Court File Number: 38505

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

B E T W E E N:

JOANNE FRASER, ALLISON PILGRIM, and COLLEEN FOX

Appellants
(Appellants)

- and -

ATTORNEY GENERAL OF CANADA

Respondent
(Respondent)

APPELLANTS' FACTUM ON APPEAL
(Filed pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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

Solicitors for the Appellants

TO: The Registrar
Supreme Court of Canada
301 Wellington Street
Ottawa, ON K1A 0J1

AND TO: Nathalie G. Drouin
Deputy Attorney General of Canada

Per: Christopher Rupar
BJ Wray

Department of Justice Canada
Civil Litigation Section
National Litigation Sector
50 O'Connor Street, Room 500
Ottawa, ON K1A 0H8
T: 613-670-6338
F: 613-954-1920
E: christopher.rupar@justice.gc.ca

Solicitors for the Respondent

Per: Robert Frater

Department of Justice Canada
Civil Litigation Section
National Litigation Sector
50 O'Connor Street, Room 500
Ottawa, ON K1A 0H8
T: 613-670-6289
F: 613-954-1920
E: robert.frater@justice.gc.ca

Agent for the Respondent

Attorney General of Ontario
Constitutional Law Branch
McMurty-Scott Building, 4th Floor
720 Bay Street
Toronto, ON M7A 2S9

Per: Rochelle Fox
Yashoda Ranganathan

T: 416-995-3288 / 647-637-0883
F: 416-326-4015
E: rochelle.fox@ontario.ca
yashoda.ranganathan@ontario.ca

Counsel for the Intervener,
Attorney General of Ontario

Borden Ladner Gervais LLP
World Exchange Plaza
1300-100 Queen Street
Ottawa, ON K1P 1J9

Per: Karen Perron

T: 613-237-5160
F: 613-230-8842
E: kperron@blg.com

Agent for the Intervener,
Attorney General of Ontario

Ministère de la Justice du Québec
1200, route de l'Église, 4e étage
Québec, QC G1V 4M1

Per: Catheryne Bélanger

T: 418-643-1477x23177

E: catheryne.belanger@justice.gouv.qc.ca

Counsel for the Intervener,
Attorney General of Québec

Noël & Associés
111, rue Champlain
Gatineau, QC J8X 3R1

Per: Sylvie Labbé

T: 819-503-2174
F: 819-771-5397
E: p.landry@noelassocies.com

Agent for the Intervener,
Attorney General of Québec

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PART I – OVERVIEW & STATEMENT OF FACT

A. Overview

1. Balancing work and child care obligations is a challenge for any family. Historically in Canada, primary responsibility for child care has fallen to female working parents, either by dropping out of the work force for a few years or by working part-time. It has long been recognized that these decisions impair the economic position of women in society, not only through lost earnings and missed career opportunities, but also through systemic barriers like pension plan rules that were designed for "male pattern employment". In the 1980s and 1990s, pension plans were revised to address structural inequities that had a negative impact on women. Vesting periods were reduced to accommodate breaks in service or employment, plans were opened up to part-time workers, and leaves of absence for maternity leave or other reasons were deemed pensionable service if the employee topped up the contributions.

2. The Appellants are female members of the Royal Canadian Mounted Police ("RCMP" or "the Force") who claimed that the RCMP statutory pension plan - the *Royal Canadian Mounted Police Superannuation Act*, RSC 1985, c.R-11 ("*RCMPSA*") and the *Royal Canadian Mounted Police Superannuation Regulations*, CRC, c.1393 (the "*Regulations*"), together referred to as the RCMP Pension Plan - discriminates on the grounds of sex and parental status, contrary to subsection 15(1) of the *Canadian Charter of Rights and Freedoms*, by denying them the benefit of accruing full-time pensionable credit for periods when they temporarily worked reduced hours for family reasons. Under the Plan, members can accrue pensionable service during leaves of absence, such as maternity, sick or education leaves, provided the member pays both the employer and employee contributions for the leave period. But members who temporarily reduce their hours of work to address caring for young children see their pensions diminished as they are not afforded the option of "buying back" full-time pension credit for the hours not worked.

3. Policing is a demanding job that often includes long hours and shift work on evenings, nights, weekends, and statutory holidays. Obtaining childcare to support such schedules can be extremely difficult, particularly in the small and isolated communities to which many RCMP officers are posted. Recognizing that managing work-life balance and childcare responsibilities presented a major challenge for the retention of female members, the RCMP adopted a policy to

provide for “job-sharing” arrangements in 1997. This benefitted members who needed to temporarily work more flexible hours for family reasons, while at the same time assisting the Force in retaining trained and experienced members.

4. From 1997 to 2011, approximately 140 RCMP members entered job-sharing arrangements under this policy. The vast majority were women with young children, some of whom would otherwise have resigned from the Force for lack of viable childcare options in their communities. The Appellants were among the first cohort of women to job-share in the RCMP. They found the arrangements dramatically improved their roles as both parents and police officers. However, the Appellants were disappointed to learn that job-sharing was treated differently under the Plan. While they could “buy back” full-time pensionable credit for the periods they were on maternity leave, pensionable credit while job-sharing accumulated only at a part-time rate, and they were barred from buying back full-time credit for this period when they resumed full-time duties. In other words, for pension purposes they would have been in a better position had they remained off work completely.

5. The Federal Court and Federal Court of Appeal both dismissed the Appellants’ case. The Federal Court of Appeal acknowledged that the Appellants’ retirement pensions would be less than they would have been had they worked full-time hours throughout their careers or than they would have been had they taken unpaid care and nurturing leave instead of job-sharing and opted to exercise buy-back rights. However, the Court of Appeal held that precise evidence regarding the economic consequences was necessary to establish the Appellants were denied a “benefit of the law” under s. 15 of the *Charter*. Further, although the evidence showed that women bore primary responsibility for balancing work and child care responsibilities, and nearly all RCMP members who job-shared were women, the Federal Court of Appeal characterized the distinction as one of personal choice rather than a prohibited ground of sex or family status.

6. The Appellants submit that pension design is an important component of employment equity, and the RCMP Pension Plan discriminates on the grounds of sex and family status by denying them the benefit of accruing full-time pensionable credit for periods they were working reduced hours for family reasons. The Plan perpetuates the stereotype that women may fill one of two roles in society, either that of caregiver or member of the labour force - but not both at the

same time. The Appellants submit that the RCMP Plan violates subsection 15(1) of the *Charter*, and their appeal ought to be allowed with appropriate remedial orders.

B. Statement of Facts

(i) The Appellants and Evidence of RCMP Women

7. The Appellants are retired police officers and regular members of the RCMP. They are also women and mothers. The Appellants and the two other RCMP women who provided evidence in the case joined the Force in the 1980s and were posted to detachments across the country – Alberta, Quebec, Nova Scotia and Newfoundland. In their evidence, they related the challenges of being patrol officers, working long hours and around the clock shift work, seven days a week. Fraser and Fox were both married to RCMP members, so their relationships had to accommodate two people working shifts. All except Pilgrim also worked in small communities. They also testified about how much they enjoyed their demanding jobs as patrol officers.[1]

8. The RCMP women in this case started having children in the early to mid-1990s, returning to full-time duties after six-month maternity leaves.[2] Each described the enormously stressful challenges they encountered in returning to patrol duties, arranging for child care, and balancing their many responsibilities.

9. Fraser described feeling "overwhelmed" trying to prove herself at work, while worrying about her son at home.[3] Pilgrim explained that she felt guilty about being away from her infant daughter, and at the same time that she was not giving her all at work. As someone who was accustomed to excelling, she felt like she was "on a treadmill" and found the experience impacted

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[1] Judgment and Reasons of Justice Kane, dated June 8, 2017 ("FC Judgment") [Appellants' Record ("AR"), Vol. I, Tab 1 at 59-63]; Affidavit of Joanne Fraser ("Fraser Affidavit"), paras 5, 7 [AR, Vol. II, Tab 9 at 130-131]; Affidavit of Allison Pilgrim ("Pilgrim Affidavit"), paras 4, 10 [AR, Vol. II, Tab 10 at 161, 163]; Affidavit of Colleen Fox ("Fox Affidavit"), para. 3 [AR, Vol. III, Tab 11 at 328]; and Affidavit of Nancy Noble, ("Noble Affidavit"), para. 4 [AR, Vol. III, Tab 12 at 344]. Noble is not a party in these proceedings, but provided evidence and would benefit if the relief is granted.

[2] FC Judgment [AR, Vol. I, Tab 1 at 59-62]; Fraser Affidavit, para. 10 [AR, Vol. II, Tab 9 at 132]; Pilgrim Affidavit, para. 15 [AR, Vol. II, Tab 10 at 164]; Fox Affidavit, para. 8 [AR, Vol. III, Tab 11 at 329]

[3] FC Judgment [AR, Vol. I, Tab 1 at 59]; Fraser Affidavit, paras 11-13 [AR, Vol. II, Tab 9 at 132]

her self-esteem.[4] Fox, whose husband was also an RCMP member, said juggling the couples' shift schedules was "hell on earth" and described meeting her husband at coffee shops and at lunch in order to breastfeed her son while on breaks from duty.[5] Noble, whose husband travelled and worked shifts, found balancing work and her first child overwhelming and asked for part-time hours on a number of occasions but was told her superiors this was not an option.[6]

10. These challenges were exacerbated after the RCMP witnesses had their second children. Fox found working full-time shift work and caring for two children, including one with a disability, was simply not possible. After all other options, including a request to work part-time, were denied by the RCMP, she felt she had no other choice but to retire from the Force in 1994.[7] When Fraser completed her second maternity leave in early 1997, she could not find a day care or caregiver in her small community who could care for her young children during evening or overnight shifts. She had no option but to stop working and stay home. Fortunately for Fraser, the RCMP's attitude towards care and nurturing leave had improved and she was granted a five-year leave of absence without pay ("LWOP").[8]

11. The situation was different when Pilgrim had her second child. The RCMP had introduced a "job-sharing" policy in December 1997, allowing members to work reduced or part-time hours for a limited period if they could find another member to share a single position. Job-sharing "made a world of difference" for Pilgrim, reducing the stress of struggling to keep up with her duties at work and improving her life at home as well.[9]

12. Fraser was asked to return early from LWOP in 2000 and was invited to job-share with another member. Under this new arrangement, Fraser was able to manage her shifts around her

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[4] FC Judgment [AR, Vol. I, Tab 1 at 60]; Pilgrim Affidavit, paras 15-18 [AR, Vol. II, Tab 10 at 164-165]
[5] FC Judgment [AR, Vol. I, Tab 1 at 61]; Fox Affidavit, paras 8-10 [AR, Vol. III, Tab 11 at 329]
[6] FC Judgment [AR, Vol I, Tab 1 at 62]; Noble Affidavit, paras. 7-12 [AR, Vol. III, Tab 12 at 345-346]
[7] FC Judgment [AR, Vol. I, Tab 1 at 61-62]; Fox Affidavit, paras 13-14 [AR, Vol. III, Tab 11 at 330-331]
[8] FC Judgment [AR, Vol. I, Tab 1 at 59]; Fraser Affidavit, paras 15-17 [AR, Vol. II, Tab 9 at 133]
[9] FC Judgment [AR, Vol. I, Tab 2 at 60]; Pilgrim Affidavit, paras 20-25 [AR, Vol. II, Tab 10 at 165-166]

husband's schedule, and found she could regain her comfort level as a patrol officer, while remaining present in her children's lives and able to participate in important moments such as school trips and sporting events.[10]

13. Fox was "thrilled" to learn about the new job-sharing policy, applying to re-enroll in the Force and returning to duty in September 2000. Job-sharing allowed Fox to transition smoothly into patrol duties after having been off for more than five years. She felt that for the first time, she wasn't short-changing anyone: "On the contrary, I felt as though I was excelling as a mother and as a member of the RCMP."[11]

(ii) The RCMP and Job-Sharing / Part-Time Work

14. The *RCMP Act* does not provide for full- or part-time employment of members. Subsection 2(1) simply defines "member" as a person who is appointed to a rank or position and is employed by the Force. When the Appellants joined the RCMP, all regular members were expected to fulfill their duties on a full-time basis unless they were off work on leave – only civilian members could be employed part-time.[12]

15. In 1997, the RCMP introduced a "Job-Sharing" policy. According to the Respondent, the policy was instituted "to facilitate work-life balance for members of the Force who, due to personal or family circumstances, would benefit from being able to work part-time instead of taking extended leaves of absence in the form of LWOP."[13]

16. Women were only allowed to enter the RCMP as police officers in 1974, when the famous first all-female Troop 17 was sworn in.[14] The RCMP women in this case joined the Force slightly more than a decade later. It would take another decade before the RCMP would

