Court File No.: A142/89

SUPREME COURT OF ONTARIO
(COURT OF APPEAL)

IN THE MATTER OF an Application for Judicial Review pursuant to The Judicial Review Procedure Act, R.S.O. 1980, c.224;

AND IN THE MATTER OF the Pay Equity Act, S.O. 1987, c.34.

B E T W E E N :

THE HALDIMAND-NORFOLK REGIONAL BOARD OF COMMISSIONERS OF POLICE and THE REGIONAL MUNICIPALITY OF HALDIMAND-NORFOLK

Appellants

- and -

ONTARIO NURSES' ASSOCIATION and THE PAY EQUITY HEARINGS TRIBUNAL

Respondents

- and -

THE METROPOLITAN BOARD OF COMMISSIONERS OF POLICE and THE MUNICIPAL POLICE AUTHORITIES and THE EQUAL PAY COALITION

Intervenors

FACTUM OF THE INTERVENOR EQUAL PAY COALITION

GOWLING, STRATHY & HENDERSON
Barristers & Solicitors
2 First Canadian Place
Suite 2400
Toronto, Ontario
M5X 1A4

Chris G. Paliare
Martha Milczynski

(416) 862-8484

Solicitors for the
Equal Pay Coalition

TO: KINGSMILL, ROSS, McBRIDE
Barristers & Solicitors
P.O. Box 907
1 King Street West
Hamilton, Ontario
L8N 3P6

W. Graydon Sheppard
Stanley F. Floras
(416) 572-5806

Solicitors for The Haldimand-Norfolk Regional Board of Commissioners of Police

And TO: SHIBLEY, RIGHTON & McCUTCHEON
Barristers & Solicitors
401 Bay Street
Suite 1800
Toronto, Ontario
M5H 2Z1

J. Paul Wearing
J. Paul R. Howard
(416) 363-9381

Solicitors for The Regional Municipality of Haldimand-Norfolk

AND TO: CORNISH ROLAND
Barristers & Solicitors
210 Dundas Street West
Suite 500
Toronto, Ontario
M5G 3E8

Mary Cornish
Susan Ursel
Lori Newton
(416) 971-5011

Solicitors for the Ontario Nurses' Association

AND TO: CAVALLUZZO, HAYES & LENNON
Barristers & Solicitors
43 Madison Avenue
Toronto, Ontario
M5R 2S2

Paul J.J. Cavalluzzo
Karen Schucher
(416) 964-1115

Solicitors for the Pay Equity Commission

AND TO: **HICKS MORLEY HAMILTON STEWART STORIE**
Barristers & Solicitors
30th Floor, Toronto-Dominion Centre
Box 371,
Toronto, Ontario
M5K 1K8

Christopher G. Riggs
John C. Field
(416) 362-1011

Solicitors for the Intervenors, the
Metropolitan Toronto Board of Commissioners
of Police and the Municipal Police Authorities

AND TO: **THE ATTORNEY GENERAL OF ONTARIO**
720 Bay Street
Toronto, Ontario
M5G 2K1

Leslie M. McIntosh
(416) 326-4148

Counsel for the Attorney
General of Ontario

TABLE OF CONTENTS

Court File No.: A142/89

SUPREME COURT OF ONTARIO
(COURT OF APPEAL)

IN THE MATTER OF an Application for Judicial Review pursuant to The Judicial Review Procedure Act, R.S.O. 1980, c.224;

AND IN THE MATTER OF the Pay Equity Act, S.O. 1987, c.34.

B E T W E E N :

THE HALDIMAND-NORFOLK REGIONAL BOARD OF COMMISSIONERS OF POLICE and THE REGIONAL MUNICIPALITY OF HALDIMAND-NORFOLK

Appellants

- and -

ONTARIO NURSES' ASSOCIATION and THE PAY EQUITY HEARINGS TRIBUNAL

Respondents

- and -

THE METROPOLITAN BOARD OF COMMISSIONERS OF POLICE, THE MUNICIPAL POLICE AUTHORITIES and THE EQUAL PAY COALITION

Intervenors

FACTUM OF THE INTERVENOR EQUAL PAY COALITION

Nature of the Appeal

1. This is an appeal from a decision of the Supreme Court of Ontario (Divisional Court) released on November 23, 1989 which dismissed an application for judicial review of a majority decision of the Pay Equity Hearings Tribunal ("the Tribunal") under the Pay Equity Act, S.O. 1987, c.34.

PART I - THE FACTS

2. The Intervenor, the Equal Pay Coalition (the "Coalition") is a broad based coalition of organizations which has sought the implementation of equal pay for work of equal value through legislation and collective bargaining.

3. The Coalition represents over one million Ontario women and men. Nationally, the Coalition represents over three million people and 415 groups through its member group, the National Action Committee on the Status of Women.

4. Among the Coalition's members are groups and associations representing non-unionized women, including organizations which represent visible minorities and immigrant women.

5. The Coalition was granted leave to intervene in this proceeding because of its expertise and concern that the interpretation to be given to the Pay Equity Act "may have an impact on employees in this province beyond the direct interests of the parties involved".

Appeal Book, Tab 15, p.140, per Dubin C.J.O.
Schedule "C", Order

(i) Tribunal Decision

6. The Tribunal decision under appeal involved an application to the Tribunal by the Ontario Nurses' Association ("ONA") for a declaration that the Haldimand-Norfolk Regional Police Force be included in the "establishment" of the Regional Municipality of Haldimand-Norfolk for the purpose of implementing pay equity for ONA's member nurses in its bargaining units at the Municipality's Regional Health Unit and Grandview Lodge, a Home for the Aged.

Appeal Book, Majority Decision, Tab 8, pp.41-42

7. The Appellants and the Respondent ONA jointly requested that the Tribunal first decide the question of the definition of the "establishment" which required the determination of who was the "employer".

Appeal Book, Majority Decision, Tab 8, pp.42-43

8. The word "establishment" is defined in the Act:

> s.1(1) "Establishment" means all the employees of an employer employed in a geographic division or in such geographic divisions as are agreed upon under s.14 or decided upon under s.15.
>
> Pay Equity Act, S.O. 1987, c.34 s.1(1)

9. The word "employer" is not defined in the Act. The Tribunal therefore developed a set of criteria or tests to be applied to the facts of particular cases. On this issue the Tribunal was unanimous.

Appeal Book, Majority Decision, Tab 8, pp. 71-72

Appeal Book, Dissent, Tab 8, p. 78

10. Applying these criteria, the majority of the Tribunal determined that the Regional Municipality of Haldimand-Norfolk was the "employer" of the Regional Police and of the applicant nurses for the purposes of the Pay Equity Act.

Appeal Book, Majority Decision, Tab 8, pp.76-77

11. The decision of the majority of the Tribunal was made the subject of an application for judicial review.

Appeal Book, Tab 9, pp.82-87

12. On November 23, 1989, the Divisional Court released written reasons dismissing the application for judicial review. The Court held that the determination of who was the employer was within the Tribunal's jurisdiction and that its finding that the employer was the Regional Municipality was not patently unreasonable.

Appeal Book, Tab 7, pp. 30-40

PART II - ISSUES ON APPEAL

13. The issues in this appeal are:

(i) whether the appropriate standard of review to be applied to the majority decision of the Pay Equity Hearings Tribunal is the standard of correctness or the standard of patent unreasonableness; and

(ii) whether the Pay Equity Hearings Tribunal failed to meet the appropriate standard of review in defining "employer" and "establishment", within the meaning of section 1(1) of the Pay Equity Act, as the Regional Municipality of Haldimand-Norfolk for both the Regional Police Force and the applicant nurses.

14. The Coalition takes no position on the appropriate standard of review. The Coalition seeks to assist this Honourable Court in determining the appropriate interpretive approach to the Pay Equity Act.

PART III - SUBMISSIONS

15. The Coalition submits that it is appropriate and in fact necessary to adopt a broad and purposive interpretive approach to the Pay Equity Act. A broad and purposive definition of "employer" in particular is required given that this definition determines the extent or scope of the Pay Equity Act's application.

