PAY EQUITY: THE CANADIAN EXPERIENCE

DISCUSSION PAPER PREPARED FOR
THE UNITED STATES CHAMBER OF COMMERCE

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INTRODUCTION

Pay equity is an appealing phrase. Invented in Canada, the phrase expresses an idea originating in the United States: the idea that pay should be determined by the "value" of the job, with value being determined by the effort expended to perform the work, not the pay the job can command in the labor market. This idea first come to prominence in the United States with National Academy of Sciences reports in 1979 and 1981[1] advocating "comparable worth". Comparable worth makes use of job evaluation techniques similar to those used by government and larger private sector employers to compare the worth, usually expressed in job evaluation points, of different types of work.

This idea is quite different from the "equal pay for equal work" that has long been required in the United States and Canada.[2] Equal pay for equal work requires employers to pay male and female employees the same pay for work that is substantially similar. Comparable worth or pay equity makes comparisons of the value of very different types of work and require that men and women performing it receive the same pay if the work is of "equal value".

Several provinces in Canada adopted pay equity legislation inspired by American comparable worth theories in the 1980's.[3] The equal pay provisions of the federal *Canadian Human Rights Act*, which applies to the limited industrial sectors coming under

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[1] Donald J. Treiman: *Job Evaluation: An Analytic Review. Interim Report of the Committee on Occupational Classification and Analysis to the Equal Employment Opportunity Commission*, National Research Council, (Washington, D.C.: National Academy of Sciences, 1979); Donald J. Treiman and Heidi I. Hartman (eds): *Money Work and Wages: Equal Pay for Job of Equal Value*, (Washington, D.C.: National Academy Press, 1981).

[2] *Equal Pay, Act of 1963*, 29 U.S.C. §1206(d). Canadian examples include the *Female Employees Equal Pay Act*, S.C. 1956, c. 38.

[3] The provinces of Manitoba, Newfoundland and Labrador, New Brunswick, Nova Scotia, Ontario and Quebec have passed pay equity legislation. Only the Ontario and Quebec statutes cover private sector employers.

federal jurisdiction in Canada, have been interpreted by the courts as being effectively the same as these provincial statutes.[4]

In Ontario and Quebec, the two most populous provinces, pay equity legislation applies to both private and public sector employers. The equal pay provisions of the *Canadian Human Rights Act* also apply to both public and private sector employers in industries coming under federal legislative jurisdiction. Canada thus has over twenty-five years' experience with equal pay legislation that covers over 60% of its private sector[5] workforce and a considerably higher percent of its public sector (civil service) and para-public sectors.[6] This experience should be of interest to the United States in any consideration of whether adopt to comparable worth legislation itself.

I THE ORIGINS OF CANADIAN PAY EQUITY LEGISLATION

a) The Royal Commission on Equality in Employment

Pay equity legislation in Canada begins with the 1984 report of the Royal Commission on Equality in Employment, usually known as the Abella Report from the name of the commissioner.[7] The Commission's report dealt with two distinct subjects:

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[4] *Public Service Alliance of Canada* v. *Canada Post Corporation* 2011 SCC 57, [2011] 3 S.C.R. 572; *Canadian Human Rights Commission* v. *Canadian Airlines International*, 2006 SCC 1, [2006] 1 S.C.R. 3. The Canadian constitution gives exclusive jurisdiction over labor, employment and human rights matters in almost all industries to the provinces as part of their power over "property and civil rights". The federal government has exclusive jurisdiction to legislate on these matters for only a limited number of industries, which are listed in the constitution. Exclusive jurisdiction is just that. Federal legislation does not "pre-empt" provincial legislation in labor employment or human rights. It simply does not apply to provincially regulated employers. The same is true of provincial legislation on these matters vis-à-vis federally regulated employers. For a brief discussion of this division of powers, see R.L. Heenan and T. Brady: "Canada" in W.L. Keller and T. Darby (eds): *International Labor and Employment Laws* (3d ed.), Vol. IB, ABA section of Labor and Employment Law, (Washington: BNA Books, 2009) (with annual supplements).

[5] The approximately 7,215,000 private sector employees in Ontario and Quebec are covered by pay equity legislation. There are some 820,000 private sector workers coming under federal legislative jurisdiction. The total private sector Canadian workforce numbers some 11,138,000 employees.

[6] The "para-public sector" in Canada refers to economic activities that are largely funded by money from the federal or provincial government, or both; employees in this sector are not, though, employed in the civil service but are employed by entities such as school boards, universities or hospitals.

