## PART I - FACTS

1. This Intervenor, comprised of the Hospital Employees Union, the Health Sciences Association and the B.C. Government and Service Employees' Union (the "B.C. Health Care Unions") , adopts the Statement of Facts of the Appellant.

## PART II - ISSUES

2. The B.C. Health Care Unions submit that the *Public Sector Restraint Act* (the "Legislation") violates section 15 of the *Canadian Charter of Rights and Freedoms* (the "*Charter*") is not saved by section 1

## PART III - ARGUMENT

3. This case asks two important questions: (1) whether the Legislature infringed section 15 of the *Charter* when it authorized the Crown to pay persons doing male dominated jobs more than those performing female dominated jobs, for work of equal value; and (2) can the Crown's fiscal policies alone can justify the infringement of rights guaranteed under the *Charter*. The first question was answered in the affirmative by the arbitration panel and every judge in the Courts below and should similarly be answered in the affirmative by this Court.

4. The second question must be answered in the negative, if we are to take seriously our constitutional commitment to equality. That commitment becomes meaningless if it can be infringed because the price of treating our citizens with the dignity that the equality right ensures is considered too costly. Costs can never be a pressing compelling objective under section 1 of the *Charter*. Furthermore, to suggest that Courts can consider costs as an objective justifying an infringement of the equality guarantee (or any right or freedom) would require the Court to engage in an inquiry for which it is simply not suited and which is not appropriate if we are to maintain an appropriate separation between the legislative and judicial branches of government. If costs are relevant at all, it is at the remedial stage of the analysis, and perhaps in relation to minimal impairment. The Court ought never to allow legislation to operate which infringes section 15 when the only justification offered is that the Province claims it can not afford to treat its citizens with dignity. The government might have argued that because of the costs implications, this Court should suspend any declaration of invalidity in order to allow the government to consider if there are other avenues open to it to discharge its constitutional obligation in a manner which might have less financial impact. It has not made such an argument, and as result, we say the only option for this Court is to render the legislation of no force and effect.

**Section 15**

**Introduction**

5. The Respondent and the intervening Attorneys General assert, first, that there was no obligation to pay wages consistent with pay equity prior to the Province entering into the Pay Equity Agreement and second, that because of this, there can be no section 15 implications from legislation respecting obligations under that Agreement. We do not accept either of these assertions.

6. It must be recognized, and it is not and cannot be disputed, that in the period prior to 1988, the Province's pay scales reflected and reinforced gender discrimination. And it must be recognized that the Province's act of paying its workers certain wages is an act for which the Province is responsible and which is subject to *Charter* scrutiny. We submit that it is not self-evident that the Province was not constitutionally required to pay wages consistent with pay equity prior to 1988.

7. However, for the purposes of this Appeal, it is not necessary for the Court in this case to determine whether the Province's act of paying its employees discriminatory wages constituted a

breach of section 15 prior to 1988. That determination might be influenced by a number of factors. For example, it might be relevant to the analysis of substantive discrimination that neither the workers nor the Province knew, prior to 1988, the extent of the discrimination.

8. The situation is different after the Pay Equity Agreement is signed and the process which was undertaken under that Agreement has identified and quantified the prior discrimination. It is respectfully submitted that in assessing the purpose and effect of the Legislation, and whether it constitutes discrimination, this Court must have regard to the entire "social, political and legal context." In this case, the relevant context includes the fact that through the Pay Equity Agreement, the Province acknowledged that its pay practices constituted discrimination, and committed to remedy that discrimination. That fact is highly relevant for a contextual application of section 15.

***R. v. Turpin*, [1989] 1 S.C.R. 1296 ("*Turpin*") at para. 45**

9. A number of the intervening Attorneys General suggest that accepting this argument is the equivalent of a finding that the executive act of signing the Pay Equity Agreement constrains the Province in its ability to pass legislation. However, it is not the Act of signing the agreement, which constrains; it is the dictates of the *Charter*. The signing of the Pay Equity Agreement itself did not give rise to a brand new constitutionally protected entitlement - the right to equal treatment in employment arises from section 15(1) itself. However, once the Pay Equity Agreement has defined the extent of the ongoing discrimination and an agreed upon method of addressing it, the Province's refusal to pay the Pay Equity portion of its wage bill from 1988-1991 constitutes discrimination.

10. In the courts below, the section 15 debate has focused on the relationship between systemic discrimination suffered by workers in female dominated jobs and the discrete discrimination effected by section 9(3) the Legislation. The government has argued that the effect of the Legislation is simply to allow ongoing systemic discrimination to continue, and that this cannot constitute a discrete act of discrimination. The Court of Appeal held, and the Appellant seems to agree, that the Legislation creates discrimination anew, because the Pay Equity Agreement had already remedied the systemic discrimination. We submit that there is another way to consider this issue: the Legislation is a **positive** act of discrimination, but this discrimination can only be understood as such within the context of ongoing **systemic** discrimination. Moreover, the Legislation must be considered with regard to the relevant context - and a vital component of that context is the existence of the Pay Equity Agreement.

