

The Evolution and Mechanics of Pay Equity in Ontario

MORLEY GUNDERSON

CIBC Professor of Youth Employment

Centre for Industrial Relations and

Department of Economics

University of Toronto

Toronto, Ontario

Nous retraçons l'évolution de l'équité salariale en Ontario à travers ses diverses phases, tout en examinant la raison d'être de chaque phase et la complexité qui résulte de chaque avancée. Nous analysons ensuite la pratique de l'équité salariale aujourd'hui en cours, en considérant les diverses conceptions et méthodes d'application ainsi que les mécanismes de base impliqués à chaque étape de la mise en œuvre : identification des emplois où la discrimination sexuelle prédomine, à l'intérieur d'un même établissement; application d'un processus d'évaluation d'emplois sans discrimination sexuelle; établissement du rapport entre salaires et résultats de l'évaluation, et rajustement du salaire pour les emplois à dominance féminine. Nous examinons les justifications de ces divers processus, ainsi que les problèmes de mise en œuvre qui sont liés à la complexité de ceux-ci.

The evolution of pay equity in Ontario is traced through its various stages, along with the rationale for each stage and the complexity that results from each advancement. The current practice of pay equity is then analyzed with respect to various design and implementation features as well as the basic mechanics that are involved in each implementation step: identifying gender-dominated jobs within the same establishment; applying gender-neutral job-evaluation procedures; establishing the relationship between pay and the job-evaluation results, and adjusting pay in the predominantly female-dominated jobs. The rationales for these features are discussed as is the implementation problems associated with their complexity.

Pay equity in Ontario can be ranked as the most advanced in the world.¹ As outlined in more detail subsequently, pay equity in Ontario is *proactive* in that employers are required to have a pay equity plan in place whether or not there has been a complaint. This is in contrast to most practices where pay equity is initiated only when there has been a complaint. In Ontario, pay equity applies to the *private* as well as the public sector, in contrast to most jurisdictions where it applies only to the public sector. In Ontario, the scope of the legislation has been expanded from equal pay for work

of equal value to *proportionate pay* for work of proportionate value when equal value comparisons are not possible. Furthermore, if comparisons within the establishment are not possible, *proxy comparisons across different employers and establishments* can be made, at least in the public sector. This is in contrast to the usual practice of limiting comparisons to within the same establishment and employer. Ontario also has an *emerging jurisprudence* from the Pay Equity Tribunal that highlights a wide range of issues that arise with this broader application of pay equity. For these reasons the Ontario experience

merits consideration, especially with respect to lessons that may be learned for other jurisdictions moving down this path.²

The purpose of this paper is to discuss the evolution and mechanics of pay equity in Ontario. A companion paper, Gunderson and Lanoie (2002), applies a set of program evaluation procedures to many of these mechanics, as well as to some of the more general principles of pay equity. In this present paper, attention is paid to the rationale for pay equity and its relationship to other policies, notably employment equity. The paper concludes with a summary and some observations on lessons that can be learned from the Ontario experience.

The evolution of pay equity in Ontario is informative since it illustrates the natural progression of the concept, as well as the limitations of earlier policies, which in turn gave rise to changes that ultimately evolved into the current policy of pay equity.³ Understanding the mechanics of pay equity in Ontario is also informative since the mechanics provide “flesh and blood” to the skeleton that is essentially the principle of pay equity. It is through the mechanics that the general principles are translated into specific procedures, and it is the specific procedures that can determine the success or failure of the policy initiative.⁴ As the expression goes: “The devil is in the detail” — with the detailed mechanics being the focus of this analysis.

EARLY EVOLUTION OF PAY EQUITY IN ONTARIO

The concept of equal pay in Ontario was initially confined to the requirement of equal pay for *equal* work as embodied in the equal pay legislation of 1951 in Ontario, the first equal pay legislation in Canada (Gunderson 1985, p. 239). Comparisons were allowed only if the work done by the female was equal to the work done by the male, with the work having to be identical in each and every aspect. Small differences in even a minor component

of the job (e.g., heavy lifting) could not be offset by other differences (e.g., more frequent lifting). This narrow definition effectively emaciated the policy since it would be exceedingly rare to find jobs that are identical in each and every task. The jobs also had to be in the same occupation and establishment.

Because of this limitation, the policy was expanded through jurisprudence in the 1950s to require that the work only had to be “substantially similar” and not identical in each and every task. Nevertheless, the jobs had to be substantially similar in each and every component (e.g., skill, effort, responsibility, working conditions). Small differences in one component (e.g., heavy lifting under effort) could not be offset by differences in another component (e.g., more responsibility).

The composite approach would allow such trade-offs by requiring only that the work be equal in the *composite of tasks*, not necessarily in each and every component.⁵ That is, differences in one component could be traded off against differences in another component. This was the nucleus of pay equity or equal pay for work of equal value, which allows jobs to be compared as long as they are of equal value in the composite or totality of tasks. This requires some judgement call about how the different components of the job could be compared. This was accomplished through job-evaluation procedures. The composite approach, however, is one step short of pay equity since it does not allow comparisons across different occupations within the same establishment. This was regarded as a very limiting restriction given the importance of the segregation of females into low-paying occupations compared to unequal pay within the same occupation as a determinant of the male-female wage gap (Groshen 1991; Gunderson 1989a; Gunderson and Riddell 1991).

Pay equity has all of the attributes of the composite approach, especially that it allows trade-offs amongst the different components of jobs for them still to be considered equal, but it also allows

comparisons across *different occupations* as long as the jobs are deemed of equal value as determined by a job-evaluation scheme. This allowance of comparisons across otherwise dissimilar occupational groups is the quantum leap of pay equity — an important leap given the fact that women disproportionately tend to occupy the lower paying occupations within establishments. In effect, the key rationale for pay equity is to expand the scope of equal pay policies to deal with the substantial portion of the pay gap that is attributed to women occupying the low-paying occupations within an organization. Furthermore, it is to do so without requiring women to use the conventional economic mechanism of mobility or moving from low-paying to high-paying jobs, a mechanism that may be inhibited by employment discrimination in hiring and promotion practices.

