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Comparable Worth: The U.S./Canadian Experience

Patrick J. Cihon

Elizabeth C. Wesman

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ELIZABETH C. WESMAN**

I. THE UNITED STATES EXPERIENCE

A. Introduction

The relative recentness of the controversy over comparable worth in the United States belies its considerable history. At the heart of the matter is the gap between average men's and women's wage earnings. Documentation is available from as early as 1815 when women's earnings in the agricultural sector were less than 29% of men's earnings. Between 1815 and 1930, as the nation became increasingly industrialized, the gap gradually decreased, but it has remained relatively stable at 60% since the 1930s.[1]

This section of the paper reviews attempts to address the discrepancy between men's and women's earnings through legislation and the court system. The initial focus is upon federal legislation and litigation. Next, recent state and municipal efforts attempting to confront the issue of comparable worth are reviewed, with particular attention focused on comparative worth programs in Washington and Minnesota. Finally, this Article briefly examines the role of labor unions in

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* Patrick J. Cihon is an Assistant Professor of Law & Public Policy at Syracuse University School of Management. He received a B.A. from Penn. State University, a LL.B. from Osgoode Hall Law School of York University, Toronto, Canada and a LL.M. from Yale Law School. His research interests are in the areas of labor law, employment discrimination and comparative labor relations. He is co-author of *Business Law: Text and Cases*, published by John Wiley and Sons; and co-author of *Labor and Employment Law*, to be published by PWS—Kent Publishing Co.

** Elizabeth C. Wesman is an Assistant Professor of Personnel and Industrial Relations at Syracuse University School of Management. She received an A.B. from Smith College, an M.A. from Northwestern University and a Ph.D. from the New York State School of Industrial and Labor Relations at Cornell University. She was a 1980 Department of Labor Doctoral Research Fellow. Her research interests include employment discrimination, international labor relations and comparable worth. She is co-author of a book on labor relations administration to be published by Business Publications Inc.

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1. S. WILLBORN, A COMPARABLE WORTH PRIMER 8 (1986).

the comparable worth controversy and appraises the prospects for a viable comparable worth policy in the United States.

B. Legislative History

The National War Labor Board (NWLB), established during World War II to facilitate stability in labor relations and to intervene in wage rate disputes, recognized the concept of equal pay for jobs of comparable quantity and quality in some of its earliest cases.[2] A tripartite body, the NWLB comprised twelve members, four each from the labor, management and public sectors; nationally, there were twelve regional Boards. In its Termination Report,[3] the Board summarized its decisions in the cases where correctness of wage rate by sex was at issue. The Board rejected the concept of equal pay for equal work in intra-plant wage determination.[4] Rather it noted, that a proper balance of wage rates could only be achieved through objective job evaluation. Such evaluation would be used to establish the worth of a job, irrespective of sex, on the basis of "skill, effort and job content."[5]

Wherever possible, the Board preferred to remand wage disputes and resolution of pay inequities to the parties in the collective bargaining relationship. In fact, they often deferred to the collective bargaining agreement, even in cases where the rates for female-dominated jobs were historically lower than rates for male-dominated jobs.[6] However, in cases where a content and skills comparison of so-called "male" and "female" jobs revealed intra-plant inequities, such deferral to a long-standing negotiating practice could be modified. In those instances, the Board normally recommended a re-evaluation of job rates "through collective bargaining conducted in good faith."[7]

The NWLB was not a judicial or quasi-judicial body as is the present National Labor Relations Board; nor, were its actual enforcement powers established during its short life span. Nevertheless, its experiences and holdings provided the impetus for introduction of a

2. NWLB v. Norma Hoffman Bearings Corp. 2247-D (July 18, 1942); NWLB v. Brown and Sharpe Mfg. Co. 2228-D (Sept. 25, 1942); NWLB v. General Motors Corp. 2252-D and 2255-D (Sept. 26, 1942).

3. *Termination Report*, 1 NAT'L WAR LAB. BD. 291 (1946).

4. *Id.* at 291, 294.

5. *Id.* at 291-94; *see also* NWLB v. Aviation Corp. 2941-D (July 27, 1943).

6. *Termination Report, supra* note 3, at 295. Gen. Elec. Co. No.111-17208-D and Westinghouse Elec. & Mfg. Co. No.111-17209- (Dec. 12, 1945) (one opinion).

7. General Elec. Co. No. 111-17208-D and Westinghouse Elec. & Mfg. Co. No. 111-17209 (Dec. 12, 1945) (one opinion).

comparable worth bill in Congress in 1945.[8] It was soundly defeated, as were similar bills introduced yearly until 1962.[9] In that year Congress began debate over the bill that later became the Equal Pay Act of the 1963 amendment to the Fair Labor Standards Act.[10] Early versions of the bill required equal pay for employees, irrespective of sex, who perform "work of comparable character, the performance of which requires comparable skills."[11] Thus, jobs rated equally by a job evaluation system would have to be comparably compensated. In support of that version of the bill, then Secretary of Labor Arthur Goldberg testified that the Kennedy Administration believed that comparability of jobs could be assessed through objective job evaluation.[12]

Women's groups and some unions also supported the concept of equal pay for work of comparable value.[13] James Carey testified on behalf of the Industrial Union Department of the AFL-CIO. He argued that the bill would prevent employers from (1) paying lower wages to women performing the same jobs as men; (2) modifying traditionally male-dominated jobs, thereby artificially creating lower paying female-dominated jobs; and (3) paying women less as a policy, irrespective of the work performed.[14]

Employers, represented by the National Association of Manufacturers opposed the use of the term "comparable work" noting that it was far too general and did not specifically address the idea that men and women are equal.[15] They feared government oversight and intervention in a wage structure they had developed over the years and over which employers preferred to retain control.[16] Eventually, enthusiastically supported by Representatives Charles E. Goodell (R-N.Y.), and Katherine St. George (R-N.Y.) the employers' view prevailed, and the word "equal" was substituted for the word "compara-

8. L. LORBER, SEX AND SALARY: A LEGAL AND PERSONNEL ANALYSIS OF COMPARABLE WORTH 15 (1985) [hereinafter LORBER].

9. *Id.*

10. 29 U.S.C. § 206(d) (1976).

11. 108 CONG. REC. 14,767-71 (1962).

12. *Hearings on Equal Pay Act of 1962 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 87th Cong., 2d Sess. 1-5 (1962) (Statement of Arthur J. Goldberg, Secretary of Labor) [hereinafter *1962 House Hearings*].

13. *See generally id.*

14. *Id.* at 76.

15. *Id.* at 68.

16. *Id.*

ble" in the bill that eventually became the Equal Pay Act.[17] Accordingly, as enacted, the Equal Pay Act of 1963 is not a vehicle for addressing the pay inequities which are the focus of advocates of comparable worth.

1. The Bennett Amendment

Before Congress passed Title VII of the Civil Rights Act of 1964,[18] both houses of Congress debated over the inclusion of sex among the prohibited bases for discrimination in employment. In order to resolve possible conflicts between the coverage of Title VII and of the Equal Pay Act, the Bennett Amendment was inserted as section 703(h) of Title VII.[19] Section 703(h) reads in part as follows:

> It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 6(d) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 206(d)).[20]

Unfortunately, the Bennett Amendment served to confuse more than clarify. There are two theories as to the meaning of the Bennett Amendment. The first theory asserts that the Bennett Amendment provides that practices not prohibited by the Equal Pay Act are also not prohibited by Title VII.[21] Proponents of this theory view coverage of Title VII as limited only to jobs which are substantially equal; viz., requiring equal skill, effort, and responsibility and performed under similar working conditions.[22] Adherents of the second theory interpret the Bennett Amendment as affording defendants in Title VII wage discrimination suits[23] only the four affirmative defenses provided by the Equal Pay Act: seniority systems, merit systems, wage differentiation based upon quantity or quality of production and other factors other than sex.[24] According to this second theory, plaintiffs may bring a claim for wage discrimination under Title VII even if the

17. 109 CONG. REC. 9197, 9198, 9209 (1963). For the complete discussion of the Bennett Amendment, *see* 110 CONG. REC. 2577-84 (1964).
18. 42 U.S.C. § 2000(e) (1987).
19. *See, e.g.*, 110 CONG. REC. 2577, 2584 (1964).
20. 42 U.S.C. § 2000(e) (1987).
21. LORBER, *supra* note 8, at 16.
22. *Id.*; *see also* 29 U.S.C. § 206(d) (1982).
23. LORBER, *supra* note 8, at 16.
24. *Id.*

jobs in dispute are not equal.[25]

In 1985 in an attempt to resolve the conflict, the Equal Employment Opportunity Commission (EEOC) rejected comparable worth as a basis for determining job discrimination by a vote of 5-0.[26] While their ruling may be viewed as an indication of where EEOC litigation efforts and resources will be focused, it is not dispositive of the controversy.[27] Also in 1985, the House of Representatives defeated H.R. 3008, a bill intended to promote equitable pay practices and to eliminate discrimination within the Federal civil service. The bill's sole purpose was to compel a study to determine whether the government's position classification system was consistent with Title VII of the Civil Rights Act of 1964 and section 6(d) of the Fair Labor Standards Act of 1938.[28] To date, the EEOC has not moderated its position, nor has there been any significant attempt to resuscitate H.R. 3008. Accordingly, it appears that legislation concerning comparable worth will not be forthcoming soon from the federal government.

However, as is discussed in detail below, the issue of comparable worth has been debated at length in the federal courts, and it appears likely that litigation will continue until the issue is conclusively resolved by the Supreme Court, or until comparable worth is clearly mandated, or rejected, by statute.

C. Judicial Decisions

The landmark decision involving wage discrimination in dissimilar jobs is *County of Washington v. Gunther*.[29] Plaintiffs were women guards employed by the County of Washington, Oregon, in the female section of the county jail.[30] The county had evaluated the jobs of male and female guards by means of a job survey and found the male guard jobs to be more hazardous and demanding—and therefore more valuable—than the female guard jobs.[31] The county then adjusted the wage rates of male guards to reflect the survey results, but set the wage rates of the female guards at a level lower than indicated

25. *Id.*

26. Courts asked to bar pay on "worth" basis, The San Diego Times-Union, Aug. 17, 1985, § A, at 8.

27. S. WILLBORN, *supra* note 1, at 33. Willborn appears to be saying that this isn't dispositive of the controversy because the courts have played a more central role in the development of comparable worth theory and are well-suited forums for this type of case.

28. H.R. 3008, 99th Cong., 1st Sess. (1985).

29. 452 U.S. 161 (1981).

30. *Id.* at 163-64.

31. *Id.* at 165.

by the survey.[32]

The women guards filed suit under Title VII, alleging wage discrimination on the basis of sex.[33] The district court dismissed the female guards' claim, holding that the claim could not be brought under Title VII unless the jobs met the Equal Pay Act's equal work standard.[34] The Ninth Circuit Court of Appeals reversed, holding that the women were not so constrained by the Act's equal work standard, thus rejecting the district court's interpretation of the Bennett Amendment.[35]

On appeal, the U.S. Supreme Court affirmed the circuit court's finding, but specifically narrowed the question before them.[36] The Court held that the claim was not based upon comparable worth, "under which plaintiffs might claim increased compensation on the basis of a comparison of the intrinsic worth or difficulty of their job with that of other jobs in the same organization or community."[37] Instead, the court found it to be a claim of sex discrimination in wage rate determination.[38] The Court held that such a claim was not precluded by the Bennett Amendment to Title VII. Thus, the Court adhered to the second theory[39] of the meaning of the Bennett Amendment, namely that it intended "to incorporate only the affirmative defenses of the Equal Pay Act into Title VII."[40]

Specifically, the Court found that the County of Washington had discriminated against the female guards when it paid the male guards 100% of the evaluated worth of their jobs and the female guards only 70% of the evaluated worth of their jobs.[41] However, the Court in *Gunther* declined to involve itself in the assessment of job evaluation techniques, or to make its own assessment of job worth.[42] Nevertheless, the *Gunther* decision appears to establish Title VII as a vehicle for employees seeking to pursue wage discrimination claims beyond the coverage of the Equal Pay Act. Since the decision in *Gunther*, no

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32. *Id.* at 166.
33. *Id.* at 164.
34. *Id.* at 165.
35. 602 F.2d 882, 891 (9th Cir. 1979).
36. County of Washington v. Gunther, 452 U.S. 161, 168 (1981).
37. *Id.* at 166.
38. *Id.* at 181.
39. LORBER, *supra* note 8, at 16. For a summary of the second theory of the Bennett Amendment *see supra* text accompanying note 23.
40. *Id.* at 168.
41. *Id.* at 180-81.
42. *Id.* at 181.

other similar cases have reached the Supreme Court. Thus, it has been left to the lower federal courts to grapple with numerous "comparable worth" type cases without benefit of further guidance from the highest federal judicial body.[43]

In two cases preceding *Gunther*, *Christensen v. State of Iowa*[44] and *Lemons v. City and County of Denver*,[45] the Eighth and Tenth Circuit Courts of Appeal denied wage discrimination claims based upon compensation differentials in dissimilar male- and female-dominated jobs.[46] In *Christensen*,[47] two clerical employees brought suit against their employer, the University of Northern Iowa, alleging illegal sex discrimination in employment.[48] The University had commissioned a job evaluation study, as a result of which clerical jobs and physical plant workers' jobs received similar point values.[49] Because the external job market paid higher wages to physical plant employees than clerical workers, the University modified the results of its new compensation system to provide higher starting pay for incoming physical plant workers.[50] Consequently, employees in the male-dominated physical plant jobs continued to be paid more than the all-female clerical employees despite equivalent seniority and labor grade.[51] The court found that the plaintiffs had not established a prima facie violation of Title VII of the Civil Rights Act of 1964, noting that nothing in Title VII required an employer "to ignore the market in setting wage rates for genuinely different work classifications."[52] In *Lemons*,[53] the Tenth Circuit rejected a similar complaint by nurses that the City of Denver was underpaying them in comparison with different, male-dominated jobs which were of equal worth to their employer.[54] Citing *Christensen*,[55] the court found that the employer was responsible for providing equal pay for equal work, not for rectifying

43. J. FRIEDMAN & G. STRICKLER, JR., THE LAW OF EMPLOYMENT DISCRIMINATION, 605-06 (1987).

44. 563 F.2d 353 (8th Cir. 1977).

