Court File No. 29597

SUPREME COURT OF CANADA

(On Appeal from the Court of Appeal for Newfoundland and Labrador)

BETWEEN:

NEWFOUNDLAND AND LABRADOR ASSOCIATION OF PUBLIC AND PRIVATE EMPLOYEES

APPLICANT (Respondent)

AND:

HER MAJESTY THE QUEEN IN RIGHT OF NEWFOUNDLAND AS REPRESENTED BY TREASURY BOARD AND THE MINISTER OF JUSTICE

RESPONDENT (Appellant)

AND:

ATTORNEY GENERAL OF QUEBEC
ATTORNEY GENERAL OF ALBERTA
ATTORNEY GENERAL OF NEW BRUNSWICK

INTERVENERS

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MEMORANDUM OF ARGUMENT

PART I: STATEMENT OF FACTS

1. The Appellant, the Newfoundland and Labrador Association of Public and Private Employees (NAPE), appeals from the judgement of the Court of Appeal for Newfoundland and Labrador dated December 6, 2002 which dismissed an appeal from a decision of Mercer J. dated March 20, 1998 which set aside an award of an Arbitration Board with respect to pay equity.

2. This appeal concerns the entitlement of persons employed in female dominated job classifications to pay equity wage adjustments for the years 1988 to 1991. There is no legislation which requires the negotiation of pay equity agreements. In this case, the principle of pay equity was agreed to by the Government of Newfoundland and Labrador (Government) and NAPE in the ordinary process of collective bargaining.

3. On June 24, 1988, NAPE and the Government signed the Pay Equity Agreement, which provided pay equity for employees covered by six health care collective agreements. As a result of the Pay Equity Agreement, Article 24.11 and Appendix H were added to the relevant collective agreements on November 14, 1990.

4. Under the Pay Equity Agreement, the effective date for the implementation of pay equity was agreed to be April 1, 1988. The Agreement provided for five pay equity adjustments: April 1 in 1988, 1989, 1990 and 1991, with a final pay-out of the remaining amounts on April 1, 1992. If the pay equity adjustments were not paid at the end of the fourth year, the remaining adjustments would be paid out in their entirety in the fifth year. On March 20, 1991 the parties agreed on the quantum of compensation and on April 1, 1991 when the calculations were finalized, the employees were entitled to be paid their first, second, third and fourth payments.

5. On April 18, 1991, the Government of Newfoundland and Labrador enacted the Public Sector Restraint Act, S.N. 1991, c. 3 (the Act). The legislation received Royal Assent on April 18, 1991 with effect as of March 31, 1991.

6. Section 9 of the Act cancelled the payments which were due under the Pay Equity Agreement relating to the period April, 1988 to July, 1991. Section 9 reads:

> 9(1) Notwithstanding another Act, where the Lieutenant-Governor in Council determines that an arbitration award or adjudication judgment is made in contemplation of or to compensate for the restraint period even where there are no compensation increases during the restraint period, the Lieutenant-Governor in Council may set aside or modify that award or judgment in order to comply with the intent and purpose of this Act.
>
> (2) Where there is a provision in a pay equity agreement which provides that the pay equity agreement shall be implemented retroactively, that provision is void.
>
> (3) Notwithstanding the other provisions of this Act, a pay equity agreement may be negotiated or implemented, but the 1st pay equity wage adjustment date shall be the date on which the pay equity wage adjustment is agreed upon.
>
> (4) This section applies whether the pay equity agreement is reached or the pay equity wage adjustment date is agreed upon before or after the date this Act comes into force.
>
> (5) In this section "pay equity agreement" means an agreement between a public sector employer and a group of public sector employees to recognize the compensation practice which is based primarily on the relative value of the work performed, irrespective of the gender of employees, and includes a requirement that no employer shall establish or maintain a difference between compensation paid to male and female employees, employed by that employer, who are performing work of equal or comparable value.

7. The Public Sector Restraint Act thus confiscated the payments relating to the period April 1, 1988 to July, 1991 by legislating in s. 9(3) that the "1st pay equity wage adjustment date shall be the date on which the pay equity wage adjustment is agreed upon". The result was that the date of the first pay equity wage adjustment was changed by the legislation from April 1, 1988 to July 1991. The affected employees thus lost the three years of pay equity wage adjustments which had become due on April 1, 1991. Employees who retired during the period April 1, 1988 to July 1991 received their pension based on the discriminatory salary paid prior to the date of the Pay Equity Agreement. Employees injured on the job during the same period received workers compensation benefits based

on the discriminatory salary paid prior to the date of the Pay Equity Agreement.

8. On April 22, 1991, NAPE filed nine grievances on behalf of employees in the following bargaining units: Hospital Support Staff, Central Laundry, Laboratory and X-Ray, Waterford Hospital Support Staff, Victorian Order of Nurses Support Staff and Group Homes. The grievances claimed that the failure to pay the pay equity wage adjustments as specified in the Pay Equity Agreement was a violation of the collective agreement and was contrary to the Charter.

9. The grievances proceeded before an Arbitration Board comprised of David Alcock, chair, Jeffrey Sack, Q.C., union nominee, and Ronald Noseworthy, Q.C., employer nominee. At the arbitration hearing, which took place October 16-19, 1995, NAPE argued inter alia that s. 9 the Public Service Restraint Act violated s. 15 of the Charter and that this violation was not saved by s. 1. The Government argued that the Arbitration Board was disqualified by virtue of a reasonable apprehension of bias, that the Board lacked jurisdiction to hear the grievances, that s. 9 of the Public Sector Restraint Act did not violate s. 15 and that, if there was such a violation, it was saved by s. 1.

10. The Board issued its award on April 14, 1997. The Board unanimously held that the legislation violated s. 15, that there was no reasonable apprehension of bias and that the Board had jurisdiction over the subject matter of the grievances. The Board, by a majority (Alcock and Sack Q.C.), also held that the legislation was not saved by s. 1. Noseworthy Q.C., dissented on this point and held that the Act was saved by s. 1.

11. On June 10, 1997, the Government filed an application for judicial review in the Supreme Court Trial Division. On June 12, 1997, NAPE filed a cross-application for judicial review.

12. On March 20, 1998, Mercer J. quashed the award. He held that the Arbitration Board lacked jurisdiction over the subject matter of the grievance. He also held that although s. 9(3) of the Act was a violation of s. 15 of the Charter, the legislation was saved by s. 1. According to Mercer J. the

Board erred in finding that s. 9 of the Act was not the least drastic means available to the legislature to accomplish the objective of reducing expenditures and in finding that the section had a disproportionately severe effect on the persons to whom it applied.

13. NAPE appealed and the Government cross-appealed. By judgment dated December 6, 2002, a unanimous Court of Appeal dismissed the appeal but in doing so the Court of Appeal affirmed the finding of the Arbitration Board that it had jurisdiction to hear the grievance. The Court of Appeal thus upheld the findings of Mercer J. that there was no reasonable apprehension of bias and that although s. 9 violated s. 15 the section was saved by s. 1.

14. In its decision on s. 1, the Court of Appeal upheld Mercer J.'s finding that there was a sufficiently important objective and a rational connection to the objective but that the Board had erred in finding that the minimal impairment component of the proportionality test had not been met.

15. The Court of Appeal also held that Mercer J.'s findings were consistent with the doctrine of separation of powers which, in its view, was a necessary element for a Court to consider in the s.1 analysis.

Reasons of the Court of Appeal, Appellant's Record, Vol. II, pp. 348-352, 357, 366-368, and 392.

16. Marshall J.A. summarized the decision of the Court of Appeal as follows:

> [630] The issues and results are as follows:
>
> (i) Did the Decision under appeal err in holding the Board lacked jurisdiction to hear grievances? **YES**
>
> (ii) Did the decision under appeal err in finding that s. 9 of the **Public Sector Restraint Act** infringes s. 15(1) of the **Charter**? **NO**
>
> (iii) Did the decision under appeal err in holding the violation of s. 15(1) of the

Charter was saved under s.1 of the **Charter**? **NO**

(iv) Did the decision under appeal err in agreeing with the Board's conclusion that s-s.9(3) of the restraint legislation extinguished Government's obligation in the Pay Equity Agreement to provide pay equity adjustments for the period from April 1, 1988 to March 31, 1991? **NO**

(v) Did the decision under appeal err in agreeing with the Board's conclusion that Government was not required to pay the wage rate due in the fourth year of the Pay Equity Agreement? **NO**

(vi) Did the decision under appeal err in concluding the Board made no error in referring to Hansard in its interpretation of s.9 of the restraint legislation? **NO**

(vii) Did the decision under appeal err in finding there was no reasonable apprehension of bias on the part of the Chair from the employment of the Chair's spouse? **NO**

. . .

Conclusion

[638] While the judge's holding that the Board lacked jurisdiction to hear the grievances challenging the constitutional validity of s.9 of the **Public Sector Restraint Act** must be set aside, his conclusion that the Board erred in finding the infringement of s. 15(1) of the **Charter** was not saved by s. 1 of the **Charter** is upheld. His conclusion that the restraint legislation extinguished obligation under the Pay Equity Agreement to provide pay equity adjustment for the period from April 1, 1988 to March 31, 1991, is also upheld, as well as his disposition of the other issues raised in this appeal. In the result, the appeal and cross-appeal are dismissed.

