



SUPREME COURT OF CANADA

CITATION: Withler v. Canada (Attorney General), 2011 SCC 12,
[2011] 1 S.C.R. 396

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BETWEEN:

Hazel Ruth Withler and Joan Helen Fitzsimonds

Appellants

and

Attorney General of Canada

Respondent

- and -

Attorney General of Ontario and

Women's Legal Education and Action Fund

Interveners

CORAM: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron,
Rothstein and Cromwell JJ.

JOINT REASONS FOR JUDGMENT: McLachlin C.J. and Abella J. (Binnie, LeBel, Deschamps,
(paras. 1 to 84) Fish, Charron, Rothstein and Cromwell JJ. concurring)

Withler v. Canada (Attorney General), 2011 SCC 12, [2011] 1 S.C.R. 396

**Hazel Ruth Withler and
Joan Helen Fitzsimonds**

Appellants

v.

Attorney General of Canada

Respondent

and

**Attorney General of Ontario and
Women's Legal Education and Action Fund**

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Indexed as: Withler v. Canada (Attorney General)

2011 SCC 12

File No.: 33039.

2010: March 17; 2011: March 4.

Present: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Constitutional law — Charter of Rights — Right to equality — Discrimination based on age — Federal pension legislation reducing supplementary death benefit by 10 percent for each year by which plan member exceeds prescribed ages — Surviving spouses receiving reduced supplementary death benefits — Whether reduction provisions discriminate against surviving spouses — Canadian Charter of Rights and Freedoms, ss. 1, 15(1) — Canadian Forces Superannuation Act, R.S.C. 1985, c. C-17, s. 60(1) — Public Service Superannuation Act, R.S.C. 1985, c. P-36, s. 47(1).

Constitutional law — Charter of Rights — Right to equality — Contextual analysis — Whether use of comparator groups is appropriate in analysis of equality rights — Canadian Charter of Rights and Freedoms, s. 15(1).

The appellants, representative plaintiffs in two class actions, are widows whose federal supplementary death benefits were reduced because of the age of their husbands at the time of death. The *Public Service Superannuation Act* and the *Canadian Forces Superannuation Act* provide federal civil servants and members of

the Canadian Forces, and their families, with a suite of work-related benefits, including a “supplementary death benefit”, a lump sum payment made to a plan member’s designated beneficiary upon the member’s death. The supplementary death benefit is reduced by 10 percent for each year by which the plan member exceeded a prescribed age.

The appellants contend that those provisions are of no force and effect because they infringe s. 15(1) of the *Charter* and are not justified under s. 1. They seek a monetary judgment in the amount by which their supplementary death benefits were reduced. The trial judge dismissed both class actions and the British Columbia Court of Appeal upheld the trial decision.

Held: The appeal should be dismissed.

The central and sustained thrust of the Court’s s. 15(1) jurisprudence has been the need for a substantive contextual approach and a corresponding repudiation of a formalistic “treat likes alike” approach. An analysis based on formal comparison between the claimant group and a “similarly situated” group promotes formal, not substantive equality. A “mirror comparator group” analysis may become a search for sameness, may shortcut the substantive equality analysis and may be difficult to apply. While equality is inherently comparative and comparison plays a role throughout the s. 15(1) analysis, a mirror comparator approach can fail to identify — and may, indeed, thwart the identification of — the discrimination at which s. 15 is

aimed. What is required is an approach that takes account of the full context of the claimant group's situation, the actual impact of the law on that situation, and whether the impugned law perpetuates disadvantage to or negative stereotypes about that group.

The jurisprudence establishes a two-part test for assessing a s. 15(1) claim: (1) Does the law create a distinction that is based on an enumerated or analogous ground? and (2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping? The claimant must establish that he or she has been denied a benefit that others are granted or carries a burden that others do not, by reason of a personal characteristic that falls within the enumerated or analogous grounds of s. 15(1). It is not necessary to pinpoint a mirror comparator group. Provided that the claimant establishes a distinction based on one or more of the enumerated or analogous grounds, the claim should proceed to the second step of the analysis. This provides the flexibility required to accommodate claims based on intersecting grounds of discrimination. At the second step, the question is whether, having regard to all relevant factors, the distinction the law makes between the claimant group and others discriminates by perpetuating disadvantage or prejudice to the claimant group, or by stereotyping it.

Since the Reduction Provisions at issue in this case are age-related, they constitute an obvious distinction on an enumerated ground, but, because the age-based rules are, overall, effective in meeting the actual needs of the claimants and in

achieving important goals such as ensuring that retiree benefits are meaningful, they do not violate s. 15(1). Pension benefit schemes are designed to benefit a number of groups in different circumstances and with different interests, and each element of the scheme must be considered in relation to the suite of benefits provided. As a broad-based scheme meant to cover the competing interests of various age groups, distinctions on general criteria, including age, had to be made to address the members' different needs over the course of their working lives. When the supplementary death benefit is considered in the context of the other pensions and benefits to which the surviving spouses are entitled, it is clear that its purpose corresponds to their needs. For younger employees, it acts as group life insurance by insuring against unexpected death at a time when the surviving spouse would not be protected by a pension. For older employees, whose spouses' long-term income security is guaranteed by the survivor's pension coupled with the public service's health and dental plans, it is intended to assist with the costs of last illness and death.

It is unnecessary to consider justification under s. 1.

Cases Cited

Applied: *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143; *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497; **explained:** *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, 2004 SCC 78, [2004] 3 S.C.R. 657; *Hodge v. Canada (Minister of Human*

Resources Development), 2004 SCC 65, [2004] 3 S.C.R. 357; **referred to:** *R. v. Kapp*, 2008 SCC 41, [2008] 2 S.C.R. 483; *Ermineskin Indian Band and Nation v. Canada*, 2009 SCC 9, [2009] 1 S.C.R. 222; *A.C. v. Manitoba (Director of Child and Family Services)*, 2009 SCC 30, [2009] 2 S.C.R. 181; *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567; *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203; *R. v. Turpin*, [1989] 1 S.C.R. 1296; *Haig v. Canada (Chief Electoral Officer)*, [1993] 2 S.C.R. 995; *Lovelace v. Ontario*, 2000 SCC 37, [2000] 1 S.C.R. 950; *Gosselin v. Quebec (Attorney General)*, 2002 SCC 84, [2002] 4 S.C.R. 429; *Nova Scotia (Workers' Compensation Board) v. Martin*, 2003 SCC 54, [2003] 2 S.C.R. 504; *M. v. H.*, [1999] 2 S.C.R. 3; *Granovsky v. Canada (Minister of Employment and Immigration)*, 2000 SCC 28, [2000] 1 S.C.R. 703.

Statutes and Regulations Cited

Canada Pension Plan, R.S.C. 1985, c. C-8.

