



**SUPREME COURT OF CANADA**

**CITATION:** Quebec (Attorney General) v. Alliance du personnel professionnel et technique de la santé et des services sociaux, 2018 SCC 17

**APPEAL HEARD:** October 31, 2017  
**JUDGMENT RENDERED:** May 10, 2018  
**DOCKET:** 37347

**BETWEEN:**

**Attorney General of Quebec**  
Appellant/Respondent on cross-appeal

and

**Alliance du personnel professionnel et technique de la santé et des services sociaux et al.**

Respondents/Appellants on cross-appeal

- and -

**Attorney General of Ontario et al.**  
Interveniers

**OFFICIAL ENGLISH TRANSLATION:** Reasons of Côté, Brown and Rowe JJ.

**CORAM:** McLachlin C.J. and Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté, Brown and Rowe JJ.

**REASONS FOR JUDGMENT:** Abella J. (McLachlin C.J. and Moldaver, Karakatsanis, Wagner and Gascon JJ. concurring)  
(paras. 1 to 61)

**JOINT REASONS DISSENTING ON** Côté, Brown and Rowe JJ.

**THE APPEAL:**  
(paras. 62 to 114)

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QUEBEC (A.G.) v. APTS

**Attorney General of Quebec**

*Appellant/Respondent on cross-appeal*

v.

**Alliance du personnel professionnel et technique de la santé et des services sociaux, Catherine Lévesque, Syndicat de la fonction publique et parapublique du Québec inc., Fédération interprofessionnelle de la santé du Québec, Guy-Philippe Brideau, Nancy Bédard, Syndicat des employé(e)s de l'Université de Montréal, Sylvie Goyer, Conseil provincial des affaires sociales, Johanne Harrell, Josée Saint-Pierre, Ghyslaine Doré, Conseil provincial du soutien scolaire, Louise Paquin, Lucie Fortin, Syndicat des professionnelles et professionnels de Laval-Rive-Nord, SCFP 5222, Syndicat des fonctionnaires municipaux de Montréal (SCFP), section locale 429, Section locale 3134 du Syndicat canadien de la fonction publique, employé-es de bureau de la Ville de Lorraine, Henriette Demers, Section locale 930 du Syndicat canadien de la fonction publique (FTQ), Fernande Tremblay, Syndicat canadien de la fonction publique, section locale 4503, Josée Mercille, Syndicat canadien de la fonction publique, section locale 3642, Chantal Bourdon, Conseil d'intervention pour l'accès des femmes au travail (CIAFT) du Québec inc., Association des psychologues du Québec, Syndicat des employées et employés professionnels-les et de bureau (CTC-FTQ), section locale 578, Lise Audet and Syndicat québécois des employées et employés de service, section locale 298 (FTQ)** *Respondents/Appellants on cross-appeal*

and

**Attorney General of Ontario,  
Conseil du trésor, Commission des normes, de l'équité,  
de la santé et de la sécurité du travail (formerly known as  
Commission de l'équité salariale), Equal Pay Coalition,  
New Brunswick Coalition for Pay Equity,  
Women's Legal Education and Action Fund,  
Public Service Alliance of Canada,  
Centrale des syndicats du Québec,  
The Professional Institute of the Public Service of Canada,  
The Canadian Association of Professional Employees,  
The Association of Canadian Financial Officers and  
The Professional Association of Foreign Service Officers**

*Intervenors*

**Indexed as: Quebec (Attorney General) v. Alliance du personnel professionnel et technique de la santé et des services sociaux**

**2018 SCC 17**

File No.: 37347.

2017: October 31; 2018: May 10.

Present: McLachlin C.J. and Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté, Brown and Rowe JJ.

ON APPEAL FROM THE COURT OF APPEAL OF QUEBEC

*Constitutional law — Charter of Rights — Right to equality —  
Discrimination based on sex — Pay equity — Amendments to legislative scheme  
addressing systemic wage discrimination — suffered essentially by women — by  
replacing continuous obligation to maintain pay equity with obligation to conduct*

*audits every five years without retroactive adjustment to date of emergence of pay inequity — Whether s. 76.5 of Pay Equity Act, under which compensation adjustment is payable only from date of posting of results of audit process, and s. 103.1 para. 2, which bars Pay Equity Commission from assessing adjustment payments prior to posting, violate s. 15 of Charter — Whether s. 76.3, which does not require inclusion of precise date of emergence of pay inequity in audit posting, violates s. 15 of Charter — If so, whether infringement justifiable — Pay Equity Act, CQLR, c. E-12.001, ss. 76.3, 76.5, 103.1 para. 2 — Canadian Charter of Rights and Freedoms, ss. 1, 15.*

In 1996, Quebec adopted a legislative scheme to address systemic wage discrimination against women. The *Pay Equity Act* set out a process aimed at ensuring that employers provided equal pay for work of equal value. Under ss. 40-43, which have now been repealed, employers had a continuous obligation to maintain pay equity and adjust compensation accordingly. After 10 years, the compliance with the *Act* had not met expectations.

In 2009, the *Act to amend the Pay Equity Act* replaced the ongoing obligation to maintain pay equity with a system of mandatory audits every five years in which the employer is only required to rectify the wages going forward. Under s. 76.5 of *Pay Equity Act*, adjustments in compensation apply from the date of the posting of the results of the audit process. Section 76.3 provides no requirement that the audit posting include the date on which any pay inequity emerged. Under s. 103.1 para. 2, no compensation adjustments can be assessed by the Pay Equity Commission

prior to the date of the audit posting. If, however, an employer acts “in bad faith or in an arbitrary or discriminatory manner”, adjustments in compensation and interest apply from the date of that conduct pursuant to s. 76.9 and the Pay Equity Commission may make a determination to that effect under s. 101 para. 3. The respondents brought proceedings seeking a declaration that these amendments violated the equality rights in s. 15 of the *Canadian Charter of Rights and Freedoms*.

The trial judge held that ss. 76.3 and 76.5 breached s. 15. The declaration of invalidity was suspended for one year. The Court of Appeal upheld the trial judge’s finding that ss. 76.3 and 76.5 breached s. 15 of the *Charter*. In addition, it concluded that s. 103.1 para. 2 violated s. 15. Regarding the cross-appeal, both the trial judge and the Court of Appeal held that the unions did not meet their onus of proving the unconstitutionality of the provisions in the 2009 *Act to Amend the Pay Equity Act* that repealed 40-43 of the *Pay Equity Act*.

*Held* (Côté, Brown and Rowe JJ. dissenting on the appeal): The appeal and the cross-appeal should be dismissed. Sections 76.3, 76.5 and 103.1 para. 2 of the *Pay Equity Act* are unconstitutional.

*Per* McLachlin C.J. and **Abella**, Moldaver, Karakatsanis, Wagner and Gascon JJ.: Sections 76.3, 76.5 and 103.1 para. 2 of the *Pay Equity Act* violate s. 15(1) of the Charter. The purpose of the *Act* is to provide “equal pay for work of equal value”, a strategy that recognizes that since “women’s work” is valued less than “men’s work”, the pay and status are lower and the result is systemic wage

discrimination. Leaving wage inequities in place makes women “the economy’s ordained shock absorbers”. Pay equity legislation, such as the *Act* at issue here, accordingly targets women in redressing the pay discrimination they have suffered. The provisions at issue, which alter the way in which the legislation identifies and redresses differences in men’s and women’s pay, therefore draw distinctions based on sex.

Assessed on their own, and regardless of the prior legislative scheme, ss. 76.3, 76.5 and 103.1 para. 2 have a discriminatory impact. Any pay inequities emerging during the five year period between audits go uncorrected until the next audit. Even when an audit reveals the emergence of pay inequity during the previous five years, only adjustment payments going forward are payable. This effectively gives an amnesty to the employer for discrimination between audits. Employers are required to post the results of the audit, but not the date on which pay inequity emerged, thus obscuring when adjustment payments ought to have been made. Employees are thus deprived of the evidentiary foundation for showing bad faith by the employer, which is the only route to obtaining retroactive compensation. Further, retroactive compensation is only available to sanction deliberate and improper behaviour in the conduct of mandatory audits, not the discrimination that may otherwise be revealed by the process. Inequities that subsequently emerge before the next audit will therefore be immune from remedial redress except where the claimants can prove intentional discrimination, an approach to discrimination long rejected by

this Court and at odds with the purpose of pay equity legislation, namely, to remedy systemic discrimination.

Although the scheme purports to address systemic discrimination, it in fact codifies the denial to women of benefits routinely enjoyed by men — namely, compensation tied to the value of their work. Men receive this compensation as a matter of course; women, under this scheme, are expected to endure five year periods of pay inequity, and to receive equal compensation only where their employer voluntarily acts in a non-discriminatory manner, or where they can meet the heavy burden of proving the employer engaged in deliberate or improper conduct. The scheme thus places barriers along the path to equal pay for women. And it correspondingly tolerates undervaluation of women’s work whenever women cannot clear the specific hurdle of proving that they should be paid equally because their employer acted improperly. Absent such behaviour, working women are told that they must simply live with the reality that they have not been paid fairly, even where a statutorily mandated audit has made that fact clear.

Section 15(2) has no application in cases such as this one. It protects ameliorative programs for disadvantaged groups from claims by those the program was not intended to benefit that the ameliorative program discriminates against them. Section 15(2) cannot bar s. 15(1) claims by the very group the legislation seeks to protect.

None of the impugned provisions can be justified under s. 1. Encouraging increased employer compliance by lightening the burden through denial of retroactive payments can, in some circumstances, constitute a pressing and substantial objective. Although there is no empirical or other evidence to show how denying retroactive compensation has advanced this objective, reducing the employer's obligations can be seen, at a theoretical level, to be rationally connected to increased employer compliance. At the minimal impairment stage, however, there is virtually no evidence that other means of encouraging employer compliance — such as stricter enforcement of the *Pay Equity Act*'s requirements through the offence provisions contained within it — would be ineffective. Therefore, eliminating pay equity obligations except for adjustments every five years does not impair female employees' equality rights as little as reasonably possible, it suspends their rights to be free from pay discrimination for five year intervals.

Quebec has failed to demonstrate that the law satisfies the overall balancing requirement of the s. 1 analysis. The harmful effects are to create barriers to access for equitable pay for the very people whom this pay equity scheme was designed to help; the benefits are, at the moment, indiscernible and speculative given the absence of evidence. Reducing employers' obligations in the hopes of encouraging compliance subordinates the substantive constitutional entitlement of women to be free from discrimination in compensation, to the willingness of employers to comply with the law. As for the information in the audit posting, the justifications analysis fails at every step. Quebec has not provided any explanation for

the exclusion of the date when pay inequities re-emerged other than to say that it is not relevant information under the new scheme. Since the five year gap between remedial compensation has been found to be unconstitutional, the date on which pay inequities re-emerge is plainly relevant information.

As for the cross-appeal, the onus of proving the unconstitutionality of the provisions in the 2009 *Act to Amend the Pay Equity Act* that repealed 40-43 of the *Pay Equity Act* was not met.

*Per Côté, Brown and Rowe JJ.* (dissenting on the appeal): The appeal should be allowed and the cross-appeal dismissed. Sections 76.3, 76.5 and 103.1 para. 2 of the *Pay Equity Act* do not create a discriminatory distinction that infringes s. 15 of the *Canadian Charter of Rights and Freedoms*.

