Federal Court of Appeal  Cour d'appel fédérale

Date: 20130124

Docket: A-393-11

Citation: 2013 FCA 16

CORAM: **DAWSON J.A.**
GAUTHIER J.A.
STRATAS J.A.

BETWEEN:

DOUG RUNCHEY

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

and

JUDITH WILSON

Respondent/Intervener

Heard at Vancouver, British Columbia, on June 21, 2012.

Judgment delivered at Ottawa, Ontario, on January 24, 2013.

REASONS FOR JUDGMENT BY: STRATAS J.A.

CONCURRED IN BY: DAWSON J.A.
GAUTHIER J.A.

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REASONS FOR JUDGMENT

STRATAS J.A.

A. Introduction

[1] Mr. Runchey applies for judicial review from the decision dated September 8, 2011 of the Pension Appeals Board: 2011 LNCPEN 77 (Appeal CP27301). The Board dismissed Mr. Runchey's appeal from the Review Tribunal.

[2] The Review Tribunal upheld a decision by the Minister of Human Resources and Skills Development to allow the application of Mr. Runchey's ex-spouse for a division of pension credits under the *Canada Pension Plan*, R.S.C. 1985, c. C-8 (the "Plan").

[3] The central issue in Mr. Runchey's application for judicial review concerns the interaction of two sets of provisions in the Plan:

- *The Division of Unadjusted Pensionable Earnings provisions of the Plan (the "DUPE provisions").* Under the DUPE provisions, certain pension credits may be divided between ex-spouses in certain circumstances: section 55.1 of the Plan.

- *The Child-Rearing Provisions of the Plan ("CRP").* Under the CRP, parents who leave the workforce or reduce their participation in it for a period of time to raise their children are accommodated: sections 48 and 49 of the Plan.

The precise nature of these provisions and how they interact will be discussed below.

[4] In his application for judicial review and in the administrative proceedings below, Mr. Runchey maintains that these provisions interact in a manner that treats men differently from women and discriminates against men, contrary to the constitutional guarantee of equality contained in subsection 15(1) of the Charter.

[5] For the reasons that follow, I conclude that the provisions do not violate section 15 of the Charter. Accordingly, I would dismiss the application for judicial review with costs.

B. Background

[6] After 19 years of marriage, in April 1992, Mr. Runchey and Ms. Wilson (the named intervener in this Court) divorced. Before they divorced, they signed a separation agreement in which they agreed, among other things, to divide their existing Plan credits.

[7] Many years later, on April 15, 2008, Ms. Wilson applied to the Minister under the DUPE provisions of the Plan for a division of their unadjusted pensionable earnings – sometimes known as a credit split – for the period during which they cohabited during their marriage.

[8] Mr. Runchey was advised of Ms. Wilson's application and was asked whether he agreed with the cohabitation period. Mr. Runchey agreed with the period but refused to agree to a division for any period of time that would be or had been excluded or dropped out of Ms. Wilson's contributory period due to the CRP. The period that would be dropped out of Ms. Wilson's contributory period under the CRP fell within May 1974 to October 1984.

[9] On June 18, 2008, the Minister decided to grant Ms. Wilson's DUPE application for the period in question. The Minister did not accept Mr. Runchey's position.

[10] Mr. Runchey asked the Minister to reconsider the decision. He asked that the DUPE division be reversed during the period of potential CRP eligibility (May 1974 to October 1984). He asked that both he and Ms. Wilson be allowed CRP eligibility for that period or that Ms. Wilson be disallowed from being able to claim CRP eligibility for that period.

[11] On December 19, 2008, the Minister rejected Mr. Runchey's reconsideration request and confirmed the DUPE decision. The Minister also advised Mr. Runchey that the CRP could not be applied in his case because he had not applied for a Plan benefit.

[12] Mr. Runchey appealed to the Review Tribunal the Minister's denial of his request for a reconsideration of the DUPE decision. Before the Review Tribunal, he argued that the interaction of the DUPE provisions and the CRP treated men differently from women and in a discriminatory way, contrary to subsection 15(1) of the Charter.

[13] On April 22, 2010, the Review Tribunal dismissed Mr. Runchey's appeal. It held that it did not have jurisdiction to consider the Charter issue raised by Mr. Runchey because only the Minister's decision concerning Ms. Wilson's request for credit-splitting under DUPE was before it. It found that the DUPE provision, by itself, did not contravene the Charter.

[14] Mr. Runchey appealed to the Pension Appeals Board. He advanced substantially the same submissions he made before the Review Tribunal.

[15] The Board rejected Mr. Runchey's submissions on the following bases:

- The Board's jurisdiction under the Plan is limited to what the Review Tribunal could or could not do. In this case, the Board found that "the Review Tribunal correctly declined jurisdiction to deal with the Charter issue raised by Mr. Runchey because the only ministerial decision under review was the one mandated by the [Plan] (a DUPE distribution) which Mr. Runchey agrees was done correctly" (at paragraph 34).

- Even if the operation of the CRP in conjunction with the DUPE provisions could be considered by the Board, the Board found they did not discriminate against men under subsection 15(1) of the Charter (at paragraphs 36-48).

[16] As mentioned above, Mr. Runchey now brings an application for judicial review before this Court.

C. Preliminary objection by the Attorney General

[17] In this Court, the Attorney General maintains that the only matter before this Court is the Minister's decision under the DUPE provisions. There is no decision concerning CRP before the Court. The Attorney General notes that Mr. Runchey concedes that the credit-splitting under the

DUPE provisions was performed exactly according to the law as written. Therefore, the Attorney General says that the constitutional issue is not squarely before this Court in this application.

[18] I disagree. Mr. Runchey's position, expressed in his notice of application, is that the Minister's application of the DUPE provisions, as written, perpetuates a constitutional infirmity. That infirmity is the discrimination against men, contrary to subsection 15(1) of the Charter, caused by the interaction of the CRP and DUPE provisions. To address this infirmity, in his notice of application he claims, among other things, a declaration that he will have "equal access to the [CRP] as a result of the DUPE action, as does [Ms. Wilson]."

[19] Mr. Runchey's notice of application is not drafted with precision. To some extent, the lack of precision of the notice of application is understandable because Mr. Runchey is a self-represented litigant. In this regard, I note that the Attorney General did not seek to clarify Mr. Runchey's notice of application. From his memorandum and his argument in this Court, it was evident that the Attorney General appreciated exactly what Mr. Runchey was arguing in his application and was not prejudiced in any way.

[20] The effect of Mr. Runchey's core submission is that by deciding Ms. Wilson's request for credit-splitting under the DUPE provisions as written, those provisions being contrary to subsection 15(1) of the Charter, the Minister made an invalid decision.

[21] Therefore, I find that the constitutional issue raised by Mr. Runchey is squarely before the Court and must be determined.

[22] From this, it follows that the constitutional issue raised by Mr. Runchey was also squarely before the Pension Appeals Board. Although the Board had only Ms. Wilson's application for credit-splitting under the DUPE provisions before it, Mr. Runchey's constitutional argument, directed to the validity of the DUPE provisions to be applied by the Board, was also before the Board. It follows that the Board's decision that it did not have jurisdiction to consider Mr. Runchey's constitutional argument cannot stand. In the end, this does not matter, as the Board went on to consider and dismiss Mr. Runchey's constitutional argument on its merits.

D. Mr. Runchey's standing

[23] The Attorney General submitted that Mr. Runchey is not able to advance his constitutional challenge. Ms. Wilson was the only primary caregiver and so there are no circumstances where Mr. Runchey would be eligible for the CRP. Even if Mr. Runchey were able to establish that the interaction of the CRP and DUPE provisions creates a distinction between males and females, he is not personally affected.

[24] I disagree. Among other things, Mr. Runchey seeks a declaration that the interaction of the CRP and DUPE provisions infringes the Charter. The Attorney General requests that if this Court rules that the declaration should be granted, the declaration should be suspended so that Parliament,

by legislative amendment, can fix the constitutional defect. That fix might change the basis upon which pension credits are split, affecting Mr. Runchey directly.

[25] Further, Mr. Runchey's claim, as described above, smacks as a challenge brought not only on the basis of direct standing but also on the basis of public interest standing. Mr. Runchey, as a male, seeks to vindicate the equality rights of males, claiming that the interaction of the DUPE provisions and the CRP causes systemic discrimination contrary to section 15 of the Charter. The Attorney General did not take issue with Mr. Runchey's standing to advance this claim as a public interest litigant.

