
**PAY EQUITY HEARINGS TRIBUNAL**

PEHT Case No: **3696-10-PE**

Ontario Nurses' Association, **Applicant** v "Participating Nursing Homes", **Respondent** v Ministry of the Attorney General, **Intervenor**

PEHT Case No: **1507-11-PE**

Service Employees International Union, Local 1, **Applicant** v "Participating Nursing Homes", **Respondent** v Ministry of the Attorney General, **Intervenor**

**BEFORE:** Mary Anne McKellar, **Chair**, and **Members**, Catherine Bickley and Carla Zabek

**APPEARANCES:** Mary Cornish, Jennifer Quito and Emily Dixon for Service Employees International Union, Local 1; Jan Borowy and Elizabeth McIntyre for Ontario Nurses' Association; Michael Allen, Scott Ridgeway and Mary Kokosis for Participating Nursing Homes; Carolyn Kay, Frank Cesario and Jacqueline J. Luksha for the Ministry of the Attorney General

**DECISION OF THE TRIBUNAL:** January 21, 2016

## I. INTRODUCTION

1. These are applications under the *Pay Equity Act*, R.S.O. 1990, c. P.7, as amended ("the Act").

2. Tribunal File No. 3696-10-PE is an application by the Ontario Nurses Association ("ONA"), objecting to the Notice of Decision issued by a Review Officer on August 5, 2010. The responding party to the

application is a group of nursing homes ("the Homes"). The Notice of Decision issued as the result of a complaint to the Pay Equity Office by ONA that the Homes had failed to maintain pay equity, contrary to the requirements of the Act. The Review Officer determined there had been no contravention.

3. Tribunal File No. 1507-11-PE is an application by the Service Employees International Union, Local 1 ("SEIU"). SEIU also filed a complaint with the Pay Equity Office that the Homes had failed to maintain pay equity. A Notice of Decision in that matter issued on August 26, 2011, determining there had been no contravention of the Act.

## II. SCOPE OF THE ISSUES BEFORE THE TRIBUNAL

4. ONA, SEIU and the Homes were the only parties when the hearing of this application commenced. In our October 15, 2013 decision in this matter, we canvassed how the Ministry of the Attorney General ("Ontario") came to intervene in this matter:

> 1. These are applications under the *Pay Equity Act* ("the Act") in respect of which continuation hearings have been scheduled for several days commencing October 17, 2013 and extending into February 2014. These hearing dates are devoted to determining the threshold issue of whether the Act obliges employers to maintain a proxy pay equity plan, and if it does not, whether that contravenes the *Canadian Charter of Rights and Freedoms* ("the Charter"). The parties have commonly referred to these issues as the "first phase" of the hearing. Should there be an obligation to maintain a proxy pay equity plan, then the question of whether these responding parties ("the Nursing Homes") have satisfied that obligation or not would only be determined after a second round of hearing dates, likely commencing no earlier than mid-2014.

5. The above passage reflects what we understood the parties' positions to be with respect to the issues before us at the time Ontario intervened:

- The Homes and Ontario took the position that the Act's obligation that an employer maintain pay equity does not apply where that employer had achieved pay equity using the proxy

methodology of comparison by entering into what we will refer to as “Proxy Plans” or “$1.50 Plans”. ONA and SEIU disagreed.

- In the event we agreed with the interpretation of the Act advanced by the Homes and Ontario, then SEIU and ONA took the position that the failure of the Act to impose a maintenance obligation in respect of Proxy Plans contravenes section 15 of the *Canadian Charter of Rights and Freedoms*.

- Should we find merit in either of the positions advanced by ONA and SEIU, the parties agreed that we should not decide at this stage the question of whether the Homes owe any maintenance adjustments to employees represented by ONA and SEIU.

6. Only at the point of final argument did it become clear that the position of the Homes and Ontario had shifted significantly from what we have described above. They now acknowledge that the Act’s maintenance obligation attaches to the Proxy Plans, but assert that the mechanism by which the Act requires that pay equity in such cases be maintained is not the same as the mechanism by which it was achieved. ONA and SEIU say that the same mechanism must be used. They argue that this is what the Act, properly interpreted requires.

7. If the Act does not lend itself to the interpretation contended for by the Unions, they say that it contravenes section 15 of the Charter. They say that section requires that the Act’s provisions, and in particular the maintenance obligation, must apply to the equal benefit of all female job classes covered by the Act.

8. Finally, ONA asserts that “changed circumstances” make the Proxy Plans no longer appropriate for its female job class in the Homes.

## III. THE EVIDENCE

9. The evidence adduced in this matter was extensive. It took a variety of forms. For now, we merely outline the variety of that evidence. Such of it as we find necessary or useful to refer to in these reasons is discussed in further detail at the appropriate point.

10. ONA, SEIU and the Homes entered into a written "Partial Agreed Statement of Facts" ("the ASF") prior to Ontario becoming involved in the proceeding. When Ontario did become involved, it wrote to the Tribunal indicating which of those facts it accepted, which ones it disputed in whole or in part or had no knowledge of, and which portions of the ASF it characterized as going beyond the stipulation of facts.

11. In addition to the above, the parties filed with us on consent a volume of "Legislative History". The documents in it pertain to the genesis, promulgation, and amendment of the Act.

12. We heard testimony from several witnesses about their direct knowledge of matters pertinent to: the operation of the Homes; their relationship to government; employment in them; the bargaining relationship of the workplace parties; and the negotiation of the Proxy Plans. These witnesses were:

- Cathy Carroll – Secretary-Treasurer of SEIU;
- Beverley Mathers – Manager of Labour Relations for ONA;
- Lawrence Walter – Government Relations Officer for ONA;
- Sandy Kravets – an RN employed in one of the smaller homes since 1980;
- Jean Kuehl – an RN employed in one of the larger homes since 1991;
- Brent Binions – Chief Executive Officer and President of Chartwell which owns and operates 189 retirement and long-term care residential facilities in Canada, including 30 homes affected by these applications; and
- Robert Bass – Principal of Bass & Associates Ltd., involved in central collective bargaining in the long-term care sector (including pay equity) since 1990.

13. We also qualified a number of individuals as expert witnesses and they provided opinion evidence in particular subject areas. In respect of each of those individuals we received in evidence a variety of documentary material: *curriculum vitae*; reports of the evidence about which testimony was elicited; and copies of scholarly articles they had authored or about which they commented. The witnesses

who provided opinion evidence were: Dr. Robert Shillington; Paul Durber; Dr. Richard Chaykowski; and Dr. Michael Baker.

## IV. THE FACTS

### (a) The Workplace Parties and the Workplaces

14. The workplace parties and the workplaces affected by these applications are described in Paragraphs 2 to 12 of the ASF. Ontario agrees with these facts, although noting a small error in the title of the legislation referred to in paragraph 4:

> 2. The Ontario Nurses Association ("ONA") is the bargaining agent that represents the female job classes of approximately 2100 registered nurses and allied health professionals who work at approximately 200 nursing homes across the province.
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> 3. The Service Employees International Union Local 1 (“SEIU Local 1") is the bargaining agent that represents female job classes in the vast majority of Ontario nursing homes. The SEIU Local 1 represents bargaining units which include female job classes including but not limited to registered *practical* nurses, personal support workers, health care aides, dietary, housekeeping and recreational aides. SEIU Local 1 Canada is the successor local to the SEIU Local 204 Local signatories to the 1995 Pay Equity Plan referred to below.
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> 4. The Respondents, the Participating Nursing Homes ("the Employers'), are a group of employers that operate up to 143 nursing homes licensed under the *Long Term Care Act, 2007* (previously the *Nursing Homes Act*). Some of the employers are chains that operate multiple nursing homes and others operate single nursing homes.
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> 5. The Unions and the Participating Nursing Homes have a collective bargaining relationship under the *Labour Relations Act* and the *Hospital Labour Disputes Arbitration Act*.
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> 6. The Unions and the Participating Nursing homes have for many years conducted their bargaining centrally with respect to both collective agreement matters and pay equity. The central bargaining process is voluntary. Each round of negotiations is governed by a separate participation agreement. The group of nursing homes

varies from each round. In the relationship between ONA and the Employers, there are approximately 143 nursing homes represented. In the relationship between SEIU Local 1 and the Employer there are approximately 100 nursing homes represented.

7. In bargaining the collective agreement, the Unions and the Participating Nursing Homes agree to bargain a number of terms of the agreement centrally. Other issues are negotiated locally. In the ONA bargaining unit, the wage rates for the Registered Nurse ("RN") job classes are negotiated centrally and so are the same at all the Participating Nursing Homes. In the SEIU bargaining, master provisions are negotiated, though some uniqueness in language and rates of pay exist among participants. The largest employer member of SEIU Participating Homes is Extendicare.

8. Ontario's elderly are cared for in nursing homes, homes for the aged and retirement homes.

9. Employment in this sector is almost exclusively female with nursing home workers historically and currently over 90% female.

10. Homes for the aged workers are similarly highly female dominated although they are primarily employed by municipalities where there are many male comparator jobs.

11. The high female dominance of nursing home and homes for the aged work was present in 1995 when the Pay Equity Plans were negotiated and continues to this date.

12. Nursing homes and homes for the aged have very similar work and job classifications. The employees in both establishments carry out similar functions of caring for the ill and elderly under similar extensive and detailed legislative requirements set out in the Long Term Care Homes Act, 2007 and regulations and government directives. This includes provisions directing similar role descriptions and scope of action for job classes in both institutions.

15. For the most part, the workers affected by this application provide care for the frail elderly. Workers in the Homes are not the only workers in Ontario to do so. For example, PSWs and RNs may

also attend to the needs of the elderly populations by providing services to them: in the client's own home; in a retirement home; in a home operated by a charity ("Charitable Home"); in a municipally owned home ("Municipal Home"); or in a hospital.

16. The wage rates in retirement homes are $4 - $5 per hour lower than the rates in the Homes, according to Robert Bass. Rates paid to PSWs providing home care services are also much lower. The rates in Charitable Homes may vary, and the rates paid in Municipal Homes and hospitals are higher, by as much as $2 per hour or more.

**(b) Overview of the Act and Legislative History**

17. It is useful to set out the history of the Act in order to appreciate how the proxy provisions fit into its scheme. What follows is not intended to offer a definitive or exhaustive interpretation of how the Act works. It is an extremely general account of its provisions intended at this point simply to provide context for the parties' arguments. We recognize that the Legislative History informing the various iterations of the Act is relevant to our decision, and it is discussed at a later point. Additionally the proxy provisions contained in Part III.2 of the Act are the subject of a separate and more detailed examination.

18. In November 1985, one year prior to the introduction of pay equity legislation, the province, through the Minister Responsible for Women's' Issues, released its "Green paper on Pay Equity". This paper provided the factual justification for the legislation, and identified various issues relating to legislating pay equity and discussed some implementation models. In terms of the factual context for this legislative initiative, the Green Paper identified that, on average, womens' full-time earnings were 62% of mens' full-time earnings. The 38% differential was referred to as the "wage gap". Several factors were identified as contributing to the wage gap: 16% of it was attributable to differences in hours worked; 5%-10% due to factors such as experience, education, and level/rate of unionization; 10%-15% due to occupational segregation; and 5% due to wage discrimination. These factors were then discussed briefly, as being either within the purview of the legislation or not:

> As mentioned, when only full-time annual earnings are compared, the wage gap is 38%. If the comparison is further adjusted to examine average hourly earnings, the wage gap is 22%. This latter calculation illustrates

the differences in the hours worked between males and females working full-time. Some of the jobs men and women perform require varying levels of training and education. Men and women also differ in the amount and type of labour force experience they have. These factors, plus different rates of unionization account for another portion of the wage gap, a portion which is more difficult to measure than that attributable to full or part-time and hourly earnings.

Discrimination may affect each and every component of the overall wage gap. For example, differences in hours worked may reflect an inequitable division of labour within the household. Differences due to productivity-related factors such as relevant education and training may reflect screening prior to entry into the labour force. Such factors, however, are beyond the scope of a pay equity policy.

Studies show that upwards of 10 points of the 38 point wage gap are attributable to occupational segregation. In many cases, women are segregated into lower-paying jobs which require the equivalent amount of skill, effort and responsibility as male jobs, but are not paid accordingly. This undervaluation of "women's work" is, to some extent, the result of situations in which women, initially entering the paid labour force, took jobs involving the type of work traditionally performed at home, such as caring for children, tending the sick, and serving food. In the home setting, this kind of work is not remunerated, nor is its value recognized economically, and the labour market has perpetuated these circumstances in low wage-setting for women. It is the portion of the wage gap which may be attributed to this undervaluation of women’s work which pay equity is intended to address.

Occupational segregation also involves the segregation of women in jobs which require less skill, effort and responsibility than jobs filled by men. This latter aspect of occupational segregation will not be affected by a pay equity policy.

A final portion of the wage gap is due to wage discrimination by some employers, who are paying women less than men for equal work or substantially the same work, contrary to existing legislation. The continued existence of this form of wage discrimination

> indicates that current mechanisms are not effective. Implementation of a pay equity policy will have some effect on closing this portion of the wage gap.
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> While a consensus is developing around the thesis that women's unequal pay and their occupational segregation are related, debate continues about how much of the wage gap can actually be attributed to this relationship. As a result, experts differ in determining what portion of the wage gap could be closed by pay equity legislation, although most agree that it could exceed one quarter of the overall gap of 38 percentage points. Pay equity policies could, therefore, result in women's average wages rising to between 70% and 80% of men's.
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> The Government's commitment to the principle of pay equity does not depend upon the size of the wage gap or upon the portion or percentage of the wage gap which could be closed by a pay equity policy. Rather, it rests on the conclusion that some portion of the wage gap is due to discrimination which has not been eliminated by existing equal pay for equal work and equal opportunity initiatives. This portion of the wage gap can be narrowed or eliminated by a pay equity policy.
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> The remainder of the wage gap which is not addressed by pay equity requires for its reduction a strong and cohesive employment equity strategy. In accordance with its absolute commitment to the elements of such a strategy, which embraces, among other initiatives, pay equity, the Government is making substantial investments in education and training, increasing child care facilities and assistance to employers with their employment equity plans. Employment equity will become a reality when the workplace skills of both men and women are fully utilized. The benefits of employment equity will greatly reward such efforts and should be reflected in a narrowing of that portion of the wage gap which cannot be addressed by a pay equity policy.

19. The Act was passed in 1987 and became effective on January 1, 1988. When the proposed legislation was introduced in the House in 1986, then Attorney-General Ian Scott made two comments that are pertinent to this proceeding. One was the statement that “comparisons will not be made between wages paid by one employer and those paid by another” (Hansard, November 24, 1986 at p. 3552).

The other was an acknowledgment that the legislation introduced (and passed) did not offer a mechanism for pay equity achievement in predominantly female workplaces and that needed to be addressed as soon as possible (Hansard, November 24, 1986, at p. 3553).

20. The Act applies to all employers in the public sector, and defines public sector in a way that includes many agencies that receive government funding. The Act also applies to private sector employers who employ 10 or more employees.

21. The Homes in this application are the operators of for-profit long-term care facilities, which constitute part of the public sector under the Act. The employees affected by this application are represented by ONA and SEIU. For that reason, our description of the Act at this point omits any reference to the obligations it imposes on small private sector employers (those with 10 to 50 employees), or employers whose employees are not represented by a bargaining agent. In other words, we describe what the Act requires be done where there is an obligation that an employer and bargaining agent bargain pay equity and reduce their agreements to the terms of a pay equity plan.

