

IN THE SUPREME COURT OF CANADA

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

B E T W E E N:

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**

Respondents
(Appellant)

- and -

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PART I – INTERVENER LEAF’S STATEMENT OF FACTS

1. The Intervener, the Women's Legal Education and Action Fund (LEAF) accepts the Statement of Facts of the Appellant, the Newfoundland and Labrador Association of Public and Private Employees (NAPE), and also relies upon the following facts.

2. The Respondent in this case is the Newfoundland provincial government. As a government actor the Newfoundland government is subject to the *Canadian Charter of Rights and Freedoms*, and as the equality claimants' employer it is subject to the Newfoundland *Human Rights Code* - both prohibit sex-based discrimination, which includes sex-based wage discrimination.

Canadian Charter of Rights and Freedoms, Constitution Act, 1982, as enacted by the Canada Act 1981 (UK), 1982, c. 11, sections 15 and 32(1)

The Newfoundland *Human Rights Code*, 1970, c. 262, s. 9(1)(a)

3. NAPE and the Newfoundland government entered into a Pay Equity Agreement in June, 1988. The purpose of the Pay Equity Agreement was to remedy sex-based wage discrimination in the government workforce. The pay equity negotiations which resulted in this agreement were preceded by a long history of sex-based wage discrimination by the Newfoundland government. The government undertook to remedy the acknowledged wage discrimination by negotiating a remedial regime that would incrementally achieve pay equity for the claimant employees over a five-year period beginning in April, 1988.

Arbitration Award, April 1997, Appellant's Record, Vol. I, at 4, 6, and 30-31

4. However, payment of discriminatory wages continued for three years after the Agreement was reached, while NAPE and the government negotiated the level of redress required to remedy the identified discrimination. Prior to implementing payments under the Agreement, the government predicted a fiscal deficit. It then made deficit reduction a political priority.

5. This deficit reduction priority was largely achieved through the introduction of the *Public Sector Wage Restraint Act* (the "Act"). The Act froze the wages of all public sector employees by suspending all scheduled wage increases. Additionally, the government deprived the claimant employees of the pay equity adjustment payments owed for the period from April, 1988 through March, 1991.

Public Sector Wage Restraint Act, S.N. 1991, c. 3, Appellant's Factum, Tab 2

6. In effect, the Newfoundland government knowingly persisted in discriminatory practices for three years. It relieved itself forever of its obligation to provide pay equity redress for work done between April, 1988 and March, 1991, and thus permanently confiscated the equality-promoting compensation owed to the claimant employees.

PART II – INTERVENER LEAF’S STATEMENT OF POSITION ON THE ISSUES

7. LEAF’s position on the Constitutional questions in issue is that there is a violation of s. 15 of the *Charter*, which is not demonstrably justified as a reasonable limit under s. 1 of the *Charter*.

PART III - INTERVENER LEAF’S STATEMENT OF ARGUMENT

Overview of LEAF’s Position on Section 15 of the *Charter*

8. This case concerns government devaluation of women’s work, and related devaluation of women as citizens and members of society. LEAF’s submissions on s. 15 could be presented in accordance with the three-step test articulated in *Law v. Canada*. However, LEAF submits that the *Law* test disconnects from each other the principles underlying the substantive equality analysis, creating the potential to inadvertently undermine the *Charter*’s substantive equality guarantee. Therefore, LEAF’s analysis of the s. 15 violation in this case does not match the specific *Law* steps, but instead applies a holistic, interconnected approach that focuses on the devaluing and subordinating effects of the government action. In the s. 15 submissions that follow, LEAF: (1) reviews the substantive equality principles this Court has consistently affirmed and that constitute the interconnected approach, (2) outlines the reasons why the *Law* framework operates to put the substantive equality goal in jeopardy, and (3) demonstrates that the impugned action in this case violates women’s substantive equality.

Law v. Canada (Minister of Employment and Immigration), [1999] 1 S.C.R. 497

Section 15 Guarantees Substantive Equality

9. Like all the rights and freedoms guaranteed by the *Charter*, s. 15 is to be interpreted using a purposive and contextual approach.

Law v. Canada, supra, at para. 40

10. Section 15 has a two-fold, remedial purpose: (1) to eliminate and prevent discrimination; and (2) to promote equality.

It may be said that the purpose of s. 15(1) is to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or

social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration.

Law v. Canada, supra, at para. 51 [emphasis added]

Section 15 of the *Canadian Charter of Rights and Freedoms, supra*

11. Beginning with *Andrews v. Law Society of British Columbia*, this Court has consistently rejected an abstract and formalistic approach to equality rights in favour of a contextual and substantive approach.

Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143 at 164-171, per McIntyre J.

Law v. Canada, supra at paras. 25, 38, and 81

12. The heart of the substantive equality approach is the recognition that differentiation, by itself, is not a violation of equality rights. A violation of equality rights is established by differentiations that substantively discriminate – these are grounds-based differentiations that reflect, perpetuate, reinforce, exacerbate or fail to remedy historical patterns of oppression of particular groups and individual members of these groups. The prohibited grounds of discrimination are those enumerated in s. 15, grounds analogous to the enumerated grounds, and interlocking grounds, for example, gendered disability discrimination, racialized gender discrimination and gendered age discrimination.