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[10] FC Judgment [AR, Vol. I, Tab 1 at 59]; Fraser Affidavit, paras 20-24 [AR, Vol. II, Tab 9 at 134-135]
[11] FC Judgment [AR, Vol. I, Tab 1 at 62]; Fox Affidavit, paras 16-20 [AR, Vol. III, Tab 11 at 331-332]
[12] Affidavit of Shelley Rossignol, sworn March 23, 2015 ("Rossignol Affidavit"), para. 45 [AR, Vol. V, Tab 18 at 810]; Fox Affidavit, paras 2, 7 and 13 [AR, Vol. III, Tab 11 at 327-330]; and Noble Affidavit, paras 10 and 12 [AR, Vol. III, Tab 12 at 345-346]
[13] Rossignol Affidavit, para. 46 [AR, Vol. V, Tab 18 at 810]; RCMP Bulletin re Job-Sharing, dated December 5, 1997 [AR, Vol. II, Tab 10 at 175]
[14] Pilgrim Affidavit, para. 4 [AR, Vol. I, Tab 10 at 161]

recognize through its job-sharing policy that women were usually the primary care-givers in the home and faced challenges managing both a family and career. A study conducted for the Solicitor General of Canada in 1993, called *The Status of Women in Canadian Policing,* found that many well-trained women police officers were leaving the profession to stay home and raise their families.[15] Some aspects of police work, such as the hours of work, resulted in high turnover rates for women.[16] According to the study, the majority of female police officers

> faced tremendous pressure in attempting to manage both a family and a career. Shift-work proved to be a major obstacle especially during the preschool years. In many cases, the pressure proved to be too great and the result was a high turnover rate for female officers.[17]

17. The *Status of Women in Canadian Policing* study made a number of recommendations to ease the stress of managing active police duty and family obligations, including job-sharing and part-time police positions.[18] The study noted that job-sharing could also be an effective means of allowing a female officer on maternity leave to reintegrate and ease back into the job.[19]

18. The RCMP's new job-sharing policy in 1997 was welcomed by female members as a progressive and innovative step, but finding a partner to share a position often presented a barrier. In the first few years, only fourteen RCMP members entered job-sharing agreements, all of them women. After five years, 34 members had participated in job-sharing agreements, of whom 30 were women and nearly all had small children.[20] Working part-time work without a "job-share

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[15] Walker, G., "The Status of Women in Canadian Policing: 1993" (Ottawa: Department of Public Security Canada, 1993), ["*Status of Women in Canadian Policing*"] p. 43, 111-112

[16] *Status of Women in Canadian Policing*, p. 43, 55 and 148

[17] *Status of Women in Canadian Policing,* p. 148. The Applicant Fox resigned from the RCMP in 1994 after maternity leave for her second child as there were no flexible options available at that time: Fox Affidavit, para. 13 [AAR, Vo. III, Tab 11, p. 330]

[18] *Status of Women in Canadian Policing* , p. xxv-xxvi, 52, 111-112, 150, and 179-180

[19] *Status of Women in Canadian Policing,* p. iv, 109

[20] Memo to RCMP Commissioner Murray, dated June 8, 2000 [AR, Vol. III, Tab 12 at 363]; Pilgrim Affidavit, paras 22-24 [AR, Vol. II, Tab 10 at 165-166]; Fox Affidavit, paras 16, 18-19 and 21 [AR, Vol. III, Tab 11 at 331-332]; Noble Affidavit, paras 25, 32 and Exhibit K [AR, Vol. III, Tab 12 at 350, 352, 503-506]. The Federal Court of Appeal suggests at para 17 that "no evidence" was provided as to the reasons these first officers elected to job-share, but the survey attached to Exhibit K of the Noble Affidavit indicates that 32 out of the 34 members who entered job-sharing arrangements had one or more dependents.

partner" was not contemplated by the 1997 policy and the Force could terminate these arrangements and return job-share partners to full-time duties on one month's notice.[21]

19. The RCMP job-sharing policy was updated four times after 1997. The 2003 version contemplated part-time employment for civilian members, but regular members could only work reduced hours by job-sharing in a full-time position.[22] It was not until 2007 that the RCMP job-sharing policy was amended to permit regular members to work "part-time" without having to "share" a full-time position. Significantly, however, RCMP policy remained clear that work on a part-time basis was only a temporary arrangement for full-time members: "part-time employment may be considered to address specific needs of full-time members on a limited basis."[23]

20. Despite recognizing flexible work arrangements like job-sharing as "mutually beneficial" to the Force and its members, the rate of job-sharing/part-time employment by regular members in the RCMP remains exceedingly low. As of May 2014, only 29 out of a total of 18,391 regular members across Canada were working part-time. Data provided by the RCMP from 2010 and 2014 indicate that 100% of regular and civilian members working in job-sharing positions were women, with a significant majority citing childcare as their reason for doing so.[24]

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[21] RCMP Bulletin re Job-Sharing, dated December 5, 1997, s. 1.a.1 and 1.e [AR, Vol. II, Tab 10 at 175]; and Noble Transcript Q53 at 13-14: "The terminology wasn't used as part-time work within the RCMP at that time. At that time we were referred to as job-sharing." [AR, Vol. VI, Tab 21 at 980-981]

[22] RCMP Admin Manual, II.10, 2003, Part-Time Employment and Job Sharing, s. F.1 [AR, Vol. II, Tab 10 at 235]

[23] RCMP Admin Manual, II.10, Amended 2007-01-23, Part-Time Employment, ss. 1.2, 1.4, 1.12, 3.3.1.3, and 3.3.3, s.1.4 for quotation (emphasis added) [AR, Vol. II, Tab 10 at 238-239]. The 2011 and 2014 versions of the Part-Time Employment policy are the same as the 2007 version in all relevant aspects: see RCMP Admin Manual, II.10, Amended 2011-10-27, Part-Time Employment, ss. 1.1.2, 1.1.4 and 1.1.12 [AR, Vol. II, Tab 10 at 251-252]; and RCMP Admin Manual, II.10, Amended 2014-09-04, Part-Time Employment, ss. 1.1.2, 1.1.4, and 1.1.12 [AR, Vol. V, Tab 18 at 856-857]

[24] Rossignol Affidavit, paras 17, 47 [AR, Vol. V, Tab 18 at 803, 810]; Exhibits A and C to the Rossignol Affidavit [AR, Vol. V, Tab 18 at 817-819, 835-839] The Federal Court of Appeal misstated this evidence at para 18 when the Court suggested "many" of the members reported reasons for job-sharing "unrelated to the need to care for young children" [AR, Vol. I, Tab 3 at 81]. Exhibits A and C to the Rossignol Affidavit demonstrates otherwise [AR, Vol. V, Tab 18 at 819, 838-839].

(iii) RCMP Pension Plan, Job-Sharing and Temporary Part-Time Work

21. RCMP members are compensated through salary and benefits set by Treasury Board under the *RCMP Act*.[25] RCMP members are also required to participate in a contributory defined benefit pension plan, the terms of which are established by law in the *RCMPSA* and the *Regulations*. The Plan is a registered pension plan under the *Income Tax Act*, RSC 1985, c. 1 (5th Supp.), and is subject to the provisions of that *Act* and the *Income Tax Regulations*, CRC, c. 945 ("*ITR*").[26]

22. Under the *RCMPSA*, members receive pension benefits on retirement based on the pension contributions accrued to the credit of the individual member. Ordinarily, members are credited for pensionable service by being actively at work, with mandatory contributions to the Plan made by both the member and the employer.[27] However, there are also circumstances in which members can make pension contributions – and thus earn entitlement to enhanced pension benefits – even if they are not actively at work. Full-time RCMP members on an approved leave without pay ("LWOP") may be credited for their time off work, provided they elect to contribute to the pension fund on their return to full-time service.[28] RCMP members can take approved LWOP for many different reasons, including illness, education, maternity or paternity leave, or care and nurturing of pre-school-aged children. If the member so elects, they can then "buy back" any pension contributions for time not worked by paying the combined employee and employer contributions for the leave period in question.[29]

23. When the Appellants entered job-sharing agreements, they and the RCMP contributed to the Plan based on their reduced pay and hours of work.[30] The Appellants and the other RCMP women believed that, since there were full-time employees who were agreeing to temporarily

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[25] *Royal Canadian Mounted Police Act*, RSC 1985, c.R-10 ("*RCMP Act*"), s. 22
[26] *RCMPSA*, section 5; FC Judgment [AR, Vol. I, Tab 1 at 66]; Rossignol Affidavit, para. 8 [AR, Vol. V, Tab 18 at 802]
[27] *RCMPSA*, sections 5, 6 and 10
[28] *RCMPSA*, section 6(a), 6.1 and 27
[29] RCMP Admin Manual, II.5 – Leave, sections D, G, J, and L.1.a [AR, Vol. II, Tab 10 at 201-202, 209-212, 214-216]; Contribution rates can differ based on the reason LWOP is taken: see *RCMPSA*, ss 6.1 and 27; Rossignol Affidavit, paras 35-36 [AR, Vol. V, Tab 18 at 807-808]
[30] RCMP Bulletin re Job-Sharing, issued December 5, 1997, Appendix B, Compensation for Regular Members on Job Sharing, section 10 [AR, Vol. II, Tab 10 at 185]

work part-time hours for a limited period, the would later be given the opportunity to "buy back" full-time pension credit for the unworked hours under the job-sharing arrangement in the same way.[31] In other words, they viewed themselves as being on leave without pay half the time, and working the other half.[32]

24. Some in the RCMP Compensation Section shared this understanding as both Pilgrim and Fraser were advised in error that they would have the option of buying back full-time pensionable service credit for time not worked while job-sharing, because time not worked while job-sharing would be regarded as LWOP.[33] It was not until later that the Appellants learned that the Force did not have legislative authority to extend the "buy-back" option to members working reduced hours on a temporary basis because the *RCMPSA* provisions permitting members to buy back pension for periods of LWOP do not contemplate "part-time" LWOP under a job-sharing arrangement.[34]

25. Under the *RCMPSA*, the Appellants continued to accumulate pensionable years of service during the years they job-shared. But each pensionable year of service while job-sharing was fixed at the lower rate, with pension benefits being calculated accordingly. Consequently, when the Appellants retired, although they may have the same years of pensionable service as other colleagues, their pension benefits were lower because of the years they job-shared. RCMP

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[31] Fraser Affidavit, paras 21 and 26 [AR, Vol. II, Tab 9 at 134-135]; Pilgrim Affidavit, paras 27, 29 [AR, Vol. II, Tab 10 at 166-167]; Fox Affidavit, para. 24 [AR, Vol. III, Tab 11 at 333]; and Noble Affidavit, para. 15 [AR, Vol. III, Tab 12 at 347]; Noble Transcript, Qs. 111-113 at 27-28 [AR, Vol. VI, Tab 21 at 994-995]

[32] In the case of Pilgrim, she worked one week on, one week off, and for the entire period filed time sheets coded "LWOP" for her off weeks, without objection or complaint from the Force: Pilgrim Transcripts, Qs. 195 and 197-201 at 47-49 [AR, Vol. VI, Tab 22 at 1072-1074]

[33] Fraser Affidavit, para. 21 [AR, Vol. II, Tab 9 at 134]; Fraser Transcript, Q.48 at 9-10 [AR, Vol. VI, Tab 20 at 921-922]; Pilgrim Affidavit, paras. 29-30 [AR, Vol. II, Tab 10 at 167]; Pilgrim Transcript, Qs. 195 and 197-201 at 47-49 [AR, Vol. VI, Tab 22 at 1072-1074]; Email of C. Langlois, dated Sept. 17, 1999 [AR, Vol. II, Tab 10 at 261]

[34] Fraser Affidavit, para. 21 [AR, Vol. II, Tab 9 at 134]; Rossignol Affidavit, paras 40-42 [AR, Vol. V, Tab 18 at 808-809]; Affidavit of Kimberley Gowing ("Gowing Affidavit"), paras 53-55 [AR, Vol. V, Tab 17 at 754-755]

members who entered job-sharing arrangements permanently lost credit for full-time pensionable service that could never be recovered or re-purchased.[35]

26. Provisions under the *Income Tax Act* and *Income Tax Regulations* do permit pension plans to be designed so as to allow members who temporarily reduce their hours to later make additional contributions such that they will be deemed to have accrued full-time pensionable service. Under these provisions, full-time employees can temporarily reduce their hours of work, and then buy back credit for full-time pensionable service when they return to full-time hours. The *ITR* provisions that allow buying back pension credit for temporarily reduced hours of work are alongside the ones that do the same for leaves of absence. [36]

27. As the Respondent highlights in its evidence, these *ITR* provisions are optional for a registered pension plan and the *RCMPSA* does not expressly provide for such arrangements. As a result, RCMP members are denied the opportunity to "buy back" pension credit for time not worked due to temporarily reduced hours under part-time or job-sharing arrangements.[37] There is no explanation from the Respondent as to why the *RCMPSA* does not permit this benefit of optional pension contributions, aside from the comment that any legislative amendments would require Treasury Board approval.[38]

(iv) Support from RCMP Management and Attempts at Reform

28. RCMP members who initially participated in job-sharing arrangements protested to senior management when they learned they would not be allowed to buy back full-time pensionable service for job-sharing periods in the same way as they would if they were completely off work. Grievances were filed and memos were sent to senior executives, including Deputy Commissioners and the Commissioner of the RCMP. In a June 2000 memo to RCMP Commissioner Murray, fourteen female members from across Canada articulated their

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[35] Fraser Affidavit, paras 29, 32 [AR, Vol. II, Tab 9 at 136-137]; Pilgrim Affidavit, para. 38 [AR, Vol. II, Tab 10 at 169]; Noble Affidavit, para. 30 [AR, Vol. III, Tab 12 at 351]; Gowing Affidavit, paras 34 [AR, Vol. V, Tab 17 at 749]

[36] *Income Tax Regulations*, CRC c. 1393, s. 8300(1) ("period of reduced services"), s. 8500(1) ("eligible period of reduced pay"), s. 8504(4) and s. 8507.

