Court File No. 37002

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF QUEBEC)

B E T W E E N :

CENTRALE DES SYNDICATS DU QUÉBEC,
FÉDÉRATION DES INTERVENANTES EN PETITE ENFANCE DU QUÉBEC (FIPEQ-CSQ),
LE SYNDICAT DES INTERVENANTES EN PETITE ENFANCE DE MONTRÉAL (SIPEM-CSQ),
LE SYNDICAT DES INTERVENANTES EN PETITE ENFANCE DE QUÉBEC (SIPEQ-CSQ),
LE SYNDICAT DES INTERVENANTES EN PETITE ENFANCE DE L'ESTRIE (SIPEE-CSQ),
MADAME FRANCINE JOLY, MADAME NATHALIE FILLION,
MADAME LOUISE FRÉCHETTE,
FÉDÉRATION DU PERSONNEL DE SOUTIEN DE L'ENSEIGNEMENT SUPÉRIEUR (FPSES) (CSQ),
SYNDICAT DES INTERPRÈTES PROFESSIONNELS DU SIVET (CSQ),
MADAME CHANTAL BOUSQUET, MONSIEUR YANNICK FRANÇOIS

APPELLANTS

- and -

LA PROCUREURE GÉNÉRALE DU QUÉBEC

RESPONDENT

- and -

LE PROCUREUR GÉNÉRAL DE L'ONTARIO

INTERVENER

- and -

EQUAL PAY COALITION, NEW BRUNSWICK COALITION FOR PAY EQUITY and WOMEN'S LEGAL EDUCATION AND ACTION FUND

INTERVENERS

FACTUM OF THE INTERVENERS

EQUAL PAY COALITION, NEW BRUNSWICK COALITION FOR PAY EQUITY and WOMEN'S LEGAL EDUCATION AND ACTION FUND

(Pursuant to Rules 47, 55, 56 and 57 of the *Rules of the Supreme Court of Canada*)

(CONT'D)

B E T W E E N :

**CONFÉDÉRATION DES SYNDICATS NATIONAUX,
FÉDÉRATION DE LA SANTÉ ET DES SERVICES SOCIAUX,
SYNDICAT DES TRAVAILLEUSES ET TRAVAILLEURS
DES CPE DE LA MONTÉRÉGIE,
SYNDICAT DES TRAVAILLEUSES DES
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MADAME FRANCE LANIEL,
MADAME GINETTE LAVOIE,
MADAME DANIELLE PARÉ**

APPELLANTS

- and -

LA PROCUREURE GÉNÉRALE DU QUÉBEC

RESPONDENT

- and -

LE PROCUREUR GÉNÉRAL DE L'ONTARIO

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(Pursuant to Rules 47, 55, 56 and 57 of the Rules of the Supreme Court of Canada)

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FACTUM OF THE INTERVENERS

EQUAL PAY COALITION,
NEW BRUNSWICK COALITION FOR PAY EQUITY and
WOMEN'S LEGAL EDUCATION AND ACTION FUND

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PART I: OVERVIEW

1. This intervention is brought by the Ontario Equal Pay Coalition, the New Brunswick Coalition for Pay Equity and the Women's Legal Education and Action Fund (collectively, the "Equality Coalition"). The Coalition partners are Ontario and New Brunswick pay equity organizations representing English- and French-language constituencies in provincial and federal jurisdictions, and LEAF which has a national mandate to advance *Charter* equality rights.

2. The Equality Coalition's submissions address three themes connected to Constitutional Question #1 regarding the interpretation of s. 15 of the *Charter*:

a. **Contextual analysis under s. 15**: To properly focus analysis on the impugned law's *effect*, contextual analysis under s. 15 must address the structural nature of systemic sex discrimination, occupational sex segregation and undervaluing of women's work; Canadian governments' legal obligations to redress systemic sex discrimination in pay; and the broader legal context in which Québec's *Pay Equity Act* and regulations arose. Consideration of Québec's intent, rationale or justification of the impugned law[1] must be reserved to s. 1.

b. **Comparison under s. 15:** After *Kapp, Withler,* and *Québec v. A,*[2] s. 15 comparison must account for discrimination's systemic nature and must do so in a substantive way. The differential impact of the impugned law is based on sex. The law allocates women's rights based on women's close proximity to male work and their degree of integration into male work environments. The more deeply women bear the burden of systemic sex discrimination that produces sex-segregated occupations and sex-segregated workplaces, and that devalues women's work, the shallower is the remedy that the law grants them.

c. **Section 15(2):** Section 15(2) does not apply as "reverse discrimination" is not at issue.