45. 602 F.2d 228 (10th Cir. 1980), *cert. denied*, 449 U.S. 888 (1980).

46. 563 F.2d 353, 354 (8th Cir. 1977); 602 F.2d 228, 231 (10th Cir. 1980), *cert. denied*, 449 U.S. 888 (1980).

47. 563 F.2d 353 (8th Cir. 1977).

48. *Id.* at 354.

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.* at 356.

53. 602 F.2d at 231.

54. *Id.*

55. 563 F.2d 353 (8th Cir. 1977).

historic market inequalities between wage rates for dissimilar jobs.[56]

In a similar case, *Briggs v. City of Madison*,[57] a district court denied relief to public health nurses alleging wage discrimination on the basis of being paid less than the sex-segregated job of male sanitarians.[58] The plaintiffs argued that their jobs were of equal value to those of the sanitarians but the latter were being paid higher salaries. While the court found that the nurses had shown their jobs to be substantially similar to the sanitarians, it did not find the city's rationale to be a guise for illegal sex discrimination. As in *Lemons*, the City pointed to the higher salaries required to recruit sanitarians in the labor market, a defense the court found persuasive.[59] Moreover, the court in *Briggs* expressed its own reluctance to become involved in the evaluation of the abstract worth of one job with respect to another, dissimilar job.[60]

More recently, the Ninth and Seventh Circuit Courts of Appeal have considered comparable worth claims. In *Spaulding v. University of Washington*,[61] members of the University's nursing faculty attempted to establish that they performed work essentially similar to members of the architecture, health services, urban planning and other departments who were compensated at a higher rate than the nursing faculty. Since the nursing faculty were predominately female and the other departments predominately male, the nurses argued that they were experiencing wage discrimination on the basis of sex, in violation of the Equal Pay Act and Title VII of the Civil Rights Act of 1964.[62] The court rejected their claim on two grounds. First, the training required for various disciplines was sufficiently different that teaching jobs in those disciplines were not substantially equal (therefore they had not established a prima facie case under the Equal Pay Act).[63] Second, since the nurses' showing of disparate impact or disparate treatment did not include a proof of discriminatory animus they could not prevail under Title VII.[64] The court found that, although the nurses were paid less than faculty in other disciplines at the University of Washington, the nursing faculty was paid more than

56. 602 F.2d at 231.
57. 536 F. Supp. 435 (W.D. Wisc. 1982).
58. *Id.*
59. 536 F. Supp. at 437-38, 446.
60. *Id.* at 444-45.
61. 740 F.2d 686 (9th Cir. 1984), *cert. denied*, 469 U.S. 1036 (1984).
62. *Id.* at 696-97.
63. *Id.* at 698.
64. *Id.* at 699-701.

the faculty at some comparable schools of nursing.[65] Further, the court found no evidence of the endemic discrimination alleged in the nurses' complaint.[66] Accordingly, in *Spaulding*, the court lent some support to the holding in *Lemons*, namely that a prima facie case of wage discrimination cannot be established simply by a statistical showing that male- and female-dominated jobs command different salaries in the market place.[67]

In *American Nurses' Association v. State of Illinois*,[68] another case involving nurses, the Seventh Circuit Court of Appeals sought to clarify the federal courts' position on comparable worth complaints. Concurring with the holdings in *Gunther*, *Spaulding*, *Lemons* and *Christensen*,[69] the court reiterated that where jobs are not equal, there is no cause of action under the Equal Pay Act of 1963, although plaintiffs may have access to relief under Title VII. Accordingly, the Seventh Circuit reversed the lower court's dismissal of the case.[70]

As in *Gunther*, the State of Illinois had commissioned a comparable worth study and found female-dominated jobs were compensated on average at a lower rate than male-dominated jobs. However, unlike *Gunther*, Illinois had not commissioned a subsequent job evaluation to re-assess the purpose of wage levels and perhaps reduce the male-female wage discrepancies.[71] The Seventh Circuit found that a comparable worth study does not, in itself, provide a basis for a claim under Title VII, although "it may provide the occasion on which the employer is forced to declare his intentions toward his female employees."[72] The court reversed and remanded the case to the district court to consider evidence concerning whether the wage differential discovered by the comparable worth study simply reflected market rates[73] or if it was a pretext for illegal sex-based wage discrimination.[74]

Of all the litigation involving comparable worth issues after *Gun-*

65. *Id.*

66. *Id.* at 702-04.

67. *Id.*

68. 783 F.2d 716 (7th Cir. 1986).

69. 452 U.S. 161 (1981); 740 F.2d 686 (9th Cir. 1984), *cert. denied*, 469 U.S. 1036; 602 F.2d 228 (10th Cir. 1980), *cert. denied*, 449 U.S. 888 (1980); 563 F.2d 353 (8th Cir. 1977).

70. 783 F.2d at 716, 720.

71. *Id.* at 721, 725.

72. *Id.* at 721, 727.

73. *Id.* at 730; *see also* Briggs v. City of Madison, 536 F. Supp. 435 (W. D. Wisc. 1982).

74. *Id.* at 723, 730; *see also* Van Heist v. McNeilab, Inc., 624 F. Supp. 891 (D. Del. 1985) (a woman whose job is not equal to males' jobs may still have a claim under Title VII if her treatment as an employee generally (bonuses, raises, etc.) is not equal to males).

ther, the case with the most far-reaching consequences to date is *American Federation of State, County & Municipal Employees (AFSCME) v. State of Washington*.[75] Two unions brought the suit, alleging sex-based wage discrimination under a comparable worth theory. Judge Jack E. Tanner of the district court held that (1) the class, consisting of employees—male and female—in female-dominated (70% or more) jobs constituted an appropriate class; (2) that the state's compensation system for female-dominated jobs constituted sex-based wage discrimination in violation of Title VII; (3) injunctive relief was called for; (4) existing state comparable worth bills did not provide an adequate remedy for the discrimination; and (5) because the state was not maintaining its compensation system in good faith, back pay (in the amount of $800 million) should be awarded.[76]

Much of the judge's decision was based upon three factors. First, the state's long-term knowledge of the wage disparity (from wage studies performed as early as 1974). Second, its post-Title VII sex discrimination in employment advertising and job assignments, and third, its failure to implement legislation, dating from 1977, intended to reduce the existing wage discrimination.[77]

The Ninth Circuit Court of Appeals reversed the lower court's decision finding the fact that the State paid the (lower) market rate for certain female-dominated job categories did not constitute disparate impact or disparate treatment.[78] The court held that "such a compensation system, the result of a complex of market forces, does not constitute a single practice that suffices to support a claim under disparate impact theory," and that AFSCME had not proven discriminatory animus.[79] However, despite its victory on appeal, the State of Washington commenced and ultimately completed, negotiations with AFSCME which implemented a wage adjustment of those jobs found to be undercompensated by the State's various comparable worth studies.[80]

Despite the considerable litigation surrounding comparable worth, an important issue remains unresolved. The preceding cases

75. 578 F. Supp. 846 (W.D. Wash. 1983) *rev'd.*, 770 F.2d 1401 (9th Cir. 1985).

76. 578 F. Supp. at 859-71.

77. *Id.* at 860-62.

78. 770 F.2d at 1401, 1405-06.

79. *Id.* at 1406.

80. 4 Employee Relations Weekly (BNA) No. 16, at 493-94 (Dec. 23, 1985). For a further discussion of the Washington State settlement *see infra* text accompanying notes 105-14.

illustrate that market price—the going rate for workers in the external labor market—is the most common factor other than sex used as a defense in wage discrimination suits which include comparable worth in the complaint.[81] Even in cases where disparate impact has been proven, resort to the market may shield employers from a showing of discriminatory animus or intent.[82] Some authorities question whether market rates should be permitted to justify wage discrimination, suggesting that market rates are already so tainted by sex discrimination they should not be available as a defense.[83] Moreover, there is significant precedent for disqualification of market rates or market preference as a defense in Title VII claims.[84]

As such, given the decisions of the courts in the majority of comparative worth cases, it appears that any progress in the area of comparable worth must be legislative, rather than judicial, absent a stand on the issue by the United States Supreme Court. In view of the current administration's stand on comparable worth, legislative progress will occur in states or municipalities rather than in the federal sector.[85]

The following section reviews the efforts of several states and large cities to rectify the wage inequalities inherent in male- versus female-dominated occupations. The comparable worth legislation and wage adjustment systems in the States of Washington and Minnesota will be discussed in particular length.

D. State and Municipal Comparable Worth Implementation

The efforts to implement comparable worth at the state and municipal levels are almost exclusively restricted to public employees. The process normally occurs in three steps:

(1) a task force is commissioned to assess the earnings gap between male and female employees and determine the degree of sex segregation in state employment;

(2) a professional job evaluation is conducted; and

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81. LORBER, *supra* note 8, at 29.

82. *See, e.g.*, Briggs v. City of Madison, 536 F. Supp. 435, 446 (1982).

83. S. WILLBORN, *supra* note 1, at 51.

84. *See, e.g.*, Diaz v. Pan Am World Airways, Inc., 422 F.2d 385 (5th Cir. 1971), *cert. denied* 404 U.S. 950 (1971).

85. 3 Employee Relations Weekly (BNA) No. 43, at 1360 (Nov. 4, 1985). The comparable worth theory seems to have made its biggest inroads in the public sector where cities, counties, and states have been under pressure to adjust wage scales according to the comparable worth of dissimilar jobs. *Id.*

(3) the mechanism is established and funds appropriated for correcting pay imbalances thus identified.[86]

For example, the State of California formed a Comparable Worth Task Force.[87] In its August 1985 report to the state legislature, the Task Force recommended that steps be taken to reduce the wage gap between male- and female-dominated occupations in both the public and private sectors.[88]

1. Municipal Implementation

Although no state legislation has been forthcoming, several California municipalities have implemented or placed on the ballot programs committed to increasing the pay of workers in undervalued municipal jobs.[89] In November 1986, San Francisco voters adopted[90] a proposal which requires the city's Civil Service Commission to conduct a yearly pay equity survey, and, based upon the survey results, allows the city's Board of Supervisors to increase pay rates as recommended by the Commission, based upon the survey results.[91]

The City of Los Angeles took a different approach: negotiating an agreement with the American Federation of State County & Municipal Employees (AFSCME)[92] which provides for wage increases of up to 15% over three years for employees holding clerical and library jobs in the city.[93] More recently, in the State of Washington, the City of Seattle reached an agreement to increase the pay of certain city employees with Local 17 of the International Federation of Professional and Technical Engineers, which represents 2000 of the city's employees. Seattle has agreed to spend approximately $2.3 million to adjust the pay scale of employees who received less than 85% of the

86. S. WILLBORN, *supra* note 1, at 59.

87. 3 Employee Relations Weekly (BNA) No. 41, at 1305 (Oct. 21, 1985). The Comparable Worth Task Force was created in 1983 through enactment of Assemblymember Sally Tanner's (D-El Monte) Assembly Concurrent Resolution 37. *Id.*

88. *Id.* at 1305-06.

89. See 3 Employee Relations Weekly (BNA) No. 43, at 1360 (Nov. 4, 1985) (City of Pasadena, California has set up a job recruitment program aimed at pushing women toward higher-paying city jobs after a 1984 survey by the City's Commission on the Status of Women found that female city employees generally earned lower wages than their male counterparts). *Id.*; *see also* 3 Employee Relations Weekly (BNA) No. 44, at 1413-14 (Nov. 18, 1985) (An ordinance providing 7000 female and minority San Francisco City workers with an $8.8 million pay equity wage adjustment was repealed by the city's voters on November 5, 1985).

90. 4 Employee Relations Weekly (BNA) No. 34, at 1062-63 (Aug. 25, 1986).