[7] A Royal Commission is a body named by the government of the day to investigate some event or to conduct a broader inquiry on some subject, usually with a view to producing a report recommending legislation to deal with the subject. The Royal Commission here was of the second type. Its report is published as: Rosalie Silberman Abella: *Report of the Royal Commission on Equality in Employment* (Ottawa: Supply and Services Canada, 1984).

the participation of women, the disabled, visible minorities, and aboriginal Canadians in the workforce and the use of comparable worth, renamed "pay equity", to address the differences in earnings between men and women in the workforce.[8] It concluded that a "massive policy response to systemic discrimination" was needed, including new legislation requiring employers to adjust pay on the basis of the idea of comparable worth.[9]

The Report's recommendations for comparable worth legislation were based almost wholly on American ideas and on American case law; the Report simply combined these ideas with Canadian data on male and female earnings, the distribution of male and female employees in the Canadian workforce and information on Canadian equal pay legislation.[10] A key source of ideas for the Report was clearly the American National Academy of Sciences reports of 1979 and 1981 prepared for the EEOC on the earnings of female employees.[11] The main ideas found in the Abella Report on what it renamed "pay equity" are all found in the National Academy of Sciences report: that work in occupations primarily populated by women is underpaid because the work is primarily done by women; that this underpayment is the result of an undervaluing of the types of work women most frequently do; that the undervaluing is the result of discriminatory beliefs and attitudes regarding women in the workforce widespread in society; that this undervaluing of work usually performed by women means the labor market cannot be relied on to correct underpayment of women for their work. The solutions put forward by the National Academy of Sciences report were the use of job evaluation to uncover the degree of underpayment of work performed primarily by women and the use of regression analysis applied to an employer's existing wage structure for this purpose.[12]

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[8] Abella Report, pp 232-254.
[9] *Ibid*, p. 254. The Report included five recommendations for legislative changes to promote pay equity: p. 261, recommendations 32-36.
[10] *Supra*, fn 7. The American experience is referred to, or American authors cited, on pp 232-233, 237-238, 243-244, 247-248 and 250-252 of the Report.
[11] Donald J. Treiman and Heidi I. Hartman (eds): *Women, Work and Wages: Equal Pay for Job of Equal Value* (Washington: National Academy Press, 1981).
[12] *Supra*, fn 11, pp 68-90.

The Abella Report also relied on the International Labour Organization's 1951 Equal Remuneration Convention Number 100, which provides for "equal remuneration for men and women for work of equal value"[13] as support for the idea of comparable worth. The records of the meetings and conferences leading to the adoption of the text of the Convention – the *travaux préparatoires* in diplomatic parlance – show, though, that it is far from clear that "comparable worth" as put forward in the 1970's as what was in the minds of the drafters of the convention.

And, from an American point of view, it is critical to remember that the United States is not a party to Convention 100. Under article 19 of the International Labour Organization Constitution, that means Convention 100 does not bind the United States or its constituent states.[14]

The Abella Report recommended mandatory job evaluation by employers as the main solution to the problem it saw of underpayment of women.[15]

b) Pay Equity Legislation in Response to the Abella Report

Manitoba was the first province to pass legislation inspired by the Abella Report. Its *Pay Equity Act*[16], introduced in 1985, applies only to employees in the provincial civil service and to employees in the "para-public" sectors of health care, universities, and schools. This model of pay equity legislation applying only to the provincial civil service or para-public employers was followed in three other provinces in the 1980's.[17]

Ontario and Quebec, the two most populated provinces, took a different route. In 1987, Ontario introduced legislation covering all public and para-public employers and all private sector employers with 10 or more employees in the province. The legislation

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[13] International Labour Organization Convention No. 100, art. 2(1), available at www.ilo.org, Labour Standards, Convention 100. Canada ratified this convention in 1972.
[14] International Labour Organization Constitution, articles 19(5)(l), (7)(b), available at www.ilo.org/Labour Standards.
[15] *Supra*, fn 8, pp 243-244, 250-253.
[16] *Pay Equity Act*, C.C.S.M. c. P.13, as am. An electronic version of this statute is available at CanLII.org/EN/Manitoba/Statutes.
[17] New Brunswick: *Pay Equity Act 2009*, S.N.B. P-5.05 (replacing 1989 legislation); Nova Scotia: *Pay Equity Act*, R.S.N.S. 1989, c. 337 (originally enacted 1987); Prince Edward Island: *Pay Equity Act*, R.S.P.E.I. 1988, c. P-2 (originally enacted 1988). Electronic versions of these statutes are available at CanLII.org/EN/under the name of the province.

imposed different time limits for employers to meet their pay equity obligations depending on the size of their workforce, but no significant differences are made between the obligations of employers in these sectors.[18]

Quebec followed suit in 1996 with a statute modeled quite closely on that of Ontario.[19] The most important differences between the two statutes are the plugging of perceived loopholes and other changes to the Ontario statute that pay equity advocates considered necessary.

The federal *Canadian Human Rights Act* applies to the approximately ten percent of the Canadian workforce that is employed in industries coming under federal legislative jurisdiction.[20] It covers all employers, private sector or other, in those industries. Passed in 1977, the federal statute does not use the term "pay equity". Instead it requires employers to pay male and female employees in the same establishment "equal pay for work of equal value".[21]

Despite what might be thought to be some significant differences between the federal act and those of the provinces, the federal act has been interpreted as creating very similar obligations for employers, with one crucial distinction: the federal statute does not require employers to carry out pay equity studies. Instead, pay equity complaints are dealt with using the normal complaints process found in the federal statute. In the 1980's and 1990's, a number of federally regulated employers voluntarily conducted pay equity studies with unions representing their employees, in some instances after a complaint had been filed. The unions then successfully relied on the results in support of pay equity complaints. There do not appear to have been joint union-employer studies since then in the federal jurisdiction.

