Court File No. 29597

IN THE 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

APPELLANT
(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 QUÉBEC, ATTORNEY GENERAL OF ALBERTA, ATTORNEY GENERAL OF NEW BRUNSWICK, ATTORNEY GENERAL OF BRITISH COLUMBIA, WOMEN'S LEGAL EDUCATION ACTION FUND, CANADIAN LABOUR CONGRESS, CANADIAN ASSOCIATION FOR COMMUNITY LIVING, CANADIAN HEARING SOCIETY AND COUNCIL OF CANADIANS WITH DISABILITIES, HOSPITAL EMPLOYEES' UNION, THE BRITISH COLUMBIA GOVERNMENT AND SERVICE EMPLOYEES UNION AND THE HEALTH SCIENCES ASSOCIATION
INTERVENERS

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FACTUM OF THE INTERVENER
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PART I: STATEMENT OF FACTS

1. At issue on this appeal is whether legislation violates the right to equality in s. 15(1) of the *Charter* where it overrides and invalidates collectively bargained entitlements to pay equity adjustments which were negotiated as a remedy to eliminate sex-based wage discrimination and, if so, whether the violation is justified under s. 1 of the *Charter*.

2. By order of this Court dated 8 March 2004, the Canadian Labour Congress was granted leave to intervene in this appeal.

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3. The CLC is the national central labour body for the labour movement in Canada. Affiliated to the CLC are 12 provincial and territorial federations of labour and 60 trade union organizations from coast to coast representing approximately 2.5 million members. The CLC represents approximately 64% of the unionized workforce in Canada. A significant component of the CLC's membership is made up of federal and provincial public sector employees whose collective agreements are negotiated with government in its role as employer. Approximately 1,174,000 CLC members are public sector employees. The CLC's mandate is to represent and promote the interests of working people in Canada and to represent the overall perspective of the trade union movement in Canada. For decades the CLC has played, and continues to play,
20 the leadership role at the national level in coordinating and presenting the trade union position on pay equity.

4. The CLC adopts the statement of facts as set out in the factum of the Appellant Newfoundland and Labrador Association of Public and Private Employees ("NAPE").

PART II: CLC's POSITION ON THE ISSUES

5. The CLC supports the Appellant's position that the impugned legislation discriminates on the basis of sex and so violates s. 15(1) of the *Charter*. The CLC further supports the
30 Appellant's position that the violation of s. 15(1) is not demonstrably justified under s. 1 of the *Charter*. As a result, the CLC submits that Constitutional Question No. 1 should be answered in the affirmative; Constitutional Question No. 2 should be answered in the negative.

PART III: LAW AND ARGUMENT

A. Context for Section 15 Analysis

6. This Court has repeatedly stressed that an inquiry into whether the s. 15 right to equality has been violated must be conducted in a "purposive and contextual manner in order to permit the realization of the provision's strong remedial purpose". The remedial purposes of s. 15 are (a) "to rectify and prevent discrimination against particular groups suffering social, political and legal disadvantage in society";(b) "the amelioration of the conditions of disadvantaged persons"; and (c) "the promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration."

> ***Andrews v. Law Society of British Columbia,*** [1989] 1 S.C.R. 143 at 171
> ***Law v. Canada***, [1999] 1 S.C.R. 497 at para. 47, 51
> ***Lovelace v. Ontario (Attorney General)*** [2000] 1 S.C.R. 950 at para. 54, 60

7. It is also well-established that a s. 15 claim must be examined in the broader social, political, historical and legal context within which the impugned law operates and the claim arises: "Determining whether legislation violates these purposes [of s. 15] requires examining the legislation in the context in which it applies, with attention to the interests it affects, and the situation and history in Canadian society of those who are treated differently by it."

> ***Corbière v. Canada***, [1999] 2 S.C.R. 203 at para. 63-64, per L'Heureux-Dubé J. (dissenting but not with respect to this comment)
> ***Law v. Canada***, *supra* at para. 59-75
> ***R. v. Turpin***, [1989] 1 S.C.R. 1296 at 1331-1332

8. The contextual analysis in this case must take into account three critical factors.

(a) First, the contextual analysis must recognize the pre-existing disadvantage faced by women, particularly women working in female-dominated jobs, who have historically been and continue to be penalized and prejudiced by systemic wage discrimination. Pay equity is a systemic remedy to rectify and prevent this systemic discrimination, thus ameliorating conditions for a disadvantaged group.

(b) Second, the contextual analysis must recognize the *nature* of the substantive right at issue. Pay equity is a fundamental human right and is one of the earliest

recognized international human rights and international labour standards. The right to pay equity encapsulates (i) a substantive human rights *entitlement* to sex equality in the workplace; (ii) a systemic human rights *remedy* for discrimination; and (iii) as implemented through collective bargaining and collective agreement enforcement, a human rights *enforcement mechanism* for eradicating discrimination and ensuring equality outcomes. The repeal of pay equity rights thus affects entitlements, remedies and mechanisms that are directly aimed at achieving the purposes of s. 15.

(c) Third, the contextual analysis must recognize that the government – as an employer – is under a mandatory pro-active obligation to eliminate sex-based wage discrimination to achieve pay equity in the workplace. Repealing commitments undertaken to fulfill this duty again undermines s.15's purpose.

