*, includes an employment agency, an employers' organization, an unincorporated association, a trade or occupational association, a trade union, a partnership, a municipality, a board of police commissioners established under the *Police Act*, being chapter 381 of the Revised Statutes of Ontario, 1980, and a police services board established under the *Police Services Act*; ("personne")

Note: On a day to be named by proclamation of the Lieutenant Governor, the definition of "person" in section 46 of the Act is amended by striking out "police services board established under the *Police Services Act*" and substituting "police service board established under the *Community Safety and Policing Act, 2019*". (See: 2019, c. 1, Sched. 4, s. 25)

"regulations" means the regulations made under this Act; ("règlements")

"Tribunal" means the Human Rights Tribunal of Ontario continued under section 32; ("Tribunal")

"Tribunal rules" means the rules governing practice and procedure that are made by the Tribunal under section 43. ("règles du Tribunal") R.S.O. 1990, c. H.19, s. 46; 1994, c. 27, s. 65 (24); 2002, c. 18, Sched. C, s. 7; 2006, c. 21, Sched. F, s. 136 (2); 2006, c. 30, s. 7.

Civil remedy

46.1 (1) If, in a civil proceeding in a court, the court finds that a party to the proceeding has infringed a right under Part I of another party to the proceeding, the court may make either of the following orders, or both:

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. 2006, c. 30, s. 8.

Same

(2) Subsection (1) does not permit a person to commence an action based solely on an infringement of a right under Part I. 2006, c. 30, s. 8.

Penalty

46.2 (1) Every person who contravenes section 9 or subsection 31 (14), 31.1 (8) or 44 (13) or an order of the Tribunal is guilty of an offence and on conviction is liable to a fine of not more than $25,000. 2006, c. 30, s. 8.

Consent to prosecution

(2) No prosecution for an offence under this Act shall be instituted except with the consent in writing of the Attorney General. 2006, c. 30, s. 8.

Acts of officers, etc.

46.3 (1) For the purposes of this Act, except subsection 2 (2), subsection 5 (2), section 7 and subsection 46.2 (1), any act or thing done or omitted to be done in the course of his or her employment by an officer, official, employee or agent of a corporation, trade union, trade or occupational association, unincorporated association or employers' organization shall be deemed to be an act or thing done or omitted to be done by the corporation, trade union, trade or occupational association, unincorporated association or employers' organization. 2006, c. 30, s. 8.

Opinion re authority or acquiescence

(2) At the request of a corporation, trade union, trade or occupational association, unincorporated association or employers' organization, the Tribunal in its decision shall make known whether or not, in its opinion, an act or thing done or omitted to be done by an officer, official, employee or agent was done or omitted to be done with or without the authority or acquiescence of the

corporation, trade union, trade or occupational association, unincorporated association or employers' organization, and the opinion does not affect the application of subsection (1). 2006, c. 30, s. 8.

Act binds Crown

47 (1) This Act binds the Crown and every agency of the Crown. R.S.O. 1990, c. H.19, s. 47 (1).

Act has primacy over other Acts

(2) Where a provision in an Act or regulation purports to require or authorize conduct that is a contravention of Part I, this Act applies and prevails unless the Act or regulation specifically provides that it is to apply despite this Act. R.S.O. 1990, c. H.19, s. 47 (2).

3. ***Public* Sector *Compensation Restraint to Protect Public Services Act, 2010***

INTERPRETATION

Interpretation

1 (1) In this Act,

"Board" means the Public Sector Compensation Restraint Board established by subsection 18 (1); ("Commission")

"compensation" means all forms of payment, benefits and perquisites paid or provided, directly or indirectly, to or for the benefit of a person who performs duties and functions that entitle him or her to be paid, and includes discretionary payments; ("rémunération")

"compensation plan" means the provisions, however established, for the determination and administration of a person's compensation; ("régime de rémunération")

"effective date" means, in relation to an employer, employee or office holder, the date described in section 6; ("date d'effet")

"Minister" means the minister to whom the administration of this Act is assigned under the *Executive Council Act*; ("ministre")

"office holder" means a holder of office who is elected or appointed under the authority of an Act of Ontario; ("titulaire de charge")

"pay range" means a range of rates of pay; ("échelle salariale")

"prescribed" means prescribed by a regulation made under this Act; ("prescrit")

"rate of pay" means the rate of remuneration or, where no such rate exists, any fixed or ascertainable amount of remuneration; ("taux de salaire")

"restraint measure" means a requirement set out in section 7, 8, 9, 10 or 11. ("mesure de restriction") 2010, c. 1, Sched. 24, s. 1 (1).