16. The Coalition submits that the Pay Equity Act must be interpreted and applied in a manner that seeks to assist the greatest number of women, taking into account:

(i) the pervasive nature of pay inequity and occupational segregation that exists in our society;

(ii) the requirements of section 15 of the Canadian Charter of Rights and Freedoms; and

(iii) the legislative purpose, scheme and application of the Pay Equity Act.

17. Only in that context can the interpretive approach taken by the Pay Equity Hearings Tribunal in the Haldimand-Norfolk case be evaluated in terms of both the principles of statutory interpretation and the impact of that interpretive approach.

A. PAY INEQUITY and OCCUPATIONAL SEGREGATION

(i) Pay Inequity

18. Historically, women's compensation has been treated differently from that of men. Women's wages were frequently set at a level of about two thirds of those of men, on the assumption that men were "breadwinners" who should earn enough to support a wife and children. Pay scales for women's wages often began at a lower level and covered a smaller range than men's on the assumption that women were less productive than men.

> Niemann, Lindsay: Wage Discrimination and Workers: The Move Towards Equal Pay For Work of Equal Value in Canada, Women's Bureau - Labour Canada, Ottawa: 1984; p.34

19. Women in Ontario represent about 43% of the employed labour force. They earn on average about 65% of what is earned by men. A large part of the gap between men's and women's wages is directly attributable to the undervaluing of the work that women do.

> Gunderson; Muszynski, Women and Labour Market Poverty, Ottawa, 1990; p.95
>
> Canada - Statistics Canada: Earnings of Men and Women in 1988, Ottawa, 1989, Cat. No. 13-217
>
> Gunderson, Employment Income: 1986, Ottawa: Statistics Canada, 1989, p.29
>
> Green Paper on Pay Equity, Ontario, 1985

20. Over time, discriminatory notions about the value of the jobs and skills traditionally held by women have become integrated into compensation systems and practices so that sex discrimination in compensation operates irrespective of labour "market forces".

21. Pay inequity and the undervaluation of work performed by women is a result of compensation policies and systems which make sex discriminatory assumptions that pre-empt comparisons of skill, effort, working conditions and responsibility between jobs held predominantly by women and jobs held predominantly by men. By preventing such comparisons, sex discrimination embedded in compensation systems denies employees in predominantly female job classes wages and benefits commensurate with the fair value of their work.

Green Paper on Pay Equity, Ontario, 1985, pp.10-12

Gunderson; Muszynski: Women and Labour Market Poverty, Ottawa, 1990, pp. 44-48

22. Many employers continue to pay women less than men for doing substantially the same work, despite the requirements of the Employment Standards Act that such work be compensated equally.

Green Paper on Pay Equity, Ontario, 1985, pp. 9-11

Employment Standards Act, R.S.O. 1980 c.137; s.33

23. Research shows that, for every additional percentage point increase in the participation of women in an occupation, there is a $42 decrease in annual pay for that occupation.

Report to the Minister of Labour, Pay Equity Commission, October, 1989, p.1

(ii) Occupational Segregation

24. More significantly, a large part of the female work force is segregated into predominantly female occupations which require equivalent amounts of skill, effort and responsibility as jobs predominantly held by men, but which are not paid accordingly. Systemic sex discrimination in compensation is endemic to occupationally segregated job classes.

Green Paper on Pay Equity, Ontario, 1985 pp. 9-11

Abella Report on Equality in Employment, Ottawa, 1984, pp. 245-249

Gunderson; Muszynski: Women and Labour Market Poverty, Ottawa, 1990; pp. 93-98

25. Studies show that, as a group, women occupy a narrower range of jobs in a narrower range of industries than men do. Those jobs tend to be predominantly held by women and also tend to be low paying. For these reasons, these jobs are often called "female job ghettos".

Gunderson; Employment Income, 1986, Ottawa, Statistics Canada, 1989, Table 4, p. 21

Gunderson; Muszynski, Women and Labour Market Poverty, Ottawa, 1990, pp. 94-95

26. About sixty percent of women work in three occupational categories: clerical, sales and service. These sectors are predominantly female and are the same general categories into which women were segregated in 1901.

Gunderson; Muszynski, Women and Labour Market Poverty, Ottawa, 1990, pp. 93-97

Abella Report on Equality in Employment, Ottawa; 1984, p. 245

27. In 1985, the clerical, sales and service sectors had average annual incomes of $13,885, $16,284, and $11,270 respectively, compared to an average of $18,910 for all occupations. Women in these job sectors, however, received average annual incomes of only $12,746, $9,594 and $7,362 respectively, making them among the poorest members of the paid work force.

Gunderson, Employment Income, 1986, Ottawa, Statistics Canada, 1989, Table 6, p. 21

Gunderson, Muszynski, Women and Labour Market Poverty, Ottawa, 1990, Table 4.2, p. 95

28. Among the occupational categories with the highest concentration of men are the transport, construction, machinery and forestry sectors. In 1985, these sectors had average annual incomes of $21,186, $19,502, $22,034 and $17,945 respectively. The women that were employed in these sectors earned only $11,100, $12,655, $13,473 and $6,193 respectively.

Gunderson; Muszynski, Women and Labour Market Poverty, Ottawa, 1990, p. 95

29. Women are also segregated within the broad occupational groupings depending on their job classification or the product or tasks involved. For example, in the managerial and administrative categories, women tend to occupy administrative positions and not executive positions. In most industries in the manufacturing sector and in the leather, textile and apparel sector, male and female employees are also not evenly distributed. Men and women perform different kinds of work to the extent that they are employed in completely different enterprises.

Gunderson; Muszynski, Women and Labour Market Poverty, Ottawa, 1990, p. 93

Evans, Predominantly Female Establishment Study: Manufacturing Sector, Ontario, Pay Equity Commission, 1988, excerpts

Bush, Female Predominant Workplace Study No. 6: Leather, Textile and Apparel Manufacturing Sectors, Ontario, Pay Equity Commission, 1988, excerpts

30. Policy makers and entrepreneurs structure their enterprises in a variety of ways and for a variety of reasons which may be perfectly valid for business purposes but which may have no significance for pay equity purposes. These structures tend to mirror and reproduce the occupational segregation of work by gender.

31. The result of this pervasive occupational segregation is that men and women often do not work in the same workplaces or in the same enterprises. Even where they do, they do quite different work and by application of conventional Labour Relations Board principles of "community of interest" are often, where they are unionized, in different bargaining units.

Sack & Mitchell, Ontario Labour Relations Board Law and Practice, Toronto, 1985, pp. 140-141

32. In addition, the valuation of predominantly female jobs has reflected and reinforces the fact that women have a socially disadvantaged status with respect to men. Employers have tended to

value men and male characteristics, values and activities more highly than those of women. Where jobs are identified as being appropriate for women, the very designation "women's work" has carried with it an inference that those jobs are of lesser value than jobs predominantly held by men:

> ...the evidence for sex stereotyping in job related contexts is certainly strong enough to suggest that sex stereotyping will pervade the evaluation of jobs strongly identified with one sex or the other. That is, it is likely that predominantly female jobs will be undervalued relative to predominantly male jobs in the same way that women are undervalued relative to men.
>
> Blumrosen, "Wage Discrimination, Job Segregation and Title VII of the Civil Rights Act of 1964", Journal of Law Reform, Vol. 12:3, Spring 1979, p. 397 at p. 419
>
> Green Paper on Pay Equity, Ontario, 1985, p. (i)

33. Unionization has significantly improved women's earnings and decreased the earnings gap between women and men in some workplaces.

34. The overall wage gap between women and men, however, has changed little in 20 years despite legislation requiring equal pay for substantially similar work. Similarly, patterns of occupational segregation have been left largely undisturbed by years of equal opportunity programs.

35. Moreover, while 37% of male employees belong to unions, only 28% of the total female labour force is unionized. Most predominantly female job sectors are largely non-unionized, for example: the garment industry, retail, childcare, insurance and financial services.