1. Pre-Existing Disadvantage: Systemic Sex Discrimination in Wages

9. Women in Canada are disadvantaged by systemic sex discrimination in pay: "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." According to Statistics Canada, in 2001 women employed full-year, full-time in Canada averaged just 71.6% of male full-time earnings. While some of this gap is attributable to legitimate factors for wage differentials such as hours of work, education levels, length of labour force experience and degree of unionization, a differential of 10% to 20% in pay (i.e. up to 2/3 of the wage gap) is directly the result of sex discrimination.

> Justice Rosalie Abella, ***Report of the Commission on Equality in Employment*** (Ottawa, 1984) at 233-239 [hereinafter "***Abella Report***"]
> Canadian Human Rights Commission, ***Time for Action: Special Report to Parliament on Pay Equity*** (Ottawa: Minister of Public Works and Govt. Services, 2001) at 3
> Statistics Canada, ***Average Earnings by sex and work pattern*** (22 Dec. 2003), available on-line at http://www.statcan.ca/english/Pgdb/labor01a.htm

10. Systemic sex-based wage discrimination persists in Canada arising out of three fundamental features associated with women's work:

(a) First, to a very large extent, women and men continue to be segregated in different jobs in the workplace. There are still "women's jobs" and "men's jobs" with women limited to a narrow range of sales, service and clerical occupations.

(b) Second, the gender segregation of the labour force is accompanied by wage inequality. Female-domination of a job and low pay are linked. The more female-dominated the industry or the occupation, the more women's wage rates are depressed. In 1995 women accounted for less than 20% of workers in the ten top paying jobs and more than 78% of those in the ten lowest paying jobs.

(c) Third, this lower pay reflects the systemic undervaluation of women's work relative to that of men's work. It reflects the failure to recognize and value the skills, effort, responsibility and working conditions associated with female-dominated jobs. It is a product of a devaluation of women's skills (i.e. pervasive stereotypes that women's skills are not real skills but are qualities "intrinsic to being a woman" and so not deserving of compensation); a devaluation of the kind of work women do as not being "real work" (particularly in relation to the kind of care-giving work which is heavily female-dominated); and a reliance on historical stereotypes about women as secondary wage earners rather than true "breadwinners". The factors above combine to create pervasive discrimination which is generally present regardless of the particular nature of women's work, her industrial sector, her own capacities and her particular employer.

Abella Report, *supra* at 232, 245-249
CHRC, ***Time for Action***, *supra* at 2-4
Haldimand-Norfolk (No. 6) (1991), 2 P.E.R. 105 (Ontario Pay Equity Hearings Tribunal) at para. 9-10, 12, 16-20, 28-31
Canada v. Public Service Alliance of Canada [2000] 1 F.C. 146 (T.D.) at para.53, 100, 151-152, 240, 244
Statistics Canada, ***Number of Earners Who Worked Full Year, Full Time in 1995 in the 25 Highest Paying and 25 Lowest Paying Occupations and Their Average Earnings By Sex for Canada 1995,*** www.statcan.ca/english/census96/may12/t2.htm

11. The evidence before the Arbitration Board in this case established that the concern with sex-based wage discrimination in Newfoundland was long-standing. The pay equity issue arose because different rates of pay for jobs based on sex had prevailed since the 1960s. In 1986, an arbitrator conducted an independent review of compensation at a Newfoundland hospital which resulted in an award finding that the government had in fact discriminated against women workers in the health care sector. Despite this award, the discrimination persisted. Accordingly,

in its 1988 round of collective bargaining, NAPE began to negotiate pay equity and insisted that there would be no collective agreement without pay equity. The pay equity agreement that NAPE and the Newfoundland government negotiated as a result of this bargaining, thus, addressed and aimed to remedy a long-standing problem of systemic sex discrimination in pay.

Arbitration Award, Appellant's Record, Vol. 1 at p. 29 of the Award

12. In Article 1, the parties expressly stated that the purpose of the Pay Equity Agreement was to "redress systemic gender discrimination" for employees in female-dominated job classes. The Pay Equity Agreement was incorporated into the applicable collective agreements.

Pay Equity Agreement, Appellant's Record, Vol. IV, Articles 1, 4.10

2. Pay Equity is a Fundamental Human Right

13. The right to equitable pay free from gender discrimination – the right to pay equity – is not simply an entitlement arising out of a negotiated collective agreement.

14. Pay equity is a fundamental human rights *entitlement*. Pay equity has been described as a human right with "quasi-constitutional" status. The objective of pay equity is to break historical cycles of systemic sex discrimination in pay, to fairly value and compensate the work done primarily by women to eradicate this discrimination, and to provide redress for systemic discrimination. The entitlement to pay equity is enshrined in statutory human rights law and specific pro-active pay equity statutes across the country.

