

ALERT*

Supreme Court of Canada Allows Discrimination Against Women NAPE v. Newfoundland

* This alert has been prepared by the Feminist Alliance for International Action (FAFIA), the National Association of Women and the Law (NAWL), and the Newfoundland and Labrador Advisory Council on the Status of Women.

Women's rights in Canada have just taken a heavy blow at the hands of the Supreme Court. The Court has decided to override the rights of women in the name of fiscal restraint. This alert provides information to women's organizations about the NAPE decision, and seeks support for a pan-Canadian protest.

On October 24, 2004, the Supreme Court of Canada issued its decision in the case of *Newfoundland Association of Public Employees (NAPE) v. Newfoundland*. The Court ruled that the Government of Newfoundland and Labrador was justified in canceling pay adjustments that would have eliminated discrimination in the wages of women health care workers. The Court accepted the Government's claim that it faced a "fiscal crisis" and decided that it was constitutionally permissible for the Government to confiscate the agreed-upon pay adjustments and continue to discriminate against its women employees.

The Court's decision poses a threat to women's rights. While the Court did say that these were "exceptional circumstances", we must be concerned that the door will be open to government's and employers pushing to expand the definition of "exceptional". Women need to be able to count on the Court to make the promise of section 15 come to life. This decision causes great concern that women's equality will increasingly be sacrificed in the face of claims of extreme financial hardship. Women must be able to access our rights in both rich times and poorer ones; in rich provinces and in poorer ones. While the Court's decision focused on the costs of achieving equality, it is crucial to remember the real and damaging costs of inequality that harm individuals and communities.

Question: What are the facts of the NAPE case?

Answer: NAPE and the Newfoundland government entered into a Pay Equity Agreement in June 1988. The purpose of the Agreement was to remedy a long history of sex-based wage discrimination. The government agreed to provide pay adjustments that would incrementally achieve pay equity for employees in female-dominated job classes[□] over a five-year period beginning in April 1988.

In 1991 NAPE and the government reached agreement about the amount of the adjustments, and women were then owed the payments for 1988, 1989, 1990 and 1991.

[□] The overwhelming majority of the beneficiaries of the pay equity agreement are women. Some are men who are employed in the female-dominated job classes where the work has been devalued because it has traditionally been performed by women.

But prior to paying out the agreed-upon amounts, the government predicted a budget deficit, and introduced the 1991 *Public Sector Wage Restraint Act*. This legislation cancelled the pay adjustments owed for the period from April 1988 to March 1991, and pushed back the date for beginning any progress towards equal pay.

In effect, the Newfoundland government: 1) cancelled permanently its obligation to provide women with equal pay for work done between April 1988 and March 1991, and thus confiscated a portion of women's wages for this period; 2) required women to wait three more years to even *begin* to achieve wages equal to men's; and 3) permanently disadvantaged older women and women with disabilities who left the workforce between 1988-91 because their pensions and disability benefits are tied to the discriminatory wage rate. The full amount taken from women in order to retire the Newfoundland government's 1991 budget deficit is \$79.79 million plus interest.*

Question: What did the Supreme Court rule?

Answer: The Supreme Court of Canada found that the Newfoundland government discriminated against its women employees twice over: first by systematically paying them less than their male colleagues for decades, and then by asking them to forego the payments that were supposed to make up for their lost wages. The Court found that the government had violated section 15, the equality guarantee of the *Charter*.

However, the Court then found that the discrimination was justified (under section 1 of the *Charter*) because the Newfoundland government had a "severe fiscal crisis" on its hands and had to make hard choices.

Question: What is wrong with this reasoning?

Answer: A lot.

- The Court accepted shockingly weak evidence regarding the "severe fiscal crisis" - an extract from Hansard and a few budget documents. But the Court found this

* The Supreme Court's decision gives the impression that the amount confiscated from women was \$24 million, and that, aside from this, the only problem was that payments were delayed. However, the Government's Exhibit GM #1 shows that the amount due for the year 1988 to 1989 was 2.036 million, for 1989 2.036 million times 2 (4.078m), for 1990-1991 2.036 million times three ((6.1092 m) and for 1991-1992 2.036 million times four (8.1456m) and for 1992 to 1993 2.036 million times five (20.0361m). In 1993 to 1994 the final pay out would have been 23.598 m.

