

The right to equal pay for work of equal value: a fundamental human right

Submission by the New Brunswick Human Rights Commission

To the New Brunswick Wage-Gap Working Group

**The Honorable Margaret Ann Blaney,
Minister Responsible for the Status of Women, Chair**

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Executive Summary

The right to equal pay for work of equal value is a basic human right. Efforts to enforce that right should start from a rights framework analysis. This right first found expression in international law conventions adopted by the International Labour Organization and later through United Nations human rights treaty law. Canada ratified these conventions and treaties and eventually gave legal recognition to the right to equal pay for work of equal value, first through federal legislation and, to a lesser extent, in provincial laws as well. While the federal government has more recently taken a lead role in international forums in the promotion of this right, UN agencies have criticized Canada for a patchwork approach to its enforcement, citing the lack of meaningful protection in some provinces and territories.

In New Brunswick the wage gap between genders remains significant and has shown little sign of diminishing in recent years. Some enforcement remedies are available to combat pay inequity as a violation of employment standards or as a form of sex or race discrimination, but these remedies are not being accessed. As in several other provinces the legislative standards regarding pay equity in New Brunswick are minimal or non-existent. Clearer legislative provisions and more resources and education could make pay equity a reality for more New Brunswickers. This would improve the productivity and economic performance of employers within the Province.

Table of Contents

- I. Introduction
- II. History of Employment and Pay Equity
- III. Statistical review of wage gap in NB
- IV. Change drivers in NB context
- V. Options for reform
- VI. A Human Rights Approach to Pay Equity

*Employment equity is a strategy designed to obliterate the present and the residual effects of discrimination and to open equitably the competition for employment opportunities to those arbitrarily excluded. It requires **A** special blend of what is necessary, what is fair and what is workable. @*

To ensure freedom from discrimination requires government intervention through law. It is not a question of whether we need regulation in this area but of where and how to apply it. Based on history, present evidence, and apprehension for the future, the elimination of all forms of discrimination requires more, rather than less, law.

*Judge Rosalie Abella, Commissioner
Royal Commission Report on Equality in
Employment, October 1984*

I. Introduction

Following the Abella Commission report, the federal government developed a contract compliance incentive to securing employment equity in federally regulated sectors of the economy. While the Royal Commission report encouraged provinces to do the same and adopt legislation that would require every provincially regulated employer to implement employment equity, the legislative framework for employers in New Brunswick has remained relatively static since 1984. One of the questions facing the wage-gap round-table is therefore whether the recommendations from the Abella report remain valid or whether they were never, or are no longer, applicable in the New Brunswick context.

Abella Commission

The New Brunswick Human Rights Commission submits that it is helpful to commence a review of wage-gap issues in New Brunswick by reference to the Abella Commission report. This Royal Commission report constituted a watershed in the manner in which Canadians view wage-gap issues. Perhaps because of the stellar success Rosalie Silberman Abella had in her own career in the traditionally male preserve of lawyers and magistrates, becoming the youngest female appointee to the Bench and the first woman from an ethnic minority to be made a judge in Canada; perhaps also because of the trenchant analysis of the issues set forth in her report, the Abella Commission's recommendations resonated with Canadian women and changed expectations almost overnight. The passages dealing with the issues of the wage-gap, for instance, have not lost much of their bite:¹

Equal pay is an integral element in the implementation of employment equity. It must be included in any undertaking by employers to make the practices in the workplace more equitable.

¹ Abella, Judge Rosalie Silberman, *Equality in Employment: A Royal Commission Report*, Ottawa, Canadian Government Publishing Centre, 1984, pp. 232-235.

The existence of a gap between the earnings of men and women is one of the few facts not in dispute in the Equality debate. There are certainly open questions about it, the two main ones being the width of the gap and the right way to go about closing it. But no one seriously challenges the reality that women are paid less than men, sometimes for the same work, sometimes for comparable work.

¶

The current discussion surrounding equal pay issues sometimes seems to suggest that the problem is not critical. But referring to a wage gap as only 10 per cent creates a tendency to minimize the problem and to treat it as having decreased to a tolerable level.

It has not. In 1911, the average wage of employed women in Canada was 53 per cent of that of men. In 1982 it ranged from 55 to 64 per cent. This means an improvement of 2 to 11 percentage points over the course of 70 years. What is particularly noteworthy is, first, the length of the time the gap has been tolerated and, second, that it is tolerated at all.

