

July 12, 2018

The Supreme Court of Canada's Approach to the Charter's Equality Guarantee in its Pay Equity Decisions

By: Jonnette Watson Hamilton and Jennifer Koshan

Case Commented On: *Quebec (Attorney General) v. Alliance du personnel professionnel et technique de la santé et des services sociaux*, [2018 SCC 17 \(CanLII\)](#); *Centrale des syndicats du Québec v. Quebec (Attorney General)*, [2018 SCC 18 \(CanLII\)](#)

The latest decisions of the Supreme Court of Canada on s 15 of the *Canadian Charter of Rights and Freedoms* are the two companion pay equity decisions rendered May 24, 2018 in *Quebec (Attorney General) v. Alliance du personnel professionnel et technique de la santé et des services sociaux*, [2018 SCC 17 \(CanLII\)](#) (APP) and *Centrale des syndicats du Québec v. Quebec (Attorney General)*, [2018 SCC 18 \(CanLII\)](#) (CSQ). The analysis of the Charter's s 15(1) prohibition of discrimination on the ground of sex and s 15(2) protection of ameliorative programs from charges of reverse discrimination — the two-case, five-judgment spanning focus of this post — reveals a seriously fractured court reminiscent of the court that decided the so-called “equality trilogy” of the mid-1990s. It reveals the lack of consensus at the end of Beverley McLachlin's term as Chief Justice and after a significant turnover in members in the past four years, with the three most recently appointed judges who heard these appeals dissenting. The issues this post addresses — and we address them only briefly in this forum — are: (1) What is the current legal test for discerning a breach of s 15? (2) What are the contentious points on which the current justices disagree? And (3) What might these pay equity decisions mean for the future of equality law in general? Unfortunately, there is enough disagreement about the answers to the first two questions that this lengthy post will only discuss the relevant law and not go into detail on its application to the facts in this case (except in the use of comparators).

An earlier ABlawg post by Jennifer Koshan, [The Supreme Court of Canada's Pay Equity Decisions: A Call to Action for Alberta?](#), explores the implications of these two decisions for the Alberta government's pay equity obligations. The context and facts of both decisions are detailed in that post, but a brief recap to set the stage for the s 15 analysis is in order.

Facts and outcomes of the two cases

The cases involve two different challenges to one statute, Quebec's *Pay Equity Act*, [RSQ 1996 c 43](#) which applies to public and private employers with 10 or more employees. The 1996 version of the Act created a continuous obligation on employers to monitor pay equity and to make adjustments to wages to achieve it. Employees and their unions could enforce these obligations through complaints to the Pay Equity Commission, which had the power to order retroactive employee compensation.

Quebec amended its *Pay Equity Act* in 2009 because of “widespread non-compliance” (*APP* at para 16). The 2009 amendments replaced employers’ continuous obligations to implement pay equity with a system of pay equity audits to be conducted every 5 years. The amendments also removed the possibility of retroactive employee compensation unless an employer acted in bad faith, arbitrarily or with discrimination. The 2009 amendments were challenged by several unions under s 15 of the *Charter* in *APP*.

Writing for the 6:3 majority in *APP*, Justice Abella (with Chief Justice McLachlin and Justices Moldaver, Karakatsanis, Wagner and Gascon concurring) found that the 2009 amendments violated s 15(1) of the *Charter*, were not within the scope of s 15(2), and could not be justified by the government under s 1 (at paras 1-61). Justices Côté, Brown and Rowe dissented (at paras 62-114), finding no violation of s 15(1) and, alternatively, that the legislation was protected under s 15(2).

CSQ involved the development of a process, implemented by regulations under the 1996 version of the *Pay Equity Act*, for dealing with workplaces where there were no male comparators, such as child care centres. The process created a six-year delay in pay equity adjustments for women in these workplaces. The delay was challenged under s 15 of the *Charter* by unions representing employees in workplaces without male comparators.