[37] Gowing Affidavit, paras 53 and 55 [AR, Vol. V, Tab 17 at 754-755]; Rossignol Affidavit, paras 40-42 [AR, Vol. V, Tab 18 at 808-809]

[38] Rossignol Affidavit, para. 44 [AR, Vol. V, Tab 18 at 809-810]

understanding of the situation and their views as to why this denial of equal benefit of the law was unfair and illogical.[39]

29. RCMP Assistant Commissioner Gary Loeppky acknowledged in October 2000 that "there may be an element of unfairness" to this approach, and indicated that their concerns would be taken up by the RCMP Pension Advisory Committee, a statutory body tasked with advising the Minister on RCMP pension matters.[40] An actuarial firm retained by the Pension Advisory Committee confirmed that the *Income Tax Act* and *ITR* did allow pension plans to provide benefits for temporary periods of part-time service as if the services were rendered on a full-time basis. The actuary highlighted that the *RCMPSA* could be amended to accord with these provisions, noting that "this flexibility in the *ITR* is particularly useful in responding to employee requests for reduced work-hours at various stage of their family life or career".[41]

30. Pilgrim and Noble both filed grievances in 2000 challenging the denial of the right to buy back full-time pension credit for the time they were job-sharing. The grievances were dismissed at the lower levels and took years to travel through the RCMP grievance system.[42] However, in 2007 the RCMP External Review Committee upheld grievances by Pilgrim and Noble, finding there was nothing in law or policy that would prohibit the Force from defining the job-sharing arrangement as hours worked plus a period of LWOP. The Committee cited the actuarial opinion, and also mentioned a Treasury Board pre-retirement leave policy that allowed public service employees close to retirement to reduce their hours of work and treat the unworked hours as leave without pay.[43] However, in 2010 the RCMP Commissioner dismissed the grievances at final

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[39] Memo to RCMP Commissioner Murray, dated June 8, 2000 [AR, Vol. III, Tab 12 at 362]
[40] Letter from A/Commissioner Loeppky to Cst. Noble, dated Oct. 17, 2000 [AR, Vol. III, Tab 12 at 369]; *RCMPSA*, s.25.1
[41] Letter from B. Osborne, Watson Wyatt Canada, to RCMP Pension Advisory Committee, dated Nov. 1, 2000, attaching memo dated Oct. 18, 2000 [AR, Vol. II, Tab 10 at 280-284, 281 for quote]
[42] Grievance Presentation of A. Pilgrim, dated Aug. 15, 2000 [AR, Vol. II, Tab 10 at 277]; and Grievance Presentation of N. Noble and L. MacLeod, dated Nov. 14, 2000 [AR, Vol. III, Tab 12 at 376-377]; Noble Affidavit, paras 24-26 [AR, Vol. III, Tab 12 at 349-350]
[43] RCMP External Review Committee, Pilgrim Grievance Decision, dated April 30, 2007, at paras 34-35, 37-40 [AR, Vol. II, Tab 10 at 298-299]; RCMP External Review Committee, Noble Grievance Decision, dated April 30, 2007, at paras 41-48 [AR, Vol. III, Tab 12 at 518-519]; Pilgrim Affidavit, para. 34 [AR, Vol. II, Tab 10 at 168]; Also see: Treasury Board, *Directive on Leave and Special Working Arrangements* (April 1, 2009), which permits public service

level, holding that the *RCMPSA* could not permit defining job-sharing to fall within LWOP without legislative amendments. The RCMP Commissioner did add, however, "I am immensely sympathetic to the Grievor's case."[44]

31. With the RCMP Commissioner's sympathy and the support of the RCMP Pension Advisory Committee for a proposal to allow job-sharing members to buy back full pension credits, the Appellants were at one point informed that the *RCMPSA* would be amended to "correct that oversight". However, the proposed legislative changes never materialized, and the Appellants never learned why.[45] Although the Respondent's evidence acknowledges that legislative amendments to this effect were contemplated, no explanation or justification is provided for why the option was dropped.[46]

32. The Respondent did make some changes to the RCMP Pension Plan. At the time the Appellants' job-shared, there were no formal provisions in the *RCMPSA* or *Regulations* that contemplated part-time pensionable service for RCMP members. In 2006, the *Regulations* were amended to add provisions regarding part-time pensionable service[47] and in 2009 Parliament passed a brief amendment to the *RCMPSA* retrospectively "validating" all of the RCMP's pension calculations with respect to part-time service prior to 2006.[48]

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employees within two years of retirement to work reduced hours while maintaining their pension and benefits coverage at pre-arrangement levels.

[44] Grievance Decision of the Commissioner, dated June 22, 2010, paras 21-22, 49, 49 for quote [AR, Vol. II, Tab 10 at 309, 316]; and see Grievance Case Summary, dated June 14, 2010 [AR, Vol. III, Tab 12 at 524]

[45] Email from Pension Advisory Committee member Richard MacDonald, dated Sept. 5, 2002, quoted in Grievance Decision of the Commissioner, dated June 22, 2010, para. 15 [AR, Vol. II, Tab 10 at 307]; Fraser Affidavit, para. 28 [AR, Vol. II, Tab 9 at 136]; Email from Insp. C. Mackie, dated Sept. 8, 2006, quoted in Grievance Decision of the Commissioner, dated June 22, 2010 at para. 16 [AR, Vol. II, Tab 10 at 307]; Email from M. Matheson to N. Noble, dated June 30, 2005 [AR, Vol. II, Tab 9 at 156]

[46] Rossignol Affidavit, para. 57 [AR, Vol. V, Tab 18 at 814-815]

[47] Amendments to the *Regulations* introduced in late 2006 as SOR/2006-134 added definitions for "full-time member" and "part-time member" and amended provisions throughout to include both types of member. Prior to this, the *Regulations* made no reference whatsoever to "part-time". See *Royal Canadian Mounted Police Superannuation Regulations*, CRC c.1393 [in force March 22, 2006 - October 25, 2006]

[48] *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 (Bill C-18)

(v) Impact on Appellants

33. The record included government studies recognizing that facially-neutral pension rules have had an adverse effect on women and "female pattern employment", concluding that "flexibility of retirement income is required to accommodate the demands of child-rearing and other emerging patterns in the job market."[49] The Appellants all face reduced pension benefits on retirement because they chose to balance their police duties with family obligations by participating in job-sharing arrangements while their children were young.

34. Had they continued to work full-time through that period, or alternatively chosen to reduce their hours to zero and remain off work completely on "care and nurturing" leave, they would have been able to accrue full-time pension credit for those periods. Fraser's evidence was that she would have to work longer to obtain the value of a full-time 25-year pension, and will receive a lower monthly income during retirement.[50] Pilgrim estimates that her retirement income will be reduced by up to 5% annually.[51] The Respondent did not dispute this evidence and included calculations which confirm a sizeable "economic hit" to the pension benefits of those with temporary periods of reduced hours.[52] Pilgrim expressed concern that, in the wake of the breakdown in her long-term marriage, her retirement plans were more precarious. [53]

35. The Appellants gave evidence that they felt being excluded from buying full-time pension credits sent a message that members who are parents are less valued as members of the RCMP.[54] Fox felt "penalized" for returning to duty on a part-time basis, adding that the Plan "discourages women from returning to work after taking maternity leaves and creates barriers to allowing them to smoothly transition back to patrolling duties after having children."[55] And for women with

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[49] *Report of the Royal Commission on the Status of Pensions in Ontario*, Vol. III: Design for Retirement (Toronto: Queen's Printer for Ontario, 1980) at 118-120, 120 for quote [AR, Vol. IV, Tab 16 at 737-739]
[50] FC Judgment, Annex A, p. 2 [AR, Vol. I, Tab 1 at 60]; Fraser Affidavit, paras 29, 32 [AR, Vol. II, Tab 9 at 136-137]
[51] Pilgrim Affidavit, para. 38 [AR, Vol. II, Tab 10 at 169]; Noble Affidavit, para. 30 [AR, Vol. III, Tab 12 at 351]
[52] Rossignol Affidavit, paras 30-32 [AR, Vol. V, Tab 18 at 806-807]
[53] Pilgrim Affidavit, para. 39 [AR, Vol. II, Tab 10 at 169]
[54] Fraser Affidavit, para. 31-32 [AR, Vol. II, Tab 9 at 137]; Pilgrim Affidavit, para. 38 [AR, Vol. II, Tab 10 at 169]; Fox Affidavit, paras 2, 25-26 [AR, Vol. III, Tab 11 at 327-328, 333-334]
[55] Fox Affidavit, paras 24-25 [AR, Vol. III, Tab 11 at 333-334]

particularly challenging family obligations, such as children with disabilities or postings in rural or isolated communities, job-sharing or part-time work is their only available option.[56]

(vi) Decisions of the Courts Below

(a) The Federal Court Decision

36. Justice Kane of the Federal Court dismissed the Appellants' challenge to the RCMP Pension Plan, holding that the impugned provisions did not violate subsection 15(1) of the *Charter* and do not discriminate against the Appellants because they are women or because of their parental status.[57] Specifically, Justice Kane found that the pension "buy-back" provisions do not necessarily constitute a benefit under the law and do not create a distinction based on an enumerated or analogous ground because the adverse impact, if any, is simply the result of individuals choosing to work part-time.[58] Justice Kane also concluded that the Appellants were part-time rather than full-time employees during the relevant period.[59]

37. The Federal Court also found that any distinction under the Plan did not perpetuate prejudice or stereotyping because there was no evidence of any historic disadvantage to women or women with parental status arising specifically from the Plan, and it did not foster any stereotypes or assumptions about women who seek to combine both career and caregiving obligations.[60]

(b) The Decision of the Federal Court of Appeal

38. The Federal Court of Appeal largely followed the reasons of Justice Kane. With respect to the appropriate characterization of the Appellants' employment status, the Court of Appeal agreed the Appellants surrendered their full-time status when they job-shared, relying in large part on provisions in the *Regulations* that did not exist prior to 2006.[61] The Court of Appeal held

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[56] Fox Affidavit, para. 26 [AR, Vol. III, Tab 11 at 334]; and Noble Affidavit, paras 31-32 [AR, Vol. III, Tab 12 at 351-352]
[57] FC Judgment at para. 187 [AR, Vol. I, Tab 1 at 57]
[58] FC Judgment at paras 9, 11, 110-111, 133-138 [AR, Vol. I, Tab 1 at 4-5, 33-34, 40-41]
[59] FC Judgment at paras 8, 47-58 [AR, Vol. I, Tab 1 at 4, 14-17]
[60] FC Judgment at paras 12, 170-171, 181, 184-185 [AR, Vol. I, Tab 1 at 5, 51-52, 55-56]
[61] Reasons for Judgment of the Federal Court of Appeal, December 7, 2018 ("FCA Judgment") at paras 8-9, 13, 34 [AR, Vol. I, Tab 3 at 77, 79, 88]

that the Appellants did not establish that they were denied a benefit of the law because there was insufficient evidence to show the option of taking leave without pay and buying back the pensionable time would have been more financially valuable than earning a salary while job-sharing.[62] The Court of Appeal also held that the evidence was insufficient to conclude that any difference in pension treatment was due to sex or parental status, rather than the Appellants' choice to work part-time rather than taking a leave without pay.[63]

[62] FCA Judgment at paras 15-16, 50 [AR, Vol. I, Tab 3 at 80, 93]
[63] FCA Judgment at paras 51-53 [AR, Vol. I, Tab 3 at 93-94]

PART II – POINTS IN ISSUE

39. The Appellants' agree with the standard of appellate review adopted by the Federal Court of Appeal at paras 30-31 of its judgment. This appeal raises the following questions for determination by this Honourable Court:

(1) What is the appropriate characterization of the Appellants' employment status, as regular RCMP members who worked temporarily-reduced hours under job-sharing agreements?

