Citation: *Canada Employment Insurance Commission v RL*, 2026 SST 76

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	Canada Employment Insurance Commission
Representatives:	Marcus Dirnberger and Rebekah Ferriss
Respondent:	R. L.
Representatives:	Christine Davies and Benjamin Piper

Decision under appeal:	General Division decision dated October 24, 2023 (GE-21-2151)

Tribunal members:	Melanie Petrunia Elizabeth Usprich Solange Losier
Type of hearing:	Videoconference
Hearing date:	March 5, 2025
Hearing participants:	Appellant's representatives Respondent Respondent's representatives
Decision date:	**February 4, 2026**
File number:	AD-23-1069

Decision

[1] The appeal is allowed. The Respondent cannot benefit from the hours credit in section 153.17 of the *Employment Insurance Act* (EI Act). This means she doesn't qualify for maternity and parental benefits.

Overview

[2] The Government of Canada introduced a number of temporary measures during the COVID-19 pandemic intended to make it easier for claimants to qualify for benefits. This appeal is about whether one of these measures, a one-time credit of insurable hours, had a discriminatory impact on women.

[3] The Claimant (the Respondent in this appeal), R. L., worked as a server in a restaurant and was laid off during the pandemic. She applied for and received the Employment Insurance Emergency Response Benefit (EI ERB). When the EI ERB ended on September 26, 2020, like many others, she was transitioned to Employment Insurance (EI) regular benefits.

[4] As a result of a temporary measure in the EI Act, claimants who made an initial claim for benefits after September 27, 2020, were deemed to have additional hours of insurable employment in their qualifying period: 300 hours if the claim was for regular benefits and 480 if the claim was for special benefits. This section could only be used once to establish a benefit period, and the additional hours were added whether they were needed or not.

[5] When the Claimant was transitioned to regular benefits, she was deemed to have additional hours of insurable employment in her qualifying period, although she didn't need them in order to qualify for regular benefits. The Claimant received regular EI benefits for 50 weeks, from September 27, 2020, to September 11, 2021.

[6] The Claimant gave birth on July 9, 2021. After her EI regular benefits ended in September, she filed a new claim for maternity and parental benefits. She had only been able to return to work part-time due to ongoing disruptions in the restaurant

industry and had accumulated only 131 insurable hours in her new qualifying period. The Claimant was expecting that she would qualify for benefits with the additional 480-hour credit from the temporary measure.

[7] The Appellant, the Canada Employment Insurance Commission (Commission), told the Claimant that she didn't have enough hours to qualify for benefits because she had already been credited with 300 hours on her claim for regular benefits.

[8] The Claimant appealed the Commission's decision to the Tribunal's General Division. She argued the design of the temporary provision allowing for a one-time credit of insurable hours infringed her equality rights under section 15(1) of the *Canadian Charter of Rights and Freedoms* (Charter). Section 15(1) of the Charter protects people against discrimination based on their sex. The Claimant says the provision has a discriminatory impact on women who were more likely to need access to special benefits and regular benefits during the pandemic.

[9] The General Division allowed the Claimant's appeal, finding that section 153.17 of the EI Act violates section 15(1) of the Charter. It also found that the infringement could not be demonstrably justified in a free and democratic society.

[10] The Commission is now appealing the General Division decision to the Appeal Division. It argues that the General Division made numerous errors in its legal analysis and factual findings.

[11] We agree that the General Division made errors in its legal analysis. These are our reasons for allowing the appeal.

Preliminary matters

[12] This matter was originally scheduled to be heard on January 15, 2025. On January 7, 2025, the Respondent filed submissions arguing that the remedy imposed by

the General Division should be varied.[1] The hearing was adjourned to allow the Commission to file submissions in response.[2]

[13] Given our determination that the appeal is allowed, we don't need to address the arguments raised by the parties concerning remedy.

Issues

[14] The issues in this appeal are the following:

a) Did the General Division make an error of law or fact in its analysis under section 15 of the Charter?

   (i) Did the General Division make a factual error when it found that women were disadvantaged by the design of section 153.17 of the EI Act?

   (ii) Did the General Division make an error of law when it found that section 153.17 exacerbated disadvantage for women?

b) Did the General Division make an error of law in its analysis under section 1 of the Charter?

c) Did the General Division make an error of law in providing a tailored remedy?

d) If the General Division made an error, what is the appropriate remedy?

Analysis

[15] The Appeal Division can intervene if the General Division made a relevant error. So, we have to consider whether the General Division did one of the following:[3]

- failed to provide a fair process

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[1] See AD15-1 to AD15-3.
[2] See AD17-1 to AD17-3.
[3] The relevant errors, formally known as "grounds of appeal," are listed under section 58(1) of the *Department of Employment and Social Development Act* (DESD Act).

- failed to decide an issue that it should have decided, or decided an issue that it should not have decided
- misinterpreted or misapplied the law
- based its decision on an important mistake about the facts of the case

Overview of the legislation

[16] It is important in Charter cases to consider the full context.[4] We will start by reviewing the EI program, and the temporary measures introduced during the pandemic.

– Regular and special benefits in the EI Act

[17] The EI program is an insurance program intended to provide temporary income support to insured workers who have experienced an interruption of earnings in certain established circumstances.[5] To qualify for benefits, a claimant must have experienced an interruption of earnings and accumulated enough hours of insurable employment in their qualifying period, typically the 52 weeks before the start of the claimant's benefit period.

[18] If a claimant qualifies, a 52-week benefit period is established during which benefits can be paid.[6] The benefit is 55% of a claimant's average weekly earnings, based on the highest earning weeks in the qualifying period, up to a maximum benefit amount.

[19] For EI regular benefits, claimants must be available for work and file reports every two weeks about each week they are requesting benefits for. The number of weeks of regular benefits that a claimant will receive during the benefit period varies based on the unemployment rate in the claimant's EI economic region.

