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## The Supreme Court of Canada's Pay Equity Decisions: A Call to Action for Alberta?

By: Jennifer Koshan

**Case Commented On:** *Quebec (Attorney General) v. Alliance du personnel professionnel et technique de la santé et des services sociaux*, [2018 SCC 17 \(CanLII\)](#); *Centrale des syndicats du Québec v. Quebec (Attorney General)*, [2018 SCC 18 \(CanLII\)](#)

Alberta does not have strong pay equity legislation. The *Alberta Human Rights Act*, [RSA 2000, c A-25.5](#), only guarantees equal pay to employees of both sexes for “the same or substantially similar work” for the same employer (s 6). Most other Canadian jurisdictions require employers to pay male and female employees equal pay for work of equal value in either human rights legislation (see e.g. *Canadian Human Rights Act*, [RSC 1985, c H-6](#), s 11; Quebec’s *Charter of Human Rights and Freedoms*, [CQLR, c C-12](#), s 19) and / or in stand alone pay equity legislation (see e.g. Quebec’s *Pay Equity Act*, RSQ 1996, c 43, which applies to public and private employers, and Prince Edward Island’s *Pay Equity Act*, [RSPEI 1988, c P-2](#), which applies to the public sector), or they have pay equity negotiating frameworks for some public sector employees (see [here](#)). Not unexpectedly, a 2016 Parkland Institute [report](#) written by Kathleen Lahey found that Alberta has the largest gender income gap in Canada at 41%, a gap which is often larger for women who are racialized (including Indigenous women) or have disabilities (at 21). The report recommended that Alberta design “robust” pay equity legislation “capable of significantly improving the economic status of women in Alberta” (at 2, 3).

Two recent Supreme Court of Canada decisions shed some light on whether Alberta is constitutionally obliged to enact more robust pay equity legislation (see *Quebec (Attorney General) v. Alliance du personnel professionnel et technique de la santé et des services sociaux*, [2018 SCC 17 \(CanLII\)](#) (*Alliance du personnel professionnel*); *Centrale des syndicats du Québec v. Quebec (Attorney General)*, [2018 SCC 18 \(CanLII\)](#) (*Centrale des syndicats*)). This post will explore the implications of these decisions for the government’s pay equity obligations in Alberta. A future post with Jonnette Watson Hamilton will discuss in more detail the Court’s approach to equality rights under s 15 of the *Canadian Charter of Rights and Freedoms* in these cases.

### The Decisions

#### *Background*

At the outset, it is important to recognize the significance of these two Supreme Court decisions to the history of women’s equality rights in Canada. *Alliance du personnel professionnel* is the first case where a majority of the Supreme Court of Canada has provided its own reasons for

finding unjustifiable sex-based discrimination against women under the *Charter*. In *British Columbia Teachers' Federation v. British Columbia Public School Employers' Association*, [2014 SCC 70 \(CanLII\)](#), the Court allowed a *Charter* equality rights claim by women, but this was accomplished in one paragraph by restoring an arbitrator's award under a collective agreement. In *Newfoundland (Treasury Board) v. N.A.P.E.*, [2004 SCC 66 \(CanLII\)](#), the Court accepted the government's concession that legislation delaying a pay equity agreement amounted to sex discrimination, but upheld the legislation under s 1 of the *Charter* based on a "fiscal crisis" in Newfoundland and Labrador. In other cases, only dissenting justices were prepared to find sex discrimination against women (see e.g. *Symes v. Canada*, [1993] 4 SCR 695, [1993 CanLII 55 \(SCC\)](#); *Thibaudeau v. Canada*, [1995] 2 SCR 627, [1995 CanLII 99 \(SCC\)](#)). In fact, before *Alliance du personnel professionnel*, the only case where a majority of the Supreme Court had allowed a sex discrimination claim involved a man who successfully argued that a particular aspect of British Columbia family legislation discriminated against fathers (see *Trociuk v. British Columbia (Attorney General)*, [2003 SCC 34 \(CanLII\)](#)). Even in *Centrale des syndicats*, all but one justice found either no discrimination or justified discrimination under ss 15 and 1.

