

RESEARCH PAPER #47

RAPPORT DE RECHERCHE #47

Pay Inequity:

Canadian Labour Congress Analysis of the “Public Sector Equitable Compensation Act”

Teresa Healy
and
Sue Genge

February 27, 2009



Canadian Labour Congress

Congrès du travail du Canada

Pay Inequity:

Canadian Labour Congress Analysis of the
Public Sector Equitable Compensation Act

I. Key messages

- This new legislation introduces the notion that women’s work in the public sector should be valued according to prevailing market conditions in the private sector.
- It asserts a false equivalence between management and the union by making the union bear responsibility for the results of bargaining “equitable compensation,” without restricting management rights to hire, control information, determine job classifications, or issue pay cheques.
- If an employer fires a worker who files a complaint they are subject to a fine of \$10,000, while a union that endeavours to represent that worker in the making of the complaint will pay a fine of \$50,000.
- It is alarming that workers will lose the right to challenge gender-based wage gaps under Human Rights law. It is unlikely that this provision will survive a Charter challenge.
- This legislation disregards the recommendations of the Federal Pay Equity Task Force Report that called for proactive, inclusive, and timely legislation, which would ensure union involvement, and be supported by a new pay equity agency.
- We fear we are witnessing an incremental plan by this government to reduce to zero the “union advantage” for all workers—borne first, on the backs of women workers in the public sector.

II. Snapshot

The *Public Sector Equitable Compensation Act* was introduced by the Conservative minority government on February 6, 2009 as part of Bill C-10, the *Budget Implementation Bill*.

Market-based value

The legislation redefines the terms under which “value” of work is assessed. The Act maintains the traditional criteria which looks at “the composite of the skill, effort, and responsibility required in the performance of the work and the conditions under which the work is performed.” This new legislation, however, introduces the notion that women’s work in the public sector should be valued by prevailing market conditions in the non-union private sector.

Real pay equity legislation aims at eliminating systemic discrimination in wages resulting from unchecked market forces. By introducing market forces as a comparator, no redress will ever be possible.

We are in favour of public policy that leads to upward harmonization of wages and working conditions. This legislation, however, appears designed to push federal public sector wages downward to meet the lower standards of the private sector.

Joint liability

The new legislation makes management and the union jointly responsible to identify and rectify wage inequalities in the federal public sector, or face fines. The problem with this approach is that it asserts a false equivalence between management and the union

by making the union bear responsibility for the results of bargaining “equitable compensation” without restricting management rights to hire, control information, determine job classifications, or issue pay cheques.

Unions do not have the right to access pay equity relevant information that resides with management. What is a “reasonable time period” for the resolution of issues? How exactly would unions be expected to negotiate “equitable compensation” at the bargaining table during a period of federally imposed wage controls?

The new regime promises to be unworkable, contentious, lengthy and costly.

Barriers to complaints—No human rights appeals

This legislation requires unions to “refrain from engaging in any conduct that may encourage or assist any employee in filing or proceeding with a complaint under the Act” or face a fine of \$50,000. Employers are similarly bound, but the provision is clearly directed at the rights that workers have to be represented by their union. We see this as no less than a direct attack on the right to association.

If an employer fires a worker who files a complaint they are subject to a fine of \$10,000, while a union that endeavours to represent that worker in the making of the complaint will pay \$50,000.

Individual, group, and policy grievances are prohibited.

It is alarming that workers will lose the right to challenge gender-based wage gaps under Human Rights law. It is unlikely that this provision will survive a Charter challenge.

Dismissing the Pay Equity Task Force Report

This legislation disregards the recommendations of the Federal Pay Equity Task Force Report that called for proactive, inclusive, and timely legislation, which would ensure union involvement, and be supported by a new pay equity agency.

It is internationally accepted that pay equity is a fundamental human right that is non-negotiable.

We urge the Committee to recommend that the *Public Sector Equitable Compensation Act* be removed from the *Budget Implementation legislation*. We call on opposition members, including those who once committed to table a Pay Equity Bill in the House no later than Spring 2006, to oppose this undemocratic manoeuvre by the government. Pay Equity is a human rights issue and relevant legislation should be subject to extensive examination by the Departments of Justice and the Status of Women Committee before any vote is taken.