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[18] *Pay Equity Act*, S.O., 1987 c. 34, now R.S.O. 1990, c. P-7, as am. An electronic version of this statute is available at CanLII.org/EN/Ontario.
[19] *Pay Equity Act*, S.Q. 1996, c. 43, now R.S.Q., c. E-12.001, as am. An electronic version of this statute is available at CanLII.org/EN/Quebec.
[20] *Canadian Human Rights Act* S.C. 1976-77, c. 33, now R.S.C. 1985 c. H-6, as am. An electronic version of this statute is available at CanLII.org/EN/Canada.
[21] *Canadian Human Rights Act*, s. 11(1).

II PAY EQUITY AND THE PRIVATE SECTOR IN CANADA

Ontario, Quebec and the federal sector are thus the only Canadian jurisdictions with pay equity legislation applying to private sector employers, but about 11 million of the total Canadian workforce of some 17.5 million works in these jurisdictions. All the major sectors of the Canadian economy are found in these jurisdictions. Pay equity legislation in Canada thus applies to a large part of the private sector economy.

There are two legislative models for private sector pay equity in Canada. In Ontario and Quebec, special pay equity legislation has been passed whose general features are the same in both provinces. The federal jurisdiction deals with pay equity as part of its general human rights statute.

The federal statute, discussed in more detail below, permits complaints that an employer has not met its obligation in section 11 of the *Canadian Human Rights Act* to pay equal wages for work of equal value. The complaints are dealt with under the regular complaint procedures in the *Act* and are heard by the Canadian Human Rights Tribunal, which hears all complaints under the *Act* referred to it by the Canadian Human Rights Commission refers to it.

a) The Ontario/Quebec Model of Pay Equity Legislation

The Ontario and Quebec pay equity statutes are very different.[22] Both begin with a legislative finding that "systemic gender discrimination" is suffered by persons who occupy positions in predominantly female job classes".[23] While neither statute states what the "system" is that discriminates, or who the participants in it are, both put the burden of fixing the problem found by the legislatures almost entirely on employers.

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[22] Ontario *Pay Equity Act*, R.S.O. 1990 c. P-7 as am. See *supra*, fn 18 for reference to the electronic version of this *Act*. Quebec *Pay Equity Act*, R.S.Q. c. E-12.001, as am. See *supra*, fn 18 for reference to the electronic version of the *Act*.

[23] Quebec *Pay Equity Act*, s. 1. The preamble to the Ontario *Pay Equity Act* is in similar terms.

i. What is Compared

Both acts require all employers with 10 or more employees in the province to conduct pay equity studies and prepare "pay equity plans". These plans are done with the participation of employees, and of any unions representing them[24], but at the employer's expense. The Ontario *Act*, which came into effect January 1, 1988, required existing employers to conduct studies and prepare plans by differing dates, depending on the size of the employer's workforce, with larger employers having to complete the process first.[25] Employers in Ontario are now required to comply with their pay equity obligations as soon as they hire their tenth employee. The Quebec *Act* gives employers approximately one year to comply with their pay equity obligations from the date on which they hire a tenth employee.[26]

A pay equity plan prepared under the Ontario of Quebec statute will include an evaluation of the male and female dominated job in either all of the employer's places of business in a municipality (Ontario) or in all of these places of business in the province (Quebec). Under both statutes, employers may prepare a plan based on a broader or narrower geographic area by agreement with a union or with the employer's employees. In Ontario, where employees are unionized, there is normally a separate plan for each bargaining unit and an additional one for non-bargaining unit employees.

A pay equity plan will also specify the wage increases that all employees in female dominated jobs found to be underpaid will receive, as well as any back pay owing to these employees if a plan has not been completed by the deadline specified in the legislation. Ontario limits the amount payable each year as wage increases to an amount equal to one percent of the employer's payroll in the province, but the obligation to

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[24] Labor relations law in all Canadian jurisdictions broadly resembles the American *National Labor Relations Act*, 29 U.S.C. §§151-168. Unions in Canada are certified or recognized as the exclusive bargaining agent for a defined group of employees, the bargaining unit.

[25] Private sector employers with 500 or more employers on January 1, 1988 had two years to prepare a pay equity plan; those with 100 to 500 had three years; those with 50 to 99 had four years; those with 49 to 70 had five years: Ontario *Pay Equity Act*, s. 10.
The Quebec *Pay Equity Act* requires employers to comply with it by January 1 of the year following the one in which they hire a tenth employee: Quebec *Pay Equity Act*, 24.

