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PAY EQUITY IN ONTARIO: A CRITICAL LEGAL ANALYSIS[©]

BY PATRICIA C. McDERMOTT*

Equal pay for work of equal value has been a fundamental demand of the women's movement for the past three decades. Since Ontario's *Pay Equity Act*, which came into force January 1988, proposes to "redress systemic gender discrimination in compensation"¹ for those who perform work in jobs where women predominate, it deserves careful study.

At first glance, the scope of Ontario's pay equity legislation appears impressive. It covers all establishments² in the province that have ten or more employees.³ Further, unlike virtually all other *pro-active*⁴ pay equity schemes in North America, Ontario's *Act* applies

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¹ *Pay Equity Act*, S.O. 1987, c. 34, s. 4(1).

² The *Pay Equity Act*, *ibid.*, s. 1 defines establishment in a very expansive manner. It includes all employees of an employer in a relatively large geographic division. For example, the Municipality of Metropolitan Toronto is one geographic division and thus, one establishment for the purposes of the *Act*.

³ *Ibid.*, s. 3. Employers in the public sector must comply with the legislation more quickly than employers in the private sector: *ibid.*, ss 10, 13. Establishments in the public sector having fewer than ten employees are also covered: *ibid.*, s. 3.

⁴ Pro-active is used here in the sense of setting mandatory requirements for employers to assess the extent to which they are engaged in discriminatory pay practices, as well as mandatory procedures for ending these practices. Pro-active is typically used in contradiction to complaint-based. Complaint-based models, such as the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, require a complainant to begin the action by bringing a complaint to the Human Rights Commission.

to the entire private sector as well as the public sector.⁵ However, despite the expansive application of this statute, it is extremely weak in terms of delivering equity to those who experience the discriminatory pay practices it proposes to redress.

On the whole, Ontario's *Pay Equity Act* is unnecessarily complex, vague, and confusing. Every step of accomplishing what the *Act* defines as pay equity is riddled with potential interpretation problems and conflicts of interest that will undoubtedly lead to extensive litigation. Since it is difficult to critique the *Act* without a basic understanding of how it is supposed to operate, a general description of the mechanics of the statute will follow for those unfamiliar with the legislation. The often complex technical problems with the requisite procedures, as well as the low *standard of equity*⁶ that is established, will not be discussed until this general overview is complete.

I. OPERATION OF THE ACT

One of the first steps of the pay equity process is to identify both the *employer* and the *establishment*. Once this has been done, the next step is to identify all the male and female *job classes*.⁷ A female job class is a job that has 60 percent or more female incumbents; a male job class has 70 percent or more male incumbents. Basically, the female job classes are the potential recipients of pay adjustments; the male job classes are to be used as comparators or targets to establish the possibly higher levels of compensation for the female job classes.

⁵ For example, in Canada, Manitoba's *Pay Equity Act*, S.M. 1985-86, c. 21 is considered to be a pro-active pay equity scheme. In the United States, Minnesota, Oregon, and Washington have pro-active pay equity schemes.

⁶ The terms *standard of equity* and *level of equity* will be used throughout this paper. These are used in the sense that although the *Act* may deliver an improvement in one's inequitable position, there is a way to go about achieving truly equitable pay practices. We will return to a discussion of this concept.

⁷ *Pay Equity Act*, *supra*, note 1, s. 1(1).

When all the job classes have been identified, the next step is to calculate the *job rate*⁸ for each job class. The job rate is defined as the "highest rate of compensation" and includes all benefits.⁹ Next, the *value* of each job class is established by using a *gender-neutral comparison system*¹⁰ based on skill, effort, responsibility, and working conditions.¹¹ This procedure involves a job evaluation system that will assign each job class a value score or rating of some type.

When both the job rate and the value of each job class have been established, each female job class essentially looks for a male job class of comparable value. If an appropriate match is located, the female job class is entitled to the job rate of the comparable male job class. One percent of the employer's province-wide payroll must be paid out annually to redress discriminatory pay practices in all the establishments of an employer.

Where a union represents the employees, the bargaining agent and the employer must negotiate the entire process that has been outlined above.¹² When the employees are not organized, the employer decides on all pay equity matters without consulting them. However, non-union employees appear to have a more extensive complaint mechanism than those covered by a negotiated pay equity plan.¹³

The *Act* defines a *pay equity plan* as a document in which the establishment and the job classes are identified, the gender-neutral

⁸ *Ibid.*

⁹ See definition of *compensation*, *ibid.*

¹⁰ Although this phrase is used in section 12 of the *Act*, *supra*, note 1, it is not a defined term.

¹¹ *Ibid.*, s. 5.

¹² *Ibid.*, s. 14.

¹³ The *Pay Equity Act*, *ibid.*, s. 22(1) does provide a mechanism for "any ... employee or group of employees, or the bargaining agent" to complain that "there has been a contravention" of the *Act*; however, it is not clear if union members will be able to complain about the pay equity plan their union has negotiated for them. They will likely have this right if the plan does not meet the requirements set out in the *Act*. It is also unclear whether those in unions have access to the "duty of fair representation" provision in the Ontario *Labour Relations Act*, R.S.O. 1980, c. 228, s. 68. If the plan was negotiated during normal bargaining, it seems logical that they would.

job comparison is described, and the "results of the comparisons" are set out. These plans are signed and posted in each workplace in the establishment, and a copy is provided to the bargaining agent, or to any non-unionized employee affected by the plan who requests a copy.¹⁴ Non-union employees have ninety days to register complaints about the plan to their employer. If the plan is not amended to the satisfaction of all employees, anyone to whom the plan applies may then complain to the Pay Equity Commission.¹⁵ If the complaint is not settled, it will eventually be decided upon in a formal hearing before the Hearings Tribunal, the adjudicative wing of the Pay Equity Commission.¹⁶ It is interesting to note that an employee or group of employees may advise the Hearings Tribunal in writing that the employee or group wishes to remain anonymous. An agent will then represent the employee or the group before the Hearings Tribunal or in dealings with a Commission's review officer.¹⁷ This is indeed a somewhat unusual and potentially powerful mechanism for those seeking equitable pay.

