Association of Ontario Midwives
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HRTO February 2020 Remedial Decision

Frequently Asked Questions

These questions and answers are meant to serve as a general guide for complainants regarding the HRTO Remedy Decision issued on February 19, 2020. As this is an ongoing case, the following reflects the best information the AOM is able to provide its members at the date of publication [March 17, 2020].

What does the HRTO Remedial Decision say?

In February 2020 the Tribunal issued concrete and specific orders to government to end discrimination in its compensation setting practices against midwives. As a very brief summary, the Tribunal has ordered government to implement the following:

Retro Compensation:

- 20% retroactive adjustment to the four components of the course of care fees back to April 1, 2011 as recommended by Courtyard to eligible midwives.
- Calculate the necessary adjustments flowing from the new adjusted rate as of April 1, 2011, including the recalculation of the percentage increases from the 2013 and 2017 contracts. (para. 205 a)

Compensation Adjustment to all Midwives as of February 19, 2010

- Adjust the four components of the course of care fee for all midwives delivering services through the OMP as of February 19, 2020 based on the implementation of Courtyard and the recalculation of the 2013 and 2017 contracts. (para. 205 a)

Injury to Dignity

- $7,500 for injury to dignity, feelings and self-respect to eligible midwives, paid within 90 days of the Decision. (para.205 (c))

Disputes re: compensation

- Where there is a dispute between records of MOH and a midwife, the parties are directed to engage and jointly pay a third-party facilitator or work within an existing committee to resolve disputes.

Interest

- Eligible midwives are entitled to interest on those sums calculated in accordance with the Courts of Justice Act. Prejudgment interest will be paid up to the date of the Decision from the date of application in November 2013 at the rate of 1.3%
- Post judgment interest will be paid on any outstanding compensation after the expiry of the six month implementation period at the rate of 3%. (paras 177-180)

Future Compliance Measures

- Measures to prevent future discrimination for all midwives and to bring the Ministry compensation setting practices into compliance with the *Code.*

Joint Studies

- A joint non-binding study conducted by a compensation expert with expertise in pay equity, pay equity job evaluation methodologies and gender-based methodologies to cover the period from 2014 to 2020 which will serve as a baseline for reinstating the compensation benchmarks.
- The study will include a SERW (skills, efforts, responsibilities and working conditions) analysis and account for the specialized and autonomous nature of the work of midwives and their onerous on-call duties, among other things; the 1993 principles and methodology; the comparators set out in the Courtyard report; and, any other comparators deemed appropriate by the parties and compensation expert.
- The study to be commenced no later than 3 months from the Decision and completed within 4 months of start date. The study will inform the negotiations between the parties but will not be binding on them.
- The study will be updated prior to the start of negotiations for each contract. Cost of the study and updates to be paid for by the MOH. Parties to retain and pay for a third party facilitator to resolve any disagreements arising out of the study and updates. (paras. 187-189)

Gender Based Analysis

- MOH is ordered to work an expert to implement a gender-based analysis that will assess the gender impacts of the policies and practices associated with compensating midwives working as independent contractors and compensated by the MOH.
- MOH to complete the analysis within 6 months of the Decision and to provide summary of the analysis to the AOM. (paras. 190-192)

Can I read the Decision?

Yes, the Decision is a public document. We encourage all applicants to read it. You can access a copy here. Applicants may also wish to read the Interim Decision of 2014 and the Liability Decision of 2018.

In brief, why did the HRTO find in our favour?

The HRTO made a few key findings:

1. The Ministry always had an obligation to comply with the Code (*our emphasis is added*):

> *(62) There is nothing new about the Tribunal's Interim Decision which affirms that compensation-setters are ultimately responsible for ensuring that their practices comply with the Code. To the extent that any substantial change has occurred,* ***it is in the MOH repudiating the principles and norms*** *which historically governed the setting of compensation for midwives.*

2. The Ministry needs to Restore Evidence-Based Methodology (SERW) and Male Comparator:

> *(20)* ***The importance of …having adopted an evidence-based methodology*** *…****cannot be overstated:*** *it* ***made visible*** *the overlap in SERW… between midwives, nurses, physicians... It also* ***exposed the stereotypes about women's work which suppressed the compensation*** *of midwives during the pre-regulation period and which operate to align midwifery more closely with other female-dominated professions like nursing. …physician comparator …****keeps 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****.*

