Court File nº 38505

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

BETWEEN:

JOANNE FRASER, ALLISON PILGRIM
and COLLEEN FOX

Applicants
(Appellants)

and

ATTORNEY GENERAL OF CANADA

Respondent
(Respondent)

RESPONSE OF THE ATTORNEY GENERAL OF CANADA

(Pursuant to Rule 27 of the *Rules of the Supreme Court of Canada*)

ATTORNEY GENERAL OF CANADA

Department of Justice Canada
Civil Litigation Section
500-50 O'Connor Street
Ottawa, Ontario K1A 0H8
Fax: 613-954-1920

Per: Gregory Tzemenakis
Youri Tessier-Stall

Tel: 613-670-6338
613-288-5065
E-mail: gregory.tzemenakis@justice.gc.ca
youri.tessier-stall@justice.gc.ca

Counsel for the Respondent

DEPUTY ATTORNEY GENERAL OF CANADA

Department of Justice Canada
National Litigation Sector
500-50 O'Connor Street
Ottawa ON K1A 0H8
Fax: 613-954-1920

Per: Christopher Rupar

Tel: 613-670-6290

E-mail: christopher.rupar@justice.gc.ca

Agent for the Respondent

ORIGINAL TO: **THE REGISTRAR**

COPY TO:

Paul Champ / Bijon Roy
Champ & Associates
43 Florence Street
Ottawa, ON K2P 0W6
Tel: 613-237-4740
Fax: 613-232-2680
E-mail: pchamp@champlaw.ca
broy@champlaw.ca

Counsel for the Applicants

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PART I – OVERVIEW & FACTS

I. OVERVIEW

1. The applicants are seeking a benefit to which no other member of the Royal Canadian Mounted Police (RCMP), or the federal public service at large, is entitled: the right to buy back full-time pension benefits for periods of part-time service. All members of the RCMP and of the federal public service, regardless of sex or family/parental status, accrue pensionable service and make pension contributions at the same rate, and all are entitled to pension benefits that are commensurate to the hours for which they were engaged to work.

2. This matter involves the application of well-established principles and factual determinations by the courts below. Both the Federal Court of Appeal and the application judge found that the applicants had failed to establish the requisite evidentiary basis to support their claim of discrimination under section 15 of the *Canadian Charter of Rights and Freedoms*. The requirement to substantiate such claims with evidence is settled law and has been consistently reaffirmed by this Court and by the Federal Court of Appeal. An appeal to this Court is not an appropriate vehicle to remedy the evidentiary deficiencies of a party's case in the courts below. The Federal Court of Appeal and the application judge also found, based on the record and the applicable legislative and regulatory framework, that the applicants were part-time members during the relevant periods. This conclusion is largely factual in nature and is amply supported by the record.

II. FACTS

4. The applicants are current or former regular members of the RCMP who took advantage of the RCMP's job-sharing policy, which enabled them to work part-time while caring for their children. The applicants recognize that job-sharing enabled them to enjoy personal and professional benefits, such as achieving better work/life balance and being more present in their children's lives while maintaining contact with the RCMP and keeping their policing skills up-to-date.[1]

5. The parties agree that the applicants were paid for the part-time hours they worked while job-sharing, and that they made pension contributions in respect of these part-time hours. The issue in this case is the applicants' desire to buy back full-time pension benefits for periods of part-time service.

A. FEDERAL PUBLIC SECTOR PENSION PLANS

6. The Government of Canada provides retirement income and benefits to its employees through eleven statutory pension plans, including the *Royal Canadian Mounted Police Superannuation Act* (*RCMPSA*)[2] and the *Royal Canadian Mounted Police Superannuation Regulations*[3] (collectively, the "Plan")[4]. Male and female contributors enjoy equality of status and equal rights and obligations under these pension plans.[5]

7. All part-time and full-time employees across the federal public service, including the RCMP, are treated equally: all make pension contributions and accrue years of pensionable

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[1] Fraser Affidavit at paras 23-24, **Application for Leave to Appeal [ALA], Tab F at 137**; Fox Affidavit at paras 16, 19, 22-23, **ALA, Tab H at 173-175**; Pilgrim Affidavit at paras 24-25, **ALA, Tab G at 147**.

[2] *Royal Canadian Mounted Police Superannuation Act*, RSC 1985, c R-11, ss 5, 6.1 and 27 [*RCMPSA*].

[3] *Royal Canadian Mounted Police Superannuation Regulations*, CRC, c 1393, ss 10-10.10 [*Regulations*].

[4] Gowing Affidavit at paras 5-6, **ALA, tab K at 218-219**.