CHRC, ***Time for Action***, *supra* at 1-2
Canada v. PSAC, *supra* at para. 53, 98
Ontario Nurses' Association v. Haldimand Norfolk (Regional Municipality), [1989] O.P.E.D. No. 3 (P.E.H.T.) at para. 29, 43; affirmed [1989] O.J. No. 1995 (Div. Ct.); affirmed [1990] O.J. No. 1745 (C.A.)
Syndicat de la fonction publique c. Procureur général du Québec (9 January 2004), unreported (Qué. C.S.) at Annexe 11

15. As a result, pay equity adjustments are not analogous to regular increases to the wage scale. Pay equity adjustments are not "wage increases"; and they are not "just pay". Rather, they are *human rights remedies* which redress historical sex-discrimination.

Pay Equity Agreement, Appellant's Record, Vol. IV, Articles 1

16. Achieving pay equity is interconnected with and necessary to support and sustain all other social, civil and political rights. Status in contemporary society is so often and so closely related to income-earning power. As a result, the failure to fairly value female-dominated work undermines women's social value and undermines their capacity to participate in decision-making within households, within their local communities and at the national level. By contrast, pay equity secures a foundation for this broader equality.

> United Nations, ***Report of the Fourth World Conference on Women***, Beijing, China, 4-15 September 1995, A/CONF/177/20, 17 October 1995 Beijing, Chap I., resolution 1, annex I ["***Beijing Declaration***"]; annex II ["***Beijing Platform for Action***"] at para. 41
> Canada, ***Fifth Periodic Report to the United Nations Committee on the Elimination of Discrimination Against Women*** (9 April 2002), UN Doc. No. CEDAW/C/CAN/5 at para. 9

17. Apart from adjusting compensation rates, pay equity has a broader remedial impact because it requires workplace parties to actively re-examine how they value work and the workers who do it. The process of negotiating pay equity requires workplace parties to actively build equality into their practices and so transforms the status of women workers, enhancing their capacity to be full participants in the workplace, to be recognized as having the capacity to contribute to and advance within the workplace, and to resist abuse and harassment. That pay equity supports and sustains broader economic equality in the workplace is crucial because, as this Court has repeatedly recognized, work and how an individual is treated in her employment, is central to her identity, dignity and capacity to engage in 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.*
>
> ***Ref. re Public Service Employee Relations Act (Alberta)*** [1987] 1 S.C.R. 313 at 368
> ***McKinley v. B.C. Tel***, [2001] 2 S.C.R. 161 at para. 53

18. Pay equity was one of the earliest rights to be recognized and formally codified as an international human right and labour standard. Pay equity – equal pay for work of equal value – was one of the nine founding principles of the International Labour Organization in 1919. Explicit directives for achieving pay equity were adopted in ILO *Convention No. 100* in 1951 which was ratified by Canada in 1972. In its 1998 *Declaration of the Fundamental Principles*

and Rights at Work, the ILO confirmed pay equity as one of the eight "Fundamental Conventions" which all member states are under a particular duty to achieve.

> ***ILO Constitution***, Preamble, on-line at www.ilo.org/public/english/about/iloconst.htm
> ***ILO Convention No. 100 (Convention on Equal Remuneration for Work of Equal Value)***, 29 June 151, 165 U.N.T.S. 303
> ***ILO Declaration of the Fundamental Principles and Rights at Work*** on-line at www.ilo.org

19. Over the past century, the right to pay equity has been enshrined in a wide range of binding international instruments to which Canada is a signatory. These instruments have imposed increasingly specific directives for action to be taken by signatory states – including Canada – in order to achieve pay equity. In particular the instruments use strong language requiring government and employers to ensure equality outcomes in practice and mandating regular reporting to monitor compliance. The principles and obligations that emerge from these international law instruments regarding pay equity include the following:

(a) Achieving equality for women is a matter of urgency and priority to which governments must dedicate themselves "unreservedly". All necessary measures to achieve equality must be pursued and the maximum available resources must be devoted towards securing this objective.

(b) Equal pay for work of equal value is not a luxury. It is a fundamental labour standard and human right of the highest priority.

(c) Government has a legal obligation to take "*action*" – it must pro-actively "*take steps*" – to eradicate sex-based wage discrimination. Government must "initiate *positive steps* to promote equality in pay for ... work of equal value and to diminish differentials in incomes between women and men". [emphasis added]

(d) Government has a legal obligation to "ensure" pay equity outcomes. It must "*ensure* the application to all workers of the principle of equal remuneration for men and women workers for work of equal value" and must ensure that women are "*guaranteed* conditions of work not inferior to men". [emphasis added]

(e) Government – in both its role as legislator and employer – has a particular obligation to ensure that public authorities and institutions comply with the obligation to provide equal pay for work of equal value. In this respect, government has a particular duty to act as a leader in achieving pay equity.

(f) Employers – including the government – have an obligation to take pro-active steps to implement equal pay for work of equal value and to "review, analyse and, where appropriate, reformulate wage structures for female-dominated professions ... with a view to raising their low status and earnings".

(g) Government has a legal obligation to ensure that there are effective mechanisms for achieving and enforcing pay equity entitlements.

