Court File No. 37347

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

BETWEEN:

PROCUREURE GÉNÉRALE DU QUÉBEC

APPELLANT/
RESPONDENT ON
CROSS APPEAL

- and -

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(**Continued on next page**)

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FACTUM OF THE INTERVENERS

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PART I: OVERVIEW

1. This intervention is brought by the Ontario Equal Pay Coalition, the New Brunswick Coalition for Pay Equity and the Women's Legal Education and Action Fund (collectively, the "Equality Coalition"). The Coalition partners are Ontario and New Brunswick pay equity organizations representing English- and French-language constituencies in provincial and federal jurisdictions, and LEAF which has a national mandate to advance *Charter* equality rights.

2. The Equality Coalition's *Charter* submissions address three themes as follows:

   a. **Systemic Discrimination under s. 15(1):** Because systemic sex discrimination is so deeply entrenched, without continuous active review of workplace practices, discriminatory wage gaps re-emerge over time. By requiring pay equity audits only every 5 years, rather than on an ongoing basis, and denying women a remedy for the actual wage discrimination experienced during that 5-year period, the *Act* provides only episodic, intermittent and incomplete protection for equality rights contrary to s. 15.
   b. **Section 15(2):** Section 15(2) has no application in this case and cannot be used as a vehicle for s. 1 arguments.
   c. **Section 1:** The notion of deference and each stage of the proportionality test must be examined through a gender lens to ensure that s. 1 analysis is consistent with s. 28's guarantee that all rights in the *Charter* - including s. 1 - apply equally to women and men.

PART II: STATEMENT OF POSITION

3. The Equality Coalition accepts the record as it is. The Coalition's analysis of s. 15 and s.1 supports the Respondents/Appellants on the Cross-Appeal. The Coalition takes no position on remedy or the outcome of the appeal.

PART III: STATEMENT OF ARGUMENT

A. Addressing systemic sex discrimination under s. 15(1) of the *Charter*

4. At the crux of this appeal is systemic discrimination: understanding what it is; how it operates; and what equal protection and benefit of the law require in the face of it. Addressing systemic discrimination requires that the s. 15(1) analysis proceed from the perspective of the *Charter* claimants[1] and be focused on what impact the impugned law has on those claimants.[2]

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[1] *Law v. Canada [1999] 1 SCR 497* at para. 59-75; *Withler v. Canada (Attorney General)*, 2011 SCC 12 at para 2, 37-38; *Quebec (Attorney General) v. A*, 2013 SCC 5 at para. 327-329

5. The Court of Appeal[3] pursued an appropriately contextual and effects-focused analysis in concluding that (a) leaving identified wage discrimination unredressed during the five-year period between pay equity audits (s. 76.5 and s. 103.1); and (b) denying workers access to information that would enable them to assess the propriety of the pay equity audit process and outcome (s.76.3) violate equality rights under s. 15 of the *Charter* and are not saved under s. 1.

6. It is a bedrock principle that contextual analysis under s. 15 must "tak[e] full account of the social, political, economic and historical factors" that shape the claimants' situation and the effect of the impugned law.[4] By contrast, the Appellant's analysis focuses narrowly on the chronology of amendments to the *Pay Equity Act*[5] and on the purported "burden" on government to eliminate discrimination. That approach erases both the context of systemic discrimination and the impact on the claimants from the equality analysis and so yields an erroneous conclusion.

7. The term systemic discrimination refers to how power structures relationships between groups in society, privileging some and marginalizing others.[6] 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.[7]

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[2] *Withler, supra* at para. 2, 39; *Québec v. A, supra* at para. 324; *Ermineskin Indian Band and Nation v. Canada*, 2009 SCC 9 at para. 193-194; *R. v. Turpin*, [1989] 1 SCR 1296 at 1331-1332

[3] *Decision of the Court of Appeal.* A certified English translation of the decision is at **Equality Coalition Authorities ("EC Auth"), Tab 3**

