Federal Court  Cour fédérale

Date: 20170608

Docket: T-2365-14

Citation: 2017 FC 557

Ottawa, Ontario, June 8, 2017

PRESENT: The Honourable Madam Justice Kane

BETWEEN:

JOANNE FRASER, ALLISON PILGRIM AND COLLEEN FOX

Applicants

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] The Applicants, who are now all retired members of the Royal Canadian Mounted Police [RCMP], bring this application pursuant to sections 18 and 18.1 of the *Federal Courts Act*, RSC, 1985, c. F-7, seeking declaratory and other relief. The Applicants allege that 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] discriminate against them on the enumerated ground of sex and the analogous ground of parental status (as

agreed for the purpose of this application), contrary to subsection 15(1) of the *Canadian Charter of Rights and Freedoms* [the *Charter*]. The Applicants submit that the provisions of the RCMPSA and the Regulations fail to provide the equal benefit of the law to women with child-care responsibilities because they do not permit the members, who participated in job-sharing arrangements and who are predominantly women with parental status, to contribute to their pension in the same way as members who worked full-time or who took Leave Without Pay (LWOP). The Applicants argue that this violation cannot be justified in a free and democratic society.

[2] The Applicants seek a range of specific orders, some of which were revised in their oral submissions, including a declaration that the impugned provisions of the RCMPSA violate subsection 15(1) of the *Charter* and an order to read in particular language to the impugned provisions of the RCMPSA to permit the Applicants and those in the same situation to make retroactive contributions to their pension at the full-time rate (i.e., to "buy-back") in order to receive pension benefits as if they had worked full-time during the time they were job-sharing.

I. Overview

[3] The Applicants submit that the RCMPSA discriminates on the basis of sex and parental status, by denying them the option of contributing to their pension at the full-time rate for the period of service that they were job-sharing in order to meet their child-care responsibilities. The Applicants state that they will all receive a reduced retirement income compared to their colleagues with the same years of service as a result of being denied this benefit.

[4] The Applicants note that RCMP members who work part-time and/or who job-share are overwhelmingly women and that this reflects work force patterns for women more generally. The Applicants submit that the RCMPSA makes a distinction that perpetuates a pre-existing disadvantage with respect to the barriers women face to ensure a sufficient retirement income and perpetuates a stereotype that women can only fill one of two roles-either to work full time or to stay home and care for children and family-but that they cannot do both.

[5] The Respondent submits that the RCMPSA and the Regulations do not create any direct or indirect distinction on the enumerated ground of sex or on the analogous ground of parental status. The provisions at issue do not cause or contribute to the disadvantage of a reduced pension. The impact on the Applicants' pension benefits is due to their decision to job-share, and their resulting part-time employment status, and is not due to the provisions of the RCMPSA which apply to all members equally.

[6] The Respondent notes that all RCMP members accrue pensionable service and make contributions at the same rate, and all are entitled to pension benefits that reflect their years of service and assigned hours of work. No pension plan contributor can augment their pension by "buying-back" pension benefits for periods of time not worked. The Respondent submits that the Applicants are, in effect, seeking an additional benefit to which no other member of the RCMP and no other public servants are entitled.

[7] For the reasons elaborated upon below, and taking into consideration the principles of the jurisprudence, the social science literature provided by the Applicants regarding the evolution of

the status of women in the workforce, the other limited evidence, and the oral and written submissions of the Applicants and Respondent, the application is dismissed.

[8] Although the available evidence shows that the vast majority of the few members of the RCMP who job-share and work part-time are women and that at least 60% of these members do so for the purpose of meeting their child-care responsibilities, the impact on their pension benefits is not because they are women or because of their parental status. The impact on their pension benefits is because they worked part-time. Their pension reflects their part-time status just as it would for anyone who worked part-time at some point in their career.

[9] The Applicants chose to job-share to meet the challenges of balancing their family responsibilities and the demands of policing duties. While they note that this is an "economic hit" and an adverse impact on their pension, this is so only if the pension benefit is viewed in isolation from other economic and other factors and without regard to other possible advantages of job-sharing. There is no evidence on the record about the many other considerations that were part of the Applicants' decision to job-share and work part-time and there is little evidence about the other pros and cons of working part-time while meeting child-care responsibilities and remaining actively engaged with their children.

[10] However, accepting that there is an adverse impact for these Applicants, not all adverse impacts are discriminatory. The jurisprudence has established a two-part analysis to determine whether a law or policy infringes the guarantee of equality: first, does the law create a distinction

based on an enumerated or analogous ground and second, does the distinction create a disadvantage by perpetuating prejudice or stereotyping.

[11] A discriminatory distinction is one that has the effect of perpetuating an arbitrary disadvantage because of membership in an enumerated or analogous group. The RCMPSA does not create a distinction based on the enumerated ground of sex or the analogous ground of parental status. The fact that the majority of part-time members and members in a job-sharing arrangement are women and that these job-sharers are denied the option of contributing to their pension at the full-time rate is not because of the RCMPSA. Rather, it is because of their personal circumstances and the decisions they made.

[12] In the event that I am wrong in my finding and that there is a distinction in the RCMPSA based on sex or parental status, any such distinction would not create a disadvantage by perpetuating prejudice or stereotyping.

[13] The reality is that women continue to face barriers in the work place, many of which are due to the daunting challenges of balancing family and career. That the Applicants found a way to meet the challenges and later returned to full-time duties and had long careers in the RCMP is an example of more flexible arrangements that now exist to respond, to some extent, to these challenges.

[14] The Applicants efforts in pursuing this litigation to raise awareness about the need for employment policies and legislation to continue to evolve to better meet the needs of women and

parents in the work force are commendable. Although the RCMPSA does not fully meet the Applicant's needs and expectations or those of other members who job-shared and worked part-time, and may initially appear to be out of step with options for members who took LWOP, this does not mean that the RCMPSA is discriminatory.

II. Background

[15] The Applicants, Joanne Fraser, Allison Pilgrim and Colleen Fox, were police officers and members of the RCMP, and are now retired. They all gave birth to their first children in the early to mid-1990s, and all returned to full-time duties after taking a six-month maternity leave. The Applicants all describe the challenges they encountered in returning to patrol duties, arranging for child care, and juggling their many responsibilities.

[16] After giving birth to their second children, the challenges were exacerbated. Ms. Fox found that working full-time while caring for two children, including one with a disability, was not feasible. She inquired about part-time work or other options, but none were available in the RCMP at the time. Faced with no other options, she retired from the RCMP in June, 1994.

[17] Ms. Fraser also inquired about options to address the competing demands of her career and her family after her second maternity leave in March, 1997. The RCMP granted her a five year LWOP.

[18] In December 1997, the RCMP adopted a job-sharing policy; RCMP members could share a single full-time position with another member or members for a limited or fixed period of time.

[19] Ms. Pilgrim took advantage of the job sharing policy and returned to duty in a job-sharing arrangement in 1999 after her second maternity leave.

[20] Ms. Fox re-enrolled in the RCMP in 2000 and returned to duty in a job-sharing position.

[21] Ms. Fraser was approached by the RCMP to return from her LWOP in order to job-share with another member. She agreed and returned to duty in 2000.

[22] The Applicants all explain that they participated in job-sharing arrangements for family reasons, primarily to balance child care obligations with their work. They describe that job-sharing permitted them to remain active in their children's lives and meet their day to day needs as well as to maintain their expertise as police officers.

[23] The Applicants do not dispute that they each signed a Memorandum of Agreement [MOA] which set out the terms and conditions of the arrangement. They do not allege any misrepresentation by the RCMP with respect to the terms and conditions of job-sharing. However, Ms. Fraser and Ms. Pilgrim note that they were given varying advice from pay and benefits advisors about their status while job-sharing and their ability to buy-back their pension benefits.

[24] The Applicants describe that only after they had commenced job-sharing and / or when they returned to full-time duties did they become fully aware that, despite their expectation that they could "buy-back" full-time pension benefits for the period of time that they were

job-sharing in the same way as if they had been on LWOP, they could not do so. The Applicants state that they will receive lower pension benefits on retirement than if they worked full-time because they chose to participate in job-sharing arrangements for a fixed period of time to meet their child care and family responsibilities. They note that if they had opted to take LWOP they could have made contributions to "buy-back" full-time pension benefits for the time not worked and would have ultimately received pension benefits as if they had worked full-time for that period.

III. Other initiatives, grievances and complaints

[25] The Applicants and other RCMP Members who participated in job-sharing arrangements raised their concerns with senior management when they learned they would not be able to buy-back full-time pension benefits for the period of time they were job-sharing. Fourteen members wrote to RCMP Commissioner J.P.R. Murray on May 31, 2000, outlining the situation, expressing the view that the denial of this benefit was unfair and illogical, and seeking support for changes to be made.

[26] The RCMP Pension Advisory Committee [PAC], established pursuant to the *RCMP Act*, RSC 1985, c R-10 [RCMP Act] to provide advice on pension policy and related issues, also considered the issue and retained an Actuary to provide advice on the options available under the RCMPSA for part-time service. The Actuary acknowledged the flexibility provided through the *Income Tax Act*, RSC, 1985, c. 1 (5th Supp.) [ITA] and the *ITA Regulations*, CRC, c. 945 [ITA Regulations], which include provisions with respect to pension contributions for those on

temporarily reduced hours, and noted that the RCMPSA could be amended to address periods of reduced work-hours by RCMP members at various stages of their family life or career.

[27] The Actuary pointed out, in his November 1, 2000 letter summarising his opinion, that there were several restrictions in the ITA Regulations. He noted that "if a member has always rendered services on a part-time basis, it would not be possible to provide pension benefits as if the employee rendered services on a full-time basis".

[28] Ms. Pilgrim and Nancy Noble (an affiant) filed grievances in 2000 challenging the denial of their request to buy-back full-time pension benefits for the time they were job-sharing. Both grievances were referred to the External Review Committee (ERC). In 2007, the ERC found in their favour. The ERC was of the view that there was nothing in law or policy to prohibit the RCMP from defining the job-sharing arrangement as hours worked plus a period of LWOP. The ERC relied on the Actuary's opinion that the RCMPSA could be amended and on a Treasury Board pre-retirement leave policy that allowed public service employees nearing retirement to reduce their hours of work and treat the unworked hours as LWOP.

[29] The ERC decisions are not binding on the RCMP Commissioner. In 2010, the Acting Commissioner dismissed both grievances and found that the RCMPSA does not permit defining job-sharing as part LWOP, and that legislative amendments to the RCMPSA would be required to permit members to buy back pension benefits for the time spent job-sharing. The Commissioner acknowledged the members' situation but found that the inability for the job-sharing members to buy back full-time pension benefits was not discriminatory.

[30] The Applicants also note that the RCMP PAC supported a proposal to allow members who are job-sharing to buy back full-time pension credits. In addition, RCMP Inspector Carma Mackie advised the Applicants by email in 2006 that work had been completed to change the RCMPSA and the Regulations to allow job-sharers to benefit from the pension plan in the same way as full-time members.