[26] The Quebec *Pay Equity Act* requires employers to comply with it by January 1 of the year following the one in which they hire a tenth employee: Quebec *Pay Equity Act*, 24.

continue the payment continues until any "wage gap" is covered. In Quebec, the employer must normally complete any pay equity adjustments within four years of the date the plan is required to be prepared. Back pay amounts are in addition to these payments.

The two statutes set out in considerable detail how a pay equity study is to be carried out, often in arcane terms ("potential proxy establishment"[27], for example). One theme comes clearly through the mass of detail: the rules are such that few employers indeed will be found not to have a pay equity problem and, for those few, the rules are sufficiently flexible or ambiguous that they can likely be found to have one as well.

We can take as an example an idea basic to the theory of pay equity, that jobs held mostly by women ("female dominated") are underpaid vis-à-vis male dominated jobs of equal value. But what is female or male dominated work? Each of the two statutes offers four choices, some fairly objective (the percentage of male or female employees in a job class at a particular employer[28]), others less so (a difference between the percentage of women or men in a job class and their percentage in the employer's workforce as a whole that "is considered significant"[29]). Ontario provides that any job class a pay equity review officer, or an employer and union, or an employer itself if it has no unionized employees, decides is male or female dominated is male or female dominated for purposes of the statute.[30]

At times, of course, even the flexibility the acts give in defining male and female dominated job classes may not be enough. There may not be a male dominated job or class of jobs to compare with some or all of the female dominated ones. One might think that would end the matter, since, in theory, pay equity requires employers to pay the same remuneration to employees in the male and female dominated jobs in its workforce, which are of equal or nearly equal ("comparable") value. The wages work of a given value might attract at other employers is thus, in theory, not relevant to determining

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[27] Ontario *Pay Equity Act*, s. 21.11(1).
[28] Though what a « job class » is can be defined, negotiated or decided in many ways; see Ontario *Pay Equity Act*, ss 1(1), (5), 6(6) to 6(8), (10); Quebec *Pay Equity Act*, ss 53, 54.
[29] Ontario *Pay Equity Act*, s. 1(1), (5), 6(6) to 6(8); Quebec *Pay Equity Act*, ss. 53-55.
[30] Ontario *Pay Equity Act*, s. 1(1).

whether a pay equity problem exists. But this line of thought would be incorrect: both statutes create elaborate procedures for making "proxy comparisons" between male dominated jobs at other employers or notional male dominated jobs in the economy as a whole if a particular employer does not have a male comparator for some or all of its female jobs.[31]

ii. Valuing Jobs and Wages

Both the Ontario and Quebec statutes require the employer to determine which of its jobs or job classes may be male or female dominated. If any of them are, the value of their work and wages must be determined. Though this is done at the employer's expense, decisions on how jobs will be evaluated are generally made by committees in which unions or employee representatives have an equal say with the employer. Where agreement between the employer and the union or employees is not possible, an official of the pay equity commission will try leading the parties to one. If that fails, the pay equity commission may issue an order determining any matter on which there is no agreement.[32]

The value of a job is the composite of the skill, effort and responsibility it requires, together with the working conditions under which it is performed.[33] These are, of course, what the job evaluation plans often used by private sector employers examine and the job evaluation plans used under the Ontario and Quebec statutes are frequently recognizable as slightly modified versions of the plans offered by the major management consulting firms.[34] The Ontario and Quebec statutes have also helped create a cottage industry of small firms or individuals offering job evaluation plans and advice, especially to smaller employers.

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[31] These proxy comparisons are discussed in more detail in section iii below.

[32] Ontario *Pay Equity Act*, ss 13-16; Quebec *Pay Equity Act*, ss 10-20, 21, 23-35. In Quebec, employers with between 10 and 49 employees may evaluate their employees work themselves; employee involvement is not required (s.34).

[33] Ontario *Pay Equity Act*, s. 5(1); Quebec *Pay Equity Act*, s. 57.

[34] The list in John G. Kelly: *Pay Equity Management* (CCH Canadian: North York, n.d.) includes Hay Management Consultants, KPMG Actuarial, Benefits & Compensation, William M. Mercer Ltd., Price WaterhouseCoopers' consulting arm, and TPF Limited, among others.

The two statutes take rather different approaches in their requirements on which groups of employees must be covered by a single job evaluation and pay equity plan. In Quebec, a single plan generally must be applied to all of an employer's employees in the province, unless a union requires separate ones or the pay equity commission authorizes separate plans, as it may do if it considers they are warranted by regional wage disparities.[35] In Ontario, a separate plan will normally be prepared covering all of the employees' places of business in a single municipality, with separate ones for each bargaining unit and for non-unionized employees. By agreement with unions and employees, an employer can develop broader based plans.[36]

Wages are defined comprehensively in both statutes so as to include not only cash wages but all forms of benefits provided by the employer. In practice, where an employer provides a standard set of benefits applicable to both male and female dominated jobs, the tendency is to assume that the benefits literally "factor out" and look only at cash wages to determine whether the male and female jobs receive the same "wages".

iii. Which Jobs Get Pay Equity Increases

The Ontario and Quebec statutes both allow for a series of increasingly broader ways of comparing the value of jobs, as determined by the job evaluation part of a pay equity plan. The most straightforward is "job to job" comparison: if two jobs have the same or very nearly the same number of job evaluation points, they are of equal value. This type of comparison may naturally mean that some female dominated jobs cannot be matched in value with a male one and so would logically not receive pay equity increases based on the principle of equal pay for work of equal value.