In terms of setting out the context for the equality claims in the Quebec cases, the majority decision of Justice Rosalie Abella in *Alliance du personnel professionnel* provides a history of pay equity legislation in Canada (at paras 6-11; see also her reasons in *Centrale des syndicats* at paras 1-7). Legislation guaranteeing equal pay for equal work, the first wave of pay equity obligations, was enacted in the 1950s. Two royal commission reports in 1970 and 1984 found that this legislation was insufficient to deal with systemic gender-based wage inequalities (see [Report of the Royal Commission on the Status of Women in Canada](#) (Ottawa, 1970) and [Report of the Commission on Equality in Employment](#) (Ottawa, 1984) – the latter of which was written by Judge Abella, as she then was). As a result, several jurisdictions adopted second wave pay equity obligations, requiring employers to pay equal wages for work of equal value, using male comparators to assess the equivalency of work in terms of factors such as skill, effort and responsibility. Quebec created such an obligation in its human rights legislation, the *Quebec Charter*, in 1975. This legislation also proved to be insufficient, leading to a third wave of stand-alone, more proactive pay equity legislation, which was passed in Quebec in 1996.

Quebec's *Pay Equity Act* applies to public and private employers with 10 or more employees, and the 1996 version of the Act created a continuous obligation on employers to monitor pay equity and to make adjustments to wages to achieve it. Employees and their unions could enforce these obligations via a complaints process to the Pay Equity Commission and, if the Commission determined that pay equity obligations had been breached, it could order retroactive compensation to employees.

Quebec made amendments to its *Pay Equity Act* in 2009 as a result of "widespread non-compliance" with the 1996 Act (*Alliance du personnel professionnel* at para 16). The 2009 scheme replaced employers' continuous obligations to implement pay equity with a system of pay equity audits to be done every 5 years and also removed the possibility of retroactive compensation. The 2009 amendments were challenged by several unions under s 15 of the *Charter* in *Alliance du personnel professionnel*.

*Centrale des syndicats* involved the 1996 version of Quebec’s *Pay Equity Act*, specifically its process for dealing with workplaces where there were no male comparators. The development and implementation of this process created a six-year delay in pay equity adjustments for women in these workplaces. This scheme was challenged under s 15 of the *Charter* by unions representing employees in workplaces without male comparators, such as child care centres.

### ***Alliance du personnel professionnel***

The Court’s decision on the 2009 amendments is the more straightforward of the two judgments. Writing for the majority, Justice Abella (with Chief Justice McLachlin and Justices Moldaver, Karakatsanis, Wagner and Gascon concurring) found that the amendments violated s 15(1) of the *Charter*, were not within the scope of s 15(2), and could not be justified by the government under s 1. Justices Côté, Brown and Rowe dissented, finding no violation of s 15(1), and alternatively, that the legislation was protected under s 15(2).

After emphasizing that s 15 protects substantive equality, Justice Abella set out the following test for violations of s 15(1):

... does the impugned law, on its face or in its impact, create a distinction based on enumerated or analogous grounds; if so, does the law impose “burdens or denies a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating ... disadvantage” (at para 25, quoting from *Kahkewistahaw First Nation v. Taypotat*, [2015 SCC 30 \(CanLII\)](#) at para 19-20).

Applying the first step of the test, Justice Abella noted that by its nature, pay equity legislation is designed to rectify women’s inequitable compensation in the workforce. It seemed clear to her that the *Pay Equity Act* draws a distinction based on the protected ground of sex, as it is targeted at women and more specifically, “when *women* will – and will not – receive compensation for [pay] inequities” (at para 29, emphasis in original).

