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GAO

Briefing Report to Congressional Requesters

November 1993

PAY EQUITY

Experiences of Canada and the Province of Ontario

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GAO

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The Honorable John Glenn
Chairman, Committee on Governmental Affairs
United States Senate

The Honorable William L. Clay
Chairman, Committee on Post Office and
Civil Service
House of Representatives

The Honorable Dennis DeConcini
United States Senate

The Honorable Vic Fazio
House of Representatives

The Honorable Steny Hoyer
House of Representatives

In 1989, at your request, we undertook a major study of public sector activities related to equal pay for work of comparable value, or pay equity.[1] As part of that study, we reviewed activities to improve pay equity in the state of Washington and in Canada, two entities where legal initiatives mandated significant activities to achieve pay equity. We reported on the status of comparable worth initiatives in Washington State in July 1992.[2]

On October 26, 1993, we briefed your offices on our review of pay equity initiatives in Canada. This briefing report provides the legal requirements and present status of the implementation of pay equity in the federal sector of Canada and in the province of Ontario, where pay equity laws also apply in the private sector.[3] However, federally regulated private employers are subject to federal rather than provincial legislation.

[1]There are no agreed upon definitions for the terms "pay equity" and "comparable worth," which are sometimes used interchangeably. In Canada, the term pay equity is used to refer to the legal mandate that wages for women must be the same as those for men if the work is valued equally by the employer. In the past, we have referred to this concept as comparable worth to distinguish it from a broader definition of pay equity that encompasses comparable worth but also includes any efforts to ensure that wages are set objectively and fairly.

[2]Pay Equity: Washington State's Efforts to Address Comparable Worth (GAO/GGD-92-87BR, July 1, 1992).

[3]Canada's federal sector includes the public service, crown corporations, and federally regulated employers.

Your request for these analyses is part of a broader concern about whether pay discrimination resulting from gender or race is a problem in federal government wage-setting practices in the United States. It is important to note that the pay equity initiatives in Canada presented in this briefing report are based on analyses that reflect a different legal, demographic, and economic setting and therefore may not be comparable to circumstances in the United States. We are continuing to analyze whether the U.S. government's factor evaluation system (FES) may result in pay disparities because of gender and/or race.[4]

Legislative Requirements for Implementing Pay Equity in Canada

The 1977 Canadian Human Rights Act and Ontario's 1987 Pay Equity Act mandate pay equity in the federal sector and Ontario's public and private sectors, respectively. Both acts require employers to determine a job's "value" using the same set of factors—skill, effort, responsibility, and working conditions.[5] The pay equity provisions in both laws prohibit gender-based discrimination but do not specifically address racially based pay inequities.

The Canadian Human Rights Act prohibits employers in the federal sector from establishing or maintaining differences in wages between men and women who are doing work of equal value. The act includes pay equity as part of a broader discrimination law and does not specify what actions federal sector employers must take to address pay equity. The act also established the (1) Canadian Human Rights Commission and (2) Canadian Human Rights Tribunal Panel. One of the Commission's roles concerning pay equity is to investigate complaints. Upon request from the Commission, the Panel appoints a tribunal to hear complaints referred by the Commission when the employer and the complainant cannot agree on a settlement. Both the employer and the complainant subsequently may appeal to the tribunal, the Canadian Federal Court, and the Supreme Court of Canada.

A Canadian Treasury Board official told us that the 1977 Canadian Human Rights Act covers about 5,500 federal sector employers.[6] According to a

[4]FES is one of several methods used by the U.S. government to determine the relative value of white-collar jobs.

[5]When evaluating jobs, employers commonly use a point factor job evaluation system that involves assigning a total point value or "weight" to each "compensable factor" based on its relative importance to an organization. The organization then evaluates each job by totaling the points assigned to each factor to obtain a job worth score that measures the relative importance of each job to the organization. Factors are sometimes further defined using subfactors.

[6]The Treasury Board is the employer of record for Canadian federal government employees.

Statistics Canada official,[7] these employers have approximately 1.1 million employees, or about 9.4 percent of the Canadian workforce.

Ontario's Pay Equity Act addresses systemic gender discrimination in wages by mandating pay equity for employees in female job classes—occupations in which 60 percent of the incumbents are women. The act established the Pay Equity Commission consisting of the Pay Equity Office, which investigates complaints, and the Pay Equity Hearings Tribunal, which adjudicates complaints. The act also requires both public and private sector employers to (1) prepare plans that describe how employers will achieve pay equity within their establishments and (2) meet prescribed deadlines for completion of their plans and the payment of initial pay equity adjustments.[8] Ontario's public sector employers must achieve pay equity before January 1, 1998,[9] while private sector employers must make annual pay equity adjustments that total at least 1 percent of their previous year's payroll until they have achieved pay equity.

An Ontario Pay Equity Office official told us that Ontario's Pay Equity Act covers all of the approximately 3,200 public sector employers and about 33,350 private sector employers who have 10 or more employees. Ontario has a total workforce of about 4.8 million employees. According to our calculations, before Ontario amended its act, which took effect July 1, 1993, about 39 percent of the approximately 2.2 million women in the workforce could have been eligible to receive pay equity adjustments. Women were ineligible for adjustments when they worked for employers who (1) had fewer than 10 employees, (2) had no men working in jobs of comparable value, or (3) were covered by the Canadian Human Rights Act (i.e., Canadian federal sector employees). Ontario amended its act to require employers to use alternative comparison methods when no comparable male-dominated jobs exist within the establishment.[10]

A detailed description of the legal requirements for pay equity in Canada and Ontario is presented in appendix I, and the history of adjudications under the two laws is presented in appendix II.

[7]Statistics Canada is equivalent to our Bureau of the Census.

[8]According to Ontario's act, an establishment consists of all employees of one employer located in a geographic region.

[9]An amendment to the act, effective July 1, 1993, extended the date by which public sector employers must achieve pay equity from January 1, 1995, to January 1, 1998.

[10]A male-dominated job is one in which 70 percent or more of the incumbents are men.

Progress in Implementing Pay Equity

Canadian Federal Sector

A Canadian Treasury Board official told us that through calendar year 1992, Canada's federal government had paid over Can$500 million in one-time and recurring pay equity adjustments to approximately 74,000 men and women (about 25 percent of the public service).[11] Federally regulated employers paid an additional Can$58 million in adjustments to approximately 5,800 employees as a result of pay equity settlements.

In 1985, the Treasury Board established a joint management-union initiative to develop a plan to implement pay equity in the public service—which includes 72 occupational groups, 9 of which consisted predominantly of women at that time. The initiative collapsed after the evaluation of 3,200 of the 4,300 positions in a sample because of controversy about possible bias in the initiative's methodology. Subsequently, in January 1990, the Treasury Board, without union involvement, announced pay equity adjustments, which increased public service wages for approximately 68,000 employees on the basis of the data gathered during the initiative. These payments, which accounted for most of the Can$500 million in pay equity adjustments paid to public service employees, were made in two phases. The first phase involved immediate one-time retroactive payments of approximately Can$317 million. The second phase involved annual salary adjustments of about Can$81 million.

Following the Treasury Board's announcement, the Public Service Alliance of Canada, a public service union, filed a complaint with the Canadian Human Rights Commission alleging that the Treasury Board had not achieved pay equity in the public service. Following an investigation, the Commission combined this complaint with four similar public service complaints that had been filed with the Commission either during or before the joint initiative and referred the case to a tribunal. The tribunal began hearing evidence in 1991; a Commission official expects a decision in 1994.

Province of Ontario

An Ontario public service official told us that in 1990 the provincial public service implemented two pay equity plans that increased the annual wages

[11]The Canadian dollar's value fluctuates but is roughly equal to $0.75 in U.S. currency.

for approximately 31,220 union and nonunion employees (about 35 percent of the public service) by a total of approximately Can$124 million. The official also told us that as a result of these recurring pay equity adjustments, the public service had paid a total of Can$372 million through fiscal year 1992.[12] Because municipalities, school boards, universities, and private sector employers are not required to report the amounts of their pay equity adjustments to Ontario's Pay Equity Office, we could not determine the total of these additional payments.

Further details of our observations about the implementation of pay equity laws in Canada and Ontario, including details about the nature and disposition of complaints filed concerning pay equity, are also provided in appendix I.

Objectives, Scope, and Methodology

The objectives of our review were to determine both the Canadian federal sector's and Ontario's (1) legislative requirements for implementing pay equity and (2) progress to date in addressing pay equity. The details of our methodology are presented in appendix III. We did our work from September 1991 through April 1993 in accordance with generally accepted government auditing standards. We obtained informal comments on the results of our analyses from Canadian federal and Ontario provincial officials. We also shared our results with representatives of the Public Service Alliance of Canada and the Professional Institute of the Public Service of Canada, the two largest public service unions. These officials and representatives generally agreed with the information presented. We made technical changes to the report based on their comments.

[12]Ontario's fiscal year is from April 1 to March 31.

We are sending copies of this report to interested Members of Congress and congressional Committees that have responsibilities for public sector employment issues, Canadian federal and Ontario provincial officials, and other interested parties. Copies will also be made available to others upon request.

The major contributors to this briefing report are listed in appendix IV. If you have any questions about this report, please call me on (202) 512-5074.

Nancy R. Kingsbury
Director
Federal Human Resource Management Issues

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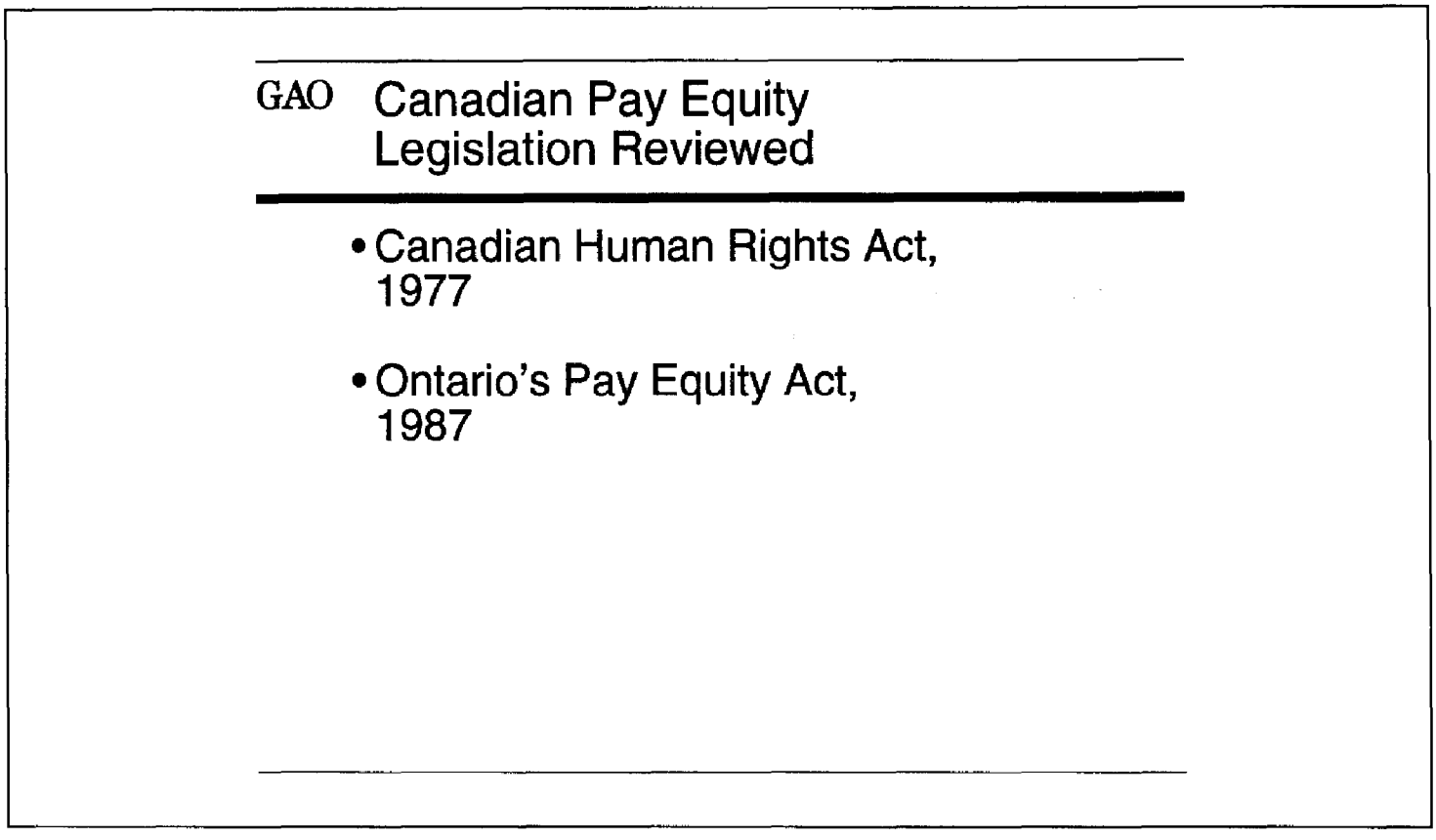
Abbreviations

FEFRA	Female Employees Fair Remuneration Act
FES	Factor Evaluation System
JUMA	Joint Union Management Initiative
ONA	Ontario Nurses Association
PSAC	Public Service Alliance of Canada

Analysis of the Pay Equity Legislation of Canada and the Province of Ontario



Canadian Pay Equity Legislation Reviewed[1]

Both the 1977 Canadian Human Rights Act and Ontario's 1987 Pay Equity Act prohibit employers from establishing or maintaining differences in pay between men and women who are doing work of comparable value. Canada included pay equity as one section of an act that prohibits discrimination on the basis of race, national or ethnic origin, color, religion, age, gender, marital status, family status, disability, or a criminal conviction for which a pardon has been granted. Ontario's legislation generally requires employers to develop and implement written plans to achieve pay equity in their establishments. While the Canadian Human Rights Act is not specific about implementation, Ontario's Pay Equity Act

[1] There are no agreed upon definitions for the terms "pay equity" or "comparable worth," which are sometimes used interchangeably. In Canada, the term pay equity is used to refer to the legal mandate that the wages for women should be the same as those for men if the work is valued equally by the employer. In the past, we have referred to this concept as comparable worth to distinguish it from a broader definition of pay equity that encompasses comparable worth but also includes any efforts to ensure that wages are set objectively and fairly.

specifies a definition for gender dominance, the methodology to be used to calculate pay equity adjustments, minimum annual pay adjustments, and justifications for wage differences for comparably valued jobs. Table I.1 compares and contrasts some of the characteristics of the pay equity legislation that is applicable in the Canadian federal sector and both the public and private sectors of Ontario.[2] Federally regulated private sector employers are subject to federal rather than provincial legislation.

Table I.1: Comparison of the Pay Equity Laws Covering the Canadian Federal Sector and Ontario

Characteristics	Canadian Human Rights Act	Ontario Pay Equity Act
Sector	Canadian federal	Ontario public and private
Year enacted	1977	1987
Enforcement agency	Canadian Human Rights Commission and Labour Canada	Ontario Pay Equity Office
Adjudicative agency	Human Rights Tribunal Panel, Federal Court, and Supreme Court	Pay Equity Hearings Tribunal
Gender dominance definition	Not specified[a]	Female dominated—60 percent Male dominated—70 percent
Methodology to determine pay equity adjustments	Not specified[b]	Job-to-job Proportional value Proxy[c]
Employers' minimum annual pay adjustment	Not specified	1 percent of annual payroll expense
Justification for wage differences for comparably valued jobs	Prescribed by Commission guidelines[d]	Seniority Merit compensation plan based on formal performance ratings Red circling Temporary training assignment Temporary skills shortage

(Table notes on next page)

[2]We are using the term "Canadian federal sector" to include the public service, crown corporations, and federally regulated employers. The Canadian public service includes those employees who work for federal government departments and for whom the Treasury Board acts as the employer. A crown corporation is one that is government-owned but operates autonomously under the direction of a government-appointed chairman, e.g., the Canadian Broadcasting Corporation. Federally regulated employers include those in the banking, interprovincial trucking, broadcasting, and telecommunications industries.

[a]The 1977 Canadian Human Rights Act authorizes the Canadian Human Rights Commission to issue guidelines that are legally binding on the Commission and any appointed human rights tribunal. In its guidelines published in 1986, the Commission defined both male-and female-dominated occupational groups on a sliding scale, depending on the number of employees—70 percent for fewer than 100 employees, 60 percent for 100 to 500 employees, and 55 percent for more than 500 employees. We refer to occupational groups that are neither male- or female-dominated as gender neutral.

[b]According to the Commission's guidelines, the work performed and the wages received by the employees of each occupational group may be compared indirectly; however, a comparison methodology is not specified. One Commission official told us that to calculate pay equity adjustments, the Commission uses a job-to-line methodology that incorporates a statistical technique called "regression analysis" to calculate a best-fitting straight line, or regression line, through a set of points plotted with job value on the horizontal axis and total wages on the vertical axis. A regression line is calculated for all male-dominated jobs in an establishment that are of comparable value to the female-dominated job(s) specified in the complaint, while the female-dominated job(s) are plotted as points on the same set of axes. The Commission calculates the pay equity adjustments as the wage increase necessary to bring each female-dominated job up to the regression line. The official also told us that incumbents of male-dominated jobs that fall below the regression line do not receive an adjustment. The act prohibits employers from decreasing the salaries of incumbents of jobs that fall above the regression line, regardless of whether the jobs are male- or female-dominated.

[c]Ontario's 1987 Pay Equity Act originally required employers to use a job-to-job methodology, which entails increasing the wages for a female-dominated job to equal those for a comparably valued male-dominated job. Effective July 1, 1993, Ontario amended the act to require employers to use one of three methodologies—job-to-job, proportional value, or proxy. The proportional value methodology, which is an option for both public and private sector employers, consists of increasing the wages for a female-dominated job until the relationship between total wages and job worth equals that for male-dominated jobs within the same establishment. The proxy comparison methodology is an option only for public sector employers, such as child care centers, that have too few male-dominated jobs to allow job-to-job or proportional value comparisons within the establishment. It involves increasing the wages for a female-dominated job to equal those for a comparably valued female-dominated job in another (proxy) public sector establishment.

[d]The Canadian Human Rights Commission's 1986 guidelines provide the following justifications for wage differences for comparably valued jobs: seniority, formal performance ratings, red circling (freezing wages for positions that are downgraded until the wages are appropriate for the newly assigned grade), temporary training assignment, labor shortage within the establishment, rehabilitation assignment, demotion with or without a wage decrease, reclassification with no wage change, and regional wage rates.

Source: 1977 Canadian Human Rights Act and 1987 Ontario Pay Equity Act data.