ILO, *Convention No. 100*, *supra* at Articles 2, 3
International Covenant on Economic, Social and Cultural Rights, 16 December 1966, 993 U.N.T.S. 3 at Articles 2, 3, 7
Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), G.A. Res. 34/180, GAOR, 34th Sess., Supp. No. 46 at 193 (1979) at Preamble, Articles 2, 11
Beijing Declaration, *supra* at para. 7
Beijing Platform for Action, *supra* at para. 4-5, para. 165(a), 166(l), 175(b), 178(a), 178(h), 178(k), 178(l), 178(o)
United Nations, *Follow-Up to the Fourth World Conference on Women and full implementation of the Beijing Declaration and the Platform for Action*, GA Res. 50/203, UN GAOR, 50th Sess., UN Doc. A/RES/30/205 (1995) at para. 21, 73, 82(h)
ILO, *Declaration of the Fundamental Principles and Rights at Work*

20. While Canada's international law obligations impose a duty to enact legislation to achieve pay equity, since 1951 they have expressly recognized collective bargaining as one of the key mechanisms for achieving pay equity for women. Most recently, the *Beijing Platform for Action* expressly commits government and employers to "recognize collective bargaining as a right and as an important mechanism for eliminating wage inequality for women".

ILO Convention No. 100, Article 2
Beijing Platform for Action, para. 178(h)

21. This Court has repeatedly stated 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". Canada's international human rights obligations are a "relevant and persuasive factor" in *Charter* interpretation; their content is an important indicator of the meaning of the "full benefit of the *Charter*'s protection".

Slaight Communications v. Davidson, [1989] 1 S.C.R. 1038 at 1056-1057
United States v. Burns, [2001] 1 S.C.R. 283 at para. 79-81
R. v. Sharpe, [2001] 1 S.C.R. 45 at para. 175-177
Baker v. Canada (Ministry of Citizenship and Immigration), [1999] 2 S.C.R. 817 at para. 69-70

22. Accordingly, the CLC submits that Canada's commitments and obligations to achieve pay equity in the international instruments set out above should inform the understanding of the nature of the right that is at issue in this case; should inform the interpretation and analysis of the right to equality under s. 15(1) of the *Charter*; and should inform the analysis of whether a

violation of the right to equality can be demonstrably justified under s. 1.

B. Government-Employer has a Pro-Active Obligation to Achieve Pay Equity

23. In addition to the international law obligations outlined above, under domestic laws every employer has a pro-active obligation to eliminate discrimination in the workplace. Government, as employer, is under a three-fold pro-active obligation to eliminate discrimination based on its duties and obligations under: (a) the anti-discrimination provisions of the applicable collective agreement; (b) the applicable human rights statute; and (c) the *Charter*.

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24. First, collective agreements in Canada usually expressly prohibit discrimination in employment based on sex and other prohibited grounds. In the present case, the government-employer was under a pro-active obligation to eliminate sex discrimination in pay as it was bound by a collective agreement clause which expressly prohibited such discrimination:

> ***[Article] 4.01 – Employer Shall Not Discriminate***
> *The Employer agrees that there shall be no discrimination with respect to any employee in the matter of ... wage rates ... by reason of ... sex...*

20 **Arbitration Award,** Appellant's Record, Vol. 1 at p. 3 in the Award

25. Second, employers – including government – are under a pro-active obligation to eliminate sex discrimination in the workplace under human rights statutes. All human rights statutes in Canada prohibit discrimination in employment based on sex. This prohibition against sex discrimination encompasses the right to discrimination-free wages.

> For relevant human rights code provisions, see **CLC Authorities, Vol. 2, Tab 27**
> ***Nishimura v. Ontario Human Rights Commission*** (1989), 70 O.R. (2d) 347 (Div. Ct.) at 354-355

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26. It is well established that employers – including government – and unions have a legal obligation to eradicate discrimination in the operation of collective agreements. To achieve equality, employers and unions must take all necessary steps to the point of undue hardship.

> ***Central Okanagan School District No. 23 v. Renaud***, [1992] 2 S.C.R 970 at para. 22-26

27. This Court has also confirmed that under human rights statutes, employers have a pro-

active obligation to identify and rectify discriminatory workplace practices. Employers must take positive steps to identify and redress discrimination on an ongoing basis, not only when a complaint comes forward: "Employers designing workplace standards *owe an obligation* to be aware of both the differences between individuals, and differences that characterize groups of individuals. *They must build conceptions of equality into workplace standards.*" This duty to eliminate discrimination must subject existing practices to critical scrutiny because at "the heart of the equality question" is "the *goal of transformation*" which requires "an examination of the way institutions and relations must be changed in order to make them available, accessible, meaningful and rewarding for the many diverse groups of which our society is composed."

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> ***British Columbia (Public Service Employee Relations Commission) v. B.C.G.S.E.U.***, [1999] 3 S.C.R. 3 [hereinafter "***Meiorin***"] at para. 39-42, para. 68

28. This mandatory duty to actively re-examine the standards, rules and practices that make up the terms and conditions of work and that shape the equality outcomes at work includes the duty to eliminate wage discrimination. Moreover, actively re-examining the value and compensation of female-dominated jobs and on this basis negotiating a pay equity agreement to redress discrimination are activities undertaken in furtherance of complying with this duty.

20 29. Third, this Honourable Court has recently confirmed that, in addition to obligations under statutory human rights legislation, where a government, acting in its role as employer, fails to provide terms and conditions of work that comply with the *Charter*, employees may sue directly under the *Charter* to protect their *Charter* rights.