[5] FC Decision at para 90, **ALA, tab B at 30**; *RCMPSA*, s 2; *Public Service Superannuation Act*, RSC 1985, c P-36, s 2 [*PSSA*].

service at the same rates, and all earn pension benefits commensurate to the hours for which they were engaged to work.[6]

1. The RCMP Pension Plan

8. The Plan does not permit members to accrue pensionable service above and beyond the hours for which they were engaged to work. This applies regardless of a member's sex or family/parental status. Part-time members cannot accrue or buy back full-time pension benefits. Full-time members cannot purchase additional pension benefits which exceed their full-time hours of work, such as overtime. This is consistent across all eleven federal public sector pension plans.[7]

9. The Plan establishes the pension regime for all regular and civilian members of the RCMP. Contributions to the Plan are mandatory and are determined based on a contributor's employment status which, for the present purposes, refers to part-time service, full-time service or leave without pay (LWOP).[8]

10. The impugned provisions can be briefly described as follows:

- Section 5 of the *RCMPSA* sets the conditions pursuant to which members must contribute to the Plan.
- Under section 6.1 of the *RCMPSA*, a member returning from LWOP may elect not to count the period beyond the mandatory first three months of the LWOP as pensionable service. The consequence is that pension contributions in respect of the "opted out" period are not required.
- Section 27 of the *RCMPSA* establishes the contribution rates for periods of pensionable LWOP. Under this provision, a member's contributions in respect of a period of

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[6] *Fraser et al v Canada (AG)*, 2018 FCA 223 at para 1 [FCA Decision], **ALA, tab D at 76**; *Fraser et al v Canada (AG)*, 2017 FC 557 at para 8 [FC Decision], **ALA, tab B at 8**; Rossignol Affidavit at paras 23-25, **ALA, tab J at 196-197**; Gowing Affidavit at paras 28, 29, 33, **ALA, tab K at 223-224**.

[7] FC Decision, para 176, **ALA, tab B at 57**; Rossignol Affidavit at paras 26, 34, 42, **ALA, tab J at 197, 199, 201**; Gowing Affidavit at paras 32, 48, **ALA, tab K at 224, 229**.

[8] *RCMPSA*, s 5(1); Rossignol Affidavit at paras 11-12, **ALA, tab J at 194**.

pensionable LWOP are based on the salary the member would have received had they not been on leave (known as their "deemed" salary).

- Section 10 of the *Regulations* sets out further parameters governing contribution rates depending on the type and length of the LWOP.
- Section 10.1 of the *Regulations* provides that members who go on LWOP are deemed to have received the pay and allowances they would have received had they not been on leave, thus enabling pension calculations for the period of LWOP in question.

2. Distinguishing "full-time" and "part-time" service with the RCMP

11. A "full-time member" of the RCMP is a member who is engaged to work 40 hours/week.[9] As of May 2014, 99.59% of the RCMP's 22,307 members were considered full-time.[10] A "part-time member" of the RCMP is a member who is engaged to work a minimum of 12 hours per week and who is not a full-time member.[11]

12. There were rules governing pension calculations for part-time members before the Plan was amended to include a definition of "part-time" in 2006. Prior to the amendments, pension calculations for periods of part-time work were governed by administrative policy such as job-sharing, detailed below. Parliament subsequently validated every calculation of part-time benefits made before the 2006 amendments.[12]

13. No member of the RCMP, or any employee of the federal public service, can have both part-time and full-time status simultaneously. Neither the Plan nor the RCMP's job-sharing policy contemplate that a member retains "underlying" full-time status while working part-time. Rather, as found by the application judge and affirmed by the Federal Court of Appeal, the job-sharing

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[9] Rossignol Affidavit at para 16, **ALA, tab J at 195**; *Regulations*, s 2.1.
[10] FC Decision at para 91, **ALA, tab B at 31**. This represents 22,215 of the RCMP's 22,307 members: see Rossignol Affidavit at para 17, **ALA, tab J at 195**.
[11] FCA Decision at para 9, **ALA, tab D at 81**; FC Decision at paras 34, 36, **ALA, tab B at 14, 15**; Rossignol Affidavit at para 18, **ALA, tab J at 195**; *Regulations*, ss 2.1, 5.2(1).
[12] FCA Decision at para 6, **ALA, Tab D at 80**; *An Act to amend the Royal Canadian Mounted Police Superannuation Act, to validate certain calculations and to amend other Acts*, SC 2009, c 13, s 12.

policy has always provided that members who job-share are working part-time as they share the duties of one full-time position.[13]

3. Equal treatment of part-time and full-time members

14. The concepts of pensionable service, pension contributions and pension benefits are key to assessing how the Plan affects part-time versus full-time members. The application judge found that the applicants misconstrued these concepts.[14]

15. The determination of pensionable service, contributions and benefits applies equally to all members, regardless of sex or family/parental status.[15] Years of pensionable service accrue at the same rate for part-time and full-time members, and both reach service thresholds at the same time.[16] Part-time and full-time members also contribute to the Plan at the same rate.[17] However, the *amount* of a part-time member's contribution is pro-rated to ensure that their contribution is proportional to their hours of work.[18] The pension benefit that a member will ultimately receive upon retirement reflects the hours for which the member was engaged to work throughout their career, thus ensuring equitable treatment between full-time and part-time members.[19]

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[13] FCA Decision at paras 32-36, **ALA, tab D at 91-92**; FC Decision at paras 47-54, **ALA, tab B at 18-20**.

[14] FC Decision at para 37, **ALA, tab B at 37**.

[15] *RCMPSA*, s 2; Rossignol Affidavit at para 34, **ALA, tab J at 199**.

