Court File No. 38505

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

B E T W E E N :

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- and -

ATTORNEY GENERAL OF CANADA

RESPONDENT

- and -

WOMEN'S LEGAL EDUCATION AND ACTION FUND INC., THE PUBLIC SERVICE ALLIANCE OF CANADA, THE NATIONAL POLICE FEDERATION AND ATTORNEY GENERAL OF ONTARIO AND ATTORNEY GENERAL OF QUÉBEC

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PART I: OVERVIEW AND STATEMENT OF FACTS

1. At issue in this appeal is how to apply the substantive equality test under s 15(1) of the *Charter*. The test articulated by this Court in *Andrews*, and again in the recent cases of *APTS* and *CSQ*,[1] appears straightforward but has proven difficult for courts to apply particularly in cases where, as here, the courts were required to assess claims of adverse effects and systemic discrimination. Despite being facially neutral, the design of the *RCMP Superannuation Act* ["*RCMPSA*"] and its Regulations[2] had the significant adverse impact of denying the female Appellants the opportunity to "buy-back" pension credits for the period in which they were in temporary "job-share" positions due to family caregiving responsibilities.

PART II: POSITION

2. It is LEAF's position that:

(a) the substantive equality analysis required by this Court is the "engine" of s 15 of the *Charter*[3] and must always give due consideration to the context in which the alleged s 15 violation occurred;

(b) this robust concept of substantive equality required by this Court's s 15 test was undermined by the lower courts by improper considerations of "choice", formalistic use of comparators and the introduction of high evidentiary burdens at the first step of the s 15 analysis; and

(c) a substantive equality analysis reveals the systemic discrimination in the design of the *RCMPSA*, which creates adverse effects for the Appellants and other RCMP employees in job-sharing positions. As in the analysis of this Court in *Brooks*,[4] these adverse effects are based on the related protected grounds of sex and/or family status.

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[1] *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143 [*Andrews*]; *Quebec (Attorney General) v Alliance du personnel professionnel et technique de la santé et des services sociaux*, 2018 SCC 17 [*APTS*]. See also its companion case: *Centrale des syndicats du Québec v Quebec (Attorney General)*, 2018 SCC 18 [*CSQ*].

[2] *RCMP Superannuation Act* RSC 1985, c R-11 [*RCMPSA*], ss 2, 5, 6, 7, 10, 27; *RCMP Superannuation Regulations* CRC, c 1393 [Regulations], ss 5, 10, 17

[3] *APTS*, *supra* note 1 at para 25.

[4] *Brooks v Canada Safeway Ltd*, [1989] 1 SCR 1219 [*Brooks*]

PART III: STATEMENT OF ARGUMENT

A. Substantive Equality is "the Engine" for the s 15 Analytical Framework

3. This Court has repeatedly recognized that the purpose of the s 15 *Charter* right is to protect and promote substantive equality, in contrast to a more impoverished conception of formal equality, with its narrower focus on "treating likes alike".[5] Equality must be found in the very substance of the law itself,[6] with a view to "rectifying and preventing discrimination against particular groups "suffering social, political and legal disadvantage in our society".[7]

4. A purposive interpretation of the *Charter* ultimately requires a single legal question to be answered in s 15 claims: "[A]t the end of the day, there is *only one question*: Does the challenged law violate the norm of substantive equality in s 15(1) of the *Charter*?"[8]

5. In its 2018 decisions in *APTS* and *CSQ*, this Court confirmed the proper analytic approach to assessing a claim under s 15 of the *Charter*:

> 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? [9]

6. This Court's analytical framework focuses on whether the distinction at issue "reinforces, perpetuates or exacerbates disadvantage". This *prima facie* test does not require claimants to establish that the distinction at issue directly "created" or "caused" the disadvantage,[10] but only that they demonstrate "a disproportionate effect…based on his or her

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[5] *Andrews*, *supra* note 1 at 167-168. See also cases following *Andrews*: *APTS*, *supra* note 1; *CSQ*, *supra* note 1; *R v Kapp*, 2008 SCC 41 [*Kapp*]; *Withler v Canada (Attorney General)*, 2011 SCC 12 [*Withler*]; *Quebec (Attorney General) v A*, 2013 SCC 5 [*Quebec v A]; Kahkewistahaw First Nation v Taypotat*, 2015 SCC 30 [*Taypotat*].