[26] In these circumstances, I am prepared to accept that Mr. Runchey has standing as a public interest litigant to advance his constitutional challenge. I prefer to consider his challenge on its merits.

E. The evidentiary record before this Court

[27] In this Court, Mr. Runchey sought to introduce an affidavit in support of his application. The affidavit contains mainly statements of law and calculations of how the CRP and DUPE provisions might apply in certain circumstances.

[28] The Attorney General moves for exclusion of the affidavit. The Attorney General submits that Mr. Runchey's affidavit is "replete with argument, opinions and conclusions that are entirely

speculative and that are outside of his personal knowledge." In response, Mr. Runchey concedes that some paragraphs in his affidavit should be struck, but insists that other paragraphs setting out factual matters were properly before the Court.

[29] I would grant the Attorney General's motion. The affidavit is inadmissible in this Court.

[30] The statements of law are inadmissible: the place for those is the memorandum of fact and law.

[31] The calculations are based on factual matters to some extent not in evidence and the calculations, themselves, are factual matters. On judicial review, factual matters are determined by the administrative decision-maker, not the reviewing court. That is the place where proof of factual matters should be offered. It is trite that the evidentiary record in this Court normally consists of the evidentiary record before the administrative decision-maker being reviewed: *Gitxsan Treaty Society v. Hospital Employees' Union*, [2000] 1 F.C. 135 at pages 144-45 (C.A.). There are narrow exceptions to this rule, none of which apply here.

[32] For Mr. Runchey's benefit, I note that the exclusion of the affidavit did not affect the merits of his application for judicial review. The statements of law in his affidavit were largely explored in the parties' memoranda of fact and law and, as will be evident in these reasons, this Court was able to identify and assess on the basis of the existing, proper evidentiary record, without assistance from the affidavit, how the CRP and DUPE provisions interact and the effects they cause.

F. The standard of review

[33] The Pension Appeals Board's decision to dismiss Mr. Runchey's constitutional argument is subject to correctness review in this Court: *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at paragraph 58.

G. Introduction to the analysis under subsection 15(1) of the Charter

[34] Faced with a claim that legislation infringes the constitutional guarantee of equality in subsection 15(1) of the Charter, the Court must consider the following two questions:

(1) Does the legislation create a distinction based on an enumerated or analogous ground?

(2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping? In other words, is there discrimination?

See generally *Law v. Canada*, [1999] 1 S.C.R. 497; *R. v. Kapp*, 2008 SCC 41, [2008] 2 S.C.R. 483 at paragraph 17; *Withler v. Canada (Attorney General)*, 2011 SCC 12, [2011] 1 S.C.R. 396 at paragraph 30.

H. Does the legislation create a distinction based on an enumerated or analogous ground?

(1) Comparator groups

[35] In considering whether legislation creates a distinction, one must first ask, "A distinction between whom?" In the equality rights jurisprudence, this is often described as the issue of "comparator groups."

[36] The selection of comparator groups can be controversial and in recent jurisprudence the Supreme Court has tried to reduce its importance in the overall analysis: *Withler, supra*. Fortunately, in benefits cases such as this, identifying the distinction and the comparator group is "relatively straightforward" because the ground for denying a benefit to a particular group is relatively clear: *Withler*, at paragraph 64. That is the case here.

[37] Mr. Runchey says that the interaction of the CRP and the DUPE provisions creates a distinction based on gender – men and women – and gender is an enumerated ground under subsection 15(1) of the Charter. While the Attorney General contests whether there is indeed a distinction, it concedes Mr. Runchey has founded his challenge upon an enumerated ground. In their oral and written arguments, the parties articulated the alleged distinction in terms of gender. For the purposes of this appeal, the comparator group need not be refined further.

(2) Examining the CRP and DUPE provisions and their interaction with each other to assess whether there is a distinction based on gender

[38] In his submissions, Mr. Runchey tended to characterize the distinction between men and women created by the CRP and DUPE provisions as being very significant, creating real differences in the size of benefits men could receive.

[39] In my view, there is a distinction, but it is qualitatively less significant than that urged by Mr. Runchey. Briefly, a distinction occurs because of the fact that, due to statutory presumptions regarding gender roles and childcare, men have greater difficulty than women in accessing the CRP. This initial distinction is carried through in the DUPE provisions, which, as we shall see, can have the effect of reducing one spouse's pension without a corresponding increase to the other's pension. Because of the distinction inherent in the CRP, men find themselves in this peculiar situation more frequently than women.

(a) General characteristics of the Plan

[40] As a general matter, the calculation of benefits under the Plan is affected by how much and how long people contribute to the Plan. More contributions generally result in greater benefits.

[41] The administrators of the Plan maintain a record of earnings for each person who has contributed to the Plan. For each year of contributions, the record lists the contributor's unadjusted

pensionable earnings ("pension credits"), as calculated under section 53 of the Plan. Contributors' pension credits are used to calculate their average pensionable earnings: section 52 of the Plan.

[42] Generally, a contributor's Plan entitlement is 25 per cent of his or her average pensionable earnings, adjusted to take into account the average of the contributor's final five-year maximum pensionable earnings: section 46 of the Plan.

(b) The DUPE provisions

[43] Under section 55.1 of the Plan, married or common law couples who subsequently separate can split the pension credits they accumulated during the period they lived together. This action is known as a Division of Unadjusted Pensionable Earnings (DUPE), and is sometimes called "credit splitting."

[44] This credit splitting is intended to provide the lower income-earning spouse with a measure of protection by potentially increasing his or her access to pension benefits in the event of marital breakdown.

[45] Subsection 55.1(1) of the Plan – what I have called the DUPE provisions – authorizes the Minister to perform a DUPE. It reads:

55.1. (1) Subject to this section and sections 55.2 and 55.3, a division of unadjusted pensionable	**55.1.** (1) Sous réserve des autres dispositions du présent article et des articles 55.2 et 55.3, il doit y

earnings shall take place in the following circumstances:

avoir partage des gains non ajustés ouvrant droit à pension dans les circonstances suivantes :

(*a*) in the case of spouses, following the issuance of a decree absolute of divorce, a judgment granting a divorce under the *Divorce Act* or a judgment of nullity of the marriage, on the Minister's being informed of the decree or judgment, as the case may be, and receiving the prescribed information;

a) dans le cas d'époux, lorsqu'est rendu un jugement irrévocable de divorce, un jugement accordant un divorce conformément à la *Loi sur le divorce* ou un jugement en nullité de mariage, dès que le ministre est informé du jugement et dès qu'il reçoit les renseignements prescrits;

(*b*) in the case of spouses, following the approval by the Minister of an application made by or on behalf of either spouse, by the estate or succession of either spouse or by any person that may be prescribed, if

b) dans le cas d'époux, à la suite de l'approbation par le ministre d'une demande faite par l'un ou l'autre de ceux-ci ou pour son compte, ou par sa succession ou encore par une personne visée par règlement, si les conditions suivantes sont réunies :

(i) the spouses have been living separate and apart for a period of one year or more, and

(i) les époux ont vécu séparément durant une période d'au moins un an,

(ii) in the event of the death of one of the spouses after they have been living separate and apart for a period of one year or more, the application is made within three years after the death; and

(ii) dans les cas où l'un des époux meurt après que ceux-ci ont vécu séparément durant une période d'au moins un an, la demande est faite dans les trois ans suivant le décès;

(*c*) in the case of common-law partners, following the approval by the Minister of an application made by or on behalf of either former common-law partner, by the

c) dans le cas de conjoints de fait, à la suite de l'approbation par le ministre d'une demande faite par l'un ou l'autre des anciens conjoints de fait ou pour son compte, ou par sa

estate or succession of one of those former common-law partners or by any person that may be prescribed, if	succession ou encore par une personne visée par règlement, si les conditions suivantes sont réunies :
(i) the former common-law partners have been living separate and apart for a period of one year or more, or one of the former common-law partners has died during that period, and	(i) soit les anciens conjoints de fait ont vécu séparément pendant une période d'au moins un an, soit l'un d'eux est décédé pendant cette période,
(ii) the application is made within four years after the day on which the former common-law partners commenced to live separate and apart or, if both former common-law partners agree in writing, at any time after the end of that four-year period.	(ii) la demande est faite soit dans les quatre ans suivant le jour où les anciens conjoints de fait ont commencé à vivre séparément, soit après l'expiration de ce délai avec leur accord écrit.

