

WITH DELIBERATE CARE: THE FRAMING OF BILL 154

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The year 1981 will always be recognized as the landmark year on the long road to pay equity in Ontario. With third reading of Bill 154 imminent,¹ the Ontario government is on the verge of being able to guarantee women in both the public and private sectors that they will finally be entitled to equal pay for work of equal value.

Bill 154—soon to be the *Pay Equity Act*²—will also give Ontario the distinction of being the first province to implement pay equity on a proactive model in the private as well as the public sector. It goes beyond the simple statement “it shall be done,” as Quebec’s human rights legislation declares.³ Bill 154 outlines specifically how to do it. The Manitoba government, with its plans for legislation in the next few years, has also committed itself to this specific approach to pay equity in the private sector.

In Ontario, the pay equity process began in 1951 with the passage of legislation that guaranteed equal pay for equal work. But there was a gradual awareness that more was needed. Female store clerks were earning the same as male store clerks, but many other women were performing jobs that were dissimilar to those held by men in their workplaces but of equal value to their employers. In spite of that, these women were generally being paid far less than men.

True pay equity, therefore, had to mean more than just the same pay for the same job. It also had to mean that dissimilar jobs would be compared to determine which were of equal value. Those jobs of equal value would have to merit equal pay.

The Government of Ontario was not satisfied with the “time will take care of it” approach to the elimination of the wage gap. Close scrutiny of recent statistics reveals that the wage gap is remaining somewhat static, rather than decreasing steadily.⁴ In tackling the wage gap, the Government of Ontario was able to draw on the experiences of other jurisdictions—including Australia, Minnesota and Manitoba. In the summer of 1985, Manitoba had introduced pay equity legislation for its public service, provincial crown corporations, and agencies such as hospitals and universities.⁵ Soon afterward, Ontario began a process aimed at leading to two separate pay equity laws—one for the public service, the other for the broader public (including school boards, municipalities, hospitals and universities) and private sectors. Those two pieces of legislation were recently rolled into one, namely, Bill 154, providing for pay equity in all sectors of Ontario’s economy.

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1. On June 15, 1987, the Bill received Third Reading and on June 29, 1987, it received Royal Assent. *Pay Equity Act*, S.O. 1987, c. 34.

2. *Pay Equity Act*, S.O. 1987, c. 34.

3. *Charter of Human Rights and Freedoms*, R.S.Q. 1980, c. C-12.

4. Canada. Statistics Canada, Consumer Income and Expenditure Division. *Earnings of Men and Women: Selected Years, 1967 to 1979*. Catalogue No. 13-577. Occasional. Ottawa, 1981. See also *Selected Years, 1981-1982*, Catalogue No. 13-577 and *Selected Years, 1984-1985*, Catalogue No. 13-217.

5. *The Pay Equity Act*, S.M. 1985-86, c. 21, C.C.S.M. P13.

The process that has led to the creation of Bill 154 has been a long and deliberately careful one. The legislation must correct the wage gaps that exist throughout Ontario's diverse economy—in its government offices, its hospitals and schools, its large and small factories and businesses. In order to do the job effectively, the legislation has to be flexible, fair and easily implemented by employers in all economic sectors.

The original, two-track approach was a sensible way to begin the exercise. In the fall of 1985, the government of Ontario began work on the public service bill. It was a clear signal that the government, as the province's largest employer, was firmly committed to pay equity and ready to lead the way in its implementation. At the same time, the government released its Green Paper on Pay Equity,⁶ a document aimed at stimulating public discussion on extending pay equity to the broader public and private sectors. Some opponents of pay equity saw this as an opportunity to convince the government of the folly of its ways. The government, however, made its position clear from the beginning. "We want a system that works," said Attorney-General Ian Scott, the Minister Responsible for Women's Issues. "Therefore, all suggestions and concerns relating to pay equity will be taken into account in the drafting of legislation. But the achievement of pay equity for women is not at issue. The commitment to pay equity in the public and private sectors has already been made."⁷

The Green Paper set out six premises upon which Ontario's pay equity legislation would be based:

1. The purpose of pay equity would be to correct gender-based pay discrimination only, not to address the issue of general wage levels;
2. Only female employees and employees in female-predominated job groups would be eligible for pay adjustments;
3. Pay equity would not require jobs to have identical value—a range of values would be permitted;
4. Equal value comparisons would be limited to a given employer's establishment—in other words, comparisons would not be made between wages paid by one employer and those paid by another;
5. The legislation would not be retroactive—no retroactive adjustments would be required; and
6. Wage reductions would not be permitted.

Beginning with these premises, and using the Green Paper as a basis for discussion, a government-appointed panel conducted four months of public hearings across the province. During that time it received hundreds of oral and written presentations which raised many concerns and suggestions about the introduction of pay equity, particularly in the private sector. At the same time, two advisory groups—one representing business, the

6. Ontario, *Green Paper on Pay Equity* (Toronto: Queen's Printer, 1985).

7. Ian Scott A.G. Ont., Address (Statement to the Legislature, 19 November 1985).

other labour—were appointed to meet regularly with Premier David Peterson and senior government officials. Their involvement, along with the submissions during the public hearings, helped to form the basis of Bill 154.