Each bargaining unit and all the non-union employees in an establishment are covered by separate pay equity plans. When a female job class is looking for an appropriate male comparator, the job class must look within its own plan first. Only if no suitable comparator is found there can a female job class search for one outside its own plan.¹⁸

II. EMPLOYER, JOB CLASS AND ESTABLISHMENT

The *Pay Equity Act* does not define employer; therefore, in identifying an employer, reliance must be placed on both the common law and the jurisprudence from other administrative tribunals. The absence of a definition may unfortunately lead to

¹⁴ *Pay Equity Act*, *supra*, note 1, ss 1, 1(3), 13.

¹⁵ *Ibid.*, ss 22-24.

¹⁶ *Ibid.*, s. 25.

¹⁷ *Ibid.*, s. 32(4).

¹⁸ *Ibid.*, ss 6(4)-(5).

costly litigation. For example, whether a franchise operation would qualify as an employer may be different under the common law than under the Ontario *Labour Relations Act*. If the *Pay Equity Act* had included a definition similar to, or the same as, another statute, it would obviously have helped avoid potentially serious delays at the outset of the process.

Identifying job classes will also present problems given the very broad definition in the *Act*:

"job class" means those positions in an establishment that have similar duties and responsibilities and require similar qualifications, are filled by similar recruiting procedures and have the same compensation schedule, salary grade or range of salary rates.¹⁹

How is "similar" to be interpreted? The danger of having such an expansive definition of job class is that it makes it possible to combine numerous positions that really deserve to be evaluated on their own and to achieve their own, potentially higher, value match.

The average number of employees an employer had in Ontario in 1987 determines when a pay equity plan must be posted.²⁰ All public sector employers, and private sector employers with 500 or more employees, must post a plan by 1 January 1990. For employers with 100 to 499, 50 to 99, and 10 to 49 employees, the posting dates are January 1991, 1992, and 1993 respectively.²¹ Since these dates represent the latest date by which an employer must post a pay equity plan, they also represent the date by which all job classes going into the plan must be identified and evaluated.²² Thus, for example, a private sector employer with 495 employees has three years from the time the *Act* came into force (minus the time needed for the evaluation) during which to decide when to calculate

¹⁹ *Ibid.*, s. 1(1).

²⁰ See *ibid.*, the definition of *effective date* in s. 1(1), ss 1(4), 10.

²¹ Note that employers with 10 to 99 employees are not required to develop and post a formal pay equity plan. They have, what is described in the margin notes of the *Act* as, a *transition* period; they do not have to comply with the *Act* until 1993 (50 to 99) or 1994 (10 to 49). See *ibid.*, s. 21(1). It is, however, not clear precisely what they are to do to comply since the *Act* does not suggest that an evaluation has to be done. It seems they simply become subject to complaints under section 7, *ibid.*

²² See *ibid.*, s. 13.

the gender predominance of job classes. Unless a job class has 60 percent or more females, it is not a female job class and can not benefit from the *Act*. Similarly, if a male job class dips below the 70 percent mark in terms of male incumbents, it is lost as a potentially beneficial comparison.

There is some room to challenge these rigid percentage cut offs by arguing, for example, that the historical incumbency of a particular job class has been female and has only recently dropped below the 60 percent point; thus, it should still be considered a female job class.²³ Again, such issues could involve extensive debate at the start of the process for those negotiating pay equity. For employees not in a union, of course, this type of complaint must wait until the plan is posted.

Unlike its predecessor Bill 105, draft legislation which was to provide for pay equity in the public service,²⁴ the *Pay Equity Act* has no effective date on which to establish gender predominance. This creates a situation in which employers without unions can literally *watch their numbers* and select dates to calculate gender predominance which would reduce their liability under the *Act*. Of course, proving that an employer has attempted to avoid the impact of the *Act* in this way would be extremely difficult.

The *Pay Equity Act* defines the term *establishment* in a rather unique manner. Basically, an establishment is "all of the employees of an employer employed in a geographic division."²⁵ The geographic divisions are based on county or territorial district lines that divide the province; they are quite large units. Typically, each major city or town in Ontario is within a county or a territorial district and will be considered an establishment. For instance, if an employer has a chain of seventeen retail outlets in Toronto, all

²³ See *ibid.*, s. 1(5).

²⁴ Bill 105, *An Act to Provide Pay Equity for Employees in Predominantly Female Groups of Jobs in the Public Service*, 2d Sess., 33d Leg. Ont., 1986 was introduced into the Ontario Legislature in February 1986. Originally, there were to be two statutes, one for the public service and one for the broader public sector and the private sector. Bill 105 was eventually withdrawn, and the public service was put under the coverage of Bill 154, *An Act to Provide Pay Equity in the Broader Public Sector and in the Private Sector*, 2d Sess., 33d Leg. Ont., 1986. Bill 154 became the *Pay Equity Act*, *supra*, note 1.

²⁵ *Pay Equity Act*, *ibid.*, s. 1(1).

seventeen constitute one establishment and would require at least one pay equity plan for the non-union employees, and if there are bargaining units, one plan for each unit.²⁶ An employer, whether alone or with agreement from the union, cannot reduce the size of the establishment to a unit smaller than the geographic division defined under the *Act*.

The first problem with defining establishment in this strange way is that it does not always coincide with reality. For instance, it is possible that an employer's operation straddles a county or district line. Perhaps the office is located in county A, while the plant is across the road in county B. Under the *Act*, there are two establishments, and there would have to be a pay equity plan for each one unless a decision is made to combine the two. For the purposes of non-union plans, employers have the right to decide on the structure of the establishment.²⁷ They can combine two or more establishments in any arrangement. The problem for the achievement of equity is that this ability to combine establishments offers employers a mechanism that can help them avoid costly comparisons for female job classes.

When a bargaining agent is negotiating pay equity, the employer and the union must both agree to expand the definition of establishment that will be used for that plan.²⁸ If the union negotiators see a benefit, in terms of having access to better male comparators, they will agree to an expansion of the definition. If, however, the expansion could introduce a lower comparator, they will not likely agree to it. Similar considerations will guide an employer's decision, and since there are going to be competing interests, this will undoubtedly be another issue that could lead to extensive litigation.

