

COMPARABLE WORTH IN MINNESOTA AND ONTARIO: IMPLICATIONS FOR U.S. POLICY

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I. INTRODUCTION

Wage inequality between the sexes persists in North America, as it does in most of the world. According to the World Economic Forum's *Global Gender Gap Report 2007*, Canadian women earn 72 percent of what men earn for similar work, U.S. women 65 percent.¹ In a 2003 statement, U.S. Representative Carolyn Maloney (NY) said,

The world today is vastly different than it was in 1983, but sadly, one thing that has remained the same is the pay gap between men and women. After accounting for so many external factors, it seems that still, at the root of it all, men get an inherent annual bonus just for being men. If this continues, the only guarantees in life will be death, taxes and the glass ceiling.²

Not only is this pay gap unfair, but it also has real socio-economic costs. One economist has estimated that the wage gap costs the average full-time U.S. woman worker between \$700,000 and \$2 million over the course of her work life.³ Low earnings contribute to poverty, and not surprisingly, more women than men live in poverty.

The 2006 American Community Survey found that 14.7 percent of women and 11.9 percent of men live below the poverty line.⁴ Children in households headed by women also suffer from women's relatively lower earning potential. While 15 percent of all U.S. families

¹ The World Economic Forum, Country Profiles for Canada and the U.S., <http://www.weforum.org/en/initiatives/gcp/Gender%20Gap/Countries2007/index.htm#profiles>. (last visited May 14, 2008). The Executive Opinion Survey is a compilation of information on a broad range of variables for which hard data sources are scarce or, frequently, nonexistent. The Survey is conducted annually, with respondent numbers currently just over 11,000 in 131 countries.

² National Committee on Pay Equity, What People Are Saying About Fair Pay, <http://www.pay-equity.org/info-saying.html> (last visited May 4, 2008).

³ AFL-CIO, It's Time for Working Women to Earn Equal Pay, <http://www.aflcio.org/issues/jobseconomy/women/equalpay/> (last visited April 23, 2008).

⁴ U.S. CENSUS BUREAU, S1701, POVERTY STATUS IN THE PAST 12 MONTHS (2006), http://factfinder.census.gov/servlet/ACSSAFFPeople?_submenuId=people_0&_sse=on follow link to Poverty, then select "Poverty Status for Individuals" (last visited April 24, 2008).

with children under 18 years had incomes below poverty level, 36.9 percent of those families headed by women alone lived in poverty.⁵

Married women and their families are also affected by the wage gap. Because married women now contribute an average of 35.1 percent of their family's income, women's relatively lower wages mean that sizeable financial resources are being denied to working women, their husbands, and their children.⁶ Improving women's earnings could have a positive impact on men who would like to spend more time with their children, but who cannot afford to reduce their work hours.⁷

While the Equal Pay Act and Title VII have done much to help women who are paid less than a male coworker with similar skills and responsibilities, these federal statutes fall short in addressing the broader pay gap. The Equal Pay Act of 1963 provides for "equal pay for equal work"⁸ and Title VII of the Civil Rights Act of 1964 prohibits discrimination on the basis of sex in hiring and all conditions of employment, including compensation and advancement.⁹ To assert a claim under either statute, a plaintiff must show that the work she performed was "equal" or "substantially equal" to the work of a higher-paid male comparator.¹⁰ This means that a woman working in a female-dominated occupation may find it impossible to find a man who does precisely the same work and to whom she can compare herself.¹¹

⁵ U.S. CENSUS BUREAU, S1702, POVERTY STATUS IN THE PAST 12 MONTHS OF FAMILIES (2006), http://factfinder.census.gov/servlet/ACSSAFFPeople?_submenuId=people_0&_sse=on follow link to Poverty, then select "Poverty Status for Families" (last visited May 26, 2008).

⁶ U.S. Bureau of Labor Statistics, Table 24. Contribution of wives' earnings to family income, 1970-2005, available at <http://www.bls.gov/cps/wlf-table24-2007.pdf> (last visited March 29, 2008).

⁷ JUDY GOLDBERG DEY AND CATHERINE HILL, BEHIND THE PAY GAP, 3 (2007).

⁸ Equal Pay Act of 1963, 29 U.S.C. § 206(d) (1978).

⁹ Civil Rights Act of 1964, tit. VII, 42 U.S.C. § 2000e (1981 & Supp. 1992).

¹⁰ L. Tracee Whitney, *"Any Other Factor Than Sex:" Forbidden Market Defenses and the Subversion of the Equal Pay Act of 1963*, 2 NU FORUM 51, 57 (Spring 1997).

¹¹ *Id.*

For instance, Carla, a salesperson at a car dealership who has several male colleagues with exactly the same job duties, has a cause of action for discrimination in pay on the basis of sex if she is paid less than the male salespeople for no legitimate reason. Legitimate reasons include differences in training, experience, or performance. However, receptionist Christine, who may also be paid less because she is a woman, has no cause of action because no male receptionists work for the dealership.

Comparable worth, also known as pay equity, seeks to provide recourse to women like Christine by offering an alternative way to compare the relative value of jobs predominately held by men with those predominately held by women. By allowing comparisons across otherwise dissimilar occupational groups, pay equity makes a quantum leap in the expansion of policies available to address the gender wage gap.¹² The ability to make cross-occupational comparisons is especially relevant in the pay equity context because there are generally a disproportionate number of women in an organization's lower paying jobs.¹³

To implement pay equity, employers must evaluate and compare the jobs in their organization according to a set of uniform criteria such as skill, effort, responsibility, or working conditions.¹⁴ Employers must then determine whether jobs typically held by women are underpaid vis-à-vis comparable jobs typically held by men.¹⁵ Once an employer determines that a wage discrepancy exists, it must develop an adjustment plan to raise the wages of those who hold underpaid jobs.¹⁶ Ideally, pay adjustments should be structured so that there is a zero correlation between what a job pays and the sex composition of its incumbents, other factors

¹² Morley Gunderson, *The Evolution and Mechanics of Pay Equity in Ontario*, CANADIAN PUBLIC POLICY – ANALYSE DE POLITIQUES, VOL. XXVIII, SUPPLEMENT 1, S119 (2005).

¹³ *Id.*

¹⁴ Heidi I. Hartmann and Stephanie Aaronson, *Pay Equity and Women's Wage Increases: Successes in the States, A Model for the Nation*, 1 DUKE J. GENDER L. & POL'Y 69, 71 (1994).

¹⁵ *Id.*

¹⁶ *Id.*

being equal.¹⁷ The goal of pay equity is to allow women to perform jobs with different duties than those performed by men, but to ensure that “male” and “female” jobs equally valuable to the employer are comparably paid.¹⁸

At the car dealership, for example, the job of salesperson would be assigned points based on the communication, interpersonal, sales, and other skills the job requires; product knowledge; effort, including cold calls and follow-up with customers; the responsibility for maintaining the pristine condition of the dealership’s inventory; and working conditions, such as the need to work evenings and weekends. Christine’s receptionist position would also be assigned points based on the skills, effort, responsibilities, and effort required. If the receptionist job scored approximately the same number of points as that of a job held by primarily male workers, the pay of the two positions could be compared to determine if Christine was underpaid.

By comparing the pay equity experiences of Minnesota and Ontario, this paper examines whether comparable worth is a viable tool for U.S. policymakers to use in closing the gender pay gap. While comparable worth was never adopted at the federal level in either Canada or the United States, both Minnesota and Ontario enacted and implemented pay equity legislation at the state and provincial level, respectively. I compare these two jurisdictions because each is recognized as having adopted the most comprehensive approach to pay equity in their respective countries.

I posit that there are three critical differences between pay equity in Minnesota and Ontario that contribute to Ontario’s greater success: the larger role played by organized labor, more comprehensive and less ambiguous legislation, and the establishment of an administrative

¹⁷ Mark R. Killingsworth, *Comparable Worth and Pay Equity: Recent Developments in the United States*, CANADIAN PUBLIC POLICY, Vol. XXVII, Supplement 1, 176 (2002).

¹⁸ BONNIE WATKINS, PAY EQUITY: THE MINNESOTA EXPERIENCE 5 (1994).

pay equity dispute resolution system. These differences reflect wider U.S. socio-political characteristics that would pose barriers to a full-scale implementation of comparable worth.

This paper is divided into four substantive sections. Part II describes the statutory implementations of pay equity policies in Minnesota and Ontario. Part III compares Minnesota and Ontario pay equity cases by analyzing differences in the court's role in the process, the litigants involved, and the legal analysis employed by the judiciary.

The remaining sections delve into the public policy aspects of the wage gap. Part IV considers comparable worth's weaknesses and concludes that pay equity may not be the most effective approach to gender pay inequity in the U.S. Part V describes the complex factors that contribute to the pay gap and suggests alternative and complementary solutions that may be more appropriate in the U.S. socio-political context.