GAO Employees Covered by the Canadian Human Rights Act

1,145,000 employees, or 9.4 percent of the Canadian workforce

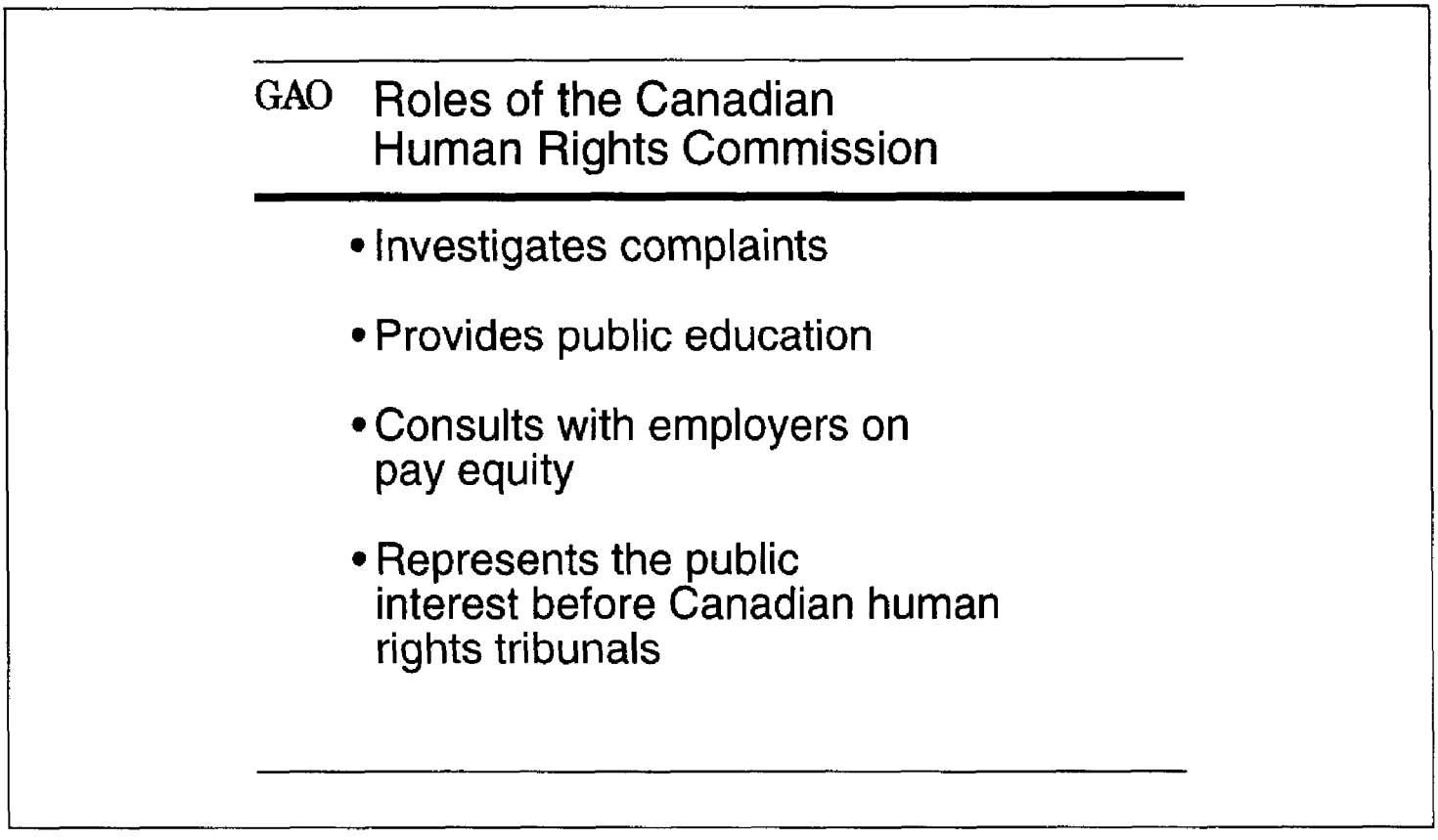
- 512,000 employees in the Canadian public sector
- 500,500 employees of federally regulated employers
- 132,500 employees of crown corporations

Employees Covered by the Canadian Human Rights Act

A Treasury Board official told us that section 11 of the Canadian Human Rights Act covers approximately 5,500 employers. According to a Statistics Canada official,[3] these employers have a total of approximately 1.1 million employees (about 9.4 percent of the Canadian workforce). In the Canadian public sector, the act covers approximately 300,000 white- and blue-collar public service employees in 72 occupational groups,[4] 77,000 employees in the Department of National Defense, 15,000 in the Royal Canadian Mounted Police, and 120,000 in other federal civilian organizations. In addition to the public sector, the act covers approximately 500,500 employees working for 4,900 federally regulated employers and 132,500 employees of crown corporations. Although the act prohibits discrimination on many grounds, including race, it does not specifically address racially based pay inequities.

[3]Statistics Canada is equivalent to our Bureau of the Census.

[4]Fifty-three of these occupational groups are male dominated, 12 are female dominated, and 7 are gender neutral.



Roles of the Canadian Human Rights Commission

The Canadian Human Rights Act established the (1) Canadian Human Rights Commission and (2) Human Rights Tribunal Panel. The act requires the Commission to accept and investigate pay equity complaints, which are allegations that an employer is paying different wages to male and female employees in the same establishment who are doing work of comparable value.[5] Although the act authorizes the Commission to initiate an investigation if reasonable grounds exist that an employer has engaged in a discriminatory pay practice, a Commission official told us that it has not initiated an investigation without a complaint.

The Commission also investigates complaints referred by Labour Canada, the equivalent of our Department of Labor. Section 182 of the Canada Labour Code authorizes Labour Canada to audit federally regulated employers for noncompliance with the Canadian Human Rights Act and to refer complaints to the Commission. In addition to accepting and

[5]The Canadian Human Rights Act requires employers to determine the "value" of work on the basis of skill, effort, responsibility, and working conditions.

investigating complaints, the Commission provides public education, consults with employers on pay equity, and represents the public interest before human rights tribunals.

GAO Commission Complaint Investigation Process

The investigator determines the relative worth of jobs specified in a complaint by using a job evaluation system that must

- incorporate skill, effort, responsibility, and working conditions;
- allow direct comparison of jobs; and
- be free of gender bias

Commission Complaint Investigation Process

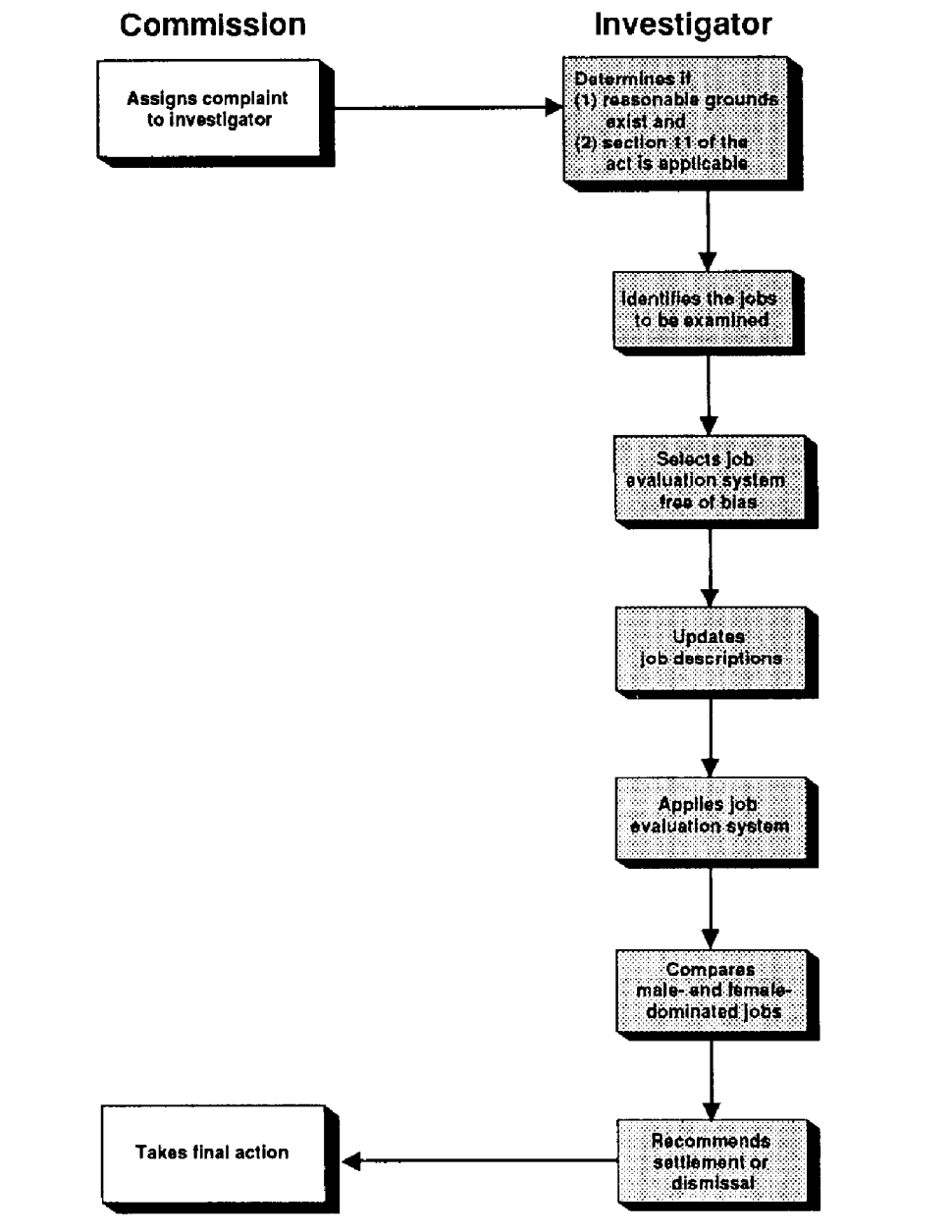
Commission officials told us that during the investigation process an investigator uses a job evaluation system to determine the relative worth of the occupations or jobs specified in the complaint and thus provides both the complainant and the employer with the relevant information to negotiate a settlement. The investigator uses the employer's existing job evaluation system if it (1) measures a job's value on the basis of skill, effort, responsibility, and working conditions; (2) allows direct comparisons of jobs to determine relative value; and (3) is free from gender bias. If the employer's job evaluation system does not meet any of these three criteria, the investigator identifies and uses one that does. Figure I.1 summarizes the Canadian Human Rights Commission's investigation process for pay equity complaints.

Figure I.2 describes the Commission's guidelines for gender neutrality concerning the employer's job evaluation system, the administration of the job evaluation system, and the collection of job content information. The

Commission published these criteria in an advisory paper to provide guidance to employers implementing pay equity in the federal sector.

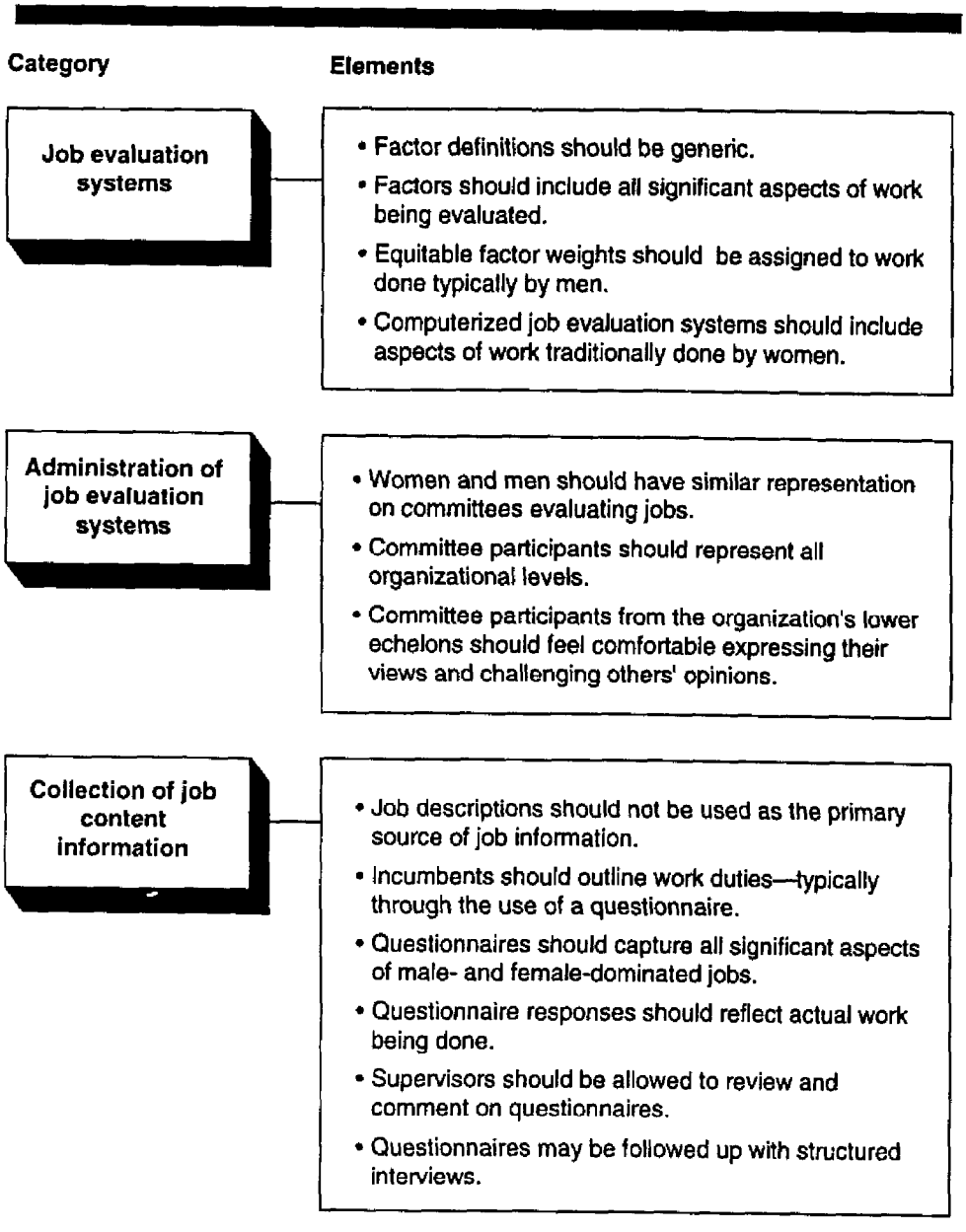
For those complaints in which the complainant and the employer have not agreed to a settlement following the completion of the investigation, the Commission has the option of either (1) appointing a conciliator to mediate a settlement through the confidential exchange of information or (2) requesting that the Canadian Human Rights Tribunal Panel appoint a tribunal to hear the complaint.

Figure I.1: Canadian Human Rights Commission's Investigation Process for Pay Equity Complaints

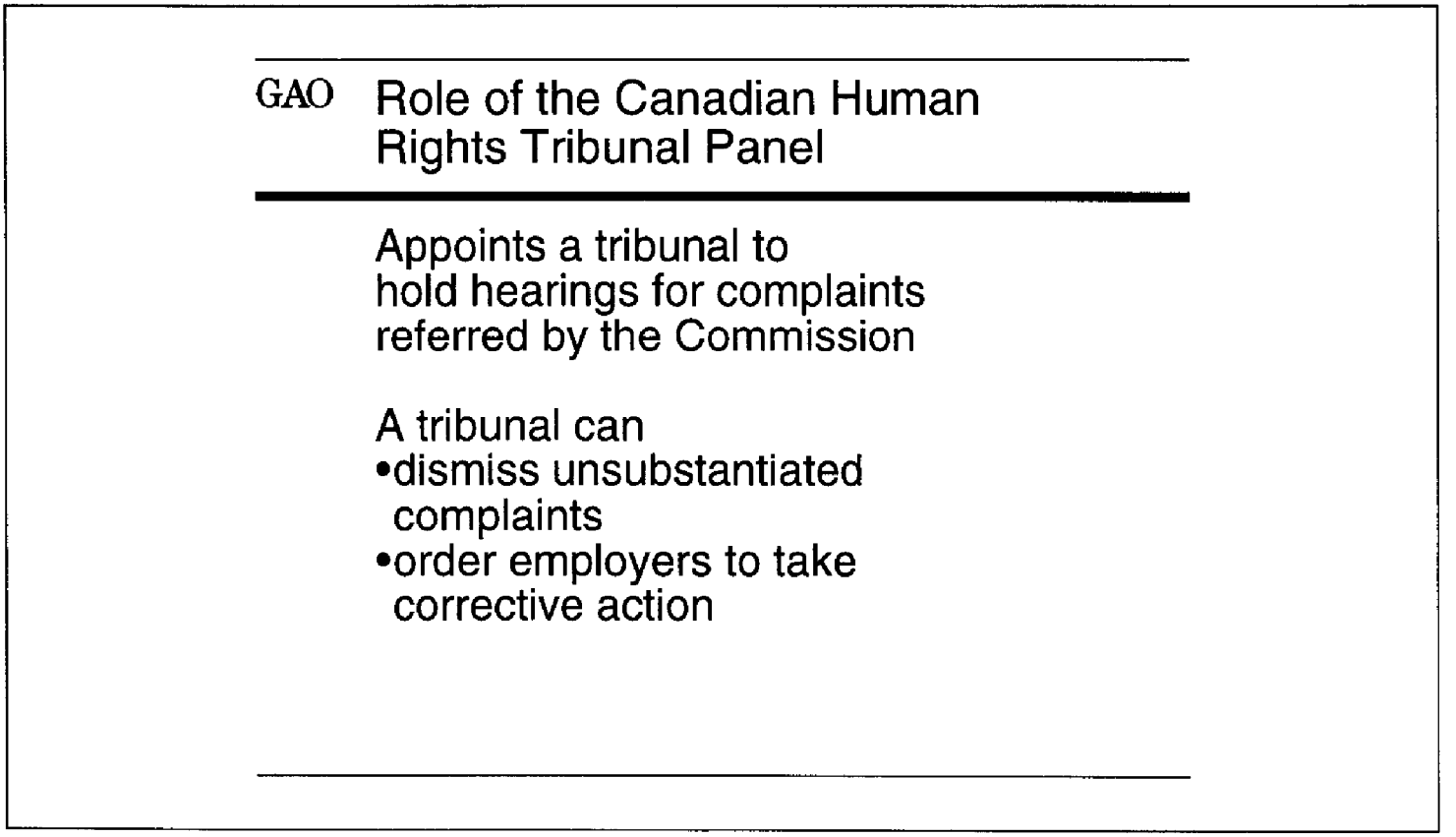


Source: Canadian Human Rights Commission data.