At the second step, she found that the 2009 amendments had a discriminatory impact on women because they perpetuated the pre-existing disadvantage of women by “making the employer’s pay equity obligation an episodic, partial obligation” such that pay inequities are only corrected every 5 years and then only prospectively and not retroactively. She agreed with the lower courts that this scheme “effectively gives an amnesty to the employer for discrimination between audits” (at para 33). Also perpetuating women’s disadvantage was the way the amendments deprived employees and their unions of information that would allow them to challenge decisions that employers make pursuant to pay equity audits on the basis of bad faith or arbitrary / discriminatory decision making (at para 34).

At the same time, Justice Abella disagreed with the unions’ argument that Quebec was obliged to retain the 1996 pay equity scheme, finding that this approach “would constitutionalize the policy choice embodied in the first version of the *Act*, improperly shifting the focus of the analysis to the *form* of the law, rather than its effects” (at para 33, emphasis in original). In other words, “Quebec was entitled to change its approach to pay equity, but whatever legislation it enacted had to be constitutionally compliant” (at para 36). The amendments did not comply with

constitutional equality rights because they “codifie[d] the denial to women of benefits routinely enjoyed by men – namely, compensation tied to the value of their work” (at para 38).

Justice Abella also held that the amendments could not be shielded from scrutiny by s 15(2), the *Charter*’s ameliorative programs provision, because s 15(2) does not apply in circumstances where “the very group the legislation seeks to protect” mounts a challenge to the discriminatory impact of the program on their group (at para 32).

Nor were the amendments justifiable under s 1 of the *Charter*, according to the majority. Even if the Quebec government had a pressing and substantial objective in seeking to increase employer compliance with pay equity obligations (at para 48), the government provided no evidence that the amendments had increased such compliance and no evidence that other ways of encouraging compliance would be ineffective (at paras 49, 51). The harms of the amendments also “far outweigh[ed]” their benefits because of the speculative nature of the benefits and the real harm to women in terms of “barriers to access for equitable pay” (at para 53).

The dissenting justices began by noting that “Quebec has been a pioneer in the struggle against pay inequities in private sector enterprises in Canada” and that it would be “profoundly unfair to Quebec society to claim that [the 2009] amendments are unconstitutional” (at para 64). Their judgment is a deferential one that sees pay equity as a policy choice best left to legislatures. According to the dissenting justices, “*Charter* rights are fundamentally *negative* ... [and] do not place the government under an obligation to act in order to obtain specific societal results such as the total and definitive eradication of gender-based pay inequities in private sector enterprises” (at para 65, emphasis in original). For them, there is no positive constitutional obligation to eliminate pay inequity in the private sector. All that s 15 requires is “that government actions do not prevent members of enumerated or analogous groups from benefiting from measures that are available to the general public” (at para 66).

These justices were not even prepared to find that the 2009 amendments met the first step of the test for s 15. However, that flows from the fact that they would have changed this first step by adding to the requirement of proving a distinction based on a protected ground a second requirement – that the distinction result in some disadvantage or prejudice to the claimant group (at para 71). In their view, the amendments did not “create an adverse distinction based on sex” (at para 93) as women were “better off than they were before the Act initially came into force” (at para 96). It followed that the entire *Pay Equity Act*, including its amendments, could also be shielded as an ameliorative program under s 15(2) of the *Charter* (at paras 107-111).

The dissent critiqued the majority for effectively “constitutionally entrench[ing] pay equity” in the private sector, to which the *Charter* does not apply (at para 84). Building on the unfairness argument with which they began, they suggested a province that did not yet have pay equity legislation applicable to the private sector – such as Prince Edward Island – could enact a statute that mirrored the 2009 version of Quebec’s law without being subject to constitutional challenge, thus “impos[ing] on Quebec, and on any province that has been a pioneer in the fight against pay inequities, obligations that are not imposed on the other provinces” (at para 85). This claim will be addressed later in this post when examining the implications of the pay equity cases for Alberta.