> ***Delisle v. Canada (Attorney General)***, [1999] 2 S.C.R. 989 at para. 32
> ***Perera v. Canada*** (1998), 154 D.L.R. (4th) 341 (F.C.A.) at 351, para. 30

30. Accordingly, even if the government had not negotiated the pay equity agreement at issue in this case, it was open to the union to challenge the government directly under s. 32(1) 30 of the *Charter* for failing to provide compensation free of discrimination based on sex. As the government-employer can be held liable directly under the *Charter* for perpetuating conditions of work that deny equality, legislation that repeals government's negotiated remedies for eliminating discrimination must, even more so, constitute a violation of *Charter* equality rights.

31. To summarize, the CLC submits that in the present circumstances the government-employer was under a mandatory pro-active legal obligation to eradicate sex-based wage discrimination and to establish pay equity in its workplaces. The Pay Equity Agreement it concluded with NAPE was in furtherance of complying with this obligation. To the extent that the Ontario Court of Appeal decision in *Ferrel* suggested that the government – in its role as *legislator* – was under no positive obligation to *enact legislation* to remedy discriminatory practices, that decision is irrelevant to the present circumstances.

C. The Provincial Legislation Violates Section 15 of the *Charter*

32. The analysis under s.15 focuses on three central inquiries to determine if the right to equality is violated: (a) does the law impose differential treatment between the disadvantaged group and others in purpose or effect? (b) are one or more enumerated or analogous grounds of discrimination the basis for the differential treatment? and (c) does the law in question have a purpose or effect that is discriminatory within the meaning of the equality guarantee?

***Law v. Canada**, supra* at para. 88

33. The CLC submits that in the present case s. 9 of the *Public Sector Restraint Act* has a differential impact based on sex that is qualitatively discriminatory and violates s. 15. The CLC further submits that the Arbitration Board, Superior Court and Court of Appeal were all correct in unanimously concluding that the impugned law violated s. 15. Before examining the substantive discrimination analysis, however, the CLC makes three preliminary points.

34. First, to maintain the integrity of the *Charter* analysis, it is crucial that the question of whether there is a breach of s. 15 is kept strictly distinct from whether such a breach can be demonstrably justified by the government. This analytical distinction is essential to ensure that *Charter* claimants are given the full benefit of the *Charter*'s protection; that substantive *Charter* rights are not truncated; and that *Charter* claimants are not subject to an impossible burden of proof. Any considerations with respect to government's purpose in enacting the legislation, limited resources, government's fiscal/budgetary policies, and the range of public policy options must be strictly reserved to the s. 1 analysis where the government bears the onus to show that any violation of s. 15 is demonstrably justified.

Andrews v. Law Society of British Columbia, *supra* at 178
Law v. Canada, *supra* at para. 81
Lavoie v. Canada, [2002] 1 S.C.R. 769 at para. 47-51
Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General), 2004 SCC 4, per Binnie J. at para. 74 (in dissent)

35. Second, this appeal is not about whether government *could* as a matter of *jurisdiction* enact a statute that amends, replaces or repeals contractual commitments it has entered into. Government's *jurisdiction* in this respect is not at issue. Rather, the operative legal question is whether the particular statute that government *has enacted* had an effect which prejudicially affected equality rights under s. 15. The *Public Sector Restraint Act*, like all other statutes, is government action that is subject to scrutiny for compliance with substantive *Charter* rights.

Charter of Rights and Freedoms, s. 32
Doucet-Boudreau v. Nova Scotia (Minister of Education), 2003 SCC 62 at para. 35
Vriend v. Alberta [1998] 1 S.C.R. 493 at para. 52-54
Ferrel v. Ontario (Attorney General) (1988), 42 O.R. (3d) 97 (C.A.) at 105-106

36. Third, the CLC submits that this appeal is focussed narrowly on the discriminatory effects that flow from the operation of government's fiscal restraint policy that is enacted in the *Public Sector Restraint Act* itself. That *Act* neither repudiates nor repeals the Pay Equity Agreement; the obligations set out in that Agreement to redress the systemic wage discrimination; or, the three-year process by which the parties identified and quantified the extent of the wage discrimination. Government's acknowledgement of this discrimination remains. The effect of the *Act* is much more limited. Without denying the existence of discrimination, the *Act* simply seeks – due to *fiscal* rather than *substantive* concerns – to reduce the amount that government is obliged to pay by way of remedy. Accordingly, this appeal is not analogous to the *Ferrel* case. This dispute does not require an examination of (or require the Appellant to prove) the systemic discrimination that pre-dated the Pay Equity Agreement. This dispute is concerned only with the specific effects that flow from government's action in enacting a law to cap its liability to eliminate the identified discrimination.

