0001-89 Ontario Nurses' Association, **Applicant** v. Regional Municipality of Haldimand-Norfolk, **Respondent**

Before: Janis Sarra, **Vice-Chair**; Sharon Laing and Geri Sheedy, **Members**

Appearances: Mary Cornish for the Applicant; Paul Wearing for the Respondent.

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

Gender Neutral Comparison System

In order 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. Although a gender neutral comparison system may involve a formalized job evaluation system, it need not necessarily do so, since the Act requires parties to use a gender neutral comparison system but makes no specific reference to job evaluation. There are four component parts to a gender neutral comparison system: the accurate collection of job information; deciding on the mechanism or tool to determine how the value will attach to the job information; applying the mechanism to determine the value of the work performed; and making the comparisons. In negotiating the system parties have the flexibility to fashion a comparison system to meet their needs. As a starting point, they are required to ensure that each component which forms part of the comparison system is gender neutral. Bias in one means the system as a whole is not gender neutral. Gender bias must be eliminated from all parts of the comparison system. Whatever comparison system is proposed, consideration must be given to the establishment to which it will be applied. This requires looking to the nature of the organization, the services it provides or the products it produces. The system must specifically address the range of work performed by female job classes. The comparison system must be applied in a consistent way. If a committee is used to evaluate jobs, is it representative, balancing the interests of the parties with duties and obligations under the *Act*. Is the decision making process accomplished in a manner free of gender bias.

Negotiation - Good Faith

The Tribunal's inquiry into the obligation to "negotiate in good faith and endeavour to agree" will examine both the substance and the process of pay equity negotiations based upon the content, time frames and results required by the *Act*. "Good faith" requires an assessment by the Tribunal of how a reasonable person or party in good faith would approach these negotiations. "Endeavour to agree" requires not only an assessment of their efforts to meet, discuss and meaningfully negotiate an agreement on the gender neutral comparison system, but also an investigation into whether the substance of their proposals meet the obligations of the *Act*.

The duty to bargain under s.14 does not extend to the choice by one party to retain the services of an individual or organization to formulate bargaining proposals. Neither does it extend to choice of the other party's negotiator. Parties to the pay equity process may have the spokesperson of their choice at the bargaining table, but the parties are responsible for any conduct or any actions taken by their agents on their behalf. Failure to deal directly with the bargaining agent is a violation of the *Act* and any attempt to bargain

directly with employees or local Applicant officials instead of the recognized bargaining agent is a violation of the obligation. An employer has a right to communicate with its employees to inform them of its obligations under the *Act*.

In this case, the point at which the Applicant raised concerns about the gender neutrality of the proposed system, the Respondent had an obligation to make inquiries and to make reasonable efforts to asssess whether the concerns were founded or not. The Respondent made no effort to demonstrate to the Applicant that the system was gender neutral or that the system would identify and value the work performed by male and female job classes. Although the proposal to use its system was a reasonable first bargaining position, it is not a defence to complete inflexibility.

Parties require sufficient information to be able to conduct bargaining in a rational and informed manner. The obligation to disclose includes an obligation to give sufficient information to allow parties to test the gender neutrality of their own proposals and to assess the bargaining position of the other party. In this case, the Tribunal finds that the Respondent failed to meet its obligation to disclose by refusing to reveal the results of the pilot test and disclose the information it was given on the computer program or the weighting embedded in the questionnaire. The Respondent failed to give the Applicant sufficient information to intelligently appraise the system.

The Respondent contended that it was entitled to act as it did because the *Act* placed paramount responsibility on the employer for the achievement of pay equity. The Tribunal rejected this defence. The obligations imposed upon the bargaining agent are of equal importance and assume an equal partnership to the pay equity negotiation process.

Remedies - Failure to Negotiate in Good Faith

Remedies are not punitive but are aimed at rectifying the consequences of a violation of the *Act*. In this case, to send the parties back to the negotiating table without any direction or timeframes would not serve to facilitate speedy completion and posting of a pay equity plan. Nor is it appropriate to require the Applicant necessarily to bargain to amend the Respondent's proposed comparison system. Given the bargaining history, this might encourage parties in the future to unilaterally adopt a comparison system confident that the Tribunal would accept that system despite the bargaining conduct. However, it may be that the system can be effectively remedied now that the parties have both some guidance as to the standard of gender neutrality and direction with respect to their bargaining obligations. The Tribunal ordered the Respondent to negotiate in good faith and to endeavour to agree with the Applicant upon a gender neutral comparison system and a pay equity plan. Both parties were to table proposals within 60 days, to co-operate with each other, and to provide full disclosure concerning the comparison systems proposed.

Système non sexiste de comparaison

Un système non sexiste de comparaison doit pouvoir permettre d'analyser et d'éliminer les structures de salaires systémiques qui sont discriminatoires. II faut accorder une attention toute particulière à l'évaluation du travail des catégories d'emplois à prédominance féminine afin de s'assurer que le système de comparaison élimine la sous-évaluation historique du travail des femmes. Un système non sexiste de comparaison comprend quatre composantes: la collecte de données précises sur les emplois; le choix d'un

mécanisme ou d'un outil pour établir des liens entre ces données et la valeur du travail; l'application du mécanisme afin de définer la valeur du travail exécuté; et l'établissement de comparaisons. Lors des négociations sur le système, les parties ont la possibilité d'élaborer et de concevoir un système de comparaison qui répond à leurs besoins. Elles sont tout d'abord tenues de s'assurer que chaque composante du système de comparaison est impartiale. Un parti pris dans une composante se répercute dans l'ensemble du système. Il importe donc que toutes les composantes du système de comparaison soient dénuées de toute marque de sexisme. Quel que soit le système de comparaison proposé, il importe de tenir compte de la nature de l'établissement auquel il sera appliqué. Il faut donc examiner la nature de l'organisme, les services qu'il fournit ou les produits qu'il fabrique. Le système doit couvrir plus particulièrement la gamme des tâches qu'effectuent les membres des catégories d'emplois a prédominance féminine. Il doit être appliqué d'une façon uniforme. Les critères suivants permettent d'établir si l'outil ou le mécanisme servant à fixer la valeur du travail a été appliqué d'une façon impartiale: l'outil devaluation du système de comparaison est-il appliqué d'une façon uniforme quel que soit le sexe des travailleurs compris dans la catégorie d' emplois?; si un comité est utilisé pour dvaluer les emplois, est-il représentatif et met-il en équilibre, d'une part, les intérêts des parties et, d' autre part, leurs devoirs et obligations en vertu de la *Loi*?; si un comité fait partie du système, est-il suffisamment competent pour permettre aux parties de satisfaire à leurs obligations?; le processus décisionnel se déroule-t-il d'une manière impartiale?; le mécanisme permet-il de repérer les formes de discrimination systémique en matière de rétribution?

Négociations - Bonne foi

L'enquête que le Tribunal mènera sur l'obligation de "négocier de bonne foi et de s'efforcer de convenir d'un systems non sexiste de comparaison et d'un programme d' équité salariale" portera tant sur le fond que sur le processus de négociations d'un programme d' équité salariale, compte tenu du contenu, des délais et des résultats qu'exige la *Loi*. En ce qui concerne le concept de "bonne foi",le Tribunal doit étudier la façon dont une personne ou une partie raisonnable participerait à ces négociations. Quant à l'obligation de "s'efforcer de convenir d'un système non sexiste de comparaison et d'un programme d'équité salariale", il convient non seulement d'évaluer les efforts qu'ont faits les parties en vue de se rencontrer, de discuter et de négocier, de façon valable, une entente sur le système non sexiste de comparaison, mais également d'enquêter sur la question de savoir si le fond de leurs propositions répond aux obligations de la *Loi.*

L'obligation de négocier, prévue à l'article 14 ne comprend pas la possibilité, pour une partie, de retenir les services d'une personne ou d'un organisme en vue de formuler des propositions en ce qui concerne les négociations. Elle ne s'applique pas non plus au choix de l'agent négociateur de l'autre partie. Les parties au processus d'équité salariale peuvent se faire représenter par le porte-parole de leur choix à la table des négociations, mais elles sont responsables des mesures prises par leur mandataire en leur nom. Le défaut de négocier directement avec l'agent négociateur constitue une infraction à la *Loi* et toute tentative de négociations directes avec les employés ou les dirigeants locaux du requérant au lieu de l'agent négociateur reconnu constitue une infraction à cette obligation. L'employeur a le droit de communiquer avec ses employés afin de les informer de ses obligations en vertu de la *Loi*.

Dans la présente affaire, lorsque le requérant a soulevé des doutes sur le caractère non sexiste du système proposé, l'intimé était tenu de mener des enquêtes et de faire des efforts raisonnable en vue de déterminer si ces doutes étaient fondés on non. L'intimé n'a pas enquêté sur les plaintes du requérant. Il s'est contenté

d'obtenir des assurances de l'expert-conseil et il n' a rien fait en vue de prouver au requérant. que le système était impartial ou qu'il permettrait d'identifier et d'évaluer le travail effectué par les catégories d'emploi à prédominance feminine et à prédominance masculine. Même si le projet d'utiliser son système était une première position de négociation raisonnable, il ne constitue pas une défense en ce qui concerne son inflexibilité totale.

Les parties ont besoin de renseignements suffisants pour pouvoir mener des négociations d'une façon rationnelle et éclairée. L'obligation de divulguer des renseignements comprend l'obligation de donner suffisamment de renseignements pour permettre aux parties de tester le caractère non sexiste de leurs propres propositions et d'évaluer la position de négociation de l'autre partie. Dans la présente affaire, le Tribunal conclut que l'intimé n'a pas respecté son obligation de divulguer des renseignements lorsqu'il a refusé de révéler les résultats de son essai-pilote et les renseignements qu'il a obtenus sur le programme informatique lui a donnés ni la cote de pondération du questionnaire. Par conséquent, l'intimé n' a pas donné suffisamment de renseignements au requérant. pour lui permettre d'évaluer de façon intelligente le système.

Le Tribunal a rejeté le moyen de défense de l'employeur. Même si les obligations que la *Loi* confère à l'employeur sont importantes, elles ne peuvent pas prendre le pas sur le devoir du requérant de respecter ses obligations légales. Les obligations que doit respecter l'agent négociateur sont tout aussi importantes. Ces obligations supposent que les partenaires au processus de négociation de l'équité salariale sont sur un même pied d'égalité. Chaque partie doit faire des efforts en vue de se renseigner sur ses obligations et de négocier un programme d'équité salariale d'une façon qui ne gêne pas l'autre partie ni ne l'empêche de respecter ses obligations.

Recours - Défaut de négocier de bonne foi

Les recours n' ont pas pour but d' être punitifs, mais ils devraient viser à remédier aux conséquences d'une infraction à la *Loi.* Ils devraient être justes et équitables et conçus de façon à permettre aux parties de satisfaire le plus rapidement possible aux obligations que leur impose la *Loi.* Dans la présente affaire, le fait de renvoyer les parties à la table des négociations sans leur donner de directives ou sans imposer de délais ne faciliterait ni l'adoption rapide d'un programme d'équité salariale ni son affichage. Il n'est pas approprié non plus d'exiger du requérant, qu'il négocie afin de modifier le système de comparaison que propose l'intimé. Toutefois, le Tribunal n'est pas persuadé que le système de comparaison est irréparable. Le Tribunal a ordonné a l'intimé de négocier de bonne foi et de s'efforcer de convenir, avec le requérant. d'un systeme non sexiste de comparaison et d'un programme d'équité salariale. Il a ordonné aux deux parties de déposer des propositions dans les 60 jours, de collaborer et de divulguer tous les renseignements concernant les systèmes de comparaison proposés.

DECISION OF THE TRIBUNAL, MAY 29, 1991

1. This is an application by the Ontario Nurses Association ("ONA") alleging that the Respondent Employer, the Regional Municipality of Haldimand-Norfolk ("Regional Municipality") has violated the *Pay Equity Act, 1987* ("the *Act*"). Specifically, ONA alleges that the Regional Municipality adopted a gender

biased comparison system and that the Employer failed to negotiate in good faith and endeavour to agree upon a gender neutral comparison system and pay equity plan contrary to sections 4, 5, 6(1), 7, 12, 13, and 14 of the *Act*. We will address these allegations in turn.

2. ONA is the certified bargaining agent for nurses employed by the Regional Municipality at its Regional Health Unit (Local 78) and for part time nurses in a second bargaining unit at two Homes for the Aged, Norview Manor and Grandview Lodge (Local 153). Each of the bargaining units has a collective agreement with the Regional Municipality and this Employer was required to post its pay equity plans on or before January 1, 1990.

3. Nurses in both settings must be licensed to practice in the province of Ontario in accordance with statutory requirements. In addition, nursing practice is governed not only by their Employer, but also by the Standards of Nursing Practice, administered by the College of Nurses of Ontario. The Public Health nurses are professionally responsible for a wide range of public health programs including the control of communicable diseases and immunization services, counselling programmes such as family planning, pre-natal and post-natal programmes, pre-school and school health services. They are responsible for home visits and arrangement of home care services. They plan and deliver health care services, such as newborn assessments, crisis intervention and health needs assessments. They are responsible for initiating, developing and teaching a large range of educational programs in the community including nutrition, basic hygiene, teaching clients to self-administer some medications, post-surgical care and AIDS prevention. They work with public officials such as police, doctors, administrators and professionals in health, community and social services to implement programmes required by Government statute and regulation. They co-ordinate or arrange other health care and community services such as children's aid and referrals to support shelters, to respond to both acute and chronic health care needs of the community.

4. The nurses in the Home for the Aged are professionally responsible for planning and delivery of direct care and the health and safety of elderly and infirm patients. Their work includes advocacy on behalf of patients, observation, assessment and evaluation of their health needs and social well-being. Nurses must co-ordinate a team of health care providers, including other nurses, dieticians, and health care aides to ensure that the appropriate health care is provided to patients. On evenings, nights and weekends, a nurse is often "in charge" and as the supervisory person on site, is responsible for the operation of the Home. Nurses prepare and administer medications, apply treatments and dressings, and are responsible for documenting, and making decisions in complying with doctors' orders. Nurses must always be prepared to deal with deaths in the Home, ranging from the physical aspects of death of residents, to providing comfort and counselling to family, friends and other residents.

5. Both bargaining units are comprised solely of female job classes. As a result, subsection 6(5) of the *Act* requires that these female job classes shall be compared to male job classes throughout the establishment for the purposes of achieving pay equity for these bargaining units. The establishment is the Regional Municipality of Haldimand-Norfolk. Both parties acknowledged that the comparison system must collect and value the job requirements of both the nurse job classes and the male job classes to be compared, however the system's ability to successfully collect the work of male comparators was not an issue before us.

Gender Neutral Comparison System

6. In this case, ONA alleges that the Regional Municipality violated the *Act* by adopting a comparison system which is not gender neutral, specifically that it does not systematically identify and therefore redress systemic discrimination in the nurses wages. The comparison system proposed by the Regional Municipality was developed by William M. Mercer Ltd ("Mercer") and is a point factor job evaluation system; it includes questionnaire development, factor selection, pilot testing, collection of data, grouping of data, a job evaluation committee process, weighting and creation of new job hierarchy, identification of male comparators and a process of undertaking the comparisons.

7. In particular, ONA alleges that the comparison system introduced by the Employer fails to systematically, comprehensively and accurately describe, measure and value the job content of the work of the nurses in the ONA bargaining units as compared to male job classes in the Regional Municipality. ONA alleges that the Respondent's minor amendments to the questionnaire are insufficient to address the fundamental gender bias embedded in the comparison system, and that the proposed joint committee process will not cure that gender bias. ONA further alleges that the Regional Municipality failed to discharge its onus of establishing that its system is gender neutral. The Regional Municipality denies the allegations and submits that its system is gender neutral. It further submits that in preferring to adopt a system to apply to jobs across the Municipality, it is not essential to have job specificity.