22. The Act's purpose is to redress systemic gender discrimination in compensation. It imposes a proactive obligation on each individual employer to establish and maintain pay equity. The steps to be undertaken are stipulated in some detail, but what the Act contemplates in essence can be described more generally. Described in the simplest terms, then, the Act requires individual employers to: (1) assess the extent of gender discrimination in pay that currently exists in their "establishments" (workplaces within the same geographic area) by determining what rate of pay would attach to work that is actually, historically or stereotypically done predominantly by women ("women's work") if that work were performed predominantly by men; (2) achieve pay equity by increasing compensation for any underpaid women's work that that assessment reveals; and (3) maintain pay equity once achieved. As noted above, the Act provides direction respecting the ways in which the above steps are undertaken or executed, and they are subject to negotiation with the bargaining agent.

23. The Act as it now reads stipulates three different methodologies by which the extent of gender discrimination in a workplace may be assessed. The starting point for all of them is a determination of the "gender predominance" of the "job classes" in the

workplace, in accordance with definitions contained in the Act. Job classes may be female, male or gender neutral. A gender-neutral comparison system ("GNCS") is used to evaluate the work performed by the job classes on the basis of skill, effort, responsibility and working conditions.

24. Once the value of the work performed by male and female job classes has been determined, it is possible to assess whether the work performed by the female job classes is equitably compensated as compared to the work performed by male job classes. The Act provides three means of making the necessary comparison.

25. The only methodology stipulated when the Act was enacted in 1987 was the "job-to-job" method of comparison. Under this method female job classes in an establishment of the employer are compared to male job classes of equal or comparable value in the same establishment of the employer to determine whether an inequity exists with respect to their compensation. The weakness of the job-to-job methodology is that it cannot provide a means for determining whether pay equity exists for a female job class unless a comparably-valued male job class also exists within the same establishment. It is of *no use* whatsoever in an establishment where there are *no* male job classes. It is of *limited* use in other establishments where there are *insufficient* male job classes such that not all female job classes can be compared to a male job class of similar value.

26. The limited applicability of the job-to-job method of comparison was recognized when the legislation was introduced. Not only was it specifically referenced in the Hansard report cited above, but section 33(2)(d) of the Act states that the Pay Equity Office:

> …shall conduct a study with respect to systemic gender discrimination in compensation for work performed, in sectors of the economy where employment has traditionally been predominantly female, by female job classes in establishments that have no appropriate male job classes for the purpose of comparison under section 5 and, within one year of the effective date, shall make reports and recommendations to the Minister in relation to redressing such discrimination.

27. There were nine different sectoral research studies conducted. One of them pertained to the Health Care Sector and was authored by Dr. Pat Armstrong ("the Armstrong Study") and published in September 1988. It was filed before us as part of the Legislative

History, but none of the other studies were. The Armstrong Study proposed that the dollar wage adjustment made to achieve pay equity for female health care jobs in large Hospitals could be provided to such similar job classes as existed in other publicly funded health care institutions.

28. In January 1989, the Pay Equity Office provided its Report to the Minister of Labour on Predominantly Female Sectors. This was essentially a summary of the various research reports that it had commissioned. Several aspects of that lengthy report are interesting. First, it noted that 25% to 33% of the wage gap that exists between men and women is attributable to the undervaluation of women's work. The balance of the difference could be attributable to any of the following factors, which the report identified as "non-discriminatory": part-time work; contracting out; low or uneven levels of government funding; overseas competition; low profit margins; and the degree and extent of unionization. These comments echo similar points raised in the 1985 Green Paper.

29. The 1989 Report on Predominantly Female Sectors also looked at the wage gap between men and women by sector, and found that it varied. The task identified then was to determine if low pay was attributable to gender discrimination and to determine the amount of correction needed. A variety of options to do so was then considered, and their strengths and weaknesses identified. For the purposes of this decision, it is not necessary to this decision to summarize that whole discussion, but we would point out that the "average adjustments" scheme put forward in the Armstrong Study was identified as having the weakness that, while it would address the issue of low wages generally, it might not address inequities.

30. Neither the Armstrong Study nor the Pay Equity Office Report on the totality of the sectoral studies attends specifically to any question of pay equity maintenance.

31. On October 18, 1989, the Pay Equity Office provided the Minister of Labour with a *Report on Options relating to Achievement of Pay Equity in Sectors of the Economy which are Predominantly Female* ("the Options Report"). The two options recommended were the proportional value ("PV") and proxy job comparison methodologies. The Options Report stressed the difference between requiring wage parity and the application of the proxy comparison methodology. On December 18, 1990, the Minister of Labour made a statement to the Ontario Legislature in which he announced that PV and proxy

legislation would be introduced in the spring 1991 session of the Legislature, and included a further commitment to providing financial assistance so that affected employers could meet their pay equity obligations.

32. In February 1991, the Ministry of Labour issued a document entitled "Extending Pay Equity by Proportional Value and Proxy Comparisons". This document had two stated purposes. The first was to provide information on the PV methodology. The second was to present a framework for dialogue about the proxy methodology. The proxy methodology as it was then envisaged was described as follows (emphasis in original):

> …in proxy comparisons the female job classes are matched to female job classes in an outside public sector establishment (referred to as the proxy organization). The pay equity adjustments are the same dollar amount as those received by corresponding female job classes in the proxy organization.

33. On December 18, 1991, the Minister of Labour made another Statement to the Legislature respecting proposed amendments to the Act contained in Bill 168. The Background Paper he included in the statement describes the proxy methodology in different terms than those used in the February 1991 document: it says that the female job classes in the seeking organization will receive pay equity adjustments to match the comparably valued *male* job rates in the proxy organization. Bill 168 was not passed.

34. On February 25, 1992, the government released a "Discussion Paper on Pay Equity: Implementing Proxy Comparisons". At page 4, it contains the first discussion in any of the legislative materials about maintenance in the context of the use of the proxy methodology:

> The comparison made to calculate the proxy pay equity adjustment will be a onetime only comparison using 1993 job rates. However, the value of the adjustment will be maintained over time by providing that the male job rates borrowed from the proxy organization will be increased at a rate equivalent to the level of the annual increase in provincial transfer payments.

35. On November 26, 1992, Bill 102, which replaced Bill 168, received first reading. It received second reading on December 10, 1992. A Technical Briefing Note from the Minister of Labour to the

Standing Committee on the Administration of Justice in respect of Bill 102 is dated January 18, 1993. It describes the proxy methodology as involving an evaluation of the female job classes from the proxy establishment as if they were male. The Ministry of Labour News release issued after the Bill received third reading on June 28, 1993 said the following about the proxy methodology:

> Proxy comparisons allow female job classes in public sector workplaces to compare wages with similar job classes that have achieved a pay equity plan in another establishment.

36. The amendments to the Act were proclaimed on July 1, 1993. They provided for two new methods of job class comparison, proportional value ("PV") in Part III.1 of the Act, and proxy in Part III.2 of the Act.

37. The PV method of comparison can be used in any establishment where there were enough male job classes that the prevailing relationship between the value of the work performed by them and their rate of compensation could be ascertained. That prevailing relationship can be expressed as a simple mathematical formula ($/point value), or as a wage line plotted on a grid where the value of the work performed increases along the *x* axis, and compensation increases on the *y* axis. Either way, the PV methodology of comparison permits the determination of what female job classes ought to be paid if the prevailing compensation/value relationship for men's work is applied to the women's work. In a workplace with no or very few male job classes, no prevailing compensation/value relationship for men's work can be ascertained, and so the PV methodology is incapable of determining whether pay equity exists.

38. Under both the job-to-job and the PV methods of comparison, what is being compared is how an employer compensates *its employees* who perform men's work vis-à-vis *its employees* who perform women's work, having regard to the value of the work performed.

39. The proxy methodology is used to determine a gender-neutral compensation system in workplaces where little or no mens' work is performed. Under the proxy method of comparison, the compensation/value relationship for women's work performed *in one employer's workplace* ("the seeking employer") is compared to the compensation/value relationship that exists for women's work

performed *in a different employer's workplace* ("the proxy employer"), where the female job classes have already achieved pay equity under one of the other methods of comparison.

40. As indicated earlier, these Homes were required under the Act to use the proxy method of comparison.

**(c) The Repeal of the Proxy Provisions and the Charter Challenge**

41. The proxy provisions of the Act were repealed in the summer of 1995, as most observers had expected the newly-elected (in June 1995) government of Premier Mike Harris would do. The repeal was the subject of a successful application challenging it as contrary to section 15 of the *Canadian Charter of Rights and Freedoms* ("the Charter"). On September 5, 1997, Mr. Justice O'Leary declared the repealing legislation to be of no force or effect:

> Conclusion
>
> It is a matter of choice for government as to whether or not it legislates to remove inequity. When, however, government decides to legislate and identifies the disadvantaged group the legislation is intended to benefit, then it must, subject to s. 1 of the Charter, make the legislation apply fairly and equally to all within the group or government itself is guilty of discriminating. This is especially so where government itself picks up the cost of removing the inequality that is the focus of the legislation. Where legislation discriminates against a portion of the group the legislation is designed to help, the legislation contravenes s. 15(1) of the Charter and so is ultra vires unless the discrimination is demonstrably justified under s. 1 of the Charter.
>
> The Pay Equity Act, because of the 1996 Schedule J amendment, discriminates against proxy sector women by denying them the opportunity of quantifying and correcting the systemic gender-based wage inequity from which they suffer, a benefit the Act grants to other women working in the broader public sector.
>
> The discrimination has not been justified under s. 1 of the Charter, in that the stated objective of the Schedule J amendment does not warrant overriding the constitutional right of equal benefit of the law. Indeed,

> the stated objective -- the restoring of the Pay Equity Act to true pay equity principles -- I find to be mistaken. Proxy method was and is an appropriate pay equity tool in keeping with the intent of the Pay Equity Act to relieve women, including those working in female-segregated workplaces in the broader public sector, from systemic gender-based wage discrimination.
>
> Since it was the 1996 Schedule J amendment that created the discrimination, I declare that Schedule J of the Savings and Restructuring Act, 1996, amending the Pay Equity Act, is unconstitutional and of no force and effect.

(*Service Employees International Union, Local 2014 v Ontario (Attorney General)* (1997), 35 O.R. (3d) 508 ("the *O'Leary Decision*").

42. Another Charter application was subsequently initiated to challenge the government's decision to cap proxy funding, but it was resolved by settlement.

43. These parties entered into Proxy Plans (described in the next section of these Facts) in June 1995. What occurred thereafter is described as follows in the ASF:

> 34. The *Pay Equity Act* and the Parties' Pay Equity Plans provided that the pay equity adjustments were to be paid out in annual increments amounting to not less than 1% of the pay roll in the Unions' bargaining units. In practice, the timing of when pay equity adjustments were made to achieve pay equity was affected by legislative and policy decisions made by the Ontario government.
>
> 35. In accordance with the Pay Equity Plan, the first pay equity adjustment under the Parties' Pay Equity Plans was made in or around April 1996.
>
> 36. However, in January 1996, the Ontario government enacted the *Savings and Restructuring Act, 1996*, 5.0. 1996, c. 1, Schedule J ("Schedule J") which purported to repeal the provisions of the *Pay Equity Act* dealing with the proxy comparison method and capped payments that were made under existing Pay Equity Plans at 3% of pay roll.

37. ONA and the Participating Nursing Homes entered into a letter of agreement indicating that the pay equity adjustment that had been made in 1996 exceeded the 3% cap that was required under Schedule J.

38. The actual payment of the SEIU Local 1 adjustments was interrupted as a result of the Ontario government's legislative enactment of Schedule J.

39. The SEIU pay equity pay equity [sic] adjustments were capped at $0.35 per hour. As a result, female job classes at that time were denied adjustments of $1.15 per hour owing under the 1995 Respondent Nursing Home Pay Equity Plans.

40. In September 1997, following a Charter legal challenge brought by SEIU Local 204, Schedule J of the *Savings and Restructuring Act, 1996* was struck down and found to be unconstitutional. As a result, the obligations of the Respondent Nursing Homes under the 1995 Plan were reinstated. See *SEIU Local 204 v. Ontario (Attorney General)* (1997), 35 O.R. (3d) 508 (Gen. Div.).

41. After the Court ruling, the legislative provisions regarding proxy pay equity were restored with the effect that the obligations under the original Pay Equity Plan were restored.

42. However, in 1998, the Ontario Government made a policy decision to cease funding further proxy pay equity adjustments. The decision was made even though the legal obligations regarding proxy pay equity were restored and the Government is the primary funder for the operations, including nursing homes, that use the proxy comparison method.

43. As a result of the Government's decision to stop funding the proxy pay equity adjustments, the Respondent Nursing Homes declined to make further pay equity adjustments.

44. The refusal of the Government to continue such funding was the subject of another challenge by ONA and SEIU Local 1 and other unions. See CUPE et al v. Ontario (Attorney General) Ontario Superior Court of Justice (01-CV-214432).

45. As a result of a May 2003 settlement of the above-noted CUPE et al. Charter challenge, the Government agreed to provide proxy pay equity funding to the health and long-term care sector, among others.

46. That settlement covered proxy pay equity funding for the period through to March 31, 2006. The Respondent Nursing Homes received pay equity funding pursuant to this settlement to continue their progress to the required rate to achieve pay equity.

47. On or around December 2, 2004, SEIU Local 1 entered into a number of agreements with Central or Master Group Nursing Homes which provided for the payment of the final adjustments so that the entire $1.50 of pay equity adjustments was paid out by January 1, 2005 to "achieve" pay equity. The Respondent Nursing Homes, along with other SEIU homes, entered into a Memorandum of Settlement to resolve all outstanding adjustments owing under the Pay Equity Plan.

48. In the 2001-2004 central nursing homes' collective agreement between ONA and the Participating Nursing Homes, the parties agreed that the pay equity adjustments made under the 27 April 2001 Memorandum of Settlement "resolve all current outstanding issues of Pay Equity and the obligations under the Proxy Pay Equity plan." This agreement is set out in Appendix D to the 2001-2004 Collective Agreement.

49. In the 2004-2006 ONA Collective Agreement, Appendix D was amended. The new Appendix D stated that the adjustments in the Memorandum of Settlement dated 27 April 2001 "resolve all the obligations for achievement of Pay equity." ONA agreed not to support any challenge to the settlement that achieved pay equity. Appendix D appeared in the same form in the 2006-2009 Collective Agreement.

50. In the 2009 round of bargaining ONA and the Participating Nursing Homes agreed that Appendix D was removed from the collective agreement.

51. In bargaining for the 2009-2011 collective agreement, ONA took the position that pay equity would be maintained by providing nursing home employees

> parity with the rates negotiated in the central hospital collective agreement (which rates have been matched by the proxy comparator Municipal Homes for the Aged).

## (d) The Proxy Plans entered into by these Parties

44. The Act does not contemplate that parties can simply elect to use the proxy method of comparison. There are certain pre-requisite steps to engaging in this exercise. At this point it is sufficient to note that all those prerequisite steps had occurred in the case of the parties affected by these applications prior to June 1995. They entered into the centrally-negotiated proxy plans before the government changed and repealed the proxy provisions.