[46] Credit splitting is mandatory and automatic for divorces and annulments occurring on or after January, 1987: paragraph 55.11(*a*) of the Plan (note that section 55 applies to divorces prior to 1987). In some provinces, couples can exclude credit splitting through written agreements: subsection 55.2(3) of the Plan. Credit splitting is also available to married couples who are separated and former common law partners, but only if they apply for it.

[47] In limited circumstances, the Minister may refuse to make a division, or may cancel a division. To do so, the Minister must be satisfied that: (i) both contributors subject to the division would be entitled to benefits; and (ii) a division would decrease the amount of both contributors' benefits: subsection 55.1(5) of the Plan.

[48] The DUPE provisions otherwise operate in a straightforward way. They simply add together all pension credits of spouses for each year they cohabited, and then divide the total credits equally between them.

[49] The effect of the DUPE provisions is to transfer pension credits from the high income-earning spouse to the low earning spouse. The pension credits transferred under the DUPE provision are credited to the record of earnings of the low earning spouse. Therefore, the monetary value of the credit split depends on a number of other factors relevant to calculating a contributor's Plan benefits, such as the contributors' earning history, age at retirement, and the use of "drop out provisions."

(c) The CRP: its general nature

[50] In certain situations, the Plan allows contributors to "drop out" low earning periods so that reduced earnings are removed from the calculation of benefits. These are governed by "drop out provisions" in the Plan.

[51] Most contributors are entitled to a "general low-earnings drop out": subsection 48(4) of the Plan. This provision allows contributors to "drop out" a certain percentage of years when their contributions are low for any reason.

[52] In addition to this general drop out, the Plan also contains drop out provisions for specific cases.

[53] The CRP, sometimes also described as the Child Rearing Drop Out (CRDO), is one such provision. Under it, parents can remove from their calculation of benefits under the Plan time spent caring for young children. In this way, the CRP ensures that parents who leave or reduce their workforce participation to raise pre-school age children are not penalized in determining future pension benefits: *Harris v. Canada (Minister of Human Resources and Skills Development)*, 2009 FCA 22 at paragraphs 89 and 101.

[54] Subsection 48(2) of the Plan is the general provision. It provides as follows:

48. (2) In calculating the average monthly pensionable earnings of a contributor in accordance with subsection (1) for the purpose of calculating or recalculating benefits payable for a month commencing on or after January 1, 1978, there may be deducted	**48.** (2) Dans le calcul, conformément au paragraphe (1), de la moyenne mensuelle des gains d'un cotisant ouvrant droit à pension, il peut être déduit, dans le but de calculer ou recalculer les prestations payables à l'égard d'un mois à compter du 1er janvier 1978 :
(*a*) from the total number of months in a contributor's contributory period, those months during which he was a family allowance recipient and during which his pensionable earnings were less than his average monthly pensionable earnings calculated without regard to subsections (3) and (4), but no such deduction shall	*a*) du nombre total de mois dans la période cotisable d'un cotisant, les mois durant lesquels il était bénéficiaire d'une allocation familiale et au cours desquels ses gains ouvrant droit à pension étaient inférieurs à sa moyenne mensuelle des gains ouvrant droit à pension établie indépendamment des paragraphes (3) et (4), mais

reduce the number of months in his contributory period to less than the basic number of contributory months, except

(i) for the purpose of calculating a disability benefit in respect of a contributor who is deemed to have become disabled for the purposes of this Act after December 31, 1997, in which case the words "the basic number of contributory months" shall be read as "48 months",

(i.1) for the purpose of calculating a disability benefit in respect of a contributor who is deemed to have become disabled for the purposes of this Act in 1997, in which case the words "the basic number of contributory months" shall be read as "24 months", and

(ii) for the purpose of calculating a death benefit and a survivor's pension, in which case the words "the basic number of contributory months" shall be read as "thirty-six months"; and

(*b*) from his total pensionable earnings, the aggregate of his pensionable earnings attributable to the months deducted pursuant to paragraph (*a*).

cette déduction ne peut cependant résulter en un nombre de mois de sa période cotisable inférieur au nombre de base des mois cotisables, sauf :

(i) pour le calcul d'une prestation d'invalidité d'un cotisant qui est réputé être devenu invalide, au titre de la présente loi, après le 31 décembre 1997, auquel cas « nombre de base des mois cotisables » s'interprète comme une mention de « quarante-huit mois »,

(i.1) pour le calcul d'une prestation d'invalidité d'un cotisant qui est réputé être devenu invalide, au titre de la présente loi, au cours de 1997, auquel cas « nombre de base des mois cotisables » s'interprète comme une mention de « vingt-quatre mois »,

(ii) pour le calcul d'une prestation de décès et d'une pension de survivant, et alors « nombre de base des mois cotisables » s'interprète comme une mention de « trente-six mois »;

b) du total de ses gains ouvrant droit à pension, l'ensemble de ces gains correspondant aux mois déduits en vertu de l'alinéa *a*).

[55] Paragraph (*a*) excludes months from the contributory period and paragraph (*b*) excludes earnings from total pensionable earnings. Thus, the combined effect of these paragraphs allows a contributor to "drop out" the child rearing years from his or her Plan benefit calculations.

[56] The CRP provision does not automatically exclude "child rearing" years from the qualifying parent's benefit calculations. Periods are only dropped if doing so will result in higher pension benefits: paragraph 48(2)(*a*) of the Plan.

(d) The CRP: who qualifies?

[57] Paragraph 48(2)(*a*) of the Plan specifies that contributors only qualify for the CRP in months that they (i) are a "family allowance recipient" and (ii) have pensionable earnings that are "less than his [or her] average monthly pensionable earnings."

[58] The first requirement, "family allowance recipient," is defined in the Plan and the *Plan Regulations*, C.R.C., c. 385. As will be seen below, a parent is considered a "family allowance recipient" if he or she received a payment under the old *Family Allowances Act* or qualified for the Canada Child Tax Benefit. The definition also includes the spouse or partner of someone who received a payment under the old *Family Allowances Act*, but only if the recipient of the family allowance waives his or her entitlement to the CRP.

[59] The second requirement – earnings below average monthly pensionable earnings – ensures that the CRP does not drop out months that would otherwise increase the contributor's pension benefits.

[60] Central to Mr. Runchey's case is the first requirement – when a person is a "family allowance recipient" within the meaning of the CRP.

(e) "Family allowance recipient": section 42 of the Plan

[61] Section 42 of the Plan defines "family allowance recipient" for the purposes of the CRP. It reads as follows:

42. "Family allowance recipient" means a person who received or is in receipt of an allowance or a family allowance pursuant to the *Family Allowances Act*, chapter F-1 of the Revised Statutes of Canada, 1970, as it read immediately before being repealed or the *Family Allowances Act* for that period prior to a child reaching seven years of age, and such other persons as may be prescribed by regulation;	**42.** « bénéficiaire d'une allocation familiale » La personne qui reçoit ou a reçu une allocation ou une allocation familiale en vertu de la *Loi sur les allocations familiales*, chapitre F-1 des Statuts revisés du Canada de 1970, telle qu'elle se lisait avant son abrogation, ou de la *Loi sur les allocations familiales*, durant la période précédant le moment où un enfant atteint l'âge de sept ans, et toute autre personne désignée par règlement.

[62] Under this definition, a "family allowance recipient" includes any contributor that received an allowance under the various versions of the *Family Allowances Act* before their child turned seven years of age. The most recent version of the *Family Allowances Act* (R.S.C. 1985, c. F-1) was

repealed as of January 1, 1993: R.S. 1992, c. 48, s. 31. After this date, parents were not eligible for family allowances. Accordingly, family allowances are not relevant to defining "family allowance recipient" after 1993.

[63] As a result, the family allowance cannot be a basis for determining CRP eligibility after 1992. Section 42 of the Plan solves this problem by including in the definition of family allowance recipient "such other persons as may be prescribed by regulation." A regulation has been enacted and lies at the heart of the gender distinction under attack in this case.