8. This is the first case in which the issue of gender neutrality has been litigated. The question of what is gender neutral is a complex one and this is only a first assessment of what might constitute legal standards. We found the evidence and submissions of both parties to be very thorough and thoughtful, and we commend the parties for their assistance. As a Tribunal we are bound by both the *Interpretation Act* [Section 10 of the *Interpretation Act* R.S.O. 1970 c.225 specifies: such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the *Act* according to its intent, meaning and spirit] and the *Charter* [*Charter of Rights and Freedoms* R.S.C. 1985] to interpret the *Pay Equity Act, 1987* in a fair and purposive manner having regard to both the objectives and the wording of the *Act* and the constitutionally enshrined guarantees of equality. In fact, the *Act* states in its preamble that affirmative action is required to redress systemic wage discrimination. Section 4 specifies that the purpose of the *Act* is to redress systemic wage discrimination in compensation for work performed by employees in female job classes.

9. It is increasingly acknowledged that the persistence of systemic wage discrimination acts as a barrier to the full and equal participation of women in the workforce. The Supreme Court of Canada in *Janzen v. Platy Enterprises Limited* cited with approval from *Bell v. Ladas* [(1980), 1 C.H.R.R. D/155 at D/156] in addressing related issues of sexual harassment and pay discrimination:

> The evil to be remedied is the utilization of economic power or authority so as to restrict a woman's guaranteed and equal access to the workplace and all of its benefits ... Where a woman's equal access is denied or when terms or conditions differ when compared to male employees, the woman is being discriminated against. [1989 1.S.C.R. 1252 at 1277]

One such benefit is fair wages. A fair wage is important to the well-being of workers, not only in meeting the necessities of life, but in guaranteeing a sense of dignity and of recognition for the value of the work they perform. This has relevance in the context of pay equity. The *Act* requires Employers to remedy pay discrimination by identifying and redressing the wage gap through a pay equity plan. Where the Employer's employees are unionized, these obligations must be undertaken in conjunction with the bargaining agent.

10. The *Pay Equity Act, 1987* acknowledges that wage discrimination in women's salaries has been systemic. The *Act* does not seek to lay blame upon employers or unions for historical wage discrimination, but rather provides a framework for redressing that wage discrimination. Thus, motive and intent are unhelpful in assessing whether these parties have met their obligations under the *Act*; the goal is not to punish wrongdoers but rather to provide an effective remedy for wage discrimination. [See Re: *Ontario Human Rights Commission v. Simpson Sears Ltd.,* [1985] 2 S. C. R. at p.547, see also *Action Travail des Femmes v. C. N. R. Co.*, [1987] 1 S. C. R. 1114] This view was endorsed by the Supreme Court of Canada when interpreting federal anti-discrimination legislation in *Robichaud v. Canada (Treasury Board):*

> Since the *Act is* essentially concerned with the removal of discrimination, as opposed to punishing anti-social behavior, it follows that the motives or intention of those who discriminate are not central to its concerns. Rather, the *Act is* directed to redressing socially undesirable conditions quite apart from their reasons for existence. [[1987] 2 S.C.R. 84 at page 90]

11. The *Pay Equity Act, 1987* specifically acknowledges that existing compensation practices have failed to recognize or remedy systemic wage discrimination. This discrimination is in large measure due to institutional practices rather than individual, actions. Thus the requirement to use a gender neutral comparison system is one which reflects and attempts to remedy these historical problems. As such, the Employer is required to examine present compensation practices and to establish and maintain pay equity. Pay equity is achieved when:

> 6(1) For the purposes of this Act, 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.

12. Section 12 of the *Act* creates a statutory obligation upon the Employer to use a gender neutral comparison system to undertake a comparison between female and male job classes in the establishment to determine whether pay equity exists. Section 12 requires:

> Before the mandatory posting date, every employer to whom this Part applies, shall, using a gender neutral comparison system, compare the female job classes in each establishment of the employer with the male job classes in the same establishment to determine whether pay equity exists for each female job class.

That comparison system must be able to assess the content requirements of both female and male job classes, and to establish a process to assess their relative value. In order for the system to be gender neutral, we find it must be able to analyse and rectify systemic patterns of wage discrimination. Since the *Act* requires that discrimination in compensation of female work be addressed, 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. In a unionized setting the parties must negotiate in good faith and endeavour to agree upon the gender neutral comparison system and the pay equity plan for each bargaining unit; there is an obligation upon both the Union and the Employer under section 7 to negotiate for compensation practices in such a manner as not to contravene the requirement to establish and maintain pay equity.

13. In this case, the parties were in dispute as to who bears the onus in establishing whether the proposed system is gender neutral. As the Supreme Court of Canada in Simpson Sears, [*Supra* at p. 193] has held, the issue of onus arises where the evidence does not indicate a clear result, and the concept of onus is available as a tie breaker, by requiring that one party or the other prove something on the balance of probabilities. In this case however, we find the evidence sufficiently clear as not to require resort to onus of proof under the *Pay Equity Act, 1987*.

14. The *Act* necessitates an inquiry by the Tribunal, when a complaint is filed, into whether the comparison system in any given establishment is "described" and whether it is "gender neutral". Thus in this case it is important to assess what constitutes a comparison system and what makes it gender neutral. We had the benefit of expert evidence from a number of disciplines. The Applicant called two expert witnesses. Dr. Lynda Ames is an expert in both the American and Canadian context, in job evaluation questionnaire construction, reliability and validity testing procedures, data management and analysis, and comparison systems as they relate to gender bias. Dr. Pat Armstrong is an expert on the nature of women's work in Canada, and in particular, work in the health care sector; with expertise in critiquing the gender effect of methodologies which capture and analyse the content of women's work. The Regional Municipality called three expert witnesses. Dr. Vida Scarpello has American expertise in compensation design, implementation and audit, and work generally, including job evaluation and consensus decision making. Dr. Charles Fay is an American expert in traditional job evaluation methodology and compensation, including information collection, evaluation and analysis as well as bias in human resource decision making. Mr. James Delaney, with the Mercer firm, is an experienced job evaluation consultant, who testified on the proposed job evaluation system in this case. Although we find the expert evidence is helpful in setting the context for these first cases, we are concerned that it not become the only route parties take to resolution or adjudication of these issues. We believe parties with obligations under the *Act* will themselves develop the skills to design and implement gender neutral comparison systems.

15. The Tribunal also considered at length the jurisprudence from other jurisdictions in Canada, the United States and the European Economic Community. However, at the time of our consideration of this case, other provincial jurisdictions in Canada had no jurisprudence interpreting provincial statutory requirements of gender neutrality and thus provided no assistance. The American caselaw on comparable worth must be read with caution because of different statutory requirements respecting onus, intentional

discrimination and liability, as well as a very different context of labour and employment relations. Where jurisprudence is helpful from other jurisdictions, we have noted it.

16. The Regional Municipality is a public sector employer required to comply with Part II of the *Act*. Accordingly, it is required to negotiate and implement a pay equity plan for the female job classes in its establishment. [Pay Equity Commission, *Pay Equity Implementation Series # 9,* July, 1988 pg. 2] Section 13 specifies what pay equity plans must include. Subsection 13(2)(a) specifies that where female and male job classes exist in an establishment, every pay equity plan "shall describe the gender neutral comparison system used for the purposes of section 12". A job comparison system is any system designed to determine the relative worth of jobs within an employer's establishments. A gender neutral comparison system describes how the comparisons between male and female job classes are to be accomplished under the *Pay Equity Act, 1987*; it positively identifies and values characteristics of work, particularly women's work, which were historically undervalued or invisible. The *Act* recognizes that gender biases have existed and the gender neutral comparison system must work to consciously remove these biases. Gender bias can enter at different points in the process; in collecting information on job classes; in the selection and definition of sub-factors by which job classes may be evaluated; in weighting of factors and in the actual process of evaluating jobs [*ibid*]. The Supreme Court of Canada has said when addressing programs designed to redress systemic discrimination in employment, that a system must be able to analyse and destroy systemic patterns and must include measures designed to break the continuing cycle of systemic discrimination. [*Action Travail des Femmes , supra* at 1143] The purpose of using a gender neutral comparison system is to remove the arbitrariness and gender bias in the valuing of work. By introducing a systematic means of identifying and valuing work, the comparison system reduces some of the subjectivity and underlying assumptions in evaluating work which have been part of the historical pattern of wage discrimination encountered by women workers.

17. Consideration of the issues and evidence in this case has persuaded the Tribunal that there are four component parts of the gender neutral comparison system required to be described for the purposes of the *Act*, specifically: the accurate collection of job information; deciding on the mechanism or tool to determine how the value will attach to the job information; applying the mechanism to determine the value of the work performed; and making the comparisons. Accordingly, the Tribunal finds that parties must negotiate and endeavour to agree upon these elements of a gender neutral comparison system in order to meet the obligations to describe the system as required by section 13 of the *Act*.

18. Both parties led very helpful evidence on the historical context of women's work and on how wage discrimination is often embedded in existing compensation systems. Compensation practices have reflected long standing historical social and economic relations in which men were the "bread winners" and women the "at home care givers". When women entered the work force in large numbers, compensation systems continued to reflect that unequal economic status. [Evidence of Dr. Armstrong, Dr. Fay, Dr. Ames] Women's work differs from men's work, both historically and today. Women work predominantly in the clerical, retail and service sectors and men continue to dominate the managerial, industrial and financial sectors. More importantly, however, for pay equity purposes, the skill, effort, responsibility and working conditions required for women's work differ from men's work. Many pay practices have failed to record or to value these differences. Deeply held attitudes meant the gender of a job class was viewed in the

assessment of its value; if it was "women's work", it often led people, without any conscious decision making, to give less value to the work.

19. Traditional job evaluation often reinforced and perpetuated these attitudes, largely rewarding the skills and job content characteristics of male work and ignoring or giving less value to the skills and job content requirements of women's work. Originally, job evaluation was designed and applied in industrial and manufacturing workplaces, and to managerial positions. When these systems were applied to workplaces in the health, service and office sectors, few changes were made to the underlying assumptions with which the value of jobs were assessed.[Evidence of Dr. Armstrong, Mr. Delaney] The skills, ability and experience of women in these jobs were not recognized, leading to an inaccurate and inadequate appraisal of the value of their work, and the resultant wages paid to them. Studies have demonstrated that the sex of the job incumbent has been a factor contributing to the traditional placement of the job within the hierarchy of the workplace in both wages and status. [Shepela and Viviano "Some Psychological Factors Affecting Job Segregation and Wages" in Remick *Comparable Worth and Wage Discrimination,* Temple University Press, Phildelphia at p.47] Steinberg and Haignere conclude that traditional job evaluation methodologies created pervasive salary inequities by lowering the value of a characteristic or activity of work simply through its association as women's work. They conclude that this is a reflection of cultural and social stereotyping of the work traditionally done by women and the value attached to it. They found many job related skills are not treated as skills by evaluators, but rather as qualities "intrinsic to being a woman" and therefore not compensable. [R. Steingberg and L. Haignere, "Equitable Compensation: Methodological Criteria for Comparable Worth", in C.Bose and G. Spitze *Ingredients for Women's Employment Policy*, State University of New York, 1987 at p.163] Many compensation systems have made invisible the skills and responsibility required in women's work. These skills were associated with women's work in the home; patience and effective personal relations in raising and nurturing children, or care giving for ill or aging family members. Gender bias is embedded in conventional skill definitions of job complexity and human capital characteristics.[Ronnie Steinberg, "Social Construction of Skill" in *Work and Occupations* May 1990, State University of New York Press at p.183] Those skills were invisible in job evaluation and were considered natural attributes, of women as opposed to skills required on the job.

20. Although a gender neutral comparison system may involve a formalized job evaluation system, it need not necessarily do so, since the *Act* requires parties to use a gender neutral comparison system but makes no specific reference to job evaluation. [*Women's College Hospital* (1989), 1 P.E.R. 53 at page 67] The *Act* requires jobs to be evaluated on the basis of rationally and consistently applied principles that are free of gender bias and which meet the statutory criteria. This obligation may be met by the use of formal job evaluation or through some other comparison system. In this case, the Employer's system was a point factor job evaluation system. The Regional Municipality distinguished between traditional job evaluation and job evaluation it wishes to use for pay equity purposes. Traditional job evaluation is used to explicitly define goals and values of management and then record and reward them based upon prevailing marketplace wages. [D. Schwab, "Job Evaluation and Pay Setting Concepts and Practices" in *Comparable Worth: Issues and Alternatives* E.R. Livernash ed., Washington D.C: Equal Employment Advisory Council, 1980 at page 76. See also H. Remick, "Major Issues in A Priori Applications" in *Comparable Worth and Wage Discrimination* H. Remick ed., Temple University Press, Philadelphia, 1984] In contrast, job evaluation for pay equity purposes is designed to identify and close the wage gap where salary differentials

are a function of gender and not job requirements, and thus is designed to eliminate gender bias and wage discrimination.

21. The *Act's* purpose is to redress the systemic discrimination built into existing compensation practices. If the skill, effort, responsibility and working conditions are required in the normal performance of the work, they must be of value to the organization whether or not those requirements have been consciously recognized or previously valued by the employer. They must be identified, recorded and valued in order to meet the requirements of the Pay *Equity Act, 1987.* Subsection 4(2) specifies how systemic gender wage discrimination shall be identified:

> Systemic 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.

Subsection 5(1) requires:

> For the purposes of this Act, 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 and the conditions under which it is normally performed.

22. These statutory requirements provide guidance in determining how to assess the gender neutrality of a proposed comparison system. The object of section 5 is to determine the value of work to be compared using the statutory criteria. Parties in negotiating the system, have the flexibility to fashion a comparison system to meet their needs. However, as a starting point, they are required to ensure that each component which forms part of the comparison system is gender neutral. Bias in one means the system as a whole is not gender neutral. Gender bias must be eliminated from all parts of the comparison system.

23. Mr. Delaney of Mercer described the system developed by his firm for this workplace. It consists of a questionnaire which uses predetermined compensable factors to simultaneously collect and value information. The weighted value of each factor relative to other factors is a key part of the system. The consultant writes the language and selects factors to measure job content from job classes across the establishment. The levels in each question measure requirements in increasing order of complexity; the consultant establishes the levels by equating particular types of job requirements at the same level of complexity or difficulty. Mr. Delaney testified that this questionnaire is a communication by the employee to the job evaluation committee about the content of their job, and is also a communication to the employee on what scale the employer is valuing their job. The job evaluation committee receives the questionnaire and assigns composite point weights; it can seek additional information through desk audits or request an incumbent to attend committee meetings. Mr. Delaney indicated the importance of the committee being representative of women and men, management and union as well as a range of job classes in the establishment.

COLLECTION OF JOB INFORMATION

24. Having carefully considered the evidence and submissions in this case, we find that the parties have an obligation to ensure the collection of job content information meets the requirements of the *Act* to accurately identify skill, effort, responsibility and working conditions normally required in the work of both the female job classes in the establishment and the male job classes to be compared. Not only is this a necessary condition of a gender neutral comparison system but we also find that section 5 of the *Act* requires a standard of correctness, that is, the skills, effort, responsibility and working conditions must be accurately and completely recorded and valued.

25. We note that the evidence of the Employer's experts was inconsistent with respect to the necessity of accurate information collection. Mr. Delaney on behalf of the Employer testified that the methodology must collect the most accurate job content information possible in order to measure its value; he cautioned that correct choices of compensable factors and weights will not prevent failure if the information collection processes are faulty. In contrast, Dr. Scarpello testified that it is not necessary to capture all job content, that the organization can choose what job content to collect so long as male and female job classes are measured by the same standard. However, the section 5 standard of correctness and completeness makes Mr. Delaney's assessment more appropriate to the Ontario statute. We also concur with Dr. Ames and Dr. Armstrong that it is essential that there be reliable, accurate, and valid empirical data on job content requirements.

