



Canadian Union of Public Employees

Submission to the
House of Commons
Special Committee on Pay Equity

April 18, 2016

Introduction and summary

The Canadian Union of Public Employees (CUPE) represents 635,000 workers in a wide range of occupations across federal and provincial jurisdictions. Eighteen thousands of those members are in federally regulated industries. Sixty eight per cent of our members are women; seventy eight per cent of our 7,000 flight attendants are women.

Our comments are based on extensive experience with pay equity regimes and a strong history of activism on equality rights.¹ Our principal experience with the federal equal pay provisions has been the CUPE Airline Division complaint filed on behalf of flight attendants. We have also challenged gender pay discrimination in all of the provincial jurisdictions.

Based on our 22-year struggle for pay justice under the federal complaint-based system and four decades of experience with provincial regulatory regimes, we call for a proactive federal pay equity law modeled on the recommendations of the 2004 Pay Equity Task Force and the Quebec legislation to which those best align. CUPE joins other trade unions and pay equity advocates in calling for the repeal of the *Public Sector Equal Compensation Act*.

The most effective pay equity laws are proactive, compulsory, comprehensive, and feature strong oversight, enforcement and ongoing maintenance. A proactive pay equity law, properly written, is the only way to remedy wage discrimination: a systemic solution to a systemic problem.

We know what's needed; the evidence is strong. The federal Pay Equity Task Force carried out thorough research and consultations, as reflected in its 2004 report, *Pay Equity: A Fundamental Human Right*. The International Labour Organization has studied regulatory options since then and pointed to Quebec's law as the leading model.² The work has been done, and federal pay equity legislation should be drafted without further delay.

Gender pay gap

Women continue to be paid less than men for work of equal value – and the pay gap is growing for full-time work and some occupations. Women working full time and full year in Canada earn 72% of what men earn on average. Based on average annual earnings, women earn 66.7% of what men earn in Canada.³

The gender pay gap persists despite women's increased labour force participation and education. There are 8.5 million more women in the Canadian workforce than there were 20 years ago,⁴ and women's participation rate rose from 50.3% in 1986 to 58.3% in 2009.⁵ Women now outnumber men among university graduates, yet women with university degrees earn 17% less than men with university degrees (for full-time work).⁶

Progress on narrowing the wage gap has slowed and even reversed in a number of occupations.⁷ The wage gap for full-time work is intensifying in Canada. In 2009 women earned on average 74.4% of what men earned; in 2011, it was 72%.⁸

As highlighted by the 2004 Task Force report, racialized women, immigrant women, Aboriginal women and women with disabilities suffer from substantially higher pay gaps. Working full-time, Aboriginal women earn 10% less than Aboriginal men and 26% less than non-Aboriginal men. Racialized women earn 21% less than racialized men and 32% less than non-racialized men. Immigrant women earn 25% less than immigrant men and 28% less than non-immigrant men. Women with disabilities are not only more likely to live in poverty than those without disabilities but are more likely than men with disabilities to live in poverty.

The gender pay gap is intensified by the fact that women, in particular marginalized women, make up the majority of workers in precarious employment, and that form of employment is on the rise. Recent research documents the growth of precarity in the public sector and the impacts on women, using an intersectional analysis.⁹

Canada's international ranking on the gender pay gap is extremely poor. In 2014, Canada had the seventh largest wage gap of all 34 OECD countries.¹⁰

International obligations

The right of women to equal pay for work of equal value and equal treatment in pay and employment opportunities are internationally recognized human rights and labour standards.¹¹ The most effective way for Canada to meet its international obligations and domestic commitments on these rights is to enact stand-alone, proactive pay equity legislation.

Monitoring bodies internationally that examine Canada's compliance have cited Canada for the continuing gap and failure to redress that gap in pay equity. In a 2015 human rights report, the United Nations criticized Canada for persistent cases of gender inequality. That included a large wage gap and its disproportionate impact on women earning low wages, women from visible minority groups, and Aboriginal women.

Failure to implement proactive pay equity legislation means that the government of Canada has abrogated its responsibility to live up to its own commitments in international and domestic law.