Deemed employees

(2) For the purposes of this Act, the directors, members and officers of an employer are deemed to be employees of the employer. 2010, c. 1, Sched. 24, s. 1 (2).

Employer of office holders

(3) A reference in this Act to the employer of an office holder is a reference to the employer to which the office holder is elected or appointed, and the use of this terminology is not intended to create a deemed employment relationship between them for the purposes of this or any other Act or any law. 2010, c. 1, Sched. 24, s. 1 (3).

APPLICATION

Members of the Assembly

2 This Act applies to every member of the Assembly. 2010, c. 1, Sched. 24, s. 2.

Public sector employers

3 (1) This Act applies to the following employers:

1. The Crown in right of Ontario, every agency thereof and every authority, board, commission, corporation, office or organization of persons a majority of whose directors, members or officers are appointed or chosen by or under the authority of the Lieutenant Governor in Council or a member of the Executive Council.
2. The Office of the Lieutenant Governor of Ontario, the Office of the Assembly, members of the Assembly, and the offices of persons appointed by order of the Assembly.
3. Every board as defined in the *Education Act*.
4. Every university in Ontario and every college of applied arts and technology and post-secondary institution in Ontario whether or not affiliated with a university, the enrolments of which are counted for purposes of calculating annual operating grants and entitlements.
5. Every hospital referred to in the list of hospitals and their grades and classifications maintained by the Minister of Health and Long-Term Care under the *Public Hospitals Act*.
6. Every board of health under the *Health Protection and Promotion Act*.
7. Hydro One Inc., each of its subsidiaries, Ontario Power Generation Inc. and each of its subsidiaries.

8. Every other authority, board, commission, corporation, office or organization of persons that is prescribed for the purposes of this subsection. 2010, c. 1, Sched. 24, s. 3 (1); 2018, c. 17, Sched. 15, s. 12.

Employers subject to thresholds

(2) This Act applies to every employer that is an authority, board, commission, corporation, office or organization of persons, other than one described in subsection (1) or (3), that meets the following conditions:

1. It received at least $1,000,000 in funding from the Government of Ontario in 2009, as determined for the purposes of the *Public Sector Salary Disclosure Act, 1996*.
2. It does not carry on its activities for the purpose of gain or profit to its members or shareholders. 2010, c. 1, Sched. 24, s. 3 (2).

Exceptions

(3) This Act does not apply to the following employers:

1. Municipalities.
2. Local boards as defined in subsection 1 (1) of the *Municipal Act, 2001*. However, this exclusion does not apply with respect to boards of health.
3. Every authority, board, commission, corporation, office or organization of persons some or all of whose members, directors or officers are appointed or chosen by or under the authority of the council of a municipality, other than one described in subsection (1).
4. Every other authority, board, commission, corporation, office or organization of persons that is prescribed for the purposes of this subsection. 2010, c. 1, Sched. 24, s. 3 (3).

Section Amendments with date in force (d/m/y)

Employees

4 (1) This Act applies to every employee of an employer to whom this Act applies, other than the employees described in subsections (2) and (3). 2010, c. 1, Sched. 24, s. 4 (1).

Exception re collective bargaining

(2) This Act does not apply to an employee who is represented by any of the following organizations which represent two or more employees for the purpose of collectively bargaining, with their employer, terms and conditions of employment relating to compensation:

1. A trade union certified or voluntarily recognized under the *Labour Relations Act, 1995*.

2. An organization that represents employees under the *Crown Employees Collective Bargaining Act, 1993*.

3. An organization designated under the *School Boards Collective Bargaining Act, 2014* as the bargaining agent for a teachers' bargaining unit.

