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## One Step Forward, Two Steps Back? Substantive Equality, Systemic Discrimination and Pay Equity at the Supreme Court of Canada

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# One Step Forward, Two Steps Back? Substantive Equality, Systemic Discrimination and Pay Equity at the Supreme Court of Canada

Fay Faraday\*

## I. INTRODUCTION

In 2018, 31 years after the equality rights guarantee in the *Canadian Charter of Rights and Freedoms* took effect, women won their first Supreme Court of Canada (SCC) appeal based on sex discrimination under section 15 of the Charter.<sup>1</sup> This historical “first” was delivered in *Quebec (Attorney General) v. Alliance du personnel professionnel et technique de la santé et des services sociaux*.<sup>2</sup> The Court vindicated women’s long-standing entitlement to non-discriminatory pay at work by striking down provisions of Quebec’s *Pay Equity Act* (PEA) which allowed identified sex discrimination in pay to go unrectified. The SCC had ruled previously on five section 15 appeals alleging sex discrimination against women. All five claims failed. In only one did the

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<sup>1</sup> Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter “Charter”].

<sup>2</sup> [2018] S.C.J. No. 17, 2018 SCC 17 [hereinafter “*Alliance*”].

Court even find a section 15 violation before dismissing it as justifiable under section 1 of the Charter.<sup>3</sup> Until 2018, the only successful section 15 sex discrimination cases at the SCC had been brought by men.<sup>4</sup> *Alliance* thus marks a watershed. An unsuccessful companion pay equity appeal, *Centrale des syndicats du Québec v. Québec (Attorney General)*,<sup>5</sup> was released the same day. Together the rulings plant seeds from which a more rigorous substantive equality analysis could grow to confront systemic discrimination. But celebration should remain tempered because the two cases simultaneously blaze as warning signs of the unrelentingly unresolved fractures that lie at the foundation of section 15 jurisprudence.

Three decades after its first Charter equality ruling, *Law Society British Columbia v. Andrews*,<sup>6</sup> the SCC continues to wrestle with the most basic equality concepts: What is the difference between formal equality and substantive equality? What is systemic discrimination? What is the role of section 15(2)? Can violations of women's sex equality rights be justified in a free and democratic society under section 1 without violating the section 28 commitment that all rights and freedoms in the Charter are guaranteed equally to men and women?

Since *Andrews*,<sup>7</sup> the Court has made at least seven foundational renovations to the section 15 legal test and sustained a four-year period from 1995 to 1999 during which there was no majority position

<sup>3</sup> *Newfoundland (Treasury Board) v. Newfoundland and Labrador Assn. of Public and Private Employees (N.A.P.E.)*, [2004] S.C.J. No. 61, 2004 SCC 66 (S.C.C.) found provincial restrictions on pay equity violated s. 15 but ruled the violation justifiable in the existing financial circumstances. Sex discrimination cases brought by women that were dismissed at the s. 15 stage were: *Symes v. Canada*, [1993] S.C.J. No. 131, [1993] 4 S.C.R. 695 (S.C.C.); *Native Women's Assn. of Canada v. Canada*, [1994] S.C.J. No. 93, [1994] 3 S.C.R. 627 (S.C.C.); *Thibaudeau v. Canada*, [1995] S.C.J. No. 42, [1995] 2 S.C.R. 627 (S.C.C.); *Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia*, [2007] S.C.J. No. 27, [2007] 2 S.C.R. 391 (S.C.C.), succeeded on the Union's s. 2(d) Charter challenge but the s. 15 claim was dismissed in just nine sentences (paras. 164-167). Other equality rights cases have succeeded under s. 15 in ways that advance equality for women; however these successful cases before *Alliance* were argued as discrimination based on grounds *other than* sex, including disability, marital status, and civil status.

<sup>4</sup> *Benner v. Canada (Secretary of State)*, [1997] S.C.J. No. 26, [1997] 1 S.C.R. 358 (S.C.C.); *Trociuk v. British Columbia (Attorney General)*, [2003] S.C.J. No. 32, [2003] 1 S.C.R. 835 (S.C.C.).

<sup>5</sup> [2018] S.C.J. No. 18, 2018 SCC 18 (S.C.C.) [hereinafter "*CSQ*"].

<sup>6</sup> [1989] S.C.J. No. 6, [1989] 1 S.C.R. 143 (S.C.C.).

<sup>7</sup> This recitation of jurisprudential about-faces is updated from my book chapter: Fay Faraday, "Working Towards Equality" in *Unions Matter: Advancing Democracy, Economic Equality and Social Justice*, Matthew Berens ed. (Toronto: Between the Lines, 2014), at 165. See also Jennifer Koshan and Jonette Watson Hamilton, "The Continual Reinvention of Section 15 of the Charter" (2013) 64 U.N.B.L.J. 19-53.

whatsoever on the legal test.<sup>8</sup> That interregnum was followed by 19 years during which three core equality concepts were adopted by a unanimous or majority Court, only to be explicitly rejected in very short order.<sup>9</sup> These reversals were then situated within a new characterization of the relationship between sections 15(1) and 15(2) of the Charter, only to have the Court restore the original relationship a decade later.<sup>10</sup> With every section 15 case, the Court states the legal test for equality rights with a slightly different nuance, leaving litigators and scholars alike struggling to parse the significance, if any, of minute variations in wording. Despite strong analysis in the 2018 majority judgments, however, the jurisprudential restlessness threatens to continue as both appeals were decided by narrow margins<sup>11</sup> in which the majority and dissent again applied mutually incompatible understandings of the four basic equality concepts identified above.

This perpetual instability makes equality litigation extremely unpredictable. It also invites litigants to repeatedly contest section 15's core principles. The meaning of equality is thus always up for debate which undermines social discourse about and commitment to equality as

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<sup>8</sup> In the Court's 1995 equality rights trilogy, the nine judges between them generated three distinct legal tests, one with a fourth variation. No test secured majority support: *Egan v. Canada*, [1995] S.C.J. No. 43, [1995] 2 S.C.R. 513 (S.C.C.); *Miron v. Trudel*, [1995] S.C.J. No. 44, [1995] 2 S.C.R. 418 (S.C.C.); *Thibault v. Canada*, [1995] S.C.J. No. 42, [1995] 2 S.C.R. 627 (S.C.C.). This discordance persisted until the Court's unanimous decision in *Law v. Canada (Minister of Employment and Immigration)*, [1999] S.C.J. No. 12, [1999] 1 S.C.R. 497 (S.C.C.), which essentially confirmed and elaborated on the original *Andrews* test (*Law Society British Columbia v. Andrews*, [1989] S.C.J. No. 6, [1989] 1 S.C.R. 143 (S.C.C.)).

<sup>9</sup> In 1999 *Law v. Canada, id.*, introduced consideration of whether "human dignity" was violated; that concept was explicitly rejected nine years later in *R. v. Kapp*, [2008] S.C.J. No. 42, 2008 SCC 41 (S.C.C.) [hereinafter "*Kapp*"]. In 2004, *Hodge v. Canada (Minister of Human Resources Development)*, [2004] S.C.J. No. 60, 2004 SCC 65 (S.C.C.), introduced "mirror comparators"; that concept was explicitly rejected seven years later in *Withler v. Canada (Attorney General)*, [2011] S.C.J. No. 12, 2011 SCC 12 (S.C.C.). In 2008, *Kapp* rejected the "human dignity" test, but introduced a discrimination test focused narrowly on "stereotype and prejudice"; that test was explicitly rejected seven years later in *Quebec (Attorney General) v. A*, [2013] S.C.J. No. 5, 2013 SCC 5 (S.C.C.).

<sup>10</sup> *Kapp, id.*, introduced a framework by which "if the government relies on s. 15(2) to defend the distinction" identified in the first step of the s. 15(1) test, "the analysis proceeds immediately to whether the distinction is saved by s. 15(2)": *Alberta (Aboriginal Affairs and Northern Development) v. Cunningham*, [2011] S.C.J. No. 37, 2011 SCC 37, at paras. 43-44 (S.C.C.). Ten years later, *Quebec (Attorney General) v. Alliance du personnel professionnel et technique de la santé et des services sociaux*, [2018] S.C.J. No. 17, 2018 SCC 17, at para. 39 (S.C.C.), rejected the notion that s. 15(2) is a stand-alone defence to s. 15(1) claims.

<sup>11</sup> *Alliance* was decided by a 6-3 majority. In *CSQ* the Court ruled 5-4 that s. 15 was violated, but the s. 15 majority split 4-1 in ruling the violation was justified under s. 1. Ultimately, eight judges upheld the law as constitutional.

a fundamental right. Two government-led legal processes in the immediate wake of *Alliance* and *CSQ* bear witness to this. Just five months after *Alliance*, a federal pay equity law was introduced<sup>12</sup> which included provisions negating legal principles that the SCC had just enunciated and which replicated provisions previously struck down as unconstitutional.<sup>13</sup> Meanwhile, in pay equity litigation, the Ontario Attorney General argued that reliance on the two SCC pay equity rulings was “misplaced and unhelpful” even though they addressed substantially the same legal issues that were at stake in Ontario.<sup>14</sup> The federal statute’s failure to reflect current legal principles, and the extreme formalism of Ontario’s radically narrow approach to constitutional precedent, both signal an abiding resistance to equality in practice. They raise serious grounds to question whether, in a period of intensifying political polarization, the federal and provincial governments have stopped engaging in the “Charter dialogue” when it comes to equality rights.<sup>15</sup> While *Alliance* marks one step forward in equality jurisprudence, these subsequent government actions may mark two steps backwards for women’s equality rights in practice.

Part II of this article provides an orientation to the socio-economic context of the gender pay gap, the elements of that gap which are targeted by pay equity, and the evolution of the right to equal pay for work of equal value that is enshrined in pay equity laws.

Part III provides an overview of *Alliance* and *CSQ*. The cases, respectively, address women’s right to an enduring remedy for systemic sex discrimination and women’s access to pay equity remedies in female-dominated workplaces.

Part IV grapples with the enduring fault lines in the jurisprudence. In examining the four foundational questions about formal versus substantive equality, systemic discrimination, the role of section 15(2),

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<sup>12</sup> *Pay Equity Act*, being Division 14 of *Budget Implementation Act 2018, No. 2*, S.C. 2018, c. 27 [hereinafter “Federal PEA”].

<sup>13</sup> *Quebec (Attorney General) v. Alliance du personnel professionnel et technique de la santé et des services sociaux*, [2018] S.C.J. No. 17, 2018 SCC 17 (S.C.C.); *Syndicat de la fonction publique c. Québec (Procureur général)*, 2004 CanLII 76338 (Que. C.S.).

<sup>14</sup> Factum of the Intervener, The Attorney General of Ontario in *Ontario Nurses’ Association v. Participating Nursing Homes; Service Employees International Union Local 1 v. Participating Nursing Homes*, Ontario Superior Court of Justice (Divisional Court), Court File Nos. 362/16, 364/16, 444/16 and 445/16 at para. 68 and 95-98 (on file with the author).

