Equality Rights and Pay Equity: Déjà Vu in the Supreme Court of Canada

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ABSTRACT

This comment analyzes the Supreme Court of Canada’s most recent decisions under the equality guarantee in the Canadian Charter of Rights and Freedoms. Quebec (Attorney General) v Alliance du personnel professionnel et technique de la santé et des services sociaux and Centrale des syndicats du Québec v Quebec (Attorney General) are companion pay equity decisions examining claims of sex discrimination under section 15(1) of the Charter and the Quebec government’s attempt to defend those claims under section 15(2) and section 1. The Court is badly split in its analysis, and the authors discuss the major points of disagreement as well as the majority’s clarification of the proper approach to sections 15(1) and (2). They also explore the implications of these cases for pay equity laws in Canada and for the future of equality rights claims.

I. INTRODUCTION

The latest Supreme Court of Canada decisions on the equality rights guarantee in the Canadian Charter of Rights and Freedoms are companion pay equity decisions rendered in May 2018.¹ In Quebec (Attorney General) v Alliance du personnel professionnel et technique de la santé et des services sociaux (APP)² and Centrale des syndicats du Québec v Quebec (Attorney General) (CSQ),³ the Court’s analysis of the section

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15(1) prohibition of discrimination on the ground of sex and the section 15(2) protection of ameliorative programs reveals a Court that is seriously fractured over equality rights, reminiscent of the deep disagreement in the so-called “equality trilogy” of the mid-1990s. The cases also exemplify the lack of consensus within the Court at the end of Beverley McLachlin’s term as chief justice and after a significant turnover in members in the previous four years, with the three most recently appointed justices who heard these appeals dissenting.

Despite this lack of consensus, it is important to recognize the significance of the cases for women’s equality rights in Canada. APP is the first time women have won a sex-based equality claim in the Supreme Court of Canada. Although the Court allowed a Charter equality rights claim by women in British Columbia Teachers’ Federation v British Columbia Public School Employers’ Association, this was accomplished in a one-paragraph decision that simply restored an arbitrator’s award. And in Newfoundland (Treasury Board) v NAPE, the Court did accept the government’s concession that legislation reneging on a pay equity agreement amounted to sex discrimination, but it upheld the legislation under section 1 of the Charter based on a “fiscal crisis” in Newfoundland and Labrador. In fact, before APP, the only case where a majority of the Supreme Court of Canada had upheld a discrimination claim based on sex involved a man who argued that a particular aspect of British Columbia family legislation discriminated against fathers. Even in CSQ, all but one justice found either no discrimination or justified discrimination under sections 15 and 1 of the Charter.

We begin this comment by setting out the facts, the outcomes, and the reasons for decision on section 15(1) of the Charter in APP and CSQ. This brief discussion of the cases describes the current analytical framework for discerning a breach of section 15(1). Lower courts, litigators, and equality-seeking groups should be pleased that the majority has clarified and simplified this framework and removed some of the unnecessary hurdles for equality claims. The good news stops there, however, as we turn in the

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next section to the contentious points between the majority and dissent on section 15(1). Our discussion of their points of divergence is lengthy—and not simply because there were so many issues on which the dissent challenged the majority. It is the dissent’s worrisome reintroduction of several previously rejected ideas about section 15(1) that necessitates this discussion and creates a feeling of déja vu. In the following section, we focus on the differences between the majority and dissent in APP over when to use section 15(2) and raise concerns about the dissent’s broad use of the ameliorative programs provision. The article then contrasts the deferential approach of the majority and the more exacting approach of Chief Justice Beverley McLachlin (as she then was) to the question of whether the breach of section 15(1) could be justified under section 1 in CSQ. Following this, we pull back from our doctrinal analysis to more broadly and optimistically consider the significance of these decisions for the future of pay equity in Canada. Finally, the article concludes less optimistically by examining what these decisions might mean for the future of equality law in general.

II. FACTS, OUTCOMES, AND SECTION 15(1) REASONS

Each case presented a different challenge to Quebec’s Pay Equity Act. Writing for the majority in both cases, Justice Rosalie Abella set the context for the section 15 analysis with a discussion of the history of pay equity legislation in Canada. Legislation guaranteeing equal pay for equal work, the first wave of pay equity obligations, was enacted in the 1950s. Two royal commission reports in 1970 and 1984—the Report of the Royal Commission on the Status of Women in Canada and the Report of the Commission on Equality in Employment, the latter of which was

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9 CQLR, c E-12.001.
10 APP, supra note 2 at paras 6–11; CSQ, supra note 3 at paras 1–7; see also Stephanie Bernstein, Marie-Josée Dupuis & Guylaine Vallée, “Beyond Formal Equality: Closing the Gender Gap in a Changing Labour Market—A Study of Legislative Solutions Adopted in Canada” (2009) 15:4 J Legis Stud 481. We note that pay equity legislation focuses on job classes that were historically identified as male/female, and courts have adopted this binary to speak of men/women in their decisions, including those in APP and CSQ. We have followed the Court's usages in this comment so that our descriptions and critiques of the Court’s analysis are easier to understand. However, we also note that, despite this binary, anyone working in a traditionally female job class can benefit from pay equity legislation because it corrects for the undervaluation of what has been seen as women’s work.
written by Judge Abella, as she then was—found that this legislation was insufficient to deal with systemic gender-based wage inequalities. As a result, several jurisdictions adopted second-wave pay equity obligations, requiring employers to pay women equal wages for work of equal value, using male comparators to assess the equivalency of work in terms of factors such as skill, effort, and responsibility. These first- and second-wave schemes were complaints-based, and, in Quebec, they were enacted as part of the Charter of Human Rights and Freedoms beginning in 1975. Complaint-based legislation also proved to be insufficient, leading to a third wave of stand-alone, more proactive pay equity legislation, which was passed in Quebec in 1996.

A. APP

1. Facts

Quebec’s Pay Equity Act applies to public and private employers with ten or more employees. The 1996 version of the Act created continuous obligations 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” with the 1996 Act. The 2009 amendments replaced employers’ continuous obligations to implement pay equity with a system of audits to be conducted every five years. In addition, the amendments removed the possibility of retroactive employee compensation unless an employer acted in bad faith, arbitrarily, or with discrimination and also denied access to information needed to evaluate and challenge employers’ decisions. The 2009 amendments were challenged under section 15 of the Charter.

2. Outcome

The six-to-three majority in APP (Abella J, with McLachlin CJ and Justices Michael Moldaver, Andromache Karakatsanis, Richard Wagner, and Clément Gascon concurring) found that the 2009 amendments violated section 15(1) of the Charter, were not within the scope of section 15(2), and could not be justified by the government under section 1.

13 Charter of Human Rights and Freedoms, CQLR, c C-12, s 19.
14 APP, supra note 2 at para 12.
16 Ibid at para 15.
17 Ibid at para 16.
18 Ibid at paras 17–18.
19 Ibid at paras 19, 34–35.
Justices Suzanne Côté, Russell Brown, and Malcolm Rowe dissented, finding no violation of section 15(1) and, alternatively, that the legislation was protected under section 15(2).