**Court of Appeal Reasons, Appellant's Record Vol. II, page 310**

11. Our submissions on section 15 will first address the pre-1988 context and will then address whether the Legislation itself breaches section 15 under the test set out in *Law*.

**There is No Dispute that the Pay Scales of the Province prior 1988 were discriminatory**

12. In the 1980s, the Union became concerned that the collective agreement included wage rates that reflected systemic discrimination against women. The health care sector in Newfoundland is 80% female. Pay equity studies have determined that the more female dominated a sector, the more undervalued the work. The union determined that it was a priority to address pay equity issues.

**Appellant's Record Vol. III, page 485**

13. There is no dispute that the parties to the Pay Equity Agreement agreed that it was aimed at "redressing systemic gender discrimination in compensation for work performed by employees in female dominated job classes." There is no dispute with the Union's evidence that the objective of the Agreement was "to establish if there was discrimination and what the quantum of discrimination was". The results of the joint study undertaken pursuant to the agreement demonstrated that there were "a significant number of female dominated classifications that were being undervalued and as such underpaid in the health sector." The government does not take issue with this finding.

**Appellant's Record, Vol. I, pages 4; Volume III pages 489 and 493**

14. There is no suggestion that the method of identifying and quantifying the discrimination was in any way flawed, or that pay equity should be addressed in some other manner (as was the case in *Ferrell*).

***Ferrel et al. v. Attorney General of Ontario*, [1998] O.J. No. 5074 (C.A.) (QL).**

**The Province was and is Responsible for Discrimination in Paying its Employees**

15. In the Courts below, it seems to have been accepted that until the Pay Equity Agreement was signed, the government had remained silent on the matter of pay equity and thus remained immune from review. However, as this Court recognized in *Dunmore*, the reason why courts do not normally review "legislative silence" is because it is accepted that areas in which the legislature has not acted are properly relegated to a "private sphere". Professor Hogg, on whom this Court relied in *Dunmore*, notes the critiques which have been made of this assumption. In any case, it seems clear that the Province's treatment of its employees was never a "private matter."

***Dunmore v. Ontario (Attorney General)*, [2001] 3 S.C.R. 1016 ("*Dunmore*") at para. 29; P.W. Hogg, *Constitutional Law of Canada*, 34-25 to 34-27.**

16. The Court made reference to this in the *SEIU* case. While holding that "the government of Ontario was under no obligation to enact the Pay Equity Act" the Court specifically stated that this finding was made "**Leaving aside any responsibility of government to eliminate systemic gender wage inequality in its own employees**...." (Emphasis added).

***Service Employees International Union, Local 204 v. Ontario (Attorney General) (1997)*, 35 O.R. (3d) 508 (Gen.Div.) ("*SEIU*")**

17. The manner in which the government deals with its employees is clearly subject to *Charter* review. We do not claim **in these submissions** that the content of collective agreements or the outcome of collective bargaining receives constitutional protection per se. That is not the issue before this Court in this case, although the question of whether and to what extent section 2(d) is implicated by legislation which, inter alia, voids collective agreements is the subject of another case which is presently working its way through the Courts: *Health Services and Support Facilities Sub-Sector Bargaining Association et al v. HMTQ,* 2003 B.C.S.C. 1379. Rather, we submit that the content of a collective agreement, or more generally the way the government pays its employees, is open to *Charter* review. In *Douglas College*, the Court found that the terms of a collective agreement violated section 15 rights on the basis of age. In this case, we submit that wages set out in a collective agreement can infringe the equality rights of the employees on the basis of gender.

***McKinney v. University of Guelph*, [1990] 3 S.C.R. 229 at 276-278; Also see *Douglas/Kwantlen Faculty Assn. v. Douglas College,* [1990] 3 S.C.R. 570 at 584-586.**

18. When the Province paid its employees in female dominated jobs less than those performing work of equal value in male dominated jobs, it engaged in a positive act and that act subjected these workers to differential treatment. This differential treatment may indeed have been part of a web of systemic discrimination faced by workers in female dominated jobs - and that web may have been made up, in part, of unconscious or conscious value judgements which tend to devalue women's work. But that does not mean that the Province is not responsible for its positive act. Whether or not paying such wages would constitute substantive discrimination under section 15, it would certainly constitute differential treatment under the first and likely the second step of the *Law* analysis.