1. The Impugned Legislation Violates Section 15

37. The CLC submits that s. 9 of the *Public Sector Restraint Act* imposes a specific and

differential burden on workers in female-dominated jobs based on sex as follows:

(a) it deprived workers in female-dominated job classes (who by definition are overwhelmingly women) of payments that were owing specifically in order to redress and rectify discrimination *on the basis of sex*;

(b) it denied to workers in female-dominated job classes millions of dollars in remedial pay equity adjustments that they were owed for the years 1988 to 1990 in respect of sex discrimination that had been identified and quantified;

(c) by eliminating entitlements that arose for the years 1988 to 1990, unlike other workers cover by the *Act*, it denied workers in female-dominated job classes entitlements that arose in years *prior* to the fiscal restraint period – human rights entitlements that they had already been waiting three years to receive;

(d) it delayed remedial adjustments from 1991 forward by delaying the first incremental payment from 1988 to 1991. Government was required to add 1% of payroll each year towards pay equity adjustments. Each annual increment built on and was in addition to the previous year's increment. Therefore delaying the initial increment did not effect a one-time loss; it created an on-going cumulative loss that carried forward from 1991 until pay equity was fully implemented. It created a further permanent loss as pensions for the affected workers will be based on these discriminatory wages;

(e) it subjected workers who suffered sex-based wage discrimination to a disproportionate and prejudicial burden. Under the *Act*, workers in female-dominated job classes were subject to the s. 5 wage freeze which affected all public sector employees. They were then subjected to an additional burden through the s. 9 claw-back of their pay equity remedy for sex discrimination with the result that the most disadvantaged workers bore the heaviest burden under the government's fiscal restraint policy; and

(f) while workers in male-dominated job classes had their compensation frozen at levels that do not discriminate on the basis of sex, workers in female-dominated job classes had their compensation capped at a discriminatory level.

38. The *Act*'s denial to workers in *female-dominated* jobs of human rights remedies devised to redress *discrimination on the basis of sex* is differential treatment on the basis of sex.

Service Employees International Union Local 204 v. Ontario (Attorney General) (1997), 35 O.R. (3d) 508 (Gen. Div.) at 522, 525
Manitoba Council of Health Care Unions v. Bethesda Hospital (1992), 88 D.L.R. (4th) 60 (Man. Q.B.) at 67-68
Syndicat de la fonction publique c. Procureur général du Québec, *supra* at pp. 12-14, 323-336

39. The CLC further submits that the effects of the *Act* are qualitatively discriminatory. The Pay Equity Agreement identified and quantified the compensation discrimination based on sex. The *Act* perpetuates this identified discrimination. It sanctions government in continuing to pay workers discriminatory compensation. It reinforces the undervaluation of women's work and undermines the collective bargaining mechanism for securing equality. The *Act* sends a strong signal that perpetuates the belief that women's economic equality is not affordable, that equality is a luxury for times of prosperity, and that women's demand for equality is contrary to the public good. By contrast, the Royal Commission on Equality in Employment strongly stated that the negative impact on women of perpetuating discriminatory low wages is staggering:

> *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.*
>
> ***Abella Report***, *supra* at 234
> ***Dunmore v. Ontario (Attorney General)***, [2001] 3 S.C.R. 1016 at para. 46

40. The CLC therefore submits that the impugned legislation clearly violates s. 15 of the *Charter* by discriminating on the basis of sex.

D. Section 1: The Violation of Section 15 is Not Demonstrably Justified

1. Interpretive Principles

41. To establish that a violation of a substantive *Charter* right is "demonstrably justifiable in a free and democratic society", the Respondent must establish that (1) the objective of the impugned statute is "of sufficient importance to warrant overriding a constitutionally protected right or freedom"; (2) and that the impairment of the right is proportional to the importance of the objective in that (a) the means chosen to implement the objective are rationally connected to the objective; (b) the means chosen impair the *Charter* right "as little as possible"; and (c) there is a proportionality between the deleterious and salutary effects of the impugned law.

> ***R. v. Oakes***, [1986] 1 S.C.R 103 at 137-138
> ***Thomson Newspaper Co. v. Canada (Attorney General)***, [1998] 1 S.C.R. 877 at para. 123-126

42. In applying this well-established test, the CLC submits that this Honourable Court must refer to the following key interpretive principles. First, the focus of the s. 1 inquiry must be on the purpose and impact of the specific provision which effects the infringement upon *Charter* rights. In the present case, then, the inquiry must focus on whether the objective of reducing government expenditures *specifically by limiting redress for identified systemic discrimination* was sufficiently pressing and substantial to warrant overriding the constitutional right to equality.

> ***RJR MacDonald Inc. v. Canada (Attorney General)***, [1995] 3 S.C.R. 199 at para. 144
> ***Nova Scotia (Workers Compensation Board) v. Martin***, 2003 SCC 54 at para. 107

10

43. Second, while this Court has indicated that the s. 1 analysis must be conducted contextually, it has equally ruled that "nothing in the jurisprudence suggests that the contextual approach reduces the obligation on the state to meet the burden of demonstrating that the limitation on rights imposed by the law is reasonable and justified." Moreover, reference to context "cannot be carried to the extreme of treating the challenged law as a unique socio-economic phenomenon, of which Parliament is deemed the best judge." While a contextual analysis assists to determine if the government has met its burden of proof, it does not result in deference which lowers the standard of justification. Accordingly, the fact that the present dispute arises in the context of fiscal restraint legislation is not a "unique socio-economic
20 phenomenon" that shields the law from full and robust *Charter* scrutiny. Governments do from time to time face periods of restraint. However, the choices government makes in enacting restraint legislation remain subject to the singular and onerous standard of justification.

