COURT NO. 29597

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE COURT OF APPEAL FOR NEWFOUNDLAND & LABRADOR)

BETWEEN:

NEWFOUNDLAND AND LABRADOR ASSOCIATION OF PUBLIC AND PRIVATE EMPLOYEES,

APPELLANT
(RESPONDENT)

AND:

HER MAJESTY THE QUEEN IN RIGHT OF NEWFOUNDLAND AS REPRESENTED BY THE TREASURY BOARD AND THE MINISTER OF JUSTICE,

RESPONDENT
(APPELLANT)

FACTUM OF THE INTERVENOR ATTORNEY GENERAL OF BRITISH COLUMBIA

Attorney General of British Columbia Ministry of Attorney General Legal Services Branch George H. Copley, Q.C. Neena Sharma, Barrister and Solicitor Constitutional and Administrative Law 1301 – 865 Hornby Street Vancouver BC V6Z 2G3 Phone: 604-660-3089 Fax: 604-660-3365 Email: neena.sharma@gems9.gov.bc.ca	Burke-Robertson Robert E. Houston, Q.C. 70 Gloucester Street Ottawa , Ontario K2P 0A2 Telephone (w) : (613) 236-9665 Fax : (613) 235-4430 Email :
Newfoundland and Labrador Association of Public and Private Employees Newfoundland and Labrador Association of Public and Private Employees Sheila H. Greene 330 Portugal Cove Pl. P.O. Box 8100, Station A	Gowling Lafleur Henderson LLP Brian A. Crane, Q.C. 2600 - 160 Elgin St Box 466 Station D Ottawa , Ontario K1P 1C3 Telephone (w) : (613) 232-1781

St. John's , Newfoundland & Labrador A1B 3M9 Telephone (w) : (709) 570-2467 Fax : (709) 754-0726 Email : sgreene@nape.nf.ca	Fax : (613) 563-9869 Email : Brian.Crane@gowlings.com
Her Majesty the Queen in Right of Newfoundland as represented by Treasury Board and the Minister of Justice Attorney General of Newfoundland and Labrador Donald H. Burrage, Q.C. Confederation Building P.O. Box 8700 St. John's , Newfoundland & Labrador A1B 4J6 Telephone (w) : (709) 729-0288 Fax : (709) 729-2129 Email : donb@gov.nf.ca	Burke-Robertson Robert E. Houston, Q.C. 70 Gloucester Street Ottawa , Ontario K2P 0A2 Telephone (w) : (613) 236-9665 Fax : (613) 235-4430 Email :
Attorney General of Alberta	Gowling Lafleur Henderson LLP Brian A. Crane, Q.C. 2600 - 160 Elgin St Box 466 Station D Ottawa , Ontario K1P 1C3 Telephone (w) : (613) 232-1781 Fax : (613) 563-9869 Email : Brian.Crane@gowlings.com
Attorney General of New Brunswick	Gowling Lafleur Henderson LLP Brian A. Crane, Q.C. 2600 - 160 Elgin St Box 466 Station D Ottawa , Ontario K1P 1C3 Telephone (w) : (613) 232-1781 Fax : (613) 563-9869 Email : Brian.Crane@gowlings.com
Attorney General of Quebec	Noël & Associés Sylvie Roussel 111 Rue Champlain Hull , Quebec J8X 3R1 Telephone (w) : (819) 771-7393

	Fax : (819) 771-5397 Email :
Canadian Association for Community Living, Canadian Hearing Society and Council of Canadians with Disabilities ARCH: A Resource Centre for Persons with Disabilities William Holder 425 Bloor Street East , Suite 110 Toronto , Ontario M4W 3R5 Telephone (w) : (416) 482-8255 Fax : (416) 482-2981 Email : holderw@lao.on.ca	South Ottawa Community Legal Services Chantal Tie 406 - 1355 Bank St Ottawa , Ontario K1H 8K7 Telephone (w) : (613) 733-0140 Fax : (613) 733-0401 Email
Hospital Employees' Union, the British Columbia Government and Service Employees' Union and the Health Sciences Association Arvay Finlay Joseph J. Arvay, Q.C. 400 - 888 Fort Street Victoria , British Columbia V8W 1H8 Telephone (w) : (250) 388-6868 Fax : (250) 388-4456 Email : jarvay@arvayfinlay.com	Lang Michener Marie-France Major 300 - 50 O'Connor Street Ottawa , Ontario K1P 6L2 Telephone (w) : (613) 232-7171 Ext: Fax : (613) 231-3191 Email :
Women's Legal Education and Action Fund Women's Legal Education & Action Fund Fiona Sampson 2 Carlton Street Suite 1307 Toronto , Ontario M5B 1J3 Telephone (w) : (416) 595-7170 Ext: 223 Fax : (416) 595-7191 Email : f.sampson@leaf.ca	Borden Ladner Gervais LLP Carole J. Brown World Exchange Plaza 1100 - 100 Queen Street Ottawa , Ontario K1P 1J9 Telephone (w) : (613) 237-5160 Fax : (613) 230-8842 Email : cbrown@blgcanada.com
Canadian Labour Congress Cavalluzzo Hayes Shilton McIntyre & Cornish Mary F. Cornish 300 - 474 Bathurst Street Toronto , Ontario	Nelligan O'Brien Payne LLP Dougald E. Brown 1900 - 66 Slater St Ottawa , Ontario K1P 5H1 Telephone (w) : (613) 238-8080

