Court File No. COA-24-CV-0058

COURT OF APPEAL FOR ONTARIO

BETWEEN:

FAIR VOTING BC and SPRINGTIDE COLLECTIVE FOR DEMOCRACY SOCIETY

Applicants (Appellants)

- and -

ATTORNEY GENERAL OF CANADA

Respondent (Respondent)

and

THE ABORIGINAL COUNCIL OF WINNIPEG, CANADIAN LAWYERS FOR INTERNATIONAL HUMAN RIGHTS, THE CANADIAN CONSTITUTION FOUNDATION, SOUTH ASIAN LEGAL CLINIC OF ONTARIO, FAIR VOTE CANADA, and WOMEN'S LEGAL EDUCATION AND ACTION FUND

Interveners

FACTUM OF THE INTERVENER, WOMEN'S LEGAL EDUCATION AND ACTION FUND ("LEAF")

August 30, 2024

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Table of Contents

Page

PART I - OVERVIEW

1. This case offers this Court one of its first opportunities to consider the principle and application of substantive equality since the Supreme Court of Canada's decision in *Sharma*.[1] The issues in this appeal are the substantive equality rights of women in relation to Canada's electoral system and, more particularly, the constitutionality of ss. 2(1), 24(1), and 313(1) of the *Canada Elections Act* (the "*Act*").[2] These statutory provisions lay the foundation for Canada's single-member plurality electoral system, which is colloquially known as the "first past the post" ("FPTP") electoral system.

2. Although the application judge accepted that the percentage of women in Parliament, currently 30%, is "too low", he found that the applicants failed to prove causation – that is, a causal connection between the FPTP system and the underrepresentation of women in Parliament. He therefore held that the impugned provisions do not violate s. 15(1) of the *Charter*.[3] The application judge appeared to accept that the "primary barrier to the election of women to Parliament" was not the impugned provisions of the *Act*, "but rather society's systemic sexism".[4] He also questioned the nature of the evidence submitted by the applicants and referred to specific counterexamples that were not in the record and of which he took judicial notice, to conclude that the applicants had failed to establish causation.[5]

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[1] *R. v. Sharma*, 2022 SCC 39 ["*Sharma*"], Women's Legal Education and Action Fund's Book of Authorities ["BOA"] Tab 9.
[2] *Canada Elections Act*, SC 2000, c 9.
[3] *Fair Voting BC v. AG Canada*, 2023 ONSC 6516, para. 28, 108, 116-117 ["*Fair Voting*"], BOA, Tab 4; *Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982*, being Schedule B to the Canada Act 1982 (UK), 1982, c. 11 section 15 ["*Charter"*].
[4] *Fair Voting*, para. 109, BOA, Tab 4.
[5] *Fair Voting*, para. 117, BOA, Tab 4.

3. The Women's Legal Education and Action Fund ("LEAF") takes no position on the merits of this appeal. Rather, LEAF submits that the judgment too narrowly construes s. 15 and a more flexible approach is required. LEAF makes two submissions to assist with the interpretation and application of s. 15.

4. First, as long confirmed by the Supreme Court of Canada, substantive equality lies at the heart of the s. 15 analytical framework. Substantive equality requires courts to consider not only whether an impugned law discriminates directly against a protected group, but also whether a law creates or contributes to a group's disadvantage by failing to account for systemic barriers.

5. Second, importing a strict causation approach into the application of the s. 15(1) test is inconsistent with substantive equality and the promise of s. 15, particularly in cases involving adverse effects discrimination. Instead, courts should adopt a flexible approach in assessing the evidence. To do otherwise risks creating undue hurdles for protected groups who look to s. 15(1) of the *Charter* to remedy systemic harms.

PART II - FACTS

6. LEAF takes no position with respect to the facts as stated by the parties.

PART III -ISSUES AND LAW

A. Substantive equality, the core of the s. 15 analytical framework, requires recognizing and accounting for systemic barriers

(i) Substantive equality is the animating norm of s. 15

7. The Supreme Court of Canada has repeatedly referred to substantive equality as the "animating norm" of s. 15 of the *Charter*.[6] From its very first s. 15 case, the Court has expressly