Problems with the current system

The current system, in which pay equity is governed by the *Canadian Human Rights Act*, does not work. Cases have dragged through tribunals and the courts over several decades, and gender wage discrimination remains pervasive. Unionized workers have struggled to achieve justice; non-unionized workers have no accessible recourse.

The complaints-based process is a very slow, lengthy, and expensive judicial process that can go all the way to the Supreme Court. The pay equity provision in the *Act* comes into play only when an individual files a complaint with the Canadian Human Rights Commission. The commission investigates the complaint and makes a decision. Either of the parties can challenge the decision with objections and judicial reviews, and in fact equal value complaints have been stonewalled every step of the way.

Our members and other women have died waiting for pay equity. In *Public Service Alliance of Canada v. Treasury Board*, it took so long for the matter to be resolved that a number of beneficiaries had died by the time the final decision was rendered. Our own case in the airline sector took 22 years, and flight attendants were in the end denied a tribunal hearing.

The law has been unable to bring wage justice to thousands of women, despite enormous resources spent by government, employers and unions. Employers and unions have litigation costs, and the public purse funds the court, commission, tribunal and related public institutions. This adversarial system is far costlier and slower than getting employers and unions to sit down and work out a pay equity plan under a proactive pay equity law. The money spent on cases in the current system could have been invested in a pay equity system that corrected injustices and delivered wage adjustments at much lower cost. Pay equity wage adjustments not only improve workers' lives but also the communities in which they spend their wages.

Non-unionized workers are effectively excluded from pay equity in the current system.¹² Without the backing of a union, workers face huge hurdles to pursuing a complaint. The process is long, costly and complicated, and non-unionized workers have less protection from negative repercussions of making a complaint. Non-unionized workers in banking, contracted support services and other federally regulated workplaces face some of the worst wage discrimination and have the least recourse.

The Supreme Court has acknowledged the failings of the current system and signaled support for the Pay Equity Task Force recommendations. In its decision in *Public Service Alliance of Canada v. Canada Post Corporation*, 2011,¹³ the Supreme Court of Canada relied on the dissenting reasons of Justice Evans, which it said "comprehensively address the issues". In his dissent, Justice Evans stated:

... it now seems to have been a mistake for Parliament to have entrusted pay equity to the complaint-driven, adversarial, human rights process of the *Canadian Human Rights Act*. ... There is now much to learn from the experience of provincial pay equity regimes, which seem not to have been plagued with the same problems of protracted litigation as the federal scheme. In the interests of all, a new design is urgently needed to implement the principle of pay equity in the federal sphere. For criticisms of the present arrangements, and recommendations for reform, see the Final Report of the Pay Equity Task Force, *Pay Equity: A New Approach to a Fundamental Right*.¹⁴

CUPE experience with the current system

Our main experience with the federal pay equity provisions has been the CUPE Airline Division complaint filed on behalf of our 7,000 flight attendants. The flight attendants' case is a clear example of the glaring inadequacies of the federal equal pay provisions in assisting women to achieve pay equity. After 22 years of delays and a flawed investigation process, flight attendants were denied pay equity.

CUPE filed two complaints of sex-based wage discrimination – one against Air Canada in 1991, the other Canadian Airlines International in 1992. The case was tied up in tribunal hearings and court for 15 years over the definition of “establishment”. After a 2006 Supreme Court ruling allowed our pay equity complaint to proceed, the union then faced a defective investigation process spanning another seven years. The Canadian Human Rights Commission dismissed flight attendants' complaint in 2011 based on a peripheral investigation, and the federal court denied the union a judicial review of that decision.

CUPE raised concerns during the course of the investigation, and our requests were denied. First, the Commission refused to have the investigators interview and shadow flight attendants in order to gain a better understanding of their responsibilities, roles and working conditions. The investigators observed airport-based work areas and videos; they did not observe flight attendants in their place of work. Second, the investigators relied on inaccurate and incomplete information from Air Canada, for example using T-4 slips to calculate compensation when flight attendants are required to work many hours for which they are not compensated. Third, the Job Evaluation Plan used by the investigators was defective, rendering the investigation flawed and unreliable.

