Federal Court  Cour fédérale

Date: 20250522

Docket: T-2016-22

Citation: 2025 FC 912

Ottawa, Ontario, May 22, 2025

PRESENT: The Honourable Madam Justice Turley

BETWEEN:

PARKDALE COMMUNITY LEGAL SERVICES
PUBLIC SERVICE ALLIANCE OF CANADA

Plaintiffs

and

HIS MAJESTY THE KING

Defendant

JUDGMENT AND REASONS

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I. Overview

[1] Since its enactment in 1977, the *Canadian Human Rights Act*, RSC 1985, c H-6 [*CHRA*] has limited the amount of monetary damages the Canadian Human Rights Tribunal [CHRT] may award complainants for pain and suffering: paragraph 53(2)(e), and for reckless and wilful discriminatory practices: subsection 53(3). Initially, the maximum amount that the CHRT could award under each head of damage was $5,000. Amendments to the *CHRA* in 1998 increased the maximum amounts to $20,000, where they remain today.

[2] The Plaintiffs commenced actions challenging the constitutionality of these statutory provisions. They seek a declaration that the statutory caps on monetary damages violate subsection 15(1) of the *Canadian Charter of Rights and Freedoms* [*Charter*] and cannot be justified under section 1. Pursuant to subsection 52(1) of the *Constitution Act, 1982*, the Plaintiffs seek an order severing the words "by an amount not exceeding twenty thousand dollars" in paragraph 53(2)(e) of the *CHRA*, and the words "not exceeding twenty thousand dollars" in subsection 53(3) of the *CHRA*, as well as declaring those words to be of no force or effect.

[3] Both parties brought motions for summary judgment, which the Court heard over the course of three days.

[4] The Plaintiffs argue that these statutory caps on damages violate the claimant group's equality rights under subsection 15(1). They define the claimant group broadly as all individuals

with founded complaints of discrimination under the *CHRA*. The Plaintiffs do not, however, assert that this collective constitutes a distinct protected group for the purposes of section 15 of the *Charter*. Rather, they assert that the caps operate in the same manner for all complainants, regardless of their protected group.

[5] The Plaintiffs allege that the caps draw distinctions, both on their face and in their impact, based on all enumerated and analogous grounds under subsection 15(1) as compared with two groups of individuals. The first is individuals without protected characteristics who have not suffered discrimination and do not require *CHRA* damages. The second is individuals who receive similar damages awards under the common law of tort and wrongful dismissal. The Plaintiffs further assert that the caps deny the claimant group equal protection and benefit of the law in a manner that perpetuates their disadvantage by arbitrarily limiting their damages.

[6] The Defendant raises two preliminary issues. First, that the Plaintiffs' motion is not suitable for summary judgment because there is conflicting expert evidence. Second, the Defendant challenges the public interest standing of the Plaintiffs to bring this constitutional challenge. On the merits of the motion, the Defendant argues that the Plaintiffs have failed to establish any distinction on an enumerated or analogous ground under section 15, and that their claim does not have an evidentiary foundation.

[7] In my view, the summary judgment motions are suitable for determination under Rules 213 and 215 of the *Federal Courts Rules*, SOR/98-106 [*Rules*]. The divergence between the parties' expert evidence is not a question of credibility requiring a trial. Furthermore, I

exercise my discretion to grant the Plaintiffs public interest standing. The Plaintiffs have demonstrated that there is a serious justiciable issue, that they have a genuine interest in the issue, and that the action is a reasonable and effective manner in which to bring the issue before the Court.

[8] The parties' summary judgment motions can be determined at the first step of the subsection 15(1) test. There is no genuine issue for trial because, as framed, the Plaintiffs' claims fail to establish that the *CHRA* damages caps create a distinction based on an enumerated or analogous ground.

[9] The Plaintiffs have advanced a broad and novel *Charter* claim — that the caps discriminate against all successful *CHRA* complainants. While mirror comparator groups are not required, a comparative analysis remains relevant at the first step of the subsection 15(1) analysis, whether the claim is one of direct or indirect discrimination. There must be a distinction between the claimant group compared to others in the social and political setting in which the question arises. Here, the two comparisons advanced by the Plaintiffs fail to satisfy this first step.

[10] The first comparator group — individuals who have not experienced discrimination and do not require remedies under the *CHRA* — is too broad to allow for any meaningful comparison. The second comparator group — individuals who receive analogous common law damages — falls outside the bounds of the social and political setting in which the constitutional question at issue arises in this case. In addition, any distinction between the claimant group and

the comparator groups is not based on enumerated or analogous grounds, but rather based on the regime.

[11] I have also considered whether the Plaintiffs' claims establish disproportionate impact at step one and discrimination at step two. At both steps, the Plaintiffs' claims suffers from an insufficient evidentiary foundation to establish a breach of section 15. They allege that the caps discriminate based on all enumerated and analogous grounds. However, their evidence is highly general, not disaggregated, and fails to engage with the distinct lived experience of individuals in each protected group. This approach hinders the Court's analysis at each stage of the test. Furthermore, I have concerns with the Plaintiffs' statistical evidence such that it cannot ground their section 15 analysis at either step.

[12] Finally, with respect to demonstrating that the caps perpetuate any historic and systemic disadvantage faced by the claimant group at step two, the Plaintiffs' approach is flawed in two critical respects. First, based on their evidentiary record, the Court cannot undertake a proper contextual inquiry that is grounded in the actual situation of the protected groups comprising the collective of the claimant group. Second, the Plaintiffs' approach neglects to consider the *CHRA* caps in their broader legislative context as required by the jurisprudence.

[13] Based on these reasons, there is no need to consider the issues of section 1 or remedies. Despite the very able advocacy of Plaintiffs' counsel, I am dismissing the Plaintiffs' motion for summary judgment and allowing that of the Defendant. The Plaintiffs' actions are dismissed.

II. Background

A. *The CHRA Regime*

[14] The *CHRA* prohibits discriminatory practices by federally regulated employers and service providers based on one or more prohibited grounds. The prohibited grounds of discrimination are race, national or ethnic origin, colour, religion, age, sex, sexual orientation, gender identity or expression, marital status, family status, genetic characteristics, disability, and conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered: *CHRA*, s 3(1).

[15] The *CHRA* applies to the federal government, First Nations, and federally regulated employers and service providers such as airlines and banks. An individual or group of individuals who have reasonable grounds to believe that a federally regulated employer or service provider is engaging or has engaged in a discriminatory practice as set out in sections 5 through 14 of the *CHRA* may file a complaint with the Canadian Human Rights Commission [CHRC].

[16] The CHRC performs a gate-keeping function by screening complaints: *CHRA*, ss 40–46. It may, for example, refuse to deal with a complaint where another available procedure has not

yet been exhausted, or where the complaint is frivolous or vexatious: *CHRA*, s 41(1). Where the CHRC does not screen out a complaint, it determines whether to refer the complaint to the CHRT: *CHRA*, ss 43–44.

[17] If, after conducting an inquiry, the CHRT finds that a complaint has been substantiated, subsection 53(2) of the *CHRA* provides for a wide range of remedies. The CHRT may order that the respondent: (i) cease the discriminatory practices and take remedial measures: s 53(2)(a); (ii) make the rights, opportunities, or privileges that were denied available to the victim: s 53(2)(b); (iii) compensate the victim for wages deprived and expenses incurred as a result of the discriminatory practice: s 53(2)(c); (iv) compensate the victim for the additional costs of obtaining alternative goods, services, facilities, or accommodation and for any expenses incurred as a result of the discriminatory practice: s 53(2)(d).

[18] In addition to these remedies, the CHRT may order that the respondent pay the victim damages for pain and suffering: s 53(2)(e), and special compensation for wilful and reckless discriminatory conduct: s 53(3). The maximum amount that may be awarded is $20,000 for each head of damage:

Complaint substantiated	**Plainte jugée fondée**
(2) If at the conclusion of the inquiry the member or panel finds that the complaint is substantiated, the member or panel may, subject to section 54, make an order against the person found to be engaging or to have engaged in the discriminatory practice and include in the order any of the following terms that the member	**(2)** À l'issue de l'instruction, le membre instructeur qui juge la plainte fondée, peut, sous réserve de l'article 54, ordonner, selon les circonstances, à la personne trouvée coupable d'un acte discriminatoire :

or panel considers appropriate:	
[…]	[…]
(e) that the person compensate the victim, by an amount not exceeding twenty thousand dollars, for any pain and suffering that the victim experienced as a result of the discriminatory practice.	**e)** d'indemniser jusqu'à concurrence de 20 000 $ la victime qui a souffert un préjudice moral.
Special compensation	**Indemnité spéciale**
(3) In addition to any order under subsection (2), the member or panel may order the person to pay such compensation not exceeding twenty thousand dollars to the victim as the member or panel may determine if the member or panel finds that the person is engaging or has engaged in the discriminatory practice wilfully or recklessly.	**(3)** Outre les pouvoirs que lui confère le paragraphe (2), le membre instructeur peut ordonner à l'auteur d'un acte discriminatoire de payer à la victime une indemnité maximale de 20 000 $, s'il en vient à la conclusion que l'acte a été délibéré ou inconsidéré.

[19] Labour boards and adjudicators have jurisdiction to interpret and apply human rights legislation: *Northern Regional Health Authority v Horrocks*, 2021 SCC 42 at para 13; *Parry Sound (District) Social Services Administration Board v OPSEU, Local 324*, 2003 SCC 42 at paras 1, 28. As a result, adjudicators under the *Federal Public Sector Labour Relations Act*, SC 2003, c 22, s 2 and the *Canada Labour Code*, RSC, 1985, c L-2 are called upon to apply the *CHRA* and may award remedies for discriminatory conduct: *Canada (Human Rights Commission) v Canada (Attorney General)*, 2016 FCA 200 at para 86.

[20] There have been calls to eliminate the *CHRA* caps. In 2000, former Supreme Court Justice and Chair of the Canadian Human Rights Act Review Panel, Gérard V. La Forest, recommended "the removal of the limits on the amount of compensation that the Tribunal can award for what we would wish to see referred to as injury to 'dignity, feelings and self-respect'": The Canadian Human Rights Act Review Panel, *Promoting Equality: A New Vision* (Ottawa: Department of Justice, 2000) Recommendation 73 at 161. Then in 2022, former Supreme Court Justice Louise Arbour concluded that "removing the cap on damages would go a long way in increasing access to justice for complainants": The Honourable Louise Arbour, CC, GOQ, *Report of the Independent External Comprehensive Review of the Department of National Defence and the Canadian Armed Forces* (Ottawa, 2022) Recommendation 7 at 138.

B. *The Plaintiffs' Charter Challenge*

[21] Parkdale Community Legal Services [PCLS] is a community legal clinic providing free legal services to low-income members of Toronto's Parkdale and Swansea communities. According to the affidavit of John No, a lawyer and director at PCLS, the clinic represents low-income, non-unionized workers who face discrimination in employment, and has significant experience representing federally regulated workers who live and work across Ontario: Affidavit of John No, affirmed July 11, 2023, at paras 3, 7, 10–11 [No Affidavit].

[22] The Public Service Alliance of Canada [PSAC] is the largest federal public service union in Canada, representing approximately 170,000 federally regulated employees. According to the affidavit of Seema Lamba, a lawyer and human rights officer at PSAC, the union regularly represents employees in human rights complaints before the CHRC and the CHRT, as well as in

employment grievances alleging discrimination under the *CHRA*: Affidavit of Seema Lamba, affirmed July 13, 2023, at paras 2–3, 5–8 [Lamba Affidavit].