[16] FCA Decision at para 8, **ALA, tab D at 93**; FC Decision at para 38, **ALA, tab B at 16**; Rossignol Affidavit at para 23, **ALA, tab J at 196**; Gowing Affidavit at paras 29, 31, **ALA, tab K at 224**; *RCMPSA*, s 6; see also s 17.2 of the *Regulations*, where the formula simply takes into account the "number of years in the segment", and s 37(1) of the *Interpretation Act*, RSC 1985, c I-21, defining a "year" as "any period of twelve consecutive months".

[17] Rossignol Affidavit at para 24, **ALA, tab J at 196-197**; Gowing Affidavit at para 28, **ALA, tab K at 223**.

[18] FCA Decision at para 8, **ALA, tab D at 81**; FC Decision at paras 39, 111, 176-77, **ALA, tab B at 16, 37, 57-58**; Rossignol Affidavit at para 24, **ALA, tab J at 196**; Gowing Affidavit at para 28, **ALA, tab K at 223**.

[19] FCA Decision at para 8, **ALA, tab D at 81**; FC Decision at paras 40-42, 176-77, **ALA, tab B 16-17, 57-58**; Rossignol Affidavit at paras 28-33, **ALA, tab J at 197-199**; Gowing Affidavit at paras 33-34, **ALA, tab K at 224-225**; *Regulations*, ss 17.1-17.3.

4. Job-sharing as a form of part-time employment

16. Both the Federal Court of Appeal and the application judge correctly found that job-sharing is and has always been a form of part-time employment.[20] As observed by the application judge, the applicants "seek to avoid this characterization because they acknowledge that part-time members cannot 'buy-back' pension benefits to augment their pension."[21]

17. Job-sharing is an employment policy instituted by the RCMP to facilitate work-life balance for members who, due to personal or family circumstances, would benefit from being able to work part-time instead of taking extended leaves of absence without pay. The aim of the job-sharing policy was to enable members to remain operationally connected to the RCMP while having a work schedule that better accommodated their individual circumstances.[22]

18. The term "job-sharing" is not defined in the Plan, nor does the Plan include provisions relating to particular work arrangements such as job-sharing.[23] The Plan simply provides that a member is either part-time or full-time, as defined therein, and determines pension contributions and benefits accordingly. The RCMP's job-sharing policy for regular members, introduced in a 1997 Bulletin, defined job-sharing as "two or three members sharing the duties and responsibilities of one full-time position".[24] Though the wording has evolved, the substance of the 1997 Bulletin remains the same today.[25]

19. The 1997 Bulletin included a Memorandum of Agreement (MoA) setting out the terms of a member's job-sharing arrangement. This included an acknowledgement that some benefits would be affected in the future and that the member had the opportunity to obtain legal and

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[20] FCA Decision at paras 32-36, **ALA, tab D at 91-92;** FC Decision at paras 47-58, 176, **ALA, tab B at 18-21, 57**; Rossignol Affidavit at para 45, **ALA, tab J at 202**.
[21] FC Decision at para 58, **ALA, tab B at 21**.
[22] Rossignol Affidavit at paras 21, 45-46, **ALA, tab J at 196, 202**; Gowing Affidavit at para 35, **ALA, tab K at 225**.
[23] FCA Decision at para 13, **ALA, tab D at 83**; Gowing Affidavit at para 26, **ALA, tab K at 223**.
[24] FC Decision at para 48, **ALA, tab B at 18**.
[25] FC Decision at para 49, **ALA, tab B at 18**.

financial advice.[26] The 1997 Bulletin also included a Pay and Benefits Summary which set out how job-sharing salary, benefits and pension contributions are calculated. The Summary confirms that the member's pay and pension contributions are prorated to reflect their part-time hours.[27]

20. Job-sharers are a subset of a larger group of part-time members. As of May 2014, none of the 29 regular members who were working part-time were job-sharing. As for civilian members, 14 of the 63 part-time members were job-sharing. This represents 0.06% of the RCMP's 22,307 members.[28] In May 2010, 11 of the 31 regular members working part-time were job-sharing, while 16 out of the 70 civilian members working part-time job-shared. Combined, this represents 0.12% of the RCMP's 23,038 members at the time.[29]

21. Formal metrics compiled by the RCMP and considered by the courts below show that members have job-shared for a variety of reasons, other than childcare obligations, including: to return to school; to pursue another career; to care for elderly parents; for medical reasons; and, to achieve better work/life balance unrelated to childcare. Approximately 60% of job-sharers cite childcare as the exclusive reason for choosing to work part-time, while the remainder do not mention childcare at all, or cite it as one reason among others.[30] Moreover, men, though fewer in number, have also job-shared since the policy was implemented.[31]

B. DECISIONS OF THE COURTS BELOW

1. Federal Court's Decision

22. The application judge dismissed the applicants' challenge to the impugned provisions and found that the applicants had presented little evidence to support their claim of discrimination