Reasons of the Court of Appeal, Appellant's Record, Vol. II, pp. 426 and 428-429.

17. Leave to appeal was granted by the Supreme Court of Canada on June 5, 2003 (Gonthier, Major and Arbour JJ.). There is no cross-appeal.

PART II: POINTS IN ISSUE

18. The following points are in issue in this appeal:

Constitutional Questions

1) Does s. 9 of the *Public Sector Restraint Act*, S.N.L. 1991, c. 3, infringe s. 15(1) of the *Canadian Charter of Rights and Freedoms*.

2) If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s.1 of the *Canadian Charter of Rights and Freedoms?*

Order of McLachlin C.J.C. dated October 29, 2003, Appellant's Record, Vol. III, p. 474.

Other Question

3) Did the Court of Appeal err in adding a further step to the section 1 analysis, namely a requirement for the Court to determine whether the separation of powers doctrine has been offended?

PART III: ARGUMENT

QUESTION #1: SECTION 15(1) OF THE CHARTER

19. The Appellant adopts the unanimous findings of the Board of Arbitration, Mercer J. and the Court of Appeal that s. 9(3) of the Public Sector Restraint Act violates s. 15(1) of the Charter. The Court of Appeal held as follows:

> [322] The discrimination effected by the repeal, then, was the product of the Government's action. It could not be legitimately attributed to a "societal problem" when its immediate cause was the legislative repeal's nullification of the commitment to pay equity over the three year period. Although under no obligation to have redressed the problem in the first place, once it did so, as the judge held, it was not open to Government to revoke its commitment without violating s. 15(1). That commitment conferred a right on affected employees to the pay equity

adjustments, and a concomitant duty on Government to provide them. The incorporation of that right into those employees' collective agreements invested their Union with power to enforce that right through normal grievance procedures if Government reneged in whole or in part on its commitment. Government did renege on its promise by its revocation through s. 9's repeal of the right to pay equity to which it had committed itself in the Pay Equity Agreement. As the judge stated, this had "an adverse impact on individuals of a particular gender". That impact was felt by those employees in the female dominated classes of the public service who were entitled to the salary adjustments under the Agreement over the restraint period, but were denied them by s. 9 of the restraint legislation. That denial, then, was the legislative repeal of the commitment through the postponement of the pay equity adjustments, and constituted the infringement of the affected employees' equality rights guaranteed under s. 15(1) of the Charter . . .

[339] Accordingly, the judge was correct in his reasoning set out in preceding paras. 74 and 75 that once Government committed itself to pay equity it could not repeal that undertaking for the duration of the restraint period as it did in s. 9 of the restraint legislation without infringing s. 15(1) of the Charter. Government's contentions that the legislative repeal had no constitutional effect, and that it was free to return to the state that existed before the commitment through the repealing legislation, cannot be given sway. Thus, the judge's ruling of correctness of the Arbitration Board's unanimous finding of violation of equality rights guaranteed under s. 15(1) of the Charter must be upheld.

Reasons of Court of Appeal, Appellant's Record, Vol. II, pp. 310–311 and 317.

20. In the s. 15 (1) analysis, the Court is concerned solely with whether the impugned legislation imposes a prejudicial burden on a disadvantaged group. No judicial deference is owed to the legislature in the s. 15(1) analysis, even when the impugned government action relates to fiscal restraint. This Court has recognized that in applying the Charter, "the courts should adopt a stance that encourages legislative advances in the protection of human rights." The scope of equality rights should not be circumscribed through deference in the s. 15(1) analysis. Consideration of the legislature's objectives or justification for the impugned action should be left to the s. 1 analysis.

Symes v. Canada, [1993], 4. S.C.R. 695, [1993] S.C.J. No. 131 at para. 109, Appellant's Book of Authorities, Volume I, Tab 1.

Andrews v. Law Society of British Columbia, [1989] S.C.R. 143, [1989] S.C.J. No. 6 at 174, Appellant's Book of Authorities, Volume I, Tab 2.

Miron v. Trudel, [1995] 2 S.C.R. 418, [1995] S.C.J. No. 44, paras. 128-129, 137 and 141 per McLachlin J., Appellant's Book of Authorities, Volume I, Tab 3.

Thibaudeau v. Canada, [1995] 2 S.C.R. 627, [1995] S.C. J. No. 42 para. 154, per Cory and Iacobucci JJ., Appellant's Book of Authorities, Volume I, Tab 4.

R. v. Turpin, [1989] 1 S.C.R. 1296, [1989] S.C.J. No. 47, at pp. 1328, Appellant's Book of Authorities, Volume I, Tab 5.

21. The test for determining whether legislation contravenes s. 15(1) of the Charter was set out in Law v. Canada (Minister of Employment and Immigration), [1999] 1 S.C.R. 497 where Justice Iacobucci stated:

> [39] In my view, the proper approach to analyzing a claim of discrimination under s. 15(1) of the Charter involves a synthesis of these various articulations. Following upon the analysis in Andrews, supra, and the two-step framework set out in Egan, supra, and Miron, supra, among other cases, a court that is called upon to determine a discrimination claim under s. 15(1) should make the following three broad inquiries. First does the impugned law (a) draw a formal distinction between the claimant and others on the basis of one or more personal characteristics, or (b) fail to take into account the claimant's already disadvantaged position within Canadian society resulting in substantively differential treatment between the claimant and others on the basis of one or more personal characteristics? If so, there is differential treatment for the purpose of s. 15(1). Second, was the claimant subject to differential treatment on the basis of one or more of the enumerated and analogous grounds? And third, does the differential treatment discriminate in a substantive sense, bringing into play the purpose of s. 15(1) of the Charter in remedying such ills as prejudice, stereotyping, and historical disadvantage? The second and third inquiries are concerned with whether the differential treatment constitutes discrimination in the substantive sense intended by s. 15(1).

Law v. Canada (Minister of Employment and Immigration), supra, at para. 39, Appellant's Book of Authorities, Volume I, Tab 6.

The Context

22. This Court has made it clear that s. 15(1) claims must be evaluated having regard to the social, political and legal context within which they arise. The claim in this case must be considered in the light of the reality of systemic discrimination in compensation against women.

R. v. Turpin, supra at 34, Appellant's Book of Authorities, Volume I, Tab 5.

Lovelace v. Ontario, [2000] 1 S.C.R. 950, [2000] S.C.J. No. 36 at para. 55, Appellant's Book of Authorities, Volume I, Tab. 7.

23. There is a recognized consensus that a discriminatory wage gap has existed between men's and women's wages. Men and women do different work, but men's work is better paid notwithstanding that methods designed to measure the value of work on an objective basis do not support better pay for comparable men's work. Even accounting for all other relevant factors, a significant proportion of the wage gap is attributable to systemic sex discrimination in compensation. As stated by Justice Abella in the Royal Commission Report on Equality in Employment: "the existence of a gap between the earnings of men and women is one of the few facts not in dispute in the equality debate". This was acknowledged by the Government by agreeing to implement pay equity.

Report of the Royal Commission on Equality in Employment by Judge Rosalie Silberman Abella ("Abella Report"), Ottawa: Ministry of Supply and Services, 1984, at 232, Appellant's Book of Authorities, Volume I, Tab 8.

Canada's International Obligations

24. Canada's international obligations, in particular the Beijing Declaration, support the submission that governments have a positive obligation to restrict the impact of legislative measures cutting back on equality protections for disadvantaged groups before enacting them. This Court has recognized that Canada's international human rights obligations are relevant and persuasive sources for Charter interpretation. The Court has also confirmed that "the Charter should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified."

Slaight Communications Inc. v. Davidson, [1989], 1 S.C.R. (4th) 416 (S.C.C.) at 1056, per Dickson C.J.C., Appellant's Book of Authorities, Volume I, Tab 9.

25. Canada has significant international human rights obligations in relation to remedying sex-based discrimination in compensation which are relevant to the interpretation of s. 15(1) of this appeal. The Appellant adopts and relies upon the guarantees of equal pay for work of equal value enshrined in international human rights documents. In particular, the Court is referred to the following international instruments to which Canada is a signatory:

> **Universal Declaration of Human Rights, signed 10 December 1948, G.A. Res. 217 A (III), U.N. Doc. A/810, at 71 (1948), Article 23 (2), Appellant's Book of Authorities, Volume I, Tab 10.**
>
> **ILO, Convention concerning Equal Remuneration for Men and Women Workers for Work of Equal Value (Convention 100), adopted by General Conference of the ILO 29 June 1951; in force internationally 23 May 1953; ratified by Canada 16 November 1972; in force in Canada 16 November 1972, Appellant's Book of Authorities, Tab 11.**
>
> **ILO, Recommendation concerning Equal Remunerations for Men and Women Workers for Work of Equal Value (Recommendation No. 90) (1951), Appellant's Book of Authorities, Volume I, Tab 12.**
>
> **International Covenant on Economic, Social and Cultural Rights, (1976) 993 U.N.T.S. 3, Article 7, Appellant's Book of Authorities, Volume I, Tab 13.**
>
> **Convention on the Elimination of All Forms of Discrimination Against Women, Official Records of the General Assembly of the United Nations, Thirty-Fourth Session, (1979) Supplement No. 46 (A/34/46), p. 193, Article 1 (1) (d), Appellant's Book of Authorities, Volume I, Tab 14.**
>
> **United Nations, Report of the Fourth World Conference on Women, General A/Conf. 177/20 (1995), Article 178 (1) (k) and (l) ["Beijing Declaration"], Appellant's Book of Authorities, Volume I, Tab 15.**

26. In addition to its commitment to strengthening equal pay mechanisms, the Beijing Declaration declares that governments have an obligation to study the gender impact of restructuring and other economic initiatives before taking steps which may have a negative impact on women's equality.