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[4] See *Weatherley v Canada (Attorney General)*, 2021 FCA 158 at paragraph 6.
[5] These established circumstances are because they have lost their jobs, taken time off work due to illness, pregnancy or childbirth, to care for a newborn or newly adopted child, or to care for or support a critically ill or injured family member or a family member who is seriously ill with a significant risk of death.
[6] See *Employment Insurance Act* (EI Act) at section 10.

[20] The EI Act also sets out circumstances that can result in being disentitled or disqualified from receiving benefits. Claimants who lose their job due to their own misconduct or voluntarily leave without just cause are disentitled from receiving benefits unless they have accumulated sufficient insurable hours since they left that employment.

[21] Special benefits are designed to provide temporary income support to insured claimants who need to take time off work in certain circumstances. The types of special benefits are the following:

- sickness
- maternity
- parental
- compassionate care
- family caregiver

[22] Each type of special benefits has entitlement conditions and a maximum number of weeks of benefits that can be paid.

[23] Maternity benefits are payable for up to 15 weeks before or after the birth of a child. Parental benefits are payable for a maximum of 35 weeks for standard benefits and 69 weeks for extended ones.[7] The benefit rate for extended benefits is 33% of a claimant's average weekly earnings. In order to qualify for maternity and parental benefits, claimants must have accumulated a minimum number of insurable hours in their qualifying period.

[24] Maternity and parental benefits, like EI regular benefits are tied to a claimant's attachment to the labour market. The Supreme Court of Canada (SCC) has said of these benefits:

> The new benefits were intended to provide pregnant women with economic and social security on a temporary basis while at the same time helping them to return to the labour market. In addition to the

[7] See EI Act at section 23.

> purely economic income replacement aspect, maternity benefits, like regular benefits, would ensure continued employability and reintegration into the labour market.[8]

[25] Often, claimants have a need to combine different types of benefits during a benefit period. One common example is maternity and parental benefits. Regular and special benefits can also be combined during a benefit period. The legislation provides for a maximum of 50 weeks of combined regular and special benefits. This was referred to by the General Division as the "stacking rules."[9]

[26] For example, if a claimant who lost their job and qualifies for regular benefits later becomes ill, gives birth, or adopts a child, the benefits can be converted from regular to sickness, maternity, or parental benefits. These claimants may have been entitled to 50 weeks of regular benefits when they applied and expect to receive up to 50 weeks of special benefits. However, they can only be paid a maximum of 50 weeks of benefits total.

[27] The only way to avoid the 50-week limit for combined benefits is if a claimant is able to establish a new benefit period. This requires accumulating sufficient hours of insurable employment to start a new claim.

– **Temporary provisions**

March to September 2020

[28] During the unprecedented COVID-19 pandemic, the government introduced various measures intended to address the high rates of unemployment and surge in applications for benefits.

[29] A new temporary benefit was created, with two streams available for access. The Canada Emergency Response Benefit (CERB) was made available to workers who couldn't access EI and was delivered by the Canada Revenue Agency.[10] The Employment Insurance Emergency Response Benefit (EI ERB) was intended for

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[8] See Reference re *Employment Insurance Act* (Can.), ss. 22 and 23, 2005 SCC 56 at paragraph 24.
[9] See EI Act at section 12(6).
[10] See *Canada Emergency Response Benefit Act*.

workers with insurable earnings and was administered by Service Canada.[11] Both paid $500 per week, to a maximum of 28 weeks between March 15, 2020, and October 3, 2020.

[30] During the period from March 15, 2020, to September 26, 2020, claims for regular or sickness benefits were treated as claims for the EI ERB. Workers could still apply for and receive the following benefits:

- maternity
- parental
- compassionate care
- family caregiver
- work-sharing

[31] Those claimants had their weekly benefit rate determined as before, based on their earnings.

– **Phase 1 credit**

[32] In August 2020, the government implemented a credit of insurable hours for claims for special benefits, retroactive to March 15, 2020, and in place until September 2020. At the time, section 153.17, which is the provision at issue in this appeal, read:

> **Special benefits**
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> **153.17 (1)** If a claimant makes an initial claim for benefits in respect of benefits referred to in any of sections 22 to 23.3 and has fewer than 600 hours of insurable employment in their qualifying period, the number of hours of insurable employment that the claimant has in that period shall be increased by 480.
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> **Work-sharing**
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> **(2)** If a claimant makes an initial claim for benefits in respect of benefits referred to in section 24 and has, in their qualifying period, fewer than the number of hours of insurable employment that is applicable to them under paragraph 7(2)(b), the number of hours of

[11] See EI Act at sections 153.5 to 153.14.

> insurable employment that the claimant has in that period shall be increased by 300.
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> **Limitation**
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> **(3)** A claimant's number of hours of insurable employment may be increased only once, either under subsection (1) or (2).

[33] This hours credit was implemented at the same time as the minimum unemployment rate of 13.1% which meant that claimants could qualify for these benefits with 120 hours of insurable employment.[12] The retroactive application allowed claimants who were receiving EI ERB or CERB during that period to switch—with as few as 120 hours of insurable employment—to one of the following benefits:

- maternity
- parental
- compassionate care
- family caregiver
- work-sharing

[34] Claimants who received the hours credit from phase 1 could not benefit from the hours credit from phase 2 under section 153.17.[13]

September 2020 to September 2021

[35] When the emergency benefit ended, most people receiving EI ERB were automatically transitioned to regular or sickness benefits. Those who were eligible for EI benefits but had been receiving CERB had to apply for EI.

[12] See EI Act at sections 153.16 and 153.17.
[13] See EI Act at section 153.17(2).