***PSAC v. Canada*, [1991] C.H.R.D. No. 4. See also *CN v. Canada (Human Rights Commission)*, [1987] 1 S.C.R. 1114 at 1138-9.**

**The Nature of the Pre-1988 Differential Treatment**

19. As this Court has noted, the distinction between direct and indirect discrimination is malleable and largely a matter of characterization. The prior differential treatment by the Province

might be characterized as direct if it is seen as paying male dominated jobs based on their value and female dominated jobs as based on less than their value. Or it might be seen as adverse effect discrimination – if the government pays all of its employees based on "market wages", this fails "to take into account the claimant's already disadvantaged position within Canadian society resulting in substantively differential treatment between the claimant and others on the basis of one or more personal characteristics." The "already disadvantaged position" of these workers arises from the fact that they suffer systemic discrimination, which leads to devaluing of labour associated with women. The "substantively different treatment" results because these workers end up being paid less for their labour than it is worth. And this is clearly the result of the Province's act of paying them less.

> ***B.C. v. B.C.G.E.U*, [1999] 3 S.C.R. 3 at para. 27; *Law v. Canada (Minister of Citizenship and Immigration)*, [1999] 1 S.C.R. 497 *("Law")*, para 88.**

**The Legislation contravenes section 15**

20. In order to succeed on a section 15(1) claim, the Claimant must demonstrate that (1) the law imposes differential treatment between the claimant and others, in purpose or effect; (2) one or more enumerated or analogous grounds are the basis for the differential treatment; and (3) the law in question has a purpose or effect that is discriminatory in the sense that it denies human dignity or treats people as less worthy.

> ***Gosselin v. Quebec (Attorney General)*, [2002] 4 S.C.R. 429 ("*Gosselin*") at para. 17*; Law, supra,* para. 88**

21. In *Law*, Iacobucci, J. warned against applying a fixed and limited formula to the section 15(1) analysis. Instead, in order to "permit the realization of the strong remedial purpose of the equality provision," it is essential to have regard to the context of the claim and the purpose of the guarantee at each stage of the test.

> ***Law, supra*, at para. 88; *Gosselin, supra*, at para. 22.**

**The Legislation has imposed differential treatment**

22. We have explained that the Province subjected workers in female dominated jobs to differential treatment even prior to 1988. However, under the process agreed to in the Pay Equity Agreement, the discrimination which had been embedded in the wage rates became more defined

and transparent. In addition, as of 1988, the Province's contractual obligations to its employees included a promise to pay wages adjusted by pay equity.

23. When s. 9(3) of the *Public Sector Restraint Act* cancelled certain of the obligations under the Pay Equity Agreement, the differential treatment of workers in female dominated professions took on a new form. As a result of the Legislation, these workers, and only these workers, received lower wages for the period 1988-1991 **than they were entitled to under the terms of the collective agreement** (which included the Pay Equity Agreement). All of the Provinces' employees worked for the period from 1988-1991 on the understanding that they would be paid according to their work's value, and according to the collective agreement. Only those in female dominated jobs were denied that entitlement.

24. The Province's general restraint program may have impacted all public employees in one way or another, but only those in female dominated jobs had their accrued entitlements retroactively eliminated. It must be remembered that the obligation to pay wages consistent with pay equity, and the resulting entitlement to receive those wages, were established in 1988 when the parties entered into the Agreement. So, while the pay equity payment which was payable in 1991 has been characterized as "retroactive", it might be more accurate to characterize it as a payment which the government had been allowed to defer.

25. In effect, there is no difference between eliminating such an accrued entitlement and imposing a tax. The Respondent could have taxed the income of people who had worked in female-dominated jobs by $24 million, or it could have eliminated $24 million of their accrued entitlements. It chose the latter, but the effect is the same for those employees.

26. Because it is understood and accepted that the Pay Equity Agreement remedied pre-existing discrimination, the benefits under that agreement must be seen not as separate entitlement, but as part of the Province's wage bill, and the refusal to pay that part of the bill constitutes differential treatment. Again, this discrimination can be characterized as either direct (only female dominated jobs are denied the benefits of the Province's commitment to pay workers according to the agreed upon wage rates, or alternatively, according to the value of their work) or adverse effect

discrimination (all workers are denied pay equity but this has a substantively different impact on those in female dominated jobs because of the systemic discrimination which they suffer).

27. The fact that the effect of systemic discrimination must be taken into account when assessing whether the Province's positive act leads to discriminatory treatment does not mean that we are outside of the *Charter*'s scope. In the same manner that "the contribution of private actors to a violation of fundamental freedoms does not immunize the state from *Charter* review; rather, such contributions should be considered part of the factual context in which legislation is reviewed"; so should the existence of systemic discrimination be taken into account as a critical aspect of context.

***Dunmore, supra* at para. 26**

**Enumerated or Analogous Grounds**

28. The legislative distinction is based on the enumerated ground of sex. The fact that a few men who work in female-dominated jobs may be affected does not preclude a finding of discrimination on this ground.