(2) What is the appropriate approach to the test for "benefit of the law" under section 15 of the *Canadian Charter of Rights and Freedoms* ("*Charter*")?

(3) Do provisions of the RCMP pension plan, including sections 5, 6, 6.1, 26, and 27 of the *Royal Canadian Mounted Police Superannuation Act*, RSC 1985, c.R-11 and sections 2 and 10 to 10.10 of the *Royal Canadian Mounted Police Superannuation Regulations*, CRC c.1393 infringe subsection 15(1) of the *Charter*, in that they operate to discriminate on the basis of sex and/or parental status by denying the appellants the right to accrue full-time pension benefit credit for periods when they worked reduced hours for family reasons?

(4) If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under section 1 of the *Charter*?

PART III – ARGUMENT

A. "Job-Sharing" and "Part-Time" Employment Status

40. The Courts below held that a change of employment status necessarily results from a change in hours of work. By characterizing the Appellants as part-time employees during the time they job-shared, the Courts below found that the Appellants were not similarly situated to full-time members on LWOP and therefore there was no time not worked that they could "buy back" for the purposes of full-time pension credit.[64] The Appellants submit that this formalistic approach is inconsistent with both the equality analysis under s. 15 of the *Charter*[65] as well as the well-established principle in labour law that working full-time hours every day is not essential to maintaining full-time status.[66]

41. Labour arbitrators are always circumspect about employers purporting to change the formal employment status of employees due to temporarily reduced hours of work. For example, Arbitrator Albertyn recognized in that it was inappropriate for an employer to change a full-time employee's status to part-time simply because of a period of reduced hours of work due to disability. The arbitrator held that the employer's decision was discriminatory because it had a detrimental impact on the employee's benefits and ruled the employee should retain their full-time status, with unworked time regarded as leave.[67] In *Riverdale Hospital*, Arbitrator Knopf similarly ruled that transferring an employee out of the full-time category "must be seen as discriminatory in effect," because it imposed penalties and restrictions that did not apply to full-time employees.[68]

42. Conversely, the Saskatchewan Court of Appeal affirmed that employees who work full-time hours do not necessarily become full-time employees when they have no legal right to have

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[64] FC Judgment at paras 8, 47-49, 110-111, 137, 176-177, 184 [AR, Vol. I, Tab 1 at 4, 14-15, 33-34, 41, 53-54, 56]; and FCA Judgment at paras 32-36 [AR, Vol. I, Tab 3 at 87-88]
[65] *Withler v Canada (Attorney General)*, 2011 SCC 12, [2011] 1 SCR 396 ["*Withler*"] at para. 37
[66] *Re Riverdale Hospital and CUPE, Local 79* (1994), 41 LAC (4th) 23 at para. 45; *OSSTF, Local 10 v Peel Board of Education* (1998), 73 LAC (4th) 183 at para. 71
[67] *OSSTF, Local 10 v Peel Board of Education* (1998), 73 LAC (4th) 183 at paras 71-72, 80. In this regard, it is noteworthy that the definition of "period of reduced services" in the ITR includes both periods of reduced pay or temporary absence as well as periods of disability: *ITR, supra*, s. 8300(1)
[68] *Re Riverdale Hospital and CUPE, Local 79* (1994), 41 LAC (4th) 23 at para. 36

the full-time hours continue.[69] The Appellants submit that as a matter of labour law, it is the right of the employer to require full-time hours from the employee, and the employee's concomitant right to demand regular full-time hours of work, that defines full-time employment status. Temporary arrangements for reduced hours of work that either party can terminate at any time do not amount to a change in employment status.

43. The Appellants submit that they were in reality full-time employees at all times because it was recognized that they were only reducing their hours of work for a fixed period of time and would later be returning to full-time duties. The job-sharing arrangements they entered into all confirmed their right to return to full-time hours at the end of that period, and also provided that the Force could terminate the arrangements early and require them to return to full-time duties on 30 days' notice.[70] The RCMP's power to require the Appellants to return to regular full-time hours at any time, and the Appellants' right to resume full-time hours of work, are more compatible with the notion of an underlying full-time status.

44. It is important to reiterate that the *RCMP Act* does not provide for full- or part-time employment of members. This is consistent with the historic recognition that police officers are not merely employees but public office holders, and their compensation is rooted in this status, and not simply in consideration for service or duties performed.[71] These principles all confirm with reality that, even while on job-sharing arrangements, the Appellants were always fully police officers. In that regard, the RCMP members on job-sharing agreements were required to maintain current with all the same standards, training and qualifications as members working full-time

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[69] *UFCW, Local 1400 v Extra Foods, a Division of Loblaws Inc.*, 2012 SKCA 21
[70] MOA for A. Pilgrim at item 11 [AR, Vol. II, Tab 10 at 196]; MOA for C. Fox at items 9-10 [AR, Vol. V, Tab 18 at 871-872]; MOA for J. Fraser at item 11 [AR, Vol. V, Tab 18 at 876]
[71] *Re Nicholson and Haldimand-Norfolk Regional Board of Commissioners of Police*, 1978 CanLII 24, [1979] 1 SCR 311 at 319-320; *Saskatoon (Chief of Police) v Saskatoon Board of Police Commissioners*, 2004 SKCA 3 at para. 19; *Crease et al. v Board of Commissioners of Police of the Municipality of Metropolitan Toronto et al.*, (1982), 39 OR (2d) 89, 1982 CanLII 2054 (ONSC), aff'd (1983), 40 OR (2d) 640, 1983 CanLII 1742 (ONCA); *Mahood v Hamilton-Wentworth Regional Board of Police Commissioners et al.*, 1977 CanLII 1405, (1977), 14 OR (2d) 708 (ONCA)

hours, and could be called out for additional duties and hours at any time if operationally required by the Force.[72]

45. In the present case, the Federal Court of Appeal's analysis relied heavily upon definitions of "full-time member" and "part-time member" in section 2.1 of the *Regulations*. However, these terms were first introduced only in late 2006, well after the Appellants' service under job-sharing agreements. In all previous versions - and at all relevant times when the Appellants worked reduced hours under job-sharing agreements - the *Regulations* simply did not contemplate and made no reference whatsoever to "part-time" employment.[73] It is only through retrospective legislation in 2009 that the Respondent "validated" the "part-time" calculations of the Appellant's pension benefits.[74] Even under the RCMP's current part-time policy, RCMP members working part-time hours do so on a temporary basis and are still presumptively viewed as full-time members: "part-time employment may be considered to address specific needs of full-time members on a limited basis."[75]

46. To conclude on this point, it is an error to characterize the Appellants as part-time employees simply because they temporarily reduced their hours of work. The definitions in the *Regulations* should not detract from this reality given that this case concerns a constitutional challenge to those same statutory provisions. As argued in more detail below, the equality analysis under s. 15 of the *Charter* must be contextual and grounded in the actual situation or reality of the group.[76]

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[72] Noble Transcript, Qs. 133, 174, and 184 [AR, Vol. VI, Tab 21 at 1002-1003, 1012-1013, 1016-1017]

[73] See, e.g., *Royal Canadian Mounted Police Superannuation Regulations*, CRC c.1393 [in force March 22, 2006 - October 25, 2006]

[74] *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 (Bill C-18)

[75] RCMP Admin Manual, II.10, Amended 2007-01-23, Part-Time Employment, ss. 1.2, 1.4, 1.12, 3.3.1.3, and 3.3.3, s.1.4 for quotation (emphasis added) [AR, Vol. II, Tab 10 at 238-239]. The 2011 and 2014 versions of the Part-Time Employment policy are the same as the 2007 version in all relevant aspects: see RCMP Admin Manual, II.10, Amended 2011-10-27, Part-Time Employment, ss. 1.1.2, 1.1.4 and 1.1.12 [AR, Vol. II, Tab 10 at 251-252]; and RCMP Admin Manual, II.10, Amended 2014-09-04, Part-Time Employment, ss. 1.1.2, 1.1.4, and 1.1.12 [AR, Vol. V, Tab 18 at 856-857]

[76] *Withler*, paras 39, 51 and 77; and *Auton v British Columbia*, 2004 SCC 78, [2004] 3 SCR 657 ["*Auton*"] at para. 25

B. The Test for Discrimination / Breach of Subsection 15(1)

47. The Appellants challenge the validity of those portions of the *Act* and *Regulations* which preclude RCMP members who temporarily worked reduced hours under job-sharing arrangements from making elective contributions to the Plan and accruing full-time pension entitlements for those periods. These provisions violate the guarantee of equal benefit of the law in subsection 15(1) of the *Charter.*[77]

48. Once the state chooses to provide a benefit, it is obliged to do so in a non-discriminatory manner.[78] Legislative schemes which exclude groups that have historically faced unequal treatment from the full benefit or protection of the law can demean their dignity, and sends a strong message that such discrimination is permissible, or even acceptable in society.[79]

49. The overarching goal of section 15 is to secure *substantive equality* – the idea that all Canadians are "recognized at law as human beings equally deserving of concern, respect and consideration."[80] As Chief Justice McLachlin succinctly put it in *Auton*, the purpose of subsection 15(1) "is to prevent the perpetuation of pre-existing disadvantage through unequal treatment."[81]

50. The juristic approach to section 15 has evolved through landmark decisions in *Andrews*, *Eldridge*, *Law*, and *Kapp*.[82] As the Supreme Court held in *Withler*,

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[77] *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 ["*Charter*"], s. 15

[78] *Eldridge v British Columbia (Attorney General)*, [1997] 2 SCR 624, 1997 CanLII 327 (SCC) ["*Eldridge*"] at para. 73; *Brooks v Canada Safeway Ltd*, [1989] 1 SCR 1219, 1989 CanLII 96 (SCC) at 1240g

[79] *Vriend v Alberta*, [1998] 1 SCR 493, 1998 CanLII 816 (SCC) ["*Vriend*"] at paras 100-101; *Adekayode v Halifax (Regional Municipality)*, 2015 CanLII 13866 (NS HRC) ["*Adekayode*"] at para. 39

[80] *R v Kapp*, 2008 SCC 41, [2008] 2 SCR 483 ["*Kapp*"] at paras 14-16 and 19-23, citing *Andrews v Law Society (British Columbia)*, [1989] 1 SCR 143, 1989 CanLII 2 (SCC) ["*Andrews*"] at 171. Also see: *Kahkewistahaw First Nation v Taypotat*, 2015 SCC 30, [2015] 2 SCR 548 ["*Taypotat*"] at para. 17; *Quebec (Attorney General) v A*, 2013 SCC 5, [2013] 1 SCR 61 ["*Quebec v A*"] at para. 325; *Withler*, *supra* at paras 2, 43

[81] *Auton*, *supra* at para. 25; *Taypotat*, *supra* at para. 17

[82] See: *Andrews*, *supra*; *Eldridge*, *supra*; *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497, 1999 CanLII 675 (SCC). Also see: *Withler*, *supra* at para. 30; *Quebec v A*, *supra* at para. 324; *Canada v Jodhan*, 2012 FCA 161 ["*Jodhan* (FCA)"] at para. 104

> The focus of the inquiry is on the actual impact of the impugned law, taking full account of social, political, economic, and historical factors concerning the group. The result may be to reveal differential treatment is required in order to ameliorate the actual situation of the claimant group.[83]

51. The two-part test for determining whether there has been discrimination in violation of subsection 15(1) asks:

> (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?[84]

52. At the first stage of the test, the distinction may involve a disproportionately negative impact on a group or individual that can be identified by factors relating to enumerated or analogous grounds, even though the law purports to treat everyone the same.[85] In the employment context, discrimination can result from a law or policy that is facially-neutral, but has the "adverse effect" of imposing penalties, restrictive conditions, or otherwise denying equal benefit for certain employees on the basis of an enumerated or analogous ground.[86]

53. The second stage of the test involves examining the circumstances of the group's members and the law's negative impact upon them. The analysis must be "contextual, not formalistic, grounded in the actual situation of the group and the potential of the impugned law to worsen their situation."[87] Dealing specifically with pension schemes, the Supreme Court held in *Withler* that discrimination can be demonstrated by showing that, when viewed contextually in light of the general needs of the group involved, the distinction perpetuates prejudice and disadvantage to members of the group on the basis of personal characteristics protected by subsection 15(1) of the *Charter*.[88]

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[83] *Withler, supra* at para. 39
[84] *Kapp, supra* at paras 17-24
[85] *Quebec v A, supra* at para. 348; *Withler, supra* at para. 64; *Falkiner v Ontario* (2000), 188 DLR (4th) 52, 2000 CanLII 30140 (ON SCDC) at para. 81
[86] *Taypotat, supra* at paras 17-18; *Ontario Human Rights Commission v Simpsons-Sears Ltd.*, [1985] 2 SCR 536, 1985 CanLII 18 (SCC) at 551, para. 18. Also see: *Andrews, supra* at 172-176
[87] *Withler, supra* at paras 35-37. Also see: *Kapp, supra* at para. 32
[88] *Withler, supra* at para. 73

C. The RCMP Pension Plan Violates Section 15 of the *Charter*

Step One: The Plan creates a distinction based on sex and family status

54. RCMP members who are actively working regular hours accrue pensionable service and benefits through contributions by the employer and the member. RCMP members who are not actively at work but are suspended or on approved LWOP also accrue full-time pensionable service, provided they purchase or "buy back" full-time credit by paying both employer and employee contributions. The benefit of full-time pension credit is therefore not based on being actively at work.

