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Treasury Board of Canada Secretariat on behalf of the Treasury Board of Canada

Applicant

and

Public Service Alliance of Canada, Professional Institute of the Public Service of Canada, Canadian Association of Professional Employees, Association of Justice Counsel, Association of Canadian Financial Officers, Canadian Union of Public Employees, Canadian Federal Pilots Association, Canadian Military Colleges Faculty Association, Canadian Merchant Service Guild, Federal Government Dockyard Chargehands Association, Federal Government Dockyard Trades & Labour Council (East), Federal Government Dockyard Trades & Labour Council (West), International Brotherhood of Electrical Workers, Professional Association of Foreign Service Officers, Union of Canadian Correctional Officers, UNIFOR/Canadian Air Traffic Control Association and Non-Unionized Employees

Affected parties

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I. INTRODUCTION

a. Nature of the Request

[1] On June 24, 2022, the Treasury Board Secretariat of Canada, on behalf of the Treasury Board as employer (TBS), filed an application under the *Pay Equity Act*[1] (*Act*) requesting authorization from the Pay Equity Commissioner (Commissioner) to establish three pay equity plans for employees in the core public administration (CPA). The CPA includes employees in the departments and other portions of the federal public administration named in Schedules I and IV of the *Financial Administration Act*.

[2] TBS proposes that the three plans be delineated as follows:

- **Plan 1**: (a) all employees working in the CPA occupying a position in a group described in any certificate issued by the Federal Public Sector Labour Relations and Employment Board (FPSLREB) (or any predecessor of that Board) to the Public Service Alliance of Canada (PSAC), employees occupying a position in that group which has been declared as a managerial or confidential position, and employees performing the duties of a position of that group who are not part of the bargaining unit; and (b) all employees working in the CPA occupying positions classified in the AS classification that are primarily engaged in planning, developing, conducting or managing internal audit work, in accordance with the internal audit policy of the Government of Canada, to assess the effectiveness of risk management, control or governance processes;
- **Plan 2**: all employees working in the CPA occupying a position in a group described in any certificate issued by the FPSLREB (or any predecessor of that Board) to the Professional Institute of the Public Service of Canada (PIPSC), employees occupying a position in that group which has been declared as a managerial or confidential position, and employees performing the duties of a position of that group who are not part of the bargaining unit; and
- **Plan 3**: all employees working in the CPA not covered by Plan 1 or Plan 2. This Plan includes the non-unionized employees.

b. Representations from applicant and affected parties

[3] The *Act* requires that the applicant and affected parties be given the opportunity to make representations in the manner specified by the Commissioner. In addition to its application, TBS provided extensive representations in support of its proposed multiple plans.

[4] There are 16 certified bargaining agents who represent employees in the CPA. Of those, the following five, representing employees in proposed Plans 1, 2 and 3, provided representations objecting to TBS's application for multiple plans:

- Professional Institute of the Public Service of Canada (PIPSC) and Canadian Association of Professional Employees (CAPE) provided a joint submission;
- Public Service Alliance of Canada (PSAC);
- Association of Justice Counsel (AJC);
- Association of Canadian Financial Officers (ACFO);

[1] SC 2018, c 27, s 416

[5] The following unions representing members in TBS's proposed Plan 3 advised that they supported the submission from ACFO:

- Canadian Union of Public Employees, Local 104;
- Canadian Federal Pilots Association;
- International Brotherhood of Electrical Workers, Local 2228;
- Professional Association of Foreign Service Officers.

[6] One individual employee submitted representations. The employee's representations claimed a wage disparity for civilian members under the *Royal Canadian Mounted Police Act*. The representations do not specifically address TBS's multiple plan proposal. As such, I have not considered them, or made a determination regarding TBS's objection that the individual is not a non-unionized employee covered under the CPA but a member of the Royal Canadian Mounted Police, represented by the Union of Safety and Justice employees.

c. Description of procedure

[7] The process for deciding an application for multiple plans is not an adversarial one where the Commissioner must rule in favour of one party or the other. Instead, the *Act* directs the Commissioner to give affected parties an opportunity to make representations regarding the application and provides the Commissioner with the discretion to set the procedure for doing so.

[8] For multiple plan applications such as this, the preferred procedure is an efficient one in order to permit the parties to begin the work of establishing a pay equity plan(s) as quickly as possible. To give effect to that, the Commissioner's default process is to decide the matter based on the written record, which was comprehensive in this case. TBS's willingness to proceed on the written record contributed greatly to curtailing delays.

[9] Along with standard procedural steps like case conferences and the granting of extensions of time on consent, this case presented several novel procedural steps, including the need to develop a process for receiving the statutorily required representations of non-unionized employees and my appointment as Commissioner. Each of these steps has proceeded in as timely a manner as possible, taking into account the impact of the process on the amount of time remaining for the employer to meet the September 2024 legislated deadline for posting a pay equity plan. In addition to that critical consideration, the time taken to resolve this matter reflects the nature of the application, the statutory requirement for me to give affected parties (including non-unionized employees) an opportunity to make representations, the volume of the parties' representations, the interpretation of novel legislation and my choice to provide the parties an opportunity to ensure their submissions responded to emerging jurisprudence interpreting this new *Act*.

d. Summary of decision

[10] Establishing multiple plans is an exception to the rule under the *Act* that an employer must create a single pay equity plan for its entire workforce (section 12). The applicant, TBS in this case, bears the burden of providing sufficient arguments and evidence to pass the threshold question of whether there are enough male comparators for a comparison of compensation to be made, and then to

demonstrate that the proposed multiple plans are appropriate to proactively redress systemic pay-based gender discrimination and achieve pay equity in its workplace.

[11] Having carefully considered the materials filed by TBS and the representations of the affected parties, the application to establish three pay equity plans for the CPA is denied for the reasons that follow.

II. ISSUES

[12] This application raises the following key issues regarding whether to authorize the establishment of multiple pay equity plans for the CPA:

- Should the application be denied on the threshold question – are there enough male comparators?
- Is it appropriate to grant the application in the circumstances?

[13] Each of these issues is analyzed in turn below.

III. ANALYSIS AND DECISION

a. Should the application be denied on the threshold question – are there enough male comparators?

i. Employer organizes and classifies the work in the CPA

[14] TBS is the employer responsible for over 70 organizations, each of which is part of a minister's portfolio. There are approximately 252,000 employees in the CPA who work for these organizations in locations across the country and abroad. The scope of work that these employees provide in the service of Canada is immense.

[15] There are 16 bargaining agents certified under the *Federal Public Sector Labour Relations Act* (FPSLRA) to represent approximately 240,000 employees in the CPA who are covered by 27 collective agreements. These are:

- Public Service Alliance of Canada (PSAC);
- Professional Institute of the Public Service of Canada (PIPSC);
- Canadian Association of Professional Employees (CAPE);
- Association of Justice Counsel (AJC);
- Association of Canadian Financial Officers (ACFO);
- Canadian Union of Public Employees (CUPE);
- Canadian Federal Pilots Association (CFPA);
- Canadian Military Colleges Faculty Association (CMCFA);
- Canadian Merchant Service Guild (CMSG);
- Federal Government Dockyard Chargehands Association (FGDCA);
- Federal Government Dockyard Trades & Labour Council (East) (FGDTLC (EAST));
- Federal Government Dockyard Trades & Labour Council (West) (FGDTLC (WEST));
- International Brotherhood of Electrical Workers (IBEW);

- Professional Association of Foreign Service Officers (PAFSO);
- Union of Canadian Correctional Officers (UCCO-CSN);
- UNIFOR/ Canadian Air Traffic Control Association (CATCA).