45. The ASF relating to the development of the proxy plans reads:

> 18. In 1995, ONA and SEIU Local 1 signed respective central Pay Equity Plans with the Participating Nursing Homes. The 1995 Pay Equity Plans are parallel plans negotiated centrally for the nursing home sector as a whole.
>
> 19. Various other unions representing other unionized job classes in nursing homes outside the Applicants' bargaining units signed parallel agreements. Parallel agreements, then, covered virtually all the different unions and all the unionized job classes in the nursing home sector. Because pay equity was negotiated on a sector-wide basis, for costing purposes, these pay equity plans are based on the same comparison using the key female job class health care aide and all provide for either a total adjustment or a weighted average adjustment of $1.50.
>
> 20. The registered nurses, RPNS or licensed staff in both nursing homes and homes for the aged are governed by the same regulations, standards and expectations. The Nursing, Personal Health Care and other bargaining unit classifications and work are nearly identical.
>
> 21. Both Nursing Homes and homes for the aged employ Registered Nurses and Registered Practical Nurses who regardless of their place of employment, have identical training and perform the same duties under the same professional rules. The Health Care Aide or Personal Support Worker provides personal care to

the resident. Given the services provided and the acuity level of both facilities, this work is also very close if not identical. Other positions such as Housekeeping and Wait Staff are also very similar in work because of the similarity of the facilities.

22. Furthermore, the Unions have extensive familiarity with the two institutions because they represent workers in both the homes for the aged and the nursing homes. As well, because of their initial pay equity work from 1988 onwards with the Respondent Nursing Homes and their work as the bargaining agents for female job classes in municipal homes for the aged, they also have familiarity with the skill, effort, responsibility and working conditions of the female job classes in the nursing homes and homes for the aged. As noted above, they operate under a similar legislative framework and extensive regulations and procedures.

23. Accordingly the 1995 negotiations for the Pay Equity Plan were informed by the above-noted extensive job content and pay knowledge.

24. As a result, SEIU and the Respondent Nursing Homes agreed to use the Health Care Aide as the key job class and used as the proxy establishment "Unionized Municipal Homes for the Aged across Ontario." Female job classes in the nursing homes and the homes for the aged were considered to be substantially similar in respect of skill, effort, responsibility and working conditions because they were subject as explained above to the same extensive regulations and policies. The Health Care Aide was identified as the key female job class, given that this job class had the largest number of incumbents both in the nursing homes and the homes for the aged and performed substantially the same work.

25. For the purpose of establishing the pay equity target rate for the job classes in the Respondent Nursing Homes, the parties reviewed the rates for Health Care Aides across Ontario in the unionized municipal homes for the aged. The parties determined that the gap between the average Health Care Aide rate in the unionized municipal homes for aged and that of the Respondent Nursing Homes was approximately $1.50 per hour.

26. In order to close the pay gap across all the female job classes in the Respondent Nursing Homes, SEIU and the Participating Nursing Homes agreed to apply the centrally negotiated $1.50 wage gap for the Health Care Aide to increase the actual wage rates of the female job classes in each of the Respondent Nursing Homes. Individual Pay Equity Plans were signed by each of the Respondent Nursing Homes using the central template.

27. As noted by Justice O'Leary in the SEIU Local 204 decision, SEIU Local 204 and other SEIU locals came to develop the "$1.50" plan as follows:

28. "With the 1993 enactment of additional methods of comparison, SEIU Local 204 and the employers of its members in predominantly female workplaces recommenced pay equity negotiations to examine whether the proportional method of comparison could be applied to their workplaces. They determined that this method could not be used because there were no or too few male comparators.

29. "As a result, almost all of SEIU Local 204's public sector female workplaces were declared eligible by the Pay Equity Commission under the *Pay Equity Act* to use the proxy comparison method, and proxy orders were issued by a review officer as provided in the Act... In accordance with their responsibilities under Part III.2 of the *Pay Equity Act*, SEIU Local 204 negotiated with the employers concerning the application of proxy and the development of proxy pay equity plans." Paras. 25-27

30. As stated by Mr. Justice O'Leary:

"SEIU Local 204 negotiated a central nursing home proxy Pay Equity Plan which covered its nursing homes, including Lincoln Place which employs the applicant Carlene Chambers.

"The Proxy Regulation mandated that nursing homes use Municipal Homes for the Aged as the applicable proxy organization. Accordingly, these central nursing home negotiations compared the wage rate of the Health Care Aide in the SEIU nursing homes with the wage rate for Health Care Aides in Municipal Homes for the Aged for whom pay equity adjusted wages had already been identified using comparable male work. Prior to pay equity adjustments, the applicant Ms. Chambers earned

> $13.46 per hour as a Health Care Aide. Using the proxy method, it was determined that, in relation to male work of comparable value, she had been underpaid by $1.50 per hour." Paras. 29-30
>
> 31. ONA's Pay Equity plan applied to “all job classes represented by the "Ontario Nurses Association." The ONA Plan determined that "a total weighted average adjustment of $1.50 per hour would achieve pay equity." In practice, the "total weighted average adjustment" was subject to further negotiation between ONA and the Nursing Homes to determine the specific pay equity adjustment.
>
> 32. The ONA Plan did not provide that every registered nurse would receive a $1.50 increase to the job rate. The pay equity adjustments were paid in different amounts dependent upon the step on the wage grid. The RN starting rate received a $0.83 per hour adjustment. The pay equity adjustment for the RN job rate was $2.59 per hour. These differing adjustments worked out to a total weighted average adjustment of $1.50 per hour.
>
> 33. Pursuant to the *Pay Equity Act*, 1995 Pay Equity Plans agreed to by the Unions and the Respondent Nursing Homes are deemed to be approved for the achievement for pay equity.

46. The term Health Care Aide (sometimes abbreviated as HCA in the documents filed before us) as a job classification has been superseded by the term Personal Support Worker (or PSW). We interpret those job titles as being interchangeable, but prefer to use PSW except when actually quoting from a document that uses the other title.

47. The Proxy Plan entered into by ONA and the Homes provides as follows:

**PAY EQUITY PLAN**

**BETWEEN:**

**ONTARIO NURSES' ASSOCIATION**

**("The Association")**

**AND**

**THE PARTICIPATING NURSING HOMES (FOR THE NURSING HOMES LISTED IN APPENDIX "A")**

**(The "Employer")**

| | |
|---|---|
| EMPLOYER AND ESTABLISHMENT: | Name of Establishment |
| DATE OF POSTING: | _____, 1995. |
| PROXY EMPLOYERS AND ESTABLISHMENTS: | Unionized Municipal Homes for the Aged across Ontario. |
| PROXY COMPARISON: | As required by the proxy comparison method, the key female job class of Health Care Aide was used to select identical female job classes in the proxy employer's establishment. A comparison was then made. |
| THE PAY EQUITY PLAN: | ALL JOB CLASSES REPRESENTED BY THE ONTARIO NURSES' ASSOCIATION |
| FEMALE JOB CLASSES REQUIRING PAY ADJUSTMENTS BASED ON PROXY VALUE COMPARISONS: | The parties have agreed that all female job classes in the bargaining units require pay equity adjustments. |
| EXCLUSIONS: | There are currently no exclusions under the exclusion provisions of the Pay Equity Act. |
| AGREEMENT WITH AND | |

| | |
|---|---|
| BY THE UNION: | This Pay Equity Plan has been negotiated between:<br><br>The Ontario Nurses' Association<br><br>and<br><br>The Participating Nursing Homes, (see Appendix "A") and this Pay Equity Plan constitutes an agreement between the two parties covering the development and implementation of Pay Equity between said certified Bargaining Units and the Employer. |
| FIRST PAY ADJUSTMENTS REQUIRED: | January 1, 1994. |
| FIRST PAY ADJUSTMENTS IMPLEMENTED: | The required adjustments for this and all Pay Equity Plans at the Participating Nursing Homes will be implemented retroactive to January 1, 1994. The Act requires that 1% of the ONA's payroll be set aside for pay equity adjustments. If additional Pay Equity funding is made available to accommodate amounts in excess of the legislated 1% in a given year, the Participating Nursing Homes will amend the schedule of adjustments to reflect that additional funding. |
| JOB CLASS USED AS BASIS OF COMPARISON: | Health Care Aide. |

| | |
|---|---|
| KEY FEMALE JOB CLASSES: | Health Care Aide. |
| GENDER-NEUTRAL COMPARISON SYSTEM USED FOR EVALUATION OF JOB CLASSES AND RESULTS OF COMPARISONS: | The Association and Management jointly reviewed and compared the classifications and reached an agreement. |
| DETERMINATION OF ADJUSTMENTS: | The parties agree that a total weighted average adjustment of $1.50 per hour would achieve Pay Equity.<br><br>The parties understand that the Pay Equity adjustments for 1994 and 1995 will be paid within 30 days following receipt of funding in 1995. |

The Pay Equity Plan as outlined in this document and the attached schedules are hereby agreed to by both the Union and the Employer.

This agreement is made in accordance with The Pay Equity Act.

Signed at "Toronto" this "26th" day of "June", 1995.

| **NAME OF ESTABLISHMENT** | **FOR THE ASSOCIATION** |
|---|---|

48. The application of the weighted $1.50 per hour adjustment was the subject of a Letter of Understanding between ONA and the Homes, which provided as follows:

> The total weighted average $1.50 (one dollar and fifty cents) adjustment referred to in the Pay Equity Plan will ultimately result in the following adjustments:

| | |
|---|---|
| Start | $0.83 |
| 1 year | 0.83 |
| 2 year | 0.00 |
| 3 year | 0.62 |
| 4 year | 0.83 |
| 5 year | 0.83 |
| 6 year | 1.25 |
| 7 year | 1.25 |
| 8 year | 2.29 |
| 9 year | 2.59 |

49. The SEIU Proxy Plan is the same as the ONA Plan, except for identifying that it applied to SEIU job classes, and for providing for a simple $1.50 per hour adjustment to all job classes, rather than a weighted average.

50. At the time that the Proxy Plans were entered into, wage rates for the same job class varied from one Home to another. The implementation of the pay equity adjustments did not lead to uniformity in the job rates across the Homes.

51. The amount of the pay equity adjustment to be paid to the job classes in SEIU and ONA bargaining units at the seeking employer Homes is expressed in the plans as having been determined by reference to the pay-equity adjusted rates being paid to PSWs in the employ of Unionized Municipal Homes for the Aged (the proxy employers). The wage rates for PSWs varied from one Municipal Home to another. The proxy plans did not necessarily "match" or "equalize" the rates of PSWs in the seeking employer's and proxy employer's establishments. According to the ASF filed by the Homes and the two unions in this proceeding, the $1.50 per hour adjustment represented "the gap between the average Health Care Aide rate in the unionized municipal homes for the aged and that of the ... Homes", but that is not stated on the face of the Plans.

52. Robert Bass and Brent Binions had knowledge of how the Proxy Plans were negotiated. Their testimony confirmed that: the parties did not agree on a gender neutral comparison system; did not use a gender neutral comparison system to evaluate job classes in the Homes and proxy female job classes; and did not undertake any proportional value exercises to ascertain the compensation/value relationship in the Homes and in the proxy establishments. All of those were, of course, the steps that are to be taken under Part III.2 of the Act. Instead, the principal negotiator for the Homes and for the Unions simply came to agree on a per-hour adjustment that the

Homes were prepared to pay, and each Union determined how that would be distributed. Although paragraph 25 of the ASF says that "the parties determined that the gap between the average HCA rate in the unionized municipal homes for [the] aged and that of the Respondent Nursing Homes was approximately $1.50 per hour", we did not hear any details of how that determination was made. We do know that the difference in pay between the HCAs at individual Homes and their counterparts in the corresponding local Municipal Homes varied from less than $1.50 per hour to in excess of $5.00 per hour. Aside from the wage rate, no other elements (benefits for example) of the compensation package seem to have been considered or quantified.

53. ONA applied the average HCA adjustment to the job classes in its bargaining units, none of whom were HCAs, but allocated it differentially among the steps on the RN pay grid. Robert Bass testified that the Homes did not care how the adjustment was allocated so long as the cost did not exceed $1.50 per hour worked. SEIU distributed the $1.50 per hour adjustment to all of the job classes in its bargaining units, even some that were male job classes, as the Tribunal has noted in previous decisions.

54. The Tribunal has noted, in both *Queensway Nursing Home v. Group of Employees*, 2010 CanLII 56873 (ON PEHT) and *Maitland Manor Health Care Centre*, 2015 CanLII 67576 (ON PEHT) that the parties' Proxy Plans did not comply with the technical requirements of Part III.2 of the Act. Nevertheless the Tribunal in both decisions vacated Review Officer Orders that issued many years later directing them to go back and do proxy properly as of January 1994. Further, the Tribunal in *Royal Crest Lifecare Group v. Warner*, 2002 CanLII 49458 (ON PEHT), ordered the employer to comply with the $1.50 Plan.

### (e) The Maintenance Requests

55. The adjustments required under the 1995 Proxy Plans were paid in full by 2005.

56. The testimony of ONA witnesses Beverley Mathers, Sandy Kravets, and Jean Kuehl as well as that of the Homes' witness Brent Binions outlined a number of changes that have occurred since the $1.50 Plans were executed. For the purposes of this decision it is sufficient to simply enumerate some of them:

- the legislative framework pursuant to which the Homes operate has changed;
- new educational requirements for PSWs were imposed;
- greater reporting requirements to the Ministry of Health and to residents and family have been mandated;
- new equipment has been introduced;
- the acuity of residents has steadily increased;
- more and greater medical services are required to meet those needs;
- there are a greater number of residents with severe cognitive and/or behavioral problems; and
- new job titles have been introduced.

57. Ms. Mathers and Lawrence Walter from ONA and Cathy Carroll from SEIU, as well as Robert Bass for the Homes, testified about collective agreement bargaining between these parties, including reference to a number of interest arbitration proceedings. Without delving into that testimony in any great detail, we can say that we agree with the Unions' assertions that the issue of whether adjustments should be awarded to maintain pay equity under the Act has not been dealt with by interest arbitrators. We also agree that the HCA/PSW rate under the collective agreements in some Municipal Homes exceed the HCA/PSW rate in the Homes' collective agreements with SEIU. So too, the RN rate in some Municipal Homes exceeds the RN rate in the Homes. The differences in these rates appears to be increasing over time.

58. There was further testimony suggesting that resident acuity levels are higher in the Homes than the Municipal Homes, and yet staffing levels are higher in the Municipal Homes.

59. In the spring of 2009, ONA contacted the Homes asserting that pay equity had not been maintained and that changed circumstances made the Proxy Plan no longer appropriate. In late July 2009, the Homes indicated that they were prepared to establish a sub-committee of the Homes to meet and discuss the issue, notwithstanding their view that changed circumstances had not occurred and that:

> With the greatest of respect, it is our view that the normal concept of maintenance applicable in a "Job-to-

> Job" or "Proportionate Value" Pay Equity Plan do not apply when Proxy Plans have been established.

60. ONA and the Homes did not reach any agreement on the issue of pay equity maintenance.

61. SEIU wrote to the Homes in June 2010 requesting compliance with the maintenance provisions of the Act. It relied on sections 7 and 14.1 of the Act. It received no response to its correspondence.

62. The above facts are derived from the ASF:

> 52. Rates of pay for municipal homes for the aged are a matter of public record.
>
> *(a) Ontario Nurses' Association*
>
> 53. Beginning on or around 23 March 2009 and continuing until around April 3, 2009, ONA sent letters to each of the Participating Nursing Homes giving them notice of ONA's concern that wage gaps have re-emerged between nursing homes and the proxy comparator with the result that pay equity is not being maintained.
>
> 54. On or around April 2009, ONA again wrote to each of the Participating Nursing Homes seeking disclosure of information relating to pay equity maintenance.
>
> 55. The 2009-2011 Collective Agreement was ratified on or around 12 June 2009.
>
> 56. After the Collective Agreement was ratified, ONA continued to try to negotiate pay equity maintenance with the Participating Nursing Homes.
>
> 57. On or around 16 July 2009, ONA confirmed its agreement to bargain pay equity maintenance centrally with the Participating Nursing Homes.
>
> 58. On or around 29 July 2009, the Participating Nursing Homes provided a response to ONA which was to deny disclosure of the information requested on the basis that it was not necessary and incredibly time consuming to compile. The Participating Homes, while differing with ONA on the nature of maintenance under Proxy Plans,

offered to meet with ONA on the issue and named members to a sub-committee for that purpose.