> **Beijing Declaration, supra at Article 58 (b), Appellant's Book of Authorities, Volume I, Tab 15.**

27. International standards with respect to pay equity, to which Canada has always been fully committed, have become increasingly demanding over time. Current international standards support broadening and strengthening pay equity legislation, not weakening it and reducing its scope.

Breach of Section 15(1)

28. Section 9(3) of the Act attracts particularly close scrutiny under s. 15(1) because:

a. the impugned governmental action is legislation which amends the collective agreement already agreed to by Government, so as to confiscate the benefit and protection of the agreement from an identifiable group; and

b. the objective of the Pay Equity Agreement and Appendix H of the Collective Agreement is to redress systemic discrimination of female employees and to promote equality.

29. The Pay Equity Agreement was intended to provide a remedy for the systemic problem of discrimination. Systemic discrimination is a problem which becomes entrenched over an extended time. It results when established practices and attitudes which infuse a system, such as the labour market, prejudicially affect or limit certain groups in a disproportionate way. This discrimination is not a product of individual or isolated acts and motivations. With respect to pay equity, the Federal Court of Appeal, citing the Canadian Human Rights Commission, has said: "[i]t is arguable, indeed, that the type of discrimination which pay equity is designed to counteract is always systemic."

PSAC v. Staff of the Non-Public Funds, [1996] F.C.J. No. 842 (F.C.A.) at paras. 12-16, Appellant's Book of Authorities, Volume I, Tab 16.

Abella Report, supra at 1, 2-3, 8-10, Appellant's Book of Authorities, Volume I, Tab 8.

30. In the case on appeal, the wage discrimination which was remedied by the Pay Equity Agreement was created by the Government who as the employer was responsible for the payment

of discriminatory wages.

31. The evidence before the Arbitration Board demonstrated that pay equity had been a live issue since the 1960's.

> The pay equity issue arose because different rates of pay have prevailed for women since the 1960s. Despite an independent review of Domestic and Utility Workers at the Waterford Hospital by a arbitrator in 1986 resulting in an award against government for discriminating against women, such discrimination persisted in the Health Care sector, as it did against an estimated 80% of health care workers across Canada at the time.
>
> After the arbitration award at the Waterford Hospital, NAPE began to negotiate pay equity with Treasury Board. In 1988 the Union insisted that there would be no collective agreement without pay equity. Government said that it would appoint a joint committee to make recommendations on pay equity, but the Union refused saying that the matter had to be negotiated. Under threat of a strike, the Premier announced that government would negotiate pay equity for the whole public sector and that its effective date would be April 1, 1988. Five unions agreed to negotiate with Mr. Curtis as their chief spokesperson. The intent was to resolve the various pay equity issues in the Health Care sector and Newfoundland Hydro and then incorporate pay equity into the other bargaining units' collective agreements.
>
> **Arbitration Award, Appellant's Record, Vol. I, p. 30 (Summarizing the union's evidence).**

32. On June 24, 1988 NAPE and the Government signed the Pay Equity Agreement which set out a process for the determination and implementation of pay equity in the health care sector, in Crown corporations or other government agencies, and in general government sector bargaining units. The Agreement provided that the first pay equity adjustment date would be April 1, 1988 and set out time frames for the implementation of pay equity. Any dispute resolution was to be by arbitration. The purpose of the Pay Equity Agreement was stipulated as follows:

> PURPOSE
>
> 1.1 To achieve pay equity by redressing systemic gender discrimination in

> compensation for work performed by employees in female dominated classes within the bargaining units represented by AAHP, IBEW, CUPE, NAPE and NLNU, and whose members are employees covered by The Public Service (Collective Bargaining) Act, 1973. (emphasis added)

Pay Equity Agreement, Appellant's Record, Vol. IV, pp. 586-597.

33. The Pay Equity Agreement was included as an appendix in the relevant collective agreements, (as required by Article 4.1). Thus, in the NAPE Hospital Support Staff collective agreement executed on November 14, 1990, the Pay Equity Agreement was attached as Schedule H and Article 24.11 was added to the collective agreement.

> 24.11 Pay Equity
>
> The parties agree to implement the Pay Equity Agreement as outlined in Schedule "H".

Collective Agreement, Appellant's Record, Vol. IV, pp. 580 and 585.

34. Pursuant to the Pay Equity Agreement, a Pay Equity Steering Committee was established whose task was to determine the amount of the pay equity adjustments. The parties did not come to agreement on the specific quantum of the adjustments in the classifications affected until March 20, 1991. As a result, there were no payouts for the three years from 1988 to 1991, although required by the terms of the Pay Equity Agreement.

Arbitration Award, Appellant's Record, Vol. I, p. 72.

35. As held by the Arbitration Award:

> It is clear and indeed it does not appear to be disputed by the parties that the Pay Equity Agreement covering employees in the health care sector required pay equity adjustments to commence effective April 1, 1988. Pursuant to that agreement, the amount of approximately $12.2 million was (but for the intervention of the relevant legislation) owing for the 1988-91 period (see GM#1). The President of Treasury

> Board puts this amount at approximately $24 million (see DC#8). In my view, the failure of the government to pay the required amount during the time period under the Pay Equity Agreement constituted a violation of the collective agreement for which the union would be entitled to a remedy. . . .
>
> The evidence of Mr. David Curtis was that the calculations by Deloitte and Touche were completed by March 20, 1991. This being so, the Employer is precluded from now taking the position that no discrimination has been established. As of March 20, 1991 the full amount required to achieve pay equity was by virtue of Article 4.01 of the collective agreement payable to all effected employees, subject to s.9 of the *Public Sector Restraint Act*.
>
> **Arbitration Award, Appellant's Record, Vol. I, pp. 75-76.**

36. The Pay Equity Agreement recognizes that a wage gap existed between the earnings of men and women in the relevant sectors of the public service. In respect of the health care sector, the amount of the wage discrepancy had been determined by March 20, 1991 and, as held by the Arbitration Award, discrimination had been established as at that date. This finding was upheld by Mercer J. and by the Court of Appeal.

37. The effect of s. 9(1) and (2) of the Act was to void the provisions in the Pay Equity Agreement which provided that the agreement would be implemented retroactively. The effect of s. 9(3) was that the first pay equity adjustment date in the Pay Equity Agreement was to be the date "on which the pay equity wage adjustments is agreed upon". It is clear from these provisions that the retroactive pay equity adjustments from April 1, 1988, which were finally calculated on March 20, 1991 and became due on April 1, 1991, were declared void and confiscated by virtue of the legislation. This was the conclusion reached in the Arbitration Award and confirmed by both courts below:

> In the result, I am satisfied that the language of s. 9 is clear and unambiguous and had the effect of extinguishing the obligations on government in the original Schedule "H" to provide pay equity adjustments for the period April 1, 1988 to March 31, 1991.
>
> **Arbitration Award, Appellant's Record, Vol. I, p. 84.**
>
> **Reasons of Mercer J., Appellant's Record, Vol. I, p. 188, para. 130.**

Reasons of the Court of Appeal, Appellant's Record, Vol. II, p. 407, para. 575.

The Law Test

38. The effect of s. 9 of the Public Sector Restraint Act was to cancel the retroactive pay equity adjustments in favour of female employees in the health care sector of the public service for reasons of fiscal restraint. This legislative action clearly satisfies steps (1) and (2) of the Law tests. The Pay Equity Agreement was entered into to remedy systemic discrimination against female employees and the required wage discrepancy was quantified by the process mandated by the Pay Equity Agreement. The Agreement was cancelled by the legislature insofar as retroactive payments were required. This law adversely impacted female employees in the public service. There was differential treatment in respect of female employees in comparison with male employees.

39. Furthermore, this was discrimination in the substantive sense as defined in Law, since the condition to be remedied was identified by both Government and NAPE in the Pay Equity Agreement as "systemic gender discrimination in compensation for work performed by employees in female dominated classes".

Pay Equity Agreement, Appellant's Record, Vol. IV, p. 586.

40. The substantive effects of s. 9(3) on women's equality rights can be summarized as follows:

a. It maintains and perpetuates systemic wage inequality between women and men;

b. It mandates increased inequality among women, in that some women will receive higher, equality-adjusted wages because they work in workplaces where the direct employer is not government, such as contractors who work in hospitals;

c. It repudiates recognition by the state of the undervaluation of work done by women,

it identifies pay inequity for women as acceptable and it repudiates state responsibility for redressing systemic discrimination for women.