At the first step of the analysis under s. 15(1) of the *Charter*, the claimant must show not only the mere existence of a distinction in the *Act*, but also a form of disadvantage flowing from that distinction. Because the *Act* entails distinctions that may affect a group consisting essentially of women, it would be absurd if an approach whose focus was on discriminatory effects did not deal first with the issue of the disadvantage resulting from one or more of those distinctions, at least on a *prima facie* basis. Pay equity for private sector enterprises is a creation of the Quebec legislature and does not have constitutional status. It is not appropriate to compare the amendments to the *Act* with the previous version of the *Act*. Such an approach would have the effect of constitutionally entrenching one mechanism that confers benefits

on a group to which an enumerated or analogous ground applies, to the detriment of other, equally valid, mechanisms. It would then no longer be open to the legislature to explore other avenues.

The employees in question have enjoyed a significant benefit. The *Act*, as a whole, creates a complete hybrid scheme that allows for a periodic review of compensation and provides a retroactive remedy in case of abuse. It thus addresses the problem of systemic discrimination in addition to, among others, that of intentional discrimination. The *Act's* ameliorative effect becomes clear when the situation is considered through the lens of the comparator group. Thus, employees in an enterprise that has fewer than 10 employees are excluded from the scope of the *Act* and do not benefit from a periodic audit of their compensation. They cannot use a complaint mechanism comparable to the one provided for in the *Act* should their employer modify their duties without taking into account the insidious factors at the root of the systemic discrimination from the standpoint of a correlative audit of their remuneration.

At the second step of the s. 15(1) analysis, it is necessary to determine whether the amendments are discriminatory by considering whether they respond to the actual capacities and needs of the members of the group or instead impose a burden or deny a benefit in a manner that has the effect of reinforcing, perpetuating or exacerbating their disadvantage. In this case, it has not been established that the measure has a discriminatory effect on the group. The state conduct does not widen

— rather than narrowing — the gap between the historically disadvantaged group and the rest of society. Contextual factors like the ones set out in *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497 — (1) a pre-existing disadvantage, (2) a correspondence with actual characteristics, (3) the impact on other groups and (4) the nature of the affected interest — are helpful in determining whether a particular distinction is discriminatory.

Although women face systemic discrimination in matters of compensation, the impugned sections do not perpetuate or reinforce the idea that women can be paid less simply because they are women. The *Act*'s objective is to permanently eradicate pay inequities by establishing a maintenance mechanism in ss. 76.1 to 76.9. This new mechanism responds to the needs of the women concerned by effectively preventing abuse by employers and also by providing them with a periodic audit of their remuneration. The scheme established by the *Act* deals with only one ground of discrimination, namely sex, and applies to only a small portion of female employees in Quebec, those who hold positions in predominantly female job classes in enterprises with 10 or more employees. There is no doubt that work is an important aspect of life and that, for many people, it is a large part of their identity. In enacting the *Act*, the Quebec legislature has recognized the nature of pay equity and its importance for women. However, the adopted measures have not constitutionally entrenched pay equity such that they would be impossible to modify.

Because it is the group to which an enumerated ground applies that is raising the discriminatory nature of the effects of a law whose specific object is the amelioration of conditions of the group's members, the s. 15(2) analysis must be deferred until after the entire s. 15(1) analysis has been completed. If a court were to follow the approach proposed in *R. v. Kapp*, 2008 SCC 41, [2008] 2 S.C.R. 483, according to which it must be determined whether s. 15(2) applies before turning to the second step of the s. 15(1) analysis so as to make it unnecessary to conclude that the equality guarantee has been violated before saving the impugned measure, the effect would be to terminate the analysis prematurely. The order set out in *Kapp* should be followed in any situation in which the claimant is not a member of the group to which the law applies. In the instant case, even it were to be held that the specific mechanism created by the statutory amendments can be considered discriminatory, the *Act* as a whole should be protected under s. 15(2). There is no doubt that the *Act* genuinely has the promotion and achievement of substantive equality as its object, as it provides for measures to combat systemic discrimination.

### **Cases Cited**

By Abella J.

**Applied:** *Kahkewistahaw First Nation v. Taypotat*, 2015 SCC 30, [2015] 2 S.C.R. 548; *Vriend v. Alberta*, [1998] 1 S.C.R. 493; **referred to:** *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143; *R. v. Kapp*, 2008 SCC 41, [2008] 2 S.C.R. 483; *Quebec (Attorney General) v. A*, 2013 SCC 5, [2013] 1 S.C.R. 61;

*Withler v. Canada (Attorney General)*, 2011 SCC 12, [2011] 1 S.C.R. 396; *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203; *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497; *Alberta (Aboriginal Affairs and Northern Development) v. Cunningham*, 2011 SCC 37, [2011] 2 S.C.R. 670; *Noël v. Société d'énergie de la Baie James*, 2001 SCC 39, [2001] 2 S.C.R. 207; *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624; *Toronto Star Newspapers Ltd. v. Canada*, 2010 SCC 21, [2010] 1 S.C.R. 721; *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199; *R. v. K.R.J.*, 2016 SCC 31, [2016] 1 S.C.R. 906.

By Côté, Brown and Rowe JJ. (dissenting on the appeal)

*Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143; *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497; *Centrale des syndicats du Québec v. Québec (Attorney General)*, 2018 SCC 18; *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, 2004 SCC 78, [2004] 3 S.C.R. 657; *Québec (Attorney General) v. A*, 2013 SCC 5, [2013] 1 S.C.R. 61; *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486; *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4, [2015] 1 S.C.R. 245; *Kahkewistahaw First Nation v. Taypotat*, 2015 SCC 30, [2015] 2 S.C.R. 548; *Withler v. Canada (Attorney General)*, 2011 SCC 12, [2011] 1 S.C.R. 396; *R. v. Kapp*, 2008 SCC 41, [2008] 2 S.C.R. 483; *Alberta (Aboriginal Affairs and Northern Development) v. Cunningham*, 2011 SCC 37, [2011] 2 S.C.R. 670; *Hodge v. Canada (Minister of Human Resources*

*Development*), 2004 SCC 65, [2004] 3 S.C.R. 357; *Ermineskin Indian Band and Nation v. Canada*, 2009 SCC 9, [2009] 1 S.C.R. 222; *Newfoundland (Treasury Board) v. N.A.P.E.*, 2004 SCC 66, [2004] 3 S.C.R. 381; *Vriend v. Alberta*, [1998] 1 S.C.R. 493; *Noël v. Société d'énergie de la Baie James*, 2001 SCC 39, [2001] 2 S.C.R. 207; *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203; *Granovsky v. Canada (Minister of Employment and Immigration)*, 2000 SCC 28, [2000] 1 S.C.R. 703; *Nova Scotia (Attorney General) v. Walsh*, 2002 SCC 83, [2002] 4 S.C.R. 325.

### **Statutes and Regulations Cited**

*Act to amend the Pay Equity Act*, S.Q. 2009, c. 9, ss. 14, 23, 40.

*Canadian Charter of Rights and Freedoms*, ss. 1, 15.

*Canadian Human Rights Act*, R.S.C. 1985, c. H-6, s. 11.

*Charter of human rights and freedoms*, S.Q. 1975, c. 6, s. 19.

*Charter of human rights and freedoms*, CQLR, c. C-12, ss. 10, 19, 49.1.

*Individual's Rights Protection Act*, R.S.A. 1980, c. I-2.

*Interpretation Act*, CQLR, c. I-16, s. 41.

*Labour Code*, CQLR, c. C-27, s. 47.2.

*Pay Equity Act*, CQLR, c. E-12.001, ss. 1, 4, 16, 31, 34, 50, 76.1 to 76.9, 76.1, 76.3, 76.4, 76.5, 76.9, 101, 103.1 para. 2, 115 to 118.

*Pay Equity Act*, S.Q. 1996, c. 43, ss. 1, 4, 16, 31, 34, 40 [am. 2006, c. 6, s. 7; rep. 2009, c. 9, s. 14], 41 [rep. *idem*], 42 [rep. *idem*], 43 [rep. *idem*], 50, 76.1 to 76.11 [ad. 2009, c. 9, s. 23], 76.1 [ad. *idem*], 76.3 [ad. *idem*], 76.4 [ad. *idem*], 76.5 [ad. *idem*], 76.9 [ad. *idem*], 100 [am. 2009, c. 9, s. 13], 101 para. 3 [ad. 2009, c. 9, s. 37], 103.1 para. 2 [ad. 2009, c. 9, s. 40], 115 [am. 2009, c. 9, s. 44] to 118.

## **Treaties and Other International Instruments**

Canada's declaration in respect of Article 11(1)(d) made upon ratification of the *Convention on the Elimination of All Forms of Discrimination against Women*, Annex A, No. 20378, January 9, 1982, 1257 U.N.T.S. 496 [declaration withdrawn May 28, 1992, 1676 U.N.T.S. 554].

*Convention concerning Equal Remuneration for Men and Women Workers for Work of Equal Value (No. 100)*, Can. T.S. 1973 No. 37.

*Convention on the Elimination of All Forms of Discrimination against Women*, 1249 U.N.T.S. 13, art. 11(1)(d).

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Smith, Lynn, and William Black. "The Equality Rights" (2013), 62 *S.C.L.R.* (2d) 301.

APPEAL and CROSS-APPEAL from a judgment of the Quebec Court of Appeal (Rochette, Doyon and Gagnon JJ.A.), 2016 QCCA 1659, [2016] AZ-51331102, [2016] J.Q. n° 13251 (QL), 2016 CarswellQue 9477 (WL Can.), affirming in part a decision of Martin J., 2014 QCCS 149, [2014] AZ-51037193, [2014] J.Q. n° 319 (QL), 2014 CarswellQue 362 (WL Can.). Appeal dismissed, Côté, Brown and Rowe JJ. dissenting. Cross-appeal dismissed.

*Louis P. Bernier* and *Marc-André Boucher*, for the appellant/respondent on cross-appeal.

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*S. Zachary Green and Courtney Harris*, for the intervener the Attorney General of Ontario.

No one appeared for the interveners Conseil du trésor and Commission des normes, de l'équité, de la santé et de la sécurité du travail (formerly known as Commission de l'équité salariale).

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*Andrew Raven, Andrew Astritis and Morgan Rowe*, for the intervener the Public Service Alliance of Canada.

*Matthew Gapmann and Nathalie Léger*, for the intervener Centrale des syndicats du Québec.

*Colleen Bauman and Erin Moores*, for the interveners The Professional Institute of the Public Service of Canada, The Canadian Association of Professional Employees, The Association of Canadian Financial Officers and The Professional Association of Foreign Service Officers.

The judgment of McLachlin C.J. and Abella, Moldaver, Karakatsanis, Wagner and Gascon JJ. was delivered by

ABELLA J. —

[1] In 1996, Quebec adopted a legislative scheme to address systemic wage discrimination against women. The *Pay Equity Act*, S.Q. 1996, c. 43 (now CQLR, c. E-12.001), set out a process of reporting, planning, comparison, evaluation and adjustment payments aimed at ensuring that employers provided equal pay for work of equal value. Once that goal — pay equity — had been achieved, the *Act* imposed a continuing obligation on employers to maintain it. And whenever employers failed to

maintain pay equity, the *Act* gave employees the right to challenge the failure and have it fully remedied immediately.

[2] After 10 years, the Government of Quebec found that compliance with the *Act* had not met expectations. In 2009, it adopted the *Act to amend the Pay Equity Act*, S.Q. 2009, c. 9, which replaced the ongoing obligation to maintain pay equity with a system of mandatory audits every five years. When an audit revealed the failure to maintain pay equity, the employer was only required to rectify the wages going forward. Unless the employer acted arbitrarily or in bad faith, he or she was not required to compensate for wage inequities that emerged between audits.

[3] Several unions challenged the amendments on the basis that they violated the equality rights in s. 15 of the *Canadian Charter of Rights and Freedoms*. The Quebec courts agreed, and parts of the legislative provisions amending the *Pay Equity Act* were struck down. The declaration of invalidity was suspended for one year.

