Newfoundland (Treasury Board) v. N.A.P.E

Women's Court of Canada
[2006] 1 W. C. R. 327

Dans l'arrêt Terre-Neuve (Conseil du Trésor) c. N.A.P.E.*, le Tribunal des Femmes du Canada infirme la décision de 2004 de la Cour suprême du Canada qui a jugé justifiable au regard de l'article premier, la décision du gouvernement de Terre-Neuve et du Labrador d'annuler ses obligations en matière d'équité salariale à l'égard des femmes, aux termes de la* Public Sector Restraint Act*, violant ainsi les droits de ces femmes à l'égalité. Le Tribunal des Femmes du Canada estime qu'il faut procéder à un compte rendu complet et substantif de la violation des droits à l'égalité en vertu de la* Charte canadienne des droits et libertés*, afin de permettre une analyse plus exhaustive des arguments utilisés pour justifier l'empiétement sur ces droits à l'égalité. Un examen des questions d'égalité soulevées par l'affaire* N.A.P.E. comprend l'historique de la discrimination *salariale fondée sur le sexe ainsi que de l'équité salariale comme solution juridique à ce problème. Sur cette toile de fond, le Tribunal des Femmes du Canada juge que le refus de respecter l'équité salariale a provoqué un préjudice matériel et symbolique tout en violant manifestement les droits des femmes à l'égalité substantive. Une analyse des principes de droit international en matière d'équité salariale révèle que la* Public Sector Restraint Act *contrevient aussi à ces normes internationales. Dans l'application de l'article premier, le Tribunal des Femmes du Canada examine le concept de la démocratie substantive comme contrepartie de l'égalité substantive et juge qu'il faut interpréter l'article premier de manière à éviter les conflits entre les droits et la démocratie. Le Tribunal estime que des considérations fiscales ne doivent jamais suffire comme motif important et urgent pour enfreindre les droits à l'égalité et que, de toute manière, le gouvernement ne s'est pas acquitté de sa charge de preuve en démontrant qu'il y avait, de fait, une crise fiscale. Le gouvernement n'a pas réussi non plus à s'acquitter du fardeau de la preuve aux stades de l'atteinte minimale et de la proportionnalité dans l'analyse en vertu de l'article premier, une conclusion qu'appuie le droit international. Le Tribunal des Femmes du Canada ordonne au gouvernement de respecter ses obligations en matière d'équité salariale à l'égard des femmes représentées par le syndicat N.A.P.E.*

In Newfoundland (Treasury Board) v. N.A.P.E. *the Women's Court of Canada reverses the Supreme Court of Canada's 2004 decision that the erasure of pay equity obligations under Newfoundland and Labrador's* Public Sector Restraint Act *was a justifiable violation of women's equality rights. The Women's Court finds that a full and substantive account of the equality rights violation under the Canadian Charter of Rights and Freedoms is required in order to provide for a more comprehensive and contextual analysis of the arguments used to justify the infringement of these rights. Examination of the equality issues*

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in N.A.P.E. *includes consideration of the history of sex-based wage* discrimination *and of pay equity as a legal remedy for such discrimination. Against this backdrop, the Women's Court finds that the erasure of pay equity results in material and symbolic harms and is a clear violation of women's right to substantive equality. A survey of international law principles on pay equity supports this finding. In considering section 1, the Women's Court examines the notion of substantive democracy as a counterpart to substantive equality, holding that section 1 of the* Charter *should be interpreted so as to avoid a conflicting relationship between rights and democracy. The Women's Court finds that fiscal considerations should never suffice as a pressing and substantial basis for overriding equality rights and, in any event, that the government did not meet its evidentiary burden in proving that a fiscal crisis existed in this case. The government also failed to meet its justificatory burden at the minimal impairment and proportionality stages of the section 1 analysis, a conclusion supported by international law. The Women's Court decides that the government must comply with its pay equity obligations to the workers represented by NAPE.*

Reconsideration of *Newfoundland (Treasury Board) v. N.A.P.E.*, [2004] 3 S.C.R. 381 (judgment of the Supreme Court of Canada reversed).

The decision of the Women's Court of Canada was delivered by:

JENNIFER KOSHAN

I. Introduction

1. In April 1991, the Newfoundland and Labrador government (referred to throughout as the government) passed wage restraint legislation, the *Public Sector Restraint Act* (*PSRA*), S.N. 1991, c. 3 rep. and subs. S.N.L. 1992, c. P-41.1, which imposed cost-cutting measures on the wages of its own employees. One effect of this legislation was to extinguish the government's obligation to pay $24 million in pay equity adjustments owed to workers in predominantly female bargaining units, who were predominantly women workers. In the government's own words, "[e]ssentially what that does is it *erases* an obligation we had there of approximately $24 million" [emphasis added] (*Newfoundland (Treasury Board) v. N.A.P.E.*, [2004] 3 S.C.R. 381 (*NAPE* SCC), Exhibit DC-8, House of Assembly Proceedings, 19 March 1991, Appellant's Record, Volume IV, at 644-5).

2. The Newfoundland and Labrador Association of Public and Private Employees (NAPE) challenged the government's legislative action as a violation of the employees' equality rights under section 15(1) of the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act 1982*, being Schedule B to the *Canada Act, 1982* (U.K.), 1982, c. 11. The courts and Arbitration Board held that the impugned legislative measure did infringe

the employees' section 15(1) equality rights. The Arbitration Board also held that the government failed to meet its obligation under section 1 of the *Charter* to justify this infringement. However, the courts disagreed. From the Newfoundland Supreme Court to the Supreme Court of Canada, the courts held that the infringement was demonstrably justifiable as a reasonable limit on equality rights in a free and democratic society.

3. The Women's Court of Canada disagrees with the conclusion reached by the courts below. In our opinion, the courts failed to hold the government to account for its decision to erase a substantial portion of its pay equity obligation. The government argued that it was required to make hard choices to address a fiscal deficit and that significantly reducing its pay equity obligations was one of these hard choices. We respectfully disagree. In our opinion, reducing pay equity obligations was a politically more expedient choice for the government than finding a way to fulfil these obligations. It was also a choice that did not comply with the government's obligations to respect and uphold women's equality rights under the *Charter*, even in times of fiscal deficit. Our reasons are set out in the following decision.

II. Factual Context

4. NAPE is a union that represents workers employed by the government. In this case, Newfoundland and Labrador was acting both as government and as employer.

A. Pay Equity Negotiations and Agreement

5. In June 1988, after lengthy negotiations, NAPE and the government reached a pay equity agreement. The agreement opened with an acknowledgment that there was sex-based wage discrimination in the public sector. The stated purpose of the agreement was "[t]o achieve pay equity by redressing systemic gender discrimination in compensation for work performed by employees in female dominated classes" (*NAPE* SCC, Exhibit C-1: Collective Agreement between the NAPE Hospital Support Staff and Her Majesty the Queen in Right of Newfoundland and the Newfoundland and Labrador Health Care Association, Appellant's Record, vol. IV, at 586).

6. When the pay equity agreement was reached, NAPE and the government did not know the extent of the discrimination and thus did not know the amounts owing in pay equity adjustments. The agreement established a process for identifying the discrimination and then remedying the discrimination once its scope was determined. The agreement also included a five-year, phased-in implementation process for the pay equity adjustments. During the first four years of the implementation period, the government was required to spend up to 1 per cent for each relevant payroll. If a job class did

not receive its full pay equity adjustment by the end of the fourth year, the government was obliged to pay the full amount of the remaining adjustment in the fifth and final year of the implementation period.

7. Most of the workers affected by the impugned legislation were in the health care sector, and many were employed as hospital and nursing home support workers. The pay equity implementation date agreed to for these workers was 1 April 1988. By 1 April 1991, the parties had determined that approximately 4,700 workers were owed pay equity adjustments. The government said that these payments represented a cost of approximately $24 million. Under the pay equity agreement, the government was obliged to make the first four pay equity adjustments to the affected employees on 1 April 1991. These four pay equity adjustments were those owing effective 1 April 1988, 1 April 1989, 1 April 1990, and 1 April 1991.

B. The Public Sector Restraint Act *and Its Impact*

8. The *PSRA* was passed in April 1991 at the same time as the pay equity job evaluation process for the health care support and hydro workers was being completed.

9. The *PSRA* imposed restraints on public sector wages in two ways. First, section 5 of the *PSRA* voided any scheduled increases in pay scales under collective agreements. This form of restraint applied to all of the public sector, including employees in female-dominated jobs who were still being paid discriminatory wages.

10. Second, section 9(1) of the *PSRA* specifically targeted the pay equity adjustments owed to employees in female-dominated jobs under the pay equity agreement. Section 9(1) was interpreted to void the government's obligation to make pay equity adjustment payments for any period prior to 1 April 1991. As a result, on 1 April 1991, the affected employees received only the first pay equity adjustment, instead of the first four pay equity adjustments that were due on this date. Thus, these workers never received the pay equity adjustments they were owed on the work they did between 1 April 1988 and 1 April 1991. In addition, the deadline for the government's obligation to implement pay equity was postponed for three years.

11. The *PSRA* imposed restraints for a two-year period from 1 April 1991 to 31 March 1993. When the government wanted to continue cost-cutting measures after the end of the legislated restraint period, it reached an agreement with NAPE to take back 1.5 sick days per employee, to reduce the employer's contribution to the pension plan, and to further extend the pay equity implementation period. Under the renegotiated pay equity implementation agreement, the government was no longer required to pay the full amount of pay equity adjustments owed in the fifth year of the implementation period. Instead, the government was obliged to pay 2 per cent of the payroll

per year until the pay equity adjusted rate was fully implemented. Under the extended pay equity implementation period, it took up to ten years for some employees to receive their full pay equity adjustment. Moreover, this renegotiated agreement did not restore the three years of pay equity adjustments for the 1988–91 period that were taken away by the *PSRA*.

12. Thus, the net effects of the *PSRA* on workers in the affected female-dominated job classes were:

- to freeze their discriminatory wages for the period from 1991 to 1993;
- to erase the government's obligations to make pay equity adjustment payments on work performed between 1 April 1988 and 1 April 1991; and
- to extend the pay equity implementation period by three years by effectively moving forward the implementation date from 1 April 1988 to 1 April 1991.

III. Judicial History

*A. Arbitration Decision (*NAPE *SCC, Appellant's Record, Volume I, at 2-137)*

13. NAPE challenged the validity of section 9 of the *PSRA* by way of a grievance under its collective agreement with the government. The Arbitration Board unanimously held that section 9 infringed section 15 of the *Charter* because it had an adverse impact on women who were already negatively affected by sex-based wage discrimination.

14. A majority of the Arbitration Board also held that the government failed to justify this infringement under section 1 of the *Charter*. All members of the board agreed that the government had a pressing and substantial need to save money and that there was a rational connection between this objective and section 9 of the *PSRA*. They disagreed about whether the government had met the proportionality requirement or not.

15. In the view of the majority, the government's evidence established that further lay-offs were the only alternative to erasing the pay equity obligation that it considered. The majority concluded that there were other alternatives that the government should reasonably have considered. These alternatives included suspending the regular step increases and the reclassification increases that continued during the restraint period. They also included the type of across-the-board cost reduction measures—that is, cutting employees' sick days and reducing the employer's pension contributions—that were taken after March 1993. Thus, it appeared to the majority that the government's decision to

unilaterally void its pay equity obligations for a three-year period was probably the most rights-infringing measure:

> [T]here is more than sufficient evidence in this case to establish that several other *less* restrictive means were available to government which would have minimized the infringement. In my view, government should not be accorded a measure of deference or flexibility here because it limited its consideration of alternatives to only one option, i.e. 900 layoffs, a choice which was probably the most severe of any that could have been contemplated at the time. Moreover, it is not really clear that government seriously considered layoffs as an option. Indeed, the reference in Hansard to 900 layoffs could be interpreted as an attempt to describe by way of example what would have been the equivalent cost of the pay equity adjustments involved in terms of jobs. Under the circumstances, it is my view that government did not reasonably attempt to minimize the infringement. Rather, it probably chose the most restrictive means available to achieve its objective (*NAPE* SCC, Appellant's Record, vol. I, at 102).

