Citation: *G. B. v. Minister of Human Resources and Skills Development*, 2014 SSTGDIS 28

Tribunal Number: GT-116567

BETWEEN:

G. B.

Appellant

and

Minister of Human Resources and Skills Development

Respondent

and

J. B.

Added Party

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section
Summary Dismissal

SOCIAL SECURITY TRIBUNAL MEMBER:	Raymond Raphael
MOTION DATE:	August 19, 2014
TYPE OF HEARING:	Teleconference
DATE OF DECISION:	September 26, 2014

PERSONS IN ATTENDANCE

G. B.: Appellant

J. B.: Added Party

Dale Randell: counsel for the Respondent

Aara Sivenius: attending on behalf of the Respondent

DECISION

[1] The Tribunal finds that the Appeal has no reasonable chance of success; therefore, the Respondent's motion to dismiss the constitutional challenge is allowed and the appeal is summarily dismissed.

BACKGROUND AND INTRODUCTION

[2] The Appellant's application for an early *Canada Pension Plan* (CPP) retirement pension was approved by the Respondent on March 11, 2011 with an effective date of July 2011. The notice of approval indicates that the Respondent could not calculate the amount of the Appellant's pension at that time, and that it would be necessary to wait until his pension starts to ensure that all available earnings and contributions are used in the calculation. The Added Party's application for a Division of Unadjusted Pensionable Earnings (DUPE) under the CPP was date stamped by the Respondent on March 22, 2011. In her application, the Added Party indicated that she and the Appellant were married on May 20, 1972, that they separated on July 30, 2007, and that they divorced on October 13, 2007.

[3] On March 28, 2011 the Respondent wrote to the Appellant requesting confirmation that he and the Added Party lived together from May 1972 until July 2007. On March 31, 2011 the Appellant confirmed that he agreed with the indicated period of cohabitation. The Added Party's application for a DUPE was approved by the Respondent on April 7, 2011 for the period from January 1972 until December 2006. On May 1, 2011 the Appellant wrote to the Respondent inquiring as to whether the DUPE would reduce his CPP retirement payment; whether it would reduce his pension payment; whether the Respondent took into account the

Added Party's ability to apply for increased pensionable earnings for the period she was not working while raising their children; and the amount that he will be receiving.

[4] On June 20, 2011 the Appellant wrote to the Respondent that since he had not received a response to his May 1st memo, he was objecting to the DUPE because the Added Party "is entitled to top-ups based on her reduced work time while at home tending the children." On July 8, 2011 the Respondent advised the Appellant that the total monthly amount for his retirement pension was $632.72. On July 18, 2011 the Respondent denied the Appellant's objection to the DUPE.

[5] On August 28, 2011 the Appellant appealed to the Office of the Commissioner of Review Tribunals (OCRT) on the following basis:

- The Child Rearing Provision was not taken into account before the Credit Split was calculated. This results in my pension being reduced from that amount payable had I remained married.

- I was the sole or primary provider for my wife and 3 children until long after they achieved the age of seven, during which time I was also making the maximum CPP contribution.

- The CPP fund nets an unearned benefit by declining my appeal in that the total paid to my ex-wife and I is less than that which would be paid had we remained married.

[6] The Appellant concludes his notice of Appeal by indicating that the Respondent's decision "amounts to discrimination based on marital status and should be reversed." On January 29, 2012, the Appellant filed a notice of appeal on constitutional grounds. On July 9, 2012 he filed his Charter submissions. By notice of motion dated October 31, 2012 the Respondent moved to dismiss the Appellant's Charter challenge as lacking a factual foundation and as being outside the jurisdiction of the OCRT to adjudicate. In view of the decision of the Federal Court of Appeal (FCA) in *Runchey v. Attorney General of Canada et al*, 2013 FCA 16, the Respondent withdrew its jurisdictional objection. The motion proceeded

before this Tribunal on the ground that the Charter challenge had no reasonable chance of success and that it should be summarily dismissed pursuant to subsection 53(1) of the *Department of Employment and Social Development Act* (DESD Act).

[7] The hearing of this motion was by teleconference pursuant to the Notice of Hearing dated July 25, 2014.

THE LAW AND APPLICABLE STATUTORY PROVISIONS

[8] Section 257 of the *Jobs, Growth and Long-term Prosperity Act* of 2012 states that appeals filed with the OCRT before April 1, 2013 and not heard by the OCRT are deemed to have been filed with the General Division of the Social Security Tribunal.

[9] Subsection 53(1) of the *Department of Employment and Social Development Act* (DESD Act) states that the General Division must summarily dismiss an appeal if it is satisfied that the appeal has no reasonable chance of success.

[10] Section 22 of the *Social Security Tribunal Regulations* (Regulations) states that before summarily dismissing an appeal, the General Division must give notice in writing to the Appellant and allow the Appellant a reasonable period of time to make submissions.

[11] Subsection 20 (1) of the Regulations provides that if the constitutional validity, applicability, or operability of any provision of the *Canada Pension Plan* is to be put at issue before the Tribunal, the party raising the issue must file a notice with the Tribunal that sets out the provision that is at issue, and contains any submissions in support of the issue that is raised.

[12] Subsection 3 (1) of the Regulations provides that the Tribunal

(a) must conduct proceedings as informally and quickly as the circumstances and the considerations of fairness and natural justice permit; and

(b) may, if there are special circumstances, vary a provision of these Regulations or dispense a party from compliance with a provision.

[13