[36] A number of temporary measures in the EI Act were in place for the period from September 27, 2020, to September 25, 2021, including the following:

- a minimum unemployment rate for all regions which meant that all applicants required a minimum of 420 hours of insurable employment to qualify for regular benefits[14]
- a minimum weekly benefit rate of $500 for regular, fishing, and special benefits ($300 for extended parental benefits)[15]
- a minimum entitlement of 26 weeks of regular benefits, retroactively increased to 50 weeks[16]
- an extension to the qualifying period of 28 weeks for those who claimed CERB or EI ERB[17]

[37] There was also a temporary pause in reviewing claims when Records of Employment suggested that a claimant had voluntarily left their employment or lost their job due to their own misconduct.[18]

– **Phase 2 credit**

[38] The provision at issue in this appeal, section 153.17 of the EI Act, was amended with Interim Order No. 8 and reads:

> **153.17 (1)** A claimant who makes an initial claim for benefits under Part I on or after September 27, 2020 or in relation to an interruption of earnings that occurs on or after that date is deemed to have in their qualifying period
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> **(a)** if the initial claim is in respect of benefits referred to in any of sections 21 to 23.3, an additional 480 hours of insurable employment; and
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> **(b)** in any other case, an additional 300 hours of insurable employment.

[14] See EI Act at section 153.16.
[15] See EI Act at section 153.10.
[16] See EI Act at section 12(2.1).
[17] See EI Act at section 153.18.
[18] See EI Act at section 153.194.

> **Limitation**
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> **(2)** Subsection (1) does not apply to a claimant who has already had the number of insurable hours in their qualifying period increased under that subsection or under this section as it read on September 26, 2020, if a benefit period was established in relation to that qualifying period.

[39] Claimants who were automatically transitioned from EI ERB to EI regular or sickness benefits were considered to have made an initial claim and deemed to have the additional hours added to the hours in their qualifying periods.

[40] Section 153.171 was also added and provides that a claimant who qualified to receive regular benefits and received the 300-hour credit could make a claim for special benefits even if they didn't have sufficient hours. This meant that claimants who were transitioned to regular benefits could convert to maternity, parental, or other special benefits during their benefit period.

[41] Additional temporary provisions were introduced for the period from September 26, 2021, to September 24, 2022. These sections aren't at issue in this appeal.

Background

[42] The Claimant had worked as a server since at least 2019, working an average of 30 to 35 hours per week. In February 2020, she started working full-time as a server at a restaurant for a new employer. In March 2020, the Claimant was laid off when the COVID-19 pandemic hit.[19] She applied for EI benefits and received the EI ERB.

[43] At this time, the Claimant had two teenage children and was their main caregiver and provider.[20] Early on in the pandemic, she moved in with her partner, which was about an hour away from her job. She was called back to work in July 2020 and agreed to return, despite the commute. She negotiated working longer hours per day, but fewer

[19] See General Division decision at paragraph 38.
[20] See General Division decision at paragraph 37.

days per week. She was only able to work part-time due to her seniority and restrictions on indoor dining. She continued to receive EI ERB.[21]

[44] The Claimant was automatically transitioned to EI regular benefits in September 2020 after receiving 28 weeks of EI ERB.[22] She was told she would need to fill out weekly reports. At the time that she was transitioned to regular benefits, the Claimant's qualifying period was extended under the temporary provisions. In her extended qualifying period of March 17, 2019, to September 6, 2020, the Claimant had 1457 insurable hours. The 300-hour credit was added, giving her 1757 insurable hours.[23]

[45] In November 2020, the Claimant learned that she was pregnant. One week later, she was laid off again.[24] The Claimant gave birth in July 2021 and continued to file reports and receive EI regular benefits until the end of her benefit period in September 2021.[25] She received 50 weeks of EI regular benefits from September 27, 2020, to September 11, 2021.

[46] The Claimant made a new claim for maternity and parental benefits on September 13, 2021. She had been told before that the hours credit would apply to her claim. The Commission determined that the credit had already been applied at the time she was transitioned to regular benefits and wasn't available for the new claim. The Claimant had accumulated 131 insurable hours from July to November 2020. She didn't have enough hours to qualify for maternity and parental benefits without the hours credit.[26]

[47] The Claimant's circumstances became very difficult after September 2021. She testified that she could not return to work because there was a one-year waitlist for daycare and she had to care for her newborn. She also had to continue to provide for

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[21] See General Division decision at paragraph 40.
[22] See the Commission's Reconsideration File GD3-88 and GD3-95.
[23] See the Commission's Reconsideration File GD3-46.
[24] See General Division decision at paragraph 42.
[25] See General Division decision at paragraph 44.
[26] See General Division decision at paragraph 44.

her two older children. She was under significant financial and psychological pressure during this time.[27]

[48] From March 2020 to September 2021, the Claimant received 78 weeks of benefits for a total of $40,111.[28]

– The General Division decision

[49] In its decision, the General Division set out the legislative framework for section 153.17 of the EI Act. It relied on the evidence of the expert witnesses of the Commission and the Claimant.[29] It discussed the nature of the EI program and the introduction of emergency benefits during the COVID-19 pandemic.

[50] The General Division then reviewed the facts concerning the Claimant's circumstances before and during the pandemic with respect to work and family obligations. These facts aren't in dispute in this appeal.