Andrews, supra, at 180-182 per McIntyre J.

Law, supra, at paras. 27, 63, and 81

Dianne Pothier, "Connecting Grounds of Discrimination To Real Peoples' Real Experiences" (2001) 13 Canadian Journal of Women and the Law 37

Iris Marion Young, *Justice and the Politics of Difference* (Princeton, New Jersey: Princeton University Press, 1990) at 48-65

13. The substantive equality approach is thus defined by several interconnected principles, which will be elaborated in the paragraphs that follow:

- A claimant does not need to prove discriminatory intent.
- Mere differentiation does not violate equality rights. Violations of equality rights involve discriminatory differentiation, including the failure to properly recognize and address difference.
- The focus is placed on the effect of the discrimination on the claimant(s).
- Questions of reasonableness and relevance of the challenged government action or inaction are conceptually distinct from the substantive equality analysis, and should be considered only as part of the s. 1 inquiry.

14. Substantive equality rights have a strong remedial purpose that focuses on the effects of discrimination. The purpose of equality rights is to remedy inequality; the purpose is not to assign blame or impose punishment.

Andrews, supra, at 173-174, per McIntyre J.

Law, supra at para. 80

15. Although discrimination is sometimes consciously intended, more often it unconsciously imposes the norms of the dominant group(s) so as to subordinate other norms and values. Discriminatory norms reflect and naturalize the needs, realities and circumstances of relatively more powerful groups, relationally ignoring or devaluing the needs, realities and circumstances of relatively less powerful groups. Substantive equality claims challenge discriminatory norms by seeking to expose the construction of difference and the power of the dominant perspective.

Canada (Attorney General) v. Mossop, [1993] 1 S.C.R. 554 at 623-625, per L'Heureux-Dubé J. dissenting

British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees' Union (B.C.G.S.E.U.), [1999] 3 S.C.R. 3 at paras. 39-41

Martha Minow, *Making All the Difference: Inclusion, Exclusion, and American Law* (Ithaca, New York: Cornell University Press, 1990) at 110-112

16. Eliminating differentiation is the appropriate remedy where the differentiation results in negative effects upon members of an oppressed group. Conversely, differentiation is the appropriate remedy where the failure to recognize and respect different needs, realities and circumstances results in negative effects upon members of an oppressed group. LEAF submits that both approaches may require transformation of established norms of social, political, economic and legal systems.

Andrews, supra at 171 per McIntyre J.

Law, supra at para. 25

B.C.G.S.E.U., supra

17. This Honourable Court has used a variety of indicia to describe substantive discrimination, including:

"Devalued", "stigmatization", "political and social prejudice", "stereotyping", "lacking political power", "exclusion", "marginalized", "historical disadvantage", "social, political and legal disadvantage", "vulnerability", "oppression", "powerlessness".

Law v. Canada, supra, at paras. 29, 34, 39, 42, 43, 44, 46, 47, 53, 63, and 64

18. These injuries of discrimination deny equal inclusion and participation in society, deny equal recognition as citizens, deny equal enjoyment of social and economic resources, and deny equal autonomy as human beings.

19. The question as to whether a distinction is discriminatory within the meaning of s. 15 is conceptually distinct from the question as to whether discrimination is reasonable or justifiable. The reasonableness and justification of discrimination are matters to be considered under s. 1 of the *Charter*, where the onus is on the party seeking to justify the infringement.

Andrews, supra, at 177-178, per McIntyre J.

Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General), [2004] SCJ 6, para. 97, per Binnie J.

How the Disconnected *Law* Approach Can Undermine Substantive Equality

20. LEAF submits that the effect of the *Law* framework is to disconnect in three significant ways the substantive equality principles that are conceptually interconnected, and that therefore need to be dealt with holistically to give effect to substantive equality and to avoid an abstract, rationalizing formalism.

June Ross, "A Flawed Synthesis of the *Law*" (2000) 11:3 Constitutional Forum 74

B. Baines, "*Law v. Canada: Formatting Equality*" (2000) 11:3 Constitutional Forum 65

Sheilah Martin, "Balancing Individual Rights to Equality and Social Goals" (2001) 80 *The Canadian Bar Review* 299

Sheilah Martin, "Court Challenges: *Law*", (Winnipeg: Court Challenges Program, 2002)

Bruce Ryder, "What's *Law* Good For? Same-Sex Marriage and Other Successes" 2003 Constitutional Cases, Seventh Annual Analysis of the Constitutional Decisions of the Supreme Court of Canada; Friday, April 2, 2004; Osgoode Hall Law School, Toronto, forthcoming, (2004) Supreme Court Law Review

21. The first disconnection occurs with the three-step test. The third step of the *Law* test -- where the substantive discrimination analysis takes place -- is the heart of the substantive equality analysis. To isolate the question of whether there is differentiation from the substantive impact asserted by the equality rights claimant obscures what should be the focus of the discrimination analysis.