Recall that female job classes seek comparable male job classes within their own plan first. Only if a comparable male job class is not found there does the female job class get to search for

²⁶ If there is no bargaining unit, then only one plan is needed. If there is a bargaining unit or units, a plan is also required for each bargaining unit. *Ibid.*, s. 14(1).

²⁷ *Ibid.*, s. 15.

²⁸ *Ibid.*, s. 14(3).

a comparator "throughout the establishment."²⁹ The problem that emerges for female job classes seeking a comparator outside their own plan is this: in which establishment do they get to search? The one they are in according to their own plan, which has been agreed upon by their bargaining agent, or the potentially different establishment designated by the employer for the purposes of the non-union pay equity plan? The most logical answer is that once their bargaining agent has agreed to a particular definition of the establishment, which must be done at the outset in order to calculate the job classes, this would serve to restrict the search for comparable male job classes to that agreed upon establishment.

For example, if a bargaining unit located in establishment X (which is also geographic division X) agrees to the employer's definition of establishment as XY (a combined establishment including two geographic divisions X and Y), it appears³⁰ that male comparators in other bargaining unit plans in X are not available to the bargaining unit's female job classes that cannot find a suitable comparator within their own plan. Only comparators in the agreed upon establishment are available to them. The female job classes in XY, whether in a bargaining unit or not, are also potentially denied access to suitable comparators that could prove to be beneficial from establishment X. This is especially unfair for the employees in the non-union plan who had no input into what the definition of the establishment would be in the first place. A Pay Equity Commission's "Guideline"³¹ suggests that the definition of establishment is restrictive when it states that

²⁹ *Ibid.*, ss 6(4)-(5).

³⁰ The *Act*, *ibid.*, s. 6(5) does say "throughout the establishment," and it seems clear that once a definition of establishment is decided upon, all of the calculations to identify the job classes are done on that basis. If a female job class in the bargaining unit wanted to search for a comparator in an establishment that was not the one to which the bargaining agent and the employer had agreed, it is likely that the employer would have very persuasive arguments to object to this interpretation of the *Act*.

³¹ It is very interesting to note that the Pay Equity Commission's "Guidelines" do not function as normal, legally binding regulations. In fact, each "Guideline" issued by the Commission carries the warning that it "will not restrict the Pay Equity Hearings Tribunal." See Ontario, Pay Equity Commission, *Pay Equity Implementation Series (#1-11)* (Toronto: The Commission, 1988) at 1:1.

[i]f no male-dominated job classes of equal or comparable value can be found, then the search must be extended to other bargaining units and the non-union group *within an employer's establishment*. This is why determining how establishment is defined for a given employer affects what job can *potentially* be compared.³²

It is clear that the process set out in the *Act* makes identifying the establishment something that has to be done at the beginning of the pay equity process; otherwise it would be impossible to calculate the job classes. Since whatever definition is decided upon can actually affect whether a job class even exists within a plan,³³ it is a problem to have to make these critical decisions about the definition of establishment so early in the process when it is impossible to know precisely which male comparators are going to be available. It could even turn out that agreeing to the expanded XY establishment is better for some female job classes in the bargaining unit, while staying with establishment X would be more beneficial for other female job classes in the same bargaining unit. Until the job evaluation procedure is complete, there is no sure way of knowing how the comparisons will line up.

III. INCOMPATIBLE JOB COMPARISON SYSTEMS³⁴

One of the major structural flaws in the *Act* is the apparent assumption that is made about the compatibility of job evaluation systems. The *Act* explicitly sets out a procedure whereby each employer decides on a job comparison system for the non-union employees in the establishment and each bargaining agent in the

³² Ontario, Pay Equity Commission, *Pay Equity Implementation Series #4* (Toronto: The Commission, March 1988) at 4:6 (emphasis added).

³³ For example, a group of jobs is 70 percent in establishment X and therefore, a male job class; however, when the establishment is expanded to include Y, and more positions are added to the male job class, it may be that the number of female incumbents moves the percentage down from 70 percent male to only 67 percent male. It is then no longer a male job class.

³⁴ Note that unlike Manitoba's *Pay Equity Act*, *supra*, note 5, Ontario's *Act* uses the term *job comparison system* instead of *job evaluation system*. Given the relatively rigid requirements of the procedure set out, it is unclear whether this terminology will make any difference in practice. It is also worth noting that most of the educational literature that is issued by the Pay Equity Commission uses *job evaluation*. (Pay Equity Commission of Ontario, *Questions and Answers: Pay Equity in the Workplace* (Toronto: The Commission, 1988) at 7.)

establishment negotiates a system for the employees within the bargaining unit. Then, as we have discussed, when there are no comparable male job classes, the female job classes get to search throughout the establishment. How can this be done if job evaluations systems are different?

Management consultants who market so-called "off-the-shelf" systems go to great lengths to describe how their products are unique. They use different methods of collecting data and rating jobs, as well as different value factors and weights.³⁵ Job evaluation systems are also structurally different. For instance, *a priori* plans have their factors and weights fixed. *Policy capturing* techniques, based primarily on multiple regression analysis, essentially work in the reverse: they assign weights to the factors by examining the data collected about the job traits an employer currently values in the specific organization. There are also non-quantitative *ranking* systems that are completely different in approach and methodology.

Since each step of a job evaluation system involves methodological decisions that render the results of one system totally incompatible with those of another, how can the female job classes in a bargaining unit using job evaluation system A seek a comparator in other pay equity plans in the establishment which use completely different systems, B or C? Leaving the solution to this crucial problem to parties with conflicting interests is another serious barrier to the achievement of true equal pay for work of equal value. Since the employer will have definite preferences about where the female job classes get to seek comparators, this is another area in which there will likely be strong differences of opinion and potential litigation.

Because the drafters of Ontario's *Pay Equity Act* had the obvious option, present in Manitoba's *Pay Equity Act*, of mandating that all parties reach an agreement on "a *single* gender-neutral job evaluation system,"³⁶ one wonders what they had in mind when they structured such a clearly problematic process? It is unlikely that,

³⁵ Value factors are, as mentioned, set out in the *Act*, *supra*, note 1, s. 5(1). They include skill, effort, responsibility, and working conditions. There is, however, no limit to the ways in which these factors can be conceptualized and measured. Weights refer to the proportion of value a factor is allotted in any particular job evaluation scheme.