41. In ruling that a 4% cap on pay equity payments was discriminatory, the Manitoba Court of Queen's Bench in Bethesda Hospital held that the extent of the problem of discrimination was defined and quantified under the Act but "the traditionally disadvantaged group was limited in its right to equal treatment." The Court ruled that the section in the Act which imposed the cap:

> . . . is patently discriminatory in that it legislatively sanctions the continued payment by the employer to persons performing "women's work" of salaries that are less than equivalent [to men's] . . . I am totally satisfied that the section on its face permits continued discrimination against persons performing women's work, who, by definition, are for the most part women. (emphasis added)

Manitoba Council of Health Care Unions v. Bethesda Hospital, [1992], CarswellMan93, at para. 30, ["Bethesda Hospital"], Appellant's Book of Authorities, Volume I, Tab 17.

42. As in Bethesda Hospital, an obvious and immediate effect of s. 9(3) is that workers in predominantly female job classes continued to receive wages which were lower than wages received by men doing work of similar value.

43. By eliminating the employer's obligation to rectify identified discrimination in predominantly female job classes, and by repudiating the legal methods to enforce and maintain negotiated pay equity plans, the legislation legitimizes and condones the practice of paying women who do "women's work" less than men who do work of equal value. Section 9(3), then, directly undermines the equality of women who do "women's work" by indicating that their work need not be compensated in a manner which reflects its actual value to society, contrary to s. 15(1) of the Charter.

Andrews v. Law Society of British Columbia, supra at p. 172, Appellant's Book of Authorities, Volume I, Tab 2.

Bethesda Hospital, supra at para. 30, Appellant's Book of Authorities, Volume I, Tab 17.

44. In assessing the prejudicial effect of s. 9(3), it is necessary to remember that the protection and benefit conferred by the Pay Equity Agreement is not confined to tangible economic benefits. In addition, the Agreement confers protection and benefit by providing governmental recognition to the equality entitlements of disadvantaged groups.

> **Egan v. Canada, [1995] 2 S.C.R. 513, [1995] S.C.J. No. 42, per Cory J., at para. 161, Appellant's Book of Authorities, Volume II, Tab 18.**
>
> **M. v. H., [1999] 2 S.C.R. 3; [1999] S.C.J. No. 23, p. 621, para. 73, Appellant's Book of Authorities, Volume II, Tab 19.**

45. One very real benefit conferred by the Pay Equity Agreement is recognition by Government that women's work has been improperly and unjustly undervalued. The very premise of the Agreement is that women's work is important to society and must be compensated according to its value. This public recognition is particularly important in the context of our present society in which a person's individual and public esteem and value is closely tied to his or her work.

46. On a number of occasions, this Court has stated that work is one of the most important means by which individuals secure dignity and self-respect in our society.

> Work is one of the most fundamental aspects in a person's life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person's employment is an essential component of his or her sense of identity, self-worth and emotional well-being. Accordingly, the conditions in which a person works are highly significant in shaping the whole compendium of psychological, emotional and physical elements of a person's dignity and self-respect. In exploring the personal meaning of employment, Professor Beatty, in his article, "Labour is not a Commodity" in Reiter and Swan (eds.), Studies in Contract Law (Toronto, Butterworths, 1980), has described it as follows, at p. 324:
>
> As a vehicle which admits a person to the status of a contributing, productive, member of society, employment is seen as providing recognition of the individual's being engaged in something worthwhile. It gives the individual a sense of significance. By realizing our capabilities and contributing in ways society determines to be useful, employment comes to represent the means by which most

members of our community can lay claim to an equal right of respect and of concern from others. It is this institution through which most of us secure much of our self-respect and self-esteem.

Reference re Public Service Employees Act (Alberta), [1987] 1 S.C.R. 313 at p. 368, Appellant's Book of Authorities, Volume II, Tab. 20.

47. By denying to employees in female dominated job classes full compensation for identified discrimination, s. 9(3) reinforces the undervaluation of women's work. It thereby reflects, reinforces and perpetuates the recognized stereotypes and assumptions about the value of women's work which have been the historical cause of systemic discrimination in compensation against women. In this respect, s. 9(3) perpetuates the precise form of injustice which both the Pay Equity Agreement and s. 15(1) are aimed at preventing.

48. Once the Government enters into a collective agreement guaranteeing benefits, it must make the benefit and protection of that agreement available without discrimination. Regardless of whether the Government had any obligation to negotiate pay equity, when it does it must do so without discrimination. When the Government has entered into a collective agreement, it may not legislatively annul the collective agreement in a manner which removes equal protection and benefit of the law. The collective agreement specifically affirms, in Article 4.01, Government's commitment to establish wage rates which are non-discriminatory.

Collective Agreement, Appellant's Record, Vol. IV, p. 575, Art. 4.01.

Egan v. Canada, supra, para. 166, per Cory J., Appellant's Book of Authorities, Volume II, Tab 18.

Brooks v. Canada Safeway Ltd., supra, para. 30, Appellant's Book of Authorities, Volume II, Tab 21.

Service Employees' International Union, Local 204, et al. v. Her Majesty the Queen in Right of Ontario 1997 CarswellOnt 3220 (Ont. Ct. Gen. Div.), para. 107, Appellant's Book of Authorities, Volume II, Tab 22.

Haig and Birch v. Canada 1992 CarswellOnt 1717 (Ont.C.A.) at p. 7, Appellant's Book of Authorities, Volume II, Tab 23.

Bethesda Hospital, supra, pp. 5-6, Appellant's Book of Authorities, Volume II, Tab 17.

49. Furthermore, the preponderance of judicial decisions go further and hold that the purposes of s. 15(1) can embrace a positive duty to act. In Eldridge and Auton, governments have been required to expand services, because the failure to do so "fails to take into account the already disadvantaged position of the claimants within Canadian society." In Cameron, the Nova Scotia Court of Appeal held that the failure to fund in vitro fertilization for infertile couples violates the equality rights of the claimants. While courts have to date not found in s. 15(1) a positive obligation to enact legislation to remedy the social evil of inequality, they have made it clear that in enacting legislation the legislature has a positive obligation to ensure that such legislation does not adversely affect disadvantaged groups:

> In other words, to promote the objective of the more equal society, s. 15(1) acts as a bar to the executive enacting provisions without taking into account their possible impact on already disadvantaged classes of persons.

Eldridge v. British Columbia (Attorney General) [1997], 3 S.C.R. 624, [1997] S.C.J. No. 86 at paras. 76-80, Appellant's Book of Authorities, Volume II, Tab 25.

> Although s. 15 of the Charter does not impose upon governments the obligation to take positive action to remedy the symptoms of systemic inequality, it does require that the government not be the source of further inequality.

Thibaudeau v. Canada, supra at para. 38, per L'Heureux-Dubé J., (dissenting but not with respect to this comment), Appellant's Book of Authorities, Volume I, Tab 4.

Auton (Guardian ad litem of) v. British Columbia (Attorney General), [2002] B.C.J. 2258 October 9, 2002, Appellant's Book of Authorities, Volume II, Tab 26.

Cameron v. Attorney General (Nova Scotia),[1999] N.S.J. No. 297 (N.S.C.A.), Appellant's Book of Authorities, Volume II, Tab 22.

Rodriguez v. British Columbia (Attorney-General), [1993] 3 S.C.R. 519 at 549 per Lamer C.J.C., (dissenting but not with respect to this comment), Appellant's Book of

Authorities, Tab 14.

Egan v. Canada, supra, para. 166, Appellant's Book of Authorities, Volume II, Tab 18.

50. This Court has repeatedly stated that the purpose of s. 15(1) of the Charter is "not only to prevent discrimination by the attribution of stereotypical characteristics to individuals, but also to ameliorate the position of groups within Canadian society who have suffered disadvantage by exclusion from mainstream society . . ." The purpose of ameliorating the condition of disadvantaged persons has been variously stated by this Court as "the promotion of human dignity" and "the promotion of a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration."

Eaton v. Brant County Board of Education, [1997] 1 S.C.R. 241, [1996] S.C.J. No. 98, per Sopinka J. at 272, para. 66, Appellant's Book of Authorities, Volume II, Tab 29.

Law v. Canada (Minister of Employment and Immigration, supra, at para. 88, Appellant's Book of Authorities, Volume II, Tab 6.

51. Where an agreement is cancelled by legislative action, there has been government action not just once but twice: first, when the Pay Equity Agreement was entered into and second, when the agreement was amended by legislation. Where the Pay Equity Agreement exists, it requires an active step by a government to change it. It is the taking of the active step of enacting confiscatory legislation which provides the basis for reviewing the Government's action under the Charter.

52. In Haig and Birch, the Ontario Court of Appeal confirmed that the government's failure to include sexual orientation as a prohibited ground of discrimination under the Canadian Human Rights Act was reviewable under the Charter and was in violation of s. 15(1). The same result would have been reached had sexual orientation been included as a prohibited ground in collective agreements with federal public servants and then had been reversed by a subsequent government.

Haig and Birch v. The Queen in right of Canada, supra, para. 15, Appellant's Book of Authorities, Volume II, Tab 23.