<sup>15</sup> Peter W. Hogg and Allison A. Bushell, “The Charter Dialogue between Courts and Legislatures (Or Perhaps the Charter of Rights Isn’t Such a Bad Thing after All)” (1997) 35 *Osgoode Hall L.J.* 75-124.

and an equality lens on section 1, the article confronts the discomfort that chafes beneath the Court's declaration that, while cherished, equality is "perhaps the Charter's most conceptually difficult provision".<sup>16</sup> Part IV uses *Alliance* and *CSQ* to speak to the silences in the jurisprudence — the obdurate refusal to speak about power — that prevent a consistent analysis of how systemic discrimination operates.

Part V examines the fragility of section 15's protection in the face of political resistance to the principle of substantive equality. It uses the federal *Pay Equity Act* and Ontario's litigation techniques to reflect on this tension and its implications for section 15's future.

## II. CONTEXT: THE GENDER PAY GAP IN CANADA<sup>17</sup>

Systemic sex discrimination that suppresses women's pay has long been documented and condemned in Canada. As early as 1984, Rosalie Abella J.'s landmark *Equality in Employment* Royal Commission Report stated that the fact systemic sex discrimination lowers women's pay is "one of the few facts not in dispute in the 'equality' debate".<sup>18</sup> Yet,

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<sup>16</sup> *Law v. Canada (Minister of Employment and Immigration)*, [1999] S.C.J. No. 12, [1999] 1 S.C.R. 497, at para. 2 (S.C.C.).

<sup>17</sup> While this article follows the structure of pay equity legislation which speaks of discrimination between "female-" and "male-" dominated jobs, the Author recognizes that gender is fluid and not confined to a rigid binary of female/male. Human rights statutes in every Canadian jurisdiction protect against discrimination based on gender identity and gender expression: see, for example, *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, s. 3(1); *Ontario Human Rights Code*, R.S.O. 1990, c. H.19, ss. 1 through 7; cf. *Saskatchewan Human Rights Act, 2018*, S.S. 2018, c. S-24.2, s. 2(1), which lists gender identity as a prohibited ground of discrimination but not gender expression. Research is beginning to document workplace discrimination — including pay discrimination — based on gender identity and gender expression: *We've Got Work to Do: Workplace Discrimination and Employment Challenges for Trans People in Ontario*, 2:1 *Trans Pulse E-Bulletin* (May 30, 2011); Ishani Nath, "For transgender women the pay gap is even wider", *Macleans* (February 8, 2018), online: <<https://www.macleans.ca/society/for-transgender-women-the-pay-equity-gap-is-even-wider/>>. To date, however, pay equity analysis struggles to break out of the female/male binary because the sex discrimination that results in unequal pay has been driven by practices which, over centuries, have institutionalized the devaluation and marginalization of work done by those who identify as women based on norms and prescribed gender roles anchored in a female/male binary. Similarly, the statistical and socio-economic data which establish an evidence-based correlation between female-dominance of occupations and suppressed pay reflects that binary. Parallel indepth and long-term research documenting similar correlations between occupations and suppressed pay on other grounds — including race, Indigeneity, disability, sexual orientation, gender identity and gender expression — has not yet been conducted, owing in large part to a lack of data that disaggregates statistics on these grounds. A critique of the limits of this analysis is beyond the scope of this article but warrants further examination.

<sup>18</sup> Justice Rosalie Silberman Abella, *Equality in Employment: A Royal Commission Report* (Canada: 1984), at 232.

despite laws that have prohibited sex discrimination in pay for generations, a large and measurable systemic gender pay gap continues to impoverish women relative to men across the country and across the labour market.

Various metrics are used to measure the gender pay gap between women's and men's earnings. The size of the gap differs whether it is measured by hourly pay, full-time/full-year pay or annual earnings; but on all measures women are paid significantly less than men.<sup>19</sup>

Annual earnings provide the most realistic picture of how much less money women have than men to meet their needs. The gender pay gap annual earnings measure also captures the many ways that systemic sex discrimination resonates in women's pay, including: (a) prejudicial treatment in hiring, training and promotions; (b) sex-based occupational segregation; (c) devaluation of women's skills and labour in traditional "female" occupations; (d) women's overrepresentation in part-time, casual, seasonal and temporary help agency work; (e) women's overrepresentation in minimum wage work; (f) gender-based violence that drives women from jobs and/or occupations; (g) barriers to unionization which arise because generations-old labour legislation was designed around male full-time work patterns; and (h) women's disproportionate burden in performing unpaid care work.<sup>20</sup>

Canada's 2016 Census data<sup>21</sup> on women's and men's annual earnings reveal that on average, women across Canada earn 32 per cent less than men. This gap is larger for women with disabilities (56%), immigrant women (55%), Indigenous women (45%) and racialized women (40%). The precise wage gap varies by province,<sup>22</sup> but the existence of the gender pay gap, and its pattern of exacerbation through intersecting forms of discrimination persists across all provinces.<sup>23</sup> In 2019, Canada

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<sup>19</sup> See, for example, Ontario, *Final Report and Recommendations of the Gender Wage Gap Steering Committee*, prepared for the Minister of Labour and Minister for Women's Issues (2016) [hereinafter "*Gender Wage Gap Report*"], at 17-18.

<sup>20</sup> Ontario Equal Pay Coalition, *Fact Sheet #1: Facts and Figures about the Gender Pay Gap* (2019).

<sup>21</sup> These are the most current comprehensive statistics at the time of writing.

<sup>22</sup> Alberta has the largest gender pay gap at 41 per cent: see Kathleen Lahey, *Equal Worth: Designing Effective Pay Equity Laws for Alberta* (Parkland Institute, 2016), at 3.

<sup>23</sup> Canada, Census (2016), Annual Earnings. See Sheila Block and Grace-Edward Galabuzi, *Persistent Inequality: Canada's Colour-coded Labour Market* (Canadian Centre for Policy Alternatives (December 2018)) on the intersection of race and sex in suppressing wages. Their analysis reveals an earnings hierarchy in which non-racialized men are the highest earners followed in descending order by racialized men, non-racialized women and finally racialized women.

has the seventh largest gender pay gap out of the 35 countries in the OECD (Organisation for Economic Co-operation and Development) and the second largest gender pay gap in the G7.<sup>24</sup>

The gender pay gap is pervasive. As economist Kate McInturff revealed, “women are paid less than men in almost every occupational category measured by Statistics Canada (469 of 500 occupations if you want to be precise).”<sup>25</sup> Women are paid less at every age group in the workforce. The gap is lowest at ages 15 to 24 (18%); peaks at ages 25 to 34 (39.6%); then remains between 33 per cent and 38 per cent throughout the rest of women’s working lives. A lifetime of suppressed wages leads to a 34 per cent gender gap in women’s pensions.<sup>26</sup> Women receive a lower return on their educational investment than men as women are paid less than men at every level of educational attainment from high school (27%), through apprenticeship and trades (39.6%), to undergraduate education (35%).<sup>27</sup> Women are paid less than men at every income decile, except for the lowest 10 per cent of earners where women receive \$190 more per year than men.<sup>28</sup>

This gender pay gap persists despite multiple legal commitments to women’s right to discrimination-free pay. As observed by Abella J. in her Royal Commission report:

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<sup>24</sup> OECD (2019), *Gender wage gap (indicator)*, online: <10.1787/7cee77aa-en>. The OECD measures the gender pay gap using the median annual earnings of women and men who work full-time.

<sup>25</sup> Kate McInturff, *Women’s Work: What is it Worth to You?* (Canadian Centre for Policy Alternatives: January 1, 2016).

<sup>26</sup> Ontario, Ministry of Labour, *Closing the Gender Pay Gap: Background Paper* (October 2015) [hereinafter “Ontario, *Closing the Gender Pay Gap*”], at 22-23. See also, Girl Guides of Canada, *Girls on the Job: Realities in Canada* (2019) which partnered with Ipsos on a survey which revealed that girls in high school earn on average \$3 less per hour than boys and were streamed into traditionally female care work. See also, Statistics Canada, *Income of individuals by age group, sex and income source, Canada, provinces and selected census metropolitan areas*, Table 11-10-0239-01 (formerly CANSIM 206-0052); and Statistics Canada, *The Economic Well-Being of Women* (2018), Catalogue 89-503-X, Tables 3a and 3b.

<sup>27</sup> Ontario, *Closing the Gender Pay Gap*, *id.*, at 22.

<sup>28</sup> Mary Cornish, *Every Step You Take: Ontario’s Gender Pay Gap Ladder* (Canadian Centre for Policy Alternatives, 2016). Moving through the income ladder, women faced the following gender pay gaps at the respective deciles: the lowest 20 per cent of earners 15 per cent; in the lowest 30 per cent of earners: 27 per cent; mid-range deciles: 25 per cent; top 10 per cent of earners: 37 per cent gap. Meanwhile, a study of women who are CEOs and top executives of Canadian corporations face a 32 per cent pay gap relative to their male colleagues: David Macdonald, *Double-Paneled Glass Ceiling: The Gender Pay Gap at the top of Corporate Canada* (Canadian Centre of Policy Alternatives, January 2019).

the [pay] gap persists through good times and bad times. It persists in the face of society's commitment to justice. It persists in defiance of the law.<sup>29</sup>

Canada's legal obligations to eliminate sex-based pay discrimination exist at both the international and domestic level. In 1919, the International Labour Organization recognized women's right to equal pay for work of equal value in its founding Constitution.<sup>30</sup> As a member of the ILO, Canada is bound by this Constitution. The ILO's 1951 *Equal Remuneration Convention* (No. 100) which elaborated on this right was ratified by Canada in 1972.<sup>31</sup> Canada has ratified successive international human rights instruments — including the *Convention on the Elimination of All Forms of Discrimination against Women*<sup>32</sup> and the *Beijing Declaration and Platform for Action*<sup>33</sup> — with increasingly prescriptive directions exhorting governments to take positive action, including legislative action, to achieve equal pay for work of equal value. In 1998, the ILO declared women's right to equal pay for work of equal value one of its eight *Fundamental Principles and Rights at Work*.<sup>34</sup>

These international human rights commitments<sup>35</sup> have influenced Canada's legislative action toward increasingly proactive obligations to

<sup>29</sup> Justice Rosalie Silberman Abella, *Equality in Employment: A Royal Commission Report* (Canada: 1984), at 232.

<sup>30</sup> International Labour Organization, *Constitution* (Preamble).

<sup>31</sup> Adoption: Geneva 34th ILC Session (June 29, 1951); entry into force May 23, 1953; ratified by Canada November 16, 1972.

<sup>32</sup> December 18, 1979, 1249 UNTS 13 (entered into force September 3, 1981; accession by Canada December 10, 1981), at article 11 [hereinafter "CEDAW"].

<sup>33</sup> United Nations, *Report of the Fourth World Conference on Women*, Beijing, China (1995) chap. 2, resolution 1, annex 1 (Beijing Declaration) and annex II (Beijing Platform for Action) Strategic Objectives F.1, para. 165(a), F.2, para. 166(l), F.5, para. 178(a), (k), (l).