[4] This is an appeal by Quebec, arguing that there is no breach of s. 15 of the *Charter*, and, if there is, it can be justified under s. 1. There was a cross-appeal by the unions seeking to have additional provisions declared unconstitutional.

[5] I agree with the Quebec courts and would dismiss both the appeal and the cross-appeal.

## Background

[6] The first Canadian efforts to close the gap between men and women's wages in the 1950s were called "equal pay for equal work" and focused on wage gaps between men and women in the same job. Because this approach failed to capture the systemic aspect of wage discrimination, it was replaced by the concept of "equal pay for work of equal value", a wider and more nuanced strategy that recognized that since "women's work" is valued less than "men's work", the pay and status are lower and the result is systemic wage discrimination (Beth Bilson, "The Ravages of Time: The Work of the Federal Pay Equity Task Force and Section 11 of the *Canadian Human Rights Act*" (2004), 67 *Sask. L. Rev.* 525, at p. 526; Richard Anker, "Theories of occupational segregation by sex: An Overview" (1997), 136 *Int'l Lab. Rev.* 315; Mary Cornish, "Closing the Global Gender Pay Gap: Securing Justice for Women's Work" (2007), 28 *Comp. Lab. L. & Pol'y J.* 219, at pp. 223-25).

[7] Two Royal Commissions contributed to the revised approach which replaced "equal work" with "equivalent" work or work of "equal value". The first, in 1970, was the ground-breaking *Report of the Royal Commission on the Status of Women in Canada*. It noted the persistence of occupational segregation and systemic wage discrimination notwithstanding that there had been laws requiring equal pay for equal work since the 1950s (paras. 236-37). It recommended that "the concept of skill, effort and responsibility be used as objective factors in determining what is

equal work” (para. 239 (emphasis deleted)), a recommendation that was ultimately reflected in s. 11 of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6.<sup>1</sup>

[8] In 1984, the *Report of the Commission on Equality in Employment* concluded that “equal pay for work of equal value should be part of all employment equity programs” (p. 261). That meant adopting policies “looking at those jobs in which women predominate and comparing their wage rates with those . . . jobs at a comparable level in which men predominate. If a wage difference is found, it then becomes a question of trying to determine whether it is a legitimate or fair one” (p. 244). Leaving wage inequities in place makes women “the economy’s ordained shock absorbers” (p. 234).

[9] These recommendations reflected approaches found in international instruments. The International Labour Organization (ILO), for example, adopted its *Convention Concerning Equal Remuneration for Men and Women Workers for Work of Equal Value (No 100)*, Can. T.S. 1973 No. 37, in 1951, which imposed an obligation on ratifying states to apply the principle of “equal remuneration for men and women workers for work of equal value” (ratified by Canada in 1972). The same principle is embodied in Art. 11(1)(d) of the 1979 United Nations *Convention on the*

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<sup>1</sup> Section 11 states, in part:

**11 (1)** It is a discriminatory practice for an employer to establish or maintain differences in wages between male and female employees employed in the same establishment who are performing work of equal value.

**(2)** In assessing the value of work performed by employees employed in the same establishment, the criterion to be applied is the composite of the skill, effort and responsibility required in the performance of the work and the conditions under which the work is performed.

*Elimination of All Forms of Discrimination Against Women*, 1249 U.N.T.S. 13 (ratified by Canada in 1981).<sup>2</sup>

[10] In 1975, Quebec adopted s. 19 of its *Charter of Human Rights and Freedoms*, S.Q. 1975, c. 6 (now CQLR, c. C-12), which states that “every employer must, without discrimination, grant equal salary or wages to the members of his personnel who perform *equivalent* work at the same place.” The regime for ensuring compliance with s. 19 relied on employee complaints to the Commission des droits de la personne. It proved to be ineffective.

[11] Quebec adopted a more proactive scheme in its 1996 *Pay Equity Act*. Section 1 of the *Act* sets out its purpose as being “to redress differences in compensation due to the systemic gender discrimination suffered by persons who occupy positions in predominantly female job classes”. Rather than relying on individual complaints, the *Act* imposed ongoing legal obligations on employers to measure and correct pay inequity, and set out processes for ensuring compliance with those obligations.

[12] The *Act* applies to all employers — public and private — with 10 or more employees.<sup>3</sup> Regardless of the number of employees, all employers must submit a

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<sup>2</sup>At the time of ratification, Canada issued a declaration relating to Art. 11(1)(d) (see 1257 U.N.T.S. 496). That declaration was withdrawn in 1992 (see 1676 U.N.T.S. 554), but it stated that Canadian legislators “have addressed the concept of equal pay referred to in article 11(1)(d) by legislation which requires the establishment of rates of remuneration without discrimination on the basis of sex. The competent legislative authorities within Canada will continue to implement the object and purpose of article 11(1)(d) and to that end have developed, and where appropriate will continue to develop, additional legislative and other measures.”

report on the implementation of the *Act* in their enterprises (s. 4). Employers with between 10 and 49 employees are responsible for determining and making adjustments to “afford the same remuneration, for work of equal value” (s. 34). All employers with between 50 and 99 employees must create a pay equity plan (s. 31), which is required to contain, among other features, the identification of predominately female job classes, the methodology for comparison and valuation, and the terms and conditions for adjustment payments (s. 50). The largest employers (those with 100 or more employees) have to establish a pay equity committee with representation from their employees (s. 16).

[13] Under ss. 40 to 43, which have now been repealed, employers had a continuous obligation to maintain pay equity and adjust compensation accordingly:

**40.** The employer shall, after adjustments in compensation have been determined or a pay equity plan has been completed, maintain pay equity in his enterprise.

In particular, the employer shall ensure maintenance of pay equity upon the creation of new positions or new job classes, the modification of existing positions or of the conditions applicable to existing positions and the negotiation or renewal of a collective agreement. When a collective agreement is being negotiated or renewed, the certified association concerned or, if applicable, the bargaining agent appointed under the Act respecting the process of negotiation of the collective agreements in the public and parapublic sectors (chapter R-8.2) shall also ensure that pay equity is maintained. [As amended by 2006, c. 6, s. 7.]

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<sup>3</sup> Employees of employers with fewer than 10 employees who seek to redress pay inequities must still resort to complaints under s. 19 of the Quebec *Charter*. Conversely, employees covered by the *Pay Equity Act* are barred from pursuing complaints under the Quebec *Charter* and may only seek recourse under the processes set out in the *Pay Equity Act*.

... <sup>4</sup>

**43.** Where, because of changed circumstances in the enterprise, the compensation adjustments or the pay equity plan are no longer appropriate to maintain pay equity, the employer shall make the modifications necessary to maintain pay equity.

[14] Section 40 confirmed that the obligation to maintain pay equity was triggered by certain changes in the circumstances of the enterprise, such as “the creation of new positions or new job classes, the modification of existing positions or of the conditions applicable to existing positions and the negotiation or renewal of a collective agreement”. If such events occurred, an employer had to adjust compensation accordingly — and prospectively. The employer’s failure to maintain pay equity under ss. 40 to 43 was to be remedied based on a complaints process:

**100.** Upon receiving a complaint from an employee or a certified association representing employees in an enterprise alleging that pay equity is not being maintained in the enterprise, the Commission shall investigate the matter and determine, where applicable, the measures to be taken to correct the situation, including the establishment of a pay

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<sup>4</sup> Sections 41 and 42 set out specific situations in which the employer’s obligations continue notwithstanding changing circumstances. They stated, in part:

**41.** If, before the completion of a pay equity plan, an association is certified under the Labour Code (chapter C-27) to represent employees in the enterprise, obligations relative to the establishment of the plan remain unchanged.

...

**42.** The alienation of the enterprise or the modification of its juridical structure shall have no effect upon obligations relative to adjustments in compensation or to a pay equity plan, which shall be binding on the new employer.

Where two or more enterprises are affected by a modification of juridical structure by amalgamation or otherwise, the provisions of this Act which apply according to the size of the enterprise shall, in respect of the enterprise resulting from the modification, be determined to be those applicable to the enterprise which employed the greatest number of employees.

equity plan. Any required adjustments in compensation shall bear interest at the legal rate as of the time they should have been paid.

[15] As a result, the Pay Equity Commission had the duty to investigate complaints regarding employers' failure to maintain pay equity. Where it found that the obligation to maintain pay equity had been breached, it had the power to order adjustments in compensation retroactive to the date on which pay inequity re-emerged.

[16] Despite specific deadlines set out in the *Act*, in the 10 years following its enactment, only 47 percent of employers had established a pay equity plan. Of the remainder, 38 percent had not initiated the process to establish such a plan. Faced with this widespread non-compliance, Quebec decided to reduce the employers' obligation to maintain pay equity, in the hope that doing so would lead to better compliance. The result was the 2009 *Act to amend the Pay Equity Act*. There is no evidence before this Court about whether compliance has improved as a result of the amendments.

[17] The amendments at issue in this appeal are the following:

- Sections 40 to 43 were repealed, abolishing the employers' continuous obligation to maintain pay equity;<sup>5</sup>
- Sections 76.1 to 76.11 were added, requiring pay equity audits every five years and setting out a process for audits;<sup>6</sup> and

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<sup>5</sup> By s. 14 of the 2009 *Act to amend the Pay Equity Act*.

<sup>6</sup> By s. 23 of the 2009 *Act to amend the Pay Equity Act*.

- Section 103.1 para. 2 was added, preventing retroactive remedies for the period between audits.<sup>7</sup>

[18] Section 76.1 stipulates that once a pay equity plan is established, employers must conduct a pay equity audit in their enterprise every five years. After conducting the pay equity audit, the results must be posted for 60 days. The posting must include a summary of the audit process as well as a list of events leading to compensation adjustments. There is, however, no requirement that the audit posting include the date on which any pay inequity emerged (s. 76.3). Employees can request additional information within 60 days of the posting (s. 76.4).

[19] Adjustments in compensation — plus interest — apply from the date of the posting (s. 76.5). No compensation adjustments can be assessed by the Pay Equity Commission *prior to* the date of the audit posting (s. 103.1 para. 2). If, however, an employer acts in bad faith or in an arbitrary or discriminatory manner, adjustments in compensation and interest apply from the date of that conduct (s. 76.9) and the Pay Equity Commission may make a determination to that effect (s. 101 para. 3).

[20] The unions brought proceedings in the Quebec Superior Court seeking a declaration that these amendments violated s. 15 of the *Charter*.

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<sup>7</sup> By s. 40 of the 2009 *Act to amend the Pay Equity Act*.

[21] The trial judge held that there was no inherent constitutional problem with Quebec's decision to repeal ss. 40 to 43 and impose in their place a system of periodic mandatory audits (2014 QCCS 149). But he agreed with the unions that the addition of s. 76.5 breached s. 15 of the *Charter* because the denial of retroactive payments for pay inequities that emerged in the period between audits led to significant financial losses for women and unduly perpetuated pay inequity. He also found s. 76.3 breached s. 15 because employers were not required to include the date of the changes in the audit posting, and therefore employees could not know when adjustments in compensation should start. The declaration of invalidity was suspended for one year.

[22] The Court of Appeal upheld the trial judge's finding that ss. 76.3 and 76.5 perpetuate disadvantage for women by preserving the pay inequity *status quo* and providing for up to five years of amnesty for employers (2016 QCCA 1659). In addition, it concluded that s. 103.1 para. 2, the provision precluding the Pay Equity Commission from ordering retroactive compensation, violated s. 15. It accepted for the sake of argument that the objective of the 2009 amendments was [TRANSLATION] [TRANSLATION] "improving and strengthening a former scheme that had been ineffective, particularly where the maintenance of pay equity was concerned", (para. 85 (CanLII)), but held that ss. 76.3, 76.5 and, by implication, 103.1 para. 2 were neither rationally connected, minimally impairing, nor proportionate to that objective.