3. Ministry Positions Rejected:

> *(34) …the position of the MOH …is inconsistent with its promotion of* ***midwives as equally competent providers of low-risk maternity care****, along with [FPs] and [OBs].*
>
> *(37)…The* ***loss of the benchmarks also prevented the MOH from fully appreciating the significance of the … recommendations made by Courtyard****…that a group of sex-segregated workers required an increase of 20% to bring their compensation up to a fair and appropriate level.*

4. The impact on midwives arose because of the Loss of Benchmarks:

> *(173) There is an objective seriousness associated with the* ***failure of the MOH, over a prolonged period****, to proactively monitor the compensation of midwives or investigate their concerns about inequity in their compensation. Their* ***vulnerability is exacerbated*** *by the fact that the MOH is their exclusive funder.*

And therefore,

> *(41) This case crystallized…after the release of the Courtyard's recommendations.*
>
> *(122) 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 six 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.*

5. Courtyard plus other orders will return midwives as close as possible to where they should be, if not for the discrimination:

> ***(41) To return midwives to the place they would have been but for the discrimination**, is to bring the parties back to a state where they are working together to **ensure that midwives are fairly and appropriately paid**, using the benchmarks as their guide, and with the MOH adhering to its obligations under the Code. **Implementation of the Courtyard report,** combined with the orders made to promote compliance with the Code, **brings the parties as close as possible to that state.***
>
> ***(157)** I am ordering the MOH to reinstate the **lost compensation benchmarks** in accordance with the recommendations in the Courtyard report **effective April 1, 2011.** The 20% adjustment is to be implemented as **a Code-related adjustment** …*

What are the Compensation Benchmarks which must be reinstated

The Tribunal defines the "compensation benchmarks" as the "*compensation principles, and the objective criteria, evidence-based compensation methodologies and the choice of comparators which the parties roughly maintained from 1993 to 2005...*" (para. 5) The Tribunal stated that "from 1993 through the 2005 agreement, the negotiations between the parties were informed by objective criteria like skill, effort, responsibility and working conditions ("SERW") which overlapped to some extent with pay equity principles and other evidence-based compensation methodologies. The parties reached agreement on positioning midwives between the senior nurses and family physicians with whom they shared an overlapping scope of practice. Their specific comparators have been senior nurses "later nurse practitioners" and family physicians employed in Community Health Centres (CHCs). (para. 5)

What are the larger implications for this Decision?

Our success has resulted in a landmark Decision and a precedent-setting case that will change how female-dominated workers and/or workers associated with women are compensated.

Protected groups under the Code will be able to cite the AOM Decisions to support their claims for effective human rights redress. Already the HRTO's interim Decision of 2014 has been cited in various human rights cases; we expect that the liability and remedy Decision will have even more widespread impact in human rights law.

This Decision will have far ranging impacts, such as:

- Ontario midwives will be used as reference for midwives elsewhere in Canada and internationally
- precedent to be cited by equity seeking groups for obligations of those with Code obligations – including other Code protected groups
- need to exempt Code adjustments from compensation restraints
- need for both retroactive and prospective remedies to ensure Code compliance
- requirement for assessment and implementation of gender-based analysis to address adverse impacts of government policies and practices

What did this Decision say about the Ministry's arguments?

The Tribunal:

- criticized the Ministry for failing to have in place any Code compliant compensation setting process and, therefore, was unable to substantiate its claims that compensation setting was free of sex bias.
- substantially rejected Ministry arguments directed at **limiting the remedial orders** to prospective compensation and no injury to dignity damages.
- found MOH again adopted narrow approach which **failed to acknowledge its proactive Code obligations** to ensure that midwives' compensation was free from sex discrimination.
- rejected MOH criticisms of the Courtyard Report, especially since **MOH failed to substantiate its compensation setting was free of sex bias**.

Were there any arguments put forward by AOM that were rejected by the Tribunal?

Tribunal rejected the AOM arguments that:

- compensation benchmarks were based on midwives maintaining a percentage relationship to CHC physicians

- the Durber Report should be used to determine remedy as it did not reflect the parties' compensation benchmark methodology
- injury to Dignity compensation should be of varying levels depending on the length of time a midwife experienced discrimination

What is the "Injury to Dignity" award?