26. Based upon the evidence in this case, the Tribunal finds the following considerations helpful in assessing the gender neutrality of the collection of the job information component of the comparison system:

- What is the range of work performed in the establishment?
- Does the system make work, particularly women's work, visible in this 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, the same way for each job class to be compared?

What is the range of work performed in the establishment?

27. There was no dispute that a comparison system must consider the establishment to which it will be applied. Dr. Ames and Dr. Fay testified that the comparison system must look at the organization in terms of the type and range of job functions, nature, culture and goals, and that the mechanism to collect information on the work must be sensitive to the range of work performed in the establishment. We agree; it is important that whatever comparison system is proposed by parties for pay equity purposes, consideration must be given to the establishment to which it will be applied. This requires looking to the nature of the organization, the services it provides or the products it produces. The system must specifically

address the range of work performed by female job classes in the establishment so that it can identify systemic wage discrimination. We find both the Employer and the Union in this case considered the need to have a comparison system appropriate to a municipal workplace. However, the appropriateness of the system to the range of work in the establishment was not at issue; rather the issue before us was its appropriateness for the nurse job classes.

Does the system make work, particulary women's work, visible in this workplace? Does the information being collected accurately capture the skill, efort, responsibility and working conditions of all female job classes and the male job classes to be compared?

28. These indicators are interwoven, but both are critical to a gender neutral comparison system. The requirement to make women's work visible is a vitally important part of the requirements to accurately capture the work performed. Since the *Act* is specifically addressed to the historical undervaluation of women's work, special attention must be paid by the parties to making visible those aspects of women's work which have been unrecognized. Given that most women and men perform different jobs, with different skills and job content characteristics, one of the initial and key requirements of a gender neutral comparison system is to make visible those job characteristics, using the statutory criteria, that were previously not visible and thus not valued. The system must account for and reflect the differential job characteristics of both male and female work and positively value them. The parties negotiating a comparison system, must determine how to best capture the job requirements and the value of the work of the job classes to be compared. A comparison system for pay equity purposes must gather or collect job content information to be able to assess the skills, effort, responsibility and working conditions normally required in the performance of the work. The system must capture and value the work that is required, so that the Employer can meet the requirement to pay equitably for it. We are persuaded that to do anything less, would be to perpetuate systemic wage discrimination. We are not suggesting that any factors in a comparison system should value work unfairly, rather, the *Act* requires parties to cast their minds to the reasons that women's work has been required work but has not been recognized or valued by the organization. As Steinberg and Haignere write:

> If jobs are described incompletely and inaccurately on a systemic basis, existing specifications become nothing more than job-content based justifications for perpetuating undervaluation of female dominated or significantly minority jobs. [Steinberg and Haignere *supra*, at page 166]

29. Steinberg and Haignere's work is helpful in summarizing the type of job content the Tribunal will assess in this case in determining whether a proposed gender neutral comparison system will capture the value of work required in female job classes. Their list of frequently overlooked job content in female jobs includes: fine motor skills like rapid finger dexterity, special body co-ordination or expert use of fingers and hands; scheduling appointments and co-ordinating meetings; record keeping and filing; reading forms; writing standard letters; protecting confidentiality; working office machines; cleaning up after others; sitting for long periods of time; time stress; communication stress giving emotional support to distressed or ill people; stress from distractions and irregular work demands, from concentration, from dealing with chronically or terminally ill persons; working with constant noise; working in an open office setting;

answering questions and complaints from the public; responsibility for patients or residents of institutions; the degree to which new or unexpected problems on the job arise; and damage to equipment from a mistake. [*ibid,* at page 168]

30. Similarly, the Pay Equity Office published a list which identifies frequently overlooked aspects of women's work:

> **SKILL:**
> operating and maintaining several different types of office, manufacturing, treatment/diagnosis or monitoring equipment;
> manual dexterity required for giving injections, typing, or graphic arts;
>
> writing correspondence for others, and proofreading and editing others' work;
> establishing and maintaining manual and automated filing systems, or records management and disposal;
> training and orienting new staff;
> dispensing medication to patients;
> deciding the content and format of reports and presentations to clients.
>
> **EFFORT:**
>
> adjusting to rapid changes in the office or plant technology;
> concentrating for prolonged periods at computer terminals, lab benches and manufacturing equipment;
> performing complex sequences of hand-eye co-ordination in industrial jobs;
> providing service to several people or departments, working under many simultaneous deadlines;
> developing work schedules;
> frequent lifting (office or medical supplies, retail goods, injured or sick people).
>
> **RESPONSIBILITY:**
>
> caring for, and providing emotional support to children, institutionalized people;
> protecting confidentiality;
> acting on behalf of absent supervisors;
> representing the organization through communications with clients and the public;
> supervising staff;
> shouldering consequences of error to the organization;
> preventing possible damage to equipment;
> co-ordinating schedules for many people.

WORKING CONDITIONS:

stress from noise in open spaces, crowded conditions; and production noise;
exposure to disease and stress from caring for ill people;
dealing with upset, injured, irate or irrational people;
cleaning offices, stores, machinery, or hospital wards;
frequent bending or lifting of office or medical supplies, retail goods, injured or sick people or children;
stress from answering complaints;
long periods of travel and/or isolation. [Pay Equity Commission, *Implementing Pay Equity in the Workplace*, Toronto.]

31. Steinberg also concludes that the invisibility of women's work may extend beyond the failure to record job tasks to the alternate forms of organization of women's work. [R. Steinberg, "Social Construction of Skill" *supra* at p. 13] For example, women often work in co-operative team structures rather than in managerial hierarchies. We find this research helpful in understanding pay equity. Both the requirement to collect accurate job information as well as the requirement to give value to the alternative ways in which women's work is organized are key to making women's work visible.

32. In our consideration of whether the comparison system makes women's work visible, we note that both parties led a considerable amount of statistical evidence to bolster their cases. The experts for both parties were clear, informative and understandable in their explanations of current competing theories of the use of statistics in compensation practices. With the greatest respect however, we do not find statistical analyses are tests of gender neutrality. As the evidence clearly indicated, statistics are a product of their underlying assumptions, both in type of analyses used and in interpretive approaches, and the experts in this case spent considerable energy outlining their professional disagreements. Opinions as to the accuracy or appropriateness of t-tests, chi square tests, Hotellings T2, cross tabulations and regression analyses are in our view legitimate interdisciplinary professional differences. In this case, we find that the statistical evidence is of limited use to our determination of the issues.

33. This is not to suggest that statistics have no relevance in the pay equity process. Parties are entitled to use such tests in order to assure themselves of the efficacy of their bargaining proposals or to test the gender neutrality of another party's proposed system. At best, the statistics may guide parties on where to look for problems in the system; for example, to test whether sufficient numbers of women are answering questions at higher levels of a questionnaire; to assess the clustering or incongruity of male and female responses; or to analyse the differences between incumbent responses and committee decisions. Such tests can begin to indicate where the system may not identify and value the work requirements of the job classes. The actual conclusions and decisions drawn from the statistics are part of the dynamic and negotiated process which must take place between parties to a pay equity plan. As the expert evidence confirmed, often quantitative analysis neglects to collect or make visible women's work. In utilizing quantitative analysis, it is not enough to merely change the language of the system to non-sexist language, rather the system must be gender neutral. Dr. Armstrong points out that some of the information that is crucial for understanding women's work is lost in statistical analysis and she concludes:

> The inadequacy of numbers as an aid to gaining a full understanding of the position of women is camouflaged by researchers' references to 'scientific' methodology, by the adoption of non-sexist language, by the use of similar questions for both sexes, and by the tabulation, according to sex, of most data. But for the most part, women and men do different work, in different places, for different pay ... assumptions may serve to conceal or distort important aspects of women's work. [P. Armstrong and H. Armstrong, "Beyond Numbers: Problems with Quantitative Data" *The Epistemology of Gender,* 1984 revised paper from *Alternate Routes* 1983 at page 54]

34. The expert evidence led by both parties confirmed that the best source of information on the job requirements are the incumbents of the jobs. Dr. Fay testified that the accuracy of data collected is likely to be greater if the job incumbents rather than the committee provide the information and draw inferences regarding the appropriate factor levels. The Tribunal concurs. The incumbents are the people most familiar with the skills and requirements of their work, including both the detail and complexity required. The greatest accuracy is achieved using information gathered from those doing the work. [see also L. Haignere and B. Fisher, "Report on the Suffolk County Supervisor Incumbent Analysis", Centre for Women in Government, Albany, New York 1987] Since section 5 imposes a standard of accuracy, correctness and completeness, job information which is not accurately collected, is not valid for purposes of the *Act*.

35. We find that the comparison system must strive to ensure incumbents can consistently and accurately report upon their work requirements. The comparison system must be able to collect and record information about the job content requirements of both the female job classes and the male job classes to be compared. It must gather the data in accordance with the statutory requirements, consistently across all the job classes to be compared, and the system must undertake this in a way that is gender neutral. That is not to suggest that each task must be recorded, rather, as the *Act* specifies, there must be accurate collection and valuing of the skills, effort and responsibility normally required in the work and the conditions under which it is normally performed. The *Act* does not direct how parties might accomplish this, and we note that there are a variety of ways, including, interviews with incumbents, questionnaires, or through sampling or testing to find explicit and hidden gender bias. Whatever they negotiate, parties must assess whether the answers given will collect information on the actual work required, and will not just be a function of the way men and women describe their work, the invisibility referred to above.

36. At a minimum, parties should look to whatever independent or objective standards are available. In this case, an independent measure of required skills was available in the "Standards of Nursing Practice" by the College of Nurses which licenses and regulates nurses. In assessing whether the system will capture the nurse job requirements in this case, we also found the evidence of Karen Boughner, a public health nurse particularly helpful; as well as the written joint responses to the Employer's pilot developed by four ONA members; the actual pilot questionnaires answered by ONA nurses in this establishment; and the evidence of Joyce Dewitt, a nursing supervisor for a non-ONA unionized Home for the Aged in this establishment.

37. The main tool used by the Employer's comparison system to record the work is the job analysis questionnaire. The questionnaire performs two functions in this case. It is the tool to collect job content

information and it is the mechanism which determines value. We will consider the ability of the questionnaire in its final form, to accurately collect job information. Having weighed the evidence, the Tribunal finds that the Regional Municipality's comparison system and in particular the questionnaire, does not make visible the work of the nurse job classes in this establishment. The comparison system does not capture the nurse's job content accurately and completely as required by section 5. We made this finding by analysing each sub-factor of the questionnaire. Given that parties had no prior guidance on making this assessment, our goal is to assist, not to condemn parties in their continued efforts to agree upon a system.

Skills Required:

38. The Regional Municipality submits that the following sub-factors form part of the "skills" information required to be collected and valued by the *Act*: reading skills, writing skills, numeric skills, oral communication skills, education, experience, manual and dexterity skills, analytical reasoning skills, financial skills, equipment and innovation.

39. With respect to "Reading Skills", we find that the job requirements of these female job classes are collected. The questionnaire was amended to include patient charts and case histories. The questions posed have sufficient clarity to allow nurses to respond to such job requirements as understanding and applying legislation, the requirement to keep current with nursing journals and other medical and administrative documents. We find that as long as nurses filling out the questionnaire understand that they are to check the highest appropriate level, the complexity of the reading skills of their job class will be collected.

40. We also find that the "Writing Skills" sub-factor allows the nurses to record their skill requirements. The questionnaire was modified to add the skill to write nursing or health care information. The question records skills "to communicate social, political or other complex information and the skill to write or modify texts to persuade or influence"; all of which may be considered part of the writing skills of the female job classes in question.

41. With respect to the "Numeric Skills" question, we find that the sub-factor does not collect the skills of the nurses. The evidence was that both the public health nurses and Home for the Aged nurses collect and analyze statistical data; specifically they construct, read and interpret graphs in order to make their own treatment decisions, to report on their activities, and to give a statistical base in which to undertake programme planning. The questions as phrased do not collect the skill requirements of these female job classes.

42. With respect to "Oral Communication Skills", we find the sub-factor does not adequately collect or make visible the skill requirements of the female job classes. The evidence of the bargaining unit nurses was that they could not locate their communication skill requirements on the questionnaire, and the pilot results confirmed this. The sub-factor does not collect communication skills required to deal with seriously ill or infirm patients, those in drug induced states or low functioning clients. It does not collect skills required to deal with clients who are in crisis, and with their families. Ms. Boughner's evidence confirmed that she was unable to locate communication skills required to rapidly switch levels of sophistication and to use several

skills in one transaction; for example, talking to an Alzheimer's patient or suicidal teenager, then the family members, the lawyer and other health professionals. The questionnaire does not collect the skills required in counselling; for example, encouraging or persuading a client or patient to follow a particular programme. It does collect the skill requirements to communicate when there are language barriers. We also accept the testimony of Ms. Boughner that the "non-verbal" communication skills required in her job could not be found in the questionnaire; specifically the need for patience, caring and listening skills in dealing with patients or grieving families. Ms. Dewitt's evidence confirmed the complexity of oral communication skills required.

43. We find the "Education" sub-factor is likely to capture the skill requirements of the nurses. Those answering the pilot appear to have located their level of education with ease at the community college/equivalent training or university graduation levels. We accept Ms. Boughner's concern that the question does not record ongoing requirements for nurses' self education to maintain the professional standards required of them, and we find that parties could choose to collect this information either in the reading skills question or education question. The "Experience" question in contrast, confuses the length of time it takes to meet the full requirements of the particular job, with prior experience required to be hired for the job. This was confirmed by the oral evidence. We leave this as a question for the parties to decide how to collect experience in a way that records experience more accurately and consistently.

44. The "Manual and Dexterity Skills" sub-factor does not adequately capture the requirements of these female job classes. Both the pilot responses and the joint response of the bargaining unit nurses confirmed that incumbents had difficulty locating their dexterity skill job requirements. Skills such as handling of newborns during assessment, use of health care technology, clinical work as public health nurses, applying sterile dressings and removing sutures, could not be located by the nurses and thus these skills were not collected. Manual and dexterity skills required in the use of a variety of audio-visual equipment are also not collected. The questionnaire does include the adjustment of delicate medical equipment; however, we do not find that this is sufficient to collect the manual and dexterity skills required in the work of these female job classes.

45. With respect to the "Analytical Reasoning Skills" sub-factor, we find that most of the nurses who completed the pilot were able to locate their skill requirements at the second highest level; that of "analyse complex information to evaluate and select most appropriate of established methods or techniques". The nurses testified with respect to the wide range of analytical reasoning they are required to apply in their work. Based upon the evidence about skills that these nurses are required regularly to use, we find the sub-factor will likely collect their job requirements.

46. Most of the nurses who answered the "Financial Skill" sub-factor responded that it does not apply to them largely because it measures formal training already measured under the education sub-factor, rather than collecting the financial skills necessary for the work. The oral evidence of both Ms. Boughner and Ms. Dewitt indicated that there are financial skill requirements in interpreting and working within budgets to ensure high levels of service delivery. Public health nurses are also required to use financial skills to assist volunteer groups and organizations to construct and implement budgets. They must use these skills to plan

and organize budgets of clients, balancing such costs as proper nutrition and at home services such as physiotherapy. We do not find those skills collected here or elsewhere in the questionnaire.

