Court File No.**: 37347**

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

B E T W E E N:

THE ATTORNEY GENERAL OF QUÉBEC

Appellant/Respondent on Cross-Appeal

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PART I – OVERVIEW

1. A legislative measure intended to redress systemic discrimination is not itself discriminatory merely because it does not go as far as possible in providing such redress. There is a difference between a law that perpetuates arbitrary disadvantage based on an enumerated or analogous ground, and a law that *ameliorates* societal systemic discrimination without altogether eliminating its effects. Eradicating all of the effects of systemic discrimination in society is a laudable aspiration, but it cannot be a constitutional requirement. An ameliorative statute like Québec's *Loi sur l'équité salariale* that makes incremental progress towards the ideal of a society free of systemic discrimination should be protected from challenge under s. 15 of the *Charter*.

PART II – ONTARIO'S POSITION

2. Ontario intervenes exclusively on the *Charter* s. 15 question raised in the Attorney General of Québec's appeal.

3. Ontario's position is that a law that has as its object the amelioration of the conditions of a disadvantaged group need not redress all of that group's disadvantage in order to comply with s. 15 of the *Charter*. Legislatures must be accorded some leeway when they implement affirmative measures aimed at redressing systemic discrimination in society, as Québec and Ontario have done in their pay equity statutes, even if these measures do not entirely or immediately eliminate all of the effects of discrimination in society. Section 15(2) of the *Charter* protects such ameliorative laws from challenge, both from persons who are not included in the benefit of the law, and from persons who benefit from the law but who object that the law does not go far enough in remedying their disadvantage.

PART III – STATEMENT OF ARGUMENT

A. Pay equity statutes are intended to ameliorate the conditions of disadvantaged groups and are therefore protected by *Charter* s. 15(2)

4. Québec and Ontario are the only provinces in Canada that have enacted pay equity statutes that impose obligations on private sector employers and unions.[1] These statutes go beyond imposing obligations on the government in the compensation of its own employees, and have the broader purpose of redressing systemic gender discrimination in the provincial workplace more generally.

5. In Ontario, as in Québec, private sector employers to whom the Act applies must not only achieve pay equity but must also maintain it, subject to the terms of the statute.[2] Ontario's *Pay Equity Act* does not have a provision precisely analogous to the pay equity maintenance provisions of the Québec Act declared invalid by the courts below. Ontario's Act does not stipulate specific procedures or schedules to follow for maintaining pay equity. Rather, as the Ontario Pay Equity Hearings Tribunal has held,

> Subsection 7(1) of the *Act* imposes an obligation on an employer to establish and "maintain" compensation practices that provide for pay equity. Maintenance is an ongoing responsibility. It includes reviewing job classes regularly to capture any changes to job duties and responsibilities, which may require pay equity adjustments.[3]

6. There can be no question that a pay equity statute like Québec's *Loi sur l'équité salariale* or Ontario's *Pay Equity Act* is a law "that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of…sex." Both the Ontario Act and the Québec Act set out their ameliorative objects in unambiguous terms:

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[1] *Pay Equity Act*, RSO 1990, c P.7 (Ontario) [*Pay Equity Act*]; *Loi sur l'équité salariale*, RLRQ c E-12.001 (Québec) [*Loi sur l'équité salariale*]. At the federal level, the *Canadian Human Rights Act*, RSC 1985, c H-6, s. 11(1) also prohibits federally-regulated private sector employers from "establish[ing] or maintain[ing] differences in wages between male and female employees employed in the same establishment who are performing work of equal value."

[2] *Pay Equity Act*, *supra* at s. 7(1): "Every employer shall establish and maintain compensation practices that provide for pay equity in every establishment of the employer."

[3] *Call-A-Service Inc v. An Anonymous Employee*, 2008 CanLII 88827 at para. 25.