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[26] FC Decision, paras 23, 179, **ALA, tab B at 11, 58**; Rossignol Affidavit, para 49(c), **ALA, tab J at 203**.
[27] Rossignol Affidavit at para 49(e), **ALA, tab J at 204**.
[28] FCA Decision at para 18, **ALA, tab D at 85**; FC Decision at para 118, **ALA, tab B at 39**; Rossignol Affidavit at para 47, **ALA, tab J at 202**.
[29] FCA Decision at para 18, **ALA, tab D at 85**; FC Decision at para 117, **ALA, tab B at 39**; Rossignol Affidavit at para 48, **ALA, tab J at 202**.
[30] FCA Decision at para 18, **ALA, tab D at 85**; FC Decision at paras 91, 117, **ALA, tab B at 31, 39**; Rossignol Affidavit at para 52, **ALA, tab J at 205**.
[31] Noble Affidavit at para 25, **ALA, tab I at 184.**

under the Plan.[32] She also noted that the pension implications of job-sharing had to be considered in conjunction with the many benefits enjoyed by the applicants while they job-shared.[33]

23. The judge articulated the two-part test for discrimination under section 15 of the *Charter*[34] – whether a distinction is drawn, and if so, whether it is discriminatory[35] – and found that all part-time members of the RCMP are treated the same, regardless of sex or parental/family status. She found that there was no nexus between the impugned provisions and the differential treatment alleged by the applicants: any impact on their pension benefits resulted not from the impugned provisions, but from their decision to work part-time.[36]

24. Significantly, the judge rejected the notion that the pension implications of job-sharing perpetuated a disadvantage or stereotype, describing the applicants' suggestion to that effect as "simply a theory" devoid of an evidentiary basis.[37] She found that the applicants exaggerated in arguing that the Plan denied them the ability to choose how to balance their career and family obligations, noting that this proposition was undermined by the applicants' own evidence about their experience while job-sharing and on LWOP.[38]

25. The judge acknowledged the complexity of social benefits legislation such as the Plan. She understood that perfection is not the standard when assessing whether benefits proffered under such a plan meet all the needs or preferences of its beneficiaries.[39] The judge recognized the overall ameliorative effect of the Plan and held that it met its overarching goal of providing retirement income.[40]

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[32] FC Decision at paras 125-30, 170-72, 181, **ALA, tab B at 41-43, 55-56, 59**.
[33] FC Decision at paras 9, 22, 128, 131-33, 185, **ALA, tab B at 8, 11, 42, 43-44, 60**.
[34] *Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK)*, 1982, c 11.
[35] FC Decision at paras 10-14, 62, 96-99, 107-11, **ALA, tab B at 8-10, 22, 32-33, 36-38**.
[36] FC Decision at paras 8, 11, 103-06, 134-39, 187, **ALA, tab B at 8, 9, 35-36, 44-46, 61**.
[37] FC Decision at paras 175-76, 181 (quote), 182-84, **ALA, tab B at 57, 59**.
[38] FC Decision at paras 179-80, **ALA, tab B at 58 - 59**.
[39] FC Decision at paras 160-66, 173-74, 186, **ALA, tab B at 51-54, 56-57, 61**.
[40] FC Decision at para 177, **ALA, tab B at 58**.

2. Federal Court of Appeal's Decision

26. The Federal Court of Appeal dismissed the appeal, pointing to the lack of evidence in the record to support the applicants' claim of discrimination.[41] The Court determined that this case turned on the first step of the s. 15 analysis, namely whether the impugned provisions create a distinction on an enumerated or analogous ground.[42] The Court found that the applicants had failed to demonstrate that the impugned provisions had a negative and disproportionate impact on them.[43] The Court went on to hold that even if the applicants had demonstrated such impact, they failed to establish the requisite nexus with an enumerated or analogous ground: the applicants' pension benefits resulted not from their sex or family status, but from their decision to job-share.[44]

27. The Court also found that the determination that the applicants worked part-time while job-sharing was largely factual and that there was "ample basis" for the application judge's conclusion to that effect.[45]

PART II – ISSUES

28. At issue is whether the following questions are of public importance or are of such a nature or significance as to warrant a decision by this Court:

A. The Federal Court of Appeal's approach to section 15 of the *Charter*;

B. The determination that the applicants worked part-time while job-sharing.

29. The respondent notes that the applicants have not, in this application, put the constitutional validity of the impugned provisions in issue.[46]

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[41] FCA Decision at paras 15-17, 46-47, 50-52, 54-55, 57, **ALA, tab D at 84-85, 96-100**.
[42] FCA Decision at paras 39-40, **ALA, tab D at 93-94**.
[43] FCA Decision at paras 47-50, **ALA, tab D at 96-97**.
[44] FCA Decision at paras 51-54, **ALA, tab D at 97-99**.
[45] FCA Decision at paras 32-36, **ALA, tab D at 91-92**.
[46] As would be required under rule 25(1)(c)(ii) of the *Rules of the Supreme Court of Canada*, SOR/2002-156.

PART III – ARGUMENT

A. THE FEDERAL COURT OF APPEAL'S APPROACH TO S. 15 OF THE *CHARTER* IS CONSISTENT WITH SETTLED PRINCIPLES

30. The Federal Court of Appeal's approach to section 15 of the *Charter* is consistent with the fundamental principle that claims of discrimination must be supported by evidence. The Federal Court of Appeal applied settled law to the facts of this matter, such that this proposed appeal raises no issue of public importance that would warrant a decision by this Court. The applicants' reliance on isolated sentences in the Federal Court of Appeal's decision ignores the broader context and thrust of the Court's reasoning.