4. Repealed: 2014, c. 5, s. 52 (2).

5. An organization that represents employees under the *Colleges Collective Bargaining Act, 2008.*

6. An association recognized under the *Police Services Act*.

Note: On a day to be named by proclamation of the Lieutenant Governor, paragraph 6 of subsection 4 (2) of the Act is repealed and the following substituted: (See: 2019, c. 1, Sched. 4, s. 49)

6. A police association recognized under the *Community Safety and Policing Act, 2019*.

7. The Association as defined in section 1 of the *Ontario Provincial Police Collective Bargaining Act, 2006*.

8. An association recognized under Part IX of the *Fire Protection and Prevention Act, 1997*.

9. An organization that, before the effective date applicable to the employer, has collectively bargained, with the employer, terms and conditions of employment relating to compensation that were implemented by the employer.

10. An organization that, before the effective date applicable to the employer, has an established framework for collectively bargaining, with the employer, terms and conditions of employment relating to compensation.

11. Another prescribed organization. 2010, c. 1, Sched. 24, s. 4 (2); 2014, c. 5, s. 52.

Other exceptions

(3) This Act does not apply to such other classes of employees as may be prescribed. 2010, c. 1, Sched. 24, s. 4 (3).

Section Amendments with date in force (d/m/y)

Other elected or appointed office holders

5 (1) This Act applies to every person who is elected or appointed under the authority of an Act of Ontario to a position with an employer to whom this Act applies. 2010, c. 1, Sched. 24, s. 5 (1).

Exceptions

(2) This Act does not apply to judges, deputy judges, justices of the peace, masters or case management masters. 2010, c. 1, Sched. 24, s. 5 (2).

RESTRAINT MEASURES

Duration of restraint measures

Effective date

6 (1) The effective date of the restraint measures for employers, office holders and employees is March 24, 2010, except as otherwise provided in this section. 2010, c. 1, Sched. 24, s. 6 (1).

Expiry of certain restraint measures

(2) The restraint measures in sections 7 to 10 expire on March 31, 2012. 2010, c. 1, Sched. 24, s. 6 (2).

Effective date for certain employers, etc.

(3) If this Act applies to an employer by virtue of a regulation, the effective date of the restraint measures for the employer and its office holders and employees is the date specified by regulation. 2010, c. 1, Sched. 24, s. 6 (3).

Same

(4) If, after March 25, 2010, this Act becomes applicable to an employer by virtue of any of paragraphs 1 to 7 of subsection 3 (1), the effective date of the restraint measures for the employer and its office holders and employees is the date on which this Act becomes applicable to the employer. 2010, c. 1, Sched. 24, s. 6 (4).

No increase in rate of pay, pay range

Rate of pay

7 (1) The rate of pay for an employee or office holder that is in effect on the applicable effective date cannot be increased before the beginning of April 2012, except as permitted by subsection (3) or (4). 2010, c. 1, Sched. 24, s. 7 (1).

Pay range

(2) The maximum amount within a pay range, if any, for an employee or office holder that is in effect on the applicable effective date, and any steps within the pay range, cannot be increased before the beginning of April 2012. 2010, c. 1, Sched. 24, s. 7 (2).

Exceptions

(3) If the rate of pay falls within a pay range that is in effect for a particular position or office on the applicable effective date, the employee or office holder's rate of pay may be increased — within that pay range — in recognition of any of the following matters only and only if the increase is authorized under the compensation plan as it existed on the applicable effective date:

1. His or her length of time in employment or in office.
2. An assessment of performance.
3. His or her successful completion of a program or course of professional or technical education. 2010, c. 1, Sched. 24, s. 7 (3).

Same, increase in minimum wage

(4) If, after the applicable effective date, an employee's or office holder's rate of pay falls below the minimum wage established under Part IX of the *Employment Standards Act, 2000*, the rate of pay may be increased to match the minimum wage. 2010, c. 1, Sched. 24, s. 7 (4).

No increase in benefits, perquisites and payments

8 (1) A benefit, perquisite or payment provided to an employee or office holder under the compensation plan as it existed on the applicable effective date cannot be increased before the beginning of April 2012, except as permitted by subsection (3). 2010, c. 1, Sched. 24, s. 8 (1).

No new or additional benefits, etc.

(2) No new or additional benefits, perquisites or payments may be provided to an employee or office holder before the beginning of April 2012, except as permitted by subsection (3). 2010, c. 1, Sched. 24, s. 8 (2).