³⁶ Manitoba's *Pay Equity Act*, *supra*, note 5, ss 9(1), 14(1) (emphasis added).

despite arrangements made to access appropriate comparators, any process can ever overcome the basic problem, in terms of achieving equity, of not offering female job classes *all* possible comparable male job classes available within the establishment, however defined.

Given a labour force so highly segregated on the basis of gender, female job classes will likely need to look for male comparators outside their own plans much of the time. Problems associated with the definition of establishment, especially those related to incompatible job evaluation systems, can potentially prevent female job classes from accessing the best possible comparable male job class. Since the *Act*, as we will discuss next, offers such a low standard of equity, these problems serve to make it difficult to achieve even this low standard.

IV. THE STANDARD OF EQUITY

The terms *standard of equity* and *level of equity* are used throughout this paper to indicate that although an improvement in a group's position in terms of receiving more equitable pay may occur, true equity has not been achieved. Perhaps the quantitative nature of money creates a perception that even a slight increase in pay can be considered pay equity; however, the restrictive process set out in this *Act* is likely to move those in female job classes only slightly closer to true equal pay for work of equal value.

The standard of equity in the *Act* is achieved for a female job class by comparing its job rate with that of an appropriate male job class (one with equal or comparable value). Basically, if the male comparator's job rate is higher than the job rate for the female job class, each position in the female job class receives the same "adjustment in dollar terms"³⁷ which is established by calculating the difference between the two job rates.

³⁷ Section 9(3) of the *Pay Equity Act*, *supra*, note 1 states that when a female job class is entitled to an increase, "all positions in the job class shall receive the same adjustment in dollar terms."

If there is no appropriate male job class in the establishment³⁸ with which to compare, that is, one with an equal or lower value, those in the female job class have no remedy under the *Act*. There is a provision in the legislation that requires the Pay Equity Office to study "systemic gender discrimination in compensation" in areas where women predominate and where there are no appropriate male job classes with which to compare. The mandate under this provision was to "make reports and recommendations to the Minister" by January 1989 concerning how to redress such discrimination.³⁹ By March 1990, no legislation has as yet been tabled to cover this large segment of employees without access to pay equity.

The number of women in Ontario that are without appropriate male comparators is significant. One only has to think of a few classic female dominated workplaces – a garment factory, a nursing home, a large law office, or an advertising agency – to realize that it will likely be the rule, rather than the exception, for workers in such establishments to be without equal or comparable male job classes with which to compare.

When there exists a possible male comparator, section 6 of the *Act* outlines an extremely confusing, and in many ways illogical, set of procedures: (a) If there is only one comparable male job class for the female job class, then the female job class is entitled to the job rate for that male job class. (b) If there is no equal or comparable male job class but only a male job class of lower value, the female job class is entitled to the job rate for that male job class. If there is more than one male job class of lower value, the female job class is entitled to the highest rate of those male job classes. (c) However, if there is more than one possible comparable male job class, the female job class is only entitled to the lowest job rate.

In terms of achieving equity in compensation, this last provision represents one of the most serious weaknesses in the *Act*.

³⁸ As we have discussed, the search must be conducted within what could be termed the home plan first, whether it is a bargaining unit plan or a non-union plan. Then, if no equal or comparable male job class is found, the search is expanded "throughout the establishment." *Ibid.*, ss 6(4)-6(5).

³⁹ *Ibid.*, s. 33(2)(e).

Why should people in female job classes receive the lowest possible job rate in the event that there is more than one appropriate comparator? What kind of equity is this? If, for example, there is one underpaid appropriate male job class, dominated by a minority group whose race or ethnicity operates to result in its work being discriminatorily undervalued, then female job classes have achieved pay equity, according to the *Act*, by being similarly underpaid.

The drafters of Ontario's *Act* had Manitoba's *Pay Equity Act* and the federal Human Rights equal value provisions, as well as examples from the U.S. jurisdictions, to draw upon.⁴⁰ There was a clear option to establish, as Manitoba's *Act* does, that the standard of equity be not the lowest when there is more than one possible comparator but "the average or projected average schedule or grade of pay of male-dominated classes performing work of equal or comparable value."⁴¹ By including this clause, Manitoba's *Pay Equity Act* sets a significantly higher standard of equity than does Ontario's legislation. In Ontario, the lowest comparator's job rate becomes the target job rate for the female job class when more than one is available. This is indeed problematic because it is very likely, particularly in large organizations, that there will be several possible comparable matches.

Using an average pay line approach, as Manitoba's *Act* does, could also help reduce potential variations in job evaluation results. Variations are likely to occur if a truly gender-neutral system is applied to a compensation programme previously constructed using a traditional job evaluation plan. Theoretically, it is not as equitable to move people who have experienced pay discrimination only part way toward what could be considered their rightful comparator; however, given the low standard of equity offered in this *Act*, and the imprecise nature of job evaluation generally, an average pay line approach may be a fairer and more practical solution. It is, of course, open to bargaining agents to negotiate some type of average pay line approach, but the problem will surely be that an employer,

⁴⁰ See Manitoba's *Pay Equity Act*, *supra*, note 5. See also *Equal Wages Guideline*, SOR/86-1082.

⁴¹ Manitoba's *Pay Equity Act*, *ibid.*, s. 6(2). Also note that in the U.S., most public service pay equity exercises use an "average pay line approach."

by agreeing to such an approach, will have to pay out more money to achieve pay equity than if adjusting only to the lowest comparator whenever more than one is available. Thus, employers will likely resist such proposals.

In other words, the *Act* offers a seemingly open-ended negotiated process on the one hand, but sets up relatively rigid rules about the method of comparison on the other. Again, it must be noted that most women in the paid labour force in Ontario, about 75 percent, are not covered by collective agreements. They have no input into how pay equity will be achieved, unless, of course, they complain after the pay equity plan is completed and posted.