(f) Subsection 77(1) of the *Plan Regulations*

[64] Subsection 77(1) of the *Plan Regulations* expands the definition of "family allowance recipient." In so doing, it adds new categories of contributors that are eligible for the CRP. This subsection states:

77. (1) For the purposes of the definition "family allowance recipient" in subsection 42(1) of the Act, family allowance recipient includes	**77.** (1) Pour l'application de la définition de « bénéficiaire d'une allocation familiale » au paragraphe 42(1) de la Loi, ce terme s'entend en outre :
(*a*) the spouse, former spouse, common-law partner or former common-law partner of a person who is described in that definition as having received or being in receipt of an allowance or a family allowance in respect of a child for any period before the child reached the age of	*a*) de l'époux, de l'ancien époux, du conjoint de fait ou de l'ancien conjoint de fait d'une personne qui, selon cette définition, reçoit ou a reçu une allocation ou une allocation familiale à l'égard d'un enfant pour toute période précédant le moment où l'enfant atteint l'âge

seven, if that spouse, former spouse, common-law partner or former common-law partner remained at home during that period as the child's primary caregiver and that period has not already been or cannot be excluded or deducted from the person's contributory period under Part II of the Act;

de sept ans si, pendant cette période, l'époux, l'ancien époux, le conjoint de fait ou l'ancien conjoint de fait restait à la maison et était la principale personne qui s'occupait de l'enfant et que cette période n'a pas déjà été exclue ou déduite de la période cotisable de la personne aux fins de l'application de la partie II de la Loi ou ne peut l'être;

(*b*) a member of the Canadian Armed Forces who, before 1973, was posted to serve outside Canada, or the spouse or former spouse of such a member, who, but for the posting, would have received an allowance or family allowance for a child under seven years of age;

b) du membre ou de son époux ou ancien époux, dans le cas d'un membre des Forces armées canadiennes qui était en poste à l'extérieur du Canada avant 1973, qui aurait reçu, n'eût été cette affectation, une allocation ou une allocation familiale pour un enfant âgé de moins de sept ans;

(*c*) the person who, under section 122.62 of the *Income Tax Act*, is considered to be an eligible individual for the purposes of subdivision a.1 of Division E of Part I of that Act (Child Tax Benefit) in respect of a qualified dependant under seven years of age; and

c) de la personne qui, aux termes de l'article 122.62 de la *Loi de l'impôt sur le revenu*, est considérée comme un particulier admissible pour l'application de la sous-section a.1 de la section E de la partie I de cette loi (prestation fiscale pour enfants) à l'égard d'une personne à charge admissible âgée de moins de sept ans;

(*d*) the person who would have been considered to be an eligible individual for the purposes of subdivision a.1 of Division E of Part I of the *Income Tax Act* (Child Tax Benefit) had a notice been filed under subsection 122.62(1) of

d) de la personne qui aurait été considérée comme un particulier admissible pour l'application de la sous-section a.1 de la section E de la partie I de la *Loi de l'impôt sur le revenu* (prestation fiscale pour enfants) si elle avait présenté

that Act, where no person was considered to be an eligible individual in respect of the same qualified dependant under seven years of age.	l'avis visé au paragraphe 122.62(1) de cette loi, lorsqu'aucune personne n'a été considérée comme un particulier admissible à l'égard de la même personne à charge admissible âgée de moins de sept ans.

[65] Paragraphs (*c*) and (*d*) of the provision extend the definition of family allowance recipient to the person eligible for the Canada Child Tax Benefit under Part I, Division E, subdivision a.1 of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.).

[66] The Canada Child Tax Benefit was introduced in the 1992 Federal Budget, and replaced the Family Allowance in 1993: S.C. 1992, c. 48, s. 12; *Wajchendler v. The Queen* (2003), 56 D.T.C .3895 at paragraph 3. It provides a single non-taxable monthly payment to the custodial parent of a child. This payment is "intended to benefit the child by providing funds to the parent who primarily fulfilled the responsibility for the care and upbringing of the child": *S.R. v. The Queen*, 2003 TCC 649 at paragraph 12.

[67] Paragraph 77(1)(*a*) further extends the definition to the spouses and common law partners of those who received a family allowance under the *Family Allowances Act*. It does so on two conditions: The spouse or common law partner must have remained at home as the primary caregiver of a child under the age of 7 and the "period has not already been or cannot be excluded or deducted from the [recipient of an allowance]'s contributory period under Part II of the Act."

[68] Before this Court, the parties contested the meaning of this latter requirement.

[69] Mr. Runchey argued that a spouse or common law partner can only qualify under this extended definition if the person who received the family allowance waives his or her right to the CRP in favour of the contributor.

[70] The Attorney General disagrees and argues that a waiver is not necessary. According to the Attorney General, the waiver was introduced to enhance administrative efficiency. If a parent cannot obtain a waiver, subsection 53(*g*) of the *Plan Regulations* allows Plan administrators to determine which parent actually acted as the primary caregiver.

[71] The Plan and *Plan Regulations* favour the applicant's interpretation. Paragraph 77(1)(*a*) says that the spouse or common law partner can only qualify for the CRP when the "period has not already been or cannot be excluded or deducted from the person's contributory period under Part II of the Act." The words "the person" refer to the parent who received an allowance under the *Family Allowances Act*. The CRP is an exclusion under Part II of the *Plan*. Therefore, a spouse or partner can only qualify for the CRP when the parent who received the family allowance does not.

[72] Thus, paragraph 77(1)(*a*) adds an important qualification to the definition of "family allowance recipient" and thus eligibility for the CRP. It recognizes that the eligibility criteria for the CRP are imperfect. That is, in some circumstances the person who received a family allowance was not the child's primary caregiver. In these circumstances, paragraph 77(1)(*a*) allows the primary

caregiver to access the CRP, but only if the other parent does not get access to the CRP. This can occur if the CRP would lower the amount of the parent's pension, or if the parent waives his or her right to it.

[73] In sum, section 42 of the Plan and subsection 77(1) of the *Plan Regulations* establish three circumstances when a contributor is a "family allowance recipient":

1. before 1992, he or she received a family allowance under the old *Family Allowances Act*; or

2. he or she remained at home as the primary caregiver of the child, he or she is the present or former spouse or common law partner of a person who received a family allowance, and the person who received a family allowance does not qualify or waives his or her right to the CRP; and

3. after 1992, he or she did or could qualify for the Canada Child Tax Benefit.

(g) Is there a gender-based distinction?

[74] The foregoing analysis shows that the CRP does not necessarily apply to the parent that had primary caregiving responsibility for the child or children. Because of the definition of "family allowance recipient," eligibility for the CRP is generally limited to parents that, before 1992, qualified for a family allowance or, after 1992, the Canada Child Tax Benefit.

[75] While family allowances and Canada Child Tax Benefit will generally have gone to the parent with primary caregiving responsibility, this is not always the case. Rather, as we shall see, both programs presumptively apply to the female parent, except when the male parent has sole custody of the child or in other limited circumstances. Therefore, the CRP program favours women as a whole.

(i) Family Allowances

[76] The *Family Allowances Act*, R.S.C. 1970, c. F-1, as it read immediately before being repealed, and all subsequent versions of the *Family Allowances Act* are relevant to determining eligibility for the CRP. This particular case concerns the *Family Allowances Act*, S.C. 1973-74, c. 44 and subsequent versions.

[77] The *Family Allowances Act* and the associated regulations favoured women over men. The allowance was normally paid to the mother, the father being eligible to receive the benefit "only in

exceptional and very precise circumstances": *Canada (Attorney General) v. Vincer*, [1988] 1 F.C. 714 at page 720 (C.A.). The allowance was not divisible between the parents. As bluntly put by Pratte J.A. in *Vincer, supra*: "[c]learly [the *Family Allowances Act* and *Regulations*] make a distinction between women and men; clearly they treat women more favourably than men."

[78] The relevant versions of the *Family Allowances Act* paid an allowance to the female parent, except as prescribed by regulations. The relevant provision read as follows:

7. (1) Where payment of a family allowance is approved, the allowance shall, in such manner and at such times as are prescribed, be paid to the female parent, if any, or to such parent or other person or such agency as is authorized by or pursuant to the regulations to receive it.	**7.** (1) Lorsque le versement d'use allocation familiale est approuvé, celle-ci doit être versée, de la manière et aux époques prescrites, au parent de sexe féminin, le case échéant, ou au parent ou autre personne ou à l'organisme qui est autorise à la recevoir par les règlements ou en vertu de ceux-ci.