[23] I agree with the Court of Appeal that ss. 76.3, 76.5 and 103.1 para. 2 are unconstitutional.

### Analysis

[24] Section 15(1) of the *Charter* states:

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.

[25] Since *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, this Court has emphasized substantive equality as the engine for the s. 15 analysis (*R. v. Kapp*, [2008] 2 S.C.R. 483; *Quebec (Attorney General) v. A*, [2013] 1 S.C.R. 61; *Kahkewistahaw First Nation v. Taypotat*, [2015] 2 S.C.R. 548). The test for a *prima facie* violation of s. 15 proceeds in two stages: does the impugned law, on its face or in its impact, create a distinction based on enumerated or analogous grounds; if so, does the law impose “burdens or denies a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating . . . disadvantage” (*Taypotat*, at paras. 19-20).

[26] The first step of the s. 15(1) analysis is not a preliminary merits screen, nor an onerous hurdle designed to weed out claims on technical bases. Rather, its purpose is to ensure that s. 15(1) of the *Charter* is accessible to those whom it was

designed to protect. The “distinction” stage of the analysis should only bar claims that are not “intended to be prohibited by the *Charter*” because they are not based on enumerated or analogous grounds — which are “constant markers of suspect decision making or potential discrimination” (*Withler v. Canada (Attorney General)*, [2011] 1 S.C.R. 396, at para. 33; *Taypotat*, at para. 19, quoting *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203, at para. 8). The purpose, in other words, is to exclude claims that have “nothing to do with substantive equality” (*Taypotat*, at para. 19, quoting Lynn Smith and William Black, “The Equality Rights” (2013), 62 *S.C.L.R.* (2d) 301, at p. 336). For that reason it is not appropriate, at the first step, to require consideration of other factors — including discriminatory impact, which should be addressed squarely at the second stage of the analysis. The focus must remain on the *grounds* of the distinction.

[27] And when identifying the distinction and the grounds for it, this Court in *Withler* rejected a search for “mirror comparator” groups:

. . . a formal analysis based on comparison between the claimant group and a “similarly situated” group, does not assure a result that captures the wrong to which s. 15(1) is directed . . . . What is required is not formal comparison with a selected mirror comparator group, but an approach that looks at the full context. [para. 40]

A mirror comparator group analysis “may fail to capture substantive inequality, may become a search for sameness, [and] may shortcut the second stage of the substantive equality analysis” (para. 60).

[28] At the second step of the s. 15(1) test, as this Court said in *Kapp* (at paras. 23-24) and *Withler* (at para. 66), it is not necessary or desirable to apply a step-by-step consideration of the factors set out in *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, and no case since *Kapp* has applied one. The focus is not on “whether a discriminatory attitude exists”, or on whether a distinction “perpetuates negative attitudes” about a disadvantaged group, but rather on the discriminatory *impact* of the distinction (*Quebec v. A*, at paras. 327 and 330 (emphasis deleted)).

[29] As previously noted, the purpose of the *Pay Equity Act* is “to redress differences in compensation due to the systemic gender discrimination suffered by persons who occupy positions in predominantly female job classes”. The very premise underlying pay equity legislation is that women have suffered discrimination in the way they are compensated in the workforce. Pay equity legislation, such as the *Act* at issue here, accordingly targets women in redressing the pay discrimination they have suffered. And the impugned provisions target women, in more specific ways, to that end. They set out how deficiencies in *women’s* pay, in comparison to men, will be identified. They set out when *women* will — and will not — receive compensation for those inequities. And they set out the information that will — and will not — be made available about when those inequities emerge to the *women* who may need to challenge them. The impugned provisions therefore draw distinctions based on sex, both on their face and in their impact.

[30] Before turning to discriminatory impact, a brief word on s. 15(2). It has no application in cases such as this one. It states:

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.

[31] Its purpose “is to save ameliorative programs from the charge of ‘reverse discrimination’” (*Alberta (Aboriginal Affairs and Northern Development) v. Cunningham*, [2011] 2 S.C.R. 670, at para. 41; *Kapp*). It protects ameliorative programs for disadvantaged groups from claims by those the program was not intended to benefit that the ameliorative program discriminates against them.

[32] In the case before us, on the other hand, the argument is that parts of an ameliorative scheme violate s. 15(1) because they have a discriminatory impact on women, the disadvantaged group the scheme was intended to benefit. Section 15(2) cannot bar s. 15(1) claims by the very group the legislation seeks to protect and there is no jurisprudential support for the view that it could do so.

[33] And there can be no doubt that ss. 76.3, 76.5, and 103.1 para. 2 have a discriminatory impact, but not because these provisions differ from the previous legislation. I do not share the unions’ view that once Quebec adopted ss. 40 to 43, it was constitutionally required to keep them on the books, so that any modification in the type or extent of protection afforded by those provisions would amount to a

constitutional violation. To accept that submission in these circumstances would constitutionalize the policy choice embodied in the first version of the *Act*, improperly shifting the focus of the analysis to the *form* of the law, rather than its effects. Instead, there is a discriminatory impact because, assessed on their own and regardless of the prior legislative scheme, the impugned provisions perpetuate the pre-existing disadvantage of women. Section 76.5 stipulates that absent a showing of bad faith on the part of the employer pursuant to s. 76.9, adjustment payments are payable only from the date of the audit posting every five years. This has the effect of making the employer's pay equity obligation an episodic, partial obligation. Any pay inequities emerging during the five year period between audits go uncorrected until the next audit. Even when an audit reveals the emergence of pay inequity during the previous five years, s. 76.5 stipulates that only adjustment payments going forward are payable. As the trial judge and Court of Appeal found, this effectively gives an amnesty to the employer for discrimination between audits. And that amnesty is cemented by the addition of s. 103.1 para. 2 barring the Pay Equity Commission from assessing adjustment payments prior to the date of the posting.

[34] Further exacerbating the disadvantage created by s. 76.5 is the addition of s. 76.3, which, as the trial judge found, denies employees and unions the information they need to challenge decisions employers make as a result of pay equity audits. Section 76.3 requires employers to post the results of the audit, but not the date on which pay inequity emerged, thus obscuring when adjustment payments ought to have been made and stripping the posting requirement of much of its meaning.

Without information about when pay inequities emerge, employees are deprived of the evidentiary foundation for showing bad faith by the employer, which is the only route to obtaining retroactive compensation for inequities emerging between audits. And the absence of that information, in turn, puts the onus on employees or unions to make requests for information under s. 76.4, contradicting Quebec's stated purpose of making the scheme more proactive and effective. It is not at all clear that that process would guarantee complete and timely disclosure of the necessary information. There is, in other words, not only no right to challenge inequities in the period between audits, there is also, through s. 76.3, a provision that makes challenging audit results an opaque and difficult to access process.

[35] Sections 76.5 and 103.1 para. 2 of the *Act* permit compensatory adjustment payments for the years between audits only if the employer or the pay equity committee acted in bad faith. "Bad faith" is well understood in Quebec's labour and employment legislation. The wording used in s. 76.9 of the *Act* — the employer cannot "act in bad faith or in an arbitrary or discriminatory manner or exhibit gross negligence" — is the same as that in s. 47.2 of the Quebec *Labour Code*, CQLR, c. C-27. And this wording has been interpreted, notably by this Court in *Noël v. Société d'énergie de la Baie James*, [2001] 2 S.C.R. 207, very narrowly to mean only conduct involving "malicious intent" or that "exceed[s] the limits of discretion reasonably exercised" (para. 52). Applied here, it means that retroactive compensation is only available to sanction deliberate and improper behaviour in the conduct of mandatory audits, not the discrimination that may otherwise be revealed

by the process. That means that once pay equity is achieved, any inequities that subsequently emerge before the next audit will be immune from remedial redress except where the claimants can prove *intentional* discrimination (that is, bad faith), an approach to discrimination long rejected by this Court and at odds with the purpose of pay equity legislation, namely, to remedy *systemic* discrimination. Further, s. 76.3 denies employees and unions the information they need to assess in a timely way — and possibly challenge — decisions employers make as a result of pay equity audits.

[36] I agree with the trial judge and the Court of Appeal that Quebec was entitled to change its approach to pay equity, but whatever legislation it enacted had to be constitutionally compliant. If, to point out just one example, s. 76.5 had required that adjustment payments be made from the date the pay inequity re-emerged, rather than from the date that the audit results were posted, then employers would not have a pay equity amnesty for the period between audits. And there would be no discriminatory impact.

[37] But the provisions at issue in this appeal have a discriminatory impact on the legislation's intended beneficiaries, resulting in a *prima facie* infringement of s. 15 of the *Charter*. The infringement occurs because when an audit reveals pay inequity, women are denied retroactive compensation and denied information required to assess and potentially challenge employer decisions.

[38] Although the scheme purports to address systemic discrimination, it in fact codifies the denial to women of benefits routinely enjoyed by men — namely,

compensation tied to the value of their work. Men receive this compensation as a matter of course; women, under this scheme, are expected to endure five-year periods of pay inequity, and to receive equal compensation only where their employer voluntarily acts in a non-discriminatory manner, or where they can meet the heavy burden of proving the employer engaged in deliberate or improper conduct. The scheme thus places barriers along the path to equal pay for women. And it correspondingly tolerates undervaluation of women's work whenever women cannot clear the specific hurdle of proving that they should be paid equally not merely because they *are* equal, but because their employer acted improperly. Absent such behaviour, working women are told that they must simply live with the reality that they have not been paid fairly, even where a statutorily mandated audit has made that fact clear. In this way, the scheme, by privileging employers, reinforces one of the key drivers of pay inequity: the power imbalance between employers and female workers. By tolerating employer decision-making that results in unfair pay for women, the legislature sends a message condoning that very power imbalance, further perpetuating disadvantage.

[39] The impugned provisions, moreover, interfere with access to anti-discrimination law under s. 19 of the Quebec *Charter*, which guarantees the right to equal pay for work of equal value, and s. 10, which guarantees the right to gender equality more generally. The impugned provisions interfere with access to these rights because complaints covered by the *Pay Equity Act* must be dealt with exclusively in accordance with the provisions of that statute (see Quebec *Charter*,

s. 49.1). The impugned provisions of the *Pay Equity Act* cut off access to any remedy for pay discrimination based on sex, except where there is evidence of bad faith. That means that, for women covered by the *Pay Equity Act*, s. 19's promise of pay equity is a right without a remedy, except for forward-looking adjustments every five years.

[40] In *Vriend v. Alberta*, [1998] 1 S.C.R. 493, this Court found a breach of s. 15 based on the “denial of access to remedial procedures for discrimination” (para. 97). The same analysis applies here, despite the fact that the legislated denial of access takes the form of a periodic suspension of existing equality rights, rather than an outright exclusion from the statutory scheme. In both cases the discriminatory impact is obvious and significant. To provide no recourse for pay discrimination based on sex, denies substantive equality to working women, entrenching and perpetuating their pre-existing disadvantage (*Andrews*, at p. 183).

[41] Nonetheless, my colleagues imply that there is no breach of s. 15(1) of the *Charter* because the Quebec legislature did not *create* pay discrimination against women. No one has suggested that it did. But when the government passes legislation in a way that perpetuates historic disadvantage for protected groups, regardless of who caused their disadvantage, the legislation is subject to review for s. 15 compliance (*Vriend*, at para. 66).