53. To summarize, having entered into the Pay Equity Agreement and Appendix H of the collective agreement to provide women with an effective remedy for systemic sex-based discrimination in compensation, the protection and benefit of that agreement must be available without discrimination. The legislature cannot amend the Pay Equity Agreement in a manner which effectively denies equal benefit and protection of the Agreement to female employees.

QUESTION #2: SECTION 1 ANALYSIS

54. Mercer J. and Court of Appeal erred in holding that the legislation was saved by s. 1 and, in particular, in finding that the Government had a pressing and substantial objective, that the legislation was not the least drastic means and that reasonable legislative effort was made to minimize the infringement of equality rights.

55. This Court has repeatedly stated that in order to establish that a limit on constitutional rights and freedoms is reasonable and demonstrably justified in a free and democratic society, two criteria must be satisfied. First, the objective of the impugned legislation must be of sufficient importance to warrant overriding a constitutionally protected right or freedom. Second, the means chosen to implement the objective must be proportional to the objective: the means must be "rationally connected" to the objective, it must impair the constitutional right "as little as possible," and there must be a proportionality between the effects of the impugned legislation and the legislative objective.

R. v. Oakes, [1986] 1 S.C.R. 103, 1986, at paras. 69-71, per Dickson C.J.C., Appellant's Book of Authorities, Volume II, Tab 30.

56. The onus of justifying a limitation on a Charter right rests on the party seeking to have that limitation upheld. Accordingly, the Government bears the onus of proving, by cogent and persuasive

evidence, that each part of the s. 1 test is satisfied.

R. v. Oakes, supra, pp. 136-137, Appellant's Book of Authorities, Volume II, Tab 30.

Vriend v. Alberta, [1998] 1 S.C.R. 493, [1998] S.C.J. No. 29, para. 108, Appellant's Book of Authorities, Volume II, Tab 31.

57. The legislature and the courts have independent obligations to ensure that legislation conforms with Charter principles. While a court must weigh the legislature's objectives, constitutionally protected rights must be given priority. This Court has warned that:

> [C]are must be taken not to extend the notion of deference too far. Deference must not be carried to the point of relieving the government of the burden which the *Charter* places upon it of demonstrating that the limits it has imposed on guaranteed rights are reasonable and justifiable. Parliament has its role: to choose the appropriate response to social problems within the limiting framework of the constitution. But the courts also have a role: to determine, objectively and impartially, whether Parliament's choice falls within the limiting framework of the constitution. The courts are no more permitted to abdicate their responsibility than is Parliament. **To carry judicial deference to the point of accepting Parliament's view simply on the basis that the problem is serious and the solution difficult, would be to diminish the role of the courts in the constitutional process and to weaken the structure of rights upon which our constitution and our nation is founded. [emphasis added]**

RJR-MacDonald Inc. v. Canada (Attorney-General), [1995] 3 S.C.R. 199, [1995] S.C.J. No. 68, at para. 136, per McLachlin J., Appellant's Book of Authorities, Volume III, Tab 32.

M. v. H., supra, per Iacobucci J. at para. 78, Appellant's Book of Authorities, Volume III, Tab 19.

Vriend v. Alberta, supra, at 142, Appellant's Book of Authorities, Volume III, Tab 31.

58. As McLachlin C.J.C. stated in R.J.R. McDonald:

> The process is not one of mere intuition, nor is it one of deference to Parliament's choice. It is a process of demonstration. This reinforces the notion inherent in the word "reasonable" of rational inference from evidence or established truths.

R.J.R. McDonald v. Canada (Attorney-General), supra, para. 128, Appellant's Book of Authorities, Volume III, Tab 32.

59. The limits on judicial deference were delineated in Vriend and in M. v. H. In Vriend, Cory J. stated that: "The notion of judicial deference to legislative choices should not . . . be used to completely immunize certain kinds of legislative decisions from Charter scrutiny." Again, in M v. H. Iacobucci J. stated:

> Under s. 1, the burden is on the legislature to prove that the infringement of a right is justified. In attempting to discharge this burden, the legislature will have to provide the court with evidence and arguments to support its general claim of justification. Sometimes this will involve demonstrating why the legislature had to make certain policy choices and why it considered these choices to be reasonable in the circumstances . . .

Vriend v. Alberta, supra, per Cory J., at para. 54, Appellant's Book of Authorities, Volume III, Tab 31.

M. v. H., supra, per Iacobucci J., para. 79, Appellant's Book of Authorities, Volume II, Tab 19.

60. In applying s. 1, the Court must determine whether the values which the legislature seeks to promote through the impugned statute are of sufficient importance to justify overriding the constitutional values enshrined in the Charter. This Court has emphasized that the value of equality is among the most fundamental values in a free and democratic society and that in weighing legislative objectives against limitations on rights, some objectives have more value, and therefore more weight, than others. Legislation which promotes equality, and legislation which promotes values which have the status of international human rights, will be given enhanced value, a value which may justify more significant incursions into other protected constitutional rights.

R. v. Oakes, supra at p. 136, Appellant's Book of Authorities, Volume II, Tab 30.

Slaight Communications Inc. v. Davidson, supra, at p. 1056, Appellant's Book of Authorities, Volume I, Tab 9.

Adler v. The Queen in Right of Ontario, [1996] 3 S.C.R. 609, [1996] S.C.J. No. 110, per

L'Heureux-Dubé J., (dissenting), paras. 91, 92 and 95, Appellant's Book of Authorities, Volume III, Tab 33.

61. As a corollary to the above principle, legislation which cuts back on the protection and benefit of a government agreement, such as the Pay Equity Agreement, which has as its object the redress of systemic sex discrimination, should be subjected to a particularly high standard of justification under s. 1.

62. Given the nature of this case, the contextual analysis requires that s. 1 must be applied in its full rigour, under principles applicable to cases in which the state is the "singular antagonist." The real issue here is not whether the government correctly determined that overall public expenditures should be reduced, but whether the re-direction of this particular expenditure constitutes a reasonable limit demonstrably justified in a free and democratic society on the equality rights of those affected by s. 9. Nor is this a case where the state is mediating competing claims and resolving issues of complex social policy.

RJR MacDonald v. Canada, supra, at paras. 68-69, per LaForest J., at paras. 135, 173-174, per McLachlin J., Appellant's Book of Authorities, Volume III, Tab 32.

Legislative Objective

63. The Court of Appeal, Mercer J. and the Arbitration Board found that the Government had satisfied the first part of the s. 1 test, by adopting the objective of reducing government expenditures. This is inconsistent with this Court's definition in M v. H. of a substantial and pressing objective as one which is designed to promote other values and principles of a free and democratic society. It is important to assess the Government's objective before embarking on the second part of the s. 1 test. The objective of s. 9 is clearly to reduce government spending. This is not an objective "designed to promote other values and principles of a free and democratic society." As Gonthier J. stated in Nova Scotia (Workers' Compensation Board) v. Martin:

> Budgetary considerations in and of themselves cannot normally be invoked as a free-

standing pressing and substantial objective for the purposes of s.1 of the Charter.

Reference re Remuneration of Judges to the Provincial Court (Manitoba), [1997] 3 S.C.R. 3, [1997] S.C.J. No. 75 at para. 281, Appellant's Book of Authorities, Volume III, Tab 34.

Nova Scotia (Workers' Compensation Board) v. Martin 2003 S.C.C. 54, [2003] S.C.J. No. 54, para. 109, Appellant's Book of Authorities, Volume III, Tab 35.

64. It is submitted that the budgetary considerations advanced by the Government as the objective of s.9 do not meet the standard of a "substantial and pressing" legislative objective.

Proportionality

65. It is submitted that Mercer J. and the Court of Appeal erred in holding that s. 9 of the Public Sector Restraint Act did not have a disproportionately severe effect on the persons to whom it applies.

66. With respect to the issue of proportionality, the Court of Appeal held:

> [494] . . . It is not too great a quantum leap, however, to suggest, just as had the deficitary burden some sixty years earlier, the deficits which preceding para. 414 notes the Minister of Finance forecasted in 1991, if unaddressed, would have had to have a very serious deleterious effect upon the Province's ability to provide basic health, educational and social services, as well as precipitating potential deep general public service salary and pension cuts. It is impossible to contemplate the Province being saddled with deficitary burdens to the tune of $400 to $600 million annually without it being thrown into the severest of economic crisis, requiring deepening cuts into those areas which manifestly secure those "*other* values and principles of a free and democratic society", of which the quote from **M v. H** in preceding para. 379 speaks. On the basis of the reasoning already developed in paras. 379 to 420, whilst giving fullest expression to the nature and importance of the individual equality rights affected by the deferral of pay equity entitlements in this case, the enjoyment of them would, in the words of **Oakes** at p. 136, nonetheless "be inimical to the realization of collective goals of fundamental importance", in light of the "horrendous" soaring deficits, and the clear threat they posed to those "*other* values and principles of a free and democratic society".