Canadian Charter of Rights and Freedoms, ss. 1, 15.

Canadian Forces Superannuation Act, R.S.C. 1985, c. C-17, s. 60(1).

Canadian Forces Superannuation Regulations, C.R.C., c. 396, s. 52.

Public Service Superannuation Act, R.S.C. 1985, c. P-36, s. 47(1).

Supplementary Death Benefit Regulations, C.R.C., c. 1360, ss. 15, 16.

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APPEAL from a judgment of the British Columbia Court of Appeal (Rowles, Ryan and Newbury JJ.A.), 2008 BCCA 539, 87 B.C.L.R. (4th) 197, 302 D.L.R. (4th) 193, 183 C.R.R. (2d) 301, 72 C.C.P.B. 161, 263 B.C.A.C. 257, 443 W.A.C. 257, [2009] 3 W.W.R. 628, [2008] B.C.J. No. 2507 (QL), 2008 CarswellBC 2750, upholding a decision of Garson J., 2006 BCSC 101, 137 C.R.R. (2d) 224, 51 C.C.P.B. 19, [2006] B.C.J. No. 101 (QL), 2006 CarswellBC 86. Appeal dismissed.

Joseph J. Arvey, Q.C., John C. Kleefeld and Elin R. S. Sigurdson, for the appellants.

Donald J. Rennie, Sharlene Telles-Langdon and Dale Yurka, for the respondent.

Robert E. Charney and Matthew Horner, for the intervener the Attorney General of Ontario.

Daphne Gilbert, Joanna Radbord and Joanna Birenbaum, for the intervener the Women's Legal Education and Action Fund.

The judgment of the Court was delivered by

THE CHIEF JUSTICE AND ABELLA J. —

I. Introduction

[1] The plaintiffs are widows whose federal supplementary death benefits were reduced because of the age of their husbands at the time of death. They argue that the legislation reducing their benefits discriminates on the basis of age, violating the equality guarantee in s. 15(1) of the *Canadian Charter of Rights and Freedoms*. We agree with the trial judge and the majority of the Court of Appeal that it does not.

[2] To resolve this appeal, we must consider comparison and the role of “mirror” comparator groups under s. 15(1), an issue that divided the courts below. In our view, the central issue in this and other s. 15(1) cases is whether the impugned law violates the animating norm of s. 15(1), substantive equality: *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143. To determine whether the law violates this norm, the matter must be considered in the full context of the case, including the law’s real impact on the claimants and members of the group to which they belong. The central s. 15(1) concern is substantive, not formal, equality. A formal equality analysis based on mirror comparator groups can be detrimental to the analysis. Care must be taken to avoid converting the inquiry into substantive equality into a formalistic and arbitrary search for the “proper” comparator group. At the end of the day there is only one question: Does the challenged law violate the norm of substantive equality in s. 15(1) of the *Charter*?

[3] Where, as here, the impugned distinction is the denial of a benefit that is part of a statutory benefit scheme that applies to a large number of people, the discrimination assessment must focus on the object of the measure alleged to be discriminatory in the context of the broader legislative scheme, taking into account the universe of potential beneficiaries. The question is whether, having regard to all relevant factors, the impugned measure perpetuates disadvantage or stereotypes the claimant group, contrary to s. 15(1) of the *Charter*.

II. The Legislation

[4] The appellants challenge the constitutionality of benefit provisions of the *Public Service Superannuation Act*, R.S.C. 1985, c. P-36, and the *Canadian Forces Superannuation Act*, R.S.C. 1985, c. C-17. These two statutes provide federal civil servants and members of the Canadian Forces, and their families with a suite of work-related benefits both during employment and after retirement, including a package of survivor benefits provided to the surviving spouse and dependants of a plan member after his or her death.

[5] The package of survivor benefits offered under both the *Public Service Superannuation Act* and the *Canadian Forces Superannuation Act* includes a “supplementary death benefit”. This benefit is akin to life insurance. It provides for a lump sum payment to be made to a plan member’s designated beneficiary at the time of the member’s death. For younger plan members, the purpose of the supplementary death benefit is to insure against unexpected death at a time when the deceased member’s surviving spouse would be unprotected by a pension or entitled to limited pension funds. For older members, the purpose of the supplementary death benefit is to assist surviving spouses with the costs of the plan member’s last illness and death. This death benefit is not intended to be a long-term income stream for the spouses of older plan members.

[6] Under both Acts, the amount of the supplementary death benefit is equal to twice the plan member’s salary at the time of death or termination of employment. Each Act, however, contains “Reduction Provisions” which take effect when the plan

member reaches a certain age. For civil servants, the value of the supplementary death benefit is reduced by 10 percent for every year by which the plan member exceeds the age of 65 (*Public Service Superannuation Act*, s. 47(1)). For members of the armed forces, the value of the benefit is reduced by 10 percent for every year by which the plan member exceeds age 60 (*Canadian Forces Superannuation Act*, s. 60(1)). It is these Reduction Provisions that are at issue in this appeal.

[7] Most federal civil servants and members of the armed forces must participate in the supplementary death benefit plan while they are employed, and may, at their option, participate in the plan after retirement. The average retirement age of civil servants is 58 or 59, and the average retirement age for members of the armed forces is 45, after 25 years of service.

[8] The supplementary death benefit is only one part of a package of survivor benefits available under the *Public Service Superannuation Act* and the *Canadian Forces Superannuation Act*. The package of survivor benefits also includes a survivor's pension (a defined benefit plan, indexed, adjusted annually and backed by the solvency of the federal government, paying 50 percent of the plan member's unreduced pension); a health care plan (which reimburses 80 percent of a surviving spouse's extended health care expenses); a dental care plan (which covers a tariff amount for a surviving spouse's dental procedures); a children's allowance (which pays a plan member's surviving spouse one fifth of the member's pension if the plan member died leaving minor children); and a student's allowance (payable to the

children aged 18 to 25 of a deceased plan member while they are enrolled in full-time post-secondary education).

[9] Participants in the civil service and Canadian Forces pension and benefits plans, along with their spouses, are also eligible for benefits available to all Canadians, such as those provided for under the *Canada Pension Plan*, R.S.C. 1985, c. C-8.

III. The Claims

[10] The appellants, Hazel Ruth Withler and Joan Helen Fitzsimonds, are the representative plaintiffs in two class actions. They contend that the Reduction Provisions discriminate on the basis of age contrary to s. 15(1) of the *Charter* and are not justified under s. 1. They seek a declaration that the Reduction Provisions infringe s. 15(1) of the *Charter* and are therefore of no force or effect. They also seek a monetary judgment for the amount by which their supplementary death benefits were reduced by virtue of the Reduction Provisions. According to actuarial evidence presented at trial, the monetary judgments sought amounted to \$2,308,000,000 in the civil service action and \$285,000,000 in the armed forces action.