[6] *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 section 15 [*Charter*]; *Andrews*, *supra* note 1 at 153. See also: *R v Turpin*, [1989] 1 SCR 1296, at pp 1325-26, 1329, 1331-32 [*Turpin*]; *R v Swain*, [1991] 1 SCR 933 at para 80 [*Swain*]; M Eberts & K Stanton, "The Disappearance of the Four Equality Rights and Systemic Discrimination from Canadian Equality Jurisprudence" (2018) 38:1 NJCL 89 at 95-96.

[7] *Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624 [*Eldridge*].

[8] *Withler*, *supra* note 5 at para 2, quoted with Court's emphasis in *Quebec v A*, *supra* note 5 at para 325.

[9] *CSQ*, *supra* note 1 at para 22 (emphasis added); *APTS*, *supra* note 1 at paras 25-26.

[10] *Vriend v Alberta*, [1998] 1 SCR 493 at para 84 [*Vriend*]; *Eldridge*, *supra* note 7 at para 55, cited in *CSQ*, *supra* note 1 at para 32 and *APTS*, *supra* note 1 at paras 41-42; *Quebec v A*, *supra* note 5 at para 332 (per Abella dissent). In the context of the Quebec *Charter* and provincial human rights legislation, see also: *Quebec (Commission des droits de la personne et des droits de la jeunesse) v Bombardier Inc (Bombardier Aerospace Training Center)*, 2015 SCC 39 at para 51; *Moore v. BC (Education)*, 2012 SCC 61 at para 33; *Peel Law Association v Pieters*, 2013 ONCA

membership in a enumerated or analogous group".[11] The analysis must not be applied mechanistically or in a decontextualized manner,[12] must proceed from the perspective of the claimants,[13] and must be focused on the impugned law's impact on those claimants.[14]

1. Substantive Equality Cures Systemic and Adverse Effects Discrimination

7. This Court in *Andrews*, informed by its earlier human rights cases,[15] included adverse effects and systemic discrimination as prohibited by s 15: "discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens . . . or which withholds or limits access to opportunities, benefits, and advantages available to other members of society".[16]

8. In *Action Travail des Femmes*, this Court defined systemic discrimination as "discrimination that results from the simple operation of established procedures of recruitment, hiring and promotion, none of which is necessarily designed to promote discrimination". The hallmark of systemic discrimination is its "structural and largely invisible nature".[17]

9. In *Meiorin*, this Court recognized that adverse effects discrimination "is a more subtle type of discrimination, which rises in the aggregate to the level of systemic discrimination and is much more prevalent that the cruder brand of openly direct discrimination".[18] The Court observed that the design of workplace norms is not neutral, despite often appearing so:

> ...the imbalances of power, or the discourses of dominance, such as racism, ablebodyism and sexism ... result in a society being designed well for some and not for others. It allows those who consider themselves 'normal' to continue to construct institutions and relations in their

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396 at paras 59-61. See also: J Hamilton & J Koshan, "Equality Rights and Pay Equity: Déjà Vu in the Supreme Court of Canada" 15 JLEL 1 at pp 5-6 ["Déjà Vu"].

[11] *Taypotat*, *supra* note 5 at para 21.

[12] *Turpin*, *supra* note 6 at p 1332.

[13] *Law v Canada*, [1999] 1 SCR 497 at paras 59-75 [*Law*]; *Withler*, *supra* note 5 at paras 2, 37-38; *Quebec v A*, *supra* note 5 at paras 327-329.