> ***RJR MacDonald Inc. v. Canada (Attorney General)***, *supra* at para. 134, 136
> ***Thomson Newspapers v. Canada (Attorney General)***, *supra* at para. 90
> ***Andrews v. Law Society of British Columbia***, *supra* at 154

44. Third, the *Charter* is "a constitutional scheme for the vindication of fundamental rights and freedoms". Accordingly, any s. 1 inquiry must be premised on a firm understanding that
30 the impugned limit violates constitutional rights. The infringements on *Charter* rights that are upheld under s. 1 are "*exceptions* to their general guarantee". In order to remain "exceptional", infringements to *Charter* rights cannot be sustained on a routine basis without diminishing the substantive *Charter* right itself. If rights infringements are repeatedly accepted, the right itself is pre-empted and devalued and becomes something which is afforded only lip service.

Doucet-Boudreau, *supra* at para. 53, 55, 59
R. v. Oakes, *supra* at 136-137
Lavoie v. Canada, *supra* at para. 48

45. Fourth, the s. 1 analysis is anchored in the fundamental values of a free and *democratic* society. The CLC underscores that Parliament's adoption of the *Charter* fundamentally changed – and was intended to change – the nature of Canadian democracy from a system of parliamentary supremacy to one of constitutional supremacy. With the *Charter*, "our constitutional design was refashioned to state that henceforth the legislatures and executive must perform their roles in conformity with the newly conferred constitutional rights and freedoms." The *Charter,* then, was and is intended to actively change how government makes its policy choices and enacts legislation:

> *Democratic values and principles under the Charter demand that legislators and the executive take these into account; and if they fail to do so, courts should stand ready to intervene to protect these democratic values as appropriate.*

Vriend v. Alberta, *supra* at para. 131-142

46. Fifth, the Canadian democracy protected under the *Charter* is not concerned solely with democratic process but is equally concerned with achieving *substantive goals* which are at the heart of democracy including "respect for the inherent dignity of the human person" and the "commitment to social justice and equality". The CLC submits that the achievement of government policy objectives *by means of discriminatory practices* is fundamentally inconsistent with the *Charter.*

R. v. Oakes, *supra* at 136
Reference re Secession of Québec, [1998] 2 S.C.R. 217 at para. 64

47. Ultimately, the government's democratic policy choices are restricted by its *Charter* obligations. In this case, the government's choices in the sphere of fiscal policy are limited by its s. 15 equality obligations. There are many policy choices government may make which do not implicate *Charter* rights. In these areas, the government is free to make choices based solely on its political priorities. However, where policy choices do have implications for *Charter* rights, government's range of choices is circumscribed by the *Charter* and its exercise of choice must conform with the *Charter.* When the government enacts economic and fiscal policy, the

Charter mandates that government recognize the law's implications for equality rights and undertake all necessary measures to safeguard equality.

48. This analysis is consistent with Canada's international law obligations which require that it commit itself "unreservedly" to achieve equality for women as a matter of "urgent action" and which mandate that government "take steps ... *to the maximum of its available resources*, with a view to progressively achieving the *full realization*" of equality rights. The "maximum of its available resources" does not mean what is left over after other policies are satisfied. Rather, it requires that in allocating resources a priority be placed on equality rights at the front end.

10 ***Beijing Declaration***, *supra* at para. 7
International Covenant on Economic, Social and Cultural Rights, *supra* at Art. 2

2. Is there a sufficiently pressing and substantial objective?

49. This Honourable Court has repeatedly ruled that "budgetary considerations in and of themselves cannot normally be invoked as a free-standing pressing and substantial objective" that is sufficiently important to warrant overriding *Charter* rights. The CLC submits that there must be no retreat from this principle.

20 ***Nova Scotia (Workers Compensation Board) v. Martin***, *supra* at para. 109
Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island, [1997] 3 S.C.R. 3 at para. 281
Schachter v. Canada, [1992] 2 S.C.R. 696 at p. 709

50. The CLC reiterates that while the government in this case was engaged in implementing a broad fiscal restraint agenda, the sole objective that must be considered here is the objective of the measure which infringes the s. 15 right. The sole issue is whether, in order to achieve the specific cost-reduction effected by s. 9 of the *Public Sector Restraint Act*, the government had a pressing and substantial objective that was sufficiently important to warrant overriding
30 *Charter* rights. The CLC submits that achieving this specific saving *by means of a discriminatory practice* is not a pressing and substantial objective for overriding *Charter* rights.

RJR MacDonald Inc. v. Canada (Attorney General), *supra* at para. 144

51. To qualify as an "abnormal" circumstance that is the exception to the above principle, an objective of achieving fiscal restraint by means of a discriminatory practice could only ever

be a pressing and substantial objective of sufficient importance to warrant overriding the *Charter* right to equality where government has clearly demonstrated that it has accommodated equality rights to the point of undue hardship in that: (1) government's fiscal objective is not itself "optional" – it is not simply a "policy choice" – but must be achieved because failure to do so threatens the nature of the state; and (2) the urgent fiscal objective cannot be achieved by any other means without engaging in discrimination. Only such a high threshold will preserve the primacy substantive *Charter* rights hold in our constitutional democracy. It is not met here.