[16] The remaining approximately 12,000 employees are non-unionized.

[17] Compensation and terms and conditions of work in the CPA are either bargained collectively under the FPSLRA regime or, in the case of non-unionized employees, set unilaterally by TBS.

[18] TBS has sole responsibility for the organization and classification of work in the CPA; it cannot be bargained. Employees in the CPA occupy a unique position to do a certain type of work or job, which is described in a job description. Those jobs are rolled up into occupational groups based on the nature of the functions they perform. Each job falls under only one occupational group. These occupational groups are then given classifications, some are further divided into sub-groups. These classifications are then assessed and evaluated to establish the appropriate value levels, ranging from entry-level to expert. The standards for evaluating these classifications differ from one another, which prevents direct comparisons. It is important to note that these job evaluation standards are used to establish a hierarchy of work. As such, another job evaluation methodology is needed to implement pay equity in the CPA.

ii. Estimated gender predominant job classes in the CPA

[19] The *Pay Equity Act* is clear that positions in the CPA that are at the same group and level comprise a single job class (section 34). The gender predominance of a job class can be determined a variety of ways, including looking at current and historical incumbency as well as gender stereotyping (sections 36 and 37). The threshold for gender predominance is 60%. That is, a job class is considered female predominant based on incumbency when at least 60% of the positions in the job class are occupied by women or were historically occupied by women.

[20] TBS has preliminarily identified 626 job classes across the CPA for the purposes of the *Act*, of which it estimates 178 are female, 350 are male and 98 are gender neutral. It sets out that the proposed plans would include the following gender predominance, recognizing that these are estimates for the purpose of the application and that a pay equity committee will need to identify job classes and gender predominance as part of its work:

- **Plan 1**: 145,000 employees approximately: 81 female job classes, 177 male job classes, 31 neutral job classes;
- **Plan 2**: 47,000 employees approximately: 60 female job classes, 57 male job classes and 41 neutral job classes; and
- **Plan 3**: 60,000 employees approximately: 37 female job classes, 116 male job classes, 26 neutral job classes.

[21] TBS submits that there would be enough male predominant job classes under each of the proposed plans to allow for comparison of compensation. It claims that the predominantly male job classes under each of the proposed plans represent a variety of work, expertise and rates of compensation, which it anticipates will translate into a range of values of work.

[22] PIPSC and CAPE argue that TBS has not provided convincing evidence that the male job classes in each proposed plan are sufficient comparators in terms of quality. They argue that the concept of "equal value" is diluted if a pay equity committee is only looking narrowly at certain jobs rather than at all jobs across the CPA.

[23] AJC argues that TBS has not met the onus of demonstrating there would be enough male comparators across its proposed plans. It asserts that while the quantity of male comparators in Plan 3 could be sufficient, they are nonetheless insufficient because they leave a female predominant job class without a "quality" male comparator.

[24] Similarly, PSAC does not dispute the sufficiency of the quantity of male comparators in each plan but it does challenge their quality. It argues TBS has not provided enough information and evidence to show that the male comparators in each plan would be broad enough to be representative of the CPA as a whole for the purposes of the pay equity exercise.

iii. Are there enough predominantly male job classes in each of the proposed plans?

[25] Subsection 30(5) establishes a threshold of "enough predominantly male job classes for a comparison of compensation" and obliges the Commissioner to deny a request for multiple plans if she of the opinion that this threshold is not met. The framework for analyzing this threshold was set out in *Canadian National Railway Company and Unifor, United Steelworkers, International Brotherhood of Electrical Workers, and Teamsters Canada Rail Conference – Multiple Plans* (December 8, 2022), Ottawa ARDA-2022-0002 (PEC-CHRC) (CN Decision) (see paragraphs 22 to 28).

[26] In the CN Decision, I stated that the *Act* must be given a broad and liberal interpretation because of its quasi-constitutional status as human rights legislation. I concluded that the term "enough" indicates an amount that is more than one predominantly male job because the term "at least one" is used elsewhere in the *Act* to set a minimum of male comparators to determine the value of work (CN Decision, paras 23-24). I also explained that the question for the Commissioner to answer at this first stage is whether multiple plans would make it impossible to fully satisfy the comparison of compensation between predominantly male and predominantly female job classes because of an insufficient number of predominantly male job classes in each of the proposed plans.

[27] The comparison of compensation is effectively the final step in creating a pay equity plan under the *Act*. As TBS details, there are many steps (i.e. identifying job classes, determining gender predominance, valuing work, calculating compensation) that a pay equity committee must finalize leading up to it. Looking at the estimated number of male job classes for each of the three proposed plans, I accept that there is a sufficient quantity of male comparators.

[28] Some of the bargaining agents called the quality of those male comparators into question. They point to both the lack of direct comparators within a plan as well as the non-representative nature of each plan.

[29] For example, the AJC relies on the conclusion of the *Expert Report on the proposal by the Treasury Board to create three separate pay equity plans for the Core Public Administration* prepared by Wendy Glaser and Meredith Parker of KPMG LLP dated January 2023 (KPMG Report) that a female Legal Practitioner (LP) job class in Plan 3 may be without a male comparator since there do not appear to be

any male job classes of equal value in the Plan. The KPMG Report did expect that at least two job classes in Plan 3 would likely be valued higher and several valued lower. It suggested that there would likely be male comparators of equal value in proposed Plan 2 and identified four job classes that could be appropriate male comparators. TBS responds to this by noting that the *Act* does not require a "job-to-job" comparison method, rather it requires the use of either the equal line or the equal average method for comparing male and female job classes. It says that both methods allow for the comparison of job classes even if no direct male comparators exist and that it is not necessary to find one or more comparators with the same value of work as each female job class. It asserts that Plan 3 contains enough male comparators to allow for the equal line method to be used.

[30] I accept TBS's assertion that if the equal line method is used to compare male and female regression lines tied to value and rates of pay within multiple plans, the equal line method allows for an extrapolation of values of work such that there would be male comparators at the high end of the range for comparison. For example, looking at the AJC's argument that the LP-03 job class may be without a male comparator, it appears that since it would be part of the female regression line in Plan 3, it would be compared against the male regression line in that plan, which would be plotted to include all of the male job classes with values ranging from those below the LP-03 job class to those above it. The KPMG Report concludes that there would be male job classes with values above that of the LP-03 job class. This appears to be the same situation in Plans 1 and 2. Even if they are restricted in the variety of job classes, by taking the average of all male job classes in a Plan and comparing them with the average of all female job classes in a Plan, it appears that it is possible to complete the comparison of compensation exercise.

[31] What is being examined at this stage is whether the comparison of compensation *could* be done in each of the three proposed plans. Whether it *should* be done is examined in the next stage as part of the determination of appropriateness. As such, on the threshold question, I accept that there would be enough male comparators in each Plan such that the application need not be denied at this stage. Instead, the analysis turns to whether or not it is appropriate to do so given the evidence that TBS has presented.

b. Guiding principles for analyzing the appropriateness of multiple plans

[32] As I stated in the CN Decision, "[i]f the threshold question has been satisfied, section 107 gives the Commissioner the authority to authorize the establishment of multiple pay equity plans upon meeting prescribed criteria" (para 29). Those criteria are:

- The workplace parties whom the Commissioner considers would be affected by the application have been given the opportunity to make representations;
- The application has not been denied on the threshold question of whether there are enough male comparators; and
- The Commissioner is of the opinion that it is appropriate in the circumstances.