## *Centrale des syndicats*

The decision in *Centrale des syndicats* was more complicated. A majority of the Court (Justices Abella, Moldaver, Karakatsanis, Gascon and Chief Justice McLachlin) held that the legislated delay period in implementing pay equity for workplaces without male comparators was discriminatory and violated s 15 of the *Charter*. Four justices dissented on this point, seeing no breach of s 15 (Justices Côté, Wagner, Brown and Rowe). Four of the five justices in the majority on s 15 decided that the government could justify the violation of equality rights under s 1, such that a majority of the Court dismissed the challenge on either s 15 or s 1 grounds. Only Chief Justice McLachlin would have allowed the claim, finding that the violation of s 15 could not be justified under s 1.

Writing for the majority once again on s 15, Justice Abella noted that in 1996, Quebec's *Pay Equity Act* did not provide a methodology for how to assess pay equity adjustments for women in workplaces with no male comparators, nor did consultations on this issue lead to any concrete proposals. The Pay Equity Commission was tasked with developing a methodology and implementing it via regulation. It did not settle on a method until 2003, largely because the Act required it to consider workplaces that did have male comparators and had completed pay equity assessments after the 1996 legislation took force. The Commission's regulation followed in 2005, followed by a further two year legislated grace period (until 2007) for employers in this category to develop pay equity plans. This process created a delay of six years for female employees in workplaces without male comparators as compared to when their female counterparts in workplaces with such comparators had access to pay equity (at para 18).

Using the same test for s 15(1) as she articulated in the *Alliance du personnel professionnel* case, Justice Abella had no difficulty finding that pay equity legislation, by "targeting systemic pay discrimination against women", draws a distinction based on sex (at para 24). She also found that the provisions in the 1996 Act creating delay in implementing pay equity for women in some workplaces amounted to a distinction based on sex. For Justice Abella, it was clear that women denied timely pay equity in workplaces without male comparators were "women whose pay has, arguably, been most markedly impacted by their gender" (at para 29) and that they "disproportionately suffer an adverse impact *because they are women*" (at para 28, emphasis in original). She went on to find that this distinction was discriminatory, as the Act denied these women access to remedies to combat the discrimination against them (at para 32, citing *Vriend v Alberta*, [1998] 1 SCR 493, [1998 CanLII 816](#)). The result of the delay in implementing pay equity was low wages and continued occupational segregation, perpetuating women's historic economic disadvantage (at para 36). Justice Abella held that s 15(2) was inapplicable for the same reasons as in *Alliance du personnel professionnel* (at paras 38-40).

However, Justice Abella (with Justices Moldaver, Karakatsanis, and Gascon concurring) held that the delay in implementing pay equity for women in workplaces without male comparators was justified under s 1 of the *Charter*. The government's purpose was to find the right methodology for these workplaces, and the delay was rationally connected to this purpose given the complexity of the issue and the absence of an existing model. Echoing the dissent's language in *Alliance du personnel professionnel*, Justice Abella noted that Quebec was a "pioneer" when it

came to pay equity for women in private sector workplaces with no male comparators and that it therefore “should be given some degree of latitude to accomplish” its objectives (at para 46). She found that the government acted with “reasonable diligence” in the context of the complexities involved, impairing women’s rights “as little as reasonably necessary” (at paras 45, 47). Lastly, the overall benefits to women of a pay equity scheme in private sector workplaces with no male comparators outweighed the harm to individual women denied pay equity during the delay period. The delay was “troubling” (at para 48), “serious and regrettable” (at para 53), but for these justices, it was not unconstitutional. They seemed persuaded that employers should not be responsible for pay equity until they have the tools to implement it, such that the absence of retroactive payments in the scheme at issue in this case did not present the same problem it did in *Alliance du personnel professionnel* (at para 54). Surprisingly, Justice Abella did not refer to the Court’s earlier decision in *Newfoundland (Treasury Board) v. N.A.P.E.*, where they unanimously found that a delay in implementing pay equity was justified based on Newfoundland and Labrador’s “fiscal crisis” (for a critique of this ruling in shadow judgment form, see Jennifer Koshan, *Newfoundland (Treasury Board) v N.A.P.E.*, [2006] 1 WCR 327, 18 CJWL 321 (Women’s Court of Canada), available [here](#)).

