

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

BETWEEN:

ATTORNEY GENERAL OF QUÉBEC

Appellant / Respondent on Cross-Appeal

- and -

**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**

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**FACTUM OF THE INTERVENERS, PROFESSIONAL INSTITUTE OF THE PUBLIC
SERVICE OF CANADA, CANADIAN ASSOCIATION OF PROFESSIONAL
EMPLOYEES, ASSOCIATION OF CANADIAN FINANCIAL OFFICERS,
PROFESSIONAL ASSOCIATION OF FOREIGN SERVICE OFFICERS**

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

**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)**

FERNADE 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

**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 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

**PROFESSIONAL INSTITUTE OF THE PUBLIC SERVICE OF CANADA,
CANADIAN ASSOCIATION OF PROFESSIONAL EMPLOYEES,
ASSOCIATION OF CANADIAN FINANCIAL OFFICERS,
PROFESSIONAL ASSOCIATION OF FOREIGN SERVICE OFFICERS**

Intervenors

GOLDBLATT PARTNERS LLP

500 - 30 Metcalfe Street
Ottawa, ON K1P 5L4

Peter Engelmann

Colleen Bauman

Tel: (613) 482-2452

Fax: (613) 235-3041

Email: pengelmann@goldblattpartners.com

**Counsel for the Joint Intervenors,
Professional Institute of the Public Service
of Canada, Association of Canadian
Financial Officers, Canadian Association of
Professional Employees, and Professional
Association of Foreign Service Officers**

TO: REGISTRAR

Supreme Court of Canada
301 Wellington Street
Ottawa, On K1A 0J1

COPIES TO:

FASKEN MARTINEAU DUMOULIN LLP

Bureau 3700
800, Place Victoria
Montréal, QC H4A 1E9

Louis P. Bernier, Ad.E.

Tel: 514-397-7463

Fax: 514-397-7600

NOËL & ASSOCIÉS

111, rue Champlain
Gatineau, QC J8X 3R1

Pierre Landry

Tel: 819-771-7393

Fax: 819-771-5397

Email: p.landry@noelassociés.com

**Counsel for the Appellant/Respondent on
Cross-Appeal, Attorney General of Québec**

**Agent for the Appellant/Respondent on
Cross-Appeal, Attorney General of Québec**

POUDRIER BRADET, S.E.N.C.

Bureau 100
70, rue Dalhousie
Québec, QC G1K 4B2

Denis Bradet

Tel: 418-780-3333
Fax: 418-780-3334
Email: dbradet@poudrierbradet.com

**Counsel for the Respondents/Appellants on
Cross-Appeal, Alliance du personnel
professionnel et technique de la santé et des
services sociaux**

POUDRIER BRADET, S.E.N.C.

Bureau 100
70, rue Dalhousie
Québec, QC G1K 4B2

Denis Bradet

Tel: 418-780-3333
Fax: 418-780-3334
Email: dbradet@poudrierbradet.com

**Counsel for the Respondents/Appellants on
Cross-Appeal, Catherine Lévesque, Syndicat
de la fonction publique et parapublique du
Québec inc.**

**MELANÇON, MARCEAU, GRENIER &
SCIORTINO**

Bureau 200
Grande Allé Quest
Québec, QC G1S 1C1

Johanne Drolet

Pierre Brun

Tel: 418-640-1773
Fax: 418-640-0474
Email: jdrolet@mmgs.qc.ca

**Counsel for the Respondents/Appellants on
Cross-Appeal, Fédération
interprofessionnelle de la santé du Québec,
Guy-Philippe Brideau, Nancy Bédard**

**CANADIAN UNION OF PUBLIC
EMPLOYEES**

1375 St. Laurent Blvd.
Ottawa, ON K1G 0Z7

Gavin Leeb

Tel: 613-237-1590 x 271
Fax: 613-237-4213
Email: gleeb@cupe.ca

**Agent for the Respondents/Appellants on
Cross-Appeal, Alliance du personnel
professionnel et technique de la santé et des
services sociaux**

**CANADIAN UNION OF PUBLIC
EMPLOYEES**

1375 St. Laurent Blvd.
Ottawa, ON K1G 0Z7

Gavin Leeb

Tel: 613-237-1590 x 271
Fax: 613-237-4213
Email: gleeb@cupe.ca

**Agent for the Respondents/Appellants on
Cross-Appeal, Catherine Lévesque,
Syndicat de la fonction publique et
parapublique du Québec inc.**