It is unclear from the statute what the often used phrase "equal or comparable value" means, particularly in the section that is, in essence, the key operative clause in the Act:

6(1) For the purposes of this Act, pay equity is achieved when the job rate for the female job class that is the subject of the comparison is at least equal to the job rate for a male job class in the same establishment where the work performed in the two job classes is of *equal or comparable value*.⁴²

Does this section mean that a precise value match is necessary for each female job class? The Ontario government's *Green Paper on Pay Equity* may offer a clue to the statute's intent. This November 1985 discussion document, the focus of Ontario's Pay Equity Hearings held throughout the province in 1986, sets out "six fundamental premises [that] will form the basis of the pay equity policy."⁴³ The third principle states that "equal value does not mean *identical* value."⁴⁴ This principle makes it clear that an exact value match may not be necessary. It notes that the term *equal value*

should not be interpreted narrowly as synonymous with "identical" value, thus requiring an exact match between the jobs being compared. It is *intended that a range of similarity will be permitted*. Thus the concept envisaged in this Green Paper may be more appropriately labelled "equivalent value", "similar value" or "comparable value", or some other term may be used to convey that identical matches between

⁴² *Pay Equity Act, supra*, note 1, s. 6(1) (emphasis added).

⁴³ Ontario, Minister Responsible for Women's Issues, *Green Paper on Pay Equity* (Toronto: The Minister, November 1985) at 3.

⁴⁴ *Ibid.* at 4.

female and male jobs are not required in order to bring the requirements of the legislation into play.⁴⁵

Since this issue was not addressed in either the report issued by the Green Paper Consultation Panel after the hearings,⁴⁶ or in the Justice Committee Hearings on the draft legislation,⁴⁷ it appears that the intended policy was clear and likely remained unchallenged. Furthermore, the Pay Equity Commission's "Guideline" on job classes clearly reinforces this interpretation; it states that "equal or comparable' means that compared job classes need not be identical in value. If, for instance, a point range is used, it is important that the ranges be consistently applied in determining comparable job classes."⁴⁸

If it was intended that each female job class not have the right to an exact, or the closest possible, value match, why use the words, contained in section 6, "the female job class *that is the subject of the comparison*" and especially, "where the work performed in *the two job classes* is of equal or comparable value"? The plain language of the statute appears to suggest that an exact match should be offered to each female job class. Since it is far more equitable to achieve the precise value match than be offered the lowest comparable male job rate in a range, an increased standard of equity would be achieved by insisting on an interpretation that the *Act* seems to support.

V. JOB EVALUATION

If comparable is found to mean that a precise value match is not necessary, how broad a range of similarity will be permitted? This is a very important issue because the broader the range of values that are considered comparable, the greater the chance of

⁴⁵ *Ibid.* (emphasis added).

⁴⁶ Ontario, *The Report of the Consultation Panel on Pay Equity* (Toronto: Ontario Women's Directorate, August 1986).

⁴⁷ Justice Committee Hearings were held on Bill 154 in the Spring of 1987.

⁴⁸ Ontario, Pay Equity Commission, *Pay Equity Implementation Series #10* (Toronto: The Commission, July 1988) at 10:1.

having a lower male job rate introduced into the range and consequently, of lowering the compensation adjustment for the particular female job class seeking an appropriate comparator.

Since female job classes receive the lowest of the range of equal or comparable male job rates, and if it is found they do not have the right to exact value matches, it is in the interest of those in female job classes to have a system with as narrow as possible value bands or ranges. Since those in non-unionized settings have no legal right to involvement in the selection or the development of the comparison system, and thus no input into issues such as the width of value bands, their only recourse will be to complain about this problem after all the evaluations have been completed.⁴⁹

Many job evaluation schemes use a system of *banding* whereby job classes are located in a hierarchy of value bands that typically cover, for instance, value *ratings* or *scores* from say 0-50, 51-100, 101-150, and so on. There is no rule about how many bands to use, nor about how wide the value bands should be. Since the parameters of the band can function to offer numerous female job classes one potentially low male job rate, such a mechanism will clearly function to lower the level of equity to the point where many female job classes will be told that they already have pay equity without the need for a pay adjustment.

If there are complaints about the approach and methodology of the plan – for instance, the charge that the width of the value bands operates to reduce the potential compensation adjustment – such complaints will have to be represented as a challenge not only to this specific plan, but also to standard mechanisms that are traditionally accepted within the fields of job evaluation and compensation theory. Such a challenge is necessary if true pay equity is ever to be achieved.

Another standard tool in the area of job evaluation is the *benchmark job*. Benchmark jobs are used in the process of creating a comprehensive hierarchical ranking of jobs within an organization. By first evaluating the benchmarks using a set of value factors, and then comparing other jobs to them using the same factors, it can be decided to what degree these other jobs are more or less valuable

⁴⁹ *Pay Equity Act, supra*, note 1, ss 15(4)-(7).

than the benchmarks. Benchmark jobs are typically highly visible, well-defined, and characterized by a wide consensus about their tasks, duties, and responsibilities.⁵⁰ Indeed, the role of consensus when using benchmark jobs makes their use suspect in the pay equity arena. Pay equity theory argues that just such consensus about both men's and women's jobs is partially responsible for the undervaluation of women's work.

Once the evaluation has been done, many schemes use the benchmarks again to develop the basis of a compensation program. The benchmark jobs are priced according to an external labour market survey and then, used to set the wages for the rest of the organization's jobs. The rationale for this process is to keep the employer competitive in terms of wages and thus, able to attract and maintain the most qualified personnel available.

It is clear that the entire thrust of pay equity legislation is, in essence, a challenge to the use of benchmark jobs to establish female job rates. There is an assumption implicit in pay equity theory, leaving aside the question of whether a benchmark scheme even operates to produce fair pay practices for men, that external market forces do not operate in the same way for women's work as they do for men's work. The often quoted example is nursing. Despite a critical shortage of nurses throughout Canada, there still exists a great deal of resistance on the part of employers to raise wages in nursing.

Thus, pay equity basically argues for a procedure that gives those doing women's work the same market value as those doing men's work. The Pay Equity Commission, for example, states that pay equity "does not disregard the market for male-dominated and gender-neutral jobs; it only addresses inequities within the company."⁵¹ In doing so, the only role market forces could play is to establish the male and gender-neutral job rates and then, via a pay equity process, give those in female job classes the male job rates without direct reference to the external market.