59. After further attempts at bargaining, the parties have reached an impasse.

60. On or around 21 January 2010, ONA filed an application with Review Services alleging that the Nursing Homes had failed to maintain pay equity for the RN job class.

*(a) Service Employees International Union, Local 1*

61. On June 9, 2010, the President of SEIU Local 1, Canada, Sharleen Stewart, wrote to all SEIU Local 1 Long Term Care Employers in the Central or Master Group (the Respondent Nursing Homes) again requesting compliance with the maintenance provisions of the *Act*. That letter can be summarized as follows:

(a) Since 1995 there has been an increasing and substantial pay gap between the wages and benefits paid to job classes by the Central or Master Bargaining Group of Employers and the Municipal Homes for the Aged where the proxy comparators were found. In addition, there had been important changes in the work required of nursing home job classes as the regulatory requirements for nursing homes and homes for the aged have increased, along with resident acuity.

(b) In accordance with sections 7 and 14.1 of the *Pay Equity Act*, SEIU Local 1 gave notice that pay equity had not been maintained as required by the *Act*.

(c) SEIU Local I Canada requested that the employers provide dates in the next month to meet in order to discuss closing the pay gaps which had been created as a result of the failure to maintain pay equity since 1995.

(d) The Applicant Union advised that if the parties were unable to resolve the issues in a timely way, it would proceed to file a *Pay Equity Act* complaint.

63. This then was the issue that prompted the application to Review Services, and which led to these applications before us.

## (f) Part III.2 of the Act: the Proxy Method of Comparison

64. This Part of the Act makes for difficult reading. Rather than simply setting out the statutory language, we have determined at this point that it is more useful to describe various elements of the proxy methodology in plain English, followed by reproducing, in instances where we think it important, the actual provisions we have just described.

65. An employer becomes a "seeking employer" only where a Review Officer so declares. Such order can only be made in respect of a public sector employer with an establishment where at least one female job class could not be compared to a male job class using either the job-to-job or the PV method of comparison.

> **21.12** (1) This Part applies to those employers who are declared, by order of a review officer, to be seeking
>
> (2) A review officer may make an order declaring an employer to be a seeking employer if the employer has given notice to the Pay Equity Office under subsection 21.2 (5) and if the review officer finds,
>
> (a) that the employer is a public sector employer; and
>
> (b) that there is any female job class within the employer's establishment that cannot be compared to a male job class within the establishment under either the job-to-job method of comparison or the proportional value method of comparison.
>
> (3) Subsections 24 (5) and (6) apply, with necessary modifications, to an order made under subsection (2).

66. A seeking employer must use the proxy methodology of comparison for all of the female job classes in its establishment. The selection of a proxy employer and proxy establishment is governed by O.Reg. 369/93. The applicable provision of the Act is section 21.14.

67. The seeking employer must identify at least one "key female job class" in its establishment. The term is defined in section 21.11(1) but need not be reproduced. A GNCS is to be used to determine the value of the work the key female job class performs. The same GNCS is to be used to determine the value of the work performed by female job classes in the proxy establishment, which we will refer to as "proxy female job classes". (See section 21.15(3))

68. A PV analysis is done, in which the proxy female job classes are treated as if they were male job classes in the seeking employer's establishment. The prevailing compensation/value relationship for the proxy female job classes is ascertained. Pay equity achievement requires that the seeking employer adjust its compensation practices so that the same compensation/value relationship obtains for the key female job class. A pay-equity adjusted rate for the key female job class is thus determined.

69. Once a pay-equity adjusted rate for the key female job classes has been determined, that job class is treated as if it were a male job class, and its compensation/value relationship is extended to the balance of the female job classes in the seeking employer's establishment. The value of the work performed by these non-key female job classes is again to be determined using the GNCS.

70. The provisions pertinent to what we have just described in the preceding two paragraphs are contained in section 21.15 of the Act:

> **21.15**(1) Pay equity is achieved for a female job class in an establishment of a seeking employer under the proxy method of comparison,
>
> (a) in the case of a key female job class,
>
> (i) when the class is compared with those female job classes in a proxy establishment whose duties and responsibilities are similar to those of the key female job class, and
>
> (ii) when the job rate for the class bears the same relationship to the value of the work performed in the class as the pay equity job rates for the female job classes in the proxy establishment bear to the value of the work performed in those classes; and
>
> (b) in the case of any other female job class,
>
> (i) when the class has been compared with the key female job classes in the establishment of the seeking employer, and
>
> (ii) when the job rate for the class bears the same relationship to the value of the work performed in the class as the pay equity job rates for the key female job classes bear to the value of the work performed in those classes.

Comparison methods

(2) The comparisons referred to in subsection (1) shall be carried out using the proportional value method of comparison,

(a) in the case of a comparison under clause (1)(a), as if the female job classes in the proxy establishment were male job classes of the seeking employer; and

(b) in the case of a comparison under clause (1)(b), as if the key female job classes of the seeking employer were male job classes of the seeking employer.

Comparison system

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

Bargaining unit

(4) Comparisons under this section for a key female job class in a bargaining unit of the seeking employer shall be made with job classes in a bargaining unit of the proxy establishment unless the seeking employer and the bargaining agent for the employees in the key female job class agree otherwise.

If no classes similar

(5) For the purpose of making comparisons under clause (1)(a), if there is no female job class in the proxy establishment whose duties and responsibilities are similar to those of the key female job class of the seeking employer, the comparison shall be made with a group of female job classes in the proxy establishment selected by the proxy employer in accordance with subsections 21.17 (4) to (6).

Group of jobs

(6) Subsections 6 (6) to (10) apply, with necessary modifications, to the proxy method of comparison.

71. The results of the above exercise must be incorporated into a pay equity plan, as stipulated in section 21.18:

**21.18**(1) Every seeking employer shall prepare a pay equity plan to provide for pay equity using the proxy method of comparison.

Contents

(2) The plan must do the following:

1. Identify the establishment to which the plan applies.

2. Identify the key female job classes of the seeking employer.

3. Identify the proxy employer and the proxy establishment.

4. Identify the female job classes in the proxy establishment with which the key female job classes of the seeking employer were compared and set out their pay equity job rates.

5. Identify the female job classes in the seeking employer that are not key female job classes and that were compared with the key female job classes.

6. Describe the gender-neutral comparison system used for the purpose of making the comparisons.

7. Describe the methodology used for the calculations required by the comparisons.

8. Set out the value of the work performed in each job class that was compared with another job class.

9. Set out the results of the comparisons.

10. Identify all positions that are excluded in determining whether a job class is a female job class or a male job class and that are not to be included in any compensation adjustments under the plan by virtue of subsection 8(3), and set out the reasons for relying on that subsection.

11. With respect to all female job classes for which pay equity does not exist according to the comparisons, indicate how the compensation in those job classes will be adjusted to achieve pay equity.

> 12. Set out the date on which the first adjustments in compensation will be made under the plan, which date shall be not later than one year after this section comes into force.
>
> Plan binding
>
> (3) A pay equity plan prepared under this Part binds the employer and the employees to whom the plan applies and their bargaining agent, if any.
>
> Plan to prevail
>
> (4) A pay equity plan prepared under this Part prevails over all relevant collective agreements and the adjustments to rates of compensation required by the plan shall be deemed to be incorporated into and form part of the relevant collective agreements.

72. The above analyses look at what the pertinent job classes were doing and how they were compensated on January 1, 1994. That is the date as of which a seeking employer must make the first adjustments required under the proxy pay equity plan (section 21.22). Further, “pay equity job rate” for the proxy female job classes is also defined as what they would be paid if they had achieved pay equity on January 1, 1994:

> "pay equity job rate" means,
>
> (a) in relation to a female job class in a proxy establishment, the job rate that would be required for that class if pay equity were to be achieved for the class as of the 1st day of January, 1994, and
>
> (b) in relation to a key female job class of the seeking employer, the job rate that would be required for that class if the job rate were to bear the same relationship to the value of the work performed in that class as the pay equity job rates for the female job classes in the proxy establishment with which the key female job class is compared bear to the value of the work performed in those female job classes in the proxy establishment; ("taux de catégorie relatif à l'équité salariale")

73. Implementation of the proxy methodology requires information about two things: (1) how the proxy female job classes

are compensated; and (2) what their job duties are (and the skill, effort, responsibility and working conditions associated with their performance). The latter information is necessary because the Act requires the seeking employer to evaluate the proxy female job classes using its own GNCS. Both types of information are obtained by the seeking employer from the proxy employer. The right to request such information and the obligation to provide it are set out in section 21.17 of the Act. One specific piece of information that must be provided on request is the "pay equity job rate" of the proxy female job classes, that is, what it was paid on January 1, 1994.

### (g) Summary of Expert Evidence

74. In accordance with the Tribunal's Rules, a report of the evidence of each proposed expert witness was filed in advance of their providing testimony. The testimony of each was transcribed by a court reporter and the parties provided the Tribunal with copies of the transcripts.

75. Below we offer a very summary description of the issues addressed by the opinion evidence. As will become clear in the analysis section of the decision, none of our determinations turn on this evidence.

76. The two witnesses called by the Unions, Mr. Durber and Dr. Shillington, provided evidence that purported to establish that women, not employed in these Homes in particular, but rather employed in several much broader sample groups (Canada, Ontario, and the health care sector) earn less than men. In addition, there was evidence proffered to establish that differences in rates of pay between men and women increase as occupational segregation by gender (percentage female) increases, and that the health care sector is overwhelmingly female.

77. Through cross-examination of Mr. Durber and Dr. Shillington, and through the evidence-in-chief of their own experts, the Homes and Ontario took issue with: (1) the accuracy of the measurements, both as to the size of the sample and the methodology of comparison; (2) what factors (outside the purview of the Act to correct) contribute to any difference that can be accurately measured; (3) how much of the difference those factors explain; and (4) what segments of the population of persons employed in health care are relevant to look at in determining the extent of occupational segregation by gender and its correlation to pay.

78. Dr. Baker's evidence was primarily focused on items (2) and (3) above. It was largely a survey of the academic literature prepared by others, which points Dr. Chaykowski also addressed. Suffice it to say that, based on the evidence of all the expert witnesses, it is clear that there continues to be a discrepancy in pay for men and women in Ontario, but there is no clear consensus on the magnitude of it. There is further consensus that a portion of the discrepancy is explained by factors that are outside the purview of the Act to correct. These factors are in large part the same as or similar to factors that the legislative history evidence shows that the Act's drafters were aware of (degree of unionization, level of education, part-time v. full time employment etc.). What remains after those factors are accounted for is an unexplained pay differential of at least 4%.

79. Dr. Chaykowski offered testimony in one additional area. That testimony purported to establish that the system by which compensation in these Homes in Ontario is determined (through collective bargaining and interest arbitration if necessary) is such that no pay inequities can re-emerge once pay equity has been achieved through application of the proxy methodology. From ONA's cross-examination of Dr. Chaykowski, significant weaknesses in the extent of his review of interest arbitration awards, and his understanding of the principles (replication and comparability in particular) on which they were premised was revealed. We do not therefore accept his conclusions on this point. More importantly, we do not see how those conclusions are at all pertinent to the task before us.

80. We are not at this juncture determining whether pay equity in the Homes has been maintained. Rather, we are determining the extent of the Act's obligation to maintain pay equity achieved under proxy (including whether it is consistent with the Charter). Whatever that obligation is, it encompasses more than merely accounting for changes in compensation, and it must be capable of application to all seeking employers' establishments, regardless of whether they are unionized or whether interest arbitration is used to resolve the terms of the employment contracts.

## V. MAINTENANCE OBLIGATIONS AS THEY PERTAIN TO PROXY PLANS – THE PARTIES' POSITIONS

81. ONA, SEIU and the Homes included in their ASF several paragraphs setting out legal propositions respecting pay equity maintenance obligations as derived from the Act and the Tribunal's

jurisprudence. These propositions (which Ontario says do not properly form part of a statement of facts) are the following:

> 62. Under Part I of the *Act*, section 7 sets out the fundamental obligations to achieve and maintain pay equity as follows:
>
> 7.(1) Every employer shall establish and maintain compensation practices that provide for pay equity in every establishment of the employer.
>
> (2) No employer or bargaining agent shall bargain for or agree to compensation practices that, if adopted, would cause a contravention of subsection (1).
>
> 63. The obligation to maintain pay equity is a joint responsibility of employers and bargaining agents. See *Ottawa Board of Education* (1995), 6 P.E.R. 45 (PEHT).
>
> 64. The Tribunal has long-held that Part I of the *Act* sets out the general obligations of the *Act* as a whole. Parts II, III.1 and III.2 of the *Act* specify the technical steps to change compensation practices and the specific job class comparison methods required to meet these general overarching obligations. The obligation to maintain applies to all employers to whom the Act applies. See: *Group of Employees v. Ontario Public Service Employees Union*, [1993] O.P.E.D. No. 47.
>
> 65. Part III.2 of the *Act* does not derogate from the general obligation that all employers must maintain pay equity. Nothing in Part III.2 authorizes an employer to allow a pay equity wage gap to re-emerge.
>
> 66. All employers, including Nursing Homes, have the obligation under section 7(1) of the *Act* to "maintain compensation practices that provide for pay equity in every establishment of the employer". No employer or bargaining agent, including those in the Nursing Home sector, shall bargain for or agree to compensation practices that, if adopted, would cause a contravention of subsection (1). See *Welland County General Hospital* (No.2) (1994, 5. P.E.R. 12 and *York Region Board of Education (CUPE)* (1995) 6 P.E.R. 3.
>
> 67. Generally, pay equity is maintained using the same method as was used to achieve pay equity. See *CUPE*

> *Local 1776 v. Brampton Public Library* (1994), 5 P.E.R. 51 (PEHT).
>
> 68. As a statute with a remedial human rights purpose, the *Pay Equity Act* must be interpreted in a large and liberal fashion. The Supreme Court of Canada has stated that such legislation is "intended to give rise, amongst other things to individual rights of fundamental importance, rights capable of enforcement, in the final analysis in a court of law". The Court further stated that "we should not search for ways and means to minimize those rights and to enfeeble their proper impact". See *Canadian National Railway v. Canada (Canadian Human Rights Commission)* [1987] 1 S.C.R. 1114.

82. ONA and SEIU argue that pay equity must be maintained in the same way that it was achieved. In the case of these Proxy Plans, they say that maintenance requires ongoing comparisons between the compensation of the female job classes in the seeking establishments and the compensation of the female job classes in the proxy establishment.

83. The Homes and Ontario say that the Homes established pay equity compliant rates of compensation in their establishments effective January 1, 1994. Those rates of compensation were initially established by comparison to rates of compensation in the proxy establishments. The Homes say that the Act contemplates a one-time only comparison with the circumstances in the proxy establishment, which is why "the pay equity job rate" for the proxy female job classes is defined as the rate paid on January 1, 1994. While the Homes acknowledge that they have an ongoing obligation to maintain compensation practices free of gender discrimination, they therefore say that they are not required to do so by reference to the circumstances in the proxy employer's establishment (i.e. information about changes in the compensation of, or in the job duties and responsibilities of, the proxy female job classes) subsequent to January 1, 1994. In short, Ontario and the Homes say that Part III.2 of the Act, properly interpreted, contemplates only an internal-to-the-seeking-establishment maintenance obligation. Furthermore, they say that this approach is most consistent with the overall scheme of the Act.