[23] The Plaintiffs filed separate Statements of Claim in 2022 challenging the constitutionality of paragraph 53(2)(e) and subsection 53(3) of the *CHRA*. These claims were consolidated in 2023.

[24] Where the constitutional validity of legislation is challenged, a notice of constitutional question [NCQ] must be served on the Attorney General of Canada and all provincial and territorial Attorneys General at least ten days before the day on which the constitutional question will be heard: *Federal Courts Act*, RSC 1985, c F-7, ss 57(1), (2) [*Act*]. In this case, however, there was no NCQ nor proof of service on the Court record. As a result, a case management conference was convened.

[25] Plaintiffs' counsel advised the Court that PCLS had served an NCQ on all provincial and territorial Attorneys General in July 2022 (when the matter was originally proceeding by way of application) and again in October 2022 (after their Statement of Claim was filed). However, the Court Registry refused the NCQ for filing in October 2022, deeming it "premature". There was no indication of this on the Court record. The Plaintiffs did not seek to serve and file a revised NCQ when the hearing for the parties' summary judgment motions was set down.

[26] The Plaintiffs advised that the Attorneys General of Northwest Territories, British Columbia, Saskatchewan, Manitoba, Ontario, and Newfoundland and Labrador indicated in

response to the October 2022 NCQ that they did not intend to intervene at this stage of the matter. The Plaintiffs noted that this includes the Attorneys General of the three jurisdictions that have human rights legislation with damages caps akin to the impugned *CHRA* provisions: Saskatchewan, Northwest Territories, and Manitoba.

[27] If the Attorneys General who did not respond had any interest in intervening, it is assumed that they would have inquired with counsel for PCLS as to when the matter would be heard. Out of an abundance of caution, however, the Court directed the Plaintiffs to write to the Attorneys General that did not respond to the October 2022 NCQ, to inform them of the hearing dates and confirm that they did not intend to participate. The Plaintiffs confirmed by letter dated July 25, 2024, that every provincial and territorial Attorney General responded that they would not participate in the proceedings before this Court.

C. *The Parties' Motions for Summary Judgment*

[28] In their motion, the Plaintiffs seek the following relief: (i) summary judgment in their favour; (ii) a declaration that paragraph 53(2)(e) and subsection 53(3) of the *CHRA* violate subsection 15(1) of the *Charter*, and that this violation is not saved by section 1; and (iii) an order pursuant to subsection 52(1) of the *Constitution Act, 1982*, severing the words "by an amount not exceeding twenty thousand dollars" in paragraph 53(2)(e) and the words "not exceeding twenty thousand dollars" in subsection 53(3) of the *CHRA*, and declaring these words to be of no force and effect.

[29] The Defendant filed a cross-motion for summary judgment, asking the Court to dismiss the Plaintiffs' actions in their entirety.

(1) The Plaintiffs' evidence

[30] In addition to the affidavit evidence of Mr. No and Ms. Lamba, the Plaintiffs adduced the expert evidence of Professor Jennifer Koshan and Professor Bruce Curran.

[31] The affidavit of John No was tendered as anecdotal evidence illustrating two broad impacts the caps have on *CHRA* complainants. First, he alleges that they deter complaints because individuals consider that the level of compensation is not worth the financial and emotional costs incurred throughout the proceedings. Second, Mr. No states that when complaints are filed, the individuals who file them feel undercompensated for the harm suffered, thus compounding the emotional and financial pain endured: No Affidavit at para 31.

[32] Ms. Lamba provides similar evidence to that of Mr. No. In particular, she states that she can recall many occasions where PSAC members expressed frustration about the limits on the *CHRA* damages awards: Lamba Affidavit at para 33.

[33] Professor Koshan, on faculty at the University of Calgary law school, provided an expert report addressing procedural and logistical barriers that complainants face under the *CHRA*. These barriers include: no costs awards, complicated procedures, perceptions of unfairness in the CHRC's procedures, and the *CHRA*'s cap on damages for pain and suffering: Expert Report of Professor Koshan at paras 22–39, Exhibit "B" to the Affidavit of Professor Jennifer Koshan,

affirmed July 12, 2023 [Koshan Report]. In Professor Koshan's opinion, these barriers prevent complainants, especially those experiencing socio-economic hardship, from receiving due compensation, and disincentivizes them from making complaints: Koshan Report at para 35.

[34] Professor Curran, on faculty at the University of Manitoba law school, conducted an empirical study comparing pain and suffering damages under paragraph 53(2)(e) of the *CHRA* with awards under the Ontario *Human Rights Code* [*OHRC*], the British Columbia *Human Rights Code* [*BCHRC*], tort damages awards, and damages in wrongful dismissal cases over a ten-year period. He also compared punitive damages awarded under subsection 53(3) of the *CHRA* with aggravated damages awarded in tort and wrongful dismissal actions.

[35] Professor Curran's study addresses two broad questions. First, whether the caps limited the amount of damages awarded under the *CHRA* relative to damages awards he deemed analogous in other contexts. Second, if so, the magnitude of the disparity. Professor Curran ultimately concludes "that the *CHRA* caps serve to limit the awards, when compared to the damages in other forums, both for 'average' cases and 'extreme' cases": Expert Report of Professor Bruce Curran at 59, Exhibit "C" to the Affidavit of Professor Bruce Curran, affirmed July 17, 2023 [Curran Report].

[36] By Order dated April 5, 2024, the Case Management Judge granted the Plaintiffs leave to serve a reply expert report addressing concerns raised by the Defendant's expert: Expert Reply Report of Professor Bruce Curran, Exhibit "A" to the Reply Affidavit of Professor Bruce Curran, affirmed March 12, 2024 [Curran Reply Report].

(2) The Defendant's evidence

[37] The Defendant relies on the affidavit of Christine Yoo, a legal assistant with the Department of Justice. Ms. Yoo's affidavit attaches legislative history documents, the CHRC's annual reports to Parliament, and the CHRT's annual reports.

[38] In addition, the Defendant tendered the expert report of Professor Michael Haan, an assistant professor at the University of Western Ontario. Professor Haan alleges several methodological and statistical flaws in Professor Curran's study: that the sample contains an unknown amount of bias, that the variables of "misconduct" and "pain and suffering" appear to have content validity issues; that Professor Curran's analysis uses statistical techniques not suitable for how the data is distributed; and that Professor Curran's regressions do not meet several basic assumptions. Based on these flaws, Professor Haan concluded that he does not share Professor Curran's opinion that the *CHRA* caps cause lower awards: Expert Report of Professor Michael Haan at para 162, Exhibit "C" to the Affidavit of Professor Michael Haan, affirmed February 7, 2024 [Haan Reply Report].

[39] The Defendant also filed a sur-reply expert report in response to Professor Curran's reply expert report. The sur-reply concluded that while Professor Curran's reply report satisfied some of Professor Haan's concerns, enough unresolved issues persist such that he remains unable to support Professor Curran's conclusions: Sur-Reply Expert Report of Professor Michael Haan at para 45, Exhibit "A" to the Affidavit of Professor Michael Haan, affirmed April 19, 2024 [Haan Sur-Reply Report].

III. Issues

[40] I have considered the following preliminary issues: (i) whether the Plaintiffs' actions are suitable for summary judgment; (ii) whether the Plaintiffs should be granted public interest standing; (iii) whether the parties' expert evidence should be admitted; and (iv) whether Professor Haan's evidence should be excluded for violating the *Browne v Dunn* rule.

[41] The issue to be determined on the merits of the motions is whether paragraph 53(2)(e) and subsection 53(3) of the *CHRA* violate subsection 15(1) of the *Charter*. Given my disposition of this legal issue, it is unnecessary for me to consider justification under section 1 of the *Charter* and the appropriate remedy.

IV. Analysis

A. *Appropriateness of Summary Judgment*

[42] In accordance with Rule 215 of the *Rules*, the Court shall grant summary judgment where it is satisfied that there is no genuine issue for trial with respect to a claim or a defence. The onus is on the party seeking summary judgment: *Canada v Bezan Cattle Corporation*, 2023 FCA 95 at 139 [*Bezan Cattle*]; *Gemak Trust v Jempak Corporation*, 2022 FCA 141 at para 67 [*Gemak Trust*].

[43] There is no genuine issue for trial if there is no legal basis to the claim based on the law or evidence brought forward: *Bezan Cattle* at para 138; *Manitoba v Canada*, 2015 FCA 57 at para 15. As held by the Federal Court of Appeal, that a summary judgment motion might have

broad legal, social, or economic implications is not a ground for refusing it: *Saskatchewan (Attorney General) v Witchekan Lake First Nation*, 2023 FCA 105 at para 34 [*Witchekan Lake First Nation*]. As Justice Rennie pointed out, "complicated and important cases, constitutional and otherwise, often proceed by way of applications and affidavit evidence alone": *Witchekan Lake First Nation* at para 33.

[44] The Plaintiffs argue that their actions are well-suited for summary judgment because there are no questions of credibility that require a trial, the parties agree on the issues to be determined, none of the lay witnesses were cross-examined, and the expert witnesses were cross-examined on their affidavits.

[45] The Defendant states that its motion is suitable for summary judgment as it is purely based on legal deficiencies in the Plaintiffs' claims. However, the Defendant argues that the Plaintiffs' motion is not suitable for summary judgment to the extent that it rests on Professor Curran's expert statistical evidence and raises credibility concerns. The mere existence of an apparent conflict in the evidence, however, does not preclude the granting of summary judgment. Courts are required to take a "hard look" at the merits and determine whether there are credibility issues that require resolution: *Witchekan Lake First Nation* at para 40; *Gemak Trust* at para 72.

[46] Simply because there are dueling expert reports does not mean that there are credibility issues at play such that a court should not grant summary judgment. As determined by Justice Rochester (then of this Court), where the case does not turn on whether the court disbelieves any

of the expert witnesses, it may proceed by way of summary judgment: *Andrie LLC v Bluewater Ferry Limited*, 2023 FC 155 at para 50.

[47] Ultimately, judges must be confident that they have all the necessary facts to resolve the dispute fairly: *Hryniak v Mauldin*, 2014 SCC 7 at para 50. Courts should proceed with care because granting summary judgment will preclude a party from presenting any evidence at trial with respect to the issue in dispute: *Milano Pizza Ltd v 6034799 Canada Inc*, 2018 FC 1112 at para 40. That said, parties are expected to put their best foot forward: *Canada (Attorney General) v Lameman*, 2008 SCC 14 at para 11.

[48] I am satisfied that this case is suitable for summary judgment. I find that the Plaintiffs have failed to establish a legal basis for their claim at step one of the section 15 test. The parties' respective motions for summary judgment may be determined on this basis. Furthermore, I have considered the evidentiary record adduced to prove disproportionate impact at step one, and discrimination at step two. The evidence, including the Plaintiffs' expert evidence, is insufficient to support their claims.

B. *The Plaintiffs Satisfy the Test for Public Interest Standing*

[49] Courts must cumulatively assess and weigh three factors to determine whether to exercise their discretion to grant public interest standing: (i) whether the action raises a serious justiciable issue; (ii) whether the party bringing the action has a genuine interest in the matter; and (iii) whether the proposed action is a reasonable and effective means of bringing the case to court: *British Columbia (Attorney General) v Council of Canadians with Disabilities*, 2022 SCC

27 at para 28 [*CCD*]; *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45 at paras 18, 20 [*Downtown Eastside*].

[50] In considering these three factors, a meaningful balance must be struck between the purposes that favour granting standing and those that militate against it: *CCD* at para 30; *Downtown Eastside* at para 23.

[51] The underlying purposes of limiting standing are to guide the efficient allocation of judicial resources, ensuring that the courts have the benefit of contending points of view of those directly affected and the proper role of courts within our democracy: *CCD* at para 29. On the other hand, the purposes that justify granting standing are giving effect to the principle of legality and ensuring access to the courts and access to justice broadly: *CCD* at para 30.