II. STATUTORY IMPLEMENTATIONS OF PAY EQUITY IN MINNESOTA AND ONTARIO

In both Canada and the United States, state and provincial efforts to address pay inequality using pay equity measures have been more successful than federal-level attempts. While Minnesota and Ontario arguably represent the most developed pay equity policies in their respective countries, there are significant differences between the pay equity legislation enacted in each jurisdiction as well as how the policy was implemented. Please refer to the table provided in Appendix I for a side-by-side comparison of the Minnesota and Ontario statutory provisions.

A. Pay Equity in Minnesota

Minnesota was the first state to provide pay equity for state government employees and the first to require pay equity for local government employees.¹⁹ In 1982, Minnesota passed the State Government Pay Equity Act requiring systematic pay adjustments to the wages of state civil service workers to redress occupational and sex-based wage differentials.²⁰ Two years later, the Minnesota Legislature passed the Local Government Pay Equity Act, which provided pay equity for the employees of cities, counties, school districts, and other local government units.²¹

The stated purpose of the Minnesota Pay Equity Act (MPEA) is to establish equitable compensation relationships between all classes of employees in order to eliminate sex-based wage disparities in public employment.²² The MPEA defines an “equitable compensation relationship” as one where the compensation for female-dominated classes is not “consistently below” that of male-dominated classes of comparable work value.²³ The act specifies that every political subdivision use a job evaluation system to determine the comparable value of jobs performed by each class of employees, but does not specify any particular system.²⁴

The executive branch of the State of Minnesota has used a job evaluation system developed by Hay Associates, a management consulting firm, since 1979.²⁵ The system uses

¹⁹ LEGISLATIVE COMMISSION ON THE ECONOMIC STATUS OF WOMEN, WOMEN, WORK, AND WAGES IN MINNESOTA, FACT SHEET (2006), *available at* http://www.commissions.leg.state.mn.us/oesw/fs/work_wages.pdf (last visited May 13, 2008).

²⁰ Hartmann and Aaronson, *supra* note 14, at 71.

²¹ Watkins, *supra* note 18, at 9.

²² Minn.Stat. § 471.992 (2004).

²³ Minn.Stat. § 471.991 (2004).

²⁴ Minn.Stat. § 471.994 (2004).

²⁵ Watkins, *supra* note 18, at 11.

four factors to rate jobs: know-how, problem-solving, accountability, and working conditions.²⁶

An example of how two distinct positions would be rated is illustrated below.

Sample Ratings for State Jobs Using Hay System²⁷		
Factors	Administrative Secretary	Groundskeeper Senior
Know-how, knowledge, and skills needed	115	100
Problem-solving, original thinking required	25	19
Accountability for actions and consequences	33	25
Working conditions, effort, disagreeableness, hazards	0	16

By using historical Hay system results when it began implementing pay equity in 1983, Minnesota was able to target undervalued, female-dominated occupations in the state government for pay adjustments.²⁸ Through effective targeting, the state was able to significantly increase women's relative earnings with relatively small expenditures.²⁹ Spreading out the initial pay adjustments over a four-year period further reduced the cost of implementation to Minnesota taxpayers.³⁰

The Minnesota Department of Employee Relations (DOER) is responsible for ensuring that state agencies and local governments comply with the MPEA.³¹ Chapter 3920 of the Minnesota Administrative Rules provides additional guidance to DOER regarding compliance procedures, such how to determine which jurisdiction is responsible for establishing

²⁶ *Id.*

²⁷ *Id.*, at 12.

²⁸ Hartmann and Aaronson, *supra* note 14, at 77.

²⁹ *Id.*, at 80.

³⁰ *Id.*, at 85.

³¹ State of Minnesota, Department of Employee Relations, Pay Equity/Comparable Worth, <http://www.doer.state.mn.us/lr-peqty/lr-peqty.htm> (last visited May 6, 2008).

compensation relationships for specific positions and submitting reports; what must be included in these reports; and which tests a jurisdiction must pass to comply with the act.³²

Minnesota legislators did not create a body to hear and resolve pay equity disputes. Rather, the MPEA provides that the Commissioner of Human Rights or any state court may use the results of any job evaluation system and the reports submitted to DOER by political subdivisions in any proceeding or action alleging discrimination.³³

B. Pay Equity in Ontario

A bit further north, the Canadian province of Ontario is also recognized as a comparable worth leader. The Ontario Female Employees Fair Remuneration Act of 1951 province was Canada's first equal pay law and in 1987, the Ontario Legislature unanimously passed the Pay Equity Act (PEA).³⁴ This law broadened the definition of pay equity to include not only identical positions, but also jobs substantially similar in their skills, effort, responsibility, and working conditions.³⁵ Recognized as the most comprehensive pay equity legislation in the world, Ontario's Pay Equity Act covered both public and private employers.³⁶

When the PEA was first enacted, comparable pay rates were determined using a rating system developed by the Ontario Pay Equity Board.³⁷ Purported to be similar to systems already used by many large employers, the Board's job-to-job comparison method directly compared the female job classes and male job classes in a single organization based on required

³² Minnesota Administrative Rules, Chapter 3920, available at <https://www.revisor.leg.state.mn.us/rules/> (last visited May 15, 2008).

³³ State of Minnesota, Department of Employee Relations, Pay Equity/Comparable Worth, <http://www.doer.state.mn.us/lr-peqty/lr-peqty.htm> (last visited May 6, 2008).

³⁴ New York Times News Service, *Ontario Takes Pay Equity a Step Further*, CHICAGO TRIBUNE (July 30, 1989).

³⁵ Kenneth A. Kovach, *An Overview and Assessment of Pay Equity Based on Large-Scale Implementation*, PUBLIC PERSONNEL MANAGEMENT 26, no. I (Spring 1997).

³⁶ *Ontario Bridges the Salary Gap*, ST. LOUIS POST-DISPATCH (August 2, 1989).

³⁷ *Id.*

education and experience, physical skill and effort, number of people supervised, stress, and complexity of the work.³⁸ If job ratings revealed wage inequalities, the act required companies to adopt an action plan to rectify the discriminatory pay gaps through pay increases within established time frames.³⁹

The Ontario Legislature amended the *Pay Equity Act* in 1992 to add two further comparison methods: the proportional method and the proxy method.⁴⁰ These additional methods facilitate the comparison of more female-dominated positions to male-dominated positions.

The proportional method allows the indirect comparison of a single female job class to a group of male job classes when no direct comparison is feasible.⁴¹ First, the organization determines the relationship between the value of the work performed and compensation received, also known as the “pay line,” for its male job classes.⁴² This pay line is generally calculated using either manual or computer-assisted regression analysis.⁴³ Once the pay line has been determined, an organization can predict what it would pay a male job class of any given value.⁴⁴ To achieve pay equity, the organization also calculates the relationship between the value of

³⁸ New York Times News Service, *supra* note 34; Ontario Equal Pay Commission, Proportional Value Method of Comparison, http://www.payequity.gov.on.ca/peo/english/casestudy/pv_intro.html, (last visited May 26, 1008).

³⁹ Mary Cornish, *Closing the Global Gender Pay Gap: Securing Justice for Women’s Work*, 28 CLLPJ 219, 237-238 (Winter 2007).

⁴⁰ Barry Brown, *Ontario Will Expand Pay Equity Women, Gay Government Workers’ Partners to Gain*, BUFFALO NEWS, (December 23, 1990).

⁴¹ Ontario Equal Pay Commission, Proportional Value Method of Comparison, http://www.payequity.gov.on.ca/peo/english/casestudy/pv_intro.html, (last visited May 26, 1008).

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

female job classes and their rates of pay to ensure that female job classes are compensated on the same pay line as male job classes.⁴⁵

The proxy method was established for use only in public sector workplaces where there are few, if any, male job classes against which to compare female job classes.⁴⁶ The method allows the wages of female job classes in public workplaces with predominately female employees, such as daycare centers, to be compared to the wages of comparable female employees in another organization, which has already established pay-equity levels.⁴⁷ Only public sector organizations that had employees on July 1, 1993 may use the proxy method.⁴⁸

The *Pay Equity Act* allows any of the parties involved in the pay equity process to file a complaint with the Equity Pay Commission regarding any pay equity issue.⁴⁹ A review officer investigates the complaint and can broker a settlement between the disputing parties if he feels such action is appropriate.⁵⁰ After the review officer informs the parties of his or her decision, either party may request a hearing before the Pay Equity Hearing Tribunal.⁵¹ The review officer also has the authority to refer the dispute to a tribunal if an employer fails to comply with an order.⁵²

The Pay Equity Hearing Tribunal (“Tribunal”), a quasi-judicial body with exclusive jurisdiction to hear and decide pay equity disputes, was established by Ontario’s *Pay Equity*

⁴⁵ *Id.* For a detailed explanation and instructions for employers on how the pay line used in the proportional method is calculated and applied, visit the Pay Equity Commission’s Regression Line Calculator at http://www.payequity.gov.on.ca/peo/english/pubs/tools_regress_pv.html.

⁴⁶ Ontario Pay Equity Commission, Pay Equity – An Overview for Employees, <http://www.payequity.gov.on.ca/peo/english/pubs/fairness.html> (last visited May 26, 2008).