91. *Id.*

92. Silas, *Worthy plea?*, 72 A.B.A.J. 35 (1986) [hereinafter Silas].

93. *Id.*

average male employees' salary.[94]

2. State Legislation

The State of Alaska has a comparable worth statute, but to date has not initiated a plan for alleviating existing wage discrepancies. Its equal pay statute, Title 18, requires equal pay for members of each sex "for work of comparable character."[95] Recently, however, the state appealed a decision by the Alaska Commission for Human Rights which upheld a claim by public health nurses that they were underpaid compared with an all-male group of physicians' assistants doing "work of comparable character."[96]

Several other states are instituting programs and funding to adjust wages of female-dominated occupations. In March 1985, the Iowa legislature appropriated $24 million earmarked to increase salaries of librarians and residential treatment workers.[97] Ohio has re-rated its jobs to reduce sex bias in the state job classification system, following a two year study of that system.[98] Four and a half million dollars annually has been budgeted for making wage adjustments—to be negotiated with the state's public sector unions in the affected job categories.[99] In 1983, Oregon adopted comparable worth legislation requiring equal pay for work of comparable character.[100] The statute defines comparability of work as "the value of the work measured by the needs of the employer and the knowledge, composite skill, effort, responsibility and working conditions required in the performance of the work."[101] The legislation also creates a task force on state compensation and classification equity to study wage discrepancies in state employment to develop a point factor job evaluation system.[102] Other states in the process of re-evaluating their compensation systems with respect to female-dominated occupations include Mary-

94. Daily Lab. Rep. (BNA) No. 24, at A-3 (Feb. 6, 1987).

95. ALASKA STAT. § 18 (1987).

96. Alaska St. Comm. for Human Rights v. State of Alaska, Alaska St. Comm. for Human Rights Case No. D-79-0724-188-E-E (Nov. 15, 1985); 4 Employee Relations Weekly (BNA) No. 9, at 274 (Mar. 3, 1986) (State of Alaska intends to appeal a ruling by the Alaska Commission for Human Rights that upheld equal pay for "work of comparable character" by public health nurses).

97. Silas, *supra* note 92.

98. 4 Employee Relations Weekly (BNA) No. 13, at 390-91 (Mar. 31, 1986).

99. *Id.*

100. OR. REV. STAT. § 652.220 (1987).

101. *Id.* § 652.220(1).

102. *Id.* § 652.220(2).

land, New Mexico, South Dakota, Washington and New York.[103]

a. Washington

In 1974, the State of Washington commissioned a comparable worth study under the joint jurisdictions of the state's Department of Personnel and the Higher Education Personnel Board. The study was performed under the direction of a professional management consultant. One hundred twenty-one job classes, chosen because of heavy predominance of males or females, were evaluated.[104] An "update" study was conducted in 1976 with the specific tasks of establishing "sex blind" benchmark job classes and developing comparable worth cost estimates.[105]

The 1976 study evaluated each job class by means of a point-factor evaluation system using the following evaluation components: knowledge and skills; mental demands; accountability; and working conditions. Total value of the points assessed for these four components determined the final point value for the job class.[106]

Following issuance of the 1976 study, then Governor Daniel J. Evans recommended adoption of the study results and a restructuring of the state's compensation system, but the legislature declined to accept his recommendations.[107] Subsequent update studies were conducted in 1979, 1980, 1982 and 1984. The final update study took place amid the AFSCME suit,[108] yet, as with the other studies, the study precipitated little actual decrease in sex-based wage differentials.[109]

In an effort to avoid further AFSCME appeals, the state negotiated an out-of-court settlement to address the disparities highlighted by the state's biennial studies.[110] The agreement was signed Decem-

103. New York State announced on April 7, 1987 that it will spend $37.8 million to adjust the pay of more than 47,000 female and minority workers represented by the Civil Service Employees Association and the Public Employees Federation. The adjustments are based upon the state's pay equity study. Daily Lab. Rep. (BNA) No. 68, at A-14-15 (Apr. 10, 1987).

104. Washington State Department of Personnel, 1984 Comparable Worth Study, Dec. 1984 (unnumbered). Sample job classes include Clerk Typist 2, Accountant 2, Drafting Technician 2, Chemist 2, Police Officer, Truck Driver 1, Registered Nurse 2. *Id.*

105. *Id.*

106. *Id.*

107. Weals, *AFSCME v. State of Washington: Rethinking Comparable Worth*, 79 NW. U.L. REV. 809, 814 (1984).

108. 578 F. Supp. 846 (W.D. Wash. 1983), *rev'd*, 770 F.2d 1401 (9th Cir. 1985).

109. Silas, *supra* note 92.

110. 4 Employee Relations Weekly (BNA) No. 16, at 493-94 (Apr. 21, 1986).

ber 31, 1985. Governor Booth Gardner signed H.B. 1703 to implement the terms of the agreement on February 18, 1986, and Judge Tanner of the U.S. District Court (W.D. Wash.) approved the settlement after a fairness hearing in April, 1986.[111]

The settlement provides for allocation of the more than $40 million initially authorized by the legislature[112] plus an additional $60 million to pay raises through 1993 for adjustment of salaries according to the current comparable worth evaluation.[113] The agreement is enforceable by either party and interpretation of its terms is to be "governed by the laws of the State of Washington."[114] An action to enforce the agreement must be "brought in a Washington State court of competent jurisdiction."[115] It has no provision for arbitration of disputes over the interpretation of the agreement or the complex salary formulae and charts incorporated by reference. Salary adjustments began on April 1, 1986, and the recentness of the system precludes any evaluation of its general acceptance or effectiveness in attaining male-female wage comparability.

b. Minnesota

Minnesota has by far the most comprehensive and effective comparable worth plan. It was the first state to voluntarily implement pay equity for its employees, and the first to extend pay equity requirements to local governments and their employees. In May 1979, the Minnesota Department of Finance completed a compensation study, using the Hay evaluation system,[116] evaluating state and local jobs. In 1982 the state legislature enacted the State Employees Pay Equity Law.[117] That law established Minnesota's pay equity policy and enunciated the system for making pay equity salary increases.[118] Implementation of the policy, which covers 34,000 state employees, began in 1983 and was to be completed in 1987. Actual distribution of the pay increases to female-dominated classes of employees was negotiated with the unions representing the state workers.[119] In the spring

111. *Id.*
112. Act of June, 1985, ch. 6, 1985 Wash. Laws 702(5).
113. Agreement on Salary Adjustment Between the State of Washington and the American Federation of State, County and Municipal Employees, Dec. 31, 1985, at 2-6.
114. *Id.* at 8.
115. *Id.*
116. S. WILLBORN, *supra* note 1, at 68-69.
117. MINN. STAT. § 43a.01(3) (1987).
118. *Id.*
119. Pay Equity: The Minnesota Experience: Before the Senate National Committee on

of 1984, coverage of the policy was extended to local governments, cities, counties and school districts, comprising 163,000 employees.[120] While the local governments retain some autonomy with respect to managing their pay equity programs, they must maintain a reporting/accountability relationship with the state government.[121]

Clerical workers and health care employees have been the primary beneficiaries of Minnesota's pay equity legislation.[122] All of the clerical workers and about half of the health care workers received pay equity increases.[123] Furthermore, no state employee's wages have been reduced to accomplish this pay equity.[124] Since implementation of the pay equity program, there have been no comparable worth related strikes or lawsuits.[125] In contrast to the Washington settlement, the Minnesota legislation acknowledges the potential role of interest arbitration in situations where a dispute arises over the results of a job evaluation study.[126] Moreover, actual distribution of pay equity adjustments is a subject for the collective bargaining process and becomes part of the negotiated agreement.[127] Accordingly, grievance or rights arbitration[128] is available for pay equity disputes arising from application of the collective bargaining agreement.

E. Future Predictions

It is too early to speculate on the impact of scattered state pay equity programs upon the wage disparities found between male- and female-dominated occupations. In no states has pay equity been extended to the private sector, where it is staunchly opposed primarily by employers. As such, Minnesota is the only state where the legislation has been extended to encompass local governments. Public support for pay equity legislation has been weak and erratic.[129] There is some indication, however, that unions may provide the impetus necessary to increase comparable worth legislation for that part of our

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Pay Equity (March 14, 1986) (Statement of Bonnie Watkins, Pay Equity Coordinator for the State of Minnesota).

120. *Id.*
121. *Id.* at 2-4.
122. *Id.* at 15.
123. *Id.*
124. *Id.* at 5.
125. *Id.*
126. MINN. STAT. § 471.992(2) (1984).
127. *Id.*
128. *Id.*
129. G. MILKOVICH & T. NEWMAN, COMPENSATION 501-03 (2d ed. 1987).

economy.[130]

F. Unions

The AFL-CIO, as noted above, has officially endorsed the theory of comparable worth.[131] In 1979 the AFL-CIO national convention urged all its affiliated unions to adopt equal pay for work of equal value as a goal in their organizing efforts and in collective bargaining.[132] Response by the member unions has been uneven. In the public sector and in unions that are heavily female, such as, the Communication Workers of America (51%), the National Education Association (60%), and the American Nurses' Association (97%), comparable worth has been enthusiastically supported.[133] There is little enthusiasm for the concept, however, in the traditionally male-dominated craft and production unions.[134]

There are many reasons these unions have not supported comparable worth legislation. For example, many industrial unions are concerned primarily with job security, foreign competition and union leadership and are understandably reluctant to espouse a cause which might disadvantage its majority male members and increase labor costs to an already besieged employer. Moreover, many unions are reluctant to exchange traditional methods of wage determination, union power and strategic position, for technical job evaluation studies. Further, public sector unions, which rely on legislative response to their wage demands rather than on the vagaries of the private market place, can far better afford to espouse political goals than can unions in the private sector.[135] Nevertheless, of the 48 million women in the work force fewer than 7 million are unionized.[136] As the labor movement in the private sector continues to decline, at present, less than 18% of the work force is organized, the public and private sector unions will need to expand their organizing efforts to attract the large number of women not yet members of a collective bargaining unit.

130. 3 Employee Relations Weekly (BNA) No. 50, at 1585 (Dec. 23, 1985) (Comparable worth will be the key issue used to recruit women into unions by union organizers); *id.*; *see also*, Wesman, Unions and Comparable Worth: Progress in the Public Section, forthcoming in Journal of Collective Negotiations in the Public Sector (to be published in 1988).

131. *See 1962 House Hearings*, *supra* note 12, at 172-73.

132. LORBER, *supra* note 8, at 33.

133. *Id.* at 33; Volz and Breitenbeck, *Comparable Worth and the Union's Duty of Fair Representation*, 10 EMPLOYEE REL. L. J. 30, 36-37 (1984).

134. LORBER, *supra* note 8, at 33.

135. *Id.* at 34-35.

136. 4 Employee Relations Weekly (BNA) No. 6, at 173-74 (Feb. 10, 1986).

Comparable worth is a cause that may serve the unions well in that effort.[137]

G. Conclusion

In the United States, acceptance of the concept of comparable worth and the legislative action taken to achieve pay equity across dissimilar occupations have proceeded slowly, although relatively steadily. The 1980 Census revealed that 56% of men and 26% of women in the work force were employed in occupations dominated by their own sex.[138] Those figures take on particular significance when paired with the Census data indicating that the more an occupation is female-dominated, the less it is likely to pay.[139]

Yet, the majority of compensation managers in the private sector remain opposed to the concept of comparable worth, even on an intraorganizational level.[140] Personnel managers urge their colleagues to "protect themselves against the contingency of court acceptance of [equal pay for work of comparable value]."[141]

However, as comparable worth makes continuing inroads into the public sector, it becomes increasingly likely that the concept eventually will be legislatively extended to the private sector. Moreover, as comparable worth programs succeed in the public sector, the private sector's chief arguments against it, namely that jobs cannot be evaluated objectively, and that pay equity will prove prohibitively expensive, will collapse. The experience of Minnesota alone has disproved both those arguments.

More significant, however, are the more mature and successful comparable worth programs in other countries, including Australia, Ireland, New Zealand, Switzerland, and the United Kingdom. The remainder of this paper reviews and assesses the comparable worth experience of Canada, which by its close geographic and economic proximity may prove a reliable indication of the future of comparable worth in the United States.

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137. *Id.*; Noble, *Unions Found Losing Bigger Share of Young*, N. Y. Times, Feb. 8, 1986, at 28.

138. S. WILLBORN, *supra* note 1, at 17.

139. *Id.* at 18.

140. Holby, *How To Avoid The Comparable Worth Trap*, PERSONNEL ADMINISTRATOR 20 (1984).

141. *Id.* at 22.

II. COMPARABLE WORTH: THE CANADIAN EXPERIENCE

A. Introduction

The average earnings of full-time female employees in Canada are approximately 63% of the average earnings of Canadian males employed full-time.[142] To address this wage gap, several Canadian jurisdictions have adopted comparable worth legislation. The legislation is relatively recent, as in the United States, and as yet there has been no significant impact upon the wage gap between male and female workers.[143] Yet, the Canadian programs demonstrate a commitment to eradicating, or reducing as much as possible, gender-based wage differentials.

The Canadian legislation sprang, not from lawsuits, or fears of litigation, but rather from the International Labour Organization (I.L.O.) Convention No.100, the "Convention Concerning Equal Remuneration for Men and Women Workers for Work of Equal Value."[144] The Convention requires that signatory nations "ensure the application to all workers of the principle of equal remuneration for men and women workers for work of equal value."[145] Canada ratified the Convention in 1972, and the Canadian federal legislation requiring comparable worth was adopted in 1977.[146] The Province of Quebec adopted its own comparable worth legislation in 1975.[147] Both the federal and Quebec legislation apply to public and private sector employers; both programs are also enforced by individual complaints.[148] More recently, Manitoba[149] and Ontario[150] adopted comparable worth legislation. Manitoba's program covers the broadly-defined public sector, while Ontario's covers both the public and private sectors. Both pay equity programs are modeled upon that of

142. Statement of Hon. Bill McKnight, Federal Minister of Labour, at the Labour Canada seminar, Equal Pay for Work of Equal Value (Feb. 2, 1986), *reprinted in* MINISTER OF LABOUR, GOV'T OF CANADA, EQUAL PAY FOR WORK OF EQUAL VALUE 7 (1986) [hereinafter EQUAL PAY FOR WORK OF EQUAL VALUE].