> Annual Report of the Minister of Regional and Industrial Expansion, Part II: Labour Unions 1987, Ottawa, Statistics Canada, p. 1
>
> Report to the Minister of Labour, Pay Equity Commission, October, 1989, pp. 141-142

36. It is submitted that women in the lowest paid job sectors are the least likely to have access to collective bargaining to improve wage rates. They are the most victimized by pay inequity. These non-unionized women in the female job ghettos are therefore in greatest need of legislatively mandated pay equity.

37. The Attorney-General of Ontario, recognized this when he introduced the Pay Equity Act to the Legislature, stating that "time alone cannot remedy the situation" of systemic sex discrimination in compensation. As the Abella Commission concluded, for women, particularly non-unionized women in female job sectors, "it is vital that equal pay be seen through the 'equal value' lens".

Legislature of Ontario Debates 2nd Sess., 33rd Parl. 1986, at 3552

Abella Report on Equality in Employment, Ottawa, 1984, p. 245

B. CANADIAN CHARTER OF RIGHTS AND FREEDOMS

38. The Constitution of Canada, including the Charter of Rights and Freedoms, is the supreme law of Canada.

Canadian Charter of Rights and Freedoms, s.52

39. Administrative tribunals exercising statutory powers are bound by the Charter of Rights and Freedoms. They must exercise their jurisdiction in issuing orders in a manner that is consistent with the rights and guarantees enumerated in the Charter.

Slaight Communications Inc. v. Davidson, [1989] 1 S.C.R. 1038

40. With respect to the Pay Equity Act's purpose of redressing systemic sex discrimination and promoting women's equal access to economic resources in compensation, special regard must be paid to the equality guarantee under the Charter.

(i) Section 15: The Constitutional Guarantee of Equality

41. Equality is one of the fundamental values of our society, against which the objects and effects of all legislation must be measured. It has been recognized an "an all-encompassing right governing all legislative action".

R. v. Oakes, [1986] 1 S.C.R. 103 at 136

Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143 at 171

42. Section 15 of the Canadian Charter of Rights and Freedoms guarantees equality before and under the law and the right to equal protection and equal benefit of the law without discrimination.

43. Section 15 mandates the promotion of equality and the remedying of existing inequality, goals which are "much more specific than the mere elimination of distinctions." This mandate "entails the promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration".

Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143 at 171

44. The nature of the discrimination prohibited by section 15 incorporates the concepts of both direct and systemic discrimination. Discrimination has been defined as:

> ... a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group which have the effect of imposing burdens, obligation or disadvantages on such individuals or groups not imposed on others, or which withholds or limits access to opportunities, benefits and advantages available to other members of society.

Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143 at 174

45. The redressing of systemic discrimination is central to this concept of equality. "To approach the ideal of full equality before and under the law... the main consideration must be the impact of the law on the individual or the group concerned".

Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143 at 165

46. Section 15 is designed "to protect those groups who suffer social, political and legal disadvantage in society" and to ensure that distinctions among citizens do not "bring about or reinforce the disadvantage of certain groups".

Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143 at pp. 154; 152

R. v. Turpin, [1989] 1 S.C.R. 1296 at 1331-1332

47. Thus, in assessing the impact of a law or a particular interpretation of a law, special attention must be given to its impact on those groups who suffer disadvantage in our society.

(ii) The Undervaluation of Women's Work or Pay Inequity is Sex Discrimination

48. Sex is a specifically prohibited ground of discrimination in section 15. The Charter acknowledges that women as a group "suffer social, political and legal disadvantage in society".

49. The fact that women in general earn substantially less than men for work of equal value is the result of systemic discrimination against women. This economic disadvantage affects all aspects of women's lives, from matters such as dignity and respect, housing and nutrition, to educational and employment opportunities.

Gunderson; Muszynski, Women and Labour Market Poverty, Ottawa, 1990, pp. 7-12

50. For a practice or law to constitute sex discrimination, it is not necessary that all women be disadvantaged or that all individuals who might be disadvantaged be women. It is sufficient that the

practice or law has the effect of limiting societal benefits and the opportunity to acquire those benefits on the basis of a characteristic related to gender.

> Brooks v. Canada Safeway Limited, [1989] 1 S.C.R. 1219 at pp. 1246-1249
>
> Janzen v. Platy Enterprises Limited, [1989] 1 S.C.R. 1252 at pp. 1284, 1288-1289

51. The Supreme Court of Canada, in elaborating the scope of sex discrimination with respect to pregnancy and sexual harassment, has emphasized the fundamental importance of women's full and unimpeded participation in the work place to the achievement of women's equality. Such full and unimpeded participation requires the equal and full recognition of the worth of jobs performed primarily by women.

> The evil to be remedied is the utilization of economic power or authority so as to restrict a woman's guaranteed and equal access to the workplace and all of its benefits... Where a woman's equal access is denied or when terms or conditions differ when compared to male employees, the woman is being discriminated against.
>
> Janzen v. Platy Enterprises Limited, [1989] 1 S.C.R. 1252 at 1277
>
> Brooks v. Canada Safeway Limited, [1989] 1 S.C.R. 1219

52. The Ontario Divisional Court has specifically found that an allegation of unequal pay for work of equal value can be sex discrimination within the meaning of sections 4, 8 and 10 of the Human Rights Code.

> Nishimura v. Ontario (Human Rights Commission) (1990), 11 C.H.R.R. D/246

(iii) The Pay Equity Act Promotes Women's Equal Access to Economic Resources

53. The Pay Equity Act promotes equal access to economic resources and attempts to remedy wage discrimination on the basis of sex. It promotes equality as comprehended by section 15 of the Charter by prescribing a proactive approach.

54. The Pay Equity Act is based on the premise that "it is desireable that affirmative action be taken to redress gender discrimination in the compensation of employees employed in female job classes in Ontario". It is a "positive remedy to address an historical imbalance" which requires the upward adjustment of women's wages and/or those of employees in female-dominated occupations.

Pay Equity Act, S.O. 1987, c.34, Preamble

Legislature of Ontario Debates 2nd Sess., 33rd Parl. 1986, at 3552

55. By legislating this remedy, the government acknowledged that its actions were consistent with subsection 15(2) of the Charter "which permits the government to establish special programs to help disadvantaged groups" and assisted in the realization of the equality mandated by subsection 15(1).

Green Paper on Pay Equity, Ontario, 1985

56. The Pay Equity Act's mandate is to promote women's equality. The Act does this by requiring an assessment of the skill, effort, responsibility and working conditions associated with traditional "women's work" and a comparison of these factors with male job classes within the same establishment.

Pay Equity Act, S.O. 1987, c.34, s.5(1)

57. In order to achieve its mandate of redressing pay inequity or wage discrimination, the Pay Equity Act specifically requires the comparison of different jobs. It goes far beyond earlier legislative attempts to achieve equal pay for the same or substantially similar jobs.

Employment Standards Act, R.S.O. 1980, c.137, s.33

Female Employees Fair Remuneration Act, 1951, S.O. 1951 c.26

See also discussion at paragraphs 102-105

(iv) Affirmative Action Statutes Such as the Pay Equity Act Must Be Interpreted Consistently with the Charter

58. The Ontario Government has enacted this affirmative action statute with the express purpose of redressing gender discrimination in compensation. It is submitted that the Pay Equity Act must be interpreted so as to fulfill the mandate of section 15 of the Charter.

59. Just as Charter rights and guarantees are relied upon to challenge legislation, these rights and guarantees can be used to mandate an interpretation and application of legislation that would promote or realize a Charter right in the context of a particular legislative framework.

Retail Wholesale and Department Store Union Local 580 v. Dolphin Delivery, [1986] 2 S.C.R. 573

Leroux v. Co-operators General Insurance Co., (1990), 71 O.R. (2d) 641 at 657 (H.C.)

Hockey v. Hockey (1989 69 O.R. (2d) 338 at 340 (H.C.)

60. The courts have recognized that section 15 of the Charter and legislation promoting equality have a common purpose. Accordingly, they require a common approach to interpretation.