> [495] For the foregoing reasons, then, this judgement rejects the argument accentuating the nature and importance of the affected pay equity equality rights as a basis for holding the deleterious effects on the limiting restraint measure render the consequential Charter infringement unjustifiable under s. 1. With due respect, the submission smacks of absolutism, which is not the standard of enjoyment of fundamental rights and freedoms which the Charter imported into the Canadian Constitution. It was open to the trial judge, without in any way denigrating the nature and importance of the infringed equality rights, to have yet concluded the overlooked "extended budgetary explanation given by the Minister", which outlined the imperative of containing and reducing fiscal deficits seriously threatening the Province's economic security and well-being, established the severity of the deleterious effects of the measure at bar that postponed enjoyment of the promised pay equity, to be justified by the urgent purposes of containing and reducing looming deficits which the measure was intended to serve.

Reasons of the Court of Appeal, Appellant's Record, Vol. II, pp. 376-7.

67. The Court of Appeal also upheld Mercer J.'s finding that the deleterious effects of s. 9 of the Act did not outweigh the salutary impact of its objective. In relation to this finding the Court of Appeal referred to and relied on The Amulree Report, the Report of the Royal Commission established on February 17, 1933 to examine Newfoundland's future in light of its then subsisting financial situation. This report was not in evidence and had not been referred to by counsel in argument before the Court of Appeal.

Reasons of the Court of Appeal, Appellant's Record, Vol. II, pp. 374-376, paras. 490-494.

Rational Connection

68. The Appellant concedes that the Government has satisfied the rational connection test.

Minimal Impairment

69. Although the Government may face difficult choices in the allocation of scarce resources,

it must choose from among the range of constitutionally permissible choices. To meet this aspect of the s. 1 test, the Government must demonstrate that it could not have met its valid objectives in a way less intrusive on constitutionally protected equality rights. Furthermore, it must demonstrate that it gave consideration to such alternatives. If the Government chooses not to tender evidence related to its consideration of other options, it fails to discharge its burden of proof. As Dickson C.J.C. stated in Oakes: "A court will also need to know what alternative measures for implementing the objective were available to the legislators when they made their decision".

RJR-MacDonald v. Canada, supra paras. 128, 136, 137, 160, 165, 167, per Iacobucci J., Appellant's Book of Authorities, Volume III, Tab 32.

Oakes, supra, at p. 138, Appellant's Book of Authorities, Volume II, Tab 30.

70. The Government's evidence on the s. 1 argument is summarized by the Board of Arbitration in its award and is also found in the evidence of Gerald Maloney and Robert Smart. Mr. Maloney testified as to the cost of implementing the Pay Equity Agreement had the Government not enacted the Public Sector Restraint Act. He initially testified that to pay the full amount including retroactivity to April 1988 would cost $145,000,000, which figure included the employees covered by the grievances and other bargaining units not covered by the arbitration: Association of Allied Health Professionals, Newfoundland and Labrador Nurses Union and the International Brotherhood of Electrical Workers. As Mr. Maloney's evidence continued, it became clear that his figures were completely unreliable, for example, they included pay equity on overtime and used employee numbers from 1993 - 1994 rather than 1991, both of which are contrary to clause 2.3 of the Pay Equity Agreement, resulting in an inflation of the cost. Counsel for the Government implicitly conceded the weakness of his testimony when she stated:

> I don't think that . . . well, in the first place, I don't think it will be that significant a difference but the point is to show the large numbers. The points make absolutely no difference, you know. If it's two million or even three million, it makes no difference. These are large amounts we're talking about. When Mr. Smart gives his evidence he will be bringing budget documents to show you in the whole fiscal picture and the importance of these documents was to give you an idea of what we would have projected the costs would have been. If we, if we had to do it retroactively according

to the scheme and to show you what has already been paid out, and the point was, I mean if it's twenty-five or even thirty-five, there's not a huge difference. I mean it's a lot of money is basically the point of the exercise. Now if there was a huge difference in the, what we have given as opposed to what it would really be then I would say it might have a difference but . . .

Mr. Sack: Well let's take your last GM number five, where you say $145 million overall is on union's assumptions we're viewing, does it make a difference to your argument if it's not $145 million but half that?

Ms. Welch Q.C.: Yeah, it's still a huge amount of money. That's the bottom line and that's the point.

Appellant's Record, Vol. I, pp. 124 to 136, Vol. II, Tabs 14, 15, 16 and 17, Vol. III, p. 434, ll. 47 -72.

71. The Government's evidence did not establish the cost of full implementation of the Pay Equity Agreement. Further, there was no evidence as to whether Government was provided with any costing at the time it was considering enacting the Public Sector Restraint Act or whether any such costing was more reliable than the figures presented at the arbitration.

72. Robert Smart was called as a witness to establish the fiscal situation of the province from 1989 to the date of the arbitration. After an objection on the grounds of lack of expertise, the question was rephrased and Mr. Smart was asked what effect the budget figures would "have had in decisions that would be made with respect to the areas that you have supervisory capacity over?" Mr. Smart testified that the cost of step progression for Government employees would have been approximately half a percent of payroll, which would have amounted to half the amount saved by the provisions of s. 9 of the Public Sector Restraint Act.

Appellant's Record, Vol. IV, p. 449, II. 79 - 83, p. 450, Il. 54 - 57; p. 458, ll. 45 - 56.

73. Mr. Smart's testimony made it clear that the Government did not give consideration to whether delaying the implementation of the Pay Equity Agreement would infringe equality rights. Mr. Smart was not able to testify as to what options were considered by Government in 1991 because

at the time he was not working in Treasury Board. Mr. Smart was not able to testify to any of the issues relevant to the s. 1 test. The Government focused on whether the money had already been paid out and would have to be clawed back:

> No, I'm saying that the general service, the air services, the marine services, a whole raft of other collective agreements . . . the management people in the Government and so on and so forth . . . were all in the period where there wasn't going to be a wage increase but proceeding with the pay equity adjustment, putting in that for the hospital support staff, would have given that small group a fairly big increase, and perhaps, I mean to go a bit further with this, it not only created in our minds a question of equity . . . how can we rationalize, even though it is pay equity . . . how can we rationalize really in these times when we don't have the money to give anyone else an increase, can we really rationalize giving this group an increase . . . So it wouldn't just be a question of those people are not going to get an increase while the hospital support staff are. We would have had to grapple with the question of how are we going to claw back some money from those other groups, either through some type of wage concession or ultimately lay offs, in order to finance this big pay equity adjustment for the hospital support staff. I think the merit of the arguments, the proof is in the pudding here.

Appellant's Record, Vol. III, p. 458, ll. 4 - 30, p. 465, ll. 50 - 61; p. 468, ll. 79 - 80; p. 470, ll. 32 - 45; p. 471, ll. 8 - 13.

74. The Arbitration Board found as follows with respect to the minimal impairment test:

> Aside from Mr. Smart's testimony regarding the process of legislation decision-making in 1991 (which cannot be given significant weight because he was not part of the legislative decision-making process at the relevant time) and some background budget material introduced by Mr. Maloney, the Employer offered no evidence that it considered "alternative measures the primary source of information on which we must rely to determine whether there were "alternative measure." or whether "reasonable legislative effort [was made] to minimize the infringement of the Charter right" was Hansard, which was introduced by the Union's witness, Mr. Curtis.
>
> A review of Hansard reveals that government's alternative to postponing pay equity in the Health Care sector and Newfoundland and Labrador Hydro was no different than its alternative to restraining wages. The thinking on each was substantially the same: there was an anticipated wage expense to be avoided and there was an anticipated pay equity lump sum expense to be avoided. Government acted directly to avoid both. The alternative to Bill 16 was said to be 2000 layoffs. The alternative to section 9 was 900 layoffs in the hospital

sector, viz, at p. 363:

. .So what we have done is we have made a decision and the choice was very clear to us: pay the $24 million retroactively or lay off another 900 people. And that is the way we look at it, 900 to 1000 people would take up the $24 million. And the choice - it is that kind of choice obviously. Both are hard choices and as Government we had to make a choice and we made the choice.

Although pay equity began to be implemented on April 1, 1991 with the payment of a single wage adjustment, the President of Treasury Board mentioned no other alternatives that were considered by government to save all or part of the $24 million lump sum expenditure. The sole choice was "pay the $24 million retroactively or lay off another 900 people".

Meanwhile, in questioning what else government could have done, the Leader of the Opposition, the Honourable Leonard Simms, suggested the following measures which might have contributed to offsetting the need to take $24 million from pay equity adjustments as well as from wages: 1) a two week unpaid leave of absence for every public servant; 2) job sharing; 3) early retirement; 4) attrition as a means of job elimination; 4) cut 1% more from travel costs, furnishings, equipment; 5) purchase service budgets; 6) cut information services; 7) cut the $8000 car allowance for Ministers; 8) eliminate the $300,000 to $400,000 cost of a Royal Visit; 9) cut $2.6 million from Exon House renovations; 10) cut $9 million for the extension to Memorial University's Administration building; 11) cut $5 million for a small animal care building; 12) cut $6 or $7 million for the Economic Recovery Commission, and 13) sell Holiday Inns for $20 million.