143. *Id.*

144. Equal Remuneration for Men and Women Workers for Work of Equal Value Convention, June 29, 1951, 304 U.N.T.S. 1953; Convention No.100 was adopted by the International Labour Organization on June 29, 1951.

145. *Id.* Art. 2.

146. The Canadian Human Rights Act, CAN. STAT. ch. 33 (1976-77)

147. Charter of Human Rights and Freedoms, QUÉ. REV. STAT. ch. C-12 (1977).

148. *See* The Canadian Human Rights Act, CAN. REV. STAT. ch. 33, § 32 (1976-77); the Charter Cont. of Human Rights and Freedoms, QUÉ. REV. STAT. ch. 12, § 69 (1977).

149. The Pay Equity Act, MAN. REV. STAT. ch. 21 (1985).

150. An Act to Provide for Pay Equity, ONT. REV. STAT. ch. 34 (1987).

Minnesota. Manitoba's program is a "pro-active"[151] program requiring positive action by the employer rather than relying upon individual complaints for enforcement. The Ontario program is also pro-active, but also provides a mechanism for individual complaints as well.

Both the Manitoba and Ontario comparable worth programs refer to their goal as the achievement of "pay equity." The term "pay equity" is used because it does not have the same negative connotation that comparable worth carries, and because the term more succinctly conveys the idea of equal pay for work of equal value. This section of the paper will describe and discuss the legislative comparable worth, or pay equity, schemes of the Canadian federal government, Quebec, Manitoba, and Ontario.

B. The Federal Canadian Comparable Worth Program

The federal Canadian comparable worth program is based on Section 11 of the Canadian Human Rights Act,[152] which was adopted in 1977. Section 11(1) requires that employers pay equal wages to male and female employees performing work of equal value in the same establishment.[153] The language of Section 11(1) closely resembles that of the I.L.O.Convention No.100, the "Convention Concerning Equal Remuneration for Men and Women Workers for Work of Equal Value."[154] The Convention was adopted by the I.L.O.in 1951, and was ratified by Canada in 1972.

The comparable worth program under Section 11 uses a complaint-based approach; it is administered and enforced by the Canadian Human Rights Commission.[155] The Section 11 requirements apply to both public and private employers within the Canadian federal sector,[156] which makes up approximately 11% of the Canadian work force.[157] The employers covered are the federal civil service,

151. Pro-active programs are those requiring positive action by an employer - such as requiring them to negotiate a pay equity program with their employees' union, rather than a "reactive" program that is triggered by individual complaints of violations of the law.

152. The Canadian Human Rights Act, CAN. STAT. ch. 33 (1976-77).

153. *Id.* § 11(1).

154. Equal Remuneration for Men and Women Workers for Work of Equal Value Convention, June 29, 1951, 304 U.N.T.S. (1953).

155. The Canadian Human Rights Act, CAN. STAT. ch. 33, § 22(1) (1976-77).

156. *Id.* § 63.

157. Remarks of Hon. Bill McKnight at the Labour Canada seminar, Equal Pay for Work of Equal Value, *reprinted in* EQUAL PAY FOR WORK OF EQUAL VALUE, *supra* note 142, at 7.

federal Crown corporations and agencies,[158] and those in the banking, transportation and communications industries.

1. The Statutory Provisions

The language of Section 11 restricts the comparable worth program to gender-based wage differentials between jobs of equal value within the same establishment. Section 11(1) reads: "It is a discriminatory practice for an employer to establish or maintain differences in wages between male and female employees employed in the same establishment who are performing work of equal value."[159]

The value of work performed is to be evaluated in light of the skill, effort and responsibility required in the performance of the work, and the conditions under which the work is performed.[160] The comparison of the value of jobs under Section 11 is confined to that of jobs between female-dominated and male-dominated jobs, but the act does not define gender-dominated job groups.[161]

Similarly, the act does not define the term "establishment," but the Commission interprets establishment in a geographic sense—the "buildings, works or installations of an employer's business that are located within the limits of a municipality, municipal district, a metropolitan area, a county . . . whichever is the largest, or such larger geographic limits that may be established by the employer or by the employer and the union."[162] The act does provide that separate establishments established or maintained for the purpose of maintaining wage differentials between male and female employees are to be, deemed to be a single establishment for the purposes of Section 11.[163]

The act broadly defines wages as "any remuneration payable for

158. Federal Crown Corporations are government-owned corporations that operate autonomously under direction of a chairman appointed by the government. Examples would be the postal service, Canada Post, and the Canadian Broadcasting Corporation. Agencies are government bodies such as the Atomic Energy Control Board and the Canadian Wheat Board.

159. The Canadian Human Rights Act, CAN. STAT. ch. 33, § 11(1) (1976-77).

160. *Id.* § 11(2).

161. The legislation does not define job groups or classes to be used as a basis of comparison to determine whether pay equity has been achieved. Some legislation, such as Manitoba's Pay Equity Act, requires that in order for a female-dominated job class to be considered for pay comparison, at least 70% of the incumbent employees in the class must be female. Manitoba Pay Equity Act, MAN. REV. STAT. ch. 21, § 1 (1985-86).

162. CANADIAN HUMAN RIGHTS COMMISSION, EQUAL PAY FOR WORK OF EQUAL VALUE: INTERPRETATION GUIDE FOR SECTION 11 OF THE CANADIAN HUMAN RIGHTS ACT, (rev. ed., 1984).

163. The Canadian Human Rights Act, CAN. STAT. ch. 33, § 11(2.1) (1976-77).

work performed by an individual . . . ."[164] An employer may not reduce wages in order to eliminate a discriminatory wage differential.[165] The act also provides that it is not a discriminatory practice to pay male and female employees different wages if the differential is due to a factor prescribed under the guidelines established by the Canadian Human Rights Commission[166] as being a reasonable factor justifying the differential.[167] The act specifically states that sex is not a reasonable factor justifying a difference in wages.[168] The guidelines adopted by the Commission set out a number of factors which may justify wage differentials. Those factors include:

1) different performance ratings under a formal performance appraisal system about which the workers have been informed;

2) seniority;

3) "red circling" of rates—where a position has been reevaluated and downgraded, but the wages of the incumbent employees in the position have been fixed;

4) rehabilitation assignments—when an employer pays wages that are higher than the value of the work performed by an employee while that employee recuperates from an injury or illness of limited duration;

5) demotion pay procedure—when an employee is assigned to a lower level position because of unsatisfactory performance, deterioration in ability to perform, increasing complexity of the job, impaired health or disability, or internal labor surplus, yet is paid the wages he or she would have received had the demotion not taken place;

6) phased-in wage reductions—when an employer gradually reduces the wages of an employee because of unsatisfactory work performance, as set out under the demotion pay procedures;

7) temporary training—when an employee in a training program, equally open to male and female employees, leading to career advancement is temporarily assigned to a position but continues to receive wages different from those received by employees who work permanently in that position;

8) labor shortage for particular jobs—so that the employer must pay premium wages to attract workers for such jobs; and

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164. *Id.* § 11(6).
165. *Id.* § 11(5).
166. *See supra* text accompanying note 95.
167. The Canadian Human Rights Act, CAN. STAT. ch. 33, § 11(3) (1976-77).
168. *Id.* § 11(4).

9) changes in work performed when positions in a particular job classification are reclassified at a lower level because of a change in job content, but the employer continues to pay the incumbent employees the same wages that they would have received had the positions not been reclassified.[169]

2. Enforcement Procedure[170]

The provisions of Section 11 are administered and enforced by the Canadian Human Rights Commission;[171] it receives complaints of violations of Section 11, or may initiate a complaint itself.[172] The Commission makes an initial investigation to determine whether the complaint may be dealt with under Section 11. If it is so covered by Section 11, then the actual job comparison must be performed.[173] The complainant must specify the job groups which are to be compared; as noted, the act restricts the equal pay requirement to gender-based comparisons.

The Commission then identifies sample jobs at all levels of the two job groups; the employer and union, if any, involved in the complaint are invited to comment upon the sample jobs. The Commission then evaluates the jobs selected along the factors of skill, effort, responsibility and working conditions. If the employer has a formal job evaluation system, it is generally used by the Commission, provided that it utilizes the four statutory factors,[174] is gender-neutral, and can be used to evaluate all of the jobs within the particular establishment.[175]

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169. The guidelines are found at S.I./78-155, 116 CAN. GAZ. 1 (Sept. 27, 1978); *see also* CANADIAN HUMAN RIGHTS COMMISSION, BACKGROUND NOTES ON PROPOSED GUIDELINES: EQUAL PAY FOR WORK OF EQUAL VALUE (1985) (a consolidation of the guidelines).

170. Telephone interview with Daniel Legare, staff member, Equal Pay Section, Canadian Human Rights Commission (Jan. 1987).

171. The Canadian Human Rights Commission (CHRC) is a civil rights enforcement agency created under the Canadian Human Rights Act. CAN. STAT. ch. 33, § 21(1) (1976-77). The CHRC is composed of at least five, and not more than eight, members appointed by the Governor General in Council. *Id.*

172. *Id.* § 32.

173. *See supra* note 170. *See also* Cadieux, *Canada's Equal Pay for Work of Equal Value Law*, in COMPARABLE WORTH AND WAGE DISCRIMINATION: TECHNICAL POSSIBILITIES AND POLITICAL REALITIES 176-77 (H. Remick ed. 1984) [hereinafter Cadieux].

174. The statute sets out four factors: skill, effort, responsibility, and working conditions under which the work is performed. The Canadian Human Rights Act, CAN. STAT. ch. 33, § 11(2) (1976-77).

175. Remarks of R. Fairweather of the Labour Canada seminar, Equal Pay for Work of Equal Value, *reprinted in* EQUAL PAY FOR WORK OF EQUAL VALUE, *supra* note 142, at 7.

The complaints generally involve direct comparisons. However, in one case the Commission was faced with comparing separate jobs widely scattered throughout the different pay levels under different collective agreements.[176] In that case, the Commission used regression analysis to arrive at a comparison of the different sample positions identified.

If the Commission's evaluation indicates that a particular job is underpaid relative to the comparably-valued job to which it is compared, the Commission proposes a settlement.[177] The proposed settlement is negotiated between the parties involved; the Commission must approve the terms of any settlement agreed to by the parties.[178]

If no settlement is forthcoming, the Commission may refer the complaint to a Human Rights Tribunal.[179] The members of the Tribunal are appointed by the Commission;[180] but the Tribunal is independent of the Commission. The Tribunal has all the powers of a court of record;[181] it holds hearings on the complaint and evaluates the evidence presented by the parties, including the Commission. The Tribunal makes its own determination of the job evaluation process, and determines whether or not sex discrimination in pay exists. If the Tribunal finds that sex discrimination in pay exists, it may make such an order as it deems appropriate to remedy the complaint.[182] The order may include a "cease and desist" order and may require the payment of compensation such as wages.[183] The orders of a Human Rights Tribunal may be reviewed by a Review Tribunal,[184] which is established in the same manner as the Human Rights Tribunal.[185] The orders of both Tribunals are enforceable by the Federal Court.[186]

176. CANADIAN HUMAN RIGHTS COMMISSION, EQUAL PAY CASEBOOK 1978-1984 (1984) [hereinafter EQUAL PAY CASEBOOK]. Text refers to the "Librarian's Case" involving the Treasury Board of Canada and the Public Service Alliance of Canada. *Id.* at 5-6; *see also* Cadieux, *supra* note 173, at 179-80.

177. *See also* Cadieux, *supra* note 173, at 177-78.

178. The Canadian Human Rights Act, CAN. STAT. ch. 33, §§ 37-38, (1976-77).

179. *Id.* § 39. A tribunal is a three-member adjudicatory panel appointed by the Commission on an ad-hoc basis to hear and decide the complaint. *Id.*

180. *Id.*

181. *Id.*

182. *Id.* § 41(2).

183. *Id.* § 41.

184. *Id.* § 42.1(2).

185. *Id.* § 42.1(3).

186. *Id.* § 43.