16. As a remedy, the Arbitration Board declared that section 9 of the *PSRA* was void and ordered the government to comply with the provisions of the pay equity agreement as incorporated in the collective agreement.

B. Judicial Review by the Supreme Court of Newfoundland (Trial Division (1998), 162 Nfld. & P.E.I.R. 1)

17. The Supreme Court of Newfoundland, Trial Division, granted the government's application for judicial review of the Arbitration Board's decision. The court held that section 9 of the *PSRA* infringed section 15(1) of the *Charter* because its effect was to continue the government's wage discrimination beyond the date when the government was obliged to eliminate this discrimination. However, the court held that the infringement was justified.

18. Justice Keith Mercer was of the view that the Arbitration Board failed to show the appropriate deference to government decision making on fiscal matters when it invoked alternative options that the government did not consider. In his view, government decisions about the expenditure of public funds belong within the government's control because they "necessarily involve choices between the claims of various sectors of society" (*NAPE,*

Supreme Court of Newfoundland, Trial Division, at para. 88). Mercer J. held that the government fulfilled its justificatory obligation to demonstrate that it had considered reasonable alternatives when it stated that lay-offs were the only alternative.

C. Appeal to the Newfoundland Court of Appeal ((2002), 221 D.L.R. (4th) 513)

19. The Newfoundland Court of Appeal agreed with Mercer J. that section 9 of the *PSRA* infringed section 15 of the *Charter* and that this infringement was justified under section 1.

20. On the section 15 question, the Court of Appeal held that the infringement was linked to the government resiling from its commitment to make the pay equity adjustments, stating:

> Once Government committed itself to pay equity it could not repeal that undertaking for the duration of the restraint period as it did in s. 9 of the restraint legislation without infringing section 15(1) of the *Charter* (at para. 339).

The Court of Appeal also agreed with the lower court that the Arbitration Board failed to accord the appropriate deference to the government's fiscal decision making.

21. Justice William Marshall went even further to pose a more general challenge to the role of the *Charter* in Canadian constitutional law. In his view, the justificatory burdens that have been imposed on governments by the courts' interpretation of section 1 were contrary to the separation of powers between the courts and the legislatures and should be re-examined. Marshall J.A. proposed that a new test be added for section 1, which would require courts to ask at every stage of the analysis whether the burden imposed on the government was displacing the proper balance between the role of the courts and the role of the legislature.

D. Appeal to the Supreme Court of Canada ([2004] 3 S.C.R. 381)

22. On appeal, the Supreme Court of Canada upheld the conclusion reached by the Newfoundland courts. On the section 15(1) question, Justice Ian Binnie, writing for a unanimous court, applied the framework from *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497. The Court held that section 9 of the *PSRA* drew a distinction on the basis of sex because it targeted female-dominated classifications and that this distinction imposed substantive discrimination on the basis of the four contextual factors articulated in *Law* (at paras. 38-51).

23. On the section 1 issue, the Supreme Court of Canada affirmed the general principle that governments are required to "demonstrate" their justification for limiting a *Charter* right. Likewise, the Court affirmed in principle the *R. v. Oakes*, [1986] 1 S.C.R. 103, framework for section 1 justification, thus rejecting Marshall J.A.'s opinion that this framework disturbs the separation of powers between the legislature and the courts (at paras. 104-16). In applying the *Oakes* framework, however, the Supreme Court of Canada agreed with the conclusion of the lower courts that the government met its section 1 justificatory burden.

24. We elaborate further on the Supreme Court of Canada's reasons for decision where they pertain directly to our discussion of particular issues.

IV. Issues

25. Does section 9 of the *PRSA* infringe section 15(1) of the *Charter*? If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under section 1 of the *Charter?*

V. Analysis

A. Section 15 of the Charter

26. The equality rights issue in this case is the constitutional validity of section 9 of the *PSRA*, which provides as follows:

> 9. (1) Notwithstanding the terms and conditions of a pay equity agreement contained in a collective agreement or added by agreement to an existing collective agreement, no pay equity agreement shall contain a provision which implements that pay equity agreement retroactively.
> (2) Where there is a provision in a pay equity agreement which provides that the pay equity agreement shall be implemented retroactively, that provision is void.
> (3) Notwithstanding the other provisions of this Act, a pay equity agreement may be negotiated or implemented, but the 1st pay equity wage adjustment date shall be the date on which the pay equity wage adjustment is agreed upon.
> (4) This section applies whether the pay equity agreement is reached or the pay equity wage adjustment date is agreed upon before or after the date this Act comes into force.

> (5) In this section "pay equity agreement" means an agreement between a public sector employer and a group of public sector employees to recognize the compensation practice which is based primarily on the relative value of the work performed, irrespective of the gender of employees, and includes a requirement that no employer shall establish or maintain a difference between compensation paid to male and female employees, employed by that employer, who are performing work of equal or comparable value.

27. Although the other courts hearing this case all held that the impugned legislative measure infringed section 15(1), they did so with a relative ease that is troubling in view of the similar ease with which they accepted as justifiable the government's decision to erase its pay equity obligations. In contrast, we undertake a detailed section 15 analysis because we believe that this type of examination of the equality rights issue is critical to properly ground the section 1 analysis.

28. Our discussion of the equality rights issue is divided into three parts. In the first part, we set out our approach to a substantive and contextualized analysis of the application of section 15(1) of the *Charter* in this case. In the second part, we outline some of the difficulties with the Supreme Court's approach in *Law*, *supra*, in terms of addressing section 15(1) claims generally and in its application to this case. In the third part, we draw on international law principles to support our analysis of section 15(1) of the *Charter*.

(1) Substantive Equality Framework

29. The text of section 15 of the *Charter* states:

> 15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
> (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

30. Beginning with the Supreme Court of Canada's decision in *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143 at 164-71 (*per* Justice

William McIntyre), Canadian courts have rejected an abstract and formalistic approach to equality rights in favour of a contextual and substantive approach.

31. In *Andrews*, the Supreme Court of Canada posed two questions for a substantive approach to equality rights under the *Charter:* (1) is there a distinction in treatment; and (2) is this distinction discriminatory? In the *Andrews* framework, the question of whether the distinction is based on a prohibited or analogous ground was part of the answer to the question of whether the distinction is discriminatory.

32. A fundamental principle of a substantive equality approach is that the focus should be on the effects of the differential treatment or action. Moreover, these effects must be looked at not simply by themselves but also in their historical, social, political, and legal context (*Andrews*, at 152, 164-9, 174-5, and 180-1; *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624 at paras. 60-1, 64-9, and 77; *Law*, at paras. 39, 42-3, 51, 54-5, 64-5, 70, and 85-6).

33. The pay equity agreement between NAPE and the government was reached in a context where discrimination is legally recognized as a significant cause of the gap between women's wages and men's wages and pay equity is recognized as a legal remedy for sex-based wage discrimination. A contextual analysis of the pay equity agreement between NAPE and the government and of the effects of section 9 of the *PSRA* is therefore necessary to the section 15 analysis in this case.

(a) Social Context of the Pay Equity Agreement

34. The principle of "equal remuneration for work of equal value" was one of the founding principles of the International Labour Organization, which was established in 1919 (Constitution of the International Labour Organization, Part XIII, *Versailles Treaty*, 28 June 1919, Article 427). This principle recognizes that the economic value of work is not inherent to the job or to the person doing the job. Economic value is socially defined and ascribed. In unionized workplaces, the union and the employer negotiate this value. In non-unionized workplaces, employers may negotiate this value with employees, or they may determine it unilaterally.

35. In 2004, almost one century after the principle of pay equity was introduced, the Federal Task Force on Pay Equity reported that the wage gap between women and men in industrialized countries continued to hover around 25 per cent. For Canada, the task force reported that women's average employment income in the year 2000 was 70.8 per cent of men's average income (*Pay Equity: A New Approach to a Fundamental Right* (Ottawa: Pay Equity Task Force, 2004) at 10 and 12). This wage gap affects women as a group and tends to be even more pronounced for Aboriginal women, women

with disabilities, poor women, and racialized women (*Pay Equity*, at 41; and Pat Armstrong and Hugh Armstrong, *The Double Ghetto: Canadian Women and Their Segregated Work*, 3rd edition (Toronto: McClelland and Stewart, 1994) at 45-9).

36. In the Canadian labour market, as in other labour markets, women tend to be clustered in jobs that are less well paid than the jobs in which men predominate. The term "occupational segregation" is often used to refer to the fact that women and men tend to perform different types of work in the labour force. Statistics for Canada for 2002 indicated that 70 per cent of all female workers in Canada worked in the areas of teaching, nursing, and related health occupations, clerical or other administrative positions, and sales and service occupations (*Pay Equity*, at 14-15, citing Statistics Canada, *Women in Canada: Work Chapter Updates* (Ottawa: Statistics Canada, 2003) at 8-9). Occupational segregation, like economic value, is the result of social practices. Many different social practices combine to produce workplaces in which women and men do different jobs.

37. Occupational segregation, and the compensation practices that are associated with it, are significant contributing factors to the sex-based wage gap. As Pat Armstrong and Hugh Armstrong have written, "[o]bviously there are not only men's jobs and women's jobs, but also men's wages and women's wages." They go on to say:

> In summary, wage differentials go hand in hand with occupational segregation. As Fox and Fox . . . conclude, "women systematically have been kept out of occupations in which men's wages are high." But the other half of the coin is that women's jobs have been systematically underpaid relative to those of men (Armstrong and Armstrong, *supra*, at 45, citing Bonnie Fox and John Fox, "Women in the Labour Market, 1931-1981: Exclusion and Competition" (1986) 23 Canadian Review of Sociology and Anthropology 1 at 15).

38. Women as workers, and the jobs women do, tend to be ascribed second-class status in the labour force. As the Women's Legal Education and Action Fund (LEAF) argued in its factum before the Supreme Court of Canada, women's labour market subordination has been normalized through practices "that stereotype and marginalize women and their work" (*NAPE* SCC, factum of the intervenor LEAF, at para. 29, reprinted in Fay Faraday, Margaret Denike, and M. Kate Stephenson, *Making Equality Rights Real: Seeking Substantive Equality under the Charter* (Toronto: Irwin Law, 2006) 471 at 476-7)). Women have commonly been assumed not to be "bread-winners" but merely working for "pin money." Their work has been assumed

not to involve the exercise of skill and expertise but, rather, to involve "natural" sex-specific traits that have been deemed to be of little value. Occupational segregation has been ascribed to women's choices rather than to workplace barriers. Women have been assumed to be selfless and unambitious (Nan Weiner and Morley Gunderson, *Pay Equity: Issues, Options and Experiences* (Markham, ON: Butterworths Canada, 1990) at 5-16; see also *Pay Equity*, *supra*, at 25-8; Judge Rosalie Silberman Abella, *Report of the Royal Commission on Equality in Employment* (Ottawa: Ministry of Supply and Services, 1984) at 245-9).