See *Family Allowances Act*, S.C. 1973-74, c. 44, s. 7(1) and the *Family Allowances Act*, R.S.C. 1985, c. F-1, s. 7(1).

[79] Despite the presumption in favour of female parents, males could receive an allowance in certain limited circumstances. Section 10 of the *Family Allowances Regulations*, SOR/74-30 provided as follows:

10. (1) Where payment of a family allowance is approved, the allowance shall be paid to the male parent where	**10.** (1) Lorsque le versement d'une allocation familiale est approuvé, le versement doit être effectué au parent de sexe masculin

(*a*) there is no female parent; or	*a*) s'il n'y a pas de parent de sexe féminin; ou
(*b*) the female parent and male parent are living separate and apart and the male parent has, in fact, custody of the child.	*b*) si les parents vivent séparés de corps et de biens et que le parent de sexe masculin a, de fait, la garde de l'enfant.
(2)…	(2)…
(3) Notwithstanding subsections (1) and (2), payment of any allowance under this Act may be made to any parent or other suitable person or agency in any case where the Minister, on the basis of information received by him,	(3) Par dérogation aux paragraphes (1) à (2), une allocation prévue par la Loi peut être versée à tel allocataire qualifié -- parent, autre personne ou organisme -- dans tous les cas où le ministre, d'après les renseignements dont il dispose:
(*a*) considers it necessary to do so by reason of infirmity, ill health, improvidence or other reasonable cause of disqualification of the person to whom the allowance is otherwise payable; or	*a*) juge nécessaire de procéder ainsi en raison de l'infirmité, de la maladie, de l'imprévoyance ou de toute autre cause d'incapacité de la personne qui devrait toucher l'allocation; ou
(*b*) considers that other special circumstances or reasonable cause of any kind renders payments to such a person or agency necessary	*b*) juge que d'autres circonstances particulières au qu'une autre raison valable, quelles qu'elles soient, exigent que le paiement soit effectué à cette personne ou à cet organisme.

[80] Under this provision, males with sole custody of the child received the Family Allowance. However, male parents could not qualify if the parents had joint custody of the child: *Canada (Attorney General) v. Sirois* (1988), 90 N.R. 39 (F.C.A.).

[81] Subsequent versions of the *Family Allowances Regulations* kept this provision, but renumbered it from section 10 to section 9: C.R.C., c. 642 (1978).

[82] On December 21, 1989, further amendments to the *Family Allowances Regulations* came into effect. These amendments added additional circumstances when male parents could receive the Family Allowance: SOR/90-35. The new provisions read:

9. (1.1) Where payment of family allowance is approved and both the female parent and male parent declare in writing that the male parent is the parent who is primarily responsible for the day-to-day care of the child, the family allowance may be paid to the male parent.	**9.** (1.1) Lorsque le service d'une allocation familiale est approuvé et que les parents de sexe féminin et de sexe masculin déclarent par écrit que le parent de sexe masculin est celui qui est principalement responsable du soin quotidien de l'enfant, l'allocation familiale peut lui être versée.
(1.2) Where payment of a family allowance is approved and the female parent and the male parent are living separate and apart and have, in fact, joint custody of the child, the family allowance may, on the written request of both the female parent and the male parent, be paid to the male parent.	(1.2) Lorsque le service d'une allocation familiale est approuvé et aue les parents de sexe féminin et de sexe masculin vivent séparés de corps et de biens et qu'ils ont la garde partagée de fait de l'enfant, l'allocation familiale peut, à la demande écrite des deux parents, être versée au parent de sexe masculin.

[83] While expanding eligibility for males, the amendments were intended to preserve females as the primary recipients of family allowances: *Regulatory Impact Analysis Statement*, C. Gaz. II, vol. 124, no. 2, page 202. The new provisions allowed male parents with joint custody to access the

Family Allowance, but only with the female parent's written consent: paragraphs (1.1) and (1.2); *Canada (Attorney General) v. Young*, [1996] F.C.J. No. 212 (T.D.) at paragraph 29.

[84] Thus, males were only eligible for the Family Allowance in limited situations. Prior to the 1989 amendments, the male had to have sole custody of the child, or there needed to be "special circumstances." After the amendments, males with joint custody could also receive payments with written consent of both parents. But women remained the primary recipients throughout the life of the Family Allowance.

(ii) Canada Child Tax Benefit

[85] Like the Family Allowance, the female parent is automatically eligible for the Canada Child Tax Benefit in most circumstances. However, unlike the Family Allowance, the male parent is usually eligible if he is the primary caregiver, even if both parents live with the child.

[86] According to the *Income Tax Act*, the parent that is the "eligible individual" of the "qualified dependent" receives the Canada Child Tax Benefit. Section 122.6 of the *Income Tax Act* defines "eligible individual" as follows:

122.6. "eligible individual" in respect of a qualified dependant at any time means a person who at that time	**122.6.** « particulier admissible » S'agissant, à un moment donné, du particulier admissible à l'égard d'une personne à charge admissible, personne qui répond aux conditions suivantes à ce moment :

(*a*) resides with the qualified dependant,

a) elle réside avec la personne à charge;

(*b*) is a parent of the qualified dependant who

b) elle est la personne — père ou mère de la personne à charge — qui :

(i) is the parent who primarily fulfils the responsibility for the care and upbringing of the qualified dependant and who is not a shared-custody parent in respect of the qualified dependant, or

(i) assume principalement la responsabilité pour le soin et l'éducation de la personne à charge et qui n'est pas un parent ayant la garde partagée à l'égard de celle-ci,

(ii) is a shared-custody parent in respect of the qualified dependant,

(ii) est un parent ayant la garde partagée à l'égard de la personne à charge;

(*c*) is resident in Canada or, where the person is the cohabiting spouse or common-law partner of a person who is deemed under subsection 250(1) to be resident in Canada throughout the taxation year that includes that time, was resident in Canada in any preceding taxation year,

c) elle réside au Canada ou, si elle est l'époux ou conjoint de fait visé d'une personne qui est réputée, par le paragraphe 250(1), résider au Canada tout au long de l'année d'imposition qui comprend ce moment, y a résidé au cours d'une année d'imposition antérieure;

(*d*) is not described in paragraph 149(1)(*a*) or 149(1)(*b*), and

d) elle n'est pas visée aux alinéas 149(1) *a*) ou *b*);

(*e*) is, or whose cohabiting spouse or common-law partner is, a Canadian citizen or a person who

e) elle est, ou son époux ou conjoint de fait visé est, soit citoyen canadien, soit :

(i) is a permanent resident within the meaning of subsection 2(1) of the *Immigration and Refugee Protection Act* ,

(i) résident permanent au sens du paragraphe 2(1) de la *Loi sur l'immigration et la protection des réfugiés* ,

(ii) is a temporary resident within the meaning of the *Immigration and Refugee Protection Act* , who was resident in Canada throughout the 18 month period preceding that time, or

(ii) résident temporaire ou titulaire d'un permis de séjour temporaire visés par la *Loi sur l'immigration et la protection des réfugiés* ayant résidé au Canada durant la période de 18 mois précédant ce moment,

(iii) is a protected person within the meaning of the *Immigration and Refugee Protection Act*,

(iii) personne protégée au titre de la *Loi sur l'immigration et la protection des réfugiés*.

(iv) was determined before that time to be a member of a class defined in the *Humanitarian Designated Classes Regulations* made under the *Immigration Act*,

(iv) quelqu'un qui fait partie d'une catégorie précisée dans *le Règlement sur les catégories d'immigrants* précisées pour des motifs d'ordre humanitaire pris en application de la *Loi sur l'immigration*.

and for the purposes of this definition,

Pour l'application de la présente définition :

(*f*) where the qualified dependant resides with the dependant's female parent, the parent who primarily fulfils the responsibility for the care and upbringing of the qualified dependant is presumed to be the female parent,

f) si la personne à charge réside avec sa mère, la personne qui assume principalement la responsabilité pour le soin et l'éducation de la personne à charge est présumée être la mère ;

(*g*) the presumption referred to in paragraph 122.6 eligible individual (*f*) does not apply in prescribed circumstances, and

g) la présomption visée à l'alinéa *f*) ne s'applique pas dans les circonstances prévues par règlement ;

(*h*) prescribed factors shall be considered in determining what constitutes care and upbringing;

h) les critère prévus par règlement serviront à déterminer en quoi consistent le soin et l'éducation d'une personne.