47. The "Equipment Knowledge" sub-factor remained unchanged from pilot to finalized version. Yet the pilot responses were inconsistent, indicating the nurses had difficulty locating their work requirements. The evidence of Ms. Boughner and Ms. Dewitt confirmed that the type of equipment knowledge and repair skills required for these female job classes is not collected in this question.

48. We find that the "Innovation Skills" sub-factor fails to collect or make visible the job requirements of the nurses. Most of the levels are directed exclusively to innovation with respect to departments or divisions of the Regional Municipality's organization, collecting managerial and organizational innovation. It fails to collect required skills in innovation in the design and implementation of public health programmes; innovative modification of client and patient procedures; or the development of new and more efficient procedures in services nurses provide to the public.

49. In sum, we find that although the skill sub-factors collect some, they fail to accurately and completely collect and make visible all the skills required in the work of the female job classes. The wording of the skills sub-factors focuses upon managerial and administrative skills, and does not identify or collect the skills of the nurse job classes, specifically in oral communication, numeric skills, manual and dexterity skills, financial skills, experience, equipment knowledge and innovation skills.

Responsibility Required:

50. According to the Regional Municipality's proposed comparison system, the following are the responsibility sub-factors: planning, co-ordination, problem solving/complexity, financial responsibility, supervision of others, supervision received, inside contacts, outside contacts, and impact of error.

51. We find that the "Planning Skills" sub-factor fails to collect or make visible the planning responsibility requirements of the nurses in these bargaining units. The planning skills required for nurses include planning presentations and educational sessions with large and small groups covering a broad age range in both classrooms and community settings; assisting clients with family planning, responsibility for planning objectives and goals for a widely varied client population; responsibility to plan public health programs to meet statutory requirements or government directives; and the planning of individual work loads on an ongoing and regular basis. The oral evidence is reinforced by the fact that all the nurses answered the pilot question at all different levels, some making margin notes to illustrate what planning requirements are not collected. The planning skills measured by the questionnaire are directed entirely to administrative management skills; to "departments, divisions, functional areas", and to "corporate strategies". As the evidence indicated, there is no room to measure or record planning for patients needs, or to recognize that these are components of the work required. The question as posed, also requires that planning skills must be those which set schedules or priorities in advance of performance of the work and thus fails to make visible the continual planning and revising which nurses must undertake to meet changing client needs. We note that these skills are not identified or collected elsewhere in the questionnaire.

52. With respect to "Co-ordination Skills", although the sub-factor specifies that co-ordination could be with respect to members of the public and control of people, on balance we are not persuaded that the question captures the co-ordination skills required for these female job classes. Pilot responses were at all different levels. The joint response of nurses reported that in their view the question had a management bias. The four nurses believe the sub-factor failed to collect the co-ordination skill requirements of their jobs including case management, public relations and co-ordination of volunteer organizations external to the Regional Municipality. The skills collected in this sub-factor are co-ordination "of other staff or people", reflecting hierarchical co-ordination over people working under the direction of someone. In contrast, a key nursing responsibility is co-ordination of efforts with other nurses and health care professionals over whom the nurse does not have managerial control, in order to accomplish the work required.

53. With respect to the "Problem Solving/Complexity" sub-factor, on balance we find this question does collect the information on problem solving/complexity required. Most of the evidence indicated that nurses undertake fairly complex problem solving, and accurate judgements are a regular part of their job requirements. Most of the nurses answering the pilot located their responsibilities at the second highest level, that of "problems are difficult to identify, facts may be insufficient or misleading. Extensive inquiry or research may be necessary, which may extend to unrelated work areas. Solutions require integration of information and considerable independent judgment."

54. The "Financial Responsibility" sub-factor was marked by several nurses in the pilot as "does not apply". However, the evidence we received from Ms. Dewitt and Ms. Boughner suggests that these job classes do require an understanding of budgets, including responsibility to make programme and equipment recommendations. We find that the nurses were unable to locate these financial responsibility requirements in the question and thus the system does not collect this aspect of their work.

55. With respect to responsibility for the "Supervision of Others", we find that the question does not accurately collect the job information of these female job classes. The nurses in the pilot test responded at all different levels from "does not apply" to the highest level, indicating that they could not locate their job requirements. The choice of sub-factor language records and credits supervision and skills often associated with job classes in a management capacity, specifically relating to direct supervision and training of staff. As Ms. Boughner, a bargaining unit nurse testified, the question does not recognize other kinds of supervisory skills that are not of a traditional manager/employee nature. It does not make visible such job requirements as supervision of other health care workers, of clients and of volunteers, and supervisory responsibility on night shifts or during the absence of the head nurse; skills that are not credited here or elsewhere in the questionnaire. Thus the sub-factor fails to make visible the way in which the nurses' work is organized and the alternative forms of team leadership and supervision required in the work of the female job classes in these bargaining units.

56. The "Supervision Received" question, posed a different sort of difficulty. Although our assessment is that the wording appears to be sufficient to collect the job requirements, we find the pilot responses by nurses indicate they were having difficulty locating their work requirements. Ms. Boughner testified that much of the day to day decision making was without supervision. She testified that supervision that is received is a "team accountability" supervision with regular strategy and reporting sessions, and that she was

unable to locate this form of supervision received in the sub-factor. We find that some investigation is required to ascertain why the relevant responsibility requirement is not being collected in this sub-factor.

57. With respect to the sub-factor of "Internal Contacts", we find the same difficulty. The sub-factor as worded appears to collect job requirements. However, again the nurses answered at very different levels, and this indication that their job requirements are not being collected was confirmed by the oral evidence. Interpersonal contacts in nursing work include emotional responsibility for patients and clients, those contacts are often the core of nursing work and are not made visible here. We find that the Employer should have inquired as to the reasons for the varied responses in the pilot. It did not, and the question remained the same from the pilot test to the finalized version. The "Outside Contacts" sub-factor of responsibility was only marginally changed from the pilot to final version, adding "clients" and "media" to the second lowest level. Yet pilot responses indicate that the nurses had a great deal of difficulty locating their jobs, responding at a wide variety of levels. In one case, the nurse answering the pilot changed her mind four times with respect to where her job requirements might fall. Based upon this and the oral evidence we received, we find that this sub-factor fails to collect the requirements of these female job classes to include contacts with respect to socially or politically delicate issues such as AIDS programmes, sex education and family planning. It also does not record responsibility for outside contacts with other service agencies and organizations.

58. The "Impact of Error" sub-factor was added to address some of the nurses concerns, and we find that this additional sub-factor does collect the job information. The Standards of Nursing Practice require nurses to acquire and maintain nursing skills to respond to perhaps infrequent but crisis situations in which the possibility of error could have serious consequences, be it such situations as cardiac arrest or elderly people choking. Also, the evidence indicates that a registered nurse working at night in the Homes for the Aged may have to adjust medication or deal with emergencies with no doctor or director of nursing available. As Ms. Dewitt's evidence illustrated, a nurse in the Homes for the Aged is in charge of patient care and must monitor or observe changes in condition. Based upon her knowledge, she must respond appropriately and the impact of an incorrect response could vitally affect the health and safety of patients. The infrequency or irregularity of these demands must be recorded, but so too must the requirement to maintain these skills as part of their job requirements. We note that the negotiation of this sub-factor is illustrative of the potential for positive pay equity negotiations. Since job information collection must be accurate and since incumbents are the best source of that information; serious negotiation for changes to more accurately collect job requirements could produce an effective comparison system. Unfortunately this did not occur between these parties beyond a small number of sub-factors.

59. In sum, we find that the Municipality's comparison system fails to accurately and completely collect and make visible the following parts of responsibility requirements of the nurses: planning skills, co-ordination skills, financial responsibility, supervision of others, supervision received, internal and external contacts.

Effort Required:

60. The Employer's comparison system includes two sub-factors under effort; mental/visual effort and physical effort. The Tribunal finds that the effort requirements of the female job classes are not accurately collected in these sub-factors either individually or in combination. Although the addition of "people" to physical effort was important, it did not adequately address the fact that the pilot responses were inconsistent, and that the nurses expressed concern that they had difficulty answering the questionnaire. In the evidence presented, the nurses cited a number of effort requirements not collected, such as production requirements of numbers of visits per week; fatigue relating to ongoing assessments of clients in home visits; mental and visual effort required in a nurse's job which is not recorded by the "monotony" focus of the sub-factor.

Working Conditions Requirements:

61. The Regional Municipality's comparison system includes two working conditions factors: "Working Conditions" and "Exposure to Stress and Risk". With respect to the working conditions sub-factor, we are satisfied that the amendments made by the Employer in adding "potentially dangerous people" and "exposure to objectionable substances" assists these female job classes in locating their working conditions in the sub-factor. This additional factor allows nurses to record objectionable working conditions such as excrement, vomit and open wounds, as well as exposure to hazardous viruses, hepatitis B and other communicable diseases. It should also collect the need to adjust to a variety of working environments continuously, which is a job requirement of the public health nurses. The Employer also added the working conditions sub-factor of "Exposure to Stress and Risk". We find that the stress sub-factor will likely capture the physical, emotional and psychological stress associated with dealing with both the physical aspects of death as well as the emotional aspects in providing support to families. It will collect the stress of dealing with patients on a regular basis in the Homes for the Aged and in dealing with clients in crisis within the public health system. We find the working conditions requirements are likely to be collected by the questionnaire.

62. In sum, we find the comparison system in this case does not make visible nurses' work in the establishment. It fails to accurately collect and thus fails to value job content information, and the system does not provide a means to analyse and then rectify deficiencies. Section II of the questionnaire asked incumbents to list job content not measured in the rest of the questionnaire, and it identified deficiencies in collection of job requirements. It is unfortunate the Employer chose not to take the section II responses into account, because they indicated major problems in making visible health care work in this establishment. We find that the Employer did not inform itself about the nurses' work through these responses or through any other efforts. We also find that the script drafted by the Employer, to be read in administering the questionnaire, does not cure the deficiencies in this respect. The script, although helpful, does not explain the purpose of the pay equity process and does not give employees specific information on how to record their job requirements in a way which will make them visible. While some of the sub-factors will adequately collect the skill, effort, responsibility and working conditions of the female job classes in these bargaining units, we find many other sub-factors are clearly deficient. In large measure, we

find this failure to collect the job requirements the end result of the inadequate negotiation process which took place between these parties.

Is the information collected accurately and consistently?

63. We find the Employer's proposal to use a closed-ended questionnaire a good one. A closed-ended questionnaire is one which frames the questions in such a way as to elicit more consistent and comparable responses, minimizing the impact of gender and linguistic differences. As the Regional Municipality submits, this format has been recognized as superior to open-ended questionnaires which often collect extraneous information related more to personal abilities, perception and gender of incumbents than the actual job requirements. We also find the Employer's removal of supervisory review of the questionnaires, to allow for anonymity of incumbent responses, to be an important step. It may be that incumbents who do not fear reprisal from their supervisors are more likely to give accurate job information than those concerned about the reaction of their supervisors.

64. The questionnaire must use language that is understandable to employees. This requires not only clarity and non-sexist language, but also wording that allows incumbents to properly recognize and report the skill, effort, responsibility and working conditions required in their work. Women and men tend to use different vocabulary in describing their work, which can affect the value placed upon their work. Women tend to use verbs that are softer or weaker, down-playing the action or activeness. We concur with Dr. Ames' evidence that parties should assure themselves that answers given are not a reflection of gender, education, class or ethnic background, but rather, that those responding have understood the questions and have answered them. The comparison system must be analyzed to ensure wording of any sub-factors selected is gender neutral.

65. In this case, we find that there are comprehension problems in the questionnaire. For example, each level measured frequency and complexity simultaneously. As the evidence indicated, given that an incumbent could only respond to one level, often the frequency and complexity were not paired to accurately reflect the work. The language was also not accessible. For example, much of the language uses relative terms such as "smaller" or "more frequent" with no reference point as to smaller or more frequent than what. Without some grounding, either task based, or reference points for words which imply a comparison with something else, the responses to the questionnaire are likely to be inconsistent and invalid. The Pay Equity Office recommends that relative terms such as frequency, should contain fixed points of reference such as 3 hours per week or 2 times a month as a means to accurately and consistently collect job information. [Pay Equity Commission, *supra*] Such a technique would have improved the collection of job information for this comparison system immeasurably.

66. Dr. Ames, a specialist in questionnaire construction, testified that because the questionnaire had an unnecessarily complex sentence structure, answers to questions which cannot be understood by incumbents will be random, inaccurate and increase the possibility of both error and gender bias. Dr. Fay testified that the questionnaire was "not an easy read" but that accessibility was a price to be paid to have the questionnaire applicable to a wide range of jobs. We find that there is a need for the employee to readily understand and accurately interpret the questions in order for the comparison system to accurately and

comprehensively record and value job requirements. Where there is considerable variance in questionnaire responses for the nurses in the same job class, it is likely there is comprehension difficulty, thus warranting some investigation. We note that Ms. Dewitt's scores on the questionnaire were consistently higher than the nurses participating in the pilot. Ms. Dewitt testified that she had filled the questionnaire out six times and that she relied upon both her first hand knowledge of the job and a number of job evaluation courses she had taken. We find this illustrates that some of the comprehension difficulties might be cured by more training of incumbents prior to filling out the questionnaire. Incumbents must be able to find their job requirements within the questions posed.

67. The Tribunal received a great deal of evidence on how parties can verify if information is collected consistently. Once the comparison system has met the initial requirement to accurately collect the skill, effort, responsibility and working conditions requirements of the job classes to be compared, the comparison system must be applied in a consistent way. Dr. Fay testified consistent application was a requirement of any effective comparison system. However, the Union submitted consistency will only address a certain portion of gender bias, that implicit in a consistency approach is the assumption that there are no differences between male and female work; it submits that a consistent application of a comparison system which ignores gender will not reveal wage discrimination.

68. The Tribunal finds that consistency is a necessary but not a sufficient requirement of gender neutrality. Consistently applying a system which does not accurately collect job requirements and which is not gender neutral will not achieve gender neutrality. Further, a consistently applied comparison system which leads to some wage increases to female job classes, does not in itself confirm for parties that the system is gender neutral. The requirement of consistency is a sequential one, and becomes valid only after the initial obligation of accurate and complete collection of job information is satisfied.

DECIDING ON THE MECHANISM OR TOOL TO DETERMINE HOW VALUE WILL ATTACH TO THE INFORMATION

69. The second component of a gender neutral comparison system, is valuing the information collected. A gender neutral comparison system must have a mechanism or tool to determine how value will attach to the information collected based upon the statutory criterion. At each step of the negotiation process, parties must endeavour to assure themselves that the system is gender neutral. Deficiencies in the collection of job requirements for example, cannot be cured by a valuing tool which effectively determines value; and in turn, a valuing tool which is so flawed that it ignores the statutory obligations, cannot be cured by accurate collection of job requirements.

70. This is a more complex part of the gender neutral comparison system and we appreciate that the parties had little guidance on how to ensure that they are determining the value of work in a manner which meets their statutory obligations. Selection of the tool or mechanism to value the work must be negotiated under section 14 as part of the gender neutral comparison system, yet subsections 4(2) and 5(1) of the *Act* require parties to identify systemic gender discrimination by undertaking comparisons of the value of the work based upon the composite of skill, effort, responsibility and working conditions. The parties then, in negotiating a mechanism to determine value, must meet the *Act's* requirements to identify systemic

discrimination. We find that the value which attaches to the work is the joint decision of the parties. The Tribunal's role in this respect is to ensure that the process and content required by the *Act* are followed; and only in cases where parties have bargained to an impasse on specific value issues will we intervene to decide the most appropriate determination of value.