Figure I.2: Canadian Human Rights Commission's Guidelines for Gender Neutrality

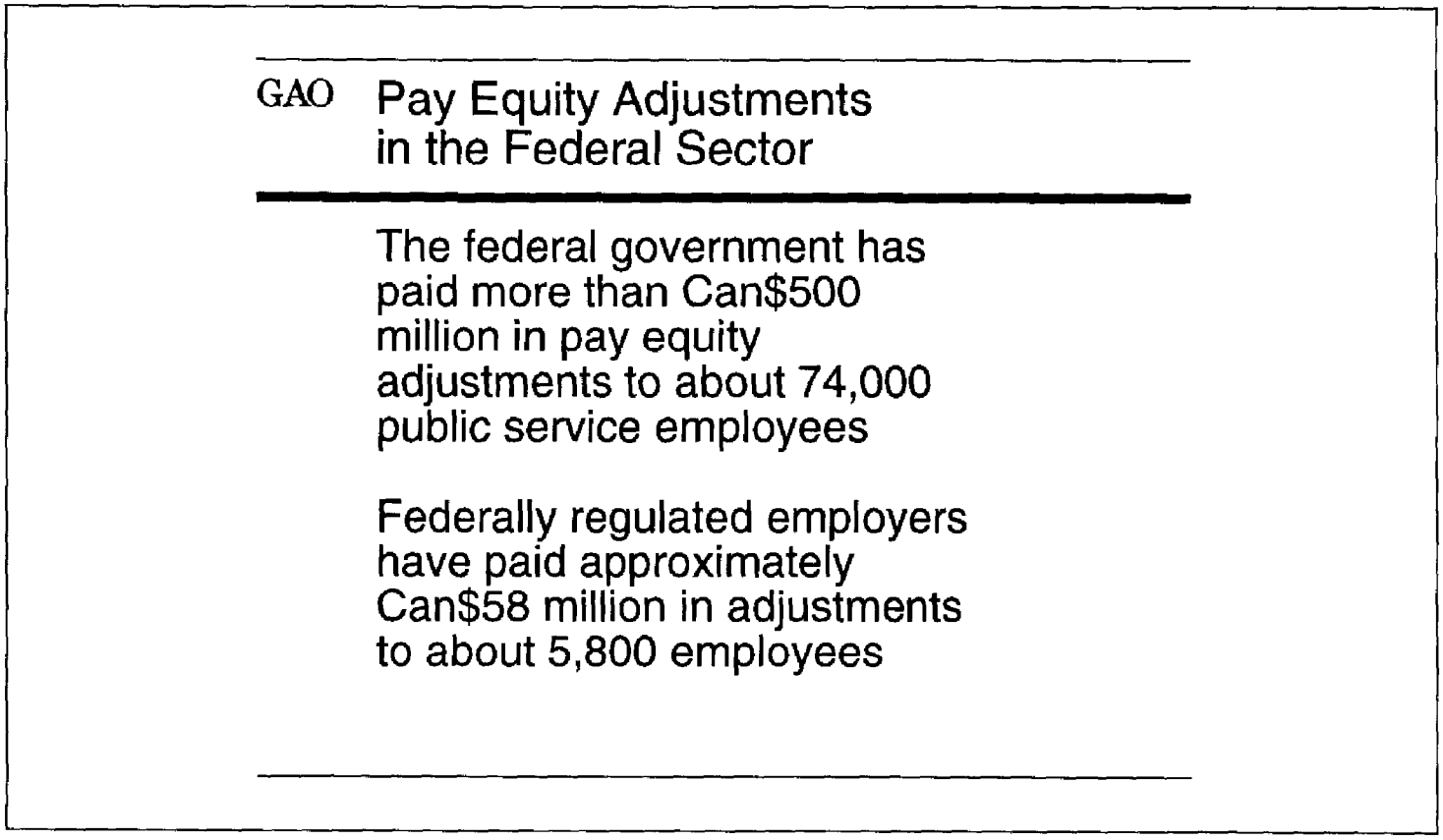


Source: Canadian Human Rights Commission data.



Role of the Canadian Human Rights Tribunal Panel

The Canadian Human Rights Act requires the Human Rights Tribunal Panel to appoint a tribunal to hear complaints referred by the Commission. After the complainant, the employer, and the Commission present evidence and arguments, a tribunal either dismisses an unsubstantiated complaint or orders the employer to take corrective action. The Commission is responsible for monitoring the employer's compliance with the tribunal's orders. Either the employer or the complainant subsequently may appeal to the tribunal, the Canadian Federal Court, and the Supreme Court of Canada.



Pay Equity Adjustments in the Federal Sector

A Canadian Treasury Board official told us that through calendar year 1992 the federal government had paid a total of more than Can$500 million in one-time and recurring pay equity adjustments to approximately 74,000 employees. This amount includes pay equity adjustments paid as a result of (1) settlements mediated by the Commission between the Treasury Board and complainants, (2) a tribunal order that resolved one pay equity complaint, and (3) a joint initiative between the Treasury Board and the public service unions to do a study of pay equity in the public service. Although it fluctuates, the Canadian dollar is equal to about $0.75. In addition to the payments made by the federal government, federally regulated employers paid approximately Can$58 million to about 5,800 employees as a result of pay equity settlements. We could not determine whether these adjustments were one-time or recurring.

GAO Complaints Received by the Human Rights Commission

- From 1978 through 1992, the Commission received 268 pay equity complaints
- The Commission mediated settlements for 28 complaints; on average, about 2.4 years elapsed from the receipt of a complaint to its settlement

Complaints Received by the Human Rights Commission

In resolving pay equity complaints, the Canadian Human Rights Commission dismisses unsubstantiated complaints, mediates settlements between complainants and employers, or requests that the Human Rights Tribunal Panel appoint a tribunal to resolve complaints. In some instances, complainants have withdrawn complaints before they were resolved. A tribunal either dismisses unsubstantiated complaints or orders the employer to take corrective action.

From 1978 through 1992, the Commission received 268 complaints—241 before 1991, and 27 during 1991 and 1992, including 3 complaints referred by Labour Canada. According to a Commission official, the Commission implemented an automated system to monitor complaint disposition by pay equity case rather than individual complaint during 1991.[6] Therefore, we were unable to determine the changes in the disposition of the 241 complaints received before 1991. As of 1990, 164 of the 241 complaints

[6]A pay equity case may consist of two or more similar pay equity complaints against the same employer.

remained open; the Commission dismissed 36, mediated a settlement for 28, and referred 7 to a tribunal; complainants withdrew 6. We were unable to determine the exact amount of recurring and one-time pay equity adjustments that resulted from the mediated settlements. Of the seven complaints referred to a tribunal, five are the subject of ongoing hearings; a tribunal has issued an order for one and dismissed one. Table I.2 shows the status of the complaints received by the Canadian Human Rights Commission before 1991.

Table I.2: Status of Pay Equity Complaints Received by the Canadian Human Rights Commission

	Commission's disposition of complaints				Tribunals' disposition of complaints			
Year	Open	Dismissed	Settled	Withdrawn[a]	Open[b]	Order issued	Dismissed	Total
1978		1	1	2			1	**5**
1979		2	7[c]		2			**11**
1980		2	5	1				**8**
1981		13	5			1		**19**
1982		8		1				**9**
1983	1	2	2	1				**6**
1984		1	2	1	1			**5**
1985		4	3					**7**
1986	3	2	1					**6**
1987	1				1			**2**
1988	120[d]	1	2					**123**
1989	17[d]							**17**
1990	22				1			**23**
Total	**164**	**36**	**28**	**6**	**5**	**1**	**1**	**241**

[a]Complaints were withdrawn by the complainants.

[b]A tribunal is currently hearing these complaints.

[c]The Commission referred one of these complaints to a tribunal; however, the employer and the complainant negotiated a settlement in the interval between the referral and the hearing. The tribunal held hearings to address jurisdictional issues raised during the Commission's investigation of the complaint.

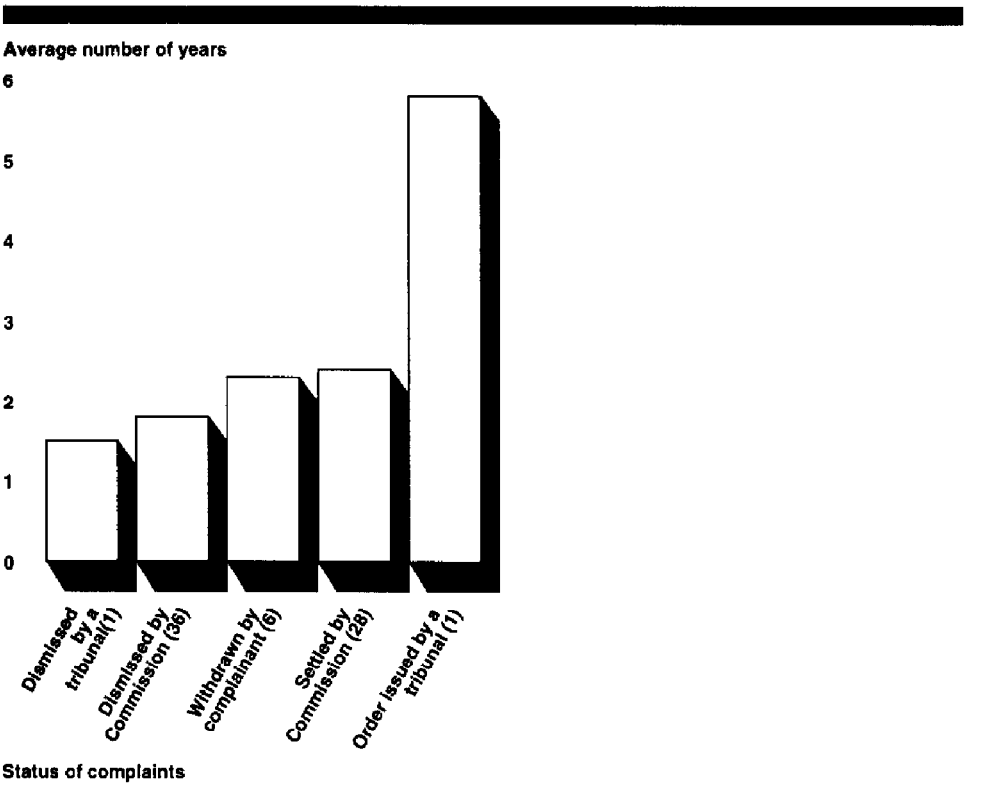
[d]The Commission received 120 complaints in 1988 and 6 in 1989 that were filed by individual employees against the same employer.

Source: Canadian Human Rights Commission data.

Of the 241 complaints received by the Canadian Human Rights Commission before 1991, 72 (about 30 percent) were resolved by 1990.

The time elapsed from the Commission's receipt of each complaint to its resolution varied: About 1.5 years elapsed before 1 complaint was dismissed by a tribunal; on average, 1.8 years elapsed for the 36 complaints dismissed by the Commission; 2.3 years for the 6 complaints withdrawn by the complainants; and 2.4 years for the 28 complaints for which the Commission mediated a settlement. About 5.8 years elapsed for the 1 complaint for which a tribunal ordered a settlement. Figure I.3 shows the average time elapsed for complaints that were resolved by either the Commission or a tribunal or that were withdrawn by the complainants.

Figure I.3: Time Elapsed From the Canadian Human Rights Commission's Receipt of a Complaint to Its Resolution



Note: These numbers include all of the complaints resolved by the Human Rights Commission or a tribunal from calendar year 1977 through 1990.

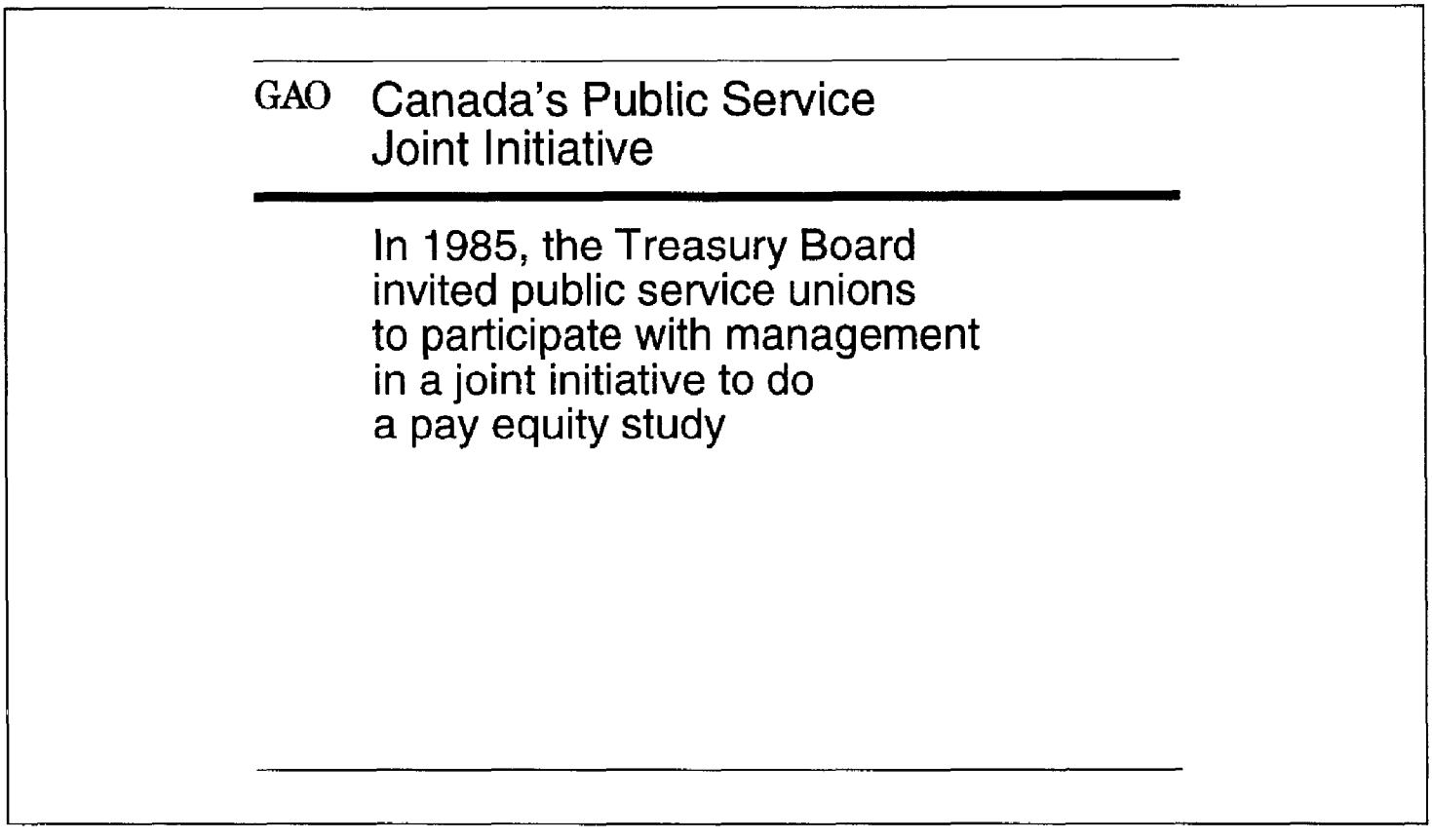
Source: Canadian Human Rights Commission data.

GAO A Human Rights Tribunal Ordered Complaint Resolution

Tribunal ordered employer to
- designate hospital services jobs as female-dominated
- pay Can$30 million in one-time pay equity adjustments
- increase annual salaries of community health workers by Can$2,000
- revise its job evaluation system to eliminate gender bias

A Human Rights Tribunal Ordered Complaint Resolution

A tribunal issued an order in response to a complaint filed by a public service union, the Public Service Alliance of Canada, on behalf of hospital services employees. After the Commission published guidelines that defined gender dominance, the tribunal ruled that (1) this occupational group, in which 57 percent of the incumbents were women, was female-dominated and (2) the public service's classification system was affected by gender bias because it failed to value two job characteristics of community health workers on native reserves—caring for the sick and the elderly and understanding both native and western cultures. The tribunal ordered the public service to pay Can$30 million in one-time pay equity adjustments, increase the annual salaries of about 350 community health workers by approximately Can$2,000, and revise its classification system to eliminate the gender bias.



Canada's Public Service Joint Initiative

In December 1984, the Public Service Alliance of Canada filed a complaint with the Commission on behalf of approximately 50,000 clerical workers alleging discrimination in both classification and pay. In March 1985, the president of the Treasury Board established a joint union-management committee to study pay equity in the public service. Thirteen of the 15 public service unions agreed to participate in the joint initiative; an additional union joined them midway through the initiative. The joint initiative was cochaired by a management and a union representative, and a Commission representative attended all joint committee meetings to observe the proceedings and provide guidance on interpreting the Canadian Human Rights Act.

GAO Actions Taken During the Joint Initiative

- **October 1986**
  Joint committee selected job evaluation contractor
- **June 1988**
  Master evaluation committee completed 503 benchmark position evaluations to provide guidance to 5 job evaluation committees
- **April 1989**
  Joint committee added four more evaluation committees

Actions Taken During the Joint Initiative

In October 1986, the joint committee contracted with Norman D. Willis & Associates of Seattle, Washington, to (1) train and offer guidance on job evaluation; (2) modify its job evaluation factor definitions and job evaluation questionnaire to meet the specifications suggested by the Commission and the requirements of the Canadian government;[7] and (3) test the reliability and consistency among the committees that evaluated the public service positions, which are jobs held by specific incumbents. The joint committee convened a master evaluation committee to develop benchmark position evaluations.[8] The committee had equal representation from both union and management participants as well as from men and women with a wide variety of occupational experience.

[7]The contractor's job evaluation system consisted of four factors—knowledge and skills, mental demands, accountability, and working conditions—that were used to determine the relative value of jobs. These factors are variants of the statutorily required ones.

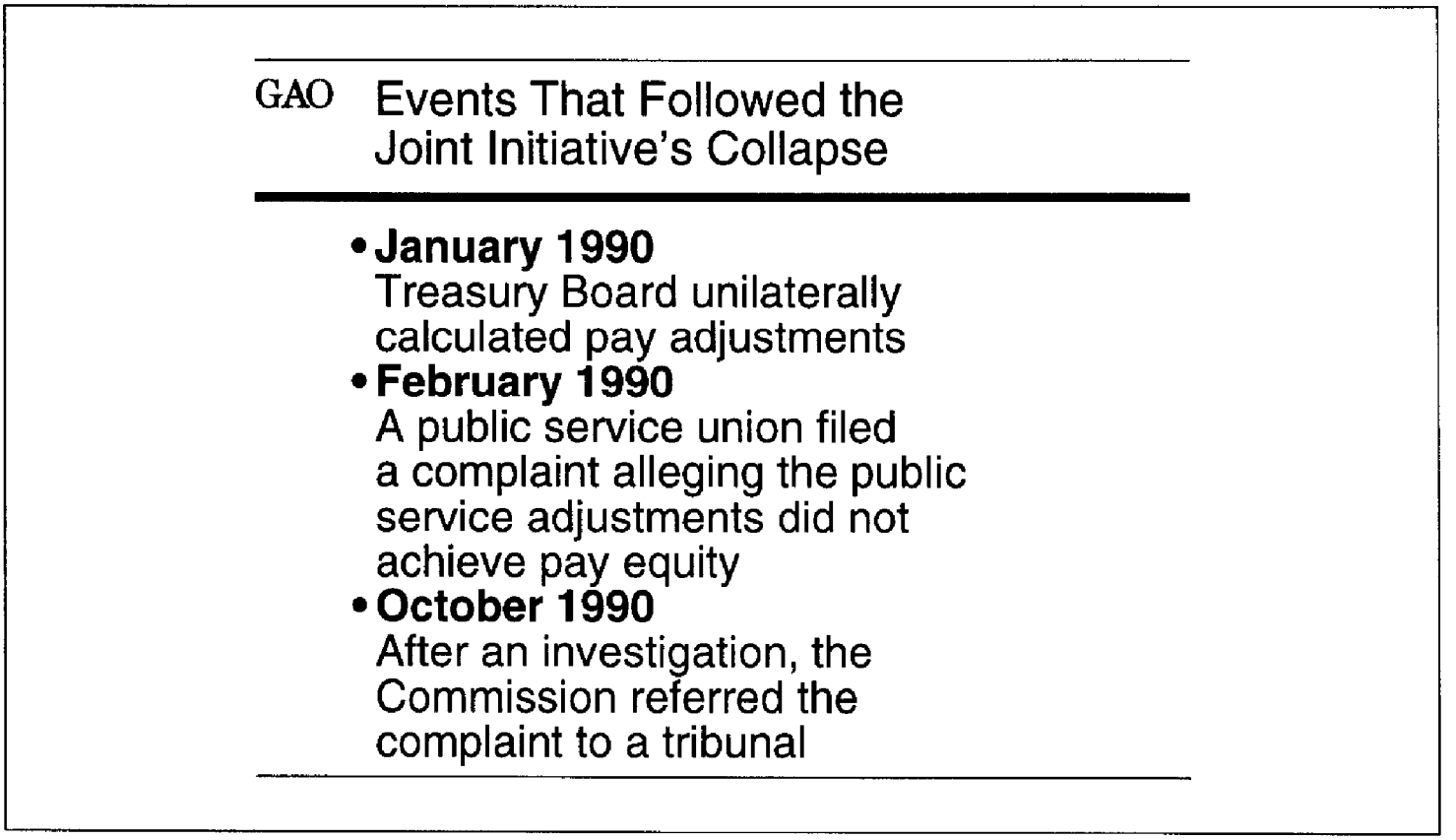
[8]A benchmark position evaluation is the record of the application of a job evaluation system to a position and the resulting job worth score. Benchmarks served as guidance to the evaluation committees that subsequently applied the contractor's job evaluation system to the sample of public service positions.