¶

The cost of the wage gap to women is staggering. And the sacrifice is not in aid of any demonstrably justifiable social goal. To argue, as some have, that we cannot afford the cost of equal pay to women is to imply that women somehow have a duty to be paid less until other financial priorities are accommodated. This reasoning is specious and it is based on an unacceptable premise: the acceptance of arbitrary distinctions based on gender as a legitimate basis for imposing negative consequences, particularly when the economy is faltering.

If the argument had logic, let alone fairness, on its side, it would suggest that some redress has been available for women during the times of economic strength. But the appeal to women as the economy's ordained shock absorbers was and is a spurious one. We would have witnessed fluctuating differences between male and female incomes over the years, depending on the clemency of the economic climate. There has been no such fluctuation. The gap persists through good times and bad times. It persists in the face of society's commitment to justice. It persists in defiance of the law.

There was an urgency to Judge Abella's recommendations that demanded swift action. The federal response was fairly quick and in the provinces too legislative reforms were undertaken. In New Brunswick the Pay Equity Act² was passed some five years after the report's release, and yet this response too was prompted in large measure as a result of pressures channeled into action by the Abella report. As we approach the twentieth anniversary of this report's release, the urgency does not seem to have abated. It would be helpful to consider what was recommended and what was done, at the federal level and at the provincial level and then assess the merit and success of those efforts.

² *Pay Equity Act*, R.S.N.B. 1989, c.P-5.01.

The Kingsmill Report

In counterpoint to that report it is also helpful to consider current trends in other jurisdictions and in particular the emphasis now placed in some jurisdictions on voluntarist approaches to the implementation of pay equity in the private sector. The recently released Kingsmill Report in Britain advocates forcefully the view that swifter progress will be made in achieving pay equity by focusing on the business case for employment equity and allowing private sector employers to lead the effort in closing the wage gap as a means of achieving increased productivity:³

The labor market is changing dramatically. Decreasing fertility rates and increasing life expectancy mean that employers will have to look to under utilized groups within the labor market and make the most effective use of their human capital to maintain levels of growth. That means finding new ways of recruiting, retaining and developing women. The out-performance of women over men in terms of educational achievement at all levels makes it essential to maximize the benefits obtained from investment in women's education, which means addressing the disparities between the skills and attainments of women and the positions they occupy. In a climate in which competition for employees is fierce and in which rapid innovation demands the constant updating of knowledge and skills, the impact on business of failure to make best use of human capital will become increasingly severe. Any business that fails to ensure that women play a full part in its operations cannot hope to optimize its productivity and competitiveness. Conversely, the rewards for organizations that find ways to overcome the barriers and constraints that currently limit the role and contribution of women are considerable. They will minimize the costs and risks arising from litigation, high turnover and low morale, and enhance returns. Although still in its infancy, a growing body of research points to the importance of good human capital management practices. For example, recent work carried out at Sheffield's Institute of Work Psychology found that indicators of people management were strongly correlated with variations in productivity and profitability and were a better predictor of company performance than strategy, technology or research and development.

...

A number of the senior executives with whom I met from the private sector were similarly willing to commit their organisations to undertake reviews (see annex 3). I have considered carefully whether it is necessary to go further, and make employment and pay reviews mandatory for private sector companies as well. I have concluded that this would not be desirable at this stage. I do not see such reviews as ends in themselves, but rather as essential management tools to enable organizations to identify the challenges they face and to assess the impact of the policies and initiatives they introduce. The experience of the companies that I have

³ Kingsmill, Denise, *The Kingsmill Report: Review of women's employment and pay*, United Kingdom, Department of Trade and Industry (Cabinet Office), December 2001, pp.6-7 et 9.