Exceptions

(3) A benefit, perquisite or payment may be increased, or an additional benefit, perquisite or payment provided, to an employee or office holder in recognition of any of the following matters only and only if it is authorized under the compensation plan as it existed on the applicable effective date:

1. His or her length of time in employment or in office.
2. An assessment of performance.
3. His or her successful completion of a program or course of professional or technical education. 2010, c. 1, Sched. 24, s. 8 (3).

Time off

(4) For greater certainty, time off is a benefit for the purposes of this section. 2010, c. 1, Sched. 24, s. 8 (4).

Effect of cost increases

(5) If the employer's cost of providing a benefit, perquisite or payment under the compensation plan as it existed on the applicable effective date increases after that effective date, the increase in the employer's cost does not constitute an increase in the benefit, perquisite or payment itself. 2010, c. 1, Sched. 24, s. 8 (5).

No change upon renewal, etc.

Employees

9 (1) The renewal of an employee's contract cannot, before the beginning of April 2012, change the compensation plan as it existed on the applicable effective date for that position. 2010, c. 1, Sched. 24, s. 9 (1).

Office holders

(2) The re-election of an office holder or the renewal of an office holder's appointment cannot, before the beginning of April 2012, change the compensation plan as it existed on the applicable effective date for that office. 2010, c. 1, Sched. 24, s. 9 (2).

Interpretation

(3) If the employee remains employed in the same position but has a new employment contract, or if the office holder remains in the same office but has a new appointment, the new contract or appointment is deemed to be a renewal for the purposes of this section. 2010, c. 1, Sched. 24, s. 9 (3).

New employees, job changes, etc.

Employees

10 (1) The compensation plan for a person who becomes an employee, or accepts a new position, on or after the applicable effective date and before the beginning of April 2012 must be no greater than the compensation plan as it existed on that effective date for other employees in a similar position with the same employer. 2010, c. 1, Sched. 24, s. 10 (1).

Office holders

(2) The compensation plan for a person who becomes an office holder, or is elected or appointed to a different office, on or after the applicable effective date and before the beginning of April

2012 must be no greater than the compensation plan as it existed on that effective date for other holders of the same or a similar office. 2010, c. 1, Sched. 24, s. 10 (2).

No future compensation re restraint measures

11 A compensation plan cannot provide compensation after March 31, 2012 to an employee or office holder for compensation that he or she did not receive as a result of the restraint measures in this Act. 2010, c. 1, Sched. 24, s. 11.

Conflict with this Act

12 (1) This Act prevails over any provision of a compensation plan and, if there is a conflict between this Act and a compensation plan, the compensation plan is inoperative to the extent of the conflict. 2010, c. 1, Sched. 24, s. 12 (1).

Same

(2) This Act prevails over any other Act and over any regulation, by-law or other statutory instrument. 2010, c. 1, Sched. 24, s. 12 (2).

Exception

(3) Nothing in this Act shall be interpreted or applied so as to reduce any right or entitlement under the *Human Rights Code* or the *Pay Equity Act*. 2010, c. 1, Sched. 24, s. 12 (3).

Same

(4) Nothing in this Act shall be interpreted or applied so as to reduce any right or entitlement provided under section 42 or 44 of the *Employment Standards Act, 2000*. 2010, c. 1, Sched. 24, s. 12 (4).

Same

(5) Nothing in this Act shall be interpreted or applied so as to prevent the application of the insurance plan under the *Workplace Safety and Insurance Act, 1997* after the effective date to an individual to whom the insurance plan did not apply on the effective date. 2010, c. 26, Sched. 16, s. 1.

Section Amendments with date in force (d/m/y)

COMPLIANCE REPORTS

Reports by employers

13 (1) Every employer to whom this Act applies shall give the Minister such reports as may be prescribed concerning its compliance with the restraint measures that apply to its employees and office holders. 2010, c. 1, Sched. 24, s. 13 (1).

Same

(2) Each report must be submitted in such form and manner as may be prescribed and within the prescribed period. 2010, c. 1, Sched. 24, s. 13 (2).

Same

(3) Each report shall include a statement signed by the employer's highest ranking officer certifying whether the employer has complied with the restraint measures throughout the reporting period. 2010, c. 1, Sched. 24, s. 13 (3).

