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

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, 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 HEALTH SERVICES EMPLOYMENT UNION AND THE HEALTH SERVICES ASSOCIATION

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PART I – FACTS

1. The Attorney General of New Brunswick (hereinafter "AGNB") accepts the facts as presented by the Respondent.

PART II – ISSUES

2. The constitutional questions as formulated by Chief Justice McLachlin ask:

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

   b) **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*?**

3. The AGNB takes the position that s. 9 of the **Public Sector Restraint Act** does not infringe s-s. 15(1) of the **Canadian Charter of Rights and Freedoms**.

4. In the alternative, if the challenged provision infringes s-s. 15(1) of the **Charter**, the AGNB takes the position that the infringement is justified under s. 1.

PART III – ARGUMENTS

5. The AGNB submits that the main issue to be determined in this case is whether the postponement of a pay equity agreement can itself be discriminatory independently of any existing practice that may have led to it.

6. It is fairly well established now that the constitutional protections set minimums and not maximums. Legislative assemblies and governments are free to add to the constitutional guarantees as long as they do not go below what is enshrined (unless justified under s. 1). In cases dealing with the equality right, s-s. 15(2) makes this principle explicit.

7. When an issue arises and a party claims that the government is acting in a discriminatory fashion, it bears the burden of proving the discrimination. The fact that the government has accepted to enter into negotiations on a particular subject matter and an agreement may have been reached does not eliminate that burden. Even when an agreement is subsequently repudiated or postponed, it is not in itself a proof or indication of discrimination and it is still incumbent on a party to establish a discriminatory practice that exists outside of the agreement.

8. A court of law asked to consider the situation must limit itself to the existence of discrimination and the appropriate remedy if it is established. Just like an agreement could go further than an existing discriminatory practice, it could also fall short. It is therefore not sufficient to show that negotiations occurred or that an agreement was reached to conclude to a discrimination.

9. To hold otherwise would transform the individual protection of s. 15 of the **Charter** into a collective right. Not only would it mean that repudiated or postponed agreements are discriminatory, it would also have to mean that completely implemented agreements cured an existing discriminatory practice. This later scenario would mean, in cases of this sort, that no employee covered by the agreement could thereafter claim systemic discrimination. Whether the agreement was sufficiently generous to completely correct the discrimination for a particular individual or not would become irrelevant. By the same token, it would eliminate any s. 15 right of action of the particular individual and place that individual at the complete mercy of the labour association's negotiating power.

10. Consequently, the fact that there has been an agreement and that it has been repudiated or postponed afterward has little relevance to the actual status of the individuals and the existence or scope of an alleged discriminatory practice. This, the AGNB respectfully submits, indicates that the postponement of the implementation of an agreement like it is here the case does not establish discrimination.

11. This case is concerned with 1 simple element: the date of implementation of an agreement. The AGNB submits that a date of implementation is not an analogous ground pursuant to s. 15. For example, in the case of **Bauman *v.* Nova Scotia (A.G.)**, [2001] N.S.J. No. 115, the Nova Scotia Court of Appeal had to determine whether a decision by the Legislative Assembly to implement some changes to workers' compensation benefits as of a certain date was discriminatory. Justice Bateman, for the court, rejected those arguments and concluded (at para. 65) that there was no discrimination pursuant to s. 15 of the **Charter**. Leave to appeal that judgment was refused on September 13, 2001, [2001] S.C.C.A. No. 277.

12. In the case of **Nova Scotia (Workers' Compensation Board) *v.* Martin**, [2003] 2 S.C.R. 504 at para. 73, Justice Gonthier, for the Court, discussed a similar argument presented by the Appellants that a provision was discriminatory because following an amendment to the Act, persons in similar position were covered while they were not. It was noted in reply that:

> **Finally, the appellants submit that workers suffering from chronic pain and eligible for s. 10E benefits constitute an appropriate comparator group. Assuming without deciding that such workers do constitute an appropriate comparator group, I do not think this approach advances the appellants' argument. As the Court of Appeal indicated, the distinction between this group and the appellants would be the date of their injury and the status of their case before the Board, rather than the nature of their disability. Thus, in any case, the second branch of the test would not be met.**
>
> (Underlining added)

13. If the Appellants in this case claim that they have been subjected to a discriminatory practice by the government from April 1st, 1988 to the date of final implementation of the agreement, they have the burden to establish such a practice and its extent. That however, has no impact on s-s. 9(2), (3) and (4) of the **Public Sector Restraint Act**, which provides that:

> 9(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.
>
> 9(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.