71. In this case, the parties negotiated for a mechanism to determine value but did not complete negotiations for the comparison system. Consequently, we will assess only those components in evidence and at issue before us. The evidence led persuaded us that the following questions would be helpful:

> 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 sub-factors, if used, undertaken free of gender bias?
>
> Are levels or equivalencies, if used, free of gender bias?
>
> Is the composite required by subsection 5(1) decided in such a way that gives value to all the statutory criteria and is point weighting free of gender bias?

Can the tool determine value of the work performed using the statutory criteria?

72. We find this requires that the mechanism or tool to decide value of the job information, attaches that value based upon the criteria of skill, effort, responsibility and working conditions. In this case, the questionnaire serves not only as the tool for collection of job information, but serves also as the decision making tool with respect to attaching value. The questionnaire is divided into sub-factors. Each of these sub-factors attach to one of the statutory criteria, as discussed above. Each level of each question or sub-factor response is assigned a point value, and each sub-factor as a whole has a percentage weight attached to it. We find therefore, that the tool does determine a value of the work performed based upon the statutory criteria.

73. However, the Tribunal's enquiry does not end there. Subsection 4(2) specifies that systemic gender discrimination must be identified by undertaking comparisons of the job classes based upon the value of the work performed. This imposes an obligation upon the parties to pay equity negotiations to ensure that the value they jointly attach is gender neutral, addressing directly the requirement to identify systemic discrimination. We appreciate that this is not an easy process. Systemic discrimination by its very nature tells us that it is hidden, and neither overt or intended. However, we are persuaded that the parties can undertake such a process by examining the selection of sub-factors and the choice of levels or equivalencies, if used, to investigate if they are gender neutral.

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

74. There are four statutory criterion required to be used in valuing work requirements. For comparison systems which are point factor job evaluation, the choice of sub-factors is an important part of establishing a means to sort and value the work performed. Treiman has found that the choice of sub-factors included in job evaluation can have very substantial consequences for the ordering of jobs with respect to their relative worth and hence relative pay. [D. Treiman, "Effect of Choice of Factors and Factor Weights in Job Evaluation" in H. Remick, *supra* at p. 88] Although sub-factors are not required by the *Act*, if as in this case, parties choose to propose them, they must recognize that there are sub-factors which are acknowledged to benefit female or male work. Some sub-factors value directly the skill, effort, responsibility and working conditions of male jobs and others those of female jobs, and yet others collect the value of work of both genders.

75. The choice of the sub-factors must be undertaken in a manner that does not create or maintain discriminatory valuing of the work requirements of female or male job classes. Parties must try to ensure each sub-factor identifies and values the particular job characteristics equitably for both female and male jobs to be compared. This will help parties to identify as much as possible at the front end of the process, any potential gender bias. This assessment is not definitive, because there will inevitably be sub-factors which favour some types of work, but such an exercise helps to identify where systemic discrimination can enter. The parties, in selecting sub-factors must strike a balance to ensure that all the job requirements for both female and male job classes are identified and valued as required by section 5 of the *Act*. Applying sub-factors the same way to female and male job classes does not necessarily result in gender neutrality if the sub-factors themselves already are gender biased. Parties to a pay equity plan are in the best position to ensure that selection of sub-factors presents a fair balance of criteria,and to ensure they value the work performed in such a way as not to favour female or male job classes. Where the parties are not in agreement, the Tribunal must weigh the evidence and balance the interests of the parties in assessing this component of the comparison system.

76. The Employer's evidence was that historically, sub-factors for job evaluation were constructed to replicate as closely as possible the existing wage hierarchy and thus also replicated any gender bias that might have existed in the establishment. It submits that its choice of sub-factors in this case was based upon the need to balance sub-factors which it viewed as favouring the work of male and female job classes. The Municipality added the sub-factors of "impact of error" and "exposure to stress and risk" in an effort to redress the imbalance in factors favouring male work. The questionnaire contains 24 sub-factors based upon skill, effort, responsibility and working conditions. The Union submits that there continues to be a substantial imbalance in the selection of sub-factors such that the comparison system can only favour male job classes in its result.

77. In this case, we find that the sub-factors do provide a range of possibilities for incumbents to identify and record job requirements of both nurse's work and the male job classes to be compared in this establishment, however the selection of sub-factors does not cure the serious deficiencies in accurate collection of job content information.

Are levels or equivalencies, if used, free of gender bias?

78. In this case, weighting is involved at two points in the process, the first is in setting levels and equivalencies, which constitute an initial weighting process. We find that the failure of this questionnaire to make visible the women's work of these job classes is further aggravated by the weighting already embedded in the questionnaire. In this case, the questionnaire not only collects job information but evaluates it simultaneously. Each question contains a range of levels of increasing difficulty or complexity, and each higher level is therefore assigned a higher value. The Employer's choices of equivalencies set an initial rather crucial hierarchy of value. No consideration was given to possible gender bias in setting that hierarchy of levels within the questionnaire. The ordering and valuing of the information has been done without an analysis of the current pay structure, or requirements of nurse's work in this establishment which need to be valued. The questionnaire asks those responding to rate themselves on a scale, at levels which are already pre-weighted and which establish a hierarchy of job content. Value judgments are already embedded, and we find that the Employer did not put its mind to the impact on the work of these female job classes.

79. It is precisely the weighting embedded in these levels or equivalencies that the Employer is required to negotiate with ONA and, although there was considerable negotiation between these parties, they reached an impasse. The Tribunal has jurisdiction to decide these issues once parties reach an impasse and seek a decision from the Tribunal; however, we find it more helpful in this case to alert the parties to concerns we noted, in order to assist the parties when they return to the negotiating table. As a result, we identify here only a couple of examples, based upon the evidence led, of how valuing through the setting of equivalencies may not properly value nurses' work. One example is the "Impact of Errors" sub-factor, in which "loss to the Municipality's prestige" is two levels higher than "may result in serious injury to others". Another example is in the "outside contacts" sub-factor, in which contact with the media and publicity with respect to the image of the Municipality is seven levels higher than routine contact with patients. The structuring of values is such that the jobs with formal managerial responsibility are to score at the highest levels. The initial weighting by equivalencies consistently reflects and values formal supervision as opposed to the alternate ways in which nurses' work is organized. In part, the difficulties in assessing the equivalencies arise because the nurses' work has not yet been accurately collected, and thus cannot yet be valued. When the job requirements are collected and made visible, they must also, in a questionnaire such as this, be placed at the appropriate levels to value their work in a gender neutral manner.

80. The parties must negotiate these equivalencies to remove as much gender bias as possible. We appreciate this process is difficult and at times may be irresolvable. Where parties cannot agree on a value, the Tribunal will resolve the impasse and decide value based upon first hand evidence of both female and male job classes, and upon any objective criteria or standards which may exist. In this case, we heard no evidence on the value of the male job classes to be compared and therefore will not make any further assessment on the equivalencies other than to direct parties to negotiate.

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

81. We find that a key part of the comparison system which parties must negotiate is the weighting given to the factors and sub-factors in the comparison system. The composite of the criteria as required by subsection 5(1) must correctly measure and value the skill, effort, responsibility and working conditions, and weigh them in such a way as to not unfairly advantage either female or male job classes. Since the *Act* recognizes that systemic biases have historically favoured the work performed in male jobs, the parties negotiating the comparison system must pay particular attention to ways in which the weightings effect female jobs as an indicator of hidden bias.

82. The Tribunal received considerable evidence regarding the implication of weighting in terms of the statutory requirements of gender neutrality. In this comparison system, the second part of weighting is the relative point values of the sub-factors. Bias can enter at this stage of the process as well, since decisions are not merely technical, but rather, value judgements are being made about equity between female and male job characteristics. Gender bias can be magnified through weighting procedures and parties must check to confirm whether high values given to particular job characteristics are justified or not. As part of negotiating how the comparison system will value the job requirements, parties must ensure such weighting is gender neutral, they must consciously evaluate whether the assignment of weights unfairly rewards or penalizes male or female job classes. Treiman's work demonstrates that weighting of sub-factors can have substantial consequences for ordering the worth of jobs, particularly when sub-factors are highly correlated. [D. Treiman "Effect of Choice of Factors and Factor Weights in Job Evaluation" *ibid* at p. 88; see also D.M. Werwie, *Sex and Pay in the Federal Goverment, Using JobEvaluation Systems to Implement Comparable Worth,* Greenwood Press, New York,1987 at p. 100] Dr. Ames stressed that the correlation of sub-factors, where different sub-factors value the same type of job content more than once, must be carefully analysed to ensure parties are not giving unfair value to male job classes when assigning point weighting. Haignere reports that it is difficult to weight job content if the invisibility of women's work is not identified earlier in the process; she also points out that it is a new and difficult challenge to weight job characteristics of women's work that have never been valued before. [L. Haignere "Pay Equity Implementation"; Conference Paper, Centre for Research on Public Law and Public Policy, Osgoode Law School, Toronto, 1990]

83. We find that, although an analysis of weighting can and should help identify any previously hidden biases, in itself analysis at the weighting stage is not sufficient to meet the requirement of gender neutrality. It is part of the sequential process of checks and balances that parties must undertake at each step to ensure, as much as possible, that the system is gender neutral and that it attaches value in a manner which does not unfairly advantage male or female job classes. We find, in this case, the parties should have negotiated point weighting with a view to agreeing upon weights that value equally the female and male job requirements. Although the Mercer comparison system initially proposes a particular weighting of the sub-factors to arrive at a composite, we note with approval the Employer's evidence that it would negotiate these composites with ONA. Although evidence on the Canadian Union of Public Employees ("CUPE 2210") bargaining unit in this establishment was led, we do not find it appropriate to assess that composite weighting, since any negotiated results for one pay equity plan may not be appropriate for another. In this

case, the parties have not yet negotiated a point value hierarchy for the jobs in these bargaining units and accordingly, we will not make a finding.

APPLYING THE TOOL OR MECHANISM TO DETERMINE THE VALUE OF THE WORK

84. In assessing the evidence, we find the following assisted us in assessing its 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 decision making process accomplished in a manner free of gender bias?
>
> Did the mechanism identify systemic wage discrimination?

85. The *Act* does not require parties to utilize joint committees in the implementation of a genderneutral comparison system; however, where the system requires committees, the parties have an obligation to ensure that they contribute to, rather than detract from, the gender neutrality of the comparison system. In this case, the system includes a joint job evaluation committee to collect questionnaire responses, assign weights to the sub-factors, and apply the weights to the average responses to determine a point value for each job class. The Regional Municipality submits that consensus by the joint job evaluation committee is a key part of its comparison system. It submits that if the committee can agree, and it is composed of individuals representative of Union and management, men and women, representing a cross section of job classes, then consensus is as near a measure of gender neutrality as possible. The Union argues that the joint committee should not be a test of gender neutrality.

86. We find the submissions of the Employer persuasive, although we qualify them in part. If a representative group of people agree, hopefully as much potential bias as possible has been eliminated in the value judgements made in use of the comparison system. [Steinberg and Haignere, *supra* at page 17 have also concluded that diversity of the representation with respect to race, sex, age, job and union background decreases the likelihood of system bias] However, we find that the parties must be alert to the fact that historical attitudes about the value of women's work can continue to operate in a committee situation regardless of representation. Consensus in and of itself does not necessarily eliminate traditional biases and stereotyped notions of women's work. Although members selected for a committee might be representative of jobs within an establishment, often they are also aware of the current salary hierarchy, particularly in a public sector workplace such as in this case. That awareness of salary levels often lowers the point values of a job class even when the job requirements are taken into account. [M. Mount and R.A. Ellis "Sources of Bias in Job Evaluation: A Review and Critique of Research", *Journal of Social Issues,*

Vol. 4S, No. 4, 1989 at 156] Mr. Delaney testified that it was possible to convince a committee that an unfair system was fair. This is reinforced in an article by Erica Szyszczak who commented:

> While such a (job evaluation) scheme looks attractive in giving an appearance of an objective scientific approach to defining the value of jobs, it is also recognized that it can conveniently disguise and reinforce sex discrimination. As with all aspects of the wage bargaining process, a job evaluation scheme relies upon a set of skills agreed between management and Unions and reflects the relative bargaining strengths not only between these parties but also between male and female workers themselves. [E. Szyszczak, "Pay Inequalities and Equal Value Claims" *Modern Law Review,* Vol. 48, 1985, at page 144]

87. Joan Acker in her book on the Oregon comparable worth experience, [J. Acker, *Doing Comparable Worth,* Temple University Press, Philadelphia, 1988]documented the powerful nature of small group committee dynamics. She found that women's opinions were not taken seriously and that committee decisions disproportionately reflected men's consensus. Although the use of committees in the Ontario pay equity context is new, we find the American experience helpful in alerting parties to where gender bias may enter the committee process.

88. The committee works with the job content information collected and attaches a value to the information. If there are inaccuracies in the initial collection of information, a committee cannot adequately compensate without going back and accurately collecting all this information. For example, if the level of the sub-factor measures more than one task as it does in this case, the committee will have difficulty identifying which part the incumbent responded to. If all the previous requirements for gender neutrality have been met, this is not a problem; however, the committee process doesn't correct inaccurate information collected at the outset. We agree with Dr. Fay that the ability of the Committee to follow up with individual incumbents to obtain additional job information, is an important aspect of this system. However, parties are still obliged by section 5 of the *Act* to accurately collect the skill, effort, responsibility and working conditions normally required as the first component of the comparison system.

89. We find the Employer's proposal for an equally represented union nominated and management nominated joint committee, representative of both sexes and various job classes, to be a good one. Although we recognize that consensus of the committee is in itself not a test of gender neutrality, we find such representation assists in ensuring that a range of views are represented. Agreement on the valuing of jobs by representative committee members can help to reduce bias in valuing work. We also find that training of the committee is a key requirement. Where there is a job evaluation committee, it is essential that there be adequate training in bias-free evaluation and that members develop a conscious awareness of the attitudes and biases people bring to point valuing. Value judgements made by a committee untrained in identifying systemic bias, will likely preserve existing wage inequities through the undervaluation of female job classes. [Dr. Fay; see also Mount and Ellis, *supra*] In this case although the Employer relied upon the training used for its non-union and CUPE 2210 committees, it could not provide any details or specific training information on whether the training was aimed at bias free evaluation. Without commenting on those comparison systems, the Tribunal finds that the evidence of committee training proposed by the Employer was inadequate to assure us that value-weighting decisions would be made without gender bias.

Given the Municipality's heavy reliance upon the committee as part of the system, this training would have to be more comprehensive.

90. In conclusion, while the Tribunal finds that consensus in the decision making process is an important part of acceptance of the pay equity plan, in itself it is not a guarantee of gender neutrality. Parties must satisfy the requirement for gender neutrality in all parts of the comparison system. Where consensus cannot be reached and parties cannot agree, they have recourse to the Pay Equity Commission, first to the Review Services process and then to the Hearings Tribunal. That process recognizes that while consensus and agreement are desirable, they are not always possible, in which case the *Act* provides a dispute resolution mechanism.

MAKING THE COMPARISONS:

91. This part of the comparison system requires that the female job classes be compared to male job classes to determine whether pay equity exists for each female job class as required by sections 12 and 14(2)(a). In this case, the female job classes in these bargaining units have not yet been compared to male job classes. Although the Regional Municipality urged us to assess the gender neutrality of this part of the comparison system based upon its application to other bargaining units in this establishment, we do not feel it is appropriate to do so. This component, like the others, must be negotiated with the Union. Choices in bargaining by CUPE 2210 may not be the same choices these parties would make. Accordingly, we will not make any findings on this part of the process.