> 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.[4]
>
> 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.[5]

7. The stated purpose of these statutes is to *redress* systemic gender discrimination in compensation, not to eradicate it in every circumstance. This more modest ambition does not make these statutes any less ameliorative in purpose, and it should not deprive them of the protection of s. 15(2). As this Court held in *Cunningham*, "s. 15(2) is aimed at permitting governments to *improve* the situation of members of disadvantaged groups that have suffered discrimination in the past, in order to enhance substantive equality."[6] A statute that *improves* the situation of members of a disadvantaged group is exactly the kind of statute protected by s. 15(2), even if it does not altogether remedy that group's disadvantage.

8. The courts below concluded that because the *Loi sur l'équité salariale* did not offer employees in female-predominant jobs a complete remedy for systemic gender discrimination, it perpetuated the very discrimination that it was intended to redress: "[la *Loi*] perpétue l'inégalité dont elles sont victims. …L'effet discriminatoire que la législation devait enrayer demeure."[7] This focus on whether discriminatory effects would persist notwithstanding the redress afforded by the Québec Act is inconsistent with this Court's emphasis that ameliorative programs should be judged under s. 15(2) by their *purpose* rather than their *effects*:

> The language of s. 15(2) suggests that legislative goal rather than actual effect is the paramount consideration in determining whether or not a program qualifies for s. 15(2) protection….The purpose-driven approach also reflects the language of the provision itself, which focusses on the "object" of the program, law or activity rather

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[4] *Pay Equity Act*, *supra* at Preamble, s. 4(1).
[5] *Loi sur l'équité salariale*, *supra* at s. 1.
[6] *Alberta (Aboriginal Affairs and Northern Development) v. Cunningham*, 2011 SCC 37 at para. 40 (emphasis in original).
[7] Jugement de la Cour d'appel, 2016 QCCA 1659 (Les honorable Louis Rochette, François Doyon et Claude C. Gagnon, JJ.C.A.), 12 October 2016, Dossier de l'appelante, Partie I, p. 63 at paras. 72-73.

> than its impact. Moreover, the effects of a program in its fledgling stages cannot always be easily ascertained. The law or program may be experimental. If the sincere purpose is to promote equality by ameliorating the conditions of a disadvantaged group, the government should be given some leeway to adopt innovative programs, even though some may ultimately prove to be unsuccessful. The government may learn from such failures and revise equality-enhancing programs to make them more effective.[8]

9. If an ameliorative program does not lose the protection of s. 15(2) even if it "may ultimately prove to be unsuccessful" or does not "offer a benefit that effectively tackled the problems faced by" the targeted group,[9] then it is difficult to see why it should lose the protection of s. 15(2) merely because it does not seek to eliminate all of the disadvantage experienced by the targeted group. Moreover, as this Court has recognized, the "standard of perfection" is "not the standard to be applied" under s. 15 in assessing government's response to complex problems for which there is no perfect solution.[10]

10. The *Loi sur l'équité salariale* is not the only anti-discrimination statute that contains internal limits, qualifications or conditions on the redress it affords for systemic discrimination. The Pay Equity Hearings Tribunal has observed of the Ontario *Pay Equity Act* "that not all women will benefit from the Act, not all will benefit equally, and the wage gap between men and women will not be completely eliminated."[11] Statutes such as the Ontario *Human Rights Code*[12] and the *Accessibility for Ontarians with Disabilities Act, 2005*[13] also include provisions such as limitation periods,[14] the phasing-in of standards over several years,[15] or defences[16] and exemptions[17] that can limit the ability of individuals to obtain redress for systemic

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[8] *R. v. Kapp*, 2008 SCC 41 at paras. 44-47 [*R. v. Kapp*].
[9] *R. v. Kapp*, *supra* at paras. 47 and 60.
[10] *Gosselin v. Québec (Attorney General)*, 2002 SCC 84 at paras. 55 and 72; *Withler v. Canada (Attorney General)*, 2011 SCC 12 at para. 67.
[11] *Ontario Nurses' Association v. Participating Nursing Homes*, 2016 CanLII 2675 (PEHT) at paras. 173-179.
[12] *Human Rights Code*, RSO 1990, c H.19 [*Human Rights Code*].
[13] *Accessibility for Ontarians With Disabilities Act, 2005*, SO 2005, c 11.
[14] See e.g. *Human Rights Code*, *supra* at s. 34(1).
[15] See e.g. *Accessibility for Ontarians With Disabilities Act, 2005*, *supra* at s. 1(a).
[16] See e.g. *Human Rights Code*, *supra* at s. 18.
[17] See e.g. *Human Rights Code*, *supra* at s. 20.