22. The second disconnection occurs with the four-factor analysis at the third step of the *Law* test. LEAF submits that the first and fourth factors lie at the core of the substantive equality approach and should guide the interconnected analysis. The first "contextual factor" examines

whether the affected group has experienced or experiences oppression. The fourth “contextual factor” examines how the claimant’s interest is affected by the impugned measure. However, the second and third factors should not be independent inquiries because they are corollaries of the first factor. The second factor relates to the substantive equality principle that differential treatment can be required to properly address non-stereotypical, differential needs. If this factor is considered in isolation, however, it has the potential to import conceptions of “relevance” and “reasonableness” that fail to question the very discriminatory norms the equality claim seeks to eliminate. It also has the potential to shift the focus away from effects to look instead for discriminatory intention. Similarly, the third factor reflects the substantive equality principle that affirmative action measures are not discriminatory differentiations. This factor should be part of the analysis only where such measures are at issue, otherwise it too has the potential to shift the focus away from effects towards a search for discriminatory intention.

23. The third disconnection occurs with the separation of “dignity” from the concrete harms which are the indicia of substantive discrimination. Although *Law*’s statement of the purpose of s. 15 explicitly recognizes that injury to dignity is a harm related to “the imposition of disadvantage, stereotyping, or political or social prejudice”, this fundamental connection is lost when the test is formulated to ask whether the claimant “feels” that “they are less capable, or less worthy of recognition or value”. LEAF respectfully submits that this truncation treats dignity as an abstract emotive feeling, so as to trivialize and improperly individualize the concrete harms of substantive discrimination -- subordination, devaluation, disenfranchisement and disempowerment, resulting in social, political, legal and economic inequality. Dignity is only relevant to a substantive equality analysis to the extent that it constitutes a value that is undermined by the harms of discrimination.

Sheilah Martin, “Balancing Individual Rights to Equality and Social Goals” *supra*
 Sheilah Martin, “Court Challenges: *Law*”, *supra*

24. It is important to apply a holistic, interconnected substantive equality analysis rather than a disaggregated approach to ensure that the full impact of the discrimination is exposed and addressed. In this case, an interconnected analysis demonstrates how the government’s confiscation of equality-redressing pay equity adjustments designed to remedy sex-based wage discrimination violates the substantive equality rights of the claimants.

Confiscating Pay Equity Adjustments Renews, Perpetuates and Reinforces Discrimination

25. Sex-based wage discrimination refers to compensation systems and practices that devalue women and their work by paying women less than men for doing the same work as men, or for doing different work that is of equal value to work done by men. Pay equity is designed to remedy sex-based wage discrimination. Pay equity is not a wage increase.

Pat Armstrong and Hugh Armstrong, *The Double Ghetto: Canadian Women and Their Segregated Work* (Toronto: McClelland and Stewart, 1994) at 41-45

Nan Weiner and Morley Gunderson, *Pay Equity: Issues, Options and Experiences* (Markham, Ontario: Butterworths Canada Ltd., 1990) at 5-16

Canada (Attorney General) v. Public Service Alliance of Canada, [2000] 1 F.C. 146 (T.D.) at para. 117

26. It has long been recognized that there is a significant wage gap between women's and men's paid labour. Recently, the United Nations Committee on the Elimination of Discrimination Against Women noted in its comments on Canada's conformity with the Convention on the Elimination of All Forms of Discrimination Against Women its concern with the continued failure of provincial governments to implement pay equity in practice.

Judge Rosalie Silberman Abella, *Report of the Royal Commission on Equality in Employment* (Ottawa: Ministry of Supply and Services, 1984) at 232, 234, Appellant's Book of Authorities, Volume 1, tab 8

Committee on the Elimination of Discrimination Against Women, Twenty-eighth Session, January 31, 2003, Draft Report on Canada's Fifth Periodic Report at paras. 49-52 <http://www.un.org/womenwatch/daw/cedaw/cedaw28/ConComCanada.PDF> (accessed April 27, 2004)

Submission of the Canadian Human Rights Commission to the Pay Equity Task Force, March 2003, available at: http://www.chrc-ccdp.ca/legislation_policies/equitytaskforce-en.asp at 2 (accessed April 27, 2004)

27. Sex-based wage discrimination is integrally related to other forms of employment discrimination against women - occupational segregation, barriers to advancement, sexual harassment and involuntary part-time employment - such that women's participation in the labour force is characterized by inequality. In some contexts, women's employment inequality reflects stereotypes of women as secondary participants in the workforce and secondary wage earners. Women's employment inequality may also result from labour market oppressions of women who are already marginalized by interlocking grounds of discrimination. Aboriginal women, younger and older women, immigrant women, women with disabilities and women who

experience racialized gender discrimination have the highest levels of unemployment among women and are often segregated into the lowest-valued and lowest paid jobs.