[14] *Withler*, *supra* note 5 at paras 2, 39; *Quebec v A*, *supra* note 5 at para 324; *Ermineskin Indian Band and Nation v Canada*, 2009 SCC 9 at paras 193-194; *Turpin*, *supra* note 6 at pp 1331-1332.

[15] See e.g.: *Ontario Human Rights Commission and O'Malley v Simpsons-Sears Ltd*, [1985] 2 SCR 536.

[16] *Andrews*, *supra* note 1 at 187(emphasis added).

[17] *CN v Canada (Canadian Human Rights Commission)*, [1987] 1 SCR 1114 [*Action Travail*] at 1138-39; Eberts & Stanton, *supra* note 6 at 94. See also: Canada, Human Resources and Skills Development Canada, Report of the Commission on Equality in Employment (Ottawa: Justice R Abella, Commissioner, 1984) at 9-10 [Abella Report]; M Minow, *Making All the Difference: Inclusion, Exclusion and American Law* (Ithaca: Cornell University Press, 1990) at 110-112, LBOA Tab 3.

[18] *B.C (Public Service Employee Relations Commission) v BCGSEU*, [1999] 3 SCR 3 at para 29 [*Meiorin*)].

image…".[19]

10. This Court has allowed claims of discrimination, including adverse effects or systemic discrimination, particularly in cases of structural design flaws.[20] For instance, in *Eldridge*, the design of the government's medical benefit plan adversely affected some individuals with disabilities.[21] In *Brooks*, this Court found that the health insurance plan at issue "imposed unfair disadvantages on pregnant women".[22] In *Meiorin,* in the human rights context, the government's fitness test was structured in a way that adversely affected some female employees. Appellate courts have similarly upheld claims of adverse effects discrimination where design flaws in impugned policies denied claimants on maternity leave equal benefit of recall from layoff and salary bonuses due to sex[23] and access to promotion due to disability.[24]Although not all people with disabilities in *Eldridge*, nor all female employees in *Brooks* or *Meiorin*, were adversely affected, the government was effectively ordered to proactively take measures in each case to ensure substantive equality by redesigning the benefits program and workplace testing to prevent exclusion of the claimants.[25]

11. The Appellants' claim of adverse effects discrimination is analogous to the cases above. Women who worked in temporary job-sharing arrangements to maintain their careers while meeting their family responsibilities were denied the opportunity to "buy-back" pension credits for the period they were in job-shares as they could have done if they were on leave without pay ("LWOP"), due to the *RCMPSA*'s design. As the evidence showed, only a minor modification of the RCMP pension plan's systemic design flaws would be required to respond to employees' gendered family obligations in a non-discriminatory manner.[26]

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[19] *Meiorin*, *supra* note 18 at para 41, quoting with approval S Day & G Brodsky, "The Duty to Accommodate: Who Will Benefit?" (1996) 75 Can Bar Rev 433. See also: Eberts & Stanton, *supra* note 6 at 94-95; F Faraday "One Step Forward, Two Steps Back? Substantive Equality, Systemic Discrimination and Pay Equity at the Supreme Court of Canada," (forthcoming 2020) 94:2 *SCLR*; J Watson Hamilton & J Koshan, "Adverse Impact: The Supreme Court's Approach to Adverse Effects Discrimination under Section 15 of the *Charter*" (2015) 19:2 Rev Const'l Stud 191 [Hamilton & Koshan, "Adverse Impact"].

[20] *Eldridge*, *supra* note 7; *Vriend*, *supra* note 10; *Meiorin*, *supra* note 18; *APTS*, *supra* note 1.

[21] See *Eldridge*, *supra* note 7; see Hamilton & Koshan, "Adverse Impact", *supra* note 19.

[22] *Brooks*, *supra* note 4.