Cf. ***Meiorin***, *supra* at para. 55, 62

3. Does the violation impair equality rights as little as possible?

52. If this Court finds that there is a pressing and substantial objective, the CLC agrees with the Appellant that the "rational connection" test is met in the present case. The CLC submits, however, that the impugned law did not impair equality rights as little as possible and that its deleterious effects outweigh its salutary effects. Ths CLC submits that the contextual analysis here must acknowledge that public sector employees generally bear a disproportionate burden of government fiscal restraint policies. Fiscal restraint is often imposed by targeting employee compensation as a first line of cuts without sufficient consideration of other policy options.

a. Minimal impairment of *Charter* rights

53. To ensure full benefit of the *Charter*'s protection, s. 1 requires that an assessment of the equality impacts of government choices be actively incorporated as a fundamental element of all government decision-making. As noted above, legislation may affect a wide range of interests, some of which implicate *Charter* interests to greater or lesser degrees; some of which are policy options with no *Charter* implications. Where *Charter* rights are at issue, these rights cannot be treated the same as non-*Charter* rights. They must be given priority.

Doucet-Boudreau, *supra* at para. 39

54. As a practical matter, then, s. 1 requires that the government demonstrate that in enacting a law it engaged in decision-making which actively took into account *Charter* rights by (a) actively identifying which effects of the legislation have implications for *Charter* rights; and (b) actively and demonstrably engaging in a process which prioritizes its decision-making to

preserve *Charter* rights and avoid infringements of *Charter* rights.

55. This approach is consistent with Canada's domestic human rights law and with Canada's international human rights commitments which mandate it to actively "use gender-impact analyses in the development of macro- and micro-economic and social policies in order to monitor such impacts and restructure policies in cases where harmful impact occurs". The federal government has long accepted that such "gender-based analysis" or "gender mainstreaming" is necessary to fulfil Canada's international law commitments.

> ***Beijing Platform for Action***, at para. 165(p) ; ***Beijing Follow-Up,*** at para. 73(a)(b)
> Canada, ***Gender-Based Analysis: A Guide for Policy-Making*** (Ottawa: Status of Women Canada, 1995) at 1, 4-5
> Canada, ***Diversity and Justice: Gender Perspectives - A Guide to Gender Equality Analysis 1998*** (Ottawa: Department of Justice, 1998) at Part One and Part Two
> ***Meiorin,*** *supra* at para. 68

56. By failing to conduct the above gender analysis, legislatures have in the past erroneously identified pay equity adjustments as a target for retrenchment because they have failed to recognize and treat these adjustments as the fundamental human rights remedies that they are. Instead, these human rights remedies have been characterized as simple "wage increases". This results in a false comparison in which workers in female-dominated job classes are characterized as getting "wage increases" that others are not. Failure to acknowledge the implications of retrenching on this *Charter* right and human rights remedy contributes to a backlash against workers in female-dominated jobs, thereby compounding their discrimination. Under the *Charter*, this characterization has been and should once again be rejected.

> See cases cited at para. 38 above

57. A failure to conduct the analysis set out above, to properly recognize the gendered impacts of fiscal policy, and to prioritize and safeguard equality rights will result in a failure to meet the s. 1 minimal impairment test. The CLC supports the Appellant's position that this test is not met on the facts of this case as there were numerous alternatives to cutting pay equity.

> ***Arbitration Award***, Appellant's Record, Vol. 1 at p. 97-102 of the Award

b. Disproportionate Deleterious Effects

58. The CLC submits that the deleterious effects of the impugned law outweigh the law's

objective and its salutary effects. While the law has achieved the "salutary" effect of reducing government spending, it has had the deleterious effects of doing so by means of and at the cost of perpetuating sex discrimination which has been actively identified and quantified; at the cost of condoning the undervaluation of female-dominated work; and at the cost of marginalizing those who have already suffered discrimination by perpetuating the belief and reality that their equality is not equally valued but must be subordinated and postponed.

Vriend v. Alberta, *supra* at para. 68-69

59. Moreover, the CLC submits that the legislation has the deleterious effect of permitting the government – in its role as legislator – to use its power to lower the mandatory duty of government – in its role as employer – to achieve equality in a manner that is not open to other employers. This has the further far from minimal impact of reducing and leaving vulnerable in the future the degree of human rights protection that is available to public sector employees.

60. Finally, disadvantaged groups are repeatedly faced with the argument that redressing equality is too expensive. This economic argument fails to acknowledge that the cost of achieving equality – the cost of redress – is proportional to and reflective of the extent of the discrimination experienced. To use cost of redress against *Charter* claimants is to penalize them doubly in that the claimants have already suffered long-term discrimination which has resulted in the quantified material disadvantage and the magnitude of the government's delinquency – the size of this equality debt – is then relied upon as a reason not to pay redress.

Vriend v. Alberta, *supra* at para. 122
Canada v. PSAC, supra at para. 8-10

61. The CLC submits that the government has not met the standard of justification under s. 1 and that the violation of s. 15 rights cannot be upheld. The Intervener CLC supports the order requested by the Appellant.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 28th DAY OF APRIL 2004.

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Counsel for the Intervener CLC

PART IV: TABLE OF AUTHORITIES

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