This is a common form of remedy at the HRTO. We argued that midwives were entitled to this award because of, among other factors:

- a strong connection between their identities & their work
- the caring dilemma
- harm to their dignity & self-respect: MOH no longer acknowledged connection to work of physicians
- working so hard with such onerous on-call responsibilities for such low pay can lead to feelings of embarrassment
- lack of respect: MOH took steps to ensure fair comp for CHC physicians
- dignity undermined by failure of MOH to take concerns about gender discrimination seriously & having to complain to the Tribunal.

The Tribunal awarded:

> (205) *…$7,500 as compensation for injury to dignity, feelings, and self-respect, to each midwife who meets the definition of a party, within 90 days of this Decision.*

The AOM had requested the injury to dignity award be based on each year of discriminatory treatment.

Who will be eligible for the $7,500 injury to dignity damages awarded by the Tribunal?

The AOM's legal team tried to tailor the injury to dignity, recognizing some have suffered from the discriminatory conditions much longer than others. The AOM asked the Tribunal to award $7,500 per midwife per year. The Decision ruled for a total amount of $7,500 per eligible midwife. This amount is to be paid within 90 days (3 months) of the Remedial Decision received on February 19, 2020. However, the judicial review may change this timeline.

How do I know if I am a complainant in this case?

The Tribunal can only order remedy to a party whose human rights were infringed. The AOM filed the application to the Tribunal on November 27, 2013 on behalf of midwives – specifically on behalf

of the complainants (and only those who consented in writing to be represented are deemed "complainants").

A complainant or "eligible party" is someone who gave the AOM, the applicant, consent to represent them in this case and whose consent was filed with the Tribunal in a timely way. To be a complainant, you would have needed to sign the AOM consent form and submitted your form with the AOM. The AOM then filed consents with the Tribunal. This is a legal process, with rules and limitations set by the Tribunal. The Tribunal defined who is an eligible party in its Decision (paras. 74-93). If you can't remember signing form, contact Diana MacNab diana.macnab@aom.on.ca and she can confirm whether your name is on the complainant list.

If I'm not an eligible party, what implications will that have?

Only complainants will have access to some parts of the remedy, like retro pay and an award for injury to dignity. However, the Tribunal has ordered that all midwives will benefit from the remedy orders which adjust compensation from February 2020 onwards. As well, all midwives will benefit from the future compliance measures.

Who is eligible for the remedies of retroactive compensation and the injury to dignity award?

The Tribunal determined that:

1. Midwives who ceased to provide midwifery services before November 27, 2012 are not eligible for retroactive compensation or injury to dignity damages, regardless of whether they filed a consent by the August 8, 2019 deadline. The legal rules state that a person must file an application with the Tribunal within a year of having experienced discrimination. The AOM filed the application with the Tribunal in November 2013. This is why the Tribunal won't accept applications from midwives who didn't provide midwifery services after November 27, 2012.

2. Midwives who provided midwifery services (or were on a Code-based leave of absence e.g. mat leave, disability leave) at any point during the period between November 27, 2012 and the present, and who filed a consent with the Tribunal by August 8, 2019, are entitled to retroactive compensation and injury to dignity damages pursuant to the remedial Decision.

In addition to filing a consent, to be an eligible party the consent must be filed within one year of providing midwifery services.

If a midwife retired prior to November 2012, and has filed a consent form, are they eligible for remedy?

Filing a consent form to be a complainant does not, on its own, guarantee eligibility. In the Decision, the Tribunal chooses 2011 as a benchmark year for compensation, referring to the Courtyard Report. The Tribunal rejected the argument that midwives who left practice prior to November 27, 2012 (one year prior for AOM application) are eligible for compensation. The AOM's legal team tried a number of legal arguments around this, but they were rejected. As such, a member who retired prior to November 27, 2012 regardless of if and when they filed a consent form, would unfortunately be disqualified from receiving retro pay and the injury to dignity remedy.

Did the AOM advocate for all midwives to join as complainants?

Yes. The AOM filed complainant consent forms at the time of the initial application, and subsequently filed further consents, arguing that as new midwives joined the profession, they too should have the ability to be a party in the application. The AOM advocated for midwives who retired from practice prior to November 2012 to also be represented. The Ministry argued that some consents that were filed later were untimely, citing the time limit of one year prior to the date of Application. In the end, the Tribunal made the determination described above.