PART II: STATEMENT OF POSITION

3. The Equal Pay Coalition accepts the record as it is. The Coalition takes a position that supports the Appellants' analysis under s. 15 of the *Charter*, but the Coalition takes no position on s. 1 or on the outcome of the appeal.

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[1] *Pay Equity Act*, CQLR, c. E-12.001, s. 38

[2] *R. v. Kapp*, 2008 SCC 41; *Withler v. Canada (Attorney General)*, 2011 SCC 12; *Québec (Attorney General) v. A*, 2013 SCC 5

PART III: STATEMENT OF ARGUMENT

A. Contextual analysis under section 15

4. Systemic sex discrimination that suppresses women's pay has long been documented and condemned. It is "one of the few facts not in dispute in the 'equality' debate".[3] It continues to shape women's social, economic, and political reality. Yet, the lower court errs by failing to assess s. 38's effect in this broader context, and so fails to see its constitutional significance.

5. The lower court's contextual analysis[4] focussed narrowly on government's intent and the chronology of Québec's legislative process. That approach contradicts this Court's direction that context under s. 15 extends beyond the impugned law and must "tak[e] full account of the social, political, economic and historical factors" that shape the claimants' situation and the effect of the impugned law.[5] The lower court overlooks the systemic discrimination that pay equity aims to redress and so misses s. 38's effect on the Appellants.

6. Further, by embedding government intention and justification in the s. 15 "context", the lower court renders these critical issues immune to scrutiny for *Charter* compliance. That contradicts the repeated admonition that analysis of substantive rights and s. 1 justification must be kept distinct to avoid eroding the scope of substantive rights and to avoid claimants having "to justify what should analytically have been part of the government's burden."[6] *Québec v. A* states:

> An emphasis at this stage on whether the claimant group's exclusion was well motivated or reasonable is inconsistent with this substantive equality approach to s. 15(1) since it redirects the analysis from the impact of the distinction on the affected individual or group to the legislature's intent or purpose. As McIntyre J. warned in *Andrews*, an approach to s. 15(1) based on assessing the "reasonableness" of the legislative distinction would be a "radical departure from the analytical approach to the *Charter*" under which "virtually no role would be left for s. 1." (pp. 181-182) It would also effectively turn the s. 15(1) analysis into a review of whether the legislature had a "rational basis" for excluding a group from a statutory benefit. … Assessment of legislative purpose is an important part

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[3] Justice Rosalie Silberman Abella, *Equality in Employment: A Royal Commission Report* (Canada: 1984) ("Abella Report") at 232

[4] *Judgment de la Court supérieure*, Appeal Book, Vol 1 at para. 33-140. A certified English translation of the decision is at **Equality Coalition Authorities ("EC Auth"), Tab 1**

[5] *Withler*, *supra* at para. 2, 39; *Québec v. A*, *supra* at para. 324; *Ermineskin Indian Band and Nation v. Canada*, 2009 SCC 9 at para. 193-194; *R. v. Turpin*, [1989] 1 SCR 1296 at 1331-1332

[6] *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143 at 178; *Québec v. A*, *supra* at para. 340

> of a *Charter* analysis, but it is conducted under s. 1 once the burden has shifted to the state to justify the reasonableness of the infringement.[7]

7. Instead, the contextual analysis here must focus on how systemic sex discrimination has structured our labour market. Systemic pay discrimination is a "culmination of individual practice, institutional wage practices and a history of employment and compensation … which has historically not recognized the value of women's labour in the workforce."[8] The gender pay gap is higher for women facing intersectional discrimination: racialized and Indigenous women, women with disabilities, immigrant women, and members of the LGBTQ community. [9]

8. Pay equity jurisprudence recognizes that systemic sex discrimination in pay is driven by occupational sex segregation and the devaluation of the work that women do. The more women predominate in a job, the lower it is paid. As accepted by the Pay Equity Hearings Tribunal:

> Women are paid less because they are in women's jobs, and women's jobs are paid less because they are done by women. The reason is that women's work - in fact, virtually anything done by women – is characterized as less valuable. In addition, the characteristics attributed to women are those our society values less. In the workplace, the reward (wage) is based on the characteristics the worker is perceived as bringing to the task … The lower the value of those characteristics, the lower the associated wage.[10]