Canadian National Railway Co. v. Canada (Canadian Human Rights Commission), [1987] 1 S.C.R., 1114 at 1138

Brooks v. Canada Safeway Limited [1989] 1 S.C.R. 1219 at 1232

61. This common approach has been held to include the following principles:

(i) where a statute can reasonably bear an interpretation that conforms with the Charter, it should be interpreted in this manner; and

Leroux v. Co-operators General Insurance Co. (1990), 71 O.R. (2d) 641 at 655 (H.C.)

Re Attorney-General of Manitoba And Metropolitan Stores Limited, [1987] 1 S.C.R. 110 at 125

Retail Wholesale and Department Store Union Local

580 v. Dolphin Delivery, [1986] 2 S.C.R. 573

(ii) the values embodied in the Charter must be given preference over an interpretation of a statute which would run contrary to them.

Hills v. Attorney-General of Canada, [1988] 1 S.C.R. 513 at 558

62. It is submitted that by establishing a test or set of criteria for the definition of "employer" in a broad manner, the Pay Equity Hearings Tribunal's decision realizes the values of section 15 of the Charter.

63. The Tribunal's approach to the definition of "employer" permits the comparison of female job classes with a broader base of male job classes.

64. This best fulfills the purpose of the Pay Equity Act which in turn, best promotes women's equality. In particular, this assists those women who are employed in female job ghettos where male comparators might not exist under a narrower definition of "employer".

65. Women employed in female job ghettoes are the most disadvantaged of all female employees. They are the lowest paid and least likely of all employees to be represented by a union. They are, in the employment context, "a group lacking in political power and as such, [are] vulnerable to having their interests overlooked and their rights to equal concern and respect violated".

Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143 at 152

66. It is respectfully submitted that section 15 of the Charter thus mandates an interpretation of "employer" and an application of the Pay Equity Act that ensures maximum access to pay equity.

(C) THE PAY EQUITY ACT: LEGISLATIVE PURPOSE, SCHEME and APPLICATION

(i) Legislative Purpose

67. The express purpose of the Pay Equity Act is to take affirmative action "to redress systemic gender discrimination in compensation for work performed by employees in female job classes".

Pay Equity Act, S.O. 1987, c.34, Preamble and s.4(1)

68. Systemic discrimination is defined in the Government of Ontario's Green Paper on Pay Equity as those "policies, laws, or practices which have a discriminatory or adverse effect on a particular group, even where discrimination was not intended".

Green Paper on Pay Equity, Ontario: 1985 at p.116

69. A discussion of systemic discrimination is found in the Report of the Commission on Equity in Employment chaired by Judge Rosalie Abella. It has been quoted with approval by the Supreme Court of Canada:

> Discrimination...means practices or attitudes that have, whether by design or impact, the effect of limiting an individual's or a group's right to the opportunities generally available because of attributed rather than actual characteristics...
>
> If the barrier is affecting certain groups in a disproportionately negative way, it is a signal that the practice that leads to this adverse impact may be discriminatory.
>
> Abella Report on Equality in Employment, Ottawa, 1984
>
> Andrews v. Law Society of British Columbia, (1989) 1 S.C.R. 143 at 174
>
> Canadian National Railway Co. v. Canada (Canadian Human Rights Commission) [1987] 1 S.C.R. 1114 at 1138-9

70. The systemic discrimination which the Pay Equity Act is intended to address is the undervaluation of work performed predominantly by employed women.

Green Paper on Pay Equity, Ontario: 1985, pp. 1-6

71. The institutionalized undervaluation of work performed by employed women leads to the impoverishment of women. In fact, women as a group are poorer than men as a group.

Gunderson, Muszynski, Women and Labour Market Poverty, Ottawa; 1990, pp. 7-12 and 30

(ii) Legislative Scheme

72. The Pay Equity Act requires employers to take affirmative action to redress gender discrimination in the compensation of employees employed in female job classes in Ontario.

Pay Equity Act, S.O. 1987, c.34, s.4(1) and preamble

73. In particular, all Ontario employers, except private sector employers with less than ten employees, are required to establish and maintain compensation practices which provide for pay equity in every establishment of the employer.

Pay Equity Act, S.O. 1987, c.34, s.3

74. This is done by first comparing the compensation and the value of work performed in each female job class with their counterparts in male job classes. The criteria applied in determining the value of work are a composite of the skill, effort and responsibility normally required in performing the work and the conditions under which it is performed.

Pay Equity Act, S.O. 1987, c.34, ss.4(2) and 5(1)

75. Pay equity within the context of the Pay Equity Act is then "achieved" by increasing the wages of any female job class to those of the lowest paid male job class which is found to be of comparable value.

Pay Equity Act, S.O. 1987, c.34, s.6

76. A pay equity plan which sets out the above process to establish pay equity in the workplace and which identifies the required pay adjustments must be prepared.

77. In establishments where no employee is represented by a bargaining agent, the employer unilaterally prepares and posts the plan for the entire establishment.

Pay Equity Act, S.O. 1987, c.34, s.15(1)

78. In unionized establishments, employers must bargain in good faith with the bargaining agent(s) to agree on a gender-neutral comparison system and on the preparation and implementation of the pay equity plan. The employer then posts the plan for each bargaining unit.

Pay Equity Act, S.O. 1987, c.34, ss.14(2) and 14(4)

79. The Pay Equity Act thus seeks to redress pay inequity or systemic sex discrimination in compensation by requiring those who set and maintain compensation practices to apply pay equity plans to those practices. These plans require the job value comparisons which systemic sex discrimination prevented.

80. The implementation of these objectives, however, requires the initial determination of the "establishment" and who is the "employer".

(iii) Application: Definition of "Employer"

81. There is not, in law, a single uniform definition of "employer" or "employee". While Courts have developed general principles for "control" and "organization" tests, the determination of the issue by an administrative tribunal is generally dependent upon the reason or legislative purpose for the inquiry.

Lapensee v. Ottawa Day Nursery Inc. (1986), 35 C.C.L.T. 129 (Ont. H.C.)

R v Pereira (1988), 20 C.C.E.L. 187 (Alta. Q.B.) at 200

Cormier v. Alberta Human Rights Commission (1984), 14 D.L.R. (4th) 55 (Alta. Q.B.)

82. In deciding who is an employer, administrative tribunals take as their starting point the purpose and intent of the legislation they are empowered to interpret. As a result, a legal entity may be found to be an employer for the purpose of one particular statute but not for another.

Sutton Place Hotel [1980] O.L.R.B. Rep. October 1538

R v. Pereira (1983), 20 C.C.E.L. 187 (Alta. Q.B.)

Cormier v. Alberta Human Rights Commission (1984), 14 D.L.R. (4th) 55 (Alta. Q.B.)

(a) Labour Relations Act

83. The express purpose of the Ontario Labour Relations Act is to promote collective bargaining in the province of Ontario. In that context, the Ontario Labour Relations Board may be required, for example, to determine whether two or more legal entities which carry on associated or related activities should be treated as a single employer for collective bargaining purposes.

Labour Relations Act R.S.O. 1980, c.228, Preamble; s.1(4)

York Condominium Corporation, [1977] O.L.R.B. Rep. October 645 at 648

McCollum Graphics Incorporation, [1986] O.L.R.B. Rep. January 131 at 135

84. The Ontario Labour Relations Board may also be required to determine whether an individual or group of individuals are employees or independent contractors under the Labour Relations Act. This determination necessarily defines who is the employer for the purposes of collective bargaining.

Labour Relations Act, R.S.O. 1980, c.228, ss.1(1)(h)(i)

Algonquin Tavern, [1981] O.L.R.B. Rep. August, 1057

OPSEU v. Industrial Resource Centre (Windsor/Essex) Inc, [1982] O.L.R.B. Rep. 1482

(b) Workers' Compensation Act

85. The determination of whether a particular person is a "worker", as opposed to an "independent operator", will result in that worker's employer assuming certain rights and obligations under the Workers' Compensation Act.

