**Court File No. 37002**

**IN THE SUPREME COURT OF CANADA**
(ON APPEAL FROM THE QUÉBEC COURT OF APPEAL)

B E T W E E N:

**CENTRALE DES SYNDICATS DU QUÉBEC et al.**

Appellants

- and –

**THE ATTORNEY GENERAL OF QUÉBEC**

Respondent

-and-

**ATTORNEY GENERAL OF ONTARIO, EQUAL PAY COALITION, WOMEN'S LEGAL EDUCATION AND ACTION FUND and NEW BRUNSWICK COALITION FOR PAY EQUITY**

Interveners

A N D B E T W E E N:

**CONFÉDÉRATION DES SYNDICATS NATIONAUX et al.**

Appellants

- and –

**ATTORNEY GENERAL OF QUÉBEC**

Respondent

-and-

**ATTORNEY GENERAL OF ONTARIO, EQUAL PAY COALITION, WOMEN'S LEGAL EDUCATION AND ACTION FUND and NEW BRUNSWICK COALITION FOR PAY EQUITY**

Interveners

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# FACTUM OF THE INTERVENER, THE ATTORNEY GENERAL OF ONTARIO

(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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# TABLE OF CONTENTS

## PART I – OVERVIEW

1. The gender wage gap in the earnings of men and women in Canada is a persistent and complex problem, and one that calls for a multifaceted response. Provinces and the federal government have undertaken wide consultative reviews on how best to address this issue, and some provinces have enacted pay equity legislation (equal pay for work of equal value), employment equity strategies (encouraging more women to enter previously male-dominated workplaces or professions) and other measures aimed at closing the gender wage gap, such as maternity benefits and parental leave programs. Addressing the gender wage gap does not admit of a one-size-fits-all solution. Legislatures need flexibility to devise innovative solutions to such polycentric problems, including approaches that are phased in over time or that address different employment groups in different ways.

2. In this case, the distinction at issue is not based on sex, as both the claimant group and the comparator group are employees working in female predominant jobs. Rather, the difference in treatment is based on where these employees work. This is not a distinction that engages the purpose of s. 15 of the *Canadian Charter of Rights and Freedoms.*[1] It would frustrate rather than promote substantive equality if legislatures were not free to establish different pay equity rules for different employers based on differences in size, sector or other economic or employment-based factors that are not themselves based on immutable personal characteristics: "The cost of identical treatment for all would be loss of real opportunities to lessen disadvantage and prejudice."[2]

## PART II – ONTARIO'S POSITION

3. Ontario intervenes exclusively on the *Charter* s. 15 question in this appeal. Ontario supports the respondent's position that any distinction in treatment under Quebec's *Pay Equity Act* between women who work in workplaces with male-predominant comparators and women who work in workplaces without male-predominant comparators is not a distinction based on sex.

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[1] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 ["*Charter*"].

[2] *Alberta (Aboriginal Affairs and Northern Development) v. Cunningham*, 2011 SCC 37 at para. 41 ["*Cunningham*"].

## PART III – STATEMENT OF ARGUMENT

### A. Pay equity statutes are complex regulatory regimes that inevitably affect different groups of employees differently

4. Jurisdictions across Canada have taken a range of different legislative approaches to the issue of pay equity, which has been described by this Court as "one of the most difficult and controversial workplace issues of our times."[3] At the federal level, the *Canadian Human Rights Act* provides for a complaint-based system that relies on litigation to achieve pay equity.[4] Four provinces have enacted pay equity legislation applicable to the broader public sector only that is "proactive" in that it prescribes specified steps public sector employers must take to achieve pay equity, even in the absence of a complaint.[5] Four provinces have not enacted any special-purpose pay equity statutes.[6] Two provinces, Québec and Ontario, have enacted regulatory regimes that impose proactive pay equity obligations on both public sector and private sector employers and unions.[7]

5. As the federal Pay Equity Task Force Report observed, "Canadian jurisdictions have tried in many different ways to give legislative effect to the principle of equal pay for work of equal value."[8] Female workers across the country are therefore treated differently in terms of whether or not their employers are subject to pay equity obligations, what methods of pay equity comparison are available, and the timing of any pay equity compensation adjustments.