In *CSQ*, a 5:4 majority of the Court (Justices Abella, Moldaver, Karakatsanis, Gascon and Chief Justice McLachlin) held that the legislated delay in implementing pay equity for workplaces without male comparators was discriminatory and violated s 15 of the *Charter* (at paras 1-56). Justices Côté, Wagner, Brown and Rowe dissented on this point, seeing no breach of s 15 (at paras 57-153). However, four of the five justices in the majority on s 15 decided that the government could justify the violation of equality rights under s 1, with the result that an 8:1 majority of the Court dismissed the challenge, whether on s 15 or s 1 grounds. Only the Chief Justice would have allowed the claim, finding that the violation of s 15 could not be justified under s 1 (at paras 154-159).

References to the dissenting judgment in both cases will be to the judgments of Justices Côté, Brown and Rowe, joined by Justice Wagner in *CSQ*, because of our focus on s 15.

Section 15(1) tests and contentious points of law

What is the current legal test for discerning a violation of the *Charter*’s guarantee of equality? What are the contentious points on which the justices disagreed?

In discussing the answers to these questions furnished by both cases, we rely on the fact they are “companion cases”. In other words, they are cases initially heard on the same day, with reasons rendered in both on the same day, and both concern closely related issues arising from the same *Pay Equity Act*. Although a single decision is sometimes used to explain two or more companion cases, in this instance separate decisions were released, one for each case. The two decisions do differ in the judges’ treatment of s 15 in some respects, as we will discuss.

Substantive equality

All justices are agreed that substantive equality is “the engine for the s 15 analysis” (*APP* at para 25; see also *APP* at para 66, *CSQ* at paras 25 and 117). However, they do not agree on how to distinguish substantive equality from formal equality.

This is most evident in *CSQ* when the justices apply the first step of the test for a violation of s 15(1) and disagree on whether delaying pay equity implementation for women in workplaces without male comparators discriminates on an enumerated or analogous ground. The majority held that delay in implementing pay equity for the sub-set of women in workplaces without male comparators did discriminate on the basis of sex, an enumerated ground (*CSQ* at paras 23, 24 and 29). The dissent agreed with the trial judge’s decision that the differential treatment of women in workplaces without male comparators was based on the lack of male comparators (*CSQ* at paras 122 and 130), which is neither an enumerated nor an analogous ground of discrimination. The majority explicitly accused the trial judge and those in dissent of adopting a formal equality approach (*CSQ* at para 25), analogizing their approach to “the paradigmatic example of formalism in *Bliss* ... [where] the Court had concluded that legislation excluding pregnant women from unemployment benefits did not discriminate on the basis of sex, but on the basis of pregnancy” (*CSQ* at para 27).

Not surprisingly, the dissent denied that their decision amounted to adopting a formal equality approach as in *Bliss* (*CSQ* at para 123). Their reasons for concluding the situation at hand was different from *Bliss* are opaque enough that we are unable to paraphrase them (*CSQ* at paras 124-125). The dissent may have simply deferred to the trial judge’s conclusion because he reached it “[a]fter thoroughly reviewing the evidence” (*CSQ* at para 125). However, their acknowledgement that the group adversely affected by the impugned provisions “consists mostly of women and is at a particular disadvantage in the labour market” (*CSQ* at para 121) begs the question of how this was a distinction that was other than sex-based, and appears to parallel the reasoning in *Bliss* that pregnancy discrimination is not sex discrimination because not all women become pregnant.

The test for determining a breach of section 15(1)

The Supreme Court’s formulation of the test for discrimination in *R v Kapp*, [2008 SCC 41 \(CanLII\)](#) at para 17 has been at the centre of considerations of s 15(1) since 2008. However, it has not been clear whether the *Kapp* test was replaced with a new analytical framework over the past five years, beginning with the majority s 15(1) judgment of Justice Abella in *Quebec (Attorney General) v A*, [2013 SCC 5 \(CanLII\)](#). Lower court decisions such as *Redfern v Qikiqtani Inuit Association*, [2018 NUCJ 13 \(CanLII\)](#) at para 59, *Elder Advocates of Alberta Society v Alberta*, [2018 ABQB 37 \(CanLII\)](#) at para 340 and *156158 Canada Inc. c. Attorney General of Quebec*, [2017 QCCA 2055 \(CanLII\)](#) at paras 30-31 continued to use the *Kapp* formulation:

- (1) Does the law create a distinction based on an enumerated or analogous ground?
- (2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping? (*Kapp* at para 17)