Chief Justice McLachlin agreed with Justice Abella on s 15(1). In her words, the impugned scheme “gave employers *carte blanche* to ignore pay inequity in their organizations during the delay”, it “bolstered the very power imbalance between employers and female employees that lies at the heart of gender-based pay disparities” and it effectively “said to impacted women: this is your problem” (at paras 156 and 157). She dissented in the overall result of the case by finding that the impugned provisions of the Act could not be justified under s 1. For the Chief Justice, even the rational connection stage of s 1 was a problem for the government. To find that the delay was necessary “would be to accept that obeying pay equity laws is an option that can be negotiated and that the very segment that perpetuates systemic pay inequities — the employers — should be able to perpetuate them as the price of accepting the law” (at para 157). The government also failed to prove that the scheme impaired women’s rights as little as reasonably possible – for example, was partial redress for pay inequity considered and, if not, why? Lastly, the Chief Justice found that the government had not established that it properly balanced the benefits of denying women a remedy with the harms to this “already-marginalized” group (at para 158).

Justices Côté – now joined by Justice Wagner in addition to Justices Brown and Rowe – reiterated the point that Quebec was a ground-breaker on pay equity and found that it had not violated s 15. In their view, the relevant distinction drawn by the legislation was “not based on sex, because the differential treatment does not result from the fact that the affected employees are women. ...[T]he basis for the differential treatment affecting the employees in question lies in the lack of male comparators in their employers’ enterprises” (at para 122). We will have more to say about this reasoning in our post on the Court’s approaches to s 15 in these cases.

Justices Côté et al also found that the distinction drawn by the impugned scheme was not discriminatory, noting that “the systemic discrimination at issue in this case was not caused by the legislature’s actions. On the contrary, the Act has an ameliorative effect and does not have the effect of perpetuating that systemic discrimination” (at para 140). While not relying on s

15(2), they stated that “it will not always be able to ameliorate the conditions of every member of a disadvantaged group at the same time and in the same way” (at para 147) but did not address the lack of retroactive compensation for women in workplaces without male comparators once the Commission had developed its methodology for them.

### **Implications for Alberta**

Justice Abella held in *Alliance du personnel professionnel* that Quebec had some flexibility in how to implement its pay equity obligations and that “the *Charter* does not constitutionalize a single model of pay equity regime” (at para 60). However, she also found that any given pay equity regime must be constitutionally compliant, and that s 15 of the *Charter* necessitates that women not be denied “benefits routinely enjoyed by men – namely, compensation tied to the value of their work” (at para 38). This appears to require, as a matter of constitutional obligation in jurisdictions which have implemented pay equity legislation, that women be paid equally for *work of equal value*. *Centrale des syndicats* indicates that where governments include workplaces without male comparators in their pay equity legislation, they have some constitutional leeway in their implementation schedules, and it does not explicitly require pay equity legislation to include such workplaces, even in the dissent of Chief Justice McLachlin. However, if we take seriously the obligation to pay women equally for work of equal value, that obligation should extend to workplaces covered by equal pay legislation even where there are no male comparators. Compliance with constitutional equality rights dictates that women in workplaces without male comparators should also be guaranteed the benefit of compensation that is tied to the value of their work, even if it may take time and effort to assess that value.