Also, because pay adjustments began in 1991 instead of 1988, it took women until 1996 before they reached the position of receiving equal pay for work of equal value. So they also lost pay that they were entitled to during the years between 1991 and 1996. This explains the total, which is calculated at \$79.79 million plus interest.

sufficient. There was no critical probing of the long-term effect of the legislation on women employees or the alternatives considered. In effect, the Court accepted the Newfoundland government's *word* that violating women's rights was necessary, and did not seriously test the government's claim.

- The government of Newfoundland predicted that there for 1990-91 there would be a deficit of \$120 million, and in the following year, there would be a deficit "in the vicinity of \$200 million". The Court concluded that "this was an 'unprecedented' time" in the finances of the provincial government, and that it faced a crisis, sufficient to justify overriding the rights of women. However, the fiscal state of affairs cannot reasonably be considered "unprecedented"; in fact, it was significantly better than it had been for years. The deficits of the previous five years were: 1985-86: \$253 million; 1986-87: \$231 million; 1987-88: \$197 million; 1988-89: \$226 million; 1989-90: \$175 million. (See Newfoundland Public Accounts: http://www.fin.gc.ca/frt/2004/frt_e.pdf at Table 17). Also, Newfoundland has had bigger deficits since then. For example, Newfoundland's deficit in 1993-94 was \$341 million; in 1994-95: \$374 million; in 1999-2000: \$269 million; and in 2002-03: \$691 million. If the prospect of a \$120 million deficit provides a constitutional justification for ignoring the equality rights of women, women in Newfoundland, and in many other parts of Canada, may have no rights they can rely on.
- The Court showed a grave disregard for women's human rights. "Fiscal crisis" or not, governments are never entitled to save money by discriminating against women. Women have the right to be treated as equal members of society. Women and other groups that are socially and economically disadvantaged in Canada count on governments to allocate resources in ways that will bring us up to the standard of equality. If the Court stops upholding rights when money is at stake, it will always be women, and others who are unequal, whose equality rights will be overridden.

Question: Does the NAPE decision have implications for other women's cases and other equality cases?

Answer: Yes.

The NAPE decision is about pay equity, and this is extraordinarily important issue to women. Sex-based wage discrimination tells women and men, in the most concrete of terms, that women are not worth as much as men. Unequal wages deprive women of income; contribute to the feminization of poverty; increase women's financial dependence upon men, including in situations where they are at risk of spousal abuse and violence; reduce women's pensions and disability benefits; and diminish women's ability to participate fully in society. Discriminatory wages result in discriminatory pensions and discriminatory disability benefits.

Pay equity also matters to Aboriginal women, younger and older women, immigrant women, women with disabilities and women who experience racialized gender discrimination because they are often segregated into the lowest paid jobs where wages are most affected by sex and race stereotyping.

But the section 1 reasoning of the Court -- that justifies overriding equality rights when there is a government claim that there is an "extreme fiscal crisis" -- could be raised in other cases by governments who are also seeking to avoid the costs of equality."

Also, governments may be tempted to use the dollar size of the Newfoundland deficit as a sort of rule-of-thumb for daily business, to define when they are in "a severe fiscal crisis" that lets them ignore equality interests.

Question: What should women do?

Answer: Protest.

It is essential to the rights of women for women to let governments in Canada know that we do not accept the ruling of the Court in NAPE, and we will not accept the overriding of our rights in the name of "fiscal crisis."

Canada is one of the richest countries in the world. Women are entitled to equality whether economic times are relatively good or relatively bad. Women's rights are not for rich times only.

Question: How should women protest?

Answer: Two ways

- Endorse a letter to Premier Danny Williams of Newfoundland and Labrador demanding repayment to women in Newfoundland of the \$79 million owed.
- Endorse a letter to the Prime Minister stating that we will not accept our rights being overridden on the basis of claims of "fiscal crisis," and requesting the federal government to share with the Province of Newfoundland and Labrador the cost of paying to women the \$79 million that is owed.

Note: These letters will be circulated to you for endorsement.

Question: How can the organizers of this action be contacted?

Answer: Here is contact information: FAFIA: Nancy Peckford: npeckford@fafia-afai.org; or Shelagh Day: sheday@interchange.ubc.ca

NAWL: Andree Cote: andree@nawl.ca

**Newfoundland and Labrador Advisory Council on the Status of Women:
pacswclcd@nf.aibn.com**