[11] The class in each action is comprised of the surviving spouses of former federal government employees or members of the Canadian Forces who died between April 17, 1985 (when s. 15 of the *Charter* came into force) and November 2, 2001

(when the class proceedings were certified). Each class member received a reduced supplementary death benefit by operation of the Reduction Provisions.

[12] Within each plaintiff class, the level of economic well-being varies. Each class member, however, receives a survivor's pension and each is ineligible for the federal government's guaranteed income supplement because his or her income is too high.

IV. The Arguments

[13] Ms. Withler and Ms. Fitzsimonds argue that the Reduction Provisions create distinctions and impose disadvantages based on age or grounds analogous to age, contrary to s. 15(1) of the *Charter*, which provides:

Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

[14] The claimants acknowledge that statutory age-based distinctions may be valid if the age chosen is reasonably related to the statute's legislative goal. They argue, however, that the Reduction Provisions are wholly unrelated to any legitimate legislative goal. It is arbitrary, they contend, to reduce the supplementary death benefit on the basis of age because most, if not all, persons over 65 (or 60) need the

supplementary death benefit, and that need increases over time. The claimants contend that the Reduction Provisions are based on an uninformed and inaccurate stereotype that the older one gets the less one needs financial assistance and that the Reduction Provisions do not correspond to their actual needs and circumstances. Finally, the claimants submit that the Reduction Provisions discriminate against them on the basis of age because they perpetuate the belief that as a person ages, he or she becomes less deserving of the benefit or worthy of the state's care and concern.

[15] The Attorney General of Canada submits that there is no evidence that the age-based distinction set out in the Reduction Provisions perpetuates historical disadvantage, prejudice or stereotyping. The supplementary death benefit is, in its view, merely one component of a suite of benefits. The entire suite operates in tandem to provide a reasonable measure of protection for plan members and their families. The failure of the plans to meet the needs of all members at all times, the Attorney General submits, does not render the Reduction Provisions discriminatory.

V. Judicial History

[16] The trial judge, Garson J., dismissed both class actions (2006 BCSC 101, 137 C.R.R. (2d) 224). She found it difficult to identify an appropriate comparator group, because the claimant classes were composed of many different people in many different situations and economic circumstances. She reluctantly accepted the comparator group proposed by the claimants — civil servants and members of the

armed forces who received an unreduced supplementary death benefit — as the basis for the analysis.

[17] Garson J. went on to apply a contextual discrimination analysis, and concluded that the Reduction Provisions were not discriminatory:

The design of the whole benefit package is a balancing exercise that takes into account the whole population of civil servants, and members of the armed forces. It is integrated with all the other benefits and also balances the interests of the public to ensure that the civil service is treated equitably but not over generously. [para. 155]

[18] When the Reduction Provisions were considered in relation to the entire benefit plan provided for by the *Public Service Superannuation Act* and the *Canadian Forces Superannuation Act*, they corresponded to the claimants' needs and circumstances. The legislative scheme as a whole accounted for each claimant's need for a continued income stream, as well as for life insurance coverage at the time of his or her spouse's death. The plans did not bear any of the hallmarks of discrimination and did not demean the claimants' dignity.

[19] On appeal to the British Columbia Court of Appeal, Ryan J.A. (Newbury J.A. concurring) upheld the trial decision (2008 BCCA 539, 87 B.C.L.R. (4th) 197). Like the trial judge, they saw the real issue as whether, viewing the case in its entire context, discrimination under s. 15(1) of the *Charter* had been established.

[20] Ryan J.A. rejected the claimants' submission that the appropriate comparator group should be narrowed to consist only of surviving spouses who received both an unreduced supplementary death benefit and a survivor's pension. Narrowing the comparator group in this way would, in Ryan J.A.'s view, deprive the court of the ability to fully analyse whether the impugned legislative distinction was discriminatory. The proper comparator group was, as the trial judge had found, all recipients of an unreduced supplementary death benefit.

[21] Ryan J.A. held that the trial judge had properly considered the discrimination claim with reference to the benefits package as a whole and correctly concluded that discrimination had not been made out. Finding no error of fact or law in the trial judge's reasoning, she dismissed the appeal, commenting:

This case demonstrates the difficulty that arises when one attempts to isolate for criticism a single aspect of a comprehensive insurance and pension package designed to benefit an employee's different needs over the course of his or her working life. . . . The comprehensive plan, while not a perfect fit for each individual, did not meet the hallmarks of discrimination given that it was a broad-based scheme meant to cover the competing interests of the various age groups covered by the plan. [para. 181]

[22] Rowles J.A., dissenting, would have allowed the appeal. In her view, the trial judge erred by failing to fully state and consistently apply the appropriate comparator group. Rowles J.A. accepted the claimants' submission that, pursuant to the mirror comparator approach, the appropriate comparator group was comprised of surviving spouses who both received an unreduced supplementary death benefit and

were eligible for a survivor's pension. She cautioned, at paras. 58-59, that a "contextual analysis" did not invite a "broad, generalized examination of the facts in evidence", but rather entailed a "directed inquiry" focussed through the application of the four factors set out in *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497.

[23] Rowles J.A. concluded that seniors suffer from disadvantage and vulnerability based on their economic well-being, and that the Reduction Provisions did not account for the claimants' actual circumstances. The claimants clearly had greater needs than the younger surviving spouses, whose benefits were unreduced. Concluding that the Reduction Provisions served no ameliorative purpose and the interest affected was significant, Rowles J.A. held that a reasonable person in the claimants' circumstances would feel ignored and devalued on account of the Reduction Provisions. This amounted to an affront to the claimants' dignity and, consequently, a breach of s. 15(1) of the *Charter*, which was not justified under s. 1.

VI. The Issues

[24] The first issue is whether the appellants lack standing because their claim is based on the age of the deceased plan members rather than their own ages.

[25] The second and main issue is whether the Reduction Provisions discriminate against the claimants. The appeal, viewed broadly, calls for clarification

of the role of mirror comparator groups and comparison in the s. 15(1) analysis. More precisely, the issue is how an analysis under s. 15(1) is to proceed where the impugned law is part of a wide-reaching legislative scheme of government benefits.

VII. Analysis

A. *Standing*

[26] The Attorney General of Canada has asserted throughout that the appellants lack standing because their claim is based on the age of the deceased plan members rather than their own age. Only those who suffer discrimination may bring a s. 15 claim, and in this case, it is the age of the plan member, not the surviving spouse, which is the basis for differential treatment. The Attorney General submits that this is not an instance where the legislation would be insulated from *Charter* scrutiny by denying the appellants standing. A plan member who has reached the age at which he or she is affected by the Reduction Provisions would have standing to bring a challenge.