<sup>34</sup> International Labour Organization (General Conference, 86th Sess., Geneva, June 1998).

<sup>35</sup> Canada has ratified numerous international instruments committing it to equal pay for work of equal value. But the most recent UN Periodic Reviews of Canada's compliance with the *International Covenant on Civil and Political Rights*, the *International Covenant on Economic, Social and Cultural Rights* and CEDAW each expressly highlight the reviewing committee's concerns about the persistent gender pay gap across Canada and its exacerbated impact on Indigenous women, racialized women and low income women; the persistence of horizontal and vertical sex segregation of occupations; and a lack of affordable childcare that perpetuates sex segregation of occupations, the gender pay gap and women's continuing primary role in unpaid care work: UN Committee on Economic, Social and Cultural Rights, *Concluding observations on the sixth periodic report of Canada*, March 23, 2016, E/C.12/CAN/CO/6 at 5, para. 21; UN Human Rights Committee, *Concluding observations on the sixth periodic report of Canada*, August 11, 2016, CCPC/C/CAN/CO/6, at 2, para. C7; UN Committee on the Elimination of Discrimination Against Women, *Concluding observations on the combined eighth and ninth periodic reports of Canada*, November 25, 2016, CEDAW/C/CAN/CO/8-9, at 14, para. 38(a) and (b).

close the gender pay gap<sup>36</sup> using the legal standard of “equal pay for work of equal value”. “Pay equity” is the term of art which refers to this specific legal standard.

In 1951, the same year ILO Convention No. 100 was adopted, Ontario introduced the *Female Employees Fair Remuneration Act* — Canada’s first statute to protect women’s right to equal pay without discrimination based on sex. Between 1952 and 1975, the federal government and remaining provinces followed suit. These “first wave” equal pay guarantees — now incorporated into employment standards legislation — protect women’s right to be paid the same as men doing *substantially the same work*.

The “second wave” of protections came as provincial and federal human rights statutes were adopted between 1962 and 1979.<sup>37</sup> Human rights laws give broad guarantees of equality in all aspects of employment from advertising for jobs, through recruitment, hiring, training, pay, benefits, promotions, harassment on the job, terminations, and discriminatory impacts of any other terms and conditions of work.

These two statutory frameworks had limited impact on closing the gender pay gap, however, because they require individual women to file complaints about their circumstances. Combatting systemic wage discrimination that permeates the labour market cannot be done effectively one woman, one case at a time. Thus, in 1986, five years after Canada acceded to CEDAW, provinces began introducing pay equity statutes that mandated employers to *proactively* deliver equal pay for work of equal value.<sup>38</sup>

Women in Canada remain “concentrated in industries that parallel their traditional gender roles at more than double the rate of men”; within industries, “women and men tend to occupy distinct occupations, with women’s typically being at lower levels than men’s”; and across industries women continue to work in occupations that parallel traditional

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<sup>36</sup> See the history outlined in *Quebec (Attorney General) v. Alliance du personnel professionnel et technique de la santé et des services sociaux*, [2018] S.C.J. No. 17, 2018 SCC 17, at paras. 6-11 (S.C.C.).

<sup>37</sup> Territorial human rights codes were introduced later: Yukon (1987), Northwest Territories (2002), Nunavut (2003).

<sup>38</sup> Manitoba introduced Canada’s first proactive pay equity legislation in 1986. In 1987, Ontario introduced the first proactive pay equity legislation that applied to both the public and private sector and in 1992 expanded the law to become the first pay equity statute that provided remedies for women who work in predominantly female workplaces in the broader public sector. In 1996, Quebec introduced the first statute that provided pay equity entitlements to women in female-dominated workplaces in both the public and private sector.

gender roles of care work, education and service.<sup>39</sup> The proportion of women working in the 20 most female-dominated occupations in Canada has barely shifted in more than a generation, from 59.2 per cent in 1987 to 56.1 per cent in 2015.<sup>40</sup> Pay equity laws address the fact that sex segregation by occupation and workplace is accompanied by systemic devaluation of the work women do. As the Ontario Pay Equity Hearings Tribunal summarized in one of Canada's foundational pay equity rulings:

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. In the workplace, the reward (wage) is based on the characteristics the worker is perceived as bringing to the task. ... The lower the value of those characteristics, the lower the associated wage.<sup>41</sup>

Since 1987 the SCC has recognized that discrimination arises from the continued operation of systems that have been designed around the interests, values and experiences of groups with greater political, economic and social power and privilege. Whether it is intentional or not, this systemic discrimination is frequently a product of continuing to do things “the way they have always been done”.<sup>42</sup>

Pay equity laws identify how these unspoken assumptions and practices operate and eliminate their discriminatory effects. They address the impact of the sex segregation of work by comparing the wages of women and men doing *different jobs of similar value*. Pay equity laws impose proactive obligations on employers that generally track these five steps:

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<sup>39</sup> Melissa Moyser, *Women and Paid Work* (Ottawa: Statistics Canada, corrected version published March 9, 2017) [hereinafter “Moyser, *Women and Paid Work*”], at 22-24.

<sup>40</sup> Moyser, *Women and Paid Work*, *id.*, at 23-24 and Table 7.

<sup>41</sup> *Ontario Nurses' Association v. Women's College Hospital*, [1992] O.P.E.D. No. 20, 3 P.E.R. 61, at para. 16-18. See also, *Haldimand-Norfolk (No. 33)* (1989), 1 P.E.R. 17, at para. 44 (Ont. P.E.H.T.), *aff'd* (1990), 1 P.E.R. 188 (Ont. Div. Ct.) and Marie-Therese Chicha, *L'equite salariale: mise en oeuvre et enjeux*, 3<sup>e</sup> ed. (Cowansville: Éditions Yvon Blais, 2011), at 23.

<sup>42</sup> See *C.N.R. v. Canada (Canadian Human Rights Commission)*, [1987] S.C.J. No. 42, at para. 34, [1987] 1 S.C.R. 1114, at 1138-39 (S.C.C.): “systemic discrimination in an employment context is discrimination that results from the simple operation of established procedures ... none of which is necessarily designed to promote discrimination.” See also, *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees' Union (B.C.G.S.E.U.)*, [1999] S.C.J. No. 46, [1999] 3 S.C.R. 3, at para. 68 (S.C.C.).

- Step 1: Identify which jobs are female-dominated, male-dominated or neutral in that they do not reflect a gender predominance in present or historical incumbency or norms.
- Step 2: Evaluate female-dominated and male-dominated jobs based on their skill, effort, responsibility and working conditions to determine, in a gender-neutral way, the value of all jobs to the employer.
- Step 3: Compare the total compensation of female- and male-dominated jobs of similar value.
- Step 4: Adjust the total compensation of female-dominated jobs to close the pay gap where they are paid less than male-dominated jobs of similar value.
- Step 5: Monitor compensation on an ongoing basis to ensure that as new jobs are created, old jobs disappear and duties of existing jobs change over time, discriminatory devaluation of women's work is not revived. Where pay equity gaps re-emerge, employers must *maintain* pay equity by adjusting the pay of female-dominated jobs on an ongoing basis to close the pay equity gaps as they arise.<sup>43</sup>

In unionized workplaces, pay equity statutes typically require that this process be conducted with active participation of the bargaining agent. In non-unionized workplaces, employers conduct the analysis to create a pay equity plan but workers must be given a period to review and challenge the employer's analysis.

Pay equity laws epitomize the active intervention that the SCC has recognized is necessary to "break a continuing cycle of systemic discrimination"; "to create a climate in which both negative practices and negative attitudes can be challenged"; and to "destroy those patterns in order to prevent the same type of discrimination in the future." They are consistent with Canada's bedrock human rights principle that systemic discrimination requires systemic remedies.<sup>44</sup>

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<sup>43</sup> See, for example, *Call-A-Service Inc. v. An Anonymous Employee*, [2008] O.P.E.D. No. 11, 2008 CanLII 88827, at para. 25 (Ont. P.E.H.T.).

<sup>44</sup> *C.N.R. v. Canada (Canadian Human Rights Commission)*, [1987] S.C.J. No. 42, at paras. 34, 40 and 44, [1987] 1 S.C.R. 1114, at 1138-39, 1141-43, 1145 (S.C.C.).

### III. THE QUEBEC PAY EQUITY APPEALS

Both 2018 pay equity appeals arose from challenges to Quebec's *Pay Equity Act*.<sup>45</sup>

#### 1. *CSQ*: Pay Equity in Female-Dominated Workplaces

The legal challenge in *CSQ* was brought by unionized women — primarily childcare workers and language interpreters — working in traditionally female-dominated occupations in deeply sex-segregated industries. Their workplaces had no male-dominated jobs. They argued that by imposing a multi-year delay and denial of a remedy for sex-based wage discrimination in female-dominated workplaces, the PEA violated their right to equality contrary to section 15 of the Charter.

The PEA was passed in 1996. Section 1 expressed the law's purpose as being to “redress differences in compensation due to the systemic gender discrimination suffered by persons who occupy positions in predominantly female job classes.” Further, it stated that women working in female-dominated workplaces without male-dominated jobs have the right to pay equity using wage comparisons from outside their specific enterprise.

The law required employers, generally, to pay out any identified pay equity adjustments beginning in 2001.<sup>46</sup> But for women working in Quebec's over 2,000 female-dominated private sector workplaces,<sup>47</sup> the PEA delayed their pay equity remedies for 11 years. Regulations directing how to select male comparators from outside sex segregated

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<sup>45</sup> *Newfoundland (Treasury Board) v. Newfoundland and Labrador Assn. of Public and Private Employees (N.A.P.E.)*, [2004] S.C.J. No. 61, 2004 SCC 66 (S.C.C.) found provincial restrictions on pay equity violated s. 15 but ruled the violation justifiable in the existing financial circumstances. Sex discrimination cases brought by women that were dismissed at the s. 15 stage were: *Symes v. Canada*, [1993] S.C.J. No. 131, [1993] 4 S.C.R. 695 (S.C.C.); *Native Women's Assn. of Canada v. Canada*, [1994] S.C.J. No. 93, [1994] 3 S.C.R. 627 (S.C.C.); *Thibaudeau v. Canada*, [1995] S.C.J. No. 42, [1995] 2 S.C.R. 627 (S.C.C.); *Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia*, [2007] S.C.J. No. 27, [2007] 2 S.C.R. 391 (S.C.C.), succeeded on the Union's s. 2(d) Charter challenge but the s. 15 claim was dismissed in just nine sentences (paras. 164-167). Other equality rights cases have succeeded under s. 15 in ways that advance equality for women; however these successful cases before *Alliance* were argued as discrimination based on grounds *other than* sex, including disability, marital status, and civil status.

<sup>46</sup> CQLR, c. E-12.001, ss. 37, 38 and 71 [hereinafter “PEA”].