This highlights the interrelationship between equal pay policies and policies designed to provide equal employment opportunities, including employment equity. Economists tend to emphasize that equal employment opportunity (including employment equity) policies may be a substitute for equal pay policies, because the equal employment opportunity policies increases the overall demand for female labour, thereby increasing both female employment opportunities and wages. In contrast, equal pay (including pay equity) policies will reduce female employment by setting wages above the market wage. Equal employment opportunity policies, however, do require women to leave the lower paying female-dominated jobs to get the higher wage in the male-dominated jobs, with the reduction in supply of female labour in the female-dominated jobs also serving to raise wages for those who remain in those jobs. Pay equity, therefore, is based, in part, on the normative judgement call that women should not have to leave the “undervalued” female jobs to get equal pay for work of equal value (Robb 1984, 1987).

Pay equity can also be regarded as complementary to equal employment opportunity policies, with both being regarded as necessary to sustain each

other. If equal pay policies existed alone then women might not be hired, unless an equal employment opportunity policy also existed. If equal employment opportunity policies existed alone then women may be paid discriminatory wages, unless equal pay exists. This latter reasoning, however, downplays the economic argument that equal employment opportunity policies, by increasing the overall demand for female labour, may increase both female wages and employment opportunities.

Conventional pay equity generally restricts comparisons to jobs of equal value. Yet, if the concept of pay equity is appropriate, it is a logical extension to allow comparisons of proportionate value (Gunderson 1985, p. 238). If it is deemed that a female-dominated job, which has 100 percent of the value of a male-dominated job, should get 100 percent of the pay of the male-dominated job, then it would seem a logical extension to argue that a female-dominated job of 80 percent of the value of a male-dominated job should get 80 percent of the pay of the male-dominated job. In essence, *proportionate pay for work of proportionate value* is a logical extension of the concept of equal pay for work of equal value. As discussed subsequently, such a procedure has been adopted in Ontario when equal value comparisons are not available.

LIMITATIONS OF PAY EQUITY

While pay equity policies are generally regarded as the furthest in the evolution of equal pay policies, they still have limitations that inhibit their ability to deal with the entire male-female wage gap. For example, comparisons are made only between male-dominated and female-dominated jobs, where gender dominance is defined by some criteria such as 70 percent or more of either sex. Presumably the rationale is that female-dominated jobs are systematically undervalued relative to male-dominated jobs. This also applies to males who happen to be in female-dominated jobs. It does mean, however, that redress is not possible for females who happen to

be in male-dominated jobs or mixed jobs. This could lead to a situation where, if a pay line were estimated relating pay to points in male-dominated jobs, and if every female in those jobs were below the male pay line, there would be no grounds for redress.

The potential scope of pay equity is also limited by the fact that females in Canada (unlike females in the US or males in Canada) may *not* be significantly underpaid when they are in female-dominated jobs (based on evidence from Baker and Fortin 1999, 2001). They attribute their finding to the higher degree of unionization in Canada, and to the fact that Canadian women in public sector jobs like education, health, and welfare are relatively well-paid.

Pay equity, like all equal pay policies, generally restricts comparisons to within the same establishment.⁶ The rationale is that pay policies are determined within an establishment; hence, the rectification of inequities should be done at that level where pay is determined. While there is a practical logic to this argument, it does restrict the scope of pay equity since some establishments (especially small ones) may not have male comparators. Evidence for Ontario,⁷ for example, indicates that in the early years of pay equity, 31.5 percent of the organizations in the public sector and 27.5 percent in the private sector made no pay equity adjustment because they could not find male comparator groups. The problem was particularly acute in small organizations. Baker and Fortin (2000) also find that Ontario's pay equity legislation has had no substantial impact on reducing the overall male-female wage gap in the private sector in large part because females tend to be employed in small, low-wage establishments where implementation and enforcement are difficult and where male comparators are not common. Carrington and Troske (1995) and Reilly and Wirjanto (1999) also emphasize that a substantial portion of the overall male-female wage gap can arise because females are disproportionately employed in low-wage establishments and industries. When equal-value comparisons are restricted to within the same establishment, it is also possible

that comparisons may be made with male-dominated jobs whose wages reflect other forms of discrimination (e.g., on the basis of being visible minority or Aboriginal person or disabled) and for the female-dominated jobs to be paid this discriminatory norm, with no redress because they were paid the wage of the male-dominated jobs of equal value.

These examples are not meant to suggest that pay equity is inappropriate because of this limited scope, or that it should be extended to cover these limitations. The intent is simply to highlight that even a comprehensively applied policy of pay equity that was rigorously enforced would not eliminate the male-female pay gap. Furthermore, legitimate compromises have to be made because these limitations exist for practical and other reasons, as discussed subsequently.

The previous discussion of the limitations of pay equity refers to its limitations to reduce the male-female earnings gap, in large part because of its limited scope of coverage. In the longer run, it could also work against the economic forces of mobility out of low-wage, predominantly female, jobs and into higher paying male jobs in response to the incentives created by the wage differential. Furthermore, pay equity can reduce the returns to education and training (O'Neill, Brien and Cunningham 1989; Orazem and Mattila 1990) and this can also reduce the incentives for individuals to acquire the human capital that could facilitate reducing the gap in the long run.

MECHANICS OF PAY EQUITY IN ONTARIO

The mechanics of pay equity in Ontario⁸ tend to follow the conventional broad generic steps: first, identify gender-dominated jobs within the same establishment; second, apply gender-neutral job-evaluation procedures; third, establish the relationship between pay and the job-evaluation results; and fourth, adjust pay in the predominantly female-dominated jobs. Yet contentious issues are involved in each and every step, leading to a "litigation nightmare," as the Pay Equity Tribunal has had to sort

out incredibly complex issues. The issues often involve technical matters (detailed subsequently) that require expensive expertise, giving rise to the risk that the real beneficiaries become the consultants, litigants and expert witnesses who have a vested interest in the complexity of the process. Furthermore, the potential loopholes in the system can create incentives for strategic responses of the parties, as well as an incentive for the regulatory agencies to close the loopholes with more regulations — regulations beget further regulations, as illustrated subsequently.