However, there are several problems with this formulation, as noted by Justice Abella in *Quebec v A*, particularly in its erasure of adverse effects discrimination in the first step, and its confining of disadvantage to “perpetuating prejudice or stereotyping” in the second step. The *Quebec v A* revised approach — which confirmed that the perpetuation of historical disadvantage was also a form of discrimination — was later approved in the unanimous *Kahkewistahaw First Nation v Taypotat*, [2015 SCC 30 \(CanLII\)](#). These two paragraphs are worth setting out because of the different ways the majority and dissent in *APP* and *CSQ* quoted and relied on them:

The first part of the s. 15 analysis therefore asks whether, on its face or in its impact, a law creates a distinction on the basis of an enumerated or analogous ground...

The second part of the analysis focuses on arbitrary — or discriminatory — disadvantage, that is, whether the impugned law fails to respond to the actual capacities and needs of the members of the group and instead imposes burdens or denies a benefit in a manner that has the effect of reinforcing, perpetuating or exacerbating their disadvantage... (*Taypotat* at paras 19-20)

In the majority decision in *APP*, the *Taypotat* framework for s 15(1) was affirmed for the most part, but the beginning of the second step — the sections about “arbitrary — or discriminatory — disadvantage” and “whether the impugned law fails to respond to the actual capacities and needs of the members of the group” — were omitted:

The test for a prima facie violation of s. 15 proceeds in two stages: does the impugned law, on its face or in its impact, create a distinction based on enumerated or analogous grounds; if so, does the law impose “burdens or denies a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating... disadvantage...” (*APP* at para 25)

This test is almost identical to the one used by the majority in *CSQ*. The only substantive change is that “including ‘historical’ disadvantage” was added to the end, perhaps narrowing or clarifying “disadvantage”:

When assessing a claim under s. 15(1), this Court’s jurisprudence establishes a two-step approach: Does the challenged law, on its face or in its impact, draw a distinction based on an enumerated or analogous ground, and, if so, does it impose “burdens or [deny] a benefit in a manner that has the effect of reinforcing, perpetuating or exacerbating ... disadvantage”, including “historical” disadvantage? (*CSQ* at para 22)

APP and *CSQ* have clarified the jurisprudence by indicating that the analytical framework from *Kapp* (and *Withler v. Canada (Attorney General)*, [2011 SCC 12 \(CanLII\)](#) (*Withler*)) is no longer the law. The current framework for analyzing an alleged violation of s 15(1) of the *Charter* is that set out in *Taypotat* at paras 19-20, *APP* at para 25 and *CSQ* at para 22. However, there is one important difference between *Taypotat* and *APP* / *CSQ*. In *Taypotat*, the Court emphasized “arbitrary” disadvantage (at paras 16, 18

and 20), a formulation for the test that we critiqued [here](#) and [here](#). In *APP* and *CSQ*, the majority does not qualify “disadvantage” with the term “arbitrary”. We return to this point later.

The dissent basically reiterated the *Kapp* test without restricting the understanding of disadvantage to mean only prejudice or stereotyping: “(1) Does the law create a distinction based on an enumerated or analogous ground? and (2) Does the distinction create a discriminatory disadvantage by, among other things, perpetuating prejudice or stereotyping?” (*CSQ* at para 117). However, they went on to modify that approach in two ways. In *APP*, the dissent added to the first step of s 15(1) a requirement to consider whether the distinction is disadvantageous or prejudicial, and in both *APP* and *CSQ* the dissent brought back the four contextual factors from *Law v. Canada (Minister of Employment and Immigration)*, [1999 CanLII 675 \(SCC\)](#). We elaborate on the dissent’s approach to s 15(1) and compare it to the majority’s approach in the following sections.

The dissent’s approach to the first step in the section 15(1) analysis

In *APP*, the dissent quoted the test from *Taypotat* as “the most recent pronouncement on the proper analytical approach” to s 15(1) (at para 69). However, they went on to say:

In our view, in the case at bar, the disadvantageous or prejudicial nature of the law, which is as a general rule considered at the second step of the s. 15(1) analysis, must instead be examined at the first step. (at para 71)

It is unclear why the dissent specified that this change must be made “in the case at bar”. Is this a change the dissent favours for only certain types of cases? They did not use this approach in *CSQ*, but did not explain why.