⁴⁷ James Rusk, *Ontario Loses Pay-Equity Fight*, GLOBE AND MAIL (September 9, 1997).

⁴⁸ Ontario Pay Equity Commission, *supra* note 41.

⁴⁹ Ontario Pay Equity Commission, The Complaint Process, http://www.payequity.gov.on.ca/peo/english/casestudy/c_complaints.html (last visited May 10, 2008).

⁵⁰ *Id.*

⁵¹ Ontario Pay Equity Hearings Tribunal, Frequently Asked Questions, http://www.labour.gov.on.ca/pec/peht/peht_faq.html#How (last visited May 30, 2008).

⁵² Ontario *Pay Equity Act* of 1987, Part IV Enforcement.

*Act.*⁵³ An important impetus for establishing the Tribunal was that its proceedings were expected to be less formal, less expensive, and more expeditious than court proceedings.⁵⁴

The Tribunal consists of a Chair, one or more Vice-Chairs, and equal numbers of members representing employers and employees.⁵⁵ The Lieutenant Governor in Council appoints all positions, and selects members for their specialized expertise in labor and employment law, compensation systems, and pay equity.⁵⁶ The Chair and Vice-Chairs are lawyers, often with extensive experience as counsel and adjudicators before the courts and other tribunals.⁵⁷

Three-person panels -- a panel chair, a member representative of employers, and a member representative of employees -- hear cases.⁵⁸ The employer and employee representatives are expected to bring the perspective of their particular constituency into the Tribunal's decision-making.⁵⁹ While these members are not advocates for individual parties, they ensure that the Tribunal's decision making is fully informed.⁶⁰

III. DIFFERENCES IN PAY EQUITY LITIGATION IN MINNESOTA AND ONTARIO

There are several significant differences in the way pay equity litigation is handled in Minnesota and Ontario. The court's role in the process, the litigants involved, and the legal analysis judges employ have all impacted pay equity's implementation in these jurisdictions.

⁵³ Ontario Pay Equity Hearings Tribunal, What Is the Pay Equity Hearing Tribunal?
http://www.labour.gov.on.ca/pec/peht/peht_what.html (last visited March 31, 2008).

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

A. The Role of the Court

In Minnesota, the District Court serves as the forum of first instance for pay equity disputes. While the Department of Employee Relations assists local governments to comply with the *Minnesota Pay Equity Act* and can assess penalties for violations, the department is not authorized to hear or decide disputes between employers and employees regarding pay equity issues.⁶¹ Therefore, disputes may remain unresolved, because going to court is not worth the time and expense to the potential plaintiff, and even routine disagreements must be handled by the court system. The adversarial nature of court proceedings can raise the hackles of both parties, and may prevent the amicable resolution of fairly minor differences.

Loew v. Dodge County Soil and Water Conservation District demonstrates the role that Minnesota courts play in pay equity disputes. When the MPEA went into effect in 1984, Kathleen Loew and a fellow employee created job descriptions and job rankings for the two “job classes” employed by the Dodge County Soil and Water Conservation District (DCSWCD) – the clerk/accountant position Loew held since 1978 and two technician positions held by male incumbents.⁶² At the time, Loew’s pay was 87 percent of the technician’s salary, a percentage that met MPEA requirements.⁶³

All was well until July 1997 when the Minnesota Department of Employee Relations (DOER) notified DCSWCD that they were no longer in compliance with the MPEA because Loew’s salary had fallen to 81 percent of the technician’s salary.⁶⁴ The five-member board of supervisors that managed the three employees raised Loew’s salary in 1998 and 1999 to avoid a

⁶¹ Watkins, *supra* note 18, at 9.

⁶² *Loew v. Dodge County Soil and Water Conservation Dist.*, 2006 WL 1229641 at *1 (Minn.App. May 9, 2006).

⁶³ *Id.*

⁶⁴ *Id.*

\$46,500 DOER penalty, but began discussing a review of the current ranking system.⁶⁵ The board concluded that the “office work” performed by Loew (answering telephone, fielding questions from the public and DCSWCD program participants, clerical duties, maintaining files, and bookkeeping) and the “technical work” performed by the male technicians (surveying, designing conservation structures, farm planning, and maintaining the county ditch system) were “drastically different” and that the clerk/accountant position did not merit 87 percent of the technician’s pay as dictated by the existing job rankings.⁶⁶

A consultant’s initial review of the ranking system confirmed the board’s obligation to pay Loew 87 percent of the technician’s pay, so they contracted with another group to obtain a second opinion.⁶⁷ The DCSWCD positions were re-ranked, allegedly based on inaccurate job descriptions submitted by the board, and the resulting rankings rated Loew’s job at 65 percent of the technician’s jobs.⁶⁸ The board adopted the new ranking system in 2000 over Loew’s objections that she was given insufficient points in the “fiscal responsibility” category for her bookkeeping duties.⁶⁹ The board responded that Loew was not “fiscally responsible” for county funds and that her bookkeeping duties warranted points in the “spreadsheets” category only.⁷⁰ Interestingly, the technicians were given the same number of points in the “spreadsheets” category even though they seldom worked with spreadsheets.⁷¹

⁶⁵ *Id.*

⁶⁶ *Id.* at *1 -*2.

⁶⁷ *Id.* at *2.

⁶⁸ *Id.* at *2 -*3.

⁶⁹ *Id.* at *2.

⁷⁰ *Id.*

⁷¹ *Id.* at *2.

In 2001, Loew's hours were reduced from 32 to 16 per week and the board began to look at contracting out the bookkeeping work she performed.⁷² In March 2002, the board eliminated Loew's position.⁷³ Loew filed suit a year later alleging discrimination on the basis of sex.⁷⁴

The Department of Employee Relations (DOER) played no role in resolving this dispute. When Loew contacted them in 1997 to ask what her employer needed to do to comply with the pay equity act, a DOER official suggested that she contact a lawyer and the state human rights department about a possible discrimination claim.⁷⁵ Because pay equity reports must be submitted only once every three years,⁷⁶ DCSWCD's next report was not due until sometime later in 2002.⁷⁷ After eliminating Loew's position, the board no longer had to account for any difference in pay between female-dominated and male-dominated "job classes."⁷⁸

Loew demonstrates how loose job evaluation standards, ineffective enforcement, and the lack of non-judicial dispute resolution mechanisms combine to hamper Minnesota's pay equity goals. Here, DOER's authority to fine DCSWCD did convince the board to pay Loew the requisite 87 percent of her male coworker's salaries for several years.⁷⁹ However, the lack of dispute resolution steps between the imposition of a fine and a sex discrimination claim, meant that Loew had no recourse against her employer until after she had already lost her job.

In Ontario, the first step in resolving a pay equity dispute is an assessment of the complaint by a Review Officer who is authorized to mediate a resolution or refer the case to the

⁷² *Id.* at *3.

⁷³ *Id.*

⁷⁴ *Id.* at *4.

⁷⁵ *Id.*

⁷⁶ State of Minnesota, Department of Employee Relations, Pay Equity/Comparable Worth, <http://www.doer.state.mn.us/lr-peqty/lr-peqty.htm> (last visited May 6, 2008).

⁷⁷ 2006 WL 1229641, at *3.

⁷⁸ *Id.*

⁷⁹ *Id.*, at *2.

Pay Equity Hearings Tribunal.⁸⁰ Thus, courts hear only those disputes that cannot be resolved via the established quasi-judicial process, generally those that present a standard of review or constitutional question.

For example, *Glengarry v. O.N.A.* arose from a very complex technical dispute between Glengarry Memorial Hospital and the Ontario Nurses' Association ("ONA") about determining when pay equity had been achieved for nurses at the hospital. As part of pay adjustment agreement negotiated with ONA, the hospital agreed to increase the nurses' pay by \$0.37.⁸¹ The two parties later reached a new collective bargaining that increased the nurses' base rate.⁸² Glengarry Memorial Hospital refused to add the agreed upon pay equity adjustment to the bargained for increase on the grounds that the \$0.37 pay adjustment would have increased the nurses pay to more than that of the male comparator.⁸³

After the Tribunal determined that the pay equity adjustment was to be added, the hospital applied for judicial review.⁸⁴ The Divisional Court concluded that the Tribunal exceeded its jurisdiction by ordering the pay adjustment add on.⁸⁵ ONA then appealed.⁸⁶ The Ontario Court of Appeal found that the language of the *Pay Equity Act* indicated that the Tribunal held the overall responsibility for deciding when, whether, and how pay equity was achieved and determined that the correct standard of review was patent unreasonableness.⁸⁷ The Court held that the Tribunal's decision to order the pay adjustment was not patently

⁸⁰ Equal Pay Coalition, How Pay Equity Works, <http://www.equalpaycoalition.org/understanding.php> (last visited May 15, 2008).

⁸¹ *Glengarry Memorial Hospital v. Ontario (Pay Equity Hearings Tribunal) Re Ontario Nurses' Association and Pay Equity Hearings Tribunal et al.*, Ontario Court of Appeal (1995), 1995 CarswellOnt 502, 1.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

unreasonable, and the nurses were awarded the additional .037 cents per hour that Ontario's Pay Equity Hearing Tribunal deemed they deserved.⁸⁸ Here, the court was involved in a decision about the standard of review applicable to Tribunal decisions, not in whether the process to determine the raise was correct.