Identifying Gender-Dominated Jobs within the Same Establishment

In Ontario, male-dominated jobs are defined as having 70 percent or more males and female-dominated jobs as having 60 percent or more females. The broader definition for female-dominated jobs enables adjustments to occur for more females, albeit this also means that adjustments will occur for substantial numbers of males in those jobs that are around 60 percent female (and hence 40 percent male). The fact that a larger number of males are involved in those jobs also means that their pay is likely to be higher and hence the adjustment smaller on a per person basis.

The quantitative cut-off can enable employers to manipulate their workforces somewhat to avoid certain comparison. For example, if they had an occupation that was 60 percent female, they could make it 59 percent female by hiring or reallocating a few males into those jobs. Similarly, if they had a male-dominated occupation that was 70 percent male, but they did not want it to be a comparator group because of its unusually high pay, they could make it 69 percent male, and hence not eligible as a comparator group, by hiring or reallocating a few females into that job. To inhibit such actions, the Ontario legislation allows the historical incumbency of the job and the gender stereotyping of the work to be considered in determining gender dominance.

While these more subjective criteria were included in the original legislation to close potential

loopholes that can be involved with the more objective quantitative measures of gender dominance, they can give rise to more contesting over the interpretation of the subjective criteria. Furthermore, they illustrate how such potential abuses of regulation are usually dealt with by adding more regulations.

The identification of gender dominance within the establishment also gives rise to the issue of the definition of the establishment and the employer. This can be especially elusive in the public sector, where the employer could be the local unit providing the service (e.g., local hospital), or the unit where budget decisions are made within that sector (e.g., department of health and social services), or the unit where overall budget decisions are made (e.g., provincial government). Employee groups usually want a broad definition of the employer because it potentially provides more male-dominated comparator groups as well as a larger pool of funds for pay equity adjustments. It was for those reasons that nurses in Ontario pushed for having the provincial government rather than the local hospitals as the employer (Fudge 1991a).

Applying Gender-Neutral Job-Evaluation Procedures

Pay equity essentially substitutes the administrative procedure of job evaluation for the market forces of supply and demand for determining the “worth” of a job and hence its wage. As such, job evaluation is at the heart of pay equity.

While there is a wide range of job-evaluation procedures, they essentially involve the use of a job-evaluation committee to evaluate jobs in terms of components such as skill, effort, responsibility, and working conditions. The job-evaluation committee typically consists of supervisors, employees (usually representatives of the union if present) and consultants, with the composition of the committee potentially affecting the outcomes.

Job-evaluation systems like the Hay system, for example, involve the components of know-how,

problem-solving, accountability, and working conditions.⁹ Typically, points are assigned to these components (within a predetermined range that differs by the component) and these points are summed, with the total point score being the “value” of the job.

Subjective judgements and biases can enter this procedure at each and every stage, giving rise again to the potential for contestable and litigious issues.¹⁰ The different range of points assigned to the different components of the job implicitly weighs those components differently. Biases may enter in the way a given concept is considered, the classic example being the consideration given to physically dirty work in male-dominated jobs, while it may be downplayed in female-dominated jobs like nursing where employees deal with human waste.

Establishing the Relationship between Pay and Job-Evaluation Results

Once the value of the male- and female-dominated jobs is determined, the next step is to establish the relationship between pay and job-evaluation values. Typically, this is done by estimating pay lines showing the relationship between pay and job-evaluation points separately in male-dominated jobs and in female-dominated jobs.

While seemingly simple, a host of technical issues are involved in such procedures. Should the pay lines have an intercept, which implies that there should be some pay even if the value of the job according to job-evaluation procedures is zero? Should the slopes of the male pay line and female pay line be constrained to be the same? How should extreme outliers be treated? Should the pay lines be linear or allowed to be non-linear, and if non-linear, of what particular functional form? Should the pay lines be non-linear in a segmented fashion with separate segments estimated over different ranges of the points? How many observations are required for the estimation of pay lines? Clearly, these and other technical issues again can give rise to contestable issues and litigation, with potentially important implications for the magnitudes of the awards. As well,

they can make the process less transparent to the parties and lead to expensive litigation with expert pitted against expert.

In most cases, there are no “right” or “wrong” answers to these questions. However, there are properties associated with each of the procedures, although these properties are not always transparent, at least to the non-technical layperson. For example, allowing an intercept in the pay line does have the intuitively appealing property that the line will pass through the mean of the data, meaning that a person of average job-evaluation score will receive the average pay. An intercept, however, does flatten the slope of the pay line, hence reducing the pay increase associated with additional points and thereby effectively reducing the wages of employees with high job-evaluation scores relative to what they would have been without an intercept in the pay line. Requiring the slopes of the male and female pay line to be the same implies that the value of an *additional* point is the same in male-dominated and female-dominated jobs. Adjusting the female pay line to the male pay line implies the same average cost as adjusting each female job to the male pay line because a property of the regression pay line is that the positive and negative deviations offset each other and sum to zero.

Given that there is usually legitimate debate over these technical issues, perhaps a sensible policy would be to have that debate resolved by experts *in advance* of the application of the policy (rather than when it arises in each case), and then require a standardized procedure that incorporates that agreement. For example, it may be predetermined that if pay lines are used, they have to have an intercept, a linear functional form between pay and points, and the outlying 5 percent of extreme cases are given the maximum pay of the non-outliers of the same job-evaluation score.

Adjusting Pay in the Predominantly Female Jobs

The final step in pay equity involves adjusting the pay of the predominantly female jobs that are

undervalued. Again, a series of technical issues can be involved.

Should the female pay line be adjusted to the male pay line, in which case the female-dominated jobs that were “underpaid” relative to other female-dominated jobs (i.e., negative deviations about the female pay line) will remain “underpaid” relative to the new common pay line, and the opposite for previously “overpaid” female-dominated jobs? Should the pay in each female-dominated job be adjusted to the male pay line, in which case this previous “underpayment” and “overpayment” also would be rectified for the female-dominated jobs? Such a female job to male pay-line procedure would yield more variation in the wage adjustment since it would eliminate not only the systematic differences between the male and female pay lines, but also the random deviations around the female pay line. The latter, however, would not appear to be appropriate to eliminate since they reflect internal inequities within female jobs (not pay inequities) and they remain around the male pay line. Should the pay for different subgroups of female-dominated jobs be adjusted to specific segments of the male pay line estimated over the range of points associated with each female subgroup, or should they be adjusted to the total male pay line? Should the pay in the female-dominated jobs be adjusted to the pay of the male-dominated jobs of comparable value without regard to pay lines?