3. Operation

The effects of the comparable worth program under Section 11 have been relatively limited. Most complaints deemed to be valid have been settled rather than referred to a Tribunal.[187] As of February 1986, 21 complaints have been settled while 27 were dismissed; the settlements have affected about 4,800 employees and have involved about $123 million (Canadian).[188] The Commission does not report the decisions of Tribunals, but only releases a summary of such decisions; settlements are publicly announced.[189]

Most of the settlements have involved complaints alleging sex-based pay differentials between similar jobs. However, in one case, the director of nursing at a federally-operated hospital alleged that she was paid less than the male assistant director general of the hospital, the male director of auxiliary services, and the male director of personnel.[190] The job evaluation conducted by the Commission established that the jobs of director of personnel and director of auxiliary services involved less skill, effort, and responsibility than did the nursing director's job. The assistant director general's job was rated roughly equal to the nursing director's job,[191] but was paid almost $10,000 (Canadian) more per year.[192] The Commission concluded the wage disparity between the nursing director and assistant director general positions was due to sex discrimination against the traditionally female-dominated nursing occupation. A settlement adjusted the nursing director's salary upward to equal that of the assistant director general.[193]

In another case,[194] involving 470 federal librarians, predominantly female, who complained that their jobs were underpaid relative to those of historical researchers, who were predominantly male.[195] The complaint involved six different pay levels for the librarians, and five pay levels for the historical researchers;[196] the relevant positions involved were also under several different collective agreements, and

187. Remarks of R. Fairweather at the Labour Canada seminar, Equal Pay for Work of Equal Value, *reprinted in* EQUAL PAY FOR WORK OF EQUAL VALUE, *supra* note 142, at 7.
188. *Id.*
189. *See* EQUAL PAY CASEBOOK, *supra* note 176.
190. *Id.* at 4.
191. *Id.*
192. *Id.*
193. *Id.*
194. *Id.* at 5-6.
195. *See* Cadieux, *supra* note 173, at 179-81.
196. EQUAL PAY CASEBOOK, *supra* note 176, at 5-6.

the employer had different job evaluation systems for the two job groups.[197] Because of these factors, and the number of jobs[198] involved, direct job-to-job comparisons were impossible. The Commission identified several sample jobs from each pay level in both groups, and used a single job evaluation system for comparison.[199] Using statistical regression analysis to compare the different positions, the Commission concluded that the complaint was justified.[200] The Commission recommended a settlement, which was agreed to by the employer; the cost of the settlement is approximately $900,000 (Canadian dollars) per year.[201]

4. Discussion

Given the relatively broad scope of Section 11, covering of both public and private sector employers, the results of the federal Canadian comparable worth program have been rather limited. The limited interpretation given to "establishment"[202] under the act restricts the range for drawing job comparisons. Furthermore, the lack of any definition of gender-dominated job groups may make it more difficult for a complainant to establish a valid complaint under the act. The Commission's policy of using the job evaluation system of the employer means that most complaints held to establish sex-based pay differentials are due only to the inconsistent application of the job evaluation system. These factors unduly restrict the Commission's choices as to an appropriate evaluation system.

The Commission has proposed new guidelines under the act which would address some of these problems.[203] One proposal would provide that "establishment" be determined functionally rather than geographically; that is, the employees subject to a common set of personnel and compensation policies would be deemed to be within the same establishment.[204] This would expand the range of jobs among which comparisons for equal pay consideration could be drawn. A second proposed guideline would restrict group complaints to those

197. *Id.*

198. *Id.* The "Librarian's Case" involved approximately 700 jobs. *Id.*

199. *Id.*

200. *Id.*

201. *Id*; *see also* Cadieux, *supra* note 173.

202. *See supra* note 162 and accompanying text.

203. CANADIAN HUMAN RIGHTS COMMISSION, BACKGROUND NOTES ON PROPOSED GUIDELINES—EQUAL PAY FOR WORK OF EQUAL VALUE 21-22 (1985) [hereinafter BACKGROUND NOTES]. These guidelines are still pending as of September 1987.

204. *Id.* at 11-12.

involving a complaining group that is predominantly of one sex, while the group to which the complainant group is to be compared is predominantly of the other sex.[205] While the Commission does this in practice,[206] there is no basis for it in the statute or guidelines. The guidelines would define sex predominance as being those job groups where the number of employees of one sex is at least 70% of the group, for groups of less than 100 employees; for groups of between 100 and 500 employees, 60% or more of the group would be of one sex to be considered sex predominant; and for groups larger than 500 employees, at least 55% of the employees must be of one sex to be considered sex predominant.[207]

Another proposed guideline would formalize the Commission procedure of using the employer's job evaluation system, while allowing the Commission the ability to use other means, such as statistical regression analysis.[208] A final proposed guideline would allow the payment of different wages to men and women performing work of equal value when the pay differential was due to a regional differential not related to sex. Under this proposal, an employer could pay workers in New Brunswick less than workers in Ontario performing the work of equal value, if the prevailing pay rate for such work was lower in New Brunswick than in Ontario.[209]

It remains to be seen whether the adoption of the proposed guidelines would make the federal comparable worth program any more effective. Labour Canada,[210] the federal labor ministry, has undertaken a program to ensure that equal pay for work of equal value is implemented within the federal sector.[211] This program involves an analysis of the compensation practices of federal employers, an educational program to promote understanding of the requirements and operation of the program under Section 11, and last, a promotion of voluntary compliance with Section 11 through counseling and advis-

205. *Id.* at 5-6.

206. *See* Cadieux, *supra* note 173, at 176-77; *see also* Equal Pay for Work of Equal Value, *supra* note 142, at 11-12 (statements of R. Fairweather).

207. BACKGROUND NOTES, *supra* note 203, at 21.

208. *Id.* at 22.

209. *See* Equal Pay for Work of Equal Value, *supra* note 142, at 10. (statements of R. Fairweather).

210. Labour Canada is the federal department responsible for labor matters. It is the equivalent of the United States Department of Labor.

211. *See* remarks of Hon. Bill McKnight at the Labour Canada seminar, Equal Pay for Work of Equal Work, *reprinted in* EQUAL PAY FOR WORK OF EQUAL VALUE, *supra* note 142, at 3.

ing of employers.[212] If this program is successful, it would surely increase the effectiveness of the comparable worth program under Section 11 more than any of the proposed guidelines or procedural changes.

C. Quebec: Comparable Worth Under the Charter of Human Rights and Freedoms

Adopted in 1975, the Quebec Charter of Human Rights and Freedoms[213] is a comprehensive antidiscrimination provision. Section 10 of the Charter, the basic declaration of rights under the Charter, prohibits discrimination on the basis of race, color, sex, pregnancy, sexual orientation, civil status, age (subject to legal limitations), religion, political convictions, language, ethnic or national origin, social condition, handicap, or use of any means to palliate a handicap.[214] Section 19 of the Quebec Charter of Human Rights and Freedoms is the basis of the Quebec comparable worth program. Section 19 provides: "Every employer must, without discrimination, grant equal salary or wages to the members of his personnel who perform equivalent work at the same place."[215]

The reference to "without discrimination" in Section 19 must be read in light of Section 10's declaration; that is, Section 19 prohibits discrimination in pay based on the grounds set forth in Section 10.[216] While the reference to "equivalent work" in Section 19 could be read as requiring only equal pay for equal work, it was intended to require, and is interpreted by the Quebec Human Rights Commission as requiring, the payment of equal pay for work of equal value.[217] The Quebec Human Rights Commission is responsible for the administration and enforcement of Section 19.[218]

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212. *Id.*

213. Quebec Charter of Human Rights and Freedoms, QUÉ. REV. STAT. ch. C-12 (1977); all references to the statute here refer to English-language version.

214. *Id.*, § 10.

215. *Id.*, § 19.

216. Section 10 defines discrimination as: "Discrimination exists where such a distinction, exclusion or preference (based on race, colour, sex, *etc.* - the prohibited bases) has the effect of nullifying or impairing such right." *Id.*, § 10. 3 QUEBEC HUMAN RIGHTS COMMISSION, EQUAL PAY FOR EQUIVALENT WORK, WITHOUT DISCRIMINATION 29-30 (1980) (Unofficial English Trans.) [hereinafter WITHOUT DISCRIMINATION]. (This volume is a report on interpretation of the pay equity provision under the Quebec Charter of Human Rights and Freedoms, published by the Quebec Human Rights Commission).

217. The Commission has set out its interpretation in WITHOUT DISCRIMINATION, *supra* note 216, at 44-57; *see also* S. WILLBORN, *supra* note 1, at 86.

218. Quebec Charter of Human Rights and Freedoms, QUÉ. REV. STAT. ch. C-12 (1977).

The Quebec comparable worth program is entirely complaint-based; it relies upon complaints of alleged violations of Section 19 to initiate proceedings under the Charter of Human Rights and Freedoms.[219] The Quebec program does not provide for collective bargaining between the employer and the union representing the relevant employees over job evaluation or wage adjustments needed to achieve pay equity.[220]

1. The Statutory Requirements

The general "equal pay for equivalent work" requirement of Section 19 is interpreted by the Quebec Human Rights Commission as encompassing work evaluated as being of comparable value.[221] The general language of Section 19 is unrestrictive as to the way to determine whether work is of comparable value. First, the language of Section 19 does not outline any factors to be used as the basis of evaluating the value of the jobs at issue. Also, Section 19 does not compare jobs performed by workers of opposite gender. Nor does Section 19 restrict the comparisons to jobs of the same geographical location, as the reference to the work to be compared being performed "in the same place" is not interpreted to mean that the jobs must be performed in the same geographic location.[222] The statute defines "salary and wages" as including "the compensations or benefits of pecuniary value connected with the employment."[223] However, because of the limitations imposed by Section 90 of the Charter of Human Rights and Freedoms,[224] Section 19 does not apply to claims involving "pension plans, retirement plans, life insurance plans or any other plan or scheme of social benefits"[225] unless those plans are discriminatory on the basis of "race, color, religion, political convictions,

219. *Id.* §§ 69, 70.

220. *Id.*

221. WITHOUT DISCRIMINATION, *supra* note 216, at 44-57.

222. The Commission interprets "same place" to mean "the overall facilities or group of facilities belonging to the same individual and legal entity, which has all the necessary components to operate autonomously and separately." *Id.*, at 44-48.

223. Quebec Charter of Human Rights and Freedoms, QUÉ. REV. STAT. ch. C-12, § 56 (1977).

224. Section 90 states that "Sections 11, 13, 16, 17 and 19 of this Charter do not apply to pension plans, retirement plans, life insurance plans, or any other plan or scheme of social benefits unless the discrimination is founded on race, colour, religion, political convictions, language, ethnic or national origin or social condition." QUÉ. REV. STAT. ch. C-12, § 90 (1977).

225. *Id.*

language, ethnic or national origin or social condition."[226] As a result of that exception, complaints alleging sex-based differentials in pension plan premiums or benefits among employees performing equivalent work can not be filed under Section 19.[227] The repeal of Section 90 is pending;[228] upon its repeal, Section 19 may be used to attack gender-based differentials in pension premiums or benefits.

Section 19[229] of the Charter lists certain exceptions to the equal pay requirement; pay differentials due to experience, seniority, years of service, merit, productivity or overtime are "not considered discriminatory if such criteria are common to all members of the personnel."[230] There is no monetary limit for claims under Section 19. Last, the provisions of Section 19 apply to all employers—both public and private sector—within provincial jurisdiction. Section 76 of the Charter requires that the Quebec Human Rights Commission refuse to pursue a complaint involving an employer outside its jurisdiction.[231]

2. Enforcement

The comparable worth provisions of Section 19 are complaint-based; an individual alleging a violation of Section 19 must file a written complaint with the Commission.[232] Upon receipt of a complaint, the Commission begins an investigation into the allegations; however, the Commission may also begin an investigation on its own initiative.[233] In order to be considered valid, the complaint must allege that workers performing work of equivalent value to that performed by the complainant, are receiving greater pay.[234] Further, it is significant to note that the basis for comparing jobs is not restricted to comparisons between male-dominated and female-dominated jobs. The

226. *Id.*

227. This would preclude claims such as those involved in the United States' cases of City of Los Angeles v. Manhart, 435 U.S. 702 (1978); and Ariz. Gov't Comm. v. Norris, 463 U.S. 1073 (1983), where sex-based pension premium and benefit differentials were held to be sex discrimination in violation of Title VII of the Civil Rights Act of 1964, Title 7 (codified as amended at 42 U.S.C. §§ 2000e-2000e-15).

228. Section 90 of the Quebec Charter of Human Rights and Freedoms is to be repealed when Qué. Stat. ch. 61, § 25 (1982) is proclaimed in effect. As of August, 1987, section 25 had not yet been proclaimed into effect.

229. QUÉ. REV. STAT. ch. C-12, § 19 (1977).

230. *Id.*

231. *Id.* § 76.

232. *Id.* § 69.

233. *Id.* § 73.

234. *See* WITHOUT DISCRIMINATION, *supra* note 216, at 39-43.

language of Section 19, in light of Section 10, would allow comparisons between any jobs deemed to be of equal or comparable value within an employers' work force, if the alleged pay discrimination is based on one of the prohibited grounds set out in Section 10.[235] Unfortunately, the statute is silent as to the factors to be used in determining if the jobs at issue are of comparable value.

In its investigation of the complaint, the Commission generally will use the employer's own job evaluation system to determine whether the jobs at issue are of comparable value.[236] However, the Commission will first determine if the employer's evaluation system[237] is biased in its operation or application. If the employer does not have a job evaluation system, the Commission generally uses a point-factor system based on the skills, effort, responsibility and working conditions of the relevant jobs.[238]

If the Commission's investigation reveals that the complaint is factually valid, the Commission must "endeavour to induce the parties to settle their dispute;"[239] and any such settlement must be executed as a written document.[240] When the Commission is unable to reach a settlement, it recommends to the parties any actions it feels are appropriate to settle the dispute.[241] If the parties do not adopt the Commission's recommendation, the Commission may, with the consent of the complainant, refer the complaint to the Provincial courts

235. In one complaint under Section 19, summer employees alleged that they were paid less than the permanent employees performing similar work. La Commission de Droits de la Personne du Quebec v. La Ferme de la Poulette Grise, Inc., 3 CAN. HUM. RTS. REP. 6235-49 (1982). The case was decided on other grounds; the court held that because the summer employees were paid the same as all employees doing equivalent work under short-term contracts, there was no wage discrimination as envisioned by Section 19. *See* S. WILLBORN, *supra* note 1, at 86-87.