> **9**(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.

These provisions simply provide that pay equity agreements will be implemented from the date of agreement and not retroactively.

14. In the alternative, should this piece of legislation be declared invalid, the AGNB submits that it is justified under s. 1. Before proceeding to that analysis however, it is crucial to review certain principles.

"Crisis" Legislation

15. One important issue to be addressed in this case is the extent to which provincial legislatures can enact "crisis" legislation. Following this Court's decision in the **Anti-Inflation Act Reference**, [1976] 2 S.C.R. 373, there is little doubt that Parliament has the authority, under the emergency branch of the Peace, Order and Good Government (POGG) power, to enact legislation to remedy critical situations.

16. In fact, when reading that decision, it would seem that Parliament can even "invade" fields of exclusive provincial jurisdictions to address concerns that have reached a critical status and the only thing required is Parliament's own "rational" opinion that some crisis need to be remedied. The only remaining question is whether the provincial legislatures can enact their own "emergency" legislation.

17. This Court has on some occasions suggested the possibility. Namely, in the **Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island**, [1997] 3 S.C.R. 3 at para. 137 (hereinafter **Provincial Court Judges' Reference**), the majority accepted that provincial legislatures could set judicial salaries without recourse to the remuneration commissions in cases of outbreak of war or pending bankruptcy. This, the AGNB submits, strongly suggests that the province can act even though national defence and

bankruptcy are matters of exclusive federal jurisdictions (s-s. 91(7) & (21) of the **Constitution Act, 1867**).

18. Again when dealing with s. 7 of the **Charter**, although discussing its interaction with s. 1, this Court suggests that emergency situations can justify departure from the principles of fundamental justice (**Reference re *Motor Vehicle Act* (B.C.)**, [1985] 2 S.C.R. 486 at p. 518; **New Brunswick (Minister of Health and Community Services) *v.* G.(J.)**, [1999] 3 S.C.R. 46 at para. 99). Although jurisdictions over criminal law is reserved exclusively to Parliament (s-s. 91(27) of the **Constitution Act, 1867**), provincial legislatures have extensive powers over matters of property and civil rights, the administration of justice, the constitution, maintenance and organization of provincial courts of both civil and criminal jurisdiction, and the imposition of punishments by fine, penalty or imprisonment (s-s. 92(13), (14) & (15) of the **Constitution Act, 1867**). It is therefore doubtful that departure from s. 7 and the principles of fundamental justice in cases of emergency could only be justified by Parliament.

19. Consequently, the AGNB respectfully submits that even if "emergency" is not an enumerated subject matter in ss. 91 and 92 of the **Constitution Act, 1867** and even if the courts have usually dealt with emergency legislation under the POGG power of Parliament, this does not exclude provincial legislation, at least regarding matters within their jurisdictions and especially the power over their own constitution (s. 45 of the **Constitution Act, 1982**). To prevent provincial legislation in such cases would amount to rendering their constitution useless as they would not have the power to protect it.

20. The AGNB submits that there is little doubt that the **Public Sector Restraint Act** (1991) involved in this case is legislation to address issues of critical importance in the province of Newfoundland and Labrador.

21. Although many diverging opinions may have been expressed about the real threat associated with the state of the public finances as they were in the early 1990s, the Newfoundland and Labrador Legislature felt the matter to be one of urgency and importance

and it acted accordingly. It would be wrong for the courts now to second-guess the decision of the elected representatives on such a clear matter of public policy, which leads us to the issue of legislative judgments and the applicable reviewing standards.

Legislative Judgment and the Rational Basis Test

22. Canada lives under a regime of democratic governments. No doubt the principles of the rule of law and constitutionalism are very important to this country, but they are not the only ones. The roles and underlying tenets of our representative institutions are also of paramount importance. The decisions of those institutions represent the democratic will of the population.