1. The test under section 15 of the Charter

31. When legislation is challenged under subsection 15(1) of the *Charter*, the only issue for a reviewing court is whether the impugned legislation violates the norm of substantive equality protected by the *Charter*.[47] The applicable two-part test, as articulated by the Federal Court of Appeal, is: (1) *w*hether the impugned provisions result in a distinction on enumerated or analogous grounds; and if so (2) whether the distinction is discriminatory in that it "imposes a burden or denies a benefit in a manner that has the effect of reinforcing or perpetuating prejudice or disadvantage".[48] Where indirect discrimination is alleged, as in the present case, the threshold for a claimant is higher at the first stage of the analysis.[49]

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[47] FCA Decision at para 39, **ALA, tab D at 93**; FC Decision at paras 96, 98, 107, 114, 156, **ALA, tab B at 32-33, 36-37, 38, 50**; *Withler v Canada (AG)*, 2011 SCC 12 at para 2.

[48] FCA Decision at para 39, **ALA, tab D at 93**; *Withler v Canada (AG)*, 2011 SCC 12 at para 30; *Kahkewistahaw First Nation v Taypotat*, 2015 SCC 30 at paras 19-20; *Centrale des syndicats du Québec v Quebec (Attorney General)*, 2018 SCC 18 at para 22; see also *Miceli-Riggins v Canada (AG)*, 2013 FCA 158 at para 43.

[49] FC Decision at para 100, **ALA, tab B at 34**, citing *Withler v Canada (AG)*, 2011 SCC 12 at para 64.

32. It is settled law that evidence of differential treatment is required to support a claim of discrimination under section 15 of the *Charter*. As held by this Court, section 15 cases must not be based in a factual vacuum:

> the courts have every right to expect and indeed to insist upon the careful preparation and presentation of a factual basis in most *Charter* cases […]. *Charter* decisions cannot be based upon the unsupported hypotheses of enthusiastic counsel.[50]

33. This Court has consistently reaffirmed this basic principle,[51] recently holding that mere intuition that provisions may have some disparate impact is insufficient: "there must be enough evidence to show a *prima facie* breach" of section 15 of the *Charter*.[52] The Court has also specifically cautioned against inferring causation in the absence of evidence in section 15 cases:

> If the adverse effects analysis is to be coherent, it must not assume a statutory provision has an effect which is not proved. We must take care to distinguish between effects which are wholly caused, or are contributed to, by an impugned provision, and those social circumstances which exist independently of such a provision.[53]

34. The analysis must focus not on the mere presence or absence of a difference, but on the actual effects of the impugned legislation on substantive equality.[54] The Federal Court of Appeal has embraced these principles in numerous cases, including in the decision subject to this leave application.[55]

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[50] *Mackay v Manitoba*, [1989] 2 SCR 357 at paras 8-9 (WL).

[51] See for example: *Ernst v Alberta Energy Regulator*, 2017 SCC 1 at para 22; *Guindon v Canada*, 2015 SCC 41 at para 116; *British Columbia (Attorney General) v Christie*, 2007 SCC 21 at para 28; *R v Spence*, 2005 SCC 71 at para 68.

[52] *Kahkewistahaw First Nation v Taypotat*, 2015 SCC 30 at para 34, cited in the FCA Decision at para 46, **ALA, tab D at 96**.

[53] *Symes v Canada*, [1993] 4 SCR 695 at para 142 [emphasis added], cited in the FCA Decision at para 54, **ALA, tab D at 99**.

[54] *Quebec (AG) v A*, 2013 SCC 5 at paras 168-69; *Withler v Canada (AG)*, 2011 SCC 12 at para 39; *Miceli-Riggins v Canada (AG)*, 2013 FCA 158 at para 53

[55] FCA Decision at paras 43-44, 46-47, 50-54, **ALA, tab D at 95, 96, 97-99**; *Grenon v Canada*, 2016 FCA 4 at para 45, leave to SCC denied in file no 36891, 2016 CanLII 41074; *Miceli-Riggins v Canada (AG)*, 2013 FCA 158 at paras 53, 76; *Canada (AG) v Lesiuk*, 2003 FCA 3 at para 51.

2. No evidence of differential treatment

35. The Federal Court of Appeal applied these principles and found that the applicants had failed to discharge their burden of demonstrating that the Plan resulted in differential treatment on any enumerated or analogous grounds.[56] Given the paucity of evidence, the Court exercised the appropriate degree of judicial restraint in the face of complex social benefits legislation. Distinctions which arise under such schemes "will not lightly be found to be discriminatory. The Supreme Court has confirmed this over and over again."[57]

36. Programs that aim to benefit certain groups, such as the Plan, necessarily draw lines; the question for a reviewing court is "whether the lines drawn are generally appropriate, having regard to the circumstances of the persons impacted and the objects of the scheme".[58]