84. The Unions say two things in response.

85. First, they say that systemic gender discrimination pervaded the pre-Act compensation practices in the Homes, and that if the same compensation-setting mechanisms are now employed without any external check, such discrimination will creep in again.

86. Second, they say that the position of the Homes and Ontario does not provide a means of maintaining pay equity for all of the female job classes in the seeking establishment. For any establishment in which pay equity must be achieved using the proxy methodology, the Act creates two distinct categories of female job classes: the key female job class(es); and the non-key female job classes. The argument of the Homes and Ontario is that because the key female job class is deemed to be a male job class vis-à-vis the non-key female job classes, pay equity is maintained so long as the parties maintain the compensation/value relationship between these two categories by negotiating only across-the-board percentage pay increases. According to the Unions, the flaw in that analysis is its failure to recognize that the key female job class is in fact a female job class for whom pay equity must also be established and maintained. Accordingly, there must be a means of ensuring that its rate of compensation remains pay equity compliant. They say that any assessment of equity necessarily implies a comparison, and the approach advanced by the Homes and Ontario does not provide any measure against which the rate of compensation for the key female job class can be compared. Further, the Unions say that the other parties' focus on January 1, 1994 as the effective date of the information a potential proxy employer must provide ignores the fact that information about compensation in the long-term care sector is widely available and relied on all the time in, for example, interest arbitrations.

## VI. ANALYSIS OF THE ACT'S REQUIREMENTS RE MAINTENANCE OF PAY EQUITY

87. We start with some general observations about the Act, and the obligation to maintain, and then move into a more particular discussion of the proxy provisions.

88. Pay equity under the Act is established on an employer-by-employer basis. Even so, not all employers are required to establish and maintain pay equity. The Act only applies to private sector employers who employ 10 or more employees. Female job classes in the establishments of small private sector employers have no access to the remedial provisions of the Act. Female job classes employed by

large private sector employers may also have no practical access to the remedial provisions of the Act if the employer's workforce is so predominantly female that it is impossible to use the job-to-job or PV methods of comparison. That is because Part III.2 of the Act does not apply to private sector employers.

89. Each individual employer to whom the Act applies is obligated to critically examine *its own* compensation practices using one of the three comparison methodologies, to determine if womens' work (that performed by female job classes) is equitably compensated as compared to mens' work (that performed by male job classes), having regard to the value of each.

90. The Act does not require wage parity as between different employers. Two different employers operating the same kind of business in the same geographic area may have pay-equity-compliant compensation practices even though the female job classes performing the same or substantially similar duties for each of those employers do not receive similar compensation. In other words, the Act contemplates that the rates of pay for the same or similar women's work may vary depending on *the identity and characteristics of their employer*.

91. If an employer operates in more than one geographic region of the province, each of those geographic areas constitutes an "establishment" under the Act. An employer may choose to combine its establishments for the purpose of satisfying its obligations under the Act, but is not required to do so. What is required is that compensation practices *in each individual establishment* are pay-equity compliant. Where the same female job class exists in more than one establishment of the employer, it is possible that pay equity may be achieved in each establishment even though those two female job classes are paid different rates. What matters is that the female job classes are paid equitably as compared to the male job classes in the local establishment. In other words, even where female job classes may perform work of the same value for the same employer, the Act contemplates that their rates of pay may vary depending *on the characteristics of the individual establishment* in which they work.

92. The Act also recognizes that an employer may have more than one compensation practice within a single establishment. Separate determinations of whether pay equity exists (and if not, how any inequity must be redressed) are required to be done for each bargaining unit in the establishment, and for the non-union employee

group. Each of those exercises requires the use of a GNCS, but there is no obligation to use the same GNCS in respect of each employee group. If it is possible to do so, the comparison of rates of pay either under the job-to-job methodology where there exist equal or comparably-valued male and female job classes, or under a compensation/value analysis (PV), is confined within the particular employee group. In other words, even where female job classes may perform work of the same value for the same employer within the same establishment, the Act contemplates that their rate of compensation may vary depending on *whether they are unionized or which bargaining unit they are in*.

93. The Act recognizes that not all differences in compensation between comparably-valued men's and women's work (where the women's work is paid less) in the same establishment are necessarily attributable to gender discrimination. Section 8(1) of the Act outlines a number of situations where such difference(s) in compensation need not be redressed.

94. Where any comparison of the compensation for the male and female work in an establishment occurs across (rather than within) employee groups, ongoing wage parity as between job classes, or ongoing matching of the male wage line after pay equity has been achieved may not be required if the rate of pay associated with the male work increased because of a difference in bargaining strength between the employee groups (see section 8(2) of the Act).

95. The proxy methodology of comparison represents a significant departure from what we have described above. It measures one employer's compensation practices in its establishment against the compensation practices in an establishment of a different and unrelated employer. Part III.2 of the Act's prescriptions with respect to what comparisons can be made are however consistent with Parts II and III.1 in that they attempt to eliminate factors other than systemic gender discrimination from affecting the measure of any adjustments required. We see therefore that: the seeking and the proxy employer's establishments (or the proxy employer's head office) must be geographically proximate (O.Reg.93/10, s.2(4)); there are regulatory constraints on the choice of proxy establishment available; the female job classes in the proxy establishment to whom the seeking employer's key female job classes are compared are those who have similar duties and responsibilities, unless there are no such female job classes in the proxy establishment; and unless the seeking employer and a bargaining agent for the key female job classes agree otherwise,

the proxy female job classes to which the former are compared must also be job classes within a bargaining unit.

96. The result of the exercise described above determines a pay equity compliant rate for each of the key female job classes in the seeking employer's establishment. Because those pay equity compliant rates are not determined by a job-to-job comparison of the key female job classes in the seeking employer's establishment and the proxy female job classes, but rather by the application of a PV analysis, they will not necessarily match the rate paid to any of the proxy female job classes. In other words, the proxy provisions do not assume that the application of this methodology will result in wage parity as between the key female job classes of the seeking employer (or any other female job classes in that establishment) and any of the proxy female job classes.

97. The standard against which the compensation of the key female job classes in the seeking establishment is measured is the "pay equity job rate" of the proxy female job classes. That is defined as "the job rate that would be required for that job class if pay equity were achieved for the class as of the 1st day of January, 1994" (section 21.11(1)). Section 21.11(2) makes clear that it is the proxy employer who determines and communicates what the pay equity rate is for the proxy female job classes (section 21.11(2)): "for the purposes of the definition of "pay equity job rate", the job rate for a female job class of the proxy establishment is the rate indicated by the proxy employer for that class under paragraph 2 of subsection 21.17(1). Subsection 21.17(1) stipulates that a seeking employer may request any potential proxy employer to provide it with "… information about the duties and responsibilities of each female job class in the potential proxy establishment whose duties and responsibilities are similar to those of the key female job class of the seeking employer…[and] the pay equity job rate for each [of them]". Section 21.17(2) obliges the proxy employer to respond to a request for information within 60 days.

98. Above we have described the Act's provisions as they pertain to the obligation to establish pay equity. We now turn our attention to the obligation to maintain pay equity.

99. The Act does not define "maintenance". The term does however appear a number of times.

100. Section 7(1) of the Act is the source of what is usually referred to as the obligation to "maintain pay equity". The actual language used in the section is the following:

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

101. Section 8(5) of the Act (referred to briefly above) also expressly refers to "maintenance":

> **8.** (5) The requirement that an employer maintain pay equity for a female job class is subject to such limitations as may be prescribed in the regulations. 1993, c. 4, s. 6.

102. O.Reg. 491/93 is the only regulation that prescribes "Limitations on Maintaining Pay Equity". Its application is restricted to certain situations where pay equity was achieved for a female job class using the job-to-job methodology of comparison.

103. The only other mentions of "maintenance" in the Act occur in section 7.1(1) which merely tracks the language of section 7(1), and in the regulation-making powers enumerated in section 36, where subsection 36(1)(f.1) merely tracks the language of section 8(5).

104. All of the substantive references to maintenance obligations are contained in "Part I – General" of the Act, which, as the title suggests, contains provisions that are generally applicable to all employers to whom the Act applies. None of the subsequent Parts of the Act, which deal with pay equity implementation, and provide for the use of the three job comparison methodologies, contain any specific indication of how pay equity is to be maintained where it is achieved using a particular methodology.

105. There is no basis in the statute or the case law for any conclusion that the obligation to "maintain compensation practices that provide for pay equity" only applies where pay equity was achieved using the job-to-job or proportional value methodology, and does not extend to those situations where pay equity was achieved using the proxy methodology of comparison.

106. Despite their positions at the outset of this hearing, Ontario and the Homes ultimately acknowledged what we have stated above:

these Homes are subject to the obligation to maintain pay equity. The question that remains is how it is to be maintained. In the absence of a definition of maintenance, the scope of that obligation must be ascertained from a consideration of the Act as a whole. In addition, we are cognizant of the fact that the Unions in their Charter argument (which we address later) invite us to compare the substance of the maintenance obligation as it applies to two groups: those for whom pay equity has been achieved under the job-to-job and PV methodologies; and those for whom pay equity has been achieved under the proxy methodology. That approach also demands the consideration of the whole of the Act as well.

107. The few sections of the Act in which the term "maintain" appears do not offer much guidance as to the substantive content of the obligation. The plain meaning of the word "maintain" suggests to us that the obligation is to continue the compensation/value relationship that is established when a female job class' rate becomes pay equity compliant. A change in either variable – the job class' compensation or its value (the amalgam of skill, effort, responsibility and working conditions) – will affect that relationship. That is why both must be monitored, as the Tribunal's case law has noted.

108. The concept of "changed circumstances" is related to, and often discussed in connection with, the "maintenance" obligation. This term appears in both sections 14.1(1) and 22(2) of the Act:

> **14.1** (1) If, in an establishment in which any of the employees are represented by a bargaining agent, the employer or the bargaining agent is of the view that because of changed circumstances in the establishment the pay equity plan for the bargaining unit is no longer appropriate, the employer or the bargaining agent, as the case may be, may by giving written notice require the other to enter into negotiations concerning the amendment of the plan.
>
> ...
>
> **22.** (2) Any employee or group of employees, or the bargaining agent, if any, representing the employee or group of employees, may file a complaint with the Commission complaining with respect to a pay equity plan that applies to the employee or group of employees that,

> (a) the plan is not being implemented according to its terms; or
>
> (b) because of changed circumstances in the establishment, the plan is not appropriate for the female job class to which the employee or group of employees belongs.

109. In *Thunder Bay Police Service*, [2006] O.P.E.D. No. 9, the Tribunal said the following about the maintenance obligation:

> 6. Section 7 of the Act requires employers and trade unions to "establish and maintain compensation practices that provide for pay equity". Meeting that obligation requires employers and unions to review their pay equity plans as positions are added or eliminated from the bargaining unit, or as duties and responsibilities are altered. The plan must be up to date and respond to present realities of the workplace…

110. The above statement was echoed and elaborated on in *Call-A-Service Inc.*, [2008] O.P.E.D. No. 11, as follows:

> 24. During the hearing, the Tribunal heard evidence from the Employer's Executive Director that on several occasions the Employer had "amended and reposted" a pay equity document because of changes in its establishment. It seems that from time to time, the Employer had viewed those changes sufficient to render its deemed approved plan to be "no longer appropriate" for the establishment, and thus proceeded to amend, repost, and re-implement another pay equity plan. In the wake of that, it is apposite to set out the differences between changes that come about because of maintenance and changed circumstances.
>
> 25. Maintenance is the means by which an employer ensures that compensation practices are kept up-to-date and remain consistent with pay equity principles. Subsection 7(1) of the *Act* imposes an obligation on an employer to establish and "maintain" compensation practices that provide for pay equity. Maintenance is an ongoing responsibility. It includes reviewing job classes regularly to capture any changes to job duties and responsibilities, which may require pay equity adjustments. Some examples of changes resulting from ongoing maintenance are: changes to job titles; changes to the duties and

responsibilities of a job that may place it in a different job class and salary scale; the creation or elimination of a job class, in particular, a male comparator job class; and changes in the gender dominance.

26. Changes arising from maintenance do not give rise to a formal review period as required under subsections 15(4) to (8) of the *Act.*

27. Most significantly though, such changes do not open a deemed approved plan. (*Centennial College* (2001 – 02), 12 P.E.R. 102, at para. 20. To paraphrase the ruling of the panel in that case, the importance of a deemed approved plan makes it counter-intuitive to the scheme of the *Act* to contemplate treating subsequent events, as rendering a deemed approved plan open.

28. By contrast, in the case of a non-union establishment, subsections 14.2 of the *Act* permits an employer where, "because of changed circumstances in the establishment the pay equity plan … is no longer appropriate" to amend and repost a deemed approved plan. Essentially, the changed circumstances would render a "deemed approved plan" not workable.

29. The *Act* does not define the term "changed circumstances". It is clear, however, that the existing plan must be "no longer appropriate" for the establishment. Implicitly, in changed circumstances, the Employer must prepare and implement a new pay equity plan because the existing one is no longer suitable for the establishment. Some examples of changed circumstances could be: restructuring of the establishment; the certification of a union in a non-union establishment; and the amalgamation or merger of two or more employers. (*Parry Sound District General Hospital (No. 2)* (1996), 7 P.E.R. 73; and *St. Joseph's Villa* (1993), P.E.R. 33). To paraphrase the panel in *Parry Sound,* it would be counter-intuitive to enact a provision permitting one to challenge a deemed approved plan that contravenes the *Act,* and then immediately below, permit one to challenge a deemed approve plan each time there are revisions: para. 28.

30. In this case, having examined the changes, the Tribunal iterates its conclusion that none of the changes the Employer relied on in this case to amend and repost the 2002 Plan, are changed circumstances sufficient to

> require amending and reposting that plan. Those changes are integral to the Employer's responsibility to maintain compensations practices that are consistent with pay equity as contemplated by subsection 7(1) of the *Act*.

111. It may be useful to contrast the above cases to ones where the Tribunal has concluded that a plan is not appropriate because of "changed circumstances". In *St. Josephs Villa*, [1993] 4 P.E.R. 33, a pay equity plan was concluded in a non-unionized workplace. A trade union was subsequently certified to represent employees in some, but not all, of the job classes covered by the plan. The Tribunal concluded that because the Act required a separate pay equity plan for each bargaining unit and for the non-union employee group, the existing plan was not appropriate, and ordered that it be "split".

112. We agree with and adopt the reasoning in the cases cited above. Having done so, it is clear that any changes in the job responsibilities or educational requirements of the job classes represented by the Unions, or changes in the acuity and demands of patients in the Homes, are not the type of "changed circumstances" that have been found by the Tribunal to render a plan not appropriate for one or more female job classes and warrant its reposting. Even accepting the accuracy of all the evidence proffered by the Unions (and ignoring the extent to which the Homes disputed it), we are satisfied that it does not support a conclusion that there are "changed circumstances" as the Tribunal has interpreted that term. Rather, they are assertions that the value (the amalgam of skill, effort, responsibility and working conditions) of the bargaining units' job classes has increased. This is precisely the kind of change that the Tribunal has said is to be addressed through the maintenance process.