The pay equity legislation of Ontario essentially specifies the latter job-to-job comparison procedure, with a complicated set of requirements to deal with issues that can arise. Comparisons are made with job classes that have similar duties, responsibilities, and qualifications and that are filled by similar recruiting procedures and have the same compensation schedule, salary grade or range of salary rates. The highest rate of pay for a job class is used for comparison purposes, with all persons within a job class receiving the same adjustment. The adjustment procedure depends upon whether there is a single male comparator group or more than one male comparator group.

If there is a single male-dominated comparator job of the same job value as determined by job-evaluation procedures, then the pay in the female-dominated job is adjusted to the pay in that male-dominated job. If there is no male-dominated job at the same value as the female-dominated job, then the nearest male-dominated job of *lower* value is used as the comparator group.

If there is more than one male comparator job of the same value, then the adjustment is to the *lowest* male job class — obviously a smaller magnitude than if the adjustment were made to the average pay of the male jobs.¹¹ If there are no male jobs at the same value as the female jobs, and if the nearest male comparator job of lower value has more than one male job class at that lower value, then the *highest* paying lower value male comparator group is used.

Clearly, the job-to-job approach involving specific comparators can be complicated and not readily understood. Furthermore, it can lead to strategic responses on the part of the parties. For example, given that the highest paying job rate is used when there is a range of rates, there is an obvious incentive for the firm to try to have the highest paying male rate be as low as possible within the range of male rates,¹² and the highest paying female rate be as high as possible within the range of female rates. Furthermore, in the case where there are multiple male comparators of the same value as a particular female-dominated job, so that the job rate in the female job is raised only to the lowest job rate of the male-dominated job, there is an obvious incentive for the firm to have the lowest paid male-dominated job rate be as low as possible.

With the exception of the situation when low-wage comparators can be established to favour employers, the results from manipulating most of the technical procedures including those related to adjusting wages and in establishing the relationship between pay and job-evaluation results (as discussed in the previous section) do not obviously favour the

employer or the potential recipients. They do, however, favour the party that can most skilfully manipulate the technical procedures to work in their favour. That could be an employer or a union (depending upon who has the expertise or the “deep pockets” to hire the expertise). It would not likely be an individual or a small group of individuals without resources or powerful representation.

Proportionate Value Comparisons

In 1993, the Ontario legislation was amended to include two procedures to utilize in cases where the job-to-job comparisons would not be possible because of the lack of adequate male comparator groups.¹³ This could occur if the organization had mostly female job classes or if there were no male comparators of comparable or lower value.

In the case where there are some male comparators but they are all of higher value, the proportionate value method is to be used. Such comparisons essentially involve estimating a pay line to establish the “non-discriminatory” relationship between pay and points based on all of the male-dominated jobs (including ones that may already have been used in direct job-to-job comparisons). This pay line is then extended or projected downward over the range of points of the lower valued female-dominated jobs for which there was no comparable or lower valued male comparator job. The rates in these female-dominated jobs are then raised to the projected male pay line — a line that indicates what male-dominated jobs would be paid if they had those lower job-evaluation scores but were paid according to the conventional relationship between pay and points in the male-dominated jobs. This yields proportionate pay for proportionate value where proportionate value is determined by the projected male pay line. It is a step beyond equal pay for work of equal value because it does not require the jobs to be of equal value. In fact, it does not require an actual male-dominated job to exist with even substantially similar job-evaluation points. Essentially, hypothetical or “phantom” male-dominated jobs are “constructed” to correspond to the lower valued

female-dominated jobs, with the pay in those male jobs being the predicted pay they would have received based on projecting the male pay line downwards. The proportionate value method is to be used only for those female-dominated jobs that cannot find a male comparator of comparable or lower value.¹⁴ If the pay-line procedure is used for all jobs in the establishment, then those female-dominated jobs that could find a male comparator group of equal or lesser value are to receive an adjustment that is the greater of the conventional job-to-job comparison or the job-to-pay-line comparison. In essence, pay-line procedures can be used for all jobs including those that could find a conventional comparator group, but only if their adjustment is at least as great as they would have received under the conventional job-to-job comparisons.

Proxy Comparisons

In cases where the establishment has mostly female job classes so that it is not possible to use either the direct job-to-job comparisons, or the indirect proportionate value comparisons, then the proxy method is to be used. This requirement, however, applies only to the broader public sector, and it is to be used only if the job-to-job comparisons or proportionate value comparisons do not provide male comparator groups. The organization must notify the Pay Equity Commission that this occurred. After verifying these conditions, a review officer issues an order to proceed with proxy comparisons.

The proxy comparison essentially requires organizations that have any unmatched female job classes to find a proxy organization with a similar principal activity and similar female job classes. The proxy comparison method is a major step in the evolution of pay equity since it essentially allows comparisons outside the same employer and establishment.

In determining the appropriate proxy employer, the seeking organization first categorizes itself in one of nine categories listed in the regulations of

the legislation.¹⁵ Then it matches itself with a potential proxy employer that is most similar from the corresponding list of the types of such employers as also provided in the regulations. If the seeking employer cannot categorize itself in one of the nine provided categories, then it must select a hospital or municipality as a proxy employer. If there is no proxy employer in the geographic division, then the geographically closest proxy establishment is to be used.

After doing its conventional internal job evaluation, the seeking organization then selects a proxy employer, and provides that employer with the job-evaluation information for its key female job classes (those with the most employees and/or those that perform duties essential to delivering the organization's services). The proxy employer is required to then provide descriptions of duties and pay (including the costing of fringe benefits) of similar female job classes that have received pay equity adjustments (and hence would be the same as their male job classes).

The seeking organization uses these female job classes from the proxy organization to create a proxy pay line in its own organization. It then uses the proportionate value method to raise the pay of its female job classes to the proxy female pay line. Even though this is a female-job to female-pay-line procedure, it is designed to reflect what male pay lines would yield since the female jobs from the proxy organizations are ones that have already achieved pay equity.

