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Minding the Gap: Pay Equity and the Role of Law in Narrowing Canada's Gender Wage Gap

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Graduate Program in Law

A thesis submitted in partial fulfillment of the requirements for the degree in Master of Laws

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ABSTRACT

Canada has a gender wage gap. Gender discrimination is one of the factors underlying that gap. The goal of this thesis is to determine if Canadian law can be used to narrow the gender wage gap and if so, what legal reforms should be made? To meet these ends this thesis examines the evolution of relevant Canadian human rights and pay equity law and makes comparisons between the types of laws specific jurisdictions use and the size of their respective gender wage gaps. The focus then shifts to laws enacted in foreign jurisdictions that Canada could adopt to further address the gender discrimination underlying the gap. Ultimately, this thesis argues that Canadian law can be reformed to narrow the gender wage gap by first, widening the applicability of pay equity law among jurisdictions and workforce sectors and second, compel employer compliance through complimentary legislation such as pay transparency laws.

KEYWORDS

Pay Equity, comparable worth, equal pay for work of comparable value, equal pay for work of equal value, equity, pay, comparable worth, women, women's rights, Canada, equality, employment, discrimination, wage gap, gender wage gap, gender pay gap, pay disparity, transparency law, human rights, pay equity law

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Finally, I would like to dedicate this thesis to my husband, Brenden Beaudoin, my daughter, Rosalie Summer Beaudoin, and my parents, Rhonda and Ronald Cummins.

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PREFACE

P.1 Background Information on Thesis Topic Selection:

I entered this thesis project knowing that I wanted to choose a topic within my areas of interest, those being human rights law, gender equality, and employment law. Further I wanted to select a topic that was not only interesting but also timely, important, and specific enough to complete in a one year thesis. Ultimately I decided to dedicate my thesis project to finding ways which Canadian law could be revised to narrow the gender wage gap. I found this topic an interesting one to pursue because I always saw Canada as very progressive in furthering women's equality rights. I had hoped that men and women were treated equally in this country and I thought that for the most part, they were. In my own experience, it appeared that I was being treated the same and given the same opportunity as my fellow classmates and work colleagues. In fact, I had attended law school courses and practiced in law firms with more women than men and often appeared before female justices in court. At first glance, it may appear that this increased number of women in post-secondary institutions and the workforce in recent years is evidence that Canada has been successful in furthering gender equality in education and employment. This may be true in some respects, however it is apparent that Canadian women face gender inequalities in the workplace, an issue directly evidenced by the gender wage gap. Therefore, I decided to dig deeper into the problem of Canada's gender wage gap to see if there was a way to use law to address the issue and find ways to narrow the gap.

P.2 Research Question and Goals of Thesis

My thesis question is as follows:

Despite Canada being a champion for equality and human rights, pay inequality persists between men and women for work of similar value. Can the law be used as an effective tool to further the goal of pay equity between men and women? If so, how should Canadian law be reformed to help narrow the gender wage gap?

The ultimate goal of my research is to contribute viable suggestions for the legal reform of gender based pay equity law in Canada. Canadian gender equality norms are evident in society, as well as in the Charter, human rights legislation and provincial pay equity legislation. However, despite the existence of such laws, gender equality is lacking at the ground level, which can be seen in the fact that men are still often being paid more than women for the same or comparable work.

The main argument of my thesis is that proactive pay equity laws such as free-standing pay equity legislation and transparency laws, among others, can help Canada narrow the gender wage gap by decreasing the portion of the gap that is caused by employer discrimination. My recommendation is that jurisdictions without pay equity legislation enact it and that the jurisdictions that do have such legislation strengthen it so that it has wider applicability to reach more employees. Further, transparency laws should also be implemented across jurisdictions to ensure that employers are not only committed to achieving pay equity but also to maintaining it.

P.3 Methodology

The primary method of my thesis will be a doctrinal review of pay discrimination and pay equity laws across various Canadian jurisdictions. I will also be looking at the gender wage gaps across these provinces to try and determine any logical correlations arising between the laws employed by specific provinces and their respective gender wage gaps. In addition to a doctrinal method, comparative and critical analysis methodologies will also be used. I am using a variety of methodologies in this research project so that I am able to progress my research beyond the classic doctrinal methodology of examining what the law presently is, into comparative and critical analysis methods that enable me to discover and suggest ways in which the law can be transformed to more effectively meet the goals of my research. The ultimate goal of my research project is to critically analyze and compare relevant pay equity and pay discrimination laws in order to propose reasonable recommendations on how Canadian law can be reformed to move further towards pay equity and narrow the gender wage gap.

P.4 Thesis Structure

My thesis structure is designed in a way that will assist me in determining how Canada can reform the law to decrease gender discrimination and narrow the gender wage gap. To meet these ends, my thesis is structured as follows:

The **first** chapter will explore the problem of the gender wage gap, where it exists, what causes it, what can help fix it and a discussion on some relevant terms which can be confusing. The **second** chapter examines Canada's pay equity obligations under international law, the history and evolution of Canadian gender pay discrimination law to

the call for more proactive laws and the creation of pay equity legislation. The **third** chapter focuses on present pay discrimination and pay equity laws within Canadian jurisdictions as well as their relevant gender wage gaps. This chapter finishes with criticisms and justification for enacting free-standing pay equity law followed by recommendations for strengthening existing laws within the jurisdictions to further pay equity and narrow the wage gap. The **fourth** chapter explores other new laws enacted in foreign jurisdictions to achieve pay equity such as pay transparency and related laws which Canada could adopt. This is followed by a discussion of the Ontario Transparency legislation enacted in 2018, which is yet to come into force and effect, and the impact of the 2018 Federal Budget on pay equity and the wage gap. The **fifth** chapter will conclude the thesis with final thoughts on the wage gap and suggested legal reforms.

P.5 Scope and Limitations of Thesis Project

To be clear, I note that due to the time and content limitations of this thesis, I am limiting the scope of my topic in two ways: First, my research will be focused on the principle of equal pay for work of equal value. In this context, women being paid less than their male cohorts, can be attributed to direct discrimination by employers and undervaluing of women's work. I will not be looking at pay inequality between men and women that can be attributed to other factors that can account for pay disparity, such as differences between hours worked, job type, skill level, leaves of absence for child rearing etc. Instead, I will only be considering the wage gap that exists between men and women with equal skills and experience within the same job, or where both men and women are performing jobs of equal value. For the purposes of this thesis, work of equal

value is determined by looking to the following four factors: skill, effort, responsibility, and working conditions. Although some of these factors are arguably subjective and their application is admittedly complex, these specific factors are commonly accepted and used to measure work value in pay equity and relevant human rights legislation across various jurisdictions. Although determining the quality and weight of these particular factors as a way to value work is an interesting and important topic in relation to pay equity and the gender wage gap, that specific topic falls beyond the scope of this particular thesis.

The second way in which I am limiting the scope of my thesis project is that I will only be focusing on legal reform, as a means to narrow the gender wage gap. I will not be focusing on the historical, social, political, cultural, or other factors that are responsible for and perpetuate gender discrimination, and the inextricably linked gender wage gap. Realistically, a multi-faceted approach to address those underlying factors, would be required to completely close the gap. Regardless, in my view essential initial progress can be made through legal reform, towards narrowing the gap and decreasing disparity. For example, pay equity laws place the burden on employers to ensure they achieve and maintain pay equity within their establishments. Further, transparency laws bring pay disparity to light so that it may be further determined if differential pay is justified. Although legal reform alone will not completely close the gender pay gap in Canada, legal reform is arguably a necessary first step to narrow the gap.

CHAPTER 1

1. INTRODUCTION TO THE GENDER WAGE GAP

Chapter 1 begins with a brief introduction to how Canadian law reform can narrow the gender wage gap. Next this Chapter introduces the gender wage gap in greater detail, where it exists, who it effects, why it exists and how we can try to fix it. It shows that the gap is a serious global and domestic problem that not only infringes upon a woman’s fundamental human right to pay equity, but also impacts families, children, men, the nation, the world. It will become apparent that even though there are many factors that cause the gap, one is discrimination on the basis of gender. It is this factor which accounts for a portion of the wage gap that can be narrowed through the law and legal reform. In later chapters, it will become clear that proactive laws which obligate employers to ensure that they achieve, maintain, and report pay equity serves as an effective way to reduce gender pay discrimination and narrow the gender wage gap.

1.1 Introduction to How Canadian Law Reform Can Narrow the Gender Wage Gap

Canada is a country with a reputation as a global leader on gender equality.¹ However, gender inequalities persist within the nation and are evident in the existence of the gender wage gap.² Canadian men are paid more than Canadian women for work of the same

¹ Sandrine Devillard, et al, “The power of parity: Advancing women’s equality in Canada” (June 2017 last modified), online: *McKinsey & Company* <<https://www.mckinsey.com/featured-insights/gender-equality/the-power-of-parity-advancing-womens-equality-in-canada>>.

² As will be discussed in greater detail later in this Chapter, a 2017 Statistics Canada report states that Canadian women earn 87 cents for every dollar earned by a man. Melissa Moyser, “Women in Canada: a

value and sometimes women are paid less than men even for the same job.³ This is not a problem that is unique to Canada as the gender wage gap thrives in countries around the globe.⁴ However, in a country such as Canada, where women's rights have come such a long way, it is a shame to see such inequality in something as basic and fundamental to survival as employment income.

According to Canada's obligations under international law, the government is required to, "adopt all necessary measures" to reach pay equity.⁵ However, although Canadian law has moved from the principle of "equal pay for equal work" to "equal pay for work of equal value", the materialization of this theory has not yet reached the ground level, as is evident in the persistence of the gender wage gap.⁶ On the positive side, some Canadian jurisdictions have attempted to further pay equity by moving beyond reactive complaint's based human rights models alone to deal with pay equity to also enacting free standing

Gender-based Statistical Report, Women and Paid Work" (9, March 2017 last modified) at 26, online (pdf): *Statistics Canada* <statcan.gc.ca/pub/89-503-x/2015001/article/14694-eng.pdf>.

³ Women earn 87 cents for every dollar earned by a man often due to gender wage inequality within occupations, *Ibid.*

⁴ The Canadian Women's Foundation website states that the gender wage gap exists to some extent in every country in the world. Canadian Women's Foundation, "The Facts about the Gender Wage Gap in Canada" (August 2018 last updated), online: *Canadian Women's Foundation* <canadianwomen.org/the-facts/the-wage-gap/> [Canadian Women's Foundation, "Facts about the Gender Wage Gap"].

⁵ Mary Cornish, Fay Faraday, & Michelle Dagnino, "Linking International and Domestic Equality Rights: Using Global Gender Standards to Further Canadian Women's Equality", Paper for the Canadian Bar Association Annual Legal Conference, Vancouver B.C. August 2005, citing CEDAW, Articles 2 and 24. See *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, GA res. 34/180, 34 UN GAOR Supp. (No. 46) at 193, UN Doc. A/34/46; 1249 UNTS 13; 19 ILM 33; 1980 [CEDAW].

⁶ The principle of "Equal pay for equal work" means that women should be paid the same amount as men when they are performing the same job. The principle of "equal pay for work of equal value" goes a step further to say that women should receive the same pay as men for similar jobs that are considered to be of the same worth. These principles will be discussed in greater detail later in this Chapter and in Chapter 2.

pay equity legislation.⁷ However, other provinces have failed to do so and continue to have the largest gender wage gaps in the nation.⁸

Although there are many factors that underlie the gender wage gap as well as many tools that would be required to completely close the gap, this research focuses mainly on one cause and one fix. Through this thesis, the case will be made that Canadian law has the ability to effectively address the portion of the gender wage gap that can be attributed to gender pay discrimination and thereby assist in narrowing the gender wage gap. The law is an effective tool for eliminating discrimination because it reflects the norms and values of society and has the ability to persuade or deter specific actions and results.

Specific laws used by various Canadian and foreign jurisdictions may serve as a promising starting point in narrowing the gender pay gap. For example, this thesis examines pay transparency laws, which are laws that can help bring the existence of pay disparity to light so that it may be determined as to whether or not the difference in pay may be justified. For example, one justifiable reason for pay disparity may be due to one employee earning less than another for the same job because they worked less hours. The thesis also examines pay equity laws, which place the onus onto the employer to ensure that pay equity is achieved within their workplace. Although these laws are not the final solution to fixing the longstanding and complex problem of the gender wage gap in

⁷ For example, provinces such as Ontario, Quebec, New Brunswick, Nova Scotia, Manitoba and Prince Edward Island have all enacted pay equity legislation. Government of Canada, “Fact Sheet: Evolution of pay equity” (August 2018), online: *Government of Canada* <canada.ca/en/treasury-board-secretariat/services/innovation/equitable-compensation/fact-sheet-evolution-pay-equity.html> [Government of Canada, Fact Sheet].

⁸ For example, Alberta and Newfoundland and Labrador have the largest gender wage gaps in the nation. The Conference Board of Canada, “Provincial and Territorial Ranking: Gender Wage Gap” (15 January 2017), *The Conference Board of Canada*, online: <conferenceboard.ca/hcp/provincial/society/gender-gap.aspx>.

Canada, these types of laws are a vital first step in identifying gender pay inequity, assessing whether or not the disparity is justified, and ensuring progress is being made by employers towards pay equity.

This thesis will show that headway to closing the gap can be made by extending the protections offered by proactive pay equity legislation to as many Canadian women as possible. This can be achieved by implementing a combination of widely applicable pay equity legislation to ensure women receive equal pay for work of equal value, alongside pay transparency legislation to monitor employer compliance. Ontario is one province that appears to be heading most progressively towards achieving its obligation to achieve pay equity. As will be discussed in Chapter 4, Ontario has the most widely applicable pay equity legislation and it has recently enacted transparency legislation which is set to come into force and effect in 2019.⁹ Ontario's existing pay equity legislation combined with the incoming pay transparency legislation appear to be a promising combination of legal tools intended to narrow the gender wage gap. It would be ideal if the remaining Canadian jurisdictions would take notice and follow suit to further reduce the size of Canada's gender wage gap.

1.2 Pay Equity, Equal Pay and Employment Equity

Before we go further into the sections of this thesis that deal specifically with the law and legal terms, it is necessary to understand the difference between, “pay equity”, “equal pay” and “employment equity”, as these terms are not synonymous but sound similar. First, “equal pay” (for equal work) means that men and women should be paid the same

⁹ *The Pay Transparency Act* 2018, SO 2018, c 5 [*Pay Transparency Act*].

amount for the same work. This is a narrow perspective of equality which was used more commonly in older legal instruments. On the other hand, today “pay equity” is a human right in Canada, found in various Human Rights Acts and other legislation throughout the country.¹⁰

Second, “pay equity” goes beyond the more straightforward concept of “equal pay” for equal work, to also include equal pay for work of equal value. Unlike “equal pay”, the goal of “pay equity” is not simply to ensure that men and women are being paid the same amount of money for the same job. Rather, “pay equity” aims to stop systemic discrimination related to the under-valuation of work traditionally performed by women.¹¹ To meet these ends, a “pay equity” process requires the employer to assess various factors which assist in determining what qualifies as work of equal value. Those factors include, skill, effort, responsibility and working conditions. Jobs performed by men and women which entail the same amount of skill, effort, responsibility and working conditions can be said to be jobs of the same value.¹²

To help provide a specific definition for “pay equity”, Manitoba’s *Pay Equity Act* states that, “pay equity”, can be understood as,

“[...] a compensation practice which is based primarily on the relative value of the work performed, irrespective of the gender of employees, and includes the requirement that no employer shall establish or maintain a difference between the

¹⁰ For example, pay equity is protected by s.11 of the *Canadian Human Rights Act, Canadian Human Rights Act*, RSC 1985, c H-6, s.11 [*CHRA*].

¹¹ Government of Canada, “Introduction to Pay Equity” (August 2018 last visited), online: *Government of Canada* <canada.ca/en/employment-social-development/programs/pay-equity/intro.html> [Government of Canada, “Introduction”].

¹² These four factors were set out in the *Equal Wages Guidelines*, to assess the value of a given job. These Guidelines will be discussed in greater detail in Chapter 2. *Equal Wages Guidelines*, 1986, SOR/86-1082, s.3-8 [*Equal Wages Guidelines*].

wages paid to male and female employees, employed by that employer, who are performing work of equal or comparable value.¹³

Third, in contrast to “pay equity” and “equal pay”, “employment equity” focuses on more than gender-based wage discrimination. Instead the goal of “employment equity” is to remove employment barriers for women, as well as the following designated groups: Indigenous Peoples, people with disabilities and visible minorities.¹⁴ By removing these barriers, women are more able to access higher paying male dominated jobs. Some organizations are obligated by law to have in place Employment Equity Programs (EEP) to ensure that their workforce profile adequately reflects the diversity of the labour force.¹⁵ For example, the *Employment Equity Act*, aims to ensure that all Canadians have the same access to the labour market.¹⁶ The *Employment Equity Act* requires federal employers to increase employment representation of the four designated groups by 1) ensuring all four designated groups are fully represented in all levels of the organization, 2) identifying any applicable employment barriers for the group members, and 3) work with employees to develop a plan (EEP) that promotes full representation of all group members in the workforce.¹⁷

It is important to note that the *Employment Equity Act* only applies to a narrow section of the Canadian workforce, such as: federally regulated industries, crown corporations, federal organizations with 100 employees or more and other sections of federal public

¹³ This definition is listed in Manitoba’s pay equity legislation entitled, *The Pay Equity Act*, CCSM 1985, c P13, s.1 [*Manitoba Pay Equity Act*].

¹⁴ The Government of Canada, “Introduction”, *supra* note 11.

¹⁵ Joanne D. Leck, “Making Employment Equity Programs Work for Women” (2002) 28 Can Public Policies and Economic Forces 85.

¹⁶ Canadian Human Rights Commission, “Frequently Asked Questions” (August 2018 last visited), online: *Canadian Human Rights Commission*, <chrc-ccdp.gc.ca/eng/content/frequently-asked-questions-0>. See also, *Employment Equity Act*, S.C. 1995, c.44 [*Employment Equity Act*].

¹⁷ *Ibid.*

administration such as the Royal Canadian Mountain Police and the Canadian Forces.¹⁸

In contrast to the federal *Employment Equity Act*, Canadian provinces do not have freestanding employment equity legislation. Instead, employment equity protection comes under provincial human rights legislation which protects groups of people that fall into specific identifiably vulnerable groups such as women and visible minorities.¹⁹

However, the *Employment Equity Act* is the only freestanding legislation of its kind in the country which limits its applicability to ensure an equal playing field in the realm of employment in the workforce.

Although employment equity legislation and EEP's are certainly an important way to deter workplace discrimination and curb gender discrimination in general, their relationship to and connection with pay equity fall outside the scope of this thesis.

However, EEP's would be an essential component to a more comprehensive legal reform plan to further narrow the gender wage gap. Employment equity laws and plans aim to increase the number of women in the workforce and into higher paying, traditionally male-dominated jobs. This is distinguishable from pay equity laws and plans which instead focus on increasing the pay for women in traditionally female jobs.

Benefits of EEPs include improved human resources practices, increased presence and improved status of women, and narrowing of gender wage gaps.²⁰ Another benefit to mandating EEP's is that it could stop employers from potentially creating loopholes in

¹⁸ Government of Canada, "Employment Equity in Federally Regulated Workplaces" (16 February 2018 last modified), online: *Government of Canada*, <canada.ca/en/employment-social-development/programs/employment-equity.html> [Government of Canada, "Employment Equity"].

¹⁹ For example, section 5(1), of the Ontario *Human Rights Code* guarantees the right to equal treatment with respect to employment, without discrimination due to race, ancestry, place of origin, ethnic origin, colour, sex, creed, sexual orientation, gender identity, age, gender expression, marital status, family status or disability. *Human Rights Code*, RSO 1990, c H.19, s.5(1) [*Ontario Human Rights Code*].

²⁰ Leck, *supra* note 15 at 88.

their obligations under pay equity laws. This is due to the fact that EEP's require employers to hire a certain number of women among all levels of the organization so that they are fully represented. Without such a requirement, it is possible that employers could avoid pay equity obligations by hiring only male employees.²¹ If this is true, and employers refuse to hire women then it could lead to further gender segregation of the workforce, which is another cause of the gender wage gap. Therefore, to avoid this potential issue, it would be beneficial to enact both employment equity and pay equity legislation to narrow the gender wage gap.

Although employment equity legislation has the potential to force employers to hire more women into higher paying jobs, employment equity policy and legislation are highly criticized, mainly due to high implementation and administration costs as well as the tendency for such legislation to create male-backlash.²² This may be why the legislation is presently limited to federal sector employers with 100 or more employees.²³ This may also be part of the reason why Ontario, the only province to have implemented employment equity legislation repealed it shortly after it was enacted.²⁴ Although employment equity legislation would be a useful tool for addressing the gender segregation of the workforce that contributes to the gender wage gap, it is beyond the scope of this thesis which focuses on pay equity.

²¹ This is a serious and valid concern which was kindly brought to my attention by the Supervisor of my Thesis, Dr. Gillian Demeyere, *B.A, LL.B, M.A., LL.M, S.J.D*, from the Faculty of Law in the University of Western Ontario (April 2018).

²² Joanne Leck explains that "Male backlash" is when men have negative reactions to reverse discrimination and hiring/promotion decisions that are based on protected group membership rather than individual merit. Leck, *supra* note 15 at 91.

²³ Government of Canada, "Employment", *supra* note 18.

²⁴ Mary Cornish, "Employment and Pay Equity in Canada - - Success Brings Both Attacks and New Initiatives" (1996) 22:35 *Can-United States LJ* 271.

1.3 The Gender Wage Gap: A Global Problem

The gender wage gap is a phenomenon that has existed across the globe since women entered the workforce. The gender wage gap is the disparity between the average wages earned by women and the average wages earned by men.²⁵ This difference in pay is not solely due to men working more hours than women. Nor is the difference in pay solely due to men working more difficult or dangerous jobs than women, which may be seen as more “valuable” work due to the heightened level of skill or responsibility involved. Although these factors certainly explain a portion of the income disparity between men and women, these explainable factors only account for a portion of the gap and the remainder of the gap is likely due to other factors, including gender discrimination.²⁶ The gender discrimination referred to here is evident in employment settings around the globe, where female employees are being paid less money than men for the same work or for work of the same value.²⁷

Gender pay discrimination, and the resulting gender wage gap are inconsistent with women’s fundamental human rights. It is clear that equal pay for work of equal value,

²⁵ Government of New Brunswick, “Pay Equity” (August 2018 last visited), online: *New Brunswick Canada* <gnb.ca/content/gnb/en/departments/women/Economic_Security/content/Pay_Equity.html>.

²⁶ Some of the “other factors” which are also at play may be women being less willing to negotiate or being more agreeable than men resulting in lower wages. Francine D. Blau, Lawrence M. Kahn, “Why do Women Still Earn Less than Men?” (19 October 2017), online: *World Economic Forum*, <weforum.org/agenda/2017/10/why-do-women-still-make-less-than-men>.

