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• THE SUPREME COURT OF CANADA ISSUES A SIGNIFICANT JUDGEMENT ON SUBSTANTIVE EQUALITY IN *FRASER V. CANADA* (*ATTORNEY GENERAL*), OCTOBER 16, 2020 •

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IMPORTANT ADVANCES ON ISSUES FOR GENDER EQUALITY AND PENSIONS

On October 16, 2020, the Supreme Court of Canada issued an important decision, in *Fraser v. Canada (Attorney General)*, [2020] S.C.J. No. 28, 2020 SCC 28, that clarifies the law under section 15 of the *Charter of Rights and Freedoms* (the “*Charter*”). The decision significantly advances equality law for women in Canada and for those developing a systemic discrimination argument. Legislatures, policy makers, and pension plan administrators should examine the decision in detail as it spells out a roadmap for a gender-based analysis and substantive equality.

As the majority of the Supreme Court noted, fifty years ago the Royal Commission on the Status of Women set out a blueprint to address inequities in the workplace for women. Despite the Commission’s recommendations for women’s equality, for over twenty-five years, three women RCMP officers, Joanne Fraser, Allison Pilgrim, and Colleen Fox, argued that inequities in their workplace had not been addressed as they were discriminated against in their pension plan because they were women.

The Supreme Court agreed and said that the women were discriminatorily treated when their pensions were reduced after they went on a temporary job share arrangement due to childcare responsibilities. The Court ruled that the RCMP pension plan violated the women’s equality rights under the *Charter*. The Court ordered the government to develop a meaningful remedy with fulsome and retroactive equal access to enable the buy-back of pension credits. Importantly, the remedy applied to all women affected by the judgement.

The claimants sought to have the ability to “buy-back” pension credits for the period in which they were in temporary “job-share” positions due to family caregiving responsibilities, as others were able to when they went on various unpaid leaves. At the RCMP, women overwhelmingly relied on the job-share program in order to respond to the double burden of their career obligations and childcare. The inability to buy-back their pension, the women argued, violated their *Charter* right to gender equality. The pension plan allowed others to buy-back pension credits for various unpaid leaves, including suspensions for disciplinary action without pay. The lower courts found that this was not discrimination as in their view it was a matter of “choice” and that the women did not meet the onus to prove discrimination.

In one of the most significant *Charter* equality cases, the Court not only affirmed women's right to equal pension benefits, but also provided a much-needed roadmap for future cases involving adverse effect discrimination, systemic discrimination, and substantive equality.

The women and the intervenor, the Women's Legal Education Action Fund ("LEAF"), argued that the substantive equality analysis is the "engine" of section 15 of the *Charter* and must always give due consideration to the context in which the alleged section 15 violation occurred. Substantive equality was undermined by the lower courts by improper considerations of "choice" and a formalistic use of mirror-like comparators. Although the pension plan was facially neutral, a substantive equality analysis would reveal the adverse impact and systemic discrimination in the design of the pension plan.

Three significant issues in a gender equality analysis were alive in this case: the need for a contextual reading of section 15 of the *Charter*; that caregiving responsibilities are inextricably linked to sex as a ground; and whether the notion of a women's "choice" to have children was a rationale to deny access to a benefit. On all these issues, the Court advanced a contextual analysis of substantive equality.

The Court clarified the tests required under section 15 and set out the type of evidence required to demonstrate an adverse effect of the legislation. The Court relied upon extensive analysis by numerous feminist legal scholars, particularly, Elizabeth Shilton's work on pension plans based upon a norm of a presumptively male worker in a full-time and permanent position unencumbered with important family care responsibilities and where plans provide enhanced access to benefits to those who fit this norm.

THE HIGHLIGHTS OF THE SUBSTANTIVE EQUALITY ROADMAP

First, the *Charter* protects substantive equality; substantive equality must be looked at in its context to see how there is a disproportion impact on women, or members of a protected group. Full-time RCMP members who job-share were predominantly women and sacrificed pension benefits because of a

temporary reduction in working hours. This pension arrangement had a disproportionate impact on women and perpetuated their historical disadvantage and as such it was a clear violation of their right to equality under section 15 of the *Charter*.