**CANADIAN UNION OF PUBLIC
EMPLOYEES**

1375 St. Laurent Blvd.
Ottawa, ON K1G 0Z7

Gavin Leeb

Tel: 613-237-1590 x 271
Fax: 613-237-4213
Email: gleeb@cupe.ca

**Agent for the Respondents/Appellants on
Cross-Appeal, Fédération
interprofessionnelle de la santé du Québec,
Guy-Philippe Brideau, Nancy Bédard**

**SYNDICAT CANADIEN DE LA
FONCTION PUBLIQUE**

1375, boul. Saint-Laurent Est
Ottawa, ON K1G 0Z7

Annick Desjardins

Tel: 613-237-1590 x 220

Fax: 613-237-4213

Email: adesjardins@cupe.ca

Counsel for the Respondents/Appellants on Cross-Appeal, 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, employés-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, Syndicat québécois des employées et employés de service, section locale 298 (FTQ)

**CANADIAN UNION OF PUBLIC
EMPLOYEES**

1375 St. Laurent Blvd.
Ottawa, ON K1G 0Z7

Gavin Leeb

Tel: 613-237-1590 x 271

Fax: 613-237-4213

Email: gleeb@cupe.ca

Agent for the Respondents/Appellants on Cross-Appeal, 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, employés-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, Syndicat québécois des employées et employés de service, section locale 298 (FTQ)

**DIRECTION GÉNÉRALE DES AFFAIRES
JURIDIQUE ET LÉGISLATIVE**

3e étage, secteur 100
875, Grande Allée Est
Québec, QC G1R 5R8

Josée De Bellefeuille

Tel: 418-643-0875 x 4266
Email: josee.debellefeuille@sct.gouv.qc.ca

**Counsel for the Intervener,
Conseil du Trésor**

**COMMISSION DES NORMES, DE
L'ÉQUITÉ, DE LA SANTÉ ET DE LA
SÉCURITÉ DU TRAVAIL**

524, rue Bourdages
Local 304
Québec, QC G1M 1A1

Jean-François Paquet

Tel: 418-266-4900 x 5330
Fax: 418-266-4922
Email: jean-francois.paquet@cnesst.gouv.qc.ca

**Counsel for the Intervener,
Commission des normes, de l'équité, de la
santé et de la sécurité du travail,
anciennement Commission de l'équité
salariale**

ATTORNEY GENERAL OF ONTARIO

720 Bay Street, 4th Floor
Toronto, ON M7A 2S9

S. Zachary Green

Courtney Harris
Tel: 416-326-8517
Fax: 416-326-4015
Email: zachary.green@ontario.ca

**Counsel for the Intervener,
Attorney General of Ontario**

BORDEN LADNER GERVAIS LLP

100 Queen Street
Suite 1300
Ottawa, ON K1P 1J9

Nadia Effendi

Tel: 613-237-5160
Fax: 613-230-8842
Email: neffendi@blg.ca

**Agent for the Intervener,
Attorney General of Ontario**

FAY FARADAY
860 Manning Ave.
Toronto, ON M6G 2W8

Fay Faraday
Janet E. Borowy
Tel: 416-389-4399
Fax: 647-776-3147
E-mail: fay.faraday@faradaylaw.com

**Counsel for the Interveners, Equal Pay
Coalition, New Brunswick Coalition for Pay
Equity, Women's Legal Education and
Action Fund**

**RAVEN, CAMERON, BALLANTYNE &
YAZBECK LLP**
1600 - 220 Laurier Ave West
Ottawa, ON K1P 5Z9

Andrew Raven
Andrew Astritis
Morgan Rowe
Tel: 613-567-2901
Fax: 613-567-2921
E-mail: araven@ravenlaw.com

**Counsel for the Intervener,
Public Service Alliance of Canada**

BARABÉ CASAVANT
9405, rue Sherbrooke Est
Montréal, QC H1L 6P3

Nathalie Léger
Matthew Gapmann
Tel: 514-356-8888 Ext: 2124
Fax: 514-356-0990
E-mail: leger.nathalie@lacsq.org