Minnesota judges, who may or may not have a labor or employment law background, must decide pay equity issues that might be more efficiently decided by an expert administrative body. The ambiguity of the MPEA and its failure to address basic pay equity issues, such as how to consistently measure the value of a job class, compel judges to act as policy-makers.

In *Armstrong*, a male fire prevention inspector belonging to a balanced class of employees sued to have his salary increased to match that earned by trade inspectors, a male-dominated class arguing that the day-to-day duties of both groups were the same most of the time.⁸⁹ Minn.Stat. § 471.992 requires "equitable compensation relationships" between female-dominated, male-dominated, and balanced classes of employees.⁹⁰ In 1990, the statute was amended to clarify that "equitable compensation relationship" meant the compensation for female-dominated class is not consistently below the compensation for male-dominated classes of comparable work value.⁹¹ In an important policy-making decision regarding who did and did not have standing vis-à-vis the MPEA, the *Armstrong* Court concluded that the legislative purpose of the act is "the equalization of wage rates made disparate by gender-based differences" and that as a member of a balanced class, *Armstrong* was not within the class of persons intended to benefit from the act.⁹²

⁸⁸ *Id.*

⁸⁹ *Armstrong v. Civil Service Com'n of the City of St. Paul*, 498 N.W.2d 471, 472-473 (Minn.App. 1993). Minn.Stat. § 471.991 defines a "male-dominated class" as a job class where at least 80 percent of the employees are male, a "female-dominated class" as a job class where at least 70 percent of the employees are female, and a "balanced class" as all other job classes that do not fall into the two other categories.

⁹⁰ 498 N.W.2d 471, at 473.

⁹¹ Minn.Stat. § 471.991 subd. 5 (1990).

⁹² 498 N.W.2d 471, at 475.

In *Qualle v. Beltrami*, the question was whether the Beltrami County Court violated the MPEA by increasing the pay of a male county court administrator over that determined appropriate by a pay equity plan then in effect to ensure MPEA compliance.⁹³ The trial court found that the County Board's salary determination failed to consider Buifford Qualle's specific qualifications and individual performance and was therefore arbitrary and capricious under Minn.Stat. § 485.018 governing district court administrators.⁹⁴

The plan used to determine appropriate salary ranges for different classes of county employees used only a questionnaire that assigned a rating for 1) know-how; 2) experience; 3) contacts with others; 4) independence of action/complexity of duties; 5) effect of error; 6) type of supervision; 7) effort; and 8) working conditions.⁹⁵ Each factor was assigned a particular weight and rated by a letter grade.⁹⁶ The court administrator position was assigned grade level 20, and because Qualle's current salary was above the pay range determined for the position, was frozen.⁹⁷

Qualle appealed the decision in District Court and the court ordered the county board to raise the "know-how" and "contacts with others" ratings thereby increasing the court administrator's grade level to 22.⁹⁸ His salary was increased commensurately.⁹⁹ Using the courts as the exclusive arbiters of relatively minor procedural disputes such as this one forces judges to act as pay equity policy-makers and seems a poor use of judicial resources.

Ontario judges also play a policymaking role, but at a much higher level. The decision in *S.E.I.U. Local 204 v. Ontario (Attorney General)* called for the expenditure of billions of dollars

⁹³ *Qualle v. Beltrami County*, 420 N.W.2d 256 (Minn.App. 1988).

⁹⁴ *Id.*

⁹⁵ *Id.*, at 257.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

of provincial funds and restrained legislative activity. In 1997, the Ontario Court's General Division ruled unconstitutional provincial omnibus legislation that would have eliminated pay-equity increases for about 100,000 women working for nursing homes, day-care centers and social-service organizations.¹⁰⁰ The law eliminated the proxy method as a valid method of determining equitable pay in the public sector and capped pay-equity increases that were already in progress at a point which left the women \$418 million (Canadian) short of achieving equity.¹⁰¹

Justice O'Leary held that although the government can choose whether to legislate an end to pay equity, it must "make the legislation apply fairly and equally to all within the group, or government itself is discriminating."¹⁰² This is especially so where the government itself picks up the cost of removing the inequity that is the focus of the legislation."¹⁰³ The Court's decision could cost taxpayers hundreds of millions of dollars over the next decade and a half.¹⁰⁴ Even when acting as a policymaker, the Court was constrained by the plain language of the statute and the legislative purpose of taking affirmative action to redress systemic gender discrimination.¹⁰⁵

B. Litigants

As the chart below illustrates, unions represent the majority of Minnesota's public sector employees. Despite this, in the seven Minnesota cases where the MPEA was implicated, all of the plaintiffs were individuals or small groups of employees.¹⁰⁶ In *Loew v. Dodge County Soil*

¹⁰⁰ Rusk, supra note 47.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Haldimand-Norfolk (Region) Commissioners of Police v. Ontario Nurses' Ass'n. et al*, Ontario Supreme Court (1989), 30 C.C.E.L. 139, 36 O.A.C. 276, 1 P.E.R. 188, 1989 CarswellOnt 776, 3.

¹⁰⁶ *Loew v. Dodge County Soil and Water Conservation Dist.*, 2006 WL 1229641 at *1 (Minn.App. May 9, 2006); *Erickson v. St. Cloud Civil Service Bd.*, 1998 WL 551938 at *1 (Minn.App. Sept. 1, 1998); *Aanenson v. County of Norman*, 1996 WL 393951 at *1 (Minn.App. 1996); *Armstrong v. Civil Service Com'n of City of St. Paul*, 498 N.W.2d 471 (Minn.App. 1993); *Bierly v. Board of County Com'rs, Faribault County, Minn.*, 1990 WL 119369 at *1 (Minn. App. Aug. 21, 1990); *In re Mille Lacs County Atty. Salary and Budget for 1987*, 422 N.W.2d 291 (Minn.App. Apr. 19, 1988); *Qualle v. Beltrami County*, 420 N.W.2d 256 (Minn.App. 1988).

and *Water Conservation Dist.*, plaintiff Kathleen Loew was the only female employee of a small county government agency.¹⁰⁷ In *Aanenson v. County of Norman*, the plaintiffs were five female employees in the county recorder/motor vehicles office and the court administration office.¹⁰⁸ Of the remaining cases, most were individual plaintiffs protesting the way job evaluations done to comply with the MPEA were conducted at their county or municipal government workplaces.¹⁰⁹

Minnesota Public Sector Union Representation in 2003¹¹⁰

	Number of Employees	% of Employees Represented
State	42,000	93
Local	65,000	57
University of Minnesota	6,000	29
K-12	85,000	70
Other	5,000	86
Total	203,000	67

In marked contrast, the plaintiffs in Ontario cases that reach the courts are almost exclusively unions representing larger groups of employees.¹¹¹ For example, in *S.E.I.U. Local 204 v. Ontario (Attorney General)*, five unions combined forces to launch a challenge to overturn the Ontario government's decision to make individual employers responsible for proxy pay equity funding instead of paying for the mandated pay adjustments out of provincial government

¹⁰⁷ 2006 WL 1229641, at *1.

¹⁰⁸ 1996 WL 393951, at *1.

¹⁰⁹ *Qualle v. Beltrami County*, 420 N.W.2d 256 (Minn.App. 1988); *Armstrong v. Civil Service Com'n of City of St. Paul*, 498 N.W.2d 471 (Minn.App. 1993); *Bierly v. Board of County Com'rs, Faribault County, Minn.*, 1990 WL 119369 at *1 (Minn. App. Aug. 21, 1990).

¹¹⁰ State of Minnesota Bureau of Mediation Services, 2006-07 Biennial Budget Governor's Recommendation, 2 (January 25, 2005), available at

http://www.finance.state.mn.us/budget/operating/200607/gov_rec/mediation_services.pdf.

¹¹¹ Many of the complaints resolved by Review Officers at the Ontario Pay Equity Commission and by the Ontario Pay Equity Hearings Tribunal do involve individuals or small groups of employees. See Pay Equity Hearing Tribunal, Reported Decisions, Pay Equity Report Volume 13,

<http://www.labour.gov.on.ca/pec/peht/decisions/report13.html> (last visited June 1, 2008).

funds.¹¹² SEIU itself is the largest health care union in North America with a membership of 1.4 million.¹¹³ SEIU's Canadian membership counts for more than 85,000 with 43,000 members in Ontario.¹¹⁴

Similarly, in *Glengarry v. O.N.A.*, the Ontario Nurses' Association is a trade union representing more than 54,000 registered nurses and allied health professionals in hospitals, community health, long-term care, Canadian Blood Services, clinics and industry.¹¹⁵ Ontario's strong labor organizations have the financial backing and political clout inherent in a large organization, which enables them to fight and win pay equity battles for the working women they represent.