3. Majority’s Test for a Violation of Section 15(1)

It is significant that Abella J took the opportunity to clarify the test for determining a breach of section 15(1) in the pay equity cases. The Supreme Court of Canada’s formulation of the test in *R v Kapp*[^20] had been at the centre of considerations of section 15(1) since 2008. It asked: (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?[^21] There are problems with this formulation. Its focus on “creating a distinction” in the first step seems to overlook adverse effects discrimination, and it confines disadvantage to “perpetuating prejudice or stereotyping” in the second step.[^22] In 2013, Abella J acknowledged these problems in *Quebec (Attorney General) v A*, casting doubt on the continuing authority of *Kapp*.[^23] The *Quebec v A* majority approach—which confirmed that perpetuation of historical disadvantage is also a form of discrimination prohibited by section 15(1)—was later approved by the Court in its unanimous decision in *Kahkewistahaw First Nation v Taypotat*.[^24] Nevertheless, many lower court decisions have continued to use the *Kapp* test.[^25]

The following formulation of the test from *Taypotat* is worth setting out in full because of the different ways the majority and dissent in *APP* and *CSQ* quoted and relied on it:

[^20]: 2008 SCC 41 [*Kapp*]; see also *Withler v Canada (Attorney General)*, 2011 SCC 12, [2011] 1 SCR 396 [*Withler*], which confirmed the *Kapp* approach.

[^21]: *Kapp*, supra note 20 at para 17.


[^23]: *Quebec v A*, supra note 4.


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.26

In APP, the majority affirmed Taypotat’s test for section 15(1) for the most part:

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 [deny] a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating ... disadvantage.”27

Notably, the majority in APP removed references to “arbitrary—or discriminatory—disadvantage” and “whether the impugned law fails to respond to the actual capacities and needs of the members of the group” from the second step. We will discuss the significance of these deletions below.

4. Majority’s Application of Their Test for a Violation of Section 15(1)

Applying the first step of the revised test in APP, the majority noted that, by its nature, pay equity legislation is designed to rectify women’s inequitable compensation in the workforce.28 In their view, the Pay Equity Act drew a distinction based on the protected ground of sex because it was targeted at women. More specifically, the impugned provisions drew a line between “when women will—and will not—receive compensation for [pay] inequities.”29

At the second step, the majority found that the 2009 amendments had a discriminatory impact because they perpetuated women’s pre-existing disadvantage by “making the employer’s pay equity obligation an episodic, partial obligation.”30 Worse, the amendments operated only

26 Taypotat, supra note 24 at paras 19–20.
28 APP, supra note 2 at para 29.
29 Ibid [emphasis in original].
30 Ibid at para 33.
prospectively, leading the majority to characterize this scheme as “effectively giv[ing] an amnesty to the employer for discrimination between audits.”\textsuperscript{31} The amendment depriving employees and their unions of information they needed to be able to prove bad faith or arbitrary or discriminatory decision-making by employers—which was the only way to obtain retroactive compensation—was also seen by the majority as perpetuating women’s disadvantage.\textsuperscript{32}

5. Dissent’s Test for a Violation of Section 15(1)

In \textit{APP}, the dissent first noted that \textit{Taypotat} provided “the proper analytical approach” under section 15(1) of the \textit{Charter}.\textsuperscript{33} They described this approach as, first, whether the law, “on its face or in its impact, creates a distinction on the basis of an enumerated or analogous ground”\textsuperscript{34} and, second, whether “the disadvantage is \textit{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.”\textsuperscript{35} In other words, the dissent kept the “actual capacities and needs” elaboration that the majority removed from the \textit{Taypotat} formulation. More importantly, the dissent created another hurdle in the first step of the test by imposing a requirement to consider whether the distinction is disadvantageous or prejudicial. And, for the second step, the dissent brought back the four contextual factors from \textit{Law v Canada (Minister of Employment and Immigration)}.\textsuperscript{36}

6. Dissent’s Application of Their Test for a Violation of Section 15(1)

In concluding there was no violation of section 15(1), the dissent relied heavily on two related points. First, by comparing the situation of employees under the amended legislation to their situation without any pay equity legislation, it was clear to them that a benefit was conferred.\textsuperscript{37} They saw no disadvantage in the distinction drawn for the purposes of step one.

\begin{thebibliography}{9}
\bibitem{31} \textit{Ibid}.
\bibitem{32} \textit{Ibid} at para 34.
\bibitem{33} \textit{Ibid} at para 69.
\bibitem{34} \textit{Ibid} at para 70, citing \textit{Taypotat, supra} note 24 at para 19.
\bibitem{35} \textit{APP, supra} note 2 at para 73 [emphasis in original], citing \textit{Taypotat, supra} note 24 at para 20.
\bibitem{36} \[1999\] 1 SCR 497, 170 DLR (4th) 1 [\textit{Law}]. These factors are discussed later in this article.
\bibitem{37} \textit{APP, supra} note 2 at paras 88–9, 112. The dissent in \textit{APP} also stated “in passing” that it was an error to “compare the amendments to the Act with the previous version of the Act” because to do so “would have the effect of constitutionally entrenching one mechanism” (at para 85).
\end{thebibliography}
The dissent’s second main point was that the legislation did “not perpetuate pre-existing disadvantages” 38 but, rather, ameliorated disadvantage. 39 In their view, the gap between the employees to whom the Act applied and everyone else was not widened by the statutory amendments, and therefore there was no discrimination for the purposes of step two. 40 The dissent also insisted on the related idea that the Act was not the source of the differences in compensation. 41

B. CSQ

1. Facts

CSQ examined the development of a process for securing pay equity in workplaces where there were no male comparators, such as child care centres. The Pay Equity Act of 1996 had not set out a method for assessing pay equity adjustments in these workplaces, nor did consultations on this issue lead to any concrete proposals. 42 The Pay Equity Commission was tasked with developing a method and implementing it in regulations. 43 It did not settle on an approach until 2003. 44 The commission’s regulation followed in 2005, and a two-year legislated grace period postponed pay equity for employers in the “no male comparators” category until 2007. 45 This process created a total delay of almost six years for employees in workplaces without male comparators as compared to the 2001 date when their counterparts in workplaces with such comparators had access to pay equity. 46 The key provision responsible for the delay, section 38 of the 1996 Act, was challenged under section 15 of the Charter.

2. Outcome

In CSQ, the five-to-four majority of the Court on section 15 (Abella J, with Moldaver, Karakatsanis, Gascon JJ, and McLachlin CJ concurring) held that the legislated delay was discriminatory and violated section 15(1). Côté, Wagner, Brown, and Rowe JJ dissented on this point, seeing no breach of section 15(1). However, four of the five justices in the majority on section 15(1) decided that the government’s violation of equality rights was justified under section 1, with the result that an eight-to-one majority

38 Ibid at para 68 [emphasis in original].
39 Ibid at para 92.
40 Ibid at paras 68, 106.
41 Ibid at para 97.
42 CSQ, supra note 3 at para 10.
43 Ibid at paras 11–12.
44 Ibid at para 17.
45 Ibid.
46 Ibid at paras 18, 15.
of the Court dismissed the challenge. Only McLachlin CJ would have allowed the claim, finding that the violation of section 15(1) could not be justified under section 1.  

3. Majority’s Test for a Violation of Section 15(1)  

The majority in CSQ used a formulation of the test for section 15(1) that was almost identical to the one they articulated in APP. The only substantive change was the addition of “including ‘historical’ disadvantage” to the end of step two, perhaps expanding 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? 

4. Majority’s Application of Their Test for a Violation of Section 15(1)  

In CSQ, the majority again had no difficulty finding that the pay equity legislation, in general, drew a distinction based on sex by “targeting systemic pay discrimination against women.” They also found that the impugned provisions, creating the six-year delay in implementing pay equity for women in some workplaces, amounted to a distinction based on sex. Women denied timely pay equity in workplaces without male comparators were “women whose pay has, arguably, been most markedly impacted by their gender” and who “disproportionately suffer an adverse impact because they are women.” Drawing an analogy to the lack of remedies available for sexual orientation discrimination that was found to violate section 15(1) in Vriend v Alberta, the majority went on to find that this distinction was discriminatory because the Pay Equity Act denied these

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47 Because our focus is on section 15 and not section 1, our references to the “dissent” in both cases are to the judgments of Côté, Brown, and Rowe JJ, joined by Wagner J in CSQ. When we refer to the dissent of McLachlin CJ on the section 1 justification issue in CSQ, we use her name.