**Counsel for the Intervener,
Centrale des syndicats du Québec**

**RAVEN, CAMERON, BALLANTYNE &
YAZBECK LLP**
220 Laurier Avenue, Suite 1600
Ottawa, ON K1P 5Z9

Andrew Astritis
Tel: 613-567-2901
Fax: 613-567-2921
E-mail: aastritis@ravenlaw.com

**Agent for the Interveners, Equal Pay
Coalition, New Brunswick Coalition for Pay
Equity, Women's Legal Education and
Action Fund**

SUPREME ADVOCACY LLP
100- 340 Gilmour Street
Ottawa, ON K2P 0R3

Marie-France Major
Tel: 613-695-8855 Ext: 102
Fax: 613-695-8580
E-mail: mfmajor@supremeadvocacy.ca

**Agent for the Intervener,
Centrale des syndicats du Québec**

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PARTS I AND II: OVERVIEW, FACTS, AND POSITION ON THE ISSUES

1. The Professional Institute of the Public Service of Canada (the “Institute”), the Canadian Association of Professional Employees (“CAPE”), the Professional Association of Foreign Service Officers (“PAFSO”), and the Association of Canadian Financial Officers (“ACFO”) (collectively, the “the Institute et al.”) intervene in the present appeal and cross-appeal as a friend of the Court to address the constitutionality of 2009 amendments¹ to the Quebec *Pay Equity Act* (“PEA”)² and to make submissions regarding the requirements of substantive equality under the *Charter of Rights and Freedoms*,³ in the context of specialized human rights legislation.

2. The sections of the *PEA* at issue in this appeal and cross-appeal address an employer’s obligation to perform a pay equity audit every five years. Despite the fact that the audit process set out in Chapter IV.1 of the *PEA* is *the* main redress mechanism for gender discrimination in pay once an initial pay equity plan is completed, this maintenance regime is fundamentally flawed in that it denies employees wage adjustments owing, allows employers to limit the information available to employees and their representatives about the audit, and gives employers broad discretion to determine adjustments made during the maintenance phase without a requirement for the participation of employees or their bargaining agents.

3. The Institute et al. submit that, to comply with s. 15 of the *Charter*, proactive pay equity legislative schemes must require the active involvement of employees and their representatives in pay equity maintenance. To provide real redress in accordance with the requirements of substantive equality in s. 15, employees and their representatives must have access to full and complete information about the maintenance process and a right to participate in that process. Maintenance adjustments must be made back to the date that the inequity occurs. In addition, judicial deference under s. 1 should not be extended so as to relieve the government of its burden of demonstrating that the limits it is imposing on the fundamental human right to equal pay are reasonable and justifiable.

4. The Institute et al. adopts the facts as set out in the factum of the Respondents/Appellants

¹ *An Act to amend the Pay Equity Act, SQ 2009, c 9*, [the “Amending Act”].

² *Pay Equity Act*, CQLR c E-12.001, [the “PEA”].

³ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11 [the “Charter”].

on the cross-appeal.

PART III: ARGUMENT

A. The Maintenance Regime in Chapter IV.1 of the *PEA* is Contrary to Section 15

5. The Institute et al. submit that, when read as a whole and in context, the maintenance scheme in the *PEA* denies employees the right to full and effective redress for human rights violations they have suffered as a result of systemic gender discrimination in pay by failing to provide for their effective participation in the maintenance process and by limiting the time periods for which compensation owed to employees must be paid. As a result, the legislative scheme perpetuates systemic discrimination in the form of wage gaps between male- and female-dominated jobs and violates the substantive equality rights of women, contrary to s. 15.

The Pay Equity Audit is the Redress Mechanism for Future Gender Discrimination in Pay

6. As set out in section 1 of the *PEA*, providing “redress” for “differences in compensation due to the systemic gender discrimination” is the very purpose of the Act.⁴ Thus, as a starting point, it is important to highlight that the maintenance scheme in Chapter IV.1 of the *PEA* is *the* mechanism for female employees to obtain remedies for systemic gender discrimination in pay on a go-forward basis, making it all the more important that it be effective.