²⁷ For example, a New Zealand study found that although men and women employees in a specific industry were adding the same value to their firms, the women were only receiving 84 cents for every dollar earned by the men and attributed the difference in pay to sexism by employers. This is only one example of a type of discrimination that can be found in countries throughout the world. Isabelle Sin, “Women paid less for same contribution to work, and sexism is to blame – study” (August 2018, last visit), online: *The Conversation*, <theconversation.com/women-paid-less-for-same-contribution-to-work-and-sexism-is-to-blame-study-83052>.

also known as “pay equity”, is a fundamental human right.²⁸ The National Association of Women and the Law (NAWL) articulated this well, stating,

“Just as women have the right to life, liberty and security of the person and the right to be equal before the law, so too do women have the right to remuneration proportional to the value of the work they perform. Pay equity is neither a bonus to be distributed during economic booms nor a ploy that results in undeserved windfalls. Rather, pay equity redresses historic employment discrimination according to basic human rights principles.²⁹”

It is true that over the past half century, there have been substantial advances in women’s equality rights across the globe. For instance, there has been a substantial increase in female participation in the world’s workforce since the 1950s. Women have also had an increased presence in high level educational institutions in recent decades.³⁰ The World Economic Forum stated that women have actually surpassed men in pursuing higher education, a trend which began in the early 1980s.³¹ Further, there appears to be a steady increase in the number of females participating in politics among an increasing number of countries.³² Yet, despite this commendable progress made within various areas of gender equality across the globe, considerable gender wage gaps persist.

²⁸ Margot Young, “*Status of Women Canada, Pay Equity: A Fundamental Human Right*” (Ottawa: Status of Women Canada 2002), at “Executive Summary”.

²⁹ The National Association of Women and the Law, [NAWL] is a feminist organization that promotes Canadian women’s equality rights through legal education, research and advocacy for law reform. National Association of Women and the Law, *NAWL’s Brief to the Pay Equity Task Force* (August 2018 last visited), at “Summary of Recommendations”, online: *National Association of Women and the Law*, <[google.ca/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&ved=2ahUKEwjfnN3J4LvcAhUr7YMKHd4VCkAQFjABegQIBBAC&url=http%3A%2F%2Fwww.nawl.ca%2Fns%2Fen%2Fdocuments%2FPub_Brief_PayEquity02_en.doc&usg=AOvVaw3IDGQH_f41h6px9yJOybd9](http://www.nawl.ca/files/2018/08/NAWL_Brief_PayEquity02_en.doc)> [NAWL, “Brief”].

³⁰ For example in Canada, there was a mass inclusion of women into the labour force in the second half of the 20th century, Statistics Canada, “The Surge of Women in the Workforce” (5, May 2018), online: *Statistics Canada* <<https://www150.statcan.gc.ca/n1/pub/11-630-x/11-630-x2015009-eng.htm>>.

³¹ Blau, *supra* note 11.

³² Although gender participation in politics is not yet balanced globally, there has been an increased presence of females in politics in a number of countries. For example since the 1990s, Rwanda, Bolivia and South Africa went from 2-7 percent female participation in parliament to over 50 percent participation by 2016. Ravi Kumar, “These three countries significantly increased women parliamentarians” (3, July 2016),

Men are still earning more money than women in a global context.³³ As a result, women are most often the head of low-income households.³⁴ In recent years poverty rates for women and children have increased.³⁵ Pay inequality results in poverty for women and their families and economic insecurity.³⁶ This situation of having women including single mothers who often take-on the majority of care-giving roles in such a vulnerable financial position has resulted in a disturbing global trend called the “feminization of poverty”.

The feminization of poverty occurs when women comprise a higher percentage of the poor than men.³⁷ Placing women in such a vulnerable position is dangerous for many reasons as low wages affect where women and often their children can afford to live, what they can afford to eat and where they go to school and to work.³⁸ This is especially true for families where women are the sole or major income earners. Further, it places women in a vulnerable position to be more dependent on men which in turn increases their risk for encountering domestic abuse. Low income earning women who are in abusive relationships may be faced with making a decision between facing violence or poverty³⁹.

online: *The World Bank* <blogs.worldbank.org/governance/these-three-countries-significantly-increased-women-parliamentarians>.

³³ The Canadian Women’s Foundation, “Facts about the Gender Wage Gap”, *supra* note 4.

³⁴ NAWL, “Brief”, *supra* note 29 at 2.1, citing, Statistics Canada, “Women in Canada 2000: A Gender-based Statistical Report” (Ottawa: Minister of Industry, 2000) [hereinafter “Women in Canada”].

³⁵ Margaret L. Anderson, *Thinking About Women: Sociological Perspectives on Sex and Gender*, University of Delaware, (New Jersey: Pearson Education Inc. 2015) at 157.

³⁶ Mary Cornish, “Canada’s growing 33% Gender Pay Gap: What Needs to be Done? Brief of the Ontario Equal Pay Coalition”, at 4, (Paper delivered by the Equal Pay Coalition at the Federal Parliamentary Committee on the Status of Women, 12 May 2004) [Cornish, “Canada’s growing”].

³⁷ Charlotte Bunch, “Women’s Rights as Human Rights: Toward a Re-Vision of Human Rights” (1990) 12 Hum. Rts. Q. 486.

³⁸ Shawn M. Burn, “The Gender Pay Gap: Why men tend to earn more, why it matters, and what to do about it, (10 April 2014), online: *Psychology Today* <psychologytoday.com/us/blog/presence-mind/201404/the-gender-pay-gap>.

³⁹ Canadian Women’s Foundation, “The Facts About Gender-Based Violence” (August 2018 last visited), online: The Canadian Women’s Foundation <canadianwomen.org/the-facts/gender-based-violence/>.

The gender pay gap exists in virtually every country in the world, yet the size of the gap varies from one country to the next.⁴⁰ The size of the gender wage gap also depends on whether an adjusted or unadjusted gender wage gap calculation is used with the latter yielding larger percentages of wage differences between men and women.⁴¹ According to the World Economic Forum, based on an unadjusted gender wage gap calculation, women's average earnings across the globe in 2016 were almost half of the men's wage with women earning \$10,778 and men earning \$19,873.⁴² It has also been estimated using an adjusted gender wage gap calculation that women working the same full-time, year-round hours as men make 81 cents for every dollar earned by a man globally.⁴³ Neither the unadjusted nor unadjusted wage gap calculations are acceptable if the world is truly aspiring to reach gender parity in the workforce.

⁴⁰ For example, the World Economic Forum does an annual study of gender gap data comparisons between 144 countries, which includes information specific to the gender wage gap of each country. World Economic Forum, "Global Gender Gap Report 2017" (December 2017 last visited), at 112 online (pdf): World Economic Forum <http://www3.weforum.org/docs/WEF_GGGR_2017.pdf> [World Economic Forum, "Gender Gap Report 2017].

⁴¹ It is important to understand that there are two ways to calculate the gender wage gap, that being using either the "adjusted" or the "un-adjusted" wage gap calculations. An unadjusted wage gap calculation tends to yield a much higher percentage of difference in pay between men and women because it fails to remove the portion of the gap that can be directly attributed to women working less hours. This thesis instead focuses primarily on "adjusted" gender wage gap calculations, which tend to result in smaller percentages in pay between men and women which only contains the portion of the gap that can be attributed to discrimination. For further information on the "adjusted" and unadjusted" calculations, see European Commission Eurostat, "Item 3, Adjusted gender pay gap, Meeting of the Board of the European Directors of Social Statistics" (Luxemburg 4-5 December 2017) at 2, online (pdf): *European Commission* <<https://circabc.europa.eu/webdav/CircaBC/ESTAT/dss/Library/DSS%20meetings/DSS%20meetings%202017/3.%20DSS%20Board%20meeting%20-%204%20and%205%20December%202017/DSSB-2017-Dec-%203%20Adjusted%20gender%20pay%20gap.pdf>>.

⁴² The World Economic Forum, "The Global Gender Gap Report 2016" (August 2018 last visited), online (pdf): *The World Economic Forum*, <http://www3.weforum.org/docs/GGGR16/WEF_Global_Gender_Gap_Report_2016.pdf> [World Economic Forum, "Global Gap Report 2016"].

⁴³ Blau, *supra* note 26.

The gender wage gap has proven stubborn and resistant to significant change or elimination.⁴⁴ According to the World Economic Forum, based on current trends it will take another 217 years to close the economic gender gap which includes wage parity and labour market participation.⁴⁵ This timeframe for closing the economic gap for women around the world is unacceptable. Women are entitled to realize pay equity now as it is a fundamental human right. It is therefore essential that nations take immediate action so that women across the world may benefit from this fundamental right.

Clearly, it is not just women that benefit from pay equity. Paying women the full value of the worth of their work also benefits society and the nation as a whole. Pay equity is a key economic driver and countries benefit financially by ensuring that pay equity is achieved within their borders. For example, it has been estimated that Canada lost \$125 billion in potential income as a result of unequal income and labour force participation in 2005.⁴⁶ According to the World Economic Forum, “The most important determinant of a countries’ competitiveness is its human talent – the skills, education, and productivity of it’s workforce- and women account for one-half of the potential talent base throughout the world”.⁴⁷ Economies benefit from capitalizing on the skills and talents of women in

⁴⁴ Beth Bilson, “The Ravages of Time: The Work of the Federal Pay Equity Task Force and Section 11 of the Canadian Human Rights Act” (2004) 67 Sask. L. Rev. 525 at 525.

⁴⁵ World Economic Forum, “Gender Gap Report 2017”, *supra* note 40 at viii.

⁴⁶ Cornish, “Canada’s growing”, *supra* note 36 at 4, citing <<http://www.theglobeandmail.com/report-on-business/careers/why-we-should-still-mind-the-wage-gap/article4486383>>. See also the original RBC Report which states \$126 billion rather than \$125 billion which may mean that there was a typo or a deliberate rounding down of the total in the Globe and Mail article. RBC Financial Group, “The Diversity Advantage: A Case for Canada’s 21st Century Economy” (Paper Presented at the 10th International Metropolis Conference: Our Diverse cities: Migration, Diversity and Change, Toronto Ontario, 20, October 2005), at 6 online (pdf): *RBC Financial Group* <http://www.rbc.com/diversity/pdf/diversityAdvantage.pdf>.

⁴⁷ Cornish, “Canada’s growing”, *supra* note 36 at 4.

the workforce and one way to encourage women to fully participate therein is to ensure them pay equity.

Speaking on the economic advantages for striving to achieve pay equity, Christine Lagarde, Managing Director of the International Monetary Fund stated that,

“Equal pay and better economic opportunities for women boosts economic growth-creating a bigger pie for everyone to share, women and men alike. Better opportunities for women also promote diversity and reduce economic inequality around the world. It is an economic no-brainer”.⁴⁸

Prime Minister of Canada, Justin Trudeau also placed emphasis on gender as a key to economic growth while speaking in Toronto where he recently stated,

“Everyone’s wondering with an aging demographic, with challenges around global growth, where are those next bits of growth coming from? Well, part of it comes from going from 88 cents an hour on a man’s dollar in hourly wage... to a better level”.⁴⁹

Further speaking on the issue of pay equity he said, “It’s a fundamentally smart thing to do. Much of Canada’s growth over the past few decades came from the entry into the workplace of successful women.”⁵⁰ These are wise words as it has been estimated in a 2016 study by Deloitte LLP for the provincial Ministry of Labour that the wage gap represents \$18 billion in annual “forgone income” in Ontario alone, which equates to 2.5 percent of the provinces GDP.⁵¹

⁴⁸ Laura Cooper, “The State of Women in Canada’s Economy: In Pictures” (March 2017), at p.1 online: *RBC* <http://www.rbc.com/economics/economic-reports/pdf/other-reports/Women_Mar2017.pdf>, citing Christine Lagarde, Managing Director of the International Monetary Fund, (14, November 2016).

⁴⁹ Prime Minister Justin Trudeau spoke in Toronto the week of the article dated March 8, 2018, by Ian Bickis of the Canadian Press, as posted on the Global News Website. Ian Bickis, “Canada Must Do Better to Close Gender Gap But it Won’t be Easy: Bill Morneau” (8 March 2018), online: *Global News* <globalnews.ca/news/4069751/bill-morneau-canada-must-close-gender-gap/>.

⁵⁰ *Ibid.*

⁵¹ Fay Faraday, “Speaker’s Corner: Pay Transparency Laws Needed” (10 July 2017), online: *Law Times* <<https://www.lawtimesnews.com/author/na/speakers-corner-pay-transparency-laws-needed-13500/>>.

It is apparent that more needs to be done globally to address the issue of the gender wage gap. This problem has existed for far too long and women should not have to wait another 20 years to fix it, let alone the 217 years the Global Economic Forum estimates it will take for economic parity with men. The gender wage gap is problematic on many fronts. Pay equity is a fundamental human right and to pay women less than men for work of the same value is devaluing and demeaning to the world's female population. By failing to take effective action to close gender wage gaps, countries are losing out on economic gains, disenfranchising female citizens and perpetuating the systemic discrimination that underlies gender pay discrimination. Further the gender wage gap is directly contributing to the feminization of poverty. Poverty rates for women and children have been increasing over the years.⁵² This is an alarming trend which is reflected in the gender wage gap that results in poverty for women and their families and creates economic insecurity.⁵³

1.4 The Gender Wage Gap in Canada

The gender wage gap exists even in countries with a reputation for commitment to gender equality, such as Canada.⁵⁴ According to the 2017 'Global Gender Gap Index', Canada ranks as having the 46th narrowest gender wage gap on a list of 144 countries.⁵⁵ This

⁵² Anderson, *supra* note 35 at 157.

⁵³ Cornish, "Canada's growing", *supra* note 36 at 4.

⁵⁴ Numerous articles, polls and reports rank Canada as one of the top countries to live, in large part due to the country's social inclusivity and policies that protect women's rights. For example; Alison Millington, "The 23 Best Countries to Live in if you're a Woman" (8 March 2018), online: The Business Insider UK <uk.businessinsider.com/the-best-countries-for-women-us-news-world-report-2017-3/#5-canada-protecting-womens-rights-in-part-of-this-north-american-countrys-domestic-and-foreign-policy-19>. See also, U.S. News and World Report, "Best Country Rankings" (August 2018 last visited), at 112 online: *US News and World Report* <usnews.com/news/best-countries/canada>.

⁵⁵ World Economic Forum, "Gender Gap Report 2017", *supra* note 40 at 112.

means that Canada has a gender pay disparity which is greater than at least 45 other countries.⁵⁶ In 2017 Statistics Canada reported that Canadian women earned approximately 87 cents for every dollar earned by a man.⁵⁷ Although this \$0.13 wage variance in pay between Canadian men and women may not seem like much of a difference in pay at first glance, it adds up quickly. Logically, this wage disparity over the span of a year, or over the course of a career could result in women earning hundreds or even thousands of dollars less than a man, often within the same profession or job.

Further, this pay discrepancy undoubtedly results in substantial disparity between men and women's pensions, often greatly affecting their respective standard of living upon retirement. This is because pension is calculated based on income history, therefore a lower income would result in a lower pension⁵⁸. Additionally, noting that women tend to live longer than men it is apparent that women's pension savings often need to stretch out over a longer life span.

Canada's poor performance at closing the gender wage gap appears perplexing when considering how successful Canada has been in achieving advancements towards women's equality in related fields, such as an increased number of women entering politics, higher education, and the workforce. For example, women now make up half of the Cabinet in the Federal government and there seems to be an increase in Canadian female politicians in general.⁵⁹ Women also have an increased presence in the nation's

⁵⁶ *Ibid.*

⁵⁷ Moyser, *supra* note 2 at 26.

⁵⁸ Mark Miller, "The Gender Pay Gap Haunts Women into Retirement Too" (4 February 2016), online: Time <time.com/money/4207853/gender-pay-gap-retirement/>.

⁵⁹ At least half of the federal cabinet ministers listed on the Prime Minister of Canada's website are women, as listed on the Justin Trudeau website. Justin Trudeau, Prime Minister of Canada (January 2018) at "cabinet", online: *Justin Trudeau, Prime Minister of Canada* <<https://pm.gc.ca/eng/cabinet>>.

workforce and within Canadian post-secondary institutions as students. Women make up approximately half of the Canadian workforce and compose at least 62% of University students.⁶⁰

The World Economic Forum, the same institution that ranked Canada at number 46 regarding the gender wage gap, has also ranked Canada at the highest ranking for women's educational attainment in comparison with men's.⁶¹ The World Economic Forum further stating that the educational attainment gap has been closed in Canada since 2013.⁶² Despite substantial time, energy and finance investments by women into their education, data shows that women continue to earn less money than men in all occupations, industries and education levels.⁶³ Statistics Canada data shows that of 500 occupations tracked, women are paid less than men in 469 of them.⁶⁴

According to 2016 data collected by the Ontario Equal Pay Coalition and the Canadian Centre for Policy Alternatives, women in Ontario earn 29.3% less than men.⁶⁵ Women also earn substantially less than men across the country on an estimated annual income, with men earning an average of \$51,900 and women earning \$36,000 resulting in a \$15,900 annual pay gap between men and women.⁶⁶ It has been estimated that women

⁶⁰ Cornish, "Canada's growing", *supra* note 36 at 4.

⁶¹ "Educational attainment", is a sub-index used by the World Economic Forum as part of their Global Gender Gap Index Report to capture the gap between male and female access to education through ratios males and females in primary, secondary and tertiary level education. World Economic Forum, "Gender Gap Report 2017", *supra* note 40 at 112.

⁶² Canada's ranking for educational attainment is set at number 1, the highest position possible which is shared with a handful of other countries. *Ibid* at 21.

⁶³ Cornish, "Canada's growing", *supra* note 36 at 4, citing Cara Williams, "Economic Well Being", Women in Canada: A Gender Based Statistical Report, Statistics Canada (December 2010).

⁶⁴ Faraday, *supra* note 51.

⁶⁵ Marilisa Racco, "The Gender pay gap costs Canadian women almost 16,000 a year" (April 2018) at 10, online: *Global News* <globalnews.ca/news/4135180/gender-pay-gap-canada/>.

⁶⁶ *Ibid*.

would have to work an additional three and a half months per year to earn the same as men do in 12 months.⁶⁷

Each of the foregoing statistics appear to be based on an unadjusted gender wage gap calculation that fails to contemplate the difference in the number of hours worked between men and women. This means that these gap calculations include all women, including those who spend less hours in the workforce, often because they are taking care of domestic and family duties at home. It is common knowledge that women take on a larger burden of necessary household and childcare duties than men. It is unfair that women often lose out significantly on income simply because a portion of their time working is devoted to unpaid domestic home and care-giving work at home. This caregiving work is arguably essential for not only living at an acceptable quality of home life but also for sustaining life and raising future generations. Someone must take on this important task and the duty often falls upon women.

The persistence of Canada's gender wage gap contradicts the progress the country has made in the political and educational realms as well as in the workforce. These statistics are disappointing as they provide evidence that Canada still has a long way to go in order to fully achieve gender equality. Narrowing the gender wage gap is an essential step in meeting this goal.

⁶⁷ *Ibid.*

1.5 Some of the Factors that Contribute to the Gender Wage Gap

There are multiple factors contributing to the gender wage gap, some of which are easily identifiable and readily apparent, and others that are less apparent or more or indirect.

Women taking on fewer working hours such as part-time work to accommodate care-giving duties, or taking jobs requiring a low level of education, skills or training, are examples of some of the easily identifiable, explainable factors that contribute to the gap.

However, even when we factor out each of these explainable causes for gender pay inequality from a gender wage gap calculation, a considerable and persistent unexplained portion of the wage gap persists.⁶⁸ This unexplained factor, which is less obvious or easy to directly identify is considered a manifestation of discrimination against women.⁶⁹ This thesis focuses specifically on the portion of the wage gap which can be directly attributed to gender pay discrimination. Gender discrimination by employers is the targeted cause because it is one specific area of the gap which the law can assist in resolving.

Although this thesis specifically targets the gender discrimination component of the gender wage gap, it is important to also recognize that the wage gap is caused by multiple factors. Various social, economic, historical, political, cultural and other factors have contributed to and perpetuated the gender inequality and discrimination that underlie the gender wage gap. Therefore, in order to fully address the resulting systemic

⁶⁸ It has been estimated in the U.S.A that in a 2014 publication by university research professors that even after we factor out gender job segregation, differences in experience, union status race and education, 41% of the gender wage gap remains unexplained. Even when every possible employment factor is taken into account, social scientists still found that women earned only 91% of what men earn for the same job. Anthony P. Carnevale, Nicole Smith, “Gender Discrimination Is at the Heart of the Gender Wage Gap” (19, May 2014), online: *Time Magazine* <time.com/105292/gender-wage-gap/>.

⁶⁹ Bilson, *supra*, note 44 at 526.

discrimination, progress is required through a variety of means, such as through gender equality education. However, in this thesis, the ultimate goal is not to examine every possible cause of the gender wage gap, nor every tool available or required to completely close it. That would be an insurmountable task to achieve within the parameters of this thesis project. Instead the goal of this thesis is to focus on one tool, the law, as a means to narrow one distinct component of the gender wage gap, that being gender pay discrimination.

As shall be discussed later in this Chapter, the law is a viable tool for closing the gender wage gap as it serves as both a reflection of society's values as well as a compelling force to act in accordance with those values. However, in addition to examining how the law can be used to address the discrimination component of the gender wage gap, it is also important to discuss some of the other causes of the gender wage gap and related theories to understand the complexity and magnitude of the problem.

The Human Capital Theory

In general, there are two primary theories forwarded by scholars as the cause of the gender pay gap, the *human capital theory* and the *dual labour market theory*. The first theory is the *human capital theory*, which assumes that wage differences between men and women in a competitive market system reflect differences in worker characteristics known as human capital. According to this theory, women earn less because they have less education, skill and experience and tend to work less hours and participate for a shorter period in the workforce than men.⁷⁰

⁷⁰ Anderson, *supra* note 35 at 139.

Although it is true that a portion of the gender wage gap is attributable to certain human capital characteristics, such as many women working less hours than men or taking more time out of the workforce to care for the family, this factor accounts for only a portion of the gap. Other factors, such as gender segregation of the marketplace and discrimination also account for a portion of the wage gap, among others. The human capital theory therefore is only able to explain the gender gap in part and it is apparent that other factors are also responsible.

Further an important issue that arises when considering the human capital theory is that it highlights one of the ways in which discrimination is at play with the gender wage gap. The theory highlights common assumptions and stereotypes that are made within society and by employers about women. For example, there are common stereotypes that women often forgo education and tend to caregiving and cleaning duties in the home instead. However, such stereotypes are often incorrect. Not all women lack higher or specific types of education, or take extended time out of the workforce to have a family or work part time to care for the home.⁷¹ Rather, this is an example of gender discrimination which leads to lower wages for women. Some employers assume that women lack the level of skill or education achieved by their male counterparts. Others predict that women are not ideal job candidates because they will likely take time of work to have children

⁷¹The fact that women take on more of the family and home care duties is not due to their sex or determined by biology. Women typically take on the majority of these unpaid domestic roles because of social norms, values and expectations. This adversely effects the economic position of women and impacts the gender wage gap. It is also helpful to note that there is a difference between the terms “sex” and “gender”. When speaking of “sex”, this is the strictly biological differences between men and women. On the other hand, “gender is the culturally specific set of characteristics that identifies the social behaviour of men and women and the relationships among and between them. See Sara Hawryluk & Tricia Bakken, *Balancing the Scales of Pay Equity: The need for gender analysis and Budgeting*, Canadian Centre for Policy Alternatives, (Regina: Canadian Centre for Policy Alternatives, Feb 2009) at 5, citing Status of Women in Canada 1998. Gender-Based Analysis: A Guide for Policy Making, Ottawa: Ont. Cat. No. Sw21-16/1996, 3.

and put in less hours at work thereafter to raise them. It is these types of misconceptions and stereotypes which lead some employers to hire men rather than women or pay men more than women because they determine female employees are less committed to their jobs and therefore perform less valuable work.