55. Only one category of RCMP members are treated differently under the Plan: members who temporarily work reduced hours are not permitted to purchase or buy back full-time pension credit for time not worked in the same way. These members accrue pensionable years of service but at a reduced rate. They permanently lose full-time credit for those years of service and can never recover it in any way, leading to reduced pension benefits as compared to their colleagues. The impact of this distinction is disproportionately borne on the basis of enumerated and analogous grounds, as it is predominantly women with young children who temporarily work reduced hours in order to balance career and family obligations.

56. The Appellants' claim is not that they should be compensated the same as RCMP members who are actively at work. The law is clear that most employment benefits are extended as compensation for work performed. However, other employment benefits are not necessarily based on being actively at work but rather on the continuing status of being an employee. For this reason, the Ontario Court of Appeal in *Orillia Soldiers* expressly distinguished between compensatory and non-compensatory employment benefits.[89] Properly characterized, and considered contextually with regard to the actual situation of RCMP women who temporarily worked reduced hours for family reasons, the benefit at issue in the present case is not extended to RCMP members exclusively based on work performed. Members on suspension or those who take LWOP are, by definition, not assigned any hours of work, yet they are accorded the right to

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[89] *Ontario Nurses' Assn v Orillia Soldiers Memorial Hospital* (1999), 42 OR (3d) 692, 1999 CanLII 3687 (ONCA), [1999] OJ No. 44 (QL) at paras 63, 71-72. Also see: *Lavoie v Canada (Treasury Board of Canada)*, 2008 CHRT 27 at para. 139

purchase or buy back pension contributions on a full-time basis. This benefit is not based on being on active duty, nor is it strictly or exclusively compensation for hours worked. Rather, the Plan creates this distinction on the basis of discriminatory grounds.

(i) Equal "Benefit of the Law"

57. The Federal Court of Appeal held that the Appellants' *Charter* claim failed on the first step of the analysis because they could not establish "the requisite adversity of treatment" under the law. The Court recognized that RCMP members who are working parents are given two options by the Force to address the demands associated with balancing work and caring for young children: (1) members can go on leave without pay; or (2) they can reduce their hours of work to part-time hours under a job-sharing arrangement. The FCA noted that members who job-share continue to receive salary for their work, but acknowledge they experience a reduction in their pension. Conversely, members on unpaid leave do not receive any salary, but they continue to enjoy the right to buy full-time pension credit for the period of leave. The FCA held that the Applicants' claim should be dismissed because the specific pecuniary value of these two different options was not in evidence, and therefore it is unclear what "benefit of the law" had been denied to the Applicants. "Without any evidence as to relative value of the two packages," the FCA said, "it is impossible to conclude that job-sharing is adverse to being on a leave without pay."[90]

58. The Appellants submit that it was inappropriate for the Federal Court of Appeal to consider income earned by job-sharing members as a benefit that somehow balances out the inability to buy-back pension rights. Job-sharing members should be entitled to earn income for active work and have the right to exercise pension buy-back rights for time not work. As a basic premise, the Applicants submit that income earned for active employment is a different type of remuneration than pension or other employment benefits, which in some circumstances can be earned irrespective of being actively at work.[91] The more fundamental point, however, is that "the concept of equal benefit of the law should not be restricted to a simple calculation of economic profit or loss."[92]

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[90] FCA Judgment at para 50 [AR, Vol. I, Tab 3 at 93]
[91] *Ontario Nurses' Assn v Orillia Soldiers Memorial Hospital*, [1999] OJ No. 44 (ONCA) at paras 63, 71-72
[92] *Egan v Canada*, [1995] 2 SCR 513, 1995 CanLII 98 (SCC) at 593

59. This same respondent made similar arguments in *Egan v Canada*. The Attorney General of Canada contended in that case that the homosexual plaintiffs had not suffered economically from the definition of "spouse" under the *Old Age Security Act* because they received more financially in combined federal and provincial benefits as individuals than as a legal couple under the statute. All judges of the Court agreed that this was not an appropriate way to frame "benefit of the law". Cory J., in dissent but not on this point, observed that "precise mathematical calculation of benefits" which could be paid will inevitably vary from individual to individual in a group claim depending on the circumstances, and this should not be defining feature. L'Heureux-Dubé J. agreed with Cory J., and added that it would take to narrow a view of "equal benefit of the law" to define it strictly in terms of economic interests. [93]

60. Cory J. also stated in *Egan* that "[a] law may well confer a benefit by providing individuals with the opportunity to make a significant choice." [94] In the present case, the Court of Appeal fell into error by looking for a precise calculation of benefits. The benefit of the law at issue here is the opportunity to elect to purchase full-time pension credits for time not worked. No doubt some individuals may feel that they can invest the money better in private RRSPs rather than the Plan, but others may prefer the security of a defined benefit pension plan. The point is that RCMP Plan affords the benefit of making that significant decision for one's own retirement planning.[95] The right or opportunity to make that election to "buy back" full-time pension service for time not worked is the benefit of the law at issue in this appeal.

61. Finally, the Appellants did provide some evidence about the differential pension benefits that the Appellants may experience. [96] The Respondent did not dispute that evidence and acknowledged that the Appellants and others in their position would suffer an "economic hit" with respect to their pensions as compared to those who worked full-time or went on LWOP and bought back full-time pension credit. [97] The Federal Court of Appeal erred by rejecting this evidence and the Appellants submit that a denial of a benefit of the law has been established.

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[93] *Egan, supra* at at 531, 565 (L'Heureux-Dube, J.) and 591 (Cory J.)
[94] *Egan, supra* at 593
[95] *RCMPSA*, section 6.1 and *Regulations*, section 10
[96] FC Judgment, Annex A, pp. 2-3 [AR, Vol. I, Tab 1 at 60-61]; Fraser Affidavit, paras 29, 32 [AR, Vol. II, Tab 9 at 136-137]; and Pilgrim Affidavit, para. 38 [AR, Vol. II, Tab 10 at 169]
[97] Rossignol Affidavit, paras 30-32 [AR, Vol. V, Tab 18 at 806-807]

(ii) Distinction Based on Sex

62. Sex-based discrimination will be found where there is a predominant number of one sex suffering from or burdened by a particular distinction.[98] The evidence overwhelmingly demonstrated that RCMP members who temporarily work reduced hours are predominantly women. In the first few years of the job-sharing policy, all fourteen of the RCMP members who entered job-sharing arrangements were women.[99] By 2002, 30 of the 34 members who participated in job-sharing agreements were women, and nearly all had small children.[100] More recent data from 2010-2014 indicates that 100% of members working reduced hours through job-sharing were women, a significant majority of whom citing childcare as their reason for doing so.[101] This data is consistent with the reality that part-time workers in Canada are disproportionately women, and that this is directly linked to childcare obligations.[102]

63. The inextricable link between women disproportionately working part-time and their role in families was identified in the landmark *Report of the Commission on Equality in Employment*. Justice Abella highlighted that various studies showed that a major reason why women were over-represented in part-time work was because they were combining childcare responsibilities with jobs in the paid labour market.[103] Policing is not immune to these gendered differences in social responsibility for child care. The expert evidence of Professor Higgins included a study which found that 61% of female police constables also have primary responsibility for childcare in their families, as compared to only 9% for male constables.[104]

64. Consistent with workforce patterns for women in Canada more generally, RCMP members who work reduced hours in job-sharing or part-time work are overwhelmingly women. The Appellants submit that this overrepresentation of women in temporary job-sharing or part-time work in the RCMP is sufficient to demonstrate that denying the right to buy back full-time

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[98] *Falkiner v Ontario* (2000), 188 DLR (4th) 52, 2000 CanLII 30140 (ON SCDC) at paras 84-85; *Symes v Canada*, [1993] 4 SCR 695, 1993 CanLII 55 (SCC) at 764
[99] Memo to RCMP Commissioner Murray, dated June 8, 2000 [AR, Vol. III, Tab 12 at 363]
[100] Noble Affidavit, para. 25 [AR, Vol. III, Tab 12 at 350]
[101] Exhibits A and C to the Rossignol Affidavit [AR, Vol. V, Tab 18 at 816 and 834]
[102] See: Statistics Canada, *Paid Work: Women in Canada: A Gender-based Statistical Report* (Ottawa: Statistics Canada, December 2010) at 13-15
[103] *Commission on Equality in Employment* at 185-186 [AR, Vol. IV, Tab 14 at 699-700]
[104] Duxbury and Higgins at 24 [AR, Vol. IV, Tab 13 at 597]

pension credit to those members has an adverse effect on the grounds of sex by denying those women the ability to enjoy pension benefits on retirement equal to their colleagues.[105]

(iii) Distinction Based on Family Status

65. Section 15 of the *Charter* prohibits differential treatment of individuals on the basis of enumerated or analogous grounds. In identifying such analogous grounds, the Supreme Court of Canada guides us to look for personal characteristics that are "immutable or changeable only at unacceptable cost to personal identity."[106] The Appellants maintain that being in a parent-child relationship is an immutable personal characteristic that is fundamentally important to an individual's personal identity. For parents, this family status carries with it social, cultural, economic and legal obligations and responsibilities that are vitally important to the individual and society as a whole. Becoming a parent, and the freedom to fulfill that role as one deems best, are characteristic of the values of self-worth, autonomy and self-determination inherent to human dignity and the equality guarantee.[107]

66. In their evidence, the Appellants spoke meaningfully of the importance and value they placed on parenthood and its fundamental place in their identity.[108] Pilgrim explained that she always wanted to be an RCMP police officer, and how she worked to develop skills and abilities that would serve her well in the Force. She was proud to become an RCMP member, and loved her job. But her sense of self changed once she became a mother.[109]

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[105] *Esposito v British Columbia*, 2006 BCHRT 300 ["*Esposito*"] at paras 100, 142; *Falkiner v Ontario* (2000), 188 DLR (4th) 52, 2000 CanLII 30140 (ON SCDC) at paras 74-75

[106] *Corbiere v Canada*, [1999] 2 SCR 203, 1999 CanLII 687 (SCC) at para. 13; also see *Withler*, para. 33

[107] *Law*, *supra* at para. 53; *Brooks v Canada Safeway Ltd*, [1989] 1 SCR 1219, 1989 CanLII 96 (SCC) at 1237-1238; *Symes v Canada*, [1993] 4 SCR 695, 1993 CanLII 55 (SCC) at 803-804; *Brown v Canada*, 1993 CanLII 683 (CHRT) ["*Brown*"] at 25; *Johnstone v Canada*, 2014 FCA 110 ["*Johnstone*"] at paras 21 and 66; *Adekayode*, *supra* at paras 17 and 39; *International Association of Fire Fighters, Local 268 v Adekayode*, 2016 NSCA 6 ["*Adekayode* NSCA"]; at paras 93-97; *Esposito*, *supra* at para. 100

[108] Fraser Affidavit, paras 2, 24 [AR, Vol. II, Tab 9 at 129-130, 134-135]; Pilgrim Affidavit, paras. 2, 13-14, 25 [AR, Vol. II, Tab 10 at 160-161, 163-164, 166]; Noble Affidavit, paras 2, 11-12 [AR, Vol. III, Tab 12 at 343-344, 346]

[109] Pilgrim Affidavit, paras 3-6, 10, and 13, 13 for quote [AR, Vol. II, Tab 10 at 161-162, 163]

67. The Supreme Court of Canada has yet to formally decide whether family status is an analogous ground protected by section 15 of the *Charter*. However, the Court has suggested that this may be the case. In *Symes*, the claimant unsuccessfully argued that the deduction cap for child care expenses under the *Income Tax Act* constituted discrimination on the ground of sex. However, Iacobucci J. for the majority and L'Heureux-Dubé J. in dissent both suggested that the claim could have been considered one of family status.[110] Similarly, in *Thibaudeau*, McLachlin J., as she then was, and L'Heureux-Dubé J. in dissent both found that the "status of separated or divorced custodial parent" was an analogous ground of discrimination.[111]

68. An important indicator of an analogous ground is whether it is included in federal or provincial human rights codes.[112] Family status is a protected ground in nearly every human rights code in the country.[113] While the definition of family status differs, the core protection in all of the statutes includes "being in a parent child relationship".[114] In the jurisprudence under human rights legislation, the concept of family status as it relates to the parent-child relationship incorporates "the entire scope of legal obligations of care, responsibility and protection for a child that a person takes on when they enter into a parental relationship with a child".[115]