7. Pursuant to s. 19 and s. 49.1 of the Quebec *Charter of human rights and freedoms*,⁵ discrimination in compensation on the basis of gender must be redressed under the *PEA*, rather than under the *Quebec Charter*. After the initial pay equity plan is completed and adjustments to compensation are made under Division III of Chapter II, redress for future inequities in compensation is primarily obtained through the pay equity audit process in Chapter IV.1 of the *PEA, supra*. This is because complaints regarding ongoing pay equity concerns under the *PEA*

⁴ *PEA, supra*, s. 1. Thus, the starting point for the *PEA* is a recognition and acceptance that systemic discrimination *has* occurred, and that its purpose is to remedy that.

⁵ *Charter of Human Rights and Freedoms*, CQLR c C-12 [the “*Quebec Charter*”]

are an ineffective means of enforcing and maintaining pay equity.⁶ Although section 100 of the *PEA* allows employees or their unions to complain about the failure to do a pay equity audit or the failure to conduct it in accordance with the *PEA*, as with section 76.5 of the *PEA*, relief for any inequity that occurred prior to the posting of the audit is precluded.⁷ As well, since, as discussed below, the pay equity audit provisions in Chapter IV.1 of the *PEA* allow the employer tremendous scope in implementing maintenance, complaining about a failure to comply with those same provisions is of limited utility. In addition, sections 101 and 76.9 of the *PEA* require that employees show that the employer “act[ed] in bad faith or in an arbitrary or discriminatory manner or exhibit[ed] gross negligence”⁸ with respect to the maintenance of pay equity, effectively requiring that employees prove intent or meet a very high standard of proof in order to obtain full redress for a violation of their human rights. It is trite law that proof of intent to discriminate is not necessary for a finding of discrimination,⁹ or any resulting remedies. Thus, neither of these complaint mechanisms provide an effective redress for ongoing or future systemic gender discrimination in compensation.

The Pay Equity Audit Process Fails to Provide for the Participation of Employees and their Representatives

8. Although the pay equity audit process set out in Chapter IV.1 of the *PEA* is *the* redress mechanism for future gender discrimination in pay once an initial pay equity plan is completed, it is a fundamentally flawed process that perpetuates rather than remedies systemic discrimination by failing to provide for the participation of employees and their representatives in the maintenance of pay equity.

9. Problematically, s. 76.2 of the *PEA* allows the employer the choice to conduct all aspects of the maintenance process without any participation or consultation whatsoever with employees

⁶ Special Committee on Pay Equity, *Its Time to Act: Report of the Special Committee on Pay Equity*, (June 2016) at pages 8-12 [the “Special Committee Report”].

⁷ Section 103.1, *PEA*, *supra*

⁸ Contrary to the Quebec AG’s submissions (paras. 48-51 of their cross-appeal factum), an individual’s right to be free from discrimination in the human rights context is not comparable to the duty of fair representation owed by a union to its members in the labour context.

⁹ See for example, *Ont. Human Rights Comm. v. Simpsons-Sears*, [1985] 2 SCR 536 at para. 14.

or their representatives, regardless of the number of employees.

10. Experts in pay equity have repeatedly commented on the necessity of including employees and their representatives at all stages of a pro-active pay equity regime. For example, in the federal *Pay Equity Task Force Final Report*, the Task Force Chair, Beth Bilson stated that all employees should “have the right to participate in pay equity implementation *and maintenance*.”¹⁰ She explained that employee participation at all stages of the pay equity process was necessary to address systemic discrimination:

The struggle to eliminate systemic discrimination is... a process of changing attitudes and habits..., and broad-based participation in a clear process assists with this transformative objective...

[Employee] participation is a means of ensuring an objective process that complies with the legislation’s primary aims. This participation meets a fundamental objective of pay equity, which is to enhance the visibility of the various overlooked aspects of women’s work...

As a human right, pay equity is a matter of public policy that the courts have ruled to be quasi-constitutional. Whatever its form, employee participation is needed to eliminate systemic wage discrimination. This type of discrimination is hard to detect, as it often results from longstanding practices and attitudes that have been accepted as normal in the workplace....Because employees have specific or first-hand knowledge of the jobs in an organization, their participation offers a better guarantee of achieving these results.¹¹

11. Not only can employees provide necessary information on the work they do and the relative value of that work, but they can also ensure that the results achieved are not attenuated over time.¹² Conversely, experience has shown that where employers have full control of the pay equity plan, they have the “the technocratic means to manage the change, which usually mean[s] minimizing the change.”¹³ Pursuant to s. 76.2 of the *PEA*, employers have broad discretion to determine adjustments made during the maintenance phase of their pay equity programs, and as a result an equally broad discretion to manipulate the results in their favour.