consulted indicates that employment and pay reviews are most effective in uncovering the strategic information that will be of benefit to the company as well as its employees when they are driven by business incentives and tied to corporate objectives. The path that a review will take depends upon the specific circumstances of the company involved, such that it is difficult to generate a “one size fits all” model. Firms will need to use the tools that work best for them, and I see a real risk that management will not take appropriate action in response to such reviews if they have conducted them simply because they were obliged to do so. Organisations are likely to find that addressing the issues that emerge requires a range of measures and may involve changing their work culture to address such issues as ‘long hours’ and barriers to flexible working. Those measures will be most effective where they clearly support key business objectives of the organisation and have the commitment of its top management. It is for this reason that I believe that the most successful programmes are likely to be those undertaken voluntarily. In this review I have therefore focused on actions that work with the grain of the market and which I judge should help to build and maintain momentum on a voluntary basis. But I do not believe that this is an issue on which government should close its mind. If it becomes clear over the next few years that a voluntary approach is leading to an unacceptable ‘tail’ of laggards who are simply not putting in place the systems to enable them to answer basic questions about their employment of women and the extent of any gender pay gap then it would be appropriate to return to the issue of whether a mandatory requirement for employment and pay reviews is necessary.

The Human Rights Commission submits, in the following pages, that whether one views pay equity as an issue, which urgently needs legislative action, or one, which can only be successfully achieved by the enlightened self-interest of the private sector, the value or the end, sought is a fundamental human right. The Commission is already mandated to uphold equality rights in the employment sector and will be a willing partner in any efforts to reduce and eliminate wage gaps experienced by disadvantaged groups in New Brunswick society.

The submissions which follow begin with an analysis of the history of the right to equal pay for work of equal value, first at international law and then domestically both in terms of federal policy and also in approaches taken provincially, and especially in New Brunswick. The paper will then touch briefly on a statistical review of the current wage gap in New Brunswick and then outline some of the factors militating in favour of change or renewed efforts on this issue in the province. Finally the Commission will then outline three broad options for reform and focus on the advantages of the third option which we have framed as a human rights approach to pay equity.

II. *History of Employment and Pay Equity:*

Internationally:

The earliest reference in an international legal text to the principle of equal pay for equal work is found in the 1919 Preamble to the Constitution of the International Labour Organization.⁴ The ILO was formed under the auspices of the Treaty of Versailles at the close of the First World War.⁵ The ILO grouped labour delegates from every nation member of the League of Nations and prepared international treaties in areas related to employment standards. These treaties and conventions once ratified by national governments became binding norms of international law. The earliest formulation of the right addresses the narrow issue of equal pay for equal work.

This principle was later enshrined in the Universal Declaration of Human Rights, adopted by the United Nations General Assembly on December 10, 1948.⁶ Article 23 of the UDHR declares, in part, that: **A**everyone without discrimination has the right to equal pay for equal work[@]

In 1951 the principle was broadened through the adoption by member nations of the *ILO Convention no (100) Concerning Equal Remuneration for Men and Women Workers for Work of Equal Value*.⁷ This ILO Convention was ratified by Canada in 1972. Later on, in 1958, *ILO Convention (No. 111) Concerning Discrimination in Respect of Employment and Occupation* was adopted.⁸ It required member states to adopt national policies for the promotion of equal opportunity in employment and was ratified by Canada in 1964.

In 1966 the UN General Assembly adopted two international covenants to give expression to the rights set out in the Universal Declaration. Unlike the Universal Declaration these Covenants once ratified would form part of international treaty law and would be legally binding upon signatory States. The *International Covenant on Social Economic and Cultural Rights*⁹ was ratified by Canada in 1976. It provides in Article 7 that State Parties:

Arecognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure in particular:

(a) Remuneration which provides all workers, as a minimum, with:

⁴ *International Labor Organization's Constitution of June 28th 1919*, concluded in Versailles and entered into force January 10th 1920.

⁵ For more information concerning the International Labor Organization, see: <http://www.ilo.org>.

⁶ *Universal Declaration of Human Rights*, G.A. Res. 217A(III), Doc.A/810 N.U., page 71(1948).

⁷ *ILO Convention no (100) Concerning Equal Remuneration for Men and Women Workers for Work of Equal Value*, adopted by the General Conference of the International Labor Organization, called in Geneva by the Administration Council of the International Labor Office for its 34th session, June 29th 1951.

⁸ *ILO Convention (No. 111) Concerning Discrimination in Respect of Employment and Occupation*, adopted June 25th 1958 by the General Conference of the International Labor Organization, called in Geneva by the Administration Council of the International Labor Office, 42nd session; the Convention entered in force June 15th 1960 with respect with its section 8.

⁹ *International Covenant on Social Economic and Cultural Rights*, (December 16th 1966), N.U.R.T. 3.