***Symes v. Canada*, [1993] 4 S.C.R. 695.**

29. In *SEIU*, the court considered the repeal of the proxy approach to pay equity, which had the effect of making those women who work in very female dominated sectors unable to receive the benefit of pay equity. The court held that this was discrimination based on sex:

> The women affected by Schedule J are identified by the fact that they are predominantly women who do "women's work" in predominantly female workplaces, distinguishing characteristics which are clearly "closely related" to the enumerated ground of sex.
>
> ***
>
> It is submitted, on the basis of this group of characteristics, that Schedule J has a prejudicial effect on the enumerated ground of sex.

***SEIU, supra*, at pp. 288 and 289.**

30. The Pay Equity Agreement was entered into because the work done by women, and associated with women, has been historically undervalued. The Ontario Pay Equity Tribunal discussed the low value put on women's work in their decision in *Women's College Hospital and Ontario Nurses' Association*:

> Women are paid less because they are in women's jobs, and women's jobs are paid less because they are done by women. **The reason is that women's work - in fact, virtually anything done by women - is characterized as less valuable. In addition, the characteristics attributed to women are those our society values less.**

***Women's College Hospital and Ontario Nurses' Association*** **(1992), 3 P.E.R. 61 at paras. 16-17.**

31. A contextual approach reveals that pay equity is inextricably linked to women's equality in two ways. Firstly, certain work has thus been systemically undervalued **because of** its association with women and secondly, the undervaluing of this work contributes to women's economic and social inequality.

32. Prior to the signing of the Pay Equity Agreement, there might have been some confusion or ignorance as to whether or how or to what extent the wages were discriminatory. However, after the gender based discrimination is identified and quantified, when the Province refuses to follow the process agreed on to rectify it, it is clear that the Province's decision is being made in full cognizance that it will perpetuate and reinforce existing disadvantage based on sex.

33. Denying accrued entitlements on the basis that those entitlements arise from a pay equity process thus constitutes a distinction based on sex. As noted, there is no dispute that the purpose of the Pay Equity Agreement was to address gender based discrimination in compensation. It follows that singling out these accrued entitlements is a gender based exercise.

34. In the alternative, we submit that the legislative distinction is drawn on the analogous ground of those who work in female dominated sectors. Analogous grounds will be recognized when to do so will further the purpose of section 15.

***Corbiere v. Canada,*** **[1999] 2 S.C.R. 203 ("*Corbiere*").**

35. Membership in the occupational group of people who work in female dominated sectors exposes workers to prejudice and stereotyping - this is one of the aspects of the systemic discrimination faced by the group. Analogous grounds signal "a type of decision making that is suspect because it often leads to discrimination and denial of substantive equality." To the extent

that decisions have been made about workers on the basis that they do work associated with women, this has led to discrimination and the denial of substantive equality. It is, thus, a suspect marker.

***Corbiere, supra,* at para. 8.**

36. The relation between 'workers in female dominated jobs' and occupational status is much like the relation between the ground aboriginality-residence and the more general ground of residence. In *Corbiere,* the Court made it clear that aboriginality-residence had unique and distinguishing features: "The ordinary residence decisions faced by the average Canadians should not be confused with the profound decisions Aboriginal band members make to live on or off their reserves, assuming choice is possible." In a similar manner, the ordinary "occupation" decisions faced by the average Canadian should not be confused with the occupational decisions available to workers in 'women's jobs'. The latter are unique in terms of the constraints which pertain specifically to female dominated occupations and whose singularity is reflected in the numerous pay equity initiatives pursued by governments in Canada and elsewhere. Thus, to paraphrase *Corbiere,* by recognizing 'workers who work in female dominated occupational sectors' as a new analogous ground, no new water is charted in the sense of finding occupational status, in the generalized abstract, to be an analogous ground.

***Corbiere, supra*, at para. 15.**

37. Moreover, the ground of "workers in female dominated occupations" is in many respects what the Court in *Corbiere* refers to as an "embedded ground." Despite the fact that a small percentage of male workers also do "women's work" and thereby share the negative effects of devaluation and stereotyping, the analogous ground of "workers who do women's work" inheres in the enumerated ground of sex much in the way the analogous ground of pregnant women inheres in the ground of sex or the way the analogous ground of aboriginality-residence inheres in the ground of aboriginality.

***Corbiere, supra*, at para. 15.**

38. The analogous grounds analysis also includes a consideration of the nature of the characteristic in question. A characteristic must be at least constructively immutable such that "the

government has no legitimate interest in expecting us to change to receive equal treatment under the law." In *Corbiere*, for example, the court found that the government had no legitimate interest in expecting off reserve aboriginals to live on reserve to receive equal treatment under the law. Similarly, the government has no legitimate interest in expecting workers to quit their work in female dominated sectors in order to receive fair treatment.