37. The evidence did not allow the courts below to conclude that the lines drawn are inappropriate. Most of the evidence adduced by the applicants pointed to the impact of work/life conflict on the number of hours they were available or willing to work while job-sharing, as opposed to the impact of the impugned provisions on their pension benefits. This does not assist them in establishing the *Charter* violation they allege: "[i]n each case, it must be established that the [impugned] measure affects them because of or by reason of, a prohibited ground […] and not as a consequential effect."[59]

38. More specifically, the Federal Court of Appeal's review of the record revealed that:

- there was no compelling evidence regarding the financial impacts of job-sharing as opposed to going on LWOP;[60]
- there was little evidence about the number of RCMP members who chose to job-share / work part-time, and no evidence about those who chose LWOP;[61]

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[56] FCA Decision at paras 40, 43-52, **ALA, tab D at 94-98**.
[57] *Miceli-Riggins v Canada (AG)*, 2013 FCA 158 at para 57.
[58] *Withler v Canada (AG)*, 2011 SCC 12 at para 67.
[59] *Grenon v Canada*, 2016 FCA 4, para 44, cited in FC Decision at para 105, **ALA, tab B at 35**.
[60] FCA Decision at paras 15-16, **ALA, tab D at 84**.
[61] FCA Decision at paras 17-18, **ALA, tab D at 85**;

- the impugned provisions could not be viewed in isolation, but should instead be assessed in the light of the entire remuneration package offered to members who choose to job-share as compared to members who choose LWOP.[62]

- an informal survey of job-sharers conducted by one of the applicants failed to address the key question of *why* the participants job-shared.[63] This is critical to the allegation of discrimination on the intertwined grounds of sex and family/parental status;

- even if there was differential treatment, the evidence – including the applicants' expert report on the issue of women in policing – failed to establish the requisite nexus between the differential treatment alleged and an enumerated or analogous ground;[64]

- there was no evidence to suggest that LWOP was unavailable to the applicants and similarly-situated individuals; [65]

- there was no evidence to suggest that more men (or members without children) had opted to take LWOP, as compared to women (or members with children);[66]

- the fact that more women than men job-share does not suffice to establish a distinction based on an enumerated or analogous ground. The evidence must demonstrate that the alleged discriminatory distinction results from the impugned provisions; the analysis must be qualitative, not numerical.[67]

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[62] FCA Decision at paras 49-50, **ALA, tab D at 96-97**.
[63] FCA Decision at para 17, **ALA, tab D at 85**; Noble Affidavit at para 25, **ALA, tab I at 184**.
[64] FCA Decision at paras 19, 51-53, **ALA, tab D at 85-85, 97-98**; see also *Grenon v Canada*, 2016 FCA 4 at paras 39, 41.
[65] FCA Decision at para 52, **ALA, tab D at 98**.
[66] FCA Decision at para 52, **ALA, tab D at 98**.
[67] FCA Decision at para 53, **ALA, tab D at 98**, relying on *Grenon v Canada*, 2016 FCA 4 at para 41; see also *Miceli-Riggins v Canada (AG)*, 2013 FCA 158 at para 81; *Thibaudeau v R*, [1994] 2 FC 189, [1994] 2 FCJ No 577 (FCA) at para 22, rev'd on other grounds in [1995] 2 SCR 627, [1995] SCJ No 42; *Native Council of Nova Scotia v Canada (AG)*, 2011 FC 72 at para 53, relying upon *Boulter v Nova Scotia Power Inc*, 2009 NSCA 17 at para 77 (leave to appeal to SCC denied 2009 CanLII 47476); *Falkiner v Ontario (Minister of Community and Social Services)*, 59 OR (3d) 481, [2002] OJ No 1771 (ONCA), at paras 75, 81, and 105.

39. The Federal Court of Appeal conducted a fulsome analysis of the record. Its approach reflects the requisite "flexible and contextual inquiry into whether a distinction has the effect of perpetuating arbitrary disadvantage on the claimant because of his or her membership in an enumerated or analogous group".[68] The Court did not, as the applicants suggest, adopt an overly narrow view of section 15 by focussing exclusively on evidence pertaining to pecuniary interests. Nor did it find that economic loss was necessary to establish denial of a benefit of the law. On the contrary, the Court expressly acknowledged that it had to look beyond strictly financial considerations, holding that "*even if it were permissible* to consider only the differential pension treatment" [69], there was no nexus between the alleged adverse result and the grounds protected under section 15.

40. In requiring the applicants to substantiate their allegations with evidence, the Court did not "shortcut or thwart"[70] the section 15 analysis, but rather preserved its integrity. Given the evidentiary lacunae, there was no reason for the Federal Court of Appeal to disturb the application judge's finding that the impugned provisions apply equally to all part-time members of the RCMP and that they treat men and women alike, just as they treat parents and non-parents alike.[71] To the extent that the impugned provisions do create a disadvantage, which both courts below rejected,[72] the disadvantage is experienced identically by men, women, parents and non-parents: a member who worked part-time at some point during their career will have their pension benefits for that period pro-rated accordingly.