It must also be asked what is left for step two of the test for s 15(1) if the first step considers, even in just a *prima facie* way, whether a distinction is disadvantageous to the claimant? The dissent said:

The second step is more onerous, as it requires proof that the disadvantage is *discriminatory* in that the law “fails to respond to the actual capacities and needs of the members of the group and instead imposes burdens or denies a benefit in a manner that has the effect of reinforcing, perpetuating or exacerbating their disadvantage” ... (at para 73, emphasis in original)

It is unclear how the second step is more onerous than the first under this formulation, unless perhaps it is in the dissent’s focus on perpetuation of *historical* disadvantage.

The dissent’s change to the first step of s 15(1) may also supplant s 15(2), the role of which is to save ameliorative programs from the charge of discrimination. Their point for adding to the first step appears to be their concern with finding that pay equity laws like Quebec’s — which are generally speaking designed to promote women’s equality — could violate even the first step of s 15(1) (see e.g. at para 64, where the dissent speaks of the majority decision as “profoundly

unfair to Quebec society” given “what the province’s National Assembly has done” to achieve pay equity). But if that is the concern, s 15(2) may protect those laws from being scrutinized under the second step of s 15(1), as the dissent later found (and as we explain below). There is no need for an early cut-off to s 15 claims by changing the first step of s 15(1) if the dissent’s real concern was about saving ameliorative programs.

The role of comparators in step one

Because the test for a breach of s 15(1) requires that a law create a distinction on the basis of an enumerated or analogous ground, the analysis involves an element of comparison. There was little disagreement between the majority and dissent on the role of comparator groups — in theory. The majority in *APP* reminds us that a search for a mirror comparator group was rejected in *Withler* (at para 27). The dissent in *APP* agrees that “caution is required in choosing such a group, given that this choice could dictate the result of the analysis,” but also correctly notes it is not the use of comparators that is proscribed but only their overly rigid use (at para 92).

However, in *CSQ*, where the issue was the legislated six-year delay in implementing pay equity for women in workplaces without male comparators, the dissent and the majority each chose only one comparator group and both defended their choice as the relevant one (at paras 28 and 127). The choice of comparators was determinative of the results of step one for both, and of the entire claim for the dissent, which held the delay was not based on an enumerated or analogous ground (at para 130).

In *CSQ*, the majority held that the relevant distinction created by both the *Pay Equity Act* as a whole and the impugned provision was “between male employees and underpaid female employees, whether or not those male employees [were] in the same workplace” (at para 28; see also paras 24, 29 and 33). Thus, the ground shown to be relevant by the comparison was the enumerated ground of sex. For the majority, it was inescapable that the challenged provision that delayed implementation of pay equity for women in workplaces without male comparators was sex-based, because the categories of women in workplaces with male comparators and women in workplaces without male comparators would not exist and could not be explained without distinguishing between men and women (at para 29).

The dissent rejected sex as the ground of discrimination, having rejected “male employees” as the comparator group because the *Pay Equity Act* does not apply to male employees (at para 127). But why would legislation remedying the discrimination in pay that women have suffered as women and as compared to men apply to male employees? The criteria the dissent used — that the Act does not apply to men — would disqualify most of the comparator groups used over the decades in other cases. There is no discussion of these two points as the dissent apparently thought their argument about the *Pay Equity Act* not applying to male employees was a self-evident one, instead of the exercise in formalism that it appears to be.

The dissent’s approach to comparators also seems inconsistent with their acknowledgment that the group adversely affected “consists *mostly* of women and is at a particular disadvantage in the labour market” (at para 121, emphasis added). This passage indicates that the Act does in fact apply to some male employees — those working in positions that are female dominated without

male comparators in the same workplace (e.g. male child care workers). The dissent seems unwilling to see adverse effects discrimination in its approach to comparison.