[51] The General Division set out the legal principles relevant to the analysis of discrimination under section 15 of the Charter. It cited the articulation of the test by the SCC in the recent decision in *R v Sharma*:

> [The two-step test] requires the claimant to demonstrate that the impugned law or state action: 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.[30]

[52] The General Division identified some of the key elements of the two-step section 15 analysis.[31]

[53] In applying the principles of a section 15 analysis to the facts of the case, at step 1, the General Division found that the protected or enumerated ground in this case

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[27] See General Division decision at paragraphs 45 and 46.
[28] See General Division decision at paragraph 51.
[29] The Claimant relied on the evidence of Professor Jennifer Robson and Dr. Ruth Rose. The Commission relied on the evidence of Benoit Cadieux.
[30] See *R v Sharma*, 2022 SCC 39 at paragraph 28.
[31] See General Division decision at paragraph 58.

was sex, as maternity has been found to be associated with being a woman. It found that the Claimant's sex played a role in being treated differently and therefore there was a distinction on the ground of sex.[32]

[54] In *Sharma*, the SCC found that a disproportionate impact is necessary to find that there is a distinction:

> We start with the difference between impact and *disproportionate* impact. All laws are expected to impact individuals; merely showing that a law impacts a protected group is therefore insufficient. At step one of the s. 15(1) test, claimants must demonstrate a *disproportionate* impact on a protected group, as compared to non-group members. Said differently, leaving a gap between a protected group and non-group members *unaffected* does not infringe s. 15(1).[33]

[55] In considering the impact of the legislative measure on women, the General Division reviewed the evidence of the general situation of women in the workplace, the situation of women during the pandemic and the impact of the law in practice.[34] The General Division concluded that section 153.17 of the EI Act had a disproportionate impact on women for the following reasons:

- Women were more affected by the pandemic.
- Historically, women receive fewer regular and more special benefits compared to men.
- Women were in a more precarious position in the job market than men during the pandemic.[35]

[56] The General Division found that the design of the credit, specifically that it applied to a first claim whether it was needed or not, contributed to an increase in the historic disadvantage suffered by women.[36]

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[32] See General Division decision at paragraph 63.
[33] See *Sharma* at paragraph 40.
[34] See General Division decision at paragraphs 64 to 89.
[35] See General Division decision at paragraph 92.
[36] See General Division decision at paragraphs 102 and 103.

[57] On step 2 of the section 15 analysis, the General Division looked at the purpose of section 153.17 in the context of the Act as a whole. It found that the purpose of the section was to facilitate access to benefits for all those who required help to qualify.[37]

[58] The General Division found that the distinction created by the design of section 153.17 is discriminatory because it fails to respond to the actual needs of the group's members. Women are denied special benefits, exacerbating their historic disadvantage in the job market.[38]

[59] The General Division concluded:

> I find that the design of section 153.17 of the Act prevents women from accessing maternity and parental benefits in a way that perpetuates and exacerbates their historic disadvantage, both in the workplace and in accessing EI benefits. It does this in a way that does not correspond to, or even consider, their actual needs and circumstances. As a result, I find that the Appellant has satisfied both steps of the section 15 test and established discrimination based on sex.[39]

[60] The General Division then turned to the analysis under section 1 of the Charter, which states:

> The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

[61] Citing the well-established test from the SCC decision in *R v Oakes*, the General Division found that the first part of the test was satisfied: the legislative objective of the measure was pressing and substantial.[40]

[62] On the proportionality analysis, the General Division found that there was a rational connection between the means chosen and the government objective. However, the General Division found that the section failed to meet the minimal

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[37] See General Division decision at paragraph 109.
[38] See General Division decision at paragraph 120.
[39] See General Division decision at paragraph 124.
[40] See *R v Oakes*, [1986] 1 SCR 103.

impairment requirement. It determined that the Commission hadn't shown that the measure impaired the right to equality as little as reasonably possible to achieve the purpose of the legislation.[41]

[63] Finally, the General Division determined that a tailored remedy was appropriate in the circumstances. Applying the concept of severance, the General Division declared the second paragraph of section 153.17 to be of no force or effect for the Claimant. This section limited the ability for the credit to be used on more than one claim for benefits. This meant that the Claimant could use the 480-hour credit on her claim for maternity and parental benefits.[42]

The General Division made an error in its analysis under section 15 of the Charter

[64] The Commission argues that the General Division made numerous errors in its decision at both step 1 and step 2 of the Charter analysis.

Step 1– Whether the impugned law created a distinction based on an enumerated ground or analogous ground, on its face or in its impact

[65] The Commission says that the General Division made an error in finding that there is a distinction on the basis of sex and that the design of the one-time credit disadvantaged women. The Commission doesn't disagree with the detailed description provided by the General Division of historic disadvantage faced by women in the job market. But, it says that the only reasonable inference is that women needed the hours credit more than men and were helped more by it, especially when it comes to special benefits.[43]

[66] The Commission says women were helped by the measure and the fact that there was a limit to how much they were assisted doesn't amount to a discriminatory distinction.

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[41] See General Division decision at paragraph 148.
[42] See General Division decision at paragraph 165.
[43] See AD8-13.

[67] The Commission also argues that the General Division made an error by not comparing the circumstances of the claimant group to men in the context of the actual legislation. It says that the General Division failed to consider the limitations of the legislation that applied to all claimants when conducting its comparative exercise. The General Division focused on historic or systemic disadvantage rather than the disproportionate impact of the legislation.[44]

[68] The Commission says that the General Division erred in its comparative exercise. It took an approach to causal nexus that is contrary to the law. Specifically, it ignored that the impact of the hours credit, which applied only to a claimant's first claim, was also felt by men. In other words, the Commission says that the General Division's analysis confused causes and effects. It says that it was the circumstances of the pandemic that resulted in women needing the credit to establish a second claim, not the design of the provision. The hours credit and the limit to the first claim didn't negatively impact women more than men.[45]

[69] The Commission also argues that the General Division didn't explain how the credit caused or contributed to the disproportionate impact. Citing the Federal Court of Appeal decision in *Weatherley*, the Commission says that the government isn't required to implement a scheme that eradicates pre-existing inequality.[46]

[70] The Claimant argues that the Commission's position misunderstands the fundamental commitment to substantive equality set out in the case law on section 15(1). Specifically, the Claimant points to the SCC decision in *Fraser* where the Court stated that "neutral laws ignore the true characteristics of a group which act as headwinds to the enjoyment of society's benefits."[47]