In 1996, the proxy method of comparison was to be phased out through the *Savings and Restructuring Act 1996*, to be effective 1 January 1997. In September of 1997, however, the proxy method was restored by the Ontario Court of Justice (in *Service Employees' International Union, Local 204 v. Attorney General of Ontario*) on the grounds that the legislation must be applied in a "fair and non-discriminatory" manner. The court ruled that this was not done when the burden of its cutbacks in pay equity were placed on those who otherwise were helped by the proxy comparisons.¹⁶

Other Design Features

As with other pay equity initiatives, the legislation in Ontario has other features designed in part to minimize conflict with other objectives and to facilitate the implementation. For example, the coverage was to be phased, beginning with the public sector, the broader public sector and Crown corporations, and then to larger firms in the private sector down to smaller firms, but with firms of fewer than ten employees being exempt. A limit on the magnitude of the overall wage adjustment was set at 1 percent of payroll per year for private sector firms. A wide range of allowable exemptions were specified in the original legislation, allowing for wage differences between male- and female-dominated jobs of the same value as determined by job-evaluation schemes providing they reflected an exempt factor: seniority; temporary training assignments; merit; red-circling, whereby compensation of a comparator group is frozen at an artificially high level while the position is downgraded; skill shortages that cause temporary increases in compensation; and bargaining strength (the latter after pay equity has been achieved). In general, these exemptions are designed to mitigate the conflict that arises when pay equity clashes with the forces of the market (e.g., merit, shortages, temporary training) or collective bargaining (e.g., seniority, bargaining strength). That is, even though pay equity involves a rejection of the forces of the market and collective bargaining as mechanisms for determining pay, there is some compromising when pay equity conflicts with some of the most important aspects of those conventional mechanisms. Mitigating the conflict that arises when pay equity clashes with the forces of the market is largely designed to appease employers, and mitigating the conflict when pay equity clashes with collective bargaining is largely designed to appease unions. The fact that elements of both were included in the original legislation highlights the compromises that are often involved to get political acceptance of such initiatives.

In order to facilitate a self-managed process and to minimize litigation and maintain a collaborative

climate, the Ontario Pay Equity Commission has tried to emphasize its role as mediator and facilitator between the parties, as well as in providing information and education services (emphasized in its annual reports). In that vein, it has also produced a wide range of documents, manuals, and fact sheets outlining suggested procedures.¹⁷

Tribunal Decisions

In spite of these efforts to facilitate a collaborative self-managed process, disputes inevitably occur, especially given the complicated nature of the process. The myriad of decisions of the Ontario Pay Equity Tribunal have been important in interpreting the mechanics and design and implementation features of pay equity.¹⁸ While a comprehensive review of this extensive jurisprudence is beyond the scope of this current analysis, some of the important generalizations can be put forth to illustrate the complexities involved.

One of the most contentious issues has been the definition of the employer — an important factor in influencing the ability to pay the requisite adjustments and in determining the availability of comparator groups. The tribunal departed from the conventional tests under the common law or by the Ontario Labour Relations Board, and enunciated a series of tests based on four criteria:

1. Who has overall financial responsibility?
2. Who has responsibility for compensation practices?
3. What is the nature of the business, service or enterprise?
4. What is most consistent with achieving the purpose of the Act? (Elliott 2001, p. 1.02)

An additional contentious issue has involved the implications of “changed circumstances” from such factors as the sale, transfer or merger of a business, or the reorganization of work and restructuring of

jobs.¹⁹ The tribunal has basically tried to walk the fine line between allowing changes in the pay equity procedure to be flexible and accommodate the new circumstances (many of which are more common given the dramatic restructuring that has occurred) providing they make the earlier procedures “no longer appropriate,” and that the new procedures are also consistent with the purposes of the Act and not simply disguised procedures to strategically avoid the requirements. For example, different comparators can be used as can different job evaluations and gender-dominated jobs, but the new procedures must be consistent with the requirements of the law.

The tribunal has interpreted the various exemptions (e.g., for seniority, merit pay, red-circling, skill premiums) narrowly and cautiously to make sure that they serve a legitimate purpose and are not simply attempts to evade the letter and the spirit of the law. As well, they must be consistently applied to both male- and female-dominated occupations.

Overall, it is difficult (at least for this reader of the decisions) to detect any noticeable trend in the decisions in terms of stricter or more lenient interpretations of the requirements. Certainly, extreme characterizations do not seem reasonable. That is, it does not appear to be the case that the original legislation has been effectively emaciated by tribunal decisions that are favourable mainly to employers. Nor does it appear to be the case that the tribunal has read into the law interpretations that are stricter than originally intended. It appears to be walking the fine line between interpretations that on the one hand provide a degree of flexibility in times when there is more pressure to be flexible and to deregulate, and, on the other hand, adhere to the original spirit of the legislation.

Union Role

As outlined in Gunderson (forthcoming) unions play a crucial role in pay equity, especially given the complexity of the process. In complaints-based systems they are often crucial in initiating complaints and in protecting workers against reprisals by

management. In proactive systems (such as Ontario) that do not rely on complaints, unions can be especially important in providing information in areas such as job evaluation, finding appropriate comparator groups, the appropriate definition of the employer and pay (including non-wage compensation), estimating pay lines, determining exemptions and exclusions, and representing workers before tribunal hearings.²⁰ In the legislative arena they are important in the lobbying for initiatives like pay equity.²¹

In Ontario, if a union is present the entire pay equity process must be negotiated between the union and management, with a pay equity plan negotiated for each bargaining unit in the establishment. As well, once pay equity is achieved, pay differentials can arise if they reflect “bargaining strength.” While this may at first glance appear to be a concession to unions, it actually enables employers to argue that subsequent pay differences reflect bargaining strength and not pay differences to be addressed by pay equity (McDermott 1991, p. 129).

Public sector unions have often regarded pay equity as a possible strategic mechanism to enhance budget allocations to their members (Weiner and Gunderson 1990, p. 93) an especially important strategy given the importance of such budget allocations in determining the pay of public sector workers. It is for this reason, for example, that they have generally tried to have the employer defined more broadly — to access “deeper pockets” (Fudge 1991*b*, p. 66; McDermott 1991, p. 123). There is also the possibility that pay equity awards can reduce the discretionary funds that unions can otherwise “win” (and receive credit for) through collective bargaining. While direct evidence on this is not available, it is consistent with the fact that unions often try to downplay that the source of the wage increase was from pay equity awards as opposed to from unions through collective bargaining — a strategy that leaves recipients often unaware of the fact that they received a pay equity increase (Evens and Nelson 1989).