⁵⁰ L. Kaufman, *Job Evaluation Systems: Concepts and Issues* (Kingston, Canada: Industrial Relations Centre, Queen's University, 1986) at 17.

⁵¹ Ontario, Pay Equity Commission, *Pay Equity Implementation Series #1* (Toronto: The Commission, March 1988) at 1:7.

The use of value bands and benchmark jobs creates serious problems for the achievement of even the relatively low standard of equity offered by the *Act*. It will be interesting to see how management consultants defend their job evaluation methodologies, given that pay equity legislation is directed at dismantling many of the pay practices constructed by these very schemes.⁵² It will also be instructive to assess how consultants respond to suggestions that their methodology be altered. Joan Acker's revealing description of how the Hay Associates,⁵³ a well-known international consultant in the area of job evaluation, resisted repeated proposals that its "Hay Guide-Chart Profile" be modified in minor ways during the State of Oregon's pay equity process would suggest that firms are not likely to be receptive to recommendations that their systems be altered.⁵⁴

VI. GROUP OF JOBS

Besides the provision that female job classes receive the lowest male job rates when there is more than one possible comparison, the group of jobs mechanism in Ontario's *Pay Equity Act* is another major feature that operates to deliver an unbelievably low standard of equity to those in female job classes experiencing discriminatory pay practices. A group of jobs is defined by the *Act* as "a series of job classes that bear a relationship to each other because of the nature of the work required to perform the work of each job class in the series and that are organized in successive levels."⁵⁵ If such a progression of jobs exists in an organization and is 60 percent or more female, the employer, with agreement from the union, if there is one, may use the job class in the group of jobs

⁵² As R. Steinberg and L. Haignere note, many U.S. pay equity exercises end up using "the very management consulting firms that have been using biased job evaluation systems for decades." R. Steinberg & L. Haignere, "Equitable Compensation: Methodological Criteria for Comparable Worth" in C. Bose & G. Spitze eds, *Ingredients for Women's Employment Policy* (New York: SUNY Press, 1987) 157 at 158.

⁵³ It is interesting to note that Manitoba's public service selected Hay Associates. For a discussion of the selection process see "Pay Equity in Manitoba" (1987) 16 Man. L.J. 227.

⁵⁴ J. Acker, "Sex Bias in Job Evaluation" in Bose & Spitze, *supra*, note 52 at 183.

⁵⁵ *Pay Equity Act, supra*, note 1, s. 6(10).

with the greatest number of employees as the representative job class.⁵⁶ Then, only this job class is evaluated and seeks an appropriate male comparator on behalf of all the other job classes in the series. If a pay adjustment is established by the process, all the other job classes in the group receive the same adjustment.⁵⁷ It is interesting to note that this representative job class could in fact be a male dominated job class in the series. As long as the group of jobs is 60 percent female overall, this male job class can, as strange as it may seem, represent the female job classes in the series.

The Pay Equity Commission's "Implementation Guideline" on the topic of group of jobs presents a very telling example that illustrates not only the way the group of jobs provision is supposed to work, but also the way employers can save time and money on the evaluation process and, if they are fortunate enough, avoid paying out sizeable pay equity adjustments. This example is here reproduced exactly as it appears in the "Guideline".⁵⁸

	<i>Current annual salary</i>	<i>Pay Equity (PE) adjustment required</i>	<i>Annual salary after PE adjustments</i>	<i>Differential after PE adjustments</i>
Job class I	\$14,000	\$2,000	\$16,000	0
Job class II	16,000	No comparison possible	16,000	3,000
Job class III	18,000	1,000	19,000	3,500
Job class IV	20,000	2,500	22,500	- 400
Job class V	22,000	100	22,100	

⁵⁶ *Ibid.*, ss 6(6)-(9).

⁵⁷ Section 9(3), *ibid.*, states that when a female job class is entitled to a compensation increase, "all positions in the job class shall receive the same adjustment in dollar terms." One assumes this general provision would operate in a similar fashion in the group of jobs situation.

⁵⁸ Ontario, Pay Equity Commission, *Pay Equity Implementation Series #6: Using the "Group of Jobs" Approach* (Toronto: The Commission, May 1988) at 6:3.

The "Guideline" explains that if the five job classes are treated individually, each job class might have to be adjusted by different amounts. This would mean that the previously uniform differentials between job levels would undoubtedly change. Even the actual *order* of the job classes, in terms of compensation, could change. Job Classes IV and V in the example above, for instance, would switch places in the hierarchy.

The differences in adjustments would simply be the consequence of each particular job class, with its own value score, seeking its own male job rate match. The change in the order of the two job classes (IV and V) could also be explained by the individual search for a value match; but it could also be explained by a finding that Job Class V, according to the new gender-neutral evaluation done, is actually of *less* value than Job Class IV. Given the imprecise nature of job evaluation,⁵⁹ and the likely possibility that many currently undervalued jobs are actually worth more than they are being paid (after all, this is exactly what this legislation is aimed at exposing and correcting), it is certainly probable that there will be a reordering of existing hierarchical compensation structures.

In terms of undermining the level of equity, the dangers of using the group of jobs approach are obvious. Looking at the example above, how can it be argued that equity could ever be served by using Job Class II as the representative job class and finding that there is no possible comparison available for the entire series when all the other job classes, if they had been evaluated individually, would have been entitled to a pay adjustment? If Job Class V had been the representative job class, why should Job Classes I, III, and IV receive only one hundred dollars when they should be receiving, despite all the limitations we have discussed,⁶⁰ two thousand, one thousand, and two thousand five hundred dollars respectively?

⁵⁹ See Kaufman, *supra*, note 50 at 26-27 for a discussion of the bias present in many schemes. See also H. Remick, ed., *Comparable Worth and Wage Discrimination* (Philadelphia: Temple University Press, 1984) at 59-98.

⁶⁰ Examples of these limitations include receiving the lowest possible comparison when there is more than one appropriate comparator, the potential use of banding systems, and so on.