As a result, the dissent's chosen comparator group was women in workplaces with male comparators, who fell within the *Pay Equity Act* but were not subject to the impugned provision creating delay in receipt of pay equity adjustments (at paras 122 and 127). And being in a workplace with or without male employees turns on where the employee works, which is not an enumerated or analogous ground, so the claimant's s 15 claim failed at the first step in the dissent's opinion. In this respect, the dissent is reminiscent of the Court's decision in *Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia*, [2007 SCC 27 \(CanLII\)](#), where the majority found that any distinctions in the impugned legislation "relate essentially to the type of work [the employees] do, and not to the persons they are" (at para 165). For a critique of that reasoning, see [here](#) and [here](#).

The dissent's argument that one cannot look at the Act as a whole but must look only at what differentiates the claimants from others within the *Pay Equity Act* (at para 126) suggests that, once the government enacts a positive, equality-enhancing piece of legislation such as the *Pay Equity Act*, any distinctions within the Act are non-discriminatory. The Act could delay implementation of pay equity obligations for seven years for women whose workplaces lie south of the St. Lawrence River or for women with blue eyes, and those distinctions would fail the first step of the s 15(1) analysis (at para 128). Although the dissent accused the majority of using reasoning that leads to only one conclusion — "that every distinction in a pay equity statute is necessarily based on sex" (at para 126) — the dissent's approach also leads to only one conclusion, even if it was the opposite conclusion.

The second step in the section 15(1) analysis

The majority in *APP* and *CSQ* did not elaborate on the second step in the s 15(1) test except to reiterate in both cases that the focus is on the "discriminatory impact of the distinction" (*APP* at para 28, *CSQ* at para 31). For the most part, the majority was content to use the formulation set out by the unanimous court in *Taypotat*, absent its elements of responsiveness to capacities and needs and arbitrariness: "whether the distinction is a discriminatory one, that is, whether it imposes burdens or denies benefits in a way that reinforces, perpetuates, or exacerbates disadvantage" (at para 30).

The primary change called for by the dissent in the second step of the s 15(1) test was the resurrection and application of the four contextual factors in *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497, [1999 CanLII 675 \(SCC\)](#) (*Law*), summarized at para 88: (a) pre-existing disadvantage, (b) the relationship between grounds and the claimant's characteristics or circumstances, (c) ameliorative purpose or effects of the law, and (d) nature of the interest affected. This is a significant change because, as the majority noted, "[a]t the second step of the s. 15(1) test, as this Court said in *Kapp* (at paras 23 and 24) and *Withler* (at para 66), it is not necessary or desirable to apply a step-by-step consideration of the factors set out in *Law* ... and no case since *Kapp* has applied one" (*APP* at para 28). Nevertheless, the dissent in both *CSQ* and *APP* did consider and apply the four factors from *Law*, although at times rewriting these into its own language.

For example, the third contextual factor is described as “impact on other groups” in the dissent in both *APP* and *CSQ*. This label appears to derive from *Withler*: “Where the impugned law is part of a larger benefits scheme ... the ameliorative effect of the law on others and the multiplicity of interests it attempts to balance will also colour the discrimination analysis [under s. 15(1)]” (*Withler*, at para 38, as cited at para 145 of *CSQ*, addition in original). The focus on “other groups” is confusing, however, in part because the ameliorative effect of the *Pay Equity Act* as a whole plays a prominent and recurring role in the dissents in both cases.

The ameliorative effects of the Act were also referenced by the dissent when considering the second, correspondence factor. For example, in *CSQ*, the dissent noted that “significant differences in compensation due to systemic gender discrimination already existed in the labour market and that these differences were maintained in the private sector” (at para 140). Furthermore, “the systemic discrimination at issue in this case was not caused by the legislature’s actions. On the contrary, the Act has an ameliorative effect and does not have the effect of perpetuating that systemic discrimination” (at para 140). The dissent appears to say that any disadvantages women experience in compensation correspond with the way things are, which the government was trying its best to remedy. They also used this thinking as the basis for distinguishing *Newfoundland (Treasury Board) v. N.A.P.E.*, [2004 SCC 66 \(CanLII\)](#), where the Supreme Court unanimously accepted that a legislated delay to pay equity in fiscal restraint legislation violated s 15. In the case at bar, the claimants “are better off than they were before the Act initially came into force” (at para 95).