If I haven't already signed a consent form, is it too late?

The AOM has filed 1 041 applicant names with the tribunal. The deadline to file consents from complainants with the Tribunal was **August 8 2019.** The legal rules state that only those who are applicants in a case are eligible to receive remedy from the case; people can't come forward *after* a case has been argued and won to say that they want to be applicants or to receive remedy. However, the Tribunal's orders regarding compensation adjustments to ensure compensation is free from a gender penalty as of the date of the Decision and moving forward will be benefit ***all*** midwives.

Are NRs or midwives who registered after November 2013 eligible?

The Tribunal ordered that midwives who provided midwifery services (or were on a Code-based leave) at any point during the period between November 27, 2012 and the present, and who filed a consent by August 8, 2019, are entitled to retroactive compensation and injury to dignity damages pursuant to the remedial Decision.

The Tribunal is clear that moving forward as of February 19, 2020, all midwives are entitled to a new compensation rate. As of February 19, 2020, all midwives will benefit from a 20% compensation adjustment.

How would a Human Rights Code-related leave of absence, such as a mat leave or disability leave, affect eligibility?

The Tribunal addresses the issue of Code-related leaves, and say they would be exempt. If an applicant was on a maternity or disability leave (or another Code-related leave) and, therefore, did not provide services during a period, the Decision states they should not be penalized. However, if services were not performed for reasons other than those in relation to the Code e.g. a sabbatical, then retro compensation would likely not be paid out for the time during the leave.

Midwives who were on disability or maternity leave and would have received higher support payments during the 2013 - 2020 period if not for the discriminatory pay: will their disability or maternity leave payments be adjusted?

This is not made clear in the Tribunal's Decision. However, from an equity standpoint, this should be the case and AOM will strongly advocate for this.

If a midwife stopped working part way through the period where the Tribunal is ordering compensation, will that midwife still be considered eligible for the years worked?

Yes, as long as the midwife is an eligible complainant in the case, the midwife would be eligible for remedy on compensation that they earned during those years.

If a midwife was on a Code-related leave within the year prior to Nov 2013, would the midwife still be considered an eligible applicant; or if a midwife is on a disability currently how will that impact retroactive compensation?

Being on a Code-related leave such as maternity leave or disability leave will not hurt a midwife's eligibility. That would be discriminatory and of course the Tribunal would not permit discrimination in the application of this remedy based on a Code related ground. The Tribunal has defined "practising" as "*rendering services as a midwife and billing the MOH for services or otherwise engaged in work on behalf of their practice groups or the OMP generally or midwives who would be practising but for a Code-related leave during that period*." (Para. 91)

What about midwives who are currently working in EMCMs under an employee model? What does this Decision mean for them?

Those working in an employee model, not as independent contractors, are not covered by the Decision. Their pay equity rights are governed by the Pay Equity Act which is the mechanism to address gender discrimination in pay. The AOM brought this case forward because, as independent contractors, midwives had no mechanism through the Pay Equity Act to address gender inequity in their pay. Alternate models and new models did not exist when the Application was filed in 2013. Moving forward, the 2020-2023 contract recently ratified by members provide more ties to midwives working in salary, EMCM, and IMP models to the TPA-MPG Template Agreement, with explicit language about the relativity of compensation in those agreements. The AOM's expectation is for those models to be adjusted based on the compensation of midwives working in the independent contractor model. The Decision states alternate models are to be included in the gender based analysis assessment done by Ministry going forward.

If a complainant changed their name during this period (e.g. through marriage), and so currently uses a different name than that on the consent form, will eligibility be affected?

The complainant should notify the AOM that they are using a different name. Eligibility will not be affected.

During the time period of 2008-2011 the AOM negotiated a contract, and fought hard to ensure that a compensation study was included as part of the next round of bargaining. The Decision described how this report was non-binding and there was no mechanism to deal with the disputes that arose from the Courtyard Report. How do we ensure moving forward that any joint reports or compensation reviews are binding? Or at least that a process is put in place for dispute resolution?