[6] *Sharma*, para. 37 (per Brown and Rowe JJ., majority), BOA, Tab 9; *Withler v. Canada (Attorney General)*, 2011 SCC 12 ["*Withler*"], para. 2, BOA, Tab 10; see also *R. v. Kapp,* 2008 SCC 41,

endorsed a substantive equality approach to s. 15 claims.[7] This approach recognizes that "identical treatment may frequently produce serious inequality".[8] In contrast to formal equality, with its narrow focus on "treating likes alike",[9] substantive equality "rejects the mere presence or absence of difference as an answer to differential treatment. It insists on going behind the façade of similarities and differences". The focus of substantive equality "is on the actual impact of the impugned law, taking full account of social, political, economic and historical factors concerning the group."[10]

(ii) Substantive equality requires an approach grounded in context

8. The goal of substantive equality embodies a commitment to acknowledging and addressing not only direct discrimination, but also adverse effects discrimination, which occurs when a facially-neutral law has a disproportionate impact on members of a protected group.[11] As early as *Meiorin*, the Supreme Court of Canada recognized that "this more subtle type of discrimination, which rises in the aggregate to the level of systemic discrimination, is now much more prevalent than the cruder brand of openly direct discrimination."[12]

[" *Kapp*"], paras. 15-16 (per McLachlin C.J.C and Abella J., majority), BOA, Tab 8; *Quebec (Attorney General) v. Alliance du personnel professionnel et technique de la santé et des services sociaux*, 2018 SCC 17 ["*Alliance*"], para. 25 (per Abella J., majority), BOA, Tab 7.

[7] *Kapp,* para. 15 (per McLachlin C.J.C. and Abella J., majority), BOA, Tab 8, quoting *Andrews v. Law Society of British Columbia*, [1989] 1 SCR 1 ["*Andrews*"], pp. 165 and 171 (per McIntyre J., majority), BOA, Tab 1; see also *Fraser v. Canada (Attorney General)*, 2020 SCC 28 ["*Fraser*"], para. 42 (per Abella J., majority), BOA, Tab 5.

[8] *Andrews*, at p. 164 (per McIntyre J., majority), BOA, Tab 1.

[9] *Andrews*, pp. 167-168, BOA, Tab 1. Also see: Jonnette Watson Hamilton and Jennifer Koshan, "Adverse Impact: The Supreme Court's Approach to Adverse Effects Discrimination under Section 15 of the Charter" (2015) 19:2 Rev Const Stud 191-235, p. 194, BOA, Tab 11.

[10] *Withler,* para. 39, BOA, Tab 10.

[11] *Fraser,* paras. 30, 31 and 47 (per Abella J., majority), BOA, Tab 5.

[12] *British Columbia (Public Service Employee Relations Commission) v. BCGSEU,* [1999] 3 SCR 3 ["*Meiorin*"], para. 29, BOA, Tab 2.

9. The courts have recognized two types of adverse effects discrimination. First, a law or government action may be facially-neutral, but operate in practice as "built-in headwinds" that disadvantage members of protected groups.[13] For example, in *Simpsons-Sears,* an employer adopted a policy, for legitimate business reasons and without discriminatory intent, requiring employees to work on Saturdays. This adversely impacted the claimant employee, who could not work on Saturdays without compromising her religious beliefs.[14] Second, a law or government action may fail to accommodate members of protected groups.[15] For example, in *Eldridge,* all patients lacked access to sign language interpreters under the health care scheme, but this lack of access had a disproportionate impact on those who had hearing loss and required interpreters to meaningfully communicate with health care providers.[16]

10. The second type of adverse effects discrimination is particularly important when considering impugned laws in the context of systemic or societal barriers. As explained by Jennifer Koshan and Jonnette Watson Hamilton, the "accommodation of difference puts adverse effects discrimination at the heart of substantive equality as a way to recognize and remedy systemic discrimination."[17]

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[13] *Fraser*, para. 53 (per Abella J., majority), BOA, Tab 5.
[14] *Ont. Human Rights Comm. v. Simpsons-Sears*, [1985] 2 SCR 536, para. 18, BOA, Tab 6.
[15] *Fraser,* para. 54 (per Abella J., majority), BOA, Tab 5. This type of adverse effects discrimination is more accurately framed as "'failure to account for difference.' Accommodation is only one of several responses that could be made to account for difference, in addition to affirmative action programs and changes to the law": Jennifer Koshan and Jonnette Watson Hamilton (2023), "'Clarifications' or 'Wholesale Revisions'? The Last Five Years of Equality Jurisprudence at the Supreme Court of Canada", 114 S.C.L.R. (2d) 15-33 ["Koshan and Watson Hamilton"], footnote 45, BOA, Tab 13.
[16] *Eldridge v. British Columbia (Attorney General)*, [1997] 3 SCR 624 ["*Eldridge*"], paras. 69, 71 and 83, BOA, Tab 3.
[17] Koshan and Watson Hamilton, para. 18, BOA, Tab 13; *Eldridge*, para. 65, BOA, Tab 3. Also see *Andrews*, pp. 168-169, BOA, Tab 1, in which the majority described the "accommodation of differences" as "the essence of true equality".