[52] Weighing the relevant factors, cumulatively and purposively, I find that the Plaintiffs satisfy the test for public interest standing.

(1) There is a serious justiciable issue

[53] In order to constitute a serious issue, the question raised need only be "far from frivolous": *CCD* at para 49. Given the broad remedial purpose of the *CHRA*, the legality of the caps on damages has potentially wide-ranging implications. There is thus no question that the Plaintiffs' claims raise a serious issue.

[54] The Defendant acknowledges that "the constitutionality of legislation is always a serious issue" but asserts that there is an inadequate factual matrix in this case: Defendant's Memorandum of Fact and Law at para 52 [Defendant's MOFL]. In oral submissions, however, the Defendant addressed the sufficiency of the factual setting under the rubric of the third factor, namely, reasonable and effective means. This is the appropriate stage at which to evaluate this consideration, and I therefore address it below: *CCD* at paras 55, 60–72, 88.

[55] A justiciable issue is one that is suitable for judicial determination: *CCD* at para 50; *Downtown Eastside* at para 30. The court must have "the institutional capacity and legitimacy to adjudicate the matter": *CCD* at para 50. Here, the constitutionality of the caps on damages is clearly an appropriate question for this Court to adjudicate.

[56] The Plaintiffs thus meet this first hurdle to public interest standing.

(2) The Plaintiffs have a genuine interest in the matter

[57] Under this second factor, a public interest litigant must demonstrate that they have a real interest in the proceeding, or that they are engaged with the issues raised. It reflects the concern for conserving scarce judicial resources and screening out mere busybodies: *CCD* at para 51.

[58] The affidavit evidence supports both PCLS and PSAC's interest in this matter. PCLS provides legal services to vulnerable and low-income workers in Toronto. It has represented such individuals in human rights matters, both in Ontario and federally. As the exclusive bargaining agent for approximately 170,000 federally regulated employees, PSAC represents their members

in discrimination claims under the *CHRA* and in employment grievances alleging discrimination contrary to the *CHRA*.

[59] I find that the Plaintiffs have satisfied this second factor. Notably, the Defendant did not challenge the Plaintiffs' genuine interest in the constitutionality of the *CHRA* damages caps.

(3) This action is a reasonable and effective means of bringing the matter to Court

[60] This third factor is concerned with both legality and access to justice: *CCD* at para 52; *Downtown Eastside* at para 49. As such, courts should consider whether the proposed proceeding is an economical use of judicial resources, whether the issues as presented are suitable for determination in an adversarial setting, and whether allowing the matter to proceed upholds the principle of legality: *CCD* at para 54.

[61] In *CCD*, the Supreme Court set out a non-exhaustive list of considerations courts may take into account when determining whether the proposed proceeding is a reasonable and effective means of bringing the case:

> [55] The following non-exhaustive list outlines certain "interrelated matters" a court may find useful when assessing the third factor:
>
> 1. *The plaintiff's capacity to bring the claim forward*: What resources and expertise can the plaintiff provide? Will the issue be presented in a sufficiently concrete and well-developed factual setting?
>
> 2. *Whether the case is of public interest*: Does the case transcend the interests of those most directly affected by the challenged law or action? Courts should take into account that one of the ideas animating public interest litigation is that it may provide access to justice for disadvantaged persons whose legal rights are affected.

> 3. *Whether there are alternative means*: Are there realistic alternative means which would favour a more efficient and effective use of judicial resources and would present a context more suitable for adversarial determination? If there are other proceedings relating to the matter, what will be gained in practice by having parallel proceedings? Will the other proceedings resolve the issues in an equally or more effective and reasonable manner? Will the plaintiff bring a particularly useful or distinctive perspective to the resolution of those issues?
>
> 4. *The potential impact of the proceedings on others*: What impact, if any, will the proceedings have on the rights of others who are equally or more directly affected? Could "the failure of a diffuse challenge" prejudice subsequent challenges by parties with specific and factually established complaints?
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> [Citations omitted]

(a) *The Plaintiffs' capacity to bring the matter forward*

[62] I am satisfied that the Plaintiffs have the requisite expertise and resources to advance these claims. Both PCLS and PSAC are represented by experienced counsel. Further, both organizations have experience advancing and participating in *Charter* and human rights litigation: No Affidavit at paras 14–22; Lamba Affidavit at paras 11–17.

[63] The Defendant asserts that the Plaintiffs' claims lack a sufficiently concrete and well-developed factual setting. The Defendant argues that, generally, "*Charter* challenges should be grounded in the lived reality of plaintiffs directly affected by the impugned law": Defendant's MOFL at para 50.

[64] As the Supreme Court has made clear, "a directly affected *plaintiff* is not vital to establish a 'concrete and well-developed factual setting'" [emphasis in original]. A public interest litigant

can establish a sufficient factual setting by calling affected or otherwise knowledgeable non-plaintiff witnesses: *CCD* at para 66. This is precisely what the Plaintiffs did in this case — they tendered affidavit evidence from fact witnesses, as well as expert witnesses, to support their *Charter* claim.

[65] Here, we do not have the "absence of a factual basis": *CCD* at para 72. Rather, the Defendant takes issue with the quality of the evidence adduced, alleging that the Plaintiffs' expert statistical evidence is methodologically flawed and that the Plaintiffs failed to adduce any individualized facts: Defendant's MOFL at para 58.

[66] In considering whether the factual setting is sufficient to grant standing, the nature of the pleadings is relevant. For example, whether the case is "argued largely on the face of the legislation" or whether it "turn[s] more heavily on individualized facts": *CCD* at para 72. Here, as in *CCD*, the Plaintiffs allege direct discrimination and argue that the caps are unconstitutional on their face. In the alternative, they argue adverse impact. Further, they argue that there is no need for individualized facts and that it is "open to them to prove the impacts and unconstitutionality of the legislation through a variety of evidence": *Single Mothers' Alliance of BC Society v British Columbia*, 2022 BCSC 2193 at para 103 [*Single Mothers' Alliance*].

[67] As the Supreme Court explained in *Fraser v Canada (Attorney General)* 2020 SCC 28 [*Fraser*], section 15 claims may be proven through different types of evidence:

> [57] Courts will benefit from evidence about the physical, social, cultural or other barriers which provide the "full context of the claimant group's situation". This evidence may come from the claimant, from expert witnesses, or through judicial notice. The

> goal of such evidence is to show that membership in the claimant group is associated with certain characteristics that have disadvantaged members of the group, such as an inability to work on Saturdays or lower aerobic capacity. These links may reveal that seemingly neutral policies are "designed well for some and not for others". When evaluating evidence about the group, courts should be mindful of the fact that issues which predominantly affect certain populations may be under-documented. These claimants may have to rely more heavily on their own evidence or evidence from other members of their group, rather than on government reports, academic studies or expert testimony.
>
> [58] Courts will also benefit from evidence about the outcomes that the impugned law or policy (or a substantially similar one) has produced in practice. Evidence about the "results of a system" may provide concrete proof that members of protected groups are being disproportionately impacted. This evidence may include statistics, especially if the pool of people adversely affected by a criterion or standard includes *both* members of a protected group *and* members of more advantaged groups.
>
> [Citations omitted, emphasis in underline added]

[68] I am not persuaded that the Plaintiffs' claims lack the necessary factual context for the purposes of granting standing. The Defendant's challenge to the validity of the Plaintiffs' expert evidence is relevant on the merits of the summary judgment motions but does not preclude granting standing. Similarly, whether the Plaintiffs' evidence establishes disproportionate impact at step one of the section 15 test, or disadvantage at step two, is a question for determination on the merits. In order to demonstrate a sufficient factual context, the Plaintiffs need not establish that they will prove their section 15 claim: *Single Mothers' Alliance* at para 123. I therefore find that they have cleared this hurdle.

(b) *Whether the case is of public interest*

[69] The Plaintiffs' claims clearly raise an issue of public interest that transcends their immediate interests: *CCD* at paras 55, 110; *Downtown Eastside* at para 73. Based on the broad remedial purpose of the *CHRA*, this *Charter* challenge could affect a large group of people. In addition, granting standing will promote access to justice and ensure that this significant legal issue is litigated.

(c) *Realistic alternative means*

[70] The Plaintiffs argue that "[t]his action also provides a far more efficient means of litigating these concerns than any individual grievance or human rights complaint": Plaintiffs' Memorandum of Fact and Law at para 33 [Plaintiffs' MOFL]. On the other hand, the Defendant asserts that it would be preferable to raise this issue before the CHRT, thus ensuring "that the constitutional question is raised within a concrete factual context, more suitable for adversarial determination": Defendant's MOFL at para 57.

[71] The CHRT has jurisdiction to consider the constitutionality of provisions in its home statute: *CHRA*, s 50(2); *Nova Scotia (Workers' Compensation Board) v Martin; Nova Scotia (Workers' Compensation Board) v Laseur*, 2003 SCC 54 at para 3 [*Martin*]; *Air Canada Pilots Association v Kelly*, 2011 FC 120 at para 51 [*Kelly*]. As an administrative tribunal, however, the CHRT cannot make a general declaration of invalidity under subsection 52(1) of the *Constitution Act, 1982*: *Mouvement laïque québécois v Saguenay (City)*, 2015 SCC 16 at para 153; *Martin* at para 31; *Kelly* at para 479.

[72] As a result, the CHRT would only be able to declare the damages caps unconstitutional for the purposes of a particular case, and any such ruling would have no binding effect for future cases. Such a decision would also be subject to judicial review before this Court: *Act*, ss 18, 18.1.

[73] Moreover, the uncontested evidence of Professor Koshan speaks to the procedural and logistical barriers faced by *CHRA* complainants that may dissuade an individual from bringing a complaint that raises this constitutional issue. Notably, in the 48 years since the *CHRA* was enacted, no complainant has challenged the constitutionality of these provisions before the CHRT.

[74] Granting public interest standing to the Plaintiffs promotes the efficient use of judicial resources. The parties have devoted considerable effort and time to this case, adducing affidavits and expert reports, conducting cross-examinations, and filing comprehensive written submissions. Further, these motions took place over three hearing days. As articulated in a recent *Charter* challenge before the Ontario Superior Court, "there is little efficiency to be gained by not deciding the case": *Fair Change v His Majesty the King in Right of Ontario*, 2024 ONSC 1895 at para 28.

(d) *Potential impact of the proceeding on the rights of others*

[75] A final consideration in assessing the third factor is whether the proceeding will have any impact on the rights of others who are directly affected. More particularly, whether "the failure of a diffuse challenge could prejudice subsequent challenges to the impugned rules by parties

with specific and factually established complaints": *Downtown Eastside* at para 51, citing *Danson v Ontario (Attorney General)*, [1990] 2 SCR 1086 at 1093.

[76] The Defendant argues that this is directly applicable here, as "[t]he Plaintiffs[']claims are extremely diffuse" and not succeeding may prejudice other claims: Defendant's MOFL at para 58. While there is a risk that the Plaintiffs' lack of success could impinge on the rights of directly affected individuals, the manner in which this claim was framed and the evidentiary record upon which it is based may not preclude an individual from bringing forward a *Charter* challenge based on a different evidentiary record. That said, this consideration is but one factor relevant to the Court's determination on public interest standing.

(4) Cumulative weighing

[77] Considering all the relevant factors, I exercise my discretion to grant public interest standing to the Plaintiffs, PCLS and PSAC. In my view, granting public interest standing in this case promotes access to justice and judicial economy.