[27] The majority of the Court of Appeal chose not to address standing, given its conclusion on the substantive issue. Because we agree with the trial judge and the majority of the Court of Appeal that there was no discrimination, it is technically unnecessary to decide the standing issue. That said, we find the trial judge's reasoning generally persuasive.

[28] Garson J. concluded, “in this specific case, where the target of the impugned provision is the plaintiff and it is the plaintiff who suffers the discrimination associated with her spouse’s age, the plaintiff should have standing” (para. 92). The result is a just one, because in reality it is the plaintiffs who experience the impact of the Reduction Provisions. The Attorney General’s approach ignores the fact that, as Garson J. found, the impugned provisions are targeted at benefits payable to the plan members’ beneficiaries. As will be seen, it is the interests of the surviving spouses at various stages of the plan member’s working life that the benefit provisions attempt to address. No one is more directly affected by the Reduction Provisions than the surviving spouses. It is highly unlikely that the challenge would be mounted by the plan members themselves. There is also, as the trial judge found, likely to be a strong correlation between the age of the plan member and the age of the surviving spouse. In these circumstances, the trial judge was correct to grant the appellants standing.

B. *The Equality Claim*

(1) Substantive Equality: Overview

[29] Discrimination was defined by McIntyre J. in *Andrews*, as follows:

. . . 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. [pp. 174-75]

(See also *R. v. Kapp*, 2008 SCC 41, [2008] 2 S.C.R. 483, at para. 17; *Ermineskin Indian Band and Nation v. Canada*, 2009 SCC 9, [2009] 1 S.C.R. 222, at para. 188; *A.C. v. Manitoba (Director of Child and Family Services)*, 2009 SCC 30, [2009] 2 S.C.R. 181, at para. 109; *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567, at para. 106.)

[30] The jurisprudence establishes a two-part test for assessing a s. 15(1) claim: (1) Does the law create a distinction based on an enumerated or analogous ground? (2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping? (See *Kapp*, at para. 17.)

[31] The two steps reflect the fact that not all distinctions are, in and of themselves, contrary to s. 15(1) of the *Charter* (*Andrews; Law; Ermineskin Indian Band*, at para. 188). Equality is not about sameness and s. 15(1) does not protect a right to identical treatment. Rather, it protects every person's equal right to be free from discrimination. Accordingly, in order to establish a violation of s. 15(1), a person "must show not only that he or she is not receiving equal treatment before and under the law or that the law has a differential impact on him or her in the protection or benefit accorded by law but, in addition, must show that the legislative impact of

the law is discriminatory” (*Andrews*, at p. 182; *Ermineskin Indian Band*, at para. 188; *Kapp*, at para. 28).

[32] McIntyre J. viewed discrimination through the lens of two concepts: (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; and (2) stereotyping on the basis of these grounds that results in a decision that does not correspond to a claimant’s or group’s actual circumstances and characteristics (*Andrews*; *Kapp*, at para. 18).

[33] The first step in the s. 15(1) analysis ensures that the courts address only those distinctions that were intended to be prohibited by the *Charter*. In *Andrews*, it was held that s. 15(1) protected only against distinctions made on the basis of the enumerated grounds or grounds analogous to them. An analogous ground is one based on “a personal characteristic that is immutable or changeable only at unacceptable cost to personal identity”: *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203, at para. 13. Grounds including sexual orientation, marital status, and citizenship have been recognized as analogous grounds of discrimination.

[34] However, a distinction based on an enumerated or analogous ground is not by itself sufficient to found a violation of s. 15(1). At the second step, it must be

shown that the law has a discriminatory impact in terms of prejudicing or stereotyping in the sense expressed in *Andrews*.

[35] The first way that substantive inequality, or discrimination, may be established is by showing that the impugned law, in purpose or effect, perpetuates prejudice and disadvantage to members of a group on the basis of personal characteristics within s. 15(1). Perpetuation of disadvantage typically occurs when the law treats a historically disadvantaged group in a way that exacerbates the situation of the group. Thus judges have noted that historic disadvantage is often linked to s. 15 discrimination. In *R. v. Turpin*, [1989] 1 S.C.R. 1296, for example, Wilson J. identified the purposes of s. 15 as “remedying or preventing discrimination against groups suffering social, political and legal disadvantage in our society” (p. 1333). See also *Haig v. Canada (Chief Electoral Officer)*, [1993] 2 S.C.R. 995, at pp. 1043-44; *Andrews*, at pp. 151-53, *per* Wilson J.; *Law*, at paras. 40-51.

[36] The second way that substantive inequality may be established is by showing that the disadvantage imposed by the law is based on a stereotype that does not correspond to the actual circumstances and characteristics of the claimant or claimant group. Typically, such stereotyping results in perpetuation of prejudice and disadvantage. However, it is conceivable that 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. If it is shown that the impugned law imposes a disadvantage by stereotyping members of the

group, s. 15 may be found to be violated even in the absence of proof of historic disadvantage.

[37] Whether the s. 15 analysis focusses on perpetuating disadvantage or stereotyping, the analysis involves looking at the circumstances of members of the group and the negative impact of the law on them. The analysis is contextual, not formalistic, grounded in the actual situation of the group and the potential of the impugned law to worsen their situation.

[38] Without attempting to limit the factors that may be useful in assessing a claim of discrimination, it can be said that where the discriminatory effect is said to be the perpetuation of disadvantage or prejudice, 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, will be considered. Where the claim is that a law is based on stereotyped views of the claimant group, the issue will be whether there is correspondence with the claimants' actual characteristics or circumstances. Where the impugned law is part of a larger benefits scheme, as it is here, the ameliorative effect of the law on others and the multiplicity of interests it attempts to balance will also colour the discrimination analysis.

[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.

[40] It follows that a formal analysis based on comparison between the claimant group and a “similarly situated” group, does not assure a result that captures the wrong to which s. 15(1) is directed — the elimination from the law of measures that impose or perpetuate substantial inequality. What is required is not formal comparison with a selected mirror comparator group, but an approach that looks at the full context, including the situation of the claimant group and whether the impact of the impugned law is to perpetuate disadvantage or negative stereotypes about that group.

(2) The Role of Comparison Under Section 15: The Jurisprudence

[41] As McIntyre J. explained in *Andrews*, equality is a comparative concept, the condition of which may “only be attained or discerned by comparison with the condition of others in the social and political setting in which the question arises” (p. 164). However, McIntyre J. went on to state that formal comparison based on the logic of treating likes alike is not the goal of s. 15(1). What s. 15(1) requires is substantive, not formal equality.

[42] Comparison, he explained, must be approached with caution; not all differences in treatment entail inequality, and identical treatment may produce “serious inequality” (p. 164). For that reason, McIntyre J. rejected a formalistic “treat likes alike” approach to equality under s. 15(1), contrasting substantive equality with formal equality.