IV. The Evidence

[31] The evidence was provided by way of affidavits. The Applicants submitted their own affidavits with exhibits, along with the affidavit of Nancy Noble. They describe their careers, the challenges of returning to patrol duties full-time after their second maternity leave while meeting their responsibilities to their children, and their job-sharing arrangements.

[32] The Applicants also submitted the affidavit of Professor Christopher Higgins describing the conclusions of his research on work and family issues, and the impact of "role overload" (when work interferes with family obligations or when family obligations interfere with work to the extent that the person feels the stress of never having enough time) on individuals and organizations, including in the policing environment.

[33] The Respondent submitted the evidence of pension experts, Shelly Rossignol and Kimberley Gowing.

[34] Ms. Rossignol describes the RCMP pension plan (the RCMPSA), part-time employment generally and in the RCMP, LWOP, and job-sharing. Ms. Rossignol explains the difference

between pensionable service, pension contributions, pension benefits, and how pension benefits are calculated (i.e. the amount the retired member will receive). Ms. Rossignol also clarifies some of the information included in the affidavits of the Applicants.

[35] Ms. Gowing provides an overview of public sector pension plans, including the RCMPSA, describes part-time pensionable service, describes LWOP, and explains that the ITA Regulations regarding temporarily reduced hours are optional and are not part of the RCMPSA or the *Public Service Superannuation Act*, RSC 1985, c P-36 (PSSA).

[36] A more detailed summary of the affiants' evidence is attached as Annex A**.**

V. The Concepts and Terminology

[37] The Applicants used various terms to refer to the contributions or benefits they hoped or intended to "buy-back" in order to have the same pension benefits upon retirement as if they had worked full-time throughout their years of service. The relief initially requested by the Applicants also suggests some misunderstanding of the terms and the operation of the RCMPSA. In addition, the terms the Court has used in summarizing the submissions and capturing the issues at stake may also vary. It is, therefore, helpful to clarify the concepts of pensionable service, pension contributions and pension benefits as well as part-time and full-time employment status, LWOP, and temporarily reduced hours. Regardless, there may be some inadvertent misuse of the proper terms regarding the "buy-back" concept.

[38] With respect to pensionable service, Ms. Rossignol explains the "one year equal one year" rule, which means that years of pensionable service accrue at the same rate for part-time and full-time members; a member who works for one year accrues one year of pensionable service, regardless of their status. In other words, a member who worked for 20 years full-time and 5 years part-time has 25 years of pensionable service, just as a member who worked full-time for 25 years.

[39] With respect to pension contributions, all members contribute the same legislated rate, i.e. 7.5% of their salary, to the pension fund. This amount is pro-rated to reflect the assigned hours of work, so that contributions are made proportional to the actual salary during that period. The Applicants contributed to their pension while they were job-sharing and their contributions were proportional to their assigned hours.

[40] Pension benefits refer to the amount a member will receive from the pension plan upon retirement. The pension benefit is based on the average annual pay received during the five best consecutive years of highest paid pensionable service. Where a member has periods of part-time pensionable service, the average annual pay is determined based on the full-time equivalent of their pay so as not to disadvantage a member for working part-time during the years that their position attracts the highest salary rates. The pension is subsequently pro-rated to reflect the member's actual assigned hours of work.

[41] The calculation provided by Ms. Rossignol as an example shows that a member who worked for 30 years comprising 25 years full-time, two years at 18.75 hours per week, and three

years at 20 hours per week, with the five best years' salary averaging $50,000, would receive a pension benefit of $27, 600 per year. This reflects the pro-rating of the 5 years on part-time status.

[42] If that member had worked full-time for 30 years, the pension benefit would be $30,000 based on the same calculations. This reflects a difference of $2,400 per year or 92% of the full pension based on five years of part-time status.

[43] Employment status also requires clarification. The Applicants characterize their status in a few different ways. The Applicants submit that they were full-time members of the RCMP who agreed to temporarily work reduced hours. They also submit that the time they were not working in the job-sharing arrangement was LWOP. The Applicants also acknowledge that they were temporarily working part-time while job-sharing. Under all scenarios the Applicants argue that they were presumptively full-time, as their reduced or part-time hours were only for a limited time, and could be changed by their commanding officer.

[44] Ms. Pilgrim states that she viewed herself as being on LWOP half the time, and working the other half, and that she submitted her time sheets accordingly, identifying the week she did not work as LWOP.

[45] The Applicants submit that the distinction between part-time and full-time need not be so rigid because the social reality is that full-time members will work reduced hours while their

children are young and return later to full-time duty. The Applicants submit that this differs from the situation of a member who is hired to work part-time.

[46] The Respondent disagrees with the Applicant's characterization of their status as presumptively full-time. The RCMPSA or the Regulations do not include a definition of "job-sharing" and provide only that a member is either full-time or part-time. The Respondent submits that job-sharing is and has always been a form of part-time employment noting that this was acknowledged by the Applicants under cross-examination. Although the Applicants had been full-time members, their status changed to part-time while they were job-sharing.

[47] In my view, it is clear that the Applicants worked part-time while they were in a job-sharing arrangement.

[48] The 1997 Bulletin described "job-sharing" as meaning two or three members sharing the duties and responsibilities of one full-time position. It also describes "job-sharing employment" as applying to a member whose normal hours of work are more than an average of 12, but less than 40 per week. This is consistent with the definition of part-time work found in the *Public Service Superannuation Regulations*, CRC, c 1358, s.3(2).

[49] The RCMP Administration Manual 11.10 (which Ms. Rossignol explains captures the contents of the 1997 previous Bulletins regarding job-sharing) includes a Chapter on "Compensation for Part-time or Job-sharing Members". Although it uses both terms, which could suggest some difference between the two, the provisions are the same for members who

work part-time or members who job-share. In addition, it clearly distinguishes those who job-share and those who are full-time members.

[50] The provisions of the standard MOA, which each member in a job-sharing arrangement signed, also makes the distinction with full-time employment. For example, a clause provides that if the member requests "full-time employment in the future" such a request will be considered only if it is administratively or operationally feasible. If the commanding officer requests the member to increase their hours up to full-time employment, one month's notice is required, which also signals a change in employment status.

[51] The MOA signed by Ms. Pilgrim stated, among other provisions, that the job-sharing arrangement would begin on August 6, 1999 and end on August 6, 2002, "at which time [she] would revert to full-time status or the appropriateness of continuing the job-sharing arrangement will be re-evaluated".

[52] Ms. Noble's MOA noted that she would work "one-half of a full-time member's scheduled hours" and that each member in the job-sharing arrangement "will do one-half of a full time member's work".

[53] These provisions support the conclusion that the members who were job-sharing were neither full-time members, nor presumptively full-time, at that time. Full-time is a different employment status than their status while job-sharing. The evidence of Ms. Rossignol and Ms. Gowing explain that job sharing is part-time employment and all compensation and related

matters, including pension contributions, are calculated on the basis of part-time employment status.

[54] I also note that Ms. Fox retired from the RCMP in 1994 and re-enrolled in 2000. Upon her re-enrollment she immediately began to work in a job-sharing arrangement. This is not consistent with the Applicants' argument that they were presumptively in a full-time position; Ms. Fox did not have any position prior to her re-enrollment.

[55] I do not agree that the Applicants were partly on LWOP while job-sharing. LWOP is a different status that reflects that the member has no assigned hours and no attachment to the workplace during the time on LWOP. The Applicants had assigned hours, which were on average 18.75 hours per week, which is half-time.

[56] The Applicants' reference to the ITA and the ITA Regulations and their alternative characterization of their status as full-time members on temporarily reduced hours does not reflect the reality or that concept. As explained by Ms. Gowing, the notion of temporarily reduced hours is distinct from part-time work or LWOP. An employee who works full-time or part-time may be permitted to work temporarily-reduced hours. The ITA Regulations do not create any right for an employee to work temporarily reduced hours. Rather, they address the tax treatment for a pension plan member who has worked temporarily reduced hours and who makes additional pension contributions. This is only possible where the applicable Registered Pension Plan permits. Ms. Gowing notes that neither the PSSA nor the RCMPSA permit this. The fact that the ITA Regulations address this possibility does not buttress the Applicant's argument that

they were on temporarily reduced hours or that the relevant contextual analysis should consider that their situation should be compared with those who do work temporarily reduced hours and can make additional contributions.

[57] Moreover, as explained by Ms. Gowing, even if the Applicants' situation were characterized as temporarily reduced hours, they would not have had the ability to augment their pensions because the RCMPSA does not provide for this.

[58] To conclude on the issue of terms and employment status, I find that the Applicants worked part-time while job-sharing. The Applicants seek to avoid this characterization because they acknowledge that part-time members cannot "buy-back" pension benefits to augment their pension. In addition, employment status is not an enumerated or analogous ground. However, the finding that the Applicants had part-time status does not end the analysis in the present case, as that would foreclose consideration of their claim. The focus is on substantive equality. The Applicants claim is based on the impact of the RCMPSA on their situation as job-sharers who worked part-time and the reasons that led them to do so.

[59] I again note that, based on the clarification of terms and the operation of the RCMPSA, the specific relief requested by the Applicants has been modified.

VI. The Issues

[60] The key issue is whether the impugned provisions of the RCMPSA and the Regulations violate the guarantee of equal protection and benefit of the law without discrimination pursuant to subsection 15(1) of the *Charter*, and if so, whether that violation can be saved by section one.

[61] More specifically, the issue is whether the impugned provisions of the RCMPSA that prevent the Applicants from making pension contributions equal to those of full-time members for the period of time they were working part-time while job-sharing create a distinction on the basis of the enumerated ground of sex or the analogous ground of parental status and whether that distinction is discriminatory.

[62] The Applicants and Respondent agree that the two-part test established in the jurisprudence governs the analysis. As confirmed by the Supreme Court of Canada in *Withler v Canada (Attorney General)*, [2011] 1 SCR 396 [*Withler*], at para 30,

> The jurisprudence establishes a two-part test for assessing a s. 15(1) claim: (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? (See *Kapp*, at para. 17.)

[63] As a preliminary issue, the Respondent submits that the affidavit of Professor Higgins should not be admitted.

VII. The Preliminary Issue; Should the Affidavit of Professor Higgins be Admitted?

[64] The Respondent submits that Professor Higgins' evidence is not admissible; it is neither relevant nor necessary to assist the Court and it does not meet the criteria established for the admission of expert evidence in *R v Mohan*. [1994] 2 SCR 9, [1994] SCJ No. 36 [*Mohan*].

[65] The Respondent submits that Professor Higgins' evidence does not provide information which is likely to be outside the experience and knowledge of the Court. Professor Higgins is not an expert on pensions and his evidence does not address the issue the Court must decide.