M5T 2S6 Telephone (w) : (416) 964-1115 Fax : (416) 964-5895 Email :	Fax : (613) 238-2098 Email :

PART 1: STATEMENT OF FACTS

1. The Attorney General of British Columbia has applied for an extension to permit intervention in this case.

2. The Attorney General of British Columbia supports the position of the Respondent in this appeal and adopts its statement of facts at paragraphs 1 – 19 of its Factum.

PART II: ISSUES ON APPEAL

3. The Chief Justice stated the following constitutional questions on October 29, 2003:

> 1. Does s. 9 of the *Public Sector Restraint Act*, S.N.L. 1991, c. 3, infringe s. 15(1) of the *Canadian Charter of Rights and Freedoms*? and
>
> 2. If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

4. The Attorney General of British Columbia submits the answer to those questions is: 1. no and 2. yes.

5. The Attorney General of British Columbia submits the following propositions support our position with respect to the first constitutional question:

> A. Executive action cannot bind future Parliaments or Legislatures;
>
> B. It is imperative in s. 15 cases to carefully analyze the purpose of the legislation;
>
> C. Courts cannot spend public money; and
>
> D. Strong policy reasons support incorporation of these principles in s. 15.

6. As to the second constitutional question, the Attorney General of British Columbia adopts the submissions of the Respondent under s. 1 of the *Charter*.

PART III: STATEMENT OF ARGUMENT

Introduction

7. This appeal provides an opportunity for the Court to recognize the appropriate boundaries between our two most basic legal institutions: the courts and the legislatures. Where and how these boundaries exist raises a debate about which of those institutions, on any given question, is best suited to achieve the Constitution's promise of a "free and democratic society" with a "Constitution similar in Principle to that of the United Kingdom".

8. The debate in this case was presumed by the Court of Appeal to reside primarily in Section 1 of the *Charter*. In particular, that Court concentrated on determining the appropriate degree of deference it should grant to government's financial situation and budgetary concerns when enacting legislation.

9. The Attorney General of British Columbia says, however, the debate about the boundaries between courts and legislatures is fundamental and ought to take place in s. 15. We say the Court must be mindful of the institutional limits of its authority over questions of constitutional law in order to respect the legislatures' constitutional authority to determine matters of public policy. To fail to do so risks the very legitimacy of judicial review.

> …judges have little choice but to confront the question of institutional boundaries. Ignoring, dismissing, minimizing or deflecting this aspect of review does not advance its legitimacy. Instead, that legitimacy depends on the Court's willingness to respect institutional boundaries…
>
> Jamie Cameron, "Positive Obligations Under Sections 15 and 7 of the Charter: A Comment on *Gosselin* v. *Quebec*" (2003), 20 S.C.L.R. (2d) 65 at 75-76

10. Professor Cameron's further notes:

> This paper does not explain precisely how the court should answer the question of institutional boundaries. That answer would be informed, initially, by a set of assumptions about institutional functions; in turn, these assumptions would have to confront fundamental issues about the

> role of the judiciary and the limits on its authority which set boundaries on review. In more concrete terms, the concept of boundaries could then generate principles or criteria which would then apply on a case-to-case basis. Meantime, the limited purpose of this paper has been to explain why it is imperative for the court to include the question of institutional boundaries in its analysis. Instead of focusing exclusively on the substantive entitlement, it should consider all dimensions of the constitutional question at stake, before deciding the outcome.
>
> Jamie Cameron, *supra,* at 91

11. The Attorney General submits there is a set of constitutional principles that are applicable in this case, and other s. 15 cases which involve the spending of public funds. These principles provide the answer to Professor Cameron's question of institutional boundaries. This approach is legitimate and compelling because it emanates from the Constitution itself. We say taking account of these constitutional principles within s. 15 is the preferred approach; it avoids reliance on any "dialogue" theory between the judiciary and Parliament, which all too easily confuses the appropriate constitutional boundaries of these fundamental legal institutions.