Pat Armstrong and Hugh Armstrong, *supra* at 41-49

Submission of the Canadian Human Rights Commission to the Pay Equity Task Force, *supra* at 2 and 3

Recommendations to the Pay Equity Task Force – Status of Women Canada, November, 2002, available at: <http://www.payequityreview.gc.ca/4493-e.html> at 2 (accessed April 27, 2004)

Women's Economic Independence and Security: A Federal / Provincial / Territorial Strategic Framework, March 2001, a joint study released by the Federal / Provincial / Territorial Ministers Responsible for the Status of Women available at: http://www.swc-cfc.gc.ca/pubs/0662655427/200103_0662655427_e.pdf at 13-16 (accessed April 27, 2004)

28. Sex-based wage discrimination results from the systemic undervaluation of women's work through the interaction of socially-constructed divisions of labour and social constructions of the value of labour. Women are occupationally segregated into low-paid and low-status jobs, which are often low-paid and low-status precisely because they are jobs women do.

Pat Armstrong and Hugh Armstrong, *supra*

Nan Weiner and Morley Gunderson, *supra*

Canada (Attorney General) v. Public Service Alliance of Canada, *supra*, para. 151

Judge Rosalie Silberman Abella, *Report of the Royal Commission on Equality in Employment*, *supra* at 245-249

29. In the context of sex-based wage discrimination, the normalization of women's subordination is reflected in the systems and practices that undervalue women's work through assumptions that stereotype and marginalize women and their work. These assumptions include:

- a. Women are secondary wage earners: they are not "breadwinners" but "pin money" earners;
- b. Women's work does not involve skills and expertise, but simply draws on women's "natural" or "inherent" qualities and abilities;
- c. Women choose to be clustered in occupationally segregated and low-paid work;
- d. Women are selfless and are willing to bear a disproportionate economic burden.

Nan Weiner and Morley Gunderson, *supra*

30. Sex-based wage discrimination tells women and men, in the most concrete of terms, that women are not worth as much as men. Unequal wages deprive women of income; contribute to the feminization of poverty; increase women's financial dependence upon men, including in

situations where they are at risk of spousal abuse and violence; reduce women's pensions and disability benefits; and diminish women's ability to participate fully in society. Discriminatory wages result in discriminatory pensions and discriminatory disability benefits.

Women's Economic Independence and Security: A Federal/Provincial/Territorial Strategic Framework, *supra* at 16-19 and 23-26

Judge Rosalie Silberman Abella, *Report of the Royal Commission on Equality in Employment*, *supra* at 234-235

31. At the same time, sex-based wage discrimination legitimizes and reinforces men's social, political, legal and economic power in relation to women. It normalizes and rationalizes paying men more than women by sending the message that men, and men's work, are "worth more" to society than women and their work. Unequal wages for women's work increase men's power by increasing women's dependence upon men and making women vulnerable to male abuse, violence and harassment. By normalizing and rationalizing men's social, political legal and economic advantage in relation to women, pay inequity reinforces gender hierarchy.

32. Where government perpetrates the unequal pay, it sends a message that wage equality for women is not affordable for "society". As long as government's fiscal health is subsidized by sex-based wage discrimination within its own workforce, government sends the message that women's economic inequality and social inequality are not a public responsibility, but a burden that women are expected to bear. When government devalues women's work, it devalues women's contributions to society and women's citizenship status within society. Government sends the message that women's social inequality is "affordable", while respecting women's equality rights is not. In the result, government, business, taxpayers and men are unjustly enriched at the expense of women public servants.

33. In the legal context in which this case arises, LEAF submits that the government had a legal obligation to act to remedy its own sex-based wage discrimination. This legal context consists of: (1) s. 15 of the *Charter*, (2) human rights legislation, (3) international covenants prohibiting employment discrimination generally and sex-based wage discrimination specifically, and (4) the anti-discrimination provision in the collective agreement between NAPE and the government.

United Nations Covenants, Appellant's Book of Authorities, Volume 1, tabs 1-5

34. In *Andrews*, this Court stated: "Discrimination is unacceptable in a democratic society because it epitomizes the worst effects of the denial of equality, and discrimination reinforced by law is particularly repugnant. The worst oppression will result from discriminatory measures having the force of law."

Andrews v. Law Society of British Columbia, supra at 172, per McIntyre J.

35. In this case, the impugned measure has a two-fold discriminatory impact on the claimants that violates s. 15. First, by confiscating the compensation redress payments that should have been made for work done in 1988 to 1991, the three years prior to the restraint period, s. 9 targeted women for a pay cut on top of the general salary freeze imposed on all government employees. Second, the three-year delay in implementing the Pay Equity Agreement meant not only that women were deprived of three years of pay equity adjustments, but also that they had to wait three more years to begin to achieve wages equal to men's.

36. By using its legislative power to renege on its pay equity obligation and commitment, the government renewed, perpetuated and reinforced the oppression and devaluation that result from sex-based wage discrimination, as described above in paragraphs 27-32. This action was in itself a s. 15 violation because it continued, condoned and exacerbated discrimination. In addition, s. 15 was violated because the government action sent a message that women's equality is a frivolous luxury that must give way to other government objectives.