[87] Under this provision, the "eligible individual" is the parent who "primarily fulfils the responsibility for the care and upbringing of the qualified dependant": subsection 122.6(*a*).

[88] Subsection 122.6(*f*) presumes that the female parent is the primary caregiver when she is living with the child. Therefore, when both parents reside with the child, the female parent benefits from a presumption that she is the "eligible individual" and collects the Canada Child Tax Benefit.

[89] However, this presumption is rebuttable: *Canada (Attorney General) v. Campbell*, 2005 FCA 420 at paragraph 24; *Cabot v. Canada*, [1998] 4 C.T.C. 2893 at paragraph 24 (T.C.C.). Subsection 122.6(*h*) of the definition authorizes factors for determining which parent is the primary caregiver. These factors are set out in section 6302 of the *Income Tax Regulations*, C.R.C., c. 945.

[90] Furthermore, the presumption can be excluded by regulations made under subsection 122.6(*g*) of the definition. For example, the presumption does not apply when the woman advises the Minister in writing that the man is the primary caregiver, nor, when competing claims are made, there are two female parents or the parents reside in different locations: *Income Tax Regulations* at subsection 6301(*a*), (*c*) and (*d*). In these circumstances, the male parent may claim the Canada Child Tax Benefit without documentation: *Campbell, supra*, at paragraph 12.

[91] Evidence given by an expert called by the Attorney General confirms that this constitutes another administrative barrier to access to the CRP encountered by male child caregivers, caused by

the operation of an administrative policy that works in conjunction with the above-mentioned provisions of the *Income Tax Regulations*:

> Under the Canada Child Tax Benefit (CCTB) Program, only the CCTB eligible individual can benefit from the CRP as specified under subparagraphs 77(1)(c) and (d) of the CPP Regulations. However, in cases where male contributors stayed at home to raise the child(ren) but the female parent received the CCTB, the Canada Revenue Agency (CRA) has agreed to provide a letter confirming the fact that if the male parent had applied for the CCTB according to section 122.6 of the *Income Tax Act* at the time when he was at home caring for the children, he would have been determined to have been the eligible individual for the dates indicated.
>
> Before CRA issues this letter they must receive a signed declaration from the female parent, who had been identified as the "eligible" recipient of the CCTB, attesting to the fact that the other parent was, in fact, the primary caregiver of the child(ren). The female parent must specify the period of time the other parent was the primary caregiver of the child(ren). All other periods would remain with the parent who had originally been identified as the "eligible" CCTC recipient.

(Exhibit "B" to the Affidavit of Natasha Rende, at page 14; Respondent's Record, at page 513.) The requirement that the female parent sign a declaration before the male can benefit is an administrative obstacle to the male parent that female parents do not encounter. And it might be quite an onerous obstacle where the marriage has broken down and the parents are not cooperating with each other.

[92] Therefore, the *Income Tax Act* does not preclude male parents from claiming the Canada Child Tax Benefit. However, because of the presumption in subsection 122.6(*f*), male parents can face an additional administrative burden to qualify when both the parents live with the child. Thus, the preceding analysis shows that it is easier for women to qualify for the Canada Child Tax Benefit as compared to men, and thus gain access to the CRP.

(h) The interaction of the CRP and DUPE provisions

[93] Mr. Runchey focuses upon the interaction of the CRP and DUPE provisions on credit splits.

[94] As already discussed, the DUPE provisions equalize the couple's credits for each year of cohabitation. This effectively transfers credits from the spouse with more pension credits in each year to the spouse with fewer credits. The CRP operates differently. Rather than granting additional credits to the "child rearing" parent, it permits him or her to simply "drop out" the qualifying years from his or her pension calculation.

[95] In some situations, both the DUPE provisions and CRP will apply in the same year. That is, the spouses' pension credits are equalized for the same year that the "child-rearing" parent subsequently drops out of his or her pension calculation.

[96] When this happens, Mr. Runchey says that the CRP and DUPE provisions interact in a way that is unfair to the "working parent." This is because the working parent effectively transfers credits to the child-rearing parent even though the child-rearing parent gets no benefit from these credits (*i.e.* because the period is "dropped out" of the child-rearing parent's pension calculation). In his view, it is "unfair and unjust" to reduce the working parent's pension credits when the other parent does not need them.

[97] Mr. Runchey points out, with justification as the above analysis shows, that men suffer this "unfairness" more often than women. As already discussed, female parents have disproportionate access to the CRP. As a result, when the DUPE and CRP overlap, the male parent is likely to be the one transferring credits that the other parent does not need.

[98] This effect is widely understood. One government document, marked "draft" and dated November 30, 2004, states that in this situation "the potential use of [the transferred] credits is lost to both partners, and the point of the credit split itself is lost": Respondent's Record, Vol. 1, page 230. See also *National Post* article dated April 30, 1999, Respondent's Record, Vol. 1, page 241.

[99] In light of the foregoing analysis, I conclude that the interaction of the CRP and DUPE provisions does create a gender-based distinction, a qualitatively subtle one, but nonetheless a distinction. Women do have disproportionate access to the CRP and this can affect the credit split under DUPE to the detriment of men in certain circumstances.

I. Is there discrimination?

(1) General principles

[100] The second part of the test – whether there is discrimination – is key. It relates directly to the purpose of section 15 of the Charter. Section 15 of the Charter is not about preventing or redressing mere distinctions.

[101] For this reason, not all distinctions created by legislation offend section 15: *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143 at page 182; *Law*, *supra* at paragraph 51; *Ermineskin Indian Band and Nation v. Canada*, 2009 SCC 9, [2009] 1 S.C.R. 222 at paragraph 188. Put another way, "equality is not about sameness and s. 15(1) does not protect a right to identical treatment": *Withler*, *supra* at paragraph 31.

[102] Rather, section 15 is aimed at combating discrimination, which is to be understood as perpetuating disadvantage and stereotyping: *Kapp*, *supra* at paragraph 24; *Withler*, *supra* at paragraph 37.

[103] A classic statement of discrimination is found in *Andrews*, *supra* at pages 174-75:

> …discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed.

[104] Subsequent cases have attempted in various ways to explain that discrimination is more than just treating someone differently. There is a personal "sting" to discrimination. When present, it assaults the dignity of the individual by labelling the individual, for reasons outside of his or her

control, as being unworthy of equal respect, equal membership or equal belonging in Canadian society: *Law*, *supra* at paragraphs 47-53.

[105] In *Withler*, *supra* the Supreme Court described two different types of discrimination. These types, their characteristics, and the types of evidence that are relevant to them, are as follows:

(1) *The perpetuation of prejudice or disadvantage to members of a group on the basis of personal characteristics identified in the enumerated and analogous grounds.* In *Withler*, the Supreme Court observed that perpetuation of disadvantage typically occurs when the law treats a historically disadvantaged group in a way that exacerbates the situation of the group: see, for example, the comments of Wilson J. in *R. v. Turpin*, [1989] 1 S.C.R. 1296 at page 1333 (section 15 as a tool to remedy or prevent "discrimination against groups suffering social, political and legal disadvantage in our society"). The sort of evidence that is relevant to this type of discrimination includes "evidence that goes to establishing a claimant's historical position of disadvantage or to demonstrating existing prejudice against the claimant group, as well as the nature of the interest that is affected": *Withler*, at paragraph 38.

(2) *The creation or perpetuation of disadvantage based on a stereotype that does not correspond to the actual circumstances and characteristics of the claimant or claimant group.* Here, historic disadvantage is not required. As explained in *Withler*, "a group that has not historically experienced disadvantage may find itself the

> subject of conduct that, if permitted to continue, would create a discriminatory impact on members of the group…by stereotyping members of the group" (at paragraph 36). The sort of evidence to be considered here includes "whether there is correspondence with the claimants' actual characteristics or circumstances," and "the ameliorative effect of the law on others and the multiplicity of interests [the law] attempts to balance": *Withler*, at paragraph 38.