[23] *Commission des écoles catholiques de Québec c Gobeil*, 1999 CanLII 13226 (QC CA); *Procureure générale du Québec c Association des juristes de l'Etat*, 2017 QCCA 103

[24] *Procureure générale du Québec c. Association des juristes de l'État*, 2018 QCCA 1763

[25] *Meiorin*, *supra* note 18.

[26] Appellants' Factum, at para 29; Letter from B. Osborne, Watson Wyatt Canada, to RCMP Pension Advisory Committee, dated 1 Nov 2000, attaching memo dated 18 Oct 2000 [AR, Vol. II, Tab 10 at 280-284].

B. Lower Courts' Analysis Fails to Give Effect to Substantive Equality

12. With this Court's focus on the "perpetuation of disadvantage", the s 15 test is a framework well suited to rendering visible and remedying the harm of systemic discrimination in appropriate claims, which is precisely what the Court did in *APTS*. However, both lower courts denied the Appellants' claim at the first step of the s 15(1) analysis by adopting a long-rejected formal equality approach rather than a contextual approach to ensure that s 15 embodies a right to substantive equality.[27] They further failed to recognize the structural context giving rise to the adverse effects experienced by the Appellants due to male norms embedded in the design of the *RCMPSA*. This led the courts to improperly rely on a factor of "choice" and to impose onerous evidentiary and causation requirements on the Appellants.[28]

1. *RCMPSA*'s privileging of male pattern employment invisible to lower courts

13. At the first step of the s 15 test, the courts were required to determine whether the *RCMPSA*, on its face or in its impact, drew a "distinction" on an "enumerated or analogous ground". This Court has stated that this step is "not a preliminary merits screen, nor an onerous hurdle designed to weed out claims on technical bases"; the first step should only bar claims that are not "intended to be prohibited by the Charter" because they are not based on enumerated or analogous grounds.[29] The analysis proceeds "from the perspective of the claimants" with due regard to the relevant social, political and legal context structuring their experience.[30]

14. This context includes the fact that the RCMP remains a male-dominated workplace.[31] Despite s 2 of the *RCMPSA* stating that "male and female contributors under this *Act* have equality of status and equal rights and obligations under this *Act*",[32] the *RCMPSA*'s design is based upon the norm of a presumptively male worker unencumbered with important family care

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[27] *Andrews*, *supra* note 1 at pp 167-168; *APTS*, *supra* note 1; *CSQ*, *supra* note 1; *Kapp*, *supra* note 5; *Withler*, *supra* note 5; *Quebec v A*, *supra* note 5; *Taypotat*, *supra* note 5.

[28] See J Watson Hamilton & J Koshan, "Time for Buy-Back: Supreme Court Set to Hear Important Adverse Effects Discrimination Case," (5 September 2019) *ABlawg: The University of Calgary Faculty of Law Blog*, online: <https://ablawg.ca/2019/09/05/time-for-buy-back-supreme-court-set-to-hear-important-adverse-effects-discrimination-case/> [Hamilton & Koshan, "Buy-Back"] for a more detailed analysis of the errors of the lower courts in this case than this factum can set out.

[29] *APTS*, *supra* note 1 at paras 26-27.

[30] *Withler*, *supra* note 5; *Quebec v A*, *supra* note 5.

[31] P Conor, et al, *Police Resources in Canada, 2018* (Ottawa: Statistics Canada, 2018), online: Government of Canadahttps://www150.statcan.gc.ca/n1/pub/85-002-x/2019001/article/00015-eng.htm.

[32] *RCMPSA*, *supra* note 2 at s 2.

responsibilities. Its design favours permanent, full-time workers with long service and relatively high pay – namely, "male pattern employment"[33] – by providing enhanced access to benefits to those who fit this norm.