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[3] *Newfoundland (Treasury Board) v. N.A.P.E.*, 2004 SCC 66 at para. 30.
[4] *Canadian Human Rights Act*, RSC., 1985, c. H-6, s. 11 and *Equal Wages Guidelines, 1986*, SOR/86-1082.
[5] *The Pay Equity Act*, CCSM. c. P13 (Manitoba); *Pay Equity Act*, SNB 2009, c P-5.05 (New Brunswick); *Pay Equity Act*, RSNS 1989, c 337 (Nova Scotia); *Pay Equity Act*, RSPEI 1988, c P-2 (Prince Edward Island).
[6] In these provinces (Saskatchewan, Newfoundland, British Columbia and Alberta), non-legislative approaches to pay equity have been undertaken in respect of public sector employees. These approaches are described in the federal Pay Equity Task Force Report, *infra* at pp. 72-74.
[7] *Pay Equity Act*, RSO 1990, c P.7 (Ontario); *Loi sur l'équité salariale*, RLRQ, ch. E-12.001 (Québec).
[8] Final Report of the Pay Equity Task Force, *Pay Equity: A New Approach to a Fundamental Right* (Ottawa: Public Works and Government Services Canada, 2004) at p. 75 ["The federal Pay Equity Task Force Report"].

6. Ontario's *Pay Equity Act* is one of the first and most sophisticated of the Canadian pay equity statutes,[9] and one of the only pay equity statutes in Canada to apply to the private sector. The Ontario *Pay Equity Act* is proactive, regulatory legislation that "requires employers, and where they exist, bargaining agents, to address systemic discrimination through a series of required steps."[10] The "steps to be undertaken are stipulated in some detail" by the *Pay Equity Act* itself.[11] The method to determine and compare the value and compensation of different job classes, the permissible exceptions, and the timing of any compensation adjustments payable are all specified by the legislation. The *Pay Equity Act* "requires employers and unions to take specific action" but also "sets the standards by which such actions will be measured."[12]

7. Like Québec's Act, Ontario's *Pay Equity Act* makes distinctions that result in different groups of employees being treated differently. Ontario's *Pay Equity Act* is a complex regulatory scheme that imposes specific obligations on employers that can vary depending on the identity and characteristics of those employers, which can result in different employers using different prescribed methods of comparison and/or having different deadlines for compliance. The pay equity rules that apply to specific workplaces can depend, *inter alia*, on the size of the employer, whether the employer is in the public or private sector, the geographic location of the employer, and whether there are male-predominant job classes within the establishment that can serve as comparators.

8. One consequence of this variation is that the effective dates for achieving pay equity and for the payment of adjustments owing are different as between different employers. In Ontario, an employer's deadline for compliance depends on whether the establishment is in the public or private sector, when it came into existence, and the number of employees it had on January 1,

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[9] See the federal Pay Equity Task Force Report at p. 68: "Passed in 1989, Ontario's *Pay Equity Act* was perhaps the most progressive pay equity statute of its time."

[10] *Clow v. Peterborough (City)*, 1996 CanLII 8060 (Pay Equity Hearings Tribunal ["PEHT"]) at para. 41.

[11] *Ontario Nurses' Association v. Participating Nursing Homes*, 2016 CanLII 2675 (PEHT) at paras. 22-24 ["*Participating Nursing Homes*"]. The parties have filed applications for judicial review of the PEHT's decision, although no hearing of the judicial review has been scheduled.

[12] *Ontario Nurses Association v. Haldimand-Norfolk (Regional Municipality) (No.1)*, [1989] O.P.E.D. No. 1, 1 P.E.R. 1 (PEHT) at para. 27.

1988 (when the Act became effective) or July 1, 1993 (when the Act was amended to include new methods of comparison):[13]

a) All new public sector employers that started their organization after January 1, 1988 must achieve pay equity immediately upon start-up, unless they use the proxy method of comparison.

b) All private sector employers with fewer than 10 employees in existence on January 1, 1988 and all new private sector employers that started business after January 1, 1988 must achieve pay equity on the day they hire or hired their tenth employee.

c) Smaller private sector employers who had between 10 and 99 employees on January 1, 1988 and who chose not to post a pay equity plan by December 31, 1993 must achieve pay equity according to deadlines (January 1, 1993, July 1, 1993, or January 1, 1994) that depend on their size and method of implementing pay equity.