It is also significant that in the second step of their s 15(1) analysis, whether in their discussion of the *Law* contextual factors or otherwise, the dissent only discussed the Act and its unchallenged provisions. They do not discuss the provisions said to be unconstitutional.

Positive and negative Charter rights

Both the majority and the dissent in *APP* and *CSQ* accepted that the Quebec government did not cause pay discrimination against women. This led to a debate about whether a state has a “freestanding positive obligation ... to redress social inequalities” (*APP* at para 42). This is a long-standing debate, around since at least *Eldridge v. British Columbia (Attorney General)*, [1997] 3 SCR 624, [1997 CanLII 327 \(SCC\)](#) and *Vriend v. Alberta*, [1998] 1 SCR 493, [1998 CanLII 816 \(SCC\)](#).

The dissent in *APP* made the brash assertion that “*Charter* rights are fundamentally negative in that they preclude the state from acting in ways that would impair them” (at para 65). They then accused the majority of requiring the government to act “in order to obtain specific societal results such as the total and definitive eradication of gender-based pay inequities in private sector enterprises” (at para 65). The dissent, on the other hand, asserted that, given that the government did not cause the pay inequity problem in the private sector, “it would have been perfectly valid from a constitutional standpoint for the legislature not to intervene” (*CSQ* at para 144; see also *APP* at paras 65 and 66).

Had the dissent stated that *Charter freedoms* are essentially negative, and had they drawn a distinction between *rights* and *freedoms*, as the *Charter* itself does, we might not quarrel with their assertion. But the right to vote in s 3, the right to enter and remain in and leave Canada in s

6(1), and the right to be informed promptly of the reason for arrest or detention in s 10(a) — to name but a few — do impose positive duties on the state.

The majority did not, however, take issue with the dissent’s assertion about the nature of *Charter* rights. Instead they denied that finding a breach of s 15(1) imposes an obligation on the state “to enact benefit schemes to redress social inequalities” (*APP* at para 42). It is only when the legislature chooses to act that it must act without reinforcing discrimination (*APP* at para 42, *CSQ* at para 33). The majority found, in the case of the six-year delay of pay equity at issue in *CSQ*, that “[t]he fact that the Act was intended to help these women does not attenuate the *fact* of the breach” (at para 35, emphasis in original). Chief Justice McLachlin, who agreed with the majority in *CSQ* on the breach of s 15(1), added that “the scheme bolstered the very power imbalance between employers and female employees that lies at the heart of gender-based pay disparities, thereby perpetuating systemic inequality” (at para 156). It was therefore only because Quebec had already passed pay equity legislation that it had a duty to act without discrimination in the implementation of that scheme, although as is noted in Jennifer Koshan’s [post](#) on pay equity, this argument could be extended to all jurisdictions in Canada.

The “gap” metaphor

The dissent made much of the “gap” metaphor introduced to s 15 jurisprudence by Justice Abella, writing for the majority on that issue in *Quebec v A* (at para 332) and endorsed in *Taypotat* (at para 20): “If the state conduct widens the gap between the historically disadvantaged group and the rest of society rather than narrowing it, then it is discriminatory.” Justice Abella seems to have abandoned this promising metaphor in the pay equity cases, perhaps due to its mis-use by the dissent.

The dissent used the metaphor to support its finding that the *Pay Equity Act* had narrowed rather than widened the gap between “the employees to whom the Act applies and the rest of society” (*APP* at para 68; see also paras 76, 92 and 106 and *CSQ* at paras 135, 142 and 149). Once again, the dissent focused on the Act as a whole and ignored the impugned provisions. And again, they seem to find that once the state chooses to legislate when it did not have to, anything goes. Their use of the metaphor says nothing about the provisions that were at issue in either case.

The applicability of s 15(2) of the Charter

The last major disagreement between the majority and the dissent in these two pay equity cases is about the purpose, framework for analysis, and applicability of s 15(2) of the *Charter*.