39. Wage discrimination has direct material consequences for women. Simply put, they do not earn as much money as men. This inequality has also compounded other employment inequalities that women experience. It has done so largely by reinforcing second-class status for women in the workplace. This second-class status, in turn, has been reflected in, and has reinforced, other systems and practices of sex inequality in employment, including insufficient provision for childcare and other family care responsibilities, part-time employment, precarious employment, and sexual harassment. Women experience these employment inequalities in different ways, depending upon their social class, race, and abilities (See Leah F. Vosko, *Temporary Work: The Gendered Rise of a Precarious Employment Relationship* (Toronto: University of Toronto Press, 2000) at 3-13 and 27-44; see also Judy Fudge and Rosemary Owens, eds., *Precarious Work, Women and the New Economy: The Challenge to Legal Norms* (Oxford: Hart Publishing, 2006); Ann Porter, *Gendered States: Women, Unemployment Insurance and the Political Economy of the Welfare State in Canada 1945-1997* (Toronto: University of Toronto Press, 2003); and Cynthia Cranford, Leah Vosko, and Nancy Zukewich, "The Gender of Precarious Employment in Canada" (2003) 58 Relations industrielles/ Industrial Relations 454).

(b) Legal Responses to Sex-Based Wage Discrimination

40. The principle of "equal remuneration for work of equal value" calls for an examination of the compensation practices associated with the jobs women do and the second-class status ascribed to women's jobs and women's work. This principle was enshrined in 1951 in the International Labour Organization's (ILO) *Convention no. 100 Concerning Equal Remuneration for Men and Women for Work of Equal Value*, General Conference, 34th Sess. (*Equal Remuneration Convention*) and has since been incorporated into the *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 U.N.T.S. 3, Article 7; the *Convention on the Elimination of All Forms of Discrimination against Women*, 18 December 1979, 1249 R.T.N.U. 13, adopted by the UN General Assembly Resolution 34/180, Article 11; and the *Beijing Declaration and Platform for Action*, UN Doc. A/CONF.177/20 (1995)

and UN Doc. A/CONF.177/20/Add.1 (1995), Article 167. Canada has ratified all of these conventions and has signed the *Beijing Declaration*.

41. In Canada, legal remedies for sex-based wage discrimination have generally taken two forms. Equal pay laws are one form of remedy. These laws are designed to address the direct discrimination that occurs when women are paid less than men for doing the same work or substantially similar work. First passed by provincial legislatures in the 1950s and 1960s, these legal provisions were often later incorporated into human rights statutes or employment standards statutes (in Ontario, for example, see *Female Employee's Fair Remuneration Act*, S.O. 1951, c. 26; *Ontario Human Rights Code*, S.O. 1961-2, c. 93, s. 5; and *Employment Standards Act*, S.O. 1968, c. 35, s. 19). The equal pay remedy can be used where there is a relatively obvious comparison between women's work and men's work, but it is not available where there is no such obvious comparison to make.

42. Pay equity laws are a second form of legal remedy. The expression "pay equity" is linked with the legal remedy for non-explicit and systemic sex-based wage discrimination. The pay equity legal remedy typically requires that a gender-neutral job evaluation process be conducted to find a way of comparing women's work with men's work and of determining whether women's work is under-valued and underpaid relative to men's work. This process typically evaluates the work in terms of skill, effort, responsibility, and working conditions. An important goal is to attach value to the aspects of the job that are often discounted when economic value is assigned to women's paid work. If the job evaluation process shows that women are paid less for doing work that is relatively equal in skill, effort, responsibility, and working conditions to men's work, then women are entitled to have their wages equalized with the wages of the male comparator (for discussion of the legislated approaches to pay equity, see *Pay Equity, supra*, at 63-76).

43. In Canadian law, pay equity is conceptually and legally a human rights remedy for sex-based wage discrimination. Pay equity is considered a "human right" because it requires an examination of the impact of existing systems and practices and a re-evaluation of the value of women's work in relation to men's work. Pay equity legal remedies are designed to challenge labour market inequities and to provide a measure of redress for sex-based wage discrimination by moving towards equalizing the wages paid for women's work in relation to wages paid for men's work. As the Federal Pay Equity Task Force stated in its 2004 final report:

> At the heart of the principle of equal pay for equal value is a concern with systemic discrimination, and with pay practices which have routinely overlooked or devalued important aspects of the work done by women.

> We think that the elimination of discrimination should be the central focus of pay equity legislation, and consequently that it should be characterized as human rights legislation (*Pay Equity*, at 150).

However, while pay equity remedies can challenge some labour market inequities and can provide a measure of redress for sex-based wage discrimination, they are not a solution to all of the problems of unequal wages, let alone all of the problems of discrimination against women in employment (see Judy Fudge and Patricia McDermott, eds., *Just Wages: A Feminist Assessment of Pay Equity* (Toronto: University of Toronto Press, 1991); Judy Fudge, "The Paradoxes of Pay Equity: Reflections on the Law and the Market in Canada and the *PSAC*" (2000) 12 Canadian Journal of Women and the Law 313-45; Ceta Ramkhalawansingh, "Employment Standards Legislation: A Primary Source of Women's Employment Inequality" (1993) 2 Canadian Labour and Employment Law Journal 80-9; see also *Pay Equity*, Recommendations 6.9 and 6.10). The latter recommendations of the Federal Pay Equity Task Force recommend that pay equity legal obligations be expanded to apply to wage discrimination in relation to disability, visible minority status, and Aboriginal status.

44. The Supreme Court of Canada introduced its discussion of the legal issues in this case by stating: "Pay equity has been one of the most *difficult and controversial* workplace issues of our times" (*NAPE* SCC, at para. 30 [emphasis added]). The Court did not explain what it meant when it said that pay equity is a "difficult" and "controversial" issue. We believe that this statement reflects the fact that pay equity questions the legitimacy of compensation practices that produce relatively higher wages for men. Pay equity challenges the idea that compensation practices that systemically produce lower wages for women's work are normal or natural. This challenge may be "difficult" and "controversial." However, the effectiveness of equality rights would be significantly diminished if they did not require engaging with difficult and controversial issues.

45. Human and equality rights principles require us to examine social practices and systems from different perspectives and, in particular, from the perspective of groups who do not benefit equally from them. As Justice John Evans of the Federal Court wrote in *Canada (Attorney General) v. Public Service Alliance of Canada*, [2000] 1 F.C. 146 at paras. 117 and 151,

> [T]he policy motivating the enactment of the principle of equal pay for work of equal value is the elimination from the workplace of sex-based wage discrimination. The kind of discrimination at issue here is systemic in

> nature: that is, it is the result of the application over time of wage policies and practices that have tended either to ignore, or to undervalue work typically performed by women . . .
>
> [T]he nature of systemic discrimination often makes it difficult to prove that the disadvantaged position in the workplace of many members of particular groups is based on the attributes associated with the groups to which they belong. This is because, as Dickson C.J. observed in *Canadian National Railway Co., supra*, at page 1139, systemic discrimination "results from the simple operation of established procedures of recruitment, hiring and promotion, none of which is necessarily designed to promote discrimination." Accordingly, an employer's wage policies and practices may be based on such deep-rooted social norms and assumptions about the value of the work performed by women that it would be extremely difficult to establish in a forensic setting that, if women were paid less than men performing work of equal value, that difference was based on sex.

46. As the Supreme Court of Canada held in *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3 at para. 41, a substantive approach to discrimination calls for the transformation of systems and practices that have discriminatory impact:

> Under the conventional analysis, if a standard is classified as being "neutral" at the threshold stage of the inquiry, its legitimacy is never questioned. The focus shifts to whether the individual claimant can be accommodated, and the formal standard itself always remains intact. The conventional analysis thus shifts attention away from the substantive norms underlying the standard, to how "different" individuals can fit into the "mainstream," represented by the standard . . . Referring to the distinction that the conventional analysis draws between the accepted neutral standard and the duty to accommodate those who are adversely affected by it. Shelagh Day and Gwen Brodsky ["The Duty to Accommodate: Who Will Benefit?" (1996) 75 Canadian Bar Review 433], *supra*, write:
>
> > The difficulty with this paradigm is that it does not challenge the imbalances of power, or the discourses

> of dominance, such as racism, ablebodyism and sexism, which result in a society being designed well for some and not for others . . .
>
> As a formula, different treatment for "different" people is merely the flip side of like treatment for likes. Accommodation does not go to the heart of the equality question, to the goal of transformation, to an examination of the way institutions and relations must be changed in order to make them available, accessible, meaningful and rewarding for the many diverse groups of which our society is composed [at 462].
>
> I agree with the thrust of these observations. Interpreting human rights legislation primarily in terms of formal equality undermines its promise of substantive equality and prevents consideration of the effects of systemic discrimination, as this Court acknowledged in *Action Travail* [*Canadian National Railway Co. v. Canada (Canadian Human Rights Commission)*, [1987] 1 S.C.R. 1114], *supra* at paras. 40-1).

A substantive approach to equality rights under section 15 of the *Charter* similarly calls for the transformation of discriminatory systems and practices.

(c) Section 15 of the Charter *and the Effects of Section 9 of the* PSRA

47. In the government's own words, section 9 of the *PSRA* erased three years of pay equity adjustments owed to women workers in the public service. From the perspective of the affected workers, and as articulated by LEAF, section 9 imposed a "disproportionate burden" of the government's deficit reduction measures on women workers, who were subjected both to a general wage freeze affecting all public sector employees and to a claw-back of their pay equity payments (*NAPE* SCC, LEAF factum, at para. 39).

48. By erasing the government's pay equity obligations from 1988 to 1991, section 9 revoked the compensatory redress owed to women workers for work done during the three years *prior to* the restraint period. Section 9 also forced women workers to wait three more years to begin to achieve wages equal to men's wages. The courts below framed section 9 as a temporary measure that only delayed or postponed the implementation of the pay equity agreement. In our opinion, these efforts at minimizing the effect of section 9 are misguided and incorrect.

49. Section 9 was not a temporary measure. The affected employees lost forever the pay equity adjustments they were owed on work done between

1 April 1988 and 1 April 1991. They also lost forever the cumulative benefits that would have flowed from receiving the four pay equity adjustments they were entitled to receive on 1 April 1991, only one of which was actually received. This erasure additionally affected older workers and workers with disabilities who began to receive pensions or income replacement benefits between 1 April 1988 and 1 April 1991, since these benefits were permanently calculated upon their discriminatory wages.

50. Section 9 did not simply delay the implementation of the pay equity agreement. It permanently extinguished a significant portion of the government's legal obligations.

51. As argued by LEAF, when the government's fiscal health is subsidized by sex-based wage discrimination within its own workforce, economic and social inequalities continue to be imposed on women (*NAPE* SCC, LEAF factum, at para. 32). These burdens impose material inequalities that infringe section 15 of the *Charter*. The message that accompanies these burdens is that the government can avoid its responsibility for women's social and economic inequalities. This message also infringes section 15 of the *Charter*.

52. A government witness in the grievance arbitration proceeding, Gerald Maloney, testified that the initiative taken by the government in 1993 to further extend the pay equity implementation period was driven in part by the perceived inequity of some employees receiving more than others during a period of ongoing fiscal restraint. In his words,

> [t]he net . . . effect of that . . . was to, rather than make the final pay equity adjustment in that fifth year of 1995, it was to spread out the pay equity process over another four or five year period and gradually build up to the achievement of full pay equity. But it was driven by, by those two primary considerations, one being the difficulty we had with absorbing a $12 million expenditure at one time, and the second, the inequity, I guess, that we felt it was creating by giving one group *a fairly substantial pay raise* when there was another group, or most of the rest of the public sector, who were not going to get anything (*NAPE* SCC, Appellant's Record, vol. III, at 548-49 [emphasis added]).