C. Legal Analysis

In Minnesota, pay equity cases are treated as sex discrimination claims subject to the McDonnell Douglas burden-shifting framework, which requires plaintiffs to first establish, by a preponderance of the evidence, a prima facie case of gender discrimination.¹¹⁶ The defendant must then produce a legitimate, nondiscriminatory explanation to rebut the prima facie case.¹¹⁷ Finally, the plaintiff retains the burden of persuasion and must demonstrate that the defendant's explanation is only a pretext for the true discriminatory reason.¹¹⁸ This framework creates an evidentiary challenge for plaintiffs who must not only prove that they are being discriminated against, but also that the employer's given reason for the difference in pay is pretextual. While

¹¹² Jane Stinson, *Show Us Our Money: A Pay Equity Cross-Country Check Up*, OUR TIMES, February/March 2004, at 2, available at http://findarticles.com/p/articles/mi_qa5404/is_200402/ai_n21346114.

¹¹³ SEIU, History, <http://www.seiulocal1.org/content/aboutus/index.php?nav=main&a=About+Us> (last visited June 1, 2008).

¹¹⁴ *Id.*

¹¹⁵ Ontario Nurses' Association, FAQs, <http://www.ona.org/faq> (last visited June 1, 2008).

¹¹⁶ 1996 WL 393951, at *1.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

the MPEA allows pay equity job evaluations and employer's pay equity reports to be admitted as evidence, the statute does not provide a separate cause of action.¹¹⁹

In *Aanenson v. County of Norman*, five female employees in the Norman County recorder/motor vehicles office claimed that the county's salary schedule was discriminatory based on gender.¹²⁰ They presented evidence that the deputies in the county treasurer/auditor office, a "gender-balanced" class, received higher salaries than their own "female-dominated" classes, although all of the groups had similar work value points.¹²¹

The court found no identifiable correlation between the county's salaries and its comparable work value points.¹²² County officials testified that the salaries were set before the comparable work value points were established and that they were not instructed that identical points merited identical salary ranges.¹²³ The court did not question this possible violation of the Minnesota Pay Equity Act.

County officials also explained that following a merger of the treasurer and auditor offices, the salaries of the remaining employees were increased to reflect their additional workload.¹²⁴ The court accepted the county's explanation for the wage disparity as gender-neutral and ruled that the employees failed to prove that the wage disparity was attributable to gender.¹²⁵ Although the outcome here was correct given that the reason for the discrepancy in compensation was a difference in workload, this case illustrates the evidentiary burden that the plaintiff must bear in a sex discrimination case subject to the McDonnell Douglas burden-shifting framework.

¹¹⁹ Minn.Stat. § 471.997 (2004).

¹²⁰ 1996 WL 393951, at *1.

¹²¹ *Id.*

¹²² *Id.*, at *2.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

On the rare occasions where Ontario Courts review Pay Equity Hearing Tribunal decisions, they are able to look to the more comprehensive statute for guidance instead of relying on a common law framework. In *Haldimand-Norfolk*, the issue before the Ontario Supreme Court, Divisional Court was the standard of review to be applied to Pay Equity Hearings Tribunal decisions.¹²⁶ The Pay Equity Hearing Tribunal had determined that the Haldimand-Norfolk Regional Police Force was part of the “establishment” of the Regional Municipality of the Haldimand-Norfolk for pay equity purposes.¹²⁷ The Regional Municipality applied to the Court to quash the decision, presumably because it did not want the police force to be included in the male job classes against which its female job classes would be compared.¹²⁸

The Court determined that the correct standard of review was “Did the legislator intend the question to be within the jurisdiction conferred on the Tribunal?”¹²⁹ The answer was “yes” based on an earlier Supreme Court of Canada decision, which held that the legislature intended the Tribunal to answer the question of who the employer is, and therefore which entities must be included in the employer’s “establishment.”¹³⁰

The opinion also made clear the Pay Equity Hearings Tribunal was protected by a strong privative clause in the PEA that allowed Court review of Tribunal decisions only when the Tribunal exceeded its jurisdiction by making a patently unreasonable error of law.¹³¹ Here, Justice McKeon held that the Tribunal’s decision was well within those bounds.¹³²

¹²⁶ *Haldimand-Norfolk (Region) Commissioners of Police v. Ontario Nurses' Ass'n. et al*, Ontario Supreme Court (1989), 30 C.C.E.L. 139, 36 O.A.C. 276, 1 P.E.R. 188, 1989 CarswellOnt 776, 1.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*, at 5.

¹³¹ *Id.*

¹³² *Id.*

As the cases presented above demonstrate, there are important differences in how pay equity operates in Minnesota and Ontario. First, the marked differences in Minnesota's and Ontario's pay equity legislation dictate the very different roles the courts play. Because the MPEA is more ambiguous and contains less specific provisions about how pay equity is to be managed logistically, and because courts are the fora of first instance for pay equity disputes in Minnesota, judges there decide disputes about very basic interpretations of pay equity policy. In contrast, Ontario courts are involved only in very contentious or very high level policy disputes.

Second, the role that Ontario's unions play in equalizing the power balance between employees and employers in pay equity disputes is critical. Many working women in Ontario benefit from the fact that both their union and their government, in the form of the Pay Equity Commission, are looking out for their interests.

In Minnesota, women whose employers fail to comply with legislative mandates have to prove a difficult sex discrimination claim to enforce their right to pay equity. Finally, the contrast between the common law sex discrimination legal analysis employed in Minnesota and the more statutory-based legal analysis employed in Ontario is critical for both pay equity policy consistency and enforcement.

IV. A CRITICAL VIEW OF PAY EQUITY

A. Entitlement to Equality Is Not the Same as Actual Equality¹³³

The Ontario Pay Equity Act has increased the earnings of hundreds of thousands of Ontario women. However, even with significant government intervention, the gender-based pay gap is far from closed. Twenty years after the enactment of the Ontario Pay Equity Act, women there still earn 29 percent less than men, according to the President of the Ontario Secondary

¹³³ This poignant heading was taken from Jeanne M. Dennis, *The Lessons of Comparable Worth: A Feminist Vision of Law and Economic Theory*, 4 UCLA WOMEN'S L.J. 1, 10 (1993).

School Teachers' Federation.¹³⁴ In a recent speech, Ontario's Chief Pay Equity Commissioner stated that there was still major non-compliance in the private sector, particularly in non-unionized sectors.¹³⁵

Rosemary Warskett, a law professor at Carleton University in Ottawa, stresses the importance of unions in making pay equity a viable policy tool.¹³⁶ She concludes that "the only people ... [pay equity] legislation has benefited are women who have a union or some other form of representation as a group."¹³⁷

Partly due to employers' non-compliance and partly due to the characteristics of many women's workplaces, the policy may not reach those women who may need it most, despite Ontario's broad statutory coverage of both public and private employers with over 10 employees. A 2000 study by Baker and Fortini found that Ontario's pay equity legislation has had no substantial impact on reducing the overall male-female wage gap in the private sector primarily because females tend to be employed in small, low-wage establishments where implementation and enforcement are difficult and male comparators are not common.¹³⁸

From 1982 to 2002, the female-to-male average wage ratio of Minnesota state employees increased from 74 percent to 97 percent, an achievement that the Legislative Commission on the Economic Status of Women attributes primarily to the state's pay equity policy.¹³⁹ However, the sex differential has not been entirely eliminated and ongoing monitoring is required to prevent

¹³⁴ *OSSTF Calls for Action on Pay Equity*, MARKETWIRE CANADA (February 14, 2008).

¹³⁵ Cornish, *supra* note 39, at 237-238.

¹³⁶ Stinson, *supra* note 112, at 3.

¹³⁷ *Id.*

¹³⁸ Gunderson, *supra* note 12, at S120.

¹³⁹ LEGISLATIVE COMMISSION ON THE ECONOMIC STATUS OF WOMEN, WOMEN, WORK, AND WAGES IN MINNESOTA, Fact Sheet, (April 4, 2006), *available at* http://www.commissions.leg.state.mn.us/oesw/fs/work_wages.pdf (last visited May 13, 2008).

backsliding.¹⁴⁰ Professor Steven Rhoads observes that because of a need to stay on budget, the Minnesota system has led to a loss of jobs for women in the public sector.¹⁴¹

By including local government employees, the Minnesota Pay Equity Act covers a broader range of public employees than any other U.S. state's pay equity legislation. Evens so, less than 8 percent of Minnesota workers were subject to the MPEA as of 2003.¹⁴² Progress made in narrowing the public sector pay gap has apparently not spilled over to Minnesota's private sector. In 2000, after pay equity had been in place for over 15 years, the earnings gap remained greater in Minnesota (72.9 percent) than in the U.S. overall (73.4 percent).¹⁴³

Pay equity is limited by its own definition to comparisons of jobs that are determined to be of the same or similar value as measured by some job evaluation instrument.¹⁴⁴ Ontario's Pay Equity Commission provides two examples that illustrate how female jobs might be undervalued. First, in evaluating the job of secretary-receptionist, the listening skills, customer service expertise and patience required to deal with dissatisfied or impatient clients might be discounted, while in evaluating the job of collection agent, the equivalent abilities would be taken into consideration.¹⁴⁵ Second, in a cashier's job, the physical effort required to continuously lift light weights might be undervalued, while lifting heavy weights in the job of a handler would be included, even if this task is performed only occasionally.¹⁴⁶

¹⁴⁰ Killingsworth, *supra* note 17, at 182.