While I do not necessarily advocate that all or any of these measures should have been chosen by government to minimize the infringement, I merely point out that the Leader of the Opposition proposed numerous alternative options. The President of Treasury Board mentioned only one alternative, i.e., 900 layoffs. On balance, I am satisfied that Hansard indicates that only one alterative to the infringement might have been considered by government. However, as I read *Oakes*, the key point on this subject is what alternative measures were <u>available</u> when the legislators made their decision. More to the point: if other less severe alternatives were available at the time, would consideration of only one alternative, i.e. 900 layoffs, fit the notion of "margin of appreciation" or be construed as a reasonable legislative effort to minimize the infringement of the Charter right?

Mr. Smart, speaking in terms of alternatives considered in 1994 during the process of negotiating an agreement subsequent to the legislated restraint period, indicated that wages were frozen and further reductions in pay equity adjustments were effected, the latter because a large lump sum final adjustment was looming. In his view, the economic circumstances facing the Province in 1995 were very much the same as they were in 1991 . . .

Similarly, Mr. Smart testified that, during the two-year legislated restraint period, regular

step increases and reclassifications continued to be paid. His evidence is that the cost of annual step increases was one half of one percent, in other words, one half of an annual pay equity adjustment. Although the cost of reclassifications was not immediately known, it too could have made a contribution to minimizing the infringement of the protected right. Add to that the contributions potentially associated with sick leave recovery and pension plan contribution reduction and it quickly becomes apparent that there were other less intrusive measures available for government to employ in 1991 in order to minimize the infringement.

The reason that the Courts accord governments a measure of deference and flexibility in choosing between various alternatives is because the Courts usually "cannot easily ascertain with certainty whether the least restrictive means have been chosen". It should be noted that mention of the foregoing alternatives is by no means an attempt to identify with certainty the least drastic infringement or "least restrictive means". However, there is more than sufficient evidence in this case to establish that several other <u>less</u> restrictive means were available to government which would have minimized the infringement. In my view, government should not be accorded a measure of deference or flexibility here because it limited its consideration of alternatives to only one option, i.e., 900 layoffs, a choice which was probably the most severe of any that could have been contemplated at the time. Moreover, it is not really clear that government seriously considered layoffs as an option. Indeed, the reference in Hansard to 900 layoffs could be interpreted as an attempt to describe by way of example what would have been the equivalent cost of the pay equity adjustments involved in terms of jobs. Under the circumstances, it is my view that government did not reasonably attempt to minimize the infringement. Rather, it probably chose the most restrictive means available to achieve its objective.

In the result, I am satisfied that government has not shown that it had a reasonable basis for concluding that it has complied with the principle of minimal impairment in seeking to attain its objective of pay equity cost restraint. As far as the lump sum pay equity expense is concerned, the objective could have been substantially achieved and, therefore, the infringement significantly minimized, through several alternative means which would have spread the effect among all classes of employees without requiring such drastic action as laying off 900 people. In my view, if it became necessary to touch a portion of the protected right after those reasonable measures had been pursued, such action probably would have survived a s.1 analysis.

<u>Appellant's Record</u>, Volume I, pp. 98-103.

75. Mercer J. overturned the Arbitration Award on minimal impairment and held as follows:

The Board, in my opinion, erred in its analysis of the evidence. It focused its attention on one passage from the speech of the Minister of Finance of March 19,

1991 and the Board accordingly concluded:

> "Government should not be accorded a measure of deference...because it limited its consideration of alternatives to only one option, i.e. 900 layoffs...." (Board's decision, p. 101)

My objection is this aspect of the Board's decision is that it overlooks the extended budgetary explanation given by the Minister. The Minister had earlier explained that Government was faced with a 200 million dollar deficit which was threatening to escalate. The limits of Government borrowing were explored and tax increases were decided upon. Expenditure reductions were examined and had to emphasize the salary and compensation component which represented approximately 70% of provincial expenditures, apart from social assistance payments and debt service payments. That is apparent from the evidence of R. Smart, p. 69 and from the budget excerpts which were before the Board and which were obviously known to all members of the legislature. The Minister stated that to achieve the required expenditure reductions. Government considered the general wage freeze and deferral of pay equity adjustment payments to advert the possibility of max layoffs with a consequent drastic effect on Government services. In introducing the legislation the Minister addressed its affect upon the Pay Equity Agreement. In summary, the twenty-four million dollars saved by the deferral of the pay adjustments was part of a larger two hundred million dollar fiscal problem. To address that problem Government had considered various alternatives such as borrowing, tax increases, budget freezes and reductions in Government expenditures.

A second error of the Board was its improper use of the evidence respecting other options available to Government. The Board referred to suggestions made by the Opposition in the legislative debate which included a range of proposals such as:

> "a two week unpaid leave of absence for every public servant; ....(7) cut the $8,000 car allowance for Ministers, (8) eliminate the $300,000-$400,000 cost for a Royal Visit...(10) cut 9 million from (university capital budget)."

The Board also referred to different restraint measures undertaken in 1994 and to the continuance of step increases and reclassifications during the restraint period. The Board concluded:

> "There is more than sufficient evidence in this case to establish that several other less restrictive means were available to government which would have minimized the infringement." Board decision p. 101."

> The Board essentially undertook an independent assessment and determined that there were, in its opinion, preferable options available to Government in 1991 to satisfy its objective. With respect, the evidence ought to have been examined to determine whether the legislature made a reasonable effort to minimize the infringement of the Charter right - Hogg p. 35-31. In that examination an appreciable measure of deference should be accorded the legislature in its decision on fiscal matters.
>
> **Appellant's Record, Volume I, pp. 176-177.**

76. The Court of Appeal upheld Mercer J.'s findings on minimal impairment and rejected the Appellant's argument that the Government did not consider alternate measures which did not violate equality rights.

> The first questions the credentials of one of Government's principal witnesses who testified before the Arbitration Board regarding the seriousness of the fiscal deficit on which Government was attempting to justify the restraint legislation's *Charter* violation. In this submission, NAPE's counsel points to the transcript of that public servant's evidence before the Board which records him to have been attached to the Department of Career Development as Assistant Deputy Minister of Finance and Administration at the time of enactment of the impugned restraint legislation. Not having been directly associated with Treasury Board or the Department of Finance at the time of passage of the restraint legislation, counsel argues that witness's evidence regarding the seriousness of the deficit and the importance of the legislation's objective in curbing it should be discounted. With respect, however, this submission cannot be given sway. The witness in question had spent most of his career in Treasury Board, and, during the first ten years preceding his tenure as Assistant Deputy Minister in the other Department, had been involved in virtually every division in it. Moreover, he had returned to Treasury Board in 1993. There is, no basis to seriously question his competency to provide the evidence to which he attested before the Arbitration Board.
>
> **Appellant's Record, Volume II, pp. 343-344, pp. 362-363.**

77. Mercer J. and the Court of Appeal erred in holding that the Government had satisfied the minimal impairment branch of the proportionality test. The Arbitration Board was correct in holding that the Government failed to adduce evidence that it could not have met its objectives in a way less intrusive on equality rights. The Government chose not to tender evidence related to any

consideration of other options and therefore it failed to discharge its burden of proof.

Proportionality Between Means and Ends

78. Under this branch of the s. 1 test, the question is whether the deleterious effect of s. 9 is disproportionate to the governmental objective. Even if the means are rationally connected to the objectives of the legislature and they minimally impair the Charter right, the degree of prejudice imposed on the Charter right may be too great to be justified in a free and democratic society.

79. The deleterious effects of s. 9 are particularly severe:

a. a group affected is denied the protection and benefit of a contractual remedy for discrimination;

b. discriminatory practices are condoned and entrenched and the very stereotypes and prejudices that are the historical cause of sex-based discrimination in compensation are reinforced; and

c. the equality principles of both the Pay Equity Agreement and the Charter are undermined.

80. Thus, discriminatory practices are condoned and entrenched and the very stereotypes and prejudices that are the historical cause of sex-based discrimination in compensation are reinforced; and the equality principles of the Charter are undermined. Accordingly, the effect of s. 9 is not proportional to its objective and it is not saved by s. 1.

81. The fiscal policies embodied in s. 9 strike an inappropriate balance between the legislature's objectives and equality rights. The Abella Report recognized that the social and economic cost of allowing employers to continue paying discriminatory wages is staggering and unjustifiable:

> The cost of the wage gap to women is staggering. And the sacrifice is not in aid of any demonstrably justifiable social goal. To argue, as some have, that we cannot afford the cost of equal pay to women is to imply that **women somehow have a duty to be paid less until other financial priorities are accommodated. This reasoning is specious and it is based on an unacceptable premise that the acceptance of arbitrary distinctions based on gender is a legitimate basis for imposing negative consequences, particularly when the economy is faltering. [emphasis added]** . . .
>
> The cost of the wage gap to women is staggering. And the sacrifice is not in aid of any demonstrably justifiable social goal. To argue, as some have, that we cannot afford the cost of equal pay to women is to imply that **women somehow have a duty to be paid less until other financial priorities are accommodated. This reasoning is specious and it is based on an unacceptable premise that the acceptance of arbitrary distinctions based on gender is a legitimate basis for imposing negative consequences, particularly when the economy is faltering. [emphasis added]**
>
> **Abella Report, supra, at 234, Appellant's Book of Authorities, Volume I, Tab 8.**

82. In order to meet the s. 1 test, the Government's objective must be not merely legitimate, or even merely "pressing and substantial," it must be so pressing and substantial as to warrant overriding constitutionally protected equality rights. Only the most extreme and compelling financial pressures could sustain a claim that the objective of fiscal savings warrants the overriding of constitutionally protected rights.