<sup>47</sup> *Centrale des syndicats du Québec c. Québec (Procureur générale)*, [2014] J.Q. no 9467, 2014 QCCS 4197, at para. 4 (Que. C.S.) [hereinafter “*CSQ (QCCS)*”].

workplaces were not made for nine years.<sup>48</sup> Section 38 of the PEA granted a further two-year grace period for employers to implement the comparisons.<sup>49</sup> For these women, section 38 and section 129 of the PEA rendered pay equity a right without a remedy until 2007 and they received no remedy for discrimination that existed before 2007. During this entire 11-year period from 1996 to 2007, women in female-dominated workplaces had no other legal recourse for sex discrimination in pay because the PEA prohibited them from seeking remedies under the *Quebec Charter of Rights and Freedoms*.<sup>50</sup>

The Quebec Superior Court dismissed the section 15 Charter claim. While acknowledging that the PEA imposed a disadvantage on women, the Court found that “the reason [for the disadvantage] is not that women occupy these positions but rather that the enterprises that hire them have no predominantly male job classes to ensure comparison”.<sup>51</sup> Accordingly, the distinction was not based on sex but on “working in an enterprise where there are no predominantly male job classes”; this did not qualify as an analogous ground.<sup>52</sup> Without citing section 15(2) of the Charter, the Court held that government had no obligation to address pay equity. Rather than *delaying* access to pay equity, section 38 should be read as establishing the timetable to *enable* women to access pay equity remedies.<sup>53</sup>

The Quebec Court of Appeal issued a one-sentence ruling: “Nous partageons entièrement l’avis du juge de première instance.”<sup>54</sup>

The Supreme Court of Canada split 5-4 on the section 15 analysis. Five judges<sup>55</sup> ruled that section 38 of the PEA violates section 15 of the

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<sup>48</sup> *Regulation respecting pay equity in enterprises where there are no predominantly male job classes*, E-12.001, r. 2 (effective as of May 5, 2005).

<sup>49</sup> CQLR, c. E-12.001.

<sup>50</sup> Under s. 128 and s. 129 of Quebec’s PEA, *id.*, jurisdiction for any sex-based pay discrimination complaints filed after November 27, 1997, was transferred from the Human Rights Commission to the Pay Equity Commission. In addition, s. 125 of the Quebec’s PEA amended s. 19 of the *Quebec Charter of human rights and freedoms*, CQLR, c. C-12, such that: “Adjustments in compensation and a pay equity plan are deemed not to discriminate on the basis of gender if they are established in accordance with the *Pay Equity Act*.”

<sup>51</sup> *Centrale des syndicats du Québec v. Québec (Procureur générale)*, [2014] J.Q. no 9467, 2014 QCCS 4197, at para. 198 (Que. C.S.). A certified English translation of the decision is included in the materials filed by the Intervener Equality Coalition in SCC Court File #37002.

<sup>52</sup> *Id.*, at para. 200.

<sup>53</sup> *Id.*, at paras. 201-204.

<sup>54</sup> *Centrale des syndicats du Québec c. Québec (Procureur générale)*, [2016] J.Q. no 1991, 2016 QCCA 424, at para. 1 (Que. C.A.).

<sup>55</sup> *Centrale des syndicats du Québec v. Québec (Attorney General)*, [2018] S.C.J. No. 18, 2018 SCC 18, at paras. 22-36, *per* Abella J. (writing for herself and Moldaver, Karakatsanis and Gascon JJ. ) and at paras. 154-156, *per* McLachlin C.J.C. (writing for herself alone) (S.C.C.).

Charter by discriminating on the basis of sex; but four found this justifiable under section 1. Four judges found no section 15 violation because they held the differential treatment was based on “the lack of male comparators in their employers’ enterprises”, not sex.<sup>56</sup> Only McLachlin C.J.C. found a section 15 violation that could not be justified under section 1.<sup>57</sup>

## 2. *Alliance*: Employers’ Duty to Maintain Pay Equity

*Alliance* addresses employers’ duty to maintain pay equity after it is first established. The original 1996 PEA required employers to maintain pay equity by adjusting compensation on an ongoing basis as pay discrimination re-emerged over time. Despite statutory deadlines for compliance, by 2006 only 47 per cent of employers had pay equity plans and a further 38 per cent had not even begun the pay equity process. The Court writes: “[f]aced with this widespread non-compliance, Quebec decided to reduce the employers’ obligation to maintain pay equity, in the hope that doing so would lead to better compliance.”<sup>58</sup> In 2009, amendments replaced employers’ continuous pay equity maintenance obligation with pay equity audits to be conducted every five years.<sup>59</sup> Where an audit disclosed a discriminatory pay gap, absent proof of employer bad faith, the remedy only adjusted women’s pay on a go-forward basis.<sup>60</sup> Unlike pay equity plans which are negotiated with the union, the pay equity audits were conducted by the employer alone. The employer was required to post the audit results but was not required to disclose the information and analysis upon which those results were based.<sup>61</sup>

The pay equity audit and maintenance provisions affect *all* Quebec workers who are subject to the PEA. Several unions jointly challenged these provisions,<sup>62</sup> arguing that by allowing remedies only every five years

<sup>56</sup> *Id.*, at paras. 119-122, *per* Côté J. (writing for herself and Wagner, Brown and Rowe JJ.).

<sup>57</sup> *Id.*, at paras. 157-159, *per* McLachlin C.J.C.

<sup>58</sup> *Id.*, at para. 16.

<sup>59</sup> *Pay Equity Act*, CQLR, c. E-12.001, Chapter IV.1.

<sup>60</sup> *Id.*, s. 76.5. That payment could either be made as a lump sum, or with permission of the Pay Equity Audit Committee could be spread over a maximum four years:*Id.*, s. 76.5.1. Also s. 103.1, para. 2.

<sup>61</sup> *Id.*, s. 76.3

<sup>62</sup> The 30 claimants included 14 individuals, numerous bargaining units of the Syndicat canadien de la fonction publique, Alliance du personnel professionnel et technique de la santé et des services sociaux, Syndicat de la fonction publique et parapublique du Québec, and Fédération interprofessionnelle de la santé du Québec among others, along with the non-unionized worker advocacy organization Conseil d’intervention pour l’accès des femmes au travail.

and only on a go-forward basis, the PEA created periods during which identified discrimination was not rectified. Further, by excluding unions from the pay equity audits and denying access to the information and analysis on which the audit results were based, the PEA denied the ability to determine if the audits were valid.

The Quebec Superior Court and Quebec Court of Appeal both agreed that by prohibiting remedies for pay discrimination that emerged during the five years between audits and by prohibiting access to the audit information, the PEA violated section 15 and that violation was not justifiable under section 1.<sup>63</sup> Both Quebec courts ruled that the PEA did not discriminate based on sex by allowing employers to conduct pay equity audits without union involvement.<sup>64</sup> The Attorney General of Quebec appealed the decisions. The Unions cross-appealed the ruling on unions' exclusion from pay equity audits.

The SCC ruled 6-3 in favour of the claimants on the lack of remedy between audits and the denial of audit information.<sup>65</sup> They ruled, however, that the unions “have not ... discharged their onus of proving that the lack of employee participation has a discriminatory impact in the circumstances of this case.”<sup>66</sup> The dissenting judges held that there was no violation of section 15 and even if there was, “the Act as a whole should be protected under s. 15(2).”<sup>67</sup>

#### IV. ONE STEP FORWARD: RECOGNIZING SYSTEMIC DISCRIMINATION

##### 1. Confronting Privilege

Throughout its section 15 jurisprudence, the SCC has waxed rhapsodic over the *idea* of equality, proclaiming that section 15 “reflect[s] the fondest dreams, the highest hopes and the finest

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<sup>63</sup> *Alliance du personnel professionnel et technique de la santé des services sociaux c. Québec (Procureur générale)*, [2014] J.Q. no 319, 2014 QCCS 149, at paras. 50-56 (Que. C.S.) [hereinafter “*Alliance (QCSC)*”]; *Québec (Procureur générale) c. Alliance du personnel professionnel et technique de la santé et des services sociaux*, [2016] J.Q. no 13251, 2016 QCCA 1659, at paras. 72-74 (Que. C.A.) [hereinafter “*Alliance (QCCA)*”]. A certified English translation of the Court of Appeal decision is included in the materials filed by the Intervener Equality Coalition in SCC Court File #37347.

<sup>64</sup> *Alliance (QCCA)*, *id.*, at para. 107.

<sup>65</sup> *Québec (Attorney General) v. Alliance du personnel professionnel et technique de la santé et des services sociaux*, [2018] S.C.J. No. 17, 2018 SCC 17, at paras. 33-57 (S.C.C.), *per* Abella J. (writing for herself and McLachlin C.J.C., Moldaver, Karakatsanis, Wager and Gascon JJ.).

<sup>66</sup> *Id.*, at para. 60.

<sup>67</sup> *Id.*, at paras. 106, 107, Côté, Brown and Rowe JJ. writing jointly in dissent.

aspirations of Canadian society.”<sup>68</sup> At the same time, though, the Court is less comfortable with equality as a *reality*, protesting that “... [t]he difficulty lies in giving real effect to equality.”<sup>69</sup> This sentiment was echoed in Binnie J.’s declaration in *Newfoundland (Treasury Board) v. Newfoundland and Labrador Assn. of Public and Private Employees (N.A.P.E.)* that “[p]ay equity has been one of the most difficult and controversial workplace issues of our times.”<sup>70</sup> In both *Alliance* and *CSQ*, Côté J. firmly roots her dissenting reasons within the “difficulty” frame, bemoaning the “almost inherent difficulty” in interpreting section 15 and reiterating Binnie J.’s complaint that pay equity is difficult.<sup>71</sup> Yet, these conclusory declarations of equality’s purported difficulty are offered without explanation of — and ward off scrutiny of — *what* precisely about equality makes it so difficult to understand and implement. The protestations moreover ring hollow when the SCC routinely deals with legally complex, high stakes appeals in criminal, tax, transnational corporate law, amongst others, without complaining that they are too difficult. So what is it about equality that makes the Court squeamish?

Equality litigation is “difficult” — or more accurately gives rise to feelings of discomfort — precisely because it confronts how law operates as the tool that institutionalizes power and privilege in society.<sup>72</sup> In judicial reasoning, the presumption of a law’s constitutionality at times is conflated with an assumption of compliance with constitutional norms in practice. This erases the reality and dynamics of systemic discrimination and replaces them with the narrative that discrimination is aberrant rather than endemic.<sup>73</sup>

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<sup>68</sup> *Vriend v. Alberta*, [1998] S.C.J. No. 29, [1998] 1 S.C.R. 493, at para. 67 (S.C.C.) [hereinafter “*Vriend*”]. Similarly in *Law v. Canada (Minister of Employment and Immigration)*, [1999] S.C.J. No. 12, [1999] 1 S.C.R. 497, at para. 2 (S.C.C.): “[...]the quest for equality expresses some of humanity’s highest ideas and aspirations”.