12. While the Attorney General of British Columbia therefore adopts the position of the Respondent on s. 15 (contained at paras. 21-31 of its Factum), we say that position finds further support in the institutional limits to the Court's function of judicial review arising from the constitutional principles identified in paragraph 5, *supra.*

A. Executive Action Cannot Bind Future Parliaments or Legislatures

13. It is a fundamental constitutional principle that legislatures and certainly executive councils cannot bind future parliaments or legislatures. To say, as the Court of Appeal has said in this case, that once a government enters a field it cannot withdraw, absent severe or grave financial circumstances, is inimical to our system of democracy. It is contrary to a basic premise of ss. 91 and 2 of the *Constitution Act, 1867* viz. the exclusive legislative authority to enact laws also implies the exclusive legislative authority to repeal laws.

> If a legislative body could bind itself not to do something in the future, then a government could use its parliamentary majority to protect its policies from alteration or repeal. This would lay a dead hand on a government subsequently elected to power in a new election with new issues.
>
> Peter W. Hogg, *Constitutional Law of Canada*, 3rd ed. (Scarborough: Carswell, 1992) at 307
>
> Furthermore, it is fundamental to our system of government that a government is not bound by the undertakings of its predecessor.
>
> *Reference re Canada Assistance Plan*, [1991] 2 S.C.R. 525; S.C.J. No. 60 (Q.L.) at para. 64

14. More specifically, no executive council can by contract or agreement preclude a legislature or Parliament from passing laws that are contrary to that contract or agreement. If the Court of Appeal is right that s. 9 infringed s. 15 of the *Charter*, then it has granted to Newfoundland's 1988 Executive Council who entered into the Pay Equity Agreement a greater power to bind future legislatures than the elected government itself has today.

> I adopt the words of King C.J. … in *West Lakes Ltd.* v. *South Australia* (1980), 25 S.A.S.R. 389, at p. 390 …
>
> > Ministers of State cannot, however, by means of contractual obligations entered into on behalf of the State fetter their own freedom, or the freedom of their successors or the freedom of other members of parliament, to propose, consider and, if they think fit, vote for laws, even laws which are inconsistent with the contractual obligations.
>
> …
>
> A restraint on the Executive in the introduction of legislation is a fetter on the sovereignty of Parliament itself. **This is particularly true, when the restraint relates to the introduction of a money bill. By virtue of s. 54 of the Constitution Act, 1867, such a bill can only be introduced on the recommendation of the Governor General** who by convention acts on the advice of the Cabinet. If the Cabinet is restrained, then so is Parliament.
>
> (emphasis added)
>
> *Canada Assistance Plan, supra,* at paras. 64 and 65

15. This principle stems from the basic premise that legislative power itself "includes the power to make, alter, amend and repeal laws": Black's Law Dictionary, 6th ed. (St. Paul: West Publishing Co., 1990) at 900.

> Even more difficult to infer in their Lordships' opinion would be any intention of a contractual nature that the section when enacted should remain for all time upon the statute book. If a promise that it should be put upon the statute book be assumed it was a promise by the Crown that there should be enacted something which in its very nature as legislation was susceptible of repeal or amendment by the Legislature. The difficulties in the way of extending such a promise so as to include an undertaking by the executive which would be broken if it were thought desirable in the public interest to introduce amending legislation on some subsequent occasion appear to their Lordships to be, for constitutional reasons alone, insurmountable.
>
> *Attorney General of British Columbia v Esquimalt and Nanaimo Railway Co. et al.*, [1950] 1 D.L.R. 305 (JCPC) at 312

> Indeed, it can be said that the investing of ultimate control over the creation and repeal of laws exclusively in representative assemblies lies at the very roots of free and democratic society.
>
> *R.* v. *Wonderland Gifts Ltd.*, [1996] N.J. No. 146 (per Marshall J.A.) at para. 30

> The principled restriction on the Crown's ability to breach contractual obligations without consequence was endorsed by Professor P. W. Hogg, in Liability of the Crown (2nd ed. 1989), at pp. 171-72, where he wrote:
>
> …
>
> > The Parliament or Legislature has the power to cancel a contract, and this power is not limited by any obligation to pay compensation. Similarly, judicial decisions can be retroactively reversed or modified. The Canadian Charter of Rights does not provide any general protection for private property or any general prohibition on retroactive laws. Through legislation, therefore, the will of the community can be made to prevail over private contract rights. That is the ultimate safeguard of public policy.
>
> There were no Charter submissions in this appeal, and these reasons do not address potential Charter arguments. **…**
>
> *Wells* v. *Newfoundland*, [1999] 3 S.C.R. 199 at paras. 48 and 49

16. This principle was not taken into account by the Court of Appeal in this case. Its decision transforms an action of the executive council -- which was not realized in legislation -- into a constitutional dictate that the Legislature itself cannot alter without satisfying the court under a judicially created test (the *Oakes* test) that it is reasonable. Apart from ignoring the fundamental constitutional principle discussed above, this approach is logically flawed for two reasons: (i) there is no constitutional requirement for government to achieve pay equity, and (ii) government action did not create inequality.