[71] The Claimant says that the General Division's finding of disproportionate impact is one of mixed fact and law and is entitled to substantial deference. She argues that the General Division provided a thorough analysis of both the full context of the claimant

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[44] See AD8-14.
[45] See AD8-15.
[46] See AD8-17 at paragraph 47 referencing *Weatherley v Canada (Attorney General),* 2021 FCA 158.
[47] See AD13-15.

group's situation and the outcome of the law in practice. She says that this analysis was grounded in the purpose of section 153.17.[48]

[72] The Claimant argues the General Division found that many women were disproportionately affected because they could not use the one-time hours credit when applying for special benefits. It considered this in the context of the claimant group and the purpose of section 153.17 to reach its decision. She says that the General Division properly identified this purpose as facilitating access to benefits for all those who required help to qualify.[49]

[73] The parties agree that the recent SCC decisions in *Sharma* and *Fraser* are the leading authorities on section 15 analysis in cases of adverse impact discrimination.

The General Division made an important factual error when it found that women were disadvantaged by the design of section 153.17

[74] The General Division summarized the evidence concerning the full context of the claimant's group situation. Relying on the expert evidence of Dr. Ruth Rose concerning the situation of women in the workplace, the General Division noted that women are much more likely to work part-time, often for caregiving or other involuntary reasons, and work fewer hours per week than men, on average.

[75] Women continue to earn less than men and the situation of less educated and single mothers is the most difficult with respect to earnings and employment. Women are less likely to receive EI benefits in part because of the higher prevalence of part-time work, and fewer hours worked per week.

[76] The General Division also found that women receive the majority of maternity, parental, and family caregiving benefits. They are three times more likely than men to combine more than one type of benefit during one benefit period.

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[48] See AD13-16.
[49] See AD13-19 and *Fraser v Canada (Attorney General),* 2020 SCC 28 (CanLII), [2020] 3 SCR 113.

[77] The General Division looked at the evidence concerning the situation of women during the pandemic, recognizing that women were hardest hit financially during this time. It found that the historic disadvantage that women face in the workplace was increased by pandemic closures and work restrictions. The General Division noted that men recovered their pre-pandemic number of hours paid per week in September 2020 and women in May 2021.

[78] The General Division then considered the evidence concerning the impact of the law in practice. It made the following findings:

- The lower threshold requirements in place from September 2020 to September 2021 generally gave access to benefits to more women than men.
- Women were more likely to benefit from the uniform $500 benefit rate under the temporary provisions.
- 13.2% of all claims for regular benefits were established due to the measures put in place in September 2020 and 70% of those were due to the credit hours.
- 7.6% of all claims for special benefits were established because of the hours credit, with 98.8% of those claims being established after September 2020.
- These statistics only concerned first claims and there were no statistics concerning how many second claims were rejected because the hours credit wasn’t available.

[79] The General Division then determined, based on this evidence, that it is possible to conclude that as many women, and probably many more, weren’t able to qualify for maternity and parental benefits later in the pandemic. This was because the credit had applied to their first claim, even if it wasn’t needed.[50]

[50] See General Division decision at paragraph 89.

[80] The General Division concludes, on the first step of the section 15 test, that there was a distinction on the ground of sex because women:

- were more affected by the pandemic
- historically receive fewer regular and more special benefits than men
- were in a more precarious position than men during the pandemic

[81] The General Division found that the measure helped both men and women establish first claims for both regular and special benefits. But women were in a more precarious position during the pandemic. As a result, the General Division determined that it would have been more likely for some women to have been unable to qualify for benefits later in the pandemic on a second claim. Because the measure could only be applied to the first claim, it would not be available for a second claim. The General Division decided that this is a clear distinction on the basis of sex.

[82] Turning to the nexus between the provision and the adverse impact, the General Division considered the following question: Did the design of section 153.17 contribute to a greater disadvantage for women compared to men? It answered this question affirmatively, based on these findings:

> i. Women were not able to qualify for another type of benefits later on in the pandemic, because the credit hours applied only to the first claim, even if it was not needed to qualify.
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> ii. Women were more likely to need this credit. This was because they were more affected by the pandemic in terms of possibilities to earn enough qualifying hours. They were also more likely to be absent from work for family and caregiving obligations.
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> iii. Women were more likely than men to take maternity and parental leave and, therefore, to need benefits during those leaves.[51]

[83] The General Division finds that the design of the credit contributed to the disadvantage women suffered, specifically the fact that the section was designed to apply the credit to the first claim only, whether it was needed or not.

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[51] See General Division decision at paragraph 102.

– The one-time credit didn't cause or contribute to an inability to accumulate enough hours for a second claim

[84] The General Division doesn't reconcile the fact that women benefitted more from the credit applying to the first claim with its finding that this design also disadvantaged women.

[85] It is true that the Claimant would have benefitted from being able to bank the credit and apply it to a second claim. But, the evidence before the General Division was that women were more likely than men to have needed the credit on the first claim, when it was applied. It is suggested by the evidence that fewer men would have needed the hours credit on a first claim. The General Division doesn't address that the ability to bank the credit and use it on a subsequent claim would likely have benefitted men more than women.

[86] In *Sharma*, the majority summarized part one of the test as articulated in *Fraser*:

> "Said differently, the claimants had to prove that state action (the legislated restrictions to the pension plan) created or contributed to the impact (disproportionately reduced pensions) for individuals who were part of a protected group (women)."[52]

[87] Here, the question is whether the state action (adding a one-time hours credit on all first claims after September 2020) created or contributed to the impact (inability to qualify for benefits on a second claim) for individuals who were part of a protected group.

[88] Plainly, the answer is no. It is true that some women who had a previous claim for benefits were unable to qualify for benefits on a second claim because they hadn't accumulated sufficient hours. A one-time hours credit would have assisted these women. But to say that a measure could have helped ameliorate the situation isn't the same as saying it caused or contributed to the problem.