[106] Under either type of discrimination, "the analysis is [to be] contextual, not formalistic," involving "looking at the circumstances" of members of the group and "the negative impact of the law on them." The emphasis is on the "actual situation of the group and the potential of the impugned law to worsen their situation." See *Withler, supra* at paragraphs 37 to 40.

[107] The Court must "look at the reality of the situation", avoiding an "overly technical approach" or "a narrow, formalistic analytical approach": *Auton (Guardian ad litem of) v. British Columbia (A.G.)*, 2004 SCC 78, [2004] 3 S.C.R. 657 at paragraph 25.

[108] The overall objective of the analysis is to protect and promote substantive equality. In *Withler, supra* the Supreme Court described substantive equality as follows (at paragraph 39):

> Both the inquiries into perpetuation of disadvantage and stereotyping are directed to ascertaining whether the law violates the requirement of substantive equality. Substantive equality, unlike formal equality, rejects the mere presence or absence of difference as an answer to differential treatment. It insists on going behind the facade of similarities and differences. It asks not only what characteristics the different treatment is predicated upon, but also whether those characteristics are relevant considerations under the circumstances. The focus of the inquiry is on the actual impact of the impugned law, taking full account of social, political, economic and

> historical factors concerning the group. The result may be to reveal differential treatment as discriminatory because of prejudicial impact or negative stereotyping. Or it may reveal that differential treatment is required in order to ameliorate the actual situation of the claimant group.

[109] Key in assessing the existence of discrimination is the context. In some contexts, a measure may be discriminatory. In others, not.

[110] An important part of the context, as we shall see, is the nature of the legislation that creates the impugned distinction.

[111] In assessing whether an impugned provision perpetuates disadvantage and stereotype, the Supreme Court has suggested that four contextual factors can be helpful:

(1) Pre-existing disadvantage, stereotyping, prejudice, or vulnerability experienced by the individual or group at issue;

(2) The relationship or correspondence between the ground(s) on which the claim is based and the actual need, capacity, or circumstances of the claimant or others;

(3) The ameliorative effects of the impugned legislation upon a more disadvantaged person or group in society; and

(4) The nature and scope of the interest affected by the impugned legislation.

(See generally *Law*, *supra* paragraphs 62-75; *Kapp*, *supra* paragraph 19.)

[112] The four contextual factors are not to be used as a rigid template in every case. A "rigid template risks consideration of irrelevant matters on the one hand, or overlooking relevant considerations on the other": *Withler*, *supra* at paragraph 66; see also *Kapp*, *supra*. Rather, the four contextual factors are to be used as a helpful guide in the analysis.

[113] By its nature, benefits legislation, such as the Plan, has ameliorative objectives and attempts to address competing needs of different groups. This context means that distinctions arising under benefits legislation will not lightly be found to be discriminatory. This is seen in a number of Supreme Court pronouncements.

[114] To this effect, in *Withler*, *supra*, the Supreme Court held that social benefits legislation will be found to be discriminatory in only a narrow range of circumstances (at paragraph 67):

> In cases involving a pension benefits program such as this case, the contextual inquiry at the second step of the s. 15(1) analysis will typically focus on the purpose of the provision that is alleged to discriminate, viewed in the broader context of the scheme as a whole. Whom did the legislature intend to benefit and why? In determining whether the distinction perpetuates prejudice or stereotypes a particular group, the court will take into account the fact that such programs are designed to benefit a number of different groups and necessarily draw lines on factors like age. It will ask whether the lines drawn are generally appropriate, having regard to the circumstances of the persons impacted and the objects of the scheme. Perfect correspondence between a benefit program and the actual needs and circumstances of the claimant group is not required. Allocation of resources and particular policy goals that the legislature may be seeking to achieve may also be considered.

[115] The interaction of rules may give rise to distinctions that are not discriminatory, unless there is "singling out":

> It is not open to Parliament or a legislature to enact a law whose policy objectives and provisions single out a disadvantaged group for inferior treatment: *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203. On the other hand, a legislative choice not to accord a particular benefit absent demonstration of discriminatory purpose, policy or effect does not offend this principle and does not give rise to s. 15(1) review. This Court has repeatedly held that the legislature is under no obligation to create a particular benefit. It is free to target the social programs it wishes to fund as a matter of public policy, provided the benefit itself is not conferred in a discriminatory manner….

(*Auton, supra* at paragraph 41.)

[116] In *Auton, supra*, the Supreme Court stressed that the purpose of the legislative scheme requires close examination in the discrimination analysis (at paragraph 42):

> Where stereotyping of persons belonging to a group is at issue, assessing whether a statutory definition that excludes a group is discriminatory, as opposed to being the legitimate exercise of legislative power in defining a benefit, involves consideration of the purpose of the legislative scheme which confers the benefit and the overall needs it seeks to meet. If a benefit program excludes a particular group in a way that undercuts the overall purpose of the program, then it is likely to be discriminatory: it amounts to an arbitrary exclusion of a particular group. If, on the other hand, the exclusion is consistent with the overarching purpose and scheme of the legislation, it is unlikely to be discriminatory. Thus, the question is whether the excluded benefit is one that falls within the general scheme of benefits and needs which the legislative scheme is intended to address.

(2) Applying the general principles: is the gender-based distinction created by the interaction between the CRP and DUPE provisions discriminatory?

[117] I answer this question in the negative. The distinction created by the interaction between the CRP and DUPE provisions is not discriminatory, based upon the general principles set out above.

[118] There are several reasons for this conclusion. To some extent these reasons overlap, interrelate and build upon each other.

– I –

[119] An important part of the context is the nature of the legislation in this case, the Plan.

[120] The Plan does not implement a social welfare scheme. Rather,

> The [Plan] was designed to provide social insurance for Canadians who experience a loss of earnings due to retirement, disability, or the death of a wage-earning spouse or parent. It is not a social welfare scheme. It is a contributory plan in which Parliament has defined both the benefits and the terms of entitlement, including the level and duration of an applicant's financial contribution.

(*Granovsky v. Canada (Minister of Employment and Immigration*), 2000 SCC 28, [2000] 1 S.C.R. 703 at paragraph 9.)

[121] The Plan is a contributory-based compulsory social insurance plan created by federal statute and administered by the federal government. Benefits are paid from direct contributions of

employees, employers, and monies earned from the investment of excess contributory funds. It covers virtually all employed and self-employed persons in Canada.

[122] It is not supposed to meet everyone's needs, but rather to provide partial earnings-replacement in certain circumstances. It is designed to be supplemented by private pension plans, private savings, or both.

[123] The Plan is a limited scheme that provides for six types of benefits, many of which are related to a contributor's insured earnings: retirement pension, disability pension, death benefit, survivor's pension, disabled contributor's child benefit and benefit for the child of a deceased contributor. It may be that for some applicants, a different set of rules or conditions for certain benefits might be preferable but the Plan cannot meet the needs of all contributors in every conceivable circumstance, nor is it designed to do that.

[124] Under the Plan, contributions do not always translate into benefits. Instead, the Plan achieves various objectives, sometimes conflicting or overlapping objectives, in a forest of detailed eligibility and qualification rules. Perhaps, in light of the analysis of the provisions above, jungle, not forest, would be more apt.

[125] Seen in light of its nature, purpose and design, the fact that the Plan treats men differently from women in the interaction of the CRP and DUPE provisions is best seen as a consequence of an intricate scheme with many eligibility and qualification rules, rather than a singling out of men for

different treatment, as was described in *Auton, supra*. For some contributors, a different set of rules or conditions might be preferable but the Plan cannot meet the preferences of every contributor in every conceivable circumstance.

[126] Further, the nature of the distinction between men and women in this case must be considered. The detailed analysis, above, shows that the interaction between the CRP and the DUPE provisions creates a detrimental effect on only some men in only certain circumstances. Not all men are affected. This underscores the finding, above, that the Plan does not "single out" men in an invidious way. Rather, the detrimental effect on a limited class of men seems to be a consequence of the interaction of complicated rules within a complicated scheme in support of a Plan that is *not* a general social welfare scheme available to all in every circumstance.