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[110] In *Symes, supra*, Iacobucci J. suggests "family or parental status" may be an analogous ground at 762 and 770, and L'Heureux-Dubé J. agrees at 825

[111] *Thibaudeau v Canada*, [1995] 2 SCR 627, 1995 CanLII 99 (SCC) at 724-725, para. 212. In the context of a citizenship issue, the Supreme Court recognized in its section 15 analysis that "the link between child and parent is of a particularly unique and intimate nature": *Benner v Canada*, [1997] 1 SCR 358, 1997 CanLII 376 (SCC) at paras 82-88

[112] *Corbiere, supra* at para 60; *Miron v Trudel*, [1995] 2 SCR 418, 1995 CanLII 97 (SCC) at 496, para. 148

[113] *Canadian Human Rights Act*, RSC 1985, c H-6, s. 3(1); *Human Rights Code*, RSBC 1996, c 210 s.7(1), 8(1), 10(1)(2), 11, 13, 14; *Alberta Human Rights Act*, RSA 2000, c A-25.5, preamble, s. 3, 4, 5, 7, 8, 9, 16, 44(1)(f); *The Saskatchewan Human Rights Code*, SS 1979, c S-24.1, s(2)(1)(h.1)(m.01); 12(4), s. 15(1.2)(e), 16(10), 25(a), 47(1); *The Human Rights Code*, CCSM c H175, 9(2)(i); *Human Rights Code*, RSO 1990, c H.19 s. 1, 2(1)(2), 3, 5,(1)(2), 6, 10(e), 20(3), 21, 22, 25(2); *Human Rights Act*, RSNS 1989, c 214 s. 3(h), 5(r); *Human Rights Act*, RSPEI 1988, c H-12 s.2(h.11), 4, 13, 18; *Human Rights Act*, 2010, SNL 2010, c H-13.1, preamble, 2(i), 9, 12(4), 21; *Human Rights Act*, SNWT 2002, c 18, s 5(1); *Human Rights Act*, RSY 2002, c 116, s. 7(k); and *Human Rights Act*, SNu 2003, c 12, s.1, 7(1). Only Quebec and New Brunswick do not have protection for family status.

[114] The Saskatchewan, Ontario, Nova Scotia, PEI and Newfoundland and Labrador statues narrowly define "family status" this way.

[115] See *Johnstone, supra* at paras 21, 59, 66; *Adekayode, supra* at para. 17 for quote

69. Finally, the Appellants submit that the disadvantage resulting from this distinction is clear on its face – inability to buy back and later enjoy the benefit of full-time pension contributions, as available to those who either worked full-time or took LWOP. This is supported by the record, including calculations from the Respondent that confirm a sizeable "economic hit" to the pension benefits of those with temporary periods of reduced hours.[116] The suggestion that any such "economic hit" might have been offset by other "appealing" benefits like reduced childcare costs or less stress is, with respect, of no moment to an analysis of whether the Plan creates a discriminatory distinction.[117]

(iv) Nexus Between Grounds and Adverse Treatment

70. The Federal Court and Court of Appeal both held that the distinction in this case was based on the Appellant's personal choice to work part-time hours rather than taking an LWOP.[118] For the Courts below, the overrepresentation of women in the RCMP with small children temporarily working part-time hours is not sufficient to demonstrate a nexus between the RCMP Pension Plan and the benefit denied to the Appellants.[119] In the Courts view, the Pension Plan did not cause women to choose to work part-time hours rather than LWOP, and therefore indirect indiscrimination could not be established.

71. The Appellants submit that the Courts below erred by ignoring the full context of the situation of the claimant group, including and in particular the historical disadvantages faced by women in the workforce and the continuing reality that women bear disproportionate responsibility as primary caregivers for young children in the home. The Courts below also overlooked the crucial context of the purpose of the impugned provisions or program at issue.

72. In the present case, the "requisite nexus" is established by the fact that one of the primary reasons that the Respondent and other employers in Canada introduced the benefit of "buy back"

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[116] Pilgrim Affidavit, para. 38 [AR, Vol. II, Tab 10 at 169]; Fraser Affidavit, paras 29, 32 [AR, Vol. II, Tab 9 at 136-137]; Noble Affidavit, para. 30 [AR, Vol. III, Tab 12 at 351]; Rossignol Affidavit, paras 30-32 [AR, Vol. V, Tab 18 at 806-807]
[117] FC Judgment at paras 128-133 [AR, Vol. I, Tab 1 at 38-40]
[118] FC Judgment at paras 11, 128, 134 and 137 [AR, Vol. I, Tab 1 at 5, 38, 40-41]; FCA Judgment at para. 53 [AR, Vol. I, Tab 3 at 94]
[119] FC Judgment at paras 137-138 [AR, Vol. I, Tab 1 at 41]; and FCA Judgment at paras 51 and 53 [AR, Vol. I, Tab 3 at 93-94]

pension credits was to address the inequitable impact of pensions on parents who temporarily leave the workforce for child-birth and child-rearing.[120] Similarly, the RCMP was once an exclusively male workplace with no tolerance for part-time hours of work, even for a temporary period of time.[121] More than 20 years after women were first allowed to become RCMP police officers, the Respondent introduced its job-sharing policy in 1997 for regular members and allowed members the flexibility to work reduced hours for a fixed period of time.[122]

73. To establish indirect discrimination for government benefit programs, the Supreme Court of Canada has held the analysis must consider the purposive of the legislative regime at issue. In *Auton*, McLachlin C.J. said.

> Direct discrimination on the face of a statute or in its policy is readily identifiable and poses little difficulty. Discrimination by effect is more difficult to identify. Where stereotyping of persons belonging to a group is at issue, assessing whether a statutory definition that excludes a group is discriminatory, as opposed to being the legitimate exercise of legislative power in defining a benefit, involves consideration of the purpose of the legislative scheme which confers the benefit and the overall needs it seeks to meet. If a benefit program excludes a particular group in a way that undercuts the overall purpose of the program, then it is likely to be discriminatory: it amounts to an arbitrary exclusion of a particular group.[123]

74. While numerical overrepresentation of a group will not necessarily establish adverse effect discrimination, the nexus between that group and the relevant benefit of the law will be made out where the very purpose of that benefit or program was to ameliorate the specific

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[120] *House of Commons Debates*, Vol. VI, 1992 (24 Feb. 1992) at 7487 (Hon. Gilles Loiselle, President of the Treasury Board and Minister of State (Finance)); *Report of the Royal Commission on the Status of Pensions in Ontario*, Vol. III: Design for Retirement (Toronto: Queen's Printer for Ontario, 1980) at 118-120 [AR, Vol. IV, Tab 16 at 737-739]; *Shilton, supra* at 112-114; Gowing Affidavit at para. 24 [AR, Vol. V, Tab 17 at 747]

[121] *Status of Women in Canadian Policing, supra*; Pilgrim Affidavit at para. 4 [AR, Vol. II, Tab 10 at 161]; Fox Affidavit at paras 7 and 13-14 [AR, Vol. III, Tab 11 at 328-331]; and Noble Affidavit, paras 10-12 [AR, Vol. III, Tab 12 at 345-346]

[122] Rossignol Affidavit, para. 45 [AR, Vol. V, Tab 18 at 810]

[123] *Auton, supra,* at para. 42

circumstances of that disadvantaged group.[124] In that context, arbitrary exclusions - or underinclusion – can establish indirect discrimination.[125]

75. The Federal Court of Appeal acknowledged that job-sharing and LWOP "are both leave options open to RCMP members to address demands associated with caring for young children." But the Court of Appeal later rejects the proposition that overrepresentation of women in job-sharing constitutes an adverse effect because, the Court holds, the distinction is based on choice rather than their personal characteristics of being female RCMP members with young children.[126] Again, however, the Court of Appeal overlooks the fact that reason why the Respondent introduced job-sharing as an option was to specifically create an alternative to members who may otherwise choose LWOP. As the Respondent's witness acknowledged,

> The job-sharing policy was instituted to facilitate work-life balance for members of the Force who, due to personal or family circumstances, would benefit from being able to work part-time instead of taking extended leaves of absence in the form of LWOP. [127]

76. Finally, it must be understood that this is not a duty to accommodate case, and therefore the debates in the jurisprudence below about personal choice versus legal obligation in accommodation[128] are not dispositive on the issue of arbitrary exclusion from a government benefit or program under s. 15 of the *Charter*. In *Falkiner*, the Ontario Court of Appeal held that provincial social assistance legislation discriminated against single mothers by reducing their benefits as soon as a partner moved into the home.[129] The Ontario Court of Appeal held that the "spouse in the house" rule discriminated against women because the definition of spouse was too

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[124] The cases relied on by the Courts below - *Miceli-Riggins v Canada Attorney General*, 2013 FCA 158, *Grenon v Canada*, 2016 FCA 4; and arguably *Canada (Attorney General) v Lesiuk*, 2003 FCA 3 – can be distinguished on the basis that the legislative programs were not specifically designed for the groups. The Federal Court of Appeal's judgment in *Lesiuk* is perhaps more problematic and has received some academic criticism: Meehan, K., "Falling Through the Cracks: The Law Governing Pregnancy and Parental Leave," 2004 35-2 Ottawa Law Review 211, 2004 CanLIIDocs 26

[125] *Brooks v Canada Safeway Ltd*, [1989] 1 SCR 1219, 1989 CanLII 96 (SCC) at 1240g

[126] FCA Judgment at paras. 50 and 53, 50 for quote.

[127] Rossignol Affidavit, para. 46 [AR, Vol. V, Tab 18 at 810]

[128] *Johnstone v Canada (Border Services)*, 2014 FCA 110

[129] *Falkiner v Ontario (Ministry of Community and Social Services)* (2002), 59 OR (3d) 481, 2002 CanLII 44902 (ONCA)

wide and arbitrary and captured relationships that were nascent and had not necessarily reached that level. Significantly for this case, the Court of Appeal did not reject the claim on the ground that Falkiner had chosen to allow a man to live in her home. The Court held that "fundamental dignity interests" are affected when a program interferes with "highly personal choices" and causes single mothers "to give up either their financial independence or their relationship."[130]

77. With prevailing socio-economic trends that see both parents working, the choices that parents make in discharging their duties and obligations to both work and raise a family are deeply personal and affect an individual's legitimate sense of human dignity.[131] The Appellants submit that the family status of being in a parent-child relationship bears all the hallmarks of a personal characteristic or attribute that is vital to personal identity and constitutes an analogous ground of protection under subsection 15(1) of the *Charter*.

Step Two: The distinction creates a disadvantage by perpetuating prejudice and stereotyping

78. The second stage of the section 15 analysis consists of asking whether the differential treatment creates a disadvantage by perpetuating stereotypes or prejudice. To answer this question, it is helpful to consider the factors set out in *Law*, keeping in mind that none of these is a prerequisite for finding discrimination, and not all factors will apply in every case, but all are designed to illuminate the relevant contextual considerations surrounding a challenged distinction.[132]

79. While the Appellants submit that this discrimination claim could be allowed on either ground of sex or family status, this analysis will focus on both as intersecting grounds of discrimination because it presents a fuller picture of the historical disadvantage and stereotyping at play.[133] Women have historically been disadvantaged in the workplace, and disproportionately

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[130] *Falkiner v Ontario (Ministry of Community and Social Services)* (2002), 59 OR (3d) 481, at paras 101 and 103
[131] *Adekayode, supra* at para. 39; *Adekayode* NSCA, *supra* at paras 93-97; *Brown, supra* at 18
[132] *Withler, supra* at paras 66, 38; *Kapp, supra* at para. 23; *Quebec v A, supra* at para. 331 Also see: *Gosselin v Quebec (Attorney General)*, [2002] 4 SCR 429 ["*Gosselin*"] at para. 29
[133] *Withler, supra* at para. 63

experienced poverty as a result, in large part due to discriminatory beliefs and attitudes about the primary role they should fulfill in society, namely as mothers and caregivers.[134]

(i) Pre-Existing Disadvantage

80. A key marker of discrimination and denial of human dignity under subsection 15(1) is whether the affected individual or group has suffered from pre-existing disadvantage, vulnerability, stereotyping, or prejudice. Historic patterns of discrimination that have marginalized a group's members or prevented them from participating fully in society raise the strong possibility that current differential treatment of the group may perpetuate these same discriminatory views.[135] Courts have repeatedly held that women have been historically disadvantaged in the workplace.[136] The starting point for the inequities and differential treatment faced by women in the working world was the "traditional" division of labour in the family home, with the husband's work devoted to monetary gain and the wife's labour primarily occupied with raising children and maintaining the home.[137]

81. The 1984 *Commission on Equality in Employment* established the legal and policy roadmap for advancing equality in employment for Canadian women. Justice Abella's report showed that for women, achieving equality in employment required a revised approach to the role women play in the workforce.[138] Pensions and benefits were highlighted in particular as a source of inequality for women because they were typically designed to attract and reward permanent, full-time, and long-service employment – sometimes called "male pattern employment". Pensions with long vesting periods and no participation rights for part-time employees created barriers to women whose employment often included interruptions or breaks for childbirth and child rearing