15. Although this Court in *Brooks* affirmed that "everyone in society benefits from procreation",[34] childcare responsibilities are not equally shared. Women continue to retain the "ultimate" responsibility for childrearing.[35] This reality has been repeatedly recognized by both this Court[36] and by Parliament,[37] as well as by international human rights conventions, [38] including with respect to the gendered impact of pension scheme design. Gendered child, elder and other family caregiving responsibilities have historically driven and continue to drive "female pattern employment", creating the overrepresentation of women in part-time work, including job-sharing.[39] In 2017 in Canada, the majority of part-time workers continue to be women. Childcare was the reason most cited for part-time work.[40] In its recent amendments to the *Canada Labour Code*, the federal government expressly recognized that flexible work arrangements "support women's participation in the labour market, help foster greater gender equality in Canada's workforce and benefit many women who continue to do the majority of the unpaid work in the home".[41]

16. The systemic devaluation of women's work and caregiving contributions that implicitly

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[33] For discussion of what is meant by the encumbered worker and male pattern workplace norms see E Shilton, "Gender Risk and Employment Pension Plans in Canada," (2013) 17 CLELJ 101 at 112 [Shilton, "*Pensions*"] at pp 112-114.

[34] *Brooks*, *supra* note 4 at para 32.
[35] *Ibid*; Abella Report, *supra* note 17 at 25-27.
[36] *Brooks*, *supra* note 4; *Symes v Canada*, [1993] 4 SCR 695 at 762-63 [*Symes*].
[37] *The Budget Implementation Act 2017* amending the *Canada Labour Code,* Canada Gazette Part II, Volume 153, Number 12 Explanatory Note to the amendments to (2 and 6 November 2019) (*Hansard*) [*Canada Labour Code* Amendments]
[38] Equal Remuneration Convention, 1951, 29 June 1951 (adopted by the International Labour Organization, Geneva 34th ILC session); *Declaration on Fundamental Principles and Rights at Work and its Follow-up*, 18 June 1998 (adopted by the International Labour Organization, Geneva); Convention on the Elimination of All Forms of Discrimination against Women, 18 December 1979 (adopted by the United Nations Human Rights Office of the High Commissioner, New York); Beijing Declaration and Platform for Action, Beijing +5 Political Declaration and Outcome, 4-15 September 1995 (adopted by the United Nations at the Fourth World Conference on Women, New York) at 155, 161 (a), 165 (a) (b)(c) (f), 166 (1), 178 (a)-(d).
[39] Shilton, "Pensions", *supra* note 33; D Lero & J Fast, "The Availability and Use of Flexible Work Arrangements and Caregiving Leaves" (2018) 14:1 JL & Equality 1; E. Shilton, "Family Status Discrimination: 'Disruption and Great Mischief' or Bridge over the Work-Family Divide," (2018) 14:1 JL & Equality 33 [Shilton, "Family Status"]
[40] M Moyser, *Women in Canada: A Gender-based Statistical Report*, 7th ed (Ottawa: Statistics Canada, 2017), online: Government of Canada <https://www150.statcan.gc.ca/n1/pub/89-503-x/2015001/article/14694-eng.pdf>.
[41] *Canada Labour Code* Amendments, *supra* note 37

marginalizes work arrangements outside of the male full-time norm has resulted in the gendered nature of differential access to workplace benefits, including in such areas as pension design.[42] Historically, part-time workers lacked access to pensions.[43] Women's average retirement income is 34% less than that of men[44] and 72% of women over age 65 live below the poverty line.[45]

17. Viewed in this essential context of the systemic devaluation of female pattern employment, it becomes clear that the adverse impact of the Appellants' exclusion from the opportunity to access comparable benefits to full-time employees and employees on LWOP is inextricably linked to their gender and family caregiving responsibilities.

2. Claimants' "choices" irrelevant to s 15 analysis

18. By abstracting their analysis from the relevant context, the lower courts erroneously concluded that the Appellants' pensions were impacted because they had chosen to job-share as opposed to take LWOP.[46] This Court has repeatedly rejected the argument that a claimant's personal choice protects the effects of a legislative distinction from a finding of discrimination.[47] The apparent "choice" in this case was an untenable one between: a) having no income on an unpaid care leave but maintaining access to better pension benefits in the future; or b) maintaining income through a job-share which allowed the Appellants to care for young children but foregoing equal access to pension benefits in the future.