- (i) fair wages and equal remuneration for work of equal value, without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work¹⁰ [and]
- (c) Equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence¹¹

In 1981 Canada ratified the *UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)*¹⁰. This Convention guarantees in Article 11.1 the right to equal remuneration and to equal treatment in respect of work of equal value. This UN Convention has become the lead international instrument in the protection and promotion of women's equality rights. In 1995 a Fourth World Conference on Women was held in China, under the auspices of this UN Convention.¹¹ The Conference resulted in the adoption of the *Beijing Declaration and Platform for Action*.¹² It called for specific action items by governments in the critical area of Women and the Economy in order to implement CEDAW by implementing laws to give effect to ILO standards, in particular Convention no 100, to prohibit sex discrimination in employment, to increase efforts to close the wage gap between men and women, implement equal remuneration for work of equal value by strengthening legislation, establish and strengthen mechanisms to adjudicate matters relating to wage discrimination and review and, where necessary, reformulate wage structures in female dominated professions to raise their low earnings.

Finally, in 1998 the ILO adopted the *ILO Declaration on Fundamental Principles and Rights at Work*¹³, which sets out Conventions no. 100 and 111 as two of the eight basic conventions of the ILO, thereby prioritizing the pay equity principles they contain.

¹⁰ *Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)*, (December 18th 1979) 1249 R.T.N.U. 13, adopted by the U.N. General Assembly, Res. 34/180, entered into force September 3rd 1981.

¹¹ See: <http://www.un.org/womenwatch/confer/> and <http://www.unesco.org/education/information/nfsunesco/pdf/>; For further information concerning the Beijing Conference and Canada's role : McLaughlin, Audrey (The Honourable), « *Women Report* », Yukon, House of Commons, December 1995.

¹² *Beijing Declaration and Platform for Action*, A/CONF.177/20 (1995) and A/CONF.177/20/Add.1 (1995).

¹³ *ILO Declaration on Fundamental Principles and Rights at Work*, adopted by the General Conference of the International Labor Organization, 86th session, Geneva, June 18th 1998.

International law clearly positions the right to equal pay for work of equal value as a fundamental human right, alongside the right to education, the right to health care, and fundamental liberties such as freedom of conscience and freedom of expression. In fulfillment of our international obligations to uphold these rights, Canadian Governments report regularly to UN bodies responsible for the administration of these human rights treaties, through the federal Department of Foreign Affairs.

The history of the development and implementation of this right has been undeniably laborious. It took almost fifty years to find agreement globally on the formulation of the right. The last forty years have been spent trying to implement the right and to give effect to it, recognizing its programmatic nature. Social and economic rights are recognised as programmatic in that their implementation may vary depending upon the level of economic development of the state in question and recognising also that protection of these rights call for social change which can most often only be achieved over time through a program of administrative and legislative action. Human rights advocates may be disheartened by the slow pace of reform on this front, yet the history of the right to equal pay for work of equal value is one of unrelenting progress in the formulation and implementation of a universal human right. The global community has committed itself to this goal and has developed monitoring mechanisms to ensure that state parties to the various conventions guaranteeing this right actually work towards its effective implementation.

Nationally:

Within this significant international human rights activity Canada has traditionally been cautious in its efforts to adopt and implement international standards, working in a cooperative federal model and ratifying only when implementation could be assured. More recently however Canada has been at the forefront of international efforts to adopt and enforce domestic legislation implementing equal pay for work of equal value.

The *Canadian Human Rights Act* has included pay equity provisions since its inception, in 1977.¹⁴ This included the authority under section 19 of the Act to adopt regulations requiring federal contractors to implement employment equity plans. However it was not until after the recommendations of the Abella Report were tabled in late 1984, that the federal government instituted a contract compliance system to ensure that all federal contractors were employers committed to employment equity.

While the federal contract compliance and complaints based system has had some success in encouraging federally regulated employers and contractors to implement pay equity and employment equity plans in their workplaces, there has been considerable pressure in recent months to move to a more universal and mandatory implementation system. A report released in 2001 by the Canadian Human Rights Commission recognised that the current system allowed for inordinate delays in the complaint adjudication, resulted in haphazard enforcement that may actually place employers that conform with employment

¹⁴ *Canadian Human Rights Act*, S.C. 1976-77, c.33.

equity policies at an economic disadvantage, and allowed too much ambiguity in pay equity standards and concepts.¹⁵ A federal task force reviewing pay equity was expected to report in February 2003 on options for reform.¹⁶

Other provincial or territorial human rights instruments have also explicitly addressed the issue of employment equity or pay equity, but few have been as proactive as the federal government. In the early 1990s the NDP government in Ontario brought in a Pay Equity Act that required mandatory filing of pay equity plans and was hailed worldwide by women's groups as model legislation.¹⁷ Employers however disagreed and when the Government changed, the legislation was modified to remove its more interventionist provisions. Nonetheless, the amended legislation has attracted renewed interest and is currently being applied with encouraging results.