C. *Admissibility of the Parties' Expert Evidence*

[78] While the parties have not challenged the admissibility of their respective expert reports, the Court must nonetheless play its gatekeeping role and ensure that the evidence meets the relevant legal test. I am satisfied that the parties' expert evidence is admissible.

[79] There is a two-step test for determining the admissibility of expert evidence. First, it must meet the following four threshold requirements: (i) relevance; (ii) necessity; (iii) the absence of an exclusionary rule; and (iv) a properly qualified expert: *White Burgess Langille Inman v Abbott and Haliburton Co*, 2015 SCC 23 at para 19 [*White Burgess*]; *R v Mohan*, [1994] 2 SCR 9 at 20 [*Mohan*].

[80] Second, if the evidence meets these threshold requirements, judges are to undertake "a cost-benefit analysis" to determine whether the probative value of the evidence outweighs any prejudicial effects: *White Burgess* at para 24; *Mohan* at 21.

(1) The expert reports are relevant and necessary

[81] Relevance refers to the "logical relevance" of the evidence: *White Burgess* at para 23. Necessity in assisting the trier of fact requires more than simply being "helpful". The evidence should provide information that is outside the experience or knowledge of the court, for example evidence of a technical nature: *Mohan* at 23–24.

[82] While the necessity criterion should not be judged by "too strict a standard", expert evidence cannot usurp the role of the trier of fact: *Mohan* at 24. This is not the case here. None of the experts opine on the ultimate question of law before the Court, namely the constitutionality of the *CHRA* caps.

[83] This Court has determined that expert witnesses may provide valuable insights into the political, historical, and social contexts concerning a matter at issue: *Fraser v Canada (Attorney*

General), 2017 FC 557 at paras 67–73 [*Fraser FC*]; *Association of chartered Certified accountants v The Canadian Institute of Chartered Accountants*, 2016 FC 1076 at paras 31–32; *Quebec (Attorney General) v Canada*, 2008 FC 713 at paras 161–163.

[84] In *Fraser FC*, the Court admitted the expert evidence of a professor as it provided relevant and necessary context in respect of the applicants' claim of adverse impact. Justice Kane found that the "statistics cited and the references to other published research on work, family and gender elevate Professor Higgins' opinion beyond the knowledge and experience of the Court": *Fraser FC* at para 72. This reasoning is equally applicable here.

[85] The Plaintiffs adduce Professor Koshan's evidence for two purposes: (i) to justify granting public interest standing; and (ii) to support their section 15 *Charter* claim. Professor Koshan's report addresses the procedural, logistical, and substantive barriers that prevent individuals from making complaints of discrimination under the *CHRA*. It integrates a fact-based review of the CHRC's and the CHRT's statistical data, of academic literature, and of Professor Koshan's own research.

[86] Both steps of the section 15 test require evidence. To prove disproportionate impact at the first step, plaintiffs may include evidence about the "full context of the claimant group's situation": *R v Sharma* 2022 SCC 39 at para 49 [*Sharma*]. At the second step, plaintiffs must establish that "the impugned law imposes burdens or denies benefits in a manner that has the effect of reinforcing, perpetuating, or exacerbating the group's disadvantage": *Sharma* at para 51.

[87] The Plaintiffs tender Professor Koshan's report in an effort to address both steps of the section 15 test. Through Professor Koshan's report, the Plaintiffs seek to provide "a full picture of Complainants' circumstances and [establish] Complainants' disadvantage and the impact of the [c]aps in perpetuating that disadvantage": Plaintiffs' MOFL at para 39. As discussed above, the report also supports the Plaintiffs' motion for public interest standing. I am satisfied that Professor Koshan's evidence is admissible as relevant and necessary in the circumstances of this case.

[88] Professor Curran conducted an empirical study of damages over a ten-year period. He compared awards under the impugned provisions of the *CHRA* with awards by other human rights tribunals, as well as in tort and wrongful dismissal actions. Professor Curran based his study on a social science methodology called "content analysis". In response, the Defendant filed an expert report and sur-reply report from Professor Haan critiquing the methodology used by Professor Curran.

[89] I am satisfied that the expert evidence of both Professors Curran and Haan meet the threshold requirements of relevance and necessity. In terms of relevance, the Plaintiffs tender the statistical evidence to argue that the *CHRA* caps cause a disproportionate impact under step one of the section 15 analysis, and deny complainants equal benefit of the law under step two. The Defendant's expert challenges the validity of Professor Curran's statistical claims. With respect to necessity, both experts provide information that is beyond the experience and knowledge of the Court.

(2) Absence of an exclusionary rule

[90] Expert evidence will be inadmissible if it "falls afoul of an exclusionary rule of evidence separate and apart from the opinion rule itself": *Mohan* at 25. In my view, there is no contravention of such a rule in this case.

[91] While the Plaintiffs invoke the rule in *Browne v Dunn*, 1893 CanLII 65 (FOREP) [*Browne v Dunn*], this is not an exclusionary rule. As held by the Ontario Court of Appeal, the rule is "one of fairness, thus not a fixed or invariable rule, much less a rule of admissibility": *R v Vassel*, 2018 ONCA 721 at para 120 [*Vassel*]. On this basis, I address the Plaintiffs' argument regarding *Browne v Dunn* separately.

(3) The experts are properly qualified

[92] The final threshold requirement concerns the expert's qualifications, independence, and impartiality: *White Burgess* at paras 52–53.

[93] Professor Koshan's areas of expertise include constitutional law, human rights, access to justice, and legal responses to gender-based violence: Affidavit of Professor Jennifer Koshan, affirmed July 12, 2023 at para 1. Professor Curran was tendered as an expert in the areas of statistics, empirical research methodology, human rights, contracts, employment law, and labour law: Affidavit of Professor Bruce Curran, affirmed July 17, 2023 at para 1. Professor Haan's expertise lies in the areas of statistics and research methods: Affidavit of Michael Haan, affirmed February 7, 2024 at para 17.

[94] There were no challenges to any of the experts on these grounds. Absent such a challenge, an "expert's attestation or testimony recognizing and accepting [their] duty will generally be sufficient to establish that this threshold is met": *White Burgess* at para 47. This is the case here as the experts agreed to be bound by the Federal Court's Code of Conduct for Expert Witnesses in accordance with Rule 52.2 of the *Rules*.

[95] I am satisfied that the experts have the requisite expertise, knowledge, and experience to speak to the matters raised in their reports, and that they are able and willing to carry out their duties to the Court as impartial and independent witnesses.

(4) Cost-benefit analysis

[96] After finding that expert evidence meets the threshold requirements of admissibility, the helpfulness of the evidence is to be weighed against the potential risks of its admittance: *White Burgess* at paras 16, 19, 24, 54; *Mohan* at 21.

[97] In *White Burgess*, the Supreme Court held that on a summary judgment motion, a judge "should generally not engage in the second step cost-benefit analysis": *White Burgess* at para 55. This principle was based on Nova Scotian jurisprudence that precluded weighing evidence, drawing reasonable inferences, or settling matters of credibility on summary judgment motions. This Court has imported these tenets into its own jurisprudence: *Rallysport Direct LLC v 2424508 Ontario Ltd*, 2020 FC 794 at para 20. On this basis, I have not engaged in a cost-benefit analysis.

D. *The rule in Browne v Dunn is not applicable*

[98] The *Browne v Dunn* rule is one of fairness — to the witness whose credibility is attacked, to the party whose witness is impeached, and to the Court: *R v Quansah* 2015 ONCA 237 at para 77 [*Quansah*]. Here, the Plaintiffs argue that the Defendant breached the rule in "failing to confront" Professor Curran with Professor Haan's critiques during cross-examination. On this basis, they argue that the Court "should disregard Prof. Haan's evidence in its entirety": Plaintiffs' Supplemental Memorandum of Fact and Law at paras 3, 12. For the reasons set out below, I decline to do so.

[99] In my view, the Plaintiffs' reliance on *Browne v Dunn* is misplaced. The rule provides witnesses an opportunity to explain themselves before the opposing party seeks to impeach their credibility: *R v Lyttle*, 2004 SCC 5 at para 64; *Green v Canada (Treasury Board)*, 2000 CanLII 15129 (FCA) at para 25; *Quansah* at para 81. The issue here is not credibility, but rather a difference of opinion between experts about methodology. This is common in litigation. There is a salient difference between seeking to impugn an expert witness' character, reputation, or integrity, and simply seeking to undermine the validity of their methodology.

[100] The Plaintiffs' proposition would have serious consequences for the conduct of litigation involving expert witnesses. Litigants would be required to put all of their own expert's criticisms to an adversary's expert in cross-examination. This would be highly inefficient.

[101] Consequently, the rule only requires that witnesses, including experts, have an opportunity to respond to matters impugning their credibility. This interpretation is consistent with the Court's jurisprudence: *Leo Pharma Inc v Teva Canada Limited*, 2015 FC 1237 at paras 70–75 [*Leo Pharma*]; *Teva Canada Innovation v Apotex Inc*, 2014 FC 1070 at paras 72, 77, 105 [*Teva*]; *Canada Post Corporation v Canadian Union of Postal Workers*, 2012 FC 419 at paras 22–33; *South Yukon Forest Corporation v Canada*, 2010 FC 495 at paras 1202–1207 [*South Yukon*].

[102] I do not agree with the Plaintiffs that *Teva* stands for the broad proposition that "a party must squarely put criticisms of an expert to them on cross-examination in order to rely on those criticisms in argument": Plaintiffs' Supplemental Memorandum of Fact and Law at para 3. In that case, the applicants sought to impugn the independence of Apotex's two expert witnesses, arguing that their opinions were "so erroneous that [the Court] ought to conclude both were functioning as advocates for Apotex' [*sic*] position rather than as independent experts": *Teva* at para 72.

[103] Apotex argued that their experts' alleged lack of independence was not put to them on cross-examination and thus could not be asserted by the applicants: *Teva* at para 77. With respect to one of the experts, the Court determined that the failure of the applicants to cross-examine him on "the alleged weakness in his interpretation and the suggestion that he was acting as an advocate for Apotex as opposed to fulfilling the role of an independent expert" undercut the applicant's argument regarding a lack of independence: *Teva* at para 105. Significantly, Justice Gleason (then of this Court) concluded that "strictly speaking" this was not a violation of the

Browne v Dunn rule: *Teva* at para 105. In this case, there was no such attack on Professor Curran's independence.

[104] The Court's application of the rule in *South Yukon* does not assist the Plaintiffs either. In that case, the defendant challenged aspects of the plaintiff's expert evidence in closing argument, upon which the plaintiff's expert had not been cross-examined: *South Yukon* at para 1202. Justice Heneghan concluded that while the rule in *Browne v Dunn* is "not absolute", it was applicable in that case because the plaintiff expert's "qualifications and capabilities were challenged" and "[h]is reputation, if not his credibility, was put in question": *South Yukon* at para 1205. There was no such challenge to Professor Curran's qualifications, capabilities, reputation, or credibility in this case.

[105] The Court's decision in *Leo Pharma* also exemplifies the proper application of the rule. In that case, the applicant argued that the Court should give less weight to the respondent's experts because some of their evidence was inconsistent with opinions they had expressed in earlier publications. Justice Locke (then of this Court) upheld the respondent's *Browne v Dunn* objection with respect to one of the experts, finding that the applicant had failed to put the alleged inconsistency to them during cross-examination: *Leo Pharma* at para 73. In his view, the passages in question were clearly relied upon to challenge the expert's credibility and the witness was thus "entitled to have those passages (or at least their subject) brought to his attention during cross-examination so that he would have an opportunity to explain the omission": *Leo Pharma* at para 75.