Under the pay equity system proposed by the 2004 Task Force, there would have been a more thorough and transparent process, including a comprehensive job evaluation study using agreed-upon methods and participation of the incumbents. Under good legislation, flight attendants may have received justice. Instead, they were stalled for 15 years by wrangling over definitions and then denied wage equity seven years later after a faulty process for determining value and measuring the pay gap. The process was lengthy, costly and unfair.

CUPE's experience of seeing pay equity denied to flight attendants, as well as other unions' struggles on behalf of their workers under federal jurisdiction, demonstrates the need for proactive pay equity legislation.

Our experience in provinces without pay equity legislation reveals similar problems with the complaint-based system. The Supreme Court of Canada extinguished all legal rights for women in Newfoundland & Labrador entitled to pay equity retroactivity for 1988-1991. The province had claimed inability to pay during the fiscal crisis via the *Public Service Restraint Act*. Pay equity adjustments, negotiated between the government and its public sector unions (and not as a result of pay equity legislation) were to be paid yearly from 1988 to 1992 totaling \$24 million dollars. This was challenged at arbitration and through subsequent courts culminating in an

appeal by the unions to the Supreme Court of Canada. The SCC in a unanimous decision dismissed the appeal.

The “exceptional” fiscal crisis allowed the government to justify an infringement under s. 1 of the Charter. The Newfoundland government’s action sent a chill throughout the Atlantic region, slowing progress on pay equity and other human rights.

In March of 2006 when the province was experiencing exceptional wealth as a result of off-shore oil revenues, the government made \$24 million ex-gratia deferred payments, as a one-time exercise, to certain public sector employees in female-dominated occupations.

CUPE has experience with pay equity laws in New Brunswick, Prince Edward Island, Manitoba, Nova Scotia, Ontario and Quebec.

In New Brunswick, we’ve fought for pay equity for members in several sectors, but we continue to be stymied by gaps:

- The legislation excludes the private sector and many agencies in the broader public sector.¹⁵
- The government has not established an effective, proactive Pay Equity Bureau as required by the law, and the small staff assigned in the Office of Human Resources is unable to properly oversee application of the *Act*. After six years, many unionized employers have failed to complete the pay equity process, and no information is available on the process for the non-unionized staff. There has been no public report on implementation of the law.
- CUPE court stenographers and educational support workers are still waiting for pay equity adjustments, five years after their pay equity study began and six years after the *Pay Equity Act*, 2009, came into force (April 1st, 2010).

Successive governments in New Brunswick have failed to deliver on their promise to become a “model employer” by bringing pay equity to workers providing contracted or government-subsidized services. The Wage Gap Reduction Initiative has departed from basic pay equity principles and practices since its start in 2007¹⁶, leaving women in the four targeted sectors – home support, child care, group homes and transition houses – with wages so low they must work two or three jobs to survive. Economics professor and pay equity expert Ruth Rose carefully studied the methodology and concluded that the pay equity exercises were “deliberately distorted” to reduce the costs for government.¹⁷

In Manitoba, CUPE achieved pay equity adjustments for thousands of workers in universities, health care and schools,¹⁸ but the *Pay Equity Act* was insufficient and expired after four years of adjustments. The Manitoba legislation was limited in scope – in terms of sectors and

occupational groups covered – and it was a one-time exercise with a limited budget. The *Act* only covered government, health care, crown corporation and university workers; most of the broader public sector and the entire private sector were excluded. It would not certify a job class or occupation as being male or female predominant unless at least 70% of the workers in that job class were either male or female – in contrast to the gender predominance standard of 60% in other provinces. The *Act* had a sunset clause, so there has been no maintenance of pay equity where it was implemented, and the budget cap of 1% of payroll for a total of four years meant that health care workers were denied full pay equity.

CUPE, as part of the Manitoba Council of Healthcare Unions, challenged the gender wage disparity in health care that persisted after the four years expired. The Court ruled that the gap identified during the pay equity exercise had to be closed, and the government and employers were forced to make additional pay equity adjustments to the affected workers.