¹⁰ Pay Equity Task Force, *A New Approach to a Fundamental Right: Pay Equity Task Force Final Report* (Beth Bilson, Chair) (Minister of Justice and Attorney General of Canada, 2004) at p. 225, emphasis added [“Bilson Report”].

¹¹ *Ibid.*, at pp. 154, 221-223.

¹² *Ibid.* at pp. 161-162.

¹³ *Ibid.* at p. 229.

12. In unionized environments, employee representatives can play a vital role in ensuring effective employee participation in a pro-active pay equity process. As Morley Gunderson, a noted expert in industrial relations has explained:

[U]nions can be especially important in providing information in areas such as job evaluation, finding appropriate comparator groups, the appropriate definition of the employer and pay (including non-wage compensation), estimating pay lines, determining exemptions and exclusions, and representing workers before tribunal hearings.¹⁴

13. More recently, in their final report to Parliament, the federal Special Committee on Pay Equity similarly concluded that “pay equity models are most effective when both employers and bargaining agents are responsible for establishing and participating in pay equity committees.”¹⁵

14. The Special Committee on Pay Equity further recognized that, in a pro-active pay equity scheme employees “must be represented in establishing a pay equity plan as well as in maintaining the plan.”¹⁶ In other words, employee participation in the establishment of a plan,¹⁷ does not obviate the need for on-going employee participation at the maintenance phase when determining whether the redress mechanism is adequate and non-discriminatory, any more than the fact that an individual may have received an adequate remedy for discrimination once, does not disentitle one from an adequate remedy for future discrimination.

The Pay Equity Audit Process Fails to Provide Adequate Information to Employees and their Representatives and Denies Employees Full Redress

15. This problem of a lack of employee/union participation in the maintenance of pay equity is further compounded by s. 76.3 of the *PEA*, which requires employers to post very minimal and inadequate information about the methodology used in the audit and its results, and s. 76.5 of the *PEA*, which allows for salary adjustments to apply only from the date of the posting, with no retroactivity, resulting in successive five years periods for which there is no remedy available for

¹⁴ Morley Gunderson, “The Evolution and Mechanics of Pay Equity in Ontario.” Canadian Public Policy – Analyse de Politiques, Vol. 28, May 2002, Supplement 1, p. S127 quoted in the Bilson Report, *supra* at p. 119.

¹⁵ Special Committee Report, *supra* at p.21.

¹⁶ *Ibid.*

¹⁷ See for example s. 16 of the *PEA* which mandates the participation of employees in the establishment of a plan in organizations with over 100 employees.

gender discrimination in pay. Both of these provisions were found to be unconstitutional by the Court of Appeal and are the subject of the main appeal.¹⁸

16. The posting of adequate information at all stages of the pay equity process, including the maintenance phase, has been recognized as providing a limited form of employee participation since it allows employees “to understand the process for determining salary adjustments and for them to take any available recourse if they believe their rights have been infringed.”¹⁹

17. In unionized environments, this failure to provide adequate information about pay equity maintenance does not only violate the employees’ s. 15 rights, but also interferes with the right of their bargaining agent to have the information necessary to exercise its representational obligations. As this Court recognized in *Bernard v. Canada (Attorney General)*:

The tripartite nature of the employment relationship [in a unionized workplace] means that information disclosed to the employer that is necessary for the union to carry out its representational duties should be disclosed to the union in order to ensure that the union and employer are on an equal footing with respect to information relevant to the collective bargaining relationship.²⁰

18. The active participation of bargaining agents in pay equity implementation and maintenance has been demonstrated to assist in closing the pay gap to a greater extent than in environments where no bargaining agents are present.²¹ Bargaining agents may also represent their members in the pay equity complaint process as well. Without a right to obtain adequate information regarding the pay equity maintenance process, bargaining agents cannot effectively determine whether the employer has respected its obligations under the *PEA*, and as a result, cannot effectively challenge employer action on their members’ behalf. Thus, the failure to provide both employees and their bargaining agents with adequate information about the maintenance of pay equity hinders effective employee participation in the process, denies them the information needed to complain when pay equity is not being properly maintained, and further contributes to the maintenance scheme in Chapter IV.1 of the *PEA* being inadequate and

¹⁸ *Québec (Procureure générale) c. Alliance du personnel professionnel et technique de la santé et des services sociaux*, 2016 QCCA 1659 (CanLII) at paras. 71-74 [“Court of Appeal decision”].