[33] I observed that, "[e]ven though there may be enough male comparators in each proposed pay equity plan to enable a comparison to be made between the male predominant and female predominant job classes of equal or comparable value, the Commissioner may nevertheless determine that it is not appropriate to grant the application based on the facts of the case" (CN Decision, para 30).

[34] I also set out several guiding principles for analyzing what will be considered appropriate in the circumstances (CN Decision, paras 31 to 34):

- There are no fixed categories in which multiple plans will be appropriate and each application turns on its merits;
- The impact multiple plans will have on reinforcing occupational gender segregation is an important consideration; and
- It is crucial to assess whether the proposed multiple plans will proactively redress systemic pay-based gender discrimination in the workplace.

[35] TBS and the affected parties were all given copies of the CN decision in time for them to consider any impact it might have on their representations.

[36] In its application and representations, TBS offered six grounds to show why the multiple plans it proposes for the CPA should be authorized. While TBS did not have the CN Decision when it filed its application, it did acknowledge in its reply that the grounds set out in its application demonstrate that multiple plans would be the most effective option in line with the CN Decision. The bargaining agents' representations, which included several expert reports, respond fully or partially to these grounds.

c. Do TBS's six grounds demonstrate that deviating from the *Act*'s default of a single pay equity plan is appropriate in these circumstances?

i. Will a single pay equity committee be extremely challenging and require a significant amount of dispute resolution?

Positions

[37] TBS states that developing multiple plans would be the most effective option given the size of a single committee for the CPA, which would have a minimum of 18 members including representatives from the employer, the bargaining agents and non-unionized employees. It states that the size and composition of a single committee will present obstacles for reaching unanimous agreements on important pay equity steps and will likely need a significant amount of dispute resolution.

[38] The bargaining agents unanimously agree that there is no evidence to support deviating from the requirement that a single pay equity committee develop a single pay equity plan for the CPA. They disagree with TBS' argument that multiple plans would be more efficient. For instance, PIPSC and CAPE allege that there is no evidence that carving out two of the bargaining agents into their own plans (Plan 1 and Plan 2) and combining the remaining 14 bargaining agents into Plan 3 would be more effective. PIPSC and CAPE claim that TBS does not explain how the Plan 3 committee, with 16 members, will overcome the challenges alleged to be facing a single committee with 18 members.

[39] PSAC argues that the fact that the plan will be challenging to administer is not a valid basis to depart from the presumption of a single plan. AJC states that when it comes to challenges with finalizing each step with a large, single committee, the *Act* provides that the employer has the final say if employee representatives cannot agree. It argues that this encourages employee representatives to work together.

[40] ACFO claims that the pay equity exercise is not a negotiation in the same way as collective bargaining and that the *Act* and the *Pay Equity Regulations*, SOR/2021-161, demonstrate it should be a collaborative effort.

The *Act*

[41] The *Act* prescribes the minimum membership for a pay equity committee. Section 19 of the *Act* provides that, at a minimum, the committee must be composed of three members and that:

- At least two-thirds of its members must represent employees;
- At least 50% of its members must be women;
- At least one member must represent the employer;
- In a unionized workplace, each bargaining agent must select at least one member; and,
- If there are non-unionized employees, at least one member must be selected by those employees.

[42] The *Act* also establishes a process to support committee decision-making (section 20). If a pay equity committee is unable to reach consensus on an issue, they may conduct a vote, provided that quorum is met. The employer and employee representatives each, as a group, hold one vote. If employee representatives cannot, as a group, reach a unanimous decision on an issue, they forfeit their vote and the employer representatives' vote prevails.

[43] In the event that representatives cannot resolve an issue related to a step in the pay equity exercise internally within the committee, the *Act* provides recourse to the Commissioner who must assist with resolving matters in dispute (sections 147 and 154).

Analysis

[44] None of the affected parties contested TBS's estimate that at a minimum, a single pay equity committee would have 18 members and likely more since each representative is expected to invite more members. As such, when comparing the single pay equity committee with the proposed multiple pay equity committees, this composition is used.

[45] TBS's position is rooted in its past experience with its bargaining agents. It describes a single committee as requiring "multilateral negotiations" with members who have diverging interests that would make the discussions contentious and protracted. It concludes that this will often result in a situation where, when a vote is taken on an issue, the members representing employees will not be able to agree and the position of the employer will carry the day. Instead, it asserts that with the proposed three plans the resulting three committees would be more functional because there would only be one bargaining agent in each of the committees for Plan 1 and Plan 2, allowing for what it describes as "bilateral negotiations". It sees this as advantageous because it eliminates the possibility of the employer vote prevailing and negotiated solutions would be found.

[46] Despite this, TBS does not substantiate its claim that the proposed approach will decrease the need for dispute resolution. It actually appears that with the bilateral nature of the committees for Plans 1 and 2, any disagreement on a step in the process will result in a tie vote and a "matter in dispute" in

need of resolution, by the Commissioner or otherwise. Contrast this with a single committee where, as TBS correctly observes, the employer's vote will prevail in the face of any disagreement between the employee representatives leaving only those situations where there is a tie vote in need of dispute resolution. As such, if TBS is correct and the employee representatives will not unanimously agree at various stages in the process, the need for dispute resolution should decrease in a single pay equity committee because the employer's position will carry the day. In this way, this provision of the *Act* serves as an incentive for employee representatives to collaborate in a single committee.

[47] Furthermore, TBS claims that the workload would be more manageable for the Plan 3 committee even if it includes 14 bargaining agents. It highlights that while it aims to foster multilateral negotiations on shared interests with its bargaining agents, its experiences in collective bargaining have shown that even "bilateral negotiations" are challenging with different bargaining agents having different approaches, priorities and history. It is concerned that for a single committee that must carry out the sequenced pay equity process, these differences will make it challenging to advance negotiations and reach an agreement. It is particularly concerned about this in the context of deciding which job evaluation method to use. It offers examples of joint efforts pursuant to certain collective agreements that broke down at the last minute (e.g. Employee Wellness Support Program) to demonstrate this risk. It also raises the lack of success in past efforts to reform the classification system in the CPA (e.g. Universal Classification System (UCS), the Universal Job Evaluation Plan (UJEP)) to show that a single committee is not appropriate because multilateral negotiations in those processes were contentious, took a great deal of effort and time, and were not easily or amicably achieved. In the case of the UCS process, it noted that PIPSC withdrew.

[48] Several bargaining agents disagree with TBS's characterization of these joint efforts. For example, PIPSC and CAPE say that unsuccessful joint attempts to reform the classification system in the past are not evidence that the process under the *Act* to establish a pay equity plan with a single pay equity committee is doomed to fail. PIPSC and CAPE retained Paul Durber, a pay equity and compensation expert, who prepared the *Report on the Treasury Board of Canada Secretariat's Application for Multiple Pay Equity Plans in the Core Public Administration*, dated January 2023 (Durber Report). The Durber Report states that the Joint Union Management Initiative (JUMI) pay equity exercise of the 1980s demonstrates that these parties have in fact succeeded in evaluating job classes for pay equity purposes (under the former complaints-based regime of the *Canadian Human Rights Act*) across the CPA. The Report notes that the process in that case was voluntary and lacked the mechanisms, like the employer vote prevailing, that define the *Pay Equity Act*.

[49] PIPSC, CAPE, and PSAC state that the JUMI was not a failure, and that its methodology was found to be reliable by the Canadian Human Rights Tribunal (CHRT) in a decision that was upheld by the Federal Court on judicial review (*Public Service Alliance of Canada v. Canada (Treasury Board)*, 1996 CanLII 1874 (CHRT) (PSAC 1996, CHRT) at para 804, aff'd by *Canada (Attorney General) v. Public Service Alliance of Canada*, 1999 CanLII 9380 (FC), [2000] 1 FC 146 (PSAC 1999, FC)).