Both statutes deal with such a situation by changing the basis of comparison, moving steadily away from a job to job one. Ontario requires that the basic unit of comparison be the "job class"[37], a grouping of jobs whose values are averaged, as does

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[35] Quebec *Pay Equity Act*, ss 10, 11, 31, 34.
[36] Ontario *Pay Equity Act*, ss 2(1), 5.1, 13, 14, 14.1, 15.
[37] This is defined in the *Act* as "positions in an establishment that have similar duties and responsibilities and require similar qualifications, are filled by similar recruiting procedures and have the same compensation schedule, salary grade, or range of salary rates". The pay for such a group of jobs, the "job rate", is the "the highest rate of compensation for a job class": Ontario *Pay Equity Act*, s. 1(1).

Quebec.[38] A "line to line" approach is also encouraged by the Ontario and Quebec statutes and still more by pay equity commissions and job evaluation consultant practice. Such an approach involves, in essence, averaging the pay and job evaluation points of all the male dominated jobs, averaging the same information for the female dominated ones, and drawing regression lines based on these averages. If the female line is below the male one, all female dominated jobs receive wage increases to bring them up to the male line. This allows a female dominated job to receive pay equity increases based on what a hypothetical male dominated job with the same combination of pay and job evaluation points as the female one actually has would have received if the hypothetical male job existed and if the employer paid that job the wages the regression line predicts it would have paid.[39]

Sometimes, though, an employer may not have any male dominated jobs whose values can be compared to those of its female dominated ones. If that is the case, the employer will have to seek "proxies" to compare to its female dominated jobs. "Proxies" may be actual jobs at other employers or at other establishments of the same employer, under the Ontario statute[40], or notional jobs that the employer may be required to construct, under the Quebec statute.[41] To put these processes into effect, the Ontario statute allows the pay equity tribunal or commission to issue orders requiring other employers to give information on pay and job value to a "seeking employer".

Once one of these forms of comparison has been made, the employer is responsible for bringing the wages of all employees in any female dominated jobs that are found to be underpaid up to those of employees in male dominated jobs of equal value. When the Ontario legislation was first introduced, employers had a two to five year period, depending on their size, to carry out job evaluations and increase wages in female

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[38] Quebec *Pay Equity Act*, ss 53-64.

[39] Ontario *Pay Equity Act*, ss 5(1), 6(2), (3); Quebec *Pay Equity Act*, ss 61-63. In Ontario, employers with 100 or more employees are also required to use the "proportional value" method of comparison if there is no male dominated job of equal value to compare to a female dominated one. This method requires that if a male dominated job evaluated at 500 points is paid, say, $25.00 per hour, a female dominated job evaluated at 250 would have to be paid $12.50 per hour. This is, of course, far removed from equal pay for work of equal value: Ontario *Pay Equity Act*, ss 21.1-21.10. Quebec applies this principle to all employers covered by its statute: *Pay Equity Act*, s. 63.

[40] Ontario *Pay Equity Act*, ss 21.11 to 21.23.

[41] Quebec *Pay Equity Act*, ss 13, 114.

dominated jobs. An employer was required to pay an amount equal to up to 1% of its payroll in the province each year for this purpose until pay equity was attained, in addition to any back pay required. Under the Quebec statute, employers had four years to make all wage increases called for by a pay equity plan.[42]

Since the Ontario legislation came into force in 1988 and the Quebec legislation in 1996, all employers covered by the statutes should in theory have fulfilled their obligations under them years ago. The only exceptions would be those hiring their tenth employee after 1988 or 1996. In practice, the deadlines for Quebec employers have been extended a number of times (most recently to the end of 2010, though back pay with interest is due running from 2001) and the Ontario pay equity commission takes the view that all employers covered should be in compliance with the statute now. Those in Ontario that are not could face substantial back pay liability, in addition to the need to increase current wages.

Both the Ontario and Quebec schemes put much emphasis on employers agreeing with employees or with the unions representing them on the main questions involved in evaluating jobs and determining the size of wage increases for female dominated jobs, along with any back pay owed. Where this is not possible, both statutes allow employees, unions and employers to file complaints with the province's pay equity commission. The commission may also investigate whether an employer is meeting its obligations under the statute on its own initiative.[43]

In such cases, if the complaint cannot be settled or the commission cannot reach a settlement with the employer, the pay equity commission may issue an order setting out the steps the employer must take to comply with its obligations under the statute. If a party or the commission considers that the employer is not complying with the order, it may bring the order before the Pay Equity Hearings Tribunal (in Ontario) or the provincial labor relations board (in Quebec) for an adversarial hearing. The Pay Equity Hearings Tribunal or the labor relations board may issue a legally binding order that can be filed in the provincial superior court for enforcement. The order is binding and

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[42] Ontario *Pay Equity Act*, ss 13(2) to (6), 36(7)(g); Quebec *Pay Equity Act*, s. 37.
[43] Ontario *Pay Equity Act*, ss 16, 22-24; Quebec *Pay Equity Act*, ss 93, 95, 96, 102.2.

enforceable unless quashed or modified by a superior court on judicial review; the courts accord much deference to orders of such administrative tribunals.