¹⁴¹ Daniel N. Kuperstein, Note, *Finding Worth in the New Workplace: The Implications of Comparable Worth's Reemergence in the Global Economy*, 24 HOFLELJ 363, 385 (2007).

¹⁴² The Bureau of Labor Statistics reports 2,658,100 Minnesota non-farm employees in December 2003. The Minnesota Bureau of Mediation Services reports 203,000 state and local public sector employees in 2003. Bureau of Mediation Services, *supra* note 109. $203,000 \div 2,658,100 = 7.637\%$.

¹⁴³ Legislative Commission on the Economic Status of Women, *supra* note 122.

¹⁴⁴ Kovach, *supra* note 35, at 26.

¹⁴⁵ Ontario Pay Equity Commission, About Pay Equity, http://www.payequity.gov.on.ca/peo/english/rights/rights_pe.html. (Accessed on 05/12/2008).

¹⁴⁶ *Id.*

Any bias built into the evaluation instrument is carried through the measurement and pay adjustment processes.¹⁴⁷ In *Loew* discussed above, this bias and its consequences were apparent when a female employee's bookkeeping duties were allocated points in the "spreadsheets" category, but not in the "fiscal responsibility" category.¹⁴⁸ The evidence suggests that the employer deliberately manipulated the job evaluation instrument to reduce the wages it had to pay its female employee to be in compliance with the Minnesota Pay Equity Act.¹⁴⁹ Minnesota's failure to mandate a consistent job evaluation methodology makes this type of manipulation easier.

B. Pay Equity's Prospects in the U.S.

The barriers to a broad implementation of comparable worth in the U.S. are significant and are to a large extent based on the pervasive view that the market knows best and that government intervention is best avoided. Americans are receptive to the argument that equal opportunity policies that increase the overall demand for female labor by opening the door to previously closed occupations, thereby increasing both female employment opportunities and wages, are preferable to pay equity policies that "artificially" set the wage for female workers above the market rate and may actually reduce the level of female employment.¹⁵⁰

Both public and private sector employers have generally fought hard to prevent or limit the modification of existing job-evaluation systems; to prevent or control the introduction of "modified" job evaluations; and to limit the extent and magnitude of pay adjustments.¹⁵¹

Features of the new economic reality in this country, including declining unionization rates,

¹⁴⁷ Kovach, *supra* note 35, at 26.

¹⁴⁸ 2006 WL 1229641, at *2.

¹⁴⁹ *Id.*

¹⁵⁰ *See* Gunderson, *supra* note 12, at S119.

¹⁵¹ Killingsworth, *supra* note 17, at 182.

short-term and “no-strings-attached” employment relationships, increased use of contractors, and flattening corporate hierarchical structures intensify employers’ resistance to pay equity policies.¹⁵²

Resistant employers receive a great deal of support, as both legislators and courts object to interfering in the operation of the labor market on the scale that pay equity remedies seem to require.¹⁵³ In *Lemons v. City and County of Denver*, the court expressed a common sentiment when it opined that the case was “pregnant with the possibility of disrupting the entire economic system of the United States of America.”¹⁵⁴ Without strong political or union pressure to counteract this hostility, Minnesota’s pay equity policy will continue to be an anomaly in the U.S.

In Ontario, political, judicial, and organized labor forces have been better able to counterbalance employer interests. In the pay equity context, working women benefit considerably from the union representation of over 30 percent of Canadian workers. In contrast, pay equity efforts in the U.S. are seriously hampered by low unionization rates. In 2004, unions represented only 13.8 percent of U.S. workers.¹⁵⁵

While U.S. legislators have proposed federal pay equity bills, none have received much support. Longtime proponent Senator Tom Harkin (IA) has advocated a Fair Pay Act for nearly a decade.¹⁵⁶ In 2005, Senator Hillary Clinton (NY) joined others in sponsoring legislation that

¹⁵² Cornish, *supra* note 39, at 237-238.

¹⁵³ Hartmann and Aaronson, *supra* note 14, at 74.

¹⁵⁴ 17 Fair Empl. Prac. Case (BNA) 906 (D.Colo. 1978), *aff’d*, 620 F.2d 228 (10 Cir.) cert. denied, 449 U.S. 888 (1980).

¹⁵⁵ Jason Clemons, Niels Veldhuis, and Amela Karabegovic, *Explaining Canada’s High Unionization Rates*, LABOUR MARKET SERIES 1 (2005).

¹⁵⁶ Killingsworth, *supra* note 17, at 178.

would amend the Equal Pay Act's "equal pay for equal work" standard with an "equal pay for comparable work" standard.¹⁵⁷ Again, the bill did not get far.

Marked antipathy to pay equity from several quarters, pervasive employer deference in many other areas of employment law (e.g., the at-will employment presumption and restrictive covenants), combined with low and declining unionization rates and significant shifts in workplace organization and dynamics present serious uncertainties about pay equity's viability as a federal level policy solution to the wage gap.

State level pay equity policies that cover only public employers are a more reasonable goal in the U.S., although one must acknowledge that not all jurisdictions will have the political will necessary to enact such legislation. For those that do, the application of pay equity principles to the public sector may have spillover effects that could have a positive impact on women working for private employers. In this way, pay equity can serve as at least a part of a more comprehensive solution.

States exploring pay equity as a policy solution should learn from the comparative experiences of Minnesota and Ontario, and consider establishing an administrative dispute resolution mechanism and clear guidelines for how job classes are to be compared. I also recommend the inclusion of a strong and clear statement of the legislative purpose. Minnesota amended the MPEA in 1990 after realizing a stronger statement was needed.¹⁵⁸

V. POLICY RECOMMENDATION AND CONSIDERATIONS

A 2003 study by the U.S. Government Accountability Office (GAO) determined that there were many reasons for wage inequality between men and women. Specifically, the study found that women have fewer years of work experience, work fewer hours per year, are less

¹⁵⁷ Kuperstein, *supra* note 141, at 365.

¹⁵⁸ *See Armstrong v. Civil Service Com'n of the City of St. Paul*, 498 N.W.2d 471, 475 (Minn.App. 1993).

likely to work a full-time schedule, and leave the labor force for longer periods of time than men.¹⁵⁹ Additional factors contributing to the discrepancy include the distribution of care-giving responsibilities in our society, at least some vestige of sex discrimination, occupational segregation, and differences in women and men's perceived or actual bargaining power.

The many different factors contributing to the gender wage gap make the issue more complex, but also offers additional angles from which to approach the problem. Instead of adopting a government-imposed policy that may bring its own unintended consequences, I believe that addressing the underlying factors that contribute to wage inequality while actively encouraging employers to adopt meaningful diversity policies would be more politically and culturally palatable in the U.S.

Below, I identify several policy options that could complement pay equity policies or serve as substitutes. The complexity of the gender pay gap issue calls for a policy mix that addresses as many of the contributing factors as possible.

A. Increase Occupational Integration

Occupation segregation is a significant factor in wage inequality. Although substantial advances have been made to open non-traditional careers to women and many women now work in fields once closed to them, we still think of some occupations as being "men's jobs" and others as being "women's jobs." For example, women are more likely to work in education, medical professions, and administrative support jobs while men are more likely to work in engineering, architecture, or computer science.¹⁶⁰

¹⁵⁹ UNITED STATES GENERAL ACCOUNTING OFFICE, WOMEN'S EARNINGS, GAO-04-35, 2 (October 2003), *available at* <http://www.gao.gov/new.items/d0435.pdf>.

¹⁶⁰ Goldberg Dey and Hill, *supra* note 7, at 13.

Ending occupational segregation is not simply a matter of moving women into male-dominated fields. Because U.S. policymakers feel that it is critical for this country to remain competitive in science, technology, engineering and mathematics (STEM), significant efforts have been made to attract more women into STEM careers.¹⁶¹ Despite decades of effort, the STEM talent pool remains about 75 percent male.¹⁶² Change does not happen overnight: the so-called “chilly climate” that pervades STEM workplaces in industry, academe, and government reflects a legacy of exclusion.¹⁶³ As a reflection of this chilly climate, women in technical fields earn less, change jobs more often, advance more slowly and have less influence than their male counterparts.¹⁶⁴

A recent BEST report recognizes that transformational changes in the workplace will not occur without a greater inflow of technical talent from underrepresented groups, and that employers must shoulder their part of the burden by implementing effective diversity programs that make a workplace truly inclusive.¹⁶⁵ *BusinessWeek* adds that employers need to realize that it is not just about child care, flex schedules, and maternity leave, but also the sense of isolation that some women feel in heavily male-dominated workplaces.¹⁶⁶ To make women more welcome, employers should build a critical mass of women, encourage women to have a voice, and eliminate all forms of discrimination.¹⁶⁷

While encouraging women to enter non-traditional occupations and fostering their success once they get there is an important part of the pay gap solution, occupational

¹⁶¹ BUILDING ENGINEERING & SCIENCE TALENT, THE TALENT IMPERATIVE: DIVERSIFYING AMERICA’S SCIENCE AND ENGINEERING WORKFORCE 3 (2004).