Other provinces have opted to make explicit mention of pay equity in their human rights codes. The provisions which best conform to Canada's international legal obligations are perhaps those set out under the Newfoundland Human Rights Code¹⁸. They provide as follows:

Equal Pay for same or similar work

S(11) (1) An employer, or a person acting on behalf of an employer, shall not establish or maintain differences in wages between male and female employees employed in the same establishment who are performing, under the same or similar working conditions, the same or similar work on jobs requiring the same or similar skill, effort and responsibility, except where that payment is made under

(a) a seniority system; or

(b) a merit system.

(2) A female employee employed in the same establishment as a male and who is performing under the same or similar working conditions, the same or similar work on jobs requiring the same or similar skill, effort and responsibility shall have

¹⁵ Canadian Human Rights Commission, *Le temps d'agir : Rapport spécial au Parlement sur la parité salariale*, February 2001 : <http://www.chrc.ccdp.ca>.

¹⁶ March 31st 2003, the Minister of Justice and Attorney General of Canada, the Honorable Martin Cauchon, and the Minister of Labor, the Honorable Claudette Bradshaw, announced the Pay Equity Task Force will be given additional time to complete its comprehensive review of Canada's federal pay equity legislation. This report is waiting for end of June 2003. See: http://Canada.justice.gc.ca/fr/news/nr/2003/doc_30856.html.

¹⁷ *Pay Equity Act*, L.R.O. 1990, c. P.7.

¹⁸ *Newfoundland Human Rights Act*, R.S.N. 1970, C.262, as amended S.N. 1974, No.114.

(a) opportunities for training and advancement; and

(b) Pension rights and insurance benefits equal to those applicable to the male.

(3) An employer shall not reduce the wages of a male or female employee in order to comply with subsection (1).

The interpretation given by the Commission to these provisions however emphasizes equal pay for equal work and not equal pay for work of equal value. Moreover the provisions only address pay equity from the perspective of the gender gap between men and women. The impact of the provisions is therefore minimal.

The Yukon Act¹⁹ provides an interesting model, but one which is limited in its application to the public sector, as follows:

Equal pay for work of equal value

14.(1) This section applies only to the Government of the Yukon and municipalities and their corporations, boards, and commissions.

(2) It is discrimination for an employer to establish or maintain a difference in wages between employees who are performing work of equal value, if the difference is based on any of the prohibited grounds of discrimination.

(3) In assessing the value of the work performed the criterion to be applied is the composite of the skill, effort, and responsibility required and the working conditions.

(4) For the purposes of this section, "wages" means any form of payment for work performed by an individual, and includes salaries, commissions, vacation pay, dismissal wages, bonuses, value for board, rent, housing, lodging, payments in kind, employer contributions to pension funds or plans, employer contributions to long-term disability plans, employer contributions to any forms of health insurance plans, and any other advantage received directly or indirectly from the individual's employer.

(5) An employer shall not reduce wages in order to comply with this section.

¹⁹ *Human Rights Act*, R.S.Y. 1986 (Suppl.), c.11, enacted S.Y. 1987.

Other Codes have less onerous provisions Alberta's Code²⁰ for instance speaks principally to the notion of equal pay for equal work and provides as follows:

Equal pay

6(1) Where employees of both sexes perform the same or substantially similar work for an employer in an establishment the employer shall pay the employees at the same rate of pay.

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

(3) When an employee is paid less than the rate of pay to which the employee is entitled under this section, the employee is entitled to recover from the employer by action the difference between the amount paid and the amount to which the employee was entitled, together with costs, but

(a) the action must be commenced within 12 months from the date on which the cause of action arose and not afterwards,

(b) the action applies only to the wages of an employee during the 12-month period immediately preceding the termination of the employee's services or the commencement of the action, whichever occurs first,

(c) the action may not be commenced or proceeded with when the employee has made a complaint to the Commission in respect of the contravention of this section, and

(d) no complaint by the employee in respect of the contravention shall be acted on by the Commission when an action has been commenced by the employee under this section.