APPLICATIONS TO THE BOARD

Application to the Board

14 (1) An employer described in subsection (2), an employee or office holder described in subsection (3) or the Minister may apply to the Board for an order declaring whether this Act applies to an employer, employee or office holder. 2010, c. 1, Sched. 24, s. 14 (1).

Application by employer

(2) An employer may make an application in respect of the employer or any employee or office holder of the employer. 2010, c. 1, Sched. 24, s. 14 (2).

Application by employee or office holder

(3) An employee or office holder may make an application only in respect of a matter that could affect him or her personally. 2010, c. 1, Sched. 24, s. 14 (3).

Restrictions

(4) An application cannot include a request for interim relief or a request for any other remedy. 2010, c. 1, Sched. 24, s. 14 (4).

Notice to the Minister

(5) An applicant shall deliver a copy of the application and supporting documents to the Minister promptly after making the application to the Board. 2010, c. 1, Sched. 24, s. 14 (5).

Status of Minister

(6) The Minister may intervene in any application to the Board. 2010, c. 1, Sched. 24, s. 14 (6).

Order

(7) The Board may make an order declaring whether this Act applies to the employer, employee or office holder, as the case may be. 2010, c. 1, Sched. 24, s. 14 (7).

Exclusion

(8) The Board cannot make an order relating to a compensation plan. 2010, c. 1, Sched. 24, s. 14 (8).

Reconsideration

(9) An order of the Board is final and binding on the applicant and on such other parties as the Board may specify, but the Board may reconsider any order and may vary or revoke it. 2010, c. 1, Sched. 24, s. 14 (9).

Power to obtain information

15 (1) The Board may request such information as it considers relevant and appropriate in connection with an application for an order, whether or not the information would be admissible in a court, and may accept the information as evidence in an application for an order. 2010, c. 1, Sched. 24, s. 15 (1).

Compliance

(2) An employer, employee or office holder shall promptly give the Board such information as the Board may request, whether or not the employer, employee or office holder is a party to the application. 2010, c. 1, Sched. 24, s. 15 (2).

Power to compel witnesses and disclosure

16 (1) The Board may serve a summons requiring a person to attend the hearing of an application for an order, to provide testimony on oath or affirmation or in another manner, and to produce any information under the person's power or control. 2010, c. 1, Sched. 24, s. 16 (1).

Attendance not necessary

(2) In requiring the production of information, the Board may or may not require that a person attend with the information. 2010, c. 1, Sched. 24, s. 16 (2).

Confidential information

(3) The Board may require the provision or production of information that is considered confidential or inadmissible under another Act, and that information shall be disclosed to the Board for the purposes of the application. 2010, c. 1, Sched. 24, s. 16 (3).

Enforcement of Board orders

17 A copy of an order of the Board may be filed in a court of competent jurisdiction and, upon its filing, the order is enforceable as a judgment or order of a court. 2010, c. 1, Sched. 24, s. 17.

ADMINISTRATION

Board established

18 (1) An adjudicative tribunal is hereby established to be known as the Public Sector Compensation Restraint Board in English and Commission des mesures de restriction de la rémunération dans le secteur public in French. 2010, c. 1, Sched. 24, s. 18 (1).

Composition

(2) The Board is composed of a chair and may include a maximum of two vice-chairs, to be appointed by the Lieutenant Governor in Council. 2010, c. 1, Sched. 24, s. 18 (2).

Term of office

(3) The term of office of the chair and any vice-chairs is as specified by the Lieutenant Governor in Council. 2010, c. 1, Sched. 24, s. 18 (3).

Remuneration

(4) The chair and any vice-chairs shall be paid the remuneration determined by the Lieutenant Governor in Council. 2010, c. 1, Sched. 24, s. 18 (4).

Employees

(5) Such employees as are necessary for the proper conduct of the Board's work may be appointed under Part III of the *Public Service of Ontario Act, 2006*. 2010, c. 1, Sched. 24, s. 18 (5).

Powers of the Board

19 (1) The Board has the jurisdiction to exercise the powers conferred on it by this Act and to determine all questions of fact or law that arise in any application before it. 2010, c. 1, Sched. 24, s. 19 (1).

Quorum

(2) One member of the Board is sufficient for the exercise of all of the Board's powers. 2010, c. 1, Sched. 24, s. 19 (2).