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[134] *Brooks*, *supra* at 1238d; *Newfoundland v NAPE*, 2004 SCC 66 at para. 45; *M v H*, [1999] 2 SCR 3 at para. 235; *CN v Canada (Human Rights Commission)*, [1987] 1 SCR 1114; *Schafer v Canada* (1997), 35 OR (3d) 1, 1997 CanLII 1508 (ONCA) at 34; *Hartling v Nova Scotia*, 2009 NSCA 130 at paras 103-105; *Moge v Moge*, [1992] 3 SCR 813 at 853-854, 861-862

[135] *Withler*, *supra* at para. 38; *Law*, *supra* at para. 63; *Gosselin*, *supra* at para. 30

[136] *Brooks*, *supra* at 1238d; *Newfoundland v NAPE*, 2004 SCC 66 at para. 45; *M v H*, [1999] 2 SCR 3 at para. 235; *CN v Canada (Human Rights Commission)*, [1987] 1 SCR 1114, 1987 CanLII 109 (SCC); *Schafer v Canada* (1997), 35 OR (3d) 1, 1997 CanLII 1508 (ON CA) at 34; *Hartling v Nova Scotia*, 2009 NSCA 130 at paras 103-105

[137] *Moge v Moge*, [1992] 3 SCR 813 at 861

[138] *Commission on Equality in Employment* at 4 [AR, Vol. IV, Tab 14 at 692]

and reduced hours of work to balance employment with childcare. Government studies recognized that facially-neutral pension rules had an adverse effect on women and "female pattern employment", concluding that "flexibility of retirement income is required to accommodate the demands of child-rearing and other emerging patterns in the job market."[139]

82. Legislative changes led to pension reforms that were designed to enhance coverage for women, including requiring shorter vesting periods (to address work interruptions and job mobility occasioned by childbirth and choosing to stay home for child rearing) and opening plans to part-time work (women disproportionately work part-time to balance childcare responsibilities).[140] Allowing pensionable service to continue to accrue during maternity and parental leaves were further measures designed to promote equality.

83. For the Appellants, the bar against accruing full-time pension benefits under the Plan for periods when they were job-sharing echoes the historical disadvantages more widely experienced by Canadian women a generation ago. The RCMP pension plan is certainly a significant improvement over the 1980s, with provisions for pension accrual while on maternity or parental leave or extended LWOP for care and nurturing of children. Yet the *RCMPSA* continues to disadvantage women unfairly because it arbitrarily impacts the ability of female members to determine how to balance their career and family responsibilities. Once maternity leave is over, the Plan rewards full-time pension credit to members who return to work full-time or those who take an extended LWOP. But the Appellants and others who instead choose to work temporarily reduced hours are denied the same benefit of accruing full-time pension entitlements for that period. Colleen Fox described this as being "penalized" for her choice to balance career and family obligations through a job-sharing/part-time work arrangement.[141]

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[139] *Report of the Royal Commission on the Status of Pensions in Ontario*, Vol. III: Design for Retirement (Toronto: Queen's Printer for Ontario, 1980) at 118-120, 120 for quote [AR, Vol. IV, Tab 16 at 737-739]. Also see: Department of Finance Canada, *Better Pensions for Canadians: Focus on Women* (Ottawa; Minister of Supply and Services, 1982) at 3-5, 9-10; and Shilton, E, "Gender Risk and Employment Pension Plans in Canada" (2013), 117 CLELJ 101 ["Shilton"] at 112 and 120-123, for discussion of other government studies in the early 1980s and the movement for pension reform

[140] Shilton, *supra* at 123, 130

[141] Fox Affidavit, paras 24-25 [AR, Vol. III, Tab 11 at 333-334]

84. The disincentives of this pension design are particularly harmful to RCMP members in rural or isolated communities, where around-the-clock child care to accommodate policing shifts is rarely available. As a result, Fox pointed out that "job-sharing is often the only child care solution for members with children", regardless of the economic ramifications.[142] Noble added that she had encountered many RCMP women who viewed job-sharing as a solution to balancing work with extremely challenging circumstances in their family lives, and knew of other women who, like Fox, had left the RCMP when their requests for job-sharing were denied.[143]

85. There have been other negative economic consequences for RCMP women. Fraser testified that she retired later because she had to work longer to generate the value of a full-time 25-year pension.[144] Pilgrim estimates her annual retirement income will be 5% lower as a result of being denied the opportunity to buy back full-time pension credits. She testified that, with the breakdown in her marriage, she worries about how this will impact her security in retirement.[145] The Respondent acknowledged the Appellants take an "economic hit" in the circumstances.[146]

86. The Supreme Court of Canada has emphasized that legislative schemes which exclude groups that have historically faced unequal treatment from the full benefit of the law can demean their dignity and sends a strong message that such discrimination is permissible, or even acceptable in society.[147] Excluding RCMP women who balance work with childcare from the full benefit of the RCMP Pension Plan sends just such a message, and perpetuates the discriminatory

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[142] Fox Affidavit, para. 26 [AR, Vol. III, Tab 11 at 334]
[143] Noble Affidavit, paras 31-32 [AR, Vol. III, Tab 12 at 351-352]; Fox Affidavit, para. 13 [AR, Vol. III, Tab 11 at 330]; The lack of flexible work arrangements such as job-sharing or part-time employment was cited as a major reason why women left the policing profession. See *Status of Women in Canadian Policing* at 111-112
[144] Fraser Affidavit, paras 29 and 32 [AR, Vol. II, Tab 9 at 136-137] Fraser also explained that she was specifically disadvantaged by accepting to work in a job-share. She was already off on LWOP with the RCMP and working part-time for her local municipality, with the plan to buy-back her full-time pension credits when she returned. She was invited to return to work early in a job-share, and she agreed to do so assuming she could buy back full-time pension credit for the unworked hours. Had she known about this discriminatory rule, she would have remained on LWOP and continued working at the municipality. See Fraser Transcripts, Qs 128-130 at 30-31 [AR, Vol. VI, Tab 20 at 942-943]
[145] Pilgrim Affidavit, paras 38-39 [AR, Vol. II, Tab 10 at 169]
[146] Rossignol Affidavit, paras 30-32 [AR, Vol. V, Tab 18 at 806-807]
[147] *Vriend, supra* at paras 100-101

attitude that those who choose to balance work and family obligations are less worthy or deserving of respect.

87. In the present case, this differential treatment has clearly had a demeaning and painful impact on the Appellants as women. To Fraser, "this policy sends the message that the RCMP does not want women with children to return to their duties."[148] Fox testified that the exclusion of women who job-share "sent a clear message to me: women who have children are not really wanted in the Force."[149] Pilgrim explained that she had to overcome many barriers faced by women in the policing profession over her 27 years in the Force. However, this experience left her feeling that "the RCMP does not value or respect women members and members with children" and "does not really want women with children to remain in the Force."[150]

88. Finally, these historic patterns of discrimination towards women in the workforce are amplified in the RCMP context. Policing was historically an exclusively male profession, and women were not permitted to join the RCMP until 1974.[151] By 1985 (shortly before the Appellants joined the RCMP), only 3.6% of police officers in Canada were women.[152] The most recent data provided by the RCMP indicates that only 26.5% of its members are women.[153] As the Appellants' expert explained, around-the-clock shifts of patrol work presents enormous difficulties for those with childcare responsibilities, and these challenges are heightened for members posted to rural or isolated communities.[154] Inflexible work arrangements also characterize the policing profession. Again, the RCMP did not even *allow* job-sharing or part-time work for regular members until 1997. No doubt this resistance to part-time work arises from historical beliefs and attitudes about policing as a male profession, and has certainly made life more difficult for women in policing, including the Appellants.[155]

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[148] Fraser Affidavit, para. 31 [AR, Vol. II, Tab 9 at 137]
[149] Fox Affidavit, para. 25 [AR, Vol. III, Tab 11 at 333-334]
[150] Pilgrim Affidavit, paras 40-41 [AR, Vol. II, Tab 10 at 169-170]
[151] Pilgrim Affidavit, para. 4 [AR, Vol. II, Tab 10 at 161]
[152] *Status of Women in Canadian Policing*, *supra* at xxi and 2
[153] Rossignol Affidavit, para. 17 [AR, Vol. V, Tab 18 at 803]
[154] Affidavit of Prof. C. Higgins, paras 5, 10(c), 11-12 [AR, Vol. IV, Tab 13 at 526-527, 529-530]; Duxbury and Higgins, *supra* at 9, 56, 67-68, 70, 103 and 106 [AR, Vol. IV, Tab 13 at 582, 629, 640-641, 643, 676, 679]; *Status of Women in Canadian Policing*, *supra* at 148
[155] *Status of Women in Canadian Policing*, *supra* at 6-7, 52, 111-112, 125, and 148

(ii) Stereotypes

89. Traditional pensions were designed based on the stereotype that women were dependent on men. The nature and impact of this stereotype was explained by the Royal Commission on the Status of Pensions in Ontario:

> [E]mployment pensions have been designed for middle and upper-income full-time employees with long service, typically male, who provide for the support of a family. The stereotypes of women as economically dependent upon male breadwinners or as a secondary wage earner have an underlying assumption that women need not save for retirement and may rely upon the male breadwinner to do so.[156]

90. The RCMP Pension Plan does not give full consideration to the situation of women and the exclusion of the "buy back" for temporary part-time hours is a vestige of the stereotype that women should be primarily responsible for childcare, and their working life a secondary matter. The Force fails to acknowledge or treat seriously the fact that the RCMP members who choose to job-share or work part-time are overwhelmingly female and that the denial of the "buy back" pension option for temporarily reduced hours of work will have a negative impact on their retirement incomes. As Justice Abella wrote for the Commission on Equality in Employment, to achieve equality for women an environment must be created that "permits the adequate care of children while also allowing the equal right of men and women to maximize their economic potential."[157]

91. Moreover, the RCMP pension plan perpetuates the stereotype that it is acceptable for women to fill one of two roles in society – either as caregiver or member of the labour force, but not both at the same time. The Plan perpetuates the notion that there are two separate and distinct roles available to women, and that women who choose to do both at the same time are less worthy or deserving of respect. Female members who have children and take LWOP are valued and respected insofar as they are allowed access to buy back pensionable service. Women who give full-time service are also valued and respected in this way. But the category of women who are seen as trying to do both at once are not.

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[156] *Report of the Royal Commission on the Status of Pensions in Ontario, Vol. III: Design for Retirement* (Toronto: Queen's Printer for Ontario, 1980) at 116 [AR, Vol. IV, Tab 16 at 735]
[157] *Commission on Equality in Employment* at 28 [AR, Vol. IV, Tab 14 at 695]

(iii) Broader Context

92. In analyzing discrimination claims, courts must also consider the broader context of the benefit at issue and the ameliorative benefits for others. In determining whether a pension plan is discriminatory, "the question is whether the lines drawn are generally appropriate, having regard to the circumstances of the groups impacted and the objects of the scheme."[158]

93. In this case, the Plan benefits women who take LWOP by permitting them to "buy back" full-time pension contributions for the period of their leave in order to protect their retirement income, but it excludes women who balance work and family responsibilities through job-sharing from this benefit. The *Income Tax Act* and *ITR* authorize pension plans to allow members who temporarily reduce their hours of work to later make additional contributions and accrue full-time pension entitlements.[159] The Respondent argues that these provisions are merely optional, but offers no reasons why the *RCMPSA* should be more restrictive, other than to note that Treasury Board would have to approve any legislative amendments.[160] There is nothing in the broader context of the *RCMPSA* that would indicate that the "lines drawn" in the Plan are appropriate or justified.

94. To conclude, the Appellants submit the RCMP pension plan creates a distinction that adversely affects RCMP members on the grounds of sex and family status, and that this distinction perpetuates the disadvantage of women in the workplace. The Appellants will all face a reduced retirement income as compared their colleagues with the same years of service. The RCMP pension plan penalizes women who choose to balance their work and family obligations through job-sharing or part-time work. This sends the message that the Appellants' choice on a deeply personal matter is not valued or deserving of respect. The Plan discriminates on the grounds of sex and family status and violates subsection 15(1) of the *Charter*.

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[158] *Withler, supra* at paras 67 and 71, 71 for quote
[159] *ITR, supra*, s.8300(1) ("period of reduced services"), s.8500(1) ("eligible period of reduced pay"), s.8504(4) and s.8507
[160] Gowing Affidavit, paras 53 and 55 [AR, Vol. V, Tab 17 at 754-755]; Rossignol Affidavit, paras 40-42, 44 [AR, Vol. V, Tab 18 at 808-809]

D. The Impugned Provisions are Not Saved by Section 1 of the *Charter*

95. Under the *Oakes* test, the Respondent must first establish that the *Charter* breach is necessary to achieve a pressing and substantial objective. The Respondent must then show that the measures taken to achieve this objective are proportionate to the harms caused by the constitutional violation.[161] The Appellants submit that none of the requirements set out in the *Oakes* test can be met in the present case and that, as such, the breach cannot be justified under section 1 of the *Charter*.