[43] The Court’s s. 15(1) jurisprudence has consistently affirmed that the s. 15(1) inquiry must focus on substantive equality and must consider all context relevant to the claim at hand. The central and sustained thrust of the Court’s s. 15(1) jurisprudence has been the need for a substantive contextual approach and a corresponding repudiation of a formalistic “treat likes alike” approach. This is evident from *Andrews*, through *Law*, to *Kapp*. When the Court has made comparisons with a similarly situated group, those comparisons have generally been accompanied by insistence that a valid s. 15(1) analysis must consider the full context of the claimant group’s situation and the actual impact of the law on that situation. In *Lovelace v. Ontario*, 2000 SCC 37, [2000] 1 S.C.R. 950, for example, Iacobucci J.,

for the Court, having found “that the whole context of the circumstances warrants a refinement in the identification of the comparator group”, stated: “I find that the s. 15(1) inquiry must proceed on the basis of comparing band and non-band aboriginal communities” (para. 64). However, he emphasized that “we must ask whether the impugned law, program or activity has a purpose or effect that is substantively discriminatory” (para. 53).

[44] Against this background, we turn to the s. 15 cases. It is not necessary to canvass every decision. The thrust of the evolving jurisprudence on comparison and the use of mirror comparator groups is revealed by looking at a few pivotal cases.

[45] The decisions in the decade that followed *Andrews* viewed comparison as an essential facet of s. 15, without proposing a rigid conception of how it should be approached. The jurisprudence was reviewed in *Law*. While *Law* referred to “relevant comparators”, it also recognized that discrimination was the central concern and that the focus should be on the nature of the scheme and the appropriateness of the impugned distinctions having regard to the purpose of the scheme and the situation of the claimant. In the end, it was found that discrimination was negated by the purpose of the scheme of addressing long-term financial needs and ameliorating the situation of older spouses, and the particular circumstances of the claimant’s situation as a younger spouse. The claimant neither suffered disadvantage which the pension scheme perpetuated, nor did the distinctions it drew between the younger and the older spouses stereotype or stigmatize young persons. As a result, discrimination

was not made out. The Court in *Law* resolved the issue not by a formalistic comparison between particular groups, but by the contextual factors relevant to the case — the nature of the legislation and the situation of the claimant.

[46] In *Gosselin v. Quebec (Attorney General)*, 2002 SCC 84, [2002] 4 S.C.R. 429, a case concerned with assisted living benefits for younger Québécois, the analysis again focussed on the impact of the impugned law on the claimant group. In applying the s. 15(1) test, the majority stated:

. . . precisely, the question is whether a reasonable person in Ms. Gosselin's position would, having regard to all the circumstances and the context of the legislation, conclude that the Regulation in purpose or effect treated welfare recipients under 30 as less worthy of respect than those 30 and over, marginalizing them on the basis of their youth. [Emphasis added; para. 28.]

[47] *Law*, *Gosselin* and cases like them, while accepting that comparison is at the heart of a s. 15(1) equality analysis, emphasized a contextual inquiry into whether the impugned law perpetuated disadvantage or negative stereotyping.

[48] As for mirror comparator groups, Binnie J., for the Court, summarized the problem in using them in *Hodge v. Canada (Minister of Human Resources Development)*, 2004 SCC 65, [2004] 3 S.C.R. 357, at para. 18:

As is evident, a misidentification of the proper comparator group at the outset can doom the outcome of the whole s. 15(1) analysis. In fact, the seemingly straightforward selection of a comparator group has proven to

be the Achilles' heel in a variety of recent cases, including *Granovsky*, [2000 SCC 28, [2000] 1 S.C.R. 703], *Lovelace, supra*, and *Nova Scotia (Workers' Compensation Board) v. Martin*, [2003] 2 S.C.R. 504, 2003 SCC 54. In other cases, the selection has sparked a good deal of judicial debate, as in *M. v. H.*, [1999] 2 S.C.R. 3, and *Gosselin, supra*. The correctness of the "comparator group" contended for by a claimant has thus been an important battleground in much of the s. 15(1) jurisprudence

The issue in *Hodge* was whether a pension scheme that provided benefits to surviving married spouses (the suggested comparator group) discriminated by denying benefits to separated common law spouses.

[49] Binnie J. stated that the comparator group is one that "mirrors the characteristics of the claimant (or claimant group) relevant to the benefit or advantage sought" except for the personal characteristic on which the claim was based. He concluded that the claimant group was not separated common law spouses, because the claimant was not a common law spouse at the time of the contributor's death: at the date of death she "was not in any sort of relationship at all with the deceased", but was merely a "former common law spouse". Binnie J. went on to justify this result in terms of the purpose of the legislation: "The purpose of the survivor's pension is to deal with the financial dependency of a couple who at the date of death are in a relationship with mutual legal rights and obligations." The claim was dismissed at the first step of the s. 15 analysis because the distinction drawn by the law was not based on the analogous ground of marital status. (See paras. 23, 40, 45 and 47.)

[50] The Court again applied a mirror comparator group approach in *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, 2004 SCC 78, [2004] 3 S.C.R. 657. The claim was that the British Columbia government's failure to fund a particular program for autistic children violated s. 15. The Court, *per* McLachlin C.J., held that applying the relevant criteria, the appropriate comparison was with a non-disabled person, or a person suffering from a non-mental disability, who seeks and receives funding for a non-core therapy that is important to her health, is emergent, and has only recently been recognized. On these comparisons, no distinction based on disability was established. Again, the claim was dismissed at the first stage.

[51] While the Court in *Hodge* and *Auton* applied a mirror comparator group approach, both judgments emphasized the need to consider contextual factors, in particular the correspondence between the purpose of the legislative scheme and the situation of the claimant group. And both asserted the need, in the final analysis, for the substantive inquiry mandated by *Andrews*. As McLachlin C.J. stated in *Auton*:

Whatever framework is used, an overly technical approach to s. 15(1) is to be avoided. In *Andrews, supra*, at pp. 168-69, McIntyre J. warned against adopting a narrow, formalistic analytical approach, and stressed the need to look at equality issues substantively and contextually. The Court must look at the reality of the situation and assess whether there has been discriminatory treatment having regard to the purpose of s. 15(1), which is to prevent the perpetuation of pre-existing disadvantage through unequal treatment. [para. 25]

[52] The next key decision was in *Kapp*. While the case turned on s. 15(2), the Court, *per* McLachlin C.J. and Abella J., took the opportunity to summarize the law on s. 15(1) discrimination. Significantly, a mirror comparator group approach was not assigned a role in the analysis. After stressing the importance of the substantive equality approach mandated in *Andrews*, the justices wrote:

While acknowledging that equality is an inherently comparative concept . . . , McIntyre J. [in *Andrews*] warned against a sterile similarly situated test focussed on treating “likes” alike. An insistence on substantive equality has remained central to the Court’s approach to equality claims. [para. 15]

[53] After discussing *Law* and the contextual factors there proposed, McLachlin C.J. and Abella J. continued:

The analysis in a particular case, as *Law* itself recognizes, more usefully focusses on the factors that identify impact amounting to discrimination. The four factors cited in *Law* are based on and relate to the identification in *Andrews* of perpetuation of disadvantage and stereotyping as the primary indicators of discrimination. [Emphasis added; para. 23.]