1. There is No Constitutional Requirement for Government to Achieve Pay Equity

17. First, the Court of Appeal did not appreciate the significance of its own conclusions that: (i) there is no legal obligation to enter into the pay equity agreement, and, (ii) there is no constitutional obligation to enact remedial legislation implementing pay equity.

> Finally, I refer to the reasons given by MacPherson J. dismissing a motion for an interlocutory injunction in the present case before the hearing of the main application. The injunction sought was to suspend the operation of the *Job Quotas Repeal Act*, 1995 pending the determination of the application. In dismissing the motion MacPherson J. said (Dec. 29, 1005, unreported):
>
> > The purpose of the *Charter* is to ensure that governments comply with the *Charter* when they make laws. The *Charter* does not go further and require that governments enact laws to remedy society problems, including problems of inequality and discrimination …
>
> I note that arriving at this conclusion MacPherson J. was of the view that no "serious constitutional issue" was raised. …
>
> The judicial statements clearly preponderate against concluding that s. 15(1) imposes a positive obligation on legislatures to enact employment equity legislation.
>
> The extra-judicial writing on the subject is to the same effect. …
>
> *Ferrell v. Ontario (Attorney General)* (1998), 168 D.L.R. (4th) 1(Ont. C A.) at paras. 64-66; 42 O.R. (3d) 97; O.J. No. 5074; leave to appeal to SCC denied Dec. 9, 1999

> Leaving aside any responsibility of government to eliminate systemic gender wage inequality in its own employees, the government of Ontario was under no obligation to enact the *Pay Equity Act, 1987*. It could likewise have repealed the entire *Pay Equity Act* in 1996 without giving rise to any claims of discrimination.
>
> *S.E.I.U., Local 204* v. *Ontario (Attorney General)*, (1997) 151 D.L.R. (4th) 273 (Gen. Div.) at 292; 35 O.R. (3d) 508; O.J. No. 3563

18. Since there is no constitutional obligation to achieve pay equity by enacting legislation, there can be no constitutional obligation to achieve it through agreement. Thus, logically, there should be no constitutional impediment to legislation altering or even removing pay equity obligations in agreements.

> If there is no constitutional obligation to enact the 1993 Act in the first place I think that it is implicit, as far as the requirements of the constitution are concerned, that the legislature is free to return the state of the statute book to what it was before the 1993 Act, without being obligated to justify the repealing statute under section 1 of the Charter. …
>
> *Ferrell, supra,* at para. 36

19. The error in this case is highlighted by noting that the effect of the decision is to give constitutional status to an agreement between an employer and a union. Yet, jurisprudence makes it clear that the right of freedom of association guaranteed by s. 2(d) of the *Charter* does not include a right to engage in collective bargaining, nor specific elements or outcomes of that process. Instead, the scope and content of labour law and statutory collective bargaining rights are left to legislatures to determine.

> *Re Public Service Employee Relations Act* (*Alta*), [1987] 1 S.C.R. 313; S.C.J. No. 10 at paras. 139, 175-177 and 180-182
>
> *PIPSC* v. *NWT* (*Commissioner*), [1990] 2 S.C.R. 367; S.C.J. No. 75 at para. 78
>
> *Delisle* v. *Canada*, [1999] 2 S.C.R. 989 at paras. 28 and 33
>
> *R.* v. *Advance Cutting & Coring*, [2001] 3 S.C.R. 209 at paras. 156-162

Health Services and Support Facilities Sub-Sector Bargaining Association et al v. *HMTQ*, 2003 BCSC 1379 at paras. 72-95[1]

20. Therefore, section 15 in this case has allowed through the back door what cannot get in through the front door -- constitutional protection to the fruits of the collective bargaining process. At least it is constitutional protection for the fruits of collective bargaining for one party to the process, the union**.**

2. Government Action Did Not Create Inequality

21. Second, the Court of Appeal concluded that the direct effect of s. 9 was **not** to restore the wages to the level that existed prior to the government entering the pay equity agreement, but rather to perpetrate discrimination itself (Case on Appeal, paras. 319-322). Yet in coming to that conclusion the Court did not even consider whether (from both a legal and evidentiary point of view) government action itself or pre-existing societal factors caused the wage gap. This omission by the Court of Appeal missed an important element of s. 15 analysis which is to "distinguish between effects which are wholly caused, or are contributed to, by an impugned provision, and those social circumstances which exist independently of such a provision identifying the source of the discrimination."