discrimination. Such statutes should not themselves be held to be discriminatory for the reason that they contain internal limits on the redress they offer, particularly where (as in this case) the limit does not itself draw any distinction on the basis of a protected ground.

11. This case is different from *Vriend v. Alberta*,[18] in which a general anti-discrimination statute was found to be underinclusive because it did not protect against discrimination on the basis of sexual orientation. Under the Alberta statute, LGBTQ persons were effectively excluded from the protection afforded to other victims of discrimination. Here, the issue is not that women are excluded from the protection of the *Loi sur l'équité salariale* on the basis of sex, but that the redress afforded to workers in female-dominated occupations is alleged not to go far enough in redressing their disadvantage.

12. Nor is this case like *N.A.P.E.*, which involved a challenge to legislation that erased the government's pay equity obligations towards its own employees.[19] This case is not about the government as employer paying employees in predominantly female jobs less than it paid to those in predominantly male employees for work of equal value. Rather, it is about internal limits in an affirmative action statute that offers redress for societal systemic discrimination in the broader labour market, including the private sector.

B. Section 15 should encourage ameliorative laws, not invalidate efforts to redress societal discrimination incrementally

13. The Québec Court of Appeal erred in holding that *Charter* s. 15(2) "n'a pas pour objet de protéger des lois ou programmes améliorateurs contre des contestations provenant du groupe même que l'on cherche à favoriser pour le motif, par exemple, que la législation qui leur accorde des droits n'assure pas leur pleine mise en œuvre."[20] This is an unduly narrow characterization of the purpose of s. 15(2), under which "the focus is on *enabling* governments to pro-actively combat existing discrimination through affirmative measures."[21]

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[18] *Vriend v. Alberta*, [1998] 1 SCR 493.
[19] *Newfoundland (Treasury Board) v. N.A.P.E.*, 2004 SCC 66.
[20] Jugement de la Cour d'appel, *supra*, Dossier de l'appelante, Partie I, p. 51 at para. 40.
[21] *R. v. Kapp*, *supra* at para. 25 (emphasis in original).

14. The purpose of s. 15(2) is to encourage legislatures to take affirmative action without fear of constitutional challenge:

> 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.[22]

15. *Charter* s. 15(2)'s enabling purpose of encouraging affirmative action programs by protecting them from challenge is served and advanced whether the challenge comes from an excluded group that is not targeted to receive the benefit of the law, or from an included group that desires a greater benefit than the law provides. In either case, s. 15(2) "may be said both to shield and encourage legislation of this kind:"

> …the obligation purportedly imposed by s. 15(1) to enact employment equity legislation would be inconsistent with s. 15(2) which may be said both to shield and encourage legislation of this kind (see the Abella Report at p. 14). I have already indicated that, but for s. 15(2), the *Employment Equity Act, 1993* might be vulnerable to constitutional challenge by reason of its under-inclusive nature. Because s. 15(2), although concerned with pro-active legislation like the employment equity legislation in this case, clearly does not impose an obligation to enact such legislation, it does not seem sensible to read s. 15(1) as requiring the very result s. 15(2) is designed to foster.[23]

16. In *Thibaudeau*, L'Heureux-Dubé J. noted that "Although s. 15 of the *Charter* does not impose upon governments the obligation to take positive actions to remedy the symptoms of systemic inequality, it does require that the government not be the *source* of further inequality."[24] It is inherent in this distinction that the government is not the source of inequality