Maloney also suggested that section 9 of the *PSRA* was motivated by a similar concern that it would not be fair to provide pay equity adjustments when employee compensation packages were frozen:

> The state of affairs we were faced with when we renegotiated this in 1994 was not unlike the state of

> affairs we were facing in 1991 whereby again to implement pay equity in 1991 as agreed to would have required us to make a *very substantial retroactive payment* in addition to increasing our salary bill in that year and would again have had the effect of giving one group of workers *very substantial increases and very substantial retroactive cheques* during a period when we were looking at most of the public sector saying, you can't have anything (*NAPE* SCC, Appellant's Record, vol. III, at 549 [emphasis added]).

53. The suggestion that it would have been unfair to make pay equity adjustment payments in a context where employees were not receiving wage increases reflects a fundamental misunderstanding of the purpose of pay equity adjustments. Pay equity adjustments are not a wage increase. They are a monetary adjustment that is required to remove discrimination in wages. As the majority of the Arbitration Board observed, this was far from being a situation in which the pay equity adjustments could be treated as an "increase" that might create morale problems among other workers. On the contrary, eliminating the pay equity adjustments had a "double demoralizing effect" on the women workers who were subject to the across-the-board wage freeze as well as to the confiscation of their pay equity adjustment (*NAPE* SCC, Appellant's Record, vol. I, at 104). When the government and the courts characterize a pay equity obligation as a pay "increase," as though it were a discretionary matter rather than a human rights entitlement, they reinforce the idea that women's equality is a "frivolous luxury that must give way to other government objectives" (*NAPE* SCC, LEAF factum, at para. 36). The message communicated is that wage equality for women is not affordable for society.

54. In the public sector context, the under-valuation of women's work results in the costs of government being subsidized in part by women workers. It appears to us that the government and the courts perpetuated the very discrimination that pay equity legal remedies are designed to remedy when they sought to minimize the effect of section 9 of the *PSRA*. Treating the negotiated pay equity adjustments not as an entitlement but rather as government largesse undermines the transformative goal of pay equity, which is to recognize the true value of women's work and compensate it accordingly.

55. Even though the courts below consistently held that section 9 of the *PSRA* infringed section 15(1) of the *Charter*, their reasons for this decision say very little about sex-based wage discrimination and about pay equity as a legal remedy for this discrimination. In our view, their approaches to section 15(1) can only be described as minimalist. This minimalism glossed over the challenges posed by pay equity and is reflected in the Supreme Court of Canada's statement that pay equity is "difficult" and "controversial."

In our view, these unexamined challenges contributed to a flawed analysis of what the government did when it erased three years of its pay equity obligation to women workers and what other measures the government could and should have considered. We believe that the ease with which the lower courts accepted the government's section 1 argument stems from the want of a full and substantive account of why reneging on its pay equity obligation violated section 15.

(2) The *Law* Framework and its Application in This Case

56. Canadian courts have never formally rejected the substantive approach to equality first articulated by the Supreme Court of Canada in *Andrews, supra*. However, they have increasingly disagreed about what a substantive approach to equality means in the context of addressing the concrete claims brought under section 15 of the *Charter*.

57. In *Law*, *supra*, the Supreme Court of Canada re-articulated the legal framework for a substantive equality analysis. This re-articulation built on both the *Andrews* principles as well as the Court's subsequent jurisprudence (see, for example, *Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219; *Weatherall v. Canada (Attorney General)*, [1993] 2 S.C.R. 872; *Miron v. Trudel*, [1995] 2 S.C.R. 418; and *Eldridge*, *supra*).

58. The *Law* approach divided the two *Andrews* questions into three questions, which are: (1) is there a distinction in purpose or effect of the law; (2) is the distinction based on a prohibited or analogous ground of discrimination; and (3) is the distinction discriminatory in a "substantive" sense (at para. 39)? It then further divided the third question into what the Court called four contextual factors, which are: (1) is there historical or pre-existing disadvantage, stereotyping, prejudice, or vulnerability experienced by the individual claimant or group; (2) does the ground on which the claim is based correspond to the actual need, capacity, or circumstances of the claimant or others; (3) does the legislation have an ameliorative purpose or effect for a historically disadvantaged group; and (4) what is the nature and scope of the interest affected by the impugned law (at paras. 62-75)?

59. The Supreme Court of Canada emphasized that these four contextual factors were not intended to be comprehensive nor were they intended to be applied formulaically. However, as noted by LEAF, a number of commentators have expressed concerns that this is precisely what has happened in the jurisprudence since *Law* (*NAPE* SCC, LEAF factum, at paras. 20-4). Critics have suggested that the *Law* approach has become a mechanically applied checklist instead of a meaningful contextual guide and that it disaggregates and disconnects the contextual factors instead of showing how they are related. They have expressed concerns that the *Law* framework has the effect of re-introducing an abstract and rationalizing formalism into the equality analysis,

instead of providing a meaningful guide to a substantive approach to equality (*NAPE* SCC, LEAF factum, *supra*; Fay Faraday, Margaret Denike, and M. Kate Stephenson, ''Introduction: In Pursuit of Substantive Equality,'' in *Making Equality Rights Real*, *supra*, at 9-26; Beverley Baines, ''*Law v. Canada:* Formatting Equality'' (2000) 11(3) Constitutional Forum 65; Sheilah Martin, ''Balancing Individual Rights to Equality and Social Goals'' (2001) 80 Canadian Bar Review 299; June Ross, ''A Flawed Synthesis of the Law'' (2000) 11(3) Constitutional Forum 74; Bruce Ryder et al., ''What's Law Good For? An Empirical Overview of Charter Equality Rights Decisions'' (2004) 24 Supreme Court Law Review 103; and Sheila McIntyre and Sanda Rogers, eds., *Diminishing Returns: Inequality and the Canadian Charter of Rights and Freedoms* (Markham, ON: LexisNexis, 2006)).

60. Commentators have also expressed concerns that the *Law* framework distorts or under-analyzes the role of dignity in equality rights analysis by separating dignity from the concrete harms and underlying values that mark substantive discrimination (see Martin, *supra;* Sophia R. Moreau, ''The Wrongs of Unequal Treatment'' (2004) 54 University of Toronto Law Journal 291; and Denise Réaume, ''Discrimination and Dignity,'' in *Making Equality Rights Real*, *supra*, 123). These concrete harms have been identified by the Supreme Court as the harms that flow from devaluation, stigmatization, political, and social prejudice, stereotyping, lacking political power, exclusion, marginalization, historical disadvantage, social, political, and legal disadvantage, vulnerability, oppression, and powerlessness (*Law*, at paras. 29, 34, 39, 42, 43, 44, 46, 47, 53, 63, and 64, as cited in *NAPE* SCC, LEAF factum, at para. 17).

61. In our view, dignity can be relevant to a substantive equality analysis as a social value that is undermined by the concrete, material harms of discrimination. It is the latter, however, that should be the focus of section 15. These material harms are seen in the social, political, legal, and economic inequalities that are produced by practices of subordination, devaluation, disenfranchisement, and disempowerment. These inequalities include the denial of equal inclusion and participation in society, the denial of equal recognition as citizens, the denial of equal enjoyment of social and economic resources, and the denial of equal autonomy as human beings (*NAPE* SCC, LEAF factum, at para. 23; Martin, *supra;* and Colleen Sheppard, ''Inclusive Equality and New Forms of Social Governance'' (2004) 24 Supreme Court Law Review 45 at 71-3).

62. By following the *Law* approach to conclude that section 9 of the *PSRA* infringed section 15, the Supreme Court of Canada's analysis is characterized by a detachment and a mechanistic application of the contextual factors that demonstrate how the disaggregation of the factors can de-emphasize the harms of discrimination. This approach risks effacing the equality violation. In this case, the cursory and disconnected

nature of the Supreme Court's section 15 analysis failed to provide the Court with a properly contextualized examination of the harm to the women workers to incorporate within its section 1 analysis.

63. In applying the four factors, the Court held that: (1) there was pre-existing disadvantage because there was a long and chronic history of women's jobs being underpaid and that section 9 reinforced this disadvantage by taking away remedial benefits negotiated to address the under-valuation of women's work; (2) delaying payment of the pay equity adjustments not only failed to correspond to the actual needs of the claimants but in fact undermined their needs; (3) section 9 did not have an ameliorative purpose in relation to the workforce but, indeed, had the opposite purpose; and (4) the interest affected was of great importance because of the importance of work in peoples' lives (*NAPE* SCC, at paras. 41-51).

64. In principle, the purpose of the four contextual factors is to determine whether or not the differential treatment imposes substantive discrimination. By dividing the analysis into four distinct questions, however, the Supreme Court seems to be distracted from providing an answer to the central question. The answers to the four contextual factors do not appear to add up to a single answer to the question of substantive discrimination; they remain four discrete and disconnected answers. This disaggregated approach masks the seriousness of the harms of discrimination.

65. To conclude, section 9 of the *PSRA* produced substantive discrimination by perpetuating the material and symbolic devaluation of women's work. It did so by imposing on women a disproportionate share of the government's fiscal reduction measures. The effect of this action is to perpetuate stereotypes of women's work as marginal and second class, to continue women's economic and social disadvantage, and to deny women workers equal recognition and equal treatment. It is these concrete harms for which the government must account.

(3) International Law Principles

66. As noted earlier, international law also supports the conclusion that section 9 of the *PSRA* infringes section 15 of the *Charter*. International pay equity norms are binding, as the relevant treaties have been ratified by Canada, and it is presumed that Canadian legislators intend to act consistently with their international obligations. As such, international pay equity norms must be applied when considering whether section 9 of the *PSRA* violates section 15 of the *Charter*, unless these norms are inconsistent with Canadian law (see Gibran van Ert, *Using International Law in Canadian Courts* (The Hague: Kluwer Law International, 2002) at 271-2). In the context of this case, the question is whether international pay equity norms are consistent with substantive equality as protected under Canadian law. Given our conclusion

that pay equity is consistent with women's substantive equality and, indeed, remedies systemic wage inequality for women workers, this is an appropriate case in which to apply international norms to the interpretation of section 15 of the *Charter* in the context of the *PSRA*.

67. Several sources of international law provide for a right to pay equity for women. The *International Covenant on Economic, Social and Cultural Rights* provides in Article 7(a)(i) for "the right of everyone to the enjoyment of just and favourable conditions of work," including "[f]air wages and equal remuneration for work of equal value without distinction of any kind, in particular women [are] guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work."

68. Article 11(1)(d) of the *Convention on the Elimination of All Forms of Discrimination against Women, supra*, guarantees women "the right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work."

69. Similarly, Article 167(a) of the *Beijing Declaration and Platform for Action, supra*, requires that governments "enact and enforce legislation to guarantee the rights of women and men to equal pay for equal work or work of equal value" (see also Articles 168(1), 180(a), 180(h), 180(1), and 180(o)). The International Labour Organization has also recognized the principle of pay equity in the *Equal Remuneration Convention*, *supra*, and in its *Declaration of Fundamental Principles and Rights at Work*, 86th Sess. (June 1998).

70. International law also provides a right of equal pay for workers of colour and workers with disabilities. Article 5(e)(i) of the *International Convention on the Elimination of All Forms of Racial Discrimination*, 660 U.N.T.S. 195, 4 January 1969, requires states parties "to prohibit and to eliminate racial discrimination in all its forms" and to guarantee the right of racial equality in the enjoyment of economic, social, and cultural rights, including "the rights to work, to free choice of employment, to just and favourable conditions of work, to protection against unemployment, to equal pay for equal work, [and] to just and favourable remuneration." Canada ratified the *International Convention on the Elimination of All Forms of Racial Discrimination* on 15 November 1970. Article 27 of the draft *Convention on the Rights of Persons with Disabilities*, UN Doc. A/AC.265/2006/L.6 (2006), provides for "the rights of persons with disabilities, on an equal basis with others, to just and favourable conditions of work, including equal opportunities and equal remuneration for work of equal value."

