February 23, 2009

URGENT ATTENTION REQUESTED

Dear Prime Minister Harper,

We write to express our dismay at the introduction of the new *Public Sector Equitable Compensation Act*. We are concerned that this legislation has been introduced as a part of Budget 2009, and that, as a consequence, Parliament will not be permitted to decide whether the legislation has its support as a new law independent of the Budget. This amounts to legislating by stealth in our view, and is unworthy of any Canadian government, as well as unfair to women.

The legislation takes away the right of women federal public servants to equal pay for work of equal value. You have claimed that your government recognizes that pay equity is a right of women and that this new legislation merely introduces efficiency and speed to the process of obtaining pay equity in the public service. We have studied this legislation closely and find these claims false. The *Public Sector Equitable Compensation Act* empties the right to pay equity of its meaning.

The new legislated criteria for evaluating "equitable compensation" will reintroduce sex discrimination into pay practices, rather than eliminate it. Under the *Canadian Human Rights Act*, it is a discriminatory practice for an employer to establish or maintain differences in wages between male and female employees employed in the same establishment who are performing work of equal value. In assessing the value of work performed by employees, the criterion to be applied is the composite of the skill, effort and responsibility required in the performance of the work and the conditions under which the work is performed (section 11). The new legislation adopts these criteria, but adds new ones that completely undermine the commitment to equal pay for work of equal value for women. Section 4(2)(b) of *Public Sector Equitable Compensation Act* adds that the value of the work performed is also to be assessed according to "the employer's recruitment and retention needs in respect of employees in that job group or job class, taking into account the qualifications required to perform the work and the market forces operating in respect of employees with those qualifications." This permits any evaluation to take into account that male-dominated jobs are valued more highly in the market, requiring the employer to pay more to attract new employees or retain current ones, even if the value of the work when it is assessed based on skill, effort and responsibility is no greater than that of female-dominated jobs.

The right to equal pay for work of equal value was introduced in federal human rights legislation in 1977 precisely in order to expunge the sex discrimination that is inherent in market pay practices from the assessment of the value of work. Historically, the market has devalued work that is done by women. Seeking now to evaluate the federal public service's compensation practices for female dominated job groups by comparing them with pay assigned to these jobs in the market will entrench sex discrimination, not correct it.

In addition, the new legislation defines a female dominated group as one in which 70% of the workers are women; only these groups can seek "equitable compensation." This is too rigid a definition as it simply puts outside the boundaries of the legislation those job groups in which women are 51 – 69% of the workers, no matter what the context is. The legislation restricts comparisons of male and female job groups so that comparisons may only be made within defined portions of the federal public service, or within federal agencies, not across the public service as a whole. In addition, the legislation repeatedly refers to providing "equitable compensation" within "a reasonable time." This seems to imply that women public servants may not receive compensation for the full period when they received less than equal pay for work of equal value and may not receive what they are owed immediately.

We conclude that the substance of the right to equal pay for work of equal value is gone, restrictions have been placed on who falls within the scope of the legislation and on how comparisons can be made, and time periods for which compensation is owed are malleable.

In addition, the processes set out in the Act for seeking "equitable compensation" are fundamentally flawed. The legislation makes employers and unions jointly responsible for "equitable compensation," even though federal public sector unions do not have any control over the federal purse. It also makes "equitable compensation" for women federal public servants a matter to be negotiated between employers and unions alongside and at the same time as other collective bargaining issues, not separately and distinctly, as it is under the *Manitoba Pay Equity Act*.

This puts women federal public servants at risk of having their right to be free from sex discrimination in pay bargained away because other issues are of more importance to the employer or the union, or both. The Supreme Court of Canada ruled in *Dickason v. University of Alberta* that employers cannot contract out of their human rights obligations. There is nothing in this legislation that ensures that women's human rights will be respected and fulfilled in the bargaining process, rather than ignored and set aside. The effect of this restructuring of the process for obtaining pay equity is to make pay equity no longer a human right of women, but a benefit or privilege which may be bargained successfully, or not.

We note that individual women, both non-unionized and unionized, are permitted to make complaints to the Public Service Labour Relations Board if they believe that their compensation is not "equitable." However, neither non-unionized women nor unionized women will have anyone to assist them. Currently, if women file a complaint with the Canadian Human Rights Commission, the Commission will investigate it, interview witnesses and examine evidence. Under the *Public Service Equitable Compensation Act*, complainants will receive no assistance whatsoever.

Further, unionized women cannot have the assistance of their unions to make pay equity complaints. Indeed, unions will be fined $50,000 if they assist any woman to make a complaint. We point out that this legal imposition of a fine violates international human

rights norms, since it contravenes Article 9(3)(c) of the *Declaration on the Rights of Human Rights Defenders.* Article 9(3)(c) states that "everyone has the right, individually and in association with others, … [T]o offer and provide professionally qualified legal assistance or other relevant advice and assistance in defending human rights and fundamental freedoms."

This individual complaint procedure has been turned into a meaningless enforcement mechanism. Complaints about pay equity are, by definition, group complaints. Individual female public servants, without help from the Commission or their unions, will not have access to the information about pay rates and job descriptions that is necessary to make an "equitable compensation" complaint.