d) For private sector employers that had employees on January 1, 1988 and public sector employers with employees on either January 1, 1988 or July 1, 1993, the deadlines for complying with the requirements for posting pay equity plans and making adjustments are based on how many employees the private sector employer had, whether the private sector employer chose to post a plan by December 31, 1993, and the comparison method used by either a private or public sector employer to achieve pay equity.

e) Private sector employers who had 100 or more employees as of January 1, 1988 and private sector employers who had between 10 and 99 employees on January 1, 1988 and who posted a pay equity plan by December 31, 1993 are required to spend at least 1% of previous year's payroll on pay equity adjustments until pay equity is achieved.

f) Public sector employers with employees on January 1, 1988 or July 1, 1993 that used either the job-to-job or proportional value comparison methods must have fully achieved pay equity by January 1, 1998.

g) Public sector employers with employees on July 1, 1993 that have been using the proxy method of comparison must have posted their pay equity plans by January 1, 1994 and must have made adjustments beginning January 1, 1994 and continuing every year until pay equity is achieved. These employers are required to spend at least 1% of previous year's payroll on pay equity adjustments until pay equity is achieved.

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[13] Ontario. Pay Equity Office. *A Guide to Interpreting Ontario's Pay Equity Act* (Toronto: Pay Equity Commission, 2015) at pp. 21-27. The three methods of pay equity comparison in Ontario are the job-to-job method, the proportional value method, and the proxy method: see *A Guide to Interpreting Ontario's Pay Equity Act* at pp. 57-63 and 84-89.

9. The result of these (and other)[14] distinctions in Ontario's *Pay Equity Act* is that the identity and characteristics of the *employer* make a significant difference to the pay equity entitlements of the *employees*, including the date on which any pay adjustments are owing and the date that pay equity must be fully achieved.

10. It follows that, in Ontario as in Québec, the same woman performing the same work may be subject to different treatment, including different timelines for achieving pay equity and for receiving compensation adjustments, if she moves from one employer to another employer – even if little or nothing else about her job changes:

> The Act does not require wage parity as between different employers. Two different employers operating the same kind of business in the same geographic area may have pay-equity-compliant compensation practices even though the female job classes performing the same or substantially similar duties for each of those employers do not receive similar compensation. In other words, the Act contemplates that the rates of pay for the same or similar women's work may vary depending on *the identity and characteristics of their employer*.[15]
>
> Pay equity is implemented and achieved in the employer's individual establishment; the focus of the pay equity process is not sector, industry, or province-wide. Therefore, it is possible that the gender of the job class may be male in one company but female in another. For example, if the accountant position has always been occupied by women in one establishment and by men in another, the gender of the job class is female in the first case and male in the second. [16]

**B. Distinctions among employees receiving pay equity are not distinctions based on sex**

11. The purpose of pay equity is to redress systemic sex discrimination in compensation. The Ontario Act, like the Québec Act, is explicit in identifying this remedial, anti-discrimination purpose:

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[14] Other examples of distinctions permitted under the *Pay Equity Act*, RSO 1990, c P.7 include differences in treatment between employees working in different geographic divisions of the same employer (permitted under s. 1(1)), differences in treatment between employees in different bargaining units working for the same employer (permitted under ss. 6(4) and 14), and different methods of comparison depending on the characteristics of the establishment, including the availability of comparable male job classes (permitted under Parts III.1 and III.2).
[15] *Participating Nursing Homes*, *supra* at para. 90 (emphasis in original).
[16] Ontario. Pay Equity Office. *A Guide to Interpreting Ontario's Pay Equity Act* (Toronto: Pay Equity Commission, 2015) at p. 40.

> Whereas it is desirable that affirmative action be taken to redress gender discrimination in the compensation of employees employed in female job classes in Ontario; […] The purpose of this Act is to redress systemic gender discrimination in compensation for work performed by employees in female job classes.[17]

12. Pay equity legislation is based on valuing "women's work"[18] by redressing sex discrimination in compensation that results in employees in predominantly female jobs within an establishment being paid less for work of equal value than employees in predominantly male jobs. It follows that the beneficiaries of pay equity legislation are employees in predominantly female jobs. Where a comparison is made between the treatment of two groups of employees who are both entitled to pay equity, both groups will necessarily be female predominant.