We fear we are witnessing an incremental plan by this government to reduce to zero, the “union advantage” for all workers—borne first, on the backs of women workers in the federal public sector.

III. Research Paper

When the Conservative government of Stephen Harper indicated in its highly controversial Economic and Fiscal Statement of November 2008 that it intended to “modernize” the pay equity law, we asked the following questions:

To what extent would this new legislation, in effect, shift responsibility and accountability from employers to unions to make the case for adequate compensation? What are the implications of abandoning an appeals process? Is this the kind of “pro-active” legislation women workers need, or is this ultimately a coercive measure? What does this mean in the context of a federal government which intends to strip away the right to strike of federal employees. Will unions be put in the position of bargaining away a fundamental right?¹

The Conservatives have now introduced legislation on the matter and the Canadian Labour Congress is extremely concerned at the answers to our questions as elaborated in the legislation.

The *Public Sector Equitable Compensation Act*, introduced by the Conservative minority government on February 6, 2009 (as part of Bill C-10, the *Budget Implementation Bill*), begins by affirming three principles:

The first is that “women in the public sector of Canada should receive equal pay for work of equal value.” The second is that this goal should be achieved by “proactive means,” and the third asserts that

“employers in the public sector of Canada operate in a market-driven economy.” In our view, a close reading of the legislation suggests that it is this third principle that overrides and, in fact, determines the meaning of the other two. We will outline our concerns as they relate to the following aspects of the legislation.

Valuing work through market-forces

The legislation redefines the terms under which “value” of work is assessed. The Act maintains the traditional criteria which looks at the “the composite of the skill, effort and responsibility required in the performance of the work and the conditions under which the work is performed.” These are criteria that the labour movement has accepted in the past. This new legislation, however, adds a new criterion to be applied in assessing the value of work, that is:

the employer’s recruitment and retention needs in respect of employees in that job group of job class, taking into account the qualifications required to perform the work, and the market forces operating in respect of employees with those qualifications (emphasis added) (2b).

This feature of the new legislation we find extremely problematic. It introduces the notion that the value of women’s work in the public sector should be determined by prevailing conditions in the private sector, rather than in comparison with groups of male workers in the federal public sector alone. The gender discrimination reproduced by market forces are the very reason that we need government action to over-ride market dynamics.

The legislation only allows for assessments “within a portion of the federal public administration” the job group or class is to be found. While employers are seen to be operating in a market-based society, workers are seen to be operating within a bargaining unit. Clearly, we are in favour of public policy that leads to upward harmonization of wages and working conditions. This legislation, however, appears designed to push federal public sector wages downward to meet the lower standards of the non-unionized private sector. We are left to conclude that the undervaluing of women’s work will be justified and reinforced by the low wages paid to women in the private sector, and entrenched within the public sector.

Political, not administrative definitions

In this legislation, there is no definition of the meaning of “equitable compensation” and almost no elaboration of how an “equitable compensation assessment” should be conducted. Further reducing the possibility of redressing inequalities, the *Public Sector Equitable Compensation Act* applies only to “job groups” or “job classes” that are “female predominant” composed of at least 70% female employees. This is a much higher bar than has been set in the past and will mean that many workers will lose the right to challenge gender-based wage gaps. The new legislation does not cover federally regulated workplaces, such as Canada Post. Currently they are under the *Canadian Human Rights Act* and will continue to be under the old regime.

If there are very few clear definitions, even more vague is the process though which these will be determined. These are left to the Cabinet to determine at a later date. The Cabinet, acting under

the direction of the Prime Minister's Office, is charged with making regulations respecting:

... the conducting of an equitable compensation assessment... what constitutes the skill, effort and responsibility required in the performance of work and the conditions under which the work is performed... what constitutes qualifications, and how an employer's recruitment and retention needs are to be determined; and ... restricting the job groups or job classes to which an equitable compensation assessment is to have regard.... (5).