CUPE has argued for introduction of pay equity legislation in Manitoba that would be proactive, include maintenance provisions and apply to the public and private sectors. We've highlighted the gender pay discrimination against social services and child care workers, primarily women, who earn just above minimum wage, without pensions and often without extended health care benefits.¹⁹ These workers need two or three jobs and even then often rely on subsidized housing and community food banks to make ends meet.²⁰ CUPE also continues to fight for pay equity for midwives, but has been unable to secure agreement from the employer despite making it a priority in multiple rounds of bargaining.

In Nova Scotia, the government passed the *Pay Equity Act* in 1988. It covered provincial civil service and MUSH (municipal, university, school and hospital) employees. Wage adjustments were completed in 1996 and the Pay Equity commission was subsequently dismantled.

The legislation did not consider maintenance and it excluded many agencies in the broader public sector as well as the entire private sector. There is no pay equity system today to resolve gender wage discrimination disputes in the public sector in Nova Scotia, let alone the private sector where even larger gaps exist.

The strongest pay equity laws in Canada are in Ontario and Quebec, and CUPE has extensive experience with both. CUPE has been part of joint pay equity plans in hundreds of workplaces – small, medium and large. We have provided training on pay equity to thousands of employee representatives on pay equity committees, as well as to a number of employer representatives. CUPE has also participated in many public consultations, as well as ministerial consultations, on the application of the pay equity legislation, proposing amendments to improve the system for both unionized and non-unionized employees.

In Ontario, CUPE has completed close to 600 joint pay equity plans in a wide range of workplaces, leading to adjustments for thousands of members. Even with the proactive model in Ontario that covers both public and private sectors, we have experienced delays and other

problems. As in other provinces, CUPE has recently put a spotlight on gender wage discrimination in the broader public sector – specifically, child care, developmental services and community agencies.²¹ Even though the Ontario *Pay Equity Act* covers those sectors, and unions achieved proxy pay equity adjustments after court challenges, inadequate government funding has stalled implementation. For example, a report by developmental services employers stated that almost 60% of organizations with pay equity obligations did not meet their legal requirement.²²

In addition to dedicated pay equity funding to transfer payment agencies, CUPE has called on the Ontario government to improve enforcement of the *Act*, including workplace audits, additional resources for the Pay Equity Commission, and legal assistance for non-unionized women to pursue complaints.²³ CUPE is part of the Equal Pay Coalition that has recommended a number of additional measures to strengthen and enforce the Ontario *Pay Equity Act*.²⁴

In Quebec, CUPE has concluded close to 300 pay equity plans jointly with employers in public services and the private sector. All of these pay equity processes have led to wage adjustments for predominantly female job classes. In the majority of CUPE workplaces, the initial pay equity plans mandated by the *Act* were put in place after 2006, with retroactive payments back to 2001.

Implementation of the Quebec *Pay Equity Act*, which came into force in 1997, got off to a slow start for a number of reasons, chief among them:

- One chapter provided for the possibility for employers to seek an exemption under specific circumstances. Many large employers, including the Quebec government, sought this exemption from the application of the law. This chapter was declared unconstitutional in 2004 as it violated equality rights under the Canadian Charter.
- Municipalities were given an extension due to restructuring in the sector.
- In 2006, the *Act* was amended to facilitate the implementation in the broader public sector.

The Quebec system was weakened in two ways in 2009, when the government amended the *Pay Equity Act*. It improved monitoring of pay equity maintenance, which unions supported; however, in doing so, a number of mistakes were made.

One of them was to allow prospective-only pay equity maintenance, which gave employers successive periods of immunity for wage discrimination. The Superior Court of Quebec declared some of the 2009 amendments unconstitutional; the case is under appeal²⁵.

Maintenance is a key element of pay equity. After a pay equity plan is put in place and adjustments are made to wages for female job classes, the employer enters the phase of pay

equity maintenance. This is an opportunity for employers and unions to agree on new non-discriminatory wage grids that will apply to all job classes in the bargaining unit, coupled with a permanent job evaluation system based on the pay equity results. This process addresses additional internal inequities and brings coherence to the remuneration system, which also makes the administration of salaries easier for employers. It is not mandatory under the *Act*, but it is the best way to ensure pay equity maintenance. CUPE was able to agree with employers on such systems in a number of workplaces.