13. Pay equity is an inherently comparative exercise. This Court has held that "[t]o determine whether an employer is discriminating in remunerating male and female employees, comparisons must inevitably be made among groups of employees" and that "[g]iven the nature of its principles and objectives, pay equity cannot be achieved without proper comparators."[19]

14. Similarly, from the very beginning of its *Charter* s. 15 jurisprudence, this Court has stressed that equality is a comparative concept and that establishing discrimination frequently involves comparing those who receive a benefit (or suffer a burden) with those who do not:

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[17] *Pay Equity Act*, RSO 1990, c P.7, Preamble and s. 4(1). Compare *Loi sur l'équité salariale*, RLRQ, ch. E-12.001, s. 1: "The purpose of this Act is to redress differences in compensation due to the systemic gender discrimination suffered by persons who occupy positions in predominantly female job classes."

[18] See *Canada (Human Rights Commission) v. Canadian Airlines International Ltd.*, 2004 FCA 113 at para. 52, aff'd 2006 SCC 1 at para. 17: "The more particular purpose underlying section 11 is the promotion of pay equity: that is, the elimination of the wage gap between men and women performing work of equal value resulting from the historic and systemic undervaluation of women's work and the segregation of the labour market by gender."; see also Ontario, *Green Paper on Pay Equity* (1985), quoted in *Participating Nursing Homes*, *supra* at para. 18: "It is the portion of the wage gap which may be attributed to this undervaluation of women's work which pay equity is intended to address."

[19] *Canada (Human Rights Commission) v. Canadian Airlines International Ltd.*, 2006 SCC 1 at paras. 1 and 14.

> [Equality] is a comparative concept, the condition of which may only be attained or discerned by comparison with the condition of others in the social and political setting in which the question arises.[20]

15. As this Court explained in *Withler*, while a "rigid comparison between the claimant and a group that mirrors it except for one characteristic" may fail to identify the discrimination at which *Charter* s. 15 is aimed, it is nonetheless true that "Comparison plays a role throughout the analysis."[21] In particular:

> The role of comparison at the first step is to establish a "distinction". Inherent 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).[22]

16. Substantive discrimination means that "not all distinctions are, in and of themselves, contrary to s. 15(1) of the *Charter*. Equality is not about sameness and s. 15(1) does not protect a right to identical treatment":[23]

> Substantive equality, unlike formal equality, rejects the mere presence or absence of difference as an answer to differential treatment. It insists on going behind the façade of similarities and differences. It asks not only what characteristics the different treatment is predicated upon, but also whether those characteristics are relevant considerations under the circumstances.[24]

17. It follows from this reasoning that, in assessing whether differences in treatment between groups of employees under pay equity legislation are discriminatory on the basis of sex, it cannot be enough for a claimant group to show that (1) the claimant group is made up of predominantly female employees performing "women's work", and (2) the claimant group receives a smaller pay equity adjustment compared to another group of predominantly female employees. All of the beneficiaries of pay equity adjustments are employees in predominantly female jobs, and a finding that a pay equity statute is discriminatory on the basis of sex because it provides less of a

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[20] *Law Society of British Columbia v. Andrews*, [1989] 1 SCR 143 at 164; *Withler v. Canada (Attorney General)*, 2011 SCC 12 at paras. 41 and 61 ["*Withler*"].
[21] *Withler*, *supra* at paras. 58-61.
[22] *Withler*, *supra* at paras 62-65.
[23] *Withler*, *supra* at para. 31 (citations omitted); *Kahkewistahaw First Nation v. Taypotat*, 2015 SCC 30 at para. 17 ["*Kahkewistahaw*"].
[24] *Withler*, *supra* at para. 39.

benefit to one group of predominantly female employees as compared to another amounts to a finding that all employees in predominantly female jobs must receive identical pay equity remedies.

18. To hold that distinctions in pay equity legislation are based on sex simply because they afford different groups of female employees different levels of benefit obscures the real basis for these legislative distinctions – that is, "what characteristics the different treatment is predicated upon".[25] A careful identification of the basis for the distinction is necessary; to hold otherwise and to find that such distinctions are based on sex would mean that every distinction between pay equity beneficiaries would be subject to s. 15 scrutiny as it would necessarily affect predominantly female workers, even though the distinction was really *because of* employer size, method of comparison, bargaining unit, or geographical differences rather than "*because of* his or her membership in an enumerated or analogous group."[26] This would substantially increase the scope of judicial review over the design and implementation of pay equity legislation.