[4] *Withler, supra* at para. 2, 39; *Québec v. A, supra* at para. 324; *Ermineskin Indian Band and Nation v. Canada*, 2009 SCC 9 at para. 193-194; *R. v. Turpin*, [1989] 1 SCR 1296 at 1331-1332

[5] *Pay Equity Act*, CQLR, c. E-12.001

[6] Martha Minow, *Making All the Difference: Inclusion, Exclusion and American Law* (Ithaca: Cornell University Press, 1990) at 110-112, **EC Auth., Tab 5**; Sheila McIntyre, "Answering the Siren Call of Abstract Formalism with the Subjects and Verbs of Domination" in *Making Equality Rights Real: Securing Substantive Equality Rights under the Charter*, F. Faraday, M. Denike and M.K. Stephenson, eds. (Toronto: Irwin Law, 2006) at pp. 108-109, **EC Auth., Tab 7**

[7] *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 SCR 3, 1999 at para. 41; Margot Young, "Blissed Out: Section 15 at Twenty", in *Diminishing Returns*, S. McIntyre and S. Rogers, eds. (Butterworths, 2006) at pp. 63-64, 68 **EC Auth. Tab 4;** Justice Rosalie Silberman Abella, *Equality in Employment: A Royal Commission Report* (Canada: 1984) ("Abella Report") at 9-10

8. Systemic discrimination claims target the impact of practices and systems that have been established and normalized over time within this unequal power relationship.[8] They "necessarily involve an examination of the interrelationships between actions (or inaction), attitudes and established organizational structures". Claims "alleging gender-based systemic discrimination cannot be understood or assessed through a compartmentalized view"; it must be "understood, considered, analyzed and decided in a complete, sophisticated and comprehensive way."[9]

9. Systemic sex discrimination has created a labour market characterized by sex segregated occupations and devaluation of the work that women do. Systemic sex discrimination in pay results from "the application over time of wage policies and practices that have tended either to ignore, or to undervalue work typically performed by women."[10] This discrimination penalizes women such that, the more women predominate in a job, the lower it is paid.[11] Women who are marginalized by intersecting discrimination based on being Indigenous, and based on race, immigration status, disability, sexual orientation and gender identity, the deeper pay discrimination they face.[12]

10. Women's right to discrimination-free pay is not new. It is a baseline entitlement of sex equality.[13] Since 1919, international human rights instruments ratified by Canada have highlighted government's duty to secure women's right to equal pay for work of equal value.[14]

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[8] *CN v. Canada (Canadian Human Rights Commission),* [1987] 1 SCR 1114 at p. 1139*(Action Travail des Femmes)*

[9] *Association of Ontario Midwives v. Ontario (Health and Long-Term Care)*, 2014 HRTO 1370 at para. 33 ("*Ontario Midwives*")

[10] *Public Service Alliance of Canada v. Canada (Treasury Board),* 1999 CanLII 9380 (FC) at para. 117

[11] *Haldimand-Norfolk (No. 3)* (1990), 1 P.E.R. 17 para. 44; aff'd (1990), 1 P.E.R. 188 (Div. Ct.), **EC Auth., Tab 1**

[12] Ontario, *Closing the Gender Wage Gap: A Background Paper* (2015) at p 12

[13] See, for example, Ontario *Human Rights Code*, R.S.O. 1990, c. H-19, s. 5

[14] ILO Constitution (1919), Preamble; ILO *Convention Concerning Equal Remuneration for Men and Women for Work of Equal Value*, (ILO Convention No. 100) (1951), Art. 2, 3; ILO *Declaration on Fundamental Principles and Rights at Work*, (1998); UN *Convention on the Elimination of All Forms of Discrimination Against Women*, (1979), Art. 11; UN *Report of the Fourth World Conference on Women*, Beijing, China, (1995) chap. I, resolution 1, annex I [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); *Abella Report, supra* at p. 239-241; Final Report of the Pay Equity Task Force, *Pay Equity: A New Approach to a Fundamental Right*

But discrimination endures: "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."[15]

11. Pay equity laws are human rights laws that disrupt systemic discrimination by requiring workplace parties to proactively examine, challenge and alter the attitudes, practices and policies that produce pay discrimination. They require workplace parties to develop wage practices that reflect the skills, effort, responsibility and working conditions of jobs free of discrimination.