11. In the instant case, the application judge accepted that "the percentage of women in Parliament, although slowly increasing over time, is still too low".[18] He went on to note that the respondent's expert found "society's systemic sexism – gendered behaviour and the acceptance of male overrepresentation" to be the "primary barrier" to the election of women in Parliament, not the impugned sections of the *Act*.[19]

12. However, the fact that systemic sexism is the "primary barrier" to the election of women is not the end of the s. 15 inquiry where substantive equality is the goal. The impugned law does not need to have created the pre-existing barriers or biases faced by members of a protected group to have a disproportionate impact on members of that group. In *Alliance,* the Supreme Court of Canada explained that "when the government passes legislation in a way that perpetuates historic disadvantage for protected groups, regardless of who caused their disadvantage, the legislation is subject to review for s. 15 compliance."[20] The Court added in *Fraser* that it is unnecessary "to inquire into whether the law itself was responsible for creating the background social or physical barriers which made a particular rule, requirement or criterion disadvantageous for the claimant group. […] Section 15(1) has always required attention to the systemic disadvantages affecting members of protected groups, even if the state did not create them."[21]

13. Substantive equality requires an approach that considers the "full context" of the claimant(s) and the group(s) to which they belong.[22] It means acknowledging that membership in disadvantaged groups "often brings with it a unique constellation of physical, economic and social

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[18] *Fair Voting*, para. 108, BOA, Tab 4.
[19] *Fair Voting*, para. 109, BOA, Tab 4.
[20] *Alliance*, para. 41 (per Abella J., majority), BOA, Tab 7.
[21] *Fraser*, para. 71 (per Abella J., majority), BOA, Tab 5.
[22] *Fraser,* para. 42 (per Abella J., majority), BOA, Tab 5; *Withler*, para. 39, BOA, Tab 10.

barriers",[23] in this case including the systemic sexism found to exist by the application judge.[24] Substantive equality therefore recognizes that protected groups facing systemic adverse effects discrimination need more than just equal treatment (formal equality). Achieving substantive equality requires recognizing and accounting for systemic factors and biases. In the context of the s. 15(1) test, this means that a law can draw a distinction and perpetuate a disadvantage if it fails to accommodate a protected group in the face of systemic or societal biases or barriers.

B. Importing a strict causation approach into the s. 15(1) test is inconsistent with substantive equality and the promise of s. 15

(i) A requirement for causation must not create an undue barrier

14. The two-step test for analyzing a s. 15(1) claim is well-established. The claimant must demonstrate that the impugned law: (a) creates a distinction based on enumerated or analogous grounds, on its face or in its impact; and (b) imposes a burden or denies a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating disadvantage.[25]

15. The Supreme Court of Canada has held that the first step of the s. 15(1) test is "not a preliminary merits screen nor an onerous hurdle".[26] In *Fraser*, the Court held that this step simply requires some evidence of "distinction based on a protected ground."[27] The focus under the first step should therefore be on whether the law creates a *distinction* – this may be established by showing that the law contributes to the disproportionate impact on a protected group.

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[23] *Fraser,* para. 34 (per Abella J., majority), BOA, Tab 5.
[24] *Fair Voting*, paras. 109-112, BOA, Tab 4.
[25] *Sharma*, para. 28 (per Brown and Rowe JJ., majority), BOA, Tab 9; *Fraser,* para. 42 (per Abella J., majority), BOA, Tab 5; *Withler,* para. 30, BOA, Tab 10*; Kapp*, para. 17 (per McLachlin C.J.C. and Abella J., majority), BOA, Tab 8; *Alliance*, para. 25 (per Abella J., majority), BOA, Tab 7.
[26] *Alliance*, para. 26 (per Abella J., majority), BOA, Tab 7.
[27] *Fraser*, para. 50 (per Abella J., majority), BOA, Tab 5.