[66] The Applicants respond that Professor Higgins' evidence is not provided to address the issue of pensions *per se*. Rather, Professor Higgins provides relevant context; women are more likely to be responsible for child-care and this is particularly so for police officers. Professor Higgins' study shows that the culture of policing and shift work both add to "role overload" and stress. The Applicants submit that although only 10 RCMP members participated in the 2012 study, the results from 4,500 participants would equally apply within the RCMP.

A. *Professor Higgins Affidavit is Admitted*

[67] The Supreme Court of Canada set out the requirements or criteria for accepting expert evidence in a trial in *Mohan*: (a) relevance; (b) necessity in assisting the trier of fact; (c) the absence of any exclusionary rule; and (d) a properly qualified expert. Only the requirements of relevance and necessity are in issue in this case.

[68] With respect to necessity, the Supreme Court of Canada noted, at para 22 that an expert should not be permitted to testify if their testimony is not "likely to be outside the experience and knowledge of a judge":

> [22] This precondition is often expressed in terms as to whether the evidence would be helpful to the trier of fact. The word "helpful" is not quite appropriate and sets too low a standard. However, I would not judge necessity by too strict a standard. What is required is that the opinion be necessary in the sense that it provide information "which is likely to be outside the experience and knowledge of a judge or jury": as quoted by Dickson J. in *R. v. Abbey*, supra. As stated by Dickson J., the evidence must be necessary to enable the trier of fact to appreciate the matters in issue due to their technical nature. *In Kelliher (Village) v. Smith*, [1931] S.C.R. 672, at p. 684, this court, quoting from Beven on Negligence (4th ed. 1928), p. 141, stated that in order for expert evidence to be admissible, "[t]he subject-matter of the inquiry must be such that ordinary people are unlikely to form a correct judgment about it, if unassisted by persons with special knowledge." […]

[69] Professor Higgins' evidence describes the increased "role-overload" faced by women due to child-care responsibilities and how they respond to this in terms of restructuring work and family obligations.

[70] As the Respondent notes, Professor Higgins is not an expert on pensions and he does not address the central issue in this application. However, he provides context to situate the Applicants' job-sharing status. His evidence reflects the Applicants' position that women have sought job-sharing arrangements in order to respond to child-care responsibilities, that this is an example of women "scaling back" at work to address "role overload", and that this has implications in the future. This notion underlies the Applicants' submissions that the RCMPSA has an adverse effect on them on the grounds of sex and/or parental status.

[71] Much of Professor Higgins' evidence comes as no surprise to this judge and likely to many others based on personal experience and on observations of the experiences of many parents who have juggled the demands of work outside the home along with family responsibilities and who endured the stress that results. "Role overload", when defined by Professor Higgins as having too much to do and not enough time to do it, is indeed a commonly felt condition, not only by those with child-care responsibilities, but for anyone who fulfills multiple roles. Professor Higgins names this commonly understood concept, describes its impact and supports his opinion regarding the greater role assumed by women with the results of research.

[72] The statistics cited and the references to other published research on work, family and gender elevate Professor Higgins' opinion beyond the knowledge and experience of the Court. Professor Higgins' research suggests that while much has changed with respect to women in the workforce, the division of family responsibilities has not changed a great deal; women continue to assume traditional roles in the home and women are more likely than their male counterparts to scale back at work to respond to "role overload" and work-life conflict. In addition, the 2012 Report of Professor Higgins and Professor Linda Duxbury, *Caring for and about those who serve: Work-life conflict and employee well being within Canada's Police Departments*, [the Police Study] notes some of the factors that may be unique for women in policing. Although few RCMP members participated in the study, the study addresses the policing environment in general.

[73] Professor Higgins affidavit provides information that is more current and specific than earlier literature also cited by the Applicant. The affidavit is admitted only for its relevance to the contextual analysis.

VIII. Step One – Does the law create a distinction based on an enumerated or analogous ground?

A. *The Applicants' Submissions*

[74] With respect to step one of the *Withler* test, the Applicants submit that the RCMPSA creates a distinction on the enumerated ground of sex and the analogous ground of parental status. They submit that they are treated differently under the RCMPSA because they are denied the benefit that is extended to members who did not need to job-share or work part-time and either worked full-time or took the option of LWOP.

[75] The Applicants submit that they are penalized for their part-time employment unlike those on LWOP. Members who took LWOP and did not work at all were able to "buy-back" pension benefits upon their return to full-time employment. The Applicants acknowledge that a mirror comparator group is not essential for the analysis, but submit that comparison with those on LWOP provides necessary context. As a result of being denied the same benefit available to those on LWOP, the Applicants will "take an economic hit" in their retirement.

[76] The Applicants submit that the denial of this benefit exacerbates long-standing disadvantages for women in the workforce, perpetuates a stereotype that women can assume only

one role as either caregiver or full-time worker, and sends a message that they are not valued for their dual role while in a job-sharing arrangement.

[77] Although the Applicants and Ms. Noble are the only members who job-shared that provided evidence in this application, they estimate that up to 150 members who job-shared to meet child-care responsibilities have been affected by the RCMPSA and will benefit from the relief the Applicants request if the Court finds that the RCMPSA violates section 15.

[78] The Applicants note the goal of substantive equality. Conduct that widens the equality gap is discrimination, as recently articulated by Justice Abella in *Kahkewistahaw First Nation v Taypotat*, [2015] 2 SCR 548 [*Taypotat*]at para 17 and *Quebec (Attorney General) v A*, [2013] 1 SCR 61 at para 332:

> The root of s. 15 is our awareness that certain groups have been historically discriminated against, and that the perpetuation of such discrimination should be curtailed. If the state conduct widens the gap between the historically disadvantaged group and the rest of society rather than narrowing it, then it is discriminatory.

[79] The Applicants submit that once an employer extends a benefit, such as job-sharing, which was introduced to promote work-life balance, it must do so in a non-discriminatory way. Although the RCMP PAC recommended changes, and the ERC and the Commissioner were aware of the distinction and the impact on members who job-shared, the RCMP failed to make the necessary changes to extend the benefit to job-sharers to "buy-back" full-time pension benefits. The Applicants submit that this widens the equality gap.

[80] The Applicants acknowledge that the RCMPSA is facially neutral, but argue that it has a discriminatory effect on women with parental status because they are disproportionately impacted. The Applicants submit that the overrepresentation of women in part-time work in the RCMP is sufficient to prove that the distinction in the RCMPSA has an adverse effect on women and is, therefore, based on sex.

[81] The Applicants point to the data provided by the RCMP for 2010 and 2014 which demonstrates that 100% of regular and civilian members in job-sharing positions were women, with a significant majority citing child care as the reason for doing so. Professor Higgins' 2012 Police Study demonstrates that 61% of female police constables also have primary responsibility for child-care in their families, compared to 9% for male constables. The Police Study also shows that only 1% of female officers have a spouse at home full-time with their children, compared to 12% for male officers.

[82] The Applicants submit that this data is consistent with the reality that the majority of part-time workers in Canada are women, and that this status is due to their child care obligations. The Applicants note the similar findings of Justice Abella in the 1984 *Report of the Commission on Equality in Employment*.

[83] The Applicants accept the Respondent's proposal to characterize the analogous ground they claim as parental status rather than as family status, but submit that the obligation to provide for child-care is an integral part of parental status.

B. *The Respondent's Submissions*

[84] The Respondent notes that the analysis of whether the impugned provisions of the RCMPSA violate substantive equality calls for a contextual inquiry. The question is whether there is a distinction in the RCMPSA that has the effect of perpetuating an arbitrary disadvantage on the Applicants because of their membership in an enumerated or analogous group (*Taypotat*, at para 16). The Respondent submits that the RCMPSA does not perpetuate any such disadvantage.

[85] The Respondent notes that the Applicants have not been denied pension benefits. Their part-time service is fully pensionable; "one year equals one year". A member cannot make pension contributions at a greater rate than their assigned hours of work permits. This policy choice is applied consistently in all federal pension plans to all contributors. The Respondent reiterates that the Applicants are seeking an additional benefit to which no other member is entitled. If the Applicants receive a reduced pension, it is not because they are women or because of their parental status, but because they worked part-time.

[86] The Respondent adds that the RCMPSA is designed to provide retirement income to contributors who meet the eligibility criteria. It is not intended to meet all needs of all members or to provide universal benefits to all, such as to balance child-care obligations or to off-set the costs of child-care, nor does it interfere with the choices parents make.

[87] The Respondent submits that the differential treatment alleged by the Applicants does not stem from the RCMPSA, but from their decision to job-share, which means part-time status. The Applicants' personal circumstances, not their membership in a protected group, resulted in their change of employment status.

[88] The Respondent adds that the Applicants moved from full-time to part-time and back to full-time in their career, which further reflects that their experience resulted from their personal circumstances and employment status and not from their membership in a protected group.

[89] As noted above, the Respondent proposes for the purpose of this application only, that the family status of being in a parent-child relationship, in other words, parental status as a subset of family status, is more reflective of the Applicants' circumstances and is the appropriate analogous ground for protection under section 15. Contrary to the Applicants' position, the Respondent submits that parental status does not extend to the wide range of personal choices a parent makes with respect to their work or their child care responsibilities.

[90] The Respondent submits that the RCMPSA and the Regulations treat all members of the RCMP equally without any distinction, either direct or indirect, on the grounds of sex or parental status. The RCMPSA applies equally to all part-time members of the RCMP, as do similar provisions that apply to all part-time employees across the federal public service. To the extent that there is a disadvantage, it is experienced identically by men, women, parents and non-parents, i.e. if a member works part-time hours at some points during their career, their pension benefits for that period will be pro-rated accordingly.

[91] The Respondent adds that job-sharing is a staffing policy, not a pension policy. Although the limited data from the RCMP shows that child-care responsibilities are more often the reason cited for part-time work and/or job-sharing, other reasons include the care of elderly, returning to school, or simply work-life balance, unrelated to child care. More evidence would be required to fully explore why members job-share or otherwise work part-time. The Respondent also highlights that the vast majority (99.59%) of all RCMP members work full-time, with only 0.41% working part-time.

[92] The fact that more women with child-care responsibilities choose to work part-time is not sufficient to prove adverse-effects discrimination on the ground of sex (*Grenon v Canada*, 2016 FCA 4 at para 41[*Grenon*]. A qualitatively different impact of the law must be demonstrated; not just that more women than men are adversely affected, but that some women are more adversely affected than the equivalent group of men. The Respondent submits that this is not the case here.

[93] The Respondent adds that the Applicants' proposed quasi-comparator group of full-time members who take LWOP is inappropriate, noting that LWOP is a different employment status and the ability to "buy-back" pension benefits is only available to those who had full-time status before taking LWOP. Moreover, a mirror comparator group is not required. The broader context of the legislative scheme and the claimant within the scheme must be considered to assess the actual effects of the provisions on substantive equality.

[94] The Respondent reiterates that there is no differential treatment or distinction on the basis of any enumerated or analogous ground, but submits that, in the event that the Court finds any distinction, it is not discriminatory.