19. That is not to say that a legislative distinction that affects some but not all female workers could never constitute discrimination on the basis of sex. At least since this Court's decision in *Brooks*, it is evident that singling out a particular group of women for disadvantageous treatment (in that case, pregnant women) could in some circumstances constitute sex discrimination, even though not all women were negatively affected by the distinction.[27] But in *Brooks* the link between sex and the basis of the distinction was evident: "The capacity to become pregnant is unique to the female gender…The capacity for pregnancy is an immutable characteristic, or incident of gender and a central distinguishing feature between men and women. A distinction based on pregnancy is not merely a distinction between those who are and are not pregnant, but also between the gender that has the capacity for pregnancy and the gender which does not."[28] No such link between sex and the basis of the distinction is present here.

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[25] *Withler*, *supra* at para. 39.
[26] *Quebec (Attorney General) v. A*, 2013 SCC 5 at para. 331 (emphasis added); *Kahkewistahaw*, *supra* at para. 16.
[27] *Brooks v. Canada Safeway Ltd.*, [1989] 1 SCR 1219 ["*Brooks*"].
[28] *Brooks*, *supra* at 1243-1247. See also *Battlefords and District Co-operative Ltd. v. Gibbs*, [1996] 3 SCR 566 at paras. 28-29.

20. In the *Participating Nursing Homes* case, Ontario's Pay Equity Hearings Tribunal recently rejected a *Charter* s. 15 challenge alleging discrimination because the process for maintaining pay equity is different for workplaces that achieved pay equity using the proxy method of comparison as compared to workplaces that achieved pay equity using the other methods of comparison.[29] The female job classes who achieved pay equity using the proxy method of comparison were women in workplaces where the employer had no or insufficient numbers of male comparators. By contrast, those who achieved pay equity through job-to-job or proportional value methods of comparison were women in workplaces where the employer had sufficient male job class comparators to use those methods of comparison.

21. Ontario's Pay Equity Hearings Tribunal rejected the argument that the distinction in question was based on sex and found that, to the extent that there was a distinction, it arose "because of the locus of the employment relationship"[30] – that is, holding a job in a workplace where the employer has to seek pay equity comparisons through the proxy method (such employers are known as "seeking employers"). The Pay Equity Hearings Tribunal held that the challengers failed to show a distinction on a protected ground: "We do not think that having one's employment relationship with a "seeking employer" is an enumerated or analogous ground under s. 15."[31]

22. The Québec courts in this appeal followed the same approach. In this case, the Superior Court did not find that the distinction was based on sex: "Dans le cas présent, ce n'est ni sur la base du sexe, ni sur la base de la race, de l'ethnie, de l'origine nationale, de la couleur, de la religion, de l'âge ou de déficiences mentales ou physiques que la distinction est imposée. L'objet de l'article 38 de la Loi, en fixant un échéancier différent, ne vise pas à traiter les travailleuses au sein d'entreprises sans comparateur de façon moins digne que les autres."[32] Like Ontario's Pay Equity Hearings Tribunal in the *Participating Nursing Homes* case, the Superior Court in this case found that the distinction was based on a lack of male comparators in the workplace and not on the sex of the employees seeking pay equity:

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[29] *Participating Nursing Homes*, *supra* at para. 157.
[30] *Participating Nursing Homes*, *supra* at para. 157.
[31] *Participating Nursing Homes*, *supra* at para. 157.
[32] Jugement de la Cour supérieure (l'honorable Michel Yergeau, J.C.S.), 2 septembre 2014, Dossier des appelantes, vol. I, p 49, para. 197

> Si l'effet de l'article 38 L.é.s. est d'imposer une forme de désavantage sur un groupe de travailleuses en emploi dans des entreprises ayant 10 salariés ou plus, le motif n'est pas que ce sont des femmes qui occupent ces postes mais plutôt que les entreprises qui les embauchent n'ont pas de catégories d'emplois à prédominance masculine pour assurer la comparaison avec les difficultés supplémentaires d'application en découlant. La distinction ainsi créée ne repose donc pas sur un motif énuméré à l'article 15 de la Charte. Conclure autrement mènerait à dire qu'il y a discrimination fondée sur le sexe du moment que des femmes sont affectées par une disposition législative, ce qui n'est pas ce que prévoit le cadre analytique développé par la Cour suprême. [33]