***Corbiere, supra*, para. 13.**

39. Mutability also relates to the degree of choice in adopting that characteristic. As pay equity studies show, the occupational segregation which keeps women in certain jobs is systemic and widespread. The comments of the Attorney General of Alberta's at paras. 26 and 27 of its submissions demonstrate a failure to understand the nature of the systemic discrimination faced by these workers.

***Corbiere, supra*, at para. 62.**

**Substantive Discrimination**

40. The heart of the section 15 analysis considers whether a reasonable person in the Claimant's position would believe that the law treats them as less worthy of respect or value, that is, if it affects their dignity. In *Law*, this Court set out some of the relevant factors in determining if differential treatment based on an enumerated ground constitutes substantive discrimination. The application of these factors in this case reveals the substantive discrimination.

41. The study undertaken pursuant to the pay equity agreement demonstrates that the complainants have suffered pre-existing disadvantage - the benefit which were denied by the Legislation was aimed at redressing that very disadvantage. There is no correspondence with the actual needs of their workers - similar to the distinction made in *Lavoie*, "if anything, the distinction places an additional burden on an already disadvantaged group." The legislation has no ameliorative purpose aimed at protecting a vulnerable group.

***Lavoie v. Canada*, [2002] 1 S.C.R. 769 at para. 44 (*"Lavoie"*).**

42. The final factor set out in *Law* is the nature of the interest affected. While low wages in themselves will not always implicate a worker's dignity, when wages are depressed because the work is associated with women, and therefore inappropriately undervalued, dignity is harmed. The government had agreed that the pay equity payments were necessary to ensure that the labour of these workers and thus the workers themselves were appropriately valued. There can be no doubt that denying these payments will affect the workers' feelings of self-worth.

43. This court has recently confirmed that interests with an economic component will often have consequences for human dignity. In *Martin*, this Court stated:

> In many circumstances, economic deprivation itself may lead to a loss of dignity. In other cases, it may be symptomatic of widely held negative attitudes towards the claimants and thus reinforce the assault on their dignity.
>
> ***Nova Scotia (Workers' Compensation Board) v. Martin*, [2003] 2 S.C.R. 504 at para. 103 ("*Martin*").**

This is clearly the case here, where the whole point of addressing the wage gap was to address the effects of negative attitudes towards work done by women.

44. The Attorney General of British Columbia suggests that the Legislation's purpose and its underlying policy considerations are important factors within the substantive discrimination analysis. This Court rejected such an approach in *Lavoie* and held that considerations of purpose and policy only arise at the section 1 justification stage. This Court warned that it is " crucial not to elide the distinction between the claimant's onus to establish a *prima facie* section 15(1) violation and the state's onus to justify such a violation under section 1." The Court stated:

> the exigencies of public policy do not undermine the *prima facie* legitimacy of an equality claim. A law is not "non-discriminatory" simply because it pursues a pressing objective or impairs equality rights as little as possible. Much less is it "non-discriminatory" because it reflects an international consensus as to the appropriate limits on equality rights. While these are highly relevant considerations at the section 1 stage, the suggestion that governments should be encouraged if not required to counter the claimant's section 15(1) argument with public policy arguments is highly misplaced. Section 15(1) requires us to define the scope of the individual right to equality, not to balance that right against societal values and interests or other *Charter* rights.

***Lavoie, supra*, at para. 48.**

45. The effects of the Legislation are also very severe and localized. The only people affected are those who worked for the government in specific female dominated sectors between 1988 and 1991. It must be remembered that although pay equity payments commenced in 1991, those entitlements from 1988 to 1991 were lost forever. The workers who would have been entitled to those benefits have never caught up to where they would be now if the process under the Agreement had been complied with.

***Gosselin, supra,* para. 63.**

46. However, while these direct effects are localized, the overall impact of the Legislation may be more far-reaching. By reneging on its pay equity agreements, the government has sent a message: budgetary considerations justify paying workers in female dominated jobs less than the agreed upon value of their labour. This Court has acknowledged that such a message is more than purely symbolic in *Dunmore* and *PSAC* - the government has a leadership role in setting an example for employer/employee relations. The Respondent is an active agent within the ongoing context of systemic discrimination. It spoke one message: when times are tough, women can be paid less.

***Dunmore, supra,* at paras. 45 and 47; *Public Service Alliance of Canada v. Canada (Attorney-General)*, [1987] 1 S.C.R. 424 at 444-445("*PSAC*").**

**Section One**

47. The effect of section 9(3) is to take away, forever, the workers' entitlement to non-discriminatory wages for the period 1988-1991. It is not simply a "postponement" of pay equity. It is an absolute denial of fair wages for that period.