37. Contrary to the conclusions of the Newfoundland Court of Appeal, the impugned government action was not merely a temporary measure. The measure had permanent effects on all of the claimants. Specifically:

- a. The claimants who worked for the Newfoundland government between April 1, 1988 and March, 1991 had these three years of pay equity adjustments confiscated by the government. These women lost forever the economic effect of compounding and cumulative entitlements that would have come into play if the government had begun to make pay equity adjustment payments in April, 1988 as promised.
- b. The claimants who continued to work for the government during and after the restraint period did not begin to receive the incremental pay equity adjustments until 1991, three years later than they should have. These women lost forever the economic effect of compounding and cumulative entitlements that would have come into effect if the government had begun to make pay equity adjustment payments in April, 1988 as promised.

- c. Older claimants who retired between April 1, 1988 and the final implementation of the Agreement were uniquely affected because their pensions were permanently tied to discriminatory wages. These women will be at greater risk of experiencing poverty if they are forced to survive on pensions tied to unequal wages.

Monica Townson, "Reducing Poverty Among Older Women: The Potential of Retirement Income Policies", Ottawa: Status of Women Canada, 2000, chapter 3, "The Extent of Poverty Among Older Women" available at http://www.swc-cfc.gc.ca/pubs/0662659271/200008_0662659271_9_e.html (accessed April 27, 2004)

- d. Claimants who became unable to work because of disability between April 1, 1988 and the final implementation of the Agreement are uniquely disadvantaged because their disability payments are permanently tied to discriminatory wages. Women with disabilities are also especially vulnerable to poverty.

Newfoundland Court of Appeal, Reasons for Judgement, Appellant's Record, Vol.II at 346, para. 418

Fiona Sampson, "Globalization and the Inequality of Women with Disabilities" (2003) 2 Journal of Law and Equality at 16-33

38. In conclusion, LEAF submits that s. 9 of the *Public Sector Restraint Act* infringed the s. 15 rights of the claimants, requiring their employer, the Newfoundland government, to establish that this violation was a reasonable and demonstrably justified limit on equality rights in a free and democratic society. The Newfoundland government is accountable to women public servants -- as employees and as citizens -- for the devaluing and disenfranchising impacts of the impugned legislative measure.

Overview of LEAF's Position on Section 1 of the *Charter*

39. The s. 1 issue in this case is whether government's discriminatory targeting of women to bear a disproportionate burden of the fiscal deficit was reasonable and demonstrably justifiable in a free and democratic society. LEAF submits below that any violation of a *Charter* right, including violations that involve resource distribution, must be justified by the government in accordance with the *Oakes* principles. LEAF submits that the government in this case failed to meet its justificatory burden.

R. v. Oakes, [1986] 1 S.C.R. 103, at 137-140

Section 1 Guarantees A Substantive Free and Democratic Society

40. Section 1 has a two-fold purpose: (1) it guarantees *Charter* rights and freedoms at the outset, and (2) it sets out stringent criteria for justifying an infringement of a right or freedom.

It is important to observe at the outset that s. 1 has two functions: first, it constitutionally guarantees the rights and freedoms set out in the provisions which follow; and, second, it states explicitly the exclusive justificatory criteria (outside of s. 33 of the Constitution Act, 1982) against which limitations on those rights and freedoms must be measured. Accordingly, any s. 1 inquiry must be premised on an understanding that the impugned limit violates constitutional rights and freedoms--rights and freedoms which are part of the supreme law of Canada.

As Wilson J. stated in *Singh v. Minister of Employment and Immigration, supra*, at p. 218: "... it is important to remember that the courts are conducting this inquiry in light of a commitment to uphold the rights and freedoms set out in the other sections of the *Charter*.

R. v. Oakes, supra at 135-136

41. Thus, although the s. 1 analysis is conducted after a finding that a right or freedom has been violated, s. 1 is not simply a "defence" to a rights violation. Moreover, the respondent must prove that they have met the exclusive justificatory criteria.

42. The s. 1 test is found in the language of s. 1 -- the guaranteed *Charter* rights and freedoms are "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". A substantive interpretation of democracy incorporates a recognition of values and principles such as equality, inclusion, social justice, and participation, and is not a mere "majority rules" approach.

Section 1 of the *Canadian Charter of Rights and Freedoms, supra*
RJR - MacDonald Inc. v. Canada (Attorney General), [1995] 3 S.C.R. 199, at para. 126, per McLachlin J.

R. v. Oakes, supra, at 136

43. Equality is thus one of the values and principles underlying substantive freedom and substantive democracy, in addition to being guaranteed as a right under the *Charter*. Equality informs the meaning of freedom within the *Charter* and is one of the fundamental values of a democratic society.

R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295, at 313-314, per Dickson J.
R. v. Oakes, supra at 136

44. A substantive approach to democracy rejects majoritarianism as the defining principle of democratic governance and decision-making. Substantive democracy aspires to norms that value and promote diversity, inclusion, and belonging.