23. Of course, when our democratic institutions act contrary to the fundamental rights of the individuals or a minority of the population, the judiciary must, under the mandate it received with the **Charter**, ensure respect for those rights. However, when the judiciary assess the *raison d'être* of a legislative action, it is not its function to second-guess the opinion of the representative body or substitute its own. This Court has, to a certain extent, already addressed how the judiciary has to approach the evaluation of a legislative judgment.

24. In the **Anti-Inflation Act Reference**, supra at pp. 422-3, when discussing the possibility to consider extrinsic material in support of a legislative statement, Chief Justice Laskin explained:

> **When, as in this case, an issue is raised that exceptional circumstances underlie resort to a legislative power which may properly be invoked in such circumstances, the Court may be asked to consider extrinsic material bearing on the circumstances alleged, both in support of and in denial of the lawful exercise of legislative authority. In considering such material and assessing its weight, the Court does not look at it in terms of whether it provides proof of the exceptional circumstances as a matter of fact. The matter concerns social and economic policy and hence governmental and legislative judgment. It may be that the existence of exceptional circumstances is so notorious as to enable the Court, of its own motion, to take judicial notice of them without reliance on extrinsic material to inform it. Where this is not so evident, the extrinsic material need go only so far as to persuade the Court that there is a**

rational basis for the legislation which it is attributing to the head of power invoked in this case in support of its validity.

25. In many respects, the AGNB submits that the tenets of the rational basis test formulated in the **Anti-Inflation Act Reference** were repeated by the majority of this Court in the context of s. 1 analysis in **Irwin Toy Ltd. *v.* Quebec (A.G.)**, [1989] 1 S.C.R. 927 at pp. 993-4. Except that the expression "reasonable basis" is substituted with "rational basis".

> **When striking a balance between the claims of competing groups, the choice of means, like the choice of ends, frequently will require an assessment of conflicting scientific evidence and differing justified demands on scarce resources. Democratic institutions are meant to let us all share in the responsibility for these difficult choices. Thus, as courts review the results of the legislature's deliberations, particularly with respect to the protection of vulnerable groups, they must be mindful of the legislature's representative function. For example, when "regulating industry or business it is open to the legislature to restrict its legislative reforms to sectors in which there appear to be particularly urgent concerns or to constituencies that seem especially needy" [...].**
>
> **[...]**
>
> **In the instant case, the Court is called upon to assess competing social science evidence respecting the appropriate means for addressing the problem of children's advertising. The question is whether the government had a reasonable basis, on the evidence tendered, for concluding that the ban on all advertising directed at children impaired freedom of expression as little as possible given the government's pressing and substantial objective.**
>
> (Underlining added)

26. This becomes even more evident when considering the reasons of Justice La Forest in **McKinney *v.* University of Guelph**, [1990] 3 S.C.R. 229 at pp. 286 & 305:

> **In performing their functions of ensuring compliance with the constitutional norms in there amorphous areas, courts must of necessity turn to such available knowledge as exists and, in particular, to social science research, both of a particular and general nature. The Court of Appeal in its judgment (at pp. 49-51) has helpfully described the difficult problems of evaluating these works and the extent to which the judiciary should defer to legislative judgment in determining issues of minimal impairment of a constitutional right when evidence rationally supports the legislative judgment. This Court has, however, recently dealt with these issues in *Irwin Toy*, *supra*, which I have discussed earlier in these reasons and I rely on what**

> **I have already said there. I simply reiterate here that the operative question in these cases is whether the government had a reasonable basis, on the evidence tendered, for concluding that the legislation interferes as little as possible with a guaranteed right, given the government's pressing and substantial objectives.**
>
> (Underlining added)

27. The rational basis test was referred to in the **Provincial Court Judges' Reference**, supra at para. 183. This Court was again dealing with legislative judgments and the power of assemblies to allocate public funds. In such a case, the Court recognized that

> **The standard of justification here, by contrast, is one of simple rationality. It requires that the government articulate a legitimate reason for why it has chosen to depart from the recommendation of the commission, and if applicable, why it has chosen to treat judges differently from other persons paid from the public purse. A reviewing court does not engage in a searching analysis of the relationship between ends and means, which is the hallmark of a s. 1 analysis. However, the absence of this analysis does not mean that the standard of justification is ineffectual. On the contrary, it has two aspects. First, it screens out decision with respect to judicial remuneration which are based on purely political considerations, or which are enacted for discriminatory reasons. Changes to or freezes in remuneration can only be justified for reasons which relate to the public interest, broadly understood. Second, if judicial review is sought, a reviewing court must inquire into the reasonableness of the factual foundation of the claim made by the government, similar to the way that we have evaluated whether there was an economic emergency in Canada in our jurisprudence under the division of powers (*Reference re Anti-Inflation Act*, [1976] 2 S.C.R. 373).**
>
> (Underlined in the original)