C. *The principles from the jurisprudence*

[95] The definition of discrimination articulated by Justice McIntyre in *Andrews v Law Society (British Columbia)*, [1989] 1 SCR 143 at para 19 [*Andrews*] is the starting point for any analysis:

> I would say then that discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed.

[96] The approach to the analysis of whether a law or other measure constitutes discrimination and violates the section 15 guarantee of equal protection and benefit of the law has evolved to focus on substantive equality. The definition, noted above, and the two stage test, first established in *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497 [*Law*], reiterated in *R v Kapp*, [2008] 2 SCR 483, [*Kapp*] and in *Withler*, remains the framework for the analysis.

[97] In *Withler*, the Supreme Court of Canada stated the two stage test for discrimination:

(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?

[98] More recently, in *Taypotat*, the Supreme Court of Canada emphasized that the focus of section 15 is on laws that draw "discriminatory distinctions" (at paras 16-17);

> [16] The approach to s. 15 was most recently set out in *Quebec (Attorney General) v. A*, [2013] 1 S.C.R. 61, at paras. 319-47. It clarifies that s. 15(1) of the *Charter* requires a "flexible and contextual inquiry into whether a distinction has the effect of perpetuating arbitrary disadvantage on the claimant *because of his or her membership in an enumerated or analogous group*": para. 331 (emphasis added).
>
> [17] This Court has repeatedly confirmed that s. 15 protects substantive equality: *Quebec v. A*, at para. 325; *Withler v. Canada (Attorney General)*, [2011] 1 S.C.R. 396, at para. 2; *R. v. Kapp*, [2008] 2 S.C.R. 483, at para. 16; *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143. It is an approach which recognizes that persistent systemic disadvantages have operated to limit the opportunities available to members of certain groups in society and seeks to prevent conduct that perpetuates those disadvantages. As McIntyre J. observed in *Andrews*, such an approach rests on the idea that not every difference in treatment will necessarily result in inequality and that identical treatment may frequently produce serious inequality: p. 164.

[99] In *Withler*, the Court explained (at paras 62-65) that mirror comparator groups are not required to establish a distinction, but comparison as a contextual consideration continues to be relevant at both steps of the analysis. With respect to the first step, the Court noted at para 62, "[i]nherent in the word "distinction" is the idea that the claimant is treated differently than others. Comparison is thus engaged, in that the claimant asserts that he or she is denied a benefit that others are granted or carries a burden that others do not, by reason of a personal characteristic that falls within the enumerated or analogous grounds of s. 15(1)."

[100] The Court added that establishing indirect discrimination (i.e. adverse effects) may be more difficult, at para 64:

> . . . In other cases, establishing the distinction will be more difficult, because what is alleged is indirect discrimination: that although the law purports to treat everyone the same, it has a disproportionately negative impact on a group or individual that can be identified by factors relating to enumerated or analogous grounds. Thus in *Granovsky*, the Court noted that "[t]he CPP contribution requirements, which on their face applied the same set of rules to all contributors, operated unequally in their effect on persons who want to work but whose disabilities prevent them from working" (para. 43). In that kind of case, the claimant will have more work to do at the first step. Historical or sociological disadvantage may assist in demonstrating that the law imposes a burden or denies a benefit to the claimant that is not imposed on or denied to others. The focus will be on the effect of the law and the situation of the claimant group.
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> [Emphasis added]

[101] In *Grenon*, the Federal Court of Appeal found no direct distinction based on an enumerated or analogous ground in the case of a taxpayer who was denied a deduction for legal expenses incurred with respect to the determination of child support payments. The Court noted at para 36, "[a] law which is neutral on its face may, unintentionally, have a disproportionate or adverse effect on a group or individual, and if so, satisfy the first step of the *Withler* analysis."

[102] In *Grenon*, the Court highlighted the need to consider adverse effects discrimination and framed the issue, at para 37:

> . . . The question becomes whether paragraph 18(1)(a) and the definition of property in subsection 248(1), by indirectly limiting the deductibility of payors' legal expenses, intentionally or otherwise, does so on the basis of a personal characteristic. If the answer to that question is affirmative, the question becomes whether it is a discriminatory distinction.

[103] In *Grenon*, the Court noted that the limited evidence presented demonstrated that 92.8% of payors were men and based on this evidence, the provisions of the ITA had a greater impact on men than on women. However, the Court clarified that "this does not necessarily translate into a finding that the effect is "adverse"", as contemplated by section 15 and explained at para 39:

> [39] This is the false syllogism that underlies the appellant's case. The appellant confounds the fact that virtually all payors are men with the proof of adverse effect. While it is true that virtually all payors are men, and that it is mostly men that are denied the deduction, it is not a consequence of the legislation. There is no nexus between what the *ITA* requires and the consequence.

[104] The Court added:

> [41] . . . To establish a section 15 violation, the appellant must establish that the law, objectively applied, has an adverse effect on men. The law, when applied to men as opposed to women, must have a qualitatively different impact on men. A mere numerical imbalance will not suffice. Just as the inquiry as to whether an impugned provision is "discriminatory" is directed to the identification of substantive inequality, adverse effect is equally infused with the requirement of substantive discriminatory impact.

[105] The Court concluded, at para 43, that "[t]he *Charter* argument fails because it confounds the underlying social circumstances with the consequences of the law", and added at para 44:

> [44] In each case, it must be established that the tax measure affects them because of or by reason of, a prohibited ground, their gender, age or ethnicity, and not as a consequential effect.

[106] More recently, in *Thompson v Canada (Attorney General)*, 2016 FCA 253, the Federal Court of Appeal found that, although the applicant, a civilian employee who was severely disabled in a crash of a Canadian Forces aircraft, was treated differently than the military

personnel who were also injured in the crash, the differential treatment was not due to the nature of the applicant's disability but due to his employment status. The Court noted the tragic circumstances, but found that the differential treatment based on the applicant's employment does not constitute discrimination on the basis of an analogous ground pursuant to section 15.

[107] The relevant principles for step one of the analysis are summarized as follows:

- Section 15 protects substantive equality. Substantive equality seeks to prevent conduct that perpetuates arbitrary disadvantage because of membership in an enumerated or analogous group.

- Discriminatory distinctions are those which have the effect of perpetuating an arbitrary disadvantage because of membership in an enumerated or analogous group.

- Not all differential treatment or distinctions that impose burdens or deny benefits are discriminatory and, as a result, contrary to the *Charter*.

- A mirror comparator group is not required to identify a distinction. However, comparison is inherent in the notion of identifying a distinction.

- Indirect or adverse effects discrimination focuses on the effect of the law or measure on the group. Historical disadvantage may demonstrate that the law imposes a burden or denies a benefit not imposed on or denied to others.

- The qualitative differential impact must be assessed. Numerical imbalances will not be sufficient to demonstrate that a law or measure is discriminatory.

- Applied to the present case, the law must affect the Applicants because of their sex or parental status and not as a consequence of this status; there must be a "qualitative nexus between the law and the group"

D. *The provisions of the RCMPSA do not create a distinction on an enumerated or analogous ground*

[108] To establish a *prima facie* violation of subsection 15(1), the Applicants must demonstrate that the impugned provisions of the RCMPSA have a disproportionate effect on them because of their membership in an enumerated or analogous group (*Taypotat*, at para 21).

[109] Framing the issue as in *Taypotat*, the question becomes whether the RCMPSA, which makes a distinction between part-time and full-time members and prevents part-time members from contributing to their pension at the full-time rate, has the effect of perpetuating an arbitrary disadvantage on the Applicants because they are women and/or because of their parental status which led them to work part-time.

[110] The RCMPSA does not, on its face, create any distinctions on an enumerated or analogous ground. Any distinctions with respect to the pension and other benefits to be paid to members on retirement are based on the eligibility requirements of the plan (e.g. salary, years of service and part-time vs full-time periods of employment).

[111] In the present case, the Applicants are not denied a benefit that other part-time members are granted. Nor are they denied a benefit that other full-time members are granted – because no

part or full-time member can augment their pension by making contributions in excess of those tied to the assigned hours of work or employment status. The Applicants and Respondent agree that it is the impact or the adverse effects as claimed by the Applicants that must be explored.

[112] The Applicant's position is that the RCMPSA has a resulting adverse impact on their pension benefits and that this impact is because of their sex or parental status.

[113] Framing the issue as it was framed in *Grenon*, the question is whether the RCMPSA provisions that tie benefits to the employment status and assigned hours of work of the member (full-time or part-time) and limit the part-time member's ability to contribute to their pension based on that status, do so on the basis of a personal characteristic that falls within the enumerated ground (sex) or analogous ground (parental status)?

[114] Subsection 15(1) protects substantive equality. This recognizes that persistent systemic disadvantages have operated to limit the opportunities available to members of certain groups in society and that such disadvantages should not be perpetuated.

[115] The evidence provided by the Applicants supports the view that the responsibility of child-care continues to disproportionately fall upon women, regardless of their career obligations. The social science research, gender-based studies of women in the Canadian workforce, and earlier reports on the equality of women in the workforce demonstrate that societal norms and expectations place women in a different position than men, and that woman typically bear a greater burden in terms of balancing competing work priorities with family

obligations. The evidence also shows that women represent a high percentage of the part-time work force, particularly in the 25-44 age group.

[116] Although some studies are quite dated, Professor Higgins refers to more recent studies, including the Police Study, which shows that women remain primarily responsible for child-care in dual-earner families.

[117] The RCMP snapshot data, which is the only data available on part-time work and job-sharing in the RCMP, shows that in May 2010, there were 22, 937 civilian and regular members of the RCMP. Only 101 worked part-time, of which 31 were regular members. Of the 31 regular members who worked part-time, 11 were in a job-sharing arrangement. All of the job-sharers in 2010 (i.e. 100% of the 11) were women and over 60% cited child-care as one reason, if not the only reason, for doing so.

[118] The snapshot data for May 2014 shows that there were a total of 22,307 regular and civilian members of the RCMP. Only 92 members worked part-time, of which 29 were regular members. None worked in a job-sharing arrangement.

[119] Although the Applicants submit that up to approximately 150 members job-shared to meet child-care responsibilities since the inception of job-sharing, there is no cumulative data to provide a reliable estimate. The limited evidence provided by the snapshot data for 2010 and 2014 demonstrates a very low number of part-time and job-sharers. Less than half of one percent (0.41%) of all RCMP members work part-time, but those who do are predominantly women and

do so for child-care reasons. While the impact of the inability to contribute to their pension more than their part-time status would otherwise permit affects more women members with child-care responsibilities who work part-time than other members who work part-time, this is only because there are more women in this very small group.

[120] The social science research, including that provided by Professor Higgins, describes the role of women in the workforce and the multiple roles they fulfill. This evidence provides relevant context, including that the Applicants' reason for job-sharing reflects work-force patterns for women more generally and for women in policing. However, as the Respondent notes, Professor Higgins is not an expert in pensions and his opinion on "role overload" and the strategies to address it, does not make any link with pension benefits.