<sup>69</sup> *Vriend, id.*, at paras. 67-68.

<sup>70</sup> [2004] S.C.J. No. 61, 2004 SCC 66, at para. 30 (S.C.C.).

<sup>71</sup> *Quebec (Attorney General) v. Alliance du personnel professionnel et technique de la santé et des services sociaux*, [2018] S.C.J. No. 17, 2018 SCC 17, at paras. 62-63 (S.C.C.), *per* Côté J. in dissent; *Centrale des syndicats du Québec v. Québec (Attorney General)*, [2018] S.C.J. No. 18, 2018 SCC 18, at para. 57 (S.C.C.), *per* Côté J. in dissent.

<sup>72</sup> Sheila McIntyre, “Answering the Siren Call of Abstract Formalism with the Subjects and Verbs of Domination” in Fay Faraday, Margaret Denike and M. Kate Stephenson, eds., *Making Equality Rights Real: Securing Substantive Equality under the Charter* (Toronto: Irwin Law, 2006), at 108.

<sup>73</sup> Fay Faraday, “Working Towards Equality” in Matthew Berens, ed., *Unions Matter: Advancing Democracy, Economic Equality and Social Justice* (Toronto: Between the Lines, 2014), at 166

*Charter* litigation ... is premised on the notion that the baseline experience is one of constitutional compliance that delivers security and rights protection. The unspoken assumption is that an individual starts with an experience of rights protection and the impugned state action is an aberrant divergence from that presumed status of [constitutional] security.<sup>74</sup>

From the outset, *Charter* equality jurisprudence has stressed that discrimination is primarily systemic. Yet, most *Charter* litigation has challenged isolated provisions in a single statute which may deny access to a specific benefit. These cases are overwhelmingly formal equality claims involving direct discrimination.<sup>75</sup> This repetition reinforces formal equality as the paradigmatic case, creating the impression that discrimination is narrow and isolated and that only minor adjustments are required to achieve equality. Only rare *Charter* claims have challenged the structural roots of systemic discrimination and those have met with mixed success.<sup>76</sup> To paraphrase Jonnette Watson Hamilton and Jennifer Koshan, while accepting substantive equality in principle, the Court struggles to shed formal equality as the paradigmatic case which in turn impairs the Court's ability to grapple with systemic discrimination.<sup>77</sup>

In examining the categorical declarations that equality and pay equity are “difficult”, then, it is important to disaggregate what is in fact jurisprudentially complex, and what is better characterized as conceptual dissonance or avoidance techniques that arise in legal reasoning.

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<sup>74</sup> Tracy Heffernan, Fay Faraday and Peter Rosenthal, “Fighting for the Right to Housing in Canada” (2015) 24 *JLSP* 10, at 44. See also, Sonia Lawrence, “Choice, Equality and Tales of Racial Discrimination: Reading the Supreme Court on Section 15” (2006) *Articles & Book Chapters* 2130.

<sup>75</sup> See Jonnette Watson Hamilton and Jennifer Koshan, “Adverse Impact: The Supreme Court's Approach to Adverse Impact under Section 15 of the *Charter*” (2015) 19 *Rev. Const. Stud.* 191.

<sup>76</sup> For example, *Vriend v. Alberta*, [1998] S.C.J. No. 29, [1998] 1 S.C.R. 493 (S.C.C.), successfully raised a systemic challenge to the scope of human rights legislation; *Eldridge v. British Columbia (Attorney General)*, [1997] S.C.J. No. 86, [1997] 3 S.C.R. 624 (S.C.C.), successfully addressed systemic discrimination in access to health care although a similarly systemic claim did not succeed in *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, [2004] S.C.J. No. 71, [2004] 3 S.C.R. 657 (S.C.C.). Under human rights legislation see *C.N.R. v. Canada (Canadian Human Rights Commission)*, [1987] S.C.J. No. 42, [1987] 1 S.C.R. 1114 (S.C.C.); *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees' Union (B.C.G.S.E.U.)*, [1999] S.C.J. No. 46, [1999] 3 S.C.R. 3 (S.C.C.).

<sup>77</sup> Jonnette Watson Hamilton and Jennifer Koshan, “Adverse Impact: The Supreme Court's Approach to Adverse Impact under Section 15 of the *Charter*” (2015) 19 *Rev. Const. Stud.* 191, write with respect to adverse impact cases under s. 15: “while accepting adverse effects discrimination in principle, [the Court] has used direct discrimination as the paradigmatic case, and as a result, the Court's approach has had an adverse impact on adverse effects discrimination claims.”

## 2. Advancing a Substantive Equality Analysis of Systemic Discrimination

Justice Abella's majority reasons in *Alliance* and *CSQ* demonstrate that a rigorous substantive equality analysis that addresses the impact of systemic discrimination is possible. Her reasons mark an advance in substantive equality analysis and the role of section 15(2) of the Charter. They also make inroads in bringing a gendered lens to section 1 analysis that may open the way to activate section 28 of the Charter in constitutional analysis.

### (a) Systemic Discrimination<sup>78</sup>

Systemic discrimination refers to how power structures relationships between groups in society, privileging some and marginalizing others.<sup>79</sup> Within this power dynamic, dominant groups attach socially constructed meaning to human traits — such as sex — and have entrenched social systems and behaviours that institutionalize those traits as a basis on which to unequally distribute social, economic and political rights, material well-being, social inclusiveness and social participation.<sup>80</sup> As the SCC has observed, systemic discrimination institutionalizes practices that, through

the imbalances of power, or the discourses of dominance, such as racism, ablebodyism and sexism, ... result in a society being designed well for some and not for others. It allows those who consider themselves 'normal' to continue to construct institutions and relations in their image ...<sup>81</sup>

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<sup>78</sup> This section integrates analysis from the Equality Coalition's intervener facta, written by the Author, that were filed with the Court in both *Alliance* and *CSQ*.

<sup>79</sup> Martha Minow, *Making All the Difference: Inclusion, Exclusion and American Law* (Ithaca: Cornell University Press, 1990), at 110-12; Sheila McIntyre, "Answering the Siren Call of Abstract Formalism with the Subjects and Verbs of Domination" in Fay Faraday, Margaret Denike and M. Kate Stephenson, eds., *Making Equality Rights Real: Securing Substantive Equality under the Charter* (Toronto: Irwin Law, 2006), at 108-109.

<sup>80</sup> Margot Young, "Blissed Out: Section 15 at Twenty" in S. McIntyre and S. Rogers, eds., *Diminishing Returns: Inequality and the Canadian Charter of Rights and Freedoms* (Markham: LexisNexis Butterworths, 2006), at 63-64, 68; Justice Rosalie Silberman Abella, *Equality in Employment: A Royal Commission Report* (Canada: 1984), at 9-10.

<sup>81</sup> *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees' Union (B.C.G.S.E.U.)*, [1999] S.C.J. No. 46, [1999] 3 S.C.R. 3, at para. 41 (S.C.C.).

Systemic discrimination claims target the impact of practices and systems that have been established and normalized over time within this unequal power relationship.<sup>82</sup> They “necessarily involve an examination of the interrelationships between actions (or inaction), attitudes and established organizational structures.”<sup>83</sup> Claims “alleging gender-based systemic discrimination cannot be understood or assessed through a compartmentalized view”; instead they must be “understood, considered, analyzed and decided in a complete, sophisticated and comprehensive way.”<sup>84</sup>

Justice Abella’s majority reasons undertake just such a comprehensive view. They accept that systemic sex discrimination *is real* and identify how it operates to create and sustain a gender pay gap which disadvantages women. They also steadfastly maintain a systemic frame when analyzing the impact of the impugned statutory provisions.

The majority reasons in both appeals accept that in reality there is a “deep and persistent gap between women’s and men’s pay”<sup>85</sup> and that women have been and continue to be underpaid due to systemic discrimination which devalues women’s work socially and economically.<sup>86</sup> Justice Abella succinctly captures the essence of systemic sex discrimination which deprives “women of benefits routinely enjoyed by men — namely, compensation tied to the value of their work. Men receive this compensation as a matter of course” while women must repeatedly “clear the specific hurdle of proving that they should be paid equally not merely because they *are* equal, but because their employer acted improperly.”<sup>87</sup>

Significantly, understanding how sex discrimination operates systemically leads the majority to recognize that discrimination in pay “exists in the workforce whether or not there are male comparators in a particular workplace” and that “women in workplaces without male

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<sup>82</sup> *C.N.R. v. Canada (Canadian Human Rights Commission)*, [1987] S.C.J. No. 42, [1987] 1 S.C.R. 1114, at 1139 (S.C.C.).

<sup>83</sup> *Association of Ontario Midwives v. Ontario (Minister of Health and Long-Term Care)*, [2014] O.H.R.T.D. No. 1386, 2014 HRTO 1370, at para. 33 (Ont. H.R.T.).

<sup>84</sup> *Id.*

<sup>85</sup> *Centrale des syndicats du Québec v. Québec (Attorney General)*, [2018] S.C.J. No. 18, 2018 SCC 18 (S.C.C.); *Québec (Attorney General) v. Alliance du personnel professionnel et technique de la santé et des services sociaux*, [2018] S.C.J. No. 17, 2018 SCC 17, at paras. 6-9 (S.C.C.).

<sup>86</sup> *CSQ, id.*, at para. 2.

<sup>87</sup> *Québec (Attorney General) v. Alliance du personnel professionnel et technique de la santé et des services sociaux*, [2018] S.C.J. No. 17, 2018 SCC 17, at para. 38 (S.C.C.) (emphasis in original).

comparators may suffer more acutely from the effects of pay inequity precisely because of the absence of men in their workplaces”.<sup>88</sup> In this way the majority integrates a full understanding of how a deeply sex-segregated labour market and sex-segregated workplaces in which female-dominated work is most devalued are the end products of the systemic devaluation of women’s work.

As a result, the majority in *CSQ* easily identified that denying a pay equity remedy to women in female-dominated workplaces was based on sex. Access to a remedy was “expressly defined by the presence or absence of men in the workplace” and women in female-dominated workplaces are “the group of women whose pay has, arguably, been most markedly impacted by their gender.”<sup>89</sup> In the *PEA*, *women’s close proximity to male work* determines whether they are entitled to a remedy for systemic sex discrimination. The more women have suffered from systemic sex discrimination that results in deeply sex-segregated occupations, sex-segregated workplaces, and undervaluing of women’s work, the less they are entitled to remedies for systemic sex discrimination.

Similarly, understanding the dynamics of systemic discrimination enabled the majority in *Alliance* to recognize that systemic pay discrimination is not simply historical but operates on a continuing basis.<sup>90</sup> This led the majority to recognize that the pay audit process that provided remedies only on a go-forward basis was discriminatory because it effectively granted an amnesty from equality compliance of up to five years. As the Court noted, “this has the effect of making the employer’s pay equity obligation an episodic, partial obligation.”<sup>91</sup> But “the Charter right to equality is not an episodic right that exists only at designated intervals but slumbers without effect between times”.<sup>92</sup> It must be protected in a continuous, enduring way and remedies for its breach must be similarly seamless. Finally, in understanding systemic discrimination as an ongoing pattern of behaviour, Abella J. recognized

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<sup>88</sup> *Centrale des syndicats du Québec v. Québec (Attorney General)*, [2018] S.C.J. No. 18, 2018 SCC 18, at paras. 8, 29, 34 (S.C.C.).