In the Tribunal's Decision, orders have been made that will assist with future compensation reviews. Specifically the Tribunal ordered "*to reinstate the [1993] benchmarks through joint, collaborative, and regular compensation studies which account for the SERW of midwives and their comparators and take a gender-sensitive approach to determining compensation levels*." (para. 187) The Tribunal also ordered that a compensation expert, experienced in pay equity and gender based analysis be used to undertake joint compensation studies prior to each negotiation, and that this expert will have access to the record of the HRTO proceeding. The Decision states that although the study won't be binding, it will be used to inform the negotiations, and that the AOM and MOH will jointly retain and pay for a facilitator who can resolve any disagreements "*arising out of the development or implementation of the study and any updates*"(para. 189).

The Tribunal specifically decided not to order binding arbitration which the AOM had requested stating that it doubted it had the authority to do so and thereby redefine the parties' bargaining

relationship. However, the Tribunal stated that *"to the extent power imbalances are linked to gender they must be corrected"* and stated that the Decision "*addressed the imbalance in their negotiations which relates to compensation by reinstating the benchmarks and imposing the requirement of ongoing compensation studies to inform those negotiations*" (para. 196). The Tribunal also "*urged the parties to consider the benefits of binding arbitration*" (para. 200).

What is the "Courtyard Report" that is referred to in the Decision, and what is its significance?

The Tribunal's liability Decision found that the 2005 - 2008 Agreement was not discriminatory because it still had a sufficient connection to the compensation benchmarks established in 1993 at the time of midwifery regulation. The terms of the 2008 - 2011 agreement stated that a joint study (later called the Courtyard Report) would be held, and that the evidence from this study would inform negotiations processes moving forward (e.g. from April 1, 2011 onwards).

Why implement the Courtyard Report and begin remedies at 2011?

During this period of time, the Ministry gradually abandoned the main 1993 comparators, the CHC physician and the nurse practitioner. When Courtyard came out with its findings, the Ministry's response made it evident they had completely abandoned the benchmarks.

The Tribunal decided that the Courtyard's finding of a 20% equity adjustment based on using the 1993 compensation benchmarks was the best evidence of what was needed to put the midwives in the position they would have been in but for the adverse impacts they suffered as a result of the Ministry's actions since 2005. The Tribunal also found that the use of the 20% adjustments based on a joint study by the parties avoided setting an arbitrary compensation rate as of 2011. (Para. 156) Both the AOM and the Ministry jointly agreed to commission Courtyard and AOM requested implementation of Courtyard as pay equity adjustment up to time of application. The Tribunal also found that the 20% adjustment will be easier to calculate and apply than other methods.

The Tribunal concluded that its decision to implement Courtyard, along with the other orders for bringing the Ministry's practices into *Code* compliance, will reinstate midwives to the point before the discrimination and bring the parties as close as possible to the state they should have been in but for the discrimination.

During the webinar, Mary Cornish stated that the 2014 and 2017 contracts used the wording "without prejudice," but that the 2008 contracts did not. Is that part of the reason for the start of retroactive pay back to 2011? Is it not standard for contracts to include "without prejudice"? If so, I don't understand the rationale as to why the AOM did not include it in the 2008 contract.

The Tribunal found that the 2005 agreement was not discriminatory and it continued to March 31, 2008. The Tribunal held that the discriminatory conduct of the Ministry did not crystallize in damages until April 1, 2011. The parties had agreed in the 2009 agreement that the joint study would inform the next contract which began as of April 1, 2011.

Agreements are not normally reached "without prejudice". However, in 2014 and 2017, the HRTO application had been filed and was in process. Therefore, the AOM had to take care that our negotiations at that time were not held against us ("with prejudice") if we agreed to a contract with a lower increase than what the HRTO might find is due. The 2008 negotiations took place 5 years before we filed the HRTO application and, therefore, there was nothing to include a "without prejudice" clause in regards to. However, the 2008 contract did ensure that a joint compensation study was undertaken prior to the next contract to determine if indeed there was a compensation gap, as the AOM and midwives believed there was. The Courtyard study was undertaken prior to the 2011 negotiations.

What is the 20% increase about? Does it apply to CVs? Does it include an increase to benefits?

