



# Supreme Court Denies Leave to Appeal a Court of Appeal Decision Regarding Use of “Proxy” Male Job Classes for Pay Equity Maintenance

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In a [previous Focus Alert](#), we reported that the Court of Appeal for Ontario released a decision in March 2021 indicating that predominantly female workplaces with no direct male comparators were required to continue to use comparisons to other “proxy” workplaces for pay equity maintenance purposes.

On October 14, 2021, the Supreme Court of Canada dismissed the applications of the Attorney General of Ontario and the Participating Nursing Homes for leave to appeal the Court of Appeal decision.

## History of the Proceeding

In 2016, the Pay Equity Hearings Tribunal (the “Tribunal”) determined that predominantly female workplaces with no direct male comparators were required to use a gender-neutral comparison system (“GNCS”) to determine pay equity. However, the Tribunal decided that once pay equity was achieved, maintenance did not require ongoing comparison to a proxy establishment.

The Divisional Court overturned that aspect of the Tribunal’s decision, finding that maintenance required continued access to a male comparator. The Divisional Court remitted the matter back to the Tribunal to determine the procedures to be used to ensure continued access to male comparators during the maintenance process.

The Court of Appeal upheld the Divisional Court’s decision, stating that the object of the *Pay Equity Act* required ongoing comparison to men. The Court directed the parties to comply with the Tribunal’s direction with respect to the proper procedure to be used, to negotiate a GNCS, and to make any required maintenance adjustments.

## The Effect of the Decision

The denial of leave to appeal means that the Divisional Court’s determination on proxy comparison



during maintenance, as upheld by the Court of Appeal, stands. Unfortunately, it also leaves employers with predominantly female workplaces with very little guidance regarding how to go about maintaining pay equity through the use of continued proxy comparison.

In a 2020 [decision](#) between the same parties, the Tribunal had an opportunity to comment on the Divisional Court's decision to remit the procedural determination for ensuring continued access to male comparators to the Tribunal. The Tribunal noted:

The Divisional Court has provided no guidance to the Tribunal about how it should go about its directed task. Neither does the Act nor Ontario Regulation 396/93 "Proxy Method of Comparison" ("OReg 396/93"). As such, in effect, the Tribunal has been directed by the Divisional Court to prescribe a procedure that fills a legislative gap that will apply to hundreds, if not thousands, of employers and tens of thousands of employees covered by the 55 classes of "seeking employers" and "potential proxy employers" as prescribed in OReg 396/93.

The Tribunal further considered that in determining the appropriate procedure for ensuring continued access to male comparators, "it may be that the Tribunal directs submissions from only the parties to this proceeding; that the Tribunal seeks submissions from the public and other interested entities; or undertakes a different process altogether."

Unfortunately, the Court of Appeal decision also did not provide the Tribunal with any guidance with respect to how its directed task should be undertaken.

## **In Our View**

Employers with proxy pay equity plans are left without substantive guidance as to the procedure applicable to proxy comparison during the maintenance process. While the Tribunal was clear that it takes its task of determining the applicable procedure seriously, its comments suggest that the exercise to determine the appropriate procedure is currently unsettled. This uncertainty makes it difficult for employers to know whether any steps that they take in the meantime to ensure continued access to a male comparator through proxy comparison will be found to be acceptable should their process be challenged before the Tribunal in the future.

We will continue to monitor developments in relation to this issue and endeavour to update Focus readers.

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