While orders by a tribunal are the primary means of enforcing an employer's obligations, both the Ontario and Quebec statutes create a variety of offences punishable by fines for non-compliance with the deadlines established by the acts or interfering with the work of pay equity officers.[44]

b) The Federal Model

The federal *Canadian Human Rights Act*, which applies only to the relatively few employers coming under the federal legislative jurisdiction, differs sharply from the Ontario and Quebec statutes in its enforcement model.

There is no requirement for an employer to undertake a job evaluation study or prepare a pay equity plan.

Instead, an individual or "group of individuals" may file a complaint with the Canadian Human Rights Commission, which administers the federal human rights legislation, alleging that an employer is not meeting its obligation under section 11 of the *Canadian Human Rights Act* to pay male and female employees working in the same establishment equal pay for work of equal value. The complaint is dealt with in the same way as complaints under any other sections of the federal statutes. The Commission has accepted complaints from unions representing employees of the employer named as the respondent in equal pay complaints, though it has never clearly stated the basis on which a union is permitted to file a complaint. It may be that the Commission considers unions to be a "group of individuals".

The Commission investigates complaints and is empowered under the *Act* to dismiss the complaint or refer it for a hearing by the Canadian Human Rights Tribunal. The Commission does not rule on the merits of a complaint. It determines only whether, in its view, there is material before it that could justify a Tribunal finding in favor of a

[44] Ontario *Pay Equity* Act, s. 26; Quebec *Pay Equity Act*. ss 115-117.

complainant and there is a public interest in referring a complaint to the Tribunal for a hearing on the merits.

The Tribunal, in contrast to the Commission, is a quasi-judicial administrative body that determines whether a complaint has been proven on the civil standard of a balance or probabilities. It makes this determination following an adversary hearing broadly similar to those of the courts.[45] The Tribunal has broad remedial powers under the *Act*. It cannot, though, award legal costs (attorney's fees or disbursements)[46]. In complaints under section 11, the Tribunal has normally awarded back pay running from one year before the date the complaint was filed (consistent with the one year time limit for bringing complaints under the *Act*) until the date of the Tribunal's decision. Interest on the back pay has usually been awarded. Tribunals have refused to award damages for individual mental pain and suffering in section 11 group complaints to date, reasoning that the "systemic" nature of the discrimination precludes the element of personal distress or humiliation needed for such awards.

The Commission is empowered to issue "guidelines" for the interpretation of the *Canadian Human Rights Act*. These apply to itself and to the Tribunal and require them to interpret the *Act* in accordance with the guidelines. The Commission's *Equal Wages Guidelines 1986*[47] establish an interpretation of section 11 of the *Act* that substantially equates it to the Ontario and Quebec pay equity statutes, despite some obvious differences between the federal statute and these provincial legislative schemes. These include the absence of a legislative finding federally that the work of employees in female dominated jobs is systematically undervalued and underpaid; the wording of section 11 of the federal statute which makes it available equally to male and female employees, unlike the provincial statutes; and the absence of any obligation for employers to conduct pay equity studies.

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[45] *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 (*CHRA*) ss 41, 43-45, 49-54.
[46] *Canada (Canadian Human Rights Commission)* v. *Canada (Attorney General)*, 2011 SCC 53, [2011] 3 S.C.R. 471.
[47] SOR/86-1082, *Canada Gazette*, Part II, Vol. 120, No. 25, pp 4794-4798.

A number of court decisions, however, have confirmed that section 11 of the *Act* should be interpreted as largely equivalent to provincial pay equity legislation.[48]

But neither judicial interpretation nor the *Equal Wages Guidelines 1986* have tried to impose a requirement on federally regulated employers to conduct pay equity studies. In practice, the Commission has only referred complaints under section 11 to a Tribunal hearing where a job evaluation study has been available.

Most cases have involved job evaluation studies voluntarily undertaken by federally regulated employers jointly with unions representing their employees; the unions then used the results of the studies to file complaints against the employer, based on wages set out in collective agreements the unions had negotiated. The most notable such instances involved a series of complaints against the federal government by public service unions, which were settled for some $5 billion in back pay.[49] A private sector example can be found in the case of a major Canadian telecommunications company that settled complaints brought by its unions on the basis of a joint study for some $300 million.

Perhaps not surprisingly, there do not appear to have been any such joint studies undertaken since the 1990's.

III POINTS OF CONCERN FOR EMPLOYERS

The Canadian experience with pay equity has potential lessons for private sector employers in the United States that go beyond the ongoing debates about the soundness the ideas behind pay equity or comparable worth.