[106] Furthermore, I am not persuaded that there is an issue of fairness here. Professor Haan's expert reports served as "notice" to the Plaintiffs about any challenges to Professor Curran's methodology. Indeed, the Plaintiffs filed a comprehensive reply report from Professor Curran addressing the concerns raised by Professor Haan. In filing that reply report, Professor Curran had the opportunity to respond to Professor Haan's critiques of the methodology used. If the Plaintiffs were concerned about the further critiques raised in Professor Haan's sur-reply report, they could have sought leave of the Case Management Judge to file a further sur-reply in response.

[107] Based on the foregoing, I do not accept that the Defendant was obligated to put Professor Haan's critiques of Professor Curran's methodology to him on cross-examination in order to rely on those critiques at the hearing. Such an interpretation of the rule in *Browne v Dunn* is overly broad. There is thus no basis for excluding Professor Haan's evidence as asserted by the Plaintiffs.

E. *The Plaintiffs have failed to establish a breach of section 15*

(1) Section 15 framework

[108] Subsection 15(1) of the *Charter* provides as follows:

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	**15 (1)** La loi ne fait acception de personne et s'applique également à tous, et tous ont droit à la même protection et au même bénéfice de la loi, indépendamment de toute discrimination, notamment des discriminations fondées sur la race, l'origine nationale ou

mental or physical disability.	ethnique, la couleur, la religion, le sexe, l'âge ou les déficiences mentales ou physiques.

[109] A two-step test must be satisfied to establish a *prima facie* violation of section 15. A claimant must prove that the impugned law or state action: (i) on its face or in its impact creates a distinction based on an enumerated or analogous ground; and (ii) imposes burdens or denies benefits in a manner that has the effect of reinforcing, perpetuating, or exacerbating disadvantage: *Sharma* at para 28; *Fraser* at para 27; *Quebec (Attorney General) v Alliance du personnel professionnel et technique de la santé et des services sociaux*, 2018 SCC 17 at para 25 [*Alliance*].

[110] While a mirror comparator group is no longer required, comparison remains relevant at both steps of the section 15 test: *Sharma* at para 41; *Fraser* at para 94; *Withler v Canada (Attorney General)*, 2011 SCC 12 at paras 55–64 [*Withler*]. At the first step, "the word 'distinction' itself implies that the claimant is treated differently than others, whether directly or indirectly": *Sharma* at para 41. Furthermore, this distinction must be proven relative to "the condition of others in the social and political setting in which the question arises": *Sharma* at para 41, citing *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143 at 164 [*Andrews*].

[111] At the second step, comparison is useful in providing a contextual understanding of a claimant group's situation, as well as the disadvantage or stereotype to which they are allegedly subjected: *Withler* at para 65; *Begum v Canada (Citizenship and Immigration)*, 2018 FCA 181 at para 54 [*Begum*].

[112] Direct discrimination is established where a law, on its face, draws a distinction based on an enumerated or analogous ground: *Withler* at para 64. Where the impugned law is neutral on its face, a claimant must prove that the law disproportionately impacts a protected group, as compared to non-group members: *Sharma* at paras 40, 45. However, "leaving a gap between a protected group and non-group members *unaffected* does not infringe s. 15(1)" [emphasis in original]: Sharma at para 40.

[113] Two types of evidence are useful in proving that a law or state conduct has a disproportionate impact on a protected group: (i) evidence about the full context of a claimant group's situation; and (ii) evidence about the outcomes that the impugned law or action has produced in practice: *Sharma* at para 49; *Fraser* at paras 57–58.

[114] A claimant's evidentiary burden at step one is not onerous, but it must be fulfilled: *Sharma* at paras 49–50. In determining whether a claimant has met their onus, the following considerations are relevant: (i) no specific form of evidence is required; (ii) a claimant need only establish that the impugned law was a cause, not the only or dominant cause of the disproportionate impact; (iii) causation may be obvious such that no evidence is required; (iv) scientific evidence should be carefully assessed; and (v) novel scientific evidence should only be admitted if it has a reliable foundation: *Sharma* at para 49.

[115] Not every distinction is discriminatory: *Sharma* at para 51. At the second step of the test, a claimant must prove that the impugned law imposes burdens or denies benefits in a manner that reinforces, perpetuates, or exacerbates the claimant group's historic or systemic disadvantage:

Sharma at paras 51, 54; *Fraser* at para 76. Courts must assess whether the law has had a negative impact on, or worsened the situation of, group members: *Sharma* at para 52; *Withler* at para 37. Evidence about prejudice, stereotyping, and arbitrariness can satisfy a claimant's burden at the second step: *Sharma* at para 53; *Fraser* at para 78.

[116] Further, the broader legislative context should be considered in determining whether a distinction is discriminatory: *Sharma* at para 56.

(2) The Plaintiffs' claims fail at step one

(a) *No direct discrimination*

[117] I do not agree with the Plaintiffs that this is "the type of straightforward, direct discrimination the Supreme Court referenced in *Withler*": Plaintiffs' MOFL at para 48. In cases of direct discrimination, step one can be satisfied by simply reading the text of the legislation: *Sharma* at para 189. Here, the provisions at issue — the damages caps — are facially neutral in that they apply equally to all successful complainants. This distinguishes the matter from the government benefits cases referred to in *Withler*, where the law, on its face, drew formal distinctions in its treatment of contributors.

[118] The Plaintiffs argue that the caps, on their face, distinguish the claimant group (those with successful *CHRA* complaints) from individuals outside the legislative scheme who are not subject to the *CHRA*. Given the universal application of the *CHRA*, this alleged distinction is not self-evident on the face of the legislation. The prohibited grounds of discrimination set out in

section 3 are broad and general, covering all enumerated and analogous grounds under the *Charter*. Indeed, apart from the grounds of disability, and conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered, the prohibited grounds are characteristics held by all individuals: race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, gender identity, and family status.

[119] The Plaintiffs dispute that the provisions are neutral on their face because one must prove discrimination to obtain *CHRA* damages. As such, they do not apply to all individuals equally. The Plaintiffs conclude that "[i]f the *CHRA* were neutral on its face it would apply to all experiences of harm in employment, housing, goods and services, etc.": Plaintiffs' Supplemental Submissions at para 6. This, however, does not address whether the impugned provisions are themselves facially neutral. The focus must be on the text of the legislative provisions in question.

[120] This case is also fundamentally different from the Supreme Court's decision in *Alliance*. In that case, the Court determined that the impugned provisions of Quebec's pay equity legislation drew distinctions on the basis of sex, both on their face and in their impact. This finding was based on the legislation's express purpose to remedy wage discrimination suffered by women. The Court emphasized that the impugned provisions "set out how deficiencies in *women's* pay, in comparison to men, will be identified" [emphasis in original]: *Alliance* at para 29. On that basis, the distinction was clear on the face of the legislation. This is not the case here.

[121] In my view, this case is more appropriately viewed through the lens of adverse impact discrimination. Regardless of which lens is used, however, the determinative issue is that the comparator groups advanced by the Plaintiffs are fundamentally flawed.

(b) *Comparator groups are flawed*

[122] The Plaintiffs recognize that "the s. 15(1) analysis necessarily requires comparison": Plaintiffs' MOFL at para 47. Indeed, the Supreme Court has said "equality is an inherently comparative concept": *R v Kapp*, 2008 SCC 41 at para 15; and "comparison is at the heart of a s. 15(1) equality analysis": *Withler* at para 47.

[123] The Plaintiffs advance two comparator groups for the purposes of step one. The first group is comprised of individuals without protected characteristics who do not experience discrimination and thus do not require *CHRA* remedies. The second is made up of individuals who receive similar, though uncapped, damages under the common law.

[124] As further explained below, I find that each of these comparator groups are flawed for different reasons. As such, they do not "legitimately invite comparison": *Hodge v Canada (Minister of Human Resources Development)*, 2004 SCC 65 at para 1.

(i) Comparisons must be made within the social and political setting in which the question arises

[125] The role of comparison at the first step is to establish a "distinction": *Withler* at para 62. Implicit in the word "distinction" is that "the claimant is treated differently than others, whether

directly or indirectly": *Sharma* at para 41. As mentioned above, this distinction must be proven compared to "others in the social and political setting in which the question arises" [emphasis added]: Sharma at para 41, citing Andrews at 164.

[126] Thus, while a claimant need not identify a mirror comparator group, there are nevertheless boundaries in the identification process. A proper comparator group must be found within the same "social and political setting in which the question arises". After the hearing, I requested that the parties file written submissions addressing the application of this principle. I do not agree with the Plaintiffs that it only applies in cases of indirect discrimination. The same approach to comparison applies whether the discrimination alleged is direct or indirect: *Fraser* at para 48.

[127] Notably, the Plaintiffs have posited different social and political settings for each of their proposed comparator groups. However, "the social and political setting in which the question arises" does not change depending on the proposed comparator group. Rather, the relevant setting depends on the question at issue. While there may be different comparisons that can be made, the setting from which the question arises remains constant. First, the social and political setting must be determined based on the question at issue, and then the comparisons must be situated therein. Here, the Plaintiffs have reverse-engineered the exercise; they identify groups against which they seek to compare the claimant group, and then articulate different social and political settings within which each of those groups could be rooted.

[128] A recent class action in the Ontario Superior Court is a good illustration of how this analysis should operate in practice. In *Metro Taxi Ltd et al v City of Ottawa*, 2024 ONSC 2725 [*Metro Taxi Ltd*], the question at issue was whether the City of Ottawa's Taxi By-Law infringed the rights of taxi plate holders under section 15 of the *Charter*. The parties each proposed a different social and political setting in which the question arose. Justice Smith determined that the relevant setting was "the taxi industry in the City of Ottawa, and not the general population, as submitted by the Plaintiffs": *Metro Taxi Ltd* at para 285. Within the setting of the Ottawa taxi industry, the Court determined that the claimant group (racialized plate holders) could appropriately be compared with non-racialized plate holders, other taxi drivers, and private transportation company drivers: *Metro Taxi Ltd* at paras 309–310, 319.

(ii) Comparison with individuals without protected characteristics who do not experience discrimination

[129] Step one requires "a carefully defined comparator group": *Ontario Health Coalition and Advocacy Centre for the Elderly v His Majesty the King in Right of Ontario*, 2025 ONSC 415 at para 312 [*Ontario Health Coalition*]. The Plaintiffs' first proposed comparator group, however, is overly broad such that it does not allow for meaningful comparison.

[130] The Plaintiffs argue that this comparison's breadth does not make it inappropriate because the *CHRA* applies to "many settings and grounds of discrimination": Plaintiffs' Supplemental Submissions at para 16. They further assert that "the comparisons under the *CHRA* can be understood with reference to each enumerated or analogous ground". As an example, they cite disabled complainants "compared to non-disabled employees who do not require

accommodation and are already whole": Plaintiffs' Supplemental Submissions at para 16. However, the Plaintiffs did not frame their case in this manner.

[131] Relying on the Supreme Court's decision in *Alliance* and the companion case of *Centrale des syndicats du Québec v Quebec (Attorney General)*, 2018 SCC 18 [*Centrale*], the Plaintiffs argue that the most relevant comparator group is "individuals who are already whole because they did not experience discrimination based on the Complainant's protected characteristic" [emphasis added]: Plaintiffs' Supplemental Submissions at para 17. I do not agree that these cases support this comparison.

[132] In *Alliance* and *Centrale*, the comparator group was based on the express purpose of the pay equity legislation to remedy the wage gap between men and women. The Supreme Court found that the impugned provisions impeded the legislative goal of eliminating the wage gap. The comparison was between those who received inadequate remedies for wage discrimination (women) and those who did not experience wage discrimination and thus had no need for a remedy (men). This was specifically borne out by the legislative purpose at hand: redressing the gap in wages between the two groups. The same cannot be said here.