There is no theoretical justification for the group of jobs approach when the goal of this remedial legislation is to redress long-standing discriminatory pay practices. The approach appears to be based primarily on the practical rationales of decreasing the scope of the job evaluation and, more importantly, maintaining current hierarchical compensation structures, despite inequities that are left in place.

VII. EXCLUSIONS

Another major weakness that will render Ontario's *Pay Equity Act* ineffective in the pursuit of true equal pay for work of equal value is the provision termed in the margin notes "Exclusions from Determination."⁶¹ The initial problem with this provision is that it is unclear how it is supposed to work.⁶² The section simply states that "the Act does not apply so as to prevent differences in compensation" if the employer is able to demonstrate the difference is the result of one of five exemptions: (1) a formal seniority system, (2) a temporary training assignment, (3) a formal merit system, (4) red-circling, and (5) a temporary skills shortage.

One of the most logical ways to make sense of this provision is to see it operating to decrease the job rate. Instead of using the highest rate of compensation that is being paid to someone in the job class to calculate the differential in compensation between a male and a female job class, the employer is given a chance to demonstrate, and one assumes this would be the subject of negotiations if there were a union, that the highest rate of compensation should not be used as the job rate. For instance, if the highest rate of compensation is being paid to someone who although technically in the job class is actually a management

⁶¹ *Pay Equity Act, supra*, note 1, s. 8.

⁶² That there is confusion about how the exclusion provisions are supposed to work can partly be explained by differing approaches taken in two key documents, the *Green Paper* and the precursor to the *Pay Equity Act*, Bill 105 (which was to provide for pay equity in the public service, but was later withdrawn). The *Green Paper, supra*, note 43 at 24-26, under a discussion called "Allowable Exceptions," mentions that "job(s)" can be exempted for various reasons - such as labour shortages; while Bill 105, *supra*, note 24, s. 8 referred to "Exclusions from Plan" for the purposes of gender predominance.

trainee, the employer would argue that the compensation being paid to that person should not be used for the purposes of pay equity; a lower, true job rate must be found. This would be the highest rate paid to someone permanently in the job class doing the work required of those in the job class.

Perhaps the two most problematic exclusions, although all five operate to seriously reduce the level of pay equity that can be achieved, are the temporary skills shortage and the merit exemptions. The temporary skills shortage exemption functions, according to a "Guideline" from the Pay Equity Commission, to allow an employer "[to] pay a male-dominated job [class] more than a female-dominated job of equal or comparable value until the skills shortage ends."⁶³

This undefined exemption offers employers yet another mechanism by which to reduce the beneficial impact of the *Act* for these female job classes. The key problem, of course, is how long is temporary? It could be argued that skills shortages are rarely, if ever, temporary and tend to operate to raise wages permanently. Employers who have attracted persons with a certain skill by paying higher compensation than other employers must wait until the market operates to produce more of the needed skilled persons. If the skills involve training, which is likely since the shortage developed to the point where it required higher than normal compensation, the period during which training takes place would go on for some time. Furthermore, the degree of unionization would also affect the extent to which employers would then be able to reduce compensation because of an increased supply of those possessing the skills.⁶⁴

Despite the fact that the formal merit system appears to be an extremely powerful exemption in terms of potentially decreasing the level of equity, the Pay Equity Commission offers a convoluted suggestion that this exemption is not as extensive as it may first seem. A Commission "Guideline" describes a "formal merit system" as one in which "only those whose performance is judged exceptional

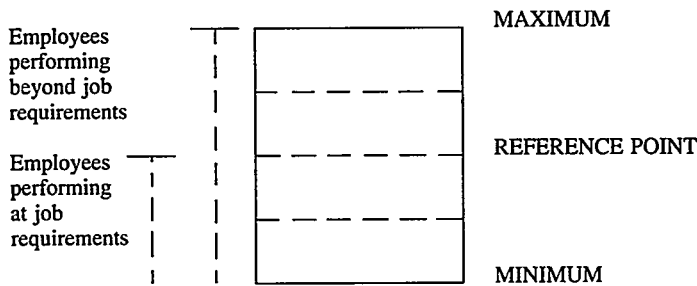
⁶³ *Pay Equity Implementation Series #1: Introduction to Pay Equity and Answers to Some Common Questions About Pay Equity* (Toronto: The Commission, March 1988) at 1:7.

⁶⁴ One wonders if the exemption would allow employers to argue, if the job evaluation results supported such a claim, that a female job class is experiencing a temporary skills shortage and should therefore be excluded from the operation of the *Act*?

will reach the maximum of their salary range, and the employees are aware of this policy."⁶⁵

The "Guideline" distinguishes two types of merit systems: one where "only those judged to be performing *above* the requirements of the job will progress to the maximum salary in the range"⁶⁶(Case I below); and another, where "virtually all employees will progress to the maximum, but those performing beyond requirements will move faster"⁶⁷(Case II below). The latter is decreed not to be a "true merit system, but is more like a modified seniority system."

CASE I
Merit system range with
reference point as the job rate



In Case I, where only those performing above the job requirements reach the maximum rate and the rest "are *expected* to reach only the midpoint, or reference point," this reference point is considered to be the salary portion of the job rate.⁶⁸ To confuse matters even more, the "Guideline" warns that the reference point and the midpoint "are two different things, which sometimes coincide

⁶⁵ *Pay Equity Implementation Series #11: Determining the Job Rate - Salary/Wages/Payments* (Toronto: The Commission, August 1985) at 11:4.

⁶⁶ *Ibid.* (emphasis in original).

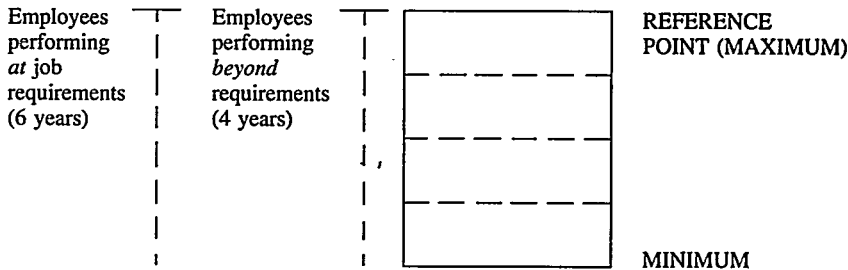
⁶⁷ *Ibid.* at 11:5.