The Quebec Code²¹ has a provision which is arguably more stringent than Alberta's but which refers to the province's Pay Equity Act, which provides for a contract compliance approach to provincial contractors. Human Rights Codes in B.C., Saskatchewan, Manitoba, Ontario and other Atlantic provinces make no mention of pay equity.

New Brunswick:

In New Brunswick the Human Rights Code²² makes no explicit reference to pay equity. In part this may be due to the fact that the New Brunswick Code was one of the first adopted

²⁰ *Human rights, Citizenship and Multiculturalism Act*, R.S.A. 1980, c. H-11.7; as amended in 1985, c.15, s.13.

²¹ *Charter of Human Rights and Freedom*, R.S.Q. 1977, c. C-12.

²² *Human Rights Code*, R.S.N.B. 1973, c.H-11.

in Canada. Government responded initially to the ILO conventions by adopting the *Fair Employment Practices Act* in 1956 and the *Female Employees Fair Remuneration Act* in 1961.

These laws were replaced in 1967 by the adoption of the *Human Rights Code* and latterly in 1971 when sex was added as a ground of discrimination. The earlier legislation, while it had a complaint driven compliance mechanism had no educational mandate and this gap was remedied by the provisions of the new *Human Rights Code* which predicated its compliance approach largely on its educational mandate.

New Brunswick also adopted pay equity provisions in its Employment standards legislation. While the provisions in question may be broad enough to encompass the notion of equal pay for work of equal value, the chapter heading in the Act speaks instead of equal pay for equal work. It is also this narrower interpretation which has been given by the only Board decision to date on the issue.

Finally, on May 19, 1989, the Province also adopted a *Pay Equity Act*. This act aimed to implement pay equity into Part I of the Civil Service. A Pay Equity Bureau was established under the legislation to monitor this process. Nonetheless the Bureau has been inactive since the mid 1990s and there has been little or no public assessment of the impact of the legislation.

The *Human Rights Code* provides that any person claiming to be a victim of sex discrimination (or other enumerated ground) in the employment sector may file a complaint with the Commission. The Commission will investigate complaints of both direct and indirect discrimination including complaints of systemic discrimination. Thus a woman or a group of women claiming to be aggrieved as a result of pay scales or practices which treat them differently from men, or persons of colour who believe that they are consistently recruited to lower paying jobs may file a complaint with the Commission.

However relatively few systemic discrimination complaints based on pay equity concerns have been filed with the Commission. Moreover the legislation has not been amended to grant more explicit remedies or powers to the Commission in this field despite the subsequent adoption of federal employment equity provisions in the *Canadian Human Rights Act*, despite the adoption of the *Charter of Rights and Freedoms*,²³ and despite repeated calls at the international level for stronger legislative measures at the provincial level.

In 1986 the Human Rights Commission held its first and only Board of Inquiry into a pay equity complaint. Thirty female workers at Kings Landing Corporation were ordered to receive a wage adjustment and awarded each 100 dollars as nominal damages for injury to their dignity.

²³ *Constitutional Act of 1982*, Canada Act, Annex B, 1982, c.11.

In the more recent past the Commission has investigated and settled several complaints where wage gap issues were raised as an element of a sex discrimination complaint. In one recent case, a large manufacturer's comptroller was paid for several years at roughly the same rate she received upon hire as an accounting clerk. The employer's comptroller in another division received roughly twice her rate of pay. The parties agreed to settle the complaint for \$85,000.00 and an undertaking by the employer to share its gender and cultural diversity initiatives and plans with the Commission for review and comment. In another complaint from the early 1990s female lawyers in a large public authority complained that they were paid less than their male counterparts in another service division. The complaint was settled on the basis of a wage adjustment for the female lawyers working in the division.

It is possible that if the Commission's legislated mandate contained more explicit provisions in the area of pay equity, that it might have insisted upon stricter enforcement of the right to equal pay for work of equal value, for instance by requiring the employers in question to file annual pay equity plans and reports on an interim basis as a term of settlement. Nonetheless the Commission cites these cases as success stories and positive examples of how individual women in the province have been able to obtain redress for wage gap issues affecting them in their workplaces, through complaint under the Commission's sex discrimination provisions.