[133] The purpose of the *CHRA* is not to remedy discrimination between groups of individuals. Rather, it is to guarantee equal opportunity for all individuals: *CHRA*, s 2. The *CHRA* prohibits discriminatory practices based on protected grounds in the provision of goods, services, facilities, or accommodations. If a complaint is substantiated, the CHRT may make an order under section 53 of the *CHRA* against the person who engaged in the discriminatory practice. In

this context, the remedies do not close a gap, as with pay equity, but rather compensate complainants for the discrimination they suffered.

[134] While the *CHRA*'s remedies are designed to make a claimant "whole", this does not mean whole in comparison with another specified group of individuals, as in the context of the pay equity legislation in *Alliance* and *Centrale*. Rather, made whole in this context is in reference to the position the claimant would have been in but for the discriminatory practice.

[135] I am also not persuaded that the Supreme Court's decision in *Vriend v Alberta*, [1998] 1 SCR 493 [*Vriend*], supports this comparator group. That case was about exclusion from a human rights regime, namely the omission of sexual orientation as a protected ground in Alberta's *Individual's Rights Protection Act*, RSA 1980, c I-2. This case, however, is not about exclusion from protection and the absence of remedies, but rather the adequacy of the remedies available.

[136] In addition, the Plaintiffs' articulation of the "social and political setting in which the question arises" is similarly overly broad. They assert that this first comparison is situated in the "precise social and political setting of the legislation", namely "the social areas to which the *CHRA* applies […] including employment, housing, and goods and services": Plaintiffs' Supplemental Submissions at para 15. The comparisons are to be made, however, with reference to the question at issue, not the legislation writ large. Here, it is the constitutionality of the damages caps that are in question. The social and political setting must, therefore, be articulated within that context. The Plaintiffs have failed to do so.

[137] For these reasons, the proposed comparator group of those individuals without protected characteristics, who do not experience discrimination and thus do not require *CHRA* damages, does not stand up.

(iii) Comparison with the common law

[138] The second comparison made by the Plaintiffs is to individuals with non-discrimination claims under the common law, specifically in tort and wrongful dismissal. The Plaintiffs assert that certain types of common law damages correlate to the damages under paragraph 53(2)(e) and subsection 53(3) of the *CHRA* and thus "should, in theory, be awarded equally in all circumstances": Plaintiffs' MOFL at para 63.

[139] This proposed comparator group squarely raises the issue of whether differential treatment can be found in reference to a distinct and separate regime. In that regard, the Plaintiffs allege that "Canadian law" has two tiers of damages — one for individuals with founded discrimination claims under the *CHRA*, and another for individuals who succeed in common law claims: Plaintiffs' MOFL at para 70. In their post-hearing submissions, they define the "social and political setting in which the question arises" in this context as "legal remedies for civil wrongs": Plaintiffs' Supplemental Submissions at para 18.

[140] Significantly, the Supreme Court has not specifically addressed what "the social and political setting in which the question arises" means in principle. A review of recent section 15 Supreme Court decisions shows that, generally, the "social and political setting" has been the legislative regime at issue, with both comparator groups subject to the same, or related,

legislation. For example, in *Sharma*, the distinction drawn was between Indigenous offenders (the claimant group) and non-Indigenous offenders (the comparator group) subject to the sentencing regime in the *Criminal Code*, RSC 1985, c C-46. *Fraser* concerned distinctions drawn by the RCMP pension regime between women (the claimant group) and men (the comparator group).

[141] In *R v CP*, 2021 SCC 19 [*CP*], there were two different but related federal statutes at play — the *Youth Criminal Justice Act*, SC 2002, c 1, and the *Criminal Code*. The section 15 *Charter* issue was whether a provision of the former statute drew a distinction based on age as compared to a provision of the latter statute. Under the *Youth Criminal Justice Act*, a young person had no automatic right of appeal to the Supreme Court. The *Criminal Code*, however, provided such a right for adults.

[142] This is not to say that a section 15 claim can never succeed based on comparisons between different regimes. In my view, *Ontario (Attorney General) v G*, 2020 SCC 38 [*G*] provides helpful insight into the boundaries of such comparisons. In that case, the Ontario Attorney General argued that the denial of the benefit at issue resulted from distinctions drawn by federal legislation that were outside the Ontario legislature's control. The Court disagreed:

> [51] These distinctions flow from the manner in which *Christopher's Law* interacts with federal legislation, including the *Criminal Code* and *Criminal Records Act*. However, legislation does not exist in a vacuum — *Christopher's Law* imposes a scheme of obligations on persons convicted of or found NCRMD in respect of sexual offences. It is layered on top of the consequences of findings made under the *Criminal Code* by design. Even if the legislature made these distinctions inadvertently, a substantive equality analysis considers distinctions that are unintentional or result from the law's interaction with other

> statutes or circumstances. These are core lessons of this Court's jurisprudence (*Fraser*, at paras. 31-34, 41-47 and 69; *Andrews*, at p. 173; *Eldridge*, at paras. 62 and 77-78). The combined effect of multiple statutes is particularly important for those with mental illnesses, as their lives are often regulated by what the intervener, the Canadian Mental Health Association, Ontario, calls a "complex web of statutes and regulations" (I.F., at para. 7).
>
> [Emphasis added]

[143] Drawing on this reasoning, "the social and political setting in which the question arises" may extend beyond the legislative regime in question where there is an overlap or interaction between regimes and/or jurisdictions. The *CHRA*, however, is a distinct and separate human rights regime under federal jurisdiction. There is no overlap nor interaction between the *CHRA* regime and the common law, as was the case with the federal and provincial statutes at issue in *G*. Absent such a link between regimes or jurisdictions, comparisons across distinct statutes cannot properly ground a section 15 claim.

[144] This approach is consistent with the Supreme Court's decision in *Martin*. In that case, the Court rejected a comparison between individuals subject to the provincial Workers' Compensation scheme and those subject to the common law. The Court found the proposed comparison was not appropriate given the different burdens to which individuals are held under the statute and at common law:

> [72] In addition, the appellants argue that another relevant comparator group is the group of persons suffering from chronic pain who are not subject to the Act and can obtain damages for their condition through the application of normal tort principles. I do not believe that this comparison is appropriate. What distinguishes this group from the appellants is not mental or physical disability — both suffer from chronic pain. Rather, the only difference between them is that persons in the comparator group are not subject to the Act and thus have access to the tort

> system, while the appellants have to rely on the workers' compensation system. In my view, the Court of Appeal correctly held that a s. 15(1) analysis based on this distinction would amount to a challenge to the entire workers' compensation system, a challenge which this Court unanimously rejected in *Reference re Workers' Compensation Act, 1983 (Nfld.)*, [1989] 1 S.C.R. 922. Moreover, such a comparison would also be inappropriate since compensation under the tort system normally requires the injured party to establish that his or her injury was caused by the negligence of another. Thus, even if the workers' compensation system did not exist, not all injured workers with chronic pain would have access to tort damages. Ms. Laseur and Mr. Martin, for instance, do not allege that anyone's negligence caused their injuries.
>
> [Emphasis added]

[145] This reasoning is equally applicable here. This Court has determined that tort law damages principles do not apply to damages for pain and suffering that may be awarded under paragraph 53(2)(e) of the *CHRA*: *Canada (Attorney General) v First Nations Child and Family Caring Society of Canada*, 2021 FC 969 at para 188 [*FNCFCSC*]. This is because the harms are measured in different ways, in that "[t]he *CHRA* is not designed to address different levels of damages or engage in processes to assess fault-based personal harm": *FNCFCSC* at para 189.

[146] In addition, as the Supreme Court pointed out in the above-cited passage in *Martin*, allowing a section 15 claim based on a distinction between remedies available under a statute, as compared to remedies at common law, would amount to a wholesale challenge of the entire statute in question.

[147] Of further relevance to this discussion is that there is no tort of discrimination. The *CHRA* was Parliament's response to the absence of remedies at common law for discriminatory

conduct. The remedies available under the *CHRA* are matters of policy within Parliament's authority.

[148] I also note that in their post-hearing submissions, the Plaintiffs assert that pain and suffering and punitive damages awards made by the Federal Public Sector Labour Relations and Employment Board [FPSLREB] under the *CHRA* can be appropriately compared with FPSLREB awards in termination grievances unrelated to discrimination. In that regard, they advance another comparator group and relevant social and political setting: "the grievors in both types of cases […] work for the federal government and seek the same types of damages from the FPSLREB for the employer's wrongful acts": Plaintiffs' Supplemental Submissions at para 21. In support, the Plaintiffs refer to two termination cases rendered by the FPSLREB where there was no allegation of discrimination on a prohibited ground. They then speculate — "one can easily envision a case remarkably like *Lyons*, in which a racialized correctional officer was terminated based on a false suspicion rooted in racist stereotypes" [emphasis in original]: Plaintiffs' Supplemental Submissions at para 21. This, however, is the first time a comparison between FPSLREB awards has been raised. While FPSLREB awards under the *CHRA* are included in Professor Curran's study, there are no FPSLREB awards in termination cases unrelated to discrimination included.

[149] In my view, using the common law as a comparator group in the circumstances of this case extends well beyond the jurisprudence. These are two distinct regimes — statutory law and common law — that apply to different contexts. There is no support for reaching from one into the other to find a comparator group.

(c) *Any distinction not based on enumerated or analogous grounds*

[150] The Plaintiffs argue that the *CHRA* caps draw distinctions on all enumerated and analogous grounds, as compared to these two comparator groups, because individuals in the claimant group have proven discrimination based on one or more protected grounds under the *CHRA*. What they need to establish, however, is that the distinction they advance between the claimant group and the comparator groups is based on enumerated or analogous grounds.

[151] The claimant group as a collective is made up of individuals with protected characteristics. This said, the comparator groups also include individuals with the same protected characteristics. The *CHRA* is legislation of universal application. As previously mentioned, the prohibited grounds of discrimination set out in section 3 are broad and general, covering all enumerated and analogous grounds under the *Charter*.

[152] The real distinction between the complainant group and the comparator groups is that those in the complainant group made out a discrimination claim under the *CHRA* and are thus entitled to compensation under that scheme. This is not an enumerated or analogous ground. Viewed in this light, any distinction at issue here is based on the relief to which the complainant group is entitled under the statutory regime having successfully proven discrimination under the *CHRA*.

(d) *Conclusion on step one*

[153] For these reasons, I find that there is no legal basis for the Plaintiffs' section 15 claim as framed. The Plaintiffs' motion for summary judgment is dismissed. Having established that there is no genuine issue for trial, the Defendant's motion for summary judgment is granted. I therefore dismiss the Plaintiffs' actions in their entirety.

(3) The Plaintiffs' claims lack a proper evidentiary foundation

[154] If I am wrong in my foregoing analysis, I have also considered whether the Plaintiffs' evidence is sufficient to establish disproportionate impact at step one, as well as discrimination at step two of the section 15 test. While these two steps ask fundamentally different questions, there may be overlap in the evidence: *Sharma* at para 30. Here, the Plaintiffs rely on the same evidence at both steps — the affidavits of Mr. No, Ms. Lamba, and Professor Koshan, as well as the empirical study undertaken by Professor Curran.

[155] The fundamental overarching flaw in the Plaintiffs' claims is that they rest on general evidence about the impacts on the claimant group as a collectivity. However, the Plaintiffs acknowledge that this collectivity is not a protected group, nor are they seeking to have it recognized as such. Their claims therefore require evidence demonstrating that the caps have an adverse effect on each protected group within the collectivity. It is insufficient to simply assert that the caps have the same disproportionate impact and that they operate in the same discriminatory manner for all successful *CHRA* complainants regardless of enumerated and analogous grounds.