By choosing not to use the term "pay equity," the government appears to sidestep all jurisprudence on the question and introduces a new term having no current legal meaning. If anything, this manoeuvre will lead to "litigious, adversarial and complaints-based" processes, which is what the government says it wishes to avoid.

Joint Liability

The legislation mandates a change in the responsibilities for ensuring pay equity. Until now, it was taken as a given that it is the employer who hires women into "women's jobs" and men into "men's jobs," sets job classifications as an aspect of management rights, and had the legal responsibility not to undervalue the skills required by women to do their work. The new legislation, however, makes it the joint responsibility of management and the union to identify and rectify wage inequalities in the federal public sector, or face fines.

The problem with this approach is that it falsely asserts an equivalence between management and the union by making the union bear responsibility for the results, without restricting management rights to hire, control information, determine job classifications, or issue pay cheques.

The false equivalence between labour and management begins by bringing the matter into the collective bargaining process. Under the new legislation, both the employer and the bargaining agent are responsible for conducting preparatory work, as well as raising and responding to questions about “equitable compensation” during collective bargaining. If an employer or a union raises wage inequality in collective bargaining, it must present a report identifying the female dominant group, describing how the assessment was carried out, and setting out how the matter should be resolved. Provisions are made for both arbitration and conciliation. If it is determined that “an equitable compensation matter exists,” the union and management must jointly submit a report to workers on how the assessment was conducted and how the matter is to be resolved before workers are asked to ratify of the collective agreement. If no such joint report is presented to workers, employers and unions will face a fine of \$50,000.

This means that unions would have to identify the problem, conduct an assessment, and propose solutions, or pay a \$50,000 fine. Management would have to do the same. However, unions do not have the right to access pay equity relevant information. Currently pay equity studies use a variety of methods to determine value of a job. For example, in current pay equity studies, sometimes questionnaires are used to gather information about what a worker does in the course of a day, since job postings are not accurate measures. Under the new regime, it would appear

that both union and management would carry out assessments, but the legislation gives no indication that unions will be given information and access that is in the hands of the employer. Nor is there any indication that workers will be permitted to participate in such assessments on work time. How would a union prepare for collective bargaining under these conditions? Further, if the matter is not to be resolved during the term of the next collective agreement, what is a “reasonable time period” for such a resolution. Since the federal government has just imposed wage controls on federal public servant for the next four years, how exactly would unions be expected to negotiate “equitable compensation” at the bargaining table?

The new regime promises to be unworkable, contentious, lengthy, and costly. Again, the conclusion we reach, is that the government is not interested in ending the wage gap between men and women, but has other goals in mind.

Barriers to complaints—No human rights appeals

The legislation includes the bizarre notion that a union is not supposed to represent the interests of organized workers in seeking to end the wage gap. Under labour law, unions have the duty of fair representation, which means they are legally bound to represent workers who face, among other other things, wage discrimination at the hands of the employer. This legislation requires unions to “refrain from engaging in any conduct that may encourage or assist any employee in filing or proceeding with a complaint under the Act” or face a fine of \$50,000. Employers are similarly bound, but the provision is clearly directed at the rights that workers have to be represented by their union. We see this as no less than a direct attack on the right to association.

If a worker “has reasonable grounds to believe ...he or she will not receive equitable compensation during the term of that collective agreement or within a reasonable period after the expiry of that term,” he or she has only 60 days after the collective agreement was entered into to file a complaint with the Public Service Relations Board. The barriers to an individual worker who wishes to file a complaint are enormous.

If the Board considers the matter to be a serious complaint, it may “direct the employer and the bargaining agent” to file a report on how the assessment was conducted and their plan to resolve the matter *in the next* collective bargaining. As the Public Service Alliance of Canada argues:

One could not... negotiate a collective agreement that would provide that the employer must not discriminate against workers of colour as of next year—the employer must simply not discriminate, as of now! This is the very essence of human rights protection. How long will this Bill allow employers to delay the implementation of pay equity? And how could unions be held liable for those delays, when they are not the ones responsible for refusing equal pay for work of equal value? ²

If the Board judges that “the employer and the bargaining agent have committed an error that is manifestly unreasonable,” it may require the employer and the bargaining agent to correct the error, file a report, pay a lump sum in compensation, or *if necessary*, alter the collective agreement “so that the employees of the job class receive equitable compensation for the remainder of the term of the collective agreement.”