¹⁹ Bilson Report, *supra*, at pages 118, 235 and 238.

²⁰ *Bernard v. Canada (Attorney General)*, [2014] 1 SCR 227 at para. 28.

²¹ Bilson Report, *supra*, at page 224.

discriminatory.

19. In addition, as the Quebec Court of Appeal recognized,²² the maintenance scheme is also discriminatory because section 76.5 of the PEA allows for the symptoms of systemic discrimination to persist. The Institute et al. submit that whereas employees who have experienced discrimination in pay on the basis of other protected grounds are entitled to full redress under s. 19, 49 and 80 of the *Quebec Charter, supra*, employees who have experienced systemic gender discrimination in pay are restricted to time-limited, partial redress under s. 76.5 of the *PEA* and that there is no basis for this differential treatment.

The Pay Equity Audit Process Perpetuates Rather than Alleviates Systemic Discrimination

20. As this Court explained in *Eldridge*, when the state decides to act it must do so in a non-discriminatory manner. It also recognized that discrimination can result “from a failure to take positive steps.”²³ Courts have previously applied this principle in the context of systemic gender-based wage inequity. For example, in *Service Employees International Union, Local 204 v. Ontario (Attorney General)*, a case involving a successful s. 15 *Charter* challenge to legislative amendments removing the proxy method of comparison for pay equity adjustments from the Ontario pay equity legislation and capping proxy workplace wage increases, the Ontario Court (General Division) explained:

The *Charter* does not place a positive obligation on government to eliminate [systemic gender wage] inequity but it does prohibit the government from creating inequity...

When [the] government decides to legislate and identifies the disadvantaged group the legislation is intended to benefit, then it must, subject to s. 1 of the *Charter*, make the

²² Court of Appeal decision, *supra* at paras. 71-74.

²³ *Eldridge v. British Columbia (Attorney General)*, [1997] 3 SCR 624 at paras. 73 and 78. See also *Schachter v. Canada*, [1992] 2 SCR 679 at p. 721, where the Court recognized that “the equality right is a hybrid of sorts since it is neither purely positive nor purely negative. In some contexts it will be proper to characterize s. 15 as providing positive rights”; and *Thibaudeau v. R.*, [1995] 2 S.C.R. 627 at p. 655; and *Vriend v. Alberta*, [1998] 1 SCR 493 at para. 61, where the Court recognized that substantive equality may be violated by a legislative omission.

legislation apply fairly and equally to all within the group or government itself is guilty of discriminating...²⁴

21. In a similar way here, the Institute et al. submit that the failure of the legislature to require some form of participation by employees in pay equity maintenance falls short of the requirements of s. 15 by failing to provide an adequate systemic remedy necessary to ensure appropriate compensation for gender inequity in wages in the future.

22. Contrary to the suggestion of the Attorney General at paragraphs 80-81 of its factum on the appeal and paragraph 47 of its factum on the cross-appeal, the fact that gender inequity in pay is an insidious form of systemic discrimination, should not be used to justify ineffective and inadequate redress mechanisms like that found in Chapter IV.1 of the *PEA*. Rather, as was recognized by Beth Bilson in her seminal report referenced above, eliminating systemic gender discrimination in compensation requires the use of systemic remedies that provide for broad-based participation by employees and their representatives.²⁵

23. Thus, the Institute et al. submits that the maintenance scheme in Chapter IV.1 of the *PEA* scheme, by failing to provide for the effective participation of employees and their representatives in the maintenance process and by denying employees the right to a full and effective redress for the human rights violations they have suffered, fails to provide an adequate systemic remedy and perpetuates systemic gender discrimination in pay, violating the substantive equality rights of women workers contrary to s. 15 of the *Charter*.