92. In conclusion, we note that even if parties are to correct the deficiencies of the system identified in this decision, that is not necessarily a guarantee of gender neutrality in implementation. Pay equity is not a precise process. The *Act is* aimed at eliminating gender bias that can be identified, and directs parties to take affirmative action to narrow the wage gap. Gender neutrality must thus be assessed in both the design and the implementation of the comparison system to be used for pay equity purposes. The standard of gender neutrality is one which will further evolve as we acquire more experience in how decisions in collection and valuing of job content make visible and value women's work. In part, acceptance by all the parties to the negotiated pay equity process is one indicator, and the *Act* is structured in such a way as to reflect that. However, given the sequential nature of the pay equity process, and in particular, in the use of a comparison system, gender neutrality can and should be assessed at each step. The progressive elimination of any potential gender bias during the stages of collection of job content, deciding and applying a tool to assess value, and making the comparisons, will work to ensure a more systematic, less subjective valuation of all work and particularly women's work, in its final application. Such a strategy is practical and achievable and best meets the purposes and implementation strategy of the *Pay Equity Act, 1987.*

The duty to negotiate in good faith and endeavour to agree upon a gender neutral comparison system and pay equity plan

93. We now examine the bargaining allegations. ONA alleges that the Regional Municipality failed to negotiate in good faith and endeavour to agree upon both a pay equity plan and a gender neutral comparison system. Specifically, the Union alleges that the Employer unilaterally hired a consulting firm and

used the consultant as spokesperson in negotiations without agreement of the Union; that the Employer chose its system and had invested too much in it prior to negotiations to be willing to honestly bargain; that the Employer used the mandatory time frames as an excuse to by-pass its bargaining obligations; that it refused to recognize the bargaining agent; that it drafted the initial job questionnaire and pilot tested its system without agreement of the Union; that the Employer abdicated all responsibility to the Mercer consultant and failed to meaningfully negotiate with the Union; that the Employer refused to disclose significant information to ONA including the results of the pilot test, which prevented the Union from evaluating the Employer's proposals. ONA also alleges that the Employer planned to implement one comparison system across the Municipal Corporation without negotiating with the Union; and that the Employer failed to engage in rational discussion or to respond adequately to the Union's criticisms, questions or proposals.

94. The Employer denies that it failed to bargain in good faith or endeavour to agree upon a pay equity plan. It denies that it unilaterally adopted a gender-biased comparison system and submits that it retained the Consultant to provide advice to the Regional Municipality in meeting its obligations under the *Act*. The Employer submits that its communication with employees was not an effort to bypass its bargaining obligations and that its actions were an effort to meet the mandatory time frames. Further, the Employer submits that it did disclose the information it had available.

95. The Tribunal received considerable oral evidence from those directly involved in the pay equity negotiations: William McDougall, Organization Development Advisor; Jeff Cann, Director of Personnel Services; Noelle Andrews, ONA Assistant Director of Government Relations; Lawrence Walters, ONA Research Officer on pay equity; and Rhondi Brown, ONA Employment Relations Officer for these bargaining units. In this case, pay equity bargaining took the form of an exchange of correspondence, telephone calls and face to face negotiations.

96. The facts are as follows. In December 1987 the Employer advised the local ONA president that the Regional Municipality had engaged the services of William Mercer Ltd. by sending her a copy of a memorandum from Mr. McDougall to all department heads. The memo said that the Employer would contact the Union when it had "an action plan in place". The memorandum outlined the aspects of the plan that the consultant was already working on including preparing a needs study, developing common factor language that would provide the basis for job evaluation for all employee groups and developing a job analysis questionnaire to collect job content. The memo added that the procedure expected to be followed would include developing job descriptions based upon the questionnaire; and it advised that a system of job evaluation, details to be provided later, was to be the subject of negotiations with the various groups. The memo contained no indication that the Union would be involved in any part of the initial process. In the early part of 1988, Mr. McDougall was contacted by Ms. Brown, the Employment Relations Officer for the provincial bargaining agent. She informed Mr. McDougall that the Employer was required to negotiate both the gender neutral comparison system and the pay equity plan with the bargaining agent, the provincial Ontario Nurses' Association.

97. In March 1988, the Employer wrote directly to the provincial bargaining agent, detailing its time schedule and the pay equity process it intended to follow. That time schedule set out dates from March

1988 to November 1989, specifying which actions the Employer would take with respect to pay equity and detailing when each action was to take place. The memorandum included a time frame in which the Employer would decide "establishment", activate a management senior staff committee to oversee job evaluation, take the Action Plan to Regional Council for approval, prepare and finalize the job analysis questionnaire, formalize bargaining unit committees, test run the questionnaire, give weight to the factors, administer the questionnaire, identify job differences, complete the job evaluation process in committee, have the consultant benchmark prices and identify pricing conflicts. Negotiations with the Union are set well into the time schedule after a number of steps are completed. The covering memorandum assured ONA that the Municipality was committed to keeping the bargaining agent informed of what was taking place in pay equity. ONA again contacted Mr. McDougall by phone in March 1988 and by written correspondence in May 1988 to inform the Employer that it was required to negotiate all parts of the pay equity plan with the provincial bargaining agent and that the Union had not agreed to any parts of the pay equity plan or the comparison system with which the Employer was proceeding. Subsequent to this, the parties had two face to face negotiating sessions, July 6 and August 26, 1988, as well as a continual exchange of bargaining positions in writing during the summer and fall of 1988. In November 1988, the Employer informed the Union it had closed negotiations, fourteen months prior to the mandatory posting date. It informed ONA on November 8, 1988 that it was proceeding to administer the system to the ONA nurses and all other employees in the establishment. Only when ONA informed the Regional Municipality on December 8, 1988 that it was complaining to the Pay Equity Commission did the Employer change its position and only administer the questionnaire to all non-ONA employees.

98. The *Act* requires that in an establishment in which any of the employees are represented by a bargaining agent, there shall be a pay equity plan for each bargaining unit. Subsection 14(2) requires the employer and the bargaining agent to negotiate in good faith and endeavour to agree before the mandatory posting date on the gender neutral comparison system used for comparing female job classes to male job classes to determine whether pay equity exists. The parties must also negotiate in good faith and endeavour to agree upon a pay equity plan for the bargaining unit.

99. Section 13 specifies that pay equity plans shall be prepared to provide for pay equity for the female job classes in each establishment and the *Act* requires that parties:

> shall identify the establishment to which the plan applies;
> shall identify all job classes which formed the basis of the comparisons using the gender neutral comparison system;
> shall describe the gender neutral comparison system used to compare job classes to determine if pay equity exists;
> shall set out the results of the comparisons;
> shall identify all positions and job classes in which differences are permitted by subsection 8(1) or 8(3) and the reasons for relying on such subsection;
> shall describe how compensation in all female job classes for whom pay equity does not exist will be adjusted to achieve pay equity;
> shall set out the date on which the first adjustments will be made under the plan.

100. These sections identify what the bargaining duty is and what the parties must undertake in negotiations to meet their obligations under the *Act*. In parts of section 13 the parties together must identify the establishment to which the plan applies and all job classes which form the basis of comparisons; the *Act* provides definitions for these aspects of the plan. If parties cannot agree, they have recourse to the dispute resolution mechanism in the *Act*. In this case, the issue of establishment was decided by a previous decision of the panel (see *Haldimand-Norfolk (No.* 3) (1989), 1 P.E.R.17) and the issue of job class was not before us. Other parts of the section 14 bargaining obligation are subject to full negotiations between the parties, such as the requirement to negotiate the component parts of the gender neutral comparison system and endeavour to agree upon a pay equity plan. Once parties have agreed upon and implemented the gender neutral comparison system to determine whether pay equity exists, sections 13 and 14 of the *Act* require the parties to set out the results of the comparisons in the pay equity plan; to identify and give reasons on all positions and job classes in which differences in compensation are permitted by subsection 8(1) or 8(3); to describe how compensation will be adjusted to achieve pay equity, and to set out the date on which first adjustments will be made.

101. Counsel for the Respondent submitted that the *Act* clearly places paramount responsibility upon the employer for the achievement of pay equity and relies upon that as defense for its actions in these pay equity negotiations. We concur that the employer has the obligation to post the pay equity plan, and to meet the mandatory time frames. The employer is also required to establish and maintain pay equity, and bears the financial responsibility to make any required wage adjustments to the salaries of workers in female job classes. Although this is an important obligation, the Tribunal finds that such an obligation cannot be taken as pre-empting the duty of the union to also meet its obligations under the *Act*. The obligations imposed upon the bargaining agent under the *Pay Equity Act, 1987* are of equal importance. Section 7 requires that no employer or bargaining agent shall *bargain for* or agree to compensation practices that would contravene the requirement to establish and maintain pay equity. The obligations assume an equal partnership to the pay equity negotiation process and each party should make an effort to inform itself of its statutory obligations. Each party must meet its obligations to negotiate pay equity in a manner which does not interfere with or prevent the other party from meeting its statutory obligations.

102. The Tribunal must assess the *Act*'s requirements to negotiate in "good faith" and to "endeavour to agree". The *Pay Equity Act, 1987* recognizes that systemic wage discrimination exists. The *Act*'s stated purpose in subsection 4(1) is to redress that wage discrimination. The *Act* specifies the standards required to achieve pay equity; specifies the content of a pay equity plan; requires negotiation of the choice of comparison system and requires that system to be gender neutral; it requires the Employer to post the plan and sets out mandatory time frames. Finally, it requires a specific and measurable result, the achievement of pay equity. Where parties agree, subsection 14(5) deems the plan approved by the Pay Equity Commission. Where parties cannot agree upon the system and pay equity plan by the mandatory posting date, they are required to notify the Pay Equity Commission, and the *Act* specifies a dispute resolution procedure. The *Act* does not contemplate that parties will resolve an impasse by resorting to economic sanction. Given these statutory requirements, the nature of the inquiry by the Tribunal into the obligation to "negotiate in good faith and endeavour to agree" will be one which examines both the substance and process of pay equity negotiations based upon the content, time frames and results required by the *Act*.

103. The Pay Equity Hearings Tribunal in assessing the disclosure obligation under the duty to negotiate in good faith has already alerted parties to this approach. In *Riverdale Hospital,* the Tribunal said:

> Section 14 of the *Act* imposes a joint obligation upon the employer and a bargaining agent to negotiate in good faith and endeavor to agree upon a gender neutral comparison system and a pay equity plan; such an obligation applies to both the process and to the content of pay equity negotiations. In bargaining the component parts of a job comparison system and a pay equity plan, the parties must meet the statutory requirements of the *Act*.[(February 16, 1990) 0016-89 (PE.H.T) [now reported at (1991), 2 PE.R.1]

104. In *Cybermedix Health Services Limited* the Tribunal said:

> The *Act* imposes a joint responsibility on the Employer and the Union for both the process and the content of pay equity negotiations. Process refers to the duty to negotiate in good faith; content refers to both the gender neutral job comparison system and the component parts of the pay equity plan. A failure to negotiate the component parts may lead to a Union rejecting the pay equity plan completed by the employer without Union input. A failure to agree to the statutory minimum would leave both parties responsible for their failure to meet their obligation.
>
> It is preferable for the parties to negotiate their plan without resort to the Commission. Success at this depend upon the bargaining agent being a full partner in the process ... given the purpose and nature of the *Pay Equity Act,* the Tribunal will review both the process and the content of the negotiations to ensure the obligations established by the *Act* are met. [(1990), 1 PE.R. 41 at page 45]

105. Different statutory provisions indicate different levels of inquiry by an administrative Tribunal. For example, with respect to the bargaining requirements to reach a first collective agreement under subsection 40(a) of the *Labour Relations Act,* the Labour Board has said it will examine not only the process but also the reasonableness of parties positions at the bargaining table. The "unreasonableness" of even one bargaining position may be sufficient to have the Board find a violation of subsection 40(a) and order first contract arbitration. [see *Formula Plastics ,*[1987] O.L.R.B. Rep. May 702; and *Venture Industries Canada Ltd.,* [1990] O.L.R.B. Rep.August 152]

106. Each tribunal which adjudicates on a duty to bargain in good faith must assess that obligation within the framework of the particular statute. The purpose of the *Labour Relations Act is* to foster harmonious labour relations and to regulate industrial conflict; it recognizes the imbalance of power between workers and their employers and creates a process by which the former can choose to be collectively represented by a bargaining agent. The *Labour Relations Act's* section 15 duty to bargain requires parties to negotiate in good faith to try to reach a collective agreement. The Board has said the *Act* does not require parties to reach a collective agreement, nor will it prescribe contents of that agreement or set a time frame for achieving one. Parties can bargain to an impasse, and dispute resolution can, under certain conditions, take the form of economic sanctions. Given this statutory framework, the nature of the Labour Board's inquiry

is largely an inquiry into the process, to assess whether the bargaining conduct meets the requirements of that *Act.* That inquiry, to date, has only extended to the content of bargaining where collective agreement provisions are specified under the *Act* or where the content of proposals reflects a party's desire to avoid making a collective agreement. The Labour Board distinguishes between "surface bargaining" which is bargaining with no intention to make a collective agreement and which is a violation of the *Act,* and "hard bargaining" where the Board has said there is no violation if a party will enter into a collective agreement but only with the contents it chooses.[see *Radio Shack,* [1979] O.L.R.B. Rep Dec.1220]

107. The purpose of the *Pay Equity Act, 1987* differs, and in contrast to the *Labour Relations Act,* the *Act* specifies the content, the timeframes and results of the bargaining process. It is against that legislative backdrop that the bargaining obligations must be assessed. In light of those substantial statutory differences, in this case we find the Labour Board's distinction between "hard" and "surface" bargaining is not relevant or useful to our pay equity inquiry. The basis for "hard" bargaining in the Labour Board's jurisprudence is that, because the *Labour Relations Act* requires no specific results, self-interest in content can be taken to bargaining impasse and then to economic sanctions. In contrast, the legislative scheme of the *Pay Equity Act, 1987 is* designed to redress systemic discrimination. Although both parties to pay equity negotiations will inevitably bargain for their self interest, that self interest does not take precedence over the statutory requirements to establish and maintain pay equity. The parties cannot rely upon process arguments to undermine the substantive goals and requirements of the legislation. [P Macklem, B. Langille "Beyond Belief: Labour Law's Duty to Bargain", *Queen's Law Journal*, vol. 13, No. 1, 1988 at p.100] Where there is honest disagreement over the content requirements of the *Act,* the Tribunal provides a dispute resolution mechanism.

108. Therefore, in light of the content requirements of the bargaining obligation under the *Pay Equity Act, 1987,* the Tribunal has assessed both the process and the substance of pay equity negotiations as required by the *Act*; a failure to negotiate in good faith or endeavour to agree with respect to either of these aspects of bargaining will constitute a violation of the *Act.* This is a first look at many of these issues. In the circumstances, we find the statements of the Labour Board apt in its discussion of the then new remedial provisions under the bargaining duty of the *Labour Relations Act.* The Board said that the legal standard of the duty to bargain is broad, and substantial elaboration on a case by case basis will be required to fully articulate the duty and to achieve certainty and predictability. [38 *DeVilbiss (Canada) Limited,*[1976] O.L.R.B. Rep. March 49 at para.15] We adopt this approach of incremental decision making. As each case comes before the Tribunal, we will be able to assess and decide the precise contours of the bargaining obligation as required by the *Act.*

109. In these early cases, it is helpful to analyse the language of the statute. Section 14 requires the parties to "negotiate in good faith" and to "endeavour to agree upon" the gender neutral comparison system and the pay equity plan before the mandatory posting date. The *Act* therefore specifies two bargaining obligations, first that the parties negotiate in "good faith" and second that they "endeavour to agree". With respect to the first part of the obligation, "good faith" requires an assessment by the Tribunal of how a reasonable person or party in good faith would approach these negotiations given the statutory directive to establish and maintain pay equity and to redress systemic gender wage discrimination. The second part of the obligation, "endeavour to agree", requires not only an assessment of their efforts to meet, discuss,

and meaningfully negotiate an agreement on the gender neutral comparison system and pay equity plan, but also an investigation into whether the substance of their proposals meet the obligations of the *Act*. In approaching a section 14 complaint, the Tribunal will investigate whether in the circumstances, the parties negotiated in good faith and whether they endeavoured to agree; the Tribunal will also inquire whether the conduct of the party, both in substance and process, was such that it hindered pay equity bargaining.