Further making the union culpable for management decisions, the Board... may require the employer, the bargaining agent or the employer and the bargaining agent as the case may be, to pay the complainant all or any part of the costs and expenses incurred by the complainant as a result of making the complaint (34).

If a worker exercises their rights under the Act and then complains that they were disciplined for doing so by either the union or the employer, a dubious standard of evidence applies:

If the complaint is made in writing, the written complaint is itself evidence that the contravention actually occurred and, if any party to the complaint proceedings alleges that the contravention did not occur, the burden of proving that it did not is on that party (39 (4)).

If an employer or the union disciplines, suspends, fires or imposes any penalty on a worker for filing a complaint, a fine of \$10,000 applies. Again, under the guise of even-handedness, the government delivers a blow against the rights of workers to be represented by their union. If an employer fires a worker who files a complaint, they may be subject to a fine of \$10,000, while a union that endeavours to represent that worker in the making of the complaint will pay \$50,000.

One of the most important and most damaging aspects of this Bill, is the decision of the government to amend the *Canadian Human Rights Act* to remove from the jurisdiction of the Human Rights Commission, wage inequality between men and women in the federal public service:

The Commission does not have jurisdiction to deal with complaints made against an employer within the meaning of the *Public Sector Equitable Compensation Act*.

Furthermore, the *Public Service Labour Relations Act* will be amended to ensure that no employee may file a grievance “in respect of any matter related to equal pay for work of equal value, or any other matter referred to in the *Public Sector Equitable Compensation Act*.” No union may file “a group grievance in respect of any matter related to equal pay for work of equal value...” and “neither the employer nor a bargaining agent may present a policy grievance in respect of any matter related to equal pay for work of equal value...” (401-403).

Dismissing the Pay Equity Task Force Report

After many years during which unions, women’s groups and pay equity experts called on governments to deal with the reality of the wage gap, the Liberal government of Jean Chretien created a task force to study the question as it pertained to the federal government. The Federal Pay Equity Task Force conducted hearings across the country and received over 60 submissions from women’s groups, unions, academics and pay equity practitioners. It commissioned over 20 independent pay equity research papers on all aspects of pay equity. The Task Force then concluded its study with a symposium of practitioners and researchers and issued recommendations in 2004 when the Liberal government of Paul Martin was in power. The Task Force’s recommendations were very well received by pay equity advocates. The Liberal government Ministers of Justice and Labour had

formally committed—before the Standing Committee on the Status of Women, in November 2005—to table a Pay Equity Bill in the House no later than Spring 2006. Given that Stephen Harper was on record as arguing that “the federal government should scrap its ridiculous pay equity law,” we knew that women’s human rights would be under constant attack under any Conservative government he would lead.³ Unhappily, our fears were confirmed, and it is worth noting that the Task Force Report can no longer be found on the Department of Justice’s website.

It is internationally accepted that pay equity is a fundamental human right that is non-negotiable. We maintain, as did the Task Force, that “proactive” pay equity legislation properly place responsibility on employers to examine their compensation systems to ensure they are paying equal pay for work of equal value to all workers, whether or not they work full time. Similarly, the Task Force was very clear in its assertion that workers of colour, Aboriginal workers, and workers with disabilities should be covered by a pay equity law. We also agreed with the Task Force’s recommendations that there should be timeliness attached to the resolution of pay equity disputes. Further, unions should be involved in the development, implementation, and maintenance of pay equity plans. Finally, unions and employers both require the assistance of a new properly funded pay equity agency tasked with ending this form of wage discrimination at the workplace.