There is also another aspect of judicial review that promotes democratic values. Although a court's invalidation of legislation usually involves negating the will of the majority, we must remember that the concept of democracy is broader than the notion of majority rule, fundamental as that may be. In this respect, we would do well to heed the words of Dickson C.J. in *Oakes*, supra, at p. 136:

The Court must be guided by the values and principles essential to a free and democratic society which I believe to embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society.

Vriend v. Alberta, [1998] 1 S.C.R. 493, at para. 140

Donna Greschner, "The Right to Belong: The Promise of *Vriend*" (1998) 9 National Journal of Constitutional Law 417

45. A substantive approach to democracy recognizes that a formal system of representative democracy is not in and of itself enough to protect and further democratic values. Enfranchisement is more than the formal, abstract right to cast a vote in an electoral process. Under conditions of systemic social, economic, political and legal inequality, a representative electoral process by majority vote is not always representative of all groups and individuals in society, and cannot by itself achieve equal representation for all citizens. Even the formal right to vote cannot be exercised equally under conditions of systemic social, economic, political and legal inequality.

46. Democracy is not a static endpoint. It is a dynamic process through which society continues to evolve and transform itself. *Charter* claims are enabled by democratic norms, are a challenge to democratic norms, and seek to expand democratic norms.

William Connolly, *The Ethos of Pluralization* (Minneapolis: University of Minnesota Press, 1995) at xiv

James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge: Cambridge University Press, 1995) at 183-187

47. Just as democracy thrives when it is informed by equality and a substantive approach, it withers when it is based on inequality and formalistic principles. Democracy can become brittle

and even erode if governments are permitted to reinforce or exacerbate the oppression and disadvantage of subordinated groups. Inequality fosters conflicts, erodes the social fabric, and undermines peace.

48. LEAF submits that by treating women public servants as both second-class employees and second-class citizens, the Newfoundland government eroded the principles of substantive democratic citizenship.

49. Section 15 violations will rarely be found reasonable and demonstrably justified in a free and democratic society, because it is the right to substantive equality that has been infringed.

In conducting the s. 1 analysis, "it must be remembered that it is the right to substantive equality and the accompanying violation of human dignity that has been infringed when a violation of s. 15(1) has been found" (*Corbiere*, supra, per L'Heureux-Dubé J., at para. 98 (emphasis deleted)). Indeed, "cases will be rare where it is found reasonable in a free and democratic society to discriminate" (see *Adler v. Ontario*, [1996] 3 S.C.R. 609, per L'Heureux-Dubé J., at para. 95 (citing *Andrews*, supra, per Wilson J., at p. 154)).

Lavoie v. Canada, [2002] 1 S.C.R. 769 at para. 6, per McLachlin C.J. dissenting
Sheilah Martin, "Balancing Individual Rights to Equality and Social Goals", supra at 352-368

50. Applying a substantive understanding of democracy, courts should not accept rationalizations such as broad and abstract appeals to the "public good" or "the general fiscal welfare" as demonstrably justifiable limitations of equality rights, because to do so suggests that equality rights are luxuries that are separate from the democratic good, instead of rights that substantively define and enhance the public good.

51. Applying a substantive understanding of democracy, courts should not exempt government decisions involving resource allocation from the onerous review of s. 15 violations that s. 1 demands.

The Courts have a Constitutionally-Mandated Role to Protect Substantive Democracy

52. The doctrine of the "separation of powers" recognizes that each branch of government has a distinct role to play within the structures of democratic governance. All branches of government in the Canadian constitutional democracy have a duty to respect and comply with the *Charter*.

53. One role of the courts is to review the actions and inactions of the legislative and executive branches of government to ensure their compliance with the *Charter*.

Parliament has its role: to choose the appropriate response to social problems within the limiting framework of the Constitution. But the courts also have a role: to determine, objectively and impartially, whether Parliament's choice falls within the limiting framework of the Constitution. The courts are no more permitted to abdicate their responsibility than is Parliament. To carry judicial deference to the point of accepting Parliament's view simply on the basis that the problem is serious and the solution difficult, would be to diminish the role of the courts in the constitutional process and to weaken the structure of rights upon which our constitution and our nation is founded.

RJR - MacDonald Inc. v. Canada (Attorney General), [1995] 3 S.C.R. 199, at para.136, per McLachlin J.

54. The question of whether a particular rights violation is justified is to be considered on a case-specific basis, with reference to a variety of contextual factors, including, the severity of the breach and the values promoted by the government action.

Thomson Newspapers Co. v. Canada (Attorney General), [1998] 1 S.C.R. 877 at paras. 90-91

Andrews, supra at 184, per McIntyre J.

55. Government action that violates a *Charter* right or freedom must be measured against principles and values of substantive democracy to determine whether or not it is constitutional. It is essential not to conflate the constitutional requirements of democracy with government action that is taken in the name of majoritarian democracy.

Because s. 1 serves first and foremost to protect rights, the range of constitutionally valid objectives is not unlimited. For example, the protection of competing rights might be a valid objective. However, a simple majoritarian political preference for abolishing a right altogether would not be a constitutionally valid objective.