[54] In summary, the theme underlying virtually all of this Court’s s. 15 decisions is that the Court in the final analysis must ask whether, having regard to all relevant contextual factors, including the nature and purpose of the impugned legislation in relation to the claimant’s situation, the impugned distinction discriminates by perpetuating the group’s disadvantage or by stereotyping the group.

(3) Concerns With the Use of Mirror Comparator Groups

[55] This brings us to the critical jurisprudential issue in this appeal. Basing the s. 15(1) analysis on a comparison between the claimant group and a mirror comparator group has been criticized on the basis that a comparator group approach to s. 15(1) may substitute a formal “treat likes alike” analysis for the substantive equality analysis that has from the beginning been the focus of s. 15(1) jurisprudence. We agree with the concerns.

[56] One concern is that the use of mirror comparator groups as an analytical tool may mean that the definition of the comparator group determines the analysis and the outcome (Peter Hogg, *Constitutional Law of Canada* (5th ed. Supp.), vol. 2, at p. 55-34). As a result, factors going to discrimination — whether the distinction creates a disadvantage or perpetuates prejudice or stereotyping — may be eliminated or marginalized.

[57] Another concern is that the focus on a precisely corresponding, or “like” comparator group, becomes a search for sameness, rather than a search for disadvantage, again occluding the real issue — whether the law disadvantages the claimant or perpetuates a stigmatized view of the claimant.

[58] A further concern is that allowing a mirror comparator group to determine the outcome overlooks the fact that a claimant may be impacted by many interwoven

grounds of discrimination. Confining the analysis to a rigid comparison between the claimant and a group that mirrors it except for one characteristic may fail to account for more nuanced experiences of discrimination. Thus, in *Lovelace*, the Court contemplated multidimensional comparisons, pointing out that “locating the relevant comparison groups requires an examination of the subject-matter of the law, program or activity and its effects, as well as a full appreciation of the context” (para. 62). See also *Law*, at para. 57, and *Granovsky v. Canada (Minister of Employment and Immigration)*, 2000 SCC 28, [2000] 1 S.C.R. 703, at para. 47. An individual’s or a group’s experience of discrimination may not be discernible with reference to just one prohibited ground of discrimination, but only in reference to a conflux of factors, any one of which taken alone might not be sufficiently revelatory of how keenly the denial of a benefit or the imposition of a burden is felt (Daphne Gilbert, “Time to Regroup: Rethinking Section 15 of the *Charter*” (2003), 48 *McGill L.J.* 627; Nitya Iyer, “Categorical Denials: Equality Rights and the Shaping of Social Identity” (1993), 19 *Queen’s L.J.* 179; Dianne Pothier, “Connecting Grounds of Discrimination to Real People’s Real Experiences” (2001), 13 *C.J.W.L.* 37).

[59] Finally, it has been argued that finding the “right” comparator group places an unfair burden on claimants (Daphne Gilbert and Diana Majury, “Critical Comparisons: The Supreme Court of Canada Dooms Section 15” (2006), 24 *Windsor Y.B. Access Just.* 111, at p. 138). First, finding a mirror group may be impossible, as the essence of an individual’s or group’s equality claim may be that, in light of their

distinct needs and circumstances, no one is like them for the purposes of comparison.

As Margot Young warns:

If there is no counterpart in the experience or profile of those closer to the centre, the marginalization and dispossession of our most unequal will be missed. These cases will seem simple individual instances of personal failure, oddity or happenstance.

(“Blissed Out: Section 15 at Twenty”, in Sheila McIntyre and Sanda Rodgers, eds., *Diminishing Returns: Inequality and the Canadian Charter of Rights and Freedoms* (2006), 45, at p. 63)

Second, it may be difficult to decide what characteristics must be “mirrored”.

Rational people may differ on what characteristics are relevant, as this case illustrates.

The concern with claimants spending time and money in a pre-trial search for the appropriate comparator group is exacerbated by the possibility that trial judges may or may not accept the claimant’s choice, and compounded by the fact that appeal courts may adopt a different comparator group later in the proceedings. When the appropriate comparator group is redefined by a court, the claimant may be unable to establish his or her claim because the record was created in anticipation of comparison with a different group.

[60] In summary, a mirror comparator group analysis may fail to capture substantive inequality, may become a search for sameness, may shortcut the second stage of the substantive equality analysis, and may be difficult to apply. In all these ways, such an approach may fail to identify — and, indeed, thwart the identification

of — the discrimination at which s. 15 is aimed. The question then is how comparison figures in the s. 15(1) analysis.

(4) The Proper Approach to Comparison

[61] The substantive equality analysis under s. 15(1), as discussed earlier, proceeds in two stages: (1) Does the law create a distinction based on an enumerated or analogous ground? and (2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping? (See *Kapp*, at para. 17.) Comparison plays a role throughout the analysis.

[62] The role of comparison at the first step is to establish a “distinction”. Inherent in the word “distinction” is the idea that the claimant is treated differently than others. Comparison is thus engaged, in that the claimant asserts that he or she is denied a benefit that others are granted or carries a burden that others do not, by reason of a personal characteristic that falls within the enumerated or analogous grounds of s. 15(1).

[63] It is unnecessary to pinpoint a particular group that precisely corresponds to the claimant group except for the personal characteristic or characteristics alleged to ground the discrimination. Provided that the claimant establishes a distinction based on one or more enumerated or analogous grounds, the claim should proceed to the second step of the analysis. This provides the flexibility required to accommodate

claims based on intersecting grounds of discrimination. It also avoids the problem of eliminating claims at the outset because no precisely corresponding group can be posited.

[64] In some cases, identifying the distinction will be relatively straightforward, because a law will, on its face, make a distinction on the basis of an enumerated or analogous ground (direct discrimination). This will often occur in cases involving government benefits, as in *Law, Lovelace* and *Hodge*. In other cases, establishing the distinction will be more difficult, because what is alleged is indirect discrimination: that although the law purports to treat everyone the same, it has a disproportionately negative impact on a group or individual that can be identified by factors relating to enumerated or analogous grounds. Thus in *Granovsky*, the Court noted that “[t]he CPP contribution requirements, which on their face applied the same set of rules to all contributors, operated unequally in their effect on persons who want to work but whose disabilities prevent them from working” (para. 43). In that kind of case, the claimant will have more work to do at the first step. Historical or sociological disadvantage may assist in demonstrating that the law imposes a burden or denies a benefit to the claimant that is not imposed on or denied to others. The focus will be on the effect of the law and the situation of the claimant group.