23. The reasoning of the Québec courts in this appeal is consistent with this Court's analysis in *Health Services,* holding that legislative distinctions that negatively affected female workers in predominantly-female sectors of employment did not amount to a distinction on the basis of sex: "The differential and adverse effects of the legislation on some groups of workers relate essentially to the type of work they do, and not to the persons they are."[34] Just as a law that negatively affects a predominantly-female employment sector is not for that reason discriminatory on the basis of sex, so too a law that benefits women workers but contains different levels of benefits based on the characteristics of the employer does not discriminate on the basis of sex.

24. In *Health Services,* this Court upheld the result of the British Columbia courts, which had rejected the discrimination claim. The British Columbia Supreme Court held as follows with respect to *Charter* s. 15:

> The government has made a policy decision with respect to the health care system that has adversely affected the employment interests of a group whose composition is linked to s. 15 characteristics. However, the fact that this group is predominantly female does not constitutionally shield it from governmental action that may adversely affect them without evidence that it is being subject to differential treatment on the basis of s. 15 characteristics. […]
>
> The fact that health sector work is "female predominant," and that much of it is considered to be "women's work," does not mean that every law that adversely affects such work or the terms and conditions of those employed to perform it is discriminatory. The true effect of the law is not upon "women" or on "those who

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[33] Jugement de la Cour supérieure (l'honorable Michel Yergeau, J.C.S.), 2 septembre 2014, Dossier des appelantes, vol. I, pp. 49-50, para. 198

[34] *Health Services and Support-Facilities Subsector Bargaining Unit Assn. v. British Columbia*, 2007 SCC 27 at para. 165.

> perform women's work" it is upon those who perform health care work in British Columbia's unionized public sector. The unique circumstances surrounding that work is the distinguishing factor: correspondence with sex or 'women's work' is not the basis of the legislation.[35]

25. Nor is working in a predominantly female workplace or employment sector an analogous ground under s. 15 of the *Charter*. This court has consistently held that analogous grounds under s. 15 of the *Charter* "flow from the central concept of immutable or constructively immutable personal characteristics," which "stand as constant markers of suspect decision making or potential discrimination."[36]

26. Working in a workplace with few or no male job classes is not analogous to immutable or constructively immutable personal characteristic such as race, national or ethnic origin, or mental or physical disabilities. Individuals move in and out of jobs and, in some cases, many jobs, over the course of their working lifetime. The demographic profile of a particular occupational group or set of employees is itself mutable; it may vary across geographical regions and may change over time. The nature of particular occupations can evolve too, for instance as new technologies transform workplaces, changing some jobs and rendering others less (or more) demanding. The treatment of occupational status or the circumstances of a particular workplace or employment sector as an analogous ground is inconsistent with the dynamic nature of society and the economy.

27. Pay equity legislation has been adapted to the variability and mutability of jobs by employing different methods and rules to try to achieve equal pay for work of equal value across a range of differing employment circumstances. Indeed, the same individual doing the same kind of work may be subject to different pay equity comparisons and rules simply by changing employers, for example if she moves from a public sector employer to a private sector one, or moves from an employer with few employees to one with many, or if she changes bargaining units or moves to a different geographical area working for the same employer. Differences in treatment resulting from such changes in employment do not engage the human rights purpose of s. 15 of the *Charter*.

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[35] *Health Services and Support – Facilities Subsector Bargaining Association et al. v. British Columbia*, 2003 BCSC 1379 at paras. 174 and 181, aff'd 2004 BCCA 377 at paras. 133-134.
[36] *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203 at paras. 8 and 13; see also *Baier v. Alberta*, 2007 SCC 31 at para. 65 and *Kahkewistahaw*, *supra* at para. 19.