[156] Indeed, the Plaintiff's evidentiary approach flattens the experiences of discrimination. Identity is contextual and requires engaging not simply with "a catalogue of personal characteristics" but rather with the experience of individuals with those characteristics: The Honourable Justice Richard Wagner, "How Do Judges Think About Identity? The Impact of 35 Years of *Charter* Adjudication" (2017) 49:1 *Ottawa L Rev* 43 at 48, 49. However, by presenting their case as a collectivity, the Plaintiffs have de-contextualized the section 15 analysis. They fail to present any evidence about the lived experience of individuals within the protected groups. Instead, the Plaintiffs ask the Court to rely on a "web of instinct" by asserting that the caps function adversely in the same way and to the same degree for all successful *CHRA* complainants regardless of their protected group: *Kahkewistahaw First Nation v Taypotat*, 2015 SCC 30 at para 34; *Begum* at para 80.

[157] On a motion for summary judgment, parties are to put their best foot forward and courts are "entitled to assume that the record contains all the evidence the parties would present at trial": *Toronto-Dominion Bank v Hylton*, 2012 ONCA 614 at para 5. The Plaintiffs assert that their claims are "well-suited to the summary judgment procedure, which this Court has used in cases involving the adjudication of *Charter* rights and claims" [footnote omitted]: Plaintiffs' MOFL at para 22. In oral submissions, they further argued that the Court has all the necessary facts it requires to fairly decide this case.

[158] As the Federal Court of Appeal concluded, "[t]here is no genuine issue for trial if there is no legal basis for the claim based on the law or evidence brought forward or if the judge has the evidence necessary to adjudicate the dispute": *Witchekan Lake First Nation* at para 65. This is

the case here. The Plaintiffs have failed to prove their case based on the legal and evidentiary requirements of section 15.

(a) *No evidence of disproportionate impact*

[159] While the Plaintiffs assert that their case is one of direct discrimination, in my view, it is more appropriately considered as a claim of indirect discrimination. In *Sharma*, the Supreme Court emphasized that claimants must establish not simply that the law impacts the protected group to which they belong, but that the impact is disproportionate:

> [40] 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).
>
> [Emphasis in original]

[160] To establish that the impugned law creates or contributes to a disproportionate impact, evidence about the circumstances of the claimant group, as well as about the effects of the law, may be adduced: *Sharma* at para 49; *Fraser* at para 60. While the evidentiary burden is not unduly onerous at this stage, it must nonetheless be satisfied: *Sharma* at para 50.

[161] Notably, the Plaintiffs did not adduce any first-hand evidence of successful *CHRA* complainants explaining how the impugned provisions impacted them. While directly affected individuals may not have wanted to bring a *Charter* challenge in their own names, they could have provided affidavit evidence about their own experiences: *Downtown Eastside* at para 71.

Instead, the Plaintiffs tendered affidavits from Mr. No and Ms. Lamba attesting to what claimants have shared with them. This constitutes "unattributed hearsay evidence of [their] unnamed clients": *Ontario Health Coalition* at para 110. Further, the Plaintiffs did not address how this evidence meets the criteria of necessity and reliability. I therefore give little weight to those portions where the affiants simply recount what their clients have expressed to them.

[162] In any event, this evidence is limited and general. Mr. No states that "[e]ven if [claimants] do elect to advance a human rights complaint with PCLS' support, they feel undercompensated for the harm they have experienced, compounding the emotional and financial harm they experienced in the initial human rights violation": No Affidavit at para 31(b). Ms. Lamba's affidavit is equally broad: "I can recall many occasions when members would express frustration to me about the limits on damages under the *CHRA*. They felt that these limits were unfair and did not adequately compensate them for their experiences": Lamba Affidavit at para 33.

[163] Professor Koshan's expert report addresses the procedural barriers faced by *CHRA* claimants in pursuing discrimination claims at the CHRC and the CHRT. In terms of the caps themselves, Professor Koshan simply states that the *CHRA* limit on pain and suffering damages "has also been noted as a barrier to human rights justice, as it fails to provide many claimants with due compensation and thus serves as a disincentive to making a complaint": Koshan Report at para 35.

[164] This type of generalized evidence falls short of satisfying the Plaintiffs' burden of demonstrating that the *CHRA* caps have a disproportionate impact: *Weatherley v Canada (Attorney General)*, 2021 FCA 158 at para 46; *Begum* at para 80. Asserting that complainants feel frustrated and undercompensated because of the caps does not alone demonstrate disproportionate impact. One might surmise that litigants in tort and wrongful dismissal cases feel the same way. However, the Plaintiffs provide no evidence in this regard and thus provide no baseline against which to show that this experience is distinct — let alone disproportionate — to *CHRA* complainants.

[165] Furthermore, the Plaintiffs argue that the *CHRA* jurisprudence itself demonstrates the plain and obvious disproportionate impact of the caps, wherein the CHRT finds that the caps reduce the compensation the tribunal may award. However, this simply shows that the caps limit damages awarded under the *CHRA*, not that they cause a disproportionate impact.

[166] This is the totality of the evidence adduced to establish disproportionate impact as compared to the first comparator group of individuals without protected characteristics who do not experience discrimination. This highlights the difficulty of invoking this particular comparison. There are no metrics available at this level of abstraction to concretely establish disproportionate impact.

[167] With respect to the Plaintiffs' second comparator group, Professor Curran's expert evidence examines the disparities between *CHRA* damages awards and analogous common law damages. While Professor Curran's study also compares the differences between *CHRA* awards

for pain and suffering under paragraph 53(2)(e), and analogous awards under Ontario and British Columbia's human rights legislation, the Plaintiffs do not rely on these statistics as proof of a distinction under step one. This is with good reason, as the jurisdiction under which a claim arises is not an enumerated or analogous ground: *Haig v Canada; Haig v Canada (Chief Electoral Officer)*, [1993] 2 SCR 995 at 1046–1047; *R v S (S)*, [1990] 2 SCR 254 at 289; *Droit de la famille — 139*, 2013 QCCA 15 at paras 59–63. Rather, the Plaintiffs rely on the differences between these awards to support their claims at step two.

(b) *Concerns with the Plaintiffs' expert statistical evidence*

[168] While statistical evidence is not required, it may be relevant at both steps of the section 15 analysis. At step one, statistics may assist in establishing clear disparities in how a law affects the claimant group as compared to the comparator group: *Fraser* at paras 62–63; *Sharma* at para 49. At step two, such evidence may help demonstrate that the impugned law reinforces, perpetuates, or exacerbates disadvantage.

[169] The Supreme Court has, however, cautioned that "[e]vidence of statistical disparity, on its own, may have significant shortcomings that leave open the possibility of unreliable results": *Fraser* at para 60. Courts must therefore critically examine the evidence to ensure it is "reliable and significant": *Fraser* at para 66. As Justice Abella explained, "[t]he weight given to statistics will depend on, among other things, their quality and methodology": *Fraser* at para 59.

[170] In this case, the Plaintiffs rely heavily on their statistical expert evidence to support their claim that the *CHRA* damages caps are discriminatory. Given the issues I have already identified

with the generalized nature of their other evidence, and considering the Supreme Court's caution about relying on statistical evidence alone, the Plaintiffs' expert evidence must be carefully examined. Based on the totality of the evidentiary concerns discussed below, in my view, the Plaintiffs' expert evidence cannot ground their section 15 claim.

(i) The data is not disaggregated

[171] Professor Curran's report does not disaggregate his data by protected groups. As such, his report fails to illustrate the differences between *CHRA* awards and the damages awards in other cases by enumerated and analogous grounds.

[172] The Plaintiffs assert that the *CHRA* caps operate in the same manner for each protected group. However, they have not established that this assumption, in fact, holds true. This has consequences at both step one and two because there is a lack of evidence showing disproportionate impact and discrimination for each of the protected groups within the collectivity. The Plaintiffs cannot rest on mere assertions that the impacts are the same for each protected group. It may be that damages awards are higher for certain groups, reflecting a greater severity of discriminatory acts. There may also be few — or no — cases for certain protected groups. Combining all cases together, as the Plaintiffs do here, elides these possibilities and weakens a fulsome section 15 analysis.

[173] Moreover, not all prohibited grounds under the *CHRA* constitute an enumerated or analogous ground under section 15 of the *Charter*. The following *CHRA*-prohibited grounds mirror the section 15 enumerated grounds: race, national or ethnic origin, colour, religion, age,

sex, and disability. Further, the analogous grounds of sexual orientation, marital status, and gender identity have been recognized by courts: *Hansman v Neufeld*, 2023 SCC 14 at paras 84–88; *Nova Scotia (Attorney General) v Walsh*, 2002 SCC 83; *Vriend*; *Centre for Gender Advocacy c Attorney General of Quebec*, 2021 QCCS 191. The remaining prohibited grounds (family status, genetic characteristics, and conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered) have not been recognized as analogous grounds under section 15.

[174] Professor Curran's CHRT data set includes all these cases without distinction. While he lists each case used in his study, he does not explicitly delineate how many cases, representing what quanta of damages awards, were included involving grounds that have yet to be recognized under section 15 of the *Charter*. The Court does not know what effect this may or may not have had on the conclusions drawn.

(ii) Methodological concerns

[175] Based on certain methodological concerns raised by the Defendant, I have further reservations about Professor Curran's study. As explained below, these concerns reveal cracks in the foundation of his study and call into question whether it can ground the Plaintiffs' claims. This is another area where the Plaintiffs' evidence exhibits weakness.

[176] Professor Curran's study considered two broad questions: (i) "do the *CHRA* caps have a limiting impact on the amount of damages awarded under the *CHRA*, relative to the analogous damages awarded in other contexts"; and (ii) "if so, what is the magnitude of this impact":

Curran Report at 16. To answer these questions, Professor Curran assessed and compared damages awards using a social science methodology called "content analysis". He defines this method as "[a]n approach to the analysis of documents and texts (including legal decisions) that seeks to quantify content in terms of predetermined categories and in a systematic and replicable manner": Curran Report at 1.

[177] Two coders generated quantitative data from legal decisions in the different jurisdictions: Curran Report at 20. The data were then presented in three ways: (i) histograms; (ii) a comparison of means test; and (iii) a regression analysis: Curran Report at 33–55 After performing these tests, Professor Curran opined that "the *CHRA* caps serve to limit the awards, when compared to the damages in other forums, both for 'average' cases and 'extreme' cases": Curran Report at 59.

[178] The Defendant argues that Professor Curran's report is methodologically flawed and should not be accepted. Their expert, Professor Haan, identified numerous concerns in his initial report. While Professor Curran's reply report satisfied some of Professor Haan's concerns, the latter's opinion was that there were "still enough existing unresolved issues" that "severely affect the accuracy and validity of [Professor Curran's] results": Haan Sur-Reply Report at paras 45, 46. In my view, two of these concerns in particular call into question the foundation of Professor Curran's study.

[179] First, in terms of sample selection, Professor Haan questions why Ontario and British Columbia human rights cases were chosen as comparators: Haan Reply Report at paras 21, 26. In

his report, Professor Curran noted that these two jurisdictions were used because they provide for pain and suffering damages and "they have a voluminous number of awards": Curran Report at 12. According to Professor Curran, Quebec was excluded because its human rights regime is distinct. Further, there were insufficient cases in other jurisdictions "to provide adequate statistical power for this study": Curran Report at 12. This includes other jurisdictions that similarly do not have damages caps.