9. The child care sector at issue in this appeal has always been paradigmatic of a sex-segregated occupation whose value and pay are deeply depressed by sex discrimination.[11]

10. Active intervention is needed to "break a continuing cycle of systemic discrimination"; "to create a climate in which both negative practices and negative attitudes can be challenged"; and to "destroy those patterns in order to prevent the same type of discrimination in the future". Systemic discrimination demands systemic remedies.[12]

11. Canadian governments' obligation to secure pay equity is not new. Women's right to

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[7] *Québec v. A*, *supra* at para. 333 [emphasis added]
[8] *Haldimand-Norfolk (No. 3)* (1990), 1 P.E.R. 17 para. 44; aff'd (1990), 1 P.E.R. 188 (Div. Ct.), **EC Auth., Tab 2**
[9] Ontario, *Closing the Gender Wage Gap: A Background Paper* (2015) at p 12.
[10] *Ontario Nurses' Association v. Women's College Hospital* (1992), 3 P.E.R. 61 at para. 16-18, **EC Auth., Tab 3**
[11] *Abella Report*, *supra* at 192
[12] *CN v. Canada (Canadian Human Rights Commission),* [1987] 1 SCR 1114 at pp. 1138-1139, 1141-1143, 1145 ("*Action Travail des Femmes*")

equal pay for work of equal value was recognized in the International Labour Organization constitution in 1919.[13] Successive international instruments spelled out increasingly prescriptive directions for positive government action to achieve equal pay for work of equal value, including: ILO *Convention No. 100*, ratified by Canada in 1972; the United Nations' *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW), ratified by Canada in 1979; and the *Beijing Declaration and Platform for Action*, signed by Canada in 1995. Equal pay for work of equal value was declared one of the ILO's *Fundamental Principles and Rights at Work* in 1998. These international commitments gave the impetus for domestic pay equity laws.[14]

12. Likewise, the need to use pay comparisons from outside a female-dominated workplace was not novel in 1996 when Québec's *Act* was enacted. The 1984 Royal Commission on *Equality in Employment* found the devaluation of women's work persisted because equal pay laws "ignore[] the substantial number of women in segregated jobs or in businesses where there are few men or none with whom to compare salaries."[15] Two decades before Québec's regulation, the Royal Commission recommended adopting equal pay for work of equal value laws. Regarding the one such law then in place, the Royal Commission recommended that government "delete the requirement that job comparisons be made only within the same establishment."[16]

13. Other precedents were also available for Québec's law. Ontario introduced Canada's first proactive pay equity statute effective in 1987. In s.33(2)(e) Ontario's *Act* set a one-year deadline to study and recommend methods to close the pay gap in female-dominated workplaces. In 1988, nine studies of female-dominated sectors – including childcare – were completed. An Options Report was prepared in 1989. The *Pay Equity Act* was amended in 1992 to include "proxy" comparisons which, in the broader public sector, used wage comparisons outside female-

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[13] ILO Constitution (1919), Preamble

[14] ILO *Convention Concerning Equal Remuneration for Men and Women for Work of Equal Value*, (ILO Convention No. 100) (1951), Art. 2, 3; ILO *Declaration on Fundamental Principles and Rights at Work*, (1998); UN *Convention on the Elimination of All Forms of Discrimination Against Women*, (1979), Art. 11; UN *Report of the Fourth World Conference on Women*, Beijing, China, (1995) chap. I, resolution 1, annex I [Beijing Declaration] and annex II [Beijing Platform for Action] Strategic Objectives F.1, para. 165(a), F.2, para. 166(l), F.5 para. 178(a),(k), (l); *Abella Report*, *supra* at p. 239-241; Final Report of the Pay Equity Task Force, *Pay Equity: A New Approach to a Fundamental Right* (Canada, 2004) at pp. 52-63

[15] *Abella Report*, *supra* at p. 238

[16] *Abella Report*, *supra* at p. 261, recommendations 32-35, esp. recommendation 35

dominated establishments.[17] Throughout this period, and to this day, the Human Rights Tribunal of Ontario has had concurrent jurisdiction under the *Human Rights Code* to address systemic wage discrimination, including pay equity, ensuring broad access to a forum to adjudicate pay equity claims.[18] Ontario's attempt to repeal the proxy comparison method was found to violate s. 15 of the *Charter* in 1997; the court found that proxy comparisons were recognized to be "an appropriate method of determining systemic gender discrimination" in female-dominated workplaces.[19] The 2004 Federal Pay Equity Task Force also found that "proxy comparisons can be used in both the public and private sectors."[20]