Symes v. *Canada*, [1993] 4 S.C.R. 695; S.C.J. No. 131 (Q.L.) at para. 134

22. Not only did the Court of Appeal not consider this issue, it did not discuss: (i) whether a job classification as identified in pay equity methodology is a personal characteristic; (ii) the appropriate comparator group, and (iii) whether there is an effect on human dignity. Each of the preceding is essential to finding an infringement of s. 15.

Law v. *Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497 at paras. 24, 39 and 51-57

Gosselin v. *Quebec (Attorney General)*, [2002] 4 S.C.R. 429 at paras. 17-20

[1] Appeal to the British Columbia Court of Appeal scheduled for May 3-6, 2004

Granovsky v. *Canada (Minister of Employment and Immigration*), [2000] 1 S.C.R. 703 at paras. 41 and 45

B. It is Imperative in s. 15 Cases to Carefully Analyse the Purpose of the Legislation

23. When legislation is challenged under the Constitution, resolution of the issue invariably turns on the characterization of the challenged *Act*. In division of powers cases, courts must first determine the "matter" to which the legislation speaks – or the pith and substance of the provisions. Under the *Charter*, courts determine the purpose and effects of the legislation.

24. The Attorney General of British Columbia submits this is not merely a descriptive exercise. It is important to carefully undertake this analysis sensitive to appropriate contextual factors because it provides the backdrop against which the constitutional analysis should occur.

> The need for a contextual inquiry to establish whether a distinction conflicts with s. 15(1)'s purpose is the central lesson of *Law*. …
>
> Both the purpose of the scheme and its effect must be considered in making this evaluation. I agree with Bastarache J. that the effects of the scheme are critical. **However, under *Law*, the context of a given legislative scheme also includes its purpose.** Simply put, it makes sense to consider what the legislator intended in determining whether the scheme denies human dignity.
>
> (emphasis added)
>
> *Gosselin, supra,* at paras. 25 and 26
>
> *Law, supra,* at paras. 57, 59 and 74

25. The Attorney General of British Columbia submits the Court of Appeal by-passed this most basic first step concentrating instead on what it had already determined and said were the discriminatory effects of the legislation. In so doing, the Court of Appeal erroneously conflated the analysis. This approach, we say, is particularly dangerous in s. 15 cases where "legislatures may – and to govern effectively – must treat different individuals and groups in different ways": *Law Society of British Columbia* v. *Andrews*, [1989] 1 S.C.R. 143 at para. 31.

26. While the Attorney General acknowledges that either a discriminatory purpose or effect can invalidate legislation under s. 15, failing to undertake a careful analysis of legislative purpose deprives the Court of the opportunity to recognize legitimate countervailing interests embodied in that legislation before deciding if there is an infringement. Viewed in this light, it is important to recognize that the *Public Sector Restraint Act* is not legislation about conferring or denying rights: nor is it a statute about implementing, introducing or altering a government program. It is about the ability of the Legislature to be accountable to the electorate. It is a statute which implements budgetary restraint measures and is directed at the wages of **all** public sector employees**.** Section 5 states, in part:

> 5.(1) Notwithstanding the terms and conditions of employment whether under a collective agreement, other contractual arrangement respecting employment or otherwise, no increase shall be applied to the pay scales of public sector employees during the restraint period.

27. The question for s. 15 becomes: with regard to legislation that denies all public sector employees (bound by collective agreement or simple contract) any pay increase, does the deferment of pay equity adjustments perpetuate the view that women (employed in the public service who belong to particular bargaining units) are less capable or less worthy of recognition or value as human beings or as members of Canadian society? The Attorney General of British Columbia says the answer is no if viewed correctly from the proper perspective of "the reasonable person, dispassionate and fully apprised of the circumstances, possessed of similar attributes to, and under similar circumstances, as the claimants": *Law*, *supra*, para. 60.

28. It is this feature of the legislation that distinguishes this case from the legislation at issue in both *Dunmore* v. *Ontario (Attorney General)*, [2001] 3 S.C.R. 1016 and *Vriend* v. *Alberta*, [1998] 1.S.C.R. 493; S.C.J. No. 29. Apart from significant factual differences[2], those two cases dealt with government's exclusion (in *Dunmore* by repeal and in *Vriend* by omission) of disadvantaged groups from legislation that conferred

[2] Importantly, *Dunmore* was **not** a case involving s. 15 of the *Charter*. Nevertheless, the Court of Appeal relied on it to support its conclusion that the *Constitution* may in some circumstances prevent a government from repealing a law it had no constitutional obligation to enact: see Case on Appeal at paras. 333-337.

significant legal rights onto groups (collective bargaining rights and human rights protection, respectively). In those limited circumstances, it may be that such an exclusion (whether by omission or repeal) may be contrary to the Constitution unless justified to the Court under s. 1. Neither of those situations involved "money" bills and the spending of public funds, unlike the legislation at issue in this case. Nor is this an exclusion case.