12. But it takes active intervention to *maintain* equality in the face of systemic discrimination. The problem is not simply historical: "systemic discrimination is a continuing phenomenon which has its roots deep in history and in societal attitudes... By its very nature, it extends over time."[16] Without conscious effort systemic patterns of discrimination re-emerge. Thus, after pay equity is achieved, pay equity laws mandate ongoing vigilance to *maintain* discrimination-free wages so workplaces do not revert to familiar patterns and practices of systemic discrimination.[17]

13. Ontario's Pay Equity Hearings Tribunal describes the obligation to maintain pay equity:

> Maintenance is the means by which an employer ensures that compensation practices are kept up-to-date and remain consistent with pay equity principles. … Maintenance is an ongoing responsibility. It includes reviewing job classes regularly to capture any changes to job duties and responsibilities, which may require pay equity adjustments.[18]

14. Systemic sex discrimination can reproduce gendered pay gaps that re-emerge at multiple junctures as jobs evolve including as a result of: changes to the duties and responsibilities of a job; the creation or elimination of a job; technological change; work reorganization; differential wage increases to male and female jobs, and so on. Workplaces are not static. Ongoing active re-assessment is needed to identify and correct any discriminatory wage gaps that re-emerge so equality is maintained. The impact of the impugned provisions must be weighed in this context.

(Canada, 2004) at pp. 52-63

[15] *Abella Report, supra* at p. 232

[16] Public Service Alliance of Canada v. Canada (Department of National Defence), 1996 CanLII 4067 (FCA); *Ontario Midwives, supra* at para. 32

[17] See *Pay Equity Act*, R.S.O. 1990, c. P-7, s. 7; Final Report of the Pay Equity Task Force, *Pay Equity: A New Approach to a Fundamental Right* (Canada, 2004) at p. 165

[18] *Call-A-Service Inc. v An Anonymous Employee*, 2008 CanLII 88827 (ON PEHT) at para. 25

15. As the bedrock of our legal system, the *Charter* provides continuous and enduring protection for our most fundamental rights, including the s. 15 right to equality. Equality is not an episodic right that exists only at designated intervals but slumbers without effect between times. Yet, that is precisely how Quebec's pay equity maintenance provisions treat it.

16. The Appellant argues that she has replaced a "minimalist" system with a more detailed, concrete one. But more words do not equate with more rights or substantive equality. *Charter* analysis must go beyond the superficial reading of the law's text to examine its actual, contextual impact on women. A right or duty briefly stated is not an empty right. Each of the fundamental freedoms in s. 15 of the *Charter* is briefly stated yet each provides robust protection for the fundamental freedom. Similarly, while Ontario's duty to maintain pay equity is stated in "minimalist" terms, a rich jurisprudence has given it meaningful substance.

17. The *Act* eliminates employers' obligation to monitor workplace changes in real time to prevent and rectify discrimination that suppresses women's wages. Instead, maintenance is only considered at five year intervals. Even when, due to sex discrimination, women are underpaid during the five year audit period, their pay is only adjusted on a go-forward basis.

18. This effectively grants amnesty to a situation in which, for periods up to five years, male- and female-dominated jobs are treated differently; "men were already paid money for value whereas the women were not."[19] The episodic and incomplete protection under the *Act* feeds a discourse that fails to treat pay equity as a normal and legitimate part of workplace rights. It fails to build women's equality into core workplace standards.[20] It perpetuates practices that privilege male wages while perpetually requiring women to "catch up", with only incomplete redress. This Court has ruled that such pay gaps violate s. 15 because they "perpetuate and reinforce the idea that women could be paid less for no reason other than the fact they are women."[21]

19. For decades this Court has stressed that systemic discrimination requires systemic remedies that "create a climate in which both negative practices and negative attitudes can be