– II –

[127] The analysis of the CRP and DUPE provisions and how they interact shows that a finding of discrimination and the awarding of relief in this case would disrupt the nature and structure of the Plan. Indeed, it would transform it from a limited contributory scheme into a general social welfare scheme designed to achieve perfect equality between men and women in all circumstances. Section 15 is to prevent and redress discrimination. It is not to alter fundamentally government programs designed for limited purposes, absent the sort of invidious characteristics described in *Auton, supra*.

– III –

[128] An important element of the context to be considered is that in benefits schemes such as the Plan, Parliament is allocating scarce resources among competing groups in pursuit of various legitimate policies. In this regard, the Plan is not unlike the *Income Tax Act*. In such legislation, Parliament allocates resources and benefits based on many factors, including demographic characteristics, in order to ameliorate adverse conditions or promote certain behaviour.

[129] The use of demographic characteristics in a context such as this cannot be seen as telling an affected group that it is somehow less worthy of worth, membership or belonging in Canadian society or placing a label on it to that effect. Demographic characteristics are simply used as a way of advancing legitimate government policy or fashioning eligibility or qualification criteria so that scarce resources can be allocated among competing groups.

[130] There may be a case where demographic criteria effectively single out a particular group for invidious treatment in a manner that has the sort of sting associated with discrimination, but, as mentioned above, in this case there is no such singling out.

– IV –

[131] An important element in the context relevant to the section 15 analysis is the ameliorative nature of the CRP and the DUPE provisions.

[132] The CRP is aimed at accommodating and assisting those who stay at home because of child rearing responsibilities. The evidence before us suggests that most who do so are women and they often suffer economically as a result: Respondent's Record, vol. 2, pages 354-357, 509-510. Mr. Runchey did not contest this either by way of evidence or submissions.

[133] This evidence shows that those who stay at home rearing children usually earn little or no income. Since pension benefits are calculated in part on the basis of a person's average earnings, the person primarily responsible for child rearing – usually a woman – is at risk of receiving lower pension benefits. Seen against the backdrop of this evidence, the CRP is ameliorative: in certain circumstances it excludes from the calculation of benefits years of little or no income due to child rearing.

[134] The DUPE provisions are aimed at transferring pension credits from the high income-earning spouse to the low earning spouse upon divorce or separation. In many families, the low earning spouse is a woman: Respondent's Record, vol. 2, pages 355, 357. Evidence before us described the disadvantage faced by divorced or separated women:

> Even if a divorced or separated woman enters paid employment, the pension she earns may be adversely affected by the years she spent in the home as a housewife. Pensions are related to earnings and her earnings prior to, during and after marriage are averaged over the number of years she could have been employed, and this includes the time she remained in the home. While some provisions is made for reducing the number of years to be averaged, there will be cases in which a divorced or separated woman will be unable to work a sufficient number of years to make up for a non-earning period as a housewife.

(Report of the Royal Commission on the Status of Women in Canada, Government of Canada, 1970 at page 38; Respondent's Record, page 510.)

[135] Further evidence comes from a special committee examining pension reform in 1983. The committee supported credit splitting, as was ultimately done in the DUPE provisions. It identified the principles behind credit splitting as follows:

- Those who care for others do work that entities them to a pension in their own right.
- Those homemakers in greatest need are those with little attachment to the labour force, because they have no opportunity to receive any pension of their own apart from Old Age Security and the Guaranteed Income Supplement.
- Marriage is a partnership of equals. It creates obligations on each spouse to provide for the needs of the other. It also creates claims; each spouse has claims on the resources of the family unit. In particular, marriage creates obligations to provide for both partners during their retirement years.

(Report of the Parliamentary Task Force on Pension Reform, House of Commons, 1983, page 75; Respondent's Record, page 511.)

[136] Accordingly, the DUPE provisions can be said to be aimed at assisting women who, as a class, suffer economic disadvantage compared to men when they leave the workforce to rear children.

[137] The fact that the interaction of the CRP and DUPE provisions can benefit women in certain circumstances cannot be said to be anomalous. It is consistent with the ameliorative nature of the CRP and DUPE programs.

[138] In the words of *Withler*, quoted above, we are to assess "whether the lines drawn are generally appropriate, having regard to the circumstances of the persons impacted and the objects of the scheme" and we need not insist on "perfect correspondence between a benefit program and the actual needs and circumstances of the claimant group." In my view, the lines drawn are generally appropriate. And in the words of *Auton*, quoted above, the Plan does not impact men "in a way that undercuts the overall purpose of the program," nor does it single out men in any invidious way.

– V –

[139] Indeed, the fact that the CRP and DUPE provisions are ameliorative in nature may have other consequences for the section 15 analysis. To the extent that they are aimed at ameliorating or remedying the condition of women, a subsection 15(1) enumerated group, they may be said to be a "law, program or activity" within the meaning of subsection 15(2). In such a case, they cannot be found to be discriminatory under subsection 15(1): *Kapp*, *supra* at paragraph 41; *Lovelace v. Ontario*, 2000 SCC 37, [2000] 1 S.C.R. 950 at paragraphs 84-87.

– VI –

[140] Repeatedly, the Supreme Court has emphasized in its jurisprudence, some of which is cited above, that there need not be "perfect correspondence" in legislation such as this between the ground or grounds on which the claim is based and the actual need, capacity, or circumstances of the claimant. A significant deviation from correspondence, however, might attract special scrutiny in the discrimination analysis.

[141] On the record before us, it cannot be said that there is a significant deviation from perfect correspondence. Further, it is discernable only after much analysis of multiple provisions that serve different ameliorative purposes. Finally, there is no evidence in the record before this Court regarding how many men who had primary responsibility for children were denied the family allowance or Canada Child Tax Benefit, and to what extent.

– VII –

[142] As noted above, in *Auton* at paragraph 41, the Supreme Court held that "a legislative choice not to accord a particular benefit absent demonstration of discriminatory purpose, policy or effect…does not give rise to s. 15(1) review." Mr. Runchey has not placed any evidence before this Court upon which it can prove a discriminatory purpose, policy or effect in the sense of a desire to treat men as not being of equal worth, membership or belonging in Canadian society.

– VIII –

[143] There is an absence of evidence in the record regarding whether men in this context have suffered any historical disadvantage, prejudice or stereotyping.

[144] This is not a situation where the Court can take judicial notice. Mr. Runchey had to prove that men in this situation are in a state of adversity and that the provisions in issue perpetuate that state. Alternatively, Mr. Runchey had to prove that the provisions in issue here create prejudice or stereotyping. He has done neither.

– IX –

[145] Part of the context to be considered is the nature and scope of the interest affected by the impugned legislation. Here, the men's interest affected is purely economic – the size of the benefit they receive after a credit split.

[146] This underscores the nature of the distinction here as being a natural consequence of a partial income replacement scheme – an economic supplement – with very detailed and complicated eligibility and qualification rules, rather than some comment on the worth, membership or belonging of men in Canadian society.

[147] In light of the foregoing, I find that there is no discrimination, and, thus, no infringement of subsection 15(1) of the Charter.

J. The remaining issues

[148] The Attorney General submitted that the CRP and DUPE provisions could be saved under section 1 of the Charter in the event that any infringement of the Charter was shown. The Attorney General also requested that any declaration of rights or declaration of invalidity be suspended for a period of eighteen months so that the Government of Canada could take steps to address the matter.

[149] Given that there is no infringement of the Charter, it is not necessary to consider these issues.

K. Disposition

[150] I would dismiss the application for judicial review. At the hearing of this matter, the Attorney General stated that it would not be seeking costs of the application. Therefore, I would award no costs.

"David Stratas"
J.A.

“I agree
Eleanor R. Dawson J.A.”

“I agree
Johanne Gauthier J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-393-11
AN APPLICATION FOR JUDICIAL REVIEW OF THE PENSIONS APPEAL BOARD DATED SEPTEMBER 8, 2011 NO. CP 27301	
STYLE OF CAUSE:	Doug Runchey v. Attorney General of Canada and Judith Wilson
PLACE OF HEARING:	Vancouver, British Columbia
DATE OF HEARING:	June 21, 2012
REASONS FOR JUDGMENT BY:	Stratas J.A.
CONCURRED IN BY:	Dawson and Gauthier J.A.
DATED:	January 24, 2013

APPEARANCES:

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