[50] PSAC also states that the UCS and UJEP exercises can be distinguished since they were efforts to overhaul the entire classification system. It also highlights that each previous joint process was voluntary. It claims that creating a single pay equity plan by following the process set out in the *Act* is a far less daunting task than developing a single classification and pay structure for the federal public service. PSAC retained Philip Johnson, Vice President for Korn Ferry and leader of its global job

evaluation practice, who prepared the *Expert Submission with respect to the Treasury Board Secretariat's Application for Multiple Pay Equity Plans for the Core Public Administration*, dated January 2023 (Johnson Report). The Johnson Report supports PSAC's position that different classifications and collective agreements can co-exist under a single pay equity plan. Specifically, the Johnson Report says that the pay equity process should be seen as akin to a periodic audit applying a gender-neutral methodology to compare wages across those classifications and collective agreements. In this way, each occupational group can continue with its own classification standard on a day-to-day basis.

[51] I find that the fact that previous joint efforts did not succeed does not logically lead to the conclusion that the three pay equity committees proposed by TBS are appropriate for achieving pay equity in the CPA. The pay equity process is a legislated obligation with responsibility placed, to varying degrees, on all workplace parties. There are dispute resolution and enforcement mechanisms in place to ensure that the exercise is completed. There is no evidence to show that any of these existed for those previous exercises.

[52] Additionally, TBS takes the position that each step in the pay equity process will be hard in a single committee because of the volume of job classes (i.e. more than 600) in the CPA. It is especially concerned about the challenge of deciding on a job evaluation tool given the multiple sub decisions related to the type of tool and its design that need to be made. PSAC raises that this argument against a single committee applies equally to TBS's proposed three plans.

[53] TBS posits that the proposed multiple plans will mitigate this challenge and allow consensus to be reached with greater ease. This seems to be because TBS would only have to work with one bargaining agent under both Plans 1 and 2. However, TBS does not explain why negotiations with those specific bargaining agents would succeed, beyond stating that they would allow for an interest-based approach. While it states that this would lead to more collaborative and productive discussions, to finding negotiated solutions, and to developing the plan with minimal delay, its position is largely based on speculation about how discussions will unfold in a large group. As PIPSC and CAPE underline, TBS does not demonstrate how multilateral negotiations with 14 bargaining agents in Plan 3 will succeed when facing all of the challenges TBS identified with 16 bargaining agents in a single plan.

[54] There is no doubt that internal disagreement between employee representatives on how to proceed would have the potential to thwart the work of a committee. Since the employer is ultimately responsible for the outcome of the pay equity exercise (i.e. increasing compensation), it is understandable that this would be a concern. However, as discussed above, Parliament sought to prevent this situation from occurring by including in the *Act* that the employer representatives' vote prevails in situations where the employee representatives cannot agree. Also, while it is not a desirable outcome, the *Act* has provisions that allow an employer to develop a pay equity plan without a committee in the event that it becomes dysfunctional. As I held in the CN Decision, the fact that a large committee will be challenging is not a sufficient reason to override the presumption of a single plan:

> The legislators were undoubtedly alive to the challenges of creating one pay equity plan in large organizations. Yet, that is what is required by the legislation. Any exception to this requirement must be carefully applied. When it is apparent that the proposed plans are contrary to the purpose of the *Act*, it is not appropriate to grant approval for the proposal. (CN Decision, para 58)

[55] Similarly, in this case I find the fact that a single pay equity committee may be challenging, or may require the parties to rely on the *Act*'s various mechanisms for breaking impasses and resolving disputes, is not a sufficient reason to override the *Act*'s presumption of a single plan, particularly in light of my conclusions below about the impact of the proposed three plans on the pay equity exercise overall.

ii. Is a single plan likely to significantly increase the time required to implement proactive pay equity?

Positions

[56] TBS states that it will take a significant amount of time to develop a pay equity plan for the CPA, noting that this is true whether it is a single or three plans. It points to the arguments above, related to the challenges of a single committee, to support its claim that three plans would take less time than one.

[57] The bargaining agents took issue with TBS's position. For example, PIPSC and CAPE argue that there is no evidence that a single plan would be more efficient. PSAC states that TBS's claim is undermined by the fact that its proposed three plans will also take significant time to administer and questions whether TBS will allocate triple the resources to the exercise. It also comments that the parties should have the opportunity to attempt to implement a single plan before concluding it is not feasible. AJC states that it is not possible to accurately assess the time commitment for single or multiple plans. ACFO states that TBS's argument is speculative and that it should not benefit from its own lack of organization and not using the early-engagement process effectively.

The *Act*

[58] The timelines under the *Act* are strict. Employers have three years, beginning on the day that they became subject to the *Act*, to post the final pay equity plan and three years plus one day to start increasing compensation, if required (sections 55 and 60). While the *Act* permits the Commissioner to extend the time for posting a pay equity plan (section 57) it also requires interest payments for increases in compensation owed (subsection 62(5)).

Analysis

[59] TBS says that in considering whether to use a single or multiple job evaluation tools, it engaged Professor John Kervin from the University of Toronto, who specializes in the areas of work and gender with a focus on women in the workforce, to write *The New Pay Equity Act: Comparing Single and Multiple Pay Equity Plan Formats for the Core Public Administration*, dated March 2022 (Kervin Report). TBS relies on the Kervin Report to demonstrate that a single pay equity plan in the CPA would lack specificity, be less accurate, and make the results less reliable.

[60] TBS claims that the Kervin Report shows that multiple plans are needed. However, the conclusion of the Kervin Report does not support that position. The Report concludes that on two of the three metrics related to timing, the default single plan for the CPA would be "similar or slightly better" (for development of valuation instrument) and "better" (for creation of groups) than multiple plans. The only metric where the Kervin Report indicated multiple plans would be preferred from a timing

perspective was for job evaluation, which TBS and several bargaining agents agree is a time consuming step. Job evaluation is discussed in more detail below (paragraphs 64 to 75).

[61] Both the Durber Report and the Johnson Report emphasize the speculative nature of TBS's view that it will be less time consuming to develop three plans. Durber draws attention to the fact that TBS has not provided estimates of the time it would take to develop a single plan versus three. While Johnson agrees that job evaluation is typically the most time consuming part of the pay equity process, he says that it is unclear why TBS believes developing three job evaluation plans will be less time consuming than developing one. Johnson's opinion is that a single job evaluation plan would be the quickest option.

[62] The legislators were alive to the length of time a joint pay equity exercise would take and provided three years for that process to occur. They were also alive to the diverse needs of employers and included certain flexibilities in relation to prescribed timelines.

[63] TBS has not presented any compelling evidence to conclude that the three pay equity committees it has proposed will be able to create three pay equity plans more quickly than a single committee could. The same number of jobs will still need to be evaluated and, as described in PSAC 1996, CHRT, the JUMI exercise showed that there are ways to distribute this work to different individuals or subcommittees, even within a single committee.

iii. Will a single job evaluation tool lead to decreased accuracy and reliability of pay equity results?

Positions

[64] TBS claims that using a single job evaluation tool for the entire CPA may lead to decreased accuracy and reliability of results.