The dissenting justices’ contrasting view, that there is no constitutional right to pay equity, is articulated most clearly in *Alliance du personnel professionnel*: “although achieving pay equity is desirable in our society, the *Charter* does not confer constitutional status on the achievement or the maintenance of pay equity” (at para 84). To be clear about the implications of this position, it suggests that women are not entitled to be free from sex discrimination in the context of workplace compensation (although if they work in the public sector, they could bring a s 15 claim against the government as their employer). In the private sector, according to the dissent, pay equity “is a creation of the Quebec legislature and does not have constitutional status” (at para 84).

It is true that private employers are not bound by the *Charter*, so there is some support for the position that there is no constitutional right to pay equity in private workplaces, only a legislative entitlement in those jurisdictions that have enacted one. The Supreme Court has not yet accepted that s 15 creates a positive obligation to enact benefit conferring legislation, but it has left this question open (see *Vriend* at paras 63-64).

However, in all jurisdictions that *have* created legislative pay equity obligations, it is a legitimate and indeed necessary exercise to scrutinize the legislation for compliance with the *Charter*. As noted by Justice Abella in *Alliance du personnel professionnel*, “when the government passes legislation in a way that perpetuates historic disadvantage for protected groups, regardless of who caused their disadvantage, the legislation is subject to review for s. 15 compliance” (at para 41, citing *Vriend* at para 66). Moreover, while governments are able to “act incrementally in

addressing systemic inequality”, they are bound by s 15 “to ensure that whatever actions” they do take “do not have a discriminatory impact” (*Alliance du personnel professionnel* at para 39).

In light of the forgoing, a strong argument can be made that Alberta’s human rights legislation – which, to repeat, requires only that employers pay men and women equally “for the same or substantially similar work” – is not *Charter* compliant because it denies women “benefits routinely enjoyed by men – namely, compensation tied to the value of their work” (*Alliance du personnel professionnel* at para 38). Put another way, a provision requiring only equal pay for the same or substantially similar work has a discriminatory impact on women by failing to pay them equitably for the value of their work. *Alliance du personnel professionnel* suggests that where a province decides to provide some guarantee against pay discrimination, it cannot stop at the first wave 1950s-style pay equity legislation but must, at the least, implement second wave legislation requiring employers to pay women equally for work of equal value. And although *Centrale des syndicats* does not explicitly recognize a constitutional obligation to provide pay equity to women in workplaces without male comparators, the right to equal compensation for work of equal value may require this approach. This point is especially important in Alberta, where “the majority of occupations remain highly gender-segregated” (see [here](#)).

What about the dissenting justices’ argument in *Alliance du personnel professionnel* that it is unfair to a province that has implemented robust pay equity obligations to be held to a higher standard than those that have weaker pay equity legislation? Leaving aside the question of whether it is appropriate to consider pay equity issues in terms of fairness to *government*, this argument does not hold up when one considers that all jurisdictions in Canada have legislated against sex discrimination in the employment context, both public and private sector. Even those jurisdictions that do not have stand alone pay equity legislation applicable to the private sector, such as Prince Edward Island and Alberta, still prohibit employers from paying female employees less than their male counterparts under their general human rights protections against employment discrimination. If these jurisdictions fail to protect women against unequal pay for work of equal value in the public or private sectors, they are subject to challenge based on their legislation’s lack of compliance with s 15.

The majority approach to s 15 in *Alliance du personnel professionnel* and *Centrale des syndicats* therefore suggests that Alberta’s minimalistic first wave pay equity legislation violates s 15 of the *Charter*. At the very least, the government must take steps to amend the *Alberta Human Rights Act* to ensure that it protects equal pay for work of equal value. The government should also consider implementing Kathleen Lahey’s recommendation for stand-alone, proactive pay equity legislation applicable to the public and private sectors, including workplaces without male comparators. As noted in *Alliance du personnel professionnel*, a failure to implement robust pay equity legislation “leav[es] wage inequities in place [that] make women “the economy’s ordained shock absorbers”” (at para 8, citing the *Report of the Commission on Equality in Employment* at p 234). Women should not have to bear this social and economic burden in Alberta - s 15 guarantees otherwise.

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