110. In this case, we received a great deal of evidence on the negotiations which took place between the parties. We also heard very thorough and thoughtful submissions on what the scope of the bargaining duty should be. Based upon the facts in this case, we found it helpful to look at the following indicia in assessing whether there was a failure to meet the obligations in sections 14 and 7 of the *Act*. They require the parties to recognize who they must bargain with; what they must do in preparation; what they must disclose to the other party; and finally what the standards of discussion or negotiation are.

The obligation to recognize and negotiate with the bargaining agent.

Did the Employer recognize and negotiate with the bargaining agent as defined by the *Act*?

The obligation for each party to make reasonable efforts to ensure that its proposals for a comparison system meet the statutory requirements for gender neutrality.

In preparing the proposal, did the party make reasonable inquiries to ensure the proposed comparison system was gender neutral?

Were the parties willing to demonstrate how the proposal was gender neutral?

The obligation to disclose the information necessary to foster full discussion.

Has the party given sufficient information to enable the other party to intelligently appraise the proposal?

Is the information sought rationally related to the issues in pay equity bargaining?

The obligation to engage in full, open and informed discussion with respect to negotiations for the pay equity plan and the gender neutral comparison system.

Was there a willingness by the parties to discuss meeting the statutory requirements?
Have parties given a justification of their positions at the negotiation table?
Have the parties carefully considered and responded to the objections, concerns and bargaining positions of the other party?

111. In this case, the Union alleges that the Employer acted in bad faith in unilaterally hiring William M. Mercer Company Ltd. as its consultant without negotiating this with the Union. The Tribunal does not concur. The duty to bargain under section 14 does not extend to the choice by one party to retain the

services of an individual or an organization to formulate bargaining proposals. Either party to pay equity negotiations may choose to hire and rely upon expert help in the course of devising their bargaining strategies. In this case, the hiring of the consultant to advise the Employer, and to formulate bargaining proposals for the Employer does not violate the *Act*.

112. Secondly, the Union alleges that the use of David Jones, a consultant with the Mercer firm as the principal spokesperson during the negotiations is also evidence of bad faith since the parties had not agreed upon him or the consulting firm. The Tribunal finds that the section 14 duty to negotiate does not extend to choice of the other party's negotiator. Parties to the pay equity process may have the spokesperson of their choice at the negotiation table. That may be a consultant, a labour relations or pay equity expert within an employer or union organization or hired on their behalf. The parties required to negotiate the gender neutral comparison system and pay equity plan are the ones ultimately responsible for any bargaining positions taken, and it is they who must agree to, and the employer who must ultimately post the plan. The parties are responsible for any conduct or any actions taken by their agents on their behalf.

The obligation to recognize and negotiate with the bargaining agent

113. Subsection 1(1) of the *Act* specifies that "bargaining agent " in this *Act* means a trade union as defined in the *Labour Relations Act* or other applicable legislation, that has the status of exclusive bargaining agent under that *Act* in respect of the bargaining unit.

114. In assessing whether the Employer met its obligation to recognize and negotiate with the bargaining agent, we find the caselaw of the Ontario Labour Relations Board helpful. In *DeVilbiss* the Board considered whether dealing directly with employees was a violation of the duty to bargain:

> the duty described in section 14 has at least two principle functions. *The duty reinforces the obligation of an employer to recognize the bargaining agent* and, beyond this somewhat primitive though important purpose, it can be said that the duty is intended to foster rational, informed discussion thereby minimizing the potential for "unnecessary" industrial conflict. [*supra,* at paragraph 15]

and in *Northwest Merchants Ltd. Canada* the Board quoted from *Treco Machine & Tool Limited:*

> The certificate thus issued alters the legal relationship between the employer and the employees in the bargaining unit. The employer is no longer permitted to deal with the employees in the bargaining unit on an individual basis, but must deal with the trade union as the certified bargaining agent of all the employees in the unit.
>
> The exclusivity of the Union's bargaining rights, as conferred by a Board certificate, and the requirement upon the employer to deal with the Union, as the certified bargaining agent, and not to go behind the certificate, has received extensive judicial support. [1983 O.L.R.B. Rep. July 1138]

115. The *Pay Equity Act, 1987* clearly specifies that the Employer must negotiate with the bargaining agent as defined by the *Labour Relations Act* and other applicable legislation. Failure to deal directly with the bargaining agent is a violation of the *Pay Equity Act, 1987* and any attempt to bargain directly with employees or local union officials instead of the recognized bargaining agent is a violation of the obligation.

116. In this case, the Union alleges that the Employer failed to recognize the Union as exclusive bargaining agent by communicating directly with the employees in these bargaining units about pay equity. The Respondent asserts the right to communicate with its employees to inform them of its obligations under the *Act.* We concur with the Respondent in this respect. In this case, the Regional Chair communicated in writing with employees in May 1988 and Mr. McDougall held informational meetings across the municipality in May and June 1988 in order to inform employees it wished to meet its obligations under the *Act.* The Tribunal does not find that these actions violated the bargaining obligations within the statute; we find the sessions were merely informational and not an attempt to negotiate directly with employees. Although any effort to directly negotiate with employees would undermine the authority of the Union as exclusive bargaining agent and constitute a violation of the bargaining obligation under the *Act,* we find no such evidence of this in this instance.

117. The Union also alleges that the Employer failed to recognize the bargaining agent when it continually tried to negotiate with the local president instead of the provincial bargaining agent, despite the Union repeatedly informing the Employer it was required to bargain with the provincial bargaining authority. In this case, there was no dispute that, unlike some unionized situations where there is considerable autonomy of local unions, that the Ontario Nurses Association has a highly centralized structure. As the evidence confirmed, the provincial organization is certified for these bargaining units, negotiates and is signator to the collective agreements. The evidence was undisputed that the bargaining history between these parties has always been with the provincial authority and not the local.

118. In this case, Mr. McDougall initially communicated with the local president Ms. Jayne Holmes in December 1987. The Respondent states that from the outset the provincial bargaining agent was copied, and for the first two months after the statute was enacted, ONA made no effort to inform the Employer that it had improperly communicated with the local president. We agree, the Tribunal finds the conduct of the Employer in these early memorandums does not constitute a violation.

119. However, after March 1988 there were several communications between Ms. Brown, Ms. Andrews, and the Employer, confirming that the Employer was obliged to negotiate pay equity with the provincial bargaining agent and not local union officers who the Employer concedes have never had collective bargaining authority. In May 1988, Ms. Andrews expressly informed the Employer that they had an obligation to negotiate with the provincial bargaining agent. In that correspondence she pointed out to the Municipality that both the pay equity plan and the gender neutral comparison system must be negotiated with the Union, and that they were requesting negotiations commence for these two bargaining units. She expressed concern about the Employer's decision to use the Mercer system, about the lack of information and the lack of negotiation with the Union as well as concern with the Municipality unilaterally implementing its action plan on the questionnaire and the job evaluation process. The letter asked that ONA as the bargaining agent be able to fully participate at all steps of the process and requested a meeting to establish

the terms of reference for pay equity negotiations. McDougall wrote back agreeing to a meeting on June 9, 1988. At this point we find that the Employer was clearly on notice that the bargaining agent was asserting its right to negotiate pay equity and that the local presidents did not have authority to negotiate for the Union.

120. However, the Employer in July 1988 again contacted the local president of Local 153 to set up central negotiations on the questionnaire; it also sent her a draft letter of understanding to sign with respect to the utilization of the job analysis questionnaire, in both cases only photo-copying ONA. One week later, the Employer further communicated with the two local presidents informing them of meetings to discuss the questionnaire, again without the approval of the bargaining agent. When the local president did not attend the meeting, McDougall wrote again to inform her what decisions had been taken and when the next central meeting was. Mr. McDougall's evidence was that despite the fact that the bargaining agent had been clear about its authority to negotiate pay equity, he still believed the local people had a role to play in negotiations and that photocopying of the bargaining agent to keep it informed was, in his view, sufficient to discharge the Employer's obligation to recognize the bargaining agent. We do not agree.

121. Again, we find the Labour Board helpful. In *Oakridge Villa Nursing Home* the Board found that local union officials signing a collective agreement without the authority of the provincial bargaining agent constituted a violation of the bargaining duty, and the Board declared the collective agreement null and void. [1987 O.L.R.B. Rep. July 1026 at paras. 14 and 15] The Board recognized that the employer could not by-pass the bargaining agent by negotiating with local officials who had neither ostensible or actual authority. In this case, in continuing to by-pass the bargaining agent after ONA had raised the issue, the Employer undermined its authority to negotiate pay equity and violated the obligation to negotiate with the bargaining agent as required by the *Act*. The labour relations caselaw points out how vital this obligation is. Employees choose who their exclusive bargaining agent is at the point at which they elect to be represented by a Union. That bargaining agent is certified under the *Labour Relations Act* and recognized by the *Pay Equity Act, 1987*. To photocopy the bargaining agent is no defense to the failure to recognize and negotiate with the bargaining agent, and accordingly, the Tribunal finds a violation of section 14 of the *Pay Equity Act, 1987*.

122. Similarly, we find the Employer's final decision to use one comparison system for all its bargaining units is a failure to recognise ONA as the bargaining agent. The fact that the Regional Municipality wanted a centralised bargaining structure and one system for its establishment was a reasonable bargaining position. The statute provides a mechanism to allow parties to negotiate centrally if they agree to; however, there is no obligation to do so and in fact the *Act* requires the Employer to bargain a comparison system and pay equity plan with each bargaining agent. In this case, ONA rejected central negotiations with the other unions, and the Employer had no statutory authority to force the Union to agree to one central system. Although the Employer could continue to propose its system at the bargaining table, it could not refuse to negotiate any system that differed from the other locals in the establishment. As the Labour Board held in *Rolph-Clark-Stone Packaging*, the refusal to negotiate with one local except upon terms being negotiated with another local, is refusal to recognize the bargaining agent and constitutes a violation of the obligation to negotiate in good faith. [1980 O.L.R.B. Rep.Jan. 93] In this case, the Employer ended negotiations

unilaterally when it could not force its central system upon the Union. In our view, this was tantamount to a refusal to recognise the bargaining agent and is a violation of the obligation to negotiate in good faith.

The obligation for each party to make reasonable efforts to ensure that its proposals for a comparison system meet the statutory requirements for gender neutrality.

123. The Tribunal recognizes that it is not possible for a party to absolutely ensure the gender neutrality of its proposed comparison system, particularly in meeting obligations under a new statute with little caselaw as guidance to the legal standards. However, this does not allow a party to opt out of its statutory obligation to negotiate in good faith and endeavour to agree upon a gender neutral comparison system. At the point at which ONA raised concerns about the gender neutrality of the system proposed, the Employer had an obligation to make inquiries and to make reasonable efforts to assess whether the concerns were either founded or unfounded. In this case, the Employer did not do this. Mr. McDougall's evidence was that he merely passed the written ONA critique about the gender bias of the methodology to the Mercer consultant. He did not ask questions, did not request a report or analysis or undertake one himself, nor did he receive a report either orally or written. The Employer took no steps to investigate the complaints other than take the assurances of the consultant that the complaints were only "syntax and semantics" by the Union. The Employer's evidence was that it did not put its mind to how the comparison system would address possible systemic discrimination in its establishment, which the *Act* requires Employers to identify and redress. When the Employer tabled the proposals, it made no effort to demonstrate to the Union that the comparison system was gender neutral, or how the system would identify and value the. work performed by female and male job classes to determine whether pay equity exists. Despite the Union's requests, it did not demonstrate how the comparison system would comply with the *Act*'s requirement to identify gender discrimination in compensation. Much of the information introduced at the hearing, on the details of the comparison system and whether it was gender neutral, was not developed in writing or made available during negotiations.

124. Therefore, the Tribunal finds that although the proposal to use its comparison system may have been a reasonable first bargaining position for the Employer, it is not a defence to complete inflexibility. Clearly, it is reasonable to hire a consulting firm with established credentials in the job evaluation field, and to accept the expert advice that a system is gender neutral. We find however, that once its system's gender neutrality is called into question, the Employer must make reasonable efforts to try to ensure that the comparison system meets the statutory requirements of the *Act*. It must inquire whether it can accurately collect the skill, effort, responsibility and working conditions of all the job classes to be compared; it must assess whether it makes visible work, particularly women's work in the establishment; and whether the choice of any sub-factors, equivalencies or weighting unfairly disadvantage or advantage the valuing of the female or male job classes. If the advice of the consultant is wrong, it is the Employer who has failed to meet its obligations and it is the Employer, not the agent against whom the Tribunal may order a remedy. We find in this case, that the Employer did not make reasonable efforts to ensure that the comparison system was gender neutral. It did not make reasonable inquiries to ensure that the system accurately collected and valued the work of all job classes or to ensure that the initial weighting embedded in the equivalencies was gender neutral. Further, it was not willing to demonstrate to ONA how the proposal was gender neutral.

The obligation to disclose the information necessary to foster full discussion

125. The Union alleges that the Respondent failed to disclose information with respect to the gender neutrality of the proposed comparison system including the results of the pilot test. The disclosure requirement has been dealt with by this Tribunal. The Tribunal has held that the parties require sufficient information to be able to conduct bargaining in a rational and informed manner. The obligation to disclose includes an obligation to give sufficient information to allow parties to test the gender neutrality of their own proposals and to assess the bargaining position of the other party. The Tribunal in *Cybermedix* wrote:

> For the parties to negotiate in good faith and endeavour to agree on the job comparison system and the pay equity plan, there must be disclosure of relevant pay equity information. Disclosure is required to foster rational and informed discussion and to move towards settlement. The parties must have sufficient information to intelligently appraise the other's proposals, to formulate their own positions in bargaining pay equity, and to fairly represent their members. [See also *Riverdale Hospital*, *supra,* at para. 20]

126. The Tribunal finds that from the outset the Municipality shared information; specifically, it forwarded copies of the available job descriptions, salary and benefits information and a copy of the CUPE 2210 rating manual. The Employer also disclosed requested information on how the Mercer sub-factors fit into the four criterion of skill, effort, responsibility and working conditions.

127. The Union also alleges that the Employer refused to disclose a terms of reference for the pay equity process. The Employer does not dispute that it promised on a number of occasions to draft a terms of reference and that it never did so. We agree with the Respondent that this does not constitute a violation of the disclosure obligation. Although it may have been helpful if these parties had negotiated a terms of reference by which they could conduct themselves through this process, especially given their agreement in this case to have one, it did not happen. We also note that the Union finally drafted and sent the Employer a draft Terms of Reference on October 25, 1988 after a number of months waiting for the Employer's draft, and this draft has not yet been negotiated.

128. The Tribunal finds the Respondent failed to meet the disclosure obligation under section 14 in two respects. First, the Employer refused to disclose the results of the pilot test it conducted to test the system. The Union requested this information on the basis that it was vital to the Union's assessment of whether the system could produce reliable and valid data for the nurses' work. The refusal to disclose these pilot results is a violation of section 14. We note that these results may have assisted the Union in appraising the Employer's proposals and in formulating its own bargaining positions. Secondly, as the evidence of Mr. Cann and Mr. McDougall disclosed, they were aware when they hired Mercer that the system was a scored questionnaire and that the questionnaire was to be fed into a computer to tabulate and average incumbent and supervisor responses. Mr. Cann testified that the Regional Municipality understood that because of this computer program, there was little flexibility to change the system. The Regional Municipality did not disclose the information it was given on the computer program or weighting embedded in the questionnaire when asked by the Union for more details on the system. We find therefore, that the Employer did not give ONA sufficient information to enable the Union to intelligently appraise the system.