The Tribunal ordered a 20% increase on the "four components" – experience fees, retention incentive, secondary care fee and on call fee. It would apply to CVs also, as this is compensation. 20% benefits are paid on compensation, and so we expect there would also be an additional benefits amount contributed although this is not directly stated in the Decision. Furthermore, although there is no specific mention of benefits on retro compensation, the Tribunal's orders are clear: implement Courtyard**.** And Courtyard references the commensurate change in benefits when compensation is adjusted.

Is the 20% adjustment tied to the actual date the consent form was signed?

Retroactive compensation will not be based on the date the consent is filed.

Will the results of this 20% increase be incorporated into the current contract that was recently ratified? How will this Decision and the imposed remedy impact future negotiations?

The Decision calls for an immediate 20% compensation adjustment for all midwives moving forward as of February 19, 2020. Beyond this current contract, the Decision orders a compensation study to look at the period of 2014-2020 to inform any further compensation adjustment and a study must take place prior to and inform all future negotiations.

What is the compensation study ordered by the Tribunal? Who leads it? What are its possible implications?

The first compensation study ordered by the Tribunal is "joint, collaborative, and regular" (using language from the 1993 Morton Report), and meant to account for the period of 2014 - 2020 in order to investigate whether further compensation adjustments (beyond the 20% already ordered) should be made. It serves as a baseline for reinstating the benchmarks, and will be updated with each new round of negotiations.

The compensation study must account for the special and autonomous work of midwives, their onerous on-call duties, the SERW of midwives, and take into account a gender-sensitive approach. It is to be conducted by a compensation expert experienced in pay equity and gender based analysis. The cost of the study and its updates will be paid for by the Ministry, but the parties are to agree and pay for a third party facilitator to resolve disagreements, if any. The gender-based analysis is to occur within 6 months of the Decision issued on February 19, 2020.

Though the AOM's legal team requested the compensation study to be binding, the Tribunal rejected this. As such, the compensation study will inform but not be binding on the government. If the government did not follow through on the findings of the compensation study, the AOM may potentially need to go back to the Tribunal and complain again. However, this order obligates the government to engage in the study.

How do we know the amount of compensation that we are individually eligible for? Who calculates the complicated amounts of our remedy? Will the midwife need to have the financial records?

An individual assessment of all eligible midwives will need to be conducted. There will need to be some mechanism to determine how much work each applicant did in any given year in order to make the proper determination of compensation. To the extent that there is a dispute between the records of a midwife and the records of the MOH, the Tribunal ordered that the parties engage a third-party facilitator or working within an existing committee (e.g. the Midwifery Services Committee).

What will happen if the government just refuses to comply with the Tribunal's orders? Can they just say "there's no money"?

The Tribunal's orders are binding on the government, pursuant to the provisions in the Code, and are enforceable unless overturned in a court, or the court sends a particular aspect of the case back to the Tribunal to deliberate. The government cannot claim it has fiscal restraints and can't pay a Code order. One way a court could enforce a Decision is to hold a party in contempt.

Can we negotiate for increased eligibility or for increased injury to dignity damages?

No. This is an order from the Tribunal and not a negotiation. It is not possible to change the content of the Decision. The Decision can be interpreted, and arguments can be made by the AOM and our legal team about what is a reasonable interpretation. What is in the Decision is final, unless overturned by Judicial Review or a higher appeal court.

Is the remedy more or less than anticipated?

Our final submission to the Tribunal and our subsequent submission on remedies details all of what the AOM requested. Although the Tribunal's orders do not go as far as we requested, we are pleased with this outcome.

Are we likely to see this money, and if so, when?

The legal team strongly believes midwives will see this money, though it is difficult to say exactly when at this point in time. Our legal team has advised us that the judicial review and appeal process can take a number of years.

What are HRTO "court" costs? Did we ask for it and get that?

The Human Rights Tribunal has no authority to award legal costs in their process so this was not requested by either the AOM or the Ministry. Once we are in the Divisional Court process, both parties (the AOM and the Ministry) can ask for court costs related to that court process. Once in the Court system, it is possible for the party that wins the case to recover some legal costs (and the party that loses the case to pay some costs). Usually what is awarded is a small amount of what the actual legal costs are.

How does the judicial review process work? And how long will it take?

The Judicial Review was scheduled for April 7-9 2020; however, we have just received notice that the hearings have been indefinitely postponed due to the COVID-19 pandemic.