[121] The limited data show that a very small percentage of RCMP members works part-time. The fact that the majority of this very small group who job-share and work part-time are women, most of whom cite child-care as the reason for doing so, is consistent with Professor Higgins research, but it does not establish that the RCMPSA is discriminatory.

[122] The Applicants' claim that the fact that more women job-share is sufficient to find discrimination based on sex cannot succeed based only on the numbers. A more qualitative assessment is required (*Grenon)*.

(1) Is the impact of the RCMPSA on the Applicants adverse or disadvantageous?

[123] As noted in *Taypotat*, the distinction must have the effect of perpetuating an arbitrary disadvantage. Not every difference in treatment will constitute inequality. In the present case, a preliminary consideration in the step one analysis is whether the claimed differential treatment or distinction is adverse; i.e., does it result in a disadvantage?

[124] As described above, the Applicants' evidence is that women who are in a parental status disproportionately account for the small number of members who job-share, and that they will take an "economic hit" on retirement compared to others who did not job-share, compared to what their pension benefits would be if they had worked full-time, and compared to those who take LWOP and then "buy-back" their pension contributions.

[125] There is a general lack of evidence on the record to support the Applicant's claims of discrimination given the significant and wide-reaching impact of the relief requested, including to find that provisions of the RCMPSA violate the *Charter*, to read in language to specific provisions in this complex scheme, and to direct a particular outcome. At the outset, I note that there is limited evidence to determine whether there is an adverse impact in terms of the "economic hit" on their pension.

[126] The "economic hit" the Applicants describe assumes that the only relevant benchmark is to compare their pension benefits to the pension they would have received if they had worked full-time throughout a 25 or 30 year career without considering any other economic or other relevant factor. The Applicants also compare their pensions to those of other members with the same years of service. However, this comparison assumes that these other members had exactly

the same best five years' salary. There is no evidence that this is the case; there could be wide variation based on positions and salary.

[127] Ms. Fraser attests that her pension will be reduced due to her part-time employment, but she does not elaborate. Ms. Pilgrim estimates that her pension will be 5 % less annually after a 27 year career, due to job-sharing, but provides only a hypothetical calculation. As noted above, the example provided by Ms. Rossignol, based on several assumptions, shows that the pension would be 92% for a member who worked five years part-time over a 30 year career. In the present case, none of the Applicants worked more than three years in part-time status.

[128] The Applicants characterize their decision to job-share as a difficult or reluctant choice given their patrol duties, shift work and the need to ensure child-care, often in rural or remote areas, and to meet other competing family responsibilities, but there is no evidence on the record about other related considerations that may have influenced the Applicants' decisions to job-share. I acknowledge that the Applicants' options to meet their competing demands were limited. However, job-sharing may have been an appealing option at that particular time. For example, there may have been lower or no child-care costs and less stress, and there would have been continuing income, albeit part-time, other benefits from employment and freedom to choose whether and how to save in other ways for retirement in order to augment their RCMP pension.

[129] There is also no evidence about the impact of continuing to work in the job-sharing arrangement rather than taking LWOP, which the Applicants propose as a contextual comparator. There is also little evidence about those on LWOP. Ms. Fraser notes that she took

LWOP for three years and later bought back her pension benefits at a cost of $24,000. However, she would have been without any income from the RCMP for that three-year period. For those on LWOP who did not work elsewhere at all during that period, there would be economic disadvantages that must be considered, even if the member on LWOP has the option to buy-back their pension benefits. There is no evidence about how long it takes to catch-up financially for the period of LWOP without any income, nor is there any evidence about the challenges of reintegration. The Applicants simply suggest that this group is better off.

[130] As noted, the data shows that very few members chose to work part-time. There is no evidence to situate the Applicants within the members who are women with parental status who did not choose to job-share or work part-time.

[131] A broader contextual analysis means looking at the bigger picture. This includes the benefits of job-sharing, which the Applicants acknowledge. Among other things, they had more time with their children, different child-care options and less stress. Ms. Fraser noted that she did not need child-care at all while job-sharing as she had different shifts than her husband.

[132] The Applicants also benefitted in some ways from job-sharing including that: they had income and employment benefits; they maintained their skills; they were eligible to apply for other positions; they contributed to their pensions on a *pro-rata* basis and accrued pensionable service at the same rate as full-time members; and, they addressed the challenges of balancing work and parental responsibilities. In addition, they will or do receive a pension, albeit lower by an estimated average 5%.

[133] Although the Applicants describe the impact of the RCMPSA on them as adverse, and their own evidence is that there is or will be a financial impact on their pensions when only the pension is considered, in the overall context and given the limited evidence on the record, it is difficult to conclude that the impact is necessarily adverse.

(2) If there is an adverse impact, is it discriminatory?

[134] Accepting that the Applicants will receive a reduced pension compared to the pension they would have received if they had continuously worked full-time, and that this has an impact on them, and leaving aside that the quantitative assessment of the "economic hit" should take into account additional factors, I find, on an analogous basis as *Grenon*, that the claimed distinction or differential treatment for the Applicants is not because of their sex and/or their parental status. The distinction is because they worked part-time in a job-sharing arrangement to meet the competing demands of their child-care responsibilities and their career.

[135] As noted by the Federal Court of Appeal in *Miceli-Riggins v Canada Attorney General*, 2013 FCA 158 at para 76 [*Miceli-Riggins*]:

> The applicant alleges that the impugned provisions have a disproportionately negative impact upon women. In making out this claim, an indirect discrimination claim, the applicant must adduce evidence showing that the impugned provision is responsible for the effect, not other circumstances: *Canada (Attorney General) v. Lesiuk*, 2003 FCA 3. We cannot just assume that the impugned provision is responsible:
>
> > If the adverse effects analysis is to be coherent, it must not assume a statutory provision has an effect which is not proved. We must take care to distinguish between effects which are wholly caused, or are contributed to, by an impugned

> provision, and those social circumstances which exist independently of such a provision.
>
> (*Symes v. Canada*, [1993] 4 S.C.R. 695 at paragraph 134.)

[136] Objectively applied, the RCMPSA does not have an adverse effect on women. It does not have a qualitatively different impact on women and women in a parental status as opposed to men or other RCMP members who are not in parental status, but have worked part-time in their careers.

[137] The fact that the vast majority of part-time members and members in a job-sharing arrangement are women, and that these job-sharers do not have the option of contributing to their pension at the full-time rate, is not a consequence of or connected to the provisions of the RCMPSA. The "trigger" is whether the member works part-time. This is not connected to the RCMPSA. Rather, this is based on the decisions the member makes, as difficult as those may be, as a family to balance work and child care, by having one parent, usually the woman, work part-time for a few years.

[138] There is no qualitative nexus between the requirements of the RCMPSA and the consequences to women and women with parental status who job-shared. The underlying social consequences which led them to job-share and to work part-time does not turn the impugned provisions of the RCMPSA that base pension contributions on part-time or full-time status into discriminatory distinctions.

[139] As in *Grenon* at para 43 "[t]he Charter argument fails because it confounds the underlying social circumstances with the consequences of the law."

[140] However, in the event that I am wrong in my finding, and if the distinction or differential treatment for the Applicants and any adverse impact on their pension that results is because of their personal characteristics as women and/or their parental status (which, in turn, led them to work part-time), the second step of the analysis will be conducted.

IX. Step 2 – Does the distinction create a disadvantage by perpetuating prejudice or stereotyping?

A. *The Applicants' Submissions*

[141] The Applicants submit that the distinction or differential treatment in the RCMPSA perpetuates the disadvantages for women in the workforce. In addition, the RCMPSA unfairly and arbitrarily affects women's ability to freely choose how to balance their career and family responsibilities.

[142] The Applicants note that the RCMP was well aware of the impact on them yet it did not pursue legislative changes. The Applicants submit that the RCMP's failure to provide a rationale has been provided which further demonstrates that the differential treatment is arbitrary and illogical.

[143] The Applicants note that historically, women have been disadvantaged in the workplace largely due to discriminatory beliefs and attitudes about the role they should play in society as

mothers and caregivers. Policing, a traditionally male profession, is a work environment in which historic patterns of discrimination against women in the workforce are amplified. Patrol duties, including shift work, and working in rural or isolated communities, create greater challenges for balancing work and child-care obligations.

[144] The Applicants also note that pensions have been highlighted as a source of inequality for women as they typically reward permanent, full-time, and long-service employment, in other words, "male pattern" employment. The 1984 Report of the Commission on Equality in Employment and the 1980 Report of the Royal Commission on the Status of Pensions in Ontario found that facially neutral pension rules had an adverse effect on women. Although changes have been made to promote equality, the Applicants submit that more needs to be done.

[145] The Applicants argue that the impact of the RCMPSA provisions exacerbates the pre-existing disadvantages and perpetuates stereotypes. They submit that the differential pension treatment perpetuates the discriminatory attitude that women who choose to balance work and family obligations are less valued adding that this is demeaning.

[146] The Applicants also submit that the RCMPSA promotes a stereotype that women should either be full-time caregivers or full-time members of the labour force, but they cannot be both at the same time. They add that women who take LWOP to meet their family responsibilities are "rewarded" with the option to "buy-back" their pension benefits and, in contrast, those who work part-time and job-share are "penalized".

B. *The Respondent's submissions*

[147] The Respondent submits that if the Court finds any distinction in the RCMPSA, it is not discriminatory. The Respondent characterizes the Applicants' claim as seeking an additional benefit that is not available to any member; denying this additional benefit does not constitute discrimination.

[148] The fact that the RCMPSA is more restrictive than the Applicants prefer does not mean it is discriminatory. The RCMPSA does not deny them a benefit in a way that reinforces, perpetuates or exacerbates a disadvantage or stereotype.

[149] The Respondent again submits that the disadvantage the Applicants claim flows from their child-care responsibilities, which affected their ability to work full-time as RCMP officers. The impact of their decision to work part-time on their pension benefits is an independent circumstance that is not exacerbated by the RCMPSA.

[150] In assessing whether any distinction within a social benefits scheme, which includes a pension plan, perpetuates a disadvantage or stereotype, the Court must consider the broader and special context of such legislation. Judicial restraint should be exercised when social benefit programs are challenged given the impact to legitimate government interests that may result. Distinctions arising under social benefits legislation will not lightly be found to be discriminatory (*Miceli-Riggins,* at para 57).

[151] The Respondent highlights the need to consider the ameliorative effect of the RCMPSA as well as the multiplicity of interests it seeks to address (*Withler* at para 38). The aim of RCMPSA is to provide benefits to members, not to off-set child care responsibilities or costs. All benefits are tied to the employment status and assigned hours.

[152] The Respondent notes that there are other advantages of the RCMPSA and related legislation, including provisions that specifically aim to support women and members with child-care obligations, such as maternity and parental leave and job protection. The Applicants acknowledged the benefits of the job-sharing program. There is no evidence, other than a hearsay comment by one affiant, to suggest that the pension implications of job-sharing deterred the Applicants or any other women from joining the RCMP.