19. Allowing such an adverse impact for the Appellants is very similar to what this Court refused to allow in *Brooks* when the design of the workplace health plan was seen to impose "a disproportional amount of the costs of pregnancy upon women. Removal of such unfair

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[42] Shilton, "Pensions", *supra* note 33 at 112.
[43] J Wallace, *Part-time Work in Canada: Report of the Commission into Part-time Wor*k, (Ottawa: Canada Commission of Inquiry into Part-time Work, 1983) at 21-23, LBOA Tab 2.
[44] Ontario, Legislative Assembly, Gender Wage Gap Strategy Steering Committee, *Final Report and Recommendations of the Gender Wage Gap Strategy Steering Committee* (Toronto: Ministry of Labour & Ministry Responsible for Women's Issue, 2016) at 18, 60-61.
[45] C Young, "Pensions, Privatization and Poverty: The Gendered Impact"(2011) 23:2 CJWL 661.
[46] *Fraser v Canada (Attorney General)*, 2018 FCA 223 [*Fraser* (FCA)] at para 53.
[47] *Quebec v A*, *supra* note 5 at paras 334-336 (per Abella dissent); *Lavoie v Canada*, 2002 SCC 23 at para 5; *Brooks*, *supra* note 4 at paras 28-29; *Symes*, *supra* note 36 at pp 803-804 (per L'Heureux-Dubé dissent); *Nova Scotia (Attorney General) v Walsh*, 2002 SCC 83 at para 157; *Communications, Energy and Paperworkers Union, Local 707 v SMS Equipment Inc*, 2013 CanLII 68986 at paras 52-53, 64, 73-76.

impositions upon women ... is a key purpose of anti-discrimination legislation".[48]

20. The lower courts' focus on the Appellants' "choice" as the cause of the adverse impact was misplaced. The focus of the court's analysis should not be on the "choice" of the women to work in temporary job-shares in order to meet family care responsibilities. Rather, the court must focus on the government's design of the pension plan which, regardless of the government's intent, effectively privileges male pattern employment and has an adverse impact of lower pensions for workers encumbered with family caregiving responsibilities. Only by ignoring that the plan design itself entails government decisions, can the claimants' "choices" be framed as the source of adverse effects.[49]

21. In essence, a pension plan designed so as not to allow those in job-sharing arrangements an opportunity to buy-back pension credits is akin to a government's decision not to fund services for those who are hard of hearing[50] or to design a proxy fitness test based on male fitness standards.[51] In those cases, seemingly neutral decisions in the government's design of the legislation resulted in adverse effects based on an enumerated ground. Similarly, the government's decisions concerning the design of the RCMP pension plan have adverse effects on workers such as the Appellants. The lower courts' analysis fails to consider whether the government should have designed the pension scheme differently to provide "equal benefit of the law" to employees engaged in non-standard, gendered employment patterns. The fact that those on LWOP could buy-back their pension credits suggests that it would not be overly costly for the government to modify the pension scheme to accommodate those in temporary job-shares.

3. Application of formalistic comparison contrary to this Court's guidance

22. This court was very clear in *Withler* that in the s 15 analysis what is "required is not formal comparison with a selected mirror comparator group, but an approach that looks at the full

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[48] *Brooks*, *supra* note 4 at para 32
[49] Shilton, "Family Status" *supra* note 39; L. Kanee & A Cembrowski, "Family Status Discrimination and the Obligation to Self-Accommodate" (2018) 14:1 JL & Equal 61; D Majury, "Women are Themselves to Blame: Choice as a Justification for Unequal Treatment" in F Faraday et al, *Making Equality Rights Real: Securing Substantive Equality Under the Charter* (Toronto: Irwin Law, 2006) 209 at 217, LEAF Book of Authorities ("LBOA"), Tab 1; Hamilton & Koshan, "Buy-Back" at p 9.
[50] *Eldridge*, *supra* note 7.
[51] *Meiorin*, *supra* note 18.