[65] The analysis at the second step is an inquiry into whether the law works substantive inequality, by perpetuating disadvantage or prejudice, or by stereotyping in a way that does not correspond to actual characteristics or circumstances. At this

step, comparison may bolster the contextual understanding of a claimant's place within a legislative scheme and society at large, and thus help to determine whether the impugned law or decision perpetuates disadvantage or stereotyping. The probative value of comparative evidence, viewed in this contextual sense, will depend on the circumstances. (See Andrea Wright, "Formulaic Comparisons: Stopping the *Charter* at the Statutory Human Rights Gate", in Fay Faraday, Margaret Denike and M. Kate Stephenson, eds., *Making Equality Rights Real: Securing Substantive Equality under the Charter* (2006), 409, at p. 432; Sophia Reibetanz Moreau, "Equality Rights and the Relevance of Comparator Groups" (2006), 5 *J.L. & Equality* 81; Pothier.)

[66] The particular contextual factors relevant to the substantive equality inquiry at the second step will vary with the nature of the case. A rigid template risks consideration of irrelevant matters on the one hand, or overlooking relevant considerations on the other: *Kapp*. Factors such as those developed in *Law* — pre-existing disadvantage, correspondence with actual characteristics, impact on other groups and the nature of the interest affected — may be helpful. However, they need not be expressly canvassed in every case in order to fully and properly determine whether a particular distinction is discriminatory (see *Ermineskin Indian Band*; *A.C. v. Manitoba*; *Hutterian Brethren*). Just as there will be cases where each and every factor need not be canvassed, so too will there be cases where factors not contemplated in *Law* will be pertinent to the analysis. At the end of the day, all

factors that are relevant to the analysis should be considered. As Wilson J. said in *Turpin*,

In determining whether there is discrimination on grounds relating to the personal characteristics of the individual or group, it is important to look not only at the impugned legislation which has created a distinction that violates the right to equality but also to the larger social, political and legal context. [p. 1331]

[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.

C. *Application to the Facts*

- (1) Step One: An Adverse Distinction Based on an Enumerated or Analogous Ground

[68] The first step in the s. 15(1) analysis is to determine whether the law, on its face or in its apparent effect, creates a distinction on the basis of an enumerated or analogous ground. In this case the question is whether the pension schemes at issue deny a benefit to the claimants that others receive. The answer to this question is clear in this case.

[69] The Reduction Provisions reduce the supplementary death benefit payable to the surviving spouses of plan members over either 60 or 65 years of age. Surviving spouses of plan members who die before they reach the prescribed ages are not subject to the Reduction Provisions. This age-related reduction in pension legislation constitutes a distinction for purposes of s. 15(1): *Law*. It is obvious that a distinction based on an enumerated or analogous ground is established.

(2) Step Two: Substantive Inequality

[70] The issue is whether the Reduction Provisions that reduce the supplementary death benefit for the beneficiaries of older deceased members violate s. 15(1)'s protection of substantive equality. The question is whether, having regard to the relevant context, the impugned law perpetuates disadvantage or prejudice, or stereotypes the claimant group.

[71] In approaching this question, it is useful to identify at the outset the relevant contextual factors. As discussed above, a central consideration is the

purpose of the impugned provision in the context of the broader pension scheme. It is in the nature of a pension benefit scheme that it is designed to benefit a number of groups in different circumstances and with different interests. The question is whether the lines drawn are generally appropriate, having regard to the circumstances of the groups impacted and the objects of the scheme. Perfect correspondence is not required. Allocation of resources and legislative policy goals may be matters to consider. The question is whether, having regard to these and any other relevant factors, the distinction the law makes between the claimant group and others discriminates by perpetuating disadvantage or prejudice to the claimant group, or by stereotyping the group.

[72] Writing before *Kapp* was decided, the trial judge in this case, Garson J., addressed the four contextual factors of *Law*, focussing mainly on pre-existing disadvantage or stereotyping, correspondence to actual circumstances and the nature and impact of the pension scheme at issue. Eschewing a formalistic analysis, she conducted a full contextual inquiry into whether these factors established discrimination in the sense discussed in *Andrews* and succeeding cases. While she reluctantly accepted the comparator group preferred by the claimants, she based the bulk of her analysis on a contextual examination of the relevant circumstances and the purpose and impact of the legislative scheme. Garson J.'s sense that comparing the claimants to just one other comparator group would be inadequate, is consistent with the view that where the impugned law is a broad-reaching benefits scheme,

comparison with multiple other groups who together compose the universe of potential beneficiaries will be necessary.

[73] Garson J. concluded that, when the Reduction Provisions were considered in relation to the entire benefit plan provided by the statutes, they corresponded to the claimants' needs and circumstances. She found that the legislative scheme as a whole accounted for each claimant's need for a continued income stream and life insurance coverage at the time of a spouse's death. In reaching this conclusion, she took into account that it is in the nature of a pension benefits scheme that it must balance different claimants' interests, and cannot be perfectly tailored to every individual's personal circumstances. The reality is that such schemes of necessity must make distinctions on general criteria, including age. The question is whether the criteria used, viewed contextually in light of the general needs of the group involved, perpetuate prejudice or disadvantage or negatively stereotype the individuals. As Ryan J.A. stated in the Court of Appeal:

This case demonstrates the difficulty that arises when one attempts to isolate for criticism a single aspect of a comprehensive insurance and pension package designed to benefit an employee's different needs over the course of his or her working life. . . . The comprehensive plan, while not a perfect fit for each individual, did not meet the hallmarks of discrimination given that it was a broad-based scheme meant to cover the competing interests of the various age groups covered by the plan. [para. 181]

[74] Garson J. correctly considered the supplementary death benefit in relation to other benefits that formed part of the comprehensive benefit scheme provided for

by the *Public Service Superannuation Act* and the *Canadian Forces Superannuation Act* to determine whether the claimants had been denied an equal benefit of the law because the provisions failed to account for the claimants' actual circumstances. Isolating the Reduction Provisions from their legislative context would have led to an artificial understanding of whether an equal benefit of the law had, in fact, been denied. As its name presages, the supplementary death benefit is "supplementary" to other benefits. Consideration of the supplementary death benefit in isolation from the other benefits offered under the *Public Service Superannuation Act* and the *Canadian Forces Superannuation Act* would create a decontextualized, and therefore unrealistic, analysis. The plan is a benefit plan, in which people pool resources for the benefit of all. Such plans cannot be looked at without considering the full picture of what they do for all members.