16. Recently, in a 5-4 split decision in *Sharma*, the majority of the Supreme Court of Canada stated that the s. 15(1) test from *Fraser* was settled; however, it then proceeded to provide a "clarification" of the causation requirements within the test.[28] The majority held that, at step one, the "claimant must present sufficient evidence to prove the impugned law, in its impact, *creates or contributes to* a disproportionate impact on the basis of a protected ground".[29]

17. The dissent in *Sharma* was critical of this and other "clarifications" made by the majority, referring to the alterations as a "wholesale revision" to the Court's approach to s. 15(1) that had been affirmed in *Fraser*. According to Justice Karakatsanis, among other things, the majority's approach "renew[s] focus on causation […], which adds nothing to the existing framework and is reminiscent of rejected pre-*Charter* approaches".[30] Recent academic literature has echoed concerns about a potentially heightened causation test under s. 15(1) in light of the majority's decision in *Sharma*. Margot Young explains that "a strict causation requirement sets up equality law to be insufficient for, or nonresponsive to, those who most need it."[31] Jennifer Koshan and Jonnette Watson Hamilton note that a claimant must now "prove the law 'caused' the disproportionate impact, in the sense that the law increased the gap between the claimant's group and others and did not just leave the gap unaddressed."[32]

18. Nevertheless, the majority in *Sharma* explicitly recognized that the evidentiary burden at the first step should not be undue.[33] The majority confirmed that the claimant "need not show the impugned law was the *only* or the *dominant* cause of the disproportionate impact—they need only

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[28] *Sharma*, para. 34 (per Brown and Rowe JJ., majority), BOA, Tab 9.
[29] *Sharma*, para. 42 (per Brown and Rowe JJ., majority) [emphasis in original], BOA, Tab 9.
[30] *Sharma*, paras. 204-206 (per Karakatsanis J., dissenting), BOA, Tab 9.
[31] Margot Young, "Zombie Concepts: Contagion in Canadian Equality Law" (2023), 114 S.C.L.R. (2d) 35-58, para. 27, BOA, Tab 12.
[32] Koshan and Watson Hamilton, para. 26, BOA, Tab 13.
[33] *Sharma.* para. 50 (per Brown and Rowe JJ., majority), BOA, Tab 9.

demonstrate that the law was *a* cause (that is, the law created *or contributed to* the disproportionate impact on a protected group)." Further, "[t]he causal connection may be satisfied by a reasonable inference."[34]

19. Assessing causation requires a consideration of context. If a protected group faces systemic or societal biases, the law may create or contribute to the disproportionate impact by failing to account for those biases—in such circumstances, the causation requirement may be satisfied even if the systemic or societal barriers were, in fact, the primary or dominant cause of that disadvantage.

(ii) The court should take a flexible approach to evidence establishing causation

20. In *Sharma*, the majority confirmed that, in establishing causation, "[n]o specific form of evidence is required".[35] Section 15 claimants can prove the disproportionate impact of a law in different ways. This can include evidence about the situation of the claimant group and evidence about the results of the law.[36] Claimants may rely on a variety of evidentiary sources, including from the claimant(s) themselves, from expert witnesses, or through judicial notice. In some cases, they may rely more heavily on expert evidence, academic studies, or government reports.[37]

21. The use of one type of evidence as opposed to another should not, on its own, affect a court's determination of whether a s. 15 violation has been made out. In *Fraser*, the Court explained that while both evidence of statistical disparity and of broader group disadvantage can assist in proving adverse impact discrimination, neither is mandatory.[38]

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[34] *Sharma,* para. 49 (per Brown and Rowe JJ., majority), BOA, Tab 9.
[35] *Sharma,* para. 49 (per Brown and Rowe JJ., majority), BOA, Tab 9.
[36] *Fraser*, paras. 55-56 (per Abella J., majority), BOA, Tab 5.
[37] *Fraser*, para. 57 (per Abella J., majority), BOA, Tab 5.
[38] *Fraser*, paras. 58-59 (per Abella J., majority), BOA, Tab 5.

22. In finding that the evidence, which consisted largely of expert evidence, was insufficient to establish causation, the application judge noted that the "lack of any Applicant with personal evidence of belonging to a section 15 group suffering discrimination gives me pause".[39] In other parts of his reasons questioning the evidentiary basis for the applicants' claims of a violation of s. 15(1), the application judge referred to individual counterexamples that were not in the record and of which he took judicial notice, including:

(i) the Conservatives produced Canada's only woman prime minister;[40]

(ii) although the Green Party was led during the last Canadian federal election by the first woman of colour to head a national political party, it was a divisive moment for the party rather than a unifying one;[41]

(iii) despite having a proportional representation system, France has never had a female president;[42] and