48. As noted above, the government does not suggest that the wage rates were not discriminatory during that period. Nor does the government suggest another method should be adopted for identifying or addressing that discrimination, other than the method set out under the Pay Equity Agreement. Rather, the government simply asserts that it was too expensive to pay the non-discriminatory wages.

49. In his decision, Marshall J.A. expressed significant concern about the Court overstepping its role, and usurping from the legislature the role of "ultimate arbitrator of the correctness of policy decisions by the elected branches of government." According to Marshall J.A., courts should only require governments to demonstrate that any limitation on *Charter* right is "reasonable", and this should be assessed not by reference to other alternatives, but simply upon an examination of the limit as set out in the legislation.

**Court of Appeal Reasons, para 348, Appellant's Record, Vol. II page 320**

50. With respect, Marshall J.A. has misconceived the nature of the section 1 analysis. It is submitted that it is Marshall J.A.'s approach, rather than the one endorsed in *Oakes* and subsequent cases, which would lead to a distortion of the fundamentals of the Constitution, including the separation of powers doctrine.

51. Under the terms of the Constitution itself, the government is required to do more than simply show that what it did was "reasonable". It must also demonstrate that the limitation on the rights is **justified.** We submit that as long as the *Oakes* test is properly applied, there is no conflict with the doctrine of separation of powers. The Constitution requires the Court to assess whether the government has met its section 1 burden. That burden is to demonstrate that the decision to limit rights is consistent with the principles and values which animate the Constitution.

***R. v. Oakes*, [1986] 1 S.C.R. 103 ("*Oakes*"); *M. v. H.*, [1999] 2 S.C.R. 3.**

52. The section 1 analysis is not simply a balancing of individual rights against the general interests of the public as whole. The language of section 1 itself requires that the only limitations on those rights which will be acceptable are those which can be justified in terms of the values of the *Charter* itself. In other words, there is an "identity of values" underlying both the rights and the acceptable limits on those rights.

> The judicial task is to monitor adherence by Canadian governments to their constitutional commitment to freedom and democracy in the second stage of the *Charter* argument, just as in the first, because the exclusive standard set for limits on enumerated rights and freedoms forwards the same values as does their entrenchment.
>
> ***

> The second stage of the *Charter* adjudication does not invite the state to rehearse in the judicial forum the entire range of considerations upon which the executive or the legislature acts. On the contrary, when the state argues the justifiability of its impugned policy, it urges the court to find consistency with a stable body of constitutional values and not an ad hoc equilibrium between the right and policy in issue. The judicial task is to discern if the impugned policy has risen to constitutional stature. By constraining other arms of government to the values encapsulated in the Constitutional, the courts carry out their traditional constitutional role.

**Lorraine Eisenstat Weinrib, "The Supreme Court of Canada and Section One of the *Charter*", [1988] 10 S.C.L.R. 469 ("Weinrib") at pages 494 & 506**

53. This Court explicitly recognized this role for the Court in *Vriend*:

> Because the courts are independent from the executive and legislature, litigants and citizens generally can rely on the courts to make reasoned and principled decisions according to the dictates of the constitution even though specific decisions may not be universally acclaimed. In carry out their duties, courts are not to second-guess legislatures and the executives; they are not to make value judgments on what they regard as the proper policy choice; this is for the other branches. Rather, the courts are to uphold the Constitution and have been expressly invited to perform that role by the Constitution itself.

***Vriend v. Alberta,* [1998] 1 S.C.R. 493 at para. 136 ("*Vriend*").**

54. It is because the Constitution requires the court to assess whether legislation is consistent with constitutional values, rather than the whole range of considerations which the government might take into account in enacting legislation, that matters such as cost and administrative convenience are not sufficient objectives for justifying limitations on *Charter* rights. Indeed, the whole point of rights is to provide certain types of interests with priority, even when it is not convenient for the majority to recognize these interests:

> By choosing to subordinate rights and freedoms to minimize cost or to maximize administrative simplicity, the state negates the very values that the *Charter* requires it to forward. The guarantee of rights requires all who exercise government power to accept the priority of certain values over routine advantages of economy or convenience. These values enjoy supreme law status in order to pre-empt the perception that their cost is too high. Rights appear to cost "extra" to those who think they do not need or benefit by them. That is a misconception. Those who wield political power protect themselves via the ballot box against the kind of state action – or inaction – that the Constitution affords as "rights" to others.