[65] Several of the bargaining agents allege that the proposed multiple plans are not going to lead to a more accurate and reliable pay equity plan. For instance, PIPSC and CAPE claim that TBS's arguments are premised on the view that the smaller the pool of job classes, the more homogenous they will be, making it easier to compare their value. It notes that the reality of the proposed three plans is that each one is heterogeneous, thereby undermining that rationale. PSAC argues that TBS's position is based on many false assumptions and that a single plan can result in an accurate, reliable and acceptable outcome.

[66] AJC claims that the concerns with lack of specificity and bias are concerns inherent in all job evaluation methodologies when there is insufficient customization and training. ACFO states that TBS's position is speculative and that job evaluation tools are not limited by the number of positions being evaluated.

The *Act*

[67] The *Act* does not set out a specific job evaluation method that a pay equity committee must use. Instead, it sets out that:

- The value of work performed by a job class must be determined based on the composite of skill, effort, responsibility and working conditions involved (section 42); and
- A pay equity committee must determine the value of work of a job class using a method that does not discriminate on the basis of gender and that is able to measure the relative value of work performed in all predominantly female and male job classes (section 43).

[68] The *Act* permits a pay equity committee to use previously determined values of work for job classes provided that the method used to determine those values complies with the foregoing requirements (subsection 41(2)).

Analysis

[69] TBS's argument that multiple plans are needed to mitigate threats to accuracy and reliability is based on the Kervin Report, which compares the accuracy and reliability of "single plan" and "multiple plan" formats for the CPA. Kervin's "multiple plan format" is defined to mean:

- A set of six to twelve partial plans,
- With each job class being assigned to one plan based on work tasks that are somewhat similar and sufficiency of male comparators, and
- With each plan having its own job valuation instrument.

[70] Kervin defines accuracy as "the degree to which a measure approximates the 'true' (typically unknown) value of some attribute" (page 4). Kervin then explains that accuracy includes looking at lack of specificity in instructions and examples, contamination, omitted indicators and bias, and analyzes the risk that each of these presents in a single plan versus the multiple plans he envisions for the CPA. Kervin defines reliability as "the extent to which a measure is consistent and free from random error, i.e. free of ratings which are randomly higher or lower than the 'true' rating" (page 5) and explains that the major threat to reliability is lack of specificity. Generally, the Kervin Report states:

> Because a single CPA pay equity plan would apply to an extremely wide range of work tasks, the job valuation instructions, definitions, and examples in the single plan's job valuation instrument are more likely to be broad, general, and lack specificity. In the multiple plan format, the narrower focus of smaller partial plans suggests that definitions and examples targeted to a smaller number of job classes with somewhat similar work will likely result in more accurate and reliable measures of the value of work in each partial plan. (pages 5-6)

[71] Relying on the opinions of their experts, the bargaining agents disagree with the findings of the Kervin Report. Several highlight the misalignment between its assumptions and TBS's proposed plans. For example, the Kervin Report concludes that "Treasury Board can make a strong case for an exemption to the requirement of a single pay equity plan for the core public administration" based on comparing the advantages and disadvantages of a single plan versus six to twelve plans organized according to similar work tasks. By contrast, TBS's proposal is based on three plans organized according to bargaining agent representation.

[72] The Durber Report concludes that the Kervin Report is based on the false premise that the smaller the pool of job classes, the more homogeneous they will be making it easier to compare their value accurately and reliably. He notes that even within bargaining units and occupational groups there is heterogeneity, citing the Administrative Services (AS) and Program Administration (PM) groups as examples. This opinion shines a light on the fact that while TBS relies on the Kervin Report as justifying the need for three plans in the CPA, it offers only the arguments analyzed above (pargraphs 37 to 55 and 56 to 63) for how the risks that heterogeneity supposedly presents to a large plan will be overcome in each of the three plans.

[73] PSAC echoes that and argues that many of the conclusions in the Kervin Report directly contradict TBS's position. It notes that concerns around heterogeneity and resulting threats to accuracy and reliability apply equally to Plans 1 and 3 and the wide range of work performed in each. It also raises the fact that the way in which TBS has delineated its proposed plans separates job classes that perform highly similar work, which runs contrary to the Kervin Report's assumption that multiple plans would consist of job classes that do similar work. The Johnson Report highlights that many of the Kervin Report's concerns regarding the accuracy and reliability of a single plan are really concerns with applying a point factor rating method. Johnson notes that such a method is likely not appropriate for the CPA because of the diversity of the jobs. Instead, Johnson suggests that the point factor comparison method can be applied to a diverse set of jobs, which was shown in the JUMI exercise.

[74] PSAC also advances that the top priority for the pay equity exercise is to identify wage gaps and criticizes the approach advanced by the Kervin Report for narrowing the scope of pay equity plans and by extension the scope of available male comparators. The Johnson Report summarizes the adverse impact the Kervin Report's approach would have on addressing systemic gender based pay inequity and says that the preferred approach is to measure the true wage gap of the entire organization rather than the accuracy of job value in portions of the organization. He concludes:

> If female dominated job classes tend to be found in lower paying occupational groupings, then limiting their ability to compare themselves against work in other (higher paying) occupational groupings is a structural barrier to achieving equity. (p. 12, emphasis added)

[75] Regarding the wage gap measurement, TBS responds that an accurate regression using the male comparators requires an accurate and reliable measure of the value of work of each job class as well as the relative value of each job class. Any advantage gained with increasing the male comparator base would be significantly offset by the degradation in reliability and accuracy of the value of work measurement. It argues that its proposed three plans will allow for a better understanding of the work and increase the accuracy in the results because PSAC (Plan 1) and PIPSC (Plan 2) will have fewer job classes to assess. Further, it argues that the bargaining agents assessing those job classes will have "intimate knowledge" of them so it will be easier to understand the range and complexity of their specific plan. The other 14 bargaining agents and non-unionized members in Plan 3 can focus on "bridging their knowledge" related to a smaller group of job classes rather than having to familiarize themselves with all job classes across the CPA. In contrast, it says a single plan could lead to mistakes and inaccurate conclusions about the value of work. Despite this, TBS does not explain how the knowledge that each of these bargaining agents has about the job classes they represent will not be equally useful in a single committee or how the bridging of knowledge could not also be done with 16

bargaining agents. There will likely need to be structural and procedural safeguards in place to mitigate potential mistakes that could arise but the potential for mistakes is not itself a reason to deviate from the *Act*.

[76] Finally, the Kervin Report and the Johnson Report present different methods for valuing jobs in the CPA. As TBS notes in its application, which valuation method to use is a decision for the pay equity committee to make. Determining whether one is more suitable than the other for valuing job classes in the CPA is not before me in this application. Accordingly, Kervin's and Johnson's views on evaluation methods are considered for the limited purpose of addressing TBS's argument that multiple plans are needed in order to overcome threats to accuracy and reliability. The Johnson Report provides credible evidence that there is another method (point factor comparison, which was used in the JUMI exercise) for accurately and reliably evaluating jobs as diverse as those in the CPA.

[77] I find the Kervin Report to be of limited value in assessing TBS's application because TBS's proposal for three plans is not based on the assumptions that underpin the Kervin Report and its conclusions. While TBS points to the Kervin Report's conclusion that "multiple plans could lead to increased accuracy and reliability", its decision to create only three plans and to structure them based on bargaining agent representation rather than the assumptions in the Kervin Report undermines the conclusions of the Report. Put differently, the Kervin Report does not deal specifically with the three plans proposed by TBS.