[42] The result of finding that Quebec's amendments breach s. 15 in this case is not, as Quebec suggests, to impose a freestanding positive obligation on the state to enact benefit schemes to redress social inequalities. Nor does it undermine the state's

ability to act incrementally in addressing systemic inequality. But s. 15 does require the state to ensure that whatever actions it *does* take do not have a discriminatory impact (*Vriend; Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, at paras. 72-80). And there is no evidence to support the *in terrorem* view advanced by my colleagues that finding a breach would have a “chilling effect” on legislatures. That amounts to an argument that requiring legislatures to comply with *Charter* standards would have such an effect. Speculative concerns about the potential for inducing statutory timidity on the part of legislatures has never, to date, been an accepted analytic tool for deciding whether the Constitution has been breached. Legislatures understand that they are bound by the *Charter* and that the public expects them to comply with it. The courts are facilitators in that enterprise, not bystanders.

[43] This brings us to s. 1. To establish that the *prima facie* infringement of s. 15 is justified, Quebec has the burden of showing that the impugned changes have a pressing and substantial objective, and that the means chosen to achieve that objective are proportionate to it.

[44] I agree with the Court of Appeal that none of the impugned provisions can be justified under s. 1, but would approach the analysis somewhat differently, starting with ss. 76.5 and 103.1 para. 2.

[45] The first step is to identify the objective of the impugned changes and, in turn, to determine whether it is pressing and substantial. This Court has emphasized

that “all steps of the *Oakes* test are premised on a proper identification of the objective of the impugned measure” (*Toronto Star Newspapers Ltd. v. Canada*, [2010] 1 S.C.R. 721, at para. 20, per Deschamps J.). Where a court finds that a specific legislative provision infringes a *Charter* right, the state’s burden is to justify *that limitation*, not the whole legislative scheme. Thus, the “objective relevant to the s. 1 analysis is the objective of the infringing measure, since it is the infringing measure and nothing else which is sought to be justified” (*RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at para. 144; *R. v. K.R.J.*, [2016] 1 S.C.R. 906, at para. 62).

[46] The objective of the measure to be considered in this case is therefore not the overall purpose of the 2009 changes, but rather the objective of the specific limitations in ss. 76.5 and 103.1 para. 2 preventing female employees from getting compensation for wage inequities that emerge during the period between five-year pay equity audits.

[47] Quebec says the objective for the denial of compensation between the audits was to improve compliance by making the scheme more “realistic”. Its approach, it says, takes into account the difficulties inherent in the ongoing obligation to maintain pay equity, putting in place a scheme that is easier to administer and more effective. Quebec accordingly argues that one of the benefits of the 2009 changes is that it will be easier to identify pay inequities as a result of the mandatory audits. The constitutional challenge, however, is not to the periodic nature of audits, but to the

fact that whatever inequity is revealed by them cannot be retroactively remedied. If Quebec's s. 1 justification rises and falls on this contention, there is no rational connection between the infringement — the denial of retroactive compensation — and its stated objective.

[48] For the sake of completeness, however, I would address a somewhat more specific framing of Quebec's objective for which it has not explicitly argued. Citing one of the unions' experts, the Court of Appeal identified one possible reading of the purpose of the scheme as being to establish a [TRANSLATION] "compromise designed to avoid the financial and administrative burdens that retroactivity would represent for enterprises" (para. 84). By implication, lightening the burden through denial of retroactive payments would encourage more employers to voluntarily comply. I am prepared to accept that encouraging increased employer compliance can, in some circumstances, constitute a pressing and substantial objective.

[49] Turning to rational connection, the legislation was amended in 2009. Yet there is no empirical or other evidence to show how these amendments have advanced the goal of ensuring employer compliance or why denying retroactivity makes compliance easier. This makes the connection tenuous at best. Nonetheless, I am also prepared to accept that reducing the employer's obligations can be seen, at a theoretical level, to be rationally connected to increased employer compliance.

[50] But the justification starts to melt away at the minimal impairment stage. Quebec has not demonstrated in any way how the means it has chosen "impair the

right . . . as little as reasonably possible in order to achieve the legislative objective” (*RJR-MacDonald*, at para. 160) or, put differently, the absence of “some other reasonable way for the legislature to satisfy the objective that would not impair the right or freedom at issue, or that would have less impact on the right or freedom” (Robert J. Sharpe and Kent Roach, *The Charter of Rights and Freedoms* (5th ed. 2013), at p. 75).

[51] There is, in fact, virtually no evidence that other means of encouraging employer compliance — such as stricter enforcement of the *Pay Equity Act*’s requirements through the offence provisions contained within it — would be ineffective, if indeed Quebec’s objective was to improve compliance. The *Act*’s penalty provisions empower the relevant enforcement bodies to charge employers with offenses for failing to comply with their obligations, and to impose fines upon conviction (ss. 115 to 118). Yet there is *no* evidence that Quebec has engaged in any meaningful effort to enforce compliance by the employers who have not adopted pay equity plans or taken the steps towards achieving and maintaining pay equity required by the former provisions. Nor has Quebec provided any explanation for why there is no such evidence. All it has said, in effect, is that it had tried a scheme creating ongoing obligations to generate equitable pay for women, but since the scheme did not live up to the province’s expectations, a new scheme eliminating those obligations would be tried.

[52] Eliminating pay equity obligations except for adjustments every five years does not impair female employees' equality rights as little as reasonably possible, it *suspends* their rights to be free from pay discrimination for five year intervals.

[53] Moreover, if ensuring improved compliance is the objective, Quebec has failed to demonstrate that the law satisfies the "overall" balancing requirement of the s. 1 analysis. Lowering the bar for compliance may or may not mean that more employers will make the effort to comply, but not only is this "enticement" not minimally impairing of the right to be free from discriminatory compensation, its harms far outweigh its benefits. The harmful effects are to create barriers to access for equitable pay; the benefits are, at the moment, indiscernible and speculative given the absence of evidence.

[54] Lowering the bar in the hopes of compliance strikes me, in any event, as being inconsistent with respect for substantive equality. It is, to me, not unlike suggesting that if not enough employers comply with a duty to build ramps for employees with disabilities, the requirement of barrier-free workplaces will be replaced by an occasional duty to retrofit. In the meantime, access will be denied to many in the hopes that it will become available for some. This, aside from being disproportionately harmful to equality seekers, means that it is constitutionally permissible to suspend the equality rights of employees from time to time in order to encourage employers to fulfill their legal anti-discrimination obligations.

[55] Section 15 protects women from discrimination. Pay equity is a strategy that protects them from *compensation* discrimination. It is not an episodic right or an occasional right. The speculative suggestion that sacrificing that right in the hope of encouraging the possibility of better compliance, does not outweigh the harm caused by the limitation.

[56] Reducing employers' obligations in the hopes of encouraging compliance subordinates the substantive constitutional entitlement of women to be free from discrimination in compensation to the willingness of employers to comply with the law. It sends the policy message to employers that defiance of their legal obligations under the *Act* will be rewarded with a watering-down of those obligations. And it sends the message to female workers that it is they who must bear the financial burdens of employer reluctance. Any benefits of that approach are outweighed by its harmful impact on the very people whom this pay equity scheme was designed to help. This overall disproportionate harm means the infringement caused by ss. 76.5 and 103.1 para. 2 cannot be justified under s. 1.

[57] As for s. 76.3, which excludes from the information required in the audit posting the date when pay inequities re-emerged, the justifications analysis fails at every step. Quebec has not offered any specific pressing and substantial objective. Nor, in fact, has it provided any explanation for the exclusion of this information other than to say that it is not relevant information under the new scheme, which only requires adjustments to be made every five years. Since the five year gap between

remedial compensation has been found to be unconstitutional earlier in these reasons, the date on which pay inequities re-emerge is plainly relevant information.

[58] I would therefore dismiss Quebec's appeal with costs.

[59] As for the cross-appeal, both the trial judge and the Court of Appeal held that the unions did not meet their onus of proving the unconstitutionality of the provisions in the 2009 *Act to Amend the Pay Equity Act* that repealed ss. 40 to 43 of the *Pay Equity Act* (the continuing obligation to maintain pay equity). I agree. As previously noted, it was open to Quebec to opt for a regime establishing periodic review of the maintenance of pay equity. The s. 15 infringement occurs because of the suspension of women's equality rights during the five-year period between audits, not because the maintenance review is periodic.

[60] The unions further argued in their cross-appeal that the scheme breached s. 15 because employees are not involved in the pay equity maintenance process. The unions have not, in my view, discharged their onus of proving that the lack of employee participation has a discriminatory impact in the circumstances of this case. After a careful review of the expert evidence, the trial judge concluded that what matters is the information available regarding maintenance, and not employee participation. The unions have not shown that the trial judge made a reviewable error in that assessment. As the Court of Appeal rightly stressed, the *Charter* does not constitutionalize a single model of pay equity regime. The focus must remain on discriminatory impact.

[61] The cross-appeal is therefore dismissed with costs.

English version of the reasons delivered by

CÔTÉ, BROWN AND ROWE JJ. —

I. Introduction

[62] Since the *Canadian Charter of Rights and Freedoms* came into force, the case law on the guarantee of equality provided for in s. 15 has undergone constant change owing to the fact that the conceptual boundaries of the guarantee are not clearly defined. In 1989, in *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, McIntyre J. noted how delicate the task before the Court — defining the scope of the equality guarantee and proposing an effective approach to protecting it — would be. He characterized equality as “an elusive concept [that], more than any of the other rights and freedoms guaranteed in the *Charter* ... lacks precise definition” (p. 164).

[63] Ten years later, in *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, Iacobucci J. spoke of an almost inherent difficulty in the interpretation of s. 15 of the *Charter*. He stated that “[t]he quest for equality expresses some of humanity’s highest ideals and aspirations, which are by their

nature abstract and subject to differing articulations. The challenge for the judiciary in interpreting and applying s. 15(1) of the *Charter* is to transform these ideals and aspirations into practice in a manner which is meaningful to Canadians and which accords with the purpose of the provision” (para. 2).

[64] In our opinion, the reasons of Abella J. do not reflect this quest for equality that has been required since *Andrews*. As is clear from the companion case of *Centrale des syndicats du Québec v. Québec (Attorney General)*, 2018 SCC 18, Quebec has been a pioneer in the struggle against pay inequities in private sector enterprises in Canada. The amendments to the *Pay Equity Act*, S.Q. 1996, c. 43 (now CQLR, c. E-12.001) (“Act”), are one part of its efforts in that regard. From this perspective, it is profoundly unfair to Quebec society to claim that these amendments are unconstitutional given that what the province’s National Assembly has done is to replace an ineffective mechanism in order to ensure *real* maintenance of pay equity by means of a process of audits of an enterprise’s pay equity plan that are to be conducted every five years. The choice to adopt this measure, which in any event ameliorates the conditions of the employees in question in comparison with the former scheme, belongs to the elected representatives of Quebecers and not to this Court.

[65] At issue in this appeal is the nature of *Charter* rights. *Charter* rights are fundamentally *negative* in that they preclude the state from acting in ways that would impair them. They do not place the government under an obligation to act in order to

obtain specific societal results such as the total and definitive eradication of gender-based pay inequities in private sector enterprises. An interpretation of the *Charter* that imposed a *positive* obligation such as that would change its nature and confer on the courts the unusual responsibility of overseeing compliance with it. Yet that is the consequence of our colleague's interpretation. Although government policies or legislation respecting human rights may be designed to eliminate pay inequities in private sector enterprises, there is no constitutional obligation to that effect: *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, 2004 SCC 78, [2004] 3 S.C.R. 657, at para. 41.