C. Courts Cannot Spend Public Money

29. The *Public Sector Restraint Act* limited government spending by curtailing increases to public sector wages. As such, the government was engaged in its definitive function -- determining fiscal priorities. That function finds it constitutional anchor in sections 54 and 55 of the *Constitution Act, 1867*, which enshrine the principle of no taxation without representation and no spending of public monies without representation.

30. Section 53 of the *Constitution Act, 1867* (along with s. 90 which makes that section applicable to the provinces) gives exclusive authority to the Legislative Assembly for both spending ("appropriating any part of the public revenue") and taxation ("imposing any tax or impost"):

> 53. Bills for appropriating any Part of the Public Revenue, or for imposing any Tax or Impost, shall originate in the House of Commons.
>
> 90. The following Provisions of this Act respecting the Parliament of Canada, namely, - the Provisions relating to Appropriation and Tax Bills, the Recommendation of Money Votes…shall extend and apply to the Legislatures of the several Provinces…[*mutatis mutandis*]

31. Section 54 of the *Constitution Act, 1867*, ensures that only a directly elected Legislature can impose a tax of its own accord. This is also stipulated in British Columbia by s. 47 of the *Constitution Act*, R.S.B.C. 1996, c. 66. Both provisions embody a critical component of our Constitution.

> In my view, the rationale underlying s. 53 is somewhat broader. The provision codifies the **principle of no taxation without representation,** by requiring any bill that imposes a tax to originate with the Legislature.
>
> (emphasis added)

Re Eurig Estate, [1998] 2 S.C.R. 565 at para. 30

See also: *Ontario English Catholic Teachers' Assn. v. Ontario (Attorney General)*, [2001] 1 S.C.R. 470 at para. 71

Westbank First Nation v. British Columbia Hydro and Power Authority, [1999] 3 S.C.R. 134 at para. 19

32. A corollary of the exclusivity of ss. 53 and 54 of the *Constitution Act, 1867*, is the principle that the judiciary does not have the power to order spending out of the public revenues. That power, constitutionally, resides in the hands of the Legislative Assembly and only through it may spending authority be delegated to the executive government, or to any other body.

Aucklands Harbour Board v. The King, [1924] A.C. 318 (JCPC) at 326-327

Attorney General of Canada v. *Stuart et al.,* (1996) 106 C.C.C. (3d) 130 (YTCA) at para. 113

British Columbia (Minister of Forests) v. Okanagan Indian Band 2001 BCCA No. 647 at paras. 34-36; aff'd [2003] 3 S.C.R. 371 at paras. 15 and 18

Hamilton-Wentworth (Regional Municipality) v. Ontario (Minister of Transportation), (1991) 78 D.L.R. (4th) 289 (Ont. C.A.) at 304; 2 O. R. (3d) 716

33. The Attorney General of British Columbia submits that the *Charter* did not bestow on courts the ability to order payment out of the public revenue beyond that expressly authorized or authorized by necessary implication by the Legislature. One cannot find in the words of s. 15 any intent by the framers to alter this fundamental tenet.

> I cannot accept that the framers of the *Charter* intended that the courts should have the power, whether by direct or indirect means, to subvert parliamentary control of the public purse.
>
> *R. v. Ho*, 2003 BCCA 663 at para. 70 (per Southin J.A. for herself)

> Courts are not the best qualified agencies to determine spending priorities for public funds: *Robinson*, *supra*, at 487 (C.C.C.); *Rain*, *supra*, at 192 (C.C.C.). Courts do not set, nor are they asked to set, elevated fees for

> doctors or other professionals such as nurses, accountants, or midwives. Courts do not set health care premiums, levels of taxation, sessional indemnities or jury fees.
>
> *R v Cai*, 2002 ABCA 299; [2003] 3 W.W.R. 423; [2002] A.J. No. 1521 (Q.L.) at para. 9

D. Strong Policy Reasons Support Incorporation of These Principles in s. 15

34. It is submitted that the Court of Appeal's decision is inconsistent with those constitutional principles discussed above. Its decision was not sufficiently mindful of the necessary implications of a decision forcing the government to spend money for a particular purpose, a purpose which the Legislature as a matter of public policy has decided should not be funded out of the Consolidated Revenue Fund. Or, at least, should not be funded retroactively.