SUMMARY AND CONCLUDING OBSERVATIONS

Pay equity in Ontario has emerged as part of a complex evolution. Each step essentially occurred to expand the potential scope of the policy in response to limitations in previous stages — limitations that effectively precluded the policy initiative from dealing with some portion of the male-female pay gap. Steps in that evolution include:

- equal pay for *equal* work,
- equal pay for *substantially similar* work,
- equal pay for work that is equal in the *compos-
ite* of tasks (but within the same occupation),
- *pay equity* or equal pay for work of *equal value* where value is determined by a gender-neutral job-evaluation scheme and comparisons are allowed across occupations (but limited to within the same establishment),
- *proportionate pay for work of proportionate value* (but only if male comparators of equal value are not available), and
- *proxy* comparisons allowing comparisons across employers and establishments (but only in the broader public sector and only if male comparator groups are not available through conventional pay equity or proportionate value comparisons).

Each of these steps occurred in response to limitations on the scope of the policy associated with previous steps. However, each step also added a layer of additional complexity. Such complexity is also inherent in the basic mechanics that are involved in the implementation steps of pay equity. Those steps are:

- identifying gender-dominated jobs within the same establishment,
- applying gender-neutral job-evaluation procedures,

- establishing the relationship between pay and the job-evaluation results, and
- adjusting pay in the predominantly female-dominated jobs.

Contentious issues are involved in each and every step. Pay equity in Ontario also has a number of other design and implementation features that add further complexity. These include phasing, limits and allowable exemptions for such things as seniority, temporary training assignments, merit, red-circling, skill shortages, and bargaining strength.

Clearly, the evolution and current mechanics of pay equity in Ontario involve a variety of features that could “make or break” the policy with respect to effective implementation. Pay equity legislation in Canada was instituted in 1987 by the Peterson Liberal government when it needed the support of the New Democratic Party (NDP), which it obtained through an accord. In 1993, the newly elected NDP government of Bob Rae expanded the scope of pay equity by allowing proportionate value comparisons and proxy comparisons. These were major changes since they fundamentally altered the principle of pay equity to allow adjustments even if there were no comparable male-dominated jobs within the establishment (in the case of proportionate value) and to allow comparisons across establishments (in the case of proxy comparisons).

Political winds, however, change, as do the legislative initiatives that bend to those winds. In 1996, the Conservative government under Harris repealed the proxy comparison method; however, this was overturned by the Ontario Court of Justice on the grounds that the repeal disproportionately would have impacted specific groups. Importantly, the court in 1998 did uphold the Conservative government’s repeal of the NDP’s Employment Equity Legislation of 1994 (but which had not yet been implemented) highlighting that the law could be repealed in total (as in the case of employment equity) but not in parts that would have a disparate

impact (as in the case of the proxy comparisons under pay equity). Presumably, the Conservative government did not want to take the political risk of attempting to repeal the full pay equity legislation. It did amend the legislation in 1997, however, to provide more flexibility after the sale of a business, and the tribunal provided more flexibility in the application of pay equity when there was a reorganization of work and restructuring of jobs. The government also consolidated various aspects of the commission with other government agencies. Furthermore, the Read (1996) report commissioned by the Harris government recommended reverting back to a complaints-based approach.

Clearly, “what the state giveth, the state can take away” — or more accurately in this case, alter substantially to reflect their political agenda. From its origins in a period of political compromise, to its heyday under the NDP, to what could be characterized as a period of retrenchment or “benign neglect” under the current Conservative government, the evolution of pay equity in Ontario clearly reflects the evolution of those changing political pressures.

NOTES

For helpful comments and discussions, the author is grateful to the late Charles Taccone of the Ontario Pay Equity Tribunal, and to Nicole Fortin and Michael Huberman as well as two anonymous referees.

¹Quebec changed its pay equity legislation in 1996 (to be implemented in 1997 with the first adjustments to begin in 2001) to have similar features to the Ontario legislation which was adopted in 1987.

²Pay equity in Ontario and the rest of Canada is detailed in Kelly (1994) and Weiner and Gunderson (1990). It is situated in the international context in Gunderson (1994) and in the context of the Canadian labour market and other policy initiatives in Gunderson (1998).

³Egri and Stanbury (1989); Handman and Jensen (1999); Ontario Consultation Panel on Pay Equity (1986); and Ontario. Minister Responsible for Women’s Issues (1985).

⁴The importance of these seemingly innocuous design and implementation details is emphasized in Abbott (1989); Acker (1989); Ames (1991, 1995); Gunderson (1989*b*, 1994); Gunderson and Riddell (1992); Gunderson and Robb (1991*a*, *b*), McDermott (1990, 1991); and McDonald and Thornton (1998).

⁵The composite approach was discussed as an option in the early 1980s in Ontario, but it was superseded by the subsequent adoption of pay equity under the accord between the Liberal and New Democratic Parties in 1987. Gunderson (1995, p. 232) outlines the political parties that were in power when the various pay equity laws were passed in Canada.

⁶An exception, through the proxy method (as in the Ontario public sector) is discussed subsequently.

⁷This evidence is discussed in Gunderson (1995, p. 240) based on survey evidence from SPR Associates (1991) and from special tabulations based on a survey conducted by Canadian Facts (1992, 1993).

⁸For practical guides to the mechanics, see Conklin and Bergman (1990); Elliott and Saxe (1987).

⁹Kelly (1994, p. 170-204) outlines the systems used by different consulting companies.

¹⁰Gender bias in job evaluation is discussed in Acker (1987, 1989); Arvey (1986); Arvey and Holt (1988); Arvey *et al.* (1985); Grams and Schwab (1985); Kelly (1994); Mount and Ellis (1989); Schwab and Wichern (1983); Schwab and Grams (1985); Weiner (1991); and Weiner and Gunderson (1990).