[75] Garson J. observed that the costs of last illness and death increase with age, particularly with each decade after 65. While the Public Service Health Care Plan does not cover 100 percent of the surviving spouses' health care costs, the record did not show that the claimant spouses were unable to meet funeral or last illness expenses. Indeed, Garson J. found that the evidence established that the surviving spouses were better equipped than most Canadians to meet their expenses.

[76] Garson J. explained that the government's statutory benefit package must account for the whole population of civil servants, members of the armed forces and their families. Each part of the package is integrated with other benefits and balanced

against the public interest. The package will often target the same people through different stages of their lives and careers. It attempts to meet the specific needs of the beneficiaries at particular moments in their lives. It applies horizontally to a large population with different needs at a given time, and vertically throughout the lives of the members of this population. For younger employees, it acts as group life insurance by insuring against unexpected death at a time when the surviving spouse would not be protected by a pension. For older employees, it is intended to assist with the costs of last illness and death. While it treats different beneficiaries differently depending on where they find themselves on this vertical scale, it is discriminatory neither in purpose nor effect.

[77] Garson J. noted that the supplementary death benefit is not intended to be a long-term stream of income for older surviving spouses. Long-term income security is instead guaranteed by the survivor's pension, which is offered under both the *Public Service Superannuation Act* and the *Canadian Forces Superannuation Act*, coupled with the public service's health and dental plans. Any reduction of the supplementary death benefit paid to the spouses of older employees is therefore offset to some degree by the surviving spouse's survivor's pension. Indeed, each member of the claimant class receives a survivor's pension. When the supplementary death benefit is considered in the context of the other pensions and benefits to which the surviving spouses are entitled, therefore, it is clear that its purpose corresponds (albeit sometimes imperfectly) to the claimants' needs:

There is not perfect correspondence between the fact that costs of last illness increase with age and the reducing nature of the [supplementary death benefit], but when combined with the entire benefit package including pension, dental, prescription, and extended health as well as the other universal government programs, . . . the law does not fail to take into account the plaintiffs' actual situation. [para. 159]

The degree of correspondence between the differential treatment and the claimant group's reality confirms the absence of any negative or invidious stereotyping on the basis of age. The benefit scheme uses age-based rules that, overall, are effective in meeting the actual needs of the claimants, and in achieving important goals such as ensuring that retiree benefits are meaningful.

[78] Having considered the factors relevant to a claim such as this, Garson J. concluded:

. . . the contextual analysis above proves that the Reduction Provisions operate within the context of a much larger employee benefit program which takes into account the need for a continuation of a stream of income and for coverage of medical expenses upon the death of the spouse.

The purpose of the [supplementary death benefit] varies somewhat as the covered employee ages. At the younger ages it provides a limited stream of income for unexpected death where the surviving spouse is not protected by a pension. At older ages the purpose of the [supplementary death benefit] is for the expenses associated with last illness and death. I conclude that the fact that the reduction means those costs may not be fully covered is not discrimination. It does not bear any of the hallmarks of discrimination as set out in the *Law v. Canada* analysis. I do not mean to say I am unsympathetic to the plight of the surviving widows who testified before me. Their loneliness and despair was quite apparent and understandable. The fact that they feel their loneliness and despair was compounded by the receipt of a reduced [supplementary death benefit] does not fulfill the requirement of a claim based on a breach of the

Charter. In my view, it is within the prerogative of Parliament to enact legislation that incorporated a plan of life insurance with the usual hallmarks of employee group insurance taking into account the competing interests of the various age groups and the public interest.

I conclude that the Reduction Provisions do not treat the plaintiffs unfairly, taking into account all of the circumstances of the legislative framework of the impugned law. [paras. 169-71]

[79] She therefore found that “[t]he plaintiffs have failed to prove that, as a group, they suffer from pre-existing disadvantage, stereotyping, prejudice or vulnerability based on their economic well-being” (para. 158). We see no basis on which to fault the trial judge’s contextual analysis and its affirmation by the majority of the Court of Appeal. However, we cannot conclude the matter without considering the dissent of Rowles J.A.

[80] Rowles J.A. understood the authorities as mandating an analysis based on a comparator group that precisely corresponded to the claimant group except for the alleged ground of discrimination, the age of the spouse at the time of death. She accepted the claimants’ submission that the appropriate comparator group, on this mirror comparator approach, was comprised of spouses who received both an unreduced supplementary death benefit and were eligible for a survivor’s pension. On this basis, she concluded that the claimants’ reduced benefit treated them unequally. Rowles J.A. acknowledged that this analysis did not constitute a full contextual analysis of the claimants’ situation under the legislation. However, in her view, such an analysis would have been in error; a “contextual analysis” did not invite a “broad, generalized examination of the facts in evidence”, but rather a

“directed inquiry” (para. 58). This directed inquiry, based on a narrowly conceived comparator group, led to the conclusion that discrimination was established. Rowles J.A. went on to conclude that the Reduction Provisions were discriminatory because they provided reduced benefits to seniors, “exacerbat[ing] their income vulnerability, which is the very harm against which survivor’s pensions are meant to protect” (para. 92).

[81] In our respectful view, Rowles J.A.’s analysis illustrates how reliance on a mirror comparator group can occlude aspects of the full contextual analysis that s. 15(1) requires. It de-emphasized the operation of the Reduction Provisions on the death benefit in the context of the entire plan and lifetime needs of beneficiaries. The result was a failure to fully appreciate that the package of benefits, viewed as a whole and over time, does not impose or perpetuate discrimination. For the reasons discussed earlier, this approach cannot be sustained.

[82] We therefore conclude that the reasons of the trial judge and the majority of the Court of Appeal disclose no error in methodology. Nor, in our view, was there error in their assessment of the evidence.

[83] Since the Reduction Provisions do not violate s. 15(1), it is unnecessary to consider whether any infringement is justified under s. 1.

VIII. Conclusion

[84] We would dismiss the appeal and answer the constitutional questions as follows:

1. Do s. 47(1) of the *Public Service Superannuation Act*, R.S.C. 1985, c. P-36, and ss. 15 and 16 of the *Supplementary Death Benefit Regulations*, C.R.C., c. 1360, infringe s. 15(1) of the *Canadian Charter of Rights and Freedoms*?

No.

2. If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

It is not necessary to answer this question.

3. Do s. 60(1) of the *Canadian Forces Superannuation Act*, R.S.C. 1985, c. C-17, and s. 52 of the *Canadian Forces Superannuation Regulations*, C.R.C., c. 396, infringe s. 15(1) of the *Canadian Charter of Rights and Freedoms*?

No.

4. If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

It is not necessary to answer this question.

Appeal dismissed.

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