¹⁶² *Id.*

¹⁶³ *Id.*, at 8.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ Vivek Wadhwa, *Fixing Engineering’s Gender Gap*, BUSINESSWEEK, March 14, 2006, at 2-3.

¹⁶⁷ *Id.*

desegregation has its limits. STEM workplaces illustrate a common catch-22 situation: you need more women in a workplace to create a more hospitable environment that attracts more women. Then, as more women enter a field, wages tend to decrease, especially after the occupation is no longer considered to be male-dominated.¹⁶⁸

In addition, many women enjoy working in traditional female fields, and this work is valuable to society.¹⁶⁹ What would happen if all of the female childcare providers left to look for jobs in construction? Perhaps we would then recognize the true value of that work and pay more for anyone willing to look after our children.

B. Recognize that Education Alone Is Not Enough

Over the past several decades, economic opportunities for women have risen substantially as more women have earned college degrees and spent more time in the paid workforce.¹⁷⁰ However, education alone is not enough to bridge the gap. While both men and women showed increased earnings with increased levels of education, at each level of education, men earned more than women.¹⁷¹

¹⁶⁸ Goldberg Dey and Hill, *supra* note 7, at 31.

¹⁶⁹ Walker, *supra* note 15, at 6.

¹⁷⁰ JULIA B. ISAACS, *ECONOMIC MOBILITY OF MEN AND WOMEN 1* (2007).

¹⁷¹ BRUCE WEBSTER, JR. AND ALEMAYEHU BISHAW, *INCOME, EARNINGS, AND POVERTY DATA FROM THE 2006 AMERICAN COMMUNITY SURVEY, ACS-08 17* (2007).



Instead, and strongly related to occupational segregation, it is clear that not all college degrees have the same positive effect on earnings.¹⁷² One study found that female students are concentrated in fields associated with lower earnings, such as education, health, and psychology and that both women and men who major in “male-dominated” subjects such as engineering, mathematics, and physical sciences tend to earn more.¹⁷³

Avoiding the pay gap is not simply a matter of women choosing the right college major, however. As early as one year after graduation, there is a pay gap between women and men who earned their degrees in the same major.¹⁷⁴ Part of the explanation is what women choose to do with their degrees. A woman with a mathematics degree might choose a lower-paying teaching position instead of a higher-paying job in business or computer science.¹⁷⁵ Another factor is where women choose to work. Women are more likely than men to work in the nonprofit and local government sectors, where wages tend to be lower than they are in the for-profit and federal government sectors.¹⁷⁶ Making women aware of the economic impact of their choices

¹⁷² Goldberg Day and Hill, *supra* note 7, at 2.

¹⁷³ *Id.*, at 1.

¹⁷⁴ *Id.*, at 2.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

and making less traditional careers and workplaces more attractive to women are both positive steps toward narrowing the pay gap.

C. Encourage Women to Ask for More

If Suzy knew that Sam was making 20 percent more than she was for doing work that was similar or was similarly valued by the employer, she might be more willing to ask for a raise. An example of knowledge prompting action happened when MIT professor Nancy Hopkins' discovered that her lab space was smaller than that of male colleagues with fewer credentials.¹⁷⁷ This led her to inquire further into differences in wages, research assistant allocation, and budgets for men and women.¹⁷⁸ When Professor Hopkins brought her detailed and thorough documentation of the gender gap at MIT to the attention of the university president, policies were instituted to rectify the situation.¹⁷⁹ Requiring publication of state employee salary information, using government resources to track gender wage discrepancies, and encouraging the disclosure of private salary information would all help make salary information more readily available and arm women with knowledge of what they are really worth.

Knowledge of the wage gap is only a first step in encouraging women to speak up for themselves. Researchers have found that women expect less, see the world as having fewer negotiable opportunities, and see themselves as working for what they care about as opposed to working for pay.¹⁸⁰ A recent survey by Negotiating Women reports that only 16 percent of women always negotiate their salary when interviewing for a job or at a job review.¹⁸¹ Women

¹⁷⁷ Goldberg Dey and Hill, *supra* note 7, at 34.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*, at 30.

¹⁸¹ Negotiating Women, Inc., *Negotiating Salaries: Survey Results*, http://www.negotiatingwomen.com/Download/QuantativeSurvey_13.pdf (last visited June 1, 2008).

that do negotiate tend to personalize the results of an unsuccessful salary negotiation, with fully 60 percent feeling that poor results reflected on their own shortcomings.¹⁸² The survey also showed that most women were not confident of their negotiating skills and that their confidence eroded further when negotiating on their own behalf.¹⁸³

Linda C. Babcock, a researcher at Carnegie Mellon, has discovered another worrisome explanation for women's reluctance to negotiate a higher starting salary or ask for a raise: women are penalized when they ask for more.¹⁸⁴ Both men and women perceive a woman who asks for more money as "less nice" and are less willing to work with her. Men who negotiate face no such penalty.¹⁸⁵

Because of women's inherent reluctance to negotiate and the accompanying social stricture against women negotiators, both women and their employers need to be apprised of how women's frequent failure to ask for more and employer's perhaps inadvertent discouragement of pay-related negotiations contributes to pay inequity. Women also need additional opportunities to learn how to negotiate successfully for themselves so that they can overcome these barriers.

D. Provide Workplace Flexibility

Experts on wage inequality acknowledge that women are more likely than men to have primary responsibility for family, and that these responsibilities factor into women's decisions about the type of employment they pursue, and how, when, and where they choose work.¹⁸⁶

Women are deemed to have actively chosen lower-paying, "female" occupations that offer greater flexibility and working conditions that allow them to focus more attention on their care-

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ Shankar Vedantam, *Salary, Gender and the Social Cost of Hagglng*, WASHINGTONPOST.COM, July 30, 2007, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/07/29/AR2007072900827.html>.

¹⁸⁵ *Id.*

¹⁸⁶ United States General Accounting Office, *supra* note 159, at 57.

giving role.¹⁸⁷ Thus, the argument goes, it is this considered choice that negatively impacts a woman's career advancement and earnings.¹⁸⁸

There is evidence that women do work fewer hours than men. In 2006, an American woman's average workweek was 36.2 hours, an American man's was 41.8 hours.¹⁸⁹ Making the choice between having a rewarding career and fulfilling family responsibilities less onerous would go a long way to closing the existing gender pay gap. Employer-sponsored programs such as on-site day care and flexible work schedules would allow both men and women to spend more time with their families without fear of adverse employment consequences. Bolstering family medical leave protections to include paid leave would also be helpful.

For example, the California Family Medical Leave Act provides up to six weeks of partially paid leave to care for a newborn, a newly adopted child, or an ill family member.¹⁹⁰ During their absence, employees are eligible to receive 55 percent of their wages.¹⁹¹ The average annual cost is \$27 per employee, which is funded through a payroll tax on employees' wages.¹⁹² This progressive policy could serve as a model for the rest of the nation.

E. Address Sex Discrimination in the Workplace

The Center for WorkLife Law at the Hastings College of Law coined the phrase "family responsibility discrimination" to describe what happens when pregnant women, parents of young

¹⁸⁷ Whitney, *supra* note 10, at 79.

¹⁸⁸ United States General Accounting Office, *supra* note 159, at 57.

¹⁸⁹ U.S. Bureau of Labor Statistics, Table 21. Average weekly hours at work in all industries and in nonagricultural industries by sex, 1976-2006 annual averages, <http://www.bls.gov/cps/wlf-table21-2007.pdf> (last visited March 29, 2008).

¹⁹⁰ U.S. Department of Labor, Employment Standards Administration, Wage and Hour Division, Federal vs. California Family and Medical Leave Laws, <http://www.dol.gov/esa/programs/whd/state/fmla/ca.htm> (last visited May 13, 2008).

¹⁹¹ *Id.*

¹⁹² ANNE MITCHELL AND LOUISE STONEY IN COLLABORATION WITH THE SMART START NATIONAL TECHNICAL ASSISTANCE CENTER, HOW TO INCORPORATE PAID FAMILY LEAVE INTO OUR FINANCE SYSTEM 2 (2003), *available at* <http://www.earlychildhoodfinance.org/handouts/FamilyLeave/IssueBrief.doc>.

children, and those responsible for caring for aging parents or sick family members are rejected for employment, demoted, harassed, or passed over for promotion because an employer assumes that their family responsibilities will prevent them from doing a good job.¹⁹³ While many women may choose to limit their labor market participation in terms of the hours they work or the types of jobs they pursue, not all do. Employer decisions based on sex stereotypes are both illegal and harmful.¹⁹⁴

Unfortunately, sex discrimination at work is still very real. Discrimination contributes to the pay gap in subtle and not so subtle ways by limiting women's career choices and opportunities and undervaluing the work that women perform. The regression analysis performed by Goldberg Dey and Hill to eliminate factors such as experience, work hours, training, education, and personal characteristics as explanations for the pay gap reveals that discrimination accounts for five percent of the pay gap immediately following graduation and 12 percent of the gap ten years after graduation.¹⁹⁵

VI. Conclusion

Pay equity can work in certain environments, and has been responsible, at least in part, for narrowing the gender pay gap in Ontario. Greater public acceptance of government intervention into private ordering, greater union participation, and a judiciary that makes decisions consistent with the purposes of the Pay Equity Act contribute to Ontario's success.