In June 1988, the master evaluation committee completed 503 benchmarks, and the joint committee convened 5 evaluation committees to apply the contractor's job evaluation system to a sample of approximately 4,300 public service positions selected from a universe of 170,000. In April 1989, the joint committee convened 4 additional evaluation committees and reduced the sample size to approximately 3,450 positions to expedite the completion of position evaluations.

GAO Actions Taken During the Joint Initiative (cont'd)

- **August 1989**
  Contractor reported that evaluation committees might have undervalued male-dominated positions and overvalued female-dominated ones
- **December 1989**
  Treasury Board and unions disagreed on the recommendation in the contractor's report

In August 1989, the contractor completed a review of a sample of more than 200 position evaluations for reliability and consistency among the evaluation committees. The contractor reported that position evaluations of male-dominated occupational groups in the sample were undervalued when compared to the benchmarks and that those of female-dominated groups were slightly overvalued. The contractor recommended that an additional 300 to 400 position evaluations be reviewed to determine whether the observed pattern was representative. The Treasury Board concluded that the contractor's study showed the position evaluations were affected by significant gender bias. The unions announced their withdrawal from the joint initiative after failing to agree with the Treasury Board's conclusion.



Events That Followed the Joint Initiative's Collapse

Without further union involvement, the Treasury Board estimated that the job worth scores for the female-dominated positions had been overvalued by 3 percent and the scores for male-dominated positions had been undervalued by 4 percent. The Treasury Board then adjusted the job worth scores of the 3,200 completed position evaluations.[9] In January 1990, the Treasury Board announced pay equity adjustments for approximately 68,000 public service employees, including clerks, secretaries, and education support workers. The payments were made in two phases: (1) one-time retroactive payments of approximately Can$317 million and (2) annual salary adjustments of approximately Can$81 million.

In February 1990, the Public Service Alliance of Canada filed a complaint with the Commission alleging that even after the Treasury Board's pay equity adjustments were made, pay equity would not be achieved. The

[9]A Treasury Board official told us that the actual adjustments to the position evaluations increased the job worth scores 3.5 percent (on average) for the male-dominated positions and 0.5 percent for the female-dominated ones.

Commission began an investigation; on the basis of the statistical evidence, the investigator's report recommended that the Commission find that (1) no systemic gender bias had affected the joint initiative evaluations and (2) the 3,200 position evaluations completed during the joint initiative could be used to calculate pay equity adjustments. However, in its formal response to the investigator's report, the Treasury Board said that the investigation had not disproved the existence of gender bias.

After investigating the Treasury Board's methodology for calculating pay equity adjustments, a separate investigator's report recommended that the Commission (1) not sanction the Treasury Board's approach to calculating the wage gap between male- and female-dominated occupational groups and (2) conclude that a wage gap still existed for all nine female-dominated occupational groups in the public service. In October 1990, the Commission combined the complaint with four similar ones filed before or during the joint initiative and referred them to a tribunal. The Commission continued to investigate other aspects of the five complaints.

The Canadian Human Rights Act defines wages as any form of remuneration payable for work done by an individual, including indirect benefits.[10] To address the issue of how to value these indirect benefits for the purposes of pay equity, the Commission developed a conceptual framework that compares benefits among occupational groups on the basis of (1) cost of employer contributions and (2) availability. The act exempts leave or benefits related to pregnancy or childbirth from the comparison process. An investigator's report recommended that the Commission refer the question of wage equality in indirect compensation to the same tribunal that was appointed to hear the five complaints previously referred by the Commission.

[10]Indirect benefits include noncash compensation items, such as vacations, employer contributions to pension and health plans, allowances and premiums, and severance pay.

GAO A Human Rights Tribunal Will Focus on Three Issues

- Whether systemic gender bias skewed the joint initiative position evaluations
- Whether adjustments made by the Treasury Board achieved pay equity
- What impact indirect benefits that are not equally accessible to both men and women have on pay equity

A Human Rights Tribunal Will Focus on Three Issues

In April 1991, a Canadian human rights tribunal held a preliminary hearing on the five complaints referred by the Commission. The tribunal began to hear evidence in September 1991. Of the various issues before it, the tribunal is focusing on the following:

- whether systemic gender bias skewed the results of the 3,200 position evaluations completed by the joint initiative,
- whether the adjustments made by the Treasury Board fully achieved pay equity, and
- what impact indirect benefits that are not equally accessible to both men and women have on the achievement of pay equity.

A Commission official told us that in January 1992, the Treasury Board said that the questionnaires used to collect job content information during the joint initiative should not be admissible before the tribunal. The Treasury Board argued that the information was privileged because it was

collected to facilitate a settlement between management and union representatives. The tribunal ruled that the questionnaires were admissible and is continuing to hear evidence.

The official also told us the Commission expects tribunal hearings to be completed by mid-1994. To limit the potential liability from the tribunal's decision, the Treasury Board is prepared to introduce legislation to make any mandated pay equity adjustments retroactive only to November 1, 1990, the date the Commission referred the complaints to the tribunal.

GAO Canada's Public Service Classification Reform

- In 1989, the Treasury Board began to assess the public service's ability to meet future demands
- The Treasury Board criticized the public service classification system for being too complex and possibly gender- and minority-biased
- In 1991, the public service created the Classification Simplification Task Force

Canada's Public Service Classification Reform

In 1989, concurrent with the joint initiative, the Canadian public service began to examine its ability to meet future internal and external demands. According to a Treasury Board official, this review, known as PS2000, criticized the public service classification system for being administratively complex and possibly gender- and minority-biased. The public service classification system uses approximately 140 job evaluation systems. The 72 public service occupational groups are further classified into subgroups, some of which are evaluated through a unique job evaluation system. The Treasury Board currently uses point factor job evaluation systems for most of these groups, although it also employs predominant degree and level description systems.[11] Table I.3 shows the type of job evaluation system used for each public service occupational group. The use of multiple job evaluation systems restricts the

[11]A point factor job evaluation system uses a set of factors and factor weights to order jobs hierarchically in terms of their value to an employer. Similarly, to rank jobs, a predominant degree job evaluation system uses levels of equally weighted factors. A level description job evaluation system uses job-to-job comparisons.

comparisons of job values between occupations and, thus, the Treasury Board's ability to address pay equity complaints. The Treasury Board official also told us that the failure of the joint initiative to remedy this situation provided further motivation for the public service to pursue classification reform.

A Treasury Board official told us that in January 1991, the Treasury Board set up the Classification Simplification Task Force to (1) design and implement a universal gender-neutral job evaluation system that could be applied to any job within the public service and (2) consolidate occupational groups without affecting current union affiliations of existing groups. The task force is made up of approximately 30 persons who represent the Treasury Board and departmental-level management. In response to a Treasury Board invitation, public service unions have participated on various committees that provided feedback to the task force.

Table I.3: Types of Job Evaluation Systems Used for Occupational Groups in the Public Service

Point factor[a]	Predominant degree[b]	Level description[c]
Administrative services	Agriculture	Actuarial science
Air traffic control	Architecture & town planning	Defense science
Aircraft operations	Biological science	Dentistry
Auditing	Chemistry	Education[e]
Clerical & regulatory[d]	Commerce	Educational support[d]
Communications	Foreign service medicine[f]	Engineering & land survey[e]
Computer systems	Nursing[d,f]	Forestry
Correctional service	Physical sciences	Historical research
Data processing[d]	Psychology	Home economics[d]
Drafting & illustration	Veterinary Medicine	Information services[d]
Economics, sociology, & statistics		Law
Education[e]		Mathematics
Engineering & land survey[e]		Medicine[f]
Electronics		Nursing[d,f]
Engineering & scientific support		Occupational & physical therapy[d]
Financial administration		Office equipment
Firefighters		Pharmacy
General labour & trades		Scientific research[e]
General services		Secretarial, stenographic, & typing[d,e]
General technical		Ship's officers
Heating, power, & stationary plant operations		Social work[e]
Hospital services[g]		Translation[d]
Library science[d]		University teaching
Lightkeepers		
Meteorology		
Organization & methods		
Personnel administration[d]		
Photography		
Primary product inspection		
Program administration		
Purchasing & supply		
Radio operations		
Scientific regulations		
Scientific research[e]		
Secretarial, stenographic, & typing[d,e]		
Senior management group		
Ship's crew		
Ship repair		
Social science support		
Social work[e]		
Technical inspection		
Welfare program		

(Table notes on next page)

Note: Three occupational groups are not listed on this chart. Air announcers is a temporary group with only two incumbents. Management trainee incumbents are evaluated through the job evaluation system of the group in which they are being trained, and printing operations uses a negotiated system to rank jobs.

[a]A point factor job evaluation system consists of a set of factors and factor weights to classify jobs hierarchically in terms of their value to an employer.

[b]A predominant degree job evaluation system employs levels of equally weighted factors to arrange jobs hierarchically.

[c]A level description job evaluation system uses job-to-job comparisons to order jobs hierarchically.

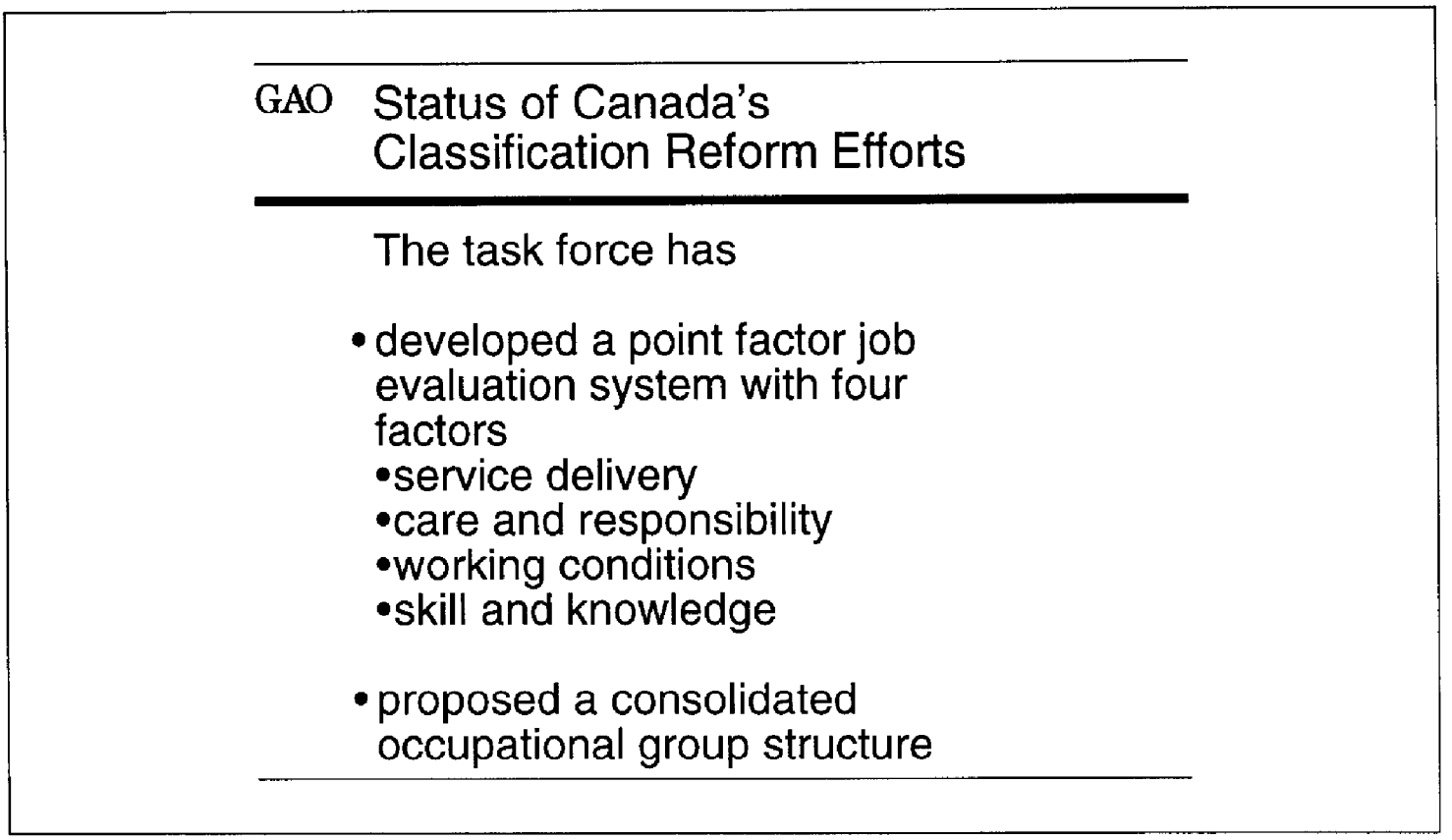
[d]This occupational group is one of the 12 groups that were female-dominated as of June 1992.

[e]The Treasury Board uses both point factor and level description job evaluation systems for different subgroups of this occupational group.

[f]The Treasury Board uses both predominant degree and level description job evaluation systems for different subgroups of this occupational group.

[g]As of June 1992, the hospital services occupational group was gender neutral; however, it was female-dominated at the start of the joint initiative in 1985 and was included in the pay equity study of the public service.

Source: Canadian Treasury Board and Professional Institute for the Public Service of Canada data.



Status of Canada's Classification Reform Efforts

According to the Treasury Board official, the task force has developed a point factor job evaluation system, known as the Universal Job Evaluation Plan, that consists of four factors—service delivery, care and responsibility, working conditions, and skill and knowledge. Table I.4 shows how each factor is further defined by subfactors. The task force is currently working on the selection of factor weights. The official predicted that Canada will pass legislation by the end of 1993 to phase out the current job evaluation systems and replace them with the new universal job evaluation system. However, salaries will continue to be determined through collective bargaining.

The Treasury Board official told us that the Classification Simplification Task Force also proposed a new consolidated occupational group structure to reduce the current 72 occupational groups to 24 while maintaining each group's current union affiliation. In December 1992, the Canadian government passed legislation authorizing the Treasury Board to

amend the specifications and definitions of occupational groups; the conversion process is scheduled to be completed in 1997. The task force has developed several courses to train managers on the implementation of the universal job evaluation system and the use of the new occupational group structure.

Table I.4: Universal Job Evaluation Plan—Factors and Subfactors

Factors	Subfactors
Service delivery	Interaction
	Influence
	Thinking challenge
	Concentration
	Physical demands
Care and responsibility	Responsibility for the work of others
	Care of individuals
	Responsibility for financial resources
	Responsibility for technical resources
Working conditions	Environment
	Effect on health
Skill and knowledge	Context
	Acts and regulations
	Theories and principles
	Methods, techniques, and practices
	Physical dexterity
	Communications

Source: Canadian Treasury Board data.

GAO Employers Covered by Ontario's Pay Equity Act

- Ontario's public service workforce of 89,000 employees
- 33,350 private sector employers who have 10 or more employees
- 3,200 public sector employers

Before the act was amended, 39 percent of Ontario's female workforce could have been eligible for pay adjustments

Employers Covered by Ontario's Pay Equity Act

Ontario's 1987 Pay Equity Act requires private sector employers who have 10 or more employees and all public sector employers to pay wages to incumbents of female-dominated jobs[12] that are at least equal to those paid to incumbents of comparable[13] male-dominated jobs within the same establishment.[14] The act does not address systemic minority-based discrimination.

Ontario's public service is composed of approximately 89,000 employees, or about 2 percent of Ontario's total workforce of 4.8 million. A Pay Equity Office official told us that the act covers about 33,350 private sector employers who have 10 or more employees and 3,200 public sector

[12]The act defines a female-dominated job as one in which 60 percent or more of the incumbents are female and a male-dominated job as one in which 70 percent or more of the incumbents are male.

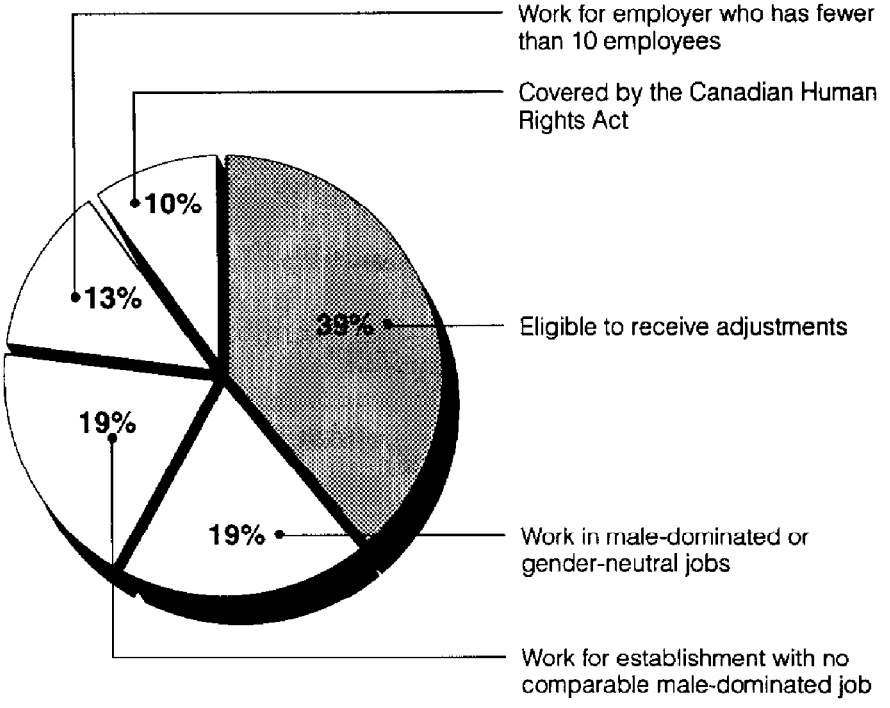
[13]Ontario's Pay Equity Act requires employers to determine a job's "value" on the basis of skill, effort, responsibility, and working conditions.