[153] The Respondent further notes that the Applicants do not allege that women, mothers, or parents are significantly more likely to work part-time. Women represent 26.5% of all RCMP members, but less than 0.5% of all members who work part-time. In other words, the vast majority of women, mothers and parents work full-time.

C. *Principles from the Jurisprudence*

[154] In *Taypotat,* at paras 16-18, the Supreme Court of Canada emphasized that the focus of section 15 is on laws that draw "discriminatory distinctions"; i.e. those that perpetuate arbitrary disadvantage because of membership in an enumerated or analogous group. The Court noted at para 21:

> [21] To establish a prima facie violation of s. 15(1), the claimant must therefore demonstrate that the law at issue has a disproportionate effect on the claimant based on his or her membership in an enumerated or analogous group. At the second stage of the analysis, the specific evidence required will vary depending on the context of the claim, but "evidence that goes to establishing a claimant's historical position of disadvantage" will be relevant: *Withler*, at para. 38; *Quebec v. A*, at para. 327.

[155] Earlier, in *Kapp*, at para 19, the Supreme Court of Canada noted that in *Law*, discrimination was viewed in terms of the impact on the "human dignity" of members of the claimant group, having regard to four contextual factors. The Court explained, at para 22, that *Law* had advanced the understanding of substantive equality, but that the concept of human dignity was difficult to apply. The Court clarified, at paras 23-24, that *Law* did not create a new test, and explained how the contextual factors in *Law* should be applied, noting that the focus is whether disadvantage and stereotyping are perpetuated.

[156] In *Withler*, at paras 35 and 36, the Supreme Court of Canada described the two ways that substantive inequality may be established: first, by showing that the law, in its purpose or effect, perpetuates prejudice and disadvantage to members of a group on the basis of personal characteristics (i.e. on enumerated or analogous grounds); and second, by showing that the "disadvantage imposed by the law is based on a stereotype that does not correspond to the actual circumstances and characteristics of the claimant or claimant group".

[157] The Court explained that perpetuating a disadvantage "typically occurs when the law treats a historically disadvantaged group in a way that exacerbates the situation of the group".

[158] The Court added at para 37:

> Whether the s. 15 analysis focusses on perpetuating disadvantage or stereotyping, the analysis involves looking at the circumstances of members of the group and the negative impact of the law on them. The analysis is contextual, not formalistic, grounded in the actual situation of the group and the potential of the impugned law to worsen their situation.

[159] The Court also noted that a mirror comparator group is not required, as such an approach could mask the assessment of substantive inequality. Rather, the approach should look "at the full context, including the situation of the claimant group and whether the impact of the impugned law is to perpetuate disadvantage or negative stereotypes about that group" (at para 40). However, comparison still plays a role in assessing the broader context, (at para 65),

> At this step, comparison may bolster the contextual understanding of a claimant's place within a legislative scheme and society at large, and thus help to determine whether the impugned law or decision perpetuates disadvantage or stereotyping. The probative value of comparative evidence, viewed in this contextual sense, will depend on the circumstances.

[160] The Court also provided guidance about the analysis required where social benefits legislation and pension programs are at issue, noting, at para 38, that "the ameliorative effect of the law on others and the multiplicity of interests it attempts to balance will also colour the discrimination analysis." The Court elaborated on the relevant considerations at para 67:

> In cases involving a pension benefits program such as this case, the contextual inquiry at the second step of the s. 15(1) analysis will typically focus on the purpose of the provision that is alleged to discriminate, viewed in the broader context of the scheme as a whole. Whom did the legislature intend to benefit and why? In determining whether the distinction perpetuates prejudice or stereotypes a particular group, the court will take into account the fact that such programs are designed to benefit a number of different groups and necessarily draw lines on factors like age. It

> will ask whether the lines drawn are generally appropriate, having regard to the circumstances of the persons impacted and the objects of the scheme. Perfect correspondence between a benefit program and the actual needs and circumstances of the claimant group is not required. Allocation of resources and particular policy goals that the legislature may be seeking to achieve may also be considered.

[161] In *Miceli-Riggins*, the Federal Court of Appeal considered the applicant's claim that her ineligibility for disability benefits pursuant to the *Canada Pension Plan*, RSC 1985, c. C-8, [CPP], violated her equality rights. The Court noted the principles in *Withler*, including that "perfect correspondence" is not required.

[162] The Court reiterated, at paras 59 and 60, that not all distinctions amount to discrimination and that a section 15 violation cannot be found simply because "social benefits legislation leaves a group, even a vulnerable group, outside the benefits scheme". The Court also observed the caution of the Supreme Court of Canada in *Withler*, that the assessment of whether social benefits legislation offends section 15 requires a sensitive assessment. The contextual analysis regarding a social benefits scheme must consider the goals of the scheme and what its architects intended to achieve or address.

[163] In *Canada (Attorney General) v Lesiuk*, 2003 FCA 3, [*Lesiuk*] the Federal Court of Appeal found that the claimant's eligibility for Employment Insurance benefits was affected by her parent-child status and child-care responsibilities. Although the Court found that the differential treatment was based on an analogous ground, it concluded that the differential treatment was not discriminatory (at para 38).

[164] The Court noted that while women may have historically faced barriers in entering the workforce which are rooted in stereotypes and prejudices, the claimant had not established that in the context of the employment insurance regime there was a history of disadvantage, stereotyping, vulnerability or prejudice.

[165] The relevant principles regarding the analysis at step two were summarized in *Withler*, at para 54:

> In summary, the theme underlying virtually all of this Court's s. 15 decisions is that the Court in the final analysis must ask whether, having regard to all relevant contextual factors, including the nature and purpose of the impugned legislation in relation to the claimant's situation, the impugned distinction discriminates by perpetuating the group's disadvantage or by stereotyping the group.

[166] The other guiding principles for step two, which are primarily drawn from *Withler*, are:

- The claimant must first demonstrate that the law at issue has a disproportionate effect *because of* his or her membership in an enumerated or analogous group (step one); if so, the analysis proceeds to step two.

- Substantive inequality, or discrimination, may be established by:

- Showing that the impugned law, in its purpose or effect, perpetuates prejudice and disadvantage to members of a group on the basis of their personal characteristics. Perpetuation of disadvantage typically occurs when the law treats a historically disadvantaged group in a way that exacerbates the situation of the group.

- Showing that the disadvantage imposed by the law is based on a stereotype that does not correspond to the actual circumstances and characteristics of the claimant or claimant group.

- In determining whether a social benefits scheme creates a distinction and perpetuates a disadvantage, the contextual analysis includes consideration of the ameliorative effect of the law or scheme, the multiplicity of interests it seeks to balance, the intended beneficiaries, whether the lines have been drawn appropriately *vis a vis* the intent of the scheme and the persons impacted, the allocation of resources and the policy goals of the architects of the scheme.

- Perfect correspondence between a social benefits scheme and the needs and circumstances of its claimants is not required.

- Not all distinctions amount to discrimination; a section 15 violation cannot be found simply because "social benefits legislation leaves a group, even a vulnerable group, outside the benefits scheme" (*Miceli-Riggins,* at para 59).

D. *The distinction does not create a disadvantage by perpetuating prejudice or stereotyping*

[167] If the impugned provisions of the RCMPSA create a distinction on the ground of sex and/or parental status, step two of the analysis requires the Court to consider whether this perpetuates disadvantage and prejudice or is based on stereotyping. A broader contextual analysis is required, including consideration of the nature and purpose of the RCMPSA in relation to the circumstances of the Applicants as women with parental status.

(1) No disadvantage is perpetuated

[168] The historic disadvantages to women in the workforce are well documented in the social science literature, including the 1984 *Report of the Commission on the Equality in Employment* which noted, among other things, that gender equality is not possible if the assumption continues to be that women have the primary responsibility for child-care. More recent reports demonstrate that women continue to make up a larger proportion of the part-time labour force, particularly in the 25-44 age category when they are most likely to be raising children. The 2010 Statistics Canada Report, *Women in Canada: a Gender-based Statistical Report-Paid Work*, indicates that the proportion of women who cite child-care as the reason for working part-time is significantly higher than men who cite child care as the reason.

[169] The 1984 Report and the 1980 *Report of the Royal Commission on the Status of Pensions in Ontario* note that women require financial security in their earning years along with other measures in order to be financially secure in retirement. However, since that time, there have been many changes, including the enhancement of employment insurance, expansion of maternity and parental leave, provisions for leave without pay, provisions that protect a job while an employee takes leave, and job-sharing. In addition, vesting periods for pensions have changed. The disadvantages that women previously experienced in terms of employment and reduced pension income have been addressed and ameliorated to some extent.

[170] In the present case, the issue is whether the RCMPSA perpetuates the historic disadvantage. As the Applicants note, policing is traditionally a male dominated profession,

women were not members of the RCMP until the mid-1970s, and the demands of patrol duties, shift work and rural and isolated postings are particularly challenging for women with children. However, there is no evidence that the RCMPSA was or is a disincentive in the recruitment of women to the RCMP. The Applicants did not provide any evidence that the RCMPSA deterred them, or anyone else, from joining the RCMP. As the Respondent's affiants explain, the RCMPSA provides the same pension benefits to all members. It would likely be regarded, as are the other public service plans, as a good plan and an incentive to prospective employees.

[171] There is no evidence of any historic disadvantage to women or women with parental status arising from this pension plan.

[172] The Respondent's affiants explained how the RCMPSA and the PSSA operate and how benefits are calculated. This portrays a stable and reliable pension plan, managed to ensure retirement income for all members from the date of retirement to death. The RCMPSA treats all members the same. The pension benefit is determined by a formula, without regard to sex or any enumerated or analogous ground. The pension benefits of each member will vary depending on input to the formula. The Applicants have not provided any evidence about the historic or current disadvantages of the RCMPSA other than their inability to "buy-back" full-time pension benefits for part-time periods of employment resulting in their reduced annual pension benefit.

[173] Although the Applicants argue that the RCMPSA has a different nature and purpose than the Employment Insurance scheme and the CPP, the principles in *Withler* and *Miceli-Riggins* regarding social benefits schemes remain applicable. The effect of the impugned provisions of

the RCMPSA on the Applicants cannot be considered in isolation from the plan as a whole. All relevant considerations, including the ameliorative effects of the RCMPSA, the multiplicity of interests it seeks to balance, the intended beneficiaries, the policy goals of the architects of the RCMPSA, and whether the lines have been drawn appropriately *vis a vis* the intent of the plan and the persons impacted, as well as the resource implications, must be taken into account.

[174] As noted above, in *Miceli-Riggins,* the Federal Court of Appeal reiterated at paras 76-79 that Courts cannot insist on "[p]erfect correspondence between a benefit program and the actual needs and circumstances of the applicant group", and that the exclusion of "a group, even a vulnerable group" from the benefits scheme does not automatically constitute a section 15 violation.