In the U.S., Minnesota was able to implement pay equity for all public employers. The state's liberal political environment and a strong political will among legislatures to address wage inequality among government employees made this policy approach possible. The U.S. as

¹⁹³ University of California, Hastings College of the Law, Center for WorkLife Law, <http://www.uchastings.edu/?pid=3624> (last visited May 12, 2008).

¹⁹⁴ See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S.Ct. 1775 (1989).

¹⁹⁵ Goldberg Dey and Hill, *supra* note 7, at 3.

a whole is much less hospitable environment for pay equity and lawmakers at both the federal and state levels have been reluctant to enact pay equity legislation. That gender-based wage inequality remains a significant problem is unquestionable. Happily for those who seek to remedy the situation, comparable worth is not the only solution.

APPENDIX

Figure 1. Provisions of the Minnesota and Ontario Statutes

	Minnesota Pay Equity Act Minn.Stat. §§ 471.991-999 (2004) & Minn.Stat. 430A.01	Ontario Pay Equity Act R.S.O. 1990, Chapter P.7
Coverage	Public employers at the state and local levels.	All public employers and private employers who employ at least 10 individuals.
Purpose	Establish equitable compensation relationships between female-dominated, male-dominated, and balanced classes of employees in order to eliminate sex-based wage disparities in public employment.	Provide for affirmative action to be taken to redress gender discrimination in the compensation of employees employed in female job classes.
Job Class Definitions	<p>“Male-Dominated Class” = over 80 percent of the employees are male.</p> <p>“Female-Dominated Class” = over 70 percent of the employees are female.</p> <p>“Balanced Class” = All other job classes.</p>	<p>“Female Job Class” = 60 percent or more of the employees in a group of jobs are female.</p> <p>“Male Job Class” = Fewer than 60 percent of the employees in a group of jobs are female.</p> <p>Alternatively, a female job class is a job class that a review officer or the Hearings Tribunal decides is a female job class or that the employer, with the agreement of the bargaining agent, if any, for the employees of the employer, decides is a female job class.</p>
Pay Equity Plan Coverage	<p><u>State</u>: All state employees.</p> <p><u>Local</u>: Employees within the political subdivision.</p>	Each “establishment” defined as all of the employees of an employer employed in a geographic division. Permits employers to agree to combine employees from two or more establishments into a single establishment for creation of a pay equity plan.
Job Valuation Criteria	Composite of skill, effort, responsibility, and working conditions.	Composite of skill, effort, responsibility, and working conditions.
Pay Equity Achieved When	<p><u>State</u>: The primary consideration in negotiating, establishing, recommending, and approving total compensation is comparability of the value of the work in relationship to other positions in the executive branch.</p> <p><u>Local</u>: Compensation for female-dominated classes is not consistently below the compensation for male-dominated classes of comparable work value within the political subdivision.</p>	Every female job class in the establishment has been compared to a male job class and any necessary adjustments have been made.

	Minnesota Pay Equity Act Minn.Stat. §§ 471.991-999 (2004) & Minn.Stat. 430A.01	Ontario Pay Equity Act R.S.O. 1990, Chapter P.7
Comparison Method(s)	Job Class-to-Job Class based on result of job evaluation system chosen by employer. Also uses a salary range test to evaluate whether employers require employees in female classes to work more years on average than employees in male classes in order to reach maximum salary.	Based on results of gender-neutral comparison system selected by the employer. Provides for three types of comparison: <ul style="list-style-type: none"> • Job Class-to-Job Class • Proportional Value – If no representative male job class or classes is found to compare to the female job class, the female job class is compared to a representative group of male job classes. • Proxy (broad public sector) – An establishment with no male job classes is matched with a "proxy employer" that has already negotiated a pay equity plan. The "seeking employer" borrows wage and job value information from the "proxy employer" to conduct its job comparisons. The "proxy employer" must be similar to that of the seeking employer.
On-going Monitoring and Maintenance	<u>State</u> : Requires continued monitoring to ensure that pay equity is maintained. <u>Local</u> : Requires reports and compliance determinations for each jurisdiction every three years.	Requires employers to establish and maintain compensation practices that provide for pay equity.
Bodies Established	None. Tasks the Department of Employer Relations (DOER) with reviewing reports and ensuring that local governments comply.	Pay Equity Commission of Ontario <ul style="list-style-type: none"> • Pay Equity Office – Employs Review Officers who investigate, mediate and resolve complaints under the <i>Pay Equity Act</i>. The PEO also provides programs and services to help people understand and comply with the <i>Pay Equity Act</i>. • Pay Equity Hearings Tribunal – Adjudicates disputes arising under the <i>Act</i>.
Exceptions	Any factor other than sex. Gender and reprisal discrimination claims under the Minnesota Human Rights Act (MHRA) are analyzed under <i>McDonnell Douglas</i> three-part burden-shifting test. Plaintiff must first establish prima facie case of discrimination, defendant is then able to assert a legitimate, non-discriminatory reason for the action, and finally plaintiff can rebut defendant's proffered reason by showing pretext.	Permits pay to be based on the following if they do not discriminate on the basis of gender: <ol style="list-style-type: none"> 1) Seniority system; 2) Participation in a temporary training or development programs; 3) Merit compensation based on a formal performance rating; 4) Red-circling; 5) Temporary pay inflation to overcome a skills shortage; 6) Designation of position as casual employment; 7) Differences in bargaining strength (after pay equity achieved), 8) Work that is 1/3 the normal work period; or 9) Seasonal work.
Limits on How Achieved		Prohibits employers from reducing the pay of another position in order to comply.

	Minnesota Pay Equity Act Minn.Stat. §§ 471.991-999 (2004) & Minn.Stat. 430A.01	Ontario Pay Equity Act R.S.O. 1990, Chapter P.7
Anti-Retaliation	Retaliation charges can be brought under the MHRA.	Prohibits intimidation, coercion, penalizing, or discriminating against anyone who participated in proceedings, makes disclosures, exercises a right, acts in compliance with, or seeks the enforcement of the Act.
Cooperation with Unions	Provides for participation by employee bargaining units.	Provides for an alternative implementation procedure when female job classes are represented by a bargaining agent. Requires employers to bargain in good faith to agree on the gender-neutral comparison system, and the preparation and implementation of a pay equity plan.

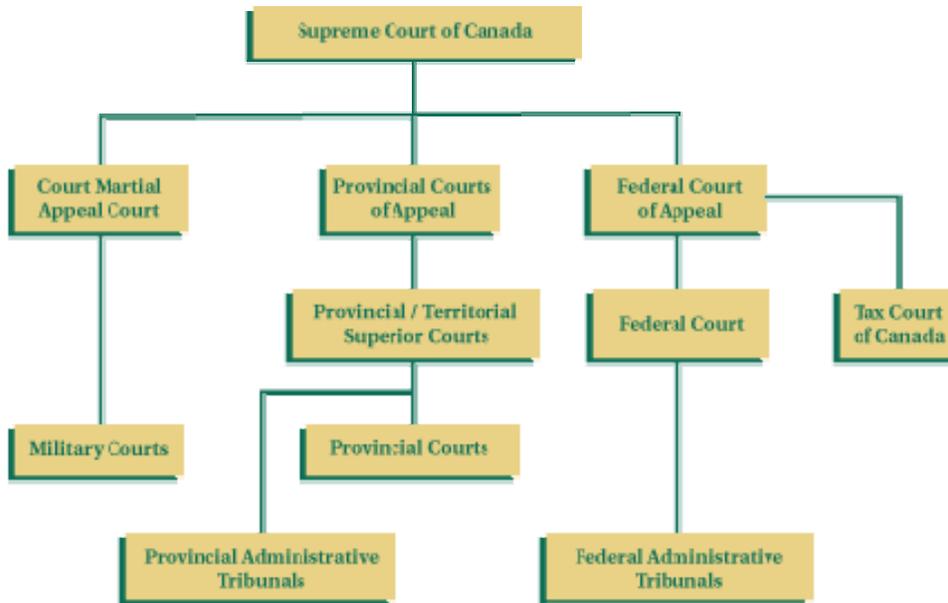
Sources:

Minn.Stat. §§ 471.991 through 471.999

Ontario Pay Equity Act

BONNIE WATKINS, PAY EQUITY: THE MINNESOTA EXPERIENCE (Fifth Edition, 1994).

Figure 2. Organization Chart of the Canadian Court System



Source: Canada's Court System, Canadian-Politics.com, <http://www.canadian-politics.com/judiciary/court-system.shtml> (last visited April 3, 2008).