14. The appeal must be assessed in this broader social, economic, political and legal context. In this context Québec's 1996 *Pay Equity Act* had a clear negative effect. Section 1 created a right to pay equity, but until 2007 s. 38 rendered it a right without a remedy. Women who worked in closest proximity to men received a remedy years earlier. While s. 1 dangled a future promise of rights, s. 38 left the most disadvantaged women last in line for a remedy. Those experiencing the deepest discrimination endured a decade of acknowledged pay discrimination, with no legal remedy and no retroactive pay. As the 1984 Royal Commission noted:

> Equality demands enforcement. It is not enough to be able to claim equal rights unless those rights are somehow enforceable. Unenforceable rights are no more satisfactory than unavailable ones.[21]

B. Comparison under section 15 of the *Charter*

15. Section 15 analysis pursues two inquiries: (1) whether the law creates a distinction on enumerated or analogous grounds; and (2) whether the distinction creates a discriminatory disadvantage.[22] But the Court emphasized that "at the end of the day, there is *only one question*: Does the challenged law violate the norm of substantive equality in s. 15(1) of the *Charter*?"[23]

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[17] *Ontario Nurses' Association v. Participating Nursing Homes*, 2016 CanLII 2675 (PEHT) at para. 19-41; application for judicial review filed though hearing date has not been scheduled.
[18] *Nishimura v. Ontario Human Rights Commission* 1989 CanLII 4317 (ON SC) at pp. 9-12; *Association of Ontario Midwives v. Ontario* , 2014 HRTO 1370 at para. 2, 28-33, 53
[19] *SEIU Local 204 v. Ontario (Attorney General),* 1997 CanLII 12286 (ON SCJ) at pp.33-35
[20] Federal Pay Equity Task Force Report, *supra* at p. 344
[21] *Abella Report*, *supra* at 10. Cf *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94 para. 46
[22] *Withler*, *supra* at para. 30; *Québec v. A*, *supra* at para. 319-332; *Kahkewistawhaw First Nation v. Taypotat*, 2015 SCC 30 at para. 18-20
[23] *Withler*, *supra* at para. 2; *Québec v. A*, *supra* at para. 325 [emphasis in *Québec v. A.*]

16. Substantive equality recognizes that s. 15 does not operate on a blank slate. It recognizes that laws operate in a pre-existing legal, political, social, economic and historical context that is marked by inequality. This inequality is socially constructed, not natural or inevitable. Accordingly, s. 15 has a strong remedial purpose.[24] Substantive equality recognizes that identical treatment can produce or exacerbate inequality and that securing s. 15's remedial purpose often requires differential treatment that takes into account differences relative to dominant groups.[25]

17. Comparison under s. 15 rejects the formalism of "treating likes alike" based solely on distinctions that appear on the face of the law because this erases the operating dynamics of systemic discrimination. Instead the focus must be on adverse effects.[26] Section 15 requires that, when enacting laws, government must take account of a law's potentially adverse impacts: "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."[27]

18. In this case, the lower court failed to examine the law's adverse effect. The court based its comparison on the "nature of the workplace" and the "presence or absence of a pay equity remedy". It compared groups defined by the very facial distinctions in the law whose effects are being challenged, thereby placing them beyond *Charter* scrutiny. This is the height of formalism. It is the "mechanical and sterile categorization process conducted entirely within the four corners of the impugned legislation" this Court rejected in *Turpin.*[28] That comparison ignores the broader social, economic, political and historical context that s. 15 demands. As a result, it overlooks the law's effect. In doing so, it misconceives what discrimination is and how it operates.

19. Discrimination is not descriptive. It is not a static snapshot in time. Instead discrimination is relational. Systemic discrimination refers to the way power operates to structure the relationships between groups in society to harmful effect.[29] This Court has recognized that the

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[24] *Andrews*, *supra at* 171
[25] *Andrews*, *supra* at 164-168
[26] *Andrews* , *supra* at 164-168; *Eldridge v. British Columbia (Attorney General)*, [1997] 3 SCR 624 at para. 54, 61-65; *Brooks v. Canada Safeway* [1989] 1 SCR 1219 at 1233-1235, 1241-1249
[27] *Eldridge*, *supra* at para. 64
[28] *R v. Turpin*, *supra* at 1332
[29] Martha Minow, *Making All the Difference: Inclusion, Exclusion and American Law* (Ithaca: Cornell University Press, 1990) at 110-112, **EC Auth., Tab 5**; Sheila McIntyre, "Answering the

goal of mitigating power imbalances lies at the heart of the *Charter*'s protection of freedom of association.[30] Similarly, s. 15 of the *Charter* is aimed at eradicating, preventing and redressing a legacy and continuing reality of power imbalances that deny our common humanity and equal entitlement to protection and benefit of the law.