48 CSQ, supra note 3 at para 22, citing Quebec v A, supra note 4 at paras 323–4, 327; Taypotat, supra note 24 at paras 19–20.

49 CSQ, supra note 3 at para 24.

50 Ibid at para 29.

51 Ibid at para 28 [emphasis in original].

women access to remedies to combat their inequality.\textsuperscript{53} The result of the delay in implementing pay equity was lower wages and continued occupational segregation, perpetuating women’s historical economic disadvantage.\textsuperscript{54}

5. Dissent’s Test for a Violation of Section 15(1)

In \textit{CSQ}, the dissent essentially reiterated the \textit{Kapp} test, without offering an explanation for why they formulated the test differently than they did in \textit{APP}. They did, however, modify the \textit{Kapp} test by allowing for the possibility of disadvantage encompassing more than 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?”\textsuperscript{55} Their approach in \textit{CSQ} also differed from that in \textit{APP} because they did not require proof of disadvantage or prejudice at step one in \textit{CSQ}. However, as in \textit{APP}, the dissent once again made use of Law’s four contextual factors in the second step of the test in \textit{CSQ}.

6. Dissent’s Application of Their Test for a Violation of Section 15(1)

In \textit{CSQ}, it was the dissent’s use of comparators at step one that proved fatal to the claim. The dissent rejected male employees as the comparator group because the \textit{Pay Equity Act} did not apply to them,\textsuperscript{56} and, accordingly, denied that the distinction was based on sex.\textsuperscript{57} Instead, they determined the basis for the differential treatment was where the claimants worked,\textsuperscript{58} which is not an enumerated or analogous ground, and so the claim failed.\textsuperscript{59} The dissent did go on to step two, offering an alternative basis on which to deny the claim. Once again, they used the Law factors to emphasize the Act’s ameliorative nature and its correspondence with the needs of the group represented by the claimants.\textsuperscript{60}

C. Summary

\textit{APP} and \textit{CSQ} have made equality rights jurisprudence clearer and more favourable to claimants by rejecting the analytical framework from \textit{Kapp}. While the majority cited \textit{Taypotat} for providing the current framework, we note two important and unacknowledged differences in their formulation

\textsuperscript{53} \textit{CSQ}, supra note 3 at para 32.
\textsuperscript{54} \textit{Ibid} at para 36.
\textsuperscript{55} \textit{Ibid} at para 117 [emphasis added], citing \textit{Kapp}, supra note 20 at para 17; \textit{Withler}, supra note 20 at paras 30, 61; \textit{Quebec v A}, supra note 4 at para 324.
\textsuperscript{56} \textit{CSQ}, supra note 3 at para 127.
\textsuperscript{57} \textit{Ibid} at paras 122, 127.
\textsuperscript{58} \textit{Ibid} at para 122.
\textsuperscript{59} \textit{Ibid} at para 130.
\textsuperscript{60} \textit{Ibid} at paras 140, 142, 145.
in the pay equity cases. The first is the omission of *Taypotat*’s use of “arbitrary” to qualify disadvantage, a formulation for the test that we have previously critiqued. The second is the omission of “actual capacities and needs,” a phrase that the dissent leaned heavily on and one that we have also critiqued. We applaud the majority’s articulation of the test for removing these inappropriate hurdles to equality rights claims and for clarifying the law.

The majority’s application of the section 15(1) test in both *APP* and *CSQ* is also significant for illustrating the importance of recognizing the perpetuation of historical disadvantage as one form of discrimination. It was obvious to the majority that pay inequity is a form of systemic, historical discrimination against women and that legislation that perpetuated that inequality amounted to sex-based discrimination. We commend this approach for its clarity and its use of context. On these aspects—and others—the majority decisions stand in stark contrast to the approach of the dissenting justices.

**III. CONTENTIOUS SECTION 15(1) POINTS OF LAW**

In this part, we analyze the four main points of contention between the majority and the dissent that were introduced in our discussion of *APP* and *CSQ* in the second section. We consider (1) the extra hurdle the dissent inserted into the first step of the section 15(1) analysis; (2) the contrasting approaches of the majority and dissent to the use of comparators; (3) the dissent’s return to *Law*’s four contextual factors; and (4) the issue of positive and negative *Charter* rights.

**A. The Dissent’s Addition to the First Step in *APP***

The dissent in *APP* considered whether the Pay Equity Act caused disadvantage at the first step of the section 15(1) test. This approach contradicts the case law, which has consistently left this issue to the second step. The dissent does not explain why in this case—but not in *CSQ*—disadvantage should be considered at the outset or what this leaves to be analyzed at the second step.

In *APP*, the dissent began with the *Taypotat* test as “the most recent pronouncement on the proper analytical approach” to section 15(1).}

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61 *Taypotat*, *supra* note 24 at paras 16, 18, 20.
63 Koshan & Watson Hamilton, “Continual Reinvention,” *supra* note 22. For other critiques of this factor, see the articles cited in note 89 below.
64 *APP*, *supra* note 2 at para 69.
Despite this endorsement, they relied on a quote from Justice Louis Lebel’s dissent on the section 15(1) issue in *Quebec v A* as having “correctly explained the approach to take at the first step.” In that quote, LeBel J set out how a claimant might prove that the impugned law creates a distinction or has an adverse impact, noting that “comparisons, if any, can help to demonstrate the existence of an *adverse distinction*.“ Immediately after this quote, the dissent in *APP* stated that “[i]n 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.”

There is no elaboration on the qualifier “in the case at bar.”

In which types of cases is the dissent arguing that the claimant must prove the disadvantageous or prejudicial nature of the impugned law as part of the first step and not, as is the norm, in the second step? We believe there are two possible explanations. The first follows from the dissent’s discussion of comparators when explaining their new approach. They noted that the first step is a comparative exercise and that inherent in the word “distinction” is the idea that the claimant is treated in a more burdensome or less beneficial way than others. They then stated that, by its nature, the *Pay Equity Act* “entails distinctions that may affect a group consisting essentially of women.” This led to the assertion that “[i]t would be absurd if an approach whose focus was on discriminatory effects did not deal first with the issue of the disadvantage resulting from one or more of those distinctions, at least on a prima facie basis.”

As already noted, the dissent did not consider disadvantage in the first step in *CSQ* perhaps because in that case only some women—those in workplaces without male comparators—were affected by the impugned provisions. It was thus possible to make a comparison *between* women in *CSQ*: some were entitled to pay equity adjustments before others were. Perhaps in *APP* the dissent felt the need for a new approach because the claimants were all women and the challenged provisions of the *Pay Equity Act* affected everyone defined by the ground of sex in the same way.

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65 *Ibid* at para 70.
66 *Quebec v A*, *supra* note 4 at para 189 [emphasis added], quoted in *APP*, *supra* note 2 at para 70.
67 *APP*, *supra* note 2 at para 71 [emphasis added]. The dissent later reiterated that at the first step of the section 15(1) analysis, “the claimant must show not only the mere existence of a distinction in the Act, but also a form of disadvantage flowing from that distinction” and that “[w]hat must be determined is whether the measure has any *effect* on the group. A claimant who is unable to show *prima facie* that a measure has disadvantageous effects has no chance of succeeding” (at paras 81–2).
69 *APP*, *supra* note 2 at para 72.
70 *Ibid* [emphasis added].
The second possibility is that the dissent added the new requirement in *APP* because they viewed the 2009 amendments as fundamentally beneficial in that they “ameliorate[d] the conditions of the employees in question in comparison with the former scheme.”\(^{71}\) Certainly, the dissent’s critique of the majority’s decision in *APP*—which focused on the majority’s “negative depiction” of the amendments\(^{72}\)—suggests that the most significant factor in their decision to require proof of disadvantage at the first step was their characterization of the amendments as ameliorative. If this “new approach” to analyzing equality claims resurfaces in a future case, it would be helpful for its proponents to explain what claims they think it should be applied to and why.