28. Such distinctions are not equivalent to the underinclusive legislation considered by this court in *Vriend*. In that case, the omission of sexual orientation as a protected ground meant that LGBTQ persons were negatively affected as compared to persons who were not characterized by that analogous ground of discrimination.[37] *Vriend* considered an underinclusive statute that failed to protect a group characterized by an immutable characteristic, whereas pay equity statutes establish different pay equity rules for workers who share the same personal characteristic of sex, but who work in different workplaces for different employers.

29. In *Vriend*, the purpose of the statute was protection against discrimination in general, but one group was excluded on the basis of an analogous ground, despite the fact that the excluded group had the same need for that protection. Here, the challenge is to a targeted ameliorative statute aimed at redressing the particular disadvantage of workers in female predominant jobs. Both the complainant group and its chosen comparator group are intended beneficiaries of the ameliorative law, albeit that the law does not provide an identical benefit to both groups. Women in workplaces with no male comparators are not excluded from protection, but do in fact benefit from the Act, as the trial judge in this case recognized.[38] The internal distinctions in the law are not based on enumerated or analogous grounds, but are based on the nature of the workplace and the employer.

30. Where, as here, the legislature takes proactive measures to ameliorate disadvantage, the s. 15 analysis should recognize that "governments may not be able to help all members of a disadvantaged group at the same time."[39] If *Charter* s. 15 is interpreted to prohibit governments from phasing in over different time periods measures that "advanc[e] or improv[e] the situation of particular subsets of groups"[40], and instead requires that all subsets of the targeted group must receive their remedies effectively simultaneously, governments may be dissuaded from acting to remedy any disadvantage until they have arrived at a perfect solution for everyone.

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[37] *Vriend v. Alberta*, [1998] 1 SCR 493.
[38] Jugement de la Cour supérieure (l'honorable Michel Yergeau, J.C.S.), 2 septembre 2014, Dossier des appelantes, vol. I, p. 47, para. 187.
[39] *Cunningham*, *supra* at para. 41.
[40] *Cunningham*, *supra* at para. 41.

## PART IV – COSTS

31. The Attorney General of Ontario does not seek costs and requests that no costs be awarded against him.

## PART V – REQUEST FOR ORAL ARGUMENT

32. The Attorney General of Ontario requests permission to present oral argument at the hearing of the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 13TH DAY OF JULY 2017

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Courtney Harris

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S. Zachary Green
Of counsel for the intervener,
the Attorney General of Ontario

## PART VI – TABLE OF AUTHORITIES

| **Cases** | **Paragraph(s) Referred to in Factum** |
|---|---|
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| *Battlefords and District Co-operative Ltd. v. Gibbs*, [1996] 3 SCR 566 | 19 |
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| *Canada (Human Rights Commission) v. Canadian Airlines International Ltd.*, 2004 FCA 113 | 12 |
| *Canada (Human Rights Commission) v. Canadian Airlines International Ltd.*, 2006 SCC 1 | 12, 13 |
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| *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203 | 25 |
| *Health Services and Support – Facilities Subsector Bargaining Association et al. v. British Columbia*, 2003 BCSC 1379 | 24 |
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| Ontario. Pay Equity Office. *A Guide to Interpreting Ontario's Pay Equity Act* (Toronto: Pay Equity Commission, 2015) | 8, 10 |
| **Legislation** | |
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| *Canadian Human Rights Act*, RSC 1985, c. H-6, s. 11<br>*Loi canadienne sur les droits de la personne*, LRC 1985, c H-6, art. 11 | 4 |
| *Equal Wages Guidelines, 1986*, SOR/86-1082<br>*Ordonnance de 1986 sur la parité salariale*, DORS/86-1082 | 4 |
| *Loi sur l'équité salariale*, RLRQ, ch. E-12.001 | 4, 11 |
| *Pay Equity Act*, CCSM. c. P13<br>*Loi sur l'égalité des salaires*, c. P13 de la C.P.L.M. | 4 |
| *Pay Equity Act*, RSO 1990, c P.7<br>*Loi sur l'équité salariale*, LRO 1990, c P.7 | 4, 9, 11 |
| *Pay Equity Act*, SNB 2009, c P-5.05<br>*Loi de 2009 sur l'équité salariale*, LN-B 2009, c P-5.05 | 4 |
| *Pay Equity Act*, RSNS 1989, c 337 | 4 |
| *Pay Equity Act*, RSPEI 1988, c P-2 | 4 |