[TRANSLATION]

Citation: *Canada Employment Insurance Commission v LC et al.*, 2024 SST 24

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	Canada Employment Insurance Commission
Representative:	Suzette Bernard
Respondents:	L. C. *et al.*
Representatives:	Kim Bouchard, Mathieu Charest-Beaudry, Jessica Lelièvre, and Louis-Alexandre Hébert-Gosselin

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Decision under appeal:	General Division decision dated January 10, 2022 (GE-18-222, GE-18-348, GE-18-2075, GE-18-3044, GE-18-3456, and GE-19-689)

Tribunal member:	Jude Samson
Type of hearing:	Videoconference
Hearing date:	March 28, 2023
Hearing participants:	Appellant Appellant's representative Respondent (L. C.) Respondents' representatives
Decision date:	January 9, 2024
File numbers:	AD-22-94, AD-22-95, AD-22-96, AD-22-97, AD-22-98, and AD-22-99

Decision

[1] I am allowing the appeal by the Canada Employment Insurance Commission (Commission). The six Respondents (Claimants) aren't eligible for any more Employment Insurance (EI) regular benefits.

Overview

[2] The Claimants received parental and maternity benefits. They all lost their jobs before or after they were off work or during that time. Then, they all applied for EI regular benefits.[1]

[3] But, the Commission denied regular benefits to all the Claimants because it could not:

- extend their qualifying periods
- extend their benefit periods
- pay benefits for more than 50 weeks, the maximum allowed under the law

[4] The Claimants appealed the Commission's decisions to the Social Security Tribunal's General Division.

[5] The Claimants argue that some sections of the *Employment Insurance Act* (Act) have a disproportionate impact on women, specifically the sections that prevent qualifying period or benefit period extensions and that limit the number of weeks of benefits they can get to 50.[2] More specifically, these sections make it harder or impossible for women to access a fundamental social safety net—EI regular benefits—when they are unemployed around the time their children are born.

[1] These benefits are available under the *Employment Insurance Act* (Act).
[2] Specifically, the appeal concerns sections 8(2), 8(5), 10(2), 10(8)(a), 10(10), and 12(6) of the Act.

[6] So, the Claimants want these sections to be found discriminatory and contrary to the right to equality under section 15 of the *Canadian Charter of Rights and Freedoms* (Charter).

[7] Since the Claimants are challenging several sections that are interrelated, I sometimes refer to the overall effect of these sections as **the 50-week limit**.[3]

[8] After a lengthy process, the General Division:

- found that the Claimants had shown that the challenged sections violate the Charter right to equality
- found that the Commission hadn't shown that these violations are justified in a free and democratic society
- found the challenged sections of the Act unconstitutional
- instructed the government to take the necessary steps to allow the Claimants to get EI regular benefits for the loss of their employment

[9] The Commission then appealed the General Division decision to the Appeal Division. Here are my reasons for allowing the Commission's appeal.

Issues

[10] My decision deals with the following issues:

a) Did the General Division make an error of law by refusing to follow decisions of the Federal Court of Appeal?

b) Did the General Division breach a principle of natural justice by joining the appeals and writing a single decision?

[3] I recognize that some of the Claimants received more than 50 weeks of benefits because of the provisions of the Québec Parental Insurance Plan, which are more advantageous in some respects: See V. D.'s situation in appeal file AD-22-95. What is important, however, is that all the Claimants were denied EI regular benefits because of the parental and maternity benefits they had already received.

c) In making its decision, did the General Division make errors of law in its analysis of the right to equality under section 15 of the Charter?

d) If so, what is the best way to fix the General Division's error?

Analysis

[11] I can intervene in this case if the General Division breached a principle of natural justice or made an error of law in making its decision.[4]

The General Division didn't make an error when it found that earlier decisions aren't determinative of these appeals

[12] The Commission argues that the Federal Court of Appeal already decided the constitutional issues raised in these appeals in *Sollbach* and *Miller*.[5] It also says that the General Division made an error of law by refusing to follow those decisions.