The dissent’s approach also leaves us asking what is left for the second step if the first step considers, even in a *prima facie* way, whether a distinction is disadvantageous to the claimant. The dissent in *APP* 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.”\(^{73}\)

It is unclear how the second step is more onerous than the first under this formulation. Perhaps it is due to the dissent’s focus on perpetuation of *historical* disadvantage at the second stage. Or perhaps it is due to their use of the second contextual factor from *Law*—the requirement for the claimant to prove that the challenged law fails to respond to the actual capacities and needs of the members of the group. All we know with certainty about the dissent’s new approach to the first step is that we cannot say much about it with certainty.

### B. The Use of Comparators in Step One

Both the majority and dissent agreed that a section 15(1) analysis is necessarily a comparative exercise, but their use of comparators differed dramatically, especially in *CSQ*. In *CSQ*, the dissent’s inappropriate choice of a comparator was determinative of their finding that the legislated six-year delay in implementing pay equity for women in workplaces without

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71 *Ibid* at para 64.
72 *Ibid* at para 83.
73 *Ibid* at para 73 [emphasis in original].
male comparators was not based on sex.\(^{74}\) We agree with the majority’s critique that this approach relies on a formal model of equality. The majority in CSQ held that the relevant distinction created by both the Pay Equity Act as a whole and the challenged provision was “between male employees and underpaid female employees, whether or not those male employees [were] in the same workplace.”\(^{75}\) For the majority, it was indisputable that the provision delaying implementation of pay equity for women in workplaces without male comparators was sex based. The categories of women in workplaces with, and without, male comparators would not exist and could not be explained without distinguishing between men and women.\(^{76}\)

The dissent argued that the majority approach was erroneous in that it “can lead to only one conclusion: that every distinction in a pay equity statute is necessarily based on sex.”\(^{77}\) They also declined to accept male employees as the comparator group because the Pay Equity Act does not apply to male employees.\(^{78}\) But no one would expect legislation that remedies the pay inequality that women have suffered as women to apply to male employees. Instead, 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 challenged provision delaying pay equity adjustments.\(^{79}\) This led to their finding that being in a workplace with or without male employees turns on where the employee works, which is not an enumerated or analogous ground. This reasoning is reminiscent of the Supreme Court of Canada’s decision in Health Services and Support-Facilities Subsector Bargaining Assn. v British Columbia, where the majority erased sex-based discrimination against a female-dominated class of health care workers by finding that any distinctions in the impugned legislation “relate[d] essentially to the type of work [the employees] do, and not to the persons they are.”\(^{80}\) More broadly, the dissent’s comparative analysis harkens back to cases that looked for a mirror comparator group—a group that mirrored the attributes of the claimants except for the ground

\(^{74}\) CSQ, supra note 3 at para 130.
\(^{75}\) Ibid at para 28; see also paras 24, 33, 29.
\(^{76}\) Ibid at para 29.
\(^{77}\) Ibid at para 126.
\(^{78}\) Ibid at para 127.
\(^{79}\) Ibid at paras 122, 127.
alleged as the basis of discriminatory treatment—before Withler v Canada (Attorney General) recognized the problems with this analysis.\(^81\)

The majority characterized the dissent’s reliance on the employees’ type of workplace as a formal equality approach. They analogized it to “the paradigmatic example of formalism in Bliss v Attorney General of Canada ... [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.”\(^82\) Not surprisingly, the dissent denied that they had adopted a Bliss-like formal equality approach,\(^83\) but the reasons for their denial are opaque.\(^84\) The dissent may have simply deferred to the trial judge’s conclusion on the “real reason for the distinction” because he reached it “[a]fter thoroughly reviewing the evidence.”\(^85\) However, their acknowledgement that the group adversely affected by the impugned provisions in CSQ “consists mostly of women and is at a particular disadvantage in the labour market,”\(^86\) begs the question of how this was a distinction that was other than sex-based. It does indeed parallel the reasoning in Bliss that pregnancy discrimination was not sex discrimination because not all women become pregnant.

The result of the dissent’s analysis in CSQ was that the section 15(1) claim failed at the first step once again, albeit for a different reason. By comparing the claimants to other women within the Pay Equity Act, and finding there was no distinction for the purposes of section 15(1), the dissent suggested that once the government enacts a positive, equality-enhancing piece of legislation such as this, any distinctions within the act are non-discriminatory.\(^87\) Although the dissent accused the majority of using reasoning that led to only one conclusion—“that every distinction in


\(^{82}\) Withler, supra note 20 at paras 26, 25, citing Bliss v Attorney General of Canada, [1979] 1 SCR 183, 23 NR 527.

\(^{83}\) CSQ, supra note 3 at para 123.

\(^{84}\) Ibid at paras 124–5.

\(^{85}\) Ibid at para 125.

\(^{86}\) Ibid at para 121.

\(^{87}\) Ibid at para 126.
a pay equity statute is necessarily based on sex”\(^{88}\)—the dissent’s approach comes close to dictating the opposite conclusion.

C. The Return of Law in the Second Step

Although the dissent did not need to discuss the second step of the section 15(1) test in either \textit{APP} or \textit{CSQ}, they did. They also resurrected the much-maligned four contextual factors from \textit{Law v Canada}: (1) pre-existing disadvantage; (2) correspondence between the grounds and the claimant’s characteristics or circumstances; (3) ameliorative purpose or effects of the law; and (4) nature of the interest affected.\(^{89}\) Returning to the \textit{Law} factors would be a significant step backwards due to the formalism that characterized the cases decided under this approach—a formalism that is also evident in the dissent’s use of these factors in \textit{APP} and \textit{CSQ}.

Although \textit{Kapp} and \textit{Withler} recognized the \textit{Law} factors as relevant to the harms of prejudice and stereotyping, they minimized their importance.\(^{90}\) The majority in \textit{APP} summarized \textit{Kapp} and \textit{Withler} as holding that “it is not necessary or desirable to apply a step-by-step consideration of the factors set out in \textit{Law}”\(^{91}\) and noted that “no case since \textit{Kapp} has applied one.”\(^{92}\) Nevertheless, the dissent justified this return to \textit{Law} as helpful in determining whether a particular distinction is discriminatory. This is not a “step by step” analysis, however. The analysis remains contextual, and not formalistic. Indeed, the factors are not exhaustive and will be considered solely to enhance our analysis.\(^{93}\)

\(^{88}\) Ibid.
\(^{90}\) \textit{Kapp}, supra note 20 at paras 23–4; \textit{Withler}, supra note 20 at para 66.
\(^{91}\) \textit{APP}, supra note 2 at para 28.
\(^{92}\) Ibid.
\(^{93}\) Ibid at para 98.
Regardless of these disavowals, the dissent’s consideration of the factors was undertaken step by step, and they did not consider any factors other than these four in either case.\textsuperscript{94}

In \textit{APP}, the dissent did not see any of the \textit{Law} factors as indicating discrimination.\textsuperscript{95} The fourth factor played an important role, with the dissent stating that the existence of “a situation in which the compensation received for one’s job seems inadequate, and which offends one’s sense of personal dignity, does not mean that the law \textit{creates} a discriminatory disadvantage.”\textsuperscript{96} This reasoning allowed a causation point to override the serious nature of the interest affected.