[89] The one-time hours credit was applied at a moment in time, on all claims, whether needed or not. This helped some qualify for benefits at that time. But it didn't

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[52] See *Sharma* at paragraph 47.

cause or contribute to those claimants' inability to accumulate enough hours for a second claim.

[90] Following the General Division's approach, placing any limits on accessing benefits could be seen to cause or contribute to the disadvantage. The fact that claimants must accumulate 600 insurable hours to qualify for benefits when viewed in the context of women's precarious position in the labour market could be seen as causing or contributing to disadvantage.

[91] In our view, the evidence concerning the **impact of the law** was lacking. Based on the evidence before the General Division, we find there was sufficient basis for it to find that women were significantly impacted by the pandemic. These women were more likely than men to need to make a second claim during the pandemic. Because the hours credit was available only for the first claim, this design therefore had an impact on women who needed to make a second claim. However, the evidence doesn't support that the impact was disproportionate. The General Division made an important factual error by misunderstanding the evidence before it.

[92] In the context of the pandemic, many women were still unemployed in September 2020 and then automatically transferred to EI regular benefits. These women may have had limited opportunities to accumulate the required number of hours in their extended qualifying period before this transition and were more likely to need help to establish a benefit period. The evidence showed that women benefited more than men from the hours credit.

[93] We find that the General Division failed to distinguish between adverse impacts resulting from the law and those that exist independently. The temporary provisions overall served to ensure that claimants could receive regular benefits, special benefits, or both. What the provisions didn't change is the impact of the stacking rules which prevent claimants from receiving more than 50 weeks of regular and special benefits combined, unless they have accumulated sufficient hours to establish a new claim.

[94] The General Division seems to ignore that women are impacted by the provisions of the EI Act concerning combining special and regular benefits, specifically, the limit of 50 weeks provided for in the stacking rules. The women who were impacted, such as the Claimant, by the design of the provision, were those who wanted to use the credit to establish a second claim for benefits, after having received up to 50 weeks of regular benefits. The temporary provisions didn't allow for this but that simply maintains the impact already imposed by the EI Act.

[95] Women who gave birth early in the pandemic benefited from the one-time credit in the initial version of section 153.17, or the provision allowing transition from EI ERB to special benefits. Women who were unemployed and required regular benefits due to the pandemic but gave birth during the pandemic benefitted from the provision allowing them to be considered major attachment claimants if they received the 300-hour credit.

[96] In the above scenarios, women would have been able to receive 50 weeks of special, regular, or combined benefits. However, the requirement that a claimant accumulate sufficient hours of insurable employment after receiving benefits in order to qualify for a second benefit period remained in place. This isn't a disadvantage caused by the automatic application of the hours credit on a first claim.

[97] There must be a link between the legislation, here the one-time hours credit, and the discriminatory impact. As the SCC has confirmed, there is a distinction to be drawn between adverse impacts that were caused or contributed to by the legislation and those that exist independently.[53]

[98] The one-time increase in insurable hours provided for in section 153.17 helped some women establish a first claim for benefits. Those women who needed the credit received benefits that they would otherwise not have qualified for and could not use the credit of hours on a second claim. Women like the Claimant who made a first claim for benefits but did not need the credit, had it applied none the less and were also not assisted on a second claim.

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[53] See *Sharma* at paragraph 44.

[99] The adverse impact, being unable to qualify for benefits on a second claim without accumulating sufficient hours, is a disadvantage that exists independently of the impugned provision.

[100] We recognize that the bar is low for meeting the test at step 1. The provisions at issue are complex, as is the relationship between the temporary provisions, the EI Act as a whole, and the unique circumstances of the pandemic. We acknowledge the difficult situation the Claimant, and many other women like her, was facing during this time.

[101] We find that, even if the Claimant had met her evidentiary burden at step 1, the General Division made an error in its analysis at step 2.

[102] The provision at issue must be considered in the context of the other provisions including the lengthened qualifying period, increased benefit amount, lower qualifying requirements etc. all designed to ensure people who needed help accessing benefits when CERB/EI ERB ended had assistance.

Step 2 – Whether the impugned law imposes a burden or denies a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating disadvantage

[103] Having found that the first step of the test was met, the General Division then considered whether section 153.17 imposes a burden or denies a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating disadvantage. It noted the guidance from *Sharma* to consider the purpose of the measure within the broader legislative context.

[104] Turning to the purpose of the measure, the General Division found that the purpose or objective of section 153.17 is to facilitate access to benefits. It determined that this definition of the section's purpose is consistent with the objective of the EI Act as a whole. It also found that this purpose is properly distinguished from the means used to attain the objective, which was the one-time hours credit.

[105] The General Division found that the distinction created by the automatic application of the hours credit on the first claim for benefits fails to respond to the actual needs of the group's members. It denies members of the group a benefit, exacerbating that group's historic disadvantage in the job market and their disadvantage when it comes to accessing EI benefits.

[106] The General Division noted that the allocation of scarce resources is usually an important consideration in cases such as this, citing *Weatherley* and *Landau*.[54] It found that it was less of a consideration in this matter because of the far-reaching scope of the special measures and the government's willingness to spend significant amounts.

[107] In its analysis of the exacerbation of disadvantage, the General Division states:

> In this case, I find it is not necessary to spend much time on the question of the government's allocation of resources within the legislative scheme or on the importance of being flexible when analyzing this question in the context of a benefits scheme. It is well known that massive amounts of money were devoted to pandemic relief, and the question of cost or resource allocation was not part of the Respondent's arguments in this case.[55]

[108] The General Division doesn't provide any explanation as to why it found it wasn't necessary to spend much time on these considerations and, doesn't spend any time on these contextual factors.