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[19] *Newfoundland (Treasury Board) v. N.A.P.E*., 2004 SCC 66 at para. 50 ("*NAPE*")
[20] Contrary to *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 SCR 3, 1999 at para. 68; *Abella Report, supra* at p. 252
[21] *NAPE*, *supra* at para. 46

challenged" and that "destroy those patterns in order to prevent the same type of discrimination in the future".[22] But Québec's episodic protection for maintenance enables tenacious patterns of systemic sex discrimination to re-emerge in the five year period after a pay equity audit. This effectively invites employers to time workplace changes to shelter under that five year amnesty on discrimination.[23] It compartmentalizes the experience of discrimination, obscuring the impact of the harm.[24] Finally, unlike other jurisdictions where women can file complaints about pay discrimination under both pay equity and human rights statutes,[25] the *Act* prohibits women from filing complaints under Québec's *Charter* to cover gaps in protection under the pay equity law.

20. All of the above has a discriminatory impact based on sex that violates the norm of substantive equality in s. 15.[26] It perpetuates actual economic disadvantage that is identified through the pay equity audit itself. Thus it fails to accord with women's needs, capacities and circumstances, and perpetuates pre-existing disadvantage rooted in historic and continuing systemic discrimination. As this Court as found, "the value placed on a person's work is more than just a matter of dollars and cents"; it shapes "the whole compendium of psychological, emotional and physical elements of a person's dignity and self-respect" and the respect they are accorded by others. Unredressed pay discrimination reinforces power imbalances that feed social marginalization and oppression because it tells women that "they did not deserve equal pay despite making a contribution of equal value."[27] This normalizes an amnesty for discriminatory behaviour, at women's expense, which has the didactic effect of undermining the legitimacy of women's equality claims.

21. Violations of the norm of substantive equality are reinforced by two other elements of the pay equity audit regime: (1) denial of workers' access to meaningful participation and

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[22] *CN v. Canada (Canadian Human Rights Commission),* [1987] 1 SCR 1114 at pp. 1138-1139, 1141-1143, 1145 ("*Action Travail des Femmes*")
[23] *Decision of the Québec Court of Appeal,* **EC Auth., Tab 3** at para 71-74
[24] Contrary to *Ontario Midwives*, *supra* at para 33
[25] See, for example, Ontario *Human Rights Code*, s. 5 and Ontario *Pay Equity Act*, s. 22; *Nishimura v. Ontario (Human Rights Commission)* (1989), 70 O.R. (2d) 347 (Ont. Div. Ct.), at 354. CUPE, Local 1999 v. Lakeridge Health Corp 2012 ONSC 2051, [2012] O.J. No. 2541, at para 77
[26] *Withler, supra* at para 2, 30; *Québec v. A*, *supra* at 319-332, esp. at para 325; *Kahkewistawhaw First Nation v. Taypotat*, 2015 SCC 30 at para 18-20
[27] *NAPE, supra* at para 40-41, 45-46, 49-51

representation in the pay equity audit process; and (2) denial of access to meaningful information to evaluate the pay equity audit process and outcome.

22. Pay equity jurisprudence recognizes that active participation in the process to achieve and maintain pay equity is itself part of substantive equality norms that help unwind patterns of systemic discrimination.[28] This negotiation process enables workplace parties to consciously re-establish new, non-discriminatory attitudes, practices and policies that can break the cycle of discrimination.[29] Ontario's pay equity jurisprudence recognizes, as a foundational principle, that workplace parties are entitled to full disclosure of information that is rationally related to a pay equity issue.[30] This disclosure obligation applies when unions are negotiating pay equity with employers, and the Pay Equity Commission will order disclosure when non-unionized workers are reviewing a pay equity plan unilaterally developed by the employer. Because systemic discrimination "cannot be isolated to a single action or statement",[31] full "disclosure is required to foster rational and informed discussions". Parties must have "sufficient information to intelligently appraise the other's proposals [and] to formulate their own positions".[32] Ultimately, denial of full disclosure and participation in pay equity maintenance – particularly when complaints under the Québec *Charter* are also denied – deprives women of meaningful mechanisms by which to enforce their right to equality.[33]

23. Finally, the Equality Coalition addresses three key errors in the Appellant's s. 15 analysis relating to (a) the purported "burden" on government to eliminate discrimination; (b) the application of *Taypotat*; and (c) the notion of "retroactivity".