[14]An establishment consists of all employees of one employer located in a geographic region.

employers in addition to the provincial public service. Before the act was amended, effective July 1, 1993, 39 percent, or about 860,000 of the women in Ontario's workforce, could have been eligible for pay equity adjustments on the basis of Ontario's Pay Equity Act. This number excluded female employees who (1) worked in either male-dominated or gender-neutral jobs;[15] (2) worked for establishments with no comparable male-dominated jobs; (3) worked for employers who have fewer than 10 employees; or (4) were covered by the Canadian Human Rights Act. Employers were not required to adjust the wages for female-dominated jobs if no comparably valued male-dominated jobs existed within their establishments. Figure I.4 shows the reasons women were ineligible to receive pay equity adjustments under Ontario's Pay Equity Act (before it was amended) as percentages of the female workforce; the shaded area represents the percentage of women who could have been eligible to receive adjustments.

[15]We use the term gender-neutral job as one in which women represent less than 60 percent and men less than 70 percent of the incumbents.

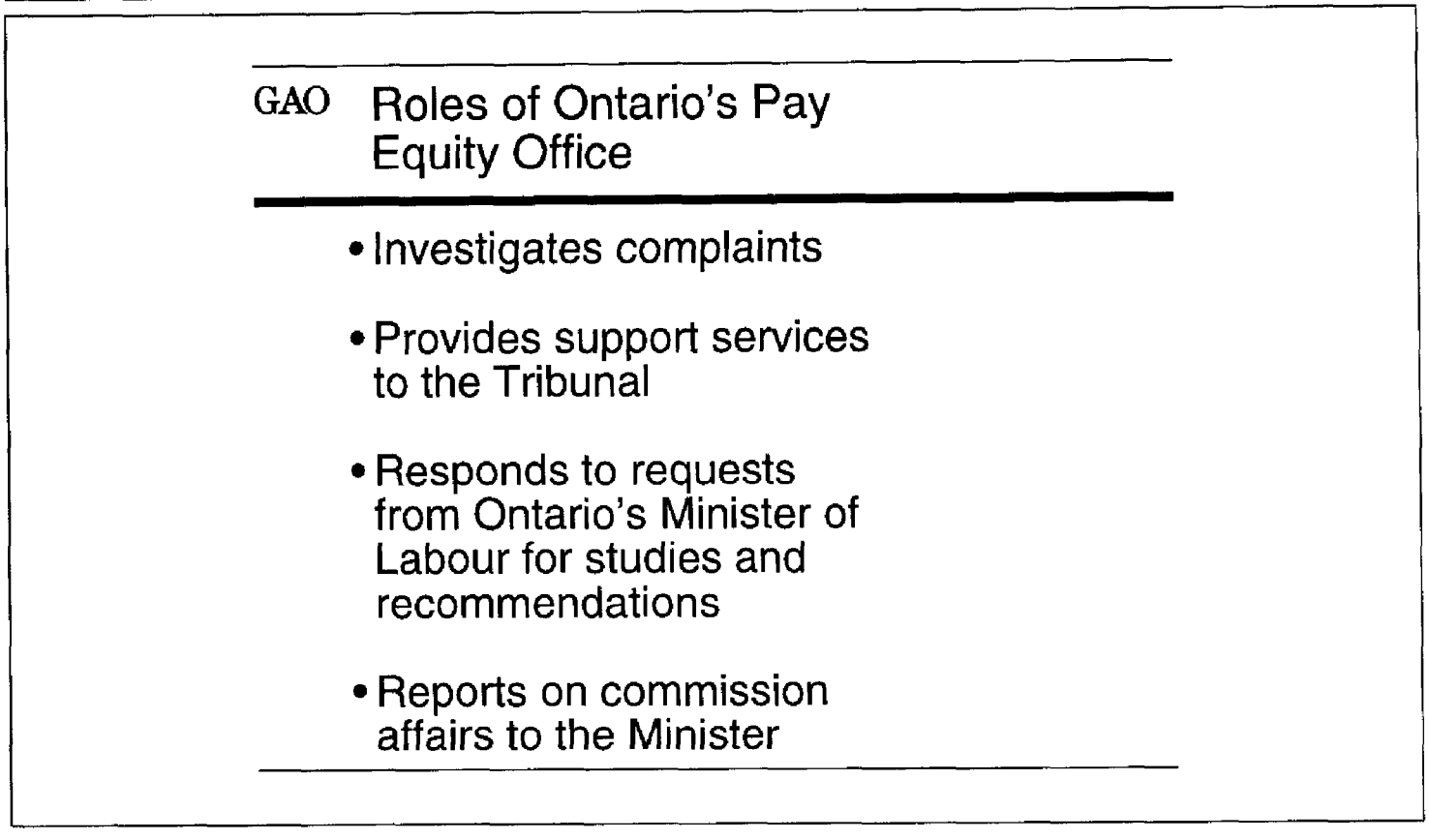
Figure I.4: Reasons Women Were Ineligible to Receive Pay Equity Adjustments Under Ontario's Pay Equity Act Before Its Amendment



Note 1: Statistics Canada reported that Ontario's total female workforce was composed of approximately 2,200,000 employees as of 1992.

Note 2: Effective July 1, 1993, Ontario amended its Pay Equity Act to require employers to use alternative comparison methods when no comparable male-dominated jobs exist within the establishment.

Source: Ontario's Pay Equity Commission data.

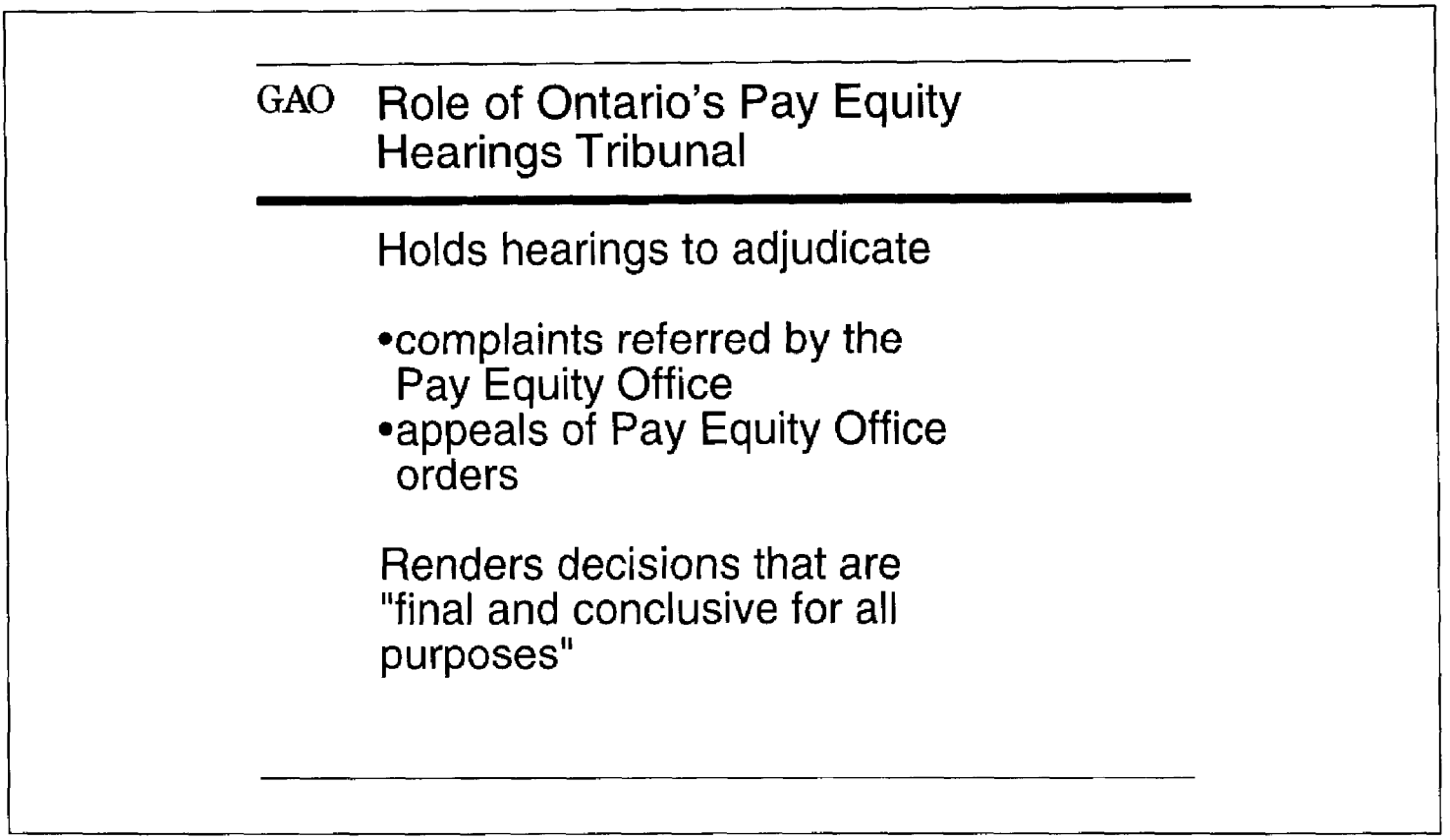


Roles of Ontario's Pay Equity Office

Ontario's Pay Equity Act established a commission that includes a Pay Equity Office and a Pay Equity Hearings Tribunal. The act requires the Pay Equity Office to investigate complaints filed with the commission. Pay equity complaints generally consist of (1) objections to the preparation or implementation of a pay equity plan—a document that details how an employer will achieve pay equity or (2) allegations of a violation of the act, such as intimidation by an employer because an employee complained. The Pay Equity Office may decide not to consider complaints it finds to be trivial, made in bad faith, or not within the commission's jurisdiction.

The act also requires the Pay Equity Office to provide support services to the Tribunal; respond to requests by Ontario's Minister of Labour for studies, reports, or recommendations related to pay equity; and report annually on Commission activities and affairs to the Minister. The Pay Equity Office may also research and make recommendations to the Minister on any aspect of pay equity as well as provide public education

programs. A Pay Equity Office official told us that the Office provides guidelines, newsletters, and a telephone hotline.



Role of Ontario's Pay Equity Hearings Tribunal

When the Pay Equity Office cannot mediate an agreement between the employer and the complainant, it issues an order specifying how the employer must resolve the complaint or refers the complaint to the Pay Equity Hearings Tribunal. The Office can request that the Tribunal enforce Pay Equity Office orders. The act allows employers and complainants to appeal a Pay Equity Office order to the Tribunal. The complainant can also request a hearing before the Tribunal when the Pay Equity Office decides not to consider a complaint. The Tribunal has exclusive jurisdiction, and the act states that its decisions are "final and conclusive for all purposes;" however, according to a Pay Equity Office official, the Ontario Court may review Tribunal decisions for errors of law or jurisdiction.

GAO Ontario Requires Employers To Develop Pay Equity Plans

Employers must
- develop separate plans for each bargaining unit and all nonunion employees within each establishment
- use one of three methods to calculate pay equity adjustments
- meet deadlines specified in the act for completing plans and making initial pay equity adjustments

Ontario Requires Employers to Develop Pay Equity Plans

The act requires private sector employers who have more than 100 employees and all public sector employers to develop, display in the establishment, and implement pay equity plans. Employers must develop a separate pay equity plan for (1) each bargaining unit and (2) all nonunion employees within each establishment. Each plan must identify

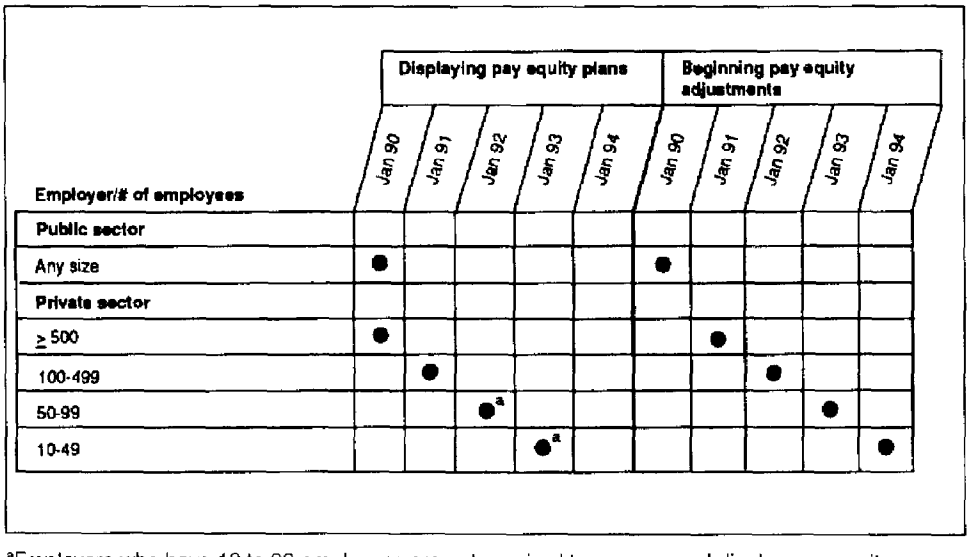
- all male- and female-dominated job classes within the bargaining unit or establishment,[16]
- the comparison system used to determine the relative value of each job,
- comparison results,
- justifications for wage differences for comparably valued jobs,
- required pay equity adjustments, and
- the date the first pay adjustments will be made as specified in the act.

[16]A job class consists of positions that have similar duties, responsibilities, and qualifications; are filled by similar recruiting procedures; and have the same compensation schedule.

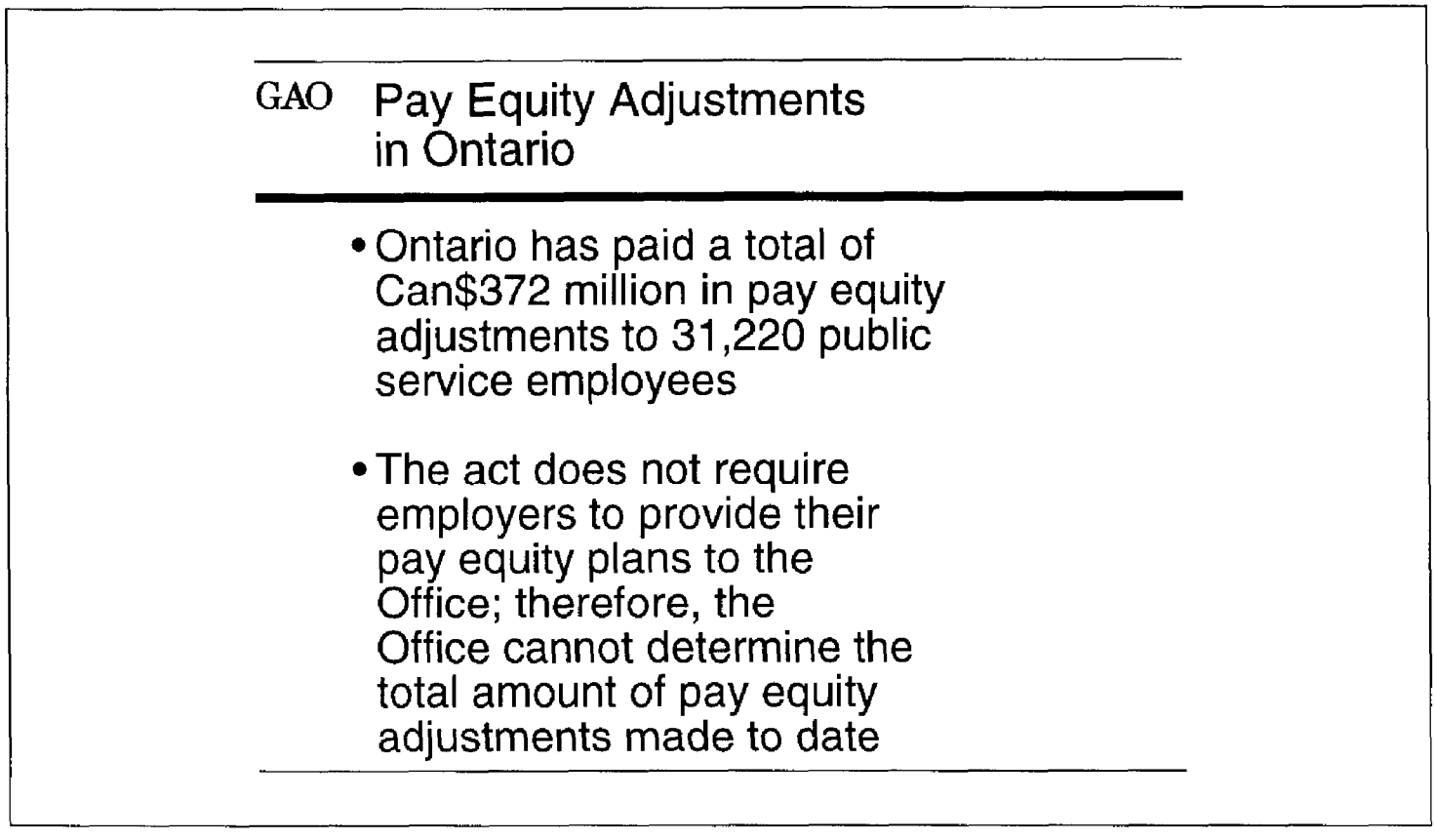
The act requires employers to use one of three methods—job-to-job, proportional value, or proxy—to calculate pay equity adjustments; however, it allows employers to pay different wages for comparably valued jobs if the difference can be justified on the basis of five exclusions. These exclusions include seniority and merit compensation based on formal performance ratings.

As shown in figure I.5, Ontario's Pay Equity Act requires employers to display their pay equity plans in their establishments and make initial pay equity adjustments by specified deadlines. Private sector employers must make annual pay equity adjustments of at least 1 percent of their previous year's payroll until they achieve pay equity. A Pay Equity Office official told us that the amendment to the act also extended the date by which public sector employers must achieve pay equity from January 1, 1995, to January 1, 1998.

Figure I.5: Deadlines Specified in Ontario's Pay Equity Act



[a]Employers who have 10 to 99 employees are not required to prepare and display pay equity plans. However, if they opt not to prepare and display the plans, they must achieve pay equity by January 1, 1993, or January 1, 1994, depending on the size of their establishment, rather than make annual adjustments of at least 1 percent of their previous year's payroll. Employers who choose to prepare and display pay equity plans need only begin making pay equity adjustments by those same dates.



Pay Equity Adjustments in Ontario

An Ontario public service official told us that in 1990 the public service posted two pay equity plans and increased the annual wages for 31,220 bargaining and nonbargaining employees (about 35 percent of the provincial public service) by a total of approximately Can$124 million. The official also told us that as a result of these recurring pay equity adjustments, the public service had paid a total of Can$372 million through 1992. Because the law does not require municipalities, school boards, universities, and private sector employers in Ontario to provide copies of their pay equity plans to the Ontario Pay Equity Office, it could not determine the amount of these pay equity adjustments.