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[48] *Public Service Alliance of Canada* v. *Canada Post Corp* 2011 SCC 57, [2011] 3 S.C.R. 572 (adopting the dissenting reasons of Evans, J.A. in 2010 FCA 56, [2011] 2 F.C.R. 221); *Canada (Canadian Human Rights Commission)* v. *Canadian Airlines International Ltd.* 2006 SCC 1, [2006] 1 S.C.R. 3.

[49] These figures exclude an estimated $200 annually in increased wages costs under the terms of the settlements: Treasury Board of Canada Secretariat: *Expenditure Review of Federal Public Sector Compensation Policy and Comparability* (Ottawa: Supply and Services Canada, 2007), Vol. I, chapter 15. This publication is available on the web at: TBS-SCT.gc.ca/EN/Expenditure Review of Federal Public Sector Compensation Policy and Comparability.

The first is that legislative finding of a pervasive undervaluing of work in jobs frequently held by women colors the whole process. Rather than approaching the job evaluation called for by the Ontario and Quebec statutes in a neutral way, the working presumption is that almost every employer will be underpaying at least some of its jobs that are female dominated. This expectation colors most aspects of job evaluation under these statutes, from the training given by consultants to employees who may be evaluating jobs, to the choice of job evaluation plans, to the information gathering, rating and adjustments of ratings that are part of any job evaluation exercise.

Second, job evaluation is costly. Job evaluation under pay equity statutes can be more costly because of requirements for employee or union involvement in all phases of the evaluation and because of the requirement for not precisely defined "gender neutrality" in the job evaluation plan and in its application. Just what this can imply emerges from the Quebec pay equity commission's aptly titled, 173 page: "Detailed guide for implementing pay equity and evaluating its maintenance".[50]

Larger employers can of course more easily bear these costs and deal with these complexities than smaller ones. While many employers with over 500 employees will have been using a formalized job evaluation plans as guides to preserving internal equity in wages and as rationales for wage structures, for fewer employers with, say, a total of 15-20 employees do. These small employers face the prospect of adding a level of complexity to their ways of paying employees not normally seen in such small workforces.

Small employers will often be driven by cost considerations to make use of one of the numerous job evaluators in the cottage industry that sprung up to meet the increased demand for job evaluation following the passage of pay equity acts in Ontario and Quebec. Since there are no professional regulatory requirements for job evaluation consultants, their genuine expertise is not always evident. A small or mid-sized employer may find itself with a plan that an audit by the pay equity commission determines is inadequate.

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[50] "*Guide détaillé pour réaliser l'équité salariale et en évaluer le maintien*", Commission de l'égalité salariale, 4th edn, 2011.

Third, small and mid-sized employers may only a small number of employees in any one job or a group of jobs with similar content. This can make the use of the seemingly precise and objective criterion of the percentage of male or female employees in jobs to determine whether they are male or female dominated or gender neutral meaningless: a job can go from one category to another when a single employee is hired or leaves. Small numbers of employees and a limited amount of different types of work, moreover, can make the male line to female line comparisons favored in practice under pay equity statutes statistically invalid. That does not mean the comparisons will not be made, only that the employer may find itself making payments on the basis of regression lines that lack genuine statistical validity.

Fourth, in the federal sector, a high rate of unionization, the presence of numbers of large employers and the complaint based process for resolving pay equity claims has led to very lengthy and costly proceedings. A complaint filed against Canada Post Corporation in 1982 was not resolved by a Canadian Human Rights Tribunal's decision until 2005. The hearing before the Tribunal had run for over 400 days between 1992 and 2002. Judicial review proceedings filed against the Tribunal's decision by both the union that had brought the complaint and Canada Post were not resolved until the Supreme Court of Canada ruled on the matter in 2011. Another complaint against a major Canadian airline, claiming that flight attendant work was of equal value to that of pilots, was before the Canadian Human Rights Tribunal and the courts from 1991 until a Commission decision to dismiss it was upheld by the courts in 2013.

Fifth, the statutory definitions of "male dominated" and "female dominated" work mean that considerable numbers of men are eligible for pay equity wage increases. Under the most straightforward of the definitions of such work in the Ontario and Quebec statutes, as many as 40% of those receiving pay equity increases can be men; under the federal *Equal Wages Guidelines 1986* this can be as many as 45% for groups of over 500.[51] If the less straightforward definitions are used, such as a "difference between the rate of representation of women or men in the job class and their rate of representation in

[51] Ontario *Pay Equity Act*, s. 1(1); Quebec *Pay Equity Act*, s. 55; federal *Equal Wages Guidelines 1986*.

the total workforce of the employer that is considered significant"[52], then the likelihood of large numbers of men receiving any equity increases only grows.