[180] I find that Professor Haan's concerns about relying on only two provinces' human rights schemes as comparators is valid. I take Professor Curran's point that Quebec's regime is distinct. I also understand that Ontario and British Columbia likely have more decisions to analyze than other jurisdictions. However, in creating his population of tort and wrongful dismissal cases, Professor Curran combined cases from all Canadian provinces, except Quebec: Table 1: A Breakdown of Cases Used in this Study, Curran Report at 22–23. Professor Curran does not explain why he takes inconsistent approaches to creating the populations for each regime, despite similar concerns between jurisdictions (number of decisions, different jurisprudences) existing in both common and human rights laws. This could lead to a reasonable inference that additional externalities modulate the actual impact of the caps.

[181] Second, the suitability of Professor Curran's populations is also put into question by their heterogeneity. Professor Haan posits that by comparing *CHRA* awards to four other sets of awards, Professor Curran implies "that the four other jurisdictions are similar enough that they form suitable comparators, and that the statistical significance of his t-tests provides support for his hypotheses that the CHRA cap pushes awards downwards. To be thorough, he should have

also compared all jurisdictions to each other, to see if there are also significant differences between jurisdictions that may not have a cap": Haan Reply Report at para 105.

[182] Professor Haan provides these comparisons himself, finding that awards for pain and suffering under the *OHRC* and *BCHRC*, as well as awards for punitive damages under tort and wrongful dismissal, "are not statistically different from one another": Haan Reply Report at paras 106–107. However, the treatment of pain and suffering awards between the common law and human rights regimes, as well as between tort and wrongful dismissal within the common law, suggests that "there are more differences across jurisdictions than the presence of an awards cap": Haan Reply Report at para 108. Notably, in his reply report, Professor Curran did not respond to Professor Haan's findings that several jurisdictions are different from the others: Haan Sur-Reply Report at paras 14, 40.

[183] In addition, Professor Curran conceded on cross-examination that additional variables could be influencing the awards, which at least calls into question the construct validity of his regression analysis: Transcript of Cross-Examination of Professor Curran, Respondent's Record, Vol 3 at 859–870. He agreed that other variables could also impact the outcome of awards: (i) the amount of compensation that the claimant sought; (ii) the quality of the evidence led; (iii) the conduct of the complainant; (iv) respondent non-participation in the proceedings; (v) the vulnerability of the victim; (vi) whether the acts were done in public versus private; (vii) the frequency of the discriminatory conduct; (viii) the availability and amount of other compensation such as lost wages; (ix) similar awards or jurisprudence of the specific tribunal; (x) the ground of discrimination: Defendant's MOFL at para 109.

[184] The Plaintiffs argue that Professor Haan's criticisms should not be given much weight as he did not undertake his own study to show what results a study incorporating his critiques would have produced. I do not agree that the Defendant's expert had to determine the impact of his noted concerns. The burden was on the Plaintiffs to establish that their methodology was sound. In addition, they could have requested leave to file a sur-sur reply report to address any deficiencies in Professor Haan's sur-reply report.

[185] Based on the foregoing, I have sufficient concerns about the Plaintiffs' statistical evidence such that it cannot ground their section 15 claims at both steps of the analysis.

(4) The Plaintiffs' claims fail at step two

[186] At step two, the Plaintiffs must establish that the *CHRA* caps impose burdens or deny benefits in a manner that has the effect of reinforcing, perpetuating, or exacerbating disadvantage: *Sharma* at para 51. Courts are required to examine the historical and systemic disadvantage of the claimant group: *Sharma* at para 52.

[187] In addition to the evidentiary concerns cited above, I find that the Plaintiffs' claims further fail at this stage because their approach is inconsistent with the jurisprudence in two ways. First, by framing the claimant group as a collectivity, the Court cannot undertake a proper contextual inquiry grounded in the actual situation of the protected groups composing the collectivity. Second, the Plaintiffs fail to account for the broader legislative context by not considering the suite of remedies available to a *CHRA* complainant.

(a) *Failure to adduce evidence of historical or systemic disadvantage for each protected group within the collectivity of the claimant group*

[188] In my view, the Plaintiffs are short-circuiting the requisite analysis at this stage by simply asserting that the claimant group — individuals with founded claims of discrimination — are "disadvantaged by definition" because "[a]ny individual who is found entitled to CHRA Damages has, by definition, experienced disadvantage and prejudice": Plaintiffs' MOFL at 78. As a general proposition, this is not controversial. However, it cannot fairly be assumed that each of the protected groups within the collectivity has suffered the same historical or societal disadvantage. This assumption alone belies a contextual, substantive approach to equality. It was incumbent on the Plaintiffs to adduce a sufficient evidentiary basis to contextualize the concrete experiences of individuals in the claimant group. Mere assertions of disadvantage are not enough: *Sharma* at para 55.

[189] Step two requires considering the "actual situation" of the protected group: *Withler* at para 37. For example, in *G*, there was significant evidence about the historical disadvantage and stigmatization faced by people with mental illness: *G* at paras 61–66. In *Fraser*, there was historical evidence about gender bias in pension plans: *Fraser* at paras 108–113. Simply because the *CHRA* caps allegedly discriminate on all enumerated and analogous grounds does not relieve the Plaintiffs of their burden of demonstrating how each individual protected group is impacted.

[190] The Plaintiffs argue that "[c]ompounding their disadvantage in society at large, Complainants are further disadvantaged when pursuing remedies for discrimination": Plaintiffs' MOFL at para 80. Professor Koshan's evidence speaks to the various barriers faced by

individuals wishing to make *CHRA* complaints. This evidence, however, shows that protected groups experience these barriers differently: Koshan Report at paras 23–24, 26– 27, 38, 42–45. For example, Professor Koshan notes that barriers related to lack of awareness on the part of complainants "may be different or intensified for members of some equity-seeking groups, including children and youth, persons with disabilities, Indigenous persons, and English language learners" [citations omitted, emphasis added]: Koshan Report at para 23. This evidence thus supports that not all members of the claimant group feel these impacts or are disadvantaged similarly.

[191] The Plaintiffs further rely on the anecdotal evidence of Mr. No and Ms. Lamba to establish "the real world impact" of the damages caps: Plaintiffs' MOFL at para 107. However, as discussed above, this evidence is general — the affiants simply state that claimants have expressed "frustration and disbelief" about the caps: Plaintiffs' MOFL at para 108. Mr. No baldly asserts that this "compound[s] the emotional and financial harm they experienced in the initial human rights violation": No Affidavit at para 31(b). This evidence is, however, insufficient to meet the Plaintiffs' burden at step two.

[192] The minority in *Sharma* held that identifying discrimination at step two "requires rigorous analysis": *Sharma* at para 198. Here, the Plaintiffs' analysis lacks the requisite rigour due to their failure to situate the disadvantage alleged within its proper historical and social context.

(b) *Failure to consider the broader legislative context*

[193] The Supreme Court has held that the broader legislative context is important in determining whether a distinction is discriminatory under step two: *Sharma* at paras 56, 57. In *CP*, Chief Justice Wagner emphasized the importance of considering a provision in its full context and "caution[ed] against artificially cherry-picking individual features from a multifaceted legislative scheme in order to reveal inequities between fundamentally distinct systems": *CP* at para 144.

[194] The Plaintiffs argue that the *CHRA* caps deny the claimant group equal protection and benefit of the law when compared with those who receive damages awards either under common law, or under the Ontario and British Columbia human rights regimes. At the heart of these comparisons is the premise of being "made whole" which, according to the Plaintiffs, the *CHRA* caps prevent. As already mentioned, however, this approach ignores the full suite of remedies available to successful *CHRA* complainants.

[195] The purpose of the remedial provisions provided under section 53 of the *CHRA* "is to make a victim of discrimination whole and to put the complainant back in the position he or she would have been in had the discrimination not occurred": *Christoforou v John Grant Haulage Ltd*, 2021 CHRT 15 at para 37, citing *Canada Post Corp v Public Service Alliance of Canada*, 2010 FCA 56 at para 299, aff'd 2011 SCC 57. In addition to damages for pain and suffering under paragraph 53(2)(e), and special compensation under subsection 53(3), remedies under section 53 of the *CHRA* include: measures to redress or prevent the discrimination in the future:

s 53(2)(a); access to the rights, opportunities or privileges that are being or were denied: s 53(2)(b); compensation for lost wages and expenses: s 53(2)(c); and compensation for any additional costs of obtaining alternative goods, services, facilities and accommodation, and any expenses: s 53(2)(d).

[196] On this basis, the Plaintiffs' singular focus on the caps is inconsistent with a contextual approach. Simply comparing the *CHRA* damages awards under paragraph 53(2)(e) and subsection 53(3) head-to-head with analogous damages awards disregards how these awards factor into the larger remedial picture of their respective regimes. Notably, under the Ontario and British Columbia human rights legislation, damages cannot be awarded for wilful or reckless conduct on the part of the respondent, unlike subsection 53(3) of the *CHRA*.

V. Conclusion

[197] I recognize that the *CHRA* damages caps have remained stagnant for over 25 years and that there have been several calls to either increase or eliminate them altogether. However, based on the framing of their case, the Plaintiffs have failed to establish that the caps breach subsection 15(1) of the *Charter*. Consequently, this is a policy issue, not a constitutional matter. As such, it would not be appropriate for the Court to comment on the stagnation.

[198] I am dismissing the Plaintiffs' motion for summary judgment and allowing the Defendant's cross-motion for summary judgment. The Plaintiffs' actions are therefore dismissed.

[199] After the hearing, the parties advised the Court that they had reached an agreement on costs. They agreed that there would be no costs payable as between PCLS and the Defendant. As between PSAC and the Defendant, they agreed that the successful party would be awarded $15,000 in costs, inclusive of all fees, taxes, and disbursements. I am satisfied that this is a reasonable amount. I therefore order that PSAC pay $15,000 in costs, all-inclusive, to the Defendant.

[200] In closing, I note that subsection 15(1) has been described by the Supreme Court as “the *Charter*’s most conceptually difficult provision”: *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497 at para 2. I commend counsel for their excellent written and oral advocacy in this interesting and challenging case.

JUDGMENT in T-2016-22

THIS COURT'S JUDGMENT is that:

1. The Plaintiffs' motion for summary judgment is dismissed.
2. The Defendant's cross-motion for summary judgment is granted, and the Plaintiffs' actions are dismissed.
3. The Plaintiff Public Service Alliance of Canada shall pay to the Defendant all-inclusive costs in the amount of $15,000.

"Anne M. Turley"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2016-22
STYLE OF CAUSE:	PARKDALE COMMUNITY LEGAL SERVICES, PUBLIC SERVICE ALLIANCE OF CANADA v HIS MAJESTY THE KING
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	JUNE 25–27, 2024
JUDGMENT AND REASONS:	TURLEY J.
DATED:	MAY 22, 2025

APPEARANCES:

Andrew Montague-Reinholdt Malini Vijaykumar Claire Kane Boychuk	FOR THE PLAINTIFF PARKDALE COMMUNITY LEGAL SERVICES
Andrew Astritis Amanda Montague-Reinholdt Zachary Rodgers Adam Gregory	FOR THE PLAINTIFF PUBLIC SERVICE ALLIANCE OF CANADA
Sean Stynes Adrian Johnston	FOR THE DEFENDANT

SOLICITORS OF RECORD:

Nelligan O'Brien Payne LLP Barristers and Solicitors Ottawa, Ontario	FOR THE PLAINTIFF PARKDALE COMMUNITY LEGAL SERVICES

RavenLaw LLP Barristers and Solicitors Ottawa, Ontario	FOR THE PLAINTIFF PUBLIC SERVICE ALLIANCE OF CANADA
Attorney General of Canada Ottawa, Ontario	FOR THE DEFENDANT