> Workers' Compensation Act R.S.O. 1980, c.539 as amended, ss. 1(1)(m), 4, 5

86. Under the Workers' Compensation Act, the Workers' Compensation Board and Appeals Tribunal have taken a broad approach to determinations of whether someone is a worker, consequently determining who is the employer liable for coverage. More importantly, the Board and Tribunal have developed this approach with the conscious effort of giving effect to the spirit and intent of the legislation of providing some form of income security to workers in the event of a work-related illness or injury. This protection is afforded even though these workers might not be found to be employees under other legislative regimes such as the Labour Relations Act and Income Tax Act.

> WCAT Decision No. 517 (May 1987)
>
> WCAT Decision No. 872 (December 1987)
>
> WCAT Decision 304, 4 WCATR 51
>
> WCAT Decision 46/87 4 WCATR 319
>
> G. Dee, N. McCombie, and G. Newhouse Worker's Compensation in Ontario, Toronto: Butterworths, 1987, at 35-39

(c) Human Rights Legislation

87. The issue of who is the employer has also arisen in the context of human rights legislation and adjudication.

88. It is a well-established principle that human rights legislation requires a purposive interpretation:

> The accepted rules of construction are flexible enough to enable the Court to recognize in the construction of a human rights code, the special nature and purpose of the enactment...and give it an interpretation which will advance its broad purposes.

Ontario Human Rights Commission and O'Malley v Simpsons Sears Limited, [1985] 2 S.C.R. 536

Robichaud v.Canada (Treasury Board),[1987] 2 S.C.R., 84 at 89

89. In Canadian National Railway Co. v Canada (Canadian Human Rights Commission), the Supreme Court of Canada approved an affirmative action program designed to combat systemic discrimination against women at the Canadian National Railway. In reaching its decision, the Court adopted the following statement by Vancise J.A., in Canadian Odeon Theatres Limited v. Saskatchewan Human Rights Commission:

> A narrow restrictive interpretation which would defeat the purpose of the legislation, that is, the elimination of discrimination, should be avoided.
>
> Canadian National Railway Co. v Canada (Canadian Human Rights Commission), [1987] 1 S.C.R. 1114 at 1138
>
> Canadian Odeon Theatres Limited v Saskatchewan Human Rights Commission and Huck, [1985] 3 W.W.R., 717 (C.A.) at 735, leave to appeal denied June 3, 1985; 60 N.R. 240 (S.C.C.)

90. The Supreme Court of Canada has also emphasized that although the words found in human rights legislation must be given their plain meaning:

> ...it is equally important that the rights enunciated be given their full recognition in fact. We should not search for ways and means to minimize those rights and to enfeeble their proper impact."
>
> Canadian National Railway Co. v Canada (Canadian Human Rights Commission), [1987] 1 S.C.R. 1114 at 1134

91. In keeping with this purposive approach to interpretation, the terms "employee" and "employer" have been defined broadly in human rights jurisprudence. For example, both taxi drivers and truck drivers, who might otherwise have been considered independent contractors, have been found to be employees.

> Cormier v Alberta Human Rights Commission et al (1984), 14 D.L.R. (4th) 55 (Alta. Q.B.)

Sharma v Yellow Cab Company Limited (1983), 4 C.H.R.R., D/1432

Pannu et al v Prestige Cab Limited, [1986] 5 W.W.R. 89 (Alta. Q.B.) aff'd (1986), 47 Alta L.R. (2d) 56 (C.A.)

92. In determining how to approach the issue of who was the employer, the Court in Cormier held:

> The first premise is that words used in stating a legal rule in one context may not mean the same or the words may be used to express a legal rule in another context. This is so whether the rule is one of statute or common law. The meaning of the same words may be found to be different if the two legal rules reflect different policy considerations and perform different social functions. Thus, for example, the notions of "master and servant", "employer and employee", and "employment" when those words are used in enunciating a legal rule that X is vicariously liable for the torts of Y, are employed as a means of delineating the limits of what is desirable as a matter of fairness and reflecting usual expectations as to who should bear the risk of loss, as well as discouraging negligent work practices. The meaning attached to those words in that context and for that purpose may be of no assistance in determining the sense of which the same words are used by the legislature when it enunciates a legal rule that reflects other policy considerations. It becomes necessary to examine the statute in which that legal rule is prescribed, in order to determine the sense in which the words are used in it.
>
> [Emphasis Added]

Cormier v Alberta Human Rights Commission et al (1984), 14 D.L.R. (4th) 55 at 70

(d) Pay Equity: Haldimand-Norfolk

93. The Pay Equity Hearings Tribunal considered the purposes and objectives of the Pay Equity Act and was unanimous in its development of the tests or criteria for determining who was the employer for the purposes of the Pay Equity Act. It concluded that the Act was "a recognition of the systemic nature of wage discrimination" and that it provided "a strategy to deal with the discrimination" through adjustments in compensation.

Appeal Book, Majority Decision Tab 8, p. 63

94. The Tribunal also noted that although the components of the Pay Equity Act included elements of labour relations law, it would not simply adopt the definition of "employer" developed by the Ontario Labour Relations Board. For example, the Tribunal rejected the factor of who was responsible for hiring and firing as being not necessarily indicative of who was ultimately responsible for settling wages or establishing compensation practices.

Appeal Book, Majority Decision Tab 8, pp. 68-71

95. The four criteria which the Tribunal considered most appropriate for determining the employer for pay equity purposes were:

1. WHO HAS OVERALL FINANCIAL RESPONSIBILITY?

   Indicia of this test include: Who has responsibility for the budget? Who bears the financial burden of compensation practices, and the burden of wage adjustments under the Act? Who is responsible for the financial administration of the budget? What is the shareholder investment or ownership? Who bears the responsibility of picking up the deficit or benefiting from the surplus?

2. WHO HAS RESPONSIBILITY FOR COMPENSATION PRACTICES?

   The indicia for this criteria include: Who sets the overall policy for compensation practices? Who attaches the value of a job to its skill, effort, responsibility and working conditions? What is the labour relations reality, who negotiates the wages and benefits with the union or sets the wage rate in a non-unionized setting?

3. WHAT IS THE NATURE OF THE BUSINESS, THE SERVICE OR THE ENTERPRISE?

   Within this test the following are helpful indica: What is the core activity of the business, service or enterprise? Is the work in dispute integral to the organization or is it severable or dispensable? Who decides what labour is to be undertaken and attaches that responsibility to a particular job? What are the employees perceptions of who is the employer?

4. WHAT IS MOST CONSISTENT WITH ACHIEVING THE PURPOSE OF [THE] PAY EQUITY ACT?

   If there is more than one possible employer, it assists the Tribunal in its determination to make reference to the purpose and objectives of the Pay Equity Act, 1987.

   Appeal Book, Majority Decision Tab 8, p. 71-72

96. In developing the above tests, the Tribunal noted that it was assisted by submissions making reference to the extensive case law in employment and labour relations. The Tribunal also stated:

> The various tests currently used have arisen from the particular problem that each Court or Tribunal is mandated to address, such as taxation liability for injuries or the scope of collective bargaining. The Tribunal must utilize those definitions only in so far as they assist the Tribunal to define employer in the statutory context of this legislation. The Tribunal must decide who is the employer on the facts in the case before it; however, the tests that it applies must utilize criteria that best accord with the objectives, structure and scheme of the Pay Equity Act, 1987.
>
> The definition of employer for one Act does not restrict another definition for purposes of pay equity. It is for the Tribunal to interpret the statute where no definition of employer exists.
>
> Appeal Book, Majority Decision Tab 8, p. 66-68

97. The Tribunal applied the tests set out in paragraph 95 above to the facts of the case before it. The majority held that for the purposes of implementing pay equity, the Regional Municipality of Haldimand-Norfolk was the employer.

Appeal Book, Majority Decision, Tab 8, p. 71-72

98. The effect of that determination was also to determine the "establishment" for pay equity purposes which consequently included the male job classes of the Regional Police Force.