Second, the Court clearly affirmed prior decisions that substantive equality is the "animating norm" of the section 15 framework. In *Fraser*, the Court emphasized that attention must be paid to the "full context of the claimant group's situation", to the "actual impact of the law on that situation", and to the "persistent systemic disadvantages [that] have operated to limit the opportunities available" to that group's members constitute that framework.

Third, the Court clarified that adverse impact discrimination violates the norm of substantive equality. Adverse impact discrimination occurs when a seemingly neutral law has a disproportionate impact on members of groups protected on the basis of an enumerated or analogous ground. The Court noted that seemingly neutral rules may operate in practice as "built-in headwinds" for members of protected groups.

Fourth, the Court upheld the two-part test for section 15 as set out in *Centrale des syndicats du Québec v. Québec (Attorney General)*, [2018] S.C.J. No. 18, 2018 SCC 18, and confirmed that the amorphous notions of dignity or stereotyping is not a requirement of the test. At the first step, in order for a law to create a distinction based on prohibited grounds through its effects, the applicant must only prove that it has a disproportionate impact on members of a protected group. The second step is whether the law has the effect of reinforcing, perpetuating, or exacerbating disadvantage. This requires an examination of the impact of the harm caused to the affected group. Such harm must be viewed in light of any systemic or historical disadvantages faced by the claimant group. The same two-step approach to section 15 applies regardless of whether the discrimination alleged is direct or indirect.

Fifth, the Court provided a very clear statement that the unified approach for both direct and indirect discrimination created in *Meiorin* in the human rights context should equally apply under the *Charter*.

Sixth, the Court had much to say about evidence in adverse effect discrimination cases. The Court further clarified that if claimants successfully demonstrate that a law has a disproportionate impact on members of a protected group, they need not also prove that the protected characteristic “caused” the disproportionate impact. It is also unnecessary for them to prove that the law itself was responsible for creating the background social or physical barriers which made a particular rule, requirement, or criterion disadvantage.

Finally, the Court firmly rejected the notion of a respondent’s defence of “choice”, relied on by the lower courts to deny the discrimination claims. A woman’s “choice” to job-share was no basis for rejecting a section 15 equality claim in this context as the decision to work on a part-time basis, far from being an unencumbered choice, “often lies beyond the individual’s effective control”. According to the majority opinion, “[d]eciding to work part-time, for many women, is a ‘choice’ between either staying above or below the poverty line.”

EFFECT ON PENSION PLANS

The findings of the Court will provide fertile ground for questioning current pension plan structures and options. Pension plans often provide options with specific, limiting criteria, and their terms often affect cohorts of members in the plan differently. Pension plans are inevitably linked to employment arrangements and can exacerbate structural inequities that result from those employment arrangements regardless of whether terms appear to be neutral on their face.

Many pension plans are going through a process of reviewing the structure of benefits given changing demographics, evolving regulation, and an increasingly unpredictable investment environment. The impact of the design of the pension benefits on substantive equality should also be a key factor in that consideration. Pension plan sponsors, administrators,

employers, unions, and members should consider traditional and accepted pension designs through a substantive equality lens. This case may bring new perspectives to the subsidies that often operate in pension plans for joint and survivor benefits (for those with spouses), enhanced early retirement benefits (for those who have worked for longer periods of time without breaks in service), and any options for buy-backs, to name a few.

The decision will not only influence statutory pension plans, but all pension plans as these principles will affect thinking about human rights codes across the country.

In our view this case will have far-reaching impact for cases raising issues of substantive equality and systemic discrimination on the basis of sex, race, and other human rights grounds.

[Jan Borowy and Danielle Bisnar, Cavalluzzo LLP, are labour and human rights lawyers who represented the Women’s Legal Education and Action Fund (“LEAF”) with their colleague Kate Hughes at the Supreme Court of Canada. Cynthia Cryslar is a pension and benefits specialist at Cavalluzzo LLP.]

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