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## • PAY EQUITY COMPLIANCE: AN UPDATE FROM THE SUPREME COURT OF CANADA •

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The Supreme Court of Canada recently rendered two decisions in two separate cases pertaining to Quebec's *Pay Equity Act* (Act) that serve as a reminder to all employers of the importance of complying with their governing pay equity legislation.

The Act came into force in 1996 to address systemic discrimination against women and to ensure employers provide equal pay for work of equal value. It applies to both public and private

sector employers with more than ten employees. In order to ensure compliance, the government later adopted the *Act to Amend the Pay Equity Act* in 2009. This legislated a system of mandatory audits every five years, rather than an ongoing obligation to maintain pay equity.

In *Quebec (Attorney General) v. Alliance du personnel professionnel et technique de la santé et des services sociaux*, [2018] S.C.J. No. 17, 2018 SCC 17, the Supreme Court of Canada agreed with the Court of Appeal of Quebec and declared certain sections of the Act to be unconstitutional as they breached the equality rights in section 15 of the *Canadian Charter of Rights and Freedoms* (Charter). The three sections of the Act at issue in this case were:

- Section 76.5 — requires adjustments in compensation to be made payable from the date of the audit posting.
- Section 76.3 — requires the results of the audit, but not the date of the audit to be posted.
- Section 103 para. 2 — provides that compensation adjustments cannot be addressed by the Pay Equity Commission (Commission) in Quebec before the date of the audit posting, except in cases where there is a finding that the employer has acted

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“in bad faith or in an arbitrary or discriminatory manner.”

In the majority decision, Justice Abella noted that “the impugned provisions perpetuate the pre-existing disadvantage of women”. The sections had a discriminatory impact. Pay adjustments were not immediately applicable and pay inequities were endured for five year periods.

In *Centrale des syndicats du Quebec et al v. Quebec (Attorney General)*, [2018] S.C.J. No. 18, 2018 SCC 18, the Supreme Court of Canada determined that section 38 of the Act was constitutional. When the Act first came into force, there was no method for assessing adjustments where there was not a male comparator. The Commission was given regulatory authority to conduct research and establish a methodology. However, the Commission did not establish a methodology immediately and the two-year grace period provided by section 38 further delayed pay equity in workplaces without male comparators. A six-year delay to pay equity ensued. The delay caused by section 38 was challenged as a breach of section 15(1) of the Charter.

Although there was a delay in implementing pay equity methodology for workplaces without a male comparator, the Court determined that the outcome resulted in a greater benefit than harm and was not unconstitutional.

Employers in Quebec impacted by this legislation should be aware of these decisions and should review any pending revisions to the Act.

In addition, while the decisions are specific to the Quebec legislation, they are a cautionary note to employers everywhere to ensure that they are pay equity compliant — regardless of the province in which they are operating.

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