In a Judicial Review, the Ontario Divisional Court determines whether there was an appropriate application of the law by the Tribunal in making this Decision. Currently, the Judicial Review has been filed by Ministry, in an attempt to have the Court overturn this Decision. The Court typically makes a Decision within 6 to 12 months of the hearing date.

If the government loses the judicial review, do they have any other options for appeal?

Whichever party loses at the Divisional court can then apply for leave to appeal to the Ontario Court of Appeal.

Does the Divisional Court give a "yes" or "no" answer of whether the Decision is overturned? Or can they turn back particular pieces of the Decision?

The Court is not retrying the case, but rather evaluating whether the way the Decision was made was appropriate and determines if the Decision or any part of it was "patently unreasonable". However, this is a very high standard for the Ministry to meet. The Courts do provide specialized tribunals with substantial deference to their Decision-making. The Courts do not necessarily send the entire Decision back or overturn the entire Decision. The Courts could either determine what the Decision should have been, or return sections to the Tribunal for it to reconsider based on the Court's directions.

If it is implemented, and then the MOH is ultimately successful in their judicial review, will midwives owe money back?

Awards of compensation and injury to dignity will likely not be paid prior to the ruling by the Divisional Court.

Is the Supreme Court of Canada obligated to hear an appeal?

Neither the Ontario Court of Appeal nor the Supreme Court of Canada are obligated to hear an appeal (from either party). To get leave to the Court of Appeal it is necessary to show that the issues will have an impact on the development of the law in Ontario and there are arguable questions of mixed fact and law. To get leave to the Supreme Court of Canada, a party needs to show that the case raises issues of national importance. As our case does have wide reaching implications, it may meet these tests.

How will COVID-19 change timelines for future court processes and implementation of the other timelines in the Decision?

It is clear that the pandemic will delay the Divisional Court process. It is too soon to know when our hearing will be scheduled. It is also too soon to know how this will affect the implementation timelines ordered in the Decision but we will keep complainants informed as we learn more.

How much have midwives paid already in special levies?

A midwife who worked from 2014 to now would have paid the following in special levies:

YEAR	LEVY AMOUNT
2014	$308.88
2015	$708.00
2016	$1,395.00
2017	$1,500.00
2018	$1,600.00
2019	$930.00
2020	$367.00
TOTAL:	**$6,808.88**

In light of the remedy Decision, the special levy fees have been an excellent investment, assuming our Decision stands. We'll continue to work to make additional fees as affordable as possible for midwives as we move forward.

If midwives who paid the levy fee are not an eligible party under this Decision, and therefore won't receive any compensation, will they get their levy fees back?

None of the ineligible midwives who did not practice after November 2012 have ever paid the levy. Midwives who worked since that date and did not file a consent will not get back their fees; however, they will benefit from the Decision in their compensation moving forward.

The judicial review in Divisional Court, and any further possible court appeals will cost money. How much is this expected to cost in special levies?

It is difficult to estimate what the ongoing costs will be. However, it will not be the same level of costs which were incurred during the period of 2016-2018 when there were 51 days of hearings. The Divisional Court hearing is only 2.5 days although there are extensive preparation costs prior to that hearing. As well, there may be further legal costs if the Divisional Court Decision is appealed or there is a reference by the Divisional Court of the case back to the HRTO.

What are the tax implications when we get this adjustment? Will we have to pay taxes as if we got this amount in one year or will be able to pay taxes as if we had received it over the course of 9 years? Will we have to pay income tax on the retroactive pay and injury to dignity?

The AOM will likely procure services of a tax specialist to assist midwives with this issue. Generally, injury to dignity damages are not taxable. Lost compensation income is taxable. There are provisions in the Tax Act for attributing lost income to previous years, in order to recalculate taxes for that specific year. Income tax likely will not be paid as if the income was earned in one year.

Will Mary Cornish be continuing as our lawyer through the appeals process?

Yes! We are also very fortunate to have Adrienne Telford and Lara Koerner Yeo also working with Mary on this case. See their bios here:

https://www.cavalluzzo.com/lawyers/bio/adrienne-telford
https://www.cavalluzzo.com/lawyers/bio/lara-koerner-yeo.

TELL MARY SHE ROCKS AND WE ARE THANKFUL.

We did and she does!