236. For a description of the procedures employed by the Commission in investigating complaints under Section 19, *see* WITHOUT DISCRIMINATION, *supra* note 216, at 82-92.

237. The point factor system is a popular method of job evaluation; it involves the rating of a job on a series of factors involved in the job such as physical effort required, complexity of tasks performed, education required, risk to employees, etc. that are presumed to contribute to the overall "worth" of the job. A point value is then assigned to each factor present in a job to indicate the egree to which each factor is present in the job. The point values for the various factors in the job are then totalled, producing a "point-factor" score that can be compared with the point-factor scores of other jobs to determine whether such jobs are of equal worth. *See* Beatty & Beatty, *Some Problems with Contemporary Job Evaluation Systems*, in COMPARABLE WORTH AND WAGE DISCRIMINATION TECHNICAL POSSIBILITIES AND POLITICAL REALITIES 59-77 (H. Remick ed. 1984).

238. *Id.*

239. QUÉ. REV. STAT. ch. C-12, § 81 (1977).

240. *Id.*

241. *Id.* § 82.

for enforcement.[242] Alternatively, the complainant may refer the dispute to the courts.[243] In addition, when seeking judicial enforcement, the Commission may request an injunction and appropriate compensation.[244]

Once before the court, the Commission has the burden of proof in establishing that a violation exists. It must convince the court that: (1) the jobs involved are equivalent in value; (2) the complainant is being paid less than the workers in the equivalent job; and, (3) the pay differential is due to, or has the effect of, discrimination on one of the bases prohibited by Section 10.[245] The court makes its own determination after a hearing, and can order such action as it deems appropriate to resolve the dispute.[246]

3. Discussion

The Quebec comparable worth program under Section 19 of the Charter of Human Rights and Freedoms has been of limited effectiveness. The results of complaints under Section 19 show that, from 1976 to 1984, successful claims have affected approximately 3,500 persons and involved approximately $500,000 (Canadian) in total wage adjustments.[247]

Through 1984, the Commission received seventy-seven complaints of alleged violations of Section 19; eighteen of those complaints were dismissed by the Commission, and ten were withdrawn. Of the remaining forty-nine complaints, twenty-two were settled after the Commission's investigation, one was decided by a court, two were on appeal in the courts, two were pending hearings by a tribunal, and twenty-two were being investigated by the Commission.[248]

The complaints generally involved women in unskilled positions

242. *Id.* § 83. The statute, in its English translation, uses the term "tribunal," but the actual reference is to a court. Section 19 complaints that are not settled may be referred to the Quebec Provincial Courts for resolution. *See also* WITHOUT DISCRIMINATION, *supra* note 216, at 93.

243. QUÉ. REV. STAT. ch. C-12, § 84 (1977).

244. *Id.* § 83.

245. WITHOUT DISCRIMINATION, *supra* note 216, at 93.

246. *Id.*

247. QUÉ. REV. STAT. ch. C-12, § 83 (1977).

248. Interview with Muriel Garon, Acting Director, Research Branch, Quebec Human Rights Commission, Montreal, Quebec (July 10, 1987); *see also* Ledoyen, Research Service of the Quebec Human Rights Commission, paper presented at *Perspectives on Equal Value*, a conference, sponsored by the Ontario Council on the Status of Women (Toronto, Feb. 3-4, 1984) [hereinafter Ledoyen].

in "low tech"[249] industries such as tobacco and paper in the private sector. Most of those complaints dealt with inconsistent applications of the employer's job evaluation system, including exclusion of female employment categories from the existing evaluation systems, fewer promotional opportunities for women and discriminatory practices in transfers, promotions and layoffs.[250] Most of the wage discrimination was the result of reflected occupational segregation by sex in the employer's workplace.[251] However, there have been a number of complaints recently filed by public sector unions on behalf of professional employees in traditionally female-dominated job classes.[252]

From 1982 until 1986, there were relatively few complaints. One reason may be that the Commission has been unable to publicize the comparable worth program because of its limited resources for enforcement. Rather, it has emphasized a preventative approach, seeking to implement pay equity through affirmative action. Additionally, the general slowdown in economic conditions in the province may also have affected the number of complaints filed under Section 19. However, as noted above, there has been a recent resurgence in complaints involving professional employees in the public sector.[253]

D. Manitoba's Pay Equity Act

Manitoba's pay equity legislation, the Pay Equity Act,[254] was adopted in 1985. The pay equity statute applies to the "extended public sector"[255] of the province and is pro-active rather than complaint-based.[256] The legislation envisions a four-year program involving col-

249. Ledoyen, *supra* note 248.

250. The complaints have generally involved unskilled or low-skilled positions in simple manufacturing operations. *See* Ledoyen, *supra* note 248, at 1. Ledoyen uses the terms "low-tech." *Id.*

251. M. Garon's Remarks at the Labour Canada Seminar, Equal Pay for Work of Equal Value (Feb 12, 1986), *reprinted in* MINISTER OF LABOUR, GOV'T OF CANADA, EQUAL PAY FOR WORK OF EQUAL VALUE 18, 20-22 (1986).

252. *Id. See also* Ledoyen, *supra* note 248, at 2-4.

253. Interview with M. Garon, *supra* note 248.

254. *Id.*

255. The Pay Equity Act, MAN. REV. STAT. ch. 21 (1985-86).

256. *Id.* § 1. The extended public sector includes not just the employees within the provincial civil service, but also the independent "Crown Entities," and External Agencies. Crown Entities are government-owned boards or corporations the operated autonomously under an official appointed by the Lieutenant Governor in Council. *Id.* The Crown Entities include Manitoba Hydro and the Manitoba Telephone system as well as the province's universities and major hospitals. *Id.*

Under the Act, External Agencies are other organizations that are not government-owned or controlled, but that receive a major portion of their funding from the province. *Id.* at

lective bargaining over job evaluations and wage adjustments. Since the program has only recently been adopted, it has not yet produced any of the envisioned results. Consequently, this Article will focus on the procedures set out in the statute and the progress made so far.

The Pay Equity Act is modeled after the Minnesota comparable worth legislation and program.[257] Manitoba's legislation covers the provincial "extended public sector:" the employees in the provincial civil service of the various Crown Entities,[258] as well as the employees of the "external agencies" listed in Schedule A of the Act.[259] Those external agencies include the four universities and the twenty-four largest health care facilities in the province. There are approximately 17,000 employees in the provincial civil service: the Crown Entities employ approximately 11,600 employees, and the listed External Agencies employ approximately 18,100 workers.[260] The Act also provides that its coverage may be extended to other external agencies that receive substantial provincial funding.[261] The Act does not apply to the local governments, municipalities or public school districts in the province.[262]

1. Administration of the Pay Equity Program

The Act's pay equity scheme is to be enforced and administered by the Pay Equity Bureau, an agency created under the Act.[263] The Act provides for the designation of an Executive Director of the Bureau, who oversees the implementation and administration of the Act, and provides information and advice to the parties under the Act.[264] The Executive Director also monitors the program's progress and re-

Schedule A. The External Agencies include the University of Manitoba, the University of Winnipeg, Brandon University and the College Université de St. Boniface, as well as the twenty-four largest health care instutitions in the province. *Id.*

257. MAN. REV. STAT. ch. 21, §§ 8-9, 13-14 (1985-86).

258. MINN. STAT. ANN. §§ 43A.01(3), 471.991-471.999 (West Supp. 1988).

259. The Crown Entities include Manitoba Hydro, the Manitoba Telephone System, the Manitoba Public Insurance Corporation and the Manitoba Workers Compensation Board. Pay Equity Act, MAN. REV. STAT. ch. 21, § 1 (1985-86).

260. *Id.* at Schedule A. The External Agencies include the University of Manitoba, the University of Winnipeg, Brandon University and the College Université de St. Boniface, as well as the twenty-four largest health care institutions in the province. *Id.*

261. PAY EQUITY BUREAU, OVERVIEW OF MANITOBA PUBLIC SECTOR GROUPS UNDER THE JURISDICTION OF THE PAY EQUITY ACT (1985) [hereinafter PAY EQUITY].

262. Pay Equity Act, MAN. REV. STAT. ch. 21, § 1 (1985-86). The Act defines substantial funding as being 50% or more of the agency's annual revenue. *Id.* § 1.

263. *Id.*

264. *Id.* § 5(1).

ports annually to the Minister responsible for the Bureau.[265]

In addition to the Pay Equity Bureau, the Act provides for the designation of a member of the provincial Civil Service Commission as the Pay Equity Commissioner.[266] The commissioner oversees the provincial Civil Service compliance with the Act, and is responsible for ensuring implementation of the pay equity program.[267] Additionally, the Act directs the Commissioner and the Civil Service Commission to cooperate with the Pay Equity Bureau in carrying out the Act's requirements.[268]

2. Procedure

The Act requires the covered employers, in cooperation with the union representing the respective employees, to evaluate the value of the various jobs within the employer's job classes. The evaluation of a job's value must be based on the skills, effort and responsibility required by the job, and on the working conditions under which the job is performed.[269] The employer is required to select a single, sex-neutral, evaluation system; the selection of the evaluation system is to be done through collective bargaining with the bargaining agent representing the employer's workers.[270] If the union and employer fail to reach agreement on an evaluation system, either party may refer the dispute to arbitration.[271] If the employer is a Crown Entity or External Agency,[272] then the dispute is referred to the Manitoba Labour Board for resolution.[273] The arbitration board or Labour Board is empowered, by the Act, to hear and determine the issue, including designation of an evaluation system and the job classes to which the system will be applied.[274]

After agreeing on the job evaluation system to be used, the employer and union must identify the job classes to which the evaluation

265. *Id.* §§ 5(1)-(3).
266. *Id.* § 5(2)(b-c).
267. *Id.* § 12(1).
268. *Id.* § 12(2).
269. *Id.* § 11.
270. *Id.* § 6(1).
271. *Id.* §§ 9(1)(a), 14(1)(a).
272. *Id.* § 10(1).
273. Crown Entities are government owned boards or corporations that operate autonomously under officials appointed by Lieutenant Governor in Council, *Id.* § 1. "External Agencies" under the Act are other organizations that are not government-owned or controlled, but that receive a major portion of their funding from the province; they include the universities and major hospitals in the province. *Id.* at Schedule A.
274. *Id.* § 15.

system shall be applied. The Act states that the evaluation system shall be applied to male- and female-dominated classes of jobs to determine the relative value of those jobs.[275] The Act defines "male-dominated classes" as being those job classes, in which there are ten or more incumbents, of whom 70% or more are men.[276] "Female-dominated classes" are defined as those job classes with ten or more incumbents, of whom 70% or more are women.[277] The Act also provides that, when a public sector employer employs five hundred or more employees, that employer and the union representing the employees may agree to designate other job classes as being either male-dominated or female-dominated in order to be evaluated.[278]

When the parties have reached agreement upon the job evaluation system to be used and the male- and female-dominated job classes to be evaluated, they are required to file a copy of their agreement with the Executive Director of the Pay Equity Bureau.[279] If the parties fail to file an agreement within the specified time limit, the Executive Director can refer the dispute to arbitration, or the Manitoba Labour Board, as appropriate.[280]

After agreeing upon the evaluation system to be used, and identifying the job classes to be evaluated, the parties are required to conduct the evaluation to determine the relative value of the various jobs.[281] As noted, the evaluation system must be sex-neutral and must consider the skill, effort and responsibility of the job, and the working conditions of the job, in determining the relative value of a particular job.[282] A single evaluation system is to be used for evaluating all the jobs of a particular employer. The Act allows the use of indirect comparisons; the parties may assign to a female-dominated class a pay grade or schedule equal to the average pay grade or schedule of male-dominated classes performing equal work or work of comparable value.[283] Having evaluated the various male- and female-dominated job classes, the parties are then required to determine the appropriate wage adjustments to various classes necessary to achieve pay equity with other classes performing equal work or work of comparable

275. *Id.* § 15(1), (4), (8).
276. *Id.* § 9(1)(b).
277. *Id.* § 1.
278. *Id.*
279. *Id.*
280. *Id.* §§ 9(2), 14(2).
281. *Id.* §§ 10(2), 15(2).
282. *Id.* §§ 9(1), 14(1).
283. *Id.* § 6(1).

value. The allocation of the wage adjustments and the implementation of the pay equity program is to be negotiated between the parties.[284]

The Act does set some limits on the wage adjustments required to achieve pay equity. No employer is required to allocate more than one percent of its total payroll in any one year for pay equity wage adjustments.[285] As well, no wages may be lowered in order to achieve pay equity; and no employee may be placed in a lower step of a paygrade or schedule after that grade or schedule has been adjusted upward to achieve pay equity.[286] Lastly, the employer is only required to make pay equity adjustments for four years;[287] that means the total cost of the pay equity wage adjustments is not required to exceed four percent of the employer's total payroll costs.