According to the majority, the purpose of s 15(2) is to save ameliorative laws and programs from charges of “reverse discrimination” (*APP* at para 31, *CSQ* at para 38). Reverse discrimination is a claim by a group or person “outside the scope of intended beneficiaries who alleges that ameliorating the situation of the intended beneficiaries discriminates against them” (*CSQ* at para 38). The *Kapp* case, which was the first to give an independent role to s 15(2), was cited by the majority as a case of reverse discrimination, with a 24-hour priority Aboriginal fishery challenged by a group of primarily white commercial fishermen (*APP* at para 75). The majority’s

definition does not necessarily require a more advantaged group to be challenging the program, although that tends to be the most common understanding of reverse discrimination.

As a result of their understanding of the purpose of s 15(2), the majority took issue with the dissent's use of the saving provision in *APP* (and its suggestion that it might be applicable in *CSQ*, at para 132). They wrote that “[i]t stands the purpose on its head to suggest that s. 15(2) can be used to deprive the program's intended beneficiaries of the right to challenge the program's compliance with s. 15(1)” (*APP* at para 38). For the majority, s 15(2) had no applicability to either case: “Section 15(2) cannot bar s. 15(1) claims by the very group the legislation seeks to protect and there is no jurisprudential support for the view that it could do so” (*APP* at para 32). For the government to invoke a s 15(2) defence, there must be a claim by a person or group *excluded* from the law or program that their exclusion is discriminatory (*CSQ* at paras 37 and 39). Whether this approach protects ameliorative programs from claims of under-inclusion by other disadvantaged groups awaits another case on another day.

According to the dissent, as long as a law or program that the government intends to be ameliorative “does not exacerbate a pre-existing disadvantage faced by the group in the situation that would prevail without state intervention, it is constitutional” (*APP* at para 66). So, if the women in workplaces without male comparators have to wait six years for pay equity to be implemented, that is fine because they are not any worse off than they were before the *Pay Equity Act* was implemented. Or, if female employees of private employers in Quebec have to wait for an audit every five years before becoming entitled to equalizing compensation going forward, that is acceptable because the pay inequities existed before the Act came into force and were caused by the market and not by the state.

The dissent acknowledged that an analysis under s 15(2) is conducted between the first and second step of the s 15(1) analysis according to *Kapp* (*APP* at para 74; *CSQ* at para 132). They also acknowledged that, in cases of reverse discrimination, this method of proceeding has the advantage of not labeling the ameliorative provisions as discriminatory (*APP* at para 76). They also saw this way of proceeding as appropriate when, as in *Alberta (Aboriginal Affairs and Northern Development) v. Cunningham*, [2011 SCC 37 \(CanLII\)](#), “a group or subset of a group is included under one of the enumerated or analogous groups but is otherwise excluded from the group to which the measure specifically applies” (at para 79).

However, in *APP* the dissent argued that the s 15(2) analysis should be postponed until after both steps of the s 15(1) analysis have been completed if and when the group challenging the law or program is the group to whom the measure applies and the object of the challenged law or program is ameliorative or the intentions of the government are benevolent (at paras 76 and 80). There is, unfortunately, no discussion about how this would work if, as the dissent also suggested, the *Law* factors are applied in the second step of the s 15(1) analysis, and whether the law or program has an ameliorative purpose or effect is one of the factors considered there.

The test for a successful invocation of s 15(2) appears to be a simple one for the dissent: “According to the principles laid down in *Cunningham*, what must be determined is whether the law has a *genuine* ameliorative object” (*APP* at para 108, emphasis in original). And “genuine” means that the law or program is “directed at improving the situation of a group that is in need of

ameliorative assistance ... [and the object] correlates to actual disadvantage suffered by the target group...” (at para 108, quoting from *Cunningham* at para 59). This of course echoes another one of the four contextual factors from *Law* that the dissent used in their s 15(1) analysis, namely the “correspondence between the measure adopted by the legislature and the group’s actual characteristics” (at paras 100 - 102), again showing the overlap in their s 15(1) and 15(2) analyses.

In applying the s 15(2) test as an alternative basis for their decision in *APP*, the dissent did not apply it to the challenged provisions, but to the entire *Pay Equity Act*. They stated:

In *Kapp*, the Court referred to the role of s. 15(2) in supporting the implementation of measures to combat systemic discrimination. Given that Quebec’s National Assembly has answered the call in this regard, the entire Act should be protected ... (at para 110)

Once again, the dissent’s point is that the legislature did not have to do anything and, because they did, whatever they did was constitutional.