<sup>89</sup> *Id.*, at para. 29.

<sup>90</sup> See, for example, *Public Service Alliance of Canada v. Canada (Department of National Defence)*, [1996] F.C.J. No. 842, 1996 CanLII 4067 (F.C.A.); *Association of Ontario Midwives v. Ontario (Minister of Health and Long-Term Care)*, [2014] O.H.R.T.D. No. 1386, 2014 HRTO 1370, at para. 32 (Ont. H.R.T.).

<sup>91</sup> *Québec (Attorney General) v. Alliance du personnel professionnel et technique de la santé et des services sociaux*, [2018] S.C.J. No. 17, 2018 SCC 17, at para. 33 (S.C.C.).

<sup>92</sup> Equality Coalition *Factum* in *Alliance*, at para. 15.

that denying access to the information underpinning pay equity audits was discriminatory because it undermines any air of reality to the promise of equality. Access to that information was a necessary operational pre-condition to verifying the audit and exercising any right to challenge its results.

The majority reasons, then, mark an advance because the reality of systemic discrimination is not merely observed once in passing but the systemic lens remains at the forefront, shaping the entire section 15 analysis.

(b) *Section 15(2)*

Section 15(2) of the Charter has bedeviled equality rights jurisprudence since the SCC's 2008 ruling in *R. v. Kapp*.<sup>93</sup> Before this, the jurisprudence treated section 15(2) as an interpretive aid that supported the substantive equality interpretation of section 15(1).<sup>94</sup> Section 15(2) "reinforce[d] the important insight" that in a social reality of systemic discrimination "substantive equality requires positive action to ameliorate the conditions of socially disadvantaged groups".<sup>95</sup>

*Kapp* instead gave section 15(2) independent effect as a "defence" to allegations of discrimination: "if the government can demonstrate that an impugned program meets the criteria of s. 15(2), it may be unnecessary to conduct a s. 15(1) analysis at all."<sup>96</sup> *Kapp* provided shelter from full section 15 scrutiny if a government could demonstrate that the impugned law, program or activity has an ameliorative or remedial purpose and targets a disadvantaged group identified by enumerated or analogous grounds. Unlike the focus on effects that informs the rest of Canada's

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<sup>93</sup> *R. v. Kapp*, [2008] S.C.J. No. 42, 2008 SCC 41 (S.C.C.). For analysis of the Court's s. 15(2) jurisprudence, see Sophia Moreau, "*R. v. Kapp*: New Directions for Section 15" (2008-2009) 40 *Ottawa L. Rev.* 283-298; Jena McGill, "Ameliorative Programs and the *Charter*: Reflections on the Section 15(2) Landscape since *R. v. Kapp*" (2017) 95 *Can. B. Rev.* 213; Jonnette Watson Hamilton and Jennifer Koshan, "The Supreme Court, Ameliorative Programs, and Disability: Not Getting It" (2013) 25 *Can. J. Women & L.* 56; Jena McGill, "Section 15(2), Ameliorative Programs and Proportionality Review" (2013), 63 *S.C.L.R.* (2d) 521-555 and Kasari Govender and C. Tess Sheldon, *R. v. Kapp* (2018) 30:2 *CJWL* 248.

<sup>94</sup> See, for example, *Lovelace v. Ontario*, [2000] S.C.J. No. 36, 2000 SCC 37 (S.C.C.).

<sup>95</sup> See Colleen Sheppard, *Study paper on litigating the relationship between equity and equality* (Ontario Law Reform Commission, 1993), at 28; *Law Society British Columbia v. Andrews*, [1989] S.C.J. No. 6, [1989] 1 S.C.R. 143, at para. 34 (S.C.C.).

<sup>96</sup> *R. v. Kapp*, [2008] S.C.J. No. 42, 2008 SCC 41, at para. 37 (S.C.C.).

equality jurisprudence,<sup>97</sup> under section 15(2) the Court adopted an analysis focused exclusively on the Government's intent such that the Court would ask if it was "rational for the state to conclude that the means chosen to reach its ameliorative goal would contribute to that purpose".<sup>98</sup>

*Kapp* and the Court's 2011 decision in *Alberta (Aboriginal Affairs and Northern Development) v. Cunningham*<sup>99</sup> both interpreted section 15(2) in appeals where parties who were not beneficiaries of an affirmative action program challenged it as being discriminatory. Had the approach, in implementation, been constrained to circumstances involving claims of "reverse discrimination" by privileged groups, this may not have been problematic. But, instead, in the wake of *Kapp*, section 15(2) has been raised routinely in litigation to respond to equality rights challenges.

When used outside the context of reverse discrimination, *Kapp* undermined the integrity of the division between section 15 and section 1 of the Charter. It dragged the analysis of purpose and rational connection out of section 1 into section 15. As will be seen in addressing Côté J.'s dissenting reasons, this heightened the stakes on the first step of the section 15(1) test in identifying whether a "distinction" exists that needs to be addressed under section 15.

Moreover, by allowing government to use section 15(2) to prevent claims by beneficiaries of affirmative ameliorative programs, it prevented those supposed beneficiaries from challenging any discriminatory impact under those programs. As identified by Kasari Govender and Tess Sheldon, by eliminating any analysis of the *effect* of government action, this approach effectively displaced section 15 as a rights framework and reduced it to a charitable framework in which disadvantaged groups must accept government's good intentions as the complete scope of constitutional protection.<sup>100</sup> Apart from being a paternalistic approach to the Charter which erodes substantive rights

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<sup>97</sup> *Ontario (Human Rights Commission) v. Simpsons-Sears Ltd.*, [1985] S.C.J. No. 74, [1985] 2 S.C.R. 536 (S.C.C.); *C.N.R. v. Canada (Canadian Human Rights Commission)*, [1987] S.C.J. No. 42, [1987] 1 S.C.R. 1114 (S.C.C.); *Law Society British Columbia v. Andrews*, [1989] S.C.J. No. 6, [1989] 1 S.C.R. 143, at para. 37 (S.C.C.).

<sup>98</sup> *R. v. Kapp*, [2008] S.C.J. No. 42, 2008 SCC 41, at paras. 40-51 (S.C.C.); *Alberta (Aboriginal Affairs and Northern Development) v. Cunningham*, [2011] S.C.J. No. 37, 2011 SCC 37 (S.C.C.).

<sup>99</sup> *Id.*

<sup>100</sup> Kasari Govender and C. Tess Sheldon, *R. v. Kapp* (2018) 30:2 CJWL 248, at 257; See also Jena McGill, *R. v. Kapp* (2018) 30:2 CJWL 221 at 235-239.

protection, that approach directly contradicted the well-established section 15 principle that good intentions cannot save a law that has discriminatory effects.<sup>101</sup>

The majority reasons in both pay equity appeals effectively pushed back at this development. The 2018 rulings reinforced a commitment to substantive equality by restoring section 15(2) to its original role as an interpretive aid to section 15(1). The majority held that in the appeals at issue “s. 15(2) has no application whatever”.<sup>102</sup> This step back to an earlier legal position marks a step forward in understanding how power dynamics operate in relationships marked by systemic discrimination. The majority underscored that the purpose of section 15(2) is to “save ameliorative programs from the charge of “reverse discrimination””.<sup>103</sup> In doing so, the majority aligns section 15(2) with the Court’s long-standing dictum that “In interpreting and applying the Charter ... the courts must be cautious to ensure that it does not simply become an instrument of better situated individuals to roll back legislation which has as its object the improvement of the condition of less advantaged persons.”<sup>104</sup>

The majority made clear that section 15(2) is not a “stand alone defence” for government “to any and all claims brought under s. 15(1)”,<sup>105</sup> it is a “defence” for those who are the beneficiaries of a special program that ameliorates systemic discrimination. Accordingly, section 15(2) can only operate in response to “a claim from someone outside the scope of intended beneficiaries who alleges that ameliorating those beneficiaries discriminates against him.”<sup>106</sup>

This important recalibration should protect substantive equality by restoring the relationship between section 15 and section 1 of the Charter and by keeping section 15 focused in a unified way on addressing systemic discrimination. The routine use of section 15(2) in equality litigation reinforced a legal and public discourse in which all equality claims are viewed as suspect while at the same time preventing analysis

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<sup>101</sup> *Centrale des syndicats du Québec v. Québec (Attorney General)*, [2018] S.C.J. No. 18, 2018 SCC 18, at para. 37 (S.C.C.).

<sup>102</sup> *Id.*; *Québec (Attorney General) v. Alliance du personnel professionnel et technique de la santé et des services sociaux*, [2018] S.C.J. No. 17, 2018 SCC 17, at para. 30 (S.C.C.).

<sup>103</sup> *CSQ, id.*, at para. 38; *Alliance, id.*, at para. 31.

<sup>104</sup> *R. v. Edwards Books and Art Ltd.*, [1986] S.C.J. No. 70, [1986] 2 S.C.R. 713, at para. 136 (S.C.C.).

<sup>105</sup> *Centrale des syndicats du Québec v. Québec (Attorney General)*, [2018] S.C.J. No. 18, 2018 SCC 18, at para. 39 (S.C.C.).

<sup>106</sup> *Id.*, at para. 38.

of actual systemic impacts. At a practical level, reliance on section 15(2) should cease except when invalidating “reverse discrimination” claims.

(c) *Bringing a Gender Lens to Section 1*

Finally, Abella J.’s reasons in *Alliance* take small steps towards incorporating a gendered lens into assessing what is considered demonstrably justifiable in a free and democratic society. This is necessary to meet the Charter’s commitment in section 28 that “the rights and freedoms referred to in it are guaranteed equally to male and female persons.” Section 28 is significantly understudied<sup>107</sup> and has to date played a limited role in litigation.<sup>108</sup> But if section 1 analysis does not consider the gendered implications of justifying a breach of Charter rights — including a breach of Charter rights other than section 15 — it risks reintroducing and rehabilitating the discriminatory norms and practices that were found to violate equality rights under section 15. Without a gender lens, systemic sex discrimination will inform what is otherwise framed as “gender neutral” deference to government, what is considered “rational”, what is characterized as “minimal impairment” and what is accepted as a “proportionate” balance between deleterious and beneficial impacts. As Kerri Froc writes in her landmark thesis, activating section 28 would keep systemic discrimination’s impact at the forefront throughout the whole Charter analysis:

Viewing the Charter through a “gender equality lens” requires courts, ... to shift their conceptualization of gender as exclusively a matter of inherent identity possessed by human beings upon which neutral legal rules apply, to gender as a structure or as a relation. It means

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<sup>107</sup> See in particular Kerri A. Froc, *The Untapped Power of Section 28 of the Canadian Charter of Rights and Freedoms*, Ph.D. Thesis, Queen’s University Faculty of Law (2015) [hereinafter “Froc”]; Sonia Lawrence, “Equality’s Shield? Notes on the Promise and Peril of Section 28”, presented at the Women’s Legal Education and Action Fund (LEAF) Colloquium, “In Pursuit of Substantive Equality”, Toronto (September 19, 2003).