[109] The General Division's analysis under step 2 consists of defining the purpose of the provision and then determining that the provision exacerbated disadvantage by denying women access to maternity and parental benefits. The General Division concludes that, because it didn't satisfy its purpose of facilitating access to benefits, the provision exacerbated disadvantage.

[110] The Commission argues that the General Division made an error by disregarding relevant case law from the Federal Court of Appeal. The General Division says that it must take caution when applying earlier cases concerning the EI Act and *Canada*

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[54] See General Division decision at paragraph 54.
[55] See General Division decision at paragraph 123.

Pension Plan, suggesting that the unique circumstances of the pandemic support this approach.

[111] The Commission argues that the General Division didn't take caution when applying those cases but rather ignored them entirely with no explanation. It says that the General Division's determination that the allocation of scarce resources was less relevant in light of the amount of money being spent on relief measures is an error of law. The case law sets out that allocation of resources is a key consideration when analyzing far-reaching measures involving significant expenditures.

[112] The Commission says that the General Division made an error by failing to follow the direction in *Weatherley* to consider the challenge of allocating scarce resources when deciding whether benefit legislation offends section 15(1) of the Charter.

[113] The Commission argues that the General Division also made an error in law when it determined that the legislation was discriminatory because it failed to respond to the actual needs of the members of the group. It says that the General Division failed follow the direction of the SCC to consider the purpose of the section in the context of the broader benefit scheme.

[114] The Commission submits that the General Division should have looked at whether the lines drawn in the legislation are appropriate, considering the objects of the legislative scheme and the groups impacted. The Commission says that the General Division found that women are denied the benefit but failed to recognize that it is a benefit no one received.

[115] The Claimant says that the General Division properly considered the purpose of the provision and found that the design of the section didn't achieve its purpose for some women. She says that this case is directly analogous to *Fraser*.

[116] The Claimant says that the General Division didn't disregard prior case law but acknowledged that the discrimination analysis has evolved considerably over time, so caution must be used when relying on earlier cases. She argues that the decisions in

Weatherley and *Landau* are distinguishable and there are no aspects of those decisions that should have been binding on the General Division.

[117] The Claimant also argues that the allocation of scarce resources doesn't absolve the government of its obligations under section 15(1) of the Charter. She says that the General Division's factual finding that the allocation of scarce resources wasn't a significant consideration in the circumstances of the pandemic is a factual finding entitled to significant deference.

The General Division failed to consider the legislative context

[118] We find that the General Division made an error in law in its analysis by failing to consider the legislative context. The SCC in *Sharma* made it clear that the broader legislative context should be taken into consideration. The Court, citing *Withler*, stated:

> Where the impugned provision is part of a larger legislative scheme (as is often so), the Court explained, that broader scheme must be accounted for (para. 3), and the 'ameliorative effect of the law on others and the multiplicity of interests it attempts to balance will also colour the discrimination analysis' (para. 38 (emphasis added)). In *Taypotat*, Abella J. harboured 'serious doubts' that the impugned law imposed arbitrary disadvantage, particularly after considering the context of the relevant legislation 'as a whole' (para. 28).[56]

[119] The General Division references the objective of the EI Act when determining the purpose of the provision but undertakes no discussion of the broader legislative context in its analysis of whether the distinction is discriminatory. In *Sharma*, the Court explicitly states:

> 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 (*Withler*, at para. 67; see also paras. 3, 38, 40 and 81).[57]

[56] See *Sharma* at paragraph 57.
[57] See *Sharma* at paragraph 59.

[120] While the General Division considers the full context of the claimant group's circumstances in the labour market, and in the pandemic, it failed to consider the context of the claimant group's situation under the legislation.

[121] Section 153.17 was added to the EI Act as part of a suite of temporary provisions to address the COVID-19 pandemic. The full legislative context, however, remains the EI Act. The Claimant received EI ERB payments for 28 weeks. This temporary benefit mirrored the CERB benefit available to those who could not access EI and otherwise met the qualifying criteria.

[122] When the CERB and EI ERB benefits stopped, the Claimant was automatically transitioned to EI regular benefits. The temporary provisions modified certain criteria to facilitate access to those benefits, temporarily, but weren't intended to divorce the benefits from the legislative scheme as a whole.

[123] Going back to the earlier discussion of EI regular, maternity, and parental benefits, it is important to keep in mind that to qualify for benefits at the time EI ERB ended, claimants still needed to have a sufficient number of insurable hours in their qualifying period. In recognition of the fact that the ongoing pandemic may have made it difficult to have accumulated these hours, the following temporary changes were made:

- Extended qualifying period
- Universal unemployment rate
- One-time hours credit
- No disqualification for voluntary leaving or dismissal

[124] Together, these temporary measures allowed for more people to qualify for benefits **at the time** that the EI ERB ended. These provisions applied whether the claim was for regular or special benefits.

[125] As discussed above, under the ordinary legislative scheme, claimants who receive EI regular benefits and need to transition to maternity and parental benefits can do so but are subject to a 50-week limit to the total weeks of benefits that they can receive. In order to receive up to 50 weeks total of maternity and parental benefits after

having received regular benefits, claimants need to have accumulated sufficient insurable hours.

[126] At the time of the transition from EI ERB, the temporary provisions loosened the rules around accessing benefits but didn't alter this long-standing feature of the EI Act. A temporary provision was added to ensure that claimants who were transitioned to EI regular benefits but needed to move to special benefits during their benefit period were able to do so.

[127] It is true that the section doesn't allow claimants to bank their hours credit for use on a second claim for benefits. The evidence before the General Division demonstrated that women would have needed the one-time hours credit more than men at the time of transition from EI ERB. If claimants had the option to bank the credit for use on a later claim, then this would have disadvantaged women as compared with men. Men would be more likely to have an hours credit available for use on a future claim whereas women would have disproportionately been required to use the credit on a first claim.