The dissent in \textit{APP} also relied on the second \textit{Law} factor, the correspondence factor. This factor has often undermined discrimination claims due to its restatement of the similarly situated test rejected as a variation on formal equality in \textit{Andrews v Law Society of British Columbia},\textsuperscript{97} as well as its inappropriate focus on arbitrariness, normally a section 1 consideration.\textsuperscript{98} These problems are evident in \textit{APP}, where the dissent relied on section 76.9 of the 2009 amendments—which required employers not to act in bad faith, arbitrarily or with discrimination—to conclude that the Act “respond[ed] to the needs of the women concerned by effectively preventing abuse by employers and also by providing them with a periodic audit of their remuneration.”\textsuperscript{99} They do not state how they

\textsuperscript{94} The third \textit{Law} factor—“ameliorative purpose or effects”—was replaced in both \textit{APP} and \textit{CSQ} by “impact on other groups,” a phrase used in \textit{Withler} (a challenge to the scope of a large pension plan, where the Court noted that “[w]here 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.” \textit{Withler}, supra note 20 at paras 38, 66, cited in \textit{CSQ}, supra note 3 at para 145).
\textsuperscript{95} \textit{APP}, supra note 2 at paras 99–105.
\textsuperscript{96} \textit{Ibid} at para 105 [emphasis added]. For a critique of this type of causation reasoning, see \textit{Vriend}, supra note 52 at para 84.
\textsuperscript{97} [1989] 1 SCR 143, 56 DLR (4th) 1; see also Bruce Ryder, Cidalia Faria & Emily Lawrence, “What’s \textit{Law} Good For? An Empirical Overview of Charter Equality Rights Decisions” (2004) 24 SCLR (2d) 1 at 2–3, 17–18 (finding that the correspondence factor was determinative in the Court’s equality decisions after \textit{Law}).
\textsuperscript{99} \textit{APP}, supra note 2 at para 101. The dissent in \textit{APP} relied heavily on section 76.9 because it allowed retroactive compensation in some circumstances. They did not address the other impugned provisions that mandated infrequent audits and an absence of information.
knew section 76.9 was effective at preventing abuse, nor do they cite post-2009 empirical evidence on this point.\textsuperscript{100} It is thus difficult to see how section 76.9 corresponded to the actual circumstances of the group, even if this was a valid consideration.

The dissent found the third factor—“impact on other groups”—neutral because “it is the group benefiting from the Act that is challenging its effects”\textsuperscript{101} rather than a group that was being denied a benefit under a general protection scheme, as in \textit{Vriend}.\textsuperscript{102} Here too, the dissent insisted that section 76.9 provided an effective remedy in some instances. They ignored the majority’s point that employees often lacked the information they needed to prove their employer acted in bad faith, arbitrarily or with discrimination.\textsuperscript{103} They also failed to acknowledge that employees may not have the time, resources, and fearlessness to make a claim against their employer.\textsuperscript{104} The dissent’s use of the Law factors in \textit{APP} also repeats much of their analysis under step one, where they found the amendments did not result in disadvantage to women. Borrowing Abella J’s “gap” metaphor from \textit{Quebec v A}, they concluded that “the state conduct does not widen—rather than [narrow]—the gap between the historically disadvantaged group and the rest of society.”\textsuperscript{105}

In \textit{CSQ}, the dissent applied two of the Law factors less dismissively than in \textit{APP}, finding the claimants had both an important right at stake and pre-existing disadvantage.\textsuperscript{106} However, they found that the remaining two factors weighed in favour of the government. For the correspondence factor, they made a causation point again, this time in reasoning that

\textsuperscript{100} At least one study of the pay equity regimes in Ontario and Quebec did find that Quebec’s Act appears to have modestly reduced the gender pay gap, although it had nothing to say about the effectiveness of section 76.9. See Judith Ann McDonald & Robert Thornton, “Have Pay Equity Laws in Canada Helped Women? A Synthetic Control Approach” (2016) 46:4 American Review of Canadian Studies 452.

\textsuperscript{101} \textit{APP}, supra note 2 at para 104.

\textsuperscript{102} \textit{Vriend}, supra note 52.

\textsuperscript{103} \textit{APP}, supra note 2 at para 35.

\textsuperscript{104} See Neil Guppy & Nicole Luongo, “The Rise and Stall of Canada’s Gender–Equity Revolution” (2015) 15:3 CRS/RCS 241 (noting that complaints-based systems leave workers with the difficult or impossible task of proving injustice); Jennifer Beeman, “Pay Equity in Quebec: A Right Unknown to the Women Workers Who Need It Most” (2004) 23:3–4 Canadian Woman Studies 96 (discussing how ineffectual Quebec’s pay equity laws have been for non-unionized female employees in female dominated jobs).

\textsuperscript{105} \textit{APP}, supra note 2 at para 106; see also \textit{Quebec v A}, supra note 4 at para 332. We thought the “widening the gap” metaphor had explanatory power and adopted it in our writing (see Jennifer Koshan & Jonnette Watson Hamilton, \textit{Alberta v Hutterian Brethren of Wilson Colony} (2018) 30:2 CJWL 292 at 300). However, Abella J seems to have abandoned this promising metaphor in the pay equity cases, perhaps due to its misuse by the dissent.

\textsuperscript{106} \textit{CSQ}, supra note 3 at para 137–8.
“significant differences in compensation due to systemic gender discrimination already existed in the labour market … [and were] not caused by the legislature’s actions.” The fact that more time was needed to address the pay inequity experienced by the claimants was seen as a necessary reality in light of the government’s “innovative” and “ameliorative” approach. Even if true, this sounds more like a section 1 justification than analysis of a section 15(1) violation.

Similarly, the dissent applied the “impact on other groups” factor to consider “the significant positive effect of the Act on many other employees who also have pre-existing disadvantages.” They described pay equity legislation as a complex scheme in which the government is “not always … able to ameliorate the conditions of every member of a disadvantaged group at the same time and in the same way.” This “progressive realization” or incremental approach argument is a variation on the theme that social and economic rights are not justiciable.

D. Positive and Negative Charter Rights

Both the majority and the dissent in APP and CSQ discussed the significance of the fact that the Quebec government did not cause pay discrimination against women. This led to a debate about whether a state has what the Quebec government called a “freestanding positive obligation … to redress social inequalities.” The dissent clearly answered this question in the negative. Even the majority did not accept that governments have positive obligations to the extent we would have liked. This is a long-standing debate in human rights and equality law, whether it is framed as positive versus negative rights, civil and political rights versus socio-economic rights, deference to governments’ spending decisions, or a separation of powers issue.