The estimated cost of the pay equity program for the four years of adjustments is $16.5 million (Canadian) for the civil service, $12.7 million (Canadian) for the Crown Entities, and $18.6 million (Canadian) for the External Agencies. The total cost of the pay equity program is estimated to be $47.8 million (Canadian).[288]

If the parties fail to reach an agreement on the implementation of the pay equity plan and wage adjustments, either party may refer the issue to arbitration[289] or to the Manitoba Labour Board in the case of a Crown Entity or External Agency.[290] The arbitration board or the Labour Board is empowered to determine the issue. If the parties have reached agreement on the implementation and wage adjustments, they must file a copy of the agreement with the Executive Director of the Pay Equity Bureau within the specified time limit.[291] Failure to file the agreement within the time limit can result in the Executive Director referring the issue to arbitration or the Labour Board for resolution.[292]

The Act imposes a duty to bargain in good faith over the development and implementation of pay equity upon both the employers and union representing the respective employees.[293] The duty to bar-

284. *Id.* § 6(2).
285. *Id.* §§ 9(1)(c), 14(1)(c).
286. *Id.* § 7(3)(a).
287. *Id.* § 7(1)-(2).
288. *Id.* § 7(3)(b).
289. PAY EQUITY, *supra* note 261.
290. Pay Equity Act, MAN. REV. STAT. ch. 21, § 10(1) (1985-86).
291. *Id.* § 15(1).
292. *Id.* §§ 9(2), 14(2).
293. *Id.* §§ 10(2), 15(2).

gain in good faith is defined as including "making every reasonable effort to reach agreement respecting the implementation of pay equity."[294] Because the pay equity program is "pro-active"[295] rather than complaint-based, there is no statutory provision for handling individual complaints about the job evaluation or pay equity implementation process. Employees with such complaints would have to address them to either their union or the Pay Equity Officer, as appropriate. The complaints could then be raised in the process of negotiations by the union and employer. Because the resolution of individual complaints appears to be entrusted to the union and employer, individuals dissatisfied with the outcome of the negotiations may be denied any effective means of resolving their complaints.

3. Timetable for Implementation

The Act sets out a timetable for the implementation of pay equity within the provincial civil service,[296] Crown Entities and External Agencies. Part II of the Act, which applies to the provincial civil service, requires that bargaining over the selection of an evaluation system commence by October 1, 1985.[297] That bargaining is to be completed, and agreement upon a single, sex-neutral, job evaluation system reached by June 30, 1986.[298] The parties must file a copy of their agreement with the Pay Equity Bureau by July 30, 1986.[299] The second stage of negotiations, regarding the implementation of the pay equity plan and adjustments, is to be completed, and the first set of wage adjustments made, by September 30, 1987;[300] a copy of the agreement on implementation is to be filed with the Pay Equity Bureau by October 30, 1987.[301] The entire pay equity process is to be completed within four years from the first adjustments, which would be by September 30, 1991.

The Crown Entities and External Agencies are under a different timetable, set out in Part IV of the Act. The initial negotiations over selection of an evaluation system are to commence by October 1,

294. *Id.* §§ 8(3), 13(3).
295. *Id.* § 8(2)-(3).
296. For a definition of pro-active, *see supra* note 84A.
297. Pay Equity Act, MAN. REV. STAT. ch. 21, § 8 (1985-86).
298. *Id.* § 9(1)(a).
299. *Id.* § 9(2)(a).
300. *Id.* § 9(1)(c).
301. *Id.* § 9(2)(b).

1986,[302] and are to be completed by June 30, 1987;[303] a copy of the initial agreement over selection of the evaluation system is to be filed with the Pay Equity Bureau by July 30, 1987.[304] The second stage of negotiations on the implementation of pay equity, and the first set of wage adjustments are to be completed by September 30, 1988.[305] A copy of the agreement on implementation of pay equity is to be filed with the Pay Equity Bureau by October 30, 1988.[306] The four year process of implementing pay equity within the Crown Entities and External Agencies is to be completed by September 30, 1992. The Crown Entities and External Agencies may each be required to designate a Pay Equity Officer for the entity or agency.[307] The Pay Equity Officer is to be responsible for supervising the implementation of pay equity within the agency or entity. The Pay Equity Officer's duties include initiating and overseeing the various negotiations required under the Act, supervising the implementation of pay equity agreements by the agency or entity administrators, and preparing any reports required by the Pay Equity Bureau.[308]

4. Progress to Date[309]

At present, the implementation of pay equity under the Act is proceeding on schedule. The Manitoba Civil Service Commission and the Manitoba Government Employees' Association have reached agreement on the evaluation system to be used to evaluate the job classes in the provincial civil service.[310] They adopted a modified Hay & Company Job Evaluation system,[311] and have identified the job classes to be identified. They have also established an evaluation committee, composed of five union and five management representatives,

302. *Id.* § 13(1).

303. *Id.* § 14(1)(a).

304. *Id.* § 14(2)(a).

305. *Id.* § 14(1)(c).

306. *Id.*

307. *Id.* § 17(1).

308. *Id.* § 17(2).

309. This section is based on a telephone interview with Carole Geller, Executive Director, Pay Equity Bureau (Dec. 1986); *see also* Pay Equity Bureau, 2 EQUALITY AT WORK (Spring 1986).

310. *See* Pay Equity Bureau, 3 EQUALITY AT WORK 6 (Spring 1986).

311. The Hay & Company job evaluation system is a job evaluation system developed by the Hay & Company Consultants. It is a point-factor system, used widely in state government. For a description of the point-factor system *see supra* note 237, Pay Equity Bureau, 1 PAY EQUITY EQUALITY AT WORK 5 (Jan. 1986).

to conduct the actual evaluations.[312] The agreement on the evaluation system is a positive first step in the implementation of the pay equity program, but because the negotiations involved only one employer and one bargaining unit, the issues involved were relatively simple. The second stage of negotiations involving implementation and wage adjustment may prove to be more difficult. Those negotiations were to be completed by September 30, 1987.[313] The negotiations over selection of the evaluation system between the Crown Entities and External Agencies and the unions representing their employees began October 1, 1986. Those negotiations involve a number of different unions and employers, and are expected to be much more difficult than the Civil Service negotiations. The various hospitals included in the list of External Agencies, and the unions representing their employees, have agreed to centralized bargaining on the job evaluation system.[314] Those negotiations involve twenty-four health care institutions and approximately sixteen different unions.[315] The outcome of those negotiations will give a good indication of the likelihood of success for the pay equity program, and may also provide an indication of the feasibility of using the Manitoba Labour Board to resolve disputes involving job evaluation and the implementation of pay equity. Because the hospital work force is primarily female, the job evaluations will involve many female-dominated job classes but only a few male-dominated job classes. Such a narrow range for evaluation comparisons may limit the effectiveness of the pay equity program in those institutions.

No regulations have been adopted under the Act as yet; however, the Pay Equity Bureau has issued guidelines setting forth recommendations about the appointment of a Pay Equity Officer by employers, and the role of the Pay Equity Officer in initiating negotiations.[316]

E. Ontario: An Act to Provide for Pay Equity

Bill 154, titled "An Act to Provide for Pay Equity,"[317] was passed by the Ontario legislature on June 15, 1987 and received royal assent on June 29, 1987. Bill 154 is the basis of Ontario's pay equity

312. Pay Equity Bureau, 3 EQUALITY AT WORK 6 (Spring 1986).

313. Pay Equity Act, MAN. REV. STAT. ch. 21, 9(1)(c) (1985-86).

314. Pay Equity Bureau, 4 EQUALITY AT WORK 5 (Spring 1987).

315. *Id.* Some of this information also was gathered in an interview with Carole Geller, Executive Director, Pay Equity Bureau.

316. Pay Equity Bureau, Pay Equity Guidelines (Nov. 1985).

317. An Act to Provide for Pay Equity, Bill 154, 3rd Sess. 33rd Leg. ONT. STAT. (1987).

program; it applies to all public sector employers and to private sector employers having ten or more employees.[318] The approach taken by the Act combines a pro-active program, similar to that of Manitoba, with a provision for complaints by individuals. The pro-active program is the major part of the program, and it utilizes collective bargaining as the mechanism through which pay equity plans are to be developed and implemented.

The scope of the legislation's coverage is very broad—both the public and private sectors are included.[319] The public sector is defined very broadly—it includes the provincial government, municipalities, school boards, universities, and hospitals.[320] Private sector employers with ten or more employees are subject to the Act; employer size is to be determined based on the average number of employees employed in Ontario during the twelve months prior to the effective date of the legislation.[321] If an employer subsequently reduces its workforce to less than ten employees, it is still subject to the legislation.[322] Unions that represent the employees of covered employers are also subject to the legislation.[323]

The Act creates the Pay Equity Commission to administer the pay equity program.[324] The Commission is responsible for overseeing the development and implementation of pay equity plans under the legislation, and for the resolution of complaints arising under the program.[325]

1. Approach

The purpose of the Act is "to redress systematic gender discrimination in compensation for work performed by employees in female job classes."[326] Such systemic discrimination will be identified by undertaking comparisons between female job classes and male job classes in the employer's same establishment, in terms of compensa-

318. *Id.* § 3(1).
319. *Id.*
320. *Id.* § 3, Bill 154 & App.
321. The Act has not yet been proclaimed into effect, nor has the effective date of the Act been set. Telephone interview with Jane Marlatt, Director of the Consultative Services Branch, Ontario Women's Directorate (July 1987).
322. An Act to Provide for Pay Equity, Bill 154, 3rd Sess. 33rd Leg. ONT. STAT. ch. 34, § 32 (1987).
323. *Id.* § 3(1).
324. *Id.* § 27.
325. *Id.* §§ 27-35.
326. *Id.* § 4(1).

tion and the value of the work performed by those job classes.[327] The Act defines "female job class" as a job class in which 60% or more of the employees are female; an employer and union may also designate a job class as a female job class through collective bargaining, and a job class may be so designated through review proceedings by the Pay Equity Commission.[328] Male job classes are defined as those in which 70% or more of the members are male; male job classes may also be designated through negotiations or through review proceedings under the Pay Equity Commission.[329]

The comparisons between male and female job classes as to the compensation they receive and the value of the work they perform are restricted to those male and female job classes in the same establishment of the employer. The Act defines "establishment" as "all of the employees of an employer employed in a geographic division."[330] The term "geographic division" is defined as "a county, territorial district or regional municipality."[331] Employers may designate more broadly-defined geographic divisions through collective bargaining, or unilaterally if the employees are not unionized.[332] The comparisons within the establishment, as to the value of the work performed, will be based on a composite of the skill, effort and responsibility normally required in performing the work, and the conditions under which it is normally performed.[333] Comparisons for female job classes under a collective bargaining agreement are restricted to those with male job classes within the bargaining unit;[334] job classes outside the bargaining unit will be compared with other classes outside the bargaining unit.[335]

Under the definition provided in the Act, pay equity will be achieved when the job rate paid to members of the female job class, who are the subject of the comparison, is at least equal to the job rate paid to members of the male job class performing work of comparable value.[336] If more than one comparison between the female job class and male job classes within the establishment is possible, pay equity is achieved when the job rate for the female class is at least equal to that

327. *Id.* § 4(2).
328. *Id.* § 1(1).
329. *Id.*
330. *Id.*
331. *Id.*
332. *Id.* §§ 14(3)(a), 15(2)(a).
333. *Id.* § 5(1).
334. *Id.* § 6(4)(a).
335. *Id.* § 6(4)(b).
336. *Id.* § 6(1).

of the male class performing comparably-valued work with the lowest job rate.[337] If no male job class within the establishment performs comparably-valued work, pay equity is deemed achieved when the job rate for the female class is at least as great as the highest rate for the male job class performing work of less value than that performed by the female job class.[338]

The Act does not prohibit differences in compensation between male and female job classes if the difference is the result of: a formal, non-discriminatory seniority system; a temporary training or development assignment equally open to male and female employees; a merit pay system based on formal performance ratings; red-circling of positions to maintain the compensation for an incumbent in a position that has been downgraded; or a skills shortage that requires inflating compensation in order to recruit employees with the required skills.[339] Positions designated as casual positions[340] may be excluded from the job classes to be compared.[341] The Act also allows pay differentials that may arise between male and female job classes after pay equity has been achieved in an establishment, when such differential is the result of differences in bargaining strength between the classes.[342]

Employees under the Act are required to develop and implement pay equity plans; if the employer's workforce is unionized,[343] their bargaining agents are to be involved in the development and implementation through collective bargaining.[344] A separate pay equity plan must be developed for each bargaining unit, as well as a plan for those employees outside the bargaining unit.[345] The pay equity plan must identify the job classes compared and the establishment within which the comparison is made, and must describe the gender-neutral comparison system used to evaluate the work performed by the job classes.[346]

The results of the comparison must be described, and the plan

337. *Id.* § 6(3).
338. *Id.* § 6(2).
339. *Id.* § 8(1).
340. "Casual positions" are those positions used sporadically or on a temporary basis by the employer. *Id.* § 8(4). The Act provides, however, that a casual position may not include regular, part-time positions or regular, seasonal positions. *Id.*
341. *Id.* § 8(3).
342. *Id.* § 8(2).
343. *Id.* § 14.
344. *Id.* § 15.
345. *Id.* § 14(1).
346. *Id.* § 13.

must describe how compensation will be adjusted to achieve pay equity;[347] the Act prohibits the reduction of compensation payable to any employee in order to achieve pay equity.[348] The plan must set out the dates for the first adjustments to compensation; such adjustments must be made not later than the dates specified in the Act: the second anniversary of the effective date of the Act for public sector employers, the third anniversary for private sector employers with five hundred or more employees, the fourth anniversary for employers with at least one hundred but less than five hundred employees, the fifth for employers with at least fifty but less than one hundred employees, and the sixth for employers with at least ten but less than fifty employees.[349]