This is important for two reasons. First, low or unclear thresholds for finding work is male or female dominated makes it more likely that such work will be discovered and that more of it will be discovered than would otherwise be the case. This increases the size of an employer's obligations to introduce pay equity wage increases and make back payments to employees in underpaid jobs. Second, the higher wages men in female dominated jobs enjoy as a result of pay equity increases are put on the "male side" of the ledger in policy debates on relative male and female earnings. So broad definitions of "female dominated" work can contribute to the problem pay equity legislation is supposed to solve.

Sixth, the process for determining whether a pay equity problem exists and for remedying it gives unions a "free rider" status. Where employees are unionized their wages will be set by the collective agreement the union negotiates with the employer. The Ontario and Quebec pay equity statutes, and case law under the federal *Canadian Human Rights Act*[53], allow unions to effectively take the position in job evaluation exercises that wages they negotiated in their collective agreements discriminate against employees in female dominated jobs in the bargaining unit, while requiring the employer to bear the whole cost of remedying the discrimination. It also gives unions a strong incentive to resolve any internal conflicts over compensation demands to be made at the bargaining table at the employer's expense. The union can use its full bargaining strength to obtain compensation increases favoring employees in mostly male jobs, then use pay equity to increase the wages of employees in mostly female ones.

Finally, the Ontario and Quebec pay equity statutes have both been in force for over fifteen years; the "pay equity" interpretation of section 11 of the federal *Canadian*

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[52] Quebec *Pay Equity Act,* s. 55(3).

[53] *Public Service Alliance of Canada* v. *Canada Post Corp.*, 2005 CHRT 35, ultimately upheld by the Supreme Court of Canada for the reasons of the dissenting judge in the Federal Court of Appeal: *P.S.A.C.* v. *Canada Post Corp.*, 2011 SCC 57, [2011] 3 S.C.R. 572; *P.S.A.C.* v. *Canada Post Corp.* 2010 FCA 56, [2011] 2 F.C.R. 221. The Tribunal finding that unions could not be liable under s. 11 of the *Canadian Human Rights Act* for discriminatory wages in their collective agreements was not an issue in the judicial review proceedings.

Human Rights Act has been applied since the mid 1980's. So it is proper to ask: what has the effect of this legislation been on wages in jobs held mostly by women?

The answer seems to be very little. A recent study, for example, shows that in Quebec women's wages are about 89% of men's, the third highest ratio in Canada. But the two provinces with higher ratios do not have pay equity legislation covering private sector employers and the same is true of Nova Scotia where women's wages are also 89% of those of men. In Ontario, women's wages are 85% of men's, only the seventh highest ratio in Canada, and very little different from those in Saskatchewan (88%) or British Columbia (83%), which have no pay equity legislation.[54] While women's wages have increased relative to those of men in all Canadian provinces since the 1980's, there is no clear link between pay equity legislation and higher wages for women overall.

One reason that suggests itself for this is that the cumbersomeness and expense of complying with the requirements for job evaluation and developing a pay equity plan have made the enforcement of pay equity statutes in Ontario and Quebec difficult.

Though large private sector employers and public sector ones generally met their obligations on schedule, numerous small employers (and it is worth remembering that these statutes apply to all employers with 10 or more employees) are either not fully aware of their obligations under the acts or that the acts even apply to them. These employers may not have even begun the process of determining which of their jobs are male or female dominated, engaging a consultant to carry out a job evaluation study, looking for proxy comparator jobs if needed and developing a pay equity plan.

In Ontario, this should have been done by January, 1993 for employers that had 10 or more employees then; ones that reach this threshold after 1993 are, in the Pay Equity Office's view, required to be in compliance as soon as they reach it. To see that this happens, the Commission has been conducting audits of about 1,000 employers per year, often in a particular economic sector, for the last several years. Government

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[54] M. Baker and M. Drolet : "A New View of the Male/Female Wage Gap" 36 *Canadian Public Policy*, No. 4 (December 2010) 429, Table 3 "Average Gender Wage Ratio by Province", p. 440. There is, of course, a lively debate among labor economists and sociologists as to how much of the differences in male and female earnings can be attributed to undervaluing of work in jobs held largely by women and whether pay equity legislation may be an effective solution to any such problem in a market economy.

statistics indicate that there are several tens of thousands of businesses in Ontario with between 10 and 99 employees.[55] In Quebec, the deadline for compliance with employer obligations has been postponed a number of times. In the federally regulated sector, virtually all pay equity complaints have been brought by unions either representing public service employees or those of large private sector employers. Smaller or non-unionized employees are absent as respondents to such complaints.

A second reason that suggests itself for the lack of any clear convergence of male and female wages that can be put down to the existence of pay equity legislation is that it is simply not an effective policy response, given the complexities of wage setting in a market economy. Whatever the answer to this broad question, it is certain that the most noticeable practical effects of pay equity legislation in Canada have been wage increases for public service workers and a large amount of new work for job evaluation consultants.

[55] Industry Canada: Key Small Business Statistics July 2012, available at www.ic.gc.ca/eic/obl.nst/eng. The Ontario Pay Equity Commission Office's Annual Reports for 2010-11 and 2008-09 illustrate the Office's audit efforts.