24. First, the Appellant's s. 15 analysis subverts the entire frame by which to assess if a law violates s. 15. Rather than focusing on the law's effect on the claimants, the Appellant asks if an undue "burden" is placed on government. This has no place in the s. 15 analysis. It imports the s.

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[28] *Call-A-Service Inc. v An Anonymous Employee*, supra at para 24-30. Thunder Bay Police Service, [2006] O.P.E.D. No. 9, at para 6

[29] Final Report of the Pay Equity Task Force, *Pay Equity: A New Approach to a Fundamental Right* supra at pages 435, 446-7 and 452

[30] *Ontario Public Service Employees Union v. Cybermedix Health Services Ltd.,* (1990), 1 P.E.R. 41, **EC Auth., Tab 2**

[31] *PSAC v. Canada (DND), supra*

[32] *Cybermedix Health Services Ltd.,* supra at para 19-21,**EC Auth., Tab 2**

[33] *Abella Report, supra* at p.10; Cf *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94 para 46

1 analysis into the heart of s. 15 gutting s. 15's protective role, and making s. 1 redundant. The scope of s. 15 protection is not defined by an abstract notion of the state's obligation to eliminate discrimination. Discrimination is identified by the effect on claimants. The state's perspective is addressed under s. 1 where any justification must meet the full s. 1 test.

25. Second, the Appellant uses an absurdly narrowly reading of isolated words from *Taypotat*[34] to suggest that discrimination only arises if government action sustains discrimination or makes it *worse* than it already is. This substantially erodes the scope of s. 15 protection without a principled basis. Section 15 jurisprudence as a whole makes clear that discrimination – particularly systemic discrimination – arises through the interaction of multiple dynamics, any one or combination of which can have a discriminatory effect.[35] Speaking of discrimination as if it is a singular "gap" that widens or narrows inaccurately portrays the experience of systemic discrimination. Section 15 is concerned with whether there is a discriminatory effect, full stop. It is not about temporal relativism. To adopt the Appellant's approach would treat existing discrimination as an acceptable baseline that is immune from *Charter* scrutiny. Far from eradicating discrimination, that approach condones and preserves existing discrimination.

26. Third, the Appellant wrongly characterizes the dispute as one concerning "retroactivity". It isn't. Pay equity *maintenance* by definition addresses discrimination that has re-emerged *after* pay equity was initially established. It is by definition discrimination that has arisen and continues during the period in which the *Pay Equity Act* has been operative. As Sullivan states, "the application of legislation to on-going facts is not retroactive because … there is no attempt to reach into the past and alter the law or the rights of persons as of an earlier date."[36] The pay equity law has been in place for more than two decades. Any breach of rights that arises during the currency of the law reflects a violation of existing rights to non-discriminatory pay and failure to redress that violation discriminates on the basis of sex.

27. Moreover, when discriminatory pay emerges after pay equity has been achieved, it is not

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[34] *Kahkewistawhaw First Nation v. Taypotat*, supra at para 16 -20

[35] *Québec v. A*, *supra* at 319-332

[36] Ruth Sullivan, *Construction of Statutes* 6th Edition (Toronto: Lexis Nexus, 2014) at p.764 **EC Auth., Tab 6;** *Public Service Alliance of Canada v. Canada Post Corporation*, 2005 CHRT 39 at para 112

a one-shot breach of rights; it is rather part of a continuing breach of rights. Every day that women are employed for discriminatory pay forms part of that continuing breach. Under human rights law, a claimant is entitled to a remedy for the full period of a continuing breach that falls within the limitation period.[37] The Québec *Pay Equity Act* effectively gives women a limitation period of zero days. They cannot file complaints. And they cannot receive a remedy before the employer-controlled posting of the pay equity audit. This situation is in direct conflict with the basic human rights jurisprudence that recognizes liability for a continuing breach of rights and is contrary to substantive equality norms because it sustains and condones discriminatory pay.

