

TOP FIVE 2021

Each year at OJEN's Toronto Summer Law Institute, a leading jurist identifies five cases that are of significance in the educational setting. The 2021 cases were selected and discussed by Professor Sonia Lawrence of Osgoode Hall Law School in Toronto. Professor Lawrence is a leading scholar in Canadian constitutional law and a prolific champion working at the intersection of law and social justice. This summary, based on these comments and observations, is appropriate for discussion and debate in the classroom setting.

Fraser v Canada (Attorney General), 2020 SCC 28

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<https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/18510/index.do>

Special Note

"Substantive equality" involves understanding that simply treating everyone exactly the same does not always lead to equitable outcomes. Supporting substantive equality can require that laws do more to address making sure that people have sufficient and equitable outcomes and opportunities to thrive. "Adverse impact" discrimination occurs when a seemingly-neutral law (one that is not plainly or obviously discriminatory) has a disproportionate impact on a group of people. To achieve what the Supreme Court calls "substantive equality", the *Charter* protects against adverse impact discrimination as well as simple discrimination.

Facts

Ms. Fraser, Ms. Pilgrim and Ms. Fox were former officers of the Royal Canadian Mounted Police (RCMP). To allow greater flexibility in caring for their young children, they decided to reduce their full-time

working hours and opted in to the RCMP's job-sharing program. The job-sharing program allowed employees to work reduced hours by sharing a full-time job with another RCMP officer. The program was designed to help employees who were having difficulty balancing full-time work hours and additional obligations. It was intended to provide an alternative to taking leave without pay. It also helped the RCMP to retain trained members, and to address staffing shortages.

Most of the job-sharing participants were women with young children.

The RCMP also provides a pension program for full-time employees. Under the rules of the program, full-time employees who had been suspended or taken an unpaid leave were allowed to replace (or, "buy back") the pension contributions they would have made if they not been on unpaid leave. The inability to do so meant their pension benefits would be reduced.



Also under the rules of the pension program, employees who participated in the job-sharing program were not considered full-time employees. Participating in the job-sharing program made Ms. Fraser and her colleagues ineligible for their full pension benefits because they were prevented from buying back to cover the missed contributions.

The officers argued that the manner in which the RCMP calculated their pensionable hours infringed upon their equality rights under s. 15 of the *Canadian Charter of Rights and Freedoms*. They argued the policy disproportionately impacted RCMP women, as mothers.

Issues

Does the RCMP's pension plan policy have a discriminatory or adverse impact on women (more specifically women with children) contrary to s.15(1) of the *Charter*?

Procedural History

The Trial Division Federal Court held that job-sharing was not disadvantageous when compared to unpaid leave and, even if it was, any disadvantage was result of employees' choice to job-share, not gender or family status. This ruling was supported by the Federal Court of Appeal. The applicants appealed to the Supreme Court of Canada (SCC).

Decision

The SCC found that full-time RCMP members who job-shared had to sacrifice pension benefits because of the temporary reduction in working hours. The RCMP's pension design perpetuated a long-standing source of economic disadvantage for women contributing to continuing their historical disadvantage. The SCC found that this pension policy breached the right to equality under s. 15(1) of the *Charter* and that this infringement could not be justified under s. 1 of the *Charter*.

Ratio

Substantive equality requires courts to look at a number of factors in their unique context, not just what lies on the surface of a law or government action. Courts should adopt a broader understanding of adverse impact discrimination to prevent harm when seemingly-neutral laws have discriminatory effects.

Reasons

Section 15 of the *Charter* states that: "every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability".



This test for deciding whether a law violates s. 15 of the *Charter* has two steps:

1. Does the law, on its face or in its impact, create a distinction on the basis of an enumerated (listed by section 15) or analogous (comparable) ground?
2. Does the law fail to respond to the actual capacities and needs of the group and instead impose burdens or deny a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating their disadvantage?

Part 1 of the s. 15 test

The first part of the s. 15(1) test was met.

The Court held that denying a buy-back option for job-sharing employees imposed less favourable pension circumstances for women. Sex is an enumerated ground under s. 15 of the *Charter*. RCMP members who participated in the job-sharing program were predominantly women with young children. From 2010-2014, 100 percent of members working reduced hours through job-sharing were women, and most of them cited childcare as their reason for participating in the program. The job-sharing program was introduced because some members required an alternative to taking leave without pay “due to their personal or family circumstances”. For many women, the decision to work

on a part-time basis, far from being an unencumbered choice, “often lies beyond the individual’s effective control”. Deciding to work part-time, for many women, is not a true choice because the alternative could mean falling into poverty.

Part 2 of the s. 15 test

The Court agreed with Ms. Fraser that the negative consequences of job-sharing perpetuate a long-standing gender bias against women in pension plans. The Court found that pension plans have historically been designed “for middle and upper-income full-time employees with long service, typically male.”

Can the law be justified under s. 1 of the *Charter*?

After determining that a law violates s. 15 of the *Charter*, the court must turn to s.1 of the *Charter*, which gives the government the opportunity to justify the breach. This is known as the *Oakes* Test. Under this test, the Crown must first establish that there is a pressing and substantial objective for limiting the *Charter* right. If it meets this part of the test, the Crown must then show that the limitation is proportionate to this objective. In other words, it must show that the benefit outweighs the harm. This second part of the test has three steps as



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well, and if the government fails to pass any element of either part, the law is not justified.

In this case, the majority of SCC found that the government was not able to pass the first step. There was no pressing and substantial objective to the rule that permitted some employees to maximize the pension contributions they could make without working while preventing it for part-time employees participating in a program intended to alleviate personal and financial stress. Accordingly, the court found that there was no need to undertake the rest of the *Oakes* analysis.



Discussion

1. What was the intention of the job-sharing program?
2. What is the difference between substantive equality and simply treating everyone the same (formal equality) in a group?
3. Section 15 prohibits discrimination of “enumerated” or “analogous” grounds. Enumerated grounds like race and religion were included by name when the law was written – why do you think the authors chose to include analogous grounds?
4. What was the main argument about sex discrimination made by Fraser and the other officers?
5. Does the SCC’s decision support the goal of substantive equality?