D. EVALUATING THE INTERPRETIVE APPROACH

(i) Statutory Interpretation

99. The fundamental rule of statutory interpretation is that all legislation is remedial. As such, the Pay Equity Act should receive:

> ... such fair, large and liberal construction and interpretation as will be ensure the attainment of the object of the act according to its true intent, meaning and spirit.
>
> Interpretation Act, R.S.O. 1980, c. 219, s.10.

100. The practical effect of this rule has been expressed as follows:

> Today, there is only one principle or approach [to statutory interpretation] namely, that the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.
>
> E. A. Driedger, Construction of Statues, 2nd ed., (Toronto: Butterworths, 1983) at p. 87
>
> Canadian National Railway Co. v. Canada (Canadian Human Rights Commission), [1987] 1 S.C.R. 1114 at 1134

101. In interpreting anti-discrimination legislation, the Act must be construed so as to defeat all attempts to do indirectly that which is enjoined.

> P. St. J. Langan, ed. Maxwell on the Interpretation of Statutes 12th ed. (Bombay: N. M. Tripathi Private Ltd. 1969) at p. 137
>
> R. v. Stephens (1908), Sask. R. 509 at 512

102. A statute's legislative history may be used as an interpretive guide:

> ... prior enactments may throw light on the intention of the legislature in repealing, amending, replacing or adding to it.
>
> Gravel v. City of St. Leonard, [1978] 1. S.C.R. 660 at 665
>
> E. A. Driedger, Construction of Statues, 2nd ed., (Toronto: Butterworths 1983) at p. 159

103. In 1951, Ontario enacted the Female Employees Fair Remuneration Act requiring equal pay for male and female employees for the same or equal work done in the same establishment. In 1974, the Employment Standards Act was amended to change "same work" to work that is "substantially the same".

> The Female Employees Fair Remuneration Act, 1951 S.O. 1951, c.26, s.2
>
> Employment Standards Act R.S.O. 1980, c. 137, s. 33

104. The Green Paper noted the very limited application of the Employment Standards provision:

> As a result, current equal pay provisions apply only to situations where men and women perform substantially the same job in the same establishment. Furthermore, not only must the work be substantially the same, it also has to be equal in each of skill, effort, responsibility and working conditions; for example, a "female" job with more responsibility but slightly less skill required would not qualify for equal pay under this legislation.
>
> Green Paper on Pay Equity, Ontario, 1985, p. 14

105. In introducing the Pay Equity Act, the Attorney General of Ontario noted that notwithstanding previous legislative attempts to promote women's access to economic resources, "in seventeen years the wage gap has decreased by only four percent".

> Legislature of Ontario Debates 2nd Sess., 33rd Parl. 1986, at 3552

106. Further:

> ... the pay equity approach recognizes that most men and women do different kinds of work and that since some women's work is undervalued there needs to be a more comprehensive basis for comparison of value than "substantially the same work". Pay equity attempts to rectify the situation by enabling comparisons of different jobs (i.e., jobs held mainly by women and jobs held mainly by men).
>
> Green Paper on Pay Equity, Ontario, 1985, p. 14

107. It is submitted that as a piece of anti-discrimination legislation the Pay Equity Act, like human rights legislation,must not be given a "narrow or restrictive interpretation which would defeat the purpose of the legislation. The purpose of the Pay Equity Act is to promote equality for women, recognizing that pay inequity is a well-recognized form of sex discrimination.

> Canadian National Railway Co. v. Canada (Canadian Human Rights Commission), [1987] 1 S.C.R. 1114 at p. 1134

108. The Pay Equity Act was designed to remedy pay inequity where previous attempts had already failed as a result of being too narrow or restricted in scope. As stated by the Attorney General:

> ... pay equity is, and will remain, a very important - indeed a central - part of the solution. It alone can address the issue of gender-based pay discrimination in the private and broader public sectors - and the impact of this discrimination on pay practices.
>
> Legislature of Ontario Debates 2nd Sess., 33rd Parl. 1986, at 3552

(ii) Impact

109. It is submitted that the determination of who is the "employer", which in turn determines the nature of the "establishment", will determine the scope of comparison under the Pay Equity Act and the extent to which pay equity will be achieved.

110. It is necessary therefore to take into account the reality of occupational segregation. Given its pervasive nature, unless "employer" and "establishment" are defined broadly, the purpose of the Pay Equity Act will not be achieved.

111. A narrow or restricted interpretive approach would foreclose, in all future cases, the possibility of providing the greatest number of male job classes for comparison or the availability of male job classes at all.

112. A broad and purposive interpretive approach will assist in breaking down the walls of female job ghettos where those walls have no pay equity function other than to seal female job classes off from meaningful male comparators.

113. This was precisely the case in the Haldimand-Norfolk matter before the Pay Equity Hearings Tribunal. Had the Tribunal developed and applied a narrow definition of employer, the result would have been to reinforce the occupational segregation of the applicant nurses by

denying them male job comparators which would otherwise be available relying upon a broader approach.

114. This result would ultimately have the most devastating effect on the lowest paid women of all in our society: those women employed in the predominantly female job sectors, particularly those women without the advantage of collective bargaining. Without male job classes in these establishments, the promise of pay equity is denied.

115. The Tribunal's purposive interpretive approach to define "employer" was specifically designed to meet the objects and goals of the Pay Equity Act to redress systemic sex discrimination in compensation and specifically took into account the fact of women's occupational segregation.

116. The equality guarantee set out in s.15 of the Charter also seeks to redress the discrimination suffered by disadvantaged groups in our society. To deprive the most disadvantaged women of the benefits of pay equity by imposing a restrictive definition of "employer" is clearly inconsistent with the equality guarantee enshrined in s.15 as well as with the stated purpose of the legislation.

117. It is thus respectfully submitted that the Pay Equity Hearings Tribunal was required to take a purposive approach to a definition of employer and establishment for the purposes of the Pay Equity Act. Such an approach was required in accordance with the general approach taken to remedial legislation and the right to equal benefit and protection under the law as guaranteed by section 15 of the Canadian Charter of Rights and Freedoms.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Chris G. Paliare

Chris G. Paliare

Martha Milczynski

Martha Milczynski

Of Counsel for the Intervenor
Equal Pay Coalition

SCHEDULE "A"

(a) Cases

1. Slaight Communications Inc. v. Davidson, [1989] 1 S.C.R. 1038

2. R. v. Oakes, [1986] 1 S.C.R. 103

3. Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143

4. R. v. Turpin, [1989] 1 S.C.R. 1296

5. Brooks v. Canada Safeway Limited, [1989] 1 S.C.R. 1219

6. Janzen v. Platy Enterprises Limited, [1989] 1 S.C.R. 1252

7. Nishimura v. Ontario (Human Rights Commission) (1990), 11 C.H.R.R. D/246

8. Retail Wholesale and Department Store Union Local580 v. Dolphin Delivery, [1986] 2 S.C.R. 573

9. Leroux v. Co-operators General Insurance Co., (1990), 71 O.R. (2d) 641 (H.C.)

10. Hockey v. Hockey (1989 69 O.R. (2d) 338 (H.C.)

11. Canadian National Railway Co. v. Canada (Canadian Human Rights Commission), [1987] 1 S.C.R., 1114

12. Re Attorney-General of Manitoba And Metropolitan Stores Limited, [1987] 1 S.C.R. 110

13. Hills v. Attorney-General of Canada, [1988] 1 S.C.R. 513

14. Lapensee v. Ottawa Day Nursery Inc. (1986), 35 C.C.L.T. 129 (Ont. H.C.)

15. R v Pereira (1988), 20 C.C.E.L. 187 (Alta. Q.B.)

16. Cormier v. Alberta Human Rights Commission (1984), 14 D.L.R. (4th) 55 (Alta. Q.B.)

17. Sutton Place Hotel [1980] O.L.R.B. Rep. October 1538

18. York Condominium Corporation, [1977] O.L.R.B. Rep. October 645

19. McCollum Graphics Incorporation, [1986] O.L.R.B. Rep. January 131

20. Algonquin Tavern, [1981] O.L.R.B. Rep. August, 1057

21. OPSEU v. Industrial Resource Centre (Windsor/Essex) Inc, [1982] O.L.R.B. Rep. 1482

22. WCAT Decision No. 517 (May 1987)

23. WCAT Decision No. 872 (December 1987)

24. WCAT Decision 304, 4 WCATR 51

25. WCAT Decision 46/87 4 WCATR 319

26. Ontario Human Rights Commission and O'Malley v Simpsons Sears Limited, [1985] 2 S.C.R. 536

27. Robichaud v.Canada (Treasury Board),[1987] 2 S.C.R., 84

28. Canadian Odeon Theatres Limited v Saskatchewan Human Rights Commission and Huck, [1985] 3 W.W.R., 717 (C.A.) at 735, leave to appeal denied June 3, 1985; 60 N.R. 240 (S.C.C.)