The *Public Sector Equitable Compensation Act* buried deep within the 2009 Budget *Implementation Bill* in no way approaches the recommendations of the Pay Equity Task Force. It would be incorrect to say that the Task Force’s recommendations have been ignored. Rather, they have been directly opposed and contradicted by this government, which has actively refused representative

consultations, union's experience, or social science to guide its legislative agenda on women's equality.

Conclusion

The Conservative Budget 2009 made only scant reference to its decision to proceed with the highly contentious "modernization" of the pay equity law that was first introduced in the November 2008 economic statement, and which provoked a national political crisis. In the Budget, the government inserted a simple line under the subheading of "structural changes" in the Fiscal Outlook chapter to indicate it intended to oversee the establishment of a new regime for the federal public sector that:

will ensure that the employer and bargaining agents are jointly responsible and accountable for negotiating salaries that are fair and equitable to all employees.⁴

Buried deep within the Budget *Implementation Bill*, however, is the full text of this substantial, proposed legislation. It is our impression that the government thinks this Bill would not survive the scrutiny of Parliament. Instead, the Conservatives are so ideologically opposed to women's equality that... The Conservative government is relentless in its campaign to define away women's inequality.

Moreover, this legislation is designed in such a way as to have broader public policy implications. It may turn out to have much less to do with ending gender inequalities and more to do with reducing the "union advantage" between public and private sector workplaces by introducing the term "equitable compensation" along with the assessment of wage rates based on market forces.

We wonder to what extent this legislation is structured to be less concerned with gender inequalities and more concerned with introducing mechanisms to deal with so called “wage disparities” between public and private workplaces.

The meaning of this emphasis on market forces should be put in the context of the demands of the Canadian Federation of Independent Business (CFIB) as articulated in their annual pre-Budget Submissions in recent years. The CFIB opposes what it calls the “public sector advantage” which, in their view, means that government and public sector employees are paid between 8% to 17% more than their counterparts in the private sector. The advantage for federal government employees is 17% over the private sector, they argue.⁵ When taking into account shorter work weeks and benefits, the advantage is greater than 30%. They argue that compensation should be fair and not exceed what is being offered in the private sector because: i) “wage disparities disrupt local labour markets and the overall competitiveness of private enterprise, and ii) increases in government spending are costs paid by taxpayers. They call for wage freezes, staff cutbacks and government spending increases to be kept in line with inflation plus population growth, no-strike legislation, reversing arbitration laws, pension reform, until public and private sector wage levels are comparable. More specifically, they argue that:

each government or public enterprise should measure and publish broad-based wage statistics of their workforces and those in the comparable private sector. These measures should attempt to deal with equivalence as much as possible.⁶

Once again, the Canadian labour movement is alerted to our long-standing understanding that “an injury to one, is an injury to all.” It is quite possible that the *Public Sector Equitable Compensation Act* is only the tip of the iceberg. Again, the attack against all workers begins with the attack against women. We fear we are witnessing an incremental plan by this government to reduce to zero, the “union advantage” for all workers, borne first, on the backs of women workers in the public sector.

TH:jc:ah:cope 225 • February 20, 2009
V:\02-03-20302-03...odt

- 1 The 2008 Economic and Fiscal Statement and the Conservative plan to “Modernize” Pay Equity: An analysis by the Canadian Labour Congress
<http://www.canadianlabour.ca/en/the-2008-economic-and-fiscal-statement-and-conservative-plan-modernize-pay-equity>.
- 2 Public Service Alliance of Canada, “The end of pay equity for women in the federal public service: PSAC’s comments on the *Public Sector Equitable Compensation Act*, February 11, 2009.
- 3 Stephen Harper, National Citizen’s Coalition *Overview* 1998.
- 4 Government of Canada, Department of Finance *Canada’s Economic Action Plan: Budget 2009* January 27, 2009, p.211.
- 5 Canadian Federation of Independent Business, *Wage Watch* (December 2008)pp.25
<http://www.cfib.ca/research/reports/rr3077.pdf> (retrieved February 11, 2009).
- 6 CFIB, *Wage Watch*, p. 16.