Sauvé v. Canada (Chief Electoral Officer), *supra* at para. 20, per McLachlin C.J.

56. LEAF submits that the Court's institutional role is not altered by the fact that the discrimination in this case is enacted in the name of fiscal restraint. To limit the Court's role in this way would effectively make government spending decisions immune from *Charter* scrutiny and the rule of law, and would significantly undermine substantive equality.

M. v. H., [1999] 2 S.C.R. 3 at paras. 79-80

Vriend, supra at para. 54

57. LEAF submits that the Newfoundland Court of Appeal failed to require the government to justify its discrimination by allowing parliamentary democracy to trump constitutional norms, for dubious reasons such as “the threat to North American society so forceability [*sic*] brought to public awareness this past year” -- i.e. the events of September 11, 2001.

Newfoundland Court of Appeal, Reasons for Judgment, Appellant's Record, Vol. II at 328, para. 367 [emphasis added]

58. LEAF submits that the Newfoundland Court of Appeal erred in law by misconstruing the function of the separation of powers doctrine within the Canadian constitutional democracy. The Court of Appeal then relied upon this misconstrual to relieve the Newfoundland government of its constitutional obligation to prove that its discrimination was reasonable and demonstrably justifiable.

The Oakes Principles for Government Compliance with the Charter

59. LEAF respectfully submits that the *Oakes* principles are designed to reinforce government accountability to its *Charter* obligations. The principles are stringent, they are intended to be applied stringently, and they are intended to be informed by the principles and values underlying a free and democratic society. As noted in para. 54 above, a s. 1 analysis is contextual, and the context of this case is a serious equality rights violation. In the case of a s. 15 breach, the burden of proof is especially onerous.

R.J.R. MacDonald, supra at paras. 127-129 and 134, per McLachlin J.
Lavoie, supra
R. v. Oakes, supra at 137-140

60. LEAF's position is that monetary considerations should not be available as a justification in the context of equality violations.

The Supreme Court has in any event held that cost is not a constitutionally permissible justification for discrimination under s. 1: *Schachter v. Canada*, [1999] 2 S.C.R. 679, at p. 709, 10 C.R.R. (2d) 1, at p. 20, per Lamer C.J.C. Cost/benefit analyses are not readily applicable to equality violations because of the inherent incomparability of the monetary impacts involved. Remedying discrimination will always appear to be more fiscally burdensome than beneficial on a balance sheet. On one side of the budgetary ledger will be the calculable cost required to rectify the discriminatory measure; on the other side, it will likely be found that the cost to the public of discriminating is not as concretely measurable. The considerable but incalculable benefits of eliminating discrimination are therefore not visible in the equation, making the analysis an unreliable source of policy decision-making.

Rosenberg v. Canada (Attorney General) (1998), 38 O.R. (3d) 577 (C.A.) at 11

Is Expenditure Reduction a Pressing and Substantial Objective?

61. In this case, the impugned provision and the legislation share the same objective -- to reduce government spending. This Court has consistently affirmed that budgetary considerations, by themselves, cannot normally constitute a pressing and substantial objective in a free and democratic society. The fact that money can be saved by disregarding *Charter* rights does not establish a reasonable and demonstrably justifiable objective in a free and democratic society. LEAF submits that this principle should again be affirmed, and should be applied in this case.

Nova Scotia (Workers' Compensation Board) v. Martin, [2003] 2 S.C.R. 504, at para. 109
Singh v. Minister of Employment and Immigration, [1985] 1 S.C.R. 177 at 218-219

62. The monetary nature of the objective is not altered by the fact that the cost reduction measure in this case was imposed to meet the government's deficit reduction objective. A substantive approach to democracy challenges the very norms and assumptions informing government decisions about how to raise and spend revenues. Deficits are not naturally-occurring phenomena. Nor are government revenue bases. They are produced by governments, through complex webs of decisions about how to raise money and how to spend money. The fact that these decisions involve questions of economic and social policy, and sometimes electoral pragmatism, cannot immunize them from *Charter* scrutiny if the principles of a substantive approach to democracy are to be given effect.

63. LEAF further submits that a cost reduction measure expressly grounded in discrimination cannot be a pressing and substantial objective, because it is contrary to the fundamental principle of equality underlying s. 1. In this case, it is difficult to separate the objective of the impugned provision from the method by which the objective is achieved. The objective was to reduce government spending by eliminating pay equity adjustments owed during the first 3 years of the agreed upon implementation period. LEAF submits that this objective is discriminatory on its face and, thus, contrary to the equality-promoting values of substantive democracy.

64. The Newfoundland Court of Appeal accepted the government's further characterization of the objective as fiscal restraint for the purpose of "promoting education, health and like social programs which are consistent with values underlying the *Charter*". The Court of Appeal also held that in the context of a "fiscal deficit of serious enough proportions to threaten economic security and well-being", it "can be assumed that those 'other values and principles' are commensurately threatened as well". In the Court of Appeal's view, it was not appropriate to require the government to prove the impact of alternative deficit reduction options on the other *Charter* values and principles.