[66] What the *Charter* is really intended to do is to protect substantive equality by, among other things, ensuring that government actions do not prevent members of enumerated or analogous groups from benefiting from measures that are available to the general public: *Andrews*, at p. 174; *Quebec (Attorney General) v. A*, 2013 SCC 5, [2013] 1 S.C.R. 61, at paras. 322-23. However, it does not create an obligation of result that applies when the legislature adopts measures that are specifically intended to narrow the gap between a group and the rest of society. The *Charter* does not compel the state to achieve equality in areas outside the government's sphere of activity, such as in private sector enterprises. Logically, if a measure intended to reduce inequality does not have the effect of exacerbating a pre-existing disadvantage faced by the group in the situation that would prevail without state intervention, it is constitutional. *A fortiori*, a measure that ameliorates the group's conditions is also

consistent with the letter and the spirit of the *Charter*. As this Court has held, such a measure will in fact be *protected* under s. 15(2).

[67] There are a variety of socio-economic theories that advocate different visions of the appropriate way to redistribute economic benefits and the implementation of mechanisms to promote social justice. This Court's role is not to dictate the best way to achieve a social ideal or to comment on the appropriateness of policies underlying legislative enactments: *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, at p. 496; see also the dissent of Rothstein and Wagner JJ. in *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4, [2015] 1 S.C.R. 245, at paras. 116-18.

[68] In sum, we cannot subscribe to the reasoning proposed by Abella J., since we do not find that the gap between the employees to whom the Act applies and the rest of society has widened as a result of the enactment of the statutory amendments at issue. In this regard, she errs in adopting a strict interpretation of ss. 76.9 and 101 of the Act that limits their true scope. Correlatively, the Act does not *perpetuate* pre-existing disadvantages.

## II. Analysis

### A. *Analytical Framework for Section 15(1)*

[69] The most recent pronouncement on the proper analytical approach under s. 15(1) of the *Charter* was in *Kahkewistahaw First Nation v. Taypotat*, 2015 SCC 30, [2015] 2 S.C.R. 548. The analysis has two steps.

[70] At the first step, it must be determined whether a law, on its face or in its impact, creates a distinction on the basis of an enumerated or analogous ground: *Taypotat*, at para. 19. To establish this, the claimant must show that the law at issue has a disproportionate effect on him or her based on membership in an enumerated or analogous group: *Taypotat*, at para. 21. In terms of proof, it will generally suffice to show that the law has “a disproportionately negative impact on a group or individual that can be identified by factors relating to enumerated or analogous grounds”: *Withler v. Canada (Attorney General)*, 2011 SCC 12, [2011] 1 S.C.R. 396, at para. 64. In this regard, we agree with LeBel J., who, in *Quebec v. A*, correctly explained the approach to take at the first step:

Thus, the claimant can show that the impugned law creates a distinction directly by imposing limitations or disadvantages on the basis of an enumerated or analogous ground: see, *inter alia*, *Miron*, at para. 131; *Lavoie v. Canada*, 2002 SCC 23, [2002] 1 S.C.R. 769, at para. 52; *Trociuk v. British Columbia (Attorney General)*, 2003 SCC 34, [2003] 1 S.C.R. 835, at para. 10. The same is true where the law restricts access to a fundamental social institution (*Law*, at para. 74) or imposes obligations that are not imposed on others (*Withler*, at para. 62). A claimant can also show that a law creates a distinction indirectly where, “although the law purports to treat everyone the same, it has a disproportionately negative impact on a group or individual that can be identified by factors relating to enumerated or analogous grounds”: *Withler*, at para. 64. At this stage, comparisons, if any, can help to demonstrate the existence of an adverse distinction. [para. 189]

[71] In our view, in the case at bar, the disadvantageous or prejudicial nature of the law, which is as a general rule considered at the second step of the s. 15(1) analysis, must instead be examined at the first step. At the first step, the Court is invited to engage in a comparative exercise. As McLachlin C.J. and Abella J. stressed, “[i]nherent in the word ‘distinction’ is the idea that the claimant is treated differently than others. Comparison is thus engaged, in that the claimant asserts that he or she is denied a benefit that others are granted or carries a burden that others do not, by reason of a personal characteristic that falls within the enumerated or analogous grounds of s. 15(1)”: *Withler*, at para. 62.

[72] By its nature, the Act entails distinctions that may affect a group consisting essentially of women. It would be absurd if an approach whose focus was on discriminatory *effects* did not deal first with the issue of the disadvantage resulting from one or more of those distinctions, at least on a *prima facie* basis.

[73] The second step is more onerous, as it requires proof that the disadvantage is *discriminatory* in that the law “fails to respond to the actual capacities and needs of the members of the group and instead imposes burdens or denies a benefit in a manner that has the effect of reinforcing, perpetuating or exacerbating their disadvantage”: *Taypotat*, at para. 20.

#### B. *Review of Kapp and Cunningham*

[74] According to the principles that were laid down in *R. v. Kapp*, 2008 SCC 41, [2008] 2 S.C.R. 483, and reaffirmed in *Alberta (Aboriginal Affairs and Northern Development) v. Cunningham*, 2011 SCC 37, [2011] 2 S.C.R. 670, At para. 44, whether s. 15(2) applies should generally be determined before turning to the second step of the s. 15(1) analysis. In *Kapp*, the Court found that the advantage of dividing the analysis in this way was to make it unnecessary to conclude that the equality guarantee had been violated before saving the measure under s. 15(2):

In other words, once the s. 15 claimant has shown a distinction made on an enumerated or analogous ground, it is open to the government to show that the impugned law, program or activity is ameliorative and, thus, constitutional. This approach has the advantage of avoiding the symbolic problem of finding a program discriminatory before “saving” it as ameliorative, while also giving independent force to a provision that has been written as distinct and separate from s. 15(1). Should the government fail to demonstrate that its program falls under s. 15(2), the program must then receive full scrutiny under s. 15(1) to determine whether its impact is discriminatory.

(*Kapp*, at para. 40)

[75] In *Kapp*, the claimants, who were commercial fishers and mainly non-Aboriginal, were not members of the group to which an enumerated or analogous ground applied that benefited from the program’s advantages. The claimants were pleading reverse discrimination, arguing that the benefit resulting from a communal fishing licence granted to three Aboriginal bands violated s. 15 of the *Charter* (para. 1). It is true that in such circumstances, there is a certain advantage to not explicitly acknowledging that a measure has discriminatory effects on one or more groups to which it does not apply before concluding that those effects are justified by

the objective of achieving substantive equality for another group that is disadvantaged. In that situation, the proposed approach is not really problematic.

[76] In the case at bar, it is the group to which an enumerated ground applies that raises the discriminatory nature of the effects of a law whose specific object is the amelioration of conditions of the group's members. If the approach proposed in *Kapp* were applied, it would have the effect of terminating the analysis prematurely. It is not impossible or unimaginable that even though a law genuinely has the amelioration of a group's conditions as its object, its *effect* might be to widen the prejudicial and discriminatory gap in relation to the rest of society: J. McGill, "Section 15(2), Ameliorative Programs and Proportionality Review" (2013), 63 *S.C.L.R.* (2d) 521. The group to which the measure or law applies would then find itself in a constitutional cul-de-sac: even though the effects of a government action would ultimately exacerbate the discrimination against the group, the courts would have to defer to the government because its intentions were benevolent. But such a situation would be contrary to the approach favoured by this Court in the equality context: *Andrews*, at p. 182; *Quebec v. A*, at para. 333.

[77] It is our opinion that such circumstances require us to defer the s. 15(2) analysis until after the entire s. 15(1) analysis has been completed. First of all, that will make it possible to determine whether the government action creates or perpetuates a discriminatory disadvantage. It is, obviously, not necessary to "save" a measure that does not violate s. 15. In addition, the second step of the s. 15(1)

analysis will help in identifying the law's real object. Thus, if a law establishes mechanisms that create *no* benefit for the group, it probably does not genuinely have the amelioration of the group's conditions as its object. It will be more difficult to rule on this point if the law creates both benefits and disadvantages. Although the test remains objective, and deferential to the legislature's preferences, there is no question that the true effect of the measures the legislature adopts can be taken into account: *Kapp*, at para. 49.

[78] Finally, the approach we recommend in this case is consistent with the combined effect of s. 15(1) and s. 15(2), namely to promote substantive equality: *Kapp*, at para. 16. It should be borne in mind that the Court acknowledged in *Kapp* that the test it was proposing at that time was only at an early stage in the development of the case law on s. 15(2) and that "future cases may demand some adjustment to the framework" (para. 41).

[79] In *Cunningham*, the Court was right to decline to alter the analytical framework for a group that was arguing that its exclusion from a program conferring a benefit on another group with characteristics similar to its own to which an enumerated ground applied was unconstitutional (para. 53). In that case, the claimants, who were members of the Peavine Métis settlement as well as being status Indians, were challenging the constitutional validity of certain provisions of the *Metis Settlements Act*, R.S.A. 2000, c. M-14, that excluded status Indians from membership in any Métis settlement. They alleged, among other things, that they were deprived of

the benefits of the program on the basis of race. We are of the view that in such cases in which a group or subset of a group is included under one of the enumerated or analogous groups but is otherwise excluded from the group to which the measure specifically applies, it will always be appropriate to follow the approach from *Kapp*, because the advantage of doing so will remain relevant.

[80] In sum, it is only where the claimant is a member of the group to which the law specifically applies that the s. 15(2) analysis should be deferred until after that of s. 15(1). In any situation in which the claimant is not a member of the group, the order set out in *Kapp* should be followed.

C. *First Step of the Section 15(1) Analysis*

[81] In her reasons, Abella J. makes it seem a simple matter to determine whether the group is affected by an adverse distinction based on sex. In her opinion, this distinction is obvious, given that the purpose of the Act is to attempt to redress pay inequities that exist between men and women in the workplace (Abella J.'s reasons, at para. 29). It is our view, however, that at this step of the analysis the claimant must show not only the mere existence of a distinction in the Act, but also a form of disadvantage flowing from that distinction.

[82] Abella J. asserts that the effects of the impugned measure should not be taken into account at the first step of the s. 15(1) analysis so as to avoid weeding out claims on technical bases. Yet this is not a mere formality or technical issue. What

must be determined is whether the measure has any *effect* on the group. A claimant who is unable to show *prima facie* that a measure has disadvantageous effects has no chance of succeeding. This being said, “disadvantage” and “prejudice” are flexible concepts that can take many forms.

[83] Whether the effects of ss. 76.3, 76.5 and 103.1 para. 2 of the Act are disadvantageous is a complex question. Without imposing an unduly heavy burden at this first step of the analysis under s. 15(1) of the *Charter*, this question warrants further consideration. Our colleague has identified a distinction under s. 15(1), but in our view, her analysis is tainted in two ways. First, its effect is that any attempt at amelioration whose objectives are not achieved in their entirety would infringe s. 15(1). For the reasons set out below, we cannot subscribe to this position. Second, our colleague’s negative depiction of the provisions notwithstanding, it is clear from a careful review of them that they are not actually disadvantageous.

[84] In the first place, Abella J.’s argument that the Act does not confer benefits but is instead a vehicle for upholding a fundamental right guaranteed by the *Charter of human rights and freedoms*, CQLR, c. C-12 (“Quebec Charter”) may seem appealing. From that perspective, given that the Act’s objective is in her view to raise compensation to the level of the advantaged group, that is, to the level of persons holding positions that fall into predominantly male job classes, the Act will almost inevitably be disadvantageous if this objective is not achieved *perfectly*, since such a failure would have the effect of “perpetuating” the pre-existing disadvantage.

However, although achieving pay equity is desirable in our society, the *Charter* does not confer constitutional status on the achievement or the maintenance of pay equity. What Abella J. does in criticizing the “episodic” and “partial” nature of the maintenance obligations provided for in the amendments to the Act (Abella J.’s reasons, at para. 33) and noting that the amendments “suspen[d]” the right of those women to be protected from pay discrimination during five-year intervals (Abella J.’s reasons, at para. 52) is in effect to constitutionally entrench pay equity. But pay equity for private sector enterprises is a creation of the Quebec legislature and does not have constitutional status.