29. Sharma v Yellow Cab Company Limited (1983), 4 C.H.R.R., D/1432

30. Pannu et al v Prestige Cab Limited, [1986] 5 W.W.R. 89 (Alta. Q.B.) aff'd (1986), 47 Alta L.R. (2d) 56 (C.A.)

31. R. v. Stephens (1908), Sask. R. 509

32. Gravel v. City of St. Leonard, [1978] 1. S.C.R. 660

(b) Authorities

33. Niemann, Lindsay: Wage Discrimination and Workers: The Move Towards Equal Pay For Work of Equal Value in Canada, Women's Bureau - Labour Canada, Ottawa: 1984

34. Gunderson; Muszynski, Women and Labour Market Poverty, Ottawa, 1990

35. Canada - Statistics Canada: Earnings of Men and Women in 1988, Ottawa, 1989, Cat. No. 13-217

36. Gunderson, Employment Income: 1986, Ottawa: Statistics Canada, 1989

37. Green Paper on Pay Equity, Ontario, 1985

38. Report to the Minister of Labour, Pay Equity Commission, October, 1989

39. Abella Report on Equality in Employment, Ottawa, 1984

40. Evans, Predominantly Female Establishment Study: Manufacturing Sector, Ontario, Pay Equity Commission, 1988

41. Bush, Female Predominant Workplace Study No. 6: Leather, Textile and Apparel Manufacturing Sectors, Ontario, Pay Equity Commission, 1988

42. Sack & Mitchell, Ontario Labour Relations Board Law and Practice, Toronto, 1985

43. Blumrosen, "Wage Discrimination, Job Segregation and Title VII of the Civil Rights Act of 1964", Journal of Law Reform, Vol. 12:3, Spring 1979

44. Annual Report of the Minister of Regional and Industrial Expansion, Part II: Labour Unions 1987, Ottawa, Statistics Canada

45. Legislature of Ontario Debates 2nd Sess., 33rd Parl. 1986

46. G. Dee, N. McCombie, and G. Newhouse Worker's Compensation in Ontario, Toronto: Butterworths, 1987

47. E. A. Driedger, Construction of Statues, 2nd ed., (Toronto: Butterworths, 1983)

48. P. St. J. Langan, ed. Maxwell on the Interpretation of Statutes 12th ed. (Bombay: N. M. Tripathi Private Ltd. 1969)

SCHEDULE "B"

Pay Equity Act S.O. 1987, c.32

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;

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

(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.

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.

(2) The fact that an employee's needs have been accommodated for the purpose of complying with the *Human Rights Code, 1981* shall not be considered in determining the value of work performed.

6.—(1) For the purposes of this Act, 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 for a male job class in the same establishment where the work performed in the two job classes is of equal or comparable value.

(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.

(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.

(4) Comparisons required by this Act,

(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.

(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.

(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.

(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 Commission decides that the group should be treated as one female job class.

(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.

(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.

(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.

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.

(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.

(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.

(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 work place.

(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.

(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.

(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.

(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 work place.

(9) Subsections 15 (2) to (8) apply to a pay equity plan described in subsection (8).

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 work place.

Canadian Charter of Rights & Freedoms

Equality Rights

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability. (83)

52. (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

(2) The Constitution of Canada includes

(*a*) the *Canada Act 1982*, including this Act;

(*b*) the Acts and orders referred to in the schedule; and

(*c*) any amendment to any Act or order referred to in paragraph (*a*) or (*b*).

EQUAL PAY FOR EQUAL WORK

33.—(1) No employer or person acting on behalf of an employer shall differentiate between his male and female employees by paying a female employee at a rate of pay less than the rate of pay paid to a male employee, or *vice versa*, for substantially the same kind of work performed in the same establishment, the performance of which requires substantially the same skill, effort and responsibility and which is performed under similar working conditions, except where such payment is made pursuant to,

(a) a seniority system;

(b) a merit system;

(c) a system that measures earnings by quantity or quality of production; or

(d) a differential based on any factor other than sex.

(2) No employer shall reduce the rate of pay of an employee in order to comply with subsection (1).

(3) No organization of employers or employees or its agents shall cause or attempt to cause an employer to agree to or to pay to his employees rates of pay that are in contravention of subsection (1).

(4) Where an employment standards officer finds that an employer has failed to comply with subsection (1), the employment standards officer may determine the amount of moneys owing to an employee because of such non-compliance, and such amount shall be deemed to be unpaid wages. R.S.O. 1980, c. 137, s. 33.

The Female Employees' Fair Remuneration Act

Interpretation

1. In this Act,

(*a*) "Director" means the Director of the Fair Employment Practices Branch of the Department of Labour;

(*b*) "establishment" means a place of business or the place where an undertaking or a part thereof is carried on;

(*c*) "Minister" means the Minister of Labour;

(*d*) "pay" means remuneration in any form. 1951, c. 26, s. 1.

Equal pay for equal work

2.—(1) No employer and no person acting on his behalf shall discriminate between his male and female employees by paying a female employee at a rate of pay less than the rate of pay paid to a male employee employed by him for the same work done in the same establishment.

Saving

(2) A difference in the rate of pay between a female and a male employee based on any factor other than sex does not constitute a failure to comply with this section. 1951, c. 26, s 2.

Conciliation officer, appointment

3.—(1) The Minister may on the recommendation of the Director designate a conciliation officer to inquire into the complaint of any person that she has been discriminated against contrary to section 2.

Form of complaint

(2) Every such complaint shall be in writing on the form prescribed by the Director and shall be mailed or delivered to him at his office.

Conciliation officer, duties

(3) The conciliation officer shall forthwith after he is appointed inquire into the complaint and endeavour to effect a settlement of the matter complained of and shall report the results of his inquiry and endeavours to the Director. 1951, c. 26, s. 3.

Commission, appointment

4.—(1) If the conciliation officer is unable to effect a settlement of the matter complained of, the Minister may, on the recommendation of the Director, appoint a commission composed of one or more persons and shall forthwith communicate the names of the members of the commission to the parties

and thereupon it shall be presumed conclusively that the commission was appointed in accordance with this Act, and no order shall be made or process entered or proceeding taken in any court, whether by way of injunction, declaratory judgment, certiorari, mandamus, prohibition, quo warranto or otherwise to question the appointment of the commission, or to review, prohibit or restrain any of its proceedings.

powers R.S.O. 1960, c. 202

(2) The commission has all the powers of a conciliation board under section 28 of *The Labour Relations Act*.

duties

(3) The commission shall give the parties full opportunity to present evidence and to make submissions and, if it finds that the complaint is supported by the evidence, it shall recommend to the Director the course that ought to be taken with respect to the complaint.

Majority recommendations to prevail

(4) If the commission is composed of more than one person, the recommendations of the majority are the recommendations of the commission.

Clarification of recommendations

(5) After a commission has made its recommendations, the Director may direct it to clarify or amplify any of them and they shall be deemed not to have been received by the Director until they have been so clarified or amplified.

Minister's order

(6) The Minister, on the recommendation of the Director, may issue whatever order he deems necessary to carry the recommendations of the commission into effect, and the order is final and shall be complied with in accordance with its terms.