III. Statistical evidence of wage gap issues in NB:

The foregoing submissions raise questions as to the appropriateness or awareness of available remedies. The remedies are there, and yet few women complain. Can we conclude that the problems are not urgent or not significant for the employee group affected? The statistics say otherwise: in 2002 the Advisory Council on the Status of Women reported that in 1999 NB ranked sixth out of the ten provinces in terms of the size of its gender pay gap.²⁴ Women working full time earned 71% of what men earned or 78% of the average male wage calculated on an hourly basis. More disquieting are the reports that women working full-time in managerial jobs earned 57% of what men did, only a marginal increase from 56% recorded almost ten years earlier; and also that 50% of lone parent women are poor as are 6% of senior women in the province.

IV. Change drivers in the New Brunswick context:

Despite the dearth of case law and complaint activity on pay equity matters in New Brunswick, a number of factors have combined to bring this issue to the forefront of the political agenda in the province in recent months:

- § United Nations reports have faulted Canada for the lack of uniformity in provincial legislative protections; Specifically, ECOSOC's Human Rights

²⁴ Advisory Council on the Status of Women, *Why such a Gap between women's and men's Salaries?*, 2002; The report is available on: www.acswcccf.nb.ca.

Committee which monitors implementation of the International Covenant on Economic Social and Cultural Rights²⁵ chastised Canada's wage discrimination of women in its 1998 report in the following terms:

The Committee is also concerned about the inadequate legal protection in Canada of women's rights which are guaranteed under the Covenant, such as the absence of laws requiring employers to pay equal remuneration for work of equal value in some provinces and territories, restricted access to civil legal aid, inadequate protection from gender discrimination afforded by human rights laws and inadequate enforcement of those laws;

- § There is growing dissatisfaction with a two tiered approach to pay equity which requires federally regulated employers to adhere to one set of rules while provincially regulated employers are not held to any comparable standards; some European nations have recently advocated for a voluntary approach to pay equity, driven by private sector business imperatives, as opposed to universally applicable mandatory reporting;
- § dissatisfaction with the federal pay equity process has led to calls for reform and a federal task force is expected to report shortly;
- § In late fall of 2000 a New Brunswick women joined in the World Women's March on UN to combat women's poverty & violence;²⁶ upon their return from New York a group of New Brunswick women met with Premier Lord to discuss their concerns and a Coalition on Pay equity was subsequently formed to lobby government on this issue; finally
- § Other groups are calling for reforms of existing provincial enforcement systems pointing to dissatisfaction with approaches that are complaint driven and require complainants to put their jobs at risk, or legislated standards that are antiquated and fail to address the real issues of under valuation of women's work.

V. *Options for reform:*

In response to some of the change drivers identified above government has created a Wage-Gap Round-Table, reporting through the Minister responsible for the Status of Women. In

²⁵ For further information about the U.N. Economic and Social Committee: <http://www.unhchr.ch/html/menu2/6/cescr.htm>.

²⁶ For more information concerning World Women's March on UN to combat women's poverty & violence, See: <http://www.ffq.qc.ca/marche2000/dyn/rech-res.php3?l=&ID=156>.

very broad lines, some of the preliminary directions for reform can be divided into three approaches as follows:

1. *Stand alone Pay Equity Commission:* Some proponents of reform will say that only a Commission with authority to investigate on its own motion can bring about change. Government must impose a pay equity planning process on the private sector since experience has shown that they will not do anything on a voluntary basis. The thrust of reform at the federal level seems headed in this direction, and in order to keep pace with the rest of the country and harmonize our approaches and have a level playing field for all employers, New Brunswick should opt for a separate pay Equity Commission with a mandate to monitor and audit the mandatory filing of pay equity and employment equity plans by all employers in the Province.

2. *Voluntarist Private Sector Approach:* Others will maintain that what is required is a volunteer approach to enforcement by private sector. It is suggested that better enforcement will come from Business recognizing that productivity and a concern for their bottom line is what should drive employment equity. Once businesses are educated on this issue they will adopt voluntary pay equity plans that will close the wage gap more effectively and decisively than any legislatively imposed solution.