¹¹Ames (1991, 1995) attributes the smaller wage effect that occurred in health-care facilities in Ontario compared to Manitoba to be due in part to the use of the lower paying male job classes in Ontario.

¹²McDonald and Thornton (1998, p. 5) cite how an employer in Ontario purposely expanded the pool of male comparators so as to increase the likelihood of having a low-paying one.

¹³This proportionate value procedure as outlined in Gunderson (1985, p. 238) is discussed by the Ontario Pay Equity Commission (1993*a*) and the proxy comparison method in Ontario Pay Equity Commission (1993*b*). The general problem of lack of male comparators was discussed in Ontario Pay Equity Commission (1989).

¹⁴Read (1996), however, recommended that the preference for job-to-job comparisons be eliminated in the Ontario legislation, and that the parties be allowed to use proportionate value comparisons in any circumstances.

¹⁵Those categories are: health-care services; services for seniors; services for persons with disabilities; counselling, referral and accommodation services; services for children and families; correctional services; cultural organizations; and miscellaneous (including municipalities and school boards). This categorization highlights the jobs that are believed not likely to be able to have male comparators within their own organization.

¹⁶In 1998, in *Ferrell v. Attorney General of Ontario*, the Ontario court upheld the earlier repeal of Ontario's short-lived Employment Equity Legislation passed in 1994 and repealed in the *Job Quotas Repeal Act* of 1995. This highlights that the repeal of either pay equity or employment equity in their totality would not be considered unfair or discriminatory, albeit the appeal of components like the proxy method of comparison would be considered unfair and discriminatory, because of its disparate impact on particular groups.

¹⁷Documents exist, for example, on job-evaluation systems, the proportional value method, the proxy method, effective pay equity committees, how to do job comparisons, banding points for pay equity purposes, and pay equity under public sector restructuring and after the sale of a business. See www.gov.on.ca/lab/pec.

¹⁸These decisions are provided in the *Pay Equity Reports* of the Ontario Pay Equity Commission (various issues) with the latest at the time of this writing being Volume 11 for the years 2000–2001. They are also outlined in the comprehensive compendium, Elliott (2001).

¹⁹In 1997 the legislation was amended to allow for adjustments that were agreed upon after the sale of a business to be different than the original adjustment agreed to prior to the sale of the business. The original legislation required the new adjustment not to be less than the adjustment under the original plan before the sale (Elliott 2001, p. 108).

²⁰As indicated by Fudge (1991*b*, p. 75): "Only large, well-financed, women-dominated unions can afford, both politically and economically, to litigate." This view is reiterated by Handeman and Jensen (1999, p. 86): "it is apparent from the case law that gains that stand to be

achieved through the PEA [*Ontario Pay Equity Act*] are largely available only to organized workers who are members of large, predominantly female unions."

²¹Evans and Nelson (1989) cite strong public sector unions, democratic control of the state, and energetic pressure groups as the key ingredients for the successful implementation of pay equity — preconditions that have parallels in the establishment of different forms of pay equity across the different jurisdictions in Canada (Gunderson 1995, p. 233).

REFERENCES

- Abbott, M. 1989. "Equal Value Tests for Pay Equity," in *Pay Equity Legislation: Linking Economic Issues and Policy Concerns*, ed. R. Chaykowski. Kingston: Industrial Relations Centre, Queen's University.
- Acker, J. 1987. "Sex Bias in Job Evaluation: A Comparable Worth Issue," in *Ingredients for Women's Employment Policy*, ed. C. Bose and G. Spitze. Albany, NY: State University of New York Press.
- _____. 1989. *Doing Comparable Worth: Gender, Class and Pay Equity*. Philadelphia: Temple University Press.
- Ames, L. 1991. "Legislating Equity: A Comparison of Provincial Legislation in Manitoba and Ontario Requiring Pay Equity," *International Journal of Public Administration* 14:871-92.
- _____. 1995. "Fixing Women's Wages: The Effectiveness of Comparable Worth Policies," *Industrial and Labor Relations Review* 48:709-925.
- Arvey, R. 1986. "Sex Bias in Job Evaluation Procedures," *Personnel Psychology* 39:315-35.
- Arvey, R. and K. Holt. 1988. "The Cost of Alternative Comparable Worth Strategies," *Compensation and Benefits Review* 20:37-46.
- Arvey, R. et al. 1985. "Reliability Artefacts in Comparable Worth Procedures," *Journal of Applied Psychology* 70:695-705.
- Baker, M. and N. Fortin. 1999. "Women's Wages in Women's Work: A U.S./Canada Comparison of the Role of Unions and 'Public Goods' Sector Jobs," *American Economic Review Papers and Proceedings* 89:198-203.
- _____. 2000. "Does Comparable Worth Work in a Decentralized Labour Market?" NBER Working Paper No. 7937. Cambridge, MA: National Bureau of Economic Research.
- _____. 2001. "Occupational Gender Composition and Wages in Canada, 1987-1988," *Canadian Journal of Economics* 34:345-76.
- Canadian Facts. 1992. *Outcomes of Pay Equity for Organizations Employing 100 to 499 Employees in Ontario*. Toronto: Pay Equity Office.
- _____. 1993. *Outcomes of Pay Equity for Organizations Employing 50 to 99 Employees in Ontario*. Toronto: Pay Equity Office.
- Carrington, W. and K. Troske. 1995. "Gender Segregation in Small Firms," *Journal of Human Resources* 30:329-65.
- Conklin, D. and P. Bergman, eds. 1990. *Pay Equity in Ontario: A Manager's Guide*. Halifax, NS: Institute for Research on Public Policy.
- Egri, C. and W. Stanbury. 1989. "How Pay Equity Legislation Came to Ontario," *Canadian Public Administration* 32:274-303.
- Elliott, C. 2001. *Ontario's Equity Laws*. Aurora: Canada Law Book.
- Elliott, C. and S. Saxe. 1987. *Pay Equity Handbook: A Step-by-Step Guide to Implementing Equal Pay for Work of Equal Value in Ontario*. Aurora: Canada Law Book.
- Evans, L. and J. Nelson. 1989. *Wage Justice: Comparable Worth and the Paradox of Technocratic Reform*. Chicago: University of Chicago Press.
- Fudge, J. 1991a. "Limiting Equity: The Definition of 'Employer' Under the Ontario Pay Equity Act," *Canadian Journal of Women and the Law* 4:556-63.
- _____. 1991b. "Litigating Our Way to Gender Neutrality: Mission Impossible?" in *Just Wages: A Feminist Assessment of Pay Equity*, ed. J. Fudge and P. McDermott. Toronto: University of Toronto Press.
- Grams, R. and D. Schwab. 1985. "An Investigation of Systematic Gender-Related Error in Job Evaluation," *Academy of Management Journal* 28:279-90.
- Groshen, E. 1991. "The Structure of the Female/Male Wage Differential," *Journal of Human Resources* 26:457-72.
- Gunderson, M. 1985. "Discrimination, Equal Pay and Equal Opportunities in the Labour Market," in *Work and Pay: The Canadian Labour Market*, ed. W.C. Riddell. Toronto: University of Toronto Press.
- _____. 1989a. "Male-Female Wage Differentials and Policy Responses," *Journal of Economic Literature* 27:46-72.
- _____. 1989b. "Implementation of Comparable Worth in Canada," *Journal of Social Issues* 45:209-22.