The very application of the concept of pay equity within the private sector presents a number of questions which are unlikely to be at issue within the public sector context. One of the fundamental issues raised during the consultative process was how to define the area or “establishment” in which specific pay equity measures would be implemented. The definition of establishment simultaneously determines the parameters for comparison and, in turn, costs. Three possible definitions were examined. Some believed that an establishment should include all of an employer’s operations throughout the province. Others advocated a narrower definition, whereby a specific geographic boundary, such as a municipality, would outline the area. Other submissions favoured a functional approach which would mean that job comparisons would not be made between different bargaining units, or between union and non-union categories.

Many agreed that the main problem was devising a method that would be flexible enough to work effectively throughout the province, while at the same time assuring that the prime objective, redress for systemic discrimination in a wage setting, was met. Too narrow a focus would preclude many women from pay equity comparisons—let alone adjustments. That concern was foremost in policy-makers’ minds when they decided to use a combined approach for the definition of “establishment” in Bill 154. They decided that the geographic definition made sense because it acknowledged that regional markets and rates of pay vary across Ontario. Into this definition they incorporated a more flexible interpretation of the functional approach, in which every effort was first to be made to carry out job comparisons within a bargaining unit. If that were not possible, comparisons were to be made with other units, or between union and non-union jobs.

Not surprisingly, one of the most contentious issues during the consultative process was the cost of pay equity. It was argued by some that many private sector companies would be unable to afford the cost of closing the wage gap, and that the higher wages would lead to higher consumer prices and would discourage foreign investment in Ontario. Mr. Scott stated, however, that “pay equity must be implemented in a fiscally responsible manner and in such a way that we do not lose our competitive edge.”⁸ To that end, Ontario has followed Manitoba’s lead by providing for the phasing in of implementation and costs.

All sectors of the economy will begin introducing pay equity within a six-year period. The first to start will be the public sector, with the largest private sector firms following, then smaller companies and finally, workplaces with 10 to 49 employees. In this way, smaller private sector employees will have ample time to prepare for the necessary wage adjustments, and also will have the opportunity to draw upon the experiences of the larger

8. Ian Scott A.G. Ont., “Notes for Remarks to the Canadian Club” (Address to the Canadian Club, Toronto, 24 March 1986) at 10.

firms that have already implemented pay equity policies. Also, while public sector employers will have five years in which to fully implement pay equity, there is no time limit for the private sector. The only stipulation is that, like public sector employers, private companies must spend 1 per cent (they may choose to spend more) of their payroll on wage adjustments each year.

Why not exempt small businesses entirely? Some suggested, for instance, that companies with fewer than 100 employees be let off the pay equity hook. Doing that, however, would also mean exempting more than half of Ontario's female workers from the benefits of pay equity. Others argued that exempting small business would place larger firms who compete with the smaller firms at a disadvantage. In short, the business community was divided on this matter. In very small firms, it is not clear whether there are enough discrete jobs with differing requirements to make straightforward comparisons. Again, decision-makers had to balance coverage with administrative feasibility, and principle with flexibility. It made more sense to include small businesses that employed 10 or more people, and to assist them with consulting services.

The actual mechanics of pay equity have also come under a lot of scrutiny by the private sector. "Easier said than done" seems to have been a common sentiment, particularly when it came to the prospect of devising ways to compare the value of dissimilar jobs. Some feared the government would simply impose a single job evaluation system across the board, or that companies would have to hire expensive consultants to cook up devilishly complex systems. Some simply asked, "Where do we start?"

Bill 154's answer to those concerns is that, as in Manitoba, the process begins with employers examining their workplaces to identify job categories that are either female-dominated (in Ontario, that is defined as a group in which at least 60 per cent of employees are women) or male-dominated (at least 70 per cent are men). Then, each female job is evaluated in terms of factors such as skill, effort, responsibility and working conditions, and compared with the value of jobs in the male predominated groups.

As for the type of job evaluation scheme, that is up to the employer. Employers may choose anything from a simple ranking system to a sophisticated plan devised by outside experts—in short, whatever works for them. If necessary, they can call on the government's Pay Equity Commission for guidance in devising a suitable approach. Formal pay equity plans are mandatory for both public sector employees and private sector firms with more than 100 employees. Smaller companies are not required to develop specific plans, but they must still correct any pay inequities that exist in their workplaces.

Another concern that arises in the context of pay equity in the private sector is the treatment of part-time workers. More than one-quarter of the women in Ontario's workforce are employed on a part-time basis.⁹ Would they be able to benefit from pay equity measures? The view taken by Bill

9. *Supra*, note 6, Appendix 3, "Women in the Labour Force" at 72.