Another phenomenon that is fueled by this type of employer stereotyping is called the “mommy tax”, where employed mothers have lower incomes than women without children.⁷² This phenomenon is fueled by employer stereotypes that women with children are less committed to their work than childless women.⁷³ This is an assumption and resulting wage penalty that is not typically faced by men, which is another contributing factor to the gender wage gap. In contrast, men sometimes receive an increase in wages when they become fathers.⁷⁴

Dual Labour Market Theory

The second major theory explaining the gender wage gap is the *dual labour market theory*, which understands the labour market as having two sectors, a primary and secondary market.⁷⁵ The primary labour market, which offers higher stability, wages, benefits and advancement opportunity is one that tends to employ men.⁷⁶ Whereas, women and minorities tend to be employed in the secondary market, which offers less job stability, lower wages and benefits or opportunity for advancements.⁷⁷ This gender segregation of the labour market is a large contributor to the gap.⁷⁸ Moreover, this type of

⁷² Anderson, *supra* note 35 at 139.

⁷³ *Ibid.*

⁷⁴ *Ibid.*

⁷⁵ *Ibid* at 140.

⁷⁶ *Ibid* at 141.

⁷⁷ *Ibid.*

⁷⁸ *Ibid.*

segregation is caused by historical discrimination against women in the job market.⁷⁹

Therefore, achieving employment equity for women, a topic which will be discussed throughout this thesis, becomes an important goal. Employment equity is touched upon briefly alongside the focus of this thesis, that being wage equity for men and women.

Further to the dual labour market theory, female-dominated jobs, such as receptionist work and care-giving positions, tend to pay less than male-dominated jobs.⁸⁰ This is an example of institutionalized discrimination, which occurs when structural patterns in society result in women being excluded from certain types of jobs.⁸¹ Despite some occupations becoming more integrated in recent years, female dominated occupations continue to exist.⁸² For example, in 2009, one fifth of all women were employed in the following five occupations: receptionist, registered nurse, nurse's aide, elementary school teacher and cashier.⁸³

Female workers also continue to dominate the lower paying occupations. For instance, in 2016, two thirds of women and less than one third of men, were employed in the following lower paying occupations: administrative, office support, education, health services and sales and services.⁸⁴ This segregation of work creates a situation where

⁷⁹ Cher Weixia Chen, *Compliance and Compromise: The Jurisprudence of Gender Pay Equity*, (Leiden, Netherlands: Martinus Nijhoff Publishers, 2011) at 23, citing A. Chung, (1995), Pay Equity for Hong King: A Preliminary Exploration", Hong Kong Law Journal 33(25): 383-400, p.386.

⁸⁰ Caroline Fredrickson, *Under the Bus: How Working Women Are Being Run Over*, (NY: The New Press, 2015), at 67.

⁸¹ Anderson, *supra* note 35 at 139.

⁸² Fredrickson, *supra* note 80 at 67.

⁸³ Although this information was a study completed in the United States, the gendered occupational segregation trends in the United States have been visibly similar to those in Canada. *Ibid*, citing White House Council on Women and Girls, Women in America Indicators of Social and Economic Well Being, (Washington, DC: U.S. Department of Commerce and Executive Office of the President, 2011) at 33.

⁸⁴ The Conference Board of Canada, *supra* note 8.

society loses out on the ambitions and talents of men and women who would be well-suited to take on employment roles traditionally filled by workers of the opposite sex.⁸⁵

According to the Institute for Women's Policy Research, some low paying jobs pay less than comparable jobs because they are filled by women, not simply because women are attracted to low paying jobs.⁸⁶ Women's segregated work is paid less than men's work in general providing evidence of systemic undervaluation of women's work.⁸⁷ Women's work such as childcare and other care-giving positions tend to be undervalued, while the "dirty" jobs and other "important" work performed by men are awarded higher pay.⁸⁸

Research also shows that men who work in female-dominated jobs tend to get on a "glass-escalator", receiving promotions and increased pay faster than women.⁸⁹ This information further supports the notion that a given job is low paying because women fill those positions, not because the job itself is low paying.⁹⁰

Yet, even when women elevate themselves with higher education so that they are able to work in higher-paying traditionally-male jobs, they are still paid less than men. Despite women becoming more educated, this did not directly result in pay equity post-graduation. A gender gap remains for women in male-dominated jobs especially a few years post-graduation. For example, a Canadian study performed on graduates with

⁸⁵ Fredrickson, *supra* note 80 at 67.

⁸⁶ *Ibid*, citing "Separate and Not Equal? Gender Segregation in the Labour Market and the Gender Wage Gap," Institute for Women's Policy Research Briefing Paper, September 2010 at 11.

⁸⁷ Cornish, "Canada's growing", *supra*, note 36 at 3.

⁸⁸ Chen, *supra* note 79 at 18, citing, Mary C. Corley & Hans O. Mauksh (1987), "Registered Nurses, Gender and Commitment", in Anne Stratham and et al. (eds), *The Worth of Women's Work*, Albany State University of New York Press, pp. 135-149.

⁸⁹ Fredrickson, *supra* note 80 at 69, citing, Boushey, "Women's Place is in the Middle Class", loc. 895, citing Christine Williams, "The Glass Escalator: Hidden Advantages for Men in the Female Professions", *Social Problems*, 39, no 3 (1992).

⁹⁰ Fredrickson, note 80 *supra* at 69.

bachelor degrees from seven universities, found that men earned \$2,800 more than women one year after graduation and then earned \$27,300 more than women eight years later.⁹¹ The largest pay differences were found to be in the traditionally male job fields of engineering and business.⁹² It was determined that explainable factors such as women taking on less working hours to dedicate more time to family care explain part of the wage difference but it also pointed to labour market discrimination as a likely key contributor as well.⁹³ Some instances of labour discrimination that female graduates would face in these types of male-dominated jobs include: being cut from leadership positions, or key assignment positions, or certain field locations, due to stereotypical preconceived notions by employers.⁹⁴

The labour market theory, much like the human capital theory highlights another way in which gender discrimination underlies explainable causes of the wage gap, that being the gendered segregation of the labour market. Despite each these two major theories explaining the wage gap in part, neither of these two theories alone provide sufficient explanation for the entirety of the gap. It is not merely individual factors described by the human capital theory that created the gap. Nor is it the gender segregation of the dual labour market theory alone which caused the gap. A large portion of the gap is still unexplained by these theories and can be directly attributed to prevalent patterns of discrimination against women.⁹⁵ Ultimately, systemic and longstanding gender

⁹¹ The Conference Board of Canada, *supra* note 8.

⁹² *Ibid.*

⁹³ *Ibid.*

⁹⁴ *Ibid.*

⁹⁵ Anderson, *supra* note 35 at 140.

discrimination which has been engrained in society is the most difficult barrier to closing the gap.⁹⁶

One way of effectively dealing with discrimination is through the law. Legal reform is one viable way to address the portion of the gender wage gap which has been caused by gender discrimination and what has led me to prepare this thesis on how legal reform can help further achieve pay equity for women.

Intersectionality

To further complicate matters, there is another factor which has an effect on the gender wage gap, that being intersectionality. Higher pay gaps exist for women who face multiple forms of discrimination.⁹⁷ In addition to sex, racialized women, immigrants, aboriginal women and women with disabilities are often discriminated against on multiple fronts and suffer from higher pay gaps.⁹⁸ This double or triple-fold discrimination faced by these women make them particularly vulnerable to receiving lesser wages than their male counterparts for comparable work leaving these women highly susceptible to economic disadvantage.

1.6 Critiques of the Gender Wage Gap and Discrimination

Critics of the existence of the gender wage gap say that gender-based inequalities are due to individual choice rather than discrimination.⁹⁹ However, this argument fails in two parts. First, this position fails to account for the portion of the gap that cannot be

⁹⁶ Chen, *supra* note 79 at 18, citing Sara L. Zeigler (2006), "Litigating Equality: The Limits of the Equal Pay Act", *Review of Public Personal Administration* 26(3): 199-215, pp.211-212.

⁹⁷ Cornish, "Canada's growing", *supra* note 36 at 2.

⁹⁸ *Ibid.*

⁹⁹ Carnevale and Smith, *supra* note 68.

explained by human capital or the gendered segregation of labour. Further the position that the gender wage gap is caused solely by women's choices and has nothing to do with discrimination is both presumptuous and incorrect.

The idea of "choice" in this context, "ignores the structural divisions in society that discriminate against the potential for equal opportunity".¹⁰⁰ These "choices" include women choosing to work less hours outside the home to care for children or the home. But in reality, this is not always a choice in the true sense of the word. In order to raise a family or even a single occupant home, somebody will be tasked with domestic duties to keep the home maintained and the family and children cared for. It is common knowledge that women are often, although not always, the first people we see step into these care-giving and household duty roles. Part of the reason we see so many women taking on this type of unpaid domestic work is because of deeply-engrained gender stereotypes such as seeing the women as the mother who takes care of the home and the man as the father who works to take care of the family financially. These stereotypes are at the root of the gender discrimination at play which may be seen to have countered the element of "choice" these women had in choosing such roles in the first place.

These presumed "choices" also include women choosing to take on female-dominated jobs that pay less than men, and taking educational paths that tend to lead to female-dominated jobs¹⁰¹. However, discrimination may very well play into these "choices" as

¹⁰⁰ The New Brunswick Advisory Council on the Status of Women, "The Pay Gap: Causes, Consequences and Actions", (A working paper, Moncton New Brunswick, May 1996) at 8.

¹⁰¹ "Female dominated jobs", or "female job class", are jobs that contain more female employees than men and male-dominated jobs are those that employ primarily men. Legislation such as pay equity legislation defines a percentage threshold of women or men that must be met to meet a specific legislation's definition of either a female-dominated or male-dominated job. For example, Ontario's Pay Equity Legislation defines "female job class" as a class in which 60% or more of the employees are female". *Pay Equity Act*, RSO 1990 c P7, definitions [*Ontario Pay Equity Act*].

well. “It is not clear how much of “choice” is the result of past discrimination which has kept women from obtaining the necessary qualifications and support to compete in traditionally male occupations”.¹⁰² For instance, young girls and women do not make choices about where to attend school and where to work in a vacuum.¹⁰³ They make such decisions under the influence of teachers, parents and other members of society and cultural norms strongly advising them as to which subjects to study and which careers are acceptable.¹⁰⁴

It is not uncommon for females to be drawn to subjects and careers in the social sciences and arts, and for men to find themselves in more technical, science or mathematical courses and related occupations. To illustrate, two thirds of Canadian post-secondary graduates in science, technology, engineering and mathematics (*STEM*) are men, whereas Canadian women make up three quarters of health care and education graduates.¹⁰⁵ Although natural ability may play a part in such decisions, it is fair to assume that gender role norms and external societal influences have also played a part in leading males and females towards these different paths. Stereotypes that women are better suited for school courses and jobs related to care-giving and that men are better at classes and jobs involving technology related skills, engineering, and mathematics are still common in society today. For example, a 2016 research study suggests that stereotypes, although often inaccurate continue to drive females away from taking courses in *STEM* fields.¹⁰⁶

¹⁰²The New Brunswick Advisory Council, *supra* note 85 at 8.

¹⁰³ Carnevale and Smith, *supra* note 68.

¹⁰⁴ *Ibid.*

¹⁰⁵ Government of Canada, “Budget 2018’s Gender Results Framework” (27 February 2018), online: Government of Canada <<https://www.budget.gc.ca/2018/docs/plan/chap-05-en.html#Budget-2018s-Gender-Results-Framework>> [Government of Canada, “Budget 2018”].

¹⁰⁶ Allsion Master, Sapna Cheryan, & Andrew Meltzoff, “Researchers explain how stereotypes keep girls out of computer science classes” (26, April 2016), online: Washington Post

These self-perpetuating stereotypes can be seen as a form of discrimination that underlies even the seemingly explainable factors of the gender wage gap.

1.7 How Legal Reform can Narrow the Gender Wage Gap

Legal reform is obviously not the only way to try and fix the wage gap, nor will law reform alone completely resolve the problem. However, law is an essential tool which must be utilized in order to reach the goal of closing the gap. The law can be considered a reflection of the norms which are valued within a society. Strengthening and increasing the implementation of pay equity laws across Canadian jurisdictions is a way to affirm and reinforce Canada's commitment to achieving gender equality. The law also serves as a tool to persuade action and compel compliance. Employers would be more motivated to ensure they are paying male and female employees fairly if they were compelled to do so under the law.

As the Honourable Justice Abella, of the Supreme Court of Canada, stated in her Royal Commission Report on equality in employment, "*To ensure freedom from discrimination requires government intervention through law. It is not a question of whether we need regulation in this area, but of where and how we apply it*".¹⁰⁷ The law therefore serves a vital role in defeating gender pay discrimination in Canada and is an essential tool for

<[washingtonpost.com/news/education/wp/2016/04/26/researchers-explain-how-stereotypes-keep-girls-out-of-computer-science-classes/?noredirect=on&utm_term=.60c5101435ae](http://www.washingtonpost.com/news/education/wp/2016/04/26/researchers-explain-how-stereotypes-keep-girls-out-of-computer-science-classes/?noredirect=on&utm_term=.60c5101435ae)>.

¹⁰⁷ At the time of her Royal Commission Report, Supreme Court Justice Abella was a judge of a lower court. Judge Rosalie Silberman Abella, *Equality in Employment: A Royal Commission Report*, General Summary (Toronto: Commission on Equality in Employment, 1984) online: <http://crrf-fcrr.com/images/stories/Equality_in_Employment.pdf>.

eliminating pay disparity between men and women. This is because as previously discussed, pay inequity is in part caused by discrimination.

Gender discrimination underlies the gender stereotypes and roles which keep women in the home more and training for and working in specific types of jobs, which are issues that law alone may not best be suited for. However, the law is suited for the type of discrimination women face from employers who have internalized those same gender stereotypes and roles and as a result pay women less than men for the same job or for jobs of the same value. In Chapter 2, this thesis will discuss how Canada has used the law to deal with gender pay discrimination in the past, how the law is presently used and how such laws need to be refocused to more effectively help narrow the gender wage gap in the future.

1.8 The Value of Supportive Policies and Programs in Addition to Legislation

Although this thesis specifically targets legislation and legislative reform as a means to narrow the pay disparity between men and women, it is important to note that legal reform alone would not be as effective as it could be with broader policy reform.

Accordingly, in addition to ensuring that laws that promote gender pay equity are in place, it is essential that supportive policies and programs are developed alongside them.

According to the Status of Women Canada (SWC),

“in order to address the inequality between men and women requires a dual approach: developing policies, programs and legislation that are women-specific as

well ensuring that legislation, programs and policies that are not specifically targeted for women do not maintain or exasperate the equality gap.”¹⁰⁸

This first stage of this process, includes not only developing legislation to deal with discrimination and pay equity but also a broad range of work-life policies, such as paid family, medical leave, and sick days and affordable child care.¹⁰⁹ Government subsidized childcare programs would benefit many women by enabling them to work outside of the home. The high cost of daycare may make it inaccessible to low income women with children. It may not make financial sense for some women to work outside of the home if their employment income fails to pay for the cost of childcare. Women could also benefit from more supportive breast-feeding policies at work, encouraging them to work by enabling them to breastfeed or pump milk for their babies while outside the home. These and other policy and program decisions should be implemented alongside the legislative reforms suggested in this thesis to help women achieve gender equality and pay equity and ultimately narrow the gender pay gap.

The second stage of this approach, that of “ensuring that the legislation, programs and policies do not perpetuate or increase the equality gap”, is a process called, “gender-based analysis”¹¹⁰. Using a gender-based analysis is useful in assisting governments in the creation of a gender budget. A gender budget is one that accounts for both direct and indirect effects of government allocations of resources on both men and women.¹¹¹ It is

¹⁰⁸ Hawryluk and Bakken, *supra* note 71 at 5, citing, Status of Women Canada, *Women’s Economic Independence and Security. A Federal/Provincial/Territorial Framework*. (Ottawa, Ont. Car. No. SW21-77/2001) 1.

¹⁰⁹ Kaitlin Holmes and Danielle Corley, “International Approaches to Closing the Gender Wage Gap” (4, April 2017), online: *American Progress* <americanprogress.org/issues/women/reports/2017/04/04/429825/international-approaches-closing-gender-wage-gap/>.

¹¹⁰ Hawryluk and Bakken, *supra* note 71 at 5.

¹¹¹ *Ibid*, citing Morgan, Clara, Gender Budgets: an Overview. Library of Parliament Nov 2007. Downloaded from <http://www.pari.gc.ca/information/library/PRBpubs/prb0725-e.htm>.

imperative that governments are aware of how their budgeting decisions effect women specifically. This is because budgets, although they may not specifically mention men or women are not gender neutral, but they are rather gender blind.¹¹²

Gender blind budgets ignore the fact that budgeting decisions have a different effect on men than they do on women often because women often have different roles and responsibilities than men.¹¹³ For example, women tend to take on the majority of unpaid work, such as family and home care duties and therefore fall into a lower income bracket than men. This is something that a government should take into account when budgeting and setting income tax reductions.¹¹⁴ When setting tax brackets, governments should be cognisant of the fact that the majority of the lowest income earners will not only be women, but often women with children and single mothers who are not always financially able to work and earn comparable income to men. Therefore, governments need to also be fully conscious of the effects their budgets have on women as, “A budget is the most comprehensive statement that a government makes in regards to social and economic plans and priorities.”¹¹⁵ As shall be discussed in Chapter 4, the Canadian Federal government’s 2018 budget is an inspiring example of a gender budget that specifically focuses on gender equality including progressive steps to narrow the gender wage gap.

¹¹² Hawryluk and Bakken, *supra* note 71 at 5.

¹¹³ *Ibid.*

¹¹⁴ *Ibid.*

¹¹⁵ Hawryluk and Bakken, *supra* note 71 at 6, citing United Nations Development Fund for Women (UNIFEM) (2005) 2005 World Summit. On the Agenda: Budgeting for Gender Equality. New York. United Nations.

1.9) Conclusion

Chapter 1 explained that the wage gap is an unfortunate and dangerous phenomenon that even exists in some of the wealthiest and most human rights focused countries around the world, such as Canada. Women continue to be paid less than men for performing the same job or for jobs with an equivalent value, meaning jobs having the same level of skill, effort, responsibility, and working conditions as those performed by men. It was determined that the gender wage gap problem is longstanding and persistent and has led to the feminization of poverty which negatively effects women, families and the economy. The many factors responsible for the existence and perpetuation of the wage gap were discussed alongside a variety of methods which would be required to close the gap. It was shown that the law is one tool which can be used to help narrow the portion of the gender wage gap that is attributed to discrimination.

It is apparent that the gender wage gap is a problem in Canada. One of the contributors to the wage gap is gender discrimination which is one causation the law can effectively address. Chapter 2 will focus on how Canada is obliged to use the law to reach pay equity and an exploration of the historical evolution of equal pay law, from the human rights complaints-based legal model to the creation of more proactive pay equity legislation which shifts the burden of ensuring pay equity from the complainant onto the employer. Chapter 2 will discuss how Canada has used the law in the past to deal with the issue of gender pay inequality and how it has impacted the gender wage gap.

CHAPTER 2

2. INTERNATIONAL INSTRUMENTS AND THE EVOLUTION OF CANADIAN PAY EQUITY LAW

The purpose of this second Chapter is to introduce Canada’s pay equity obligations under International Law and how international and domestic principles and laws evolved from pay equality to pay equity. There will be a discussion of the history and evolution of relevant Canadian legislation that deals with gender based pay discrimination and pay equity including previous influential investigative reports calling for law reform. It will become apparent that many of the recommended reforms involve the implementation of more proactive laws such as those found in free-standing pay equity legislation to decrease gender pay discrimination and narrow the nation’s gender wage gap.

2.1 Canada’s Gender Pay Equity Obligations under International Law

Canada has ratified several international human rights instruments related to pay equity. These instruments require participating governments to acknowledge the reality that women face systemic discrimination that results in, among other things, poor women and an impoverished society as a whole.¹¹⁶ The instruments then obligate signing governments, employers and civil society to commit to the goal of taking action to realize substantive pay equity.¹¹⁷ Under such laws, the government is required to “adopt all

¹¹⁶ Cornish, Faraday, & Dagnino, *supra* note 5 at 7.

¹¹⁷ *Ibid.*

necessary measures” to eradicate discrimination by any person, enterprise or organization to meet these ends.¹¹⁸

The first instruments of gender pay equality and pay equity which Canada committed to were not domestic laws but instruments of international law. Pay equity, is a fundamental human right recognized by international law.¹¹⁹ Canada is bound by a number of international instruments to promote and ensure pay equity and more specifically, gender pay equity, through the implementation of relevant domestic law. Pay equity was one of the first formally codified rights in international law and one of the nine founding principles of the 1919 International Labour Organization.¹²⁰

Although the earliest international instruments Canada ratified fell short of guaranteeing women pay equity in the conventional sense, that being equal pay for work of equal value, they were still valuable historical steps in the path to pay equity. For example, Canada signed the 1948 proclaimed *Universal Declaration of Human Rights (UDHR)*, which only guaranteed the right to equal pay for equal work, however the *UDHR* also referred to gender discrimination throughout.¹²¹ The *UDHR* was still a valuable step in history for pay equity, as it paved the way for later conventions and treaties which extended the guarantee of equal pay for equal work to a guarantee of equal pay for work

¹¹⁸ *Ibid.*

¹¹⁹ According to the Government of Canada website, pay equity is a fundamental human right. Government of Canada, “Introduction”, *supra* note 11.

¹²⁰ Cornish, et al, *supra* note 5 at 7.

¹²¹ *Universal Declaration of Human Rights*, GA Res 217(III), UNGAOR, 3d Sess. Supp. No13, UN Doc A/810 (1948), 10 December 1948 [*UDHR*].

of equal value. On the domestic level, the *UDHR* has also been referenced as the instrument which stemmed Canadian human rights laws.¹²²

After the *UDHR*, Canada ratified the *International Bill of Rights* in 1976, which contains the *International Covenant on Economic, Social and Cultural Rights (ICESCR)*.¹²³ This multinational treaty which was adopted by the UN General Assembly, guarantees everyone the right to equal remuneration for work of equal value. Canada also ratified Article 2 of the *Equal Remuneration Convention (ILO No.100)* in 1972, which requires signing members to take specific measures, such as enacting laws to “promote [...] and ensure the applications to all workers of the principle of equal remuneration for men and women workers for work of equal value.”¹²⁴ Given the fact that 173 countries ratified this Convention, it is fair to say that pay equity, including gender pay equity, has gained general acceptance to a level that can be considered customary international law.¹²⁵

In 1981, Canada signed *The Convention on the Elimination of all forms of Discrimination Against Women (CEDAW)*, which requires government members to implement positive measures to remedy the historical oppression of women. Further, *CEDAW* recognizes women’s “right to equal remuneration including benefits and equal treatment in respect

¹²² Canadian Human Rights Commission, “Human Rights in Canada” (August 2018, last visited), online: *Canadian Human Rights Commission* <chrc-ccdp.gc.ca/eng/content/human-rights-in-canada> [Canadian Human Rights Commission, “Human Rights”].

¹²³ *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 UNTS 3, CAN TS 1996 No. 46. [ICESCR]

¹²⁴ *Convention (No.100) concerning equal remuneration for men and women workers for work of equal value*, 23 May 1953, 165 UNTS 303 [ILO Convention No. 100], Article 2.