- _____. 1994. *Comparable Worth and Gender Discrimination: An International Perspective*. Geneva, Switzerland: International Labour Office.
- _____. 1995. "Gender Discrimination and Pay Equity," in *Aspects of Labour Market Behaviour: Essays in Honour of John Vanderkamp*, ed. L. Christofides, K. Grant and R. Swidinsky. Toronto: University of Toronto Press.
- _____. 1998. *Women and the Canadian Labour Market*. Toronto: ITP Nelson and Statistics Canada.
- _____. Forthcoming. "Pay and Employment Equity: The Role of Markets, Collective Bargaining and Legislation," in *Workplace Equality: An International Perspective on Legislation, Policy and Practice*, ed. C. Agocs. New York: Kluwer Academic Publishers.
- Gunderson, M. and C. Riddell. 1991. "Economics of Women's Wages in Canada," *International Review of Comparative Public Policy* 3:151-78.
- _____. 1992. "Comparable Worth: Canada's Experience," *Contemporary Policy Issues* 10:85-94.
- Gunderson, M. and P. Lanoie. 2002. "Program Evaluation Criteria Applied to Pay Equity in Ontario," *Canadian Public Policy/Analyse de Politiques*, this volume.
- Gunderson, M. and R. Robb. 1991a. "Equal Pay for Work of Equal Value: Canada's Experience," *Advances in Industrial and Labour Relations* 5:151-68.
- _____. 1991b. "Legal and Institutional Issues Pertaining to Women's Wages in Canada," *International Review of Comparative Public Policy* 3:129-50.
- Handman, S. and K. Jensen. 1999. "Pay Equity in Canada: An Overview," *Canadian Labor and Employment Law Journal* 7:66-89.
- Kelly, J. 1994. *Pay Equity Management*, 2d ed. Don Mills: CCH Canadian Ltd.
- McDermott, P. 1990. "Pay Equity in Ontario: A Critical Legal Analysis," *Osgoode Hall Law Journal* 28:381-407.
- _____. 1991. "Pay Equity in Canada," in *Just Wages: A Feminist Assessment of Pay Equity*, ed. J. Fudge and P. McDermott. Toronto: University of Toronto Press.
- McDonald, J. and R. Thornton. 1998. "Private-Sector Experience with Pay Equity in Ontario," *Canadian Public Policy/Analyse de Politiques* 24:185-208.
- Mount, M. and R. Ellis. 1989. "Sources of Bias in Job Evaluation: a Review and Critique of Research," *Journal of Social Issues* 45:153-68.
- O'Neil, J., M. Brien and J. Cunningham. 1989. "Effects of Comparable Worth Policy: Evidence from Washington State," *American Economic Review* (May):305-09.
- Orazem, P. and P. Mattila. 1990. "The Implementation Process of Comparable Worth: Winners and Losers," *Journal of Political Economy* 138:134-52.
- Ontario. Consultation Panel on Pay Equity. 1986. *Report of the Consultation Panel on Pay Equity*. Toronto: Ontario Women's Directorate.
- Ontario. Minister Responsible for Women's Issues. 1985. *Green Paper on Pay Equity*. Toronto: Queen's Printer for Ontario.
- Ontario. Pay Equity Commission. 1989. *Report to the Minister of labour by the Ontario Pay Equity Commission on Sectors of the Economy which are Predominantly Female*. Toronto: Pay Equity Commission.
- _____. 1993a. *Step by Step to Pay Equity: Using the Proportional Value Comparison*. Toronto: Pay Equity Commission.
- _____. 1993b. *A Guide to the Proxy Comparison Method Equal Value Comparison*. Toronto: Pay Equity Commission.
- _____. Various Years. *Pay Equity Reports*. Toronto: Pay Equity Commission.
- Read, J. 1996. *Review of the Pay Equity Act*. Toronto: Pay Equity Review Office.
- Reilly, K. and T. Wirjanto. 1999 "Does More Mean Less? The Male/Female Wage Gap and the Proportion of Females at the Establishment Level," *Canadian Journal of Economics* 32:906-29
- Robb, R. 1984. "Equal Pay Policy," *Proceedings of a Colloquium on the Economic Status of Women in the Labour Market*. Ottawa: Supply and Services.
- _____. 1987. "Equal Pay for Work of Equal Value: Issues and Policies," *Canadian Public Policy/Analyse de Politiques* 13(4):445-61.
- Schwab, D. and D. Wichern. 1983. "Systematic Bias in Job Evaluation and Market Wages: Implications for the Comparable Worth Debate," *Journal of Applied Psychology* 68:60-69.
- Schwab, D. and R. Grams. 1985. "Sex Related Errors in Job Evaluation: A 'Real World' Test," *Journal of Applied Psychology* 70:533-39.
- SPR Associates. 1991. *An Evaluation of Pay Equity in Ontario: The First Year*. Toronto: SPR.
- Weiner, N. 1991. "Job Evaluation Systems: A Critique," *Human Resources Management Review*, 1:119-32.
- Weiner, N. and M. Gunderson. 1990. *Pay Equity: Issues, Options and Experience*. Toronto: Butterworths.