> **R v. Oakes, supra, pp. 138-139, Appellant's Book of Authorities, Volume II, Tab 30.**

83. This Court has clearly and repeatedly recognized that "budgetary considerations cannot be used to justify a violation under s. 1." The guarantees of the Charter would be illusory if they could be overridden simply in pursuit of administrative and budgetary convenience. The lack of resources can never be used as a basis for rendering a Charter guarantee meaningless.

> **See also: Adler v. Ontario, supra at para. 112, per L'Heureux-Dube J. (dissenting but not on this issue), Appellant's Book of Authorities, Volume III, Tab 33.**

84. If budgetary considerations are relevant to the s. 1 analysis at all, the Government must demonstrate that the cost implications would be so prohibitive as to be inimical to a collective goal of fundamental importance.

85. The reasoning of O'Leary J. in S.E.I.U. v. Ontario is apposite. He held that the government failed to explain the provisions of the Savings and Restructuring Act, 1996 when it failed to justify why it did not use other methods to address its fiscal problems:

> I point out that there was no attempt by the Appellant to establish that in order to live within the $500 million cap government placed on pay equity spending, the government had to remove the proxy method and throw the full weight of the funding reduction on those working in the proxy sector. It was not explained why the burden could not have been apportioned equitably amongst all workers in the broader public sector who benefitted from the $380 million still paid annually by government towards the cost of wage adjustments in that sector.
>
> **Service Employees' International Union, Local 204, et al. v. Her Majesty The Queen in Right of Ontario, supra, at para. 105, Appellant's Book of Authorities, Volume II, Tab 22.**

86. In the case on appeal the Government has not discharged the onus of proving, by cogent and persuasive evidence, that the violation of equality rights is reasonable and demonstrably justified in a free and democratic society. Furthermore, the group whose s. 15(1) rights were violated by s. 9 was the group most in need of the protection of the Pay Equity Agreement. Very compelling evidence would be required to justify impairing constitutional rights in such circumstances. No such evidence has been adduced.

> **Tétrault-Gadoury v. Canada, supra at p. 44-46, Appellant's Book of Authorities, Volume III, Tab 36.**

87. The Government has not answered the questions posed by Iacobucci J. in M v. H.: why the legislature had to make certain policy choices and why it considered these choices to be reasonable in the circumstances.

M v. H., supra, at para. 79, Appellant's Book of Authorities, Volume II, Tab 19.

88. With regard to those who argue in favour of an incremental approach to pay equity, O'Leary J. stated in S.E.I.U. v. Ontario:

> It must also be noted that the Schedule J amendment cannot be justified as an incremental approach to pay equity. It is not a matter of putting off to another day, when the same can be afforded, the correction of the gender-based systemic wage inequity from which women in the proxy sector undoubtedly suffer. . .

Service Employees' International Union, Local 204, et al. v. Her Majesty the Queen in Right of Ontario, supra, at 302, Appellant's Book of Authorities, Volume II, Tab 22.

89. In M v. H., this Court held:

> As this Court noted in Vriend, supra, government incrementalism, or the notion that government ought to be afforded time to amend discriminatory legislation, is generally an inappropriate justification for Charter violations.

M v. H., supra, at para. 128, Appellant's Book of Authorities, Volume II, Tab 19.

Vriend v. Alberta, supra, at para. 122, Appellant's Book of Authorities, Volume II, Tab 31.

90. To sum up, legislation which fails the "objective" test cannot be justified under s. 1. In the alternative, even if a sufficiently pressing and substantial objective can be identified, s. 9 fails the proportionality test: the means are not proportional to any valid objective.

91. A Pay Equity Agreement which was freely signed by the Government in 1988 was unilaterally curtailed by the Legislature in 1991, thus confiscating payments due to the employees for pay equity adjustments. It violates the equality guarantees of s. 15 to abrogate contractual provisions designed to redress equality violations. Such an infringement cannot be justified by mere assertions of fiscal necessity.

92. A harmful precedent for equality-seekers has been established by the decision of the Court of Appeal. While the equality guarantee is to be forcefully applied in situations which do not implicate state resources, legislation which abrogates contractual provisions designed to remedy equality violations will be approached differently under s. 1.

93. Accordingly, the effect of s. 9 is not proportional to its objective and cannot be saved by s. 1. The Board of Arbitration was correct in holding that s. 9 of the Public Sector Restraint Act is unconstitutional and of no force and effect.

QUESTION #3: THE SEPARATION OF POWERS DOCTRINE

94. The Court of Appeal in its judgement criticized the s. 1 test established by this Court in Oakes and modified the test by adding the requirement of consonance with the doctrine of separation of powers. The Court stated:

> [363] For the foregoing reasons, the **Oakes** proportionality requirements provide potential for incursions by the judiciary into the field of public policy transcending the bounds of judicial sorties into that field which are tolerable under the Separation of Powers Doctrine, and go beyond s. 1's intent in empowering the judiciary to pass on the justification of Charter infringements. Hence, there is a need to revisit those requisites . . .
>
> [372] In following these requisites, and as the fourth and final consideration, the ensuing s.1 analysis will address, at the end of each stage of the appraisal of compliance with the **Oakes** criteria for justifications under s.1, whether the exercise of the judicial power in coming to those findings was in consonance with the Separation of Powers Doctrine. It is submitted that the addition of this added consideration to the s. 1 analysis finds support in Lamer C.J.C.'s affirmation in **Cooper**, already highlighted in preceding paras. 228 and 347, that the Charter should "not distort the deep structure of the Canadian Constitution", amongst which the Separation of Powers Doctrine has been numbered since the federation's inception. Although Lamer C.J.C.'s judgement in that case centered on his appeal to his colleagues to revisit the power of administrative tribunals to declare laws unenforceable under s. 52 of the Constitution Act, his caution against distorting the Doctrine in Charter cases affords support for treating the instruction that s. 1 is to be applied harmoniously with the Doctrine as a valid legal percept. (sic)

Reasons of the Court of Appeal, Appellant's Record, Vol. II, pp. 327 and 330.

95. The Court of Appeal disapproved of the Arbitration Board's assumption that an arbitration board or even a court has the right under the Charter to review fiscal decisions of the legislature. The Court of Appeal, by invoking the separation of powers doctrine as a required additional step in the s. 1 analysis put an unnecessary gloss on this Court's s. 1 jurisprudence and failed to accord the Charter its proper status as a constitutional instrument.

96. The Court of Appeal misconceives the relationship between courts and legislatures described by Hogg and Bushell as a dialogue. This Court cited with approval the "dialogue theory" in Vriend, where Iacobucci J. stated that the Charter dialogue between courts and legislatures promotes accountability and enhances democratic values, since "the work of the legislature is reviewed by the courts and the work of the court in its decisions can be reacted to by the legislature in the passing of new legislation."

Hogg and Bushell, "The Charter Dialogue between Courts and Legislatures". (1997) 35 Osgoode Hall L.J. 75-124, at pp. 79-81, Appellant's Book of Authorities, Volume III, Tab 37.

Vriend v. Alberta, supra at para. 137-141, Appellant's Book of Authorities, Volume II, Tab 31.

97. As Professor Monahan argues;

> It is important to place these claims of undemocratic judicial activism in context. First, the Charter was itself the product of a democratic process, in which it was clearly contemplated and understood that the judiciary would be assigned a much more prominent role in reviewing the substance of legislation enacted by Parliament and the legislatures. The Charter was drafted with the express purpose of avoiding the deferential and restrained interpretation that had been given to the Canadian Bill of Rights. Thus, in giving a robust interpretation to the Charter, the judiciary has been responding to the conscious political choices that were made in 1980-1982 rather than engaging in an unauthorized and illegitimate exercise in judicial law-making. This was made clear by Lamer J. in an early Charter case where he noted that the historic decision to entrust the courts with the onerous responsibility of interpreting the Charter was made by elected representatives rather than by the courts.

Accordingly, Lamer J. suggested, "[a]djudication under the Charter must be approached free of any lingering doubts as to its legitimacy."

Patrick Monahan, Constitutional Law, (Second Edition), Toronto: Irwin Law, at p. 398, 2002, Appellant's Book of Authorities, Volume III, Tab 38.

98. The Court of Appeal erred in adding a further step to the s. 1 analysis. The Charter was enacted for the express purpose of giving courts a supervisory role and it is error to relieve the state of the onus of putting forward positive proof to demonstrate a s. 1 justification.

PART IV: COSTS

99. This case has significant financial considerations for the Appellant. Costs of the appeal should be awarded to the Appellant.

PART V: ORDER REQUESTED

100. The Appellant submits that this Court should grant the appeal with costs to the Appellant.

All of Which is Respectfully Submitted.

DATED at the City of St. John's in the Province of Newfoundland and Labrador, this 14th day of January, 2004.

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PART VI
TABLE OF AUTHORITIES

PARA. NO.

VOLUME I