GAO Complaints Received by Ontario's Pay Equity Office

From fiscal year 1989 through 1992, the Pay Equity Office

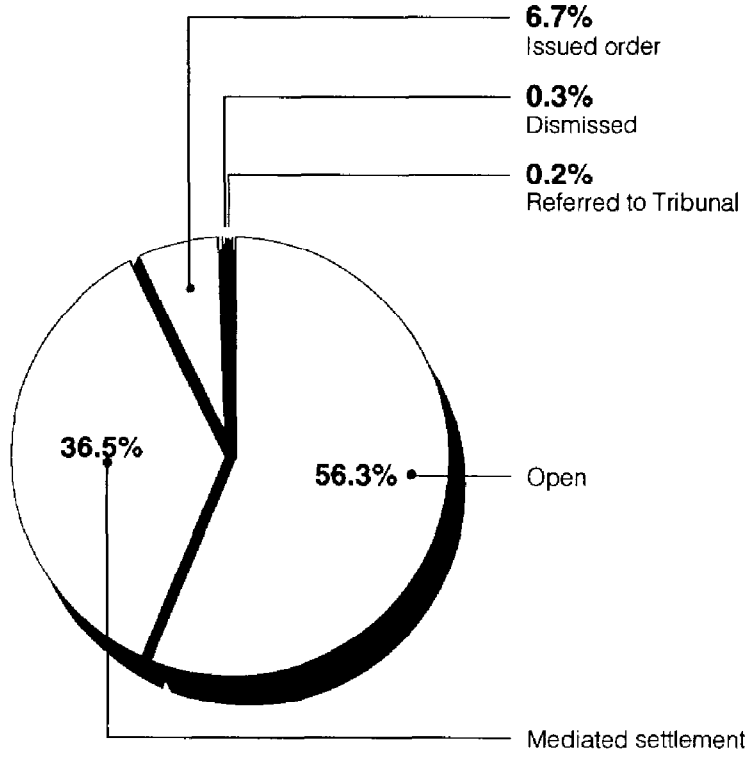
- received 2,913 complaints
- resolved 1,272 complaints

Complaints Received by Ontario's Pay Equity Office

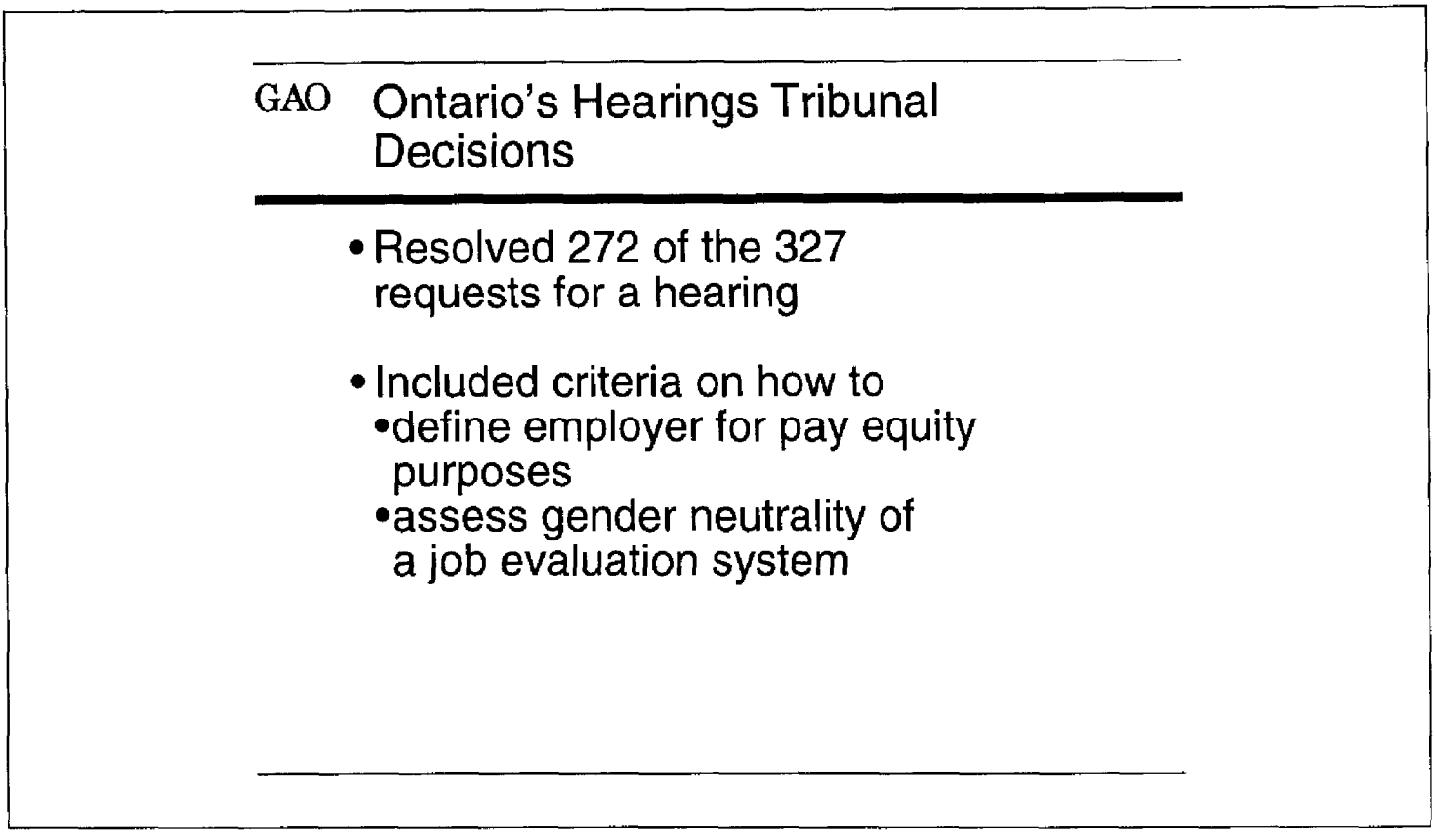
To resolve pay equity complaints, Ontario's Pay Equity Office dismisses unsubstantiated complaints and those outside the jurisdiction of the commission, mediates settlements between employers and complainants, orders employers to take corrective action when a settlement cannot be mediated, or refers the complaint to the Pay Equity Hearings Tribunal. From fiscal year 1989 through 1992,[17] the Pay Equity Office reported receiving 2,913 pay equity complaints. Although 1,641 of the complaints remained open at the end of 1992, the Pay Equity Office reportedly mediated settlements for 1,062, issued orders for 195, dismissed 9, and referred 6 to the Tribunal (see fig. I.6). A Pay Equity Office official told us that during fiscal year 1993, the Office received 618 new complaints; mediated 657 settlements; and closed 38 complaints through an order, a dismissal, or a referral to the Tribunal. The official was unable to provide more details on the disposition of the 38 complaints but said that 1,564 complaints remained open at the end of the year.

[17]Ontario's fiscal year is from April 1 to March 31.

Figure I.6: Disposition of Complaints Received by Ontario's Pay Equity Office From 1989 Through 1992



Source: Ontario's Pay Equity Commission data.



Ontario's Hearings Tribunal Decisions

By the end of fiscal year 1992, Ontario's Pay Equity Hearings Tribunal had received a total of 327 requests for a hearing from the Pay Equity Office, employers, and complainants. The Tribunal resolved 272 (83 percent) of the caseload, while 55 cases remained unresolved.

Tribunal decisions have included criteria on how to (1) define the employer for pay equity purposes and (2) assess the gender neutrality of a job evaluation system. Before its amendment, effective July 1, 1993, Ontario's act required employers to calculate pay equity adjustments using the job-to-job methodology that involves comparing female-dominated jobs with comparably valued male-dominated jobs in the same establishment. How an employer is defined can affect the number of male-dominated jobs available for pay equity comparisons.

In the case of Haldimand-Norfolk (No. 3), 1989, the Tribunal found that the Regional Municipality of Haldimand-Norfolk was the employer for its

police force, which increased by 10 the number of male-dominated jobs available for comparison. The Tribunal also specified the criteria that were to be examined when employers define who the employer was for pay equity purposes, which included (1) where within the organization the overall financial responsibility rested, (2) where the compensation practices were decided, (3) the nature of the business, and (4) the definition of employer that would have been the most consistent to achieve pay equity. The Tribunal has used these four factors for defining employers in subsequent hearings.

The Tribunal addressed the issue of gender neutrality for the first time in its written decision for Haldimand-Norfolk (No. 6), 1991. The Ontario Nurses Association alleged that the municipality's proposed job evaluation system did not value accurately the work done by nurses; the Tribunal agreed. In its decision, the Tribunal identified four parts of a comparison system that must be negotiated with employee unions and described in an employer's pay equity plan. They were how the employer would (1) collect accurate job content information, (2) develop the mechanism to convert job content information to relative job worth scores, (3) apply this conversion mechanism, and (4) compare jobs on the basis of value.

The Tribunal also provided guidance on how the employer would assess the components of a job evaluation system for gender neutrality. It said that job content information collected by the employer must represent the full range of work within the establishment; include all job characteristics, particularly those traditionally overlooked or undervalued in female-dominated jobs; and be accurate and consistent for each job. The Tribunal said that the mechanism used to convert job content information to job worth scores must incorporate the statutory criteria—skill, effort, responsibility, and working conditions—and that any subfactors or factor weights must be selected in a bias-free manner. Employers must apply the job evaluation system consistently without regard to the gender of the incumbents of a job.

Summaries of Legislative Background and Case Law

Summaries of Legislative Background and Case Law

I. Canadian Federal Pay Equity

A. International Obligations

1. International Labor Organization

In 1972 Canada ratified Convention 100, the Equal Remuneration Convention, which was adopted by the International Labor Organization in 1951. Article 2 of Convention 100 requires each signatory to promote the principle of equal remuneration for men and women for work of equal value by means of (1) national laws or regulations, (2) legally established or recognized machinery for wage discrimination, (3) collective agreements between employers and workers, or (4) a combination of these various means.

Article 3 directs that where it would be helpful, an objective job appraisal system should be implemented. It also allows for differential pay rates, which correspond to differences in the work that is to be performed without regard to gender. Article 4 requires signatories to cooperate with employers' and workers' organizations when the signatories promote comparable worth under the convention.

2. United Nations Conventions

In addition to being a signatory of Convention 100, Canada is a signatory to two United Nations Conventions supporting the concept of pay equity. In 1976, Canada signed the United Nations International Covenant on Economic, Social and Cultural Rights, which contains a commitment to equal remuneration for work of equal value. Specifically, article 7 of this covenant requires "fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work."

Moreover, in 1981 Canada ratified the United Nations Convention on the Elimination of All Forms of Discrimination Against Women. Article 11(1) of this convention requires member governments to take all appropriate measures to eliminate discrimination against women in employment in order to ensure, on a basis of equality of men and women, the right to equal remuneration, including benefits, and the right to equal treatment for work of equal value as well as

equality of treatment in the evaluation of the quality of work.

B. Canadian Federal Equal Pay Legislation

1. Historical Progression of Equal Pay Legislation

The first equal pay legislation adopted at the federal level in Canada was the Female Employees Equal Pay Act, passed in 1956.[1] This act provided in section 4(1):

> "No employer shall employ a female employee for any work at a rate of pay that is less than the rate of pay at which a male employee is employed by that employer for identical or substantially identical work."

Essentially, this was an equal pay for equal work law. The act provided in section 4(2) that work was deemed identical if "the job, duties or services the employees are called upon to perform are identical or substantially identical." Exceptions in section 4(3) were made for differences in pay rates based on seniority, the location of the job, or any factor other than gender, once the appropriate official had determined which factor would justify such a difference.

The language of the equal pay provision changed in 1971 with amendments to the Canada Labour (Standards) Code. The new language provided the following:

> "No employer shall establish or maintain differences in wages between male and female employees, employed in the same industrial establishment, who are performing, under the same or similar working conditions, the same or similar work on jobs requiring the same or similar skill, effort and responsibility."[2]

This act also officially repealed the Female Employees Equal Pay Act. The new equal pay language remained in effect until 1977, when the Canadian

[1]Ch. 38, 1956 Can. Stat. 257.

[2]R.S.C., ch. 17 (2nd Supp.), s. 38.1.

Human Rights Act was passed and became the primary equal pay legislation at the federal level.

2. Current Equal Pay Legislation--The Canadian Human Rights Act

The current federal legislation in Canada dealing with equal pay is the Canadian Human Rights Act, which was the first federal act to prescribe the concept of equal pay for work of equal value.[3] Section 11(1) of the act states:

> "It is a discriminatory practice for an employer to establish or maintain differences in wages between male and female employees employed in the same establishment who are performing work of equal value."

Other provisions in section 11 address such issues as the value of work, differences in wages based on reasonable factors (not including gender), and the definition of wages.

Section 26 of the Canadian Human Rights Act created the Canadian Human Rights Commission. In addition to the administration of the Canadian Human Rights Act, the Commission's general duties and functions include educational, research, and liaison activities.[4]

The Commission determined that the following 10 factors justify different wages for males and females: (1) different performance ratings, (2) seniority, (3) red circling (wage curtailment following downgrading), (4) a rehabilitation assignment, (5) a demotion pay procedure, (6) a procedure of phased-in wage reductions, (7) a temporary training position, (8) a labor shortage requiring premium wages, (9) a change in the work performed, and (10) regional rates of wages.[5] The Commission also deals with complaints alleging discriminatory practices under the act. Under

[3]Canadian Human Rights Act (R.S.C. 1985, c. H-6).

[4]The Commission's powers, duties, and functions are lengthy and listed in detail in section 27 of the act.

[55]Equal Wages Guidelines, 1986 [SOR/86-1082], s.16.

section 40 of the act, any individual having reasonable grounds for believing that a person is engaging or has engaged in a discriminatory practice may file a complaint with the Commission. The Commission itself may also initiate a complaint based upon the same criteria.

Under section 41 of the act, the Commission is required to deal with any complaint filed with it unless the alleged victim has not exhausted administrative or grievance procedures otherwise available or if the complaint is one more appropriately dealt with under another act of Parliament or beyond the jurisdiction of the Commission, is trivial, vexatious or made in bad faith, or is based on events that occurred more than 1 year before the Commission received it.

If the complaint meets the statutory criteria, the Commission may elect to follow a number of complaint resolution processes. The Commission may designate an investigator to investigate a complaint.[6] Under the provisions of section 44 of the act, the investigator, upon the conclusion of the investigation, submits a report of the findings to the Commission. The Commission may then adopt the report if it feels the complaint has been substantiated or dismiss the report if it finds the complaint has not been substantiated.

At any time after the filing of a complaint and before the commencement of a hearing before a human rights tribunal, a settlement may be agreed upon by the parties involved. The settlement is then referred to the Commission for approval or rejection.[7] If the complaint is not settled in the course of an investigation, dismissed by the Commission, or settled after receipt of a report adopted by the Commission, the Commission may appoint a conciliator for the purpose of attempting to bring about a settlement of the complaint.[8] The Commission may also, at any time after the filing of a complaint, refer the matter to the President of the

[6]Canadian Human Rights Act, s. 43(1).

[7]Id., s. 48(1).

[8]Id., s. 47(1).

Canadian Human Rights Tribunal Panel, who appoints a human rights tribunal to inquire into the complaint.[9]

(a) Brief Overview of a Human Rights Tribunal and How It Operates

A human rights tribunal as set forth in section 49 may not consist of more than three members appointed by the Human Rights Commission. The tribunal may not have a member who has acted as an investigator or conciliator in the complaint before the tribunal, nor may the tribunal have a member who is an officer or employee of the Commission. Individuals appointed to the tribunal are selected from prospective members chosen by the Governor in Council.

As provided in section 50 of the act, a tribunal is required to inquire into the complaint before it and give all parties to whom notice has been given a full and ample opportunity, in person or through counsel, of appearing before the tribunal to present evidence or make representations. A tribunal has the power to summon witnesses, compel witnesses to give oral or written evidence, administer oaths, and require the production of documents or other evidence, whether or not such evidence or information would be admissible in a court of law. Under section 51, the Human Rights Commission represents the public interest before the tribunal.

Section 53 provides that after the tribunal has completed its inquiry, it will dismiss a complaint if it finds the complaint to be unsubstantiated. If the tribunal finds the complaint to be substantiated, however, it may make an order against the person found to be engaging in or to have engaged in the discriminatory practice that served as the basis for the complaint. The tribunal may order that such a person (1) cease such discriminatory practice and take measures to prevent the same or a similar practice from occurring in the future, (2) make available to the victim of the

[9]Id., s. 49(1).

discriminatory practice such rights, opportunities, or privileges that are or were denied, (3) compensate the victim for wages and expenses the victim was deprived of as a result of the discriminatory practice, and (4) compensate the victim for any or all additional cost of obtaining alternative goods or services incurred by him/her as a result of the discriminatory practice.

Special compensation, not exceeding Can$5,000, may be awarded to the victim if the tribunal finds that a person has engaged in a discriminatory practice wilfully or recklessly or the victim of the discriminatory practice has suffered in respect of feelings or self-respect as a result of the practice.

(b) Canada Labour Code

The Canada Labour Code, which applies to public employees, states that where an inspector from Labour Canada has reasonable grounds at any time for believing that an employer is engaging or has engaged in a discriminatory practice described in section 11 of the Canadian Human Rights Act, the inspector may notify the Canadian Human Rights Commission or file a complaint with the Commission under the applicable rules.[10] Three references have been made. Two have been resolved without initiation of a complaint. The third has resulted in an equal pay study.

The government of Canada, in a report to the International Labour Organization, stated that Labour Canada has undertaken a proactive program to ensure pay equity in federally regulated establishments. This program includes educational and consultative services and acts to monitor employer progress toward compliance with pay equity goals. Labour Canada's program also includes inspection activities, which began

[10]Canada Labour Code, R.S.C. 1985, ch. L-2, Part III, s. 182(2).

in fiscal year 1989 and are designed to ensure the integrity of the compliance process.[11]

3. Summaries of the Five Referrals to Date of Equal Pay Cases to a Human Rights Tribunal

In the first equal pay case to reach a human rights tribunal, Local 916 of the Energy, Oil and Chemical Workers Union at the Glace Bay heavy water plant near Sydney, Nova Scotia, filed a complaint with the Human Rights Commission in April 1979. The union charged that female clerks and secretaries were doing work of equal value to that of male plant workers but were being paid less. The plant was operated by Atomic Energy of Canada Ltd.

The Commission initiated an investigation, during which it independently evaluated jobs in the two occupational groups and rated them using the company's evaluation plan. Using a modified plan from a private consulting firm, the Commission corroborated its results and found that its evaluations substantiated the complaint. The Commission concluded that there was an unfair 70-cents-per-hour wage gap between the complainants and comparative jobs at all levels.

The employer, rejecting a proposal to settle the complaint, claimed the complaint was made in bad faith and that the union should have used the collective bargaining process to obtain pay adjustments. The company claimed that the pay differential between the two groups was not based on gender but on the value, to the company, of different responsibilities. As a result of the company's refusal to negotiate a settlement, the Commission asked that a human rights tribunal be appointed to inquire into the complaint.

In 1985, the union requested that the tribunal dismiss the complaint because it claimed a settlement had been negotiated. The Commission objected, stating that it was a party to the complaint and had not seen the settlement. The Commission withdrew its complaint in 1987, however, because the plant had closed. A settlement worth Can$130,000 was made.