The second setback since 2009 is that the participation of unions and employees in pay equity maintenance is no longer mandatory. Employee and union participation on joint committees is an essential part of any pay equity scheme. Research has shown that without well-informed employee participation, job evaluation processes tend to reproduce systemic gender bias.²⁶ Our experience is to that effect. Also, it has been demonstrated that without union representation, employees are not in a position to advance pay equity claims and have their right to non-discriminatory wages fully respected.²⁷ This is a challenge that remains, even under proactive legislation, and needs to be addressed by properly resourcing investigative functions of the public body charged with overseeing the application of the legislation.

CUPE recommendations

We call for a proactive federal pay equity law modeled on the recommendations of the 2004 Pay Equity Task Force and the Quebec legislation to which those best align. CUPE joins other trade unions and pay equity advocates in calling for the repeal of the *Public Sector Equal Compensation Act*. PSECA is fundamentally flawed and cannot be improved by amendment. It must be abrogated.

Pay equity legislation and not collective bargaining is the proper way to achieve pay equity.²⁸ Equal pay for work of equal value is an internationally recognized human right. It must not be left to tradeoffs at the bargaining table.²⁹ Governments and employers are ultimately responsible for securing the entitlement; unions have a critical role that must be built into pay equity legislation.

Freedom from discrimination is a fundamental human right, and freedom from wage discrimination is an essential component of that right.³⁰ Proactive pay equity legislation is necessary to tackle systemic discrimination in wages, as part of a larger package of policy measures. In addition to biased job classification and wage-fixing systems, pay gap factors such as occupational segregation, precarious employment, and uneven distribution of unpaid labour must be addressed. Employment equity, universal child care, strong public services, decent work, living wages and free collective bargaining – these and other measures are required to achieve full wage equity.

As an immediate step, this committee has the opportunity to advance a proactive pay equity law as envisioned by the 2004 Task Force. The federal government should seize this moment to

redress gender pay discrimination for workers under federal jurisdiction and show leadership within Canada and internationally.

Endnotes

¹ Canadian Union of Public Employees. 2015. CUPE Equality History Timeline. <http://cupe.ca/cupe-equality-history-digital-timeline>

² Marie-Thérèse Chicha. 2006. "A Comparative Analysis of Promoting Pay Equity: Models and Impacts." Geneva: International Labour Organization. This study provides one of the most complete comparative analyses of pay equity models and cost/benefit effects. The author describes Canada as a "pay equity laboratory" where different legal approaches have been developed and tested, with "extensive" literature evaluating the impact.

³ CAN-SIM Table 202-0102: Average female and male earnings, and female-to-male earnings ratio, by work activity, 2011 constant dollars, annual. Ottawa: Statistics Canada.

⁴ CAN-SIM Table 282-0002: Labour force survey estimates (LFS), by sex and detailed age group, annual. Ottawa: Statistics Canada.

⁵ Labour Force Survey <http://www.statcan.gc.ca/pub/89-503-x/2010001/article/11387/tbl/tbl002-eng.htm>

⁶ *2011 National Household Survey*. Ottawa: Statistics Canada.

⁷ Kate McInturff. 2016. "Gender Equality." *Alternative Federal Budget*. Ottawa: Canadian Centre for Policy Alternatives.

⁸ Brittany Lambert, and Kate McInturff. 2016. "Make Women Count: The Unequal Economics of Women's Work." Oxfam and Canadian Centre for Policy Alternatives. P. 6

⁹ Yuriko Cowper-Smith, and Leah Levac. 2016. "Women and Public Sector Precarity: Causes, Conditions and Consequences." Canadian Research Institute for the Advancement of Women.

¹⁰ OECD Gender Wage Gap <https://www.oecd.org/gender/data/genderwagegap.htm>

¹¹ The 1948 *Universal Declaration of Human Rights*, the 1951 Equal Remuneration Convention (No. 100) of the International Labour Organization and the 1979 United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) are among the international conventions and agreements that commit to pay equity as a fundamental labour and human right. See Marie-Thérèse Chicha. 2009. *Promoting Equity: Gender-Neutral Job Evaluation for Equal Pay. A Step-by-Step Guide*. International Labour Organization.