107 Ibid at para 140.
108 Ibid at paras 143, 144.
109 Ibid at para 145.
110 Ibid at para 147.
112 APP, supra note 2 at para 42.
jurisprudence, this debate has been around since at least *Schachter v Canada*,114 *Eldridge v British Columbia*,115 and *Vriend*.116

The dissent argued in *CSQ* that, because the government did not cause pay inequity in the private sector, “it would have been perfectly valid from a constitutional standpoint for the legislature not to intervene.”117 In *APP*, using hyperbole, they accused the majority of requiring the government “to obtain specific societal results such as the total and definitive eradication of gender-based pay inequities in private sector enterprises.”118 Going even further in *APP*, the dissent uncategorically asserted that “Charter rights are fundamentally negative in that they preclude the state from acting in ways that would impair them.”119 This assertion is inconsistent with a substantive conception of equality. The notion that equality rights are only restraints on government power is a fundamental flaw of formal equality thinking.120 Charter rights cannot be rigidly categorized as negative and not positive; most are combinations of both. Language rights, the right to vote, the right to enter and remain in and leave Canada, and the right to be informed promptly of the reason for arrest or detention—to name but a few—do impose positive duties on the state.121 And, as the Court noted in *Schachter*, “the equality right is a hybrid of sorts since it is neither purely positive nor purely negative. In some contexts it will be proper to characterize s. 15 as providing positive rights.”122

Unfortunately, the majority did not take issue with the dissent’s assertion about the nature of Charter rights. Both the majority and dissent denied that section 15(1) imposes an obligation on the state “to enact

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114 [1992] 2 SCR 679, 139 NR 1 [*Schachter*].
115 [1997] 3 SCR 624, 151 DLR (4th) 577 [*Eldridge*].
116 *Vriend, supra* note 52.
117 *CSQ, supra* note 3 at para 144; see also *APP, supra* note 2 at paras 65–6.
118 *APP, supra* note 2 at para 65 [emphasis added].
119 *Ibid*.
120 Brodsky & Day, *supra* note 111 at 188, 207; Judy Fudge, “The Public/Private Distinction: The Possibilities and the Limits to the Use of Charter Litigation to Further Feminist Struggles” (1987) 25 Osgoode Hall LJ 485 at 497; see also *R v Beaulac*, [1999] 1 SCR 768 at para 20, 173 DLR (4th) 193: “Language rights are not negative rights, or passive rights; they can only be enjoyed if the means are provided.”
122 *Schachter, supra* note 114 at 722. The challenged law in *Schachter* drew a distinction between parental benefits for natural parents and adoptive parents and implicated government expenditure to extend the benefits to natural parents. See also *Eldridge, supra* note 115 at para 75, where the Court recognized a positive role for section 15 when laws reinforce the exclusion of a disadvantaged group.
benefit schemes to redress social inequalities,“¹²³ and agreed that it is only when the legislature chooses to act that it must act without reinforcing discrimination.¹²⁴ It is therefore only because Quebec had already passed pay equity legislation that the majority found it had a duty to act without discrimination in the implementation of that scheme—although as we will discuss in the next section, this argument could be extended to all jurisdictions in Canada.

IV. THE APPLICABILITY OF SECTION 15(2) OF THE CHARTER

A fifth section 15 disagreement between the majority and dissent concerns the purpose, framework of analysis, and applicability of section 15(2) of the Charter, the ameliorative programs provision. The majority’s approach to section 15(2) helps to clarify the law in this area, whereas the dissent’s approach muddies it.

According to the majority, the purpose of section 15(2) is to save ameliorative laws and programs from charges of “reverse discrimination.”¹²⁵ They defined reverse discrimination as 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.”¹²⁶ The Kapp case, which was the first to give an independent role to section 15(2), provided an example, with a twenty-four-hour priority Aboriginal fishery challenged by a group of mainly non-Aboriginal commercial fishers.¹²⁷

The majority found that section 15(2) did not apply in the pay equity cases, saying 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).”¹²⁸ There must be a claim of discrimination by a person or group excluded from the law

¹²³ APP, supra note 2 at paras 42 and 65. The Court thus disagreed with the unions’ argument that Quebec was obliged to retain the 1996 pay equity scheme, with the majority finding that this approach “would constitutionalize the policy choice embodied in the first version of the Act, improperly shifting the focus of the analysis to the form of the law, rather than its effects” (at para 33).
¹²⁴ Ibid at paras 42, 66; see also CSQ, supra note 3 at paras 33, 140.
¹²⁵ APP, supra note 2 at para 31; CSQ, supra note 3 at para 38.
¹²⁶ CSQ, supra note 3 at para 38. 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. See e.g. Kasari Govender & C Tess Sheldon, R v Kapp, [2018] 1 WCR 253, (2018) 30:2 CJWL 248 (who also provide a critique of the term “reverse discrimination,” using “equality regressive” instead).
¹²⁷ APP, supra note 2 at para 31, citing Kapp, supra note 20.
¹²⁸ CSQ, supra note 3 at para 38; see also para 32.
or program before section 15(2) applies.\(^\text{129}\) This is a welcome clarification of the role of section 15(2), although whether the majority’s approach protects ameliorative programs from claims of under-inclusion made by other disadvantaged groups awaits another case on another day.\(^\text{130}\)

In contrast, the dissent believed that section 15(2) was applicable in \textit{APP}.\(^\text{131}\) They also wanted to change when and how it was applied. The dissent acknowledged that, according to \textit{Kapp}, a section 15(2) analysis should be undertaken between the first and second steps of the section 15(1) analysis.\(^\text{132}\) They saw this way of proceeding as being appropriate in a case like \textit{Alberta (Aboriginal Affairs and Northern Development) v Cunningham},\(^\text{133}\) which involved individuals with Indian status claiming benefits under Métis settlement legislation. In that type of case, “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.”\(^\text{134}\)

However, in \textit{APP}, the dissent argued that the section 15(2) analysis should be postponed until after both steps of the section 15(1) analysis when the group challenging the law or program was the target group and the object of the challenged law or program was ameliorative or the intentions of the government were benevolent.\(^\text{135}\) They did not discuss how this postponement would fit with the use of the \textit{Law} factors in the second step of the section 15(1) analysis, which require consideration of the ameliorative purpose or effect of the impugned provision.

The test for successfully invoking section 15(2) appeared to be a simple one for the dissent: “According to the principles laid down in \textit{Cunningham}, what must be determined is whether the law has a genuine ameliorative object.”\(^\text{136}\) “Genuine” means that the law or program is

\(^{129}\) \textit{Ibid} at paras 37, 39.


\(^{131}\) \textit{APP}, \textit{supra} note 2 at paras 107–11. In \textit{CSQ}, \textit{supra} note 3 at para 152, Côté J stated that, “[a]lthough my conclusion with respect to s. 15(1) of the \textit{Charter} means that I need not deal with s. 15(2), my silence should not be interpreted as an endorsement of my colleague Abella J.’s comments on s. 15(2).”

\(^{132}\) \textit{APP}, \textit{supra} note 2 at para 74; \textit{CSQ}, \textit{supra} note 3 at para 132.

\(^{133}\) 2011 SCC 37 [\textit{Cunningham}].

\(^{134}\) \textit{APP}, \textit{supra} note 2 at para 79.

\(^{135}\) \textit{Ibid} at paras 76, 80.

\(^{136}\) \textit{Ibid} at para 108 [emphasis in original].
“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.” 137 This echoes the correspondence factor from Law that the dissent used in their section 15(1) analysis, 138 again showing the overlap in their section 15(1) and section 15(2) analyses.