¹²⁵ In Cher Wexia Chen’s book it is noted that 168 states ratified the *ILO Convention No. 100* by 2011, which was her basis for her statement that pay equity was generally accepted and therefore a norm that had potential to be considered customary international law. However, an additional 5 countries have also signed the ILO No. 100 which show further evidence that pay equity is a widely accepted norm. Chen, *supra* note 79 at 21. See also, International Labour Organization, “*Ratifications of C100 – Equal Remuneration Convention, 1951 (No. 100)*” (July 2018 last visited), online: *International Labour Organization* <https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO:11300:P11300_INSTRUMENT_ID:312245:NO>.

of work of equal value, as well as equality of treatment in the evaluation of quality of work”.¹²⁶ There are also a variety of other similar international treaties and other instruments that directly relate to pay equity for men and women, which Canada has ratified.

International human rights instruments have become increasingly specific in directives for action that are to be implemented by signing states. For instance, Canada has committed itself to the following principles which must be adhered to in domestic pay equity legislation.¹²⁷ The first principle is that pay equity is a fundamental human right for women and it is essential that governments prioritize the goal of reaching pay equity.¹²⁸ Governments must also recognize that sex-based discrimination is systemic and therefore addressing the problem requires transformative remedies that go beyond the present laws.¹²⁹ Progression to transformative remedies requires adherence to the principal of “equal pay for work of equal value” and job neutral comparisons of jobs held by men and women is necessary in order to move beyond non-discriminatory wages.¹³⁰ The previously accepted principle of “equal pay for equal work” is not enough as it fails to recognize that many jobs held by females involve the same level of skill, effort, responsibility and similar working conditions to higher paying jobs held by men.

¹²⁶ CEDAW, *supra* note 5 at 11(1)(d).

¹²⁷ Mary Cornish et al, summarize 14 key obligations and principles imposed on Canada by a number of international instruments, starting with the 1948 *Universal Declaration of Human Rights* to the 2000 Beijing +5 Resolutions. See Mary Cornish, Elizabeth Shilton, & Fay Faraday, “Canada’s International and Domestic Human Rights Obligations to Ensure Pay Equity, Obligations to Design an Effective, Enforceable and Proactive Pay Equity Law, Executive Summary”, (Research Paper Commissioned by the Pay Equity Review Task Force, Toronto (undated).

¹²⁸ *Ibid*

¹²⁹ *Ibid*.

¹³⁰ *Ibid*.

Further governments need to accept the principle that they have a duty to eradicate gender pay discrimination by taking active steps to strengthen and enact effective legislation.¹³¹ The most effective legislation being proactive as opposed to complaints based, which is a topic that will be discussed in detail throughout this chapter. Finally, governments must agree to create effective enforcement mechanisms including legal aid, reporting and follow-ups.¹³² This is essential to ensure that the laws enacted are complied with by employers. Some new laws that deal effectively with this matter are pay transparency laws which will be discussed in Chapter 4.

In signing these and other international instruments that deal with pay equity, the Canadian government has formally bound itself to the commitment of taking proactive steps to reach the principles, values, and goals mentioned therein. The government has a legal obligation to not only enact effective pay equity law but also to implement effective mechanisms to enforce the laws and insure compliance with international and national labour and employment law standards. The Canadian government acknowledged and proclaimed their duty to fulfill their agreements made under international law, in *The Federal Plan for Gender Equality (the Federal Plan)*.¹³³

As part of the *Federal Plan*, the government acknowledged that many women were experiencing unequal pay for work of equal value and utilized a gender based analysis in response as a way to address discrimination against women.¹³⁴ Gender analysis is built on

¹³¹ *Ibid.*

¹³² *Ibid.*

¹³³ Government of Canada, "Setting the Stage for the Next Century: The Federal Plan. Ottawa. Status of Women, Canada" (August 1995), online (pdf): *Government of Canada* <<http://publications.gc.ca/collections/Collection/SW21-15-1995E.pdf>>.

¹³⁴ NAWL, "Brief", *supra* note 29 at 1.1.

the notion that policy and social context are inseparable, as are social and economic issues.¹³⁵ Therefore social impact analysis, including gender analysis are an integral part of good policy analysis that should not be considered as a secondary consideration made only after costs and benefits have been assessed.¹³⁶ Under the *Federal Plan*, the government mandated that legislators apply a gender-based policy analysis at each stage of the legislative process.¹³⁷ This means that through the gender equality policy analysis process, legislators must consider how their policy decisions effect women and women's equality specifically. The federal government has committed to the objective of implementing gender based analysis throughout Federal departments and agencies, thereby implementing a systemic process to guide and inform future federal policies and legislation by assessing differential impact on men and women.¹³⁸ One of the goals of the *Federal Plan* was to improve autonomy and economic standing for women in Canada.¹³⁹ Gender budgeting is one way to further these goals for Canadian women. Chapter 4 will discuss the 2018 federal budget, which was crafted using gender budgeting as a way to improve gender equality and pay equity.

¹³⁵ *Ibid*, at 1.2, citing R. McKinley, Gender Analysis of Policy (Draft), (Ministry of Women's Affairs, New Zealand, 1993) cited in the Federal Plan for Gender Equality at 18.

¹³⁶ *Ibid*.

¹³⁷ *Ibid*.

¹³⁸ Indian and Northern Affairs Canada, "A Guide to Gender Equality Analysis", (August 2018 last visited) at 11, online (pdf): *Government of Canada* <publications.gc.ca/collections/Collection/R72-291-2000E.pdf.>.

¹³⁹ NAWL, "Brief", *supra* note 29 at 1.2, citing the Federal Plan, *The Federal Plan for Gender Equality*, 1995 at 406 [hereinafter *The Federal Plan*]. Objective 2.

2.2 Evolution of the Principle of Equal Pay for Equal Work, to Pay Equity

As discussed in Chapter 1, pay equity goes beyond the concept of equal pay. Gender pay equity specifically requires that equal pay be given to men and women for both equal work and also for work of equal value or comparable worth.¹⁴⁰ In other words, to achieve pay equity, women are to be paid the same as men not only for identical work, but also for jobs considered to be of equal value or worth. It is essential to understand the difference between the two terms and that true pay equity goes beyond simply equal pay for equal work.

Over time, Canadian principles, values, and laws have shifted from supporting only pay equality, to specifically embracing pay equity. In the first half of the twentieth century, the focus of gender pay inequality and the accompanying legislation of the time was on employers who paid women less than men for the exact same job.¹⁴¹ Up until that time, justification for paying women less than men was based on the notion that society saw men as breadwinners who required higher pay to support their families.¹⁴² Accordingly, women were paid less than men for the same jobs as their work was considered less valuable and it was presumed that they would be taken care of financially by their husbands or fathers. Further, women's work was seen as less valuable and women in the workforce were considered a threat to those vital jobs which should be filled by husbands and fathers.¹⁴³

¹⁴⁰ Chen, *supra* note 79 at 19.

¹⁴¹ Bilson, *supra* note 44 at 526.

¹⁴² *Ibid.*

¹⁴³ *Ibid.*

By mid-century there was a shift in focus from equal pay for equal work to equal pay for work of equal value, when it became apparent that the principle of equal pay for equal work failed to capture the systemic aspect involved in wage discrimination.¹⁴⁴ In contrast, the principle of equal pay for work of equal value forced recognition of the fact that women and men are often segregated into different jobs. For example, administrative assistant positions are often filled by women whereas mechanic jobs are usually men.

Although the cause of why many jobs have become gender specific goes beyond the scope of this thesis, it seems logical to assume that such values have been systemically engrained in society for many years starting in early childhood at home, in society, and in the schools. In moving from a principle of equal pay for equal work to one acknowledging equal pay for work of equal value, analysis is required as to what each job entails before it can be determined that certain jobs are being given a lower value because they are performed by a woman.¹⁴⁵

Much of the credit for this transition to the principle of work of equal value in Canada, can be attributed to the guidance given by relevant international law. This is an admirable progressive theoretical shift which has slowly taken place across the country over time. However, despite this promising theoretical advancement, achieving pay equity on the ground level in practice has not yet been realized which is evidenced in the fact that the gender wage gap persists.

¹⁴⁴ *Ibid.*

¹⁴⁵ *Ibid.*

2.3 Early Canadian Pay Equality Legislation

Equal pay legislation has been enacted in various Canadian jurisdictions since the 1950s.

However, these laws did little to further advance women's pay equality because they were primarily focused on the principle of equal pay for equal work. For example, the Ontario *Female Employee's Fair Remuneration Act*, which was brought into force in 1951, was heavily influenced by the *UDHR*.¹⁴⁶ The Ontario *Female Employee's Fair Remuneration Act* stated,

“No employer and no person acting on his behalf shall discriminate between his male and female employees by paying a female employee at a rate of pay less than the rate of pay paid to a male employee employed by him *for the same work* done in the same establishment”.¹⁴⁷

Clearly, this Act did not extend equal pay to work of equal value and it was described by women's committees as, “a toothless ghost of a real equal pay bill.”¹⁴⁸ The Act's failings can be attributed at least in part, to the fact that comparisons were only to be made between men and female jobs that were exactly the same.¹⁴⁹ This narrow application made it nearly impossible to find jobs that were identical in every task.¹⁵⁰ Although over a hundred complaints were filed pursuant to employers' contravention of the Act, there

¹⁴⁶ Canadian Human Rights Commission, “Promoting Fair Employment in Ontario: Toronto Ontario April 5”, 1951” (August 2018 last visited), *The Canadian Human Rights Commission*, online: <chrc-ccdp.gc.ca/historical-perspective/en/timePortals/milestones/59mile.asp>.

¹⁴⁷ *Female Employee's Fair Remuneration Act*, SO 1951, c.26, s.2(1).

¹⁴⁸ Dominique Clement, “A Brief History of Human Rights Law in Canada”, Clement Consulting, (August 2018 last visited) at p.4, online: <<https://historyofrights.ca/history/human-rights-law/>> citing Clement 2008.

¹⁴⁹ Morley Gunderson, “The Evolution and Mechanics of Pay Equity in Ontario” (May 2002) 28 Can Public Policy 118.

¹⁵⁰ *Ibid.*

were virtually no successful outcomes for female applicants, despite the existence of obvious wage gaps.¹⁵¹

Regardless of its apparent shortcomings, the *Female Employee's Fair Remuneration Act* still proved to be a historically significant piece of legislation, inspiring the creation of similar yet more advanced legal instruments. Shortly after Ontario introduced their *Female Employee's Fair Remuneration Act*, many other provinces followed suit with similar legislation in the 1950's and early 1960's.¹⁵² The legislation related to equal pay for men and women during this timeframe marked a shift from equal pay for equal work to equal pay for "substantially similar" work.¹⁵³

Real progress in addressing gender wage inequalities in the nation did not begin until legislation began to extend pay equality legislation to include principles of equal pay for work of equal value, otherwise known as pay equity. This transformation of the view of pay equity occurred alongside the development of human rights legislation in Canada which began in the 1970's. It was at this time that gender pay equity became accepted as a human right and legal reform was implemented to further such rights, namely through the creation of human rights legislation.

2.4 Canadian Human Rights Legislation and Pay Discrimination Based on Gender

The principle of equal pay for work of equal value first made its way into Canadian law through human rights legislation, as opposed to labour or employment law. Many

¹⁵¹ Clement, *supra* note 148 at 4.

¹⁵² *Ibid.*

¹⁵³ Gunderson, *supra* note 149 at 118.

provinces enacted human rights legislation in the 1960's and early 1970's.¹⁵⁴ However, the earliest domestic Act to specifically encompass the equal value perspective of pay equity was the Quebec, *Charter of Human Rights and Freedoms* [*Quebec Charter*] in 1975.¹⁵⁵ Under the *Quebec Charter* s.19, "Every employer must, without discrimination (including discrimination based on sex), grant equal salary or wages to the members of his personnel, who perform equivalent work at the same place".¹⁵⁶ This section of the *Quebec Charter* was a significant first step in legislating equal value pay equity as fundamental human right in Canada, which inspired similar provisions in federal legislation shortly after.

By including pay equity in human rights legislation, the principle of equal pay for work of similar value was placed in the legal framework of fundamental rights, rather than being dealt with as a regular employment issue.¹⁵⁷ This decision reflects the importance of striving to achieve pay equity in society, in an attempt to satisfy the goals and intents Canada committed to under international law.

In 1977, Canada created domestic obligations in the federal sphere to furthering pay equity by enacting the *Canadian Human Rights Act* [*CHRA*].¹⁵⁸ Section 11 of the *CHRA* specifically governs pay equity, with section 11(1) stating that it is discriminatory for employers to pay male and female employees in the same establishment a different wage if they are performing work of equal value.¹⁵⁹ This section of the *CHRA* clearly illustrates

¹⁵⁴ For a list of provincial human rights legislation and their enactment dates, see Clement, *supra* note 148 at 4.

¹⁵⁵ *Charter of Human Rights and Freedoms*, CQLR c. C-12 [S.Q. 1975, c.6] [*Quebec Charter*].

¹⁵⁶ *Ibid*, s.19.

¹⁵⁷ Bilson, *supra* note 44 at 526.

¹⁵⁸ *CHRA*, *supra* note 10.

¹⁵⁹ *Ibid*, s.11.

a legislative shift on the domestic level to a formal acceptance of the principle of equal pay for equal work and for work of equal value. Section 11 of the *CHRA* was created in response to recommendations made in a report prepared by the Royal Commission on the Status of Women, chaired by Senator Florence Bird.¹⁶⁰ Section 11(5) of the *CHRA* further states, that “For greater clarity, sex does not constitute a reasonable factor justifying a difference in wages”. Through s.11 of the *CHRA*, the government made it clear that wage discrimination based on sex was prohibited. The *CHRA* is applicable to employees under federal jurisdiction and is applicable to both the public sector and the private sector that is regulated by the federal government.¹⁶¹

The Supreme Court of Canada has noted that human rights legislation, such as the *CHRA*, is afforded quasi-constitutional status.¹⁶² In the case of *Canada (Attorney General) v. Mossop*, the court stated, “[i]t is well established that human rights legislation has a unique quasi-constitutional nature, and that it is to be given a large, purposive and liberal interpretation.”¹⁶³ This means that human rights laws prevail over regular legislation yet fall just below the position of the *Canadian Constitution Act of 1982*, including the *Canadian Charter of Rights and Freedoms [Charter]*.¹⁶⁴ This means that although human rights laws prevail over provincial statutes, they are still subject to *Charter* provisions,

¹⁶⁰ Bilson, *supra* note 44 at 526.

¹⁶¹ Canadian Human Rights Commission, “Human Rights in Canada”, *supra* note 122.

¹⁶² *Canada (Attorney General) v. Mossop*, [1993] 1 SCR 554, 1993 CanLII 164 SCC.

¹⁶³ *Ibid*, in Justice L’Heureux-Dube’s dissent.

¹⁶⁴ “Quasi-constitutional”, can be defined as a law that is below a country’s Constitution but above ordinary laws and statutes because despite not being expressly recognized in the constitution, these quasi-constitutional laws are important to society. This definition was authored by Anthony N. Doob, “Quasi-Constitutional” (February 2017), online: *Encyclopedia of Canadian Laws* <lawi.ca/quasi-constitutional/>. *Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982 (UK), 1982, c.11*. [*Canadian Charter of Rights and Freedoms*].

such as section 15. Section 15 is the formal and substantive equality provision of the *Charter* which states that,

“Every individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age, mental or physical disability”.¹⁶⁵

The elevated legislative status of the *CHRA*, falling only below the *Charter*, can be attributed to the fundamental character of the values expressed therein and the goals sought to be implemented through human rights legislation.¹⁶⁶ By specifically including pay equity provisions in the *CHRA*, Canada formally acknowledged commitment to attaining pay equity for women and the important nature of this goal.

Unfortunately, despite the promising nature of the *CHRA* and other domestic human rights legislation existing in the 1970's, little movement was made on the ground level to actively shrink the wage gap between men and women. According to Professor Beth Bilson, “Given the technical nature of issues surrounding pay equity, [...] the general exhortation in s.11 to eliminate wage discrimination did not prove helpful to workers wishing to put forward a claim.”¹⁶⁷ The laws as they stood were not as effective as anticipated and it was apparent that further investigation into where the legal system was falling short, was required for further advancement.

There are a number of reasons as to why this legal framework, crafted in the 1970s has failed to achieve success in furthering pay equity. One of the largest failings of human rights legislation in the pay equity context lies in the fact that it establishes a complaints

¹⁶⁵ *Ibid*, *Canadian Charter of Rights and Freedoms*, s.15.

¹⁶⁶ Young, *supra* note 28 at “Executive Summary”.

¹⁶⁷ Bilson, *supra*, note 44 at 526.

based system. Women wishing to bring forward a pay equity claim must take the initiative to file a claim, have ample time and financing to see a claim through, endure the stress associated with the claims process and at the same time risk their job security by filing a human rights complaint. This is undoubtedly a deterrent for many women with legitimate claims. Filing a human rights claim under Section 11 of the *CHRA* is not feasible for the vast majority of federally regulated employees, who are deterred by the financial and time costs associated with the complaint process involved under the human rights model.¹⁶⁸

However, it could be argued that the human rights law framework may be a more effective avenue to pursue pay equity claims for employees with union representation as opposed to non-union employees. A complainant with union representation would likely have access to the financing, time and legal assistance required to successfully pursue a gender discrimination claim under a human rights Act. In contrast, a non-unionized employee could find it difficult if not impossible to find the time, knowledge and funding required to further a similar human rights claim under the human rights model. Therefore the system fails to provide meaningful access to many female employees with potentially valid wage discrimination claims.

Canada has made progress in allocating remuneration for certain women in female dominated jobs who were deemed to be underpaid for comparative value. However, most of this progress under the human rights model seems to focus on women in professions represented by unions, often falling in the public employment sector. The union focus of

¹⁶⁸ Bilson, *supra*, note 44 at 530.

the complaints based human rights model is apparent from the case law. Courts and tribunals have ordered remuneration for cases where it was determined that women in primarily female occupations were underpaid for work of equal value to employees in comparable male dominated jobs.

For instance, in the 1998 case of *PSAC v. Treasury Board*, where the complaint was filed in 1983, the Human Rights Tribunal of Canada held that government employees in traditionally female positions, such as secretaries, clerks, librarians and hospital workers, were underpaid for work of equal value.¹⁶⁹ The Treasury Board and the employees union, *PSAC*, were ordered by the Tribunal to make wage adjustments which included lump sum, benefits, promotion and overtime and old-age pension payments where applicable.¹⁷⁰ This is evidence that Canada has a rather expansive definition of the term “remuneration”, which is ideal.

An expansive definition of remuneration is more appropriate than narrowing remuneration to define salary or wages alone, because employment income alone is not all that women miss out on when pay equity fails. For example, lower wages result in lower pensions as well which is often the sole source of income for retired women. Therefore an expansive definition of remuneration includes other incomes women are entitled to such as pension. However, again the human rights tribunals tend to remedy pay equity issues in a specific sector of the workforce, that being unionized women in the public and often federal sector.

¹⁶⁹ Chen, *supra* note 79 at 87, citing, the Canadian Human Rights Tribunal decision of *PSAC. v. Canada (Treasury Board)*, 1998 CarswellNat 3142. For alternate citation, see *PSAC v. Canada (Treasury Board) (No. 3)*, 1998 CanLII 3995 (CHRT) 1998-07-29.

¹⁷⁰ *Ibid.*

Although the unions might be in a better position to bring forward and advance a pay equity discrimination claim under human rights legislation, this model is still not the ideal way to deal with pay equity matters. One reason it is not the best way to resolve pay equity issues is the time required to see a claim through. To illustrate, in the case *PSAC v. Canada Post Corp*, it took the Public Service Alliance of Canada thirty years to win its pay equity case against federally regulated Canada Post on behalf of clerical workers.¹⁷¹

The complaint was made to the Canadian Human Rights Commission under the *Canadian Human Rights Act*, to obtain equal pay for work of equal value for the members of a female dominated Clerical and Regulatory Workers Group.¹⁷² The union argued that the Clerical and Regulatory Worker's Group was undervalued in comparison to the male-dominated employees such as letter carriers handlers and sorters.¹⁷³

The *PSAC v. Canada Post* case has a timeframe which extends over the course of three decades from the date the complaint was filed until the date the complainants received compensation¹⁷⁴. The complaint was filed in 1983, the Commission didn't investigate until 1985, the case was referred to the Canadian Human Rights Tribunal in 1992, the tribunal hearing took place in 1993, the Tribunal's decision was released in 2005 which was challenged by Canada Post the same year, the Supreme Court of Canada rules in

¹⁷¹ Public Service Alliance of Canada, "Canada Post pay equity timeline: Thirty years of fighting for pay equity" (16 September 2013), p.1, online: Public Service Alliance of Canada <psacunion.ca/canada-post-pay-equity-timeline-thirty-years> [*PSAC "Pay Equity Timeline"*]. See also the Supreme Court decision of *PSAC v. Canada Post Corp.*, [2011] 3 SCR 572, 201-11-17.

¹⁷² *Ibid*, *PSAC*, "Pay Equity Timeline".

¹⁷³ According to the *Equal Wage Guidelines*, when an occupational group has more than 500 employees in which at least 55% of the workers are female, then it is said to be a female-dominated group. The wages of the female dominated group must then be compared to those of the male-dominated group. *Equal Wage Guidelines*, *supra* note 12 at s.13.

¹⁷⁴ It is not uncommon to hear of pay equity litigation taking 13, 15 or even 20 years under the human rights model, as Professor Beth Bilson, Professor of Law at the University of Saskatchewan and former chair of the Pay Equity Task Force. Beth Bilson, "Pay Equity Committee on March 21st, 2016" (March 21, 2016), online: *openparliament.ca* <openparliament.ca/committees/pay-equity/42-1/2/prof-beth-bilson-1/>.

PSAC's favour in 2011, and then Canada Post and *PSAC* went back and forth with negotiations and clarifications until a final agreement was finally reached in 2013 regarding principle and interest amounts owed to the Clerical and Regulatory Workers.¹⁷⁵

In relation to the *PSAC* case, retired member of the Public Service Alliance of Canada, Mary Swinemar stated,

“In 1989 the Pay Equity Study was finished and the findings were conclusive that the Groups in the study were not being paid Equal Pay for Work of Equal Value. Then came the Court challenges and delays, appeals by Treasury Board, etc., and the years passed and settlement appeared to be farther and farther away. I kept praying that I would live long enough to actually receive a settlement cheque.”¹⁷⁶

At the end of the day, the human rights model is limited in relation to pay equity due to its reactive and retrospective nature. Rather than taking a proactive approach to dealing with gender pay disparity in the workplace, the human rights model retroactively deals with the problem after the injustice occurred. That, combined with the rather complex, costly, and time consuming litigation required to forward a claim under s.11, are all plausible reasons for the Act's failure to decrease gender wage discrimination in a meaningful way.¹⁷⁷ It is further important to note that unionized employees in female dominated occupations tend to be significantly underpaid less often than non-unionized employees.¹⁷⁸ Yet unionized employees are in the best position to have the resources to bring forward a wage discrimination claim and see it to completion.

¹⁷⁵ *PSAC*, “*Pay Equity Timeline*”, *supra*, note 171 at 1-3.

¹⁷⁶ Bilson, *supra*, note 44, at 526, citing Mary Swinemar, (Submission to the Pay Equity Task Force, June 2002) [unpublished], cited in Canada, Pay Equity Task Force, *Pay Equity: A New Approach to a Fundamental Right: Pay Equity Task Force Final Report 2004* (Ottawa: Pay Equity Task Force, 2004) (Chair: Beth Bilson) at 101 [Pay Equity Task Force Final Report].