96. Significantly, the *ITR* authorize pension plans that allow contributors to make full-time pension contributions for "a period of reduced services" on a temporary basis.[162] The Respondent acknowledges that its Plan does not extend this benefit of the law to its members, but does not explain or justify this exclusion.[163] This evidence does not come close to meeting the Respondent's heavy burden of establishing the pressing and substantial nature of the objective of excluding certain groups from a statutory regime. The Appellants submit that the section 15 breach cannot be saved by section 1.[164]

E. Remedy

97. If this appeal is allowed and the impugned provisions of the *RCMPSA* and *Regulations* are found to violate subsection 15(1) and are not saved by section 1 of the *Charter*, an appropriate and just remedial order should grant relief under subsection 52(1) or, alternatively, subsection 24(1) of the *Charter*.

98. Courts have the power to extend under-inclusive legislation either by reading in or by severance of provisions limiting the extension of benefits contrary to the *Charter*.[165] As noted by

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[161] *Oakes, supra* at 138g-139g. Also see: *Eldridge, supra* at para. 84; *Vriend, supra* at para. 108; *Andrews, supra* at 183-186
[162] *Income Tax Regulations*, CRC c. 1393, s. 8300(1) "period of reduced services", s. 8500(1), "eligible period of reduced pay", s. 8504(4)(c) and s. 8507(1), (2), (3) and (70)
[163] See Gowing Affidavit at paras 53-55 [AR, Vol. V, Tab 17 at 754-755]; Rossignol Affidavit at paras 40-42 [AR, Vol. V, Tab 18 at 808-809]
[164] *Vriend, supra* at para. 115
[165] *Schachter v Canada*, [1992] 2 SCR 679 at 695g-696a, 698b. Also see *Vriend, supra* at paras 153, 179

Lamer CJ in *Schachter*, where the issue is whether to extend a benefit to a group not included in the impugned legislation and that group is much smaller than the group already benefitted, the remedy of reading in will be considered far less intrusive than striking down the scheme.[166] The Supreme Court has also confirmed that remedies under subsections 52(1) and 24(1) may operate retroactively, reaching into the past to annul the effects of the unconstitutional law and ensure the rights of affected parties are meaningfully vindicated in a responsive and effective manner.[167]

99. In *Bigsby*, the Alberta Court of Appeal held that a statutory pension plan discriminated on the grounds of age. As a remedy, the Court granted a declaration that the plan breached the Charter and ordered the respondent to compensate the claimant in the amount of the lost pension benefits.[168] Accordingly, it is important to not simply address the discriminatory plan, but also ensure the individual receives an appropriate remedy.

100. In *Miron v Trudel*, the Supreme Court found a declaration of invalidity would still leave the appellants and others in their situation without a remedy. The Court read in common law spouses into the provisions, retroactively to the time they would likely have been amended had the legislature been forced to address the issue raised by the applicants.[169]

101. In the present case, the Appellants submit that declaratory relief and orders retroactively reading in inclusive language to the *RCMPSA* and *Regulations* should be granted, so as to ensure that the relatively small number of RCMP members who temporarily worked reduced hours under the 1997 job-sharing policy are afforded a meaningful remedy, namely the ability to contribute to and accrue pensionable benefits on an equitable basis as compared those taking LWOP, regardless of whether they are still members or if they have already retired.

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[166] *Schachter v Canada*, [1992] 2 SCR 679 at 711e-712a; *Vriend, supra* at paras 162-163
[167] *Canada v Hislop*, [2007] 1 SCR 429 at paras 81-82, citing *Miron v Trudel*, [1995] 2 SCR 418. For example, the Federal Court held in *Abdelrazik v Canada (Minister of Foreign Affairs)*, 2009 FC 580 that an applicant whose *Charter* rights were violated was "entitled to be put back in the place he would have been but for the breach" [at para. 158].
[168] *Bigsby v Alberta (Pensions Administration)*, 2005 ABCA 52 at para. 5
[169] *Miron v Trudel*, [1995] 2 SCR 418, 1995 CanLII 97 (SCC) at paras 176-180

PART IV – COSTS

102. The Appellants seek their costs throughout. However, if this Court denies the appeal then no costs should be awarded against the Appellants, in the same manner as the Courts below.

PART V – ORDER SOUGHT

103. The Appellants request the following relief:

(a) The appeal be allowed;

(b) The Court issue a declaration that the *RCMP Superannuation Act* and the *RCMP Superannuation Regulations* violate the equality guarantee in subsection 15(1) of the *Canadian Charter of Rights and Freedoms* by failing to provide the equal benefit of the law to women and individuals with family care responsibilities, and that this violation cannot be justified in a free and democratic society;

(c) The Court issue an Order reading in language to sections 5, 6.1, and 27 of the *RCMP Superannuation Act* and sections 10-10.10 of the *RCMP Superannuation Regulations*, that grants RCMP officers who work part-time for family reasons the right to contribute to the RCMP Pension Plan and accrue pension benefits on an equitable basis as compared to RCMP officers who take leaves of absence;

(d) The Court issue an Order granting retired RCMP regular members who entered job-sharing arrangements during their years of service the right, for a period of one year from the date of judgment, to buy back pensionable years of service and make contributions to the RCMP Pension Fund on an equitable basis as compared to RCMP officers who took leaves of absence;

(e) Costs be awarded to the Appellants throughout; and

(f) The Court grant such further and other relief as counsel may request and this Honourable Court may deem just.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at Ottawa, Ontario, this 12th day of August, 2019.

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Paul Champ / Bijon Roy
CHAMP & ASSOCIATES
Solicitors for the Appellants

PART VII – LIST OF AUTHORITIES

	Para(s) Cited
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Canada, Task Force on Barriers to Women in the Public Service, *Beneath the veneer: the report of the Task Force on Barriers to Women in the Public Service, Volume 1: Report and Recommendations* (Hull, 1990)	
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Walker, G., *The Status of Women in Canadian Policing: 1993* (Ottawa: Department of Public Security Canada, 1993)	72, 84, 88

APPENDIX: NOTICE OF CONSTITUTIONAL QUESTION

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:

JOANNE FRASER, ALLISON PILGRIM, and COLLEEN FOX

Appellants
(Appellants)

- and -

ATTORNEY GENERAL OF CANADA

Respondent
(Respondent)

NOTICE OF CONSTITUTIONAL QUESTION
(Filed pursuant to Rule 33 of the *Rules of the Supreme Court of Canada*)

TAKE NOTICE that I, Paul Champ, counsel for the Appellants, assert that the appeal raises the following constitutional question(s):

(1) Do provisions of the RCMP pension plan, including sections 5, 6, 6.1, 26, and 27 of the *Royal Canadian Mounted Police Superannuation Act*, RSC 1985, c.R-11 and sections 2 and 10 to 10.10 of the *Royal Canadian Mounted Police Superannuation Regulations*, CRC c.1393 infringe subsection 15(1) of the *Canadian Charter of Rights and Freedoms*, in that they operate to discriminate on the basis of sex and/or parental status by denying the appellants the right to accrue full-time pension benefit credit for periods when they worked reduced hours for family reasons?

(2) If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under section 1 of the *Canadian Charter of Rights and Freedoms*?

AND TAKE NOTICE that an attorney general who intends to intervene with respect to this constitutional question may do so by serving a notice of intervention in Form 33C on all other parties and filing the notice with the Registrar of the Supreme Court of Canada within four weeks after the day on which this notice is served.

Dated at the City of Ottawa, in the Province of Ontario, this 17th day of June, 2019.

SIGNED BY:

Paul Champ

Bijon Roy

CHAMP & ASSOCIATES
Barristers & Solicitors
43 Florence Street
Ottawa, ON K2P 0W6
T: 613-237-2441
F: 613-232-2680
E: pchamp@champlaw.ca
E: broy@champlaw.ca

Counsel for the Appellants

ORIGINAL TO: **THE REGISTRAR**

COPY TO:

Nathalie G. Drouin
Deputy Attorney General of Canada

Per: Christopher Rupar
Gregory Tzemenakis
Youri Tessier-Stall

Department of Justice Canada
Civil Litigation Section
National Litigation Sector
50 O'Connor Street, Room 500
Ottawa, ON K1A 0H8
T: 613-670-6338
F: 613-954-1920

Solicitors for the Respondent

AND TO:

Attorney General of Newfoundland and Labrador
Attn: Manager, Central Agencies & Justice Policy
Confederation Building, 4th Floor, East Block
PO Box 8700
St John's, NL A1B 4J6
F: 709-729-2129
E: justice@gov.nl.ca

Agent: D. Lynne Watt, Gowling WLG
E: lynne.watt@gowlingwlg.com

Attorney General of Nova Scotia
Department of Justice, Legal Services Division
5151 Terminal Road, PO Box 7
Halifax, NS B3J 2L6
F: 902-424-4556
E: jusmin@novascotia.ca

Agent: D. Lynne Watt, Gowling WLG
E: lynne.watt@gowlingwlg.com

Attorney General of New Brunswick
Centennial Building
PO Box 6000
Fredericton, NB E3B 5H1
F: 506-453-3561
E: jo.frank@gnb.ca

Agent: D. Lynne Watt, Gowling WLG
E: lynne.watt@gowlingwlg.com

Attorney General of Prince Edward Island
Department of Justice and Public Safety
Shaw Building, South 4th Floor, PO Box 2000
95 Rochford Street
Charlottetown, PEI C1A 7N8
F: 902-368-4910
E: sthorne@gov.pe.ca

Agent: D. Lynne Watt, Gowling WLG
E: lynne.watt@gowlingwlg.com

Attorney General of Quebec
Ministère de la Justice
Édifice Louis-Philippe-Pigeon, 2nd Floor
1200, route de l'Église, 9e étage
Québec, QC G1V 4M1
F: 418-646-0027
E: ministre@justice.gouv.qc.ca

Agent: Sylvie Labbé, Noel et Associés
E: s.labbe@noelassocies.com

Attorney General of Ontario
Attn: Constitutional Law Branch
720 Bay Street, 8th Floor
Toronto, ON M5G 2K1
F: 416-326-4015
E: attorneygeneral@ontario.ca

Agent: Karen Perron, Borden Ladner Gervais LLP
E: KPerron@blg.com

Attorney General of Manitoba
Attn: Director, Constitutional Law Branch
1205-405 Broadway
Winnipeg, MB R3C 3L6
F: 204-945-0053
E: minjus@leg.gov.mb.ca

Agent: D. Lynne Watt, Gowling WLG
E: lynne.watt@gowlingwlg.com

Attorney General of Saskatchewan
Attn: Department of Justice
820-1874 Scarth Street
Regina, SK S4P 4B3
F: 306-787-9111
E: jus.minister@gov.sk.ca

Agent: D. Lynne Watt, Gowling WLG
E: lynne.watt@gowlingwlg.com

Attorney General of Alberta
Attn: Director, Constitutional and Aboriginal Law Section
4th Floor, Bowker Building
9833-109 Street
Edmonton, AB T5K 2E8
F: 780-425-0307
E: ministryofjustice@gov.ab.ca

Agent: D. Lynne Watt, Gowling WLG
E: lynne.watt@gowlingwlg.com

Attorney General of British Columbia
Attn: Constitutional and Administrative Law Division
1001 Douglas Street
Victoria, BC V8V 1X4
F: 250-387-6411
E: AG.Minister@gov.ab.ca

Agent: Karen Perron, Borden Ladner Gervais LLP
E: KPerron@blg.com

Attorney General of the Yukon Territory
Attn: Assistant Deputy Minister
Andrew A. Philipsen Law Centre, 4th Floor, Box 2703 (J-1)
2130 Second Avenue
Whitehorse, YK Y1A 2C6
F: 867-667-5790
E: justice@gov.yk.ca

Agent: Marie-France Major, Supreme Advocacy
E: mfmajor@supremeadvocacy.ca

Attorney General of the Northwest Territories
Attn: Director, Legal Division
Department of Justice, Government of the Northwest Territories
Yellowknife Courthouse
PO Box 1320
Yellowknife, NT X1A 2L9
F: 867-873-0234
E: Mark_Aitken@gov.nt.ca

Agent: D. Lynne Watt, Gowling WLG
E: lynne.watt@gowlingwlg.com

Attorney General of Nunavut
Attn: Director, Legal & Constitutional Division
Department of Justice
PO Box 1000, Station 540
Iqaluit, NU X0A 0H0
F: 867-975-9349
E: justice@gov.nu.ca

Agent: D. Lynne Watt, Gowling WLG
E: lynne.watt@gowlingwlg.com