[13] I reject this argument. The General Division didn't make an error in considering the issues raised in these appeals.

[14] The General Division recognized that it may revisit a constitutional matter in the following situations:

- where a new legal issue is raised
- where there is a significant change in the circumstances or evidence[6]

[15] As the General Division recognized, both situations exist in this case.

[16] First, the Claimants here are challenging many different provisions, while Ms. Sollbach and Ms. Miller challenged only one provision. Second, since *Sollbach* and *Miller*, significant changes have been made to the Act and to the analytical framework

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[4] See sections 58(1)(a) and 58(1)(b) of the *Department of Employment and Social Development Act*. I don't owe the General Division any deference on these questions. See *Canada (Attorney General) c Gagnon*, 2023 FCA 174 at paragraphs 28 and 29.
[5] See *Sollbach v Canada (Attorney General)*, 1999 CanLII 9146 (FCA); and *Miller v Canada (Attorney General)*, 2002 FCA 370.
[6] See *Canada (Attorney General) v Bedford*, 2013 SCC 72 at paragraphs 42 to 44.

that applies to cases involving section 15 of the Charter.[7] Third, the evidence in this case is more complete than the evidence in *Sollbach* and *Miller*, which is rather hard to identify.

[17] Concerning the decision in *Miceli-Riggins*, it is based on different arguments, different evidence, and a different legislative scheme, namely the *Canada Pension Plan*.[8] This means that *Miceli-Riggins* should not be binding in this case.

The General Division didn't breach a principle of natural justice by joining the appeals and writing a single decision

[18] The Commission criticizes the General Division for refusing to join the appeals at the beginning of the process and then joining them toward the end, giving a single decision in six appeals.[9] In the Commission's view, joining the appeals had the following consequences:

- The General Division didn't conduct the contextual analysis required in a Charter case.
- It didn't assess the evidence or consider all the circumstances of each Claimant.

[19] I reject the Commission's arguments on this issue.

[20] While I acknowledge that the process was somewhat unusual, the Commission's complaints are about the quality of the decision, not the fairness of the process. The Commission isn't arguing, for example, that it wasn't given an opportunity to be heard, to answer the other parties' arguments, or to defend itself.

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[7] On the one hand, the Commission says that the law relating to section 15 of the Charter hasn't changed much since the decision in *Sollbach*, made in 1999. On the other hand, it says that the Supreme Court of Canada changed the relevant legal framework in 2020 when deciding the case of *Fraser v Canada (Attorney General)*, 2020 SCC 28: See AD1-61 and AD1-62 in the appeal record.
[8] See *Miceli-Riggins v Canada (Attorney General)*, 2013 FCA 158.
[9] See, for example, GD10 in file AD-22-95 and paragraph 14 of the General Division decision.

[21] The Commission has never previously objected to joining appeals and has often consolidated its submissions into a single document.

The General Division made an error of law in its analysis of the right to equality under section 15 of the Charter

[22] Context matters when considering Charter issues. So, I will begin my analysis with an overview of the EI program to give some idea of its complexity and to highlight some of its limits. I will also review the right to equality as defined by the courts when looking at section 15 of the Charter.

– The EI program provides partial and temporary income support

[23] The Supreme Court of Canada has previously set out the history and purpose of the Act.[10] The law creates "a social insurance plan to compensate unemployed workers for loss of income from their employment and [provides] them with economic and social security for a time, thus assisting them in returning to the labour market."[11]

[24] Parliament has made many changes to the law over the years. These changes generally expanded qualifying conditions, increased benefits, and eliminated certain inequities.[12]

[25] Among these changes, Parliament increased the number of situations in which a person can have an involuntary interruption of earnings and be entitled to EI benefits.