113. Both the Unions' and the Homes' arguments focused on compensation changes (limited in fact to changes in wage rates) as the only variable to which the maintenance obligation is addressed, and failed to offer an analysis capable of addressing the effect that changes in the value of job classes may have on the maintenance of pay equity that is achieved under proxy plans. For example,

- The Homes suggested that across-the-board collective bargaining increases in their establishments would mean pay equity was maintained. That would only be true, however,

if the value of the job classes in the seeking establishment remained unchanged.

- The Unions filed a great deal of data setting out the superior hourly rates enjoyed by the occupants of job classes in Municipal Homes compared to their counterparts in the like job classes in the Homes. The Unions referred to the difference between the two as the "wage gap". That term is usually used to describe not a simple difference in pay, but a difference that the Act requires be eliminated. A determination of what the Act requires involves an assessment of whether the relative value of the job classes, as compared to their compensation, has changed.
- In response to the Homes' argument that pay equity maintenance cannot necessitate continuing resort to compensation practices in the Municipal Homes because the entitlement to relevant information from the latter was a "one-shot" (i.e. as of January 1, 1994) deal, the Unions countered that the municipal wage rates were more or less a matter of public record. That may be the case, but more information than that is required to gauge whether pay equity is being maintained: information about the specific job duties and responsibilities performed in the Municipal Homes is required in order to see whether the value of those jobs as measured by a GNCS agreed to between the seeking employer and its bargaining agent has changed.

114. In large part, it seems to us, the Homes' and the Unions' arguments on maintenance failed to take account of the need to assess whether there had been any changes in the value of the work performed in either or both of the seeking employer's and the proxy employer's establishments, because the steps they took in developing the Proxy Plans do not readily allow for the ongoing meaningful measurement of that value. The Proxy Plans were based on the assumption that what was then the HCA (and is now a PSW) not only possesses similar skills regardless of whether they worked in a Municipal Home or a Home, but also performed the same duties under the same working conditions for a similar resident population; and that

the work was of the same value to the Municipal Employers and to the Homes. The parties did not agree to a GNCS and they did not evaluate any job classes. Even if the assumptions on which the Proxy Plans were predicated were accurate at the time, we cannot be certain that they remain so. Indeed, the Unions' evidence and arguments about the changes to the skill, effort, responsibility and working conditions of their jobs as compared to those performed in the Municipal Homes, where they suggest that resident acuity may not be as high or where staffing levels are greater, suggest that the assumption no longer holds true. Furthermore, we are cognizant that our analysis of the scope of the maintenance obligation where pay equity was achieved using the proxy methodology of comparison must be capable of application to all public sector workplaces in the Province where a "seeking employer" declaration was made. That includes ones where the key female job class' duties may not be so similar to the jobs performed in the proxy establishment, as is the case in the Homes and to ones where there are no collective agreements to consult. Any maintenance analysis cannot ignore the ongoing monitoring of changes in the value of the jobs, whether in the Homes alone (where the Homes say the focus should be) or in the proxy establishments as well (where the Unions say the focus should be).

115. One of the arguments that the Homes raised against an interpretation of the maintenance obligations in respect of Proxy Plans that would require seeking employers to have ongoing reference to compensation rates in the proxy establishments was that they are only entitled to information from the proxy employer about the January 1, 1994 compensation rates, so that they had no means of ensuring the maintenance of subsequent job rates. This is not a particularly persuasive argument in the case of these Homes. As the Unions pointed out, all of the proxy employers listed in the schedule are public sector employers and information about their compensation rates is widely available. To the extent that the proxy female job classes are in a bargaining unit, the applicable collective agreement setting out their compensation (and incorporating as required by the Act any pay equity adjustments) must be filed with the Ministry of Labour and is available to consult. Information about wage rates might not be so readily available where the seeking and proxy employers were not unionized.

116. Even if information about proxy employers' compensation rates is largely in the public domain, the maintenance of pay equity requires more than simply an examination of compensation rates: it also requires a monitoring of job duties and responsibilities to ensure

that comparator job classes remain appropriate. Information about any changes in job duties and responsibilities in the proxy employer's establishment that might impact the value of work performed by the proxy female job classes relative to the key female job class is not information that is in the public domain. The proxy employer's ongoing obligation to maintain pay equity and to address any changed circumstances in its own establishment may make it difficult to ascertain at any given time what the pay equity compliant rate for its job classes is. While there is no provision in Part III.2 that expressly constrains a seeking employer from requesting such information on an ongoing basis, it is an onerous task for the proxy employer, and the fluidity of circumstances may have impact on the ability to provide accurate information.

117. Contrary to what the Unions say, we think there is a substantial practical impediment to obtaining information enabling a proxy plan to be updated or maintained to reflect changes in the value or compensation rates for the proxy female job classes. Further, we are in agreement with Ontario and the Homes that this is not what the Act requires. The Act's focus is on the specific compensation practices that determine what an employer pays its own female job classes in a given establishment. As we have noted above:

- The practices of the individual employer matter, not the industry or sector of the economy in which the employer operates.
- The practices in a particular geographic area (eliminating the influence of geography as a market factor in wage setting) matter.
- The practices within the employee group to which the female job class belongs (the bargaining unit; across bargaining units; the employer's entire establishment) matter most.
- Elements of compensation unrelated to the value of work (and therefore treated as gender neutral) are not pertinent.

118. It bears repeating that in the context of the Act as a whole, the proxy methodology is extraordinary. The seeking employer's compensation practices are held up to scrutiny as against the compensation practices of another employer. In the case of these privately-owned for-profit Homes, the proxy establishment is a Municipal Home. The proxy female job classes in that Municipal Home may form part of a larger bargaining unit of municipal workers. The

broader unit would presumably have the right to strike. Any bargaining unit of employees of the Municipal Home or of a non-profit Home would be constrained by the *Hospital Labour Disputes Arbitration Act* ("HLDAA") from engaging in strike action. Even absent any changes in the value of the relevant job classes in the seeking and proxy establishments, it is possible that any difference that arose in the compensation/value relationship was attributable to bargaining strength and was justifiable under section 8(5) of the Act as not arising from systemic gender discrimination in compensation. There are other potential non-discriminatory reasons why one employer may pay its employees more than another, even if they perform work of the same value. One may simply be more generous; more efficiently managed or may have access to a different source of funds.

119. The proposed approach of the Homes (and Ontario) to pay equity maintenance does not go far enough. It is not enough to simply say that the Homes have established, as of January 1, 1994, a gender neutral compensation practice and so long as they have only implemented across the board percentage pay increases since that time, pay equity has been maintained. Such a maintenance mechanism is of no use in the many seeking establishments of this province where employees are not represented by a bargaining agent. Even where the workplace is an organized one, the proposition would only be true if the value of the job classes (the amalgam of the skill, effort, responsibility and working conditions required of them) has remained the same, and that requires monitoring.

120. If the Homes' approach does not go far enough, the Unions' goes too far. It is possible to maintain pay equity without continuing resort to the compensation practices in the proxy establishment. That is what the Act contemplates. Pay equity can be maintained for both the non-key female job classes, and for the key female job class. We explain how below. Before doing so, we want to address the decision in *Brampton Public Library Board*, [1994] O.P.E.D. No. 37 ("*Brampton Library*"), which the Unions relied on in support of the proposition that "pay equity must be maintained in the same way that it was achieved".

121. In January 1992, the Library Board concluded a pay equity plan with the union ("CUPE") that represented many of its employees. The plan used the job-to-job method of comparison, but compared female job classes at the library to male job classes employed by the City of Brampton and represented by another CUPE Local, and identified those male job classes as forming part of the Library

establishment. The Tribunal found that the Library Board did more than the Act required in reaching a plan, and that it was required to maintain the job-to-job comparison it had agreed upon.

> 35. Pursuant to the Act, the parties in this case were obligated to negotiate a gender neutral comparison system and prepare a pay equity plan. As a result of their negotiations they determined that no male comparators could be found within the Board. At this point, it was open to them to post a pay equity plan which indicated that no male comparators were found within the Board. As Mr. Tascona acknowledged, they did not follow this option. Instead, they chose to go further and negotiated an agreement which incorporated certain male job classes from the City into the Board's establishment. This agreement was made to ensure that pay equity was achieved for the female job classes at the Board. From this point on, the parties proceeded on the basis that those male job classes were part of the Board's establishment. Furthermore, they indicated in the pay equity agreement that they were part of the Board's establishment.
>
> 36. On the basis of the parties' agreement to "adopt" male job classes from the City into the Board's establishment as male comparators, the parties compared the jobs using a gender neutral comparison system, determined which jobs were comparable, determined pay adjustments and ultimately concluded a pay equity agreement which includes all of the required elements of a pay equity plan. The agreement was executed by the parties and posted in the workplace. The pay adjustments were incorporated into the collective agreements between the parties and pay equity adjustments have been made.
>
> 37. The Tribunal finds that the parties negotiated a pay equity plan within the meaning of the Act, albeit one which exceeded the requirements of the Act. The remaining issue is whether the Board is required to maintain pay equity in accordance with the Act.
>
> 38. We are mindful of Mr. Rapp's evidence that collective bargaining practices at the Board, and not the City, would determine the job rates for the female job classes at the Board. Nevertheless, there are no provisions in any of the agreements entered into by the parties, including the pay equity agreement, which evidences an

> intention on the part of the Board to modify or avoid its statutory obligation to maintain pay equity because of the manner in which the parties have proceeded to establish pay equity. Even in circumstances where parties do make such provisions, the Tribunal will review them very carefully, given our mandate of ensuring compliance with the Act.
>
> 39. It is implicit in the parties' treatment of their agreement as a pay equity plan that they intended the Act would apply to their agreement. This must therefore include the Act's provision relating to maintenance. On the basis of the evidence before us, we find that the agreement of January 27, 1992 is a
> pay equity plan and that consequently the Board is obligated to maintain pay equity. To hold otherwise would result in a disposition which generally defeats the purpose of the Act and renders subsection 7(1) inoperative in this case.

122. We read the *Brampton Library* decision as a simple case of the Tribunal holding parties to the terms of their agreement. Here is another recent example illustrating the same proposition. In *CUPE v Corporation of the City of Peterborough*, 2015 CanLII 55324 (ON PEHT), a majority of the Tribunal similarly held that an employer, having initially agreed that a particular position was a representative male job class for the purpose of creating a PV wage line could not subsequently agree it was not representative when redrawing the line for the purpose of maintenance:

> 24. In summary: there is no question that, in respect of the 2003 Plan, the Residential Mechanical Inspector was properly included as a representative male job class for purposes of the proportional value exercise that resulted in the creation of the male wage line. The Act does not say expressly that a representative male job class can later be treated as unrepresentative. None of the section 8 exemptions apply in this case. The parties' 2004 banding and compensation system does not constitute a pay equity plan or an amended pay equity plan that is subject to the maintenance requirement under the Act. The Letter of Agreement between the parties specifically requires a review of related positions where the City assigns a market adjustment to any given position. In light of all these circumstances, we are not persuaded that the Act shields the City from its obligation to maintain the 2003 Plan following the

> market pay adjustment made in relation to the Mechanical Residential Inspector job class.

123. No part of the $1.50 Plans between the Homes and the Unions can be construed as incorporating any proxy employer's job class(es) into the Homes' establishment. There is no provision of the $1.50 Plan that makes any reference to how pay equity will be maintained. We do not see how the *Brampton Library* decision has any application to the circumstances of this case.

124. Below we explain how the maintenance obligation is fulfilled for all female job classes where pay equity was achieved under the proxy methodology.

125. The initial comparison and adjustment of the value/compensation ratio of the key female job classes to match the value/compensation ratio of the proxy female job classes is capable of being expressed as a mathematical formula or equation. The equation may describe a gender neutral wage line capable of being plotted on a matrix where the increasing value of a job results in movement along the X axis, and where the increasing compensation rate of a job results in movement along the y axis. The complexity of the equation will depend on the extent to which the slope of the wage line is other than constant. If it is constant, the relationship and the equation may be very simply expressed as one of $/point of value.

126. Regardless of how the compensation/value equation is expressed, either of its variables may change over time, with the consequence that the other must also change if the same result is to be maintained.

127. Take the simple example of a key female job class that scores 500 points under the GNCS used by the seeking employer. After evaluating the proxy female job classes using the same GNCS and making the required adjustments, the pay equity compliant rate for the key female job class as of January 1, 1994 is $20.00 per hour. That may be expressed as $.04 per point. The pay equity compliant rate for the non-key female job classes will be $.04 x the point value of each of those job classes. The maintenance obligation requires that the same formula be used to determine the pay equity compliant rate for any new female job classes that are created after the plan is entered into.

128. Subsequent to January 1, 1994, the two potential triggers engaging the obligation to maintain are: a change in the compensation of the key female job class; or a change in the value of any of the job classes in the seeking employer's establishment. Whenever the hourly rate for the key female job class increases without any increase in its value occurring, the $/point ratio will increase. Pay equity for the other female job classes will be maintained only if that new ratio also obtains for them, and their value has not changed. If the job duties and responsibilities of the key female job class change such that its point value increases, then its rate of compensation must also increase to maintain whatever $/point ratio is applicable at the time. The same is true for the other female job classes.

129. This can be illustrated using our 500 point, $20.00 per hour, key female job class example above.

130. If at some point in time the key female job class rate is increased by $1.00, then the $/point ratio is $21.00 ÷ 500 = $.042. For the non-key female job classes to maintain pay equity, their job rate must equal $.042 times the point value of their jobs.

131. If the point value for the key female job class is ascertained to have also increased by 10 points to 510, then the rate that must be paid to maintain pay equity is 510 x .042 = $21.42.

132. Precisely the same exercise that we have described above can also be performed even where the initially-determined compensation/value relationship cannot be plotted as a wage line with a constant slope. In that case, the slope of the line will still be described by a mathematical formula, which will permit the determination of how non-key female job class rates should be adjusted where key female job class rates increases or where the value of the non-key female job classes increase, and will also permit the extrapolation of the line to permit the determination of the pay-equity compliant job rate for the key female job class in the event that its point value increased.

133. In summary, the Act's obligation to maintain pay equity applies regardless of the methodology of comparison used. Pay equity that is achieved under a proxy plan must be maintained. Generally speaking, maintenance requires the on-going monitoring of any changes in either the compensation or the value (the amalgam of skill, effort, responsibilities and working conditions) of female job classes and the male job classes (including deemed male job classes) used for

comparison purposes. In the case of proxy plans, however, maintenance does not require the monitoring of changes to the value or compensation of the female job classes in the proxy establishment. To so require would be inconsistent with the over-riding principle that the Act mandates each *individual employer* to whom it applies to ensure that *its own* compensation practices are free from gender discrimination. Instead, what is required is monitoring of the compensation and value relationship of the non-key female job classes and the key female job class as compared to the compensation/value relationship (PV line) that has already been determined to provide for pay equity.

## VII. SECTION 15 OF THE CHARTER

### (a) Charter Values as an Aid to Interpretation

134. When ONA and SEIU commenced these applications, they only relied on the Charter as an aid to the interpretation of the Act.