¹² Beeman, J., *L'équité salariale: un droit inconnu chez les travailleuses non syndiquées*, Conseil d'intervention pour l'accès des femmes au travail, 2005 (http://www.ciaft.qc.ca/docs/CIAFT_EqSal_mai2005.pdf).

¹³ Supreme Court of Canada in *Public Service Alliance of Canada v. Canada Post Corp.*, [2011] 3 SCR 572, 2011 SCC 57 (CanLII).

¹⁴ *Public Service Alliance of Canada v. Canada Post Corporation*, 2010 FCA 56 (CanLII), FCA, Justice Evans, dissenting.

¹⁵ The New Brunswick *Act* covers employees in government departments, hospitals, school districts and Crown Corporations. It excludes municipalities, universities and government-mandated, publicly funded and privately managed (board, agency, owner-operator) services (like home support, child care, group homes, transition houses, nursing homes and special care homes).

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- ¹⁶ Canadian Union of Public Employees - NB Division. 2014. "Pay Equity in New Brunswick."
- ¹⁷ Ruth Rose. 2014. "Pay Equity in Caregiving Services in New Brunswick." New Brunswick Coalition for Pay Equity. http://www.equite-equity.com/userfiles/file/2015-10-18_REPORT_Ruth%20Rose.pdf.
- ¹⁸ Pay equity adjustments for school board workers was part of a voluntary measure since the *Pay Equity Act* excluded school boards.
- ¹⁹ Canadian Union of Public Employees. 2012. "Pay Equity Brief to the Government of Manitoba."
- ²⁰ *Ibid*, p. 9.
- ²¹ Canadian Union of Public Employees - Ontario Division. 2015. "CUPE's Recommendations to the Minister of Labour for Closing the Gender Wage Gap."
- ²² Ontario Agencies Supporting Individuals with Special Needs. 2014. OASIS Operating Pressures Survey Report.
- ²³ Canadian Union of Public Employees - Ontario Division. 2015. "CUPE's Recommendations to the Minister of Labour for Closing the Gender Wage Gap."
- ²⁴ Equal Pay Coalition. January 2016. "Securing Human Rights Justice for Women's Work: The Path to a 0% Gender Pay Gap by 2025."
- ²⁵ *Alliance du personnel professionnel et technique de la santé et des services sociaux c. Québec (Procureur général)*, 2014 QCCS 149 (C.A.Q. 200-09-008264-142)
- ²⁶ Pay Equity Task Force. 2004. "Pay Equity: A New Approach to a Fundamental Right." Chapter 8; N. Weiner and M. Gunderson. 1990. *Pay Equity : Issues, Options and Experiences*, Butterworth, pp. 35-52; E. Dèom, D. Drouin and J. Mercier. 1998. «La formation et l'élimination des préjugés envers le travail des femmes : des leçons pour l'évaluation des emplois en contexte d'équité salariale», *Recherches féministes*, vol. 11, no 1, pp. 211-222; M. T. Chicha. *L'équité salariale: mise en oeuvre et enjeux*, pp. 99-100, 242.
- ²⁷ Conseil du statut de la femme, *Poursuivre la démarche d'équité salariale*, Mémoire sur le bilan de l'application de la *Loi sur l'équité salariale*, Assemblée nationale du Québec, Janvier 2008; Conseil d'intervention pour l'accès des femmes au travail et al., *10 ans après l'adoption de la Loi sur l'équité salariale du Québec: les travailleuses non syndiquées à la croisée des chemins*, Mémoire présenté à la Commission de l'équité salariale, Septembre 2008.
- ²⁸ E. Dèom and J. Mercier. « Équité salariale et relations du travail : des logiques qui s'affrontent », *Recherches féministes*, vol. 14, no 1, pp. 49-61.
- ²⁹ *Canada (Human Rights Commission) v. Canadian Airlines International Ltd.*, [2006] 1 SCR 3, 2006 SCC 1, at par. 40.
- ³⁰ *Newfoundland (Treasury Board) v. N.A.P.E.*, [2004] 3 SCR 381, 2004 SCC 66 (CanLII), par. 38-50.