71. Section 9 of the *PSRA*, which extinguished the government's pay equity obligations in relation to workers covered by the pay equity agreement, must be viewed as contrary to these international pay equity norms. The effect of section 9 is that women's right to be paid equally for work of equal value was erased, with material and symbolic harms for women. International law

thus confirms that section 9 of the *PSRA* is contrary to the guarantee of substantive sex equality in section 15 of the *Charter*. To put this another way, an interpretation of section 15 that found otherwise would be inconsistent with international law.

(4) The Government's Actions Must Be Demonstrably Justified

72. For all of these reasons, we conclude that the government infringed the substantive equality rights of its women workers by enacting section 9 of the *PSRA*, and is required to demonstrate that this infringement is a reasonable limit in a free and democratic society.

B. Section 1 of the Charter

(1) General Principles

73. In addressing the section 1 inquiry, it is critical to begin with the language of the provision itself: "The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." Although criteria have been developed to assist courts in conducting this inquiry, as we will discuss later in this decision, the Supreme Court of Canada confirmed in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, that the applicable test for section 1 is dictated by the language of the section itself (at para. 62 (per Justice Gérard La Forest, dissenting on other grounds) and at para.126 (per Justice Beverley McLachlin (as she then was)).

74. While the courts have come to treat section 1 as a "defence" for government infringements of *Charter* rights and freedoms, we must remember that section 1 is designed to *protect* such rights and freedoms by permitting only those violations that can be demonstrably justified as reasonable limits in a free and democratic society. As noted by Chief Justice Brian Dickson in *R. v. Oakes*, [1986] 1 S.C.R. 103 at 135-6:

> 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*, [1985] 1 S.C.R. 177 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*."

75. This section of the judgment will outline the general principles that govern inquiries under section 1 of the *Charter*. These principles include substantive democracy, government burden, and context, each of which will be considered in turn. Following the discussion of general principles, we will outline the framework and factors to be used for the section 1 analysis and apply these criteria to the facts of this case.

(a) Substantive Democracy

76. "Substantive democracy" is a term coined by LEAF in its intervenor factum before the Supreme Court of Canada in *NAPE* (at para. 43), but it must be recognized that the term describes ideas that have long been supported in constitutional jurisprudence. As noted by the Supreme Court of Canada in *Reference re: Secession of Quebec*, [1998] 2 S.C.R. 217, "[d]emocracy is commonly understood as being a political system of majority rule" (at para. 63). However, the Court cautioned that "[i]t is essential to be clear what this means" (*ibid.*) The Court observed that there has been an evolutionary process of moving towards universal suffrage and that this goal is not yet fully achieved. In this sense, "democracy is fundamentally connected to substantive goals" (at para. 64).

77. Just as section 15 of the *Charter* guarantees substantive equality, section 1 guarantees a substantive approach to the interpretation of "a free and democratic society." Substantive democracy recognizes that the rights and freedoms guaranteed by the *Charter* both reflect and inform the values and goals of Canadian society and, thus, must inform the meaning of "free and democratic" in section 1. This was clearly stated by Dickson C.J. in *Oakes, supra*, at 136:

> A second contextual element of interpretation of s. 1 is provided by the words "free and democratic society." Inclusion of these words as the final standard of justification for limits on rights and freedoms refers the Court to the very purpose for which the *Charter* was originally entrenched in the Constitution: Canadian society is to be free and democratic. The Court must be guided by the values and principles essential to a free and democratic society which I believe 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*. The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the *Charter* and the ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified [emphasis added].

78. Substantive democracy supports governance and decision making that fosters the collective good and, as argued by LEAF, ''aspires to norms that value and promote diversity, inclusion, and belonging'' (*NAPE* SCC, LEAF factum, at para. 44). This conceptualization of democracy finds support in Supreme Court of Canada case law. In *Vriend v. Alberta*, [1998] 1 S.C.R. 493 at paras. 140-2, Justice Frank Iacobucci stated as follows:

> 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 . . .
>
> [W]hen a court interprets legislation alleged to be a reasonable limitation in a free and democratic society as stated in s. 1 of the *Charter*, the court must inevitably delineate some of the attributes of a democratic society. Although it is not necessary to articulate the complete list of democratic attributes in these remarks, Dickson C.J.'s comments [in *Oakes*] remain instructive . . .
>
> Democratic values and principles under the *Charter* demand that legislators and the executive take these into account; and if they fail to do so, courts should stand ready to intervene to protect these democratic values as appropriate. As others have so forcefully stated, judges are not acting undemocratically by intervening when there are indications that a legislative or executive decision was not reached in accordance with the democratic principles mandated by the *Charter*.

79. Similarly, in *R. v. Mills*, [1999] 3 S.C.R. 668 at para. 58, Justices McLachlin and Iacobucci noted that ''constitutionalism can facilitate

democracy rather than undermine it, and . . . one way in which it does this is by ensuring that fundamental human rights and individual freedoms are given due regard and protection.'' In *Sauvé v. Canada (Chief Electoral Officer)*, [2002] 3 S.C.R. 519, McLachlin C.J. stated that ''*Charter* rights are not a matter of privilege or merit, but a function of membership in the Canadian polity that cannot lightly be set aside'' (at para. 14).

80. In our view, the relationship between rights and democracy should not be viewed as conflictual. In ''Reconceiving Rights as Relationship'' (1993) 1 Review of Constitutional Studies 1, Jennifer Nedelsky points out that the rights and freedoms we protect in a constitution represent fundamental values of our society: ''When we choose to constitutionalize a value, to treat it as a constitutional right, we are in effect saying both that there is a deeply shared consensus about the importance of that value and that we think that value is at risk'' (at 20). According to Nedelsky, we must abandon the ''rights vs. democracy'' debate and recognize that

> [r]ights are as much collective choices as laws passed by the legislature. And if rights no longer look so distinct from democratic outcomes, democracy also blurs into rights, for of course, democracy is not merely a matter of collective choice, but the expression of ''rights'' to an equal voice in the determination of those collective choices (at 5).

Looked at from this perspective, rights are not only individual entitlements but are also in keeping with collective goals. Rights are one of the vehicles through which individuals, minorities, and majorities collectively shape democratic processes and goals (see also Martha Jackman, ''Protecting Rights and Promoting Democracy: Judicial Review under Section 1 of the *Charter*'' (1997) 34 Osgoode Hall Law Journal 661).

81. A substantive approach to democracy thus recognizes that there are complex relationships between majorities, minorities, and individuals. Further, as the Supreme Court of Canada observed in *Reference re: Secession of Quebec*, *supra*, at paras. 59 and 66, it is not always simple or straightforward to identify who the majority is. For example, the shared view of a minority group can be regarded as the majority view in relation to this particular group. A substantive approach to democracy seeks to integrate majoritarian wishes, minority interests, and individual aspirations. It balances collective and individual rights and freedoms and considers them in relation to one another.

82. On the one hand, then, democracy under the Canadian Constitution is broader than a ''majority rules'' approach. At the same time, this does not mean that individual goals will always trump collective ones.

83. The notion of a conflict between individual rights and democracy is particularly inappropriate in this case. The women represented by NAPE are seeking to be paid equally for the work they perform in delivering health care and social services, contributing to the public good. It is contrary to a substantive understanding of democracy to characterize their entitlement to equal pay for this work as contrary to social goals. As we discuss later in this decision, however, this is the effect of the Supreme Court of Canada's decision in this case.

84. This case, like *Gosselin v. Quebec (Attorney General)*, [2002] 4 S.C.R. 429, provides the Women's Court of Canada with an opportunity to consider the relationship between substantive democracy and the distribution of resources in society [*Gosselin v. Quebec*, [2007] 1 W.C.R. 193]. Access to resources affects how citizens participate in society and how citizens are included in society. In our view, substantive democracy requires that government-spending decisions that have discriminatory impact be subject to scrutiny under the *Charter*. Subjecting spending decisions to *Charter* scrutiny does not mean that the courts are usurping the government's role and directing how resources will be allocated. Rather, it means that governments must be required to demonstrate that discriminatory spending decisions are necessary to accomplish their goals.

(b) Government Burden

85. The burden upon governments to justify limitations upon *Charter* rights has been discussed by the Supreme Court of Canada in a number of cases. Beginning with *Oakes*, *supra*, at 136, the Court noted that section 1 imposes "a stringent standard of justification, especially when understood in terms of the two contextual considerations named above, namely, the violation of a constitutionally guaranteed right or freedom and the fundamental principles of a free and democratic society." While the standard of proof is the balance of probabilities, this standard is to be applied "rigorously" (*Oakes*, at 137; see also *Sauvé*, *supra*, at para. 7 (per McLachlin C.J., for the majority)). As noted by McLachlin, J., writing for a majority of the Supreme Court of Canada in *RJR-MacDonald*, *supra*, at paras. 128-9:

> [T]he state must show that the violative law is "demonstrably justified." The choice of the word "demonstrably" is critical. The process is not one of mere intuition, nor is it one of deference to Parliament's choice. It is a process of demonstration. This reinforces the notion inherent in the word "reasonable" of rational inference from evidence or established truths.
>
> The bottom line is this. While remaining sensitive to the social and political context of the impugned law and

> allowing for difficulties of proof inherent in that context, the courts must nevertheless insist that before the state can override constitutional rights, there be a reasoned demonstration of the good which the law may achieve in relation to the seriousness of the infringement. It is the task of the courts to maintain this bottom line if the rights conferred by our constitution are to have force and meaning. The task is not easily discharged, and may require the courts to confront the tide of popular public opinion. But that has always been the price of maintaining constitutional rights. No matter how important Parliament's goal may seem, if the state has not demonstrated that the means by which it seeks to achieve its goal are reasonable and proportionate to the infringement of rights, then the law must perforce fail [emphasis in original].

86. Similar to section 7 of the *Charter*, the government's burden of proof is especially onerous in the context of a section 15 infringement. This is because section 15, like section 7, includes an internal qualification on the scope of the right. As we discuss earlier, not all cases of differential treatment will be found to violate the equality guarantee—there must be discrimination in the sense that substantive equality principles have been infringed. We must take care not to let the internal qualification in section 15 reduce the right to ashes, as noted by Sheila McIntyre in ''Deference and Dominance: Equality without Substance,'' in *Diminishing Returns, supra*, at 95. However, the fact that the right is internally tailored must mean that once an infringement of section 15 is found, the government's room to justify it under section 1 is more limited, as with section 7 violations (see *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486 at para. 85). Differences in detail in the operation and interpretation of the two sections will have to be dealt with as the case law develops, but the similarity in structure between the two rights is clear. We have taken the trouble earlier to lay out the importance of pay equity and to spell out the discriminatory assumptions underlying the *PSRA* in order to make plain that we have here no mere technical rights violation.

87. The Supreme Court of Canada has acknowledged that equality rights violations will rarely survive section 1 scrutiny. As stated by McLachlin C.J. and Justice Claire L'Heureux-Dubé in *Lavoie v. Canada*, [2002] 1 S.C.R. 769 at para. 6 (in dissent but not on this point):

> 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 v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203 at para. 98 (per L'Heureux-Dubé J.) [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 at para. 95 (per L'Heureux-Dubé J.) (citing *Andrews*, *supra*, at 154 (per Wilson J.)).