135. The Unions argue that the Tribunal must interpret the scope of the Act's maintenance obligation as it pertains to pay equity achieved under the proxy methodology in accordance with Charter values. Recent jurisprudence from the Supreme Court of Canada, however, has cautioned that such approach is only appropriate where the legislation in question is ambiguous, in which case the interpretation favoured is the one more consistent with Charter values. This jurisprudence was usefully summarized by the Chair of the Ontario Labour Relations Board in his May 26, 2015 decision in *Durham District School Board et al*, 2015 CanLII 30160 (ON LRB); [2015] O.L.R.D. No. 1559 at para. 91:

> 91. The jurisprudence has now evolved to the point of where it is clear that *Charter* values may be invoked in statutory interpretation only in the cases of genuine ambiguity. Prior to consideration of the *Charter*, the statute must be construed in the ordinary manner (according to the modern approach to statutory construction as set out in all of those decisions referred to in paras. 29-31, *supra)*. Only if ambiguity remains and there is more than one interpretation of the statute, equally supported by the modern approach, may *Charter* values be invoked to give preference to the interpretation or [sic] consistent with those *Charter* values. This has been most recently summarized by

the Supreme Court in *Regina v. Clarke*, 2014 SCC 28 at paras. 12-15:

[12] **The absence of ambiguity also precludes the application of the interpretive assistance of *Charter* values, which only play a role if there is genuine ambiguity as to the meaning of a provision** (*Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, and *R. v. Rodgers*, [2006] 1 S.C.R. 554). **If the statute is unambiguous, the court must give effect to the clearly expressed legislative intent.**

[13] The role of *Charter* values in interpreting statutes was explained by Iacobucci J. in *Bell ExpressVu* as follows:

> [62]... **to the extent this Court has recognized a "*Charter* values" interpretive principle, such principle can *only* receive application in circumstances of genuine ambiguity, i.e., where a statutory provision is subject to differing, but equally plausible, interpretations.** [Emphasis in original.]
>
> ...
>
> [64]... a blanket presumption of *Charter* consistency could sometimes frustrate true legislative intent, contrary to what is mandated by the preferred approach to statutory construction....
>
> ...
>
> [66]... if courts were to interpret all statutes such that they conformed to the *Charter*, this would wrongly upset the dialogic balance. Every time the principle were applied, it would pre-empt judicial review on *Charter* grounds, where resort to the internal checks and balances of s. 1 may be had. In this fashion, the legislatures would be largely shorn of their constitutional power to enact reasonable limits on *Charter* rights and freedoms, which would in turn be inflated to near absolute status. Quite literally, in order to avoid this result a legislature would somehow have to set out its justification for qualifying the *Charter* right

> expressly in the statutory text, all without the benefit of judicial discussion regarding the limitations that are permissible in a free and democratic society. Before long, courts would be asked to interpret *this* sort of enactment in light of *Charter* principles. The patent unworkability of such a scheme highlights the importance of retaining a forum for dialogue among the branches of governance. *As such, where a statute is unambiguous, courts must give effect to the clearly expressed legislative intent and avoid using the Charter to achieve a different result.* [Emphasis added.]

[14] In *Rodgers*, Charron J. confirmed these interpretive borders in the criminal law context:

> [18] It has long been accepted that courts should apply and develop common law rules in accordance with the values and principles enshrined in the *Charter*.... **However, it is equally well settled that, in the interpretation of a statute, *Charter* values as an interpretative tool can only play a role where there is a genuine ambiguity in the legislation. In other words, where the legislation permits two different, yet equally plausible, interpretations, each of which is equally consistent with the apparent purpose of the statute, *it is appropriate to prefer the interpretation that accords with Charter principles. However, where a statute is not ambiguous, the court must give effect to the clearly expressed legislative intent and not use the Charter to achieve a different result....*** **[Emphasis added.]**
>
> [19] If this limit were not imposed on the use of the *Charter* as an interpretative tool, the application of *Charter* principles as an overarching rule of statutory interpretation could well frustrate the legislator's intent in the enactment of the provision. Moreover, it would deprive the *Charter* of its more powerful purpose -- the determination of the constitutional validity of the legislation....

> [15] The requirement of statutory ambiguity as a prerequisite to the application of *Charter* values was most recently acknowledged in *R. v. Mabior*, [2012] 2 S.C.R. 584, where the Chief Justice stated that *Charter* values are "always relevant" to the interpretation of a "disputed" provision of the *Criminal Code* (para. 44). The two cases relied on by the Chief Justice for this proposition -- *R. v. Sharpe*, [2001] 1 S.C.R. 45, at para. 33 and *Application under s. 83.28 of the Criminal Code (Re)*, *[2004] 2 S.C.R. 248,* at para. 35 -- both assert that where more than one interpretation of a provision is equally plausible, *Charter* values should be used to determine which interpretation is constitutionally compliant.

136. Subsequent to the release of the OLRB decision in *Durham District School Board*, on July 3, 2015, the Ontario Court of Appeal issued two decisions touching on the role of Charter values in the interpretation of statutory instruments.

137. The decision in *Sarnia (City) v. River City Vineyard Christian Fellowship of Sarnia*, 2015 ONCA 494, overturned the decision of a Superior Court Justice with respect to the interpretation of a municipal by-law, and *in that context*, noted the presumption that “legislative provisions are presumed to be consistent with constitutional norms, including the values enshrined in the Charter. However, this presumption comes into play as an interpretive principle only if a provision is genuinely ambiguous”.

138. The decision in *Taylor-Baptiste v. Ontario Public Service Employees Union*, 2015 ONCA 495, affirmed a decision of the Divisional Court that had dismissed an application for review of the Human Rights Tribunal of Ontario’s (“HRTO’s”) dismissal of a complaint by a managerial employee about the offensive sexist content of a blog posting made by a union official. The HRTO dismissed the complaint as outside of its jurisdiction under section 5(1) of the *Human Rights Code*, finding that the offensive conduct was not “with respect to employment”. In reaching this decision, the Tribunal characterized the phrase “with respect to employment” as ambiguous, and interpreted it in a way that would not constrain the blogger’s right to freedom of expression and freedom of association under the *Charter*. Both the Divisional Court and the Court of Appeal disagreed with the conclusion that “with respect to employment” was ambiguous, but refused to find that the Tribunal’s consideration of the Charter made its decision unreasonable. Indeed, the Court noted that the Supreme Court of

Canada in *Doré v. Barreau du Québec*, 2012 SCC 12 says that such tribunals must always consider "fundamental values". The Court also went on to note however that both *Taylor-Baptiste* and *Doré* involved situations where what was at issue was whether *Charter*-protected conduct contravened the legislation that the Tribunal was empowered to apply. That is not analogous to this case.

139. In interpreting Parts I and III.2 of the Act, we are not construing a statutory prohibition. Nor are we crafting a remedy for a statutory infringement. Rather, we are determining the extent of a positive obligation imposed by the statute. These are circumstances in which it appears to us that only an ambiguity warrants resort to Charter values as an interpretive aid.

140. Part III.2 of the Act as we construe it, does not oblige seeking employers to maintain pay equity by having regard to the ongoing compensation practices in proxy establishments. There is in our view no ambiguity about that, and resort to Charter values as an interpretive aid is neither required nor appropriate.

141. The appropriate focus of any issue as to the Act's consistency with the Charter is through the raising of a Constitutional Question. We address that issue below.

**(b) The Constitutional Question**

142. In opening statements we were told that the constitutional validity of the Act was not at issue in this proceeding. Only much later, after the Unions and the Homes had reached the ASF, and after the Tribunal had commenced hearing testimony, was a formal Notice of Constitutional Question served on Ontario.

143. The issue, as we understood it at the time that the Constitutional Question was raised, was that if the Act does not impose on employers who achieved pay equity using the proxy methodology of comparison the obligation to maintain pay equity, then that is contrary to the equality guarantees in section 15 of the Charter. The Unions placed heavy reliance on the findings and reasoning in the *O'Leary Decision* in support of this argument

144. As we have noted, however, the Homes and Ontario modified their original position. Ultimately, they conceded that the obligation to maintain pay equity applies, regardless of which methodology (or

methodologies) was used to achieve it. That is in our view the correct interpretation of the Act's obligations.

145. Ultimately, the Unions argued that the Act, properly interpreted, requires the maintenance exercise to have ongoing reference to the proxy female job classes, and second, that if the Act does not so require it infringes section 15(1) of the Charter.

### (c) The Framework of the Analysis

146. Section 15 of the Charter provides as follows:

> (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) (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.

147. We were provided with a number of authorities dealing with the appropriate interpretation and application of the above provisions. In our view, it is sufficient to discuss three of them. Those three are: *Withler v. Canada (A.G.)*, [2011] 1 S.C.R. 396 ("*Withler*"); *Alberta v. Cunningham*, [2011] 2 S.C.R. 670 ("*Cunningham*"); and the *O'Leary Decision*.

148. *Withler* and *Cunningham* are unanimous decisions of a full panel of the Supreme Court of Canada, in each of which a single set of reasons issued. They set out the following framework of issues to be addressed in the analysis of legislative provisions that are alleged to contravene section 15 of the *Charter*:

> a) Does the legislation create a distinction in the treatment of individuals based on a personal characteristic that is an enumerated or analogous ground?

b) Where section 15(2) is invoked by the government, is the distinction created by an ameliorative legislative program aimed at improving the situation of a group in need of ameliorative assistance in order to enhance substantive equality?

c) If so, does the distinction drawn serve, and is it necessary to, the ameliorative purpose?

d) If the answer to questions (b) or (c) is negative, the analysis turns to section 15(1) and the question becomes: does the distinction, considered in the context of the broader legislative scheme, constitute substantive discrimination by perpetuating historic disadvantage or stereotyping?

Does the Scope of the Act's Maintenance Obligations Create a Distinction in the Treatment of Individuals Based on an Enumerated or Analogous Ground under Section 15?

149. This is the threshold question. If it is not answered in the affirmative, the impugned provisions of the Act do not contravene section 15. There are, conceptually, two parts to the question. First, what is the distinction in treatment? Second, what is it based on?

150. In *Withler* and *Cunningham*, it was easy to identify the distinction in treatment that formed the basis of the challenge. *Withler* involved a statutory benefit, the amount of which was reduced in accordance with the age of the benefit plan member at the time that it accrued. In *Cunningham* the complainants were ineligible to participate in the program that a statute created. So too in the *O'Leary Decision*, the distinction was that women in predominantly female public sector workplaces lost the opportunity to benefit from the Act and achieve pay equity when Part III.2 (the proxy provisions) of the Act, was repealed.

151. In this case, the distinction that is alleged to offend section 15 of the Charter is not so obvious. The obligation to maintain pay equity applies regardless of the methodology by which pay equity was achieved. There is no distinction there. In a plan that used the job-to-job or PV methodology, the same source of job value and compensation information used to establish pay equity is used to

maintain it. That information comes from job classes in the employer's own workplace. Our interpretation of Part III.2 of the Act is that plans developed using the proxy methodology are also maintained based on job value and compensation information for the job classes in the employer's own workplace. All maintenance exercises (regardless of the methodology of comparison) are therefore internal to the workplace. Considered in that way, there is again no distinction. The Unions say that is not the correct way to look at the situation. They say that because maintenance is confined to the workplace, and because their workplaces are almost wholly female, their compensation based on the value of their work is not being measured on an ongoing basis against the compensation paid to male job classes based on the value of their work. Of course, the direct comparison made was never between female job classes in the seeking establishment and male job classes in the proxy establishment. It was between the key female job class and the proxy female job classes who had achieved pay equity. In any event, the "loss of male comparators" is the distinction that the Unions identify as contravening section 15.

152. Ontario submits that the basis of the above distinction is neither an enumerated or analogous ground in section 15. It does not arise because of the gender of the affected employees, or even because of the fact that they perform what we have referred to as women's work, but rather because of the nature of their workplaces and the identity of their employers. They want the same kind of maintenance mechanism that is available to PSWs employed in the Municipal Homes.

153. The issue that Ontario identifies was not one that troubled O'Leary, J. He concluded that the Act was intended to benefit the working women of the province but that the legislation repealing Part III.2 excluded some of them from its reach. On that basis alone, he found that section 15 was contravened, and turned his attention to whether the legislation was justified under section 1 of the Charter:

> It is submitted that women cannot attack the Act under s. 15(1) of the Charter simply because the Act has helped them proportionately less than it has helped other women. It is said that women can attack the Act only if they have been excluded from the benefit of the Act because the Act discriminates against them on one of the prohibited grounds set out in s. 15(1) or on an analogous ground. If the applicants could say they have been discriminated against because they are women,

> then that would be a basis for invoking s. 15(1) of the Charter. Here, the complaint is not that the applicants have been excluded from the benefit of the Act because they are women. Rather, the complaint is that being women most in need of relief from pay inequity they have been removed from the protection that the Act once gave them. It is said that complaint is barred by s. 15(2).
>
> A literal reading of s. 15(2) of the Charter appears to support that argument. However, constitutional law authors and the courts have pointed out that s. 15(2) was placed in the Charter to make clear that s. 15(1) does not preclude affirmative action programs in favour of disadvantaged individuals or groups even though such programs inevitably involve some element of reverse discrimination against those not belonging to the disadvantaged group: see Peter W. Hogg, Constitutional Law of Canada, 3rd ed. (Toronto: Carswell, 1992), para. 52.8, at p. 1180, and La Forest J. in McKinney v. University of Guelph, 1990 CanLII 60 (SCC), [1990] 3 S.C.R. 229 at p. 318, 76 D.L.R. (4th) 545. Section 15(2) does not protect affirmative action legislation from attacks by members of the disadvantaged group it was designed to benefit. In Lovelace v. Ontario, June 5, 1997 (unreported) [now reported 1997 CanLII 2004 (ON CA), 33 O.R. (3d) 735, 148 D.L.R. (4th) 96], the Ontario Court of Appeal stated at p. 36 [p. 756 O.R.]:
>
> > A s. 15(2) program that excludes from its reach disadvantaged individuals or groups that the program was designed to benefit likely infringes s. 15(1). The government would then have to justify the exclusion under s. 1.
>
> There is no doubt that the applicants are members of the disadvantaged group the Pay Equity Act was designed to benefit and that they have been excluded from its reach by the Schedule J amendment. Accordingly, their claim of discrimination must succeed unless the government can justify the exclusion under s. 1 of the Charter.

154. The *O'Leary Decision* was issued some 14 years before *Withler* and *Cunningham* were decided. Its reasoning is not consistent with the framework of analysis set out by the Supreme Court in those cases, and in *Cunningham* in particular.

155. *Cunningham* involved a challenge to a legislative scheme benefiting the Metis. Metis who were also status Indians were excluded from eligibility for the program. The Cunningham family were both Metis and registered status Indians. On the kind of analysis employed in the *O'Leary Decision*, the Cunninghams fell within the group (Metis) that the legislation intended to benefit, but were excluded from its reach, presumably grounds for a finding of a section 15 contravention. That is not the analysis the Court used in *Cunningham*, nor is it the outcome it reached. Indeed, the analysis employed in the *O'Leary Decision* is at odds with the Court's description of the purpose of section 15(2) of the Charter:

> [41] The purpose of s. 15(2) is to save ameliorative programs from the charge of "reverse discrimination". Ameliorative programs function by targeting specific disadvantaged groups for benefits, while excluding others. At the time the *Charter* was being drafted, affirmative action programs were being challenged in the United States as discriminatory — a phenomenon sometimes called reverse discrimination. The underlying rationale of s. 15(2) is that governments should be permitted to target subsets of disadvantaged people on the basis of personal characteristics, while excluding others. It recognizes that governments may have particular goals related to advancing or improving the situation of particular subsets of groups. Section 15(2) affirms that governments may not be able to help all members of a disadvantaged group at the same time, and should be permitted to set priorities. If governments are obliged to benefit all disadvantaged people (or all subsets of disadvantaged people) equally, they may be precluded from using targeted programs to achieve specific goals relating to specific groups. The cost of identical treatment for all would be loss of real opportunities to lessen disadvantage and prejudice.