The pay adjustments are to be made annually, if necessary, until pay equity has been achieved.[350] In the public sector, the pay equity plans are to be fully implemented, and pay equity achieved, not later than the seventh anniversary of the effective date of the Act.[351] The annual adjustments are to be not less than 1% of the employer's annual payroll, unless a smaller adjustment will result in pay equity.[352]

2. Procedure

The Act provides for implementation to be phased in over a number of years. Public sector employers and private sector employers with five hundred or more employees must develop and begin to implement a pay equity plan by the second anniversary of the effective date of the Act.[353] Private sector employers with at least one hundred but less than five hundred employees must develop a pay equity plan by the third anniversary.[354] Private sector employers with less than one hundred employees may choose to develop a pay equity plan; if they do so, such employers with at least fifty employees must begin implementation by the fourth anniversary of the effective date of the Act,[355] and such employers with at least ten employees must begin implementation by the fifth anniversary.[356] If employers with less

347. *Id.* § 13(d).
348. *Id.* § 9(1).
349. *Id.* § 13(2)(e).
350. *Id.* § 13(5).
351. *Id.* § 13(7).
352. *Id.* § 13(4).
353. *Id.* § 10(a).
354. *Id.* § 10(b).
355. *Id.* § 10(c).
356. *Id.* §§ 10(c)-(d).

than one hundred employees choose not to develop a pay equity plan, they may continue existing pay practices until the fifth anniversary of the effective date of the Act for such employers with at least fifty employees,[357] and until the sixth anniversary for such employers with at least ten employees.[358] As of the sixth anniversary of the effective date of the Act, all covered employers must have adopted compensation practices designed to achieve pay equity.[359]

Public sector employers and private sector employers with at least five hundred employees must conduct an evaluation and comparison of the value of the work performed by male and female job classes prior to the second anniversary of the effective date of the Act.[360] Those employers also must have developed a pay equity plan and have made the first compensation adjustments by the second anniversary of the effective date for public sector employers,[361] and by the third anniversary for the large private sector employers.[362]

If the employees are unionized, the pay equity plan must be developed through collective bargaining with the appropriate bargaining agent;[363] if the employees are not organized, the employer may unilaterally develop a plan.[364] The plan, once developed, is to be posted in the workplace.[365] Once posted, if there are no objections to the plan, the pay equity plan is deemed to be approved by the Pay Equity Commission and is binding on the parties to it;[366] the plan, once approved, prevails over, and is deemed incorporated into, any collective agreement covering the employees subject to the plan.[367]

If the union and the employer are unable to agree on a pay equity plan by the required date, the employer must notify the Commission.[368] The Commission shall appoint a review officer, who will attempt to obtain an agreement between the parties.[369] If no settlement is reached, the review officer can order the parties to adopt a plan

357. *Id.* § 21(1)(a).
358. *Id.* § 21(1).
359. Firms with less than 10 employees are not covered. *Id.* § 18.
360. *Id.* § 12.
361. *Id.* § 13(e)(i).
362. *Id.* § 13(e)(i)-(ii).
363. *Id.* § 14(2).
364. *Id.* § 15(1).
365. *Id.* §§ 13(10), 14(5), 15(8).
366. *Id.* § 14(5). Sections 14(6) and (7) require the employer and allow the union involved to notify the Commission if no agreement is reached.
367. *Id.* § 16(1).
368. *Id.* §§ 16(4), 17.
369. *Id.* § 15(4).

deemed appropriate by the officer.[370] If such a plan is ordered by the review officer, either party has thirty days to file an objection with the Commission. If an objection is filed, the Commission will refer the matter to the Hearings Tribunal for a hearing on the objection, and the Tribunal may order such action as it deems appropriate.[371] If the employees subject to the pay equity plan are not unionized, the employees have ninety days from the date the plan is posted in the workplace to review and comment on the plan unilaterally developed by the employer.[372] Seven days after the close of the comment period, the employer must post the final plan, along with a notice indicating whether the plan has been amended in response to the comments of the employees.[373] Employees subject to the plan may file a notice of objection to the final plan with the Commission within thirty days of the posting of the final plan notice.[374] If no objections are filed, the plan is deemed approved by the Commission and is binding upon the employer.[375]

If objections to the pay equity plan are filed, the Pay Equity Commission may appoint a review officer to investigate the objection. The review officer is to attempt to settle the objection; if a settlement is not reached, the review officer may make such order as appropriate to settle the objection.[376] Objections to an order of a review officer may be filed with the Commission by either a party named in the complaint, or by an employee or employees subject to the plan affected by the order.[377] If the Commission receives a notice of objection to the order, the Hearings Tribunal will hold a hearing on the objection, and the Tribunal may make such order as it deems appropriate.[378] If the Commission orders any pay adjustments, they must be made retroactively to the mandatory posting date of the pay equity plan.[379]

Employers with less than one hundred employees may choose to develop a pay equity plan; if they do so, they are to follow the proce-

370. *Id.* § 16(2).
371. *Id.* §§ 16(4), 17(1).
372. *Id.* § 15(4).
373. *Id.* § 15(6).
374. *Id.* § 15(7).
375. *Id.* § 15(8).
376. *Id.* § 16(2).
377. *Id.* § 16(4).
378. *Id.* § 17(1).
379. *Id.* § 17(3).

dures described above.[380] These employers must develop, post and implement a pay equity plan by the fifth anniversary of the effective date for employers with at least fifty employees, and the sixth anniversary for employers with less than fifty, but more than ten employees.[381] If small employers choose not to develop a pay equity plan, they must adopt pay procedures designed to achieve pay equity by the fifth anniversary if they have fifty to one hundred employees, or by the sixth anniversary for those with less than fifty employees.[382]

The Pay Equity Commission may receive complaints filed by employers, unions or employees alleging that: (1) the Act or regulations under it are being violated, (2) a plan is not appropriate for the relevant female job classes, or (3) the plan is not being properly implemented.[383] The Commission may refuse to consider any complaint it determines to be trivial, frivolous, in bad faith, vexatious, or not within the jurisdiction of the Commission.[384] If the complaint is not dismissed, the Commission assigns a review officer to investigate. The officer may make appropriate orders to bring about compliance with the Act.[385] If the complaint is not settled, or if an objection to the order of the review officer is filed by a party to the order, the Commission will hold a hearing on the objection.[386] The Commission assigns the objection to its Hearings Tribunal, which is given exclusive jurisdiction to determine any question of law or fact involved in the proceedings before it.[387] The Tribunal's decision is final and conclusive.[388] The relevant employer, union and objectors, or employees if they are not unionized, are parties to the hearing before the Tribunal.[389] The Tribunal may order the preparation of a pay equity plan, or make such order as required to bring about compliance with the Act.[390] Persons or corporations violating orders of the Tribunal are subject to fines or criminal prosecution.[391]

380. *Id.* § 20.
381. *Id.* §§ 13(2)(e)(iv), (v).
382. *Id.* § 21(1).
383. *Id.* § 22(1).
384. *Id.* § 23(3).
385. *Id.* § 24.
386. *Id.* § 24(6).
387. *Id.* § 30(1).
388. *Id.*
389. *Id.* § 24(6).
390. *Id.* § 25.
391. *Id.* § 26.

3. The Pay Equity Commission

The Act establishes the Pay Equity Commission to administer the pay equity program.[392] The Commission is comprised of the Pay Equity Office and the Hearings Tribunal.[393] The Hearings Tribunal is to be made up of a presiding officer, one or more deputy presiding officers, and an equal number of representatives of employers and employees as other members. All members of the Tribunal are to be appointed by the Lieutenant Governor in Council.[394]

The Pay Equity Office is charged with enforcing the Act and any orders of the Tribunal.[395] It may also conduct research on pay equity, and is specifically charged to conduct a study into systemic gender discrimination in compensation in the traditionally female-dominated sectors of the economy, to report to the Minister of Labour within one year of the effective date of the Act.[396] The head of the Pay Equity Office is to be the chief administrative officer of the Commission, and is to be appointed by the Lieutenant Governor in Council.[397] The Pay Equity Office is to report annually to the Minister of Labour, who is to table the report in the provincial Assembly.[398]

4. Discussion

The fact that Ontario's pay equity legislation was only recently adopted and not yet proclaimed into force, means that it is far too early to evaluate its effects and effectiveness.[399] However, a few observations may be made.

First, the combination of a pro-active approach involving collective bargaining and a mechanism for individual complaints should ensure that the employees affected have some influence and input into the development and implementation of their pay equity plans. Such an approach provides a built-in enforcement mechanism, so the program should be more effective than those of Quebec and the federal Canadian government.

Second, the exception under the Act allowing for pay differentials that are the result of differences in bargaining strength could

392. *Id.* § 27.
393. *Id.* § 27(2).
394. *Id.* § 28(1).
395. *Id.* § 28.
396. *Id.* § 33(1).
397. *Id.* § 33(2).
398. *Id.* § 33(3).
399. *Id.* § 33(5).

have potentially great implications. The systemic gender discrimination that resulted in lower pay for female job classes relative to male classes performing work of comparable value is likely to produce at least the perception, if not the reality, of less bargaining power on the part of the females in traditionally female-dominated job classes. Therefore, the Act's exception could perpetuate the gender-based wage differentials that the Act was to eliminate. Thus this exception could undermine the purpose and effectiveness of the legislation. The manner in which the Pay Equity Commission, and the Hearings Tribunal interpret the bargaining strength exception may be critical to the success of the legislation.

Last, because of the broad scope of the pay equity legislation and the lengthy timetable for its implementation, it will be quite some time before the Act's effectiveness can be determined since full pay equity throughout Ontario will not be achieved for at least seven years from the effective date of the Act.

While it is too early to predict its results, the Ontario Pay Equity legislation, with its broad scope and its combination of pro-active and complaints approaches, is the most interesting of all the Canadian pay equity programs. Also, it has the potential to be the most effective in achieving true pay equity.

III. Conclusion

The comparable worth, or pay equity, programs discussed herein are of a relatively recent nature, and thus it is too early to discuss their results. However, some general observations are in order. The federal Canadian comparable worth program under the Canadian Human Rights Act, and the Quebec program under the Charter of Human Rights and Freedoms have been in operation since 1978 and 1975 respectively. Those programs are also the broadest in coverage, applying to both the public and the private sector.

Nevertheless, the results of those programs have been modest; a relatively small number of complaints have been filed, considering their broad scope of coverage and their years of operation. It may be that employers have voluntarily complied with the equal pay for work of equal value requirements. However, it is more likely that employees are not aware of the legal requirements, illustrating that reliance upon complaint-based enforcement is effective only if potential complainants are aware of their legal rights. Thus, an aggressive public education program is necessary for such enforcement to be effective.

In addition, both the federal Canadian and Quebec programs use a Human Rights Commission enforcement agency, with heavy emphasis upon conciliation and settlement. This approach tends to be time-consuming and complaints are not resolved quickly. The delay in resolving complaints may also deter complainants from filing with the agencies. A more expeditious procedure, with time limitations for any settlement efforts, would expedite the process. If settlement is not forthcoming, then resort to the courts, rather than ad hoc special tribunals, would also be more effective.

The Equal Employment Opportunity Commission's enforcement of Title VII of the Civil Rights Act of 1964 provides a model for a more effective enforcement agency for a comparable worth program to apply to the public and private sector. Such a broad program is unlikely to be adopted in the United States, given the present political climate and the unfavorable attitudes of the Reagan Administration. Any comparable worth legislation in the U.S.[400] is likely to be confined to State action on behalf of their public sector employees.

There are several models of state comparable worth legislation available. The Washington State program is based on a settlement agreement, arising out of a lawsuit by a public sector union, an approach not likely to be followed in other jurisdictions. The Washington program involves collectively-bargained wage adjustments, and can be enforced by either party in the state courts. But the Washington agreement does not provide any mechanism for individual complaints.

The Minnesota comparable worth program has been the model for the Manitoba and Ontario programs, as well as programs underway in several other states. The Minnesota program covers a very broad group of public sector employees including those of local governments and school districts. The program uses collective bargaining as the actual adjustment process. The Minnesota program also allows for arbitration, rather than litigation to settle disputes over implementation, and has some limited role for individual complaints. Manitoba's program follows that of Minnesota; it applies to the "expanded" public sector and takes a "pro-active" approach. The process involves collective bargaining and is to be completed within four years. The process provides for arbitration of disputes over imple-

400. Telephone interview with Jane Marlatt, Director of the Consultative Services Branch, Ontario Women's Directorate (July 1987).

mentation, but there is no mechanism for handling individual complaints.

Ontario has adapted the Minnesota and Manitoba programs and also provided a mechanism for individual complaints as well. The Ontario program involves collective bargaining for the development of pay equity plans for unionized employees and also provides for individual complaints. The Ontario program is very broad in scope, applying to both the broad public sector and the private sector.

The public sector programs of Minnesota and Manitoba rely heavily upon collective bargaining. Thus, such programs could only be effectively adopted in states or provinces with a high degree of unionization among public sector employees; states with little or no public sector unionization would have to substantially modify the procedures involved. But, where appropriate, the Minnesota and Manitoba programs provide good models of the methods available to implement comparable worth in the public sector. The experiences of those programs, and the results they produce, will be of great interest to all proponents of the concept of comparable worth.