(See also Sheilah Martin, ''Balancing Individual Rights to Equality and Social Goals,'' *supra*, at 352-68; and *NAPE* SCC, LEAF factum, at para. 49.)

88. We agree with these principles. Returning to the values underlying a free and democratic society, it is difficult to see how ''the inherent dignity of the human person'' and a ''commitment to social justice and equality'' can be promoted by violations of the substantive equality guarantee.

89. A related issue is the question of deference to decisions of legislatures. The Supreme Court of Canada has held that courts should show deference to governments in situations where the government is acting to protect the interests of vulnerable groups or is ''mediating'' between claims of competing rights rather than acting as a ''singular antagonist'' towards an individual or group (*Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927 at 993-4). A ''competing rights'' scenario has typically arisen in cases involving a limit on fundamental freedoms. In these cases, the limit is imposed because the exercise of the freedoms has a negative impact on the protected interests of other members of society. In the case of freedom of expression, for example, infringements have been justified where it is found that unlimited expression would have harmful effects that implicate other *Charter* rights and values, such as equality (see, for example, *R. v. Butler*, [1992] 1 S.C.R. 452; *R. v. Keegstra*, [1995] 2 S.C.R. 381; and *R. v. Sharpe*, [2001] 1 S.C.R. 45).

90. We prefer to approach the question of deference in a substantive, rather than a categorical, way by examining the substance of the justification advanced by a government for its decision to violate a *Charter* right. At some level, all government decisions involve mediating among competing claims. Where a government's justification is linked to protecting the interests of vulnerable groups, this is a consideration that should receive careful attention by the court. However, as we discuss further later in this decision, governments must do more than simply assert that an infringing measure is justified in order to protect the interests of a vulnerable group—they must *demonstrate* that this is so.

91. It could be argued that, particularly in relation to spending decisions, governments must balance the claims of competing groups and should be shown deference on this basis. The courts have taken such an approach in this case to date. There are two responses to this argument. First, courts must be

careful to distinguish between the constitutionally protected claims of equality-seeking groups to government resources and the claims of relatively privileged individuals and groups that are not based upon constitutional rights. In the scenario before us in this case, as we will elaborate upon later in this decision, there is no competition between "rights," and thus there should be no deference to government choices that infringe equality. However, there may be cases where the government is truly seeking to balance the claims of different equality-seeking groups. Our second point is that too much emphasis on a "competing rights" paradigm in this context may create or perpetuate a hierarchy between disadvantaged groups. In our view, courts should be extremely hesitant to allow governments to seek to justify an infringement of section 15 by pitting equality claimants against each other.

92. In any event, we agree with McLachlin J. in *RJR-MacDonald*, *supra*, at para. 136, that

> care must be taken not to extend the notion of deference too far. Deference must not be carried to the point of relieving the government of the burden which the *Charter* places upon it of demonstrating that the limits it has imposed on guaranteed rights are reasonable and justifiable.

(c) Contextual Inquiry

93. The importance of context to the section 1 inquiry has also been discussed by the Supreme Court of Canada in a number of cases (see, for example, *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877; and *Sharpe*, *supra*). We agree that just as it is critical to the determination of rights violations, context matters under section 1. The seriousness of the violation, the nature of the activity infringed, and the social location of the group(s) the government may have been seeking to protect are relevant contextual factors in the circumstances of this case, and we will discuss the importance of these factors. At the same time, we are mindful of the caution expressed by McLachlin J. in *RJR-MacDonald*, at para. 134, where she said:

> [N]othing in the jurisprudence suggests that the contextual approach reduces the obligation on the state to meet the burden of demonstrating that the limitation on rights imposed by the law is reasonable and justified. Context is essential in determining legislative objective and proportionality, but it cannot be carried to the extreme of treating the challenged law as a unique socio-economic phenomenon, of which Parliament is

> deemed the best judge. This would be to undercut the obligation on Parliament to justify limitations which it places on *Charter* rights and would be to substitute *ad hoc* judicial discretion for the reasoned demonstration contemplated by the *Charter*.

(d) Oakes *Factors*

94. The *Oakes* case, *supra*, established the factors that courts should review in determining whether the government has met its justificatory burden under section 1 of the *Charter, supra*. While subsequent cases have shown that there is some danger that these factors will be applied mechanically and without regard to the "bottom line" noted by McLachlin J. in *RJR-MacDonald*, at para. 129, we believe that the factors remain a useful basis for analyzing government claims of justification under section 1.

95. As first stated in *Oakes*, the government must establish two things to meet its burden under section 1: the objective of the law must be "pressing and substantial" and "of sufficient importance to warrant overriding a constitutionally protected right or freedom" (*R. v. Big M. Drug Mart Ltd.*, [1985] 1 S.C.R. 295 at 352, cited in *Oakes*, *supra*, at 138) and the means chosen to implement the objective must be reasonable and demonstrably justified in the sense that (1) the means are rationally connected to the objective; (2) the means impair the right or freedom in question as little as reasonably possible; and (3) there is proportionality between the means and the objective and between the deleterious and salutary effects of the means (see also *Dagenais v. C.B.C.*, [1994] 3 S.C.R. 835). The government is required to provide cogent and persuasive evidence at each stage of the inquiry. We will now turn to an application of these factors to the circumstances of this case, keeping in mind the overarching principles of substantive democracy, government burden, and context.

(2) Application of Principles to the *PSRA*

96. Applying the *Oakes* factors to the circumstances of this case, we find that the government has failed to meet its burden in numerous ways: there is no pressing and substantial objective; the means of achieving the government's objective does not impair the equality rights of women workers as little as reasonably possible; and there is no proportionality between the means and the objective nor between the salutary and deleterious effects of the measures. We will elaborate on each point in turn and elucidate how the Supreme Court of Canada erred in reaching the conclusions that it did on these matters.

97. It bears repeating at the outset of this discussion that the measure the government is required to justify is a measure that took away *all* pay equity

adjustments owed for a three-year period. We reject the argument put forward by the government and accepted by the Supreme Court of Canada that the government did not completely eliminate pay equity but only reduced or delayed the scope of its obligation. As noted, the fatal flaw in this logic is that the government did completely eradicate its obligation as it applied to the April 1988 to April 1991 period. Indeed, the government publicly acknowledges that this is what it did when it says that it "erased" its pay equity obligation for that period. This was a serious violation of women's equality rights with detrimental effects that were both material and symbolic. This is the context that grounds our analysis of whether the government has met its section 1 burden.

(a) Pressing and Substantial Objective: Financial Considerations, Fiscal "Emergency," and the Government's Evidentiary Burden

98. In this case, the government relied on the fact that it was facing a fiscal crisis as the objective behind the *PSRA*, including the Act's erasure of three years of pay equity obligations to the women workers represented by NAPE. The president of the Treasury Board, who is designated the government's chief collective agreement negotiator by the *Public Service Collective Bargaining Act*, R.S.N.L. 1990, c. P-42, introduced the bill in the legislature. He told the legislature that the government was facing a deficit of $120 million for 1991 and projected a deficit of $200 million for 1992. He said that cost reduction measures were necessary because the government had reached the maximum limits on its borrowing and taxing capacities.

99. Through its spokesperson, the government told the legislature that the only cost-reduction alternative to erasing its pay equity obligation would have been to lay off another 900 employees in addition to the 1,300 full-time employees who had already been laid off. The decisions facing the government were described as "difficult" or "hard" choices:

> So what we have done is we have made a decision and the choice was very clear to us: pay the $24 million retroactively or lay off another 900 people. And that is the way we look at it. 900 to 1,000 people would take up the $24 million. And the choice—it is that kind of a choice. Both are hard choices, obviously. And as Government we had to make a choice and we have made the choice (*NAPE* SCC, Exhibit DC-8, House of Assembly Proceedings, 19 March 1991, Appellant's Record, vol. IV, at 645).

100. Does this amount to a pressing and substantial objective? In our view, this question must be answered in the negative for two reasons.

First, fiscal considerations should never suffice as a pressing and substantial basis for overriding equality rights. Second, the government did not meet its evidentiary burden in proving that a fiscal crisis existed in any event.

(i) Financial considerations as a pressing and substantial objective

101. Previous case law of the Supreme Court of Canada has established the principle that financial considerations alone can never amount to an objective "of sufficient importance to warrant overriding a constitutionally protected right or freedom." Stated another way, "a measure whose sole purpose is financial, and which infringes *Charter* rights, can never be justified under s. 1" (*Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3 at para. 284, citing *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177; and *Schacter v. Canada*, [1992] 2 S.C.R. 679; see also *Gosselin*, *supra*, at para 391 (per Arbour J. in dissent) and para. 283 (per Justice Michel Bastarache in dissent); and *Nova Scotia (Workers' Compensation Board) v. Martin*, [2003] 2 S.C.R. 504 at para. 109).

102. The Women's Court of Canada agrees that government objectives based upon purely financial considerations cannot amount to a pressing and substantial reason for violating *Charter* rights. Saving money alone cannot be a pressing and substantial objective for *Charter* purposes, as governments do not save money for the sake of saving money. If a government seeks to avoid certain expenditures, this must be because there are other expenditures that the government considers it more important to make. In our view, it would be dangerous to allow governments to invoke vague notions of "cost savings" without requiring them to articulate the underlying reason for avoiding an expenditure and to prove the importance of this reason in light of *Charter* principles. To do otherwise would be to negate the burden upon the government and do an injustice to protected *Charter* rights.

103. We find that the Supreme Court of Canada erred in this case by failing to adhere to the principle that cost-savings cannot amount to a pressing and substantial objective. The government's stated objective—reducing its deficit—is the kind of vague cost-saving rationale that begs the question of what other expenditures the government believed it was more important to make (or what other cuts it thought it was more important to avoid). While the Court attempted to distinguish its previous cases on the basis that this principle only applies where the government is facing "normal" financial circumstances, we do not find this reasoning persuasive. As we will demonstrate later in this decision, the government's public accounts show that deficits, including very high deficits, are very much the norm in its economy.

104. We appreciate that governments are called upon to deal with financial pressures and that financial circumstances can change. We also

acknowledge that the Supreme Court of Canada tried to create a narrow exception for circumstances in which budgetary considerations can be a substantial and pressing concern by drawing the line at financial ''emergencies.'' In our view, however, this line-drawing exercise must be subjected to closer scrutiny. ''Emergency'' is normally a label we reserve for unexpected and uncontrollable events such as natural disasters or outbreaks of contagious diseases. Such events may give rise to unexpected government expenditures and a resulting fiscal crisis, but it is inappropriate to label every fiscal shortfall as an ''emergency.'' Short of an actual disaster of the type noted earlier, financial shortfalls are, as described by LEAF, situations ''produced by governments, through complex webs of decisions about how to raise money and how to spend money'' (*NAPE* SCC, LEAF factum, at para. 62).

105. We also accept LEAF's argument that ''[a] substantive approach to democracy challenges the very norms and assumptions informing government decisions about how to raise and spend revenues,'' and how to deal with deficits (*NAPE* SCC, LEAF factum, at para. 62). Further, substantive democracy mitigates against creating a new category of cases where the courts must show deference to government-spending decisions. To return to the *RJR-MacDonald* case, *supra*, at para. 136, ''[t]o 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 nation is founded.'' See also Sheila McIntyre, *supra* at note 48, who argues that the Supreme Court of Canada's decision in *NAPE* may have ''opened the door to deference whenever government cost-cutting reallocates social benefits among disadvantaged groups or 'important stakeholders.'''