[11]Report by the Government of Canada on Convention 100 for the period July 1, 1989 to June 30, 1991.

The tribunal in this case did not address any substantive equal pay issues because of the withdrawal of the complaint. The tribunal ruled only on jurisdictional matters resulting from procedural issues raised by the company and the Commission.

The second tribunal decision was based on a complaint filed by the Public Service Alliance of Canada (PSAC) in 1981 on behalf of hospital services employees, claiming that pay differences between similar jobs were based on gender. The Commission, during its investigation, never completed an evaluation of the jobs because the employer questioned whether the hospital services classification was female-dominated. The Commission then asked that a tribunal be appointed to address that issue before job evaluations were done.

The tribunal ruled that the hospital services classification was a female-dominated group. At the time of the ruling, this group of employees was 57 percent female. The employer maintained that a group must be 60 percent female to be considered predominantly female. The parties reached a partial settlement to which the tribunal consented. In 1987, the tribunal ordered the employer to pay 5,000 present and former workers an interim settlement of Can$30 million in back pay and salary adjustments retroactive to September 1980.

Two issues remained in dispute and were the subject of further tribunal hearings during 1989 and 1990. The two issues were (1) possible gender bias in the job evaluation system that was used in developing the partial settlement and (2) alleged undervaluing of two jobs, community health representatives on native reserves, and dietary helpers at a Montreal hospital.

In April 1991, the tribunal ordered the employer to revise the job evaluation standard used to establish relative values within the hospital services classification. The tribunal also ordered increases to the salaries of about 350 community health workers by one level, which was about Can$2,000 annually. Most of these community health workers were native women. The tribunal found that their work had been undervalued because of a failure to take into consideration the fact that the position required caring for the sick and elderly and an understanding of both native and western cultures. The government

was ordered to revise its classification system, in consultation with the Commission, to make it gender neutral.

This tribunal decision was significant for several reasons. First, the interim award of Can$30 million was the largest in the Commission's history. Moreover, this was the first time a federal tribunal had made gender bias a central element in a decision. It was also the first time the Commission was formally ordered to play a consultative role in the development of a fair wage determination system.

The third tribunal is currently ongoing. In 1985, the Treasury Board and 13 of the unions that represent employees of the Canadian federal government created the Joint Union Management Initiative (JUMA), which was to examine wage structures across the federal government. This effort, later joined by a 14th union, was designed as an alternative to a case-by-case approach to pay equity. JUMA evaluated approximately 3,200 jobs during 5 years, including jobs in the nine female-dominated occupational groups in the federal public service, before it collapsed without agreement. The main points of disagreement concerned possible gender bias in the job evaluations and how to assess and close any wage gap in the public service.

The Treasury Board then unilaterally modified the job evaluations completed by JUMA to correct perceived systemic gender bias and announced that it would pay Can$317 million to clerks, secretaries, and education support workers or from 4 to 7 percent of the employees' annual salaries, in pay equity adjustments. It planned on paying these categories a further Can$78 million in 1991-92.

One of the unions, the Public Service Alliance of Canada, claimed the wage gap was between 15 to 20 percent and filed an all-encompassing complaint with the Commission in February 1990, alleging unequal wages for work of equal value performed by all six occupations it represents. These occupations include clerical and regulatory, secretarial and typing, educational support, library science, data processing, and hospital services.

The Commission focused its investigation on the following three issues: (1) whether bias existed in

the evaluations completed by JUMA, (2) whether the Treasury Board's wage adjustments of 4 to 7 percent had eliminated wage discrimination, and (3) what was the possible impact on indirect wages or benefits.

On the issue of possible gender bias, the Commission concluded that no systemic gender bias had affected the job evaluations completed by JUMA. Therefore, the Treasury Board's modifications to the job evaluations were not warranted. Furthermore, the Commission determined that despite the Treasury Board's pay equity adjustments an unjustified pay difference remained in all nine female-dominated occupational groups. Concerning indirect wages, the Commission's investigation concluded that not all of the benefits were equally available to men and women. The finding of a wage gap, combined with the failure of the parties to agree on how to close the gap, served as the basis for the Commission to refer the case to a tribunal, which it did in October 1990. In April 1991, the Commission also sent the issue of indirect wages to the tribunal for inquiry. The tribunal began hearings in the fall of 1991 on the three issues referred to it by the Commission.

In March 1992, the Human Rights Commission referred a fourth equal pay case--that of the Public Service Alliance of Canada v. Canada Post--to a tribunal. The Alliance alleged that its 2,000 clerical employees were paid less than carriers and inside workers doing work of equal value. The Commission investigation sustained the allegation. The tribunal began hearings in September 1992. At issue is the employer's claim that the male-dominated jobs should be in a different establishment, which would prevent comparisons from being made.

In June 1992, the Commission referred its fifth equal pay case to a human rights tribunal. The Public Service Alliance of Canada was also the complainant, and the respondent was a small crown corporation, called Non-public Funds, which provides retail and other services to military bases. The Commission examined two issues--whether there was a wage gap between administrative (female) employees at the company's headquarters in Ottawa and technical employees and whether the job evaluation practices of the company (both present and proposed) were gender-biased. The existence of a wage gap was confirmed and referred.

The second issue was sent for conciliation, but insufficient changes to the proposed job evaluation plan were made to satisfy either the Commission or the complainant. Consequently, this issue was referred in March 1993 to the same tribunal. Concurrently, the parties are attempting to work out a settlement to the wage gap question.

II. Ontario Pay Equity

A. Ontario Legislation Dealing With Equal Pay for Equal Work

The first equal pay law enacted in Ontario--also the first equal pay law enacted in the entire British Commonwealth--was the Female Employees Fair Remuneration Act (FEFRA) in 1951.[12] FEFRA stated in section 2(1):

> "No employer and no person acting on his behalf shall discriminate between his male and female employees by paying a female employee at a rate of pay less than the rate of pay paid to a male employee employed by him for the same work done in the same establishment."

The act also provided in section 2(2) that a difference in pay based on any factor other than gender did not constitute a violation. The act directed that upon receipt of a complaint, a conciliation officer would inquire into the complaint, try to effect a settlement, and report the results of his inquiry to the Director of the Fair Employment Practices Branch of the Department of Labour.[13]

If the conciliation officer was not able to effect a settlement, the act stated in section 4 that a commission would be appointed to which the parties involved could present evidence and make submissions. If the commission found that the complaint was supported by evidence, it had the power to recommend to the Director what course of action to follow concerning the complaint. The Minister of Labour, on the recommendation of the Director, could issue whatever order he deemed necessary to carry the recommendations

[12] Female Employees Fair Remuneration Act, S.O. 1951, c. 26.

[13] Id., s. 3(1)-(4).

of the commission into effect, and the order would be final; failure to comply with an order made under FEFRA would be an offense punishable by a fine.

For a detailed analysis on the impact of the 1951 act, see Malarkey and Hagan, The Socio-Legal Impact of Equal Pay Legislation in Ontario, 1946-1979, 27 Osgoode Hall L.J. 295, 323 (1989).

The 1951 act was incorporated into the Ontario Human Rights Code in 1962.[14] Accordingly, the equal pay provisions of FEFRA were administered by the Ontario Human Rights Commission. In addition to recovering back wages for female employees, the Ontario Human Rights Commission engaged in a widespread educational effort to inform employers, employees, and the public about the equal pay for equal work provisions over which it had responsibility.[15]

In 1969, the equal pay provisions were expanded to the Ministry of Labour and became part of the Employment Standards Act.[16] The Employment Standards Act changed the standard of equal pay for equal work to provide the following in section 19(1):

> "No employer or person acting on behalf of an employer shall discriminate between his male and female employees by paying a female employee at a rate of pay less than the rate of pay paid to a male employee, or vice versa, employed by him for the same work performed in the same establishment, the performance of which requires equal skill, effort, and responsibility, and which is performed under similar working conditions, except where such payment is made pursuant to,
>
> (a) a seniority system;
>
> (b) a merit system;
>
> (c) a system that measures earnings by quantity or quality of production; or

[14]S.O. 1961-62, c. 93, s. 5; R.S.O. 1990, c. H-19, s. 5(1).

[15]Malarkey and Hagan, supra., p. 323 (1989).

[16]S.O. 1968, c. 35, s. 19(1); R.S.O. 1990, c. E-14, s. 32.

(d) a differential based on any factor other than [gender]."

The new law provided a more clearly defined standard of "same work." It also prescribed a more proactive approach to equal pay. Under the Employment Standards Act, the Director of the Employment Standards Branch was given expanded authority to determine the amount of money owed to an employee when the Director found that an employer had violated the equal pay provision.[17] The Director was given the authority to require any employer or employee to furnish any written or oral information required, to examine records and inspect premises, and to question any employee apart from his employer.[18] According to Malarkey and Hagan, who we cited earlier, this proactive authority was meant to correct an apparent fault of the previous equal pay legislation.

The Minister of Labour, when introducing the bill that was to become the Employment Standards Act in the Ontario legislature, stated:

> "The commission (Human Rights Commission) acts only on the receipt of a complaint. This provision has been transferred to The Employment Standards Act where it will be enforced on a regular basis by the appropriate field staff of the department. The wording of the section has been broadened and clarified to assist field staff in making on-the-job assessments."[19]

The act also contained more stringent enforcement measures. Section 35(1) provided that every employer who dismissed, threatened to dismiss, or otherwise discriminated against an employee who brought a complaint under the act or took any other action entitled to him/her under the act, could be fined up to Can$1,000. Employers who were found guilty of violating any other provision under the act could also be fined

[17]Id., s. 19(4).

[18]Id., s. 33.

[19]Malarkey and Hagan, supra., p. 323.

Can$1,000 and be forced to pay any back pay owed to employees.[20]

The Employment Standards Act was the subject of much litigation, and in some cases, courts read its equal pay provisions rather broadly, even before it was amended in 1974.

1. Regina v. Howard et al., Ex parte Municipality of Metropolitan Toronto

   In this case, the Director of the Employment Standards Branch of the Ontario Department of Labour determined that female nurses' aides and male orderlies at a Toronto nursing home were performing equal work within the meaning of the Employment Standards Act but were being paid unequal rates of pay established by a collective agreement.[21] He therefore ordered the employer to pay the nurses' aides the appropriate sums they were due. The Executive Director of Manpower Services for the Ontario Department of Labour reviewed the Director's order and made the same determination.

   A lower court quashed the determinations, finding as a matter of law that both the Director and Executive Director had interpreted the equal pay provision of the Employment Standards Act incorrectly to "mean that it had application to cases where men and women were doing work that was not the same but substantially of the same character."[22] The Ontario Court of Appeal disagreed with this view.

   The court stated that "to construe 'the same work' to mean 'the identical work' is to render completely redundant the words following 'the performance of which requires equal skill, effort and responsibility.'"[23] The court also found that the work being performed by male and female employees is the key criterion to emphasize in making an equal pay determination under the Employment Standards

[20] Id., s. 36.

[21] [1970] 3 O.R. 555; (1970), 13 D.L.R.(3d) 451.

[22] Id., at 556.

[23] Id., at 557.

Act, not their terms of hiring. The lower court had taken the view that the employees concerned had to be hired to perform the same work in order to invoke application of the equal pay provision.

Accordingly, the court determined that as a matter of law, there was no error in the Director and Executive Director's interpretation of the equal pay provision of the Employment Standards Act. The court also emphasized that the determinations made by the Director and Executive Director concerning the equal work status of nurses' aides and orderlies were factual in nature and thus, could not be afforded any value as precedent.

2. Re Board of Governors of the Riverdale Hospital and The Queen in Right of Ontario

In this case, the Director of the Employment Standards Branch of the Ontario Department of Labour made a determination that female nonregistered nursing assistants were performing the same work as male nursing orderlies and ordered the Riverdale Hospital to pay nearly Can$250,000 to female nonregistered nursing assistants.[24] The hospital applied for a review of this determination, and the Minister of Labour appointed a board of inquiry, which found that the differences between the work of the nonregistered nursing assistants and nursing orderlies "are not sufficiently significant or consequential to support a finding that the work of these two classifications of nursing personnel is not substantially the same."[25] The hospital appealed this determination to the Ontario Court of Appeal.

Counsel for the hospital claimed that there could be no discrimination within the meaning of the equal pay provision of the Employment Standards Act unless the work performed was work for which either a male or female employee could be hired. However, he conceded that it was work performed in the same establishment, requiring equal skill, effort, and responsibility and that it was performed under similar working conditions. In this case, for

[24][1973] 2 O.R. 441.

[25]Id., p. 445.

intimate matters of personal hygiene, female nursing assistants attended to female patients, and male orderlies, to male patients.

The court pointed out that the equal pay provision was not aimed at discrimination in employment but at equal pay for equal work. The court stated:

> "The fact that the men and women are not interchangeable because decency requires this be so does not negate the fact that each does exactly the same work but the woman is discriminated against by receiving less pay."[26]

The court concluded by saying that the fact that there was no interchangeability between the members of the two categories in so far as the gender of the patients they served did not prevent the categories from being the same within the interpretation applied in the Howard case. The court found no error of law in the reviewer's determination that the pay differential between the two categories constituted unequal pay for equal work.[27]

The Employment Standards Act was amended in 1974 by adding two words to its equal pay provision, which somewhat broadened the concept of "same work." The revised equal pay section read as follows, with the added words underlined:

> "No employer or person acting on behalf of an employer shall differentiate between his male and female employees by paying a female employee at a rate of pay less than the rate of pay paid to a male employee, or vice-versa, for substantially the same kind of work performed in the same establishment, the performance of which requires substantially the same skill, effort, and responsibility and which is

[26]Id., p. 446.

[27]Id., p. 447.

performed under similar working conditions . . . ."[28]

B. Pay Equity Act of 1987

The next major legislative effort was the Pay Equity Act.[29] The Pay Equity Act has as its purpose to "redress systemic gender discrimination in compensation for work performed by employees in female job classes."[30] Identification of this discrimination is to be accomplished by undertaking comparisons between male and female job classes in an establishment in terms of compensation and in terms of the value of the work performed.[31] Under section 6(1), pay equity is achieved when the job rate for the female job class that is the subject of the comparison is at least equal to the job rate for a male job class in the same establishment where the work performed in the two job classes is of equal or comparable value.

The "achievement" of pay equity is determined by other criteria when there is no male job class to compare, when more than one comparison is possible, or when job classes to be compared are not in the same bargaining unit. The first step in determining pay equity is to identify the employer, the establishment, and the pertinent male and female job classes. Employer is not a defined term under the act, but section 3(1) states that the act applies to all employers in the private sector who have 10 or more employees and all employers in the public sector.

Other terms defined in section 1(1) include establishment, which is defined as "all of the employees of an employer employed in a geographic division or in such geographic divisions as are agreed upon [through collective bargaining or those set up by an employer and agreed to by employees not represented by a bargaining agent]." A female job class is defined as one in which

[28]S.O. 1974, c. 112, s. 33.

[29]Pay Equity Act, 1987 S.O. 1987, c. 34; Pay Equity Act R.S.O. 1990, c. P-7. For a history of the legislative process see Malarkey and Hagan, supra.

[30]Id., s. 4(1).

[31]Id., s. 4(2).

60 percent or more of the members are female. A male job class is defined as one in which 70 percent or more of the members are male.

The value of these job classes is then determined by looking at a composite of the "skill, effort and responsibility normally required in the performance of the work and the conditions under which it is normally performed."[32] The comparison is done utilizing a gender-neutral comparison system.[33]

All public sector and private sector employers who have more than 100 employees are required to prepare pay equity plans, which are to include the identity of the establishment to which the plan applies and the job classes that form the basis of the job comparisons. The plan must also describe the gender-neutral comparison system used, the results of the job class comparisons, how the compensation in those job classes will be adjusted to achieve pay equity, and the date on which the adjustments will be made under the plan.[34]

The act prescribes different compliance dates for the private and public sectors. Large and medium-sized private sector employers have a staggered implementation schedule depending on the number of employees they have. Public sector employers were required to post a pay equity plan and begin to make wage adjustments on January 1, 1990.[35] The wage adjustments must be completed by January 1, 1998.[36]

Where employees are represented by a union, the union's bargaining agent and employer must negotiate the entire pay equity process.[37] Where employees are not represented by a union, the employer has no obligation to negotiate with one for preparation of a pay equity

[32]Id., s. 5(1).

[33]Id., s. 12.

[34]Id., s. 13.

[35]Id.

[36]Pay Equity Amendment Act, 1993 S.O. 1993, c. 4, s. 7.

[37]Id., s. 14.

plan.[38] Employees may, however, object to the pay equity plan by filing a complaint with the Pay Equity Commission.[39]

C. Brief Overview of the Pay Equity Commission

The Pay Equity Commission was established under the Ontario Pay Equity Act to help employees, bargaining agents, and employers achieve pay equity in the workplace and resolve any disputes that arise.[40] These disputes might arise because of a failure of parties to agree on a negotiated plan, an objection to a plan posted by an employer, or a complaint concerning the implementation of a plan or violations of the Pay Equity Act. The Commission consists of the Pay Equity Office and the Pay Equity Hearings Tribunal, independent offices with distinct functions.[41]

1. Pay Equity Office

Under section 33 of the act, the Pay Equity Office is responsible for the enforcement of the Pay Equity Act and orders of the Pay Equity Hearings Tribunal. These responsibilities must be read, however, in context of the Tribunal's powers found in sections 28 through 31 of the act. Moreover, the Pay Equity Office (1) may conduct research on pay equity and make recommendations to the Minister of Labour, (2) may conduct public education programs and provide information on pay equity, (3) shall provide support services to the Hearings Tribunal, (4) shall conduct such studies as the Minister of Labour requires, and (5) shall conduct a study with respect to systemic gender discrimination in compensation in female-dominated employment sectors and report the results to the Minister of Labour. The Pay Equity Office also serves a complaint mediation function. The head of the Pay Equity Office is responsible for designating review officers who review pay equity plans, investigate objections and complaints filed

[38]Id., s. 15.

[39]Id., s. 22(1).

[40]A Guide to the Pay Equity Hearings Tribunal Rules, September 1989, p. 4.

[41]Pay Equity Act, 1987 S.O. 1987, ch. 34, s. 27(2).

with the Commission, and attempt to effect settlements.[42]

The Review Services branch of the Pay Equity Office investigates and mediates complaints and objections raised by those involved in negotiating pay equity plans or those affected by the plans. Although the nature of the dispute and the parties involved will affect the resolution process followed by the Pay Equity Office, the process is generally the same for all types of disputes.[43]

(a) Types of Disputes

Under the Pay Equity Act, various types of disputes can be investigated by the Pay Equity Office. For example, complaints may be filed with the Pay Equity Office regarding the preparation of pay equity plans. The act requires that such plans be posted by certain dates and be negotiated with bargaining agents or available for comment by employees not represented by a bargaining agent. A review officer may be appointed to investigate complaints.

In addition to plan preparation, a dispute might arise among the parties involved during plan implementation. Any party to a plan may file a complaint with the Commission claiming that the plan is not being implemented according to its terms or that the plan is inappropriate because of changed circumstances. Moreover, a party may file a complaint at any time that alleges a contravention of the act, its regulations, or an order of the Commission.[44] Some examples of contravention are: (1) a reduction in compensation in order to achieve pay equity, (2) a failure to establish and maintain compensation practices that provide for pay equity, and/or (3) an allegation of intimidation by the employer

[42]Id., s. 34(1) and (2).