Nor will they have the resources necessary to litigate. In light of the drastic diminishment of civil legal aid in many jurisdictions, and the elimination of funding to the Court Challenges Programme, women in Canada no longer have real access to the exercise of their statutory or constitutional rights. The *Public Sector Equitable Compensation Act* contributes to this trend by stripping women of access to legal advice and legal representation which they have had in the past when pay equity was at issue, either from the Canadian Human Rights Commission or from their unions.

There have been many problems with the current federal pay equity system. At the moment, there is no proactive legislation that requires federal sector employers, including the Government of Canada, to review their compensation schemes and ensure that women are paid equal pay for work of equal value. The complaint system under the *Canadian Human Rights Act* has proven notoriously slow and unwieldy. For some years, there has been a broad consensus among employers, unions, and women's organizations that this system needs fixing. In 2004 a Pay Equity Task Force was appointed, which, after thorough review and consultation, made recommendations for a new proactive pay equity system, with a Pay Equity Commission and Tribunal. These recommendations had widespread support, and if they had been implemented women workers in the federal sector would have had access, for the first time, to an efficient and effective mechanism for realizing their right to non-discrimination in pay.

The *Public Sector Equitable Compensation Act* is a surprising and dismaying alternative to what was recommended by the Pay Equity Task Force. Nor does it comply with Canada's international and constitutional commitments to the rights of women.

Under Article 11 of the *Convention on the Elimination of All Forms of Discrimination against Women*, which Canada ratified in 1981, women are guaranteed the right to "equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work." Article 2 of the *Convention* requires states parties to ensure that women have access to effective remedies for violations of their rights. In addition, the *International Covenant on Economic, Social and Cultural Rights*, in Article 7(a)(i) guarantees to women "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 work." Canada ratified this Covenant in 1976.

Nor is the new legislation compatible with the commentary from United Nations bodies about Canada's implementation of equal pay for work of equal value. Both treaty bodies and members of a Working Group of the new Human Rights Council recognize that Canada is failing on this issue. In 2003, the Committee on the Elimination of Discrimination against Women recommended that Canada "accelerate its implementation efforts as regards equal pay for work of equal value at the federal level and …ensure that that principle is implemented under all governments." Recently, in 2009, during the Universal Periodic Review of Canada by a Working Group of the Human Rights Council, several countries recommended that Canada "take the necessary measures to end discrimination against women in workplaces and implement ILO and CESCR recommendations to ensure equal remuneration for work of equal value in public and private sectors."

In short, the *Public Sector Equitable Compensation Act* is not compatible with Canada's obligations under international human rights law, as it undermines, rather than fulfilling, the commitment to eliminating sex discrimination from pay practices, and does not provide women federal public servants with effective access to a remedy if their rights are violated.

Further, in *Newfoundland and Labrador Association of Public Employees v. Government of Newfoundland and Labrador* (NAPE), the Supreme Court of Canada ruled that s. 15 of the *Charter* guarantees to women the right to equal pay for work of equal value. Canceling payments to women public servants, which were designed to correct pay inequities, violated s. 15. In that case, the Supreme Court of Canada, wrongly in our view, decided that the cancellation of the payments was justifiable under s. 1 because the Government of Newfoundland and Labrador was in a "fiscal crisis".

In light of this reasoning from the Supreme Court of Canada, the *Public Sector Equitable Compensation Act* may not survive section 15 scrutiny. By adding "market forces" to the criteria for assessing whether there is equal pay for work of equal value, the *Act*, in effect, takes away a right that women have enjoyed, and that is recognized by the Supreme Court and under international human rights law.

Further, we can envision no section 1 argument that can justify this legislation. Although it has been introduced as a part of Budget 2009, it has not been introduced as a cost-saving measure, nor can it be defended as a means of saving money in a time of fiscal crisis. Budget 2009 allocates billions of dollars for spending, including $17 billion for infrastructure that seems destined to be spent on construction jobs that are traditionally held by men.

We conclude that the *Public Sector Equitable Compensation Act* does not comply with the commitments that Canada has made to women in international human rights

instruments or the *Charter*. We ask you to withdraw this legislation immediately and instead to implement the recommendations of the 2004 Pay Equity Task Force.

As Canadians who have contributed many years of work to improving the lives of women, we are angered when the Government of Canada moves backwards on the rights of women. This is the fifth overt attack on the rights of women in Canada made by your administration, following as it does on 1) the cancellation of funding to the Court Challenges Programme, 2) changes to the criteria for funding for Status of Women Canada's Women's Programme which preclude support for advocacy or lobbying for law reform, 3) cancellation of the Status of Women Independent Research Fund, and 4) cancellation of the child care agreements with the provinces.

We wish to be proud of Canada, but frankly, we are ashamed. We are aware of other countries in the world, with far fewer resources than Canada, who are moving forward on women's human rights, while we are slipping backwards. We urge you to reverse your course.

Sincerely,

Shelagh Day, Recipient of the Governor General's Award in Commemoration of the Person's Case 2008

Frances Ennis, Recipient of the Governor General's Award in Commemoration of the Person's Case 2008

Wendy Robbins, Recipient of the Governor General's Award in Commemoration of the Person's Case 2007

Muriel Smith, Recipient of the Governor General's Award in Commemoration of the Person's Case 2007, Member of the Order of Canada, Member of the Order of Manitoba

Joyce Hancock, Recipient of the Governor General's Award in Commemoration of the Person's Case 2006

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