

# EMPLOYMENT MATTERS

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## RECENT DECISION ON SEVERANCE PAY INCONSISTENT WITH JURISPRUDENCE

### **What is the issue?**

A recent decision of the Ontario Superior Court of Justice goes against a long history of jurisprudence on the issue of statutory severance pay. Under the *Employment Standards Act, 2000* (the “Act”), employers with an annual payroll of \$2.5 million or more are required to pay severance pay to employees with at least 5 years of cumulative service. Historically, this calculation was based on the employer’s payroll in Ontario. A recent decision challenges this approach.

### **The Case**

In *Paquette vs. Quadraspec Inc.\**, a French language decision, the company’s payroll in Ontario did not exceed \$2.5 million but if you combined its payroll in Ontario with its payroll in Quebec, the employer’s payroll did exceed \$2.5 million. Paquette argued that he should receive severance pay in accordance with s. 64 of the Act. The issue before the Court was whether it should consider the employer’s payroll outside of Ontario when determining the size of the employer’s payroll for the purposes of s. 64 of the Act.

In his decision, Justice Kane held that the Act did not limit the payroll calculation to the employer’s payroll in Ontario. He compared the Act (which does not expressly limit the payroll calculation to Ontario) with the *Pay Equity Act* (which expressly refers to Ontario payroll) and ultimately concluded that the legislature did not intend to limit the payroll calculation in that way. Justice Kane determined that if the legislature wanted to limit the payroll calculation to Ontario only, it would have done so.

### **What is the impact on employers?**

Unfortunately, this decision was not appealed. Given that it deviates significantly from historical jurisprudence, the issue will likely have to be considered by the Court of Appeal in order to afford any real certainty about its impact. It will be interesting to see if the Ministry of Labour and/or the Ontario Labour Relations Board change their approach to the calculation of severance pay as a result of this decision. If so, this could have a significant financial impact on large organizations who only have a few employees in Ontario. Further, it could also impact employment agreements that limit the employer’s liability upon termination of employment to the minimum requirements under the Act. Organizations could lose the benefit of these agreements if they do not pay severance pay because their payroll in Ontario is less than \$2.5 million but would meet the threshold if the employer accounted for its extra-provincial payroll. Some authors have even suggested that this expansion could extend to organizations with employees in the United States. Stay tuned on this important development and we will update you in due course.

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