[78] TBS asserts that its application is consistent with the Kervin Report's recommended approach and that nothing turns on the fact that the Kervin Report examined the question from the perspective of more plans than the employer ultimately applied for. I cannot agree. The assumptions on which the Kervin Report's multiple plan format are based are clearly set out in the Report. There is nothing in the Kervin Report to suggest that its conclusions are independent of its assumptions. TBS's application simply does not align with those assumptions in terms of the number of plans (it proposes three rather than six to twelve) and in terms of assigning job classes doing similar work tasks to a plan (it has assigned them based on bargaining agent representation). The Kervin Report does not examine TBS's actual proposal for three plans, and therefore does not support the proposal TBS has submitted.

[79] Related to this, I agree with the bargaining agents' experts that TBS has not satisfactorily explained how the problems of accuracy and reliability that Kervin identified as stemming from the heterogeneity of the core public administration would be addressed under TBS's proposal.

[80] Based on the evidence presented by TBS, I cannot conclude that the three plans proposed by TBS will result in greater accuracy and reliability of pay equity results than would be achieved by a single plan.

iv. Will a single pay equity plan lead to decreased acceptance of results?

Positions

[81] TBS takes the position that a large, single pay equity committee could lead to a lack of employee acceptance of the pay equity plan, which could lead to employee complaints contesting the plan.

[82] PSAC argues that employees are far more likely to reject the results of a pay equity plan that departs from the default requirements of the *Act*. ACFO similarly claims that it is more realistic to expect a challenge to the results of three plans, by three different committees with three different job evaluation tools.

The *Act*

[83] In the situation where a pay equity committee develops a pay equity plan, employees covered by the pay equity plan can make a complaint to the Commissioner in a variety of circumstances (sections 149 and 152). However, there are limitations on the basis for complaints. For example, they cannot make a complaint regarding the establishment of the pay equity plan.

Analysis

[84] In support of its position, TBS argues that negotiating each step in a single committee will likely make decision-making more demanding, lengthy and contentious. As discussed earlier, it expects that this will result in the employer vote prevailing and the need for intervention from the Commissioner. Citing PIPSC's withdrawal from the UCS, TBS claims the results would have been unacceptable to PIPSC's members. TBS also cites the 1996 report from the Office of the Auditor General for the claim that the government has attempted for many years to reform the classification and job evaluation system in the federal public service and attempts at reform could not be implemented without unmanageable disruption. It states there is a risk that this situation could occur again with the pay equity exercise. It alleges that its proposed three plans would alleviate that risk of non-acceptance by creating three "more manageable groups".

[85] However, TBS provides no evidence to explain how this risk could materialize in the context of the *Act*, which places specific obligations on bargaining agents and, under subsection 151(2) gives the employer the right to complain to the Commissioner if a bargaining agent is acting in a bad faith, arbitrary manner or discriminatory during the pay equity exercise.

[86] The concerns regarding the employer vote prevailing were analyzed earlier (paragraphs 45 to 46) and that analysis equally applies here. The fact that the *Act* allows for the employer vote to prevail in situations where employee representatives on a committee disagree, is not itself a reason to deviate from the requirements of the *Act*.

[87] TBS's argument that employees are more likely to accept the results of multiple pay equity plans is based on speculation. One could equally speculate, as ACFO argues, that employees would not accept a multiple plan process that denies employees in female job classes from having their wages compared with high paying male job classes simply because they are represented by different bargaining agents. With all of the protections the *Act* affords all parties, employees are at least as likely to reject the results of a process that departs from the requirements of the *Act* as they are one that is created using the mechanisms of the legislated regime.

v. Will a single plan contradict the existing community of interest structure and cause disruption in current labour relations?

Positions

[88] TBS argues that the *Act* effectively creates a second mechanism for wage-setting in the CPA, with the first mechanism being collective bargaining. It claims that developing a single plan would disrupt labour relations and contradict the existing community of interest structure.

[89] Several bargaining agents respond that the proposal does not reflect the existing community of interest structure. For example, PIPSC and CAPE state that while Plans 1 and 2 mimic collective bargaining relationships, there is no logical argument in relation to Plan 3. It also alleges that separating job classes into the proposed three plans prevents comparisons between groups that would otherwise have a community of interest. AJC claims that community of interest played at most an ancillary role in determining the scope of the existing bargaining units because they flow from TBS's internal classification plans.

[90] PSAC argues that Parliament structured the *Act* to be distinct from the collective bargaining regime under the FPSLRA.

[91] ACFO claims that it is unclear how a single plan would cause disruption to the current labour relations regime but multiple plans would not, particularly because the proposed Plan 3 includes a mix of various bargaining units.

[92] The AJC argued Parliament has already sub-divided the federal public administration in its definitions of "employers" for pay equity purposes under section 3 of the *Act*, and I should not further subdivide the CPA.

The *Act*

[93] It bears repeating that the *Act* is a piece of human rights legislation aimed at addressing gender-based discrimination in the compensation practices and systems of employers. The *Act* specifically addresses the interaction of the pay equity process with collective agreements by requiring two things: that if there is inconsistency between the results of the pay equity plan and the collective agreement, that the pay equity plan prevails; and that any increase payable under the plan is deemed to be part of the collective agreement (section 95).

Analysis

[94] TBS explains that it engages in collective bargaining bilaterally with the bargaining agents. By contrast, the *Act* requires that it engage with all bargaining agents in a single committee, which it sees as requiring multilateral negotiations with these same bargaining agents. It puts forward the argument that its proposed three plans make the employer and the bargaining agents accountable for any wage discrimination resulting from collective bargaining without introducing opportunities for "free-riding", while decreasing disruption to future rounds of collective bargaining. It asserts that the proposed three plans would better align pay equity and collective bargaining. To support this assertion, TBS cites a 2002 presentation by Professor Paul Weiler to the Bilson Task Force for his view that it would be inconsistent with the aims of the *Canada Labour Code* to permit female employees to benefit from the collectively

bargained gains made by employees of other bargaining units, and for his argument against an approach to pay equity that would compare contrasting bargaining results.

[95] PSAC contends that by recommending that federal proactive pay equity legislation be characterized as human rights legislation rather than collective bargaining legislation in *Pay Equity: A New Approach to a Fundamental Right*, Pay Equity Task Force Final Report 2004, author Chairperson Beth Bilson, Q.C (Bilson Task Force Report), the Bilson Task Force wholly rejected the position advanced by Weiler over two decades ago. Instead, it recommended the following:

> 16.1 The Task Force recommends that the new federal pay equity legislation provide that the process for achieving pay equity be separated from the process for negotiating collective agreements.

[96] In arriving at that recommendation, the Task Force stated:

> We are of the opinion that the system which is established under the new pay equity legislation should not privilege collective bargaining relationships, or unnecessarily restrict the range of comparison which can be used as part of the process for achieving pay equity. […]
>
> In our view, the configuration of bargaining units as they now exist cannot be relied on to provide a sound basis for conducting the unbiased examination of compensation patterns which is necessary for the elimination of wage discrimination. (page 449)

[97] Given what has transpired since Weiler's paper was presented, I cannot rely on his rationale as a justification for interpreting the *Act* in a way that contradicts the *Act*'s objective.