106. We must also keep in mind the need to undertake section 1 analysis in context. The difficulties of accepting a cost-reduction objective in the context of an equality rights violation were noted by Justice Rosalie Abella, writing for the Ontario Court of Appeal in *Rosenberg v. Canada (Attorney General)* (1998), 38 O.R. (3d) 577 (C.A.) at para. 42:

> 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.

107. As the instant case illustrates, governments engaged in a deficit reduction calculus often ignore the fact that equality promoting measures such as pay equity result in benefits to the social good as well as costs. This highlights the danger in accepting cost reduction objectives as pressing and substantial bases for overriding equality rights. In addition to being discriminatory and inconsistent with substantive democracy, the overall cost-saving potential of such objectives, if any, is simply impossible to verify.

(ii) Government's evidentiary burden

108. Second, even if fiscal considerations might in emergency situations provide pressing and substantial grounds for overriding equality rights, the government did not demonstrate that a fiscal crisis existed in this case. As noted by McLachlin J. in *RJR-MacDonald*, at para. 128, demonstration requires "rational inference from evidence or established truths" rather than intuition or deference. While common sense and inferential reasoning may be deployed, these techniques are to *supplement* rather than replace the evidence. Further, "one must be wary of stereotypes cloaked as common sense, and of substituting deference for the reasoned demonstration required by s. 1" (*Sauvé*, *supra*, at para. 18 (per McLachlin J.)).

109. The only evidence produced by the government of the objective behind section 9 of the *PSRA* was "an extract from Hansard and some budget documents" (*NAPE* SCC, at para. 55). The Supreme Court of Canada described this evidence as "casually introduced," and agreed with the Arbitration Board that the government should have called witnesses better placed to explain these records. While the Court noted that this would "ordinarily . . . be a matter of serious concern" it went on to accept this evidence as sufficient because "the essential subject matter of the s. 1 justification in this case consists of the public accounts of the Province that are filed with the House of Assembly, and comments by the Minister of Finance and the President of the Treasury Board as to what they thought the accounts disclosed and what they proposed to do about it, which are reported in Hansard" (at para. 56). The Supreme Court of Canada found that it could take judicial notice of this material.

110. More significantly, the Supreme Court expressed the view that the government's failure to call evidence in the context of the subject matter of this case was not "fatal" because "[t]here are serious limits to how far the courts can penetrate Cabinet privilege in order to require information about the deliberations of the Executive Council" (*NAPE* SCC, at para. 58).

111. In our view, the government's section 1 record *was* fatal to its position. We believe the government is required to do more than introduce statements made in the legislature and public accounts to demonstrate that there was a fiscal crisis. As noted earlier, emergencies are typically unexpected and uncontrollable events, and the applicability of this label should be proven by evidence rather than asserted. Any other approach amounts to a disguised form of deference.

112. Even if we accept the Supreme Court of Canada's conclusion that judicial notice can be taken of public accounts, the accounts themselves belie the government's argument that there was a fiscal emergency and contradict the Court's statement that this was an "exceedingly rare case" of a "severe fiscal crisis" (*NAPE* SCC, at para. 52; see also para. 85). The government's own figures, to which our attention was drawn on this application for re-consideration, show that there was not a fiscal emergency facing Newfoundland and Labrador in 1991. Rather, this was a period in which the deficit was relatively "normal." The federal government publishes budget information for all of the provinces. According to the public accounts of Newfoundland and Labrador (for the 2003-4 budget, Table 17, <http://www.fin.gc.ca/frt/2004/frt_e.pdf> accessed 2 July 2007), Newfoundland and Labrador's deficit or surplus positions for the years 1982–3 to 2003–4 were as follows:

1982–3	−$191 million	1993–4	−$341 million
1983–4	−$326 million	1994–5	−$374 million
1984–5	−$252 million	1995–6	−$190 million
1985–6	−$253 million	1996–7	−$107 million
1986–7	−$231 million	1997–8	+$133 million
1987–8	−$197 million	1998–9	−$187 million
1988–9	−$226 million	1999–2000	−$269 million
1989–90	−$175 million	2000–1	−$350 million
1990–1	−$347 million	2001–2	−$468 million
1991–2	−$276 million	2002–3	−$691 million
1992–3	−$261 million	2003–4	−$959 million

These figures show that while the deficit for the restraint period at issue in this case was actually higher than predicted by the government, Newfoundland and Labrador has regularly faced substantial deficits over this twenty-year period.

113. One of the principles underlying the substantive commitment to a free and democratic society is "faith in social and political institutions which enhance the participation of individuals and groups in society" (*Oakes*, *supra*, at 136). The faith of citizens in the institutions of government is not a given and should not be taken for granted. Governments must be prepared to subject their conduct to scrutiny to ensure that the faith of its citizens is deserved.

In our view, requiring governments to expose their factual claims to scrutiny, as required by section 1, can strengthen substantive democracy. Conversely, to defer too greatly to an unproven claim of fiscal emergency would undermine government accountability and weaken democracy in a substantive sense. To return to the Supreme Court of Canada's words in *Vriend, supra*, at para. 142, the *Charter* requires that legislators and the executive incorporate the values in a free and democratic society into their decision making, "and if they fail to do so, courts should stand ready to intervene to protect these democratic values as appropriate."

114. Overall, we conclude that the government failed to meet its justificatory burden with respect to the objective behind the erasure of women's pay equity entitlements in this case. The government did not prove the existence of a fiscal crisis, so the evidentiary basis of its argument was lacking. Further, even if the government's deficit was out of the ordinary, it is inappropriate to term this an "emergency" that was somehow out of the government's control. The purported objective—cost savings—is overly vague and did not promote the values essential to a free and democratic society, namely equality, dignity, and social inclusion. Indeed, such an objective *cannot*, without more, justify a violation of equality rights in a free and democratic society.

115. We have considered whether the government can be said to have put forward a more specific cost-related objective for violating its pay equity obligations and women's equality rights. The only evidence that might support such an argument was that of avoiding the layoffs of 900 government workers. Before the Supreme Court of Canada, the government suggested that its ability to provide "appropriate education, health care, [and] social programmes" was challenged by its deficit (see *NAPE* SCC, respondent's factum, at para. 56). However, there was no evidence to support this as the objective behind section 9 of the *PSRA*, and we decline to attribute this objective to the government. It is crucial, in our view, to avoid undertaking section 1 analysis that is inadequately grounded in evidence. The Supreme Court of Canada itself has cautioned against abstract *Charter* analysis in several cases (see, for example, *Schacter*, *supra* (per Justice Gérard La Forest concurring); and *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342).

116. As for the avoidance of lay-offs, the government did not frame this as the *objective of* section 9 of the *PSRA*. Rather, lay-offs were seen as an *alternative* way of achieving the objective of reducing the government's deficit (an alternative to be avoided). While this may seem like a matter of semantics, we decline to re-frame the government's argument about alternatives as the objective behind its decision to erase women's pay equity entitlements. Again, this is an issue of government accountability, and it is not for the courts to make the government's submissions for it.

117. The lack of a pressing and substantial objective is sufficient to dispose of this case in favour of NAPE. Nevertheless, we believe it is important

to respond to the submissions of the parties and to the findings of the Supreme Court of Canada on the proportionality stage of the *Oakes* analysis. We will do so in the next section of our judgment, assuming for the sake of argument that the government's deficit reduction objective is a pressing and substantial basis for overriding women's equality rights.

(b) Proportionality between Means and Objective

118. Even if the government's deficit reduction objective was demonstrated to be pressing and substantial, it must still prove that its means of pursuing this objective—that is, its erasure of its pay equity obligations—was proportionate to the importance of the objective. There was no dispute that the erasure of women's pay equity was rationally connected to the government's cost reduction objective. However, we find that the government did not meet its burden of proving that the means used to achieve its objective impaired women's equality rights as little as reasonably possible, nor did it prove that any salutary effects of the *PSRA* outweighed its deleterious impact. Further, international norms support the conclusion that the *PSRA* cannot be supported under section 1 of the *Charter*.

(i) Minimal impairment

119. The minimal impairment factor requires that the government provide evidence as to the alternatives it considered and the reasons why it rejected those alternatives. As stated by McLachlin J. in *RJR-MacDonald*, *supra* at para. 160, the law must fall within a range of reasonable alternatives, and the government must show that the law was "carefully tailored" to impair *Charter* rights no more than necessary. However, "if the government fails to explain why a significantly less intrusive and equally effective measure was not chosen, the law may fail."

120. We cannot support the Supreme Court of Canada's conclusion (*NAPE* SCC, at para. 90) that the Hansard record provides persuasive evidence that the government was required to balance competing disadvantages and that it considered alternative measures, namely hiring freezes, tax increases, and program cuts. As we discussed earlier, it is not sufficient for the government to rely on bald assertions made in the legislature as evidence that reasonable alternatives were considered. There must be evidence that demonstrates the level of consideration given to different alternatives and why the alternatives were rejected in favour of measures erasing pay equity for women workers.

121. In particular, we must emphasize that there is no evidence to support the government's argument that it weighed its pay equity obligations against its need to provide services such as health care, education, and social assistance. According to the testimony of the president of the Treasury Board,

lay-offs were the only concrete option the government weighed against its pay equity obligations. Even with respect to this alternative, the Arbitration Board found that "it [was] not really clear that government seriously considered layoffs as an option," rather lay-offs were mentioned as an "example [of] what would have been the equivalent cost of the pay equity adjustments involved in terms of jobs" (*NAPE* SCC, Appellant's Record, vol. I at 102).

122. We find that the government did not meet its section 1 burden of *demonstrably* justifying its choice to erase women's pay equity as a necessary means of reducing the deficit. The government asserted, rather than proved, the reasonableness of its decision to erase pay equity by invoking the spectre of layoffs. Further, the government's consideration of, at best, only one alternative means of cutting costs falls far short of its obligation to demonstrate that the law falls within a range of reasonable alternatives. As noted by McLachlin J. in *RJR-MacDonald*, *supra*, at para. 129, "if the state has not demonstrated that the means by which it seeks to achieve its goal are reasonable and proportionate to the infringement of rights, then the law must perforce fail."

123. There are other significantly less intrusive yet reasonable measures that were not addressed by the government. For example, the government could have implemented across-the-board wage cuts, using the pay equity-adjusted wage levels for the affected workers as the benchmark against which cuts were made. This option would have affirmed that pay equity is not a wage increase but rather a remedy for wage discrimination that simply brings women up to the pay level that equality principles require (but which may have to be cut equally with men's wages once brought to this level). Moreover, this alternative would have affected men's wages as well as women's and would have made more proportionate the burden of the government's deficit reduction. Instead, the government chose means that were discriminatory and that required women workers to subsidize the deficit reduction in a disproportionate way.

124. Even if an immediate crisis precluded payment of the pay equity adjustments on time, which was not proven, there was no need to infringe equality rights so drastically by extinguishing part of the obligation. Patricia Hughes has pointed out that the government could have paid off the full pay equity debt over a longer period of time or postponed payment until its finances were in a stronger position (see "*Newfoundland (Treasury Board) v. N.A.P.E.*: Women as Sacrificial Lambs" (2005) 11 Canadian Labour and Employment Law Journal 383 at 395). These sorts of measures were in fact implemented in relation to the government's remaining pay equity obligations, which were renegotiated with NAPE.

125. According to the Supreme Court of Canada decision in this case, governments must have a "margin of appreciation" to make decisions about the allocation of their resources (*NAPE* SCC, at para. 84). The Court found

that several factors weighed in favour of giving a large measure of deference to the government, including the scope of the government's financial challenge, the cost of remedying the discrimination, the government's affirmation of its pay equity obligations, and the government's mediation of competing claims for its resources. The validity of each of these factors will be considered in turn.