41. That the appellants wish to maximize their retirement income is understandable. However, the fact that the Plan, like all other federal public sector pension plans, provides fewer benefits than they would like does not mean that it is discriminatory.[73] Recognizing the "very real and significant challenges working mothers face, especially in male-dominated workplaces", the

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[68] *Kahkewistahaw First Nation v Taypotat*, 2015 SCC 30 at para 16 [ref omitted].
[69] FCA Decision at para 51, **ALA, tab D at 97-98** [emphasis added].
[70] Applicants' Leave Memorandum at paras 25, 30, **ALA, tab E at 115, 117**.
[71] FC Decision at paras 8, 47, 58, 90, **ALA, tab B at 8, 18, 21, 30**; Rossignol affidavit at para 34, **ALA, tab J at 199**; Gowing affidavit, para 38, **ALA, tab K at 226**; *RCMPSA*, s 2; *PSSA*, s 2.
[72] FCA Decision at paras 48-50, **ALA, tab D at 96-97**; FC Decision at paras 111, 136, **ALA, tab B at 37-38, 45**.
[73] FC Decision at paras 14, 186, **ALA, tab B at 9-10, 61**.

Federal Court of Appeal properly concluded that "this social reality does not give rise to a constitutional right to increased pension benefits in the absence of discrimination."[74]

B. APPLICANTS' PART-TIME STATUS IS A FACTUAL DETERMINATION THAT DOES NOT RAISE AN ISSUE OF PUBLIC IMPORTANCE

1. The courts below correctly found that the applicants were part-time members while job-sharing

42. Both the Federal Court of Appeal and the application judge found that the applicants were part-time members while job-sharing.[75] The Federal Court of Appeal noted that this determination is "largely factual" and there was "ample basis" to support this conclusion.[76] In any event, the courts below recognized, and the parties agree, that employment status is not an enumerated or analogous ground protected under subsection 15(1) of the *Charter*.[77] What the applicants describe as the "legal characterization of full-time or part-time employees"[78] is thus of marginal relevance to this matter and does not warrant this Court's attention.

43. The Federal Court of Appeal examined the definitions of "full-time member" and "part-time member" in section 2.1 of the *Regulations* and found that the former work 40 hours per week while the latter work between 12 and 40 hours per week. The Court also found – and it is undisputed – that the applicants worked between 12 and 40 hours per week while job-sharing, as clearly set out in their job-sharing agreements.[79] The applicants were therefore considered to be part-time members while job-sharing.

44. The definitions of part-time/full-time are, on their face, mutually exclusive: a member cannot be engaged to work both 40 hours/week *and* more than 12 but fewer than 40 hours/week. Contrary to what the applicants suggest, the temporary nature of job-sharing arrangements has

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[74] FCA Decision at para 61, **ALA, tab D at 101**;
[75] FCA Decision at paras 32-36, **ALA, tab D at 91-92**; FC Decision at paras 47-58, **ALA, tab B at 18-21**.
[76] FCA Decision at paras 33-34, **ALA, tab D at 91-92**.
[77] FCA Decision at para 41, **ALA, tab D at 94**; FC Decision at para 58, **ALA, tab B at 21**; *Baier v Alberta*, 2007 SCC 31, paras 63-65.
[78] Applicants' Leave Memorandum at paras 26, 36, **ALA, tab E at 115, 119**.
[79] FCA Decision at paras 9, 34, **ALA, tab D at 81-82, 92**; FC Decision at paras 47-52, **ALA, tab B at 18-19**.

no bearing on the fact that, for the duration of the arrangement, a member is working part-time. There is no such thing as "presumptive" or underlying full-time status,[80] and there is no authority for the applicants' proposition that a part-time employee maintains their full-time status "unless there is no chance he or she will return to full-time duties".[81] Notably, the applicants themselves have repeatedly acknowledged that job-sharing is a form of part-time employment.[82]

45. As in the courts below, the applicants rely on arbitral jurisprudence to suggest that there exists an "established principle" that an employee somehow retains their full-time status if they have a "legal right" to return to full-time hours during periods of part-time employment.[83] The Federal Court of Appeal correctly dismissed this argument, finding not only that the arbitral cases involved the interpretation of specific collective agreements, but also that there were several authorities that reach the opposite conclusion.[84]

46. Further, the applicants mischaracterize the Federal Court of Appeal's decision by asserting that "[t]he premise at the heart of FCA's decision is that a change of employment status necessarily results from a change in hours of work."[85] Nowhere in its decision does the Federal Court of Appeal make such a sweeping statement or otherwise reach this conclusion. The Court's decision, like that of the application judge, is simply to the effect that these applicants, given the nature of job-sharing and the applicable legislative and regulatory framework, were part-time members during the relevant periods.