[85] In passing, the respondents’ position must also be rejected, as they compare the amendments to the Act with the previous version of the Act. Such an approach would have the effect of constitutionally entrenching one mechanism that confers benefits on a group to which an enumerated or analogous ground applies, to the detriment of other, equally valid, mechanisms. It would then no longer be open to the legislature to explore other avenues. A legislature that wanted to experiment by, for example, conferring benefits that were less substantial or simply different would run the risk of having a majority of this Court question the validity of its measure. That would be an absurd outcome. Quebec’s amendments to the Act would be declared to be invalid, but a province that does not yet have similar legislation applicable to the private sector, such as Prince Edward Island, would be able to enact the Act at issue here word for word without having the constitutionality of its legislation questioned. The result would be to impose on Quebec, and on any

province that has been a pioneer in the fight against pay inequities, obligations that are not imposed on the other provinces.

[86] Also, it is just as wrong for Abella J. to state that, for women to whom the Act applies, the promise of pay equity found in s. 19 of the Quebec *Charter* is a right without a remedy except once every five years (Abella J.'s reasons, at para. 39). Section 19 para. 3 of the Quebec *Charter* expressly provides that “[a]djustments in compensation and a pay equity plan are deemed not to discriminate on the basis of gender if they are established in accordance with the Pay Equity Act”. Is it necessary to point out that the Quebec *Charter* does not have constitutional status?

[87] If it were necessary to take Abella J.'s reasoning further, it would have to be concluded that s. 19 of the Quebec *Charter* is also unconstitutional, as it provides for no remedy for employees working in enterprises with no male comparators. As for other employees, an inappropriate hurdle would be thrown in their way, as they would in that regard, too, bear the *heavy burden* (Abella J.'s reasons, at para. 38) of bringing an action and demonstrating that their employer does not grant “equal salary or wages to the members of his personnel who perform equivalent work at the same place”. Thus, it would have to be concluded that the Quebec *Charter* imposes a burden that men do not have to discharge. It is impossible for us to agree with this position.

[88] In any event, the benefits of the Act, as amended in 2009 (S.Q. 2009, c. 9), are clear. Let us begin by reading the provisions at issue that our colleague finds to be unconstitutional:

**76.3.** After conducting a pay equity audit, the pay equity audit committee, or the employer in the absence of such a committee, shall post the audit results for 60 days in prominent places easily accessible to employees. The posting shall include

- (1) a summary of the pay equity audit process;
- (2) a list of the events leading to compensation adjustments;
- (3) a list of the predominantly female job classes that are entitled to compensation adjustments;
- (4) the percentage or amount of the compensation adjustments to be paid; and
- (5) the posting date and information on the rights exercisable under section 76.4 and the time within which they may be exercised.

The pay equity audit committee, or the employer in the absence of such a committee, shall, by a means of communication likely to reach the employees, inform them of the posting and provide details such as the posting date, the posting period and how they may access its content.

**76.5.** Subject to the third paragraph of section 101, the compensation adjustments apply from the date that is the time limit for the new posting under the second paragraph of section 76.4.

Unpaid compensation adjustments shall bear interest at the legal rate from that date.

**103.1. . . .**

If the complaint was filed under section 100 in connection with a pay equity audit, the Commission may not determine compensation adjustments applicable prior to the date referred to in the first paragraph of section 76.5.

[89] Since the amendments came into force in 2009, the employees in question have enjoyed a significant benefit in comparison with the previous situation. That benefit takes the form of a periodic pay equity audit without their needing to exercise a remedy, and where applicable, a compensation adjustment for the future. This represents a major legislative change in direction. The former scheme was said to be “passive” in that it imposed only a general obligation not to discriminate on employers. It was left to employees to file complaints. Generally speaking, the “passive” legislation was harshly criticized, in part because it could result in significant emotional and financial costs as well as institutional delays: *Report of the Commission on Equality in Employment* (1984), at p. 238; on the experience under the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, see Pay Equity Task Force, *Pay Equity: A New Approach to a Fundamental Right* (2004), at pp. 97-106. The current mechanism, on the other hand, can be described as “proactive” in that it requires employers to periodically review remuneration practices and to disclose information relevant to that exercise: C. Sheppard, *Inclusive Equality: The Relational Dimensions of Systemic Discrimination in Canada* (2010), at p. 29. Thus, contrary to our colleague’s position, the Act has not legislatively entrenched discrimination by imposing a mechanism that perpetuates it. Nor does the Act impose additional hurdles, quite the contrary.

[90] In addition, s. 76.9 of the Act provides that “[n]o employer . . . may, as regards the maintenance of pay equity, act in bad faith or in an arbitrary or discriminatory manner or exhibit gross negligence with regard to employees in the

enterprise”. Section 101 para. 3 of the Act provides correlatively that “if an employer contravenes section 76.9, the Commission [de l’équité salariale, now the Commission des normes, de l’équité, de la santé et de la sécurité du travail] may determine that the adjustments in compensation are payable from the date the contravention occurred”. A mechanism therefore exists to avoid creating a gap in the Act of which it might be possible to take deliberate advantage. With respect, our colleague Abella J. is in our view mistaken in concluding that the cumulative effect of the sections in issue is to give employers an “amnesty” in respect of compensation adjustments that would be required between the periodic audits (para. 33).

[91] It is also incorrect to say that s. 76.9 of the Act applies only in cases of discrimination that is *intentional* or in bad faith (Abella J.’s reasons, at para. 35). As we mentioned above, s. 76.9 also applies to *arbitrary* or *discriminatory* conduct. It is absurd to maintain that the mechanism provided for in the Act amounts to a form of toleration on the government’s part of the undervaluation of women’s pay (Abella J.’s reasons, at para. 38). The Act, when considered as a whole, creates a complete “hybrid” scheme that allows for a periodic review of compensation and provides a retroactive remedy in case of abuse. It thus addresses the problem of systemic discrimination in addition to, among others, that of intentional discrimination.

[92] Moreover, the Act’s ameliorative effect becomes clear when the situation is considered through the lens of the comparator group. Although caution is required in choosing such a group, given that this choice could dictate the result of the

analysis, an appropriate comparator group with identical characteristics does actually seem to exist. This Court has in fact never abandoned or proscribed the use of comparative evidence. It merely issued a warning against overly rigid formalism. In the circumstances of this appeal, the probative value of the comparative evidence, viewed from a contextual standpoint, outweighs that risk: *Withler*, at para. 65; *Hodge v. Canada (Minister of Human Resources Development)*, 2004 SCC 65, [2004] 3 S.C.R. 357, at para. 23. What must be done is to compare the situation of employees in an enterprise that has 10 or more employees, to whom the Act accordingly applies, with that of employees in an enterprise that has fewer than 10 employees. The Act's beneficial effect then becomes apparent, as the latter employees do not benefit from a periodic audit of their compensation in conjunction with a remedy. They are protected only by s. 19 of the Quebec *Charter*, which provides for equal wages for equivalent work in the same workplace. Employees in an enterprise without a male comparator group and with fewer than 10 employees thus cannot use a complaint mechanism comparable to the one provided for in s. 101 should their employer modify their duties without taking into account the insidious factors at the root of the systemic discrimination from the standpoint of a correlative audit of their remuneration. So how can it be argued, focusing on the *effects* of the statutory amendments, that the Act has widened the gap between the employees in question and the rest of society or that the Act perpetuates discrimination?

[93] In the end, does the prospective effect of the compensation adjustments under s. 76.5 or the posting provided for in s. 76.3 really create an adverse distinction

based on sex, as our colleague maintains? We have great difficulty accepting such a conclusion, although it is true that the Court has in the past ruled summarily on the first step of the s. 15(1) analysis despite the existence of a doubt as to the nature of the disadvantage: *Ermineskin Indian Band and Nation v. Canada*, 2009 SCC 9, [2009] 1 S.C.R. 222, at para. 189. In our view, the second step of the analysis dispels any remaining doubt about the constitutional validity of the amendments.

D. *Second Step of the Section 15(1) Analysis*

[94] At the second step of the analysis under s. 15(1) of the *Charter*, it is necessary to determine whether the amendments are discriminatory by considering whether they respond to the actual capacities and needs of the members of the group or instead impose a burden or deny a benefit in a manner that has the effect of reinforcing, perpetuating or exacerbating their disadvantage: *Taypotat*, at para. 20; *Quebec v. A*, at para. 332; *Kapp*, at para. 17.

[95] We begin by distinguishing *Newfoundland (Treasury Board) v. N.A.P.E.*, 2004 SCC 66, [2004] 3 S.C.R. 381. In that case, the employees had acquired a contractual right to a wage adjustment, which had had the effect of crystallizing that right, but that is not what happened in the instant case. Binnie J. noted that the legislature's adoption of a positive measure does not preclude it from repealing the legislation in question:

The respondent says that female workers have no right under s. 15(1) of the *Charter* to equal pay for work of equal value. What the government gave in 1988, the government could take away in 1991. It is true that in the ordinary course, legislative adoption of a remedial measure does not “constitutionalize” it so as to fetter its repeal: *Reference re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525, at p. 563. Here, however, the provincial government signed a Pay Equity Agreement on June 24, 1988 which changed the legal landscape by creating enforceable contractual rights to end pay discrimination by a procedure contractually binding on all of the parties. The Pay Equity Agreement was incorporated into the public sector collective agreements.

This process converted pay equity from a policy argument into an existing legal obligation for the benefit of the female hospital workers. The purpose of the *Public Sector Restraint Act* was to reduce the women’s pay below their contractual entitlement. Its intended effect was to pay them less than was paid to men for work of equal value. Passage of the Act on April 18, 1991 left women hospital workers worse off than they were on April 17, 1991. The issue is whether the disadvantage thus imposed on April 18, 1991 amounted to discrimination within the scope of s. 15(1) of the *Charter*. [Emphasis added.]

(*N.A.P.E.*, at paras. 33-34)

[96] Unlike the employees in *N.A.P.E.*, the ones in the case at bar are better off than they were before the Act initially came into force. In any event, applying the analytical framework for s. 15(1) to the amendments leads to the conclusion that the sections at issue do not have a discriminatory effect: *Taypotat*, at para. 20; *Quebec v. A*, at para. 322.

[97] It is important to remember that the Act is not the source of the differences in compensation between men and women in private sector enterprises. This is self-evident, given that the Act was passed to counteract systemic discrimination.

[98] Unlike in *Vriend v. Alberta*, [1998] 1 S.C.R. 493, in which the failure to protect homosexuals in the *Individual's Rights Protection Act*, R.S.A. 1980, c. I-2, had the effect of reinforcing the prejudice against that group, the impugned provisions do not have the effect of imposing burdens, obligations or disadvantages on women that are not imposed on others, or of withholding or limiting access to opportunities and advantages that are available to other members of society. By way of illustration, factors like the ones set out in *Law* can be helpful in determining whether a particular distinction is discriminatory. This is not a “step-by-step” analysis, however. The analysis remains contextual, and not formalistic. Indeed, the factors are not exhaustive and will be considered solely to enhance our analysis. In sum, our objective is to determine the actual situation of the group and assess the potential of the impugned law to worsen their situation: *Withler*, at paras. 38 and 66; *Quebec v. A*, at para. 331; *N.A.P.E.*, at para. 44; *Law*, at para. 72.

(1) Pre-existing Disadvantage

[99] Women clearly face systemic discrimination in matters of compensation (*Centrale des syndicats du Québec*, at para. 58). However, the impugned sections do not perpetuate or reinforce the idea that women can be paid less simply because they are women. The Act's objective is to permanently eradicate pay inequities by establishing a maintenance mechanism in ss. 76.1 to 76.9. Moreover, s. 76.9 sends a clear message. It provides that no employer may “act in bad faith or in an arbitrary or

discriminatory manner or exhibit gross negligence with regard to employees in the enterprise”. Should an employer do so, a retroactive remedy is provided for in s. 101.