¹⁷⁷ Canadian Human Rights Commission, *Time for Action: Special Report to Parliament on pay equity*, (Ottawa: Human Rights Commission 2001) [Canadian Human Rights Commission, “Time for Action”].

¹⁷⁸ Gunderson, *supra* note 149 at 120.

Regardless of the exact cause, it was apparent that Canada's gender wage gap remained stagnant, despite the wealth of pay equity laws at the time. Statistical data reported seven years after the *Human Rights Act* passed, women's average earnings across occupations as a percentage of male average earnings, was between 46-68%.¹⁷⁹ Therefore, further investigation into the failings of the present legal system regarding pay equity in general was required. This inquiry was eventually achieved soon after the Royal Commission on Equality in Employment [Royal Commission] was created in 1983.¹⁸⁰

2.5 Justice Abella's Pay Equity Report: A Call for Legislative Reform

In response to the slow progress made in narrowing the gender wage gap, Judge Rosalie Silberman Abella was appointed to the *Royal Commission* to resolve the problem in 1983.¹⁸¹ Judge Abella (now known as Justice Abella) was tasked with finding the most efficient, effective and equitable means of promoting employment opportunities for, and eliminating systemic discrimination against four specific groups of minorities, including: women, native people, disabled peoples and visible minorities.¹⁸² This resulted in the creation of the, *Equality in Employment: A Royal Commission Report*, otherwise known as the "Abella Report" which was published in 1984¹⁸³.

¹⁷⁹ Kenneth A. Kovach and Peter E. Millspaugh, "Comparable Worth: Canada Legislates Pay Equity" (1990) Vol 4 No.2 *The Executive* at 95.

¹⁸⁰ *PSAC*, "Pay Equity Timeline", *supra* note 171.

¹⁸¹ It is interesting to note that Judge Abella was later appointed to sit as an honourable justice on the Supreme Court of Canada in 2004, where she remains to this day. Judge Rosalie Silberman Abella, Abella, *supra* note 107 at 5.

¹⁸² *Ibid.*

¹⁸³ Judge Rosalie Silberman Abella, Commissioner, *Report of the Commission on Equality in Employment*, (Minister of Supply and Services Canada, October 1984).

The Abella Report concluded that the voluntary measures adopted by some organizations and existing legislation were insufficient for overcoming workplace discrimination in Canada.¹⁸⁴ Accordingly, the report recommended that all federally regulated employers be required by legislation to implement employment equity.¹⁸⁵ The Report also proposed that the term, “employment equity” be adopted to describe programs of positive remedy for workplace discrimination.¹⁸⁶ The report made it clear that pay equity was an area that employers were expected to adjust their practices to comply with legislation and that employers were expected to report relevant employment equity data annually.¹⁸⁷

The report specifically addressed pay equity, stating that equal pay for work of equal value was an essential principle of employment equity and contract compliance.¹⁸⁸ It stressed that although the *Canadian Human Rights Act* specifically requires equal pay for work of equal value, it only applies to federal employees, which only account for 11% of the Canadian workforce.¹⁸⁹ It was therefore apparent that more work was required to ensure that pay equity reaches women and minorities in other employment sectors and jurisdictions as well. The report further stated that the provinces were causing Canada to fall short of meeting its international law obligations to reach pay equity because provincial laws often fail to recognize equal pay for work of equal value.¹⁹⁰

The recommendations set by the Abella Commission Report were a vast departure from the thrust of the existing employment equity legislation at the time. Not only was there a

¹⁸⁴ Abella, *supra* note 107 at 6.

¹⁸⁵ *Ibid.*

¹⁸⁶ *Ibid.*

¹⁸⁷ *Ibid.*

¹⁸⁸ *Ibid* at 7.

¹⁸⁹ *Ibid.*

¹⁹⁰ *Ibid.*

more stringent duty on the employer to ensure appropriate measures were taken to satisfy pay equity in the workplace, but there was a requirement for the implementation of stronger, more specific legislation and monitoring. Perhaps the most valuable outcome of the report was its call to shift employment equity laws from the complaints based, reactive model, to a proactive model with oversight for compliance.

The Abella Report was an aspirational work with a wealth of progressive ideas which appeared to give new life and hope to the prospect of eventually attaining substantial equality in the workplace. Law could be seen as an effective and necessary tool of positive transformation towards human equality, including gender equality. As Judge Abella stated;

“It is not that the individuals in the designated groups are inherently unable to achieve equality on their own, it is that the obstacles in their way are so formidable and self-perpetuating that they cannot be overcome without intervention. It is both intolerable and insensitive if we simply wait and hope that the barriers will disappear with time. Equality in employment will not happen unless we make it happen.”¹⁹¹

It was the honourable Justice Abella’s Report which served as the encouragement and inspiration for a new type of law which were used to deal with the issue of pay discrimination and the gender wage gap. Shortly after the release of her report, a wealth of stand-alone pay equity legislation was created in various Canadian jurisdictions. However, unfortunately, as we will see later in this thesis, not all domestic jurisdictions followed suit.

¹⁹¹ *Ibid.*

2.6 The Introduction of Canadian Pay Equity Legislation

Several legislative initiatives were taken in response to the recommendations made in the Abella Report. For example, in 1986, the Canadian government passed the *Employment Equity Act*.¹⁹² There were also advances made specific to pay equity in the revision of the *Equal Wage Guidelines* in 1986 and with the introduction of stand-alone pay equity legislation in select Canadian jurisdictions, which will be discussed in detail in the next chapter.¹⁹³

The *Equal Wages Guidelines of 1986* were a useful tool in assisting employers and other stakeholders determine work of equal value among employee job classes.¹⁹⁴ The *Equal Wage Guidelines* were established in 1978 but subsequently revised in 1982 and again in 1986.¹⁹⁵ The last revision was made to assist employers in applying the principle of equal pay for work of equal value as established in the *CHRA*.¹⁹⁶ The revised guidelines presented a process of assessment involving four comparison factors: skill, effort, responsibility and working conditions.¹⁹⁷ These factors were used in subsequent pay equity legislative schemes to assist employers in comparing the value of female and male jobs. In addition, they provide criteria for whether employees are a part of the same

¹⁹² *Employment Equity Act*, *supra* note 16. The *Employment Equity Act* is beyond the scope of this thesis. However, this and similar employment equity legislation would be another effective legal tool for increasing the number of women in higher paying jobs, thereby having a positive effect on the gender wage gap. This is a topic that I will likely research further in my future work.

¹⁹³ *Equal Wage Guidelines*, *supra* note 12.

¹⁹⁴ *Ibid.*

¹⁹⁵ Government of Canada, “Fact Sheet”, *supra* note 7.

¹⁹⁶ *Ibid.*

¹⁹⁷ *Equal Wage Guidelines*, *supra* note 12 at s.3-8(2).

establishment, and list reasonable factors for a wage difference between female and male-dominated groups of employees.¹⁹⁸

The Abella Report also inspired the creation of pay equity legislation which has been enacted among select Canadian jurisdictions, including Ontario's *Pay Equity Act* of 1987.¹⁹⁹ In general, pay equity legislation requires employers to establish male and female job classes within their establishment, use a gender-neutral evaluation system to compare the jobs using a points scale and compare the job classes to determine the value of the work.²⁰⁰ This gender neutral evaluation is often based on the four factors as per the *Equal Wage Guidelines*.²⁰¹

Justice Abella made a clear call for a more proactive approach to legislation to deal with pay equity. According to the Canadian Labour Congress,

“The pro-active approach covers all workers, recognizes that inequity in pay is systemic, changes organizational structures, combines human rights with labour and human resource plans, combines legislative direction, collective bargaining and enforcement with the option of neutral adjudication of any dispute.”²⁰²

Pay equity legislation is a proactive way to deal with gender pay discrimination. Rather than placing a duty on the employee to file a complaint, pay equity legislation requires the employer to have a pay equity plan in place to ensure that pay equity is achieved

¹⁹⁸ *Ibid* at s.10, 16.

¹⁹⁹ *Pay Equity Act*, SO 1987, c 34. This Act was since amended in 1990. See *Ontario Pay Equity Act*, *supra* note 101.

²⁰⁰ Women's Legal and Education Action Fund (LEAF), “Pay Equity” (January 2018), online: LEAF <<https://www.leaf.ca/wp-content/uploads/2011/01/PayEquityFactSheet.pdf>>.

²⁰¹ For example, Ontario's *Pay Equity Act* uses the categories of skill, effort, responsibility, and working conditions to determine work valuation at s.5(1). *Ontario Pay Equity Act*, *supra* note 101 at s.5(1). These are the same four factors used in job value assessment listed in the *Equal Wage Guidelines*. *Equal Wage Guidelines*, *supra* note 12 at 3-8.

²⁰² Hawryluk and Bakken, *supra* note 71 at 7, citing, Statistics Canada, 2009, Median Earnings and Employment for Selected Occupations 20 percent sample data, online: <<http://www12statcan.ca/English/census06/data/highlights/earnings>>.

within their place of employment. Under such pay equity plans, employers are to: identify gender dominated jobs within their establishment; apply gender-neutral job evaluations; determine the relationship between pay and the evaluation results; and adjust pay accordingly for the female dominated jobs. This system is arguably a more effective tool for dealing with the systemic nature of gender pay discrimination than that under the complaints based human rights model. Such legislation can stop pay inequity before it occurs.

Further, pay equity legislation is valuable in its ability to focus on job classes rather than just the individual employee.²⁰³ This larger class focus can result in pay equity plans and compensation rulings with wider applicability than would be offered by the complaints based, human rights model.

The scope of pay equity legislation extends beyond previous laws which promoted equal pay for “equal” or “substantially similar” by ensuring employees receive equal pay for work of “equal value”. The “quantum leap” of pay equity is its ability to make wage value comparisons across dissimilar occupational groups.²⁰⁴ This is a necessary step, given women tend to occupy the lower wage occupations in an establishment. This cross-occupational comparison valuation expanded the previous scope of pay equity policies to deal with the large portion of the wage gap that is attributed to women in the low wage positions within organizations.

²⁰³ Kovach and Millspaugh, *supra* note 179 at 96.

²⁰⁴ Gunderson, *supra* note 149 at 119.

2.7 The Task Force's 2001 Review of the Federal Sector's Human Rights Model

Despite progress in many Canadian jurisdictions enacting pay equity legislation, the Federal Government has continued to hold onto the *CHRA* as their primary method for dealing with gender pay equity discrimination. However, it was apparent that the human rights system in place for dealing with gender pay discrimination in the federal sector was not as efficient and effective as it should be. In response, the Human Rights Commission issued a 2001 report titled, 'Time for Action: Special Report to Parliament on Pay Equity'. The report pointed to the complaints based approach of human rights models as the cause for the slow advancements of gender pay equity in Canada.²⁰⁵ The process was criticized for requiring women to come forward to bring wage equity discrimination claims under the legislation, thereby risking their jobs and livelihood.²⁰⁶ Further, the legislation failed to adequately address systemic discrimination which has been normalized in the workplace.²⁰⁷

The Special Report pointed out that employers were not required to take any pay equity initiatives unless they were a specific target of a complaint.²⁰⁸ This resulted in little motivation for employers to ensure that female employees were receiving fair pay to fully compensate the value of their work. The resulting recommendation made by the Special Report was to implement an even more proactive approach to achieve fair pay between

²⁰⁵ Canadian Human Rights Commission, "Time for Action", *supra* note 177 at 11.

²⁰⁶ *Ibid.*

²⁰⁷ *Ibid* at 9.

²⁰⁸ Government of Canada, "Fact Sheet", *supra*, note 7.

men and women, including the implementation of an independent pay equity body to oversee implementation of pay equity as a principle of fundamental human rights.²⁰⁹

In response to the Human Rights Commission's 'Time for Action' Report in 2001, Canada implemented a federal Pay Equity Task Force to review s.11 of the *CHRA* and how it functions in order to make recommendations on how the federal pay equity framework could be improved.²¹⁰ Among other things, the Task Force was mandated to carry out a variety of functions, including: surveying and analyzing pay equity legislation within and outside of Canada; examining best practice models for implementation of legislation; considering experiences of relevant stakeholders, structures and institutions; assessing job evaluation and wage adjustment methodologies; and making recommendations for improving pay equity legislation.²¹¹

Upon completion of the investigation, the Task Force reported their findings in a report which was published in 2004 called "Pay Equity, a New Approach to a Fundamental Right".²¹² The Task Force determined that the various stakeholders in the public and private federal sectors including employers and employees, expressed acceptance for the principle of equal pay for work of equal value as a fundamental human right, and that employers were obligated by a positive duty to identify and eradicate discriminatory practices.²¹³ They further determined that the stakeholders were not satisfied with the *CHRA* system pursuant to s.11, as it was an insufficient vehicle for eliminating wage

²⁰⁹ Canadian Human Rights Commission, "Time for Action", *supra* note 177 at 18.

²¹⁰ The Pay Equity Task Force was also known as the, "Bilson Task Force", as it was headed by (state what her title was in the force and in life then) Beth Bilson. Government of Canada, "Fact Sheet", *supra* note 7.

²¹¹ Pay Equity Task Force, *Pay Equity: A New Approach to a Fundamental Right: Pay Equity Task Force Final Report 2004* (Ottawa 2004) at 523-524.

²¹² *Ibid.*

²¹³ Bilson, *supra* note 44 at 532.

discrimination.²¹⁴ Specific complaints about the human rights system revealed that it was costly and punishing experience.²¹⁵ These results were not surprising, as complaints-based systems have commonly been characterized as unsuited for dealing with pay equity claims. This is due, in part to the technical nature of the issues related to pay equity including the calculation of wage adjustments, job evaluation methodologies assessment and extent of occupational segregation, that make it complex and difficult for individuals and some unions to pursue claims.²¹⁶

After the conclusion of their comprehensive study and report, the Task Force made a number of recommendations for achieving pay equity for federal employees. This included a call for the creation of a stand-alone pay equity legislation and a more proactive model.²¹⁷ It concluded that, "the most effective way of addressing the problem of wage discrimination is through a separate pay equity statute that can provide the specialized technical framework required".²¹⁸ Although the federal government responded that the recommendations made by the task force failed to provide an adequate blueprint for implementing pay equity for federally regulated employees, the recommendations were considered extensively in the work leading to the creation of the *Public Sector Equitable Compensation Act (PSECA)* governing unions.²¹⁹

²¹⁴ *Ibid* at 532.-533.

²¹⁵ *Ibid* at 532.

²¹⁶ *Ibid* at 532.

²¹⁷ Government of Canada, "The Public Sector Equitable Compensation Act and the reform of pay equity" (August 2018 last visited), at 2.2, online: Government of Canada online: <canada.ca/en/treasury-board-secretariat/services/innovation/equitable-compensation/public-sector-equitable-compensation-act-reform-pay-equity.html>.

²¹⁸ *Ibid*.

²¹⁹ *Ibid*.

Over a decade since the Pay Equity Task Force submitted their final report, the wage gap persists in the public and private sectors and in provincially and federally regulated workplaces. Again the slow pace of the movement towards shrinking the wage gap led to another comprehensive report. In 2016 the Special Commission on Pay Equity, prepared a report entitled, ‘It’s Time to Act’.²²⁰ The report made familiar recommendations which called for the creation of proactive pay equity legislation for federally regulated employers, crown corporations and federally regulated companies with 15 or more employees.²²¹ In response to the “It’s Time to Act” report, the Canadian Government issued a response stating that it is committed to developing proactive federal pay equity legislation and that it strongly believes in equal pay for work of equal value and the fair treatment of all employees regardless of gender.²²² However, as will be discussed in Chapter 3, we have yet to see this proactive pay equity legislation in the federal sector approximately two years later.

2.8 Conclusion

This second chapter addressed Canada’s legal obligations under international law such as the *ILO No. 100* and *CEDAW* to ensure that the Canadian government was taking all reasonable steps to achieve pay equity between men and women. Canada has made some major strides towards meeting these obligations, starting with enacting legislation that enshrined the principle of equal pay for work of equal value such as human rights legislation. Investigations and reports by pay equity commissions into the progress of the

²²⁰ Anita Vandenberg, “It’s Time to Act, Report of the Special Committee on Pay Equity”, (Ottawa: 2016), online (pdf): *Government of Ontario* <payequity.gov.on.ca/en/DocsEN/esperp01-e.pdf>.

²²¹ Government of Canada, “Fact Sheet” *supra* note 7.

²²² *Ibid.*

laws and legal models, such as the Abella Report, have also been valuable in identifying areas of the law and legal system requiring improvement and reform. One of the most inspiring outcomes of these reports was the call for widespread freestanding pay equity legislation which takes a proactive approach to ensuring pay equity within their businesses and organizations. The next chapter will discuss laws presently used in various Canadian jurisdictions and their respective gender wage gaps.

CHAPTER 3

3. REVIEW AND COMPARISON OF PRESENT CANADIAN PAY EQUITY LAWS AND GENDER WAGE GAPS IN CANADIAN JURISDICTIONS

The purpose of this third chapter is to explore how various Canadian jurisdictions presently use legislation to deal with gender pay discrimination and pay equity. Next there will be a comparison of gender wage gaps between jurisdictions followed by an examination of the interplay between the law and the wage gaps within specific jurisdictions. The chapter will conclude with a discussion of some of the criticisms and justifications for pay equity law followed by recommendations to expand and strengthen such laws across the nation to decrease pay discrimination and in turn narrow the gender gap.

3.1 Canadian Human Rights Law and Gender Pay Discrimination Today

Every Canadian jurisdiction has enacted laws that deal with gender pay discrimination. However, the primary type of law enacted to deal with the matter within Canadian jurisdictions is found in human rights legislation. Human rights based models and agencies to enforce the legislation exist in every Canadian jurisdiction on both the Federal and Provincial levels.

The goal of human rights legislation is to prevent discrimination and provide a remedial avenue for individuals or groups who have been discriminated against. This type of legislation applies to discrimination in the workplace, schools, stores restaurants and

housing and other businesses and services.²²³ All human rights legislation must comply with the *Canadian Charter of Rights and Freedoms* of 1982 (the *Charter*), including s.15(1) of the *Charter*, which guarantees every person the right to benefit from and protection under the law without discrimination based on race, origin, colour, religion, sex, or mental or physical disability.²²⁴ Section 15 of the *Charter* guarantees both formal but also substantive equality.²²⁵ Further, these equal rights cannot be dismissed solely due to cost or inconvenience, meaning a contravention of pay equity cannot be justified by expense alone.²²⁶ Section 11(6) of the *CHRA* clarifies that an employer is prohibited from reducing wages as a means to eliminate gender based wage discrimination.²²⁷ This is important because otherwise employers may attempt to justify paying women less than men for jobs of the same value because it would cause the business undue hardship due to cost.²²⁸

In the context of gender pay discrimination, as mentioned in Chapter 2, human rights legislation is used to prohibit discrimination by employers against female workers by paying them less than male employees for the same work or for work of the same value. For example, the federally applicable *Canadian Human Rights Act (CHRA)* states at section 11(1) that,

“It is a discriminatory practice for an employer to establish or maintain differences in wages between male and female employees employed in the same establishment who are performing work of equal value”.²²⁹

²²³ Canadian Human Rights Commission, “Human Rights”, *supra* note 122.

²²⁴ *Canadian Charter of Rights and Freedoms*, *supra* note 164 at s.15.

²²⁵ NAWL, “Brief”, *supra* note 29 at 1.2

²²⁶ *Ibid*, citing, *Schachter v. Canada*, [1992] 2 S.C.R. 679 at 709.

²²⁷ *CHRA*, *supra* note 10 at s.11(6).

²²⁸ Under section 15(1,2) of the *CHRA*, an employer can claim that the cost (among other potential factors) associated with avoiding or remedying a claimed discrimination would create undue hardship on the employer and thereby trigger a justification for discrimination. *Ibid*, s.15(1,2).

²²⁹ *Ibid*, s.11(1).

Section 11(2) of the *CHRA*, further clarifies that in order to determine if employees are performing work of equal value, the following guidelines apply:

“In assessing the value of work performed by employees employed in the same establishment, the criterion to be applied is the composite of the skill, effort and responsibility required in the performance of the work and the conditions under which the work is performed.”²³⁰

Another example of similar human rights legislation used to specifically address gender wage discrimination is the *Alberta Human Rights Act*, which states in its equal pay provisions at s.6(1), “Where employees of both sexes perform the same or *substantially similar* work for an employer in an establishment the employer shall pay the employees at the same rate of pay”.²³¹ Further clarifying this at 6(2), stating that, “No employer shall reduce the rate of pay of an employee in order to comply with this section.”²³²

It is interesting to note that human rights legislation dealing with gender pay discrimination varies from one jurisdiction to the next, which may have some impact on outcomes for female employees depending on where they live and whether or not they work in a federal sector. For instance, section 6(1) of the Alberta legislation is distinguishable from section 11(1) of the *Canadian Human Rights Act* in that it does not speak of “work of equal value”, but instead references “the same or substantially the same work”. Arguably the threshold for “substantially the same work” is a higher one than the true pay equity standard “equal value”, in part because the term immediately follows “the same [...] work”. The term “substantially similar” sounds more analogous to

²³⁰ *Ibid*, s.11(2).

²³¹ Emphasis added to draw specific attention to the words, “substantially similar”. *Alberta Human Rights Act*, RSA 2000, c A-25.5, at 6(1).

²³² *Ibid*, at 6.2.

“equal work” than it does to “work of equal value”. If this assessment of the terms is correct, it may mean that women in Alberta who actually do work in a job that is considered of equal value to a particular man’s job under the *CHRC*, is not substantially similar enough to result in entitlement to equal pay.

The Prince Edward Island (PEI) *Human Rights Act*, uses other terminology in section 7, which states,

“No employer or person acting on behalf of an employer shall discriminate between his employees by paying one employee at a rate of pay less than the rate of pay paid to another employee employed by him for substantially the same work, the performance of which requires equal education, skill, experience, effort, and responsibility and which is performed under similar working conditions...”²³³

Although the PEI *Human Rights Act* uses a term in the definition similar to Alberta’s *Human Rights Act* in stating “similar work”, the section further requires that the four “equal value” assessment factors be used to determine whether or not female and male jobs are of equal value. This provides more clarity to the decision maker as to how to assess whether or not male and female jobs are “substantially similar” when faced with a gender pay discrimination claim. PEI’s standard is more akin to the relevant clause in the *CHRA* than to the one in the Alberta’s *Human Rights Act*.

Human rights legislation can be a useful tool to deal with gender pay discrimination in some cases. As previously discussed, this type of legislation is of particular assistance to women who have the financial resources, time and knowledge required to take advantage of the complaints based human rights system. Therefore most eligible candidates to successfully use this model to obtain pay equity and recourse are women who have union

²³³ *Human Rights Act*, RSPEI 1988, c.H-12, s.7 [*PEI Human Rights Act*].

representation²³⁴. Further, recognizing that there are differences in terminology and assessment factors from one jurisdiction to the next, it is reasonable to assume that the success of a woman's pay discrimination claim may also depend upon which province they reside within. Fortunately, in response to numerous calls for a more proactive and effective form of legislation made by various pay equity commissions and task force investigations and reports, a number of jurisdictions have gradually implemented additional legislation to address the matter.