[26] EI **special benefits** provide temporary support for insured persons who are unable to work because of certain life events, including illness, pregnancy, or an obligation to care for a newborn or newly adopted child.[13]

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[10] See Reference re *Employment Insurance Act* (Can.), ss. 22 and 23, 2005 SCC 56 at paragraphs 16 to 24.
[11] See *Tétreault-Gadoury v Canada (Employment and Immigration Commission)*, 1991 CanLII 12, [1991] 2 SCR 22 at page 41.
[12] See Reference re *Employment Insurance Act* (Can.), ss. 22 and 23, 2005 SCC 56 at paragraph 18.
[13] See sections 21 to 23.3 of the Act.

[27] The following key aspects of the EI program are worth noting:

- The program isn't universal. Benefits are available only to people who have worked a minimum number of hours of insurable employment during their qualifying periods.[14]

- The program provides partial and temporary income support. It spreads the risks related to the situations set out in the law across all insured persons.

- The program is funded primarily through employer and employee premiums. The law requires the Commission to set the premium rate for each year based on certain factors. The Commission's goal is to break even, in accordance with rigorous insurance principles.[15]

- The program isn't a social assistance program where benefits are determined based on the claimant's needs. Instead, the amount and duration of EI benefits are determined based on specific rules.

- The program isn't a savings account either. Contributing to the program alone doesn't entitle you to benefits. Workers have to pay premiums on all insurable earnings up to an annual maximum, even if they don't plan on getting benefits.[16]

[28] Since 2006, a federal-provincial agreement has made it possible for Quebec residents to get maternity, parental, adoption, and paternity benefits under the Québec Parental Insurance Plan (QPIP), rather than the similar benefits available under the Act.[17]

[29] In this decision, I largely disregard the fact that the Claimants received their parental and maternity benefits under the QPIP instead of the federal program. Both

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[14] Self-employed workers also qualify in certain circumstances.
[15] See Part III of the Act; and GD18-1470 of the [translation] "Backgrounder on Employment Insurance policy and legislation," dated July 15, 2019, at GD18-1466 to GD18-1591 in the appeal record (backgrounder).
[16] See paragraphs 1 to 13 of the backgrounder.
[17] See paragraphs 32 to 35 of the backgrounder (at GD18-1476 in the appeal record).

programs are closely integrated, and the Claimants never argued that their case was specific to women in Quebec. In fact, some of the Claimants received more benefits than if they had lived elsewhere in Canada.[18]

– EI regular, maternity, and parental benefits

[30] While other types of benefits are available under the Act, regular benefits and special benefits, including parental and maternity benefits, account for the vast majority of benefit payments.[19]

[31] EI **regular benefits** provide 14 to 45 weeks of support for insured persons who lose their jobs through no fault of their own.[20] To qualify for regular benefits, you need, among other things, between 420 and 700 hours of insurable employment in your qualifying period.[21]

[32] Maternity and parental benefits are among the special benefits available under the Act. To qualify for special benefits, you need 600 hours of insurable employment in your qualifying period.[22]

[33] On the one hand, biological mothers can claim up to 15 weeks of **maternity benefits** to support their physical and emotional recovery. The law provides some flexibility for biological mothers who want to get maternity benefits before or after giving birth.

[34] On the other hand, **parental benefits** provide even more flexibility for parents, whether biological or adoptive, to help them care for their new children. Parental benefits may be paid to one parent or shared between parents. Parents who share benefits can get additional weeks of benefits.

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[18] See V. D.'s situation in appeal file AD-22-95.
[19] In 2017–2018, they accounted for 98.3% of total benefit payments: See GD18-1472 in the appeal record.
[20] The number of weeks of benefits you can get is based on the regional rate of unemployment and the number of hours of insurable employment in your qualifying period.
[21] The number of hours needed is based on the rate of unemployment in the economic region where you live. See sections 7, 18(1)(a), and 50(8) of Act and section 14 of the *Employment Insurance Regulations*.
[22] See sections 6(1) ("major attachment claimant"), 22, and 23 of the Act.