Remuneration

(7) Each member of a commission shall be remunerated for his services at the same rate as a commissioner under *The Labour Relations Act*. 1951, c. 26, s. 4.

Offence

5.—(1) Every person who contravenes any provision of this Act or any order made under this Act is guilty of an offence and on summary conviction is liable to a fine of not more than $100.

Disposition of fines

(2) The fines recovered for offences against this Act shall be paid to the Treasurer of Ontario and shall form part of the Consolidated Revenue Fund. 1951, c. 26, s. 5.

Consent to prosecution

6. No prosecution for an offence under this Act shall be instituted except with the consent in writing of the Minister on the recommendation of the Director. 1951, c. 26, s. 6.

Labour Relations Act R.S.O. 1980, c.228

Preamble

WHEREAS it is in the public interest of the Province of Ontario to further harmonious relations between employers and employees by encouraging the practice and procedure of collective bargaining between employers and trade unions as the freely designated representatives of employees.

1.—(1) In this Act,

(h) "dependent contractor" means a person, whether or not employed under a contract of employment, and whether or not furnishing his own tools, vehicles, equipment, machinery, material, or any other thing, who performs work or services for another person for compensation or reward on such terms and conditions that he is in a position of economic dependence upon, and under an obligation to perform duties for, that person more closely resembling the relationship of an employee than that of an independent contractor;

(i) "employee" includes a dependent contractor;

(4) Where, in the opinion of the Board, associated or related activities or businesses are carried on, whether or not simultaneously, by or through more than one corporation, individual, firm, syndicate or association or any combination thereof, under common control or direction, the Board may, upon the application of any person, trade union or council of trade unions concerned, treat the corporations, individuals, firms, syndicates or associations or any combination thereof as constituting one employer for the purposes of this Act and grant such relief, by way of declaration or otherwise, as it may deem appropriate.

s 1(1)

(k) "employer" includes every person having in the person's service under a contract of hiring or apprenticeship, written or oral, express or implied, any person engaged in any work in or about an industry and includes,

(i) the Crown in right of Ontario and any permanent board or commission appointed by the Crown in right of Ontario,

(ii) a trustee, receiver, liquidator, executor or administrator who carries on an industry,

(iii) a person who authorizes or permits a learner to be in or about an industry for the purpose mentioned in clause (q); 1984, c. 58, s. 1 (4).

(l) "employment" includes employment in an industry or any part, branch or department of an industry; R.S.O. 1980, c. 539, s. 1 (1), cl. (l).

(m) "independent operator" means a person who carries on an industry set out in Schedule 1 and who does not employ any workers for that purpose; R.S.O. 1980, c. 539, s. 1 (1), cl. (m); 1982, c. 61, s. 2.

(z) "worker" includes a person who has entered into or is employed under a contract of service or apprenticeship, written or oral, express or implied, whether by way of manual labour or otherwise, and includes,

(i) a learner,

(ii) a member of a municipal volunteer fire brigade or a municipal volunteer ambulance brigade,

(iii) a person deemed to be a worker of an employer by a direction or order of the Board,

(iv) a person summoned to assist in controlling or extinguishing a fire by an authority empowered to do so,

(v) a person who assists in any search and rescue operation at the request of and under the direction of a member of the Ontario Provincial Police Force,

(vi) a person who assists in connection with an emergency that has been declared to exist by the head of council of a municipality or the Premier of Ontario,

(vii) an auxiliary member of a police force,

but does not include an outworker, an executive officer of a corporation, or a person whose employment is of a casual nature and who is employed otherwise than for the purposes of the employer's industry. 1984, c. 58, s. 1 (8).

4. Employers in the industries for the time being included in Schedule 1 are liable to contribute to the accident fund as hereinafter provided, but are not liable individually to pay compensation. R.S.O. 1980, c. 539, s. 4.

5. Employers in the industries for the time being included in Schedule 2 are liable individually to pay compensation and health care. R.S.O. 1980, c. 539, s. 5; 1984, c. 58, s. 4, *part*.

8. The preamble of an Act shall be deemed a part thereof and is intended to assist in explaining the purport and object of the Act. R.S.O. 1970, c. 225, s. 8.

10. Every Act shall be deemed to be remedial, whether its immediate purport is to direct the doing of any thing that the Legislature deems to be for the public good or to prevent or punish the doing of any thing that it deems to be contrary to the public good, and shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit. R.S.O. 1970, c. 225, s. 10.

SCHEDULE "C"

Court File No.: A142/89

SUPREME COURT OF ONTARIO
(COURT OF APPEAL)

THE HONOURABLE THE CHIEF JUSTICE OF THE SUPREME COURT OF ONTARIO	)	TUESDAY, THE 12TH DAY
	)	
	)	OF JUNE, 1990
	)	

IN THE MATTER OF an Appeal from a dismissal of an Application for Judicial Review pursuant to The Judicial Review Procedure Act, R.S.O. 1980, c.224;

AND IN THE MATTER OF the Pay Equity Act, S.O. 1987, c.34.

B E T W E E N :

THE HALDIMAND-NORFOLK REGIONAL BOARD OF COMMISSIONERS OF POLICE and THE REGIONAL MUNICIPALITY OF HALDIMAND-NORFOLK

Appellants

- and -

ONTARIO NURSES' ASSOCIATION and THE PAY EQUITY HEARINGS TRIBUNAL

Respondents

- and -

THE METROPOLITAN BOARD OF COMMISSIONERS OF POLICE and THE MUNICIPAL POLICE AUTHORITIES

Intervenors

O R D E R

THIS MOTION made by the Equal Pay Coalition, for an order granting leave to the Equal Pay Coalition to intervene in the Court of Appeal as a friend of the Court in the within proceedings, was heard on May 29, 1990, at Toronto.

ON READING the Motion Record of the proceeding, the Affidavit of Julie Diane Davis and the exhibits thereto and on reading the Motion Record of the Regional Municipality of Haldimand-Norfolk and on hearing submissions of counsel for the Applicants, Respondents and Intervenors,

(1) **THIS COURT ORDERS** that leave is granted to the Equal Pay Coalition to intervene as a friend of the Court.

(2) **THIS COURT ORDERS** that there will be no costs on this motion.

Assistant Registrar
Court of Appeal

INSCRIT À/ENTERED AT
TORONTO
M. FILE No.
DATE FILE No.: 816
ON/LE: JUL 19 1996
AS DOCUMENT No.: 934
EN TANT QUE DOCUMENT No.:
PER PAR:

THE HALDIMAND-NORFOLK REGIONAL BOARD OF COMMISSIONERS OF POLICE and THE REGIONAL MUNICIPALITY OF HALDIMAND-NORFOLK

-and-

ONTARIO NURSES ASSOCIATION and PAY EQUITY HEARINGS TRIBUNAL

Court File No. A142/89

SUPREME COURT OF ONTARIO
(COURT OF APPEAL)

Proceeding commenced at Toronto

O R D E R

GOWLING, STRATHY & HENDERSON
Barristers and Solicitors
Suite 2400
2 First Canadian Place
Toronto, Ontario
M5X 1A4

Chris G. Paliare
Martha Milczynski

(416) 862-8484

Solicitors for the Equal Pay Coalition

THE HALDIMAND-NORFOLK REGIONAL BOARD OF COMMISSIONERS OF POLICE and THE REGIONAL MUNICIPALITY OF HALDIMAND-NORFOLK

-and-

ONTARIO NURSES ASSOCIATION and PAY EQUITY HEARINGS TRIBUNAL

Court File No. A142/89

SUPREME COURT OF ONTARIO
(COURT OF APPEAL)

Proceeding commenced at Toronto

FACTUM OF THE INTERVENOR EQUAL PAY COALITION

GOWLING, STRATHY & HENDERSON
Barristers and Solicitors
Suite 2400
2 First Canadian Place
Toronto, Ontario
M5X 1A4

Chris G. Paliare
Martha Milczynski

(416) 862-8484

Solicitors for the Equal Pay Coalition