Protection from personal liability

20 (1) No action or other proceeding for damages shall be commenced against a member of the Board for any act done in good faith in the performance or intended performance of his or her duty or for any alleged neglect or default in the performance in good faith of his or her duty. 2010, c. 1, Sched. 24, s. 20 (1).

Crown liability

(2) Despite subsection 8 (3) of the *Crown Liability and Proceedings Act, 2019*, subsection (1) does not relieve the Crown of any liability to which it would otherwise be subject. 2010, c. 1, Sched. 24, s. 20 (2); 2019, c. 7, Sched. 17, s. 148.

Section Amendments with date in force (d/m/y)

Regulations

21 The Lieutenant Governor in Council may make regulations in respect of any matter that, in this Act, is permitted or required to be prescribed or specified by regulation. 2010, c. 1, Sched. 24, s. 21.

22 OMITTED (PROVIDES FOR COMING INTO FORCE OF PROVISIONS OF THIS ACT). 2010, c. 1, Sched. 24, s. 22.

23 OMITTED (ENACTS SHORT TITLE OF THIS ACT). 2010, c. 1, Sched. 24, s. 23.

APPENDIX 1

Male Predominance of Ontario Physicians (1978-2013)[6]			
Year	**All Physicians** (Male %)	**Family Physicians** (Male %)	**CHC Physicians** (Male %)
1978	88.1	85.7	Majority Male
1988	79.6	75.6	Majority Male
1993	75.3	71.0	Majority Male
2005	68.4	64.0	Majority Female
2010	65.1	60.0	Majority Female
2013	63.2	58.4	Majority Female

Compensation Gaps Between Midwives and Comparators (1992-2015)[7]					
Year	**Midwife (Top Level)**	**CHC Senior Nurse/Nurse Practitioner (Top Level)**	**CHC Physician (Lowest Level)**	**Compensation Gap (Midwife & Physician)**	**Compensation Gap (Midwife & Senior Nurse/NP)**
1992	$20,000	$56,000	$80,000	$60,000	$36,000 more
1993	$77,000	$56,000	$80,000	$3,000	$21,000 less
2003	$77,000	$80,000	$110,599	$33,599	$1000 less
2005	$93,600	$80,000	(Apr 1) - $113,259 (Oct 1) - $117,669	(Apr 1) $25,068 (Oct 1)- $24,069	$12,600 more
2009	$100,440	$89,203	(Apr 1) - $124,460 plus incentives valued $38,421=$162,881 (Oct 1) - $130,435 plus $38,421 incentives- $168,856	(Apr 1) $62,441 (Oct 1) $68,406	$11,237 more
2010	$104,847	$89,203	$181,233	$76,386	$15,644 more
2011	$104,847		$185,426	$81,127	
2012	$104,847		$185,426	$81,127	
2013	$104,847		(Jan 1) 183,426 (Apr 1) $182,509	(Jan 1) $78,569 (Apr 1) $77,662	
2015	$104,847		$177,673	$72,826	

[6] CIHI Physicians, by speciality and gender, and percentage distribution, by gender, Canada (1978-2014), TR T88(18), Ex. 22 (Van Wagner Aff.), p. 5821, RC V6 T91] R208 [Physician Counts]

[7] Liability Decision, [28-30, 36-37, 121-22, 149, 163-64, 178-80] R64; Remedial Decision, [27] R3510; Courtyard Report, TR T224(97), Ex. 158 (Pinkney Aff.), p. 31880, 31904-06, AC V3 T69 R1686; Spreadsheet of CHC Salary Scales (Apr 1/04 – Apr 1/13), TR T209, Ex. 143(51), p. 27511-27522, RC V5 T67 R1540; Update on CHC Compensation for CHC Executive (March 2/10), TR T24, Ex. 158 (Pinkney Aff.), p. 32783-85, RC V5 T84 R1803

HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO AS REPRESENTED BY THE MINISTER OF HEALTH AND LONG-TERM CARE
Applicant

-and-

ASSOCIATION OF ONTARIO MIDWIVES et al.

Respondents

Court File No. 131/19

ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)

PROCEEDING COMMENCED AT
TORONTO

FACTUM OF THE RESPONDENT, ASSOCIATION OF ONTARIO MIDWIVES

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