context".[52] Yet this is exactly what the lower courts did in narrowly construing the appropriate comparator by only comparing those on job-shares to those on LWOP. They focused on the plan's technical distinction on the basis of "hours of work", or categorizing full-time employees on temporary flexible work arrangements as having a part-time status, without giving effect to the context driving the gender predominance of women in part-time or lower hours of work.[53]

23. The *RCMPSA* has the disproportionate effect of categorizing access to the benefit of pension credit buy-back into two groups: enhanced access for male pattern employees and no access for female pattern employees. This Court in *CSQ*, in response to the lower court's formalistic analysis of the pay equity legislation at issue in that case, emphasized that the s 15 analysis must not "erase the sex-based character of legislation and obscure the fact that the claimants disproportionately suffer an adverse impact because they are women". Here, as in *CSQ*, it is "only if [courts] ignore the gender-driven bases for the … categories" within the *RCMPSA* that the distinction between employees on job-shares, LWOP, or full-time status can be seen as unconnected to a protected ground.[54]

4. Requiring specific evidence of impact and proof of causation at step one imposes an unduly onerous burden

24. In keeping with a purposive, substantive equality approach, courts considering adverse effects discrimination claims cannot require higher evidentiary and causation requirements than for direct discrimination.[55] In this case, the evidence was clear: all of the job-sharing RCMP members were women with family caregiving responsibilities. The expert evidence established that working women in Canada bear a disproportionate burden of childrearing which "may be particularly acute for women in policing, and most especially for those who work in rural and

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[52] *Withler*, *supra* note 5, at para 72. See also: *Moore*, *supra* note 10 at para 30; Sheila McIntyre, "Answering the Siren Call of Abstract Formalism with the Subjects and Verbs of Domination" in F Faraday, et al eds, *Making Equality Rights Real: Securing Substantive Equality Under the Charter* (Toronto: Irwin Law, 2006) 99 at 108-09, LBOA Tab 5; M Young, "Blissed Out: Section 15 at Twenty" in S McIntyre & S Rogers, eds, *Diminishing Returns – Inequality and the Canadian Charter of Rights and Freedoms* (Markham: LexisNexis Butterworths, 2006) at pp 63-64, 69, LBOA Tab 4; Hamilton & Koshan, "Buy-Back" *supra* note 28 at pp 6-7; Hamilton & Koshan "Déjà Vu".
[53] *Fraser* FCA, *supra* note 46 at paras 41, 50, 53 and 58.
[54] *CSQ*, *supra* note 1, at paras 28-29.
[55] *Quebec v A*, *supra* note 5 at para 332; Hamilton & Koshan, "Adverse Impact", *supra* note 19 at p 7; Hamilton & Koshan,"https://ablawg.ca/2019/09/05/time-for-buy-back-supreme-court-set-to-hear-important-adverse-effects-discrimination-case/Buy-Back" *supra* note 28 at p 8. See also *supra* note 10.

isolated areas with limited access to child care."[56] This evidence is consistent with prior recognition by this Court of the gendered impact of family caregiving obligations.[57]

25. The evidence adduced by the claimants ought to have been sufficient for the lower courts to find that the adverse impact of the *RCMPSA* was sufficiently connected to their gender and family status to meet the first step of the s 15 test.[58] Their failure to grapple with the systemic context leading to female predominance in job-shares further led them to unreasonably fault the claimants for not providing specific forms of evidence to establish the existence of any adverse impact caused by the *RCMPSA*.[59] In so doing, the lower courts imposed a virtually impossible evidentiary threshold in adverse effects discrimination cases.