> The Court's various comments on section 1 justification, when read together, epitomize the view that convenience, commonly held preferences and usage are repugnant not only to the rights-guaranteeing aspects of the *Charter*, but moreover to section 1 justification. Once admitted as grounds for limiting rights, these ever-present grounds will always triumph over rights guarantees: it is all or never. Interests specified as rights and freedoms are by definition granted at the expense of the collectivity, to the extent that a majoritarian measure of cost, convenience and custom prevails. Indeed, the primary purpose of constitutionalizing these interests is to give them protection from the majority's ability to infringe them without political cost. If, despite constitutional entrenchment, these values remained defeasible to the tides of the political marketplace, then the effect of the entrenchment of the *Charter*, like the enactment of the *Canadian Bill of Rights*, would indeed be without legal meaning or institutional coherence. That conclusion would deny the supremacy of the Constitution – or to use Wilson J.'s terminology, render the rights guarantees illusory.
>
> **Weinrib, *supra*, at 489 and 491; see also *Singh v. Canada (Minister of Employment and Immigration)*, [1985] 1 S.C.R. 177 ("*Singh*")**

55. This Court has previously and consistently held that budgetary considerations are not a pressing and substantial objective for the purposes of section 1. This is because only those objectives which promote *Charter* values can qualify as "pressing and substantial." Budgetary considerations, in themselves, are neither consistent nor inconsistent with these *Charter* values. Budgets, in the constitutional context, are only a means to achieve substantive goals.

> ***Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3 ("*Judges' Reference*"); *Singh, supra*; *Martin, supra*; *M. v. H., supra*; *Oakes, supra*.**

56. Marshall J.A. suggests that while budgetary considerations may be a means to an end, it should be assumed that in this case budgetary considerations are linked to "such social goals as education, health and other social programs" which promote *Charter* values. It is respectfully submitted that this assertion must be rejected. A government can always draw a theoretical link between financial concerns and other programs, but it cannot be presumed that budget cuts will promote *Charter* values. If it was possible to make such an assumption, budgetary concerns would always be substantial and compelling.

57. Marshall J.A. recognizes that it would involve the courts in excessive micro-managing of the budget if they were asked to determine whether specific cuts in spending are truly linked to the broader goals which further *Charter* values. However it cannot be that the appropriate response is to simply presume that such linkage exists. Marshall J.A.'s seems to suggest that in this case budgetary concerns should be presumed to be linked to *Charter* values because the crisis was so severe that it is self-evident that *Charter* values would be harmed if the pay equity payment was made.

58. How can the Court go about evaluating such a claim? When is a deficit **too** serious? When is a *Charter* right **too** expensive? Marshall J.A. holds that the deficit was a "cold, hard economic reality"and a pure economic fact. However, issues raised by deficits, as well as the appropriateness or effectiveness of measures to address deficits, are not technical "facts", but rather have embedded in them a host of distributive and policy issues. For example, it does not "axiomatically follow" that restraints on specific expenditures are rationally related to curbing deficits, nor can it be assumed that the reallocation of funds from pay equity would be directed to objects which furthered *Charter* values. There is no consensus among experts regarding the cause or cure for deficits, or even whether they are really a significant issue.

> **Lisa Phillips, "The Rise of Balanced Budget Laws in Canada: Legislating Fiscal (Ir)responsibility" (1996) 34 *Osgoode Hall L.J.* 681-740 (QL). Also see L. Philips, "Discursive Deficits: A Feminist Perspective on the Power of Technical Knowledge in Fiscal Law and Policy" (1996) 11 C.J.L.S. 141 at pp 145, 153 - 167.**

59. If the Court were to accept budgetary concerns as pressing and substantial, it would be required to either defer completely to the legislature's choices in this realm (which is the end result of Marshall J.A.'s approach), or to engage in a review of fiscal policies which cannot be conducted at the level of principle. The first approach would distort the Constitution by rendering the guarantee of rights without meaning. The second would involve the Court in precisely the kind of second guessing and policy making which Marshall J.A. recognizes is inappropriate.

60. In *Singh*, there was a suggestion that if a cost was "prohibitive" it might be seen as an adequate justification for the limitation of rights under section 1. If this is the case, we adopt the distinction which Professor Weinrib draws between "prohibitive costs" and budgetary considerations. The former, she suggests, are expenses that the state on a global basis simply cannot bear. The latter arise

when the state asserts that there is an "excessive financial burden given prevailing resource allocations". It is clear that in this case we are dealing with the latter; there is no suggestion (and there could not be) that pay equity is a burden that the state will simply not be able to bear at any time.

***Singh, supra*; Weinrib, *supra***

61. As Chief Justice Lamer stated in the ***Judges' Reference***

> Three main principles emerge from this discussion. First, **a measure whose sole purpose is financial, and which infringes *Charter* rights, can never be justified under section 1** (*Singh* and *Schachter*). Second, financial considerations are relevant to tailoring the standard of review under minimal impairment (*Irwin Toy*, *McKinney* and *Egan*). Third, financial considerations are relevant to the exercise of the court's remedial discretion, when section 52 is engaged (*Schachter*). [Original emphasis.]