This information was available and was rationally related to issues in pay equity bargaining. We find therefore, that the Employer violated section 14 of the *Act* in this respect.

The obligation to engage in a full, open and informed discussion

129. The Union alleges that the Employer never seriously engaged in negotiations for pay equity. It alleges that the Employer began to unilaterally implement the first stages of the pay equity plan and comparison system without full discussion or any negotiation; and alleges that when the Employer came to the negotiating table, it never seriously bargained.

130. In assessing the bargaining duty, we draw again on labour relations jurisprudence; in *Canadian Industries Limited,* the Labour Board held that the unwillingness of one party to engage in full discussion with the other was a violation of the obligation to bargain in good faith:

> 8. The conduct of negotiations is not only judged in terms of mutual recognition but also in terms of quality of discussion. This latter factor is somewhat broader in its application, extending to those situations where *there may be present the common objective of entering into collective agreement, but where there is absent any willingness to discuss how that common objective might be reached.*
>
> 22. The discussions that took place between the parties must be examined in order to determine whether there was something less then the full and free discussion required by the statute. A careful scrutiny of the negotiations reveals an unwillingness on the part of the respondent to *either provide a full justification for its own position on monetary terms or to discuss its objections* to the applicant's position in these matters.[1976 O.L.R.B. Rep. May 199] (emphasis added)

131. Thus the Tribunal finds that it is not enough that parties have the common objective of posting a pay equity plan, they must also meet the obligation to have a full and informed discussion of all pay equity issues. The Tribunal will scrutinize the pay equity negotiation process to ensure that parties have undertaken a full and informed discussion of the aspects of the pay equity plan and gender neutral comparison system they are required to negotiate. This means giving justification for their positions at the negotiating table. It also requires each party to carefully consider and respond to the objections, concerns and bargaining positions of the other party.

132. The Tribunal finds that the initial development of an action plan and time schedule by any party as a proposal to bring to the bargaining table is not subject to the bargaining obligation. However in this case, having weighed the evidence, we find that the Employer began implementing the initial stages of its plan prior to negotiation with the Union. It failed to engage in an open and full discussion and any involvement of the Union was scheduled well into the process. Although it is commendable that the Employer promised to keep the Union informed of the details of the pay equity process, the obligation with respect to the *Act* is a much higher obligation. It is the obligation to negotiate and endeavour to agree upon a pay equity plan and a gender neutral comparison system. The Respondent did not appear to grasp that it was required to

negotiate all the component parts with the bargaining agent. We find then, that the Employer was unwilling to discuss how the parties would together meet the statutory requirements of the *Act*.

133. We also find that the Employer failed in the obligation to have a full and informed discussion by failing to communicate key information to the Union with respect to the comparison system. For example, Exhibit 61 was an outline of the Mercer comparison system as proposed for implementation in this establishment. Despite repeated requests by the Union for additional information on the system, the Municipality did not prepare any manual or programme to describe the system until it did so for purposes of the hearing, almost one year after negotiations ended.

134. In this case, the Regional Council approved the action plan in April 1988 prior to any negotiation with the Union. Although Mr. McDougall's evidence was that it was not impossible to go back to Regional Council to change the system, we find that the prior approval at Council to buy the Mercer system before the Employer came to the bargaining table, heightened the Respondent's commitment to that comparison system and reduced the likelihood that negotiations with the Union would change its mind. The effect on the bargaining was problematic. For example, the Employer continued to insist it was using this point factor job evaluation system without adequately justifying these decisions to the bargaining agent. Nor did the Employer carefully consider or respond to ONA's concerns about gender bias even though they had received a detailed written critique from the Union.

135. In *Canadian Industries,* in discussing the relationship of statutory requirements of the *Anti-Inflation Act* and collective bargaining, the Labour Board wrote:

> *By adopting its own interpretation of the anti-inflation regulations and indicating its unwillingness to discuss any other interpretations, it has foreclosed the kind of full discussion required by the law.* A party cannot wrap itself in a cloak fashioned from its own interpretation of the guidelines in order to avoid the obligation to bargain in good faith. [*supra* at para. 24] (emphasis added)

136. We find this reasoning useful. Each party to the pay equity negotiation process is entitled to bring to the bargaining table its interpretation of the requirements of the *Act*. There must be space in pay equity negotiations for honest disagreement. We appreciate that the Employer took the consultant's advice in adopting its interpretation of the *Act*. However, in adopting that interpretation a party cannot be unwilling to discuss other interpretations of pay equity requirements. Such an unwillingness is particularly crucial in the pay equity context. Not only does the *Act* set the framework for the negotiation process, it sets the content, the time frames and the results which are to be achieved. It requires that parties consciously examine past wage setting practices and design an affirmative action plan to redress wage discrimination in that establishment. Therefore, in adopting its own interpretation of the *Act,* one party cannot foreclose a full and open discussion of the issues to be negotiated, whether it is endeavouring to agree upon the gender neutral comparison system or the pay equity plan. Such an unwillingness defeats the purpose of parties bargaining pay equity and constitutes a violation of the obligation to negotiate in good faith.

137. The Tribunal finds that the Municipality adopted its own interpretation of the *Act* and was unwilling to consider any other interpretation. Although parties are entitled to maintain a position in bargaining, they must be open to a discussion on other interpretations and must reasonably justify maintaining their bargaining positions. In this case, the Employer failed to consider ONA's concerns about the gender bias of the questionnaire. The Employer's evidence confirms it rejected without consideration the possibility of any other comparison system, and that it also rejected without any serious consideration any amendments to its own system beyond marginal changes to the questionnaire. ONA's written critique revealed problems in the ability of the questionnaire to accurately collect the job requirements of the nurses, as well as raising specific issues and concerns about where gender bias appeared in the comparison system. The bargaining unit nurses through ONA also documented in writing the difficulties they found with the questionnaire. Yet the Employer failed to consider these critiques seriously. The Employer refused to make any alterations to many sub-factors such as planning skills, internal contacts and supervision of others, and did not give justification for its inflexible position. We find that the Employer was unwilling to discuss the concerns of the Union or respond in any meaningful way. This inflexibility served to prohibit full and open discussion on how to meet the statutory requirement for a gender neutral comparison system.

138. During the negotiations, ONA suggested that the Employer abandon the Mercer designed comparison system and suggested the parties should instead design one themselves or alternatively, jointly hire the firm of Hubbard Revo-Cohen to undertake this. Ms. Andrews followed up in writing on October 25, 1988 proposing these alternatives, but providing no details. The Employer responded on November 7, 1988, writing that it would not change its system further and that it did not require the services of Hubbard Revo-Cohen. The Employer admitted that it did not consider the alternatives before rejecting them outright. It did not seek any information, ask any questions or request the Union to provide any information, nor was this supplied by ONA. The Hubbard Revo-Cohen methodology was not before the Tribunal and we received no evidence with respect to it.

139. The Union also alleges that the pilot test, conducted on April 27, 1988 without the agreement of the bargaining agent, is a further violation of the duty to bargain in good faith. The Municipality submitted it needed the test to ensure the sub-factors adequately reflected the jobs in the establishment. We find that the Employer did not violate the obligation to negotiate in good faith by conducting a pilot test. Any party is entitled to test its proposals in attempting to meet its statutory obligations. An Employer must make reasonable efforts to ensure that any comparison system it is proposing is gender neutral. However, the Tribunal finds that a bargaining agent is also entitled to test for the gender neutrality of its proposals or conduct tests that assess whether the Employer's system is gender neutral, and to this end the Union is entitled to the Employer's full co-operation. Practically speaking, it is preferable that parties jointly conduct testing, but we do not find that the conducting of a pilot test by one party constitutes a violation of the bargaining duty. In this case, the Employer pilot tested a preliminary version of the questionnaire, the consultant reviewed the responses, but kept no records. We find that this is unfortunate because analysis of the pilot responses by the Employer may well have convinced it that the system had problems and may have encouraged it to engage in a more full and open discussion.

140. Finally, we deal with the Employer's position that changes requested by ONA were too costly and that it had to act unilaterally and keep the time frame moving because of its obligations under the *Act*. Both

Mr. Cann and Mr. McDougall's evidence was that delay on revising the questionnaire to meet the Union's concerns interfered with the Employer's efforts to meet the time frames. It is true that both parties had an obligation to meet and negotiate in good faith in an effort to meet the mandatory time frame. Those time frames imply to a certain extent that parties work efficiently. However, the time frames do not serve as a defence to unilateral decision making or action by one party. The *Act* specifically includes a dispute resolution mechanism when parties reach a block or impassse.

141. Similarly, parties cannot opt out of their statutory obligations to negotiate and to endeavour to agree upon a gender neutral comparison system because of cost and efficiency considerations. It is hoped that parties achieve pay equity by directing dollars toward the amelioration of women's wages as opposed to administrative costs. However, parties cannot have administrative costs override where they conflict with the statutory requirement of negotiating a gender neutral comparison system and pay equity plan. [In *Singh et al v. Minister of Employment and Immigration* [1985] 1 S.C.R. 177, the Supreme Court of Canada held that administrative cost savings cannot ignore the principles of fundamental justice. Although not on point, it is helpful in the Tribunal's assessment of balancing costs with statutory obligations.] In pay equity, we find that any consideration of cost savings which has the effect of parties bypassing their statutory obligations is not acceptable. Again, where there are legitimate differences with respect to decisions on gender neutrality, the parties have recourse to the dispute resolution mechanism set out in the *Act*.

Remedies

142. A wide range of remedies are available to the Tribunal. In deciding what relief is appropriate to the facts of this case, we recognize that remedies are not to be punitive, rather they should be aimed at rectifying the consequences of a violation of the *Act*. The Tribunal has a broad discretion to craft remedies which will assist the parties in meeting their obligations under the *Act*. In doing so, we must ensure that they will be effective and applicable to the particular circumstances of this case. We find the comments of the Labour Board in *Radio Shack* helpful in this respect:

> It is trite to say that all rights acquire substance only insofar as they are backed by effective remedies. Labour law presents no exception to this proposition. An administrative tribunal with a substantial volume of litigation before it faces a great temptation to develop "boiler plate" remedies which are easy to apply and administer in all cases. This temptation must be resisted if effective remedies are to buttress important statutory rights. An important strength of administrative tribunals is their sensitivity to the real forces at play beneath the legal issues brought before them and there is no greater challenge to the application of this expertise than in the area of developing remedies. [1979 O.L.R.B. Rep. Dec. 1220 at para. 93]

143. In addition to being fair and equitable, we find that remedies should be crafted in such a way as to allow parties to fulfill their obligations under the *Act* as expeditiously as possible. We note in this case, the mandatory posting date was January 1, 1990, and thus these parties are already behind in the time frame in which any payouts would have been made. To send the parties back to the negotiating table without any

direction or time frames would thus not, in our opinion, serve to facilitate speedy completion and posting of a pay equity plan.

144. The Union submits that the Mercer comparison system as proposed by the Employer for this workplace is irreparable in its gender bias and thus it should not be required to negotiate it as the basis of a gender neutral comparison system. It relies on its expert evidence as confirmation of this position.

145. In weighing the possible remedies, we do not find that it is appropriate to require the Union necessarily to bargain to amend the Employer's proposed comparison system. We have found that the Employer began to unilaterally implement the first steps of this system without recognizing the obligation to bargain the comparison system with the Union. Given this bargaining history, to order the parties to negotiate only on the basis of the Mercer system would be to encourage parties in the future to unilaterally adopt a comparison system, confident that the Tribunal would accept that system despite the bargaining conduct, and order only amendments. To grant a "license" to by-pass the bargaining obligations set out in the *Act is* not an appropriate message to send to these parties, and would in our opinion, detract from the effectiveness of the remedy and the obligations under the *Act*.

146. However, we also recognize that the Employer has invested considerable resources in its comparison system. We are, not persuaded-that the comparison system is so lacking in gender neutrality that it is irreparable. It may well be that the system could be effectively amended, now that the parties have some guidance as to both the standards of gender neutrality and direction with respect to their bargaining obligations.

147. The Tribunal's remedial powers under subsection 25(2)(g) includes the power to order parties to take such action as in our opinion is required in the circumstances. In these circumstances we find that parties, while being given some flexibility in the choice of comparison system, must meet particular requirements and deadlines in order that there will be an expeditious completion of the pay equity plan. The fact that we have crafted a remedy under the general remedial provision does not detract from its authority. We are assisted in coming to this conclusion by the comments of the (then) Ontario High Court of Justice (Divisional Court) in its discussion of damages in *Tandy Electronics:*

> So long as the award of the Board is compensatory and not punitive; so long as it flows from the scope, intent, and provisions of the *Act* itself, then the award of damages is within the jurisdiction of the Board. The mere fact that the award damages is novel, that the remedy is innovative, should not be a reason for finding unreasonable. [*Tandy Electronics Ltd. (Radio Shack) v. United Steelworkers of America and the Ontario Labour Relation Board* (1980), 80 C.L.L.C. par. 14,017 at page 93.]

148. In this case, we find the remedy to be ordered flows directly from the scope and the provisions of the *Act*. In making this order we encourage the parties to negotiate a terms of reference or strategy for bargaining of the gender neutral comparison system and pay equity plan. We are concerned that negotiations continue expeditiously and as such, we strongly recommend that the parties seek the mediation services provided by the Pay Equity Office Review Services Branch.

Order of the Tribunal

1) We find that the Employer, the Regional Municipality of Haldimand-Norfolk has violated the *Act* and in particular sections 5, 7, 12 and 14. We find that the Employer failed to negotiate in good faith and endeavour to agree upon a gender neutral comparison system and a pay equity plan. In particular, we find that the Employer failed to negotiate the component parts of the gender neutral comparison system; failed to recognize the bargaining agent; failed to disclose information on the pilot tests, computer program, and weights embedded in the questionnaire; and failed to engage in a full and informed discussion. We also find that the comparison system proposed by the Employer does not meet the standards of gender neutrality required by the *Act* and specifically that it does not accurately capture and thus not value the content of the skill, effort, responsibility and working conditions of the work required to be done by the female job classes in these bargaining units.

2) We order the Employer to negotiate in good faith and endeavour to agree with the Union upon a gender neutral comparison system and a pay equity plan for these bargaining units.

3) We hereby revoke the order of the Review Officer dated April 6, 1989.

4) We order that within 60 days of receipt of this decision, that the Union table and negotiate with the Employer a proposed comparison system of its choosing, including justification of its applicability to this workplace and an explanation of what reasonable efforts it has made to ensure the system is gender neutral, based upon the statutory criteria and considerations articulated in this decision.

5) Further, we order that within the same 60 day period, that the Employer table and negotiate with the Union a proposed comparison system of its choosing, including justification of its applicability to this workplace and an explanation of what reasonable efforts it has made to ensure the system is gender neutral, based upon the statutory criteria and considerations set out in this decision. If the Employer chooses to amend the Mercer comparison system it proposed in this case, we order that it amend the proposed system to address the deficiencies found by the Tribunal in this decision and that it negotiate all the component parts of the comparison system with the Union.

6) We order the Employer and the Union to fully co-operate with each other to pre-test the proposed comparison systems.

7) We further order that each party disclose to the other, the details of the comparison systems proposed, including: any results of testing the system; information and results regarding other applications of the comparison systems if the party is relying on them; details of any proposed sub-factors, levels, equivalencies and weighting; as well as any computer programs which form part of the comparison system.

8) This panel will remain seized to deal with any matters arising directly out of this order.