156. The distinction in treatment that the Cunningham family suffered under the impugned legislation was attributable to the fact that they were registered status Indians. The Courts below and the parties proceeded on the basis that being a registered status Indian was an analogous ground under section 15. That was clearly not a conclusion that the Supreme Court would so easily have reached:

> 1. <u>Is the Distinction Based on an Enumerated or Analogous Ground of Discrimination?</u>

> [56] Following the analysis set out in *Kapp*, the first question is whether the distinction between Métis and status Indians in the *MSA* constitutes a distinction on an enumerated or analogous ground, thereby attracting s. 15 protection. Absent such a distinction, no claim lies under s. 15.
>
> [57] The ground advanced and applied in the courts below is registration as a status Indian, as distinguished from non-status Indians or Métis. This ground was accepted as analogous without much discussion below.
>
> [58] I refrain from making a determination as to whether registration as a status Indian constitutes an analogous ground of discrimination. The trial judge's conclusion that it did constitute an analogous ground was not challenged by the Crown in Right of Alberta before the Court of Appeal and the parties have not thoroughly canvassed the issue before this Court. Since the case has proceeded on the assumption that an analogous ground was made out, I will assume that it has been, and consider the remaining aspects of s. 15 as they apply in this case.

157. To the extent that the Act creates a distinction in the maintenance obligation that applies in respect of female job classes who achieved pay equity using the proxy methodology of comparison as compared to those who achieved under job-to-job or PV, the distinction arises because of the *locus* of the employment relationship – in a seeking employer's establishment. We do not think that having one's employment relationship with a "seeking employer" is an enumerated or analogous ground under section 15.

158. In our view, Ontario is correct. The Unions' *Charter* argument fails on the threshold question.

159. Notwithstanding that finding, we are prepared to address the other issues that arise in a section 15 analysis.

<u>Is the Act an Ameliorative Program Aimed at Improving the Situation of a Group in Need of Ameliorative Assistance to Achieve Substantive Equality?</u>

160. This was not a matter of dispute before us. There can be no doubt that the Act is an ameliorative program. The *O'Leary Decision* found it to be so. Further, section 4(1) of the Act expressly declares

its purpose in terms that are ameliorative and designed to remedy discrimination:

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

Does the Distinction in the Maintenance Obligation as it Applies to Proxy Pay Equity Plans Serve or is it Necessary to the Ameliorative Purpose?

161. Where an individual who challenges ameliorative legislation falls completely outside of the disadvantaged group that the legislation is intended to benefit, it is easy to answer the above question in the affirmative. So, for example, in the Supreme Court of Canada decision in *R. v. Kapp*, [2008] 2 S.C.R. 483, a program to foster aboriginal involvement in commercial fishing which gave three native bands a 24-hour period when only they were permitted to fish, could not be challenged by other mostly non-aboriginal commercial fishers who could not fish during that period.

162. The analysis is more complicated where it appears that those who are excluded form part of the disadvantaged group that the ameliorative program is intended to benefit. That was the apparent situation in *Cunningham*: the Metis were a disadvantaged group, yet some Metis were eligible for the program and some were not. Certainly that was the argument that the Cunninghams made. The Court, however, saw the issue in more nuanced terms:

> [61] The object of an ameliorative program must be determined as a matter of statutory interpretation, having regard to the words of the enactment, expressions of legislative intent, the legislative history, and the history and social situation of the affected groups. Defining the objective of the ameliorative program too broadly or too narrowly will skew the analysis.
>
> [62] Applying this approach, I conclude that the object of the *MSA* program is not the broad goal of benefiting all Alberta Métis, as the claimants contend, but the narrower goal of establishing a Métis land base to preserve and enhance Métis identity, culture and self-governance, as distinct from surrounding Indian cultures and from other cultures in the province.

163. What then is the ameliorative purpose of the Act? We return again to section 4 of the Act. Section 4(1) was reproduced above. Subsection 4(2) is also pertinent, as is subsection 7(1):

> 4(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 the value of the work performed.
>
> 7(1) Every employer shall establish and maintain compensation practices that provide for pay equity in every establishment of the employer.

164. The Act is focused on identifying and redressing systemic discrimination embedded in the compensation practices of individual employers in particular workplaces. Importing the compensation/value relationships that exist in the establishments of other employers is not consistent with that focus. Although Part III.2 of the Act requires seeking employers to do so in order to *establish* pay equity using the proxy methodology, not requiring them to do so thereafter, but instead obliging them to maintain the pay equity compliant compensation/value relationships they have established furthers the Act's ameliorative purpose.

165. We conclude that section 15(2) of the Charter permits the distinction in treatment about which the Unions complain in this case.

Does a proxy maintenance obligation that does not require ongoing consideration of the proxy employer's compensation practices, considered in the broader scheme of the Act contravene section 15(1) by perpetuating historic disadvantage or stereotyping?

166. It is useful at this point to consider the *Withler* reasons in more detail.

167. *Withler* involved a class action suit brought by two widows. Each was the surviving spouse of a member of the federal *Public Service Superannuation Act* or the *Canadian Forces Superannuation Act*. That legislation provided a variety of benefits to members. At issue in the case was one such benefit, the "supplementary death benefit", a lump sum payment payable to the surviving spouse of a member. The lump sum was calculated in accordance with a formula that need not be detailed here. The issue in the case was the fact that

the lump sum so calculated was payable in full to surviving spouses of members who died on or before a specified age (60 or 65 depending on the plan), but was subject to a reduction where the member was older than that at the time of death. The older the member, the greater the reduction. The appellants argued that the reduction provisions contravened section 15(1) of the Charter. The Court held that they did not.

168. Paragraph 3 of the Introduction to the decision outlines the parameters of the analysis to be undertaken, and Paragraph 25 identifies the issue:

> [3] Where, as here, the impugned provision is the denial of a benefit that is part of a statutory benefit scheme that applies to a large number of people, the discrimination assessment must focus on the object of the measure alleged to be discriminatory in the context of the broader legislative scheme, taking into account the universe of potential beneficiaries. The question is whether, having regard to all relevant factors, the impugned measure perpetuates disadvantage or stereotypes the claimant group contrary to s. 15(1) of the *Charter*.
>
> [25] ….More precisely, the issue is how an analysis under s. 15(1) is to proceed where the impugned law is part of a wide-reaching legislative scheme of government benefits.

169. The Court then goes on to identify the two questions that arise in the section 15(1) analysis. The first is the threshold issue we identified above -- does the impugned law discriminate against an individual based on a personal characteristic that is an enumerated or analogous ground? The second is, what is the substantive effect of the impugned law and does it, considered in context, perpetuate disadvantage or negative stereotypes? If either question is answered in the negative, then the impugned law is not inconsistent with section 15(1).

170. As we have already indicated above, we would answer the first question in this case in the negative. In *Withler*, however, the Court said:

> [62] The role of comparison at the first step is to establish a “distinction”. Inherent in the word “distinction” is the idea that the claimant is treated

> differently than others. Comparison is thus engaged, in that the claimant asserts that he or she is denied a benefit that others are granted or carries a burden that others do not, by reason of a personal characteristic that falls within the enumerated or analogous grounds of s. 15(1).

171. Because the legislation at issue in *Withler* reduced the supplementary death benefit payable based on the age of the member at death, the Court had no difficulty concluding that the reduction constituted a "distinction" and that it was one based on a personal characteristic within the enumerated or analogous grounds of section 15(1).

172. With respect to the second element of the section 15(1) analysis, the *Withler* Court stressed the importance of considering the impugned legislation in the context of the broader legislative scheme of which it forms a part:

> [67] In cases involving a pension benefits program such as this case, the contextual inquiry at the second step of the s. 15(1) analysis will typically focus on the purpose of the provision that is alleged to discriminate, viewed in the broader context of the scheme as a whole. Whom did the legislature intend to benefit and why? In determining whether the distinction perpetuates prejudice or stereotypes a particular group, the court will take into account the fact that such programs are designed to benefit a number of different groups and necessarily draw lines on factors like age. It will ask whether the lines drawn are generally appropriate, having regard to the circumstances of the persons impacted and the objects of the scheme. Perfect correspondence between a benefit program and the actual needs and circumstances of the claimant group is not required. Allocation of resources and particular policy goals that the legislature may be seeking to achieve may also be considered.
>
> ...
>
> [71] In approaching this question, it is useful to identify at the outset the relevant contextual factors. As discussed above, a central consideration is the purpose of the impugned provision in the context of the broader pension scheme. It is in the nature of a pension benefit scheme that it is designed to benefit a number of groups in different circumstances and with different interests.

> The question is whether the lines drawn are generally appropriate, having regard to the circumstances of the groups impacted and the objects of the scheme. Perfect correspondence is not required. Allocation of resources and legislative policy goals may be matters to consider. The question is whether, having regard to these and any other relevant factors, the distinction the law makes between the claimant group and others discriminates by perpetuating disadvantage or prejudice to the claimant group, or by stereotyping the group.

173. The Unions' Charter argument essentially posits that the Act is underinclusive and denies the benefit of meaningful maintenance to those for whom pay equity was achieved under the proxy methodology of comparison. The validity of this assertion must be viewed in the context of the Act as a whole, which neither benefits all those who perform women's work, nor provides an equal outcome to those whom it does benefit.

174. The Act can be considered as providing for two statutory benefits: the establishment of pay equity; and the maintenance of pay equity. The benefits accrue to those individuals (regardless of whether they are male or female) who perform womens' work, that is, who occupy what the Act defines to be "female job classes". Not all individuals in female job classes in Ontario are eligible for these benefits, however. The ineligibility of some arises largely as a consequence of the characteristics of their employer, and to a lesser degree the characteristics of their employment contract. Women in these categories cannot avail themselves of any benefit under the Act:

- those who work for private sector employers who employ fewer than 10 employees;
- those who work in predominantly female workplaces (where job-to-job and PV methodologies cannot be applied) if their employer is in the private sector;
- students employed for the school vacation period; and
- those in positions of casual employment as defined in the Act.

175. There has been no Charter challenge to the Act on the basis of the above exclusions, which have existed since either the effective date of the Act (January 1, 1988) or since the effective date of the proxy provisions (January 1, 1994).

176. PSWS (or RPNs or RNs) who work in retirement homes in Ontario cannot avail themselves of the proxy methodology because their employers are in the private sector, and cannot achieve pay equity under job-to-job or PV in most instances because of an insufficient number of male job classes in the establishment: see *Helen Henderson Care Centre v SEIU, L. 183* 2001 CanLII 28094 at paras. 38-41.

177. In the workplaces or establishments where female job classes are entitled to the benefit of a pay equity achievement and maintenance mechanism under the Act, there are circumstances where they will nevertheless still be paid less than the prevailing compensation-value relationship that attaches to men's work in the same establishment. These situations were enumerated in the Tribunal's decision in *Lakeridge Health Corporation* 2010 CanLII 46187 (application for judicial review dismissed 2012 ONSC 2051 (CanLII), which dealt with the use of the job-to-job comparison methodology:

> 22. The purpose of the Act is to redress gender discrimination in compensation. Gender discrimination in compensation is identified by comparing the value of work performed by male and female job classes. Where work performed by male and female job classes is of equal or comparable value (that is where a job-to-job comparison is possible), and the male job class receives greater compensation, an adjustment may be required. There are circumstances in the Act, however, where no adjustment is required and/or where discrepancies in compensation between comparably-valued male and female job classes are not only permissible but contemplated. If we are concerned with a female job class in bargaining unit A, those circumstances will include the following:
>
> • where there is a comparably-valued male job class in bargaining unit B and a comparably-valued male job class in bargaining unit A that is paid less. Then the female job class compensation is adjusted with reference to the latter's job rate; or,
>
> • where there are two (or more) comparably-valued male job classes that are available to be a comparator (i.e. in the same bargaining unit) but paid different rates. Then the female job class compensation is adjusted with reference to the job rate of the lower (or lowest) paid of the male job classes; or,

- where one of the exceptions enumerated in section 8 of the Act applies.

178. As we have noted elsewhere in this decision, regardless of the methodology by which pay equity is achieved, its achievement and maintenance do not necessarily result in wage parity. The fact that a wage discrepancy emerges or widens as among the male and female job classes that were the subject of evaluation and comparison in preparing a pay equity plan does not mean that pay equity as required by the Act has not been maintained. Where the employer of the male and female job classes is the same, any difference may be explained by other factors, such as a change in the relative value of the work performed, or differences in bargaining strength. In the case of plans that used the proxy methodology of comparison, where achievement involved looking at compensation practices in two employers, any subsequent difference in wage rates or differential increase in wage rates may also be attributable to those factors. Additionally, it could arise as a result of other characteristics of the employer or the employment contract: the size of the employer; its financial health; the source of funding wages; and collective agreement trade-offs as between wages and other benefits, monetary or otherwise.

179. Like the benefits legislation the Court was examining in *Withler*, the Unions' section 15 challenge to the Act focuses on one portion of a legislative scheme that is designed to advantage a much broader group than the female job classes in these Homes. The legislative history we set out earlier in this decision need not be repeated here. What does bear repeating is that it recognizes that not all women will benefit from the Act, not all will benefit equally, and the wage gap between men and women will not be completely eliminated. The female job classes in the Homes are able to take advantage of the proxy methodology that is not available to many working in predominantly female sectors of the economy.

180. The maintenance scheme for proxy plans does not perpetuate historic stereotyping or disadvantage. It does not contravene section 15(1) of the Charter.

## VIII. NEXT STEPS

181. We have already briefly described the circumstances in which these Proxy Plans were negotiated, and set out the pertinent portions of the ASF, and a summary of the testimony. We do not need to repeat any of that again.

182. We want to be very clear about several things. We are not criticizing these workplace parties for negotiating a solution to the pay equity issues that confronted them in the spring of 1995. Their original Proxy Plans are deemed approved, and have not been attacked in this proceeding. Regardless of the fact that they did not follow the steps outlined in Part III.2 of the Act, they may well have reached the same result in terms of adjustments that they would have reached had they done so. The fact remains that, however practical their solution in 1995 was, because they did not follow the proxy methodology as set out in Part III.2 of the Act, they are now faced with significant challenges in determining the extent of any additional adjustments that pay equity maintenance may require.

183. We do not think it is possible to conclude on an *a priori* basis that any difference in pay, or even any differential increase in pay, as between PSWs (or RNs) employed in the Homes compared to PSWs (or RNs) employed in the Municipal Homes means that pay equity has not been maintained in the Homes. The value of the job classes must be a component of any maintenance exercise.

184. Although the $1.50 Plan may have achieved pay equity, it did so without applying a GNCS. So long as the skill, effort, responsibility and working conditions of the female job classes in the Homes remained unchanged, and they received the same percentage compensation increases, the absence of a GNCS had no impact on pay equity maintenance. We have already referred to the uncontradicted evidence before us that there have been significant changes in the clientele and the duties performed in the Homes that may well impact on the value of the job classes. Those changes make the $1.50 Plan inappropriate because the pay equity consequence of them can only be ascertained by evaluating the job information using a GNCS, which the Proxy Plans lack. In the unionized environment the selection of a GNCS and its application are matters that the Act contemplates will be negotiated between the employer and the union.

185. Pursuant to our authority under section 25(2)(g) of the Act, the parties are directed to negotiate and endeavor to agree on an amendment to the $1.50 Plan to stipulate a GNCS, and to apply that GNCS to determine whether any maintenance adjustments are required.

186. This matter is adjourned *sine die* for a period of nine months to permit the parties to negotiate pursuant to the above direction.

Dated at Toronto, Ontario this 21st day of January, 2016.

"Mary Anne McKellar"_____
Mary Anne McKellar, Chair

"Catherine Bickley"_____
Catherine Bickley, Member

"Carla Zabek"_____
Carla Zabek, Member