<sup>108</sup> The significant difference a gendered lens can bring to constitutional analysis is illustrated by Wilson J.’s analysis of self-defence in the context of intimate partner violence in *R. v. Lavallee*, [1990] S.C.J. No. 36, [1990] 1 S.C.R. 852 (S.C.C.). She wrote, at para. 38:

If it strains credulity to imagine what the ‘ordinary man’ would do in the position of a battered spouse, it is probably because men do not typically find themselves in that situation. Some women do, however. The definition of what is reasonable must be adapted to circumstances which are, by and large, foreign to the world inhabited by the hypothetical ‘reasonable man’.

See also Wilson J. in *R. v. Morgentaler*, [1988] S.C.J. No. 1, [1988] 1 S.C.R. 30, at para. 242 (S.C.C.).

considering how constitutional doctrine is gendered, that is, examining how “gender acts upon [constitutional] law: how it functions in the context of conferring [constitutional] meanings; how it informs the content, organization and apprehension of [constitutional and] legal knowledge; and how it serves to legitimate [constitutional] law and reinforce particular...outcomes,” particularly as it “consistently appears not to do so.”<sup>109</sup>

The impact of bringing a gender lens to or omitting it from section 1 analysis is well illustrated by contrasting *Alliance* with *Newfoundland (Treasury Board) v. NAPE*<sup>110</sup> the last pay equity dispute that was heard by the SCC under the Charter.

*Newfoundland (Treasury Board) v. Newfoundland and Labrador Assn. of Public and Private Employees (N.A.P.E.)*, examined provincial legislation that eliminated three years’ worth of pay equity adjustments that were owed to public sector employees. The SCC found that eliminating the pay equity debt violated section 15, but then derailed vindication of the employees equality rights by reintroducing discriminatory norms under section 1. The section 1 ruling was based on judicial notice and what the Court acknowledged was a “casually introduced” record whose weakness would normally be of “serious concern”.<sup>111</sup> Despite this, the Court accepted the Government’s assessment that a financial crisis justified eliminating the pay equity payments. The Court used disparaging language in equating a decision to pay the equality debt to “throw[ing] other claims and priorities to the winds”.<sup>112</sup> It cast doubt on whether meeting Charter equality obligations “must necessarily rank ahead of hospital beds or school rooms” without appreciating the irony that the women staffing the hospitals at issue were the very ones bringing the Charter claim.<sup>113</sup> Ultimately, the Court ruled that the effect on the women, while “deeply unfortunate” was “*purely financial*” and that it would merely “leave the women hospital workers with their *traditionally lower wage scales* for a further three years.”<sup>114</sup>

By contrast, in *Alliance*, Abella J. definitively ruled that leaving discriminatory pay in place after it has been identified perpetuates

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<sup>109</sup> Kerri A. Froc, *The Untapped Power of Section 28 of the Canadian Charter of Rights and Freedoms*, Ph.D. Thesis, Queen’s University Faculty of Law (2015), at 411 (internal footnotes omitted).

<sup>110</sup> [2004] S.C.J. No. 61, 2004 SCC 66 (S.C.C.).

<sup>111</sup> *Id.*, at paras. 55-56.

<sup>112</sup> *Id.*, at para. 95.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*, at para. 98 [emphasis added].

systemic sex discrimination.<sup>115</sup> To normalize these practices is not purely financial but ideological in that it “makes women ‘the economy’s ordained shock absorbers’”.<sup>116</sup> It also feeds rather than breaks the cycle of systemic discrimination because it

[R]einforces one of the key drivers of pay inequity: the power imbalance between employers and female workers. By tolerating employer decision-making that results in unfair pay for women, the legislature sends a message condoning that very power imbalance, further perpetuating disadvantage.<sup>117</sup>

As Abella J. wrote in her 1984 Royal Commission report:

The cost of the wage gap to women is staggering. And the sacrifice is not in aid of any demonstrably justifiable social goal. To argue, as some have, that we cannot afford the cost of equal pay to women is to imply that women somehow have a duty to be paid less until other financial priorities are accommodated. This reasoning is specious and it is based on an unacceptable premise that the acceptance of arbitrary distinctions based on gender is a legitimate basis for imposing negative consequences ... .<sup>118</sup>

While she didn’t make specific reference to section 28 of the Charter, Abella J. effectively considered whether the Government’s proposed justifications for the breach perpetuated systemic discrimination. She found that they did. The Government argued that it reduced employers’ pay equity maintenance obligations because it sought to encourage increased employer compliance with the law in a context where less than half of employers have complied with their obligations. Justice Abella voiced reservations about the Government’s alleged purpose and whether its chosen method was rationally connected to that purpose, then concluded that “the justification starts to melt away at the minimal impairment stage”, particularly as “[l]owering the bar in the hopes of compliance strikes me, in any event, as being inconsistent with respect for substantive equality.”<sup>119</sup> In applying a clear gender lens, she concluded as follows on the final stage of the section 1 test:

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<sup>115</sup> *Quebec (Attorney General) v. Alliance du personnel professionnel et technique de la santé et des services sociaux*, [2018] S.C.J. No. 17, 2018 SCC 17, at paras. 33, 35-38 (S.C.C.).

<sup>116</sup> *Id.*, at para. 8.

<sup>117</sup> *Id.*, at paras. 38, 40.

<sup>118</sup> Justice Rosalie Silberman Abella, *Equality in Employment: A Royal Commission Report* (Canada: 1984), at 234.

<sup>119</sup> *Quebec (Attorney General) v. Alliance du personnel professionnel et technique de la santé et des services sociaux*, [2018] S.C.J. No. 17, 2018 SCC 17, at paras. 50 and 54 (S.C.C.).

...The speculative suggestion that sacrificing that right [to pay equity] in the hope of encouraging the possibility of better compliance, does not outweigh the harm caused by the limitation.

Reducing employers' obligations in the hopes of encouraging compliance subordinates the substantive constitutional entitlement of women to be free from discrimination in compensation to the willingness of employers to comply with the law. It sends the policy message to employers that defiance of their legal obligations under the *Act* will be rewarded with a watering-down of those obligations. And it sends the message to female workers that it is they who must bear the financial burdens of employer reluctance. Any benefits of that approach are outweighed by its harmful impact on the very people whom this pay equity scheme was designed to help.<sup>120</sup>

This gendered lens brings an integrity and consistency to the principles that inform the Charter analysis. This case takes a meaningful step forward in bringing a renewed critical perspective to section 1 and it lays the groundwork to explicitly incorporate and build on the full implications of section 28 for Charter jurisprudence.

### 3. Resistance to Substantive Equality: Re-fighting Old Battles

Even while Abella J.'s majority rulings made strides on substantive equality analysis, Côté J.'s dissenting reasons resuscitate arguments and techniques of reasoning that have been repeatedly rejected by the SCC. In this respect, the persistent instability at the root of equality jurisprudence does not reflect uncertainty or complexity in the law so much as a resistance to equality's operation as a means of redistributing power and rights. The dissenting reasons yield many more examples of these avoidance techniques, but four will suffice.

First, rather than following the uncontested principle that Charter claims must be analyzed from the perspective of the claimant, the dissenting reasons proceed from the perspective of the *government respondent*. The dissent in *Alliance* begins by chastising the majority for holding the Quebec Government to account under the Charter at all because

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<sup>120</sup> *Id.*, at paras. 55-56.

... Quebec has been a pioneer in the struggle against pay inequities in private sector enterprises in Canada. ... *From this perspective, it is profoundly unfair to Quebec society to claim that these amendments are unconstitutional.*<sup>121</sup>

Then rather than examining the PEA's impact on the claimants, the dissent decries the possibility that liability could be imposed on the Government based on the inflated premise that the PEA would "almost inevitably" be found disadvantageous if it fails to close the pay equity gap "perfectly".<sup>122</sup> In *CSQ*, the dissent begins with 24 paragraphs outlining the Government's efforts and challenges in developing the PEA and its associated regulation. This again anchors the analysis firmly in the Government's perspective and compounds the error by drawing into the section 15 analysis a full consideration of the Government's justifications which properly belong only under section 1.

Second, despite giving lip service to the principle of substantive equality, the dissent actually employs a rigid formal equality analysis that takes place squarely within the four corners of the impugned Act.<sup>123</sup> This approach has been roundly rejected since 1989 on the basis that it would lead to a "mechanical and sterile" analysis that is disconnected from an understanding of the claimants' location "in the entire social, political and legal fabric of our society".<sup>124</sup> In *CSQ*, this is precisely what arose in the dissent. Justice Côté noted that the disadvantageously affected group "consists mostly of women" but one could not, on that basis, conclude that the discrimination was based on sex: "to resolve this issue, we must go further and ask what the basis for this differential treatment is." In going further, the dissent held that the differential treatment arises not because of sex, but because of "the lack of male comparators in their employers' enterprises."<sup>125</sup> There is no explanation for why the dissent's analysis stops here. The dissent does not at this point "go further" to ask the key question: *Why is there a lack of male comparators?* Had they done so, it would have led them to the dynamics of systemic sex

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<sup>121</sup> *Id.*, at para. 64, per Côté J. in dissent (emphasis added).

<sup>122</sup> *Quebec (Attorney General) v. Alliance du personnel professionnel et technique de la santé et des services sociaux*, [2018] S.C.J. No. 17, 2018 SCC 17, at para. 84 (S.C.C.), per Côté J. in dissent (italics in the original).

<sup>123</sup> In addition to the dynamic outlined in this paragraph, the dissent in *CSQ* also resurrected the mirror comparator analysis that was rejected in *Withler v. Canada (Attorney General)*, [2011] S.C.J. No. 12, 2011 SCC 12 (S.C.C.).

<sup>124</sup> *R. v. Turpin*, [1989] S.C.J. No. 47, [1989] 1 S.C.R. 1296, at para. 46 (S.C.C.).

<sup>125</sup> *Centrale des syndicats du Québec v. Quebec (Attorney General)*, [2018] S.C.J. No. 18, 2018 SCC 18, at paras. 121-122 (S.C.C.), per Côté J. in dissent.

discrimination, which produce the sex-segregated labour market that devalues women's work — clearly a discriminatory dynamic based on sex.

Third, the dissents disavow any potential government accountability for the discriminatory impacts experienced by the claimants on the basis that the Government did not create the economic disadvantage; it pre-existed the PEA. The dissent takes the position that the Government could only be found in violation of the Charter if its own actions made that pre-existing discrimination worse. This stance contradicts the long-standing principle that a claimant's pre-existing disadvantage and the dynamics of systemic discrimination which produced that disadvantage are a core part of the contextual analysis under section 15.<sup>126</sup> More insidiously the dissent's approach treats existing systemic discrimination as an acceptable — or natural — baseline that is immune from Charter scrutiny. Far from eradicating existing discrimination, the dissent's approach condones and preserves it.