What might these pay equity decisions mean for the future of equality law in general?

At their broadest, the decisions reveal fundamental disagreements between the majority and dissenting justices about the proper approach to s 15 of the *Charter*. The majority took a broad and generous approach to discrimination under s 15(1), and significantly, dropped the language of arbitrariness that was so prominent in *Taypotat*. The dissent resurrected the more formalistic approach from *Law*, including the correspondence factor, which is essentially a consideration of arbitrariness. In addition to this burdensome requirement at step two, the dissent would make step one of the s 15(1) test more onerous in some — as yet undefined — cases.

The majority also limited the extent to which s 15(2) arguments can be successfully relied on by governments, which is a welcome development post-*Cunningham* (for our critique of that case see [here](#)). In contrast, the dissent wielded a very broad brush by relying on the ameliorative nature of pay equity legislation at every stage of its analysis, largely failing to interrogate the impugned provisions of the *Pay Equity Act* and their actual impact on some women. Their limited attention to discrimination within the Act — what they refer to as different “time limits” or “time tables” (*CSQ* at paras 121 and 127) — is consistent with their claim that *Charter* rights are “fundamentally negative” (*APP* at para 65). The dissent’s focus — almost entirely on government purpose rather than the effects of the Act — is inconsistent with the accepted approach to *Charter* analysis, and not just under s 15 of the *Charter*.

The fractious tone of the pay equity judgments and other recent judgments implicating equality rights or values, such as *Law Society of British Columbia v. Trinity Western University*, [2018 SCC 32 \(CanLII\)](#), *Trinity Western University v. Law Society of Upper Canada*, [2018 SCC 33 \(CanLII\)](#) (both commented on [here](#)) and *Ewert v. Canada*, [2018 SCC 30 \(CanLII\)](#) (commented on [here](#)) does not bode well for the future. The tone, especially that of the dissents of Justices Côté, Brown and Rowe (joined by Justice Wagner in *CSQ*) strikes us as lacking in collegiality.

For example, in the majority’s discussion of how Quebec lowered the bar for employers in the hopes of greater compliance in *APP*, they draw an analogy to replacing the requirement of barrier-free workplaces with an occasional duty to retrofit if not enough employers comply with a duty to build ramps for employees with disabilities (at para 54). The dissent’s reaction is exaggerated and disrespectful (not just to the majority, but to people with mobility-related disabilities): “Further to the example Abella J. gives in her reasons, ensuring that persons with disabilities are not discriminated against does not mean that enterprises have *an obligation to repave access ramps every week*” (at para 102, emphasis added).

Or consider these words from the dissent in *CSQ*: “The analogy my colleague is trying to draw [with *Vriend*] cannot therefore be accepted, nor is it even desirable; and it is irrelevant” (at para 151).

And for one last example, we note that instead of referring to the decisions of the majority, in both *APP* and *CSQ* the dissenting justices constantly refer to the majority decision as that of “Abella J.” It is as though Justice Abella wrote only for herself and not for (in the case of the s 15 analyses) four or five other justices as well.

Section 15 has often been the subject of disagreement, not just in the equality trilogy, but more recently in cases such as *Quebec v A* as well. This is perhaps to be expected, as s 15 cases often raise difficult issues about the state’s obligations towards disadvantaged groups and its allocation of resources — both monetary and otherwise — to alleviate disadvantage. Very different roles for the state are articulated by the majority and dissent in the pay equity judgments, and we cannot help but think that the Court’s different approaches to s 15 are coloured by those different visions and will be for some time to come.

This post may be cited as: Jonnette Watson Hamilton and Jennifer Koshan, “The Supreme Court of Canada’s Approach to the Charter’s Equality Guarantee in its Pay Equity Decisions” (July 12, 2018), online: ABlawg, http://ablawg.ca/wp-content/uploads/2018/07/Blog_JWH_and_JK_Pay_Equity_Cases_SCC_July2018.pdf

To subscribe to ABlawg by email or RSS feed, please go to <http://ablawg.ca>

Follow us on Twitter [@ABlawg](https://twitter.com/ABlawg)