B. Pay Equity is a Human Right and Deference Under Section 1 is Not Appropriate

24. Pay equity is a human right, and accordingly, the Institute et al. submit that undue judicial deference in s. 1 is not appropriate when faced with a legislative regime, such as the one found in Chapter IV.1 of the *PEA*, which perpetuates gender-based discrimination in pay by allowing pay inequity to persist for certain time periods.

25. The Attorney General of Quebec, however, at paragraph 20-24 of its factum on the cross-appeal rejects the notion that pay equity is a fundamental human right, instead arguing at

²⁴ *Service Employees International Union, Local 204 v. Ontario (Attorney General)*, 1997 CanLII 12286 (ON SC)

²⁵ Bilson Report, *supra* at pp. 112 221-223.

paragraphs 90-93 of its factum on the appeal that pay equity is essentially a question of social and economic policy on which deference to the legislature is owed.

26. The Attorney General's approach ignores the fundamental difference between social benefits legislation, by which the government is creating rights that would not otherwise exist, and pay equity legislation, the sole purpose of which is to provide a mechanism to redress a human rights violation.

27. As well, as noted above, the *PEA* is an extension of rights found in s. 19 of the *Quebec Charter*,²⁶ and as such is a human rights statute, not social welfare legislation. The quasi-constitutional human rights character of pay equity laws has been previously recognized by the courts. For example, in *Canada (Attorney General) v. Public Service Alliance of Canada*, Justice Evans described the federal pay equity provision as follows:

[T]he purpose of section 11 of the *Canadian Human Rights Act* is to redress systemic wage discrimination resulting from the historic undervaluation of the work performed by women. It is well established that human rights legislation is quasi-constitutional in nature and that its provisions should be given a broad and liberal interpretation so as to further its underlying purposes."²⁷

28. The fundamental human rights character of pay equity was also recognized by Beth Bilson who explained that [t]here [is] no disagreement...that the basic principle of entitlement to equal pay is a human right," and that "this principle is appropriately enshrined in human rights legislation and correctly seen as framed by constitutional guarantees of equality."²⁸

29. Recognizing the fundamentally different nature of human rights legislation in comparison to social benefits legislation, does not in any way create a hierarchy of rights, as alleged by the

²⁶ *Quebec Charter, supra* at s. 19.

²⁷ *Canada (Attorney General) v. Public Service Alliance of Canada*, [2000] 1 FCR 146, 1999 CanLII 9380 (FC) at para. 53. See also *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229, which specifically refers to pay equity legislation as a form of human rights legislation and *Robichaud v. Canada (Treasury Board)*. [1987] 2 S.C.R. 84 at 90 where the Court held that human rights "remedies must be effective, consistent with the 'almost constitutional' nature of the rights protected."

²⁸ Bilson Report, *supra*, at p. 7.

Appellant at paragraphs 21 and 24 of its factum on the cross-appeal, but rather is an important marker of when it is inappropriate for the Court to show deference to the legislature's choice.

30. As this Court has explained in *Sauvé v. Canada (Chief Electoral Officer)*, deference is not appropriate when fundamental rights are at issue:

At the s. 1 stage, the government argues that denying the right to vote to penitentiary inmates is a matter of social and political philosophy, requiring deference. Again, I cannot agree. This Court has repeatedly held that the “general claim that the infringement of a right is justified under s. 1” does not warrant deference to Parliament: *M. v. H.*, [1999] 2 S.C.R. 3, at para. 78, *per* Iacobucci J. Section 1 does not create a presumption of constitutionality for limits on rights; rather, it requires the state to justify such limitations.

The core democratic rights of Canadians do not fall within a “range of acceptable alternatives” among which Parliament may pick and choose at its discretion. Deference may be appropriate on a decision involving competing social and political policies. It is not appropriate, however, on a decision to limit fundamental rights.²⁹

31. Similarly, in the present case, judicial deference under s. 1 should not relieve the government of its burden of demonstrating that the limits it is imposing on the fundamental human right to equal pay are reasonable and justifiable.