That comment came after the Court wrote that "decisions about the allocation of public resources are generally within the realm of the legislature, and through it, the executive. The expenditure of public funds, as I said above, is an inherently political matter" (at para. 176).

28. In applying the rational basis test to the fact situation of the present case, it is respectfully submitted that if the legislative assembly stated that there was a fiscal crisis that needed to be remedied, this Court should limit itself to the determination of whether there

was a rational basis to that statement. If there is, this Court should not interfere with the decision.

29. With this foundation now set in place, the traditional s. 1 analysis can be better carried out.

Justification under s. 1

30. Another important issue to be determined in this case is what can constitute "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". The terminology used is not restrictive and seems to leave enough room for all kinds of "reasonable limits", as long as they are "demonstrably justified in a free and democratic society". This question goes to the heart of the first step of the **Oakes** test, i.e. whether there is a concern sufficiently pressing and substantial to justify an infringement to a **Charter** right.

a) Pressing and Substantial Concern

31. What concerns can be sufficiently pressing and substantial to justify an infringement to a **Charter** right? That is the crux of the debate at this stage of the analysis. Can a fiscal crisis be of sufficient importance to warrant postponement of a pay equity agreement?

32. As already discussed above, whether circumstances are sufficiently important to qualify as a "crisis" is a matter of legislative judgment that courts are ill equipped to review. At this level, the court should limit itself to an assessment of the foundation to the judgment and if it has a rational basis, it should not substitute its own opinion to that of the Legislature.

33. The AGNB submits that there is little doubt that the **Public Sector Restraint Act** in this case constituted "crisis" legislation. As this Court recognized in the **Anti-Inflation Act Reference**, not all crisis are wars or imminent invasions and crisis may take other very subtle forms. Fiscal and economic crisis can be just as dangerous or pervasive to the stability of a

State as can be any war, invasion or rebellion. A government that cannot sustain itself is destined to disappear. Fiscal disarray can lead to higher interest rates, higher taxation rates, higher inflation rates, lower investments, corruption, and of course lower levels of public services and a general degradation in the citizens' quality of life, which can lead to other social problems.

34. If such concerns cannot be sufficiently pressing and substantial to trigger s. 1, then one would be entitled to ask what kind of concerns are. Furthermore, if such concerns are sufficiently important to allow Parliament to use its emergency power under POGG, namely to invade fields of provincial jurisdictions with the result of overriding a fundamental component of our constitutional structure (federalism), it would be difficult to argue that the provinces are not allowed to use the same concerns to protect their constitution.

35. It is respectfully submitted that although the concerns associated with the **Public Sector Restraint Act** are imminently financial or budgetary, this should not by itself exclude it from a s. 1 consideration. A free and democratic society is entitled to have a sustainable government with stable standards of living and of taxation. That surely explains the inclusion of s. 53 in the **Constitution Act, 1867** (applicable to provincial legislatures through s. 90), to maintain a check on public expenditures.

36. Although this Court has occasionally repeated that budgetary considerations are not generally sufficient in themselves to justify an infringement to a **Charter** right, it still recognized that s. 1, like all other constitutional provisions, must be applied contextually.

37. In some cases, this Court seems to have recognized that budgetary considerations could form the requisite objective to justify an infringement to a constitutional right. For example, in the **Provincial Court Judges' Reference**, supra at para. 137, and **Mackin *v.* New Brunswick (Minister of Justice)**, [2002] 1 S.C.R. 405 at para. 72, this Court acknowledged that governments could justify not proceeding through a remuneration commission for judges in cases of "pending bankruptcy". The AGNB respectfully submits that a concern for a pending bankruptcy is in fact a budgetary consideration.