[175] The Applicants have not been excluded or left out of the RCMPSA; they receive pension benefits, albeit reduced by an approximate estimate of 5%, reflecting up to three years job-sharing in part-time status. The denial of the option to "buy-back" or contribute at the full-time rate to their pension does not perpetuate a disadvantage or a stereotype.

[176] The RCMPSA does not permit members to augment their retirement income by making contributions that exceed those based on assigned hours or employment status. Where would the line be drawn, if not at employment status? Why would the Applicants be permitted to augment their retirement income in this way and not other members who work part-time to meet other equally challenging and worthy demands, for example, for elder care or for personal mental health?

[177] The RCMPSA has an overall ameliorative effect on all members who contribute and later receive a pension, who are the intended beneficiaries. The RCMPSA permits pensionable service to accrue (one year equal one year) for part-time and full-time at the same rate, but pro-rates both contributions and benefits to reflect periods of part-time employment, as do other public service plans. The line is drawn at calculating pension benefits based on employment status and, as described by the Respondent's affiants, years of service and the best five years of salary. The formula applied based on these criteria ensure overall fairness to all contributors and the integrity of the plan. There may be many unique needs among the retirees that are not perfectly met, but the overall goal of providing retirement income is met.

[178] In *Miceli-Riggins*, the claimant had not qualified for disability benefits under the CPP because she did not meet the minimum contribution requirements due to, among other circumstances, being out of the workforce due to the birth of her child. The Federal Court of Appeal found that the claimant failed to meet the contributory requirements of the CPP not because she was a woman, but because of her personal circumstances.

[179] Just as in *Miceli-Riggins*, the Applicants were not able to make contributions at the full-time rate and to receive full pension benefits on retirement because they did not meet a requirement of the plan. The Applicants' allegation that the pension plan denies them the ability to freely choose how to balance their career and family is an exaggeration. The RCMPSA does not interfere with the choices made by the Applicants at all. The Applicants' job-sharing MOA alerted them to the financial implications and to the need to explore the legal and pension implications of job-sharing. The Applicants were aware during (or shortly after) their period of

job-sharing that they were not able to contribute at the same rate as full-time members and that their benefits on retirement could be affected. The Applicants were not prevented from making savings or purchasing RRSPs to augment their retirement income.

[180] The Applicants could have opted for LWOP. While they would have had the option to buy-back full-time pension benefits for the period on LWOP if they had been working full-time when their LWOP commenced, they would have still been without any income for the LWOP period. The Applicants noted the benefits of job-sharing. Clearly their own evidence undermines their allegation that the pension plan denies them freedom to choose how to balance their competing demands.

(2) No stereotype is perpetuated

[181] The Applicant's assertion that the RCMPSA perpetuates a stereotype that there are only two roles for women, either as a full-time caregiver or a full-time member, and that those who seek to combine those roles are less worthy or not valued is simply a theory of the Applicants. There is no evidence of any such stereotype.

[182] In *Lesiuk*, the Federal Court of Appeal found at para 45:

> These requirements do not create or reinforce a stereotype that women should stay home and care for children. Nor do these requirements affect the dignity of women by suggesting that their work is less worthy of recognition. Anyone who works the requisite number of hours in their qualifying period will qualify. It would stretch reason to imagine that reasonable persons in the respondent's situation would feel themselves any less valuable as a worker or as a member of society by the mere fact of having narrowly fallen short of qualifying for EI benefits in a given year.

> Rather, I would imagine that a reasonable person would simply feel that they had narrowly missed qualifying because of an unfortunate confluence of events.

[183] In *Miceli-Riggins* the Federal Court of Appeal noted that:

> [47] Discrimination works a personal sting upon the individual, assaulting his or her dignity by labelling the individual, for reasons outside of his or her control, as being unworthy of equal respect, equal membership or equal belonging in Canadian society: *Law*, *supra* at paragraphs 47-53.

[184] In the present case**,** no reasonable person would regard the Applicants, who worked part-time and job-shared, as any less worthy of recognition or respect. A reasonable person would regard the reduced pension as simply reflecting the Applicant's part-time status while job-sharing. As in *Miceli-Riggins*, at para 84, the conclusion is not that the Applicants are deserving of less worth but that the benefits were not provided because "technical qualification requirements were not met".

[185] To the extent that human dignity plays a role in assessing discrimination, there is no "personal sting" or "singling out" of the Applicants. The Applicants' ability to job-share, maintain their skills, and be more fully engaged in their children's care while young is likely highly regarded and valued. They contributed to the pension plan while job-sharing and had all other employment benefits. They returned to full-time duties and had long careers in the RCMP. They were not encouraged to stay out of the work force. Ms. Fraser was asked to return early from her LWOP to job-share with another member, which suggests that she was indeed valued by the RCMP.

[186] The social science evidence on the record demonstrates that even in the 21st century women continue to face barriers in the work place, many of which are due to the daunting challenges of balancing family and career. Women assume a disproportionate responsibility for child-care and may pursue alternative arrangements, including part-time work, to balance work and family and to maintain expertise and contribute their skills to their employer and their children. The Applicants describe how they have done so. That the Applicants found a way to meet the challenges and later returned to full-time duties and had long careers in the RCMP is an example of more flexible arrangements that now exist to address the challenges. But nothing is perfect, and the fact that the RCMPSA does not perfectly correspond to the Applicants' needs does not mean that the RCMPSA is discriminatory.

[187] The denial of the option to "buy-back" pension contributions at the full-time rate and the impact on the Applicants' pension benefits appears, at first reaction, to be out of step with the options available to those on LWOP, and perhaps illogical. But the analysis reveals that the RCMPSA does not discriminate against the Applicants because they are women and/or because of their parental status. The impugned provisions of the RCMPSA do not violate subsection 15(1) of the *Charter*.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The impugned provisions of the RCMPSA do not create a distinction based on the enumerated ground of sex or the analogous ground of parental status.
2. In the event that I am wrong in my finding above and that the RCMPSA does create a distinction, the distinction does not create a disadvantage by perpetuating prejudice or stereotypes and is, therefore, not discriminatory.
3. Given these findings, it is unnecessary to consider whether any breach of subsection 15(1) of the *Charter* can be saved under section One.
4. The Application is dismissed.
5. There is no order with respect to costs.

"Catherine M. Kane"

Judge

ANNEX A

The evidence

The Applicants' Affiants

Joanne Fraser

Ms. Fraser describes that she joined the RCMP in 1988, married an RCMP member in 1991 and had several postings, including in small communities. Ms. Fraser had her first child in 1993 and returned to full time duties after a six month maternity leave. She describes the challenges of returning to patrolling duties on 10 hour shifts while her husband had 12 hour shifts, finding child-care, and generally dealing with the many other circumstances that arise while caring for a young child.

In 1996, Ms. Fraser had her second child. Due to very limited child-care options in the community, she began a five year LWOP following her six month maternity leave. After being on LWOP for three and a half years, she was approached to job-share with another member and returned to operational duties in September 2000. Ms. Fraser states that before agreeing to the job-sharing arrangement she inquired and was advised that job-sharing was considered to be LWOP and it would not be a problem to "buy-back" her pension.

Ms. Fraser described the benefits of job-sharing including easing the transition back into policing, regaining skills and confidence and lessening the worry regarding child-care and family obligations.

Upon a transfer to Ottawa in 2003 and a return to full-time duties, she inquired about "buying-back" pension contributions for the time spent job-sharing and on LWOP. She was advised that she could only "buy-back" the contributions for the period on LWOP.

With respect to the impact, Ms. Fraser notes that she will have to work longer to receive her full 25 year pension and will have a lower monthly pension. She notes that if she had not agreed to return from LWOP to job-share with another member, the other member could have lost her job-sharing position or the RCMP could have lost two members. She notes the benefits of job sharing for the RCMP, the communities they worked in and the maintenance and honing of their policing skills while job-sharing.

Alison Pilgrim

Ms. Pilgrim joined the RCMP in 1987, married in 1994 and had her first child in 1995. She returned to work after a six-month maternity leave. Ms. Pilgrim notes the stress of being torn between the demands of excelling at policing and at motherhood. In 1998, her second child was born. She applied to job-share upon her return from maternity leave. She found a partner to job-share and returned to the RCMP in 1999.

Ms. Pilgrim described the benefits of job-sharing including reduced stress and meeting the demands of both policing and motherhood.

Ms. Pilgrim notes that her job-sharing MOA was silent on the issue of purchasing pension benefits. She adds that she viewed the time not worked as LWOP and, as such, that she could "buy-back" the pension entitlement in the same way as those on LWOP. She adds that a compensation specialist advised her that the time she did not work while job-sharing was LWOP.

However, the Proposed Changes to the RCMPSA released by the RCMP PAC in 2000 did not address this issue. Ms. Pilgrim then wrote to the Commissioner to voice her concerns.

Ms. Pilgrim also filed a grievance in 2000. The RCMP ERC found that there was nothing to prevent the RCMP from allowing her or other job-sharers to "buy-back" their pension contributions. However, the RCMP Acting Commissioner did not accept the recommendations of the ERC and dismissed the grievance.

With respect to the impact, Ms. Pilgrim estimates that her retirement income will be reduced by 5% annually. She also notes that the policy has caused her stress with respect to how she will financially manage in retirement. In addition, it has changed her once positive view of the RCMP; the situation demonstrates to her that the RCMP does not value women members or members with children.

Colleen Fox

Ms. Fox joined the RCMP in 1987, married another RCMP member in 1989, and was posted along with her husband to a small community in Newfoundland. She had her first child in 1990 and returned to full-time duties after a six-month maternity leave. She notes the challenges of finding child-care for her son, who had serious health issues, in a small community and the juggling between her husband's shifts and her own shifts to ensure all of her son's needs were met.

Following the birth of her second child in 1993, Ms. Fox took a six-month maternity leave and again returned to full-time patrol duties. Ms. Fox describes that opposite shifts, two children with health conditions, and finding child-care exacerbated a difficult situation. She inquired about

part-time work and transfers to the city but both were denied. Faced with no other options, she retired in June 1994. Ms. Fox notes that in her exit interview she explained that she felt forced to leave the RCMP.

Ms. Fox inquired about job-sharing upon learning of the policy. In 2000, she re-enrolled in the RCMP and job-shared with another member, although this required her to commute 200 km daily. Ms. Fox describes the benefits of job-sharing, including easing the transition back to policing, and meeting her family and home responsibilities. Ms. Fox also notes the benefits to the RCMP, pointing to her positive performance appraisals, and for the community the job-sharing members served.

Ms. Fox explains that she returned to full-time duties in 2002 with the benefit of her skills and confidence regained and the benefits of an easier transition for her children.

With respect to the impact, Ms. Fox states that denying her the right to "buy-back" the pension contributions for the time she job-shared sends the message that women who have children are not wanted in the RCMP. She states that if she had known that she could not "buy-back" this time, she would not have returned to work in 2000 but would have remained at home until 2002 and then returned full-time, despite a more difficult reintegration.