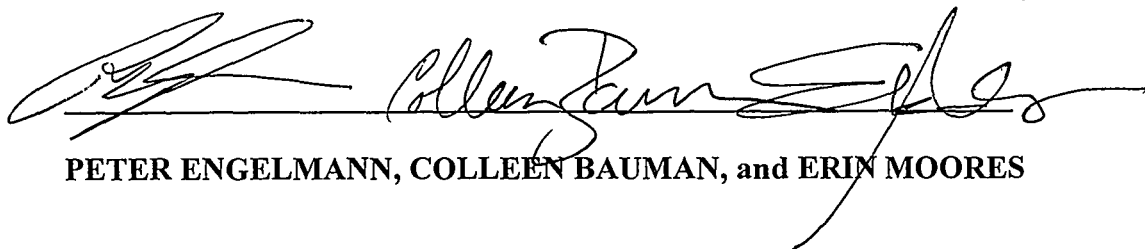
PART IV: COSTS

32. The Institute et al. do not ask for costs against any party and requests that no costs be ordered against them.

PART V: ORDER REQUESTED

33. Consistent with Rule 42(3) of the *Rules of the Supreme Court*, the Institute et al. takes no position on the order requested.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 17th DAY OF OCTOBER, 2017.



PETER ENGELMANN, COLLEEN BAUMAN, and ERIN MOORES

²⁹ *Sauvé v. Canada (Chief Electoral Officer)*, [2002] 3 SCR 519, at paras. 12-13. See also *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 SCR 199 at para. 136.

PART VI: TABLE OF AUTHORITIES

Authority	Paragraph in Factum Where Cited
<i>Bernard v. Canada (Attorney General)</i> , [2014] 1 SCR 227	17
<i>Canada (Attorney General) v. Public Service Alliance of Canada</i> , [2000] 1 FCR 146, 1999 CanLII 9380 (FC)	27
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<i>McKinney v. University of Guelph</i> , [1990] 3 SCR 229	27
<i>Ont. Human Rights Comm. v. Simpsons-Sears</i> , [1985] 2 SCR 536	7
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<i>RJR-MacDonald Inc. v. Canada (Attorney General)</i> , [1995] 3 SCR 199	30
<i>Robichaud v. Canada (Treasury Board)</i> , [1987] 2 SCR 84	27
<i>Sauvé v. Canada (Chief Electoral Officer)</i> , [2002] 3 SCR 519	30
<i>Schachter v. Canada</i> , [1992] 2 SCR 679	20
<i>Service Employees International Union, Local 204 v. Ontario (Attorney General)</i> , 1997 CanLII 12286 (ON SC)	20
<i>Thibaudeau v. R.</i> , [1995] 2 SCR 627	20
<i>Vriend v. Alberta</i> , [1998] 1 SCR 493	20
Secondary Sources	
<i>Pay Equity Task Force, A New Approach to a Fundamental Right: Pay Equity Task Force Final Report (Beth Bilson, Chair)</i> (Minister of Justice and Attorney General of Canada, 2004)	10, 11, 12, 16, 18, 22, 28
<i>Special Committee on Pay Equity, Its Time to Act: Report of the Special Committee on Pay Equity</i> , (June 2016)	7, 13, 14

Legislation	Paragraph in Factum Where Cited
<p>An Act to amend the Pay Equity Act, SQ 2009, c 9</p> <p>Loi modifiant la Loi sur l'équité salariale, LQ 2009, c 9</p>	1
<p>Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the <i>Canada Act 1982 (UK)</i>, 1982, c 11, s. 1, s. 15</p> <p>Charte canadienne des droits et libertés, partie I de la Loi constitutionnelle de 1982, constituant l'annexe B de la <i>Loi de 1982 sur le Canada (R-U)</i>, 1982, c 11, art. 1, art. 15</p>	1, 3, 5, 17, 20, 21
<p>Pay Equity Act, CQLR c E-12.001, s. 1, s. 16, s. 76.2, s. 76.3, s. 76.5, s. 76.9, s. 100, s. 101, s. 103.1</p> <p>Loi sur l'équité salariale, RLRQ, c E-12.001, art. 1, art. 16, art. 76.2, art. 76.3, art. 76.5, art. 76.9, art. 100, art. 101, art. 103.1</p>	1, 2, 5, 6, 7, 8, 9, 11, 15, 18, 19, 22, 23, 24, 27
<p>Charter of Human Rights and Freedoms, CQLR c C-12, art. 19, art. 49, art. 80</p> <p>Charte des droits et libertés de la personne, RLRQ c C-12, s. 19, s. 49, s. 80</p>	7, 19, 27