2. Qualitative differences between part-time work and LWOP

47. Both courts below recognized the qualitative differences between part-time employment and LWOP, which the applicants gloss over.[86] Full-time and part-time members are engaged to work

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[80] FC Decision at paras 53-54, **ALA, tab B at 19-20**.
[81] Applicants' Leave Memorandum at para 40, **ALA, tab E at 120**.
[82] FC Decision at para 43, **ALA, tab B at 17**; Affidavit of Colleen Fox at para 16, **ALA, tab H at 173**.
[83] Applicants' Leave Memorandum at paras 37-38, **ALA, tab E at 119-120**.
[84] FCA Decision at para 59, **ALA, tab D at 100-101**.
[85] Applicants' Leave Memorandum at para 36, see also para 26, **ALA, tab E at 115**.
[86] FCA Decision at paras 34-35, 50, **ALA, tab D at 92, 97**; FC Decision at para 55, **ALA, tab B at 20**.

a certain number of hours per week, are paid for those hours, and are required to make pension contributions in respect of those hours. By contrast, those on LWOP are "absent from the Force", have no assigned hours of work, are not paid, and must make pension contributions as set out in the *Regulations*. By definition, these employment statuses are mutually exclusive. Provisions relating to LWOP under the Plan apply equally to full-time and part-time members.[87]

48. Pension contributions for a period of LWOP are determined by the type of leave and the member's terms and conditions of employment – including their part-time or full-time status – immediately prior to going on LWOP.[88] For the purposes of calculating pension contributions, a member who is on LWOP is deemed to have received the same pay during their period of leave as they would have received had they not been absent.[89] This is in turn reflected in the pension benefit ultimately earned.[90]

49. This explains why the applicants were able to buy back full-time pension benefits upon returning from maternity leave (a form of LWOP), as they worked full-time prior to going on leave.[91] Had they worked part-time prior to going on LWOP, their buy-back rights would have been limited to their pre-LWOP part-time hours.

50. The applicants have not been "penalized", nor "permanently lost" pension benefits, and the respondent's evidence does not "confirm a sizeable 'economic hit'" to their pensions.[92] The applicants acknowledge that their hours of work while job-sharing are already fully pensionable[93] and like all other members of the RCMP their pension entitlements reflect the

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[87] Gowing Affidavit at paras 37-39, **ALA, tab K at 226;** Rossignol Affidavit at paras 35-36, **ALA, tab J at 199-200**.
[88] Rossignol Affidavit at para 36, **ALA, tab J at 199-200**.
[89] FCA Decision at para 10, **ALA, tab D at 82**; *Regulations*, s 10.1. A similar provision exists under the *Public Service Superannuation Regulations*, CRC, c 1358, s 7.1(1); Gowing Affidavit at para 41, **ALA, tab K at 227**.
[90] FCA Decision at para 10, **ALA, tab D at 82**; Rossignol Affidavit at paras 37-38, **ALA, tab J at 200**; Gowing Affidavit at para 44, **ALA, tab K at 228**.
[91] FC Decision at para 180, **ALA, tab B at 59**.
[92] Applicants' Leave Memorandum at paras 13, 18-19, 33, **ALA, tab E at 109, 111-112, 118**.
[93] FC Decision at paras 39, 132, 185, **ALA, tab B at 16, 43, 60**.

hours for which they were engaged to work. As a result, there is simply no additional pensionable time to be "bought back".

3. Income tax provisions for periods of reduced pay have no bearing on this case

51. The applicants conflate "periods of reduced pay" under tax legislation with periods of part-time service for pension purposes.[94] A period of reduced pay is not an employment status within the meaning of the Plan, or of any federal public sector pension plan, and has no bearing on a member's full-time or part-time status.[95]

52. A member of a registered pension plan may, for a number of operational or personal reasons, temporarily work fewer hours than their regular (full-time or part-time) hours and receive a reduced rate of pay. Under the *Income Tax Act*[96] and the *Income Tax Regulations*[97], a registered pension plan may, when certain conditions are met, allow this plan member to make additional pension contributions so that they are deemed to have worked their regular (full-time or part-time) hours. This entitles the plan member to the pension benefit associated with their regular hours and regular pay for the period in question.[98] It does *not* allow plan members to make contributions over and above their regular (full-time or part-time) hours.

53. The applicants worked part-time, not "reduced hours". What they are seeking goes beyond what is allowable under the tax regime. In any event, neither the Plan nor any federal public sector pension plan provides for the optional pension contributions described above.[99]

PART IV – ORDER SOUGHT CONCERNING COSTS

54. This application is without merit and the respondent should be awarded costs.

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[94] Applicants' Leave Memorandum at paras 14-15, **ALA, tab E at 109-110**.
[95] FC Decision at para 56, **ALA, tab B at 20**.
[96] *Income Tax Act*, RSC 1985, c 1 (5th Supp), as amended.
[97] Income Tax Regulations, CRC, c 945.
[98] FC Decision at para 56, **ALA, tab B at 20**; *Income Tax Regulations*, s 8500(1) (definition of "eligible period of reduced pay"), 8503(4)(a)(ii); Rossignol Affidavit at para 40, **ALA, tab J at 200-201**; Gowing Affidavit at paras 53-54, **ALA, tab K at 230**.
[99] FC Decision at para 56, **ALA, tab B at 20**; Rossignol Affidavit at paras 41-42, **ALA, tab J at 201**; Gowing Affidavit at para 55, **ALA, tab K at 206**.

PART V – ORDER SOUGHT

55. The respondent requests that this application for leave to appeal be dismissed, with costs.

DATED AT OTTAWA, this 14th day of March, 2019.

Gregory Tzemenakis
Youri Tessier-Stall

Counsel for the Respondent

PART VI – TABLE OF AUTHORITIES

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