1. The Constraining Effect on Public Policy Choices

35. The Attorney General submits the risk of finding an infringement of s. 15 in this case will be to constrain public policy choices. No matter how valid or important the goal underlying a court's decision on an alleged *Charter* infringement issue, in matters concerning the public purse, there are always competing interests which will suffer as a consequence of that decision. Those interests deserve recognition at the outset since they flow from the very nature of our democracy and the power vested in the Legislature to determine and order spending priorities.

36. This was perhaps best stated by Justice Esson of the British Columbia Court of Appeal when considering whether taxes paid under a statute subsequently held to be unconstitutional could be recovered by the taxpayer. The Court in that case refused to depart from the general law that such taxes were not repayable despite the elements of justice and equity that might make such a result seem desirable to the Court. Justice Esson observed (at paras. 107-108):

> The amount involved in these three actions is "only" something over six million dollars. In the modern scale of things, that will not have a major additional impact on the already sorry financial state of the Province. A few more schoolrooms and a few more hospital wards may have to be

> closed and a few roads may go unrepaired; or perhaps the matter will be dealt with by a further increase in the deficit so that future generations will bear the burden. The blow will, however, be greater than that inflicted by these cases. We are told that other large taxpayers, including one of the national railways, commenced action before the period of limitation expired and await the outcome of these actions to decide whether to go ahead. … Before us, it was suggested by counsel that the risk to the Province will end with those actions because the limitation period expired, at the latest, sometime in 1982. So those thousands or millions of other potential claimants cannot recover. The justice of that may not be apparent to them but, if the plaintiffs' thesis is correct, even those myriad claims may not be barred. The Limitations Act is a statute of British Columbia. Can the province invoke it to bar recovery of taxes? If the plaintiffs and Professor Hogg are right, surely not. Perhaps all those who have paid gasoline tax between 1923 and 1976 are entitled to recover. If the new constitutional ruling is as simple as it is said to be, I do not know what answer could be made to that. Laches could not be relied upon because that is, after all, a "common law" equitable doctrine which, as Professor Hogg puts it, the Province would be "powerless to enact" to bar recovery.
>
> I will not pursue these fancies further. The answer to them is, in my view, that the general law is applicable. The plaintiffs can recover only if they can satisfy the requirements of the action for money had and received, which are rooted in principles of justice and equity.

Air Canada v. British Columbia (1986), 30 D.L.R. (4th) 24 (B.C.C.A.) at paras. 107-108; [1986] 5 W.W.R. 385; 4 B.C.L.R. (2d) 356; [varied with no discussion on this point [1989] 1 S.C.R. 1161; S.C.J. No. 44 (Q.L.)

See also: *R. v. Prosper*; [1994] 3 S.C.R. 236; S.C.J. No. 72 at para. 31

37. There is also a very practical consideration. If the Court of Appeal is right, government lawyers are bound to advise their clients to be extremely careful in considering whether to implement any remedial measures (whether through legislation or not) to assist disadvantaged groups or individuals. Once the payments start or are even promised, there is a risk that those payments will not be subject to repeal according to the Constitution unless the government faces the kind of financial crisis Newfoundland was facing.

38. Governments cannot have second thoughts fiscally and withdraw. Most alarming, the electorate would be impotent to send a government to office to change that very program or promise.

39. Elected governments exercising prudent fiscal stewardship of limited public funds, which are never sufficient and for which there are always legitimate competing demands, would most likely want to avoid situations where spending priorities might become encased in constitutional concrete.

40. For those reasons, the Attorney General of British Columbia submits the Constitution itself requires these principles to be incorporated into the s. 15 analysis.

2. This Approach is Consistent with Existing s. 15 Jurisprudence

41. This approach does not diminish the crucial and important role s. 15 plays in our constitutional landscape. If the *Public Sector Restraint Act* itself contained discriminatory provisions beyond the simple repeal of pay equity obligations those other discriminatory provisions would fall to be examined through the *Law* lens for s. 15 violations.

S.E.I.U., Local 204, supra

42. But the legislation at issue here simply restored the *status quo ante* which, assuming for the sake of argument the worst possible case, might perpetuate a pre-existing discriminatory situation. If so, the complainants still have intact their *Charter* or human rights remedies to pursue against that *status quo ante* (see *Farrell, supra,* at paras. 34, 72 and 73).

43. More importantly, citizens have their democratic right to demand the government be held accountable for the choice to return to that situation. But unless the government, in repealing a contract or agreement, does so in a discriminatory manner, there ought not to be a s. 15 infringement.

> If this is so, it cannot be said that there is any legislative distinction involved as a first step in a s. 15(1) analysis. The effect of the repeal is that there is, as was the case before the enactment of the 1993 Act, no mandatory affirmative action law operating in the area of employment. This does not create or involve any distinction or any issue of equal protection of the law -- and the effect is not a distinction which results from an under inclusive law exemplified in such cases as *Eldridge* and *Vriend*.