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[22] Judge Rosalie Silberman Abella, Commissioner, "Equality in Employment: A Royal Commission Report" (Ottawa: Supply and Services Canada, 1984) at 14, quoted in *R. v. Kapp*, *supra* at para. 32.
[23] *Ferrel v. Ontario (Attorney General)*, 1998 CanLII 6274 (ON CA) at para. 47.
[24] *Thibaudeau v. Canada*, [1995] 2 SCR 627 at para. 38, per L'Heureux-Dubé J. dissenting (emphasis added).

simply because it has not taken positive action to remedy the symptoms of systemic inequality. It must equally be true that the government is not the source of inequality where it *has* taken positive action to remedy the symptoms of systemic inequality, but has not remedied those symptoms entirely. Otherwise, the law would impose an all-or-nothing choice on governments: do nothing, or face constitutional challenge for failing to eradicate the problem completely.

17. The Québec Court of Appeal seemed to invite this stark choice between legislative inaction and searching judicial review by warning that if the state elects to redress systemic inequality, its efforts to do so will be held discriminatory if they provide only a partial solution to the problem.[25] By contrast, the Court of Appeal for Ontario's decision in *Lovelace* recognized the need to avoid forcing all-or-nothing choices on government as a policy consideration supporting limited judicial review of s. 15(2) programs:

> Governments have no constitutional obligation to remedy all conditions of disadvantage in our society. If government affirmative action programs can be too readily challenged because, for example, they do not go far enough in remedying disadvantage, governments will be discouraged from initiating such programs.[26]

18. The reality is that government action intended to redress systemic discrimination in society is frequently incremental or gradual. The effects of systemic discrimination are persistent and complex, and do not readily admit of simple and complete solutions. As this Court has noted in *Auton*, "Combatting discrimination and ameliorating the position of members of disadvantaged groups is a formidable task and demands a multi-pronged response. Section 15(1) is part of that response. Section 15(2)'s exemption for affirmative action programs is another prong of the response. Beyond these lie a host of initiatives that governments, organizations and individuals can undertake to ameliorate the position of members of disadvantaged groups."[27] Governments need flexibility to be able to design measures that tackle the most complex and intractable manifestations of systemic societal discrimination, even if they

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[25] Jugement de la Cour d'appel, *supra*, Dossier de l'appelante, Partie I, p. 52 at para. 42.
[26] *Lovelace v. Ontario*, 1997 CanLII 2265 (ON CA) at para. 64, aff'd 2000 SCC 37.
[27] *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, 2004 SCC 78 at para. 27.

cannot do so fully. Otherwise, governments may choose only to address problems that can be easily resolved.

19. In *Andrews*, McIntyre J. recognized the incremental nature of society's progress towards equality when he articulated a legal framework intended to "*approach* the ideal of full equality before and under the law — and in human affairs an approach is all that can be expected."[28] Affirmative action statutes like the Ontario and Québec pay equity acts move us closer in this approach to the ideal of full equality. It is no mark against their constitutional validity that they do not get us all the way there yet. Section 15 enables equality-promoting laws and thereby advances our progress towards full equality.

PART IV – COSTS

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

PART V – REQUEST FOR ORAL ARGUMENT

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

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 16TH DAY OF OCTOBER 2017

S. Zachary Green

Courtney Harris

Of counsel for the intervener,
the Attorney General of Ontario

[28] *Law Society of British Columbia v. Andrews*, [1989] 1 SCR 143 at 165 (emphasis added).

PART VI – TABLE OF AUTHORITIES

Cases	**Paragraph(s) Referred to in Factum**
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Canadian Human Rights Act, RSC 1985, c H-6, s. 11(1). *Loi canadienne sur les droits de la personne*, LRC 1985, c H-6, art. 11(1).	4
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Reports	**Paragraph(s) Referred to in Factum**
Judge Rosalie Silberman Abella, Commissioner, "Equality in Employment: A Royal Commission Report" (Ottawa: Supply and Services Canada, 1984).	15