[35] In addition, parents can choose to receive parental benefits at a higher rate for a shorter period (the standard option) or at a lower rate for a longer period (the extended option).[23]

[36] While maternity and parental benefits support families and enable parents to care for their families, the purpose and primary effect of these benefits lie elsewhere. These benefits are, first and foremost, income replacement benefits, and they are meant to ensure a person's re-entry into the labour market.[24]

[37] In support of this conclusion, the Supreme Court of Canada pointed out that the Act doesn't grant time off work. Maternity leave and parental leave are governed by other legislation or by arrangements between employers and employees.

– **The EI program is based on a link between recent and active labour market attachment and the payment of benefits**

[38] The Act sets out two important concepts that ensure a short period of time between active labour market attachment and the payment of benefits: the qualifying period and the benefit period.

[39] The **qualifying period** is the period during which an insured person must have worked enough hours of insurable employment to get EI benefits. It is calculated using the shorter of:

- the 52-week period immediately before the beginning of a benefit period
- the period that begins on the first day of an immediately preceding benefit period and ends with the end of the week before the beginning of the benefit period for the new claim, if the insured person has already established a benefit period[25]

[23] See sections 12(3)(b) and 23 of the Act.
[24] See Reference re *Employment Insurance Act* (Can.), ss. 22 and 23, 2005 SCC 56 at paragraphs 24, 26, 34, 35, and 73 to 75.
[25] See section 8 of the Act.

[40] In the second situation, you can never use your hours of insurable employment more than once. Also, EI benefits and QPIP benefits aren't hours of insurable employment.

[41] The qualifying period can be extended in certain situations that don't apply to the Claimants in this case.[26]

[42] The **benefit period** is the time when the Commission can pay benefits to an insured person. It is established only if the person qualifies. Its start date is determined based on the date of the interruption of earnings or the date of the application, depending on the situation.[27]

[43] The benefit period is normally 52 weeks, unless it is extended for one of the reasons set out in the law.[28] But, again, the Claimants don't qualify for benefit period extensions.

[44] The Act also sets out the concept of a **benefit window**. This makes sure benefits are paid around the time of the event that caused you to claim them. For example, maternity benefits can start up to 12 weeks before the due date and end up to 17 weeks after the actual date of delivery.[29]

– Benefits can be paid for a maximum number of weeks but can be combined in certain situations

[45] Each type of benefit has its own limits, that is, a maximum number of weeks for which the Commission can pay benefits in a benefit period. For example, during a benefit period, you can get:

- up to 15 weeks of maternity benefits
- up to 35 weeks of parental benefits (under the standard option)

[26] See sections 8(2), 8(4), and 8(7) of the Act.
[27] See section 10 of the Act.
[28] See sections 10(2) and 10(10) to 10(15) of the Act.
[29] See section 22(2) of the Act.

- 14 to 45 weeks of regular benefits, normally based on the regional rate of unemployment and the number of hours of insurable employment in your qualifying period[30]

[46] You can be eligible for more than one type of benefit at the same time, but you can get only one type of benefit at a time.

[47] If you meet all the requirements, you can combine regular and special benefits within your 52-week benefit period for up to 50 weeks of benefits.[31] The Claimants' constitutional challenge is about this 50-week limit.

[48] The provisions of the law that make it possible to combine special benefits are complex.[32] However, special benefits can sometimes be combined, extending the benefit period beyond 52 weeks.[33] This means that, if the relevant conditions are met, an insured person can get all the weeks of special benefits they are entitled to during a benefit period that can be up to 104 weeks long.

– **Section 15 of the Charter guarantees "substantive" equality**

[49] Section 15(1) of the Charter reads:

> **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.

[50] To establish a violation of section 15, the Claimants have to show that the challenged sections both:

- create a distinction based on an enumerated or analogous ground, on their face or in their impact

[30] See section 12 and Schedule I of the Act.
[31] See section 12(6) of the Act.
[32] See, for example, sections 10(13) to 10(15) and 12(5) of the Act.
[33] See the backgrounder at GD18-1488 to GD18-1493 for examples.