Ferrell, supra, at para. 37

44. Realistically to hold otherwise would discourage government from ever enacting or promising measures that s. 15(2) was meant to encourage -- measures to ameliorate and remediate the situation of disadvantaged individuals. Indeed, the Ontario Court of Appeal acknowledged the importance of not "freezing" any government commitment.

> It would be ironic, in my view, if legislative initiatives such as the 1993 Act with its costs and administrative structure should, once enacted, become frozen into provincial law and susceptible only of augmentation and immune from curtailing amendment or outright repeal without s. 1 justification. If such were the case, it could have an inhibiting effect on legislatures enacting tentative, experimental legislation in areas of complex social and economic relations.

Ferrell, supra, at para. 37

45. If there is a constitutional obligation to enforce pay equity (and we say there is not), the only other realistic option for a government required to meet its obligation to be accountable to the electorate for spending, would be to reduce the wages of all male classified jobs to equal the wages of the female classified jobs. This would achieve pay equity between men and women by eliminating the gap between their wages. This is unlikely, however, to be an outcome desired by any one. However, with great respect, this is the corner that governments may be forced into if the effect of court decisions is to dictate spending priorities to the government and through it, to its citizens.

E. The Court Need Not Consider s. 1

46. It is the position of the Attorney General of British Columbia that this case should be resolved without resorting to s. 1. As discussed above, there is simply no infringement of s. 15 by s. 9 of the *Pubic Sector Restraint Act*.

47. However, since the Respondent has focussed much of its submission on s. 1, the Court may, in any event, wish to comment on the general approach to be taken to s. 1 in s. 15 cases. In that event, we support the submissions of the Respondent at paras. 32-43 and 48-103 of its Factum.

48. The Attorney General of British Columbia adds one general comment about the Section 1 analysis done by the Court of Appeal. At paras. 267 and 370, the Court of Appeal concludes it is required to apply reduced deference in section 1 to social science or other policy based evidence, relying on comments from this Court in *RJR-MacDonald Inc.* v. *Canada (Attorney General)*, [1995] 3 S.C.R. 199.

49. It should be recognized that an important distinguishing feature of the *RJR-MacDonald* case was the inability of the Court to access relevant evidence because the federal government invoked the absolute privilege contained in s. 39 of the *Canada Evidence Act*. This factor was clearly important to the Court.

> This omission is all the more glaring in view of the fact that the government carried out at least one study of alternatives to a total ban on advertising before enacting the total ban. The government has deprived the courts of the results of that study. The Attorney General of Canada refused to disclose this document and approximately 500 others demanded at the trial by invoking s. 39 of the Canada Evidence Act, R.S.C., 1985, c. C-5, thereby circumventing an application by the tobacco companies for disclosure since the courts lack authority to review the documents for which privilege is claimed under s. 39. References to the study were blanked out of such documents as were produced: Reasons at Trial, at p. 516. In the face of this behaviour, one is hard-pressed not to infer that the results of the studies must undercut the government's claim that a less invasive ban would not have produced an equally salutary result.
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> *RJR-MacDonald, supra,* at para. 166 (per McLachlin J. as she then was); see also paras. 100-101 (per La Forest J.)

50. The Attorney General submits these comments illustrate why this case should be distinguished from other s. 1 cases where s. 39 of the *Canada Evidence Act* has not been invoked. Rather than setting a higher threshold of proof for certain types of evidence, the Court was simply drawing an adverse inference consistent with the comments in *Babcock* v. *Canada (Attorney General)*, [2002] 3 S.C.R. 3 at para. 52:

> As to related information, if it has been voluntarily disclosed in other documents, then s. 39 does not apply and the documents must be produced. By contrast, the government is under no obligation to disclose related information contained in documents that have been properly certified under s. 39, but runs the risk that refusal may permit the court to draw an adverse inference.

PART IV: COSTS

51. The Attorney General does not seek costs and respectfully asks that costs not to be awarded against us.

PART V: ORDER REQUESTED

52. The Attorney General submits the appeal should be dismissed and the constitutional questions answered as follows:

1. Does s. 9 of the *Public Sector Restraint Act*, S.N.L. 1991, c. 3, infringe s. 15(1) of the *Canadian Charter of Rights and Freedoms*?

Answer: No

2. If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

Answer: Yes

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

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GEORGE H. COPLEY, Q.C., Counsel for
the Attorney General of British Columbia

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NEENA SHARMA, Counsel for
the Attorney General of British Columbia

Dated this 15th day of April, 2004.

PART VI: TABLE OF AUTHORITIES