Newfoundland Court of Appeal, Reasons for Judgment, Appellant's Record, Vol. II at 332 and 342, paras. 378 and 407 [emphasis in original]

65. LEAF submits that s. 1 requires the government to demonstrate a specific and concrete objective, otherwise it will be improperly relieved of its constitutional obligation to demonstrate how the infringing measure seeks to fulfill its objective.

The rhetorical nature of the government objectives advanced in this case renders them suspect. The first objective, enhancing civic responsibility and respect for the law, could be asserted of virtually every criminal law and many non-criminal measures. Respect for law is undeniably important. But the simple statement of this value lacks the context necessary to assist us in determining whether the infringement at issue is demonstrably justifiable in a free and democratic society. To establish justification, one needs to know what problem the government is targeting, and why it is so pressing and important that it warrants limiting a Charter right. Without this, it is difficult if not impossible to weigh whether the infringement of the right is justifiable or proportionate.

Sauvé, *supra* at para. 20 per McLachlin C.J.

66. LEAF submits that the Newfoundland Court of Appeal's reliance upon vague monetary considerations exemplifies the deficiency of an approach to s. 1 that allows majoritarian democracy to trump substantive democracy. The Court of Appeal characterizes the claimants' right to "enjoyment of pay equity adjustments" as "inimical to the realization of collective goals of fundamental importance", thereby reducing women public servants as a group to an "individual" who is outside "society" and whose interests are antagonistic to society. This is an inappropriate application of *Oakes*, because in the context of an equality claim it perverts the substantive and equality-promoting values of a free and democratic society.

Newfoundland Court of Appeal, Reasons for Judgment, Appellant's Record, Vol. II at 345-346, paras. 416-417

Confiscating Pay Equity Adjustments Is Not Proportionate to the Alleged Objective

67. In the alternative, if the government's alleged objective is found to be pressing and substantial, then a rational connection is conceded. However, LEAF submits that the impugned measure does not minimally impair the rights in issue, and the deleterious effects of the confiscating measure far outweigh any salutary effects.

68. The minimal impairment principle requires the government to prove that it limited women's equality rights "as little as reasonably possible" in the circumstances. This standard compels the government to demonstrate that it considered, and reasonably rejected, alternative measures to confiscating women's pay equity. LEAF submits that the Newfoundland Court of Appeal wrongly disregarded these requirements in two ways: (1) by accepting the government's mere assertions that it had ruled out a limited number of alternative deficit reduction measures as proof of considering and reasonably rejecting alternatives to the wholesale confiscation of the pay equity monies owed, and (2) by holding that the government was not required to respond to the panoply of alternative measures raised by the government's Opposition, and acknowledged as potentially available alternatives by the Arbitration Board.

Newfoundland Court of Appeal, Reasons for Judgment, Appellant's Record, Vol. II at 362-363, paras. 454-457

Arbitration Award, April 4, 1997, Appellant's Record, Vol. 1 at 99-100

Martin, supra at paras. 112 and 113

69. Although this Court has suggested that budgetary considerations may form part of the minimal impairment analysis, LEAF submits that they are, on their own, just as inappropriate to the proportionality inquiry as they are to the question of whether the government has established a pressing and substantial objective.

Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island, [1997] 3 S.C.R. 3 at para. 284

70. LEAF submits that the norms underlying government spending need to be scrutinized to reveal if and how discriminatory norms are informing resource allocation decisions. For example, the government should have to justify why reducing the deficit requires three additional years of discriminatory wages for child therapists, a class of employees covered by the Pay

Equity Agreement, instead of reducing or eliminating Ministerial car allowances, one of the alternative deficit reduction options identified by the Opposition.

71. LEAF further submits that the severe discriminatory harms of the absolute and permanent confiscation of the pay equity redress, i.e. the harms caused by the renewal, perpetuation and reinforcement of sex-based wage discrimination, clearly outweigh the monetary benefit of the Newfoundland government reneging on its full pay equity obligation and promise.

Vriend, supra at para. 122

72. LEAF submits that while it is not the role of the courts to micro-manage the government's resource distribution, it is their role to hold the government accountable for discriminatory decision-making. Given the blatant nature of the violation in this case, and the government's failure to justify this breach under s. 1, the violation cannot be saved.

73. LEAF submits that the remedial purpose of s. 15, and the role of s. 1 in guaranteeing a substantive free and democratic society, are achieved only by requiring government to promote respect for and inclusion of the disempowered – requiring solutions that may transform established norms of social, political, economic, and legal power.

PART IV – SUBMISSIONS CONCERNING COSTS

74. LEAF is not seeking costs in this matter and submits that no order for costs should be made against it.

PART V – ORDER REQUESTED

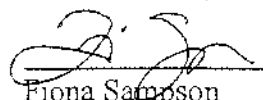
75. LEAF respectfully requests that the appeal be allowed and that the equality rights of the claimants be recognized and respected.

All of which is respectfully submitted this 28th day of April 2004.

COUNSELS' SIGNATURES



Karen Schucher



Fiona Sampson

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