

Two options for pay equity: complete compensation or no laws at all

On May 10, 2018, the Supreme Court released two decisions about challenges to pay equity laws in Quebec.^[1] Several unions challenged two provisions in the pay equity laws claiming they violated [equality rights](#) under section 15 of the *Canadian Charter of Rights and Freedoms*.^[2] Only one of the challenges was successful. As a result, companies in Quebec now have to compensate female workers for periods of time where they were underpaid relative to male workers. But the Supreme Court's ruling may have implications for other provinces that want to follow suit.

Background

Quebec is one of only two provinces in Canada (Ontario is the other) that require pay equity in the private and public sectors. Other provinces only have pay equity for public sector jobs. In Quebec and Ontario, all companies, public and private, must pay employees equally for work of equal value. In Quebec, the *Pay Equity Act*,^[3] passed in 1996, sets out the process for making sure that companies do this.

The right to equal pay for work of equal value had existed since 1975 in Quebec's *Charter of Human Rights and Freedoms*.^[4] But the right only guaranteed equal pay for employees working *in the same workplace*. So women were denied equal pay when, for example, there were no male colleagues to compare them to. The *Pay Equity Act*, passed in 1996, fixed this by giving a remedy for such workplaces. Despite its purpose of fixing wage discrimination, it faced two court challenges.

The first challenge concerned delay in putting pay equity into effect. When the Act came into force in 1997, there was no method for deciding on proper pay in situations with no male workers to compare with. The Act therefore created a Pay Equity Commission to conduct necessary research and create a method for finding the right male workers to compare with.^[5] But this took time, and the rules for deciding proper wages did not come into effect until 2005—eight years later. The *Pay Equity Act* also allowed for a further two-year grace period, which meant that pay equity did not come into effect until 2007.^[6] This meant that after the *Pay Equity Act* came into force, women in some workplaces continued to be underpaid for a whole decade while they waited for their claims to be resolved. The unions challenged the section of the *Pay Equity Act* that allowed for a grace period.

The second challenge came after Quebec changed the *Pay Equity Act* in 2009. The Government of Quebec had found that many companies were not following the rules. Before the change in 2009, the *Pay Equity Act* required companies to maintain continuous pay equity. Quebec replaced this requirement with mandatory audits that occurred only every

five years.^[7] When an audit found unequal pay, companies did not have to compensate women for failing to pay them up to that point—they only had to change the pay from that point on. The Act forced women to accept unequal pay between audits. The unions challenged the sections that excused companies from compensating for past wage discrimination.

Equality Rights under the *Charter*

The basis for the challenges was equality rights under section 15 of the *Charter*. As courts have interpreted it, section 15 prevents governments from creating a law that either “burdens or denies a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating ... disadvantage.”^[8]

Canadian courts currently use a two-step test to determine whether a law violates section 15.^[9] First, the law must create a distinction based on a ground such as those listed in section 15 of the *Charter*. Second, the law must create a distinction, based on a ground that has a negative or adverse *impact* on the affected group. In looking at a potential breach, courts will not look at negative *attitudes* toward a group. They will instead focus on how the law affects the group regardless of the attitude behind it.

Equality rights, like most rights in the *Charter*, are primarily [negative rights](#). Negative rights prevent the government from acting in certain ways. For example, section 15 of the *Charter* prevents the government from discriminating against people based on certain characteristics, such as race, sex, or religion. Negative rights are contrasted with positive rights, which require the government to *take* action to achieve specific results.

Delayed access to pay equity is justifiable

Applying equality rights to the grace period, the Supreme Court said that the grace period violated women’s equality rights. This was because the delay in putting pay equity into effect meant that wage discrimination continued for longer. The law was saved, however, because even though it violated section 15 the Supreme Court thought that the violation was acceptable under of [section 1 of the *Charter*](#). The delay was justifiable because the government of Quebec wanted to find a more effective solution to the problem of pay inequity.

Lack of back pay is *not* justifiable

The Supreme Court also found that the sections about back pay were unconstitutional and invalid. These were the sections that excused companies from compensating women for past wage discrimination.

The Supreme Court said that the way the *Pay Equity Act* addressed wage inequality “perpetuate[d] the pre-existing disadvantage of women.”^[10] Although without the *Pay Equity Act* there would be no laws at all that address wage inequality in the private sector, the Supreme Court still found that the Act created a disadvantage for women. The Supreme Court said that for the law to be valid, it would have to not only fix the issue of pay inequity,

but also force companies to compensate women for past pay inequity. This failure to provide back pay for past wage discrimination violated section 15 of the *Charter*.

Some of the judges disagreed with this view and would have upheld the law as valid. Their minority opinion pointed to the nature of section 15 as a negative right and said that the majority's decision essentially created a positive obligation for the government to obtain a specific result (pay equity, in this case). As the *Pay Equity Act* does not widen the wage gap between men and women, the minority said that the law "does not *perpetuate* pre-existing disadvantages."^[11] The *Pay Equity Act* has the purpose of narrowing the wage gap, but does so less completely. The minority said that this did not make the law unconstitutional.

The Future of Pay Equity

These two cases do not impose a freestanding obligation on all provinces to achieve pay equity in the private sector. But they do impose obligations on any province that chooses to address pay equity through legislation. That is, a province with no pay equity laws cannot be challenged in court for not having such a law. But once it creates a law, there may now be certain standards that its law must reach.

For the eight provinces that have not yet created pay equity laws for the private sector, these two cases may cause some hesitation in introducing pay equity legislation. This is because the Supreme Court has now given its vision of what pay equity should look like, and it is a vision that may be costlier than what some provinces are willing to implement. Provinces that want to move step by step towards pay equity without drastic changes may be put off from even trying. This could mean that introducing pay equity in the private sector could take longer. Traditionally, when a law provides a clear benefit in comparison to a situation with no law at all, legislatures are free to adopt whatever method they wish for providing that benefit. This may no longer be the case.

^[1] *Quebec (Attorney General) v Alliance du personnel professionnel et technique de la santé et des services sociaux*, 2018 SCC 17 ; *Centrale des Syndicats du Québec v Quebec*, 2018 SCC 18 .

^[2] Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11 .

^[3] SQ 1996, c 43.

^[4] SQ 1975, c 6, s 19.

^[5] *Pay Equity Act*, *supra* note 3, s 114.

^[6] *Ibid*, s 38.

^[7] *Alliance*, *supra* note 1 at para 2.

^[8] *Kahkewistahaw First Nation v Taypotat*, 2015 SCC 30 at para 20, [2015] 2 SCR 548.

[9] *Ibid* at paras 18-20.

[10] *Alliance*, *supra* note 1 at para 33.

[11] *Ibid* at para 68.