The dissent also stated that a law or program that the government intended to be ameliorative must not “exacerbate a pre-existing disadvantage faced by the group in the situation that would prevail without state intervention,” 139 again relying on a type of causation analysis. Once more, the dissent’s point is that the legislature did not have to do anything, but because they did, just about anything they did was constitutional. The dissent appears to believe that the state has nothing to do with the market and its systemic pay discrimination against women. 140

A. Section 1

In APP, the majority found that the 2009 amendments that violated section 15 were not justifiable under section 1 of the Charter. 141 The dissent did not address section 1 in APP or CSQ, having found no breach of section 15. As a result, in this section, our focus is on CSQ, and we contrast the deferential views of the majority with the more demanding approach of McLachlin CJ on whether the equality rights violations in that case could be justified. 142

In CSQ, Abella J (with Moldaver, Karakatsanis, and Gascon JJ concurring) held that the six-year delay in implementing pay equity in workplaces without male comparators, while discriminatory, was justified under section 1. The purpose of the delay was to find the right methodology for these workplaces, which these justices assumed to be a

137 Ibid, quoting from Cunningham, supra note 133 at para 59.
138 APP, supra note 2 at paras 100–2.
139 Ibid at para 66.
140 See Fudge, supra note 120 (noting that liberal political theory defines the market as private and political activity as public, such that private ordering, even when sanctioned by the state, is seen as beyond the scope of Charter review).
141 APP, supra note 2 at paras 43–57.
142 It is perhaps ironic that McLachlin CJ, who was the pivotal “swing vote” in Quebec v A, supra note 4, is the lone dissenting voice in CSQ. Quebec v A was a five-to-four decision on the section 15(1) issue, with McLachlin part of the majority. By joining the section 15(1) dissenters on the section 1 issue, she created a different majority that concluded there was no unjustified breach. In CSQ, she was again part of a five-to-four majority that found a breach of section 15(1). This time, the other four broke away and, in the end, created an eight-to-one majority that concluded there was no unjustified breach.
pressing and substantial objective, and the delay was rationally connected to this purpose given the complexity of the issue and the absence of an existing model.\textsuperscript{143} Echoing the dissent’s discussion of the section 15 breach in \textit{APP},\textsuperscript{144} Abella J stated that Quebec was a “pioneer” when it came to pay equity for women in private sector workplaces with no male comparators and therefore “should be given some degree of latitude to accomplish” its objectives.\textsuperscript{145} The majority found that the government acted with “reasonable diligence” in the context of the complexities involved, impairing women’s equality rights “as little as reasonably necessary” in the circumstances.\textsuperscript{146} Lastly, they believed that the eventual benefits to women of a pay equity scheme in private sector workplaces with no male comparators outweighed the harm to individual women who were denied pay equity during the delay period. The delay was “troubling”\textsuperscript{147} and “serious and regrettable”\textsuperscript{148} but not ultimately unconstitutional. They seemed persuaded that employers should not be responsible for pay equity until they have the tools to implement it. Accordingly, the absence of retroactive payments in the scheme at issue in \textit{CSQ} did not present the same problem it did in \textit{APP}.\textsuperscript{149} Surprisingly, the majority did not refer to the Court’s earlier decision in \textit{NAPE}, where the Court unanimously found that a delay in implementing pay equity was justified based on Newfoundland and Labrador’s “fiscal crisis.”\textsuperscript{150}

McLachlin CJ would not have upheld the challenged provision in \textit{CSQ} under section 1. She accepted that creating a method for evaluating underpayments in workplaces with no male comparators was a pressing and substantial objective, but found the government’s other stated objective—increasing employer compliance—was “more questionable.”\textsuperscript{151} To find that the delay was necessary for compliance “would be to accept that obeying pay equity laws is an option that can be negotiated and that the very segment that perpetuates systemic pay inequities—the employers—should be able to perpetuate them as the price of accepting the law.”\textsuperscript{152} The government also failed to prove that the scheme impaired women’s rights as little as

\textsuperscript{143} \textit{CSQ}, supra note 3 at paras 43–4. Abella J did not explicitly discuss whether the government’s objective was “pressing and substantial,” as required by \textit{R v Oakes}, [1986] 1 SCR 103, 53 OR (2d) 71.
\textsuperscript{144} \textit{APP}, supra note 2 at paras 64, 85.
\textsuperscript{145} \textit{CSQ}, supra note 3 at para 46.
\textsuperscript{146} \textit{Ibid} at paras 45, 47.
\textsuperscript{147} \textit{Ibid} at para 48.
\textsuperscript{148} \textit{Ibid} at para 53.
\textsuperscript{149} \textit{Ibid} at para 54.
\textsuperscript{150} \textit{NAPE}, supra note 7.
\textsuperscript{151} \textit{CSQ}, supra note 3 at para 157.
\textsuperscript{152} \textit{Ibid}.
reasonably possible. For example, was partial redress for pay inequity during the delay period considered and, if not, why? Lastly, the chief justice found that the government had not established that it properly balanced the benefits of denying women a remedy with the harms to this already-marginalized group.

The judgment of McLachlin CJ in CSQ, although brief, is reminiscent of her very strong section 1 reasons in RJR-MacDonald v Canada, where she took the government to task for not providing sufficient evidence to support its section 1 arguments. By contrast, Abella J’s section 1 analysis, which is also relatively short, is much more deferential to government. Reading it after taking in the majority’s strong stance on section 15 creates a sense of dissonance within their judgment.

V. IMPLICATIONS FOR CANADIAN PAY EQUITY LAWS

Do the decisions in APP and CSQ make any demands of pay equity legislation in other jurisdictions? The majority held in APP that “the Charter does not constitutionalize a single model of pay equity regime.” However, they also found that any given pay equity regime must be constitutionally compliant, and section 15 of the Charter necessitates that women not be denied “benefits routinely enjoyed by men—namely, compensation tied to the value of their work.” This arguably requires, as a matter of constitutional obligation, that any jurisdictions with a pay equity scheme must ensure that women are paid equally for work of equal value—that is, enact at least a second-wave type of legislation. Does this obligation include workplaces without male comparators? The majority in CSQ did not explicitly require pay equity legislation to include such workplaces—even the dissent of McLachlin CJ did not go that far. CSQ indicated that, where governments include workplaces without male comparators in their pay equity legislation, they have some constitutional leeway in their implementation schedules under section 1. However, the import of APP is that the obligation to pay women equally for work of

153 Ibid at para 158.
154 Ibid.
155 [1995] 3 SCR 199, 127 DLR (4th) 1. We do not suggest that the chief justice was consistent in putting the government to proof under section 1; her judgment in Alberta v Hutterian Brethren of Wilson Colony, 2009 SCC 37, [2009] 2 SCR 567, does the exact opposite, as we noted in Jennifer Koshan & Jonnette Watson Hamilton, “‘Terrorism or Whatever’: The Implications of Alberta v Hutterian Brethren of Wilson Colony for Women’s Equality and Social Justice” in Rodgers & McIntyre, supra note 22 at 221.
156 APP, supra note 2 at para 60.
157 Ibid at para 38.
equal value should extend even to workplaces without male comparators, provided a pay equity scheme is in place.

The dissenting justices’ contrasting view is that there is no constitutional right to pay equity. This view is articulated most clearly in *APP* where they state that “although achieving pay equity is desirable in our society, the *Charter* does not confer constitutional status on the achievement or the maintenance of pay equity.” 158 This statement suggests that, in the private sector, women are not entitled to be free from sex discrimination in workplace compensation, although, if they work in the public sector, they could bring a section 15 claim against the government as their employer. In the private sector, according to the dissent, pay equity “is a creation of the … legislature and does not have constitutional status.” 159

It is true that private sector employers are not bound by the *Charter*, so there is some support for the position that there is no constitutional right to pay equity in private workplaces—only a legislative entitlement in jurisdictions that have enacted one. As we discussed in the section on positive and negative rights, the Supreme Court of Canada has not yet accepted that section 15 creates a positive obligation to enact benefit-conferring legislation. However, every jurisdiction in Canada does prohibit employers from paying female employees less than their male counterparts; this is part of the general protection against employment discrimination based on sex. It is therefore legitimate and indeed necessary to scrutinize this legislation for compliance with the *Charter*. As noted by the majority in *APP*, “when the government passes legislation in a way that perpetuates historic disadvantage for protected groups, regardless of who caused their disadvantage, the legislation is subject to review for s. 15 compliance.” 160

The result of *APP* and *CSQ* is that jurisdictions requiring only that employers pay men and women equally for the same, similar, or substantially similar work are likely not *Charter* compliant because they deny women “benefits routinely enjoyed by men—namely, compensation