In addition to Human Rights Legislation, other legal tools have been implemented to deal with gender based pay inequities such as free-standing pay equity legislation. However, not every jurisdiction has enacted pay equity legislation. Instead, some provinces have enacted similar policy or negotiating frameworks that cover pay-equity and one province has enacted nothing.²³⁵

3.2 Pay Equity Laws across Canada

Pay equity legislation began to appear in Canadian jurisdictions in the 1980s.²³⁶ It is also notable that a dramatic narrowing in the unexplained factors of the gender gap occurred during this time.²³⁷ The 1980s was the decade that Canadian jurisdictions targeted pay inequality for women as an issue requiring legal reform. Canadian jurisdictions

²³⁴ As discussed earlier in Chapter 2.

²³⁵ Ontario Human Rights Commission, "Appendix 3 – Human Rights Legislation in Canada" (May 2018 last visited), online: < <http://www.ohrc.on.ca/en/teaching-human-rights-ontario-guide-ontario-schools/appendix-3-%E2%80%93-human-rights-legislation-canada>>.

²³⁶ A number of provinces enacted pay equity legislation in the 1980's, for example: Manitoba in 1986, Ontario in 1987, PEI in 1988 and Nova Scotia in 1989. Government of Canada, "Fact Sheet", *supra* note 7.

²³⁷ Francine D. Blau, Lawrence M. Kahn, "The Gender Wage Gap: Extent, Trends, and Explanations", (IZA DP No. 9656 Discussion Paper Series) (Jan 2016), at 4, online (pdf): IZA Institute of Labour Economics, <<ftp.iza.org/dp9656.pdf>>.

responded by enacting human rights legislation, pay equity legislation, other policy frameworks or a combination thereof.

For the jurisdictions that have enacted free-standing pay equity legislation, the specifics of the laws vary across jurisdictions. Some of the most critical variations are in the applicability of the law. Whether or not a female worker is protected by pay equity legislation within a given province depends largely on the size of the business that employs her and whether she works in the public or the private sector. In the next section of this chapter, a variety of Canadian jurisdictions will be discussed along with some of the different types of laws or policy frameworks they have enacted to deal with pay equity in addition to their local human rights legislation. The selected jurisdictions will be divided into four subsections, federal pay equity laws, jurisdictions with pay equity legislation, jurisdictions with specific policy or frameworks, and jurisdictions with neither pay equity legislation nor similar policies nor frameworks.

3.2.1 Federal Pay Equity Laws

Although the federal jurisdiction has not yet enacted a specific Pay Equity Act, pay equity legislation for federally regulated employees specifically requires that women and men within an establishment be paid the same for work of equal value. The applicable federal laws are: Section 11 of the *Canadian Human Rights Act (CHRA)*, the 1986 *Equal Wage Guidelines* and the *Canada Labour Code, Part III (3)*.²³⁸

As a brief recap, section 11 of the *CHRA* applies to every federal employer regardless of how many employees they have and provides that it is discriminatory for an employer to

²³⁸ Government of Canada, “Introduction”, *supra* note 11.

pay different wages to men and women within the establishment who perform work of equal value.²³⁹ The Canadian Human Rights Commission was created by the *CHRA* to, among other things, receive discrimination complaints under the *CHRA* and administer the relevant law.²⁴⁰ The 1986 *Equal Wage Guidelines (The Guidelines)* provide information on how to apply s.11 of the *CHRA* using the four gender-neutral factors of: skill, effort, responsibility and working conditions to assess the value of work and how to determine female and male dominated jobs²⁴¹. *The Guidelines* also list justifications for allowable wage differences including: seniority, differences in performance ratings, demotion, temporary or rehabilitative assignments, internal labour shortages, regional pay rates and red-circling for re-evaluation.²⁴² The *CHRA* and the accompanying *Equal Wage Guidelines* were both mentioned previously in this thesis.

One federally applicable law governing issues of gender pay discrimination which was not yet mentioned is section.249 of *Part III* of the *Canada Labour Code (CLC)*. The *CLC* bestows power upon Labour Program Inspectors to examine records of wages and collect pay equity information.²⁴³ Inspectors are tasked with alerting the Canadian Human Rights Commission (*CHRC*) to any issues of gender based pay discrimination so that the matter may undergo a formal investigation for breach of the *CHRA*.²⁴⁴

Despite the three laws applicable to gender pay discrimination in the federal sector, the federal system has yet to enact freestanding pay equity legislation. This is contrary to the

²³⁹ Government of Canada, “Introduction”, *supra* note 11.

²⁴⁰ Canadian Human Rights Commission, “The Commission: Our Work” (August 2018 last visited), online: *Canadian Human Rights Commission* <chrc-ccdp.gc.ca/eng/content/our-work>.

²⁴¹ Government of Canada, “Introduction”, *supra* note 11.

²⁴² *Ibid.*

²⁴³ *Ibid.*

²⁴⁴ *Ibid.*

recommendations of many pay equity studies of the legislation which have specifically called for more proactive legislation such as those undertaken by the Pay Equity Task Force. However, as will be discussed in the next chapter, the 2018 federal budget includes funding allocated to introduce more proactive pay equity laws aimed to increase pay equity and work towards closing the gender wage gap.²⁴⁵

3.2.2 Canadian Jurisdictions that have Enacted Pay Equity Legislation

Manitoba was the first province to enact a proactive pay equity regime to replace the human rights complaints based model in 1985.²⁴⁶ Following Manitoba's lead, a number of provinces followed suit, starting with Ontario in 1987, Prince Edward Island in 1988, Nova Scotia in 1989, and Quebec in 1996.²⁴⁷ Most recently, New Brunswick replaced earlier pay equity legislation from 1989 with the new *Pay Equity Act, 2009*.²⁴⁸ To date, these six provinces are the only ones to have enacted free-standing pay equity legislation.

For the jurisdictions that have enacted pay equity legislation, the scope of applicability of the statute varies greatly from one jurisdiction to the next. Pay equity legislation in some jurisdictions only applies to employers in the public sector, whereas it applies to both public and private sector employers in other jurisdictions. Narrowing applicability further, whether or not a jurisdiction's pay equity legislation applies to an employer also depends on how many employees they have. As a result, the likelihood of whether or not Canadian women achieves pay equity depends largely on a number of factors including:

²⁴⁵ The Government of Canada, "Budget 2018", *supra*, note 105.

²⁴⁶ *Manitoba Pay Equity Act*, *supra* note 13.

²⁴⁷ Government of Canada, "Fact Sheet", *supra* note 7.

²⁴⁸ *Pay Equity Act, 2009*, SNB 2009 c P-5.05, [*NB Pay Equity Act*]. The 2009 NB Pay Equity Act replaced the *Pay Equity Act*, SNB 1989, c P-5.01

which province or territory she lives in, as well as what sector she works in and how large the business is. If the goal is to ensure as many Canadian women reach pay equity as possible, it would be ideal to have pay equity legislation that applies to as many employers and female employees as possible. Discussion of the specific provinces that have enacted pay equity legislation and key differences in the applicability of their respective pay equity legislation, will be discussed in the following section of this chapter.

Manitoba

As briefly mentioned, Manitoba was the first province to enact pay equity legislation with the, *Pay Equity Act* in 1985.²⁴⁹ The Manitoba *Pay Equity Act* is very limited in its applicability which, according to section 3 of the Act applies only to “(a) the Crown in right of Manitoba, and (b) the civil service, every Crown entity and external agency.”²⁵⁰ Further, the Act only applies when there are 10 or more “incumbents” in a female dominated job class which is comprised of at least 70 percent female workers.²⁵¹ This means that only employers and employees in select areas of the public sector that have 10 or more employees in a female dominated job class, and no private sector employees or employees are covered by pay equity legislation in Manitoba.

Prince Edward Island

Prince Edward Island’s (PEI) *Pay Equity Act* attempts to “achieve pay equity by redressing systemic gender discrimination in wages paid for work performed by

²⁴⁹ *Manitoba Pay Equity Act*, *supra* note 13.

²⁵⁰ *Ibid*, s.3(a,b).

²⁵¹ According to the *Manitoba Pay Equity Act*, a “female dominated class” means that there are 10 or more incumbents of which 70 percent or more are female. *Ibid*, definitions (a-b).

employees in female-dominated classes in the public sector²⁵².” Therefore the *Pay Equity Act* in PEI, applies to all employers and employees in the public sector and none from the private sphere.

New Brunswick

New Brunswick’s *Pay Equity Act*, 2009, applies to employees employed in the public service if the employer has 10 or more employees.²⁵³ Casting a slightly narrower applicability net than PEI, in New Brunswick no private sector employers *or small public sector employers* are subject to the legislation and therefore their employees do not receive benefit of the legislation.

Nova Scotia

Nova Scotia’s *Pay Equity Act* applies to public sector employers of all sizes, much like PEI’s legislation but goes a step further.²⁵⁴ The Act applies to the Civil Service, Crown corporations, hospitals, education entities, universities, municipalities, municipal enterprises and public-sector corporations and all of the employees there within the foregoing sectors.²⁵⁵ Nova Scotia’s pay equity legislation therefore has a further reach than some of the legislation enacted in other provinces, with the exception of Ontario and Quebec.

²⁵² *Pay Equity Act*, RSPEI 1988, c P-2 [*PEI Pay Equity Act*].

²⁵³ *NB Pay Equity Act*, *supra* note 248 at s.4(1-2).

²⁵⁴ *Pay Equity Act*, RSNS 1989, c 337, s.4 [*NS Pay Equity Act*].

²⁵⁵ *Ibid* at s.4(1)(a-d).

Ontario and Quebec

Next will be an exploration of details and key clauses that are typically found in pay equity legislation. This will be illustrated by focusing on the Quebec and Ontario pay equity acts, as they tend to be the most comprehensive and widely applicable pay equity instruments in the country. In contrast to the provinces mentioned above, Ontario and Quebec are the only two provinces in which pay equity legislation extends beyond the public sector applying to the private sector employers and employees as well.²⁵⁶ In Ontario employers with ten or more employees are subject to pay equity legislation and are required to establish pay equity plans.²⁵⁷ Quebec employers with ten or more employees are subject to provincial pay equity legislation and additionally, companies with over 100 employees are required to establish pay equity committees and a pay equity plan.²⁵⁸

Quebec

The *Quebec Pay Equity Act of 1996*, covers both the private and public sectors.²⁵⁹ This is in addition to Quebec's *Charter of Human Rights and Freedoms (Quebec Charter)*, which also prohibits discrimination on the basis of gender and employers must pay an equal salary to employees performing equivalent work.²⁶⁰ The goal of the *Quebec Pay Equity Act* is to redress compensation differences suffered by employees in

²⁵⁶ The cited study and report prepared by Tammy Schrire discusses how the gender wage gap varies significantly from province to province. Tammy Schrire, "*The Gender Wage Gap in the Canadian Provinces, 1997-2014*" (2015) 41:4 Can Public Policy at 317.

²⁵⁷ *Ibid* at 310.

²⁵⁸ Korn Ferry, Hay Group, "Canadian pay equity Requirements" (March 2018), online: Korn Ferry <<https://www.haygroup.com/ca/services/index.aspx?ID=43781>>.

²⁵⁹ *Pay Equity Act*, CQLR c E-12.001 [*Quebec Pay Equity Act*].

²⁶⁰ *Charter of Human Rights and Freedoms*, *supra* note 164 at 10, 19.

predominantly female job classes due to systemic gender discrimination.²⁶¹ The Act applies to every employer with 10 or more employees and tasks employers with varying obligations depending on how many employees they have.²⁶² Employers with 100 or more employees must create pay equity plans and set up a pay equity committee to establish same.²⁶³ Employers with 50 to 99 employees must also set-up pay equity plans, but are not required to establish a pay equity committee.²⁶⁴ Finally, employers with 10-49 employees are required to determine compensation adjustments required to ensure that employees in predominantly female job classes receive equal pay for work of equal value with employees in predominantly male job classes.²⁶⁵

Quebec's *Pay Equity Act* also sets out a way to identify predominantly female and predominantly male job classes as well as a way to determine value of work. In general, positions held by employees that have similar responsibilities, qualifications and the same rate or scale of compensation are to be grouped together in a job class.²⁶⁶ From there, a job class is considered predominantly female or male if it is stereotypically associated with men or women, 60% of or more of the class positions are held by employees of the same sex, the difference between men or women in the job class and their rate of workforce representation of the employer is significant, or the historical incumbency of the job class in the enterprise shows that its predominantly male or female.²⁶⁷

²⁶¹ *Pay Equity Act*, *supra* note 259 at s.1.

²⁶² *Ibid* at s.4.

²⁶³ *Ibid*.

²⁶⁴ *Ibid* at s.31.

²⁶⁵ *Ibid* at s.34.

²⁶⁶ *Ibid* at s.54.

²⁶⁷ *Ibid* at s.55 (1-4).

Quebec's obligatory pay equity policy has been successful with several women in the public sector, particularly those with union representation have received compensation adjustments.²⁶⁸ The success of pay equity legislation in Quebec has resulted in a call for similar legislation in the Federal system.²⁶⁹

To determine the value of work to establish comparable work, the method is to take the following factors into account for each job class: required qualifications, responsibilities, effort required, and the working conditions.²⁷⁰ These are similar to the four assessment factors found in the *Equal Wage Guidelines*.²⁷¹ From there the employer or pay equity committee is to compare predominantly female job classes with predominantly male classes to value the differences between them and make compensation adjustments to eliminate differences in compensation as necessary to ensure equal pay for work of equal value.²⁷² The framework of this legislation is similar to the framework seen in other pay equity Acts across the nation with some differences that set it apart from most, aside from Ontario's legislation.

Both the *Quebec Pay Equity Act* and the *Ontario Pay Equity Act* serve as excellent examples of what effective pay equity legislation looks like. This is because they reach a large number of employers and female employees and also because the reporting requirements and process is tailor-made to meet the needs of employers of different sizes so that they may better understand and meet their pay equity obligations therein.

²⁶⁸ Chen, *supra* note 79 at 133.

²⁶⁹ *Ibid.*

²⁷⁰ *Quebec Pay Equity Act*, *supra* note 259 at s.57.

²⁷¹ The four factors listed in the *Equal Wage Guidelines* and the *Quebec Pay Equity Act* are the same other than the *Quebec Pay Equity Act* uses the factor term "qualifications" rather than "skill". *Equal Wage Guidelines*, *supra* note 12 at 3-8.

²⁷² *Pay Equity Act*, *supra* note 256 at s.60, 68.

Ontario

Much like the Quebec *Pay Equity Act*, the Ontario *Pay Equity Act* applies to the public sector and private sector employees who have 10 or more employees.²⁷³ All employers with 10 or more employees must value and compare every female job class to male job classes and then make necessary adjustments to achieve pay equity.²⁷⁴ Detailed pay equity plans are mandatory for employers of 100 or more employees.²⁷⁵ Also, similar to Quebec's Act, the purpose of Ontario's Pay Equity Act is to redress systemic discrimination in employment compensation for employees in female job classes.²⁷⁶ In the Ontario Act, a female job class is defined as one where 60 percent or more of the employees are female whereas a male job class requires 70 percent male employees.²⁷⁷ The reason for the 10 percent overlap of flexibility between the percentages is to prevent employers from manipulating the workforce by hiring additional male employees to avoid having 60 percent female employees.²⁷⁸ This is a difference between the Ontario and the Quebec Act.

Akin to the Quebec Pay Equity Act, the Ontario Act sets out the four commonly used factors for work value assessment: skill, effort, responsibility, and working conditions.²⁷⁹ From there employers are to use the four factor gender neutral comparison method, compare female and male job classes in the same establishment to determine whether or not pay equity exists in each job class.²⁸⁰ Finally, in general, pay equity plans are to be

²⁷³ *Ontario Pay Equity Act*, *supra* note 101 at s (1).

²⁷⁴ *Ibid* at s 5.

²⁷⁵ *Ibid* at s 10.

²⁷⁶ *Ibid* at s 4.1.

²⁷⁷ *Ibid* at definitions.

²⁷⁸ Gunderson, *supra* note 149 at 121.

²⁷⁹ *Ontario Pay Equity Act*, *supra* note 101 at s 5(1).

²⁸⁰ *Ibid*, s.12.

established to account for the gender neutral value comparison method used, describe which job classes require compensation adjustment and how this will be achieved to reach pay equity.²⁸¹ The creation of a Pay Equity Commission and Tribunal are mandated by the legislation to hear, manage and enforce pay equity matters that arise.²⁸²

Complaints for non-compliance of the Act can be brought by employers or any employees or their respective bargaining units to the Commission.²⁸³ A review officer investigates the complaint and can disregard it, try and settle it between the parties or forward the matter to a tribunal.²⁸⁴ Penalty for contravening or failing to comply with the Act or an order thereunder, may result in a fine up to \$5,000 for an individual, or up to \$50,000 in any other case.²⁸⁵

The Ontario *Pay Equity Act* is unique in scope in that it expands beyond equal pay for work of equal value to *proportionate pay* for work of *proportionate value* when value comparisons are not possible.²⁸⁶ In other words, proportionate pay for proportionate value means that employees in female dominated jobs are entitled to pay proportionate to the proportion of value they have in common with the employees in the male dominated job. For example, if the value of the work done by the female job class workers is equivalent to the value of work in the male job class, then the female class employees should receive 100 percent of the male class wage.²⁸⁷ It follows that where the work is valued at 75

²⁸¹ *Ibid*, s 2.

²⁸² *Ibid*, s 29(1-2).

²⁸³ *Ibid*, s 22.

²⁸⁴ *Ibid*, s 23.

²⁸⁵ *Ibid*, s 26(1).

²⁸⁶ Gunderson, *supra* note 149 at 120.

²⁸⁷ *Ibid*, at 119.

percent of the male job class work, the female job class employees should earn 75 percent of the male job class wage.²⁸⁸

Further, in the event comparisons within a given public sector establishment cannot be made, the Act enables proxy comparisons across different establishments and employers rather than being limited to drawing comparisons within a given establishment or employer.²⁸⁹ It is also important to note that the Act makes it clear that an employer may not reduce employee compensation to achieve pay equity.²⁹⁰ This is a common clause in pay equity legislation as well as human rights legislation to ensure that employers don't simply pay the men the same lower wage the women receive to avoid discrimination and meet pay equity.

It is apparent that pay equity legislation varies from one province to the next. The most notable way in which the legislation differs is in applicability. However, if the goal is to reduce gender discrimination for all Canadian women, it is best to use legislation that reaches as many women as possible in both the private and public sectors, regardless of the business or organization's size. It is also helpful to tailor the reporting requirements and available resources to meet the needs of the employer based on their size. For example, it may not be feasible or necessary to have an employer of 10 employees submit a report as detailed as the employer of 100. Pay equity legislation should be crafted in a way that reaches as many employees as possible and sets employers up to succeed rather than fail. The Quebec and even more so the Ontario pay equity legislation seems to do so

²⁸⁸ *Ibid.*

²⁸⁹ *Ibid* at 117.

²⁹⁰ *Ontario Pay Equity Act, supra* note 101 at s.9.

most effectively because it applies to both the public and private work sectors and applies to employers of various sizes, even those with a small number of employees.

3.2.3 Policy Frameworks in other Canadian Jurisdictions

There are also provinces that have chosen to deal with gender pay equity by means other than implementing specific legislation. British Columbia, Saskatchewan and Newfoundland and Labrador, have policy frameworks in place for negotiating pay equity in the public sector.²⁹¹ For instance, Saskatchewan has the Equal Pay for Work of Equal Value and Pay Equity Policy, 1999.²⁹² This Saskatchewan policy framework requires Crown, government and health sector employees to meet standards set out to reach the government's equal pay for work of equal value policy goals²⁹³. In contrast, Newfoundland and Labrador has pay equity negotiations with public sector unions²⁹⁴. The policy frameworks in these provinces have very limited applicability, applying only to workers in the private sector in B.C and only to unionized workers in Newfoundland and Labrador.

Each of these three provinces mentioned also have human rights legislation to deal with gender pay discrimination, but as discussed, the human rights model is a complaints-based model which requires complainants to come forward with complaints of discrimination. However, it may be difficult for an employee to be aware that they are

²⁹¹ Korn Ferry, *supra* note 258.

²⁹² Government of Saskatchewan, "Equal Pay for Work of Equal Value and Pay Equity Policy Framework", Implementation Guide, (The Government of Saskatchewan Publications Centre: 1999).

²⁹³ *Ibid.*

²⁹⁴ LEAF, *supra* note 200.

being paid unfairly and should even file a complaint. Further, even if an employee is aware of a pay inequity, they may not have the resources available to them to undergo the complaints process. Those are some reasons why pay equity legislation that puts the onus on the employer to ensure that they are achieving pay equity is a more effective model for success.

However, despite British Columbia, Saskatchewan, and Newfoundland and Labrador failing to implement pay equity legislation, they have at least implemented policy frameworks to persuade and guide employers with the tools they need to achieve pay equity within their organizations. Unfortunately, such policy frameworks lack the legal recourse for non-compliance that can instead be offered through legislative schemes, making employer compliance less certain in these provinces.

The only province that has neither enacted pay equity legislation, nor any pay equity policy based framework of any kind is Alberta.²⁹⁵ Although Alberta does, like every other Canadian jurisdiction, have a human rights code provision that specifically deals with pay discrimination, it too uses terminology that is distinct from similar legislation in other jurisdictions. Recall that the *Alberta Human Rights Act* states in its equal pay provisions at s.6(1), “Where employees of both sexes perform the same or *substantially similar* work for an employer in an establishment the employer shall pay the employees at the same rate of pay”.²⁹⁶ Unlike other jurisdictions, Alberta fails to either expressly include that employees in any particular sector are entitled to equal pay for, “work of

²⁹⁵ Korn Ferry, *supra* note 258.

²⁹⁶ Emphasis added to draw specific attention to the words, “substantially similar”. *Alberta Human Rights Act*, *supra* note 231, s.6(1).

equal value”, nor make mention of the four factors used to determine job value, in any legislation or policy framework.

3.3 Gender Wage Gaps across Canada

The following are the findings of a 2017 report published by the Conference Board of Canada ranking Canadian provinces and territories based on the size of their gender wage gaps.²⁹⁷ It is important to note that the wage gap for the provinces in this report was calculated using the difference between male and female full time weekly earnings rather than hourly earnings.²⁹⁸ This is an important factor because part of the gender wage gap can be attributed to some women working less hours to undertake domestic and family duties. Weekly earnings are not the ideal measure for calculating the wage gap, as it is a type of adjusted calculation, as it reflects the wages earned and the number of hours worked. It is best to use hourly wages instead for wage gap calculations because it excludes information on how many hours were worked and there is a more accurate reflection of compensation.²⁹⁹ However, the data used in the below study was collected from the Organization for Economic Co-operation and Development (OECD), which only compiles international gender wage gap data using weekly earnings.³⁰⁰ Using this calculation method, that being a comparison of male and female weekly wages, Canada’s gender wage gap in 2016 was 18.2 %.

²⁹⁷ The Conference Board of Canada, *supra* note 8.

²⁹⁸ *Ibid.*

²⁹⁹ *Ibid.*

³⁰⁰ The OECD’s mission is to promote policies that improve people’s economic and social well-being globally. Organization for Economic Co-operation and Development, “About the OECD” (July 2018 last visited), online: *OECD* <oecd.org/about/>.