38. Furthermore, in the case of **Air Canada *v.* British Columbia**, [1989] 1 S.C.R. 1161 at pp. 1204-07, Justice La Forest explained "solid grounds of public policy for not according a general right of recovery" for taxes paid pursuant to unconstitutional legislation. Namely, at p. 1204:

> **A related concern, and one prevalent through many of the authorities and much of the academic literature is the fiscal chaos that would result if the general rule favoured recovery, particularly where a long-standing taxation measure is involved**

Then at p. 1206:

> **Those who favour recovery of *ultra vires* taxes concede that an exception would be required where this would disrupt public finances [...].**

Those passages at least imply that a fiscal crisis is a concern of sufficient importance that a court of law should not ignore it lightly.

39. It is also interesting to note that courts will usually use budgetary considerations when comes the time to suspend a declaration of invalidity. Since 1985, when this Court first suspended its declaration of invalidity affecting all the statutes of Manitoba (**Reference re Manitoba Language Rights**, [1985] 1 S.C.R. 721), the remedy has been used with increasing frequency by tribunals.

> **Order re Manitoba Language Rights**, [1985] 2 S.C.R. 347; **Order re Manitoba Language Rights**, [1990] 3 S.C.R. 1417.

40. The AGNB respectfully submits that the concerns expressed in some cases by this Court to order a suspension are very similar to those expressed by the Newfoundland and Labrador's Legislature to postpone implementation of the pay equity agreements in this case.

> See for example, **R. *v.* Brydges**, [1990] 1 S.C.R. 190 (30 days); **R. *v.* Bain**, [1992] 1 S.C.R. 91 (6 months); **Sinclair *v.* Québec (A.G.)**, [1992] 1 S.C.R. 579 (1 year); **Schachter *v.* Canada**, [1992] 2 S.C..R 679 at pp. 723-4; **R. *v.* Feenay**, [1997] 2 S.C.R. 117 (6 months); **Eldridge *v.* British Columbia (A.G.)**, [1997] 3 S.C.R. 624 (6 months); **R. *v.* Feenay**, [1997] 3 S.C.R. 1008 (1 month); **Provincial Court Judges' Reference**, [1998] 1 S.C.R. 3 (1 year); **Provincial Court Judges' Reference**, [1998] 2 S.C.R. 443 (2 months); **Corbière *v.* Canada (Minister of Indian Affairs and Canadian North)**, [1999] 2 S.C.R. 203 (18 months); **Mackin**, supra (6 months originally plus 2 extensions of 6 months).

41. This should at least show that such considerations are of sufficient importance to fall into the category of pressing and substantial concern.

b) Rational Connection

42. The AGNB respectfully submits that the **Public Sector Restraint Act** is rationally connected to the objective of maintaining the stability of Newfoundland and Labrador's public finances in times of fiscal difficulties. The arguments of the Respondent on this issue are accepted.

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c) Minimal Impairment

43. The AGNB respectfully submits that the **Public Sector Restraint Act** minimally impairs the rights of the Appellants. It is crucial to emphasize at this stage that the Appellants were not forever precluded from obtaining pay equity. What the Legislative Assembly of Newfoundland and Labrador did is postpone the implementation of the agreements, not completely eliminate recovery. The arguments of the Respondent are also accepted on this issue.

20 *d) Proportionality Between Beneficial and Prejudicial Effects*

44. Finally, the AGNB respectfully submits that the effect of the **Public Sector Restraint Act** of maintaining the stability and viability of the Newfoundland and Labrador's public finances greatly outweighs any prejudicial effects it may have had on the Appellants. Again, the arguments of the Respondent are accepted on this item.

45. It is therefore respectfully submitted that even if s. 9 of the **Public Sector Restraint Act** infringes the equality right of the Appellants, this infringement is a reasonable limit prescribed by law demonstrably justified in a free and democratic society.

30

PART IV – ORDER SOUGHT

46. The Intervener respectfully submits that the first constitutional question should be answered in the negative or alternatively, if the answer to the first question is positive, that the second constitutional question should be answered in the affirmative.

RESPECTFULLY SUBMITTED at Fredericton , NB, this 24th day of March, 2004.

10

ATTORNEY GENERAL FOR THE PROVINCE OF NEW BRUNSWICK, Intervener

Per : _____
Gaétan Migneault
Solicitor and Agent of the Attorney General

PART V – TABLE OF AUTHORITIES

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