(iv) the United States, with its state-by-state electoral college system for presidential elections, produced a racialized person as president.[43]

23. In LEAF's submission, especially in cases involving systemic adverse effects discrimination, the court should avoid a prescriptive or narrow approach to the evidence. Establishing systemic discrimination, by definition, requires looking beyond individuals to the impact of the system or law on a group as a whole. The fact that there is no direct evidence from an individual saying that they, themselves, were the victims of the discriminatory law, is not

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[39] *Fair Voting*, paras. 73, 76-77, BOA, Tab 4.
[40] *Fair Voting*, paras. 102, BOA, Tab 4.
[41] *Fair Voting*, para. 103, BOA, Tab 4.
[42] *Fair Voting*, para. 31, BOA, Tab 4.
[43] *Fair Voting*, para. 39, BOA, Tab 4.

determinative. In assessing the evidence, the court should also recognize that not every member of a protected group needs to experience the same impact for discrimination to be established.[44] Thus, the existence of individual outliers or counterexamples does not mean that a particular law or policy does not have a disproportionate impact on members of a protected group on a systemic level. Nor are individual counterexamples or outliers probative of whether an impugned law contributes to a disadvantage on a systemic level.

24. Adopting a narrow approach that requires an individual to establish that an impugned law discriminated against them on an individual level risks restricting access to s. 15(1) to only claims of direct discrimination and ignores the systemic discrimination and barriers that protected groups may face. It undermines the goal of substantive equality, is inconsistent with decades of jurisprudence that has centered substantive equality in the s. 15(1) analysis, and risks impeding members of protected groups from looking to s. 15(1) of the *Charter* as a way to remedy systemic harms.

PART IV - ORDER REQUESTED

25. LEAF takes no position on the ultimate disposition of this appeal, and respectfully requests that it be decided in accordance with these submissions.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 30th day of August, 2024.

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Mariam Moktar

Counsel for the Intervener LEAF

[44] *Fraser,* para. 72 (per Abella J., majority), BOA, Tab 5.

SCHEDULE "A"
LIST OF AUTHORITIES

Case Law

1. *Andrews v. Law Society of British Columbia*, [1989] 1 SCR 1

2. *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 SCR 3

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

4. *Fair Voting BC v. AG Canada*, 2023 ONSC 6516

5. *Fraser v. Canada (Attorney General)*, 2020 SCC 28

6. *Ont. Human Rights Comm. v. Simpsons-Sears*, [1985] 2 SCR 536

7. *Quebec (Attorney General) v. Alliance du personnel professionnel et technique de la santé et des services sociaux*, 2018 SCC 17

8. *R. v. Kapp,* 2008 SCC 41

9. *R. v. Sharma*, 2022 SCC 39

10. *Withler v. Canada (Attorney General),* 2011 SCC 12

Secondary Sources

Jonnette Watson Hamilton and Jennifer Koshan, "Adverse Impact: The Supreme Court's Approach to Adverse Effects Discrimination under Section 15 of the Charter" (2015) 19:2 Rev Const Stud 191-235

Margot Young, "Zombie Concepts: Contagion in Canadian Equality Law" (2023) 114 S.C.L.R. (2d) 35-58

Jennifer Koshan and Jonnette Watson Hamilton, "'Clarifications' or 'Wholesale Revisions'? The Last Five Years of Equality Jurisprudence at the Supreme Court of Canada" (2023) 114 S.C.L.R. (2d) 15-33

SCHEDULE "B"
RELEVANT LEGISLATIVE PROVISIONS

***Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11**

3 Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.

15 (1) 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.

***Canada Elections Act*, SC 2000, c. 9**

Definitions

2 (1) The definitions in this subsection apply in this Act.

…

electoral district means a place or territorial area that is represented by a member in the House of Commons. (*circonscription*)

Appointment of returning officers

24 (1) The Chief Electoral Officer shall appoint a returning officer for each electoral district in accordance with the process established under subsection (1.1) and may only remove him or her in accordance with the procedure established under that subsection.

Return of elected candidate

313 (1) The returning officer, without delay after the sixth day that follows the completion of the validation of results or, if there is a recount, without delay after receiving the certificate referred to in section 308, shall declare elected the candidate who obtained the largest number of votes by completing the return of the writ in the prescribed form on the back of the writ

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FAIR VOTING BC et al	-and-	ATTORNEY GENERAL OF CANADA
Applicants (Appellants)		Respondent (Respondent)

COURT OF APPEAL FOR ONTARIO

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