[98] As the Johnson Report explains, the *Act* consciously disrupts collective bargaining. The fact of that disruption should not be used as a justification to deviate from the requirements of the *Act*. The existence of a provision in the *Act* that speaks to the effect of the pay equity process on collective agreements (section 95) demonstrates that the legislators turned their mind to the interplay between the two and decided not to structure pay equity plans based on bargaining units. As I stated in the CN Decision:

> The *Act* does not distinguish between unionized and non-unionized employees and provides mechanisms for determining the total compensation of all employees in a way that permits employers and pay equity committees to address differences in compensation, and methods of compensation, even if they are the result of collective bargaining. (CN Decision, para 57)

[99] ACFO argues that the issue of the role labour relations and collective agreements play in pay equity complaints has been addressed by the Federal Court of Appeal and upheld by the Supreme Court of Canada in *Canada (Human Rights Commission) v. Canadian Airlines International Ltd*., 2006 SCC 1 (Canadian Airlines). As discussed in the CN Decision, *Canadian Airlines* put to rest the view that pay equity legislation should be interpreted in a way that favours comparisons based on bargaining unit structures, since such an interpretive approach "would turn collective bargaining into a tool to consolidate discriminatory practices" (*Canadian Airlines*, para 41, cited in CN Decision, para 57).

[100] As well, as AJC shows, the concept of community of interest that exists in private sector collective bargaining where labour boards have the exclusive mandate to determine the appropriate unit for collective bargaining is not the same for the CPA. The existing bargaining unit structure in the CPA was shaped by the historic requirement of allowing only a single occupational group within a bargaining unit, regardless of whether its employees shared a community of interest with another group. The result is that the present scope of each bargaining unit essentially flows from TBS's internal classification plan. The AJC contrasted this to the situation for separate agencies, where the Federal Public Sector Labour Relations and Employment Board has the mandate to determine the appropriate bargaining unit structure and where it has repeatedly determined that broad based units are preferred since public servants within each agency share a community of interest.

[101] The AJC argued that several sections of the *Act*, including the definition of employers, demonstrate that Parliament turned its mind to how to address the complexities of pay equity in the federal public service. It argues that, since the definition of "employer" in subsection 3(2) of the *Act* already divides up the public service, I should not grant an application that further sub-divides it. TBS states that there is nothing in the *Act* preventing it from applying for multiple plans and if Parliament intended to preclude it from applying, this would be clearly set out in the *Act*. I interpret the *Act* to provide, quite simply, that TBS is subject to the same single plan presumption as all other employers, and that it is entitled to apply for multiple plans for the CPA pursuant to subsection 30(1).

[102] As TBS notes, that the Bilson Task Force Report acknowledged that it should be possible for TBS to apply for a delineation of more than one pay equity unit within the public service. However, the Bilson Task Force Report was silent on what that delineation might look like. It did not suggest that any delineation of multiple plans in the public service would be appropriate. Under the *Act*, the applicant must demonstrate to the satisfaction of the Commissioner that the multiple plan request is appropriate in the circumstances and consistent with the purposes and goals of the *Act*.

[103] Although TBS urges me to authorize an approach that would align pay equity plans to the CPA's bargaining structure, its own proposal only creates labour relations alignment for two of the 16 bargaining agents (i.e. PSAC in Plan 1; PIPSC in Plan 2). It groups all of the other 14 bargaining agents together into Plan 3, which bears no relationship to collective bargaining structures in the CPA.

[104] Finally, I have considered TBS's argument that aligning the pay equity exercise with existing labour relations structures is consistent with the purpose in section 2 of the *Act*, which includes "taking into account the diverse needs of employers".

[105] In my view, the phrase "while taking into account the diverse needs of employers" in section 2 reflects that the *Act* is constructed so as to provide for departures from the legislative standard in many different situations. By permitting employers to apply to the Pay Equity Commissioner to vary the standard application of the *Act* in different situations, the legislation permits the Commissioner to take into account the diversity of the employers the *Act* is designed to regulate. The very fact of considering the particular circumstances of an employer, rather than applying a "one size fits all" approach is consistent with the *Act*'s purpose of "taking into account the diverse needs of employers".

[106] Nonetheless, when it comes to the issue of whether multiple plans would be appropriate, the outcome must always consider the impact on pay equity. Section 2 provides two interpretive principles

for the *Act*: to proactively achieve pay equity while taking into account the diverse needs of employers. However, if taking into account the needs of an employer would impede the achievement of pay equity, it cannot be said that the purpose of the *Act* has been fulfilled.

[107] For all of the reasons above, I do not find that it would be appropriate to grant TBS's application in order to align the pay equity exercise with the existing community of interest structure or to decrease disruption to future rounds of collective bargaining for the CPA.

vi. Is developing a single plan for an employer as large and complex as TBS unprecedented?

Positions

[108] TBS claims that the development of a single plan for a workforce as large and diverse as the CPA would be unprecedented. Several of the bargaining agents, including PSAC and ACFO, claim that this is overstated.

Analysis

[109] TBS asserts that there is no precedent for developing a single pay equity plan for an employer of its size and complexity. It relies on the requirement under the Ontario *Pay Equity Act* and the option under the Quebec *Pay Equity Act* to establish multiple plans in certain situations involving certified bargaining agents. It states that a precedent has been set for provincial employers and that developing a single plan for TBS's large workforce would be unprecedented.

[110] I accept that a single pay equity plan of this magnitude is likely unprecedented. The CPA is a unique workforce in the federal jurisdiction and in Canada more broadly. While the Johnson Report points to some examples of large and diverse organization who operate with a single job evaluation plan, none are a perfect match for the size and complexity of the CPA.

[111] However, there is precedent for undertaking a large scale evaluation of jobs in the CPA. The JUMI exercise in the 1980s did produce evaluation results that the Canadian Human Rights Tribunal found sufficiently reliable (PSAC 1996, CHRT, upheld on judicial review, PSAC 1999, FC).

[112] Despite TBS's concern that history will repeat itself, the JUMI exercise offers useful lessons and experiences from which the present parties can learn for how to carry out their work collaboratively in a pay equity committee. As the Durber Report explains, the JUMI produced a significant number of comparative value decisions over a two-year period. In that way, it did achieve its purpose of producing gender bias free evaluations for a large and complex workplace. TBS provided no evidence to contradict this conclusion.

[113] Certainly, the JUMI process was marked with procedural challenges, as detailed in the PSAC 1996, CHRT decision. In discussing some of those challenges, the CHRT recognized the study and implementation of equal pay for work of equal value at that time in Canada was a relatively new discipline that was still in the developmental stage (PSAC 1996, CHRT, para 728). Today, that is no longer an accurate characterization of the state of pay equity in Canada. In the intervening almost 30 years, several key events occurred to advance the study and implementation of pay equity. For example: proactive pay equity continued to develop in Ontario; proactive pay equity legislation was introduced in

Quebec in 1996; the Bilson Task Force Report was released in 2004; and, greater attention has been given to addressing the gender wage gap in Canada.

[114] Both the Ontario and Quebec laws were studied by the Bilson Task Force and were undoubtedly taken into consideration in its recommendations. Despite the existence of these models in the provinces, Parliament chose a default requirement of a single plan per employer, including for the CPA. To use those provincial laws and their approach to multiple plans as a reason to grant an exemption from that requirement would be incongruous with the scheme of the *Act*.

[115] That a single pay equity plan for the CPA will be "unprecedented" does not mean that the multiple plans as proposed are appropriate in the circumstances. The *Act* creates a novel proactive pay equity regime that will ensure that women and men working in federally regulated workplaces receive equal pay for work of equal value. This requires unprecedented action on the part of all federal employers.

d. Would TBS's proposed multiple plans be gender neutral?

[116] Several bargaining agents have raised concerns about the gender neutrality of TBS's proposed plans. Some of these concerns were raised as an objection to the threshold issue of whether there are "enough" male comparators to grant the application. As set out above, TBS has met the relatively low threshold for establishing that there would be enough male comparators in each plan.

[117] However, the question of whether the resulting plans would be overall gender neutral, or would be sufficiently representative of a range of work and values in the CPA, is highly relevant to my consideration of whether it is appropriate to grant the application in the circumstances.