20. Systemic discrimination is an active institutionalized power dynamic by which some are privileged and others are marginalized. In this power dynamic, dominant groups have attached socially constructed meaning to human traits – such as sex – and have entrenched social systems and behaviours that institutionalize those traits as a basis for unequally distributing social, economic and political rights, material well-being, social inclusiveness and social participation.

21. As this Court has recognized, systemic discrimination creates adverse effects that violate human rights and constitutional norms because it institutionalizes practices that, through

> the imbalances of power, or the discourses of dominance, such as racism, ablebodyism and sexism, … result in a society being designed well for some and not for others. It allows those who consider themselves 'normal' to continue to construct institutions and relations in their image … [31]

22. As the 1984 Royal Commission observed more pointedly, systemic discrimination has "disparately negative impacts" that flow from "the structure of systems designed for a homogenous constituency" and because of "characteristics ascribed" to those outside that homogenous constituency: "The former usually results in systems primarily designed for white able-bodied males; the latter usually results in practices based on white able-bodied males' perceptions of everyone else." [32]

23. In the present context, the result is sex-segregated occupations, a sex-segregated labour market, and profound devaluation of work that is and has historically been done by women.

Siren Call of Abstract Formalism with the Subjects and Verbs of Domination" in *Making Equality Rights Real: Securing Substantive Equality Rights under the Charter*, F. Faraday, M. Denike and M.K. Stephenson, eds. (Toronto: Irwin Law, 2006) at pp. 108-109, **EC Auth., Tab 4**

[30] *Reference re Public Service Employee Relations Act (Alta.),* [1987] 1 S.C.R. 313 per Dickson C.J.C. at pp. 365-366; *Mounted Police Association of Ontario v. Canada (Attorney General)*, [2015] 1 SCR 3, 2015 SCC 1 at para. 70

[31] *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 SCR 3, 1999 at para. 41; Margot Young, "Blissed Out: Section 15 at Twenty", in *Diminishing Returns*, S. McIntyre and S. Rogers, eds. (Butterworths, 2006) at pp. 63-64, 68 **EC Auth. Tab 6**

[32] *Abella Report*, *supra* at pp. 9-10

24. Under s. 38, sex remains the critical point of distinction that results in adverse effect. The impugned law distributes women's rights based on the presence or absence of male-dominated job classes. Women's close proximity to male work – women's degree of integration into male work environments – determines whether women are entitled to a remedy for systemic sex discrimination. The more that women have suffered from systemic sex discrimination that results in deeply sex-segregated occupations, a deeply sex-segregated labour market, and deep devaluation of women's work, the less they are entitled to remedies for systemic sex discrimination. The more deeply systemic sex discrimination structures women's employment and pay, the more remote, more truncated and shallower are their available remedies.

25. To the extent that remedial law and policy reform are modeled on the most privileged women whose experiences most closely resemble those of white men, the more those laws and policies erase, devalue and exacerbate the experiences of women, who through intersecting and amplifying dynamics of discrimination, bear the heaviest burden of systemic sex discrimination.[33] A contextual comparative approach to s. 15 must not, as the court below does, brush lightly past the exclusion of those who face the greatest burden of systemic discrimination.

C. Section 15(2) must be restricted to cases alleging "reverse discrimination"

26. Section 15(2) has no application in this case. It would only apply if men challenged pay equity as so-called "reverse discrimination". This Court ruled in *Cunningham* that

> The purpose of s. 15(2) is to save ameliorative programs from the charge of 'reverse discrimination'. … At the time the *Charter* was being drafted, affirmative action programs were being challenged in the United States as discriminatory – a phenomenon sometimes called reverse discrimination.[34]

27. Guarding against reverse discrimination claims protects state efforts to redress systemic discrimination from challenges by privileged groups. This is consistent with the principle that

> In interpreting and applying the *Charter* … the courts must be cautious to ensure that it does not simply become an instrument of better situated individuals to roll back legislation which has as its object the improvement of the condition of less advantaged persons.[35]