***Judges' Reference, supra*, at para. 284.**

62. We agree that cost considerations may become relevant at the remedial stage. This may be because, as in *Schachter*, the Court considers extending a benefit that is not constitutionally required to be given to anyone - and cost may be relevant in determining if courts should presume that the legislature would have provided that benefit to all if it was understood it could not be provided to only some. In the case at bar, cost considerations might have been relevant if the government had argued that the court should suspend any declaration of invalidity in order to enable the government to design a less expensive way of addressing the infringement.

*Schachter v. Canada*, [1992] 2 S.C.R. 679 at 709-710

63. However, even at the remedy stage the burden is on the Respondent to establish that the situation is one of sufficient gravity that the remedy should be suspended. In the case at bar, Marshall J.A. seems to simply accept the government's characterization of the deficit as "horrendous" as sufficient to establish something akin to an emergency. This is not sufficient.

64. With respect to the proportionality requirements, Marshall J.A.'s suggestion that the courts must not consider alternatives other than those policies put forward by the government must be rejected. A review of whether there were other alternatives open to the government is critical to the determination of whether rights have been respected. While statements in Hansard may be

relevant to that inquiry, there is no reason why the court's consideration should be limited to this evidence. If there was a clearly less rights intrusive way of achieving the objective, it is appropriate for the government to be required to demonstrate why it was not pursued. Government officials who may be involved in drafting or designing legislation may be the best placed to provide evidence on what alternatives were available, and what their effects would have been.

65. Marshall J.A.'s approach would turn the minimal impairment inquiry on its head - rather than exploring whether the legislature took adequate care to limit rights as little as necessary, Marshall J.A. would hold that it is sufficient if rights are limited somewhat less than they might have been under another option.

66. Marshall J.A.'s approach to section 1 is informed by his approach to constitutional rights, set out at para. 245 of his judgement. With respect, there is no basis for the suggestion that the Courts' role is limited to protecting individuals from inadvertent encroachments on their rights - the protection of the *Charter* extends to all encroachments that cannot be justified. This does not, however, involve any presumption that government is acting in an unscrupulous manner.

67. In *Vriend*, this Court stated that the "*Charter* has given rise to a more dynamic interaction among the branches of government." The court noted that there is a "dialogue" which occurs between the branches of government, and that section 33 "establishes that the final word in our constitutional structure is in fact left to legislature and not the courts." Similarly, Weinrib notes:

> The *Charter* assigns institutional responsibilities according to the strengths and weaknesses of courts and legislatures. Courts of law ... are to deliberate on questions of rights and limits constrained to supreme law values; legislatures shoulder the political responsibility for denial of rights under conditions that intensify the democratic function.
>
> **Weinrib, See also *Vriend, supra.***

68. The AGBC's claim that the "Courts Cannot Spend Government Money" is easily answered: the Courts are not doing or being asked to do that. The Court is simply being asked to rule on the constitutionality of legislation. If the Legislature distributes benefits, whether they be old age security (*Egan*), medical services (*Eldridge*) or, as here, employment benefits, in manner that unjustifiably

discriminates contrary to the *Charter*, then the Court has a constitutional duty to render such laws as being of no force and effect. Nothing in sections 53 and 54 of the *Constitution Act, 1867* is inconsistent with or overrides that duty. Whatever the actual appropriation in this case (it is likely for an amount of money rather than for a particular manner of its distribution) it would be quite unprecedented were the Newfoundland government not to heed the declaration of this Court. If it chose not to appropriate sufficient funds to ensure that its laws comply with the Constitution then the Court will do what it must do to enforce the Constitution. The AGBC seems to have forgotten that it is neither the Legislature nor the Courts that are supreme; it is the Constitution. But it is for the Court to enforce the Constitution above all else.

***Doucet-Boudreau v. Nova Scotia (Minster of Education)*** **[2002] 3 SCR 3.**

69. Likewise the AGBC's claim that any finding of a section 15 infringement would "constrain public policy choices" ignores the vital distinction between constitutional policy choices and those that are unconstitutional and as to the latter, we say (respectfully) "good riddance". Finally, there is no merit to their attempted in terrorem claim that "the electorate would be impotent to send a government to office to change [a]... program or promise". The specifics of policies and programs may always change, but the right to equality is no more a matter for the ballot box than it is for the balance sheet.

## PART IV - SUBMISSIONS CONCERNING COSTS

70. The B.C. Health Care Unions are not seeking costs in this matter and submit that no order for costs should be made against them.

## PART V - ORDER REQUESTED

71. The B.C. Health Care Unions respectfully request that the appeal be allowed.

All of which is respectfully submitted this 3rd day of May, 2004

**COUNSELS' SIGNATURES**

JOSEPH J. ARVAY, Q.C.

CATHERINE J. PARKER

## PART VI
## TABLE OF AUTHORITIES

**PARAGRAPH NO(S).**

**SECONDARY SOURCES**