Weekly wage calculations:³⁰¹

Prince Edward Island (10.7%)

Manitoba (13.2%)

New Brunswick (14.3%)

Ontario (16.2%)

Quebec (16.4%)

Nova Scotia (16.4%)

Saskatchewan (21.6%)

British Columbia (22.6%)

Alberta (24.6%)

Newfoundland and Labrador (28.9%)

Most Canadian jurisdictions have been successful in narrowing the gender wage gap to some degree over the past few decades.³⁰² New Brunswick, Nova Scotia and Manitoba were the most successful provinces in narrowing the gender wage gaps by approximately 34 percent since 2000.³⁰³ Yukon was the most successful territory in the country, able to cut their wage gap in half between the years 2000 and 2015.³⁰⁴ In contrast, Newfoundland and Labrador's gender wage gap increased by 2 percent between the years 2000 to

³⁰¹ I note that I have not included the wage gaps for the Canadian territories into the list, because they go beyond the scope of the discussion and analysis for this thesis project. The territories are unique jurisdictions within Canada, where updated and accurate data and statistical and legal information sources are difficult to access and confirm. Therefore, for the purpose of this thesis project, the focus will be on the Federal and Provincial jurisdictions only.

³⁰² The Conference Board of Canada, *supra* note 8.

³⁰³ *Ibid.*

³⁰⁴ *Ibid.*

2015.³⁰⁵ Again, these calculations were completed using the median weekly wages for men and women.

The same report that put forth the above wage gap calculations, also prepared the following additional gender wage gap calculation on Canadian jurisdictions using median hourly wages. These calculations did not use the OECD for information but instead relied on statistics Canada's male and female data income.³⁰⁶ Statistics Canada uses median hourly wages for men and women in making their calculations to eliminate the factor of hours worked in the equation. This adjustment removes the gender bias that is created by some women working less hours in the workforce to tend to unpaid duties in the home. In result, more accurate jurisdictional wage gaps that reflect only a difference in pay per hour for men and women can be examined and compared.

Applying an hourly wage calculation for the gender wage gap results in a lower wage gap than one relying on weekly earnings.³⁰⁷ Using this calculation, Canada's gender wage gap based on hourly wages is 12.5 percent, that being 5.7 percent lower than the weekly wage calculation.³⁰⁸ The following reflects the updated provincial and territorial wage gaps which were also calculated using an hourly wage.

³⁰⁵ *Ibid.*

³⁰⁶ *Ibid.*

³⁰⁷ *Ibid.*

³⁰⁸ *Ibid.*

Hourly Wage Calculations:

Prince Edward Island (1.3%)

New Brunswick (3.9%)

Manitoba (8.8%)

Quebec (8.9%)

Nova Scotia (9%)

Ontario (11.4%)

Saskatchewan (16.1%)

British Columbia (17.2%)

Alberta (18.8%)

Newfoundland and Labrador (20%)

3.4 Exploring the Relationships between Law and the Gaps within Jurisdictions

In general there appears to be a correlation between pay equity law and the size of the gender wage gap. Examining the above tables, it is apparent that provinces without pay equity law or frameworks have the largest gender wage gaps in the country.³⁰⁹ P.E.I, New Brunswick, Manitoba, Quebec, Nova Scotia and Ontario, the provinces with pay equity legislation, are all at the top of the ranking list as having the smallest wage gaps. On the

³⁰⁹ Alberta and Newfoundland are both provinces without pay equity legislation or frameworks and they have the largest wage gaps in the nation. Korn Ferry, *supra*, note 258. See also, Conference Board of Canada, *supra* note 8.

other hand, Saskatchewan, British Columbia, Alberta and Newfoundland and Labrador are ranked at the bottom of the list as having the largest gaps.³¹⁰

Alberta, the one jurisdiction without pay equity legislation or additional pay equity policy frameworks in place has one of the largest gender wage gaps in the country.³¹¹ Although there are other factors which may contribute to Alberta's gap, such as the high number of high-paying male dominated oilfield jobs, it is still reasonable to attribute some of the pay disparity to the lack of formal means to assist in achieving pay equity in the workforce. There are a number of women who also work in related oil field jobs, such as workplace health and safety positions, engineering and geology based positions and a number of other camp-life jobs which would likely require similar levels of skill, effort, responsibility and working conditions as some of the male-dominated oil field jobs.

Arguably these are examples of jobs that should require equal pay because they are of equal value, and women may very well be missing out on pay they are entitled to because such pay equity measures are not in place. Accordingly, it makes sense to recognize that pay discrimination is also a contributing factor to the wage gap. Therefore, the inclusion of pay equity legislation in a given jurisdiction would be helpful in narrowing the gender pay gap.

Newfoundland and Labrador is another province that also has a large wage gap and very limited legal tools to ensure pay equity for provincial residents. Recall that the province does have a policy framework for pay equity but it is only applicable to union represented employees in the public sector. The wage gap can be explained in part by the higher

³¹⁰ *Ibid.*

³¹¹ The only wage gap lower than Alberta is Newfoundland and Labrador. *Ibid.*

concentration of women in low paying jobs in the province. In 2016, 87 percent of the province's working women were employed in the lower occupational groupings such as administrative, health and education, law, social, community and social service occupations.³¹² On the other hand, over 80 percent of the men were in occupations with higher median weekly salaries such as trades and transport and natural and applied sciences.³¹³

However, women taking on more of the low paying jobs is only part of the story as there are significant wage gaps among workers even within the same occupations. For instance, there is a weekly earnings gender gap of over 20 percent in sales and service jobs, and a gap over 46 percent in the education, law, social services and government service group.³¹⁴

There was a study examining the gender wage gaps in private sectors for full time employees from 1997 to 2014.³¹⁵ The study suggests that all provinces have made progress in narrowing the gender wage gap except for Alberta and Newfoundland.³¹⁶ It is again important to note that these two provinces lack both pay equity law or policy frameworks that apply to even the private sector. Variances between provinces in the size of gap can be in part attributed to job characteristics in a specific province.³¹⁷ The study

³¹² The Conference Board of Canada, *supra* note 8,

³¹³ *Ibid.*, citing, CANSIM table 252-0152, Labour Force Survey Estimates (LFS), Wages of Employees by Type of Work, National Occupational Classification Classification (NOC), Sex, and Age Group.

³¹⁴ *Ibid.*

³¹⁵ Schribe, *supra* note 256 at 209.

³¹⁶ *Ibid.*

³¹⁷ *Ibid.*

further found that much of the wage gap can be explained by gender differences in industry and occupation.³¹⁸

A 2010 study by Baker and Drolet, also revealed that there were substantial wage gap differences for full time employees between the provinces.³¹⁹ Women in Alberta, Newfoundland and British Columbia had the largest gaps.³²⁰ Women in PEI had the smallest wage gaps in some years and reached pay equity in others.³²¹ This study again has similar results to the above wage gap rankings. It appears that the above rankings are common findings in a number of studies.

It is important to consider how various factors influence wage gaps as well as the applicability of the various legal instruments utilized from province to province. For example, a larger percentage of women than men work in the PEI public sector than they do in the Alberta public sector.³²² Knowing that PEI is a province that has pay equity legislation that applies to public sector employees, but Alberta does not, may be one factor that explains why the wage gap for women in PEI is smaller than the wage gap in Alberta. The reach of the pay equity legislation is accessible to the majority of female employees in PEI, where most women work within the public sector. On the other hand, women working within the public sector, or the private sector for that matter, in Alberta, fall outside of the reach of any pay equity legislation because there is none. This in part can explain why the wage gap in Alberta is so much larger than the gap in PEI. Although

³¹⁸ *Ibid.*

³¹⁹ Michael Baker and Marie Drolet, "A New View of the Male/Female Pay Gap" (2010) 36:4 Canadian Public Policy 429.

³²⁰ *Ibid* at 439.

³²¹ *Ibid* at 440.

³²² *Ibid.*

this is not the only factor that accounts for the difference in wage gaps between the two provinces, it is a factor to some extent.

The applicability of a specific province's wage gap may also be a factor as to why Ontario and Quebec fall somewhere in the middle of the wage gap ranking scale despite their comprehensive legislation that reaches both the public and private sectors. Quebec and to a greater extent Ontario have a large number of federal employees. Ontario houses the nation's capital in Ottawa which is also directly connected to a major Quebec city called Hull. These are examples of some of the cities which house a large number of federal workers. It is possible that the large number of federal workers, who do not have the protection of federal pay equity legislation, contribute to the gender wage gap in these two provinces.³²³ Further, it is also possible that Ontario is home to a large number of women facing intersectionality of discrimination, which could exasperate the size of the provinces gender wage gap³²⁴. As discussed in Chapter 1, women who face discrimination based on multiple grounds tend to face higher gender wage gap disparities and are the most vulnerable to low income³²⁵. If this is indeed the case, then it would be further evidence that the federal government should enact freestanding pay equity legislation to assist in narrowing the gender wage gap.

3.5 Criticisms of and Justifications for Pay Equity Legislation

One criticism of pay equity legislation is its inability to deal with the female-male wage gap in its entirety. This criticism is based on the fact that comparisons are made only

³²³ Although this assumption is not proven or backed by evidence, it is a reasonable assumption that could account for a portion of the gender wage gap in Ontario and Quebec.

³²⁴ *Ibid.*

³²⁵ Cornish, "Canada's growing", *supra* note 36 at 4.

between female-dominated and male-dominated jobs within a particular establishment.³²⁶

As a result, pay equity legislation fails to reach the females working in male dominated jobs and females working in establishments where male dominated jobs do not exist.³²⁷

Although it is true that pay equity legislation does not apply to every female worker as per the above reasons, it does not follow that such laws are not valuable in contributing to progress towards pay equity. As previously mentioned, there are many factors responsible for the creation of the wage gap. Specific laws will likely not completely close the gap on its own. However despite this, these laws are an advancement from previous laws dealing with gender pay discrimination and their benefits do reach a number of working women that were not able to access benefits of the previous pay equality and human rights laws in a meaningful way. Pay Equity laws are an essential tool for narrowing the gender wage gap.

Another criticism of Pay Equity Legislation that arises is that it is difficult to apply to the private sector. A study from Ontario has shown that some smaller employers in the private sector lack the resources necessary to construct and implement the required pay equity evaluation plans.³²⁸ However, this difficulty could be overcome if sufficient resources, education, and direction were available to these small employers to help them understand and set-up equity plans that meet the specific needs of their business.

There was also evidence found in the same Ontario study that showed some small to mid-sized employers simply ignored the law and chose not to create a pay equity plan.³²⁹ This

³²⁶ Gunderson, *supra* note 149 at 119.

³²⁷ *Ibid.*

³²⁸ Michael Baker and Nicole M. Fortin, "Comparable Worth in a Decentralized Labour Market: The Case of Ontario" (2004) 37:4 *The Can J of Economics* 875.

³²⁹ *Ibid.*

too is a hurdle that can be overcome. In this case stronger monitoring, reporting procedures and enforcement would ensure that employers have an acceptable plan in place to ensure gender pay equity. Including some form of transparency laws that compel employers to report gender pay data regularly would also help ensure employer compliance.

Further, researchers have suggested that the Ontario pay equity legislation was too difficult to apply in the private, decentralized labour market where assessing comparable worth was more difficult than in the public sector labour market.³³⁰ Again, there are measures that could be taken to assist employers by providing them with available resources and expertise to educate and train them in creating and implementing plans that are tailor made to their needs based on the size of their business.

3.6 Recommendations for Strengthening and Expanding Pay Equity Laws across Canada

Free-standing specialized pay equity legislation is required in order to meet international and domestic pay equity obligations. Addressing pay equity through other means, such as employment standards laws, collective bargaining laws and human rights laws have not been as successful as would be necessary to achieve or set us on the road to achieving pay equity.³³¹ According to Mary Cornish, our international and domestic commitments are not met by the aforementioned legal models for a variety of reasons³³². First,

³³⁰ Schribe, *supra* note 256 at 209.

³³¹ We did not address Employment Standards Laws or Collective Bargaining Laws in any depth within this thesis because they are not viable avenues for pay equity. Therefore this is the extent to which they are useful to mention for the purposes of this thesis. Cornish, et al, *supra* note 5 at 7.

³³² Mary Cornish is a retired human rights, pay equity, labour, constitutional, administrative and employment lawyer, who devoted her career to advancing pay equity, Cavalluzzo LLP, “Mary Cornish Retires from Cavalluzzo LLP” (December 31, 2017) online: *Cavalluzzo* <cavalluzzo.com/resources/news/details/2017/12/31/mary-cornish-retires-from-cavalluzzo-llp>.

employment standards laws are built on the principle of equal pay for equal work, which are not aimed at dealing with systemic discrimination or recognize pay equity as a fundamental right.³³³ Second, collective bargaining laws that are only accessible to unionized women fails to recognize pay equity as a fundamental human right; fails to remedy systemic discrimination or ensure a substantive outcome; makes pay equity a potential bargaining chip in negotiations; and fails to provide effective and expert enforcement mechanisms.³³⁴

Third, the human rights models fail because they are complaints based and deal with issues retroactively, fail to address the systemic nature of discrimination, fail to provide effective access for employees, and lack enforcement and monitoring and direction on how to implement pay equity.³³⁵ Further the human rights system is expensive, complex and time consuming which makes it difficult for most women to access, especially those without union representation.

Research suggests that specialized pay equity legislation is the only model that is effective in recognizing wage discrimination as a systemic problem demanding a systemic remedy.³³⁶ It is an effective way to deal with the potential discrimination before it occurs, thereby bringing the problem to light so that it may be fixed. It places the onus on employers to find inequities and set up proactive plans to resolve disparity and achieve and maintain pay equity. Retroactive, complaints based models such as the human rights models are not as useful for systemic matter such as wage discrimination in part because

³³³ Cornish, et al, *supra* note 5 at 3.

³³⁴ *Ibid.*

³³⁵ *Ibid* at 4.

³³⁶ *Ibid* at 4.

women often don't know that they are being paid less than men for the same job or for work of equal value.

Pay equity legislation is able to define the right to pay equity in a detailed manner and in clear and definite terms enabling employers and employees to fully understand and act on their rights and duties, to minimize delay in litigation and to provide effective monitoring and enforcement.³³⁷ Further, the government showing serious commitment to enacting pay equity legislation promotes a culture of compliance.³³⁸ Leading by example is an essential step the government must take in meeting their obligations to take all necessary steps to pursue gender pay equity and to make it clear that gender wage discrimination is wrong and will not be tolerated.

In sum, it appears that in order to be most effective, new pay equity legislation must reflect the following principles: Pay equity is a fundamental human right and pay equity laws have primacy over all other non-constitutional rights; Pay equity legislation must be proactive and address systemic discrimination by obligating employers to rectify discriminatory practices; the legislation must apply to employees in both the private and public sector; must set-out detailed pay equity obligations providing clear guidance to employers and employees to minimize litigation.

Further, pay equity must include the following in order to ensure and guarantee that women receive non-discriminatory wages.³³⁹ Pay equity must provide a clear time frame in which steps are to be taken, and at what point substantive equality is to be achieved; it

³³⁷ *Ibid* at 7.

³³⁸ *Ibid* at 4.

³³⁹ *Ibid* at 5.

must provide warning of sanctions for non-compliance; strong enforcement measures must be set in place such as expert tribunals; legal aid must be provided when needed and direct access to the tribunals must be available to complainants; strong reporting monitoring and follow-up are essential.³⁴⁰

Writing for the Status of the Women in Canada, Margot Young made a series of recommendations are made to legislators in drafting pay equity legislation. These recommendations can be summarized as follows: Pay Equity Legislation should explicitly state that pay equity is a fundamental human right and that the federal legislation is enacted in accordance with Canada's human rights obligations under international law and that pay equity is a necessary element of a commitment to sex equality.³⁴¹ The legislation should include recognition of the remedial nature of pay equity law and its goal of eliminating female worker's inequality.³⁴² Also, a new administrative agency independent of the government should be created to oversee the implementation and processes surrounding the legislation to bolster the designation of pay equity as a human right.³⁴³ Additionally the legislative reforms should be accompanied by publicity and educational programs that communicate the nexus between pay equity and women's fundamental right to substantive equity.³⁴⁴ These recommendations would be very useful to Canadian legislators in drafting effective pay equity legislation. They adequately reflect Canadian principles of gender equality and pay

³⁴⁰ *Ibid.*

³⁴¹ Young, *supra* note 166.

³⁴² *Ibid.*

³⁴³ *Ibid.*

³⁴⁴ *Ibid.*

equity and also provide the procedural and support components necessary to make the laws effective on the ground level.

3.7 Conclusion

It is clear that pay equity law is an effective tool for ensuring that a larger number of female workers reach pay equity than have previously done so under the human rights model. This certainly does not mean that the human rights model should be set aside, as it has proved useful in helping some women achieve pay equity, especially those women represented by unions. Looking at the gender wage gaps and the relevant laws enacted in jurisdictions across Canada, it appears that there is an identifiable correlation between the type of law implemented and the size of the wage gap within jurisdictions. The jurisdictions that do not use pay equity legislation have the largest wage gaps and the provinces with pay equity legislation have the smaller wage gaps. The provinces who use policy frameworks instead of pay equity legislation fall in the middle.

It would therefore be reasonable to suggest that the jurisdictions that presently do not have pay equity legislation, enact it. If the Federal jurisdiction did so, it would assist the provinces with a high number of federal employees such as Ontario and Quebec. If Alberta and Newfoundland implemented such legislation they might not raise to the top of the list for having the smallest pay gaps in the country but it may elevate those provinces from the very bottom of the list. It would further be reasonable to suggest that the jurisdictions that do have pay equity legislation, widen the applicability to as many workers as possible within both the public and private sectors.

However, despite these recommendations about implementing and expanding applicability of pay equity law, little will be achieved unless the laws themselves have some added clarity and teeth to increase compliance and enforcement. To meet these ends the next chapter undertakes an exploration of foreign laws related to pay equity that may be useful to bolster pay equity laws here at home.

CHAPTER 4

4. EXPLORATION OF SELECT LAWS FROM FOREIGN JURISDICTIONS, RELEVANT TO THE GENDER WAGE GAP AND NEW PROGRESSIVE LAWS WITHIN THE NATION

This fourth chapter will examine alternative ways to narrow the wage gap through pay equity and anti-discrimination laws that have been enacted in foreign jurisdictions, such as pay transparency laws. There will be discussion of some promising new laws coming into force in Ontario in the near future which adopt these foreign examples among others. Finally there will be discussion of how the 2018 federal budget framework may further pay equity and narrow the gender wage gap.

4.1 Exploring New Laws to Narrow the Gender Wage Gap Using Foreign Examples

4.1.1 Pay Transparency Laws

Pay transparency laws are laws that oblige employers to disclose annual reports on gender pay data to the ministry of Labour such as how much male and female employees are paid as well as the compensation structure of a workplace by gender and job classification.³⁴⁵ These laws also give workers and investors the right to know how much

³⁴⁵ Faraday, *supra* note 51.

male and female employees are being paid in a workforce and protects workers from reprisals for discussing wages or asking for wage information.³⁴⁶

According to Fay Faraday, a labour and human rights lawyer in Toronto, co-chair of the Equal Pay Coalition, and a Professor at Osgoode Hall Law School,

“Pay transparency laws sharpen accountability for human rights compliance by giving workers key information they need to demand and enforce their rights. They help identify sticky floors, glass ceilings and occupational segregations that sustain the pay gap.”³⁴⁷

The Canadian federal and provincial government would be wise to implement transparency laws to help narrow the wage gap. This is in part because employer non-compliance with pay equity laws remains a significant issue in the workforce particularly in the private sector.³⁴⁸ By forcing employers to disclose their pay systems and what they actually pay both male and female employees, gender wage bias can be brought to light and eradicated. Employees would be empowered and able to know when wage bias has occurred, enabling them to take appropriate action to deal with the matter.³⁴⁹ At the same time, employers will be held accountable for any gender wage bias they may be responsible for in the workplace. According to the European Commission, “If companies really respect the principle of pay equity for women they should have nothing to hide. Women should not be paid less simply because they are kept in the dark about what their male colleagues earn.”³⁵⁰

³⁴⁶ *Ibid.*

³⁴⁷ *Ibid.*

³⁴⁸ *Ibid.*

³⁴⁹ Cornish, “Canada’s growing”, *supra* note 36 at 7.

³⁵⁰ *Ibid.*

Equal Pay day has been a landmark day for national leaders enacting transparency laws to further pay equity within their borders. On the American equal pay day in 2014, President Obama issued an order requiring federal contractors to disclose pay data regarding race and sex to determine if there was discrimination.³⁵¹ The EU Commission adopted multiple pay transparency measures to mark equal pay day as well including a requirement that all member states report on one of the following: 1) employees right to request pay level data broken down by gender, including bonus and other variables, 2) conducting pay audits that are available to worker's representatives upon request for larger companies, or 3) regular reporting by employers on average remuneration by employee category and broken down by gender.³⁵²

The U.K government introduced a plan in 2017 obligating companies with 250 or more employees to report their gender wage gaps and gaps in bonus pay.³⁵³ Belgium, having one of the lowest gender wage gaps in the world enacted similar legislation in 2012 in which companies of 50 or more employees were obligated to report wage gap information every two years.³⁵⁴

Pay transparency laws have also been enacted in other countries such as, Australia, Germany, Denmark and Iceland.³⁵⁵ It is interesting to note that each of these countries mentioned are ranked ahead of Canada in the 2017 Global Gender Wage Index for having smaller gender wage gaps.³⁵⁶ It may be wise to follow their lead as these countries appear

³⁵¹ *Ibid.*

³⁵² *Ibid.*

³⁵³ The Conference Board of Canada, *supra* note 8, citing U.K Government Equalities Office, Mandatory Gender Gap Reporting, February 2016.

³⁵⁴ *Ibid.*, citing Hildegard Van Hove, Some Facts About the Gender Pay Gap in Belgium, July 2015.

³⁵⁵ Faraday, *supra* note 51.

³⁵⁶ World Economic Forum, "Gender Gap Report 2017", *supra* note 40 at 112.

to be more progressive and successful at closing their own gender gaps more efficiently than Canada thus far.

4.1.2 Ban on Disclosure Request for Applicant Pay History

A growing number of states and major cities in the USA have recently enacted laws that prohibit employers in public and private sectors from asking potential employees about previous salary history during the hiring process.³⁵⁷ This law is useful in furthering pay equity because it stops employers from being tempted to pay an applicant less than they otherwise would have because the applicant accepted less at a previous job. Some of the states that have implemented these laws include: the state of Oregon, the state of New York, New York City as well as a number of counties within the state, Philadelphia and Pittsburgh, the State of Vermont, the State of Wisconsin and the Commonwealth of Puerto Rico.³⁵⁸

4.2 The Ontario Pay Transparency Act of 2018: A Step in the Right Direction

It has recently come to light that Ontario has enacted promising new transparency legislation that is soon to come into effect. This particular Act is exciting and hopeful, as it includes a number of new laws geared to decrease gender pay discrimination and further pay equity in the province. Many of the foreign laws discussed in this research

³⁵⁷ For example, New York City in the State of New York U.S.A., enforced a law that made it illegal for public and private employers of any size to ask about an applicant's salary history during the hiring process. NYC Human Rights, "Salary History Questions During Hiring Process are Illegal in NYC" (August 2018 last visited), online: *NYC Human Rights* <nyc.gov/site/cchr/media/salary-history.page>.

³⁵⁸ HR Drive, "Salary history Bans: A running list of states and localities that have outlawed pay history questions" (10 July 2018 last modified), online: *HR Drive* <<https://www.hrdrive.com/news/salary-history-ban-states-list/516662/>>.

project are included within the new *Transparency Act*, which appears to be a useful accompaniment to Ontario's existing pay equity legislation. This will further narrow the gender wage gap by obliging employers to prove that they are meeting their obligations under the Pay Equity Act and refraining from gender pay discrimination within the workplace.