⁶⁸ *Ibid.* (emphasis in original).

and sometimes do not.⁶⁹ The reference point "might be two-thirds of the way up the scale, for example."⁷⁰

Thus in Case I, the employer designates as the reference point a point on the salary range that most of the employees are expected to reach, at which time they will be performing "at the level that the job requires."⁷¹ This point then becomes the job rate (without the benefits component), and the "portion of salary range above that ... would be true merit pay and exempt from consideration for pay equity purposes."⁷² In Case II, where all employees are expected to reach the maximum salary in the range (within a certain period?), the maximum would be the job rate.⁷³

CASE II
Merit system range
with varying speed of progression



As we have discussed, the establishment of job rates is very important since they, in effect, decide the amount of pay adjustment. The presence of the merit exemption is a serious problem in spite of the Pay Equity Commission's attempt to lessen the critical blow it delivers to the pursuit of equitable pay. The "Guideline" we have

⁶⁹ *Ibid.* at 11:4.

⁷⁰ *Ibid.*

⁷¹ *Ibid.* (emphasis in original).

⁷² *Ibid.* at 11:5.

⁷³ Again, the job rate would exclude the benefits component.

examined almost entices employers to reach a low reference point (which may or may not be the mid-point) and thus, claim an exemption in establishing the job rate for the male job class. In doing so, employers can significantly reduce the differential for the comparable female job class.

As we have discussed, it will benefit female job classes to argue for the establishment of low job rates for themselves and high job rates for the male job classes. Employers will tend to favour the reverse, thereby reducing their liability under the *Act*. Offering employers the use of such a broad set of exclusions will undoubtedly work to decrease the standard of equity achieved by those in female job classes. These provisions are also likely to more seriously disadvantage non-unionized female job classes that have no input into decisions about the exclusions and can only complain once the pay equity plan is posted.

VIII. GENDER NEUTRALITY

Both the job comparison system and the use of the exemptions must be gender neutral. Although this is not a defined term in the *Act*, nor indeed is it precisely defined in the literature on pay equity, it is potentially the most powerful concept available in the effort to achieve pay equity under the type of scheme set out in the *Act*. The requirement that a job evaluation system be gender neutral essentially challenges traditional job evaluation methodology to the extent that they incorporate stereotypic notions of women's work.

The introduction of gender bias into a job evaluation system can happen at virtually any step in the process, from the data collection instruments to the definitions of factors and weights.⁷⁴ It is by removing this bias from traditional job evaluation plans that the true extent of the undervaluation of women's work will be revealed. If the *Act* operates to allow employers to maintain job classifications and evaluation systems that they have been using for

⁷⁴ For a brief overview of this topic see the *Green Paper, supra*, note 43 at 22-23. For a more extensive discussion see Remick, *supra*, note 59, or see Steinberg & Haignere, *supra*, note 52.

some time, or to introduce new schemes that do not address the problem of gender bias, pay inequities will continue unacknowledged.

Two leading American researchers in the area of pay equity, Ronnie Steinberg and Lois Haignere, have recently expressed their concern that most public sector efforts to introduce pay equity programs in the U.S. have employed "the very management consulting firms that have been using biased job evaluation systems for decades."⁷⁵ The situation will surely be the same in Ontario before long, unless efforts are made to operationalize the concept of gender neutrality and establish an acceptable standard. The Pay Equity Commission has provided some guidance on this critical topic,⁷⁶ but it will likely take key challenges before the Hearings Tribunal to establish a standard of gender neutrality that will help deliver even the low level of equity that this legislation offers. Hopefully, these cases will be heard early enough to make a difference in the way pay equity proceeds throughout the province.

IX. CONCLUSION

As we have discussed, there are many provisions in this legislation that clearly give employers, the very parties responsible for widespread inequitable pay practices, numerous mechanisms to decrease their liability under the *Act*. The most obvious are the flexibility of both establishment and job class, the group of jobs provision, banding systems, and of course, the exclusions. It would be naive to assume that employers will not exercise the full scope of their legal rights under this *Act* to reduce the amount they have to pay out in wage adjustments.

Those who contemplate launching a legal challenge about pay equity negotiations, or about their plan, will have to acknowledge that many of these mechanisms cannot be challenged unless they are clearly employed to defeat the purpose of the *Act*. For example, we discussed how the group of jobs provision can

⁷⁵ *Supra*, note 52 at 158.

⁷⁶ *Pay Equity Implementation Series #9: Gender-Neutral Job Comparison* (Toronto: The Commission, July 1988).

operate to mask the true value of many job classes in a job series by evaluating only one representative job class and using that value for all the job classes. This provision, used simply as it is set out in the *Act*, can function to significantly decrease the standard of equity without having to involve bad faith on the employer's part.

Perhaps the major failing of the *Act* is its shift in focus from the gender based wage gap to a process whereby each individual group seeks its own equity. Even this approach is seriously undermined by the provisions whereby the female job class receives the lowest possible comparison when there is more than one and of course, by the group of jobs mechanism. An average pay line approach would be, as suggested earlier, more equitable, particularly for medium and large sized employers, since it is likely that nearly every female job class would get an adjustment. More importantly, it would transform pay equity into a clearly systemic process directed at solving what the *Act* describes as a systemic problem, rather than an approach in which the mere luck of achieving a beneficial comparator plays such a critical role. Instead of emphasizing individual relationships between job classes, an average pay line scheme, based on actual compensation, not on theoretical job rates, would allow normal bargaining to continue separate and apart from pay equity. Such an approach would also ensure a more harmonious process of wage adjustments and could even include male jobs that are undervalued.

Although government policy is directed at closing only about 10 percent of an approximately 40 percent gender based wage gap,⁷⁷ it seems clear that this *Act* will fall far short of accomplishing this relatively modest goal. It is likely that only a handful of those seeking an end to the undervaluation of their work will find a remedy under this *Act*. Those that are lucky enough to accomplish any significant wage adjustments will undoubtedly find the route to pay equity long and convoluted.

⁷⁷ See the *Green Paper*, *supra*, note 43 at 9-13.