Nancy Noble

Ms. Noble joined the RCMP in 1985, married in 1994 and had her first child in 1996. She returned to work after a six-month maternity leave in 1997 and was transferred to a position to avoid shift work, due to a recently diagnosed medical condition. She explains that she inquired about part-time work but was advised this was not available.

After the birth of her second child in 1998, she inquired again about part-time work and ultimately found a member to job-share with. The job-sharing arrangement began in February 1999. She was soon advised that she would not be able to "buy-back" the pension for time not worked. Ms. Noble viewed this as an oversight and made additional inquiries, liaised with other members who were job-sharing and wrote to the Commissioner in 2000. Ms. Noble also notes the supportive position of the RCMP PAC.

Ms. Noble explains that her job-sharing was attached to a particular position which was discontinued and she returned to full-time duties in September 2000. Due to the demands of juggling work and family, her husband left his job and she continued to work full-time.

Ms. Noble grieved the decision or response from the RCMP Compensation Section which advised her that she could not make pension contributions retroactively for the time she spent job-sharing. The ERC found that the grievance had merit and recommended that the RCMP Commissioner allow the grievance and conduct a review into the discriminatory aspects of the pension policy for job-sharers. In 2010, the RCMP Acting Commissioner denied the grievance and found that the RCMPSA prevented the RCMP from treating the time not worked as LWOP.

With respect to impact, Ms. Noble notes that in her view, the situation is unfair and creates barriers to female members of the RCMP.

Christopher Higgins

Professor Higgins is a professor at the Richard Ivey School of Business at the University of Western Ontario. He describes that his research focuses on work and family issues and its impact on individuals and organizations, which he refers to as "role overload".

Professor Higgins describes "role overload" as a form of role conflict in which a person perceives that the collective demands of their multiple roles exceeds their available time and energy resources, thereby making the person unable to adequately fulfill the requirements of their various roles. Role overload exists when work interferes with family obligations or when family obligations interfere with work to the extent that the person feels the stress of never having enough time. Simply put, it means too many responsibilities and too little time to attend to them.

Professor Higgins describes the extensive research he has conducted, including with Professor Linda Duxbury, on work/life conflict. He notes that the research reveals that high levels of role overload were associated with higher levels of stress, depression, absenteeism, and decreased satisfaction with both family and work. He notes that factors that increase role overload include workplace culture, childcare availability, and shifting rather than fixed schedules.

Professors Higgins and Duxbury's 2009 study of work and family issues (*Coping with Overload and Stress: Men and Women in Dual Earner Families* published in 2010) reveals that competing work and family tensions are more often felt by women and that women in dual income families report higher stress than their male partner. Women were more likely than men to respond to the overload by scaling back at work and cutting back on outside activities, among other strategies.

In 2012, Professors Higgins and Duxbury conducted a study of 4500 police officers working for 25 police forces. Their Report, *Caring for and about those who serve: Work-life conflict and employee well being within Canada's Police Departments* [the Police Study] , provides data about gender and work- life balance and an analysis of the data.

Professor Higgins states that the data which shows that women officers who are part of a dual career family are more likely to assume child-care responsibilities than men. Professor Higgins notes that this is consistent with his other research which concluded that women continue to assume traditional roles in the home despite increasingly taking on greater roles in the workplace. He adds that unpredictable and rotating shifts are a predictor of role overload.

This research combined with previous research leads Professor Higgins to conclude that even in non-traditional professions such as policing, women are more likely than their male counterparts to scale back at work to respond to role overload and work-life conflict.

Professors Duxbury and Higgins make recommendations to Canadian police forces in their 2012 Police Study, including that members should be permitted to job-share when faced with increased role overload. Professor Higgins opines that allowing job-sharing or working part-time is the most effective way to reduce the risk of role overload among police officers and that this would be particularly beneficial to women in policing.

The Respondent's Affiants

Shelley Rossignol

Ms. Rossignol is the Legislative and Regulatory Analysis in the Pension Services Group of the RCMP with over 15 years' experience.

Ms. Rossignol describes the RCMP pension plan (the RCMPSA), part- time employment generally and in the RCMP, LWOP and job sharing. Ms. Rossignol explains the difference between pensionable service and pension benefits and how pension benefits are calculated (i.e. the amount the retired member will receive). Ms. Rossignol also clarifies some of the information included in the affidavits of the Applicants.

Ms. Rossignol explains that under the RCMPSA, RCMP members make contributions, accrue years of pensionable service, and earn pension benefits commensurate with their employment status at the contribution rates determined by the Treasury Board of Canada. RCMP members are compensated through salary and benefits set by Treasury Board under section 22 of the RCMP Act. As a benefit of their employment, they participate in a contributory defined benefit pension plan. The terms of the pension plan are set out in the RCMPSA and the Regulations. The RCMPSA is a registered pension plan under the ITA, and is subject to the provisions of the ITA and the ITA Regulations.

Ms. Rossignol explains that "job-sharing" is not defined in the RCMPSA or its Regulations. The RCMPSA and its Regulations refer to a member as part- time or full-time, and pension benefits are determined according to this status. Part- time members contribute to their pension at the same rates as full-time members, but their contributions are based on the agreed upon weekly working hours. Pension benefits are also pro-rated to account for any part- time service.
Ms. Rossignol provides several examples to demonstrate the calculations for a member who worked full-time for the majority of their career and part time for two or three years of a 25-30 year career.

Ms. Rossignol notes that there are no provisions in the RCMPSA or the Regulations to allow part- time members to "buy-back" full-time pension benefits just as there are no provisions to permit full-time members from purchasing additional pension benefits which exceed the number of hours assigned in order to augment their retirement income. This is consistent under all federal public sector pension plans.

She added that it is common for members and others to supplement their pension income with other sources of income such as RRSPs, savings and other investments.

Under the ITA and the ITA Regulations, a registered pension plan may provide that a plan member may make additional pension contributions to purchase a full-time benefit in respect of an "eligible period of reduced pay". These provisions of the income tax scheme are optional for a registered pension plan. She explains that in order for the Minister of Public Safety and Emergency Preparedness to introduce pension provisions for a period of reduced pay for RCMP members, legislative change would be required.

Ms. Rossignol explains that periods of LWOP are pensionable and require mandatory contributions from members upon their return to work. The member must contribute for a three month period and can then elect to contribute for some or all of the remaining period. A member could also elect to "buy-back" at a later date, but would be required to do so at their prevailing salary. She explains that if a member is full-time immediately prior to their LWOP, their pension contribution would be based on full-time hours. If the member part- time prior to LWOP, their pension contributions would be based on their part-time hours and they would receive a pension benefit for the LWOP period to reflect their part-time status.

Ms. Rossignol notes that part-time employment has been available to members of the RCMP since 1985. She explains that the job-sharing policy is a form of part-time employment and was implemented in 1997.

Ms. Rossignol notes that job sharing was introduced 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. It was viewed

as mutually beneficial because it enabled members to remain operationally connected to the RCMP while having a work schedule that better accommodated their individual circumstances.

Ms. Rossignol describes the policies that govern job-sharing, including that MOA must be signed by members who wish to job-share. The MOA states that it supersedes any prior oral or written representations that may have been made to the member entering into the job-sharing arrangement. The MOA also states that the member can request full-time employment in the future, that if the members hours are increased to full-time they will be provided with a written explanation of their benefits, and that members acknowledge their benefits and that they had had the opportunity to obtain legal and financial advice. The benefits applicable to job-sharers are set out in an appendix to the MOA and the calculations for salary and pension contributions are set out in a separate appendix.

Ms. Rossignol also provides data which shows that the rate of job-sharing or part-time employment by regular members has been low. The snapshot data for 2010 and 2014 shows that 100% of regular and civilian members who were job-sharing were women, with a significant majority citing child-care as the reason for doing so. Other reasons cited included returning to school, caring for the elderly and medical reasons.

Ms. Rossignol notes that all the Applicants signed MOAs, as described above, and each included estimates of their pension contributions based on their part- time hours. Ms. Pilgrim also received a response to one of her inquires explaining how pension benefits are pro-rated to reflect part-time work.

Ms. Rossignol states that there have been no changes to the RCMPSA or its Regulations to allow part-time members to purchase full-time pension benefits. She acknowledges that there may have been discussions, but no legislative changes have been made and none are contemplated.

Kimberley Gowing

Ms. Gowing is a pension specialist in the Pension and Benefits Sector of the Treasury Board Secretariat with over 25 years of experience.

Ms. Gowing provides an overview of public sector pension plans, including the RCMPSA, describes part time pensionable service and describes LWOP.

Ms. Gowing points out that part- time service is accrued at the same rate as full-time service. This means that an employee who works one year full-time would accumulate the same pensionable service as an employee who works part-time for a full year. This "one year equals one year" principle does not permit part- time or full-time employees to accrue service over and above their assigned work week.

Ms. Gowing explains that the pension benefit (the amount received on retirement) must be adjusted to reflect the periods of time that an employee worked less than full-time hours. She provides an example to demonstrate the calculation.

Ms. Gowing notes, as did Ms. Rossignol, that job-sharing is not defined in the RCMPSA, its Regulations, or in the PSSA; an employee is either part-time or full-time and their pension benefits are determined accordingly.

Ms. Gowing explains that most periods of LWOP are pensionable and require contributions from the employee following their return to work. In addition to the information provided by Ms.

Rossignol, Ms. Gowing explains that the periods of LWOP eligible for "buy-back" vary from plan to plan and are at the discretion of the plan sponsor. She notes that the provisions are designed to support the policy or business goals of the plan sponsor, such as recruitment and retention, but with limits to ensure the integrity of the plan.

Ms. Gowing explains that a contributor is deemed to have received the same salary that would have been authorized to be paid had the contributor not been absent on LWOP. She reiterates that the status of the employee immediately prior to the LWOP, whether part- time or full-time, extends for the period of LWOP and governs the contributions to be paid upon return. This applies even if the employee was on part- time before LWOP and returned to full-time or *vice versa*.

Ms. Gowing also explains, as did Ms. Rossignol, that employees cannot work part-time and "buy-back" the hours or days that they did not work so as to accrue full-time pension benefits. She adds that RRSPs are available to augment future retirement income.

Ms. Gowing also explains that the ITA Regulations allow a pension plan member who has temporarily worked reduced hours, which is distinct from part- time, to make additional contributions up to the regular full or part- time hours they worked before the temporary reduction. This enables them to maintain full pension benefits for the period of reduced pay. Ms. Gowing notes that there are conditions to be met, that these provisions are optional for a registered pension plan, and that neither the PSSA nor the RCMPSA include such provisions.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2365-14
STYLE OF CAUSE:	JOANNE FRASER, ALLISON PILGRIM AND COLLEEN FOX v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	DECEMBER 19 AND 20, 2016
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APPEARANCES:

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Gregory Tzemenakis Youri Tessier-Stall	FOR THE RESPONDENT

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