(2) Correspondence Between the Measure Adopted by the Legislature and the Group’s Actual Characteristics

[100] There is a risk that a change in an enterprise to which the Act applies that has an impact on pay equity and that occurs at the start of the five-year period preceding a pay equity audit will be influenced by elements of systemic discrimination. The re-emergence of disadvantages usually occurs when job-related duties are reorganized or changed. However, an employer that is in compliance with its obligations under the Act is required by s. 76.9 not to act arbitrarily as well as to eliminate any instance of inequitable compensation immediately by addressing the new elements of systemic discrimination. Section 76.9 is broadly worded and should be construed liberally to ensure that its object is attained: *Interpretation Act*, CQLR, c. I-16, s. 41. As well, as Abella J. points out, the Court has considered s. 47.2 of the *Labour Code*, CQLR, c. C-27, the wording of which is almost identical to that of s. 76.9 of the Act. LeBel J., writing for the Court in *Noël v. Société d’énergie de la Baie James*, 2001 SCC 39, [2001] 2 S.C.R. 207, defined that section’s scope as follows:

The Quebec *Labour Code* has partially codified the duty of representation. It is defined in the following terms in s. 47.2 *L.C.*:

**47.2.** A certified association shall not act in bad faith or in an arbitrary or discriminatory manner or show serious negligence in respect of

employees comprised in a bargaining unit represented by it, whether or not they are members.

This duty prohibits four types of conduct: bad faith, discrimination, arbitrary conduct and serious negligence. The conduct that is demanded applies both at the collective bargaining stage and in administering the collective agreement (see Gagnon, *supra*, at p. 308). First, s. 47.2 prohibits acting in bad faith, which presumes intent to harm or malicious, fraudulent, spiteful or hostile conduct (see *Becotte v. Syndicat canadien de la Fonction publique, local 301*, [1979] T.T. 231, at p. 235; and *Rayonier, supra*, at p. 201). In practice, this element alone would be difficult to prove (see G. W. Adams, *Canadian Labour Law* (2nd ed. (loose-leaf)), at pp. 13-15 to 13-18; R. E. Brown “The ‘Arbitrary’, ‘Discriminatory’ and ‘Bad Faith’ Tests Under the Duty of Fair Representation in Ontario” (1982), 60 *Can. Bar Rev.* 412, at pp. 453-54).

The law also prohibits discriminatory conduct. This includes any attempt to put an individual or group at a disadvantage where this is not justified by the labour relations situation in the company. For example, an association could not refuse to process an employee’s grievance, or conduct it differently, on the ground that the employee was not a member of the association, or for any other reason unrelated to labour relations with the employer (see D. Veilleux, “Le devoir de représentation syndicale: Cadre d’analyse des obligations sous-jacentes” (1993), 48 *Relat. ind.* 661, at pp. 681-82; Adams, *supra*, at pp. 13-18 to 13-20.1).

The concepts of arbitrary conduct and serious negligence, which are closely related, refer to the quality of the union representation. The inclusion of arbitrary conduct means that even where there is no intent to harm, the union may not process an employee’s complaint in a superficial or careless manner. It must investigate the complaint, review the relevant facts or seek whatever advice may be necessary; however, the employee is not entitled to the most thorough investigation possible. The association’s resources, as well as the interests of the unit as a whole, should also be taken into account. The association thus has considerable discretion as to the type and extent of the efforts it will undertake in a specific case. (See Adams, *supra*, at pp. 13-20.1 to 13-20.6.)

The fourth element in s. 47.2 *L.C.* is serious negligence. A gross error in processing a grievance may be regarded as serious negligence despite the absence of intent to harm. However, mere incompetence in processing the case will not breach the duty of representation, since s. 47.2 does not impose perfection as the standard in defining the duty of diligence assumed by the union. In assessing the union’s conduct, regard must be had to the resources available, the experience and training of the union representatives, who are usually not lawyers, and the priorities connected

with the functioning of the bargaining unit (see Gagnon, *supra*, at pp. 310-13; Veilleux, *supra*, at pp. 683-87; Adams, *supra*, at p. 13-37).

Bad faith and discrimination both involve oppressive conduct on the part of the union. The analysis therefore focuses on the reasons for the union's action. In the case of the third or fourth element, what is involved is acts which, while not motivated by malicious intent, exceed the limits of discretion reasonably exercised. The implementation of each decision by the union in processing grievances and administering the collective agreement therefore calls for a flexible analysis which will take a number of factors into account. [Emphasis added; paras. 47-52.]

[101] It must therefore be concluded that the new mechanism established by the 2009 amendments responds to the needs of the women concerned by effectively preventing abuse by employers and also by providing them with a periodic audit of their remuneration. Consequently, this factor also favours the appellant's argument.

[102] Moreover, it was open to the Quebec legislature to opt for mechanisms that were appropriate and practical for private sector enterprises. Further to the example Abella J. gives in her reasons, ensuring that persons with disabilities are not discriminated against does not mean that enterprises have an obligation to repave access ramps every week (Abella J.'s reasons, at para. 54).

### (3) Impact on Other Groups

[103] Our colleague relies on the reasoning adopted in *Vriend*, in which the *Individual's Rights Protection Act* had in 1990 prohibited discrimination based on any of the following grounds: race, religious beliefs, colour, gender, physical disability, mental disability, age, ancestry or place of origin. The statute had

subsequently been amended to add other grounds to the existing ones, namely marital status, source of income and family status. The *Individual's Rights Protection Act* established a remedy for all members of society so that they could avail themselves of any of the grounds of discrimination provided for in the statute. However, the Alberta government had not deemed it necessary to include sexual orientation in the statute as a prohibited ground. Individuals who were discriminated against on the basis of their sexual orientation were therefore excluded from the protection of the statute and found themselves worse off than they had been before it came into force, given that they were not protected by the statute as were other disadvantaged groups. As a result, the gap between their situation and that of the rest of society widened and their marginalization increased. In short, society had moved forward, but their situation remained unchanged.

[104] Thus, unlike a general protection scheme, such as the one established by the *Individual's Rights Protection Act* considered in *Vriend*, the scheme established by the Act deals with only one ground of discrimination, namely sex, and applies to only a small portion of female employees in Quebec, those who hold positions in predominantly female job classes in enterprises with 10 or more employees: s. 4 of the Act. In the instant case, this factor is neutralized by the fact that it is the group benefiting from the Act that is challenging its effects. It cannot therefore be argued that they are not afforded "the equal protection and equal benefit of the law" (s. 15(1) of the *Charter*), as the Act specifically provides them with a mechanism that affords them both a remedy in the event of discriminatory or arbitrary treatment (s. 76.9 of

the Act) and the benefit of an audit of their jobs for the purpose of identifying and redressing pay inequities linked to systemic discrimination.

(4) Nature of the Affected Interest

[105] There is no doubt that work is an important aspect of life and that, for many people, it is a large part of their identity: *N.A.P.E.*, at paras. 49-50. However, the fact that one is in a situation in which the compensation received for one's job seems inadequate, and which offends one's sense of personal dignity, does not mean that the law creates a discriminatory disadvantage. In enacting the Act and the 2009 amendments, the Quebec legislature has recognized the nature of pay equity and its importance for women. In short, although the interest in question is important in our society, the adopted measures have not constitutionally entrenched pay equity such that they would be impossible to modify.

(5) Conclusion on the *Law* Factors

[106] When all is said and done, it is well established that s. 15 is intended to prevent discriminatory conduct, not the attitude or motive behind such conduct. In the instant case, the state conduct does not widen — rather than narrowing — the gap between the historically disadvantaged group and the rest of society: *Quebec v. A*, at para. 332. It has not been established that the measure has a discriminatory effect on the group: *Quebec v. A*, at paras. 329-31; *Withler*, at para. 66.

E. *Application of Section 15(2)*

[107] Alternatively, even it were to be held that the specific mechanism created by the statutory amendments can be considered discriminatory, the Act as a whole should be protected under s. 15(2).

[108] According to the principles laid down in *Cunningham*, what must be determined is whether the law has a *genuine* ameliorative object:

To qualify as a genuinely ameliorative program, the program must be directed at improving the situation of a group that is in need of ameliorative assistance: *Kapp*, at para. 41. There must be a correlation between the program and the disadvantage suffered by the target group: *Kapp*, at para. 49. The goal is to promote the substantive equality of the group: *Kapp*, at para. 16. To ascertain whether these conditions are met, one looks first to the object of the program, and then asks whether it correlates to actual disadvantage suffered by the target group. [para. 59]

[109] Furthermore, a distinction that serves or advances the ameliorative object has the effect of supporting the goal of s. 15 of the *Charter*, namely the promotion of substantive equality: *Cunningham*, at para. 45.

[110] In *Kapp*, the Court referred to the role of s. 15(2) in supporting the implementation of measures to combat systemic discrimination. Given that Quebec's National Assembly has answered the call in this regard, the entire Act should be protected:

The Royal Commission Report on *Equality in Employment*, whose mandate was to determine whether there should be affirmative action in Canada and on which McIntyre J. relied to develop his theories of discrimination and equality, set out the principles underlying s. 15(2), at pp. 13-14:

In recognition of the journey many have yet to complete before they achieve equality, and in recognition of how the duration of the journey has been and is being unfairly protracted by arbitrary barriers, section 15(2) permits laws, programs, or activities designed to eliminate these restraints. While section 15(1) guarantees to individuals the right to be treated as equals free from discrimination, section 15(2), though itself creating no enforceable remedy, assures that it is neither discriminatory nor a violation of the equality guaranteed by section 15(1) to attempt to improve the condition of disadvantaged individuals or groups, even if this means treating them differently.

Section 15(2) covers the canvas with a broad brush, permitting a group remedy for discrimination. The section encourages a comprehensive or systemic rather than a particularized approach to the elimination of discriminatory barriers.

Section 15(2) does not create the statutory obligation to establish laws, programs, or activities to hasten equality, ameliorate disadvantage, or eliminate discrimination. But it sanctions them, acting with statutory acquiescence.

(*Kapp*, at para. 32 (emphasis added), quoting the *Report of the Commission on Equality in Employment* (1984), at pp. 13-14.)

[111] There is no doubt that the Act genuinely has the promotion and achievement of substantive equality as its object. The correlation between that object and the chosen mechanism is clear, even if the mechanism is not *perfect*. The appeal should also fail at this stage of the analysis.

### III. Conclusion

[112] In summary, it remains true that it is not open to Parliament or to a provincial legislature to enact a law whose provisions single out a disadvantaged group for inferior treatment: *Auton*, at para. 41, citing *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203. But if the law confers a clear benefit in comparison with the situation that would exist had it not been enacted, the legislature is free to adopt the mechanism of its choice: *Auton*, at para. 41, citing *Granovsky v. Canada (Minister of Employment and Immigration)*, 2000 SCC 28, [2000] 1 S.C.R. 703, at para. 61; *Nova Scotia (Attorney General) v. Walsh*, 2002 SCC 83, [2002] 4 S.C.R. 325, at para. 55; *Hodge*, at para. 16.

[113] Given that the sections at issue do not violate the Constitution, the respondents should undoubtedly have used the democratic avenues available to them in order to object to the enacted amendments and obtain the amendments they wanted rather than asking this Court to substitute policies it prefers for ones that were adopted democratically.

[114] In our view, therefore, the appeal should be allowed and the cross-appeal dismissed.

*Appeal dismissed with costs, CÔTÉ, BROWN and ROWE JJ. dissenting.*

*Cross-appeal dismissed with costs.*

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