- impose burdens or deny a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating disadvantage[34]

[51] The Supreme Court of Canada teaches us that discrimination can be direct or indirect. In other words, a seemingly neutral law can be discriminatory if it has a disproportionate impact on a protected group. This is called adverse impact discrimination.

[52] In addition, I would note that section 15 protects the right to equality based on sex. However, the Claimants' arguments don't apply to all women. Instead, they apply to women who lost their jobs through no fault of their own shortly before or after the arrival of a new child.

[53] Still, the Supreme Court has confirmed that claims of parental discrimination can often be brought as claims of adverse impact discrimination on the basis of sex.[35]

[54] Having provided some important background information, I will now proceed with my analysis of the General Division decision.

– The General Division didn't make an error in finding that the challenged sections, in their impact, create a distinction based on an enumerated ground

[55] In this case, the circumstances of each Claimant are slightly different. However, I see no need to highlight all these differences. In any case, the Claimants say that the challenged sections limited their access to EI regular benefits.

[56] For the purposes of this decision, I accept that the Claimants have shown that the challenged sections, in their impact, create a distinction based on sex.

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[34] See *Fraser v Canada (Attorney General)*, 2020 SCC 28 at paragraph 27.
[35] See *Fraser v Canada (Attorney General)*, 2020 SCC 28 at paragraphs 114 to 116.

[57] Two types of evidence can be used to prove that a law has a disproportionate impact on members of a protected group: evidence about the situation of the claimant group and evidence about the outcomes that the law has produced in practice.[36]

[58] On this point, I especially note the following information that the Claimants provided, which the Commission didn't dispute and the General Division accepted:[37]

- The unequal division of domestic labour continues to be the main reason why women participate in the labour force less often than men and work fewer hours on average. In 2015, women with children under 18 did 60% of the housework, including 65% of the child care. They did only 39% of the paid work. In addition, the "motherhood penalty" lasts beyond the year a child is born.

- Women see their income drop by more than 40% during the perinatal period, except in cases where they get a supplement from the employer or another source. In addition, this effect continues even nine years after childbirth.[38]

- Women are still likely to be unemployed after maternity parental [*sic*] leave despite the provisions of provincial and federal legislation meant to protect them.[39]

- Women use 94.1% of their weeks of maternity and parental benefits, and 58.8% of other special benefits.[40]

[36] See *Fraser v Canada (Attorney General)*, 2020 SCC 28 at paragraphs 56 to 62; and *R v Sharma*, 2022 SCC 39 at paragraphs 49 and 50.
[37] Most of this information is from a report by Professor Rose entitled [translation] "The combination of Employment Insurance special benefits and regular benefits and the impact that a pregnancy, a birth, or child adoption has on women's income." The report starts at GD35-2 in the appeal record.
[38] See paragraph 103 of the General Division decision.
[39] See paragraph 102 of the General Division decision.
[40] See paragraph 101 of the General Division decision.

- This means that a large number of new mothers are affected by the 50-week limit, while the number of men affected is very limited.[41]

[59] The facts of this case are similar to those that the Supreme Court of Canada considered in *Fraser*.[42]

[60] So, for the purposes of this decision, I am willing to accept that women with children are less likely than other insured persons to be able to access EI regular benefits and to be protected against the risk of job loss.

[61] However, not all distinctions are discriminatory. This issue is addressed in the second part of the test in cases involving section 15 of the Charter.

– **The General Division made an error of law in finding that the challenged sections impose burdens or deny a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating disadvantage**

[62] I sympathize with the Claimants' situation and recognize that the 50-week rule has caused them financial hardship. The General Division found that, as a result of this rule, women are kept in poverty and in relationships of dependency, and their wages are considered less worthy of protection.[43]

[63] In its decision, the General Division relied heavily on the Supreme Court of Canada's decision in *Fraser*.[44] It interpreted the decision as allowing it to minimize the importance of the legislative context in its analysis.

[64] Following the General Division decision, the Supreme Court removed any uncertainty on this issue in *Sharma*: The legislative context is an important factor that courts have to consider when determining whether a distinction is discriminatory within

[41] See paragraph 109 of the General Division decision; and GD35-3, GD35-30, and GD35-31 in the appeal record.
[42] See *Fraser v Canada (Attorney General)*, 2020 SCC 28.
[43] See paragraph 176 of the General Division decision.
[44] See *Fraser v Canada (Attorney General)*, 2020 SCC 28.

the meaning of the Charter.[45] Specifically, the Court highlighted factors to be considered when assessing the legislative context:

> Relevant considerations include: the objects of the scheme, whether a policy is designed to benefit a number of different groups, the allocation of resources, particular policy goals sought to be achieved, and whether the lines are drawn mindful as to those factors ….[46]

[65] So, I find that the General Division made an error of law in its analysis of the entire context of this situation, since it didn't consider the purpose of the EI program or its legislative context. Instead, this part of the General Division decision focuses on the Claimants' testimony and expert report.[47]

[66] When the entire context is considered, the challenged sections aren't arbitrary and don't deny a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating disadvantage.

[67] To begin with, the purpose of the program isn't to support families. It also isn't a universal benefit that goes to everyone who needs it.

[68] First and foremost, the program provides income replacement benefits and ensures the recipient's re-entry into the labour market.[48] This income support is partial and temporary in nature. In addition, as I explained above, the program is based on a link between recent and active labour market attachment and the payment of benefits.

[69] It is clear that maternity and parental benefits are consistent with the purposes of the law: They reduce the impact of an interruption of earnings and promote labour market re-entry. The issue of whether to grant additional benefits to vulnerable or disadvantaged people is beyond the purposes of the law and the Tribunal's jurisdiction.

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[45] See *R v Sharma*, 2022 SCC 39 at paragraph 56.
[46] See *R v Sharma*, 2022 SCC 39 at paragraph 59.
[47] See the General Division decision at paragraph 211.
[48] See Reference re *Employment Insurance Act* (Can.), ss. 22 and 23, 2005 SCC 56 at paragraphs 24, 26, 34, 35, and 73 to 75.

[70] The program was also designed to benefit a number of different groups, that is, for people who have had an interruption of earnings, for different reasons set out in the law.

[71] In the paragraphs above, I have set out some of the complexities built into the design of this program. The program is meant to cover the competing interests of various groups. Broad lines had to be drawn to address the different needs of insured persons.[49] This includes the 50-week limit.

[72] In addition, the 50-week limit concerns the allocation of resources. The limits set out in the Act are essential to the proper functioning and effectiveness of the program, just as they are for any other insurance program. They are important in determining the extent of the risk assumed. Changing these limits could get in the way of the Commission's goal of breaking even and could lead to higher premium rates.

[73] Although the Claimants don't agree on where the line was drawn, they don't dispute the value of the program or the need to set limits. To be viable, the program has to break even, and the premium rate has to be kept low.

[74] I recognize that a woman who gets 15 weeks of maternity benefits is limited to 35 weeks of EI regular benefits. But, the essential need to set limits in such a complex insurance program leads me to conclude that the 50-week limit isn't arbitrary and won't have the effect of reinforcing, perpetuating, or exacerbating stereotypes or prejudices.[50]

[75] The Claimants were denied benefits, but not because their wages are less worthy of protection. Like many others, they simply ran up against one of the many limits set out in the Act.[51]

[76] The 50-week limit is just one of many limits imposed by the Act. It doesn't just apply to people who want to combine maternity, parental, and regular benefits. It applies to anyone who wants to combine regular benefits with any other type of special

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[49] See *Withler v Canada (Attorney General)*, 2011 SCC 12 at paragraph 76.
[50] A similar situation is discussed in *Canada (Attorney General) v Lesiuk*, 2003 FCA 3 at paragraph 51.
[51] See *Miceli-Riggins v Canada (Attorney General)*, 2013 FCA 158 at paragraphs 84 to 89.

benefit.[52] In fact, even people who want to combine different types of special benefits encounter limits.[53]

[77] Although I noted earlier that this case resembles *Fraser*, the cases differ significantly at this second stage of the test.

[78] In *Fraser*, the claimants job-shared, which caused them to work fewer hours and had a negative impact on their pensions.

[79] However, other people working reduced hours were given the opportunity to buy back full-time pension credit for their service. This opportunity was denied to the participants in the job-sharing program, nearly all of whom were women.

[80] This case is different, since anyone who wants to combine regular and special benefits is subject to the same 50-week limit.

[81] In short, the 50-week limit doesn't create or reinforce a stereotype that women aren't valuable assets to the labour force. It also doesn't affect the dignity of women by suggesting that their work is less worthy of recognition. Anyone entitled to EI benefits will have to deal with various limits set by the program, which is both complex and narrowly targeted.

– **The Claimants used the program**

[82] The Claimants' argument is based on a lack of access to EI **regular benefits**. But, there is only one program, even if a person may be entitled to benefits based on different reasons related to their interruption of earnings.

[83] The General Division made an error of law in paragraph 222 of its decision when it found that women who get parental and maternity benefits and lose their jobs are excluded from the program.

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[52] See, for example, *RS v Canada Employment Insurance Commission*, 2022 SST 1241.
[53] See, for example, *Canada Employment Insurance Commission v JJ*, 2022 SST 262.

[84] On the contrary, these women used the program up to the maximum available under the law.

[85] The program provides temporary support if you have an interruption of earnings for a prescribed reason. Here, the Claimants had an interruption of earnings for a prescribed reason, and the Commission paid them benefits accordingly.

[86] The adverse impact claimed by the Claimants must happen relatively rarely. It doesn't apply to all women, not even all women with children.

[87] The problem for the Claimants is that their interruption of earnings was extended for another prescribed reason (loss of employment) within a short period of time.

[88] However, the Commission can never pay more than one type of benefit at a time. Moreover, you can reach the 50-week limit in various scenarios.

[89] Imagine, for example, someone who loses their job while caring for a critically ill child or while unable to work because of a health problem. Even women who don't work enough hours of insurable employment between two pregnancies will be denied benefits for the second pregnancy because they don't meet the requirements.[54]

[90] When people belonging to a protected group are faced with this problem, they could also mount constitutional challenges to remove even more limits set by the law. The Federal Court of Appeal has already warned against this situation.[55]

[91] Viewed from a different angle, the Claimants' problem is partly due to the fact that the Act improved the coverage available to pregnant women by increasing the limit for maternity and parental benefits to 50 weeks.

[92] The Claimants would be at a disadvantage if parental benefits were reduced to 15 weeks, even if this gave them better coverage in the event of unemployment.

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[54] See *JD v Canada Employment Insurance Commission*, 2019 SST 1056.
[55] See *Canada (Attorney General) v Lesiuk*, 2003 FCA 3 at paragraph 16.

– **Benefits schemes are difficult to strike down under section 15 of the Charter**

[93] Although the Act isn't immune from Charter scrutiny, equality challenges to the scheme have had little success.[56] The same goes for the *Canada Pension Plan*, which is a similar contributory scheme.[57]

[94] In *Gosselin*, the Supreme Court aptly stated:

> Perfect correspondence between a benefit program and the actual needs and circumstances of the claimant group is not required to find that a challenged provision does not violate the *Canadian Charter*. The situation of those who, for whatever reason, may have been incapable of participating in the programs attracts sympathy. Yet the inability of a given social program to meet the needs of each and every individual does not permit us to conclude that the program failed to correspond to the actual needs and circumstances of the affected group. As Iacobucci J. noted in *Law*, *supra*, at para. 105, we should not demand "that legislation must always correspond perfectly with social reality in order to comply with s. 15(1) of the *Charter*". Crafting a social assistance plan to meet the needs of young adults is a complex problem, for which there is no perfect solution. No matter what measures the government adopts, there will always be some individuals for whom a different set of measures might have been preferable. The fact that some people may fall through a program's cracks does not show that the law fails to consider the overall needs and circumstances of the group of individuals affected, or that distinctions contained in the law amount to discrimination in the substantive sense intended by s. 15(1).[58]

[95] In short, social reality is complex. While a social insurance scheme like the Act may attempt to meet the needs of various people, it can't be expected to be perfect. And perfection can't be demanded using the equality protections of the Charter.

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[56] See, for example, *Canada (Attorney General) v Lesiuk*, 2003 FCA 3; *Miller v Canada (Attorney General)*, 2002 FCA 370; *Krock v Canada (Attorney General)*, 2001 FCA 188; *Nishri v Canada*, 2001 FCA 115; and *Sollbach v Canada*, 1999 CanLII 9146 (FCA).
[57] See, for example, *Hodge v Canada (Minister of Human Resources Development)*, 2004 SCC 65; *Granovsky v Canada (Minister of Employment and Immigration)*, 2000 SCC 28; *Law v Canada (Minister of Employment and Immigration)*, 1999 CanLII 675 (SCC); *Smith v Canada (Attorney General)*, 2023 FCA 122; *Weatherley v Canada (Attorney General)*, 2021 FCA 158; *Miceli-Riggins v Canada (Attorney General)*, 2013 FCA 158; and *Runchey v Canada (Attorney General)*, 2013 FCA 16.
[58] See *Gosselin v Québec (Attorney General)*, 2002 SCC 84 at paragraph 55.

[96] I fully understand why the Claimants want to have a period to focus exclusively on their new children and then have time to look for new jobs. However, I find that the choice of granting them additional benefits is for Parliament to make, not the courts. Parliament is in a better position to assess how changing an important limit would affect a complex program such as EI.

[97] The Federal Court of Appeal has reiterated this idea in different ways, including as follows:

> When presented with an argument that a complex statutory benefits scheme, such as unemployment insurance, has a differential adverse effect on some claimants contrary to section 15, the Court is not concerned with the desirability of extending the benefits in the manner sought. In the design of social benefit programs, priorities must be set, a task for which Parliament is better suited than the courts, and the Constitution should not be regarded as requiring judicial fine-tuning of the legislative scheme.[59]

I will give the decision the General Division should have given

[98] Errors by the General Division allow me to give the decision the General Division should have given.[60] The parties agree that this is the most appropriate remedy in this case.

[99] I agree. The facts of the case aren't really in dispute. Additionally, the parties weren't prevented from presenting their case before the General Division in any way. The appeal record is complete.

[100] This means that I can decide whether the challenged sections are constitutional and whether the Claimants are entitled to additional EI regular benefits.

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[59] See *Krock v Canada (Attorney General)*, 2001 FCA 188.
[60] Sections 59(1) and 64(1) of the *Department of Employment and Social Development Act* give me the power to fix the General Division's errors in this way. Also, see *Nelson v Canada (Attorney General)*, 2019 FCA 222 at paragraphs 16 to 18.

– The challenged sections are constitutional

[101] The analysis above shows that the Claimants haven't established that sections 8(2), 8(5), 10(2), 10(8)(a), 10(10), and 12(6) of the Act violate the Charter right to equality. The challenged sections are constitutional. This means that the Claimants are subject to the 50-week limit and aren't eligible for any more EI regular benefits.

Conclusion

[102] I am allowing the Commission's appeal. The General Division made an error of law in finding that the challenged sections deny the Claimants a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating disadvantage. More specifically, the General Division didn't sufficiently consider the purpose and legislative context of the EI program.

[103] This error allows me to give the decision the General Division should have given. I find that the challenged sections are constitutional. This means that the Claimants aren't entitled to any more EI regular benefits.

Jude Samson
Member, Appeal Division