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158 *Ibid* at para 84.
159 *Ibid*.
160 *APP*, *supra* note 2 at para 41, citing *Vriend*, *supra* note 52 at para 66. The Canadian labour market is not only gendered but also racialized. Research has established that white and Canadian-born men and women are better off than their counterparts of colour, immigrants, and Indigenous Canadians with equivalent educational backgrounds and skill levels. Race and ethnicity are often overlooked in the Canadian legal scholarship on pay equity per se, but play a more substantial part in the research on employment equity more generally. See e.g. Roopkiran Kohout & Pabudyal Singh, “Pay Equity and Marginalized Women” (2018) 33:2 Gender in Management: An International Journal 123; Carol Agoes, ed, *Employment Equity in Canada: The Legacy of the Abella Report* (Toronto: University of Toronto Press, 2014).
tied to the value of their work.”\textsuperscript{161} \textit{APP} suggests that where a province decides to provide some guarantee against pay discrimination, it cannot stop at first-wave, 1950s-style legislation but must, at a minimum, implement second-wave legislation requiring employers to pay women equally for work of equal value.\textsuperscript{162} And although \textit{CSQ} does not explicitly recognize a constitutional obligation to provide pay equity to women in workplaces without male comparators, we argue that the right to equal compensation for work of equal value may require this approach.\textsuperscript{163} This point is especially important in provinces such as Alberta, where “the majority of occupations remain highly gender-segregated.”\textsuperscript{164} As noted in \textit{APP}, a failure to implement robust pay equity legislation “leav[es] wage inequities in place [that] make women ‘the economy’s ordained shock absorbers.’”\textsuperscript{165}

\begin{footnotes}
\textsuperscript{161} \textit{APP}, supra note 2 at para 38. The jurisdictions whose legislation only requires first-wave equal pay for the same, similar, or substantially similar work for public and private employers are British Columbia (\textit{Human Rights Code}, RSBC 1996, c 210, s 12(1)); Alberta (\textit{Alberta Human Rights Act}, RSA 2000, c A-25.5, s 6); Saskatchewan (\textit{Saskatchewan Employment Act}, SS 2013, c S-15.1, s 2-21(1)); Newfoundland and Labrador (\textit{Human Rights Act}, SNL 2010 c H-13.1, s 16(1)); and the Northwest Territories (\textit{Human Rights Act}, SNWT 2002, c 18, s 9(1)). British Columbia, Saskatchewan, and Newfoundland and Labrador do have policy frameworks for more fulsome second-wave pay equity—that is, equal pay for work of equal value—in the public sector. See Pay Equity Task Force, \textit{Pay Equity: A New Approach to a Fundamental Right} (Ottawa: Minister of Justice, 2004) at 72–4. Nunavut does not have any explicit pay equity provisions, only a general prohibition against sex discrimination in employment (see \textit{Human Rights Act}, SNu 2003, c 12, s 9(1)).

\textsuperscript{162} Our focus here is on substantive protections that should be provided by pay equity legislation. Arguments have also been made about the robustness of pay equity legislation on procedural grounds, but we do not address those issues here. See e.g. Pay Equity Task Force, supra note 161; Kathleen A Lahey, \textit{Equal Worth: Designing Effective Pay Equity Laws for Alberta} (Edmonton: Parkland Institute, 2016).

\textsuperscript{163} The only jurisdiction other than Quebec that includes private sector workplaces with no male comparators in its pay equity legislation is Ontario (\textit{Pay Equity Act}, RSO 1990, c P.7, s 5.1). The 2004 Pay Equity Task Force recommended new federal pay equity legislation inclusive of workplaces with no male comparators. See Pay Equity Task Force, supra note 161 at 346. The federal government finally introduced third-wave pay equity legislation in 2018, which will apply to some private sector workers and to workplaces without male comparators. See \textit{Pay Equity Act}, SC 2018, c 27, s 416 (not yet in force).

\textsuperscript{164} Rebecca Graff-McRae, “Why Should Alberta Implement Pay Equity Legislation? Because It’s 2016” (15 March 2016), online (blog): \textit{Behind the Numbers} <http://behindthenumbers.ca/2016/03/15/why-should-alberta-implement-pay-equity-legislation-because-its-2016/>; see also Lahey, supra note 162.

\textsuperscript{165} \textit{APP}, supra note 2 at para 8, citing the Royal Commission on Equality in Employment, supra note 12 at 234.
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VI. THE FUTURE OF EQUALITY LAW

Moving outside the specific context of pay equity, *APP* and *CSQ* reveal fundamental disagreements about the proper approach to section 15 of the *Charter*. The majority took a broad and generous tack under section 15(1), focusing on historic disadvantage and, significantly, dropping the language of arbitrariness that was so prominent in *Taypotat*. Deciding whether a distinction is arbitrary requires a focus on government objectives that are better addressed under section 1. In contrast, in their approach the dissent resurrected the more formalistic analysis 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 section 15(1) test more onerous in some (but which?) cases by requiring *prima facie* proof of an adverse distinction and a strict approach to comparators.

The majority also limited the extent to which section 15(2) arguments can be successfully relied on by governments, which is a positive development post-*Cunningham*.166 In contrast, the dissent repeatedly relied on the ameliorative nature of pay equity legislation at every stage of their analysis, largely failing to interrogate the challenged provisions of the *Pay Equity Act* and their actual impact on some women. Their limited attention to discrimination within the *Act*—which they characterized as different “time limits” or “time tables” for achieving pay equity rather than discriminatory delays167—is consistent with their claim that *Charter* rights are “fundamentally negative.”168 The dissent’s almost exclusive focus on government purpose rather than on the effects of the Act is inconsistent with the accepted approach to *Charter* analysis generally.169

Section 15 has often been the subject of disagreement.170 This is perhaps to be expected, as equality cases typically raise challenging issues about the

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166 For our critique of the Court’s approach to section 15(2) in *Cunningham*, see Watson Hamilton & Koshan, “Not Getting It,” *supra* note 130.
167 *CSQ, supra* note 3 at paras 121, 127.
168 *APP, supra* note 2 at para 65.
169 It has been accepted since *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295, 18 DLR (4th) 321, that either an unconstitutional purpose or effect of government action can violate the *Charter*.
170 We also have concerns about the fractious tone of the pay equity decisions, which is apparent in other recent judgments implicating equality rights or values. See e.g. *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32, [2018] 2 SCR 293; *Trinity Western University v Law Society of Upper Canada*, 2018 SCC 33, [2018] 2 SCR 453; *Ewert v Canada*, 2018 SCC 30, [2018] 2 SCR 165; see also “Year in Review 2018,” online: *Supreme Court of Canada* <https://www.scc-csc.ca/review-revue/2018/trends-tend-eng.aspx#wb-cont> (showing a decrease in the number of unanimous judgments in recent years, especially since 2016).
state’s obligations towards disadvantaged groups and its allocation of monetary and other resources to alleviate disadvantage. We see very different roles for the state articulated by the majority and dissent in the pay equity judgments. The majority, while not fully embracing the inclusion of social and economic rights in their vision of substantive equality, have at least confirmed—for the first time in a long time— that legislated social benefits must be granted in a non-discriminatory way. The dissent’s understanding of Charter rights as essentially negative, their formal conception of equality, and their contentment with an incremental approach to equality reveal a political ideology at odds with any vision of substantive equality. We believe that the Court’s different approaches to section 15 are coloured by those different visions and will be for some time to come.

171 The Supreme Court of Canada has not allowed a section 15 claim involving legislated social benefits since Nova Scotia (Workers’ Compensation Board) v Martin; Nova Scotia (Workers’ Compensation Board) v Laseur, 2003 SCC 54, [2003] 2 SCR 504.