3. *An incremental approach focused on existing remedies:*

Between the two options mentioned above is a third option which focuses on a renewed enforcement effort based on existing remedies such as those available through the Human Rights Commission. People are debating whether we need a carrot or a stick. In fact the business case for employment equity is already there and a new or better carrot is perhaps not as important as getting word out about that business case. Similarly, the compliance requirement is there in our human rights legislation backed up by constitutional guarantees, international legal obligations and case precedents. More law is perhaps not as important as better enforcement. According to this view, we do not need a new carrot or stick we need more education and better enforcement. It is this third option that the Commission wishes to explore in greater detail in the concluding paragraphs below.

VI. A Human Rights Approach to Pay Equity

When pay equity is understood in the broader context of human rights, the third of these approaches comes clearly into focus. In particular while pay equity rules may have their place in employment standards legislation, the better place to center responsibility for the establishment, monitoring and compliance with meaningful employment equity standards for the private sector in New Brunswick is with the Human Rights Commission.

This approach allows employment equity concerns to be addressed squarely for what they are: basic human rights issues. It maximizes the use of existing educational resources within the Commission and its mandate to promote compliance with human rights standards within the province. It allows for the investigation of pay equity concerns on the basis of

underlying equality rights abuses, which give rise to them. These root causes of employment and pay equity concerns are diverse and deeply ingrained but often constitute in and of themselves grounds for filing a complaint of discrimination. They include harassment, poisoned work environments, lack of accommodation of maternity leave requests, or of requests to provide day-care or flex-time arrangements for parenting responsibilities; lack of affirmative action and special programs; and exclusion from professional development opportunities or management career track assignments.

Employment equity is not just a women's issue. Race and disability groups are seeking equity through the same means. The HRC deals with all these disenfranchised groups and is best situated to promote and monitor employer diversity initiatives. Finally, this approach is consistent with existing approaches in Canada, federally, in Quebec and in other jurisdictions. It was recommended in the Abella Commission's Report on Equality in Employment in the mid 1980s and remains a proven and successful method for achieving more equity in employment.

This approach would be more affordable than others although it would clearly require the investment of additional resources in the New Brunswick Human Rights Commission. Ideally the Commission would be given greater responsibility and more resources with which to promote and monitor employment equity plans by employers in the province. The Pay Equity Act could be repealed and new provisions dealing with pay equity added to the New Brunswick Human Rights Act. Additional measures might include:

- Gradual implementation of legislated standards of employment equity starting with mandatory filing of pay equity plans with the Commission a) by public sector employers not yet covered by the Pay Equity Act; b) subsequently, on a pilot basis, by the province's largest employers; and eventually, c) in the absence of voluntary filing and implementation, the mandatory filing of plans by mid to large size companies as well.
- The Commission would have to be authorized to investigate complaints of discrimination stemming from an employer's failure to implement or observe its pay equity plan, or its failure to file or develop one, upon complaint by an employee or an employee group or representative or upon its own motion.
- The Province's approach to employment equity should clearly frame the issue at minimum as one which is of concern to the four designated groups under current federal legislation: women, native persons, racial minorities and disabled persons.
- The Working Group should also consider recommending adoption of a contract compliance requirement similar to the federal one for all provincial suppliers and purchasing agreements.

- Other remedies are needed to address the wage gap in New Brunswick, including a review of minimum wage standards in order to address the disproportionate impact on some groups, including young single working mothers, of minimum wage rates which relegate many to the ranks of the working poor.
- The Working Group should also consider policy options that could make universal and affordable day-care a reality for New Brunswick families.
- Finally the Working Group should give further consideration to means through which a provincial social auditing function could be formalized so that just as accounting practices and principles are amenable to public audit so should our employment practices. Similarly private sector businesses could be encouraged to seek an ISO certification for superior employment practices and management in the fields of employment equity, health and safety and disability management.

The foregoing policy options provide a sketch of ideas for consideration by members of the Wage-Gap Working Group. They are outlined here to stimulate discussion and invite reflection on how employment and pay equity concerns in New Brunswick might best be served by a reform of existing agencies and remedies available through them.

The resource implications of these various options have not yet been quantified and would certainly vary depending on the detailed proposals that round-table members may choose to recommend. The Commission is however interested and committed to working with the round table and with departmental officials in Training and Employment Development in identifying the necessary strategies and the resource allocation required in order to make meaningful progress in closing the wage gap.