[43]Annual Report of the Pay Equity Commission for the period April 1, 1990 to March 31, 1991.

[44]Id., s. 22(1).

because the complainant has exercised his or her rights under the act.[45]

(b) Dispute Resolution

The Pay Equity Office, upon receipt of a complaint, will assign a review officer to examine the complaint and endeavor to effect a settlement.[46] The review officer may decide that a complaint should not be considered if the subject matter is trivial, frivolous, vexatious, made in bad faith, or the complaint is not within the jurisdiction of the Commission.[47] If so, the complainant may request a hearing before the Hearings Tribunal with respect to the decision.[48]

Section 24 of the act provides that when a settlement cannot be reached on the issues, the review officer may choose to make an order that is binding on the parties. If the review officer does make an order, any of the parties may dispute the order and apply for a hearing before the Hearings Tribunal. The reviewing officer may also refer the matter to the Hearings Tribunal if a settlement cannot be effected and he or she will not be making an order or when an employer or bargaining agent fails to comply with an order made by the review officer.

2. Pay Equity Hearings Tribunal

The Hearings Tribunal is a quasijudicial body created under the Pay Equity Act to resolve pay equity disputes among employees, unions, and employers if these disputes cannot be resolved by the review officer. The Hearings Tribunal has the exclusive jurisdiction to exercise the powers conferred upon it by or under the act and to

[45]Pay Equity Implementation Series #16, Pay Equity Commission, July 1989, p. 5.

[46]Pay Equity Act, 1987 c. 34, s. 23(1).

[47]Id., s. 23(3).

[48]Id., s. 23(4).

determine all questions of fact or law that arise in any matter before it; the action or decision of the Hearings Tribunal is final and conclusive for all purposes.[49] The Hearings Tribunal, in its mission statement, has committed itself to encouraging settlement among the parties and believes that the goals of the Pay Equity Act can best be achieved through the cooperation of the parties involved.[50]

The Hearings Tribunal is required to hold a hearing (1) if a review officer is unable to effect a settlement of a complaint and has not made an order; (2) if a complainant requests a hearing following the decision by a review officer not to review a complaint because it is trivial, frivolous, vexatious, made in bad faith, or the review officer has no jurisdiction; (3) when a party makes a request for a hearing after an order has been issued by a review officer; or (4) when a review officer refers the matter because of a party's failure to comply with an order by the review officer.[51] The Hearings Tribunal may consolidate two or more complaints into one proceeding if there are common questions of law or fact or the complaints are made against the same person and have similar issues.[52]

D. Summary of Selected Pay Equity Hearings Tribunal Decisions

1. Purpose of the Pay Equity Act

Haldimand-Norfolk (No. 3) (1989), 1 P.E.R. 17.

In this case, the primary issue before the Tribunal was whether the Haldimand-Norfolk regional police force would be included in the establishment of the Regional Municipality of Haldimand-Norfolk for purposes of pay equity. Before it considered this issue, however, the Tribunal considered the nature of the Pay Equity Act.

[49]Id., s. 30(1).

[50]Pay Equity Implementation Series No. 17, Pay Equity Commission, July 1989, p. 2.

[51]Pay Equity Act, 1987 c. 34, s. 25(1).

[52]Id., s. 22(3).

The Tribunal began by looking at the act itself and its purpose and objectives. Stating that the act had elements of antidiscrimination legislation, both in its historical development and in its content, the Tribunal said that "the law is a recognition of the systemic nature of wage discrimination and provides a strategy to deal with the discrimination." It characterized the act as a proactive measure to historical wage inequity.

Moreover, the Tribunal recognized that the act has a labor relations component because in unionized workplaces the method for achieving pay equity is through the bargaining process. The Tribunal rejected, however, submissions that the Pay Equity Act was a mere collective bargaining statute, stating:

> "[The act] is however, unlike other collective bargaining statutes in that it has an interest in the content and process of pay equity negotiations in order to ensure that affirmative action is taken to redress wage discrimination."

The Tribunal cited as support for this view the act's antidiscriminatory nature as well as the fact that 79 percent of the women in the Ontario workforce were not afforded the protections of a collective bargaining agreement. The Tribunal concluded that the act "is a statute having the specific purpose of redressing wage discrimination with elements of both human rights and labour relations law."

2. Definition of Employer for Purposes of the Pay Equity Act

Haldimand-Norfolk (No. 3) (1989), 1 P.E.R. 17.

In that same case, the Tribunal decided whether the Haldimand-Norfolk regional police force would be included in the establishment of the Regional Municipality of Haldimand-Norfolk for purposes of pay equity. Section 6(1) of the Pay Equity Act states that pay equity is achieved when:

> "the job rate for the female job class that is the subject of comparison is at least equal to the job rate for a male job

> class in the same establishment where the work performed in the two job classes is of equal or comparable value."

To answer this question, the Tribunal had to decide whether the regional municipality was the employer of the police force. The act defines establishment in section 1(1) as:

> "all of the employees of an employer employed in a geographic division or in such geographic divisions as are agreed upon [through collective bargaining or those set by an employer and agreed to by employees not represented by a bargaining agent]."

Because the act does not define employer, the Tribunal stated that it must use criteria that best keep with the objectives, structure, and scheme of the act. The Tribunal followed an approach adopted by the Ontario Labour Relations Board, which included a number of factors to be examined in determining the definition of employer. Among these factors were (1) who has overall financial responsibility, (2) who has responsibility for compensation practices, (3) what is the nature of the business, service or enterprise, and (4) what is most consistent with achieving the purpose of the act.

On balance, the Tribunal found that the regional municipality was the employer of the police. Therefore, the police were determined to be part of the regional municipality's establishment.

Middlesex and London (1989), 1 P.E.R. 89.

In this case, the Tribunal reviewed the claim of the Ontario Nurses' Association that the City of London and the County of Middlesex refused to acknowledge and agree that they were the employer of the nurses at the Board of Health Middlesex-London Health Unit for the purposes of the Pay Equity Act and that the establishment therefore included the County and City employees. The Tribunal cited the four tests it had developed in Haldimand-Norfolk (No. 3) for determining the identity of the employer in cases brought before it. The Tribunal noted, however, that these tests were not all-encompassing and that

future cases might necessitate amendments. However, the Tribunal found those criteria to be particularly appropriate in determining the nurses' employer to be the Board of Health.

Metropolitan Toronto Library Board (1989), 1 P.E.R. 112.

The question for decision in this case was whether the employer was the Library Board or the Municipality of Metropolitan Toronto (Metro). The applicant in this case before the Tribunal was a union that was ordered by a review officer to negotiate a pay equity plan with the Metropolitan Toronto Library Board, which was found by the Officer to be the employer of the staff of the Metropolitan Toronto Reference Library.

Again, the Tribunal cited the four Haldimand-Norfolk criteria as a starting point for the determination of who was the employer. The Tribunal, in response to a request by the Library Board, refused to add a fifth test to the criteria set out in Haldimand-Norfolk, namely who has fundamental control over the working lives and the working environment of those employees in dispute. The Tribunal concluded, on the basis of the first three criteria, that for purposes of pay equity, Metro was the employer of the library workers.

Barrie Public Library Board (1991), 2 P.E.R. 93.

The issue before the Tribunal was whether the Barrie Public Library Board or the Corporation of the City of Barrie was the employer of the library staff. In this case, the Tribunal cited the Haldimand-Norfolk decision, examined the development of the four tests, which it applied in approaching the question of who was the employer, and stated that the question in the second test that asks "what is the labour relations reality, who negotiates the wages and benefits with the union or who sets the wage rate in the non-unionized setting?" should be of paramount consideration. Moreover, the Tribunal determined that the fourth test would only be applied when the evidence on the other three factors left doubt as to which entity was the employer. The Tribunal concluded that the Library Board was the employer of the library staff for purposes of pay

equity. The Tribunal did not consider the third or fourth criteria in reaching its decision.

Porcupine Health Unit (No. 2) (1991), 2 P.E.R. 198.

The Tribunal was asked to determine who was the employer for pay equity purposes of the nurses in the bargaining unit represented by the Ontario Nurses' Association--the Porcupine Health Unit or the municipalities in the area served by the Health Unit. In making its determination, the Tribunal adopted the approach it used in the Barrie Public Library Board decision and focused on who controlled compensation and the valuing of work. The Tribunal found that the Health Unit was the employer for purposes of pay equity.

3. Comparisons--Job Class

Wentworth County Board of Education (1990), 1 P.E.R. 132.

One of the issues before the Tribunal in this case was whether elementary teachers constituted one job class for purposes of the Pay Equity Act or whether there were instead seven job classes, based on the seven categories that the Qualifications Evaluation Council of Ontario uses to evaluate the qualifications of teachers. The review officer found that there were seven job classes for elementary teachers.

The Pay Equity Act defines "job class" as:

> "those positions in an establishment that have similar duties and responsibilities and require similar qualifications, are filled by similar recruiting procedures and have the same compensation schedule, salary grade or range of salary rates."[53]

The Tribunal stated that in order to constitute a job class, positions in an establishment must meet all four criteria outlined in the act. There was agreement by the parties that all elementary classroom teachers have similar duties and responsibilities and that elementary teaching

[53]Id., s. 1(1).

positions are filled by similar recruiting procedures. The two issues in dispute were whether teachers required similar qualifications and whether they had the same compensation schedule, salary grade, or range of salary rates.

Concerning the first issue, the Tribunal found that an Ontario teaching certificate is merely a minimum but is not sufficiently specific to determine job classes for elementary classroom teachers. Moreover, the Tribunal considered that in compensating teachers, teachers are divided by educational qualifications. Thus, elementary teachers were properly divided into seven job classes on the basis of qualifications.

In examining the second issue, the Tribunal stated that the ranges of salary rates and the number of steps to maximum salary differ from category to category. Therefore, elementary teachers did not have the same range of salary rates and were therefore in seven different job classes.

4. Comparisons--Vacant Male Job Class

Barrie Public Library Board (1991), supra.

Another issue the Tribunal decided in this case was whether a comparison could be made to a male job position that was vacant. The Library Director stated that it would be difficult for her to evaluate the skill, effort, responsibility, and working conditions of the job class because the job was never performed during her tenure. The Tribunal decided that under the circumstances it was not practical for the Library Board and the union to undertake the kind of evaluation that the Pay Equity Act required concerning this job class. The Tribunal emphasized, however, that this decision did not mean that a vacant job class can never be used as a comparator.

5. Gender-Neutral Comparison System--Elements

Haldimand-Norfolk (No. 6) (1991), 2 P.E.R. 105.

The Ontario Nurses' Association (ONA) alleged in this case that the point factor job evaluation system proposed by the Regional Municipality of Haldimand-Norfolk was not gender neutral because it

did not systematically identify and redress systemic discrimination in nurses' wages. Specifically, ONA alleged that the system failed to systematically, comprehensively, and accurately describe, measure, and value the job content of the work performed by the nurses in the bargaining units represented by ONA. This was the first case in which the Tribunal had litigated the issue of gender neutrality.

Under section 12 of the Pay Equity Act, an employer must use a gender-neutral comparison system to undertake a comparison between female and male job classes in order to determine whether pay equity exists. Section 13(2)(a) of the act specifies that every pay equity plan "shall describe the gender-neutral comparison system used for the purposes of section 12." The Pay Equity Commission stated that a job comparison system is any system designed to determine the relative worth of jobs within an employer's establishment.[54]

For a comparison system to be gender neutral, it must be able to analyze and rectify systemic patterns of wage discrimination; particular attention must be paid in valuing the work of female job classes to ensure the comparison system remedies the historical undervaluation of women's work. Statutory guidance is provided in the act. Section 4(2) specifies:

> "[s]ystemic gender discrimination in compensation shall be identified by undertaking comparisons between each female job class in an establishment and the male job classes in the establishment in terms of compensation and in terms of the value of the work performed."

Section 5(1) requires:

> "[f]or the purposes of this [a]ct, the criterion to be applied in determining the value of work shall be a composite of the skill, effort and responsibility normally required in the performance of the work

[54]Pay Equity Implementation Series No. 9, Pay Equity Commission, July 1988, p. 2.

and the conditions under which it is normally performed."

On the basis of the issues and evidence, the Tribunal determined the following four component parts of the gender-neutral comparison system are required to be described for purposes of the Pay Equity Act: (1) accurate collecting of job information, (2) deciding on the mechanism or tool to determine how the value will attach to the job information, (3) applying the mechanism to determine the value of the work performed, and (4) making the comparisons. The Tribunal found that parties must negotiate and endeavor to agree upon these elements of a gender-neutral comparison system to meet the obligations to describe the system as required by section 13 of the act.

To meet the statutory requirements of section 5 of the act, the Tribunal also emphasized the importance of accurate collection of information; that is, the skills, effort, responsibility, and working conditions must be accurately and completely recorded and valued. The Tribunal came up with the following four considerations that it considered helpful in assessing the gender neutrality of the collection of job information:

-- What is the range of work performed in the establishment?

-- Does the system make work, particularly women's work, visible in the workplace?

-- Does the information being collected accurately capture the skill, effort, and responsibility normally required in the performance of the work and the conditions under which it is normally performed for both the female job classes in the plan and the male job classes to be used for comparison?

-- Is the job information being collected accurately and consistently for each job class to be compared?

The Tribunal also cited a list published by the Pay Equity Office, which identifies frequently overlooked aspects of women's work. In this case, the Tribunal determined that the comparison system

did not make nurses' work visible in the establishment and that it failed to accurately collect job content information and thus did not adequately value it. Moreover, it did not provide a means to analyze and then rectify deficiencies.

The second component of a gender-neutral comparison system is valuing the information collected. The Tribunal considered the following factors helpful in the consideration of value:

-- Can the tool determine the value of the work performed using the statutory criteria of skill, effort, responsibility, and working conditions?

-- Is the choice of subfactors, if used, undertaken free of gender bias?

-- Are levels of equivalencies, if used, free of gender bias? and

-- Is the composite required by section 5(1) decided in such a way that it gives value to all the statutory criteria and is point weighting free of gender bias?

The Tribunal considered these factors and found that although the subfactors provide a range of possibilities to identify and record job requirements, they do not cure serious deficiencies in accurate collection of job information. The Tribunal stated that parties must evaluate whether the assignment of weights unfairly rewards or penalizes male or female job classes. Concerning equivalencies, the Tribunal found that the failure of the questionnaire under review to make women's work visible was aggravated by the weighting imbedded in it.

The third component of a gender-neutral comparison system is applying the tool or mechanism to determine the value of the work. The Tribunal listed the following criteria to assist it in assessing gender neutrality:

-- Is the valuing tool of the comparison system applied consistently without regard to the gender of the job class?

-- If a committee is used to evaluate jobs, is it

representative, balancing the interests of the parties with duties and obligations under the act?

-- If a committee is part of the system, is it sufficiently knowledgeable to enable the parties to meet their obligations?

-- Is the decisionmaking process accomplished in a manner that is free of gender bias?

-- Did the mechanism identify systemic wage discrimination?

The employer claimed that consensus by a joint job evaluation committee was a key part of its comparison system. The Tribunal found that the employer's proposal for an equally represented union-nominated and management-nominated joint committee, representative of both genders and various job classes, was a good one. However, the Tribunal cautioned that a consensus of the committee is in itself not a test of gender neutrality. It also found that the committee's training in bias-free evaluation was adequate.

Finally, the Tribunal declined to assess the gender neutrality in this case of the fourth component of a gender-neutral comparison system--making the comparisons. The Tribunal stated that this component, like the others, must be negotiated with the unions involved.

6. Maintaining Pay Equity

Glengarry Memorial Hospital (1991), 2 P.E.R. 153.

In this case, Glengarry Memorial Hospital sought to revoke an order of a review officer who ordered the employer to pay the female job class in the pertinent ONA bargaining units an additional Can$0.37 per hour. One of the issues before the Tribunal was whether the employer failed to maintain pay equity as required by section 7(1) of the Pay Equity Act, which specifies that every employer "shall establish and maintain compensation practices that provide for pay equity in every establishment of the employer."

The employer and the nurses agreed during negotiations for a pay equity plan that the registered nurses employed by the hospital constituted one female job class for pay equity purposes. However, no male job class of equal or comparable worth existed in the ONA bargaining unit. After failing to reach agreement on a pay equity plan, the parties sought the assistance of a review officer, who found that the position of maintenance supervisor was the male comparator for the female job class of registered nurses. At the time, the hourly job rate for the male comparator was Can$0.37 more than the female job class. The employer agreed to amend the collective agreement by the full pay equity amount, and the nurses received a pay equity increase of Can$0.37 per hour.

At the same time as the effective date of the pay equity increase, the employer increased the wage rates of its nonunion staff by a minimum of 5.5 percent, except for the position of maintenance supervisor and two other positions pegged at the same value for the purposes of pay equity. Those positions received increases of 3.6 percent. Under section 6(1) of the act, the job rate for the female class must be at least equal to the job rate of the male comparator. The only reason the hospital supplied for giving the male comparator less than the 5.5 percent increase given to all other nonunion job classes was that a 3.6 percent increase would keep the male comparator at the wage rate of registered nurses.

On the issue of whether the employer failed to maintain pay equity, the Tribunal ruled that giving the male comparator a 3.6 percent wage increase had the impact of artificially holding back the nurses' job rate, negating the effect of the pay equity plan.

Objectives, Scope, and Methodology

Two congressional Committee Chairmen and three Members of Congress asked us to review other governmental efforts to provide equal pay for work of comparable value as a part of our examination of the U.S. government's factor evaluation system.[1] We selected Canada because we believed it to be the first federal government to address pay equity for its employees. Ontario was selected because it was the first and only Canadian province to require both public and private sector employers to develop and implement proactive pay equity plans. The objectives of our review were to determine both the Canadian federal sector's and Ontario's

- legislative requirements for implementing pay equity, and
- progress to date in addressing pay equity.

To determine the legislative requirements for implementing pay equity in the Canadian federal sector and Ontario, we interviewed officials at the Canadian Human Rights Commission, the Treasury Board, the Ontario Pay Equity Office, and the Ontario Pay Equity Hearings Tribunal. We obtained and reviewed Commission and Pay Equity Office guidelines, complaint investigation procedures, proposed amendments to the legislation, tribunal decisions, and information on efforts to develop a universal job evaluation system for public service employees. We also reviewed independent studies and articles to obtain background information.

To determine what progress the Canadian federal sector and province of Ontario have made, we obtained data on pay equity complaints and pay equity adjustments from the Canadian Human Rights Commission, the Ontario Pay Equity Commission, and the Human Resources Secretariat—the employer for Ontario's public service employees.

[1]The factor evaluation system (FES), a point factor-method of determining the relative value of jobs, is one of several methods used by the U.S. government to classify white-collar jobs.

Major Contributors to This Briefing Report

General Government Division, Washington, D.C.	Larry H. Endy, Assistant Director, Federal Human Resource Management Issues Brenda J. Bridges, Evaluator-in-Charge Jennifer S. Cruise, Evaluator
Office of the General Counsel, Washington, D.C.	James M. Rebbe, Attorney

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