126. We have already noted that the financial challenge that led to the *PSRA* must be assessed in the context of the government's deficits before and after 1991. In this light, the challenge was not "drastic," as the Supreme Court of Canada found (*NAPE* SCC, at para. 86), but a relatively normal financial situation for Newfoundland and Labrador.

127. Further, and as acknowledged by the Supreme Court of Canada, the cost of implementing women's pay equity is actually a measure of the scale of discrimination against the women workers in this case. It would be inconsistent with the values underlying a free and democratic society to rely on the size of the discrimination as a justification for the failure to remedy it and the failure to consider alternative ways of reducing the deficit. The fact that the *PSRA* affirmed the government's commitment to pay equity and allocated $3.5 million to this obligation in 1991 is small comfort in these circumstances.

128. The Supreme Court of Canada's focus on the government's mediation between competing claims is also problematic, in our view. In the Court's words, "[t]he women hospital workers were a disadvantaged group, but so in reality were the medical patients who lost access to 360 hospital beds, students of school boards whose transfers were frozen, and those who relied on other government programs that were reduced or eliminated (although it is true that in their case *Charter* rights were not implicated)" (*NAPE* SCC, at para. 93).

129. As noted earlier, there was no evidence that the government considered further cuts to health care, education, and other programs to reduce its deficit—there was simply an assertion that these programs were at risk. Even if the government had proved that it considered these alternatives, substantive democracy principles require caution when the government's justification essentially pits one disadvantaged group against another. Government policy making may sometimes be faced with such an unhappy choice, and, when that is the true state of affairs, the dilemma must be faced. However, we must not be too quick to assume that all policy making is directed to addressing social disadvantages. Government norms, standards, and decisions function in a myriad of ways to create, reinforce, and support groups already advantaged in society as well as to address disadvantage. If upholding equality rights requires reallocation of resources, it should not be automatically assumed that resources will have to be taken away from other equally or more vulnerable groups.

130. The government's argument presupposes that norms, practices, standards, and systems that operate to the benefit of advantaged groups in society can easily trump *Charter* rights. In our view, substantive democracy requires governments to consider different approaches to distribution and redistribution, to explain what different approaches they have considered, and to explain why they have rejected them. It is this demonstrative process that is subject to judicial and public scrutiny. And, it is this process that must be assessed in terms of its concordance with the values underlying a free and democratic society under section 1 of the *Charter*.

131. The government has taken the position throughout that this case involved hard choices. In our view, however, it is critical to review government choices through the lens of equality. Despite the rhetoric of "hard choices," we suspect that the choice to erase its pay equity obligations was not a "hard" one for the government. Quite the contrary, it was a politically easy and expedient choice because it traded on women's second-class status. It is always easier for a government to target the relatively disadvantaged since they are already marginalized in the political arena. Indeed, what could better illustrate this point than the government's own words—its pay equity obligation, and the women to whom this obligation was owed, were simply erasable and thus "erased."

132. The Supreme Court of Canada's judgment trades on gender stereotypes when it characterizes the women's claim to pay equity as throwing "other claims and priorities to the winds" (*NAPE* SCC, at para. 95), implicitly chastising women for selfishness in taking hospital beds and school desks away from others. The women workers in this case had been disadvantaged by pay inequity for years, and the government was finally fulfilling its legal obligation to rectify this inequity. To deny women their pay equity entitlements in this case is akin to imposing an extra tax on the billings of male doctors for the sake of reducing the deficit. It is difficult to imagine that the courts would find legislated taxation of male doctors' salaries to be a minimally impairing alternative under the *Charter*, even though doctors are relatively privileged as compared with the women workers in this case.

133. As noted, there was no evidence that the government considered alternatives to the erasure of pay equity other than lay-offs in this case. We are therefore reluctant to discuss the hypothetical situation where a government is choosing between measures, each of which adversely impacts upon disadvantaged groups in some way. We will say, however, that governments should never be in this position until they have considered all reasonable alternatives that do not have negative and discriminatory implications for equality-seeking groups. Unless governments operate with this principle in mind, equality-seeking groups will continue to bear a disproportionate burden of reducing government deficits and will fail to receive their proper entitlements of government spending. As noted by LEAF, while it is not the role of the courts

to "micro-manage" governments' budgets, it is the judiciary's *obligation* to ensure that governments' financial decisions are consistent with substantive equality and substantive democracy under the *Charter* (*NAPE* SCC, LEAF factum, at para. 72).

134. In short, even if the government's argument that fulfilling its pay equity obligations jeopardized its health, education, and other social programs had been proved, there was still no evidence that erasing women's pay equity entitlements was the means required to meet this objective rather than some non-discriminatory alternative such as those we discussed earlier.

(ii) Balance between salutary and deleterious effects

135. The third stage of the proportionality inquiry involves a balancing between the means and objective of the legislation and between its salutary and deleterious effects. We have already found that the government did not prove the existence of a pressing and substantial objective for erasing its pay equity obligations under the *PSRA*, so there is no objective to outweigh the discriminatory means employed. However, assuming again that deficit reduction in a time of fiscal crisis was the proven objective and that this objective was sufficiently important, is there proportionality between the salutary and deleterious effects of the legislation?

136. We disagree with the Supreme Court of Canada's conclusion that the salutary effects of "preserving the fiscal health of a provincial government through a temporary but serious financial crisis" outweighed the deleterious effects of "delaying" the pay equity adjustments (*NAPE* SCC, at para. 98). As we have noted throughout this judgment, the deleterious effect of the delay imposed by section 9 of the *PSRA* was to erase three years of pay equity obligations. This had serious effects on all workers hit by this erasure, as we have discussed, and it bears repeating that this was in addition to a wage freeze imposed on all public sector workers. Furthermore, the erasure of pay equity had particularly negative effects on some of the women workers represented by NAPE—those who retired during this period and those who went on disability leave. The benefits of these workers will be "permanently tied" to the discriminatory wages they were receiving before the government implemented its pay equity obligations (*NAPE* SCC, LEAF factum, at para. 37). The Supreme Court of Canada misunderstood this point when it said that "to make a special provision for these people would have required drawing distinctions within the class of female hospital workers who were employed in the 1988-91 period, favouring some and not others" (at para. 96). The point is that the erasure of pay equity obligations for the three-year period in question had an *additional* adverse impact on some women workers beyond the negative and discriminatory effect that it had on all of the workers entitled to pay equity.

137. Seen in this light, it is impossible to conclude that any salutary effects of section 9 of the *PSRA* in reducing the deficit outweighed its deleterious effects. As the government did not *demonstrate* a worse harm to be avoided in reducing the deficit, there is no evidence of a concrete salutary benefit, much less one that advances protected *Charter* interests. In contrast, and as all courts hearing this matter have agreed, the erasure of women's pay equity does violate rights under section 15 of the *Charter* in a serious way. Accordingly, the deleterious effects of the legislation clearly outweigh any abstract salutary effects it might have had.

(iii) International law principles

138. International law also supports the conclusion that the *PSRA* cannot be justified under section 1 of the *Charter*. Section 1 analysis permits a consideration of "reasonable limits" in other free and democratic societies and under international law (*Oakes*, *supra*, at 140-1). As noted by Dickson C.J., writing for a majority of the Supreme Court of Canada in *Slaight Communications*, *supra*, at 1056,

> Canada's international human rights obligations should inform not only the interpretation of the content of the rights guaranteed by the *Charter* but also the interpretation of what can constitute pressing and substantial s. 1 objectives which may justify restrictions upon those rights . . . [T]he fact that a value has the status of an international human right, either in customary international law or under a treaty to which Canada is a state party, should generally be indicative of a high degree of importance attached to that objective.

International norms relating to pay equity and its reasonable limits are thus relevant in considering the government's deficit reduction justification in this case.

139. Article 11(1)(d) of the *Convention on the Elimination of All Forms of Discrimination against Women*, *supra*, requires that state parties "take all appropriate measures to eliminate discrimination against women in the field of employment," including in the area of pay equity. The *Report of the United Nations Committee on the Elimination of All Forms of Discrimination against Women*, Doc. CEDAW/C/2002/I/CRP.3/Add.5/Rev.1 (31 January 2003) at paras. 51-2, expressed concern over the failure to implement pay equity in Canada. The *Beijing Declaration, supra*, at Article 180(k), also requires that governments "increase efforts to close the gap between women's and men's pay, [and] take steps to implement the principle of equal

remuneration for equal work of equal value by strengthening legislation, including compliance with international labour laws and standards.'' More generally, Article 177(b) of the *Beijing Declaration* provides that governments must ''integrate a gender perspective into all economic restructuring and structural adjustment policies.''

140. These sources of international law reflect the norm that governments have a positive obligation to take all appropriate steps to implement pay equity for women. Further, they evidence the international norm that care must be taken that women not bear a disproportionate burden of government ''restructuring''—that is, cutbacks. Yet this is exactly what the *PSRA* required of women workers in Newfoundland and Labrador. As we have noted, women workers were subjected to a general wage freeze affecting all public sector employees in addition to the erasure of their pay equity entitlements.

141. In view of these international norms, the government's stated objective in this case, to reduce its deficit, is not a sufficiently important basis for overriding women's right to pay equity, nor were its means of doing so reasonable and demonstrably justified in a free and democratic society. An interpretation of section 1 of the *Charter* that came to any other conclusion would be inconsistent with Canada's international obligations.

142. Overall, the government has not met its justificatory burden under section 1 of the *Charter*. The context of this case—the erasure of women's pay equity entitlements to reduce the government's deficit—must be assessed in light of the principles of substantive democracy. It is contrary to the values underlying a free and democratic society, particularly equality and social inclusion, that women should be forced to bear a disproportionate burden of deficit reduction. Thus, the violation of the equality rights of women workers cannot be justified by the government.

VI. Remedy

143. Section 52 of the *Constitution Act, 1982, supra*, provides that any law that is inconsistent with the *Charter* is of no force or effect to the extent of the inconsistency. The courts have interpreted section 52 to permit a range of remedies. While governments' financial considerations cannot be a pressing and substantial objective under section 1 of the *Charter*, these may be relevant considerations when choosing the appropriate remedy in a given case. In the context of remedies, ''the question is not *whether* courts can make decisions that impact on budgetary policy; it is *to what degree* they can appropriately do so'' (*Schachter*, *supra*, at 709 [emphasis added]).

144. We suspect that it was the implications of the remedy in this case that drove the courts below to take an overly deferential approach to the government under section 1 of the *Charter*. However, we agree with the Supreme Court of Canada's reasoning in *Schachter* that rather than dilute the

section 1 inquiry, the appropriate place to consider the financial impact of a *Charter* claim is with respect to remedy—both what it should be and how it should be implemented.

145. The starting point is to determine the extent of the law's inconsistency with the *Charter*. Here, the inconsistency flows from the discriminatory content of section 9 of the *PSRA*. The most appropriate remedy in these circumstances is a declaration that section 9 is of no force or effect. This is the remedy originally granted by the Arbitration Board in this case.

146. The effect of this remedy is that the government must comply with the Pay Equity Agreement incorporated in its collective agreement with NAPE so as to put the women workers in the position they would have been in if section 9 of the *PSRA* had not been enacted. In consideration of the budgetary impact of this decision, we will not dictate how the government should do so. However, we note that the courts retain jurisdiction to ensure that the implementation of *Charter* remedies complies with the government's constitutional obligations (see *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, [2003] 3 S.C.R. 3).

VII. Disposition

147. Accordingly, we declare section 9 of the *PSRA* to be of no force or effect.