B. Section 15(2) of the *Charter* has no application

28. Section 15(2) has no application in this case. This Court ruled in *Cunningham* that "the purpose of s. 15(2) is to save ameliorative programs from the charge of 'reverse discrimination'."[38] It would only apply if men challenged pay equity as so-called "reverse discrimination". That is not the case here. In this case, the women whose rights are intended to be protected by the *Pay Equity Act* argue that the law perpetuates sex discrimination in pay.

29. Pay equity is not a s. 15(2) "special program". It is a human right law of general application.[39] "Human rights legislation is of a special nature and declares public policy regarding matters of general concern."[40] As such, the *Pay Equity Act* not subject to s. 15(2). Moreover, to suggest the *Act* is shielded from s. 15(2) scrutiny because it has "ameliorative" effects, ignores the real prejudicial impacts of the legislation outlined above. The Appellant's s. 15(2) approach minimizes women's rights to equality and enfeebles their proper impact.[41]

30. Sections 15(1) and 15(2) must work together to support substantive equality. But rather than responding to the claimants' s. 15 argument with its own analysis of substantive equality norms, Quebec has reframed s. 15 so that it effectively substitutes for and supplants the s. 1 argument. Quebec's s. 15(1) argument ("burden" on the government) and its s. 15(2) argument (intent, minimal impairment, proportionate impact) do not engage core s. 15 principles and leave

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[37] *Ontario Midwives* supra at para 33
[38] *Alberta (Aboriginal Affairs and Northern Development) v. Cunningham*, 2011 SCC 37 para 41
[39] Cf *Kapp, supra* at para 55
[40], *Winnipeg School Division No. 1 v. Craton,* [1985] 2 S.C.R. 150 at para 8
[41] *CN v. Canada (Canadian Human Rights Commission)* supra at para 1134

no work for s. 1 to do. This reframing must be rejected.

C. Equality principles in Section 1

31. Finally, the Equality Coalition submits that principles of equality must inform an analysis of what can be considered "demonstrably justifiable in a free and democratic society" under s. 1.[42] This is necessary in order to meet the commitment in s. 28 of the *Charter* that "the rights and freedoms referred to in it are guaranteed equally to male and female persons". Section 1 analysis must consider the gendered implications of justifying a breach of *Charter* rights otherwise what is framed as "gender neutral" deference, what is considered "rational", what is characterized as "minimal impairment" and what is accepted as "proportionate" all risk reintroducing systemic sex discrimination that has been found to violate s. 15. These principles have developed in a political and legal context that has historically been built on male norms that overlook the reality of women's lives in a society steeped in systemic sex discrimination. Unless a gender lens is brought to s. 1, this stage of the constitutional analysis may effectively invalidate s. 15 protection and perpetuate patterns of systemic sex discrimination.[43]

PARTS IV AND V: COSTS AND ORDER REQUESTED

32 By this Court's intervention order, costs will not be sought by or against the Coalition and the Coalition has been granted leave to make oral argument.

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

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Fay Faraday	**Janet E. Borowy**

[42] R. v. Oakes, [1986] 1 S.C.R. 10 at para 14

[43] Karen 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) [unpublished], especially Chapter 6

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23.	*R. v. Turpin*, [1989] 1 SCR 1296	4,6
24.	*Syndicat de la function publique du Québec inc c. Québec (Procureur general)* 2004 CanLII 76338 (QC CS)	37
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29.	Justice Rosalie Silberman Abella, Report of the Royal Commission on Equality in Employer, *Equality in Employment: A Royal Commission Report* (Canada: 1984)	7, 10, 22
30.	Karen 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) [unpublished], esp Chapter 6.	31
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