154 is that part-time work does not mean less responsibility, less skill or less value to the employer. It provides for the jobs of part-time female employees to be evaluated along with those of their full-time colleagues, as long as they meet certain criteria. The women must be seasonal workers, or be employed for at least one third of a normal work week. Those women employed for less than one third of a work week can still qualify for job comparisons if they are performing their jobs on a regular and continuing basis.

Women who are not presently covered by pay equity legislation are those who work in an all-female environment. Because Bill 154 calls for the comparison of male and female jobs to establish pay equity, these women are excluded. Unfortunately, many of them, especially child-care workers, are underpaid. For that reason, Bill 154 makes a commitment that the wage levels of these women will be studied and that recommendations on how to remedy their situation will be made to the government within a year of passage of the legislation.

Throughout the pay equity policy process in Ontario, flexibility and fairness have been paramount. One of the prime examples of flexibility is the key role the collective bargaining process will play in the implementation of equal pay for work of equal value. Unions will be involved in the development of pay equity plans in the workplace (as they are in Manitoba's public sector). While components like timing and the 1 per cent annual wage adjustment remain fixed, the legislation allows unions and employers to negotiate other aspects, such as the definitions of "establishment" and "gender predominance."

Another example of flexibility is that pay equity legislation does not mean the end of the system whereby employees can look forward to being paid more for exceptional performance, experience, or because their skills are in short supply. Employers will continue to judge the need for, and value of, areas of expertise. In recognition, however, of the temporary nature of such shortages, wage advantages should be equally fluid. As for the practice of red-circling, it is still considered a viable comparison tool to be used until a just valuation is established.

Under Bill 154, pay differences between otherwise equivalent job classes may be allowed on the basis of seniority systems, temporary training assignments or merit pay schemes. Formal merit schemes, however, must be established on a thoroughly gender-neutral basis and be communicated to all workers so that everyone understands the criteria on which performance is evaluated. Employers also bear the responsibility of demonstrating that higher wages are clearly the result of the above exceptions.

As for fairness, what can be more fair than legislation that ensures that jobs of equal value will be rewarded with equal wages, regardless of whether the worker is a man or a woman? The government of Ontario had fairness in mind when it set up a process wherein input from all sectors of the economy was actively encouraged. In addition to the public hearings and the work of the advisory groups for the drafting of Bill 154, the public had another opportunity to participate in the debate. For three weeks, the Committee on Administration of Justice held public hearings on how the Bill

could be amended, and some of the suggestions were incorporated into the legislation.¹⁰

Now, on the eve of its passage, how can we ensure that Bill 154 will work in Ontario? Part of that task will fall to the Pay Equity Commission. In addition to the educational and consultative services it will provide employers and employees, it will also be responsible for administering the implementation of the pay equity law, and for investigating complaints. The commission will rule on the complaints and resolve disputes.

The creation of the commission has fueled criticism that, in effect, the long arm of government will be reaching into the private sector. In fact, however, Bill 154 simply sets out the framework within which each public and private sector employer will manage its own pay equity plan. There is plenty of leeway for each one to tailor its plans to its own needs, and there is minimal government involvement. Therefore, while the Pay Equity Commission may serve as advisor and arbitrator, the real onus for ensuring that pay equity works is on employers and employees.

Another interesting theory sometimes heard from the private sector is that the wage gap does not actually exist. The frivolity of this statement is underlined when it is followed by the assertion that the cost of closing this imaginary gap would be prohibitive anyway.

In general, employers are coming to realize that Bill 154 actually makes good business sense. The Canadian Association of Women Executives and Entrepreneurs points out: "There is ample evidence to support the view that employees who believe that they are fairly treated by their employers are more productive and more responsive workers."¹¹ In addition, higher wages for women will mean greater purchasing power, and women will be more self-sufficient when they retire because increased incomes will mean higher pensions.

Bill 154 alone, however, will not ensure full employment in Ontario; other initiatives, such as affirmative action and education programs, will also be needed. But pay equity is a most important step toward the achievement of economic justice in Ontario. Just as Manitoba's experience helped Ontario with the drafting of its first pay equity legislation, it is hoped that our Bill 154 will be useful to Manitoba as it addresses wage inequities in its private sector. I stress once again the critical importance of creating such legislation in a spirit of fairness and flexibility. If pay equity is the destination, there can be many roads leading to it. The main thing is to get there.

10. For example, the time allowed for the preparation of public sector pay equity plans was extended to two years and provision was made committing the Commission to conduct a study and to make recommendations regarding employees in predominantly female sectors of the economy. The legislation was also amended to ensure that a position in an establishment is not assigned to a different job class solely because the needs of the occupant have been accommodated for the purpose of complying with *The Human Rights Code, 1981*, S.O. 1981, c. 53.

11. See The Canadian Association of Women Executives, *Brief to the Standing Committee on the Administration of Justice* (Toronto, 3 March 1987) at 2.