26. Section 15's purposes of promoting substantive equality and preventing the perpetuation of pre-existing disadvantage can only be realized if courts ground their analysis in the claimants' perspective, including the social, political and legal context structuring their claims. This is particularly critical in claims of adverse effects discrimination, in which disadvantage is reproduced through "structural and largely invisible" power relations, or through apparently neutral distinctions like "hours of work" or "employment status" which were, in these circumstances, gender-driven. In this case, the lower courts' failure to recognize this context further perpetuated the female claimants' pre-existing marginalization and disadvantage and undermined the goal of substantive equality.

PART IV AND V: COSTS AND ORAL ARGUMENT

27. Under the order granting LEAF intervener status, costs will not be sought by or against LEAF and LEAF is granted leave to make five (5) minutes argument.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 20th DAY OF NOVEMBER 2019.

Colleen Rauman agent for

KATE A. HUGHES / JANET E. BOROWY / DANIELLE BISNAR

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[56] *Fraser* (FCA), *supra* note 46 at paras 18-19; *Fraser v Canada (Attorney General)*, 2017 FC 557 at paras 81 and 170.
[57] *Supra* note 36.
[58] *Supra* note 10.
[59] *Fraser* (FCA), *supra* note 46 at paras 50, 168-172.

PART VII: TABLE OF AUTHORITIES

	Authorities	**Paragraph Where Cited**
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4.	*Centrale des syndicats du Québec v Quebec (Attorney General)*, 2018 SCC 18	1
5.	*CN v Canada (Canadian Human Rights Commission)*, [1987] 1 SCR 1114	8
6.	*Commission des écoles catholiques de Québec c Gobeil*, 1999 CanLII 13226 (QC CA)	10
7.	*Communications, Energy and Paperworkers Union, Local 707 v SMS Equipment Inc*, 2013 CanLII 68986	18
8.	*Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624	3, 6, 10, 21
9.	*Ermineskin Indian Band and Nation v Canada*, 2009 SCC 9	6
10.	*Fraser v Canada (Attorney General)*, 2017 FC 557	24
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PART VII : STATUTORY PROVISIONS

1. ***Rules of the Supreme Court of Canada*,** SOR/2002-156, Rules 42(5), 47(1), 55, 57(1) and (2)

   ***Règles de la Cour suprême du Canada*,** DORS/2002-156, Régles 42(5), 47(1), 55, 57(1) et (2)

2. ***Royal Canadian Mounted Police Superannuation Act*,** R.S.C., 1985, c. R-11, ss. 2, 5(1), 6, 7(a)-(g), 10(1)-(7), 27(1), (2)

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3. ***Royal Canadian Mounted Police Superannuation Regulations*, C.R.C., c. 1393**, ss. 5(1), (2), (3), 5.1(1)-(3), 5.2(1),(2), 5.3 (a), (b), 5.4, 5.5(3), 5.6(1)(e) and (2), 5.7(a), 5.9(h), 5.91(a) and (b), 5.92, 5.93, 10(1)-(4), 10.1, 10.2, 10.3, 10.4, 10.5, 10.6, 10.7, 10.8, 10.9, 10.91, 17

   ***Règlement sur la pension de retraite de la Gendarmerie royale du Canada*, C.R.C., ch. 1393**, ss. 5(1), (2), (3), 5.1(1)-(3), 5.2(1),(2), 5.3 (a), (b), 5.4, 5.5(3), 5.6(1)(e) and (2), 5.7(a), 5.9(h), 5.91(a) and (b), 5.92, 5.93, 10(1)-(4), 10.1, 10.2, 10.3, 10.4, 10.5, 10.6, 10.7, 10.8, 10.9, 10.91, 17

4. ***The Budget Implementation Act 2017* amending the *Canada Labour Code*, Canada Gazette Part II, Volume 153, Number 12 Explanatory Note to the amendments to (2 and 6 November 2019)**

   Décret fixant au 1er septembre 2019 la date d'entrée en vigueur de certaines dispositions de cette loi : TR/2019-31, La Gazette du Canada, Partie II, volume 153, numéro 12