Fourth, the dissent takes the position that the choice to adopt the pay equity audit process in the PEA was a *political* decision that is beyond the jurisdiction of the Court. The dissent states categorically that this choice “belongs to the elected representatives of Quebecers and not to this Court.”<sup>127</sup> The dissent raises the oft-heard and oft-rejected argument that if legislation intended to help disadvantaged groups was subject to Charter scrutiny it would discourage governments from addressing disadvantage. Justice Abella in *Alliance* addresses the absurdity of the dissent's assertions as follows:

... [T]here is no evidence to support the *in terrorem* view advanced by my colleagues that finding a breach would have a ‘chilling effect’ on legislatures. That amounts to an argument that requiring legislatures to comply with *Charter* standards would have such an effect. Speculative concerns about the potential for inducing statutory timidity on the part of legislatures has never, to date, been an accepted analytic tool for deciding whether the Constitution has been breached. Legislatures understand that they are bound by the *Charter* and that the public expects them to comply with it. The courts are facilitators in that enterprise, not bystanders.<sup>128</sup>

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<sup>126</sup> *R. v. Turpin*, [1989] S.C.J. No. 47, [1989] 1 S.C.R. 1296, at paras. 45-46 (S.C.C.).

<sup>127</sup> *Quebec (Attorney General) v. Alliance du personnel professionnel et technique de la santé et des services sociaux*, [2018] S.C.J. No. 17, 2018 SCC 17, at para. 64 (S.C.C.).

<sup>128</sup> *Id.*, at para. 42.

No new ground is broken by the Court in rehearsing these battles. Each line of argument essayed by the dissent and deflected by the majority has been attempted and rejected in the past. But in continuing to resist the principles and logic of substantive equality, the dissent's positioning seems to suggest that equality rights can somehow be achieved without any redistribution of rights, benefits and material well-being. This is impossible. Meanwhile, the routine repetition of these oft-rejected arguments means that those who seek to claim section 15's protection must, with each new case, stand ready to defend the exact gains that have been won multiple times in the past.

## V. TWO STEPS BACKWARD: WHITHER (WITHER) CHARTER DIALOGUE?

While the majority position at the SCC makes meaningful progress in advancing principles of substantive equality, governments seem unfazed by the Court's jurisprudential direction. As a result, women's historic Charter victory in *Alliance* is already under threat. Instead of a Charter dialogue, it appears that the phone is off the hook.

First, in introducing a new proactive *Pay Equity Act*,<sup>129</sup> the Federal Government appears not to be engaging in the expected Charter dialogue with the courts.<sup>130</sup> The Federal PEA was introduced as part of the 884-page *Budget Implementation Act, 2018, No. 2*.

Like the Quebec PEA, the Federal PEA adopts a five-year pay equity audit cycle for maintaining pay equity. Section 88(4) appears to provide that pay adjustments identified in the audit take effect on a go-forward basis. Similar to Quebec, the Federal PEA amends the otherwise-applicable *Canadian Human Rights Act* (CHRA) to prohibit women from filing pay discrimination complaints under it.<sup>131</sup> Despite the fact it was introduced five months after *Alliance* was released, the Federal PEA appears to replicate the precise effects that the SCC just ruled unconstitutional. Moreover, the Federal PEA enables some employers to decide that job evaluations that pre-date the new PEA are compliant with

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<sup>129</sup> *Pay Equity Act*, being Division 14 of *Budget Implementation Act 2018, No. 2*, S.C. 2018, c. 27.

<sup>130</sup> Peter W. Hogg and Allison A. Bushell, "The Charter Dialogue between Courts and Legislatures (Or Perhaps the Charter of Rights Isn't Such a Bad Thing after All)" (1997) 35 *Osgoode Hall L.J.* 75-124.

<sup>131</sup> *Budget Implementation Act, 2018 No. 2*, S.C. 2018, c. 27, s. 425(1).

the new law.<sup>132</sup> This lies in tension with *Alliance*'s holding that denying workers the information on which to evaluate and challenge employer-developed pay equity violates the Charter. Moreover, comparable provisions in Quebec's PEA which preserved "relativity plans" that predated that province's law were found to violate section 15 of the Charter and were ruled unconstitutional in 2004.<sup>133</sup> In these respects, there is a clear breakdown of — or disregard for — communication on what is required for Charter compliance.

The Federal PEA contains other red flags that, while not previously ruled unconstitutional, raise meaningful concerns about prejudicial impacts on equality rights. The new Act's purpose clause makes the objective of achieving pay equity subject to "the diverse needs of employers". Contrary to Abella J.'s section 1 reasons in *Alliance*, this subordinates fundamental equality rights to employer-defined "needs" and also undercuts the existing broad right to equality in the CHRA. The Federal PEA contains sweeping powers by which Cabinet can make regulations to exempt "any employer, employee or position, or any class of employers, employees or positions, from the application of any provision of this Act" with or without conditions.<sup>134</sup> Other provisions in the Act actually reduce the scope of rights protection below what currently exists in the CHRA.<sup>135</sup> This contradicts the basic equality rights principle that legislative action to address equality must move the bar forward, not back.<sup>136</sup>

These concerns are sufficiently serious that the Standing Senate Committee on National Finance took the unusual step of passing *Budget Implementation Act, 2018, No. 2*, but appending observations specifically, and only, on the new PEA. Those observations state: "Considering the concerns expressed by a certain number of witnesses, your committee calls for the Government of Canada to initiate a

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<sup>132</sup> *Pay Equity Act*, s. 41(2), being Division 14 of *Budget Implementation Act 2018, No. 2*, S.C. 2018, c. 27.

<sup>133</sup> *Syndicat de la fonction publique du Québec inc. v. Québec (Procureur général)*, [2004] J.Q. no 21, 2004 CanLII 76338 (Que. C.S.).

<sup>134</sup> *Pay Equity Act*, s. 181(1)(a), being Division 14 of *Budget Implementation Act 2018, No. 2*, S.C. 2018, c. 27.

<sup>135</sup> *Budget Implementation Act, 2018 No. 2, id.*, s. 425(1) and *Federal Pay Equity Act, id.*, s. 46(f).

<sup>136</sup> See *Law Society of British Columbia v. Andrews*, [1989] S.C.J. No. 6, [1989] 1 S.C.R. 143, at para. 34 (S.C.C.); *Eldridge v. British Columbia (Attorney General)*, [1997] S.C.J. No. 86, [1997] 3 S.C.R. 624, at para. 64 (S.C.C.).

parliamentary review in six years' time at the latest" and suggested eight specific areas of concern to be examined.<sup>137</sup>

Secondly, on the provincial front, the Attorney General for Ontario has adopted a litigation strategy that takes an aggressively narrow approach to the precedential value of the new SCC judgments and a formalist analysis that effectively ignores the SCC's systemic analysis.

Unionized nursing and service employees at 143 female-dominated nursing homes across Ontario sought to enforce pay equity maintenance using the external male comparators they originally used to achieve pay equity. Without access to the external comparators, they argued, workers in female-dominated workplaces were denied equal benefit and protection of the maintenance provisions in the Ontario *Pay Equity Act*,<sup>138</sup> and denied a full remedy for discrimination, in violation of section 15 of the Charter. In essence, the Ontario case combines the two issues addressed in the SCC pay equity appeals: Were women in female-dominated workplaces denied the same pay equity maintenance rights granted to other women under the PEA? If so, does that violate section 15 of the Charter by discriminating on the basis of sex? In 2016, the Pay Equity Hearings Tribunal denied the Unions' applications for reasons that mirror those of the Quebec Superior Court in *CSQ*. The Tribunal found that while there was differential treatment under the PEA, the distinction did not discriminate because it was based on women's "*locus of employment*" in a female-dominated workplace, not "sex".<sup>139</sup>

On judicial review, the Government argued that reliance on *CSQ* was "misplaced and unhelpful" because the specific mechanics by which external comparators were identified for female-dominated workplaces differed in the provincial statutes and because the impugned effects arose from different distinguishing techniques (in Quebec through delay, in Ontario through denial of access to male comparators).<sup>140</sup> Meanwhile, the substantive legal question in both cases was identical: whether

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<sup>137</sup> Senate of Canada, Standing Committee on National Finance, 42nd Parliament, 1st Session, 37th Report (December 7, 2018).

<sup>138</sup> R.S.O. 1990, c. P-7.

<sup>139</sup> *Ontario Nurses' Association v. Participating Nursing Homes*, 2016 CanLII 2675, at paras. 119-120 and 157 (Ont. P.E.H.T.). This ruling was overturned on judicial review: *Ontario Nurses' Assn. v. Participating Nursing Homes*, [2019] O.J. No. 2237, 2019 ONSC 2168 (Ont. S.C.J.). At the time of writing, Ontario and the Nursing Homes have applied for leave to appeal.

<sup>140</sup> Factum of the Intervener, The Attorney General of Ontario in *Ontario Nurses' Association v. Participating Nursing Homes; Service Employees International Union Local 1 v. Participating Nursing Homes*, Ontario Superior Court of Justice (Divisional Court), Court File Nos. 362/16, 364/16, 444/16 and 445/16, at paras. 68, 76.

differential treatment of workers in female-dominated workplaces discriminates contrary to section 15 of the Charter.

Similarly, even though both *Alliance* and *Participating Nursing Homes* addressed the denial of women's rights to *pay equity maintenance*, Ontario argued that *Alliance* was distinguishable because the statutory mechanisms by which maintenance operated differed under the two provincial statutes.<sup>141</sup> Meanwhile, the substantive legal question to which *Alliance* spoke was identical: whether denial of full remedies in the context of pay equity maintenance violated section 15 of the Charter.

Finally, in the alternative, Ontario argued that any distinction under the Ontario PEA "is protected by section 15(2)" because the overall purpose of the PEA is to redress systemic gender discrimination.<sup>142</sup> This argument tracks Côté J.'s dissents rather than Abella J.'s clear majority holding that section 15(2) is only available to dispute "reverse discrimination" claims which were not at issue.

Ultimately these legislative and litigation initiatives represent two steps backwards in women's fight for substantive equality. Charter litigation is lengthy, resource intensive and expensive. The victory in *Alliance* was hard won and the majority's analysis robust. It *should* provide strong guidance for systemic discrimination claims going forward. But under the current political arrangements, governments' disregard of the SCC's jurisprudential direction and rigid formalism in argument actively undermines women's right to substantive equality and poses a serious threat to women's access to justice. As long as this governmental resistance persists, it will encourage and fuel judicial recalcitrance to abandon the familiar and repeatedly rejected legal arguments reflected in the SCC dissents. Until then, we'll be walking in circles.

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<sup>141</sup> *Id.*, at paras. 95-98.

<sup>142</sup> *Id.*, at para. 101.