On April 26, 2018 Ontario passed Bill 203 on third reading. The resulting *Pay Transparency Act* will come into force and effect in Ontario on January 1, 2019.³⁵⁹ Under section 4, the stated purpose of the *Act* is to: a) promote gender equality and equal opportunity in the workplace including compensation equality between men and women through increased transparency of workplace compensation and pay, b) to disclose and remove employment and compensation inequities and to promote full participation for women and other Ontarians in the workplace, c) to promote the elimination of gender and other biases by employers in hiring, employment status and pay practices, d) to support consultation and open dialogue between employers and employees on employment compensation and equal opportunity issues, and to e) support economic growth through furthering equity in and employment equity in the workplace for women and other groups.³⁶⁰

Key features of the *Act* include section 5(1) which prohibits employers or their agents from asking for information about an applicant's compensation history.³⁶¹ This is important because it ensures that employers do not pay new employees less than they otherwise would have just because they are aware the employee has accepted a lesser

³⁵⁹ *Pay Transparency Act*, *supra* note 9.

³⁶⁰ *Ibid* at 4(a-e).

³⁶¹ *Ibid* at 5(1).

amount in a previous job. This is particularly important for women applicants and employees as many of them have been paid less than their male counterparts in the past as pay inequality is a systemic problem. This is a vital step in removing temptation for employers to pay women less than they otherwise would just because they believe they can. It is therefore a necessary component to a comprehensive plan in achieving pay equity for women and other vulnerable groups.

Another key feature of the *Pay Transparency Act*, is section 6, under which employers must include information about the compensation range for positions they advertise publically in a job posting.³⁶² This ensures that potential employees know what they can expect to receive in pay prior to applying for a position. Further, it enables a new employee to be satisfied that they are being paid fairly in comparison to other employees in comparable positions and that they are not being paid less than another candidate would be paid. It also removes any potential for employers to pay candidates below the salary range based on factors such as the gender of the new employee.

The transparency clauses of the *Pay Transparency Act* can be found at section 7 of the Act. At section 7(1), employers with 100 or more employees shall collect information on employer, workforce composition and differences in workforce composition in relation to gender, for the purpose of preparing a pay transparency report annually and submit same to the Ministry.³⁶³ Employers with 250 or more employees are required to submit their initial pay transparency report just over one year after the law comes into force, that being May 15, 2020.³⁶⁴ Smaller employers with at least 100 employees but less than 250,

³⁶² *Ibid* at.6.

³⁶³ *Ibid* at (1,4).

³⁶⁴ *Ibid* at 7(2).

are given an extra year to submit a pay transparency report with the first due on May 15, 2021.³⁶⁵ This extra year for filing gives the smaller workplace organizations additional time to allocate resources and prepare a system to collect, organize and submit the data required under the Act.

Employers are required by section 7(5) of the *Pay Transparency Act* to post the completed pay transparency reports either online or in a conspicuous place in the workplace which is likely to come to the attention of the employees. The Ministry must make the submitted reports available to the public either online, through publication or otherwise under section 7(6,7). This is an interesting component of the *Act* which is sure to further the goal of transparency but at the same time is sure to attract criticism. Rather than publicize company pay information in relation to gender, legislators had the option to instead have the reports available only to the Ministry alone. This would have ensured oversight of employers compensation practices and workforce structure data in relation to gender as well, yet would have kept the information confidential from fellow employees and the public.

A likely criticism arises regarding the choice to publicize the pay transparency reports to the general public or share compensation information with the employees in a given establishment. This criticism is based on concern that if employees are made aware of what their coworkers are being paid, employers are removing their incentive to work harder and therefore stifling competition and productivity. For example if Jack and Dianne are being paid the same amount for the same work, but Jack works much harder

³⁶⁵ *Ibid* at 7(3).

than Dianne, there is no incentive for Dianne to work harder or for Jack to continue to work as hard. This scenario may lead some people to oppose the notion that compensation information should be made public. Yet, this argument assumes that employees in the same position or in comparable work are being paid the same amount regardless of any other factors.

On the contrary, pay equity legislation, such as the Ontario pay equity legislation that will continue to be in force alongside the *Pay Transparency Act*, includes a section allowing for pay inequities in a number of instances. Justifications for paying wage differences between employees including paying a different wage to men and women who are working in jobs determined to be of comparable value include: Merit based system, seniority system, promotions system etc.³⁶⁶ These allowances for paying different rates to employees for comparable work ensures that we can still pay higher wages for harder workers or decrease wages for employees who don't work as hard on basis other than gender.

Despite the option to make the pay reports solely available to the Minister or a government agency, is arguable that with this method, the purpose of pay transparency laws would not be fully realized. To be fully transparent, pay reports should be available to the public, including employees within a given business organization. There is a public shaming element that comes into play when this information is made available to the general public. For instance, under section 13(8), of the *Act*, if an employer is determined to have contravened the Act or regulations, the Minister may publish or otherwise make

³⁶⁶ *Ibid* at 8(1).

public the name of the person who contravened the *Act*, a description of the contravention and the date it occurred and the penalty for the deemed contravention.³⁶⁷ With this publication provision, employers would have further incentive to ensure that they are engaging in fair pay practices and pay equity to avoid discontent from the public and instead attract positive attention from society. The likelihood of employer compliance in working to achieve and maintain pay equity are advanced with the publication of the pay transparency reports.

Another key component to the *Pay Transparency Act* is that under section 8, employers shall not intimidate, dismiss, penalize or threaten to penalize an employee because an employee has: a) inquired with the employer about the employee's compensation, b) disclosed the employee's compensation to another employee c) inquired about information in pay transparency reports d) given information about the employers compliance with the Act or regulations, or e) asked the employer to comply with the *Act* or regulations.³⁶⁸ This section is important because it could save employees from fear of facing adverse action for discussing wages or gender structure of the workplace. This provision is necessary to ensure that the information being reported is accurate and to promote a workplace environment where transparency and open communication flows freely.

The Ontario *Pay Transparency Act*, 2018 is an exciting piece of legislation that should serve as an inspiring example to remaining Canadian jurisdictions. For provinces that have already progressed to free-standing pay equity legislation, pay transparency

³⁶⁷ *Ibid.*, at 13(8).

³⁶⁸ *Ibid.* at 8(a-e).

legislation is the logical next step that should greatly enhance the success of pay equity within their jurisdiction. It is reasonable to predict that Ontario's gender gap will benefit from the enactment of the *Pay Transparency Act*, 2018.

4.3 Increase to Provincial Minimum Wages

Women can also benefit from an increase in minimum wage as many tend to work minimum wage jobs. Ensuring a living wage is particularly important to women because they represent approximately 60% of all minimum wage workers in the nation.³⁶⁹ By ensuring that all Canadians receive at least a minimum wage women will be lifted economically. A living wage is an estimate of what workers need to earn to afford to live and meet basic needs within a specific community.

Alberta is one province that has recently increased their minimum wage incrementally so that workers within the province are able to earn at least a living wage of \$15.00 per hour by October 1, 2018.³⁷⁰ This means that \$15.00 is the lowest amount that employees may pay their employees by law, which is quite a bit higher than the 2017 minimum wage of \$13.60.³⁷¹ There are many benefits of increasing the minimum wage including increased consumer spending, healthier people, and lower wage inequality especially for women.³⁷² According to the Alberta Government, 59.6% of low wage earners in the province are female.³⁷³

³⁶⁹ Cornish, "Canada's growing", *supra* note 36 at 7.

³⁷⁰ Alberta Government, "Changes to Alberta's Minimum Wage", The Alberta Government, (August 2018 last visited) online: *Alberta Government* <alberta.ca/alberta-minimum-wage-changes.aspx#p3984s1>.

³⁷¹ *Ibid.*

³⁷² *Ibid.*

³⁷³ *Ibid.*

In a growing trend a number of other Canadian provinces have also been raising their minimum wages as well. For example, British Columbia has announced a gradual minimum wage increase which will reach \$15.20 by June 1, 2021 and Ontario is set to reach \$15.00 by January 1, 2019.³⁷⁴ These inspiring wage increases will assist women in particular as they are the ones who tend to make up the majority of minimum wage workers across the country. This trend will also be helpful in the goal of reducing Canada's gender wage gap and in reducing the feminization of poverty.

4.4 The 2018 Federal Budget and Pay Equity

Another progressive move for pay equity in Canada can be seen in the 2018 federal government's budget.³⁷⁵ The Honourable Scott Brison, Present of the Treasury Board of Canada stated,

“Equal pay for work of equal value is a human right. Our government is taking a leadership role to close the gender wage gap by announcing proactive pay equity legislation in Budget 2018, because gender equality is not only the right thing to do for Canadians, it is also the smart thing to do to grow the middle class”.³⁷⁶

The federal budget reports that the government is introducing a new Gender Results Framework that helps track how Canada is performing in areas such as pay equity and to help define what is needed to make greater progress moving forward.³⁷⁷ The budget also reports that the government is committed to a comprehensive approach to gender

³⁷⁴ Hourly wages as of June 1, 2018 according to the Retail Council of Canada. Retail Council of Canada, “Minimum wage by Province” (August 2018 last visited), online: *Retail Council of Canada* <retailcouncil.org/quickfacts/minimum-wage-by-province>.

³⁷⁵ The Government of Canada, “Budget 2018”, *supra* note 105.

³⁷⁶ Quote by Scott Brison, President of the Treasury Board of Canada, Reported by Employment and Social Development Canada, “Budget 2018: historic pay equity legislation will help close the gender wage gap” (London Ontario, 2, March 2018), online: *Government of Canada* <<https://www.canada.ca/en/employment-social-development/news/2018/03/budget-2018-historic-pay-equity-legislation-will-help-close-gender-wage-gap1.html>>.

³⁷⁷ The Government of Canada, “Budget 2018”, *supra* note 105.

budgeting which includes progress in gender equality and taking actions towards related goals such as: reducing the gender wage gap, increasing full-time employment of women, equal sharing of parental responsibilities, a better gender balance across occupations, and having more women in higher paid quality jobs.³⁷⁸ Further there are plans to find a more balanced approach in sharing employment insurance benefits between male and female parents which would enable women to get into the workforce more equally with men and more evenly share childcare responsibilities between parents.³⁷⁹

The Federal Government is committed to making a wealth of progress towards the goal of gender pay equity which is apparent in the 2018 federal budget. It will be exciting to see further details regarding the specific new frameworks, policies and laws the government adopts to make these gender equality goals a reality.

The present Liberal government has pushed forward with goals relating to human rights and gender equality. For the first time in many years it appears that there is hope that we will see movement in the gender wage gap once again. There are promising actions that have been taken at both the federal and provincial level in jurisdictions such as Ontario with the new pay transparency legislation and in British Columbia, Ontario and Alberta with the increase of the minimum wage to a living wage, among others³⁸⁰. These new initiatives alongside those yet to come as promised in the federal budget could result in a transformative time for advancements in gender equality such as those that took place in the 1980s with the first appearance of proactive pay equity legislation in Canada.

³⁷⁸ *Ibid.*

³⁷⁹ *Ibid.*

³⁸⁰ However, despite these advances for laws relating to pay equity recently made in Ontario under the former Liberal government, it is questionable which direction the provincial pay equity and gender wage discrimination related laws will take under the newly elected Conservative government in 2018.

4.5 Conclusion

Chapter 4 explored some of the pay equity and anti-discrimination laws which foreign jurisdictions have enacted to reduce gender pay discrimination and the gender wage gaps within their borders. Next some recent and progressive Canadian laws which incorporated these laws such as the soon to be in force, *Ontario Pay Transparency Act* were discussed along with some other progressive laws Canadian jurisdictions have enacted that appear promising in their ability to narrow the gender wage gap. The Chapter closed with a discussion about the promising 2018 federal budget which targets gender equality in the workplace and is committed to take steps towards gender equality and narrowing the gender wage gap. The next chapter will conclude this thesis with a summary of the research and findings of this thesis including final recommendations on how Canadian law can be revised to further pay equity and ultimately narrow the gender wage gap.

CHAPTER 5

5. CONCLUSIONS AND REFLECTIONS

Chapter 5 will provide a reflective summary of the research covered within the first 4 chapters of this thesis and offer final recommendations on ways Canada can strengthen existing pay equity laws and incorporate new pay transparency and other laws to narrow the gender wage gap.

5.1 Conclusions Regarding the Gender Wage Gap, Gender Discrimination, Canadian Pay Equity and Human Rights Law, and Suggested Legal Reform

As discussed in Chapter 1, the gender wage gap has been a persistent problem in Canada for many decades. Despite Canada being a strong promoter of gender equality and of principles of pay equity such as equal pay for work of equal value, these values and principles fail to materialize on the ground level. Canadian men continue to earn more money than women per hour, even in situations where women are working jobs of the same value as men³⁸¹. Working jobs of the “same value” meaning that these women who make less than men are working at the same level of skill, effort, and responsibility, and within similar working conditions as men.³⁸² This portion of the gender wage gap is not

³⁸¹Recall from Chapter 1 that women make 87 cents for every dollar earned by a man. Moyser, *supra* note 2 at 26.

³⁸² These were the four factors of value assessment set out in the *Equal Wage Guidelines* as discussed in Chapters 1 and 2. *Equal Wage Guidelines*, *supra* note 12 at s.3-8.

attributable to women working fewer hours, or women having lower skills or qualifications than men, rather this pay disparity is due to gender pay discrimination.³⁸³

Fortunately the law is one tool which can be utilized to protect women from pay discrimination and compel employers to take positive steps towards pay equity. This is not to say that law alone has the ability to close the gender wage gap. However, if applied correctly the law is able to narrow that gap. For example, pay transparency laws can bring gender pay disparity to light so that it may be further determined whether or not the difference in pay is justifiable or due to gender discrimination by employers. Further, pay equity laws place responsibility onto employers to figure out if pay inequities exist within their respective workplaces and implement and maintain plans to ensure pay equity is achieved within their establishments. These initial steps of identifying and addressing pay equity issues within the workplace are essential first steps in shrinking the gap.

Not only is narrowing the gender wage gap a necessary step in realizing Canadian values and principles of gender equality but Canada is also obligated by international law to take, “all necessary measures”, to reach pay equity including the enactment of effective legislation.³⁸⁴ As discussed in Chapter 2, Canadian law has evolved in previous decades in ways that have decreased the gap to some extent. The first real progress made in law recognizing the principle of equal pay for work of equal value appeared with the

³⁸³ That is not to say that the portion of the wage gap that can be attributed to women working less hours than men to dedicate time to work in the home is any less important an issue. However, the focus of this thesis is specifically on the gender discrimination component of the wage gap. Recall from Chapter 1 that the portion of the wage gap that cannot be explained by the difference in number of hours worked and other easily identifiable factors has been determined to be a manifestation of gender discrimination. Bilson, *supra* note 44 at 526.

³⁸⁴ Cornish, et al, *supra*, note 5 at 7.

emergence of anti-discrimination, human rights legislation among Canadian jurisdictions in the 1960s and 1970s.³⁸⁵

However, the rapid progress towards pay equity made by the human rights model was short-lived as the gender wage gap persisted. It was determined by reputable reports in the early 1980s such as the Abella Report, that the failure of the human rights model was due to its reactive complaints based nature, where the burden was on the women themselves to first, figure out that they were being paid less than their male counterparts for work of the same value and then second, proceed to file an expensive and time consuming human rights complaint³⁸⁶. Shortly after the Abella Report, proactive pay equity legislation was enacted in a few Canadian jurisdictions to shift the burden from the employee onto the employer to take steps to ensure that men and women were being paid the same amount for work of equal value. However, despite the emergence of this new proactive pay equity law in Canada, the gender wage gap remains today. This is due in part to the limited number of provinces that have enacted pay equity legislation and the fact that most jurisdictions limit their applicability to the public sector³⁸⁷.

As discussed in Chapter 3, the gender wage gap varies greatly across jurisdictions. The variation can be partially attributed to the different types of legislation each jurisdiction relies on to deal with gender pay discrimination. Every jurisdiction has enacted human rights legislation but only a handful have also enacted free-standing pay equity legislation

³⁸⁵ For a list of provincial human rights legislation and their enactment dates, see Clement, *supra* note 144 at 4.

³⁸⁶ Bilson, *supra* note 44 at 526.

³⁸⁷ Ontario and Quebec are the two provinces that enacted pay equity legislation that applies to both the public and private sectors. See, *Ontario Pay Equity Act*, *supra* note 101 at 196. See also, the *Quebec Pay Equity Act*, *supra* note 259.

as well. It is clear that the provinces with pay equity legislation have the smallest gender wage gaps and the provinces without pay equity legislation have the largest gender wage gaps. Although there are other factors that contribute to the differences between the provinces respective wage gaps, such as the type of work driving their economy, gender discrimination is also a contributing factor, especially in provinces that lack pay equity law. A review of domestic gender wage discrimination and pay equity law reveals that pay equity legislation is arguably the most evolved legislation to effectively further the principle of equal pay for work of equal value in force and effect to date³⁸⁸.

The goal of this thesis was to show that revision to the law is a viable way to narrow Canada's gender wage gap. One way this can be done is to introduce widely applicable pay equity legislation into jurisdictions that have not yet enacted it. Another way is to increase the applicability of pay equity legislation in jurisdictions to include employers and employees in both the public and private sectors and to employment establishments of all sizes. A final way is to strengthen pay equity legislation is to further ensure employer compliance with the pay equity laws through the implementation of pay transparency legislation.

Despite the potential of pay equity legislation to further pay equity, valid concerns arise regarding non-compliance by some employers, particularly in the private sector, due to insufficient monitoring and enforcement. As discussed in Chapter 4, foreign jurisdictions have enacted pay transparency laws to improve employer compliance with pay equity plans and reporting procedures. Canada could also benefit by implementing pay

³⁸⁸ However, the new pay transparency legislation enacted by Ontario which is soon to take effect in 2019 may take its place as the most evolved Canadian pay equity legislation in effectively furthering the principle of equal pay for work of equal value.

transparency legislation among jurisdictions alongside widely applicable pay equity legislation. It would also be helpful to ensure that there are sufficient resources and direction available to employers to assist them in creating and administering pay equity plans, job value assessments and comparisons and reports.³⁸⁹ Other ways in which Canadian jurisdictions can further achieve pay equity for women is to increase the minimum wage to a living wage and enact laws that prohibit employers from requesting pay history from job applicants. It is clear from research of domestic and foreign laws that there are a variety of laws which Canadian jurisdictions could enact that would further pay equity and narrow the gender wage gap. Many of these laws have recently been enacted in Ontario, making that province the most progressive jurisdiction in further pay equity within the nation.

Ontario is one Canadian jurisdiction that has surpassed the others in enacting progressive laws to achieve pay equity. Not only does Ontario have the most widely applicable pay equity legislation that pertains to both the public and private sectors as well as small employers, but it is the first in Canada to enact pay transparency legislation, which will come into force in 2019³⁹⁰. Canadian pay equity would improve and the gender wage gap would narrow if the remaining Canadian jurisdictions followed Ontario's lead by implementing expansive pay equity and pay transparency legislation. Hopefully, given

³⁸⁹ Having available resources to assist smaller employers in the private sector create plans that work for their specific needs are of particular importance.

³⁹⁰ However, this legislation was enacted by the former liberal government, and it is unclear how the legislation will progress under the recently elected conservative government. For information on the budget, see *Pay Transparency Act*, *supra* note 9.

the gender equality focus of the 2018 federal budget, the Federal Government will be one of the first jurisdictions to follow suit³⁹¹.

Pay equity law is a valuable tool for ensuring employers are not discriminating against women by paying them lower wages than their male counterparts for work of equal value. However, this type of legislation does have limitations, some of which are difficult to overcome. For example women that are not in female dominated job classes and women who are in workplaces without male dominated job comparators are not protected by pay equity legislation. Further, it is arguable that pay equity legislation perpetuates gender segregation of the workforce because it only assists women in female dominated jobs, thereby keeping women in female job classes in order to receive the benefit of pay equity. Further, because women make up the majority of low income workers, this may result in actually holding women back financially by keeping them in low income jobs. However, one potential way to lift women out of lower income jobs and into more profitable ones is by enacting widely applicable employment equity alongside pay equity legislation in Canadian jurisdictions³⁹². Despite its limitations, the benefits of pay equity legislation greatly outweigh its costs and shortcoming. By continuing to broaden the applicability of pay equity legislation to a larger number of female employees and by enacting complimentary legislation to encourage employer compliance, and further the principles and purpose of pay equity, Canada will be able to decrease gender pay discrimination and in turn, narrow the gender wage gap.

³⁹¹ For information on the 2018 federal budget, see The Government of Canada, “Budget 2018”, *supra* note 105.

³⁹² Although the topic of employment equity and the ability such legislation potentially has to help raise women into higher paying jobs and thereby narrowing the gender wage gap further, this topic is beyond the scope of this limited thesis project.

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CURRICULUM VITAE

Jennifer Dawn Beaudoin

Education and Awards

University of Western Ontario (Western University) (2017 - 2018)

London, Ontario, Canada

LLM Candidate

University of New Brunswick Law School (2009 - 2011)

Fredericton, New Brunswick, Canada

LLB, May 2011

Sherrard Kuzz Scholarship (Labour Law) recipient.

Elon University School of Law (2007 - 2009)

Greensboro, North Carolina, U.S.A.

Juris Doctor Candidate, completed two years towards Law Degree.

Entrance merit-based scholarships awarded for both years attended.

Carleton University (2002 - 2005)

Ottawa, Ontario, Canada

Bachelor of Arts, Law Major, Oct 2000

Related Academic Experience:

Public Presentation at Western University Law (2018)

Presented information on my thesis, the gender wage gap and legal reform.

Dr. Gillian Demeyere's Gender and the Law Class at Western University (2018)

Guest speaker presenting on the gender wage gap and legal reform.

Related Work Experience

Crerar Law LLP (2013 - 2015)

Edmonton, Alberta, Canada

Partner at a law firm practicing primarily in family law and wills.

Canadian Centre for Professional Legal Education (CPLED) (2012 - 2013)

Edmonton, Alberta, Canada

Completed the CPLED program and articulated at a general practice firm, Patriot Law Group, in Onoway Alberta.

Called to Membership with the Alberta Bar by the Honourable Madame Justice Browne in 2013.

Patrick Cummins (summer 2009, 2010 and 2011)

Spruce Grove, Alberta, Canada

Assisted a general practice lawyer with various tasks including corporate and civil matters.

Center for Death Penalty Litigation (spring 2009)

Durham, North Carolina, U.S.A.

Performed legal work as an intern for an organization dedicated to vacating death sentences, and ensuring fair trials.

Interests and Memberships

Law Society of Alberta

Member

Condominium Plan No. xxx xxxx (2015 -2017), Edmonton, Alberta

Board member

Canadian Bar Association

Member

UNB Poverty Law Society (2011) Fredericton, New Brunswick

Student member

UNB Women in Law Society (2010 -2011) Fredericton, New Brunswick

Student organization member

Fredericton Food Bank (2010 -2011) Fredericton, New Brunswick

Participant in food drive

Student Legal Information Centre (2009 -2010) Fredericton, New Brunswick

Student volunteer

North Carolina Bar Association (2007 -2009)

Student member

Greensboro Bar Association (2007 -2009) Greensboro, North Carolina

Student member

Public Interest Law Society (2007 -2009) Greensboro, North Carolina

Elon University School of Law, student organization member

Outlaw (2007 -2009) Greensboro, North Carolina

Elon University School of Law, student organization member