Positions

[118] PSAC represents employees working in the largest female predominant job classes in the CPA, including: Administrative Services (AS), Clerical and Regulatory (CR), and Program Administration (PM) classifications. PSAC claims that these job classes will be precluded from comparison with approximately half of the male predominant job classes in the CPA, including professional job classes in Plan 2 and job classes involving executive and management functions in Plan 3.

[119] PIPSC and CAPE allege that segregating two groups of employees organized by their bargaining agents (Plan 1 and 2) away from remaining employees (Plan 3) would significantly limit the number of available comparators. Particularly, they claim that isolating clerical and administrative positions in Plan 1 (PSAC) from employees who may have similar jobs and functions in Plans 2 and 3 prevents them from being accurately compared and may entrench occupational segregation. The Durber Report provides examples of comparators that would be lost in the proposed multiple plan approach.

[120] AJC also alleges that Plan 3 is unbalanced as it contains insufficient male predominant job classes. Both ACFO and AJC claim that the proposed plans will have the result of keeping similar job classes separate from one another, and raise concerns about occupational groups that will have insufficient comparators.

[121] ACFO also claims that the proposed plans will continue to deny equal pay for work of equal value to some of the lowest paid female predominant job classes in the CPA. This includes clerical and

administrative positions under several classifications including AS, CR and PMs. ACFO states that these job classes will be compared to PSAC male ones that also tend to be the lowest paid, including those in the Operational Services (SV) group.

[122] TBS responds that these concerns about occupational gender segregation are unjustified. It claims, without clear evidence, that each plan contains a broad range of male predominant job classes for comparison to the female predominant job classes.

Analysis

[123] As the CN Decision set out, the role that multiple plans would have on reinforcing occupational gender segregation is an important consideration.

[124] Delineated as they are along bargaining agent lines, TBS's proposed three plans do not each represent the full range of jobs across the CPA. TBS has not provided persuasive evidence on how its proposal will attain the objectives of the *Act*. The conclusion of the Johnson Report summarizes the situation clearly:

> The TBS application is not based on a rational analysis of the complexity of the workforce, or the similarity of work across the 70 occupational groups, it is based on an assumption of what will make the pay equity committees easier to work with. (page 18)

[125] As PIPSC and CAPE argue, segmenting the workforce as proposed reduces the range of comparators to those represented by the same bargaining agent. This risks creating barriers to wage comparisons, which undermines the legislative objective of eliminating discriminatory pay structures. Indeed, they highlight that by focussing on collective bargaining structures, the plans are likely to perpetuate the gender biases within a labour relations regime that has never been scrutinized through a proactive pay equity lens.

[126] TBS's evidence shows that each plan contains job classes historically seen as "women's work". For example:

- **Plan 1**: includes many clerical and administrative positions like administrative assistants, clerks, librarians, teachers and social welfare staff, and the largest female predominant job classes (AS, CR and PM) in the CPA;
- **Plan 2**: includes professional and scientific positions like nurses, nutritionists and physiotherapists; and
- **Plan 3**: includes other feminized positions like financial services, human resource advisors and translators.

[127] The proposed three plans will limit the range of available male comparators for these female job classes and risk perpetuating the "mischief"– that is, the existence of a wage gap that disadvantages women because of occupational gender segregation and the systemic undervaluation of women's work—that Justice Evans of the Federal Court spoke of (PSAC 1999, FC). The proposed plans prevent diverse comparisons, particularly by separating Plans 1 and 2 from each other and from all of the other job classes in Plan 3.

[128] Over one third of the 250,000 CPA employees are employed in three female predominant classifications (AS, CR, PM) with some of the lowest wage rates. As both the Johnson Report and the Durber Report show, the effect of the proposed plans is that female job classes like these will be compared to lower paid male comparators, when jobs of equal value and likely higher pay exist in the other Plans. This risks denying equal pay for work of equal value to female predominant job classes and deepening the entrenchment of occupational segregation. Also, the Durber Report shows that dividing classically feminized occupations between the three plans prevents an examination of the value of the full range of women's work. The broader comparisons required by the *Act* will allow for a more comprehensive examination of work, including for job classes with a heterogeneous range of work.

[129] Despite its size, the CPA is a single operation. The feminized occupational groups in its workforce are spread out across the activities of portfolios, departments and branches of the CPA. They contribute value to the overarching objective of serving Canadians. The proposed three plans, structured as they are around bargaining units, cut across departments in such a way that employees that work together (e.g. in a department or portfolio) will be divided into separate plans. TBS has not demonstrated that the proposed three plans would be gender neutral and would not reinforce occupational gender segregation. To the contrary, I find that the proposed structure risks replicating gender segregation in the CPA.

e. Other issues

i. Did TBS attempt to establish a single plan or a single committee prior to submitting the request?

[130] Several bargaining agents, such as PIPSC and CAPE and ACFO claim that although there was an early engagement working group, there was no real attempt to explore the creation of a single committee nor evidence that internal or external experts made any attempt to carry out this exercise. TBS argues that there is no requirement that an employer establish a committee or attempt to develop a single plan before submitting an application for multiple plans.

[131] There is nothing in the *Act* requiring the establishment of a pay equity committee or an attempt to create a single plan before applying for multiple plans. That said, as I similarly noted in the CN Decision (para 72), if there is evidence that efforts to create a single plan with a pay equity committee were unsuccessful, it is something to advance for the Commissioner's consideration in an application for multiple plans.

[132] TBS did engage the bargaining agents in a working group in early 2021 but in early 2022, asked them for feedback on multiple plans for the CPA. It appears none were supportive. While it may have been productive to use that group as an opportunity to form and train the pay equity committee as ACFO noted bargaining agents expected, TBS was not required to attempt to establish a single pay equity plan before applying for multiple plans

ii. Does the application raise section 2(d) of the Charter concerns?

[133] ACFO raises the concern that granting TBS's application will possibly contravene section 2(d) of the *Canadian Charter of Rights and Freedoms*. I have considered this submission and TBS's reply and have determined that I do not need to address it, in light of the outcome of this decision.

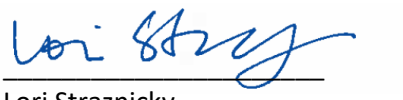
IV. CONCLUSION

[134] When taken in their totality, the analysis of the grounds advanced by TBS and the expectation that the plans would not be gender neutral, reveal that TBS has not met the burden of demonstrating that the proposed three pay equity plans would proactively redress systemic pay-based gender discrimination in the CPA as required by the *Act*.

[135] Accordingly, the application for multiple plans is denied.

[136] The representations have made clear that there is considerable history between the parties that will contribute to making the work of a single pay equity committee for the CPA challenging. A pay equity committee of this size will no doubt need clear structures, rules and processes in order to operate effectively. It will also need good faith on the part of all parties involved to come to the committee and work collaboratively in the spirit of the *Act*. It bears repeating that the *Act* is a piece of human rights legislation designed to uphold the right to equal pay for work of equal value. The committee's objective is to work together to come up with the road map to achieve pay equity in the workplace. Approaching that work as merely a different version of collective bargaining throws it into jeopardy before it has even begun.

[137] The bargaining agents have given their unanimous support for a single pay equity committee and the creation of a single plan for the CPA. They have said they are willing to approach the work collaboratively. It is now incumbent on them to put those words into action and to work with each other and the employer representatives on the committee to achieve the objectives of the *Act*.



Lori Straznicky

Interim Pay Equity Commissioner