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[33] McIntyre, "Siren Call of Abstract Formalism", *supra* at 108-109; Minow, *Making all the Difference*, *supra* at 110-112; Young, "Blissed Out", *supra* at 63-64, **EC Auth, Tabs 4-6**
[34] *Alberta (Aboriginal Affairs and Northern Development) v. Cunningham*, 2011 SCC 37 para. 41
[35] *R. v. Edwards Books and Art Ltd*., 1986 CanLII 12 (SCC), [1986] 2 S.C.R. 713 at p. 779

28. Moreover, a pay equity law is not a s. 15(2) "special program". It is human rights legislation of general application that protects workers from sex discrimination in pay.[36]

29. A law that has a broad remedial purpose may yet, in its application to those within its scope, discriminate contrary to the *Charter*. The present claim is by those who are subject to a law of general application who assert that the law has a discriminatory effect. As with all laws, when government enacts legislation to redress long-standing social harms, it must do so in a way that does not discriminate contrary to the principle of substantive equality.[37]

30. Underinclusive aspects of Ontario's and Québec's pay equity laws have previously been found to violate s.15.[38] Those conclusions were not precluded by s. 15(2). Nor should the present challenge regarding underinclusiveness be precluded.

31. Sections 15(1) and 15(2) must work together to support substantive equality. But Québec's proposed s. 15(2) analysis would evade and subvert substantive equality by shielding a law from *Charter* scrutiny in the absence of a reverse discrimination claim. Québec's s. 15(2) analysis exacerbates this by driving into s. 15(2) a complete argument regarding government's intent, minimal impairment and proportionate impact that properly belongs only in s. 1.

32. When a member of the disadvantaged group that a law is meant to assist, challenges the effect of that law as discriminatory, that claim must be subject to a full s. 15(1) analysis. To shield it from *Charter* scrutiny under s. 15(2) displaces s. 15 as a rights framework and reduces it to a charitable framework in which disadvantaged groups must accept government's good intentions as the complete scope of constitutional protection.

33. Apart from being a paternalistic approach to the *Charter* that erodes the substance of s. 15 rights, that approach directly contradicts the well-established s. 15 principle that good intentions cannot save a law that has discriminatory effects. Since *Andrews*, the key concern under s. 15

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[36] Cf *Kapp*, *supra* at para. 55

[37] *Vriend v. Alberta*, [1998] 1 SCR 493; *Ontario (Human Rights Commission) v. Ontario*, 1994 CanLII 1590 (ON CA) at pp. 20-22, 27, 29-30 (per Weiler JA), 55-56, 58-59 (per Houlden JA)

[38] *SEIU Local 204 v. Ontario*, *supra*; *Syndicat de la function publique du Québec inc c. Québec (Procureur general)* 2004 CanLII 76338 (QC CS). See also, *Canadian Union of Public Employees Local 1999 v. Lakeridge Health Corporation*, 2012 ONSC 2051 (Div. Ct.) (CanLII) at para. 80

has always been the effect of the law from the claimant's perspective. A law may have an internal logic and yet have a discriminatory effect. Again, s. 15 is not the point at which to focus on government's intent; that must be considered only under s. 1.[39]

34. Courts must not encourage governments' stance that if they will be put to the test of *Charter* compliance they will simply not enact laws to redress systemic discrimination. Courts must not pre-emptively truncate the substance of *Charter* protection in deference to that political threat. Doing so would reinforce the very power imbalances that sustain systemic discrimination.

35. As the 1984 Royal Commission stated:

> 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 …[40]

36. The harms of laws that perpetuate a *status quo* of systemic sex discrimination must be squarely confronted. It is in no way improper to put the government to the test of justification under s. 1 of the *Charter*. It is in fact the foundation of the *Charter*. A failure to accord s. 1 it's true weight by maintaining a clear division between s. 15 and s. 1, skews the balance of the *Charter* to the detriment of substantive rights and to the detriment of those most in need of the *Charter*'s protection.

PARTS IV AND V: COSTS AND ORDER REQUESTED

37. Under the order granting the Equality Coalition intervener status, costs will not be sought by or against the Coalition and the Coalition has been granted leave to make oral argument.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 2nd DAY OF AUGUST 2017.

Fay Faraday **Janet E. Borowy**

[39] *Québec v. A*, *supra* at para. 327
[40] *Abella Report*, *supra* at p. 234

PART VI: TABLE OF AUTHORITIES

Description	Paragraph in Factum
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