

# Proactive Pay Equity Legislation: Equality Law Requires it Now



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# NAWL: ADVANCING SUBSTANTIVE EQUALITY

The National Association of Women and the Law (NAWL) is a national, non-profit feminist organization that has worked since 1974 to promote the substantive equality rights of Canadian women through legal education, research, and law reform advocacy.

It is NAWL's position that every woman experiences inequality differently due to systemic discrimination on the basis of gender, race, ethnicity, nationality, class, sexual orientation, disability, age, colonialism, language and other factors. We believe that substantive equality for women will be realized only where the diversity among women is recognized and valued. We are dedicated to working collectively with other organizations in order to reflect the diversity and further the equality of all women in Canada.

## NAWL'S WORK ON PAY EQUITY

NAWL developed **significant expertise in pay equity**, and has worked collaboratively with federal unions and other women's equality rights organizations, to provide evidence to the Standing Committee on the Status of Women as well as to the Bilson Task Force on Pay Equity.

We have, on numerous occasions over the last 30 years, **underscored the problems with the complaint-based model** under the *Canadian Human Rights Act* (CHRA), and the **importance of proactive legislation at the federal level**.

For ease of reference, NAWL will file **its submissions to the Pay Equity Task Force from 2002** that, in the face of government inaction, remain as relevant today. A number of other more recent resources are also available on our website: [www.nawl.ca](http://www.nawl.ca)

## NAWL'S DEFUNDING

In **2006, NAWL was defunded** when the previous federal government removed advocacy, research and lobbying from Status of Women Canada's (SWC's) mandate, thereby preventing SWC from funding the critical work of equality rights organizations like ours.

In **2007, NAWL was forced to lay off staff and close its national office.** Since that time, NAWL's National Steering Committee and a group of feminist consultants have kept the organization alive on a volunteer basis.

It is in this significantly **diminished capacity** that we appear before this Committee, which is really **a loss for law and policy makers – and for Canadian women broadly** - given the very active role an organization like ours *could and should* be playing in helping government develop human rights and *Charter* compliant legislation.

# TWO KEY RECOMMENDATIONS

## 1) **Implement the 2004 Pay Equity Task Force recommendations**

- Establish a proactive regime;
- Repeal the *Public Sector Equitable Compensation Act (PSECA)*;
- Establish and make public a timeframe to get draft legislation on the table for feedback and comment from relevant stakeholders.

## 2) **Make funding available to equality rights law organizations**

- Ensure women's organizations have the funded capacity to meaningfully engage at federal law making tables;
- Demonstrate that the government will take seriously and act on its obligations to ensure legislation is compliant with domestic and international human rights obligations, as well as with the *Canadian Charter of Rights and Freedoms*.

# RECOMMENDATION 1: IMPLEMENT THE BILSON TASK FORCE RECOMMENDATIONS

## WHAT DO WE KNOW?

- Gender-based wage discrimination is a serious and costly human rights problem in Canada.
- Pay *inequity* is particularly acute for racialized women, immigrant women, aboriginal women and women with disabilities.
- Canada is attracting sanction by International human rights monitoring bodies and domestic courts because of its ineffective action on pay equity to date.
- Professor Bilson's Task Force did outstanding, evidence-based work to chart the way forward. The Task Force recommendations provide a detailed blueprint for how to proceed.

# COMPLY WITH DOMESTIC & INTERNATIONAL LAW

## **PAY EQUITY IS THE LAW:**

In light of both domestic and international commitments and obligations, the **Canadian government has a positive obligation to act immediately to table proactive legislation and end the systemic discrimination against women inherent in pay *inequity*.**

The adoption of such proactive pay equity **legislation, that applies to the entire federally regulated sector** (public, private, large, small, unionized, and non-unionized players) and that **recognizes equal pay for work of equal value as a human right** is an **essential step** towards ensuring the **respect of women's section 15 Charter equality rights.**

## PAY ATTENTION TO OUR COURTS

In 2011, after nearly 30 years of litigation, the Supreme Court of Canada unanimously adopted the dissenting judgement of Justice Evans from the Federal Court of Appeal in the *Canada Post* pay equity case. In his reasons, Justice Evans stated:

*“With the benefit of hindsight, 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.**”*

- *PSAC v. Canada Post Corporation*, 2010 FCA 56.



# REPEAL THE *PSECA*

In order to implement the Task Force's recommendations and institute an effective and constitutional proactive regime, it is necessary to **repeal the *Public Sector Equitable Compensation Act***.

Among other things, the *PSECA* **violates the constitutional right to sex equality** by **failing to provide an adequate mechanism to address the wage discrimination** experienced by women employed in the federal public service. It also **denies women any substantive remedy**.

# PSECA VIOLATES SECTION 15 OF THE CHARTER

## **PSECA violates women's constitutional right to equality in a number of ways, including by:**

- Incorporating the causes of discrimination ("market forces") into the factors for determining value of work;
- Requiring that pay equity, which is a human right, be subject to bargaining (such that it can be traded against other terms and conditions of employment);
- Defining female-predominance such that it excludes certain workers from accessing ANY pay equity process;
- Placing a limit on pay equity comparisons, restricting the groups in the federal public service to which workers in female-predominant groups can compare their compensation;
- Failing to provide a meaningful individual complaint process by prohibiting unions from assisting or encouraging employees to present complaints challenging discriminatory wage rates;
- Requiring individual employees to independently demonstrate that an equitable compensation assessment is "manifestly unreasonable" – a virtually impossible task given the enormous resources and expertise that would be necessary to challenge an equitable compensation assessment;
- Failing to provide substantive remedies for certain kinds of wage discrimination.

## RECOMMENDATION 2: FUND PARTICIPATION BY EQUALITY ORGS

As **part of this Committee's mandate** to propose a plan for adopting a proactive regime, government must **ensure funding is available for national equality law organizations to participate meaningfully** at federal law making tables.

Without such funding support, government will not have the women's equality rights law expertise nor stakeholder participation it needs to **guarantee** that it enacts **Constitutional legislation**.

As MP's, it is your job to ensure:

- Laws the government enacts pass *Charter* muster;
- Democratic participation in the law-making process is encouraged;
- A well-informed gender-based analysis is applied to proposals *before* they arrive to Cabinet for decision-making.

## SUMMARY: DRAFT LEGISLATION FOR FEEDBACK NOW

DO NOT REINVENT THE WHEEL. USING THE BILSON TASK FORCE RECOMMENDATIONS AS YOUR GUIDE:

1. Get proactive draft legislation on the table within an established (and public) timeframe.
2. Ensure the funding is in place to properly engage the necessary experts so that you're sure to introduce a Pay Equity Bill that meets Canada's domestic and international human rights obligations.

## THANK-YOU.

WE LOOK FORWARD TO FUNDING THAT WILL ENABLE US TO WORK WITH YOU TO ENSURE THE INTRODUCTION OF *CHARTER* AND IHRL COMPLIANT LEGISLATION BEFORE THE END OF THE CALENDAR YEAR.