[128] The General Division also does not address that the benefit some women were unable to access, the use of an hours credit on a second claim for benefits, is not a benefit that was available to any claimants. The Claimant states that this case is analogous to *Fraser*.

[129] In *Fraser* those full-time RCMP members who worked regular hours and were suspended or went on unpaid leave could obtain full pension credit for those periods. Full-time members who temporarily job-shared and reduced their hours could not obtain the same pension credit. The latter category was predominantly made up of women. There was clearly a benefit that was being denied to one group but available to another.[58]

[58] See *Fraser* at paragraph 83.

[130] In this case, the one-time credit of hours applied to all first claims and was not available on any second claims. The Claimant was denied the benefit of applying the credit to a second claim but this benefit was denied to all claimants.

[131] Also, in the full context of the legislation, the evidence demonstrated that women, including the Claimant, benefited from the increase in benefit rate to a universal $500 per week. The Claimant had accumulated 1427 hours in her qualifying period and didn't require the hours credit in order to qualify at the time she was transitioned from EI ERB. However, these hours were based on the extended qualifying period, provided for by another temporary measure. The Claimant had to accumulate fewer hours due to the universal unemployment rate and didn't have the reasons for issuance of her ROEs scrutinized. This context is important.

[132] As the SCC found in *Sharma*, leaving the situation of a claimant group unaffected is insufficient to meet the evidentiary burden at step 2. The Court stated:

> Courts must examine the historical or systemic disadvantage of the claimant group. Leaving the situation of a claimant group unaffected is insufficient to meet the step two requirements. Two decisions of this Court demonstrate this point. In *Fraser*, Abella J. observed: 'The goal is to examine the impact of the harm caused to the affected group', which may include economic exclusion or disadvantage, social exclusion, psychological harms, physical harms or political exclusion (para. 76 (emphasis added), citing C. Sheppard, *Inclusive Equality: The Relational Dimensions of Systemic Discrimination in Canada* (2010), at pp. 62-63). In *Withler*, this Court explained that a negative impact or worsened situation was required:
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> > 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. [para. 37][59]

[133] The Claimant, and other women in her situation, were unable, both before and during the pandemic, to receive 50 weeks of regular benefits followed by up to

[59] See *Sharma* at paragraph 52.

50 weeks of maternity and parental benefits without having accumulated sufficient insurable hours for two separate claims. This situation was left unaffected by the temporary provisions.

[134] Returning to the important considerations of the broader legislative context set out in *Withler*, the General Division also made an error in its legal analysis when it determined that the allocation of resources wasn't an important consideration in this matter.[60] The Commission takes issue with this finding.

[135] It appears that the evidence of the Respondent's own witness contradicted this finding by the General Division. Dr. Ruth Robson in her report states:

> The general trend towards more rules and less generous payments in the pandemic benefits, also suggests that fiscal pressures would have been an important consideration. Cost estimates for CERB had been wildly exceeded by the end of the program, due to both higher than expected demand and extensions to the duration of claims. Fiscal considerations are a normal and very important part of any government decision. Decision-makers must attend to the total costs of a policy choice, and consider how it will be paid for out of public funds. In the case of the EI changes, the program is normally financed through contributions by employers and employees which are held in a dedicated and administratively separate part of the Public Accounts of Canada (Employment and Social Development Canada, 2022).[61]

[136] The General Division provides no explanation for its determination that the allocation of resources wasn't an important consideration in light of the amounts spent on pandemic benefits. This finding was contradicted by the evidence before it.

[137] The General Division based its analysis on the purpose of the provision which it found to be to facilitate access to benefits for all those that required help to qualify. However, it ignored the broader legislative context and failed to consider whether the lines drawn in the legislation were appropriate. In *Withler*, the SCC stated:

> 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

[60] See *Withler v Canada (Attorney General)*, 2011 SCC 12 at paragraph 38.
[61] See Robson report GD29-40.

> 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.[62]

[138] When considered in context, the provisions correspond to claimants' needs and circumstances by ensuring access to benefits for women during the unprecedented circumstances presented by the COVID-19 pandemic, whether regular or special benefits. The government introduced a suite of temporary measures which allowed for more women to:

- qualify for benefits
- receive benefits for a longer period of time
- be paid at a higher rate

[139] The fact that the one-time hours credit was designed to apply automatically at the time of the first application for benefits disproportionately benefited women. It didn't help women who received 50 weeks of regular benefits in making a second claim for maternity and parental benefits, but this wasn't discriminatory. The operation of the provision was consistent with the operation of the EI Act before and after the pandemic. Claimants who wish to establish a second claim for benefits while or after having received benefits on a first claim are required to accumulate sufficient hours of insurable employment.

[140] We find that the General Division made an error of law in its analysis at step 2 by failing to consider the provision at issue within the broader legislative context. When

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[62] See *Withler* at paragraph 67.

considered in this context, section 153.17 doesn't impose a burden or deny a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating disadvantage.

[141] Having found that section 153.17 doesn't violate section 15 of the Charter, we don't need to address the parties' arguments concerning section 1 and remedy.

We will give the decision the General Division should have given

[142] The parties agree that the appropriate remedy in this matter is to make the decision. We agree.[63]

[143] For the reasons set out above, we find that section 153.17 isn't unconstitutional. The provision doesn't create a distinction based on an enumerated ground or analogous ground, on its face or in its impact. It also doesn't deny a benefit or impose a burden on women in a manner that has the effect of reinforcing, perpetuating, or exacerbating disadvantage.

Conclusion

[144] The appeal is allowed. The Claimant cannot benefit from the hours credit in section 153.17 of the EI Act. This means she doesn't qualify for maternity and parental benefits.

Melanie Petrunia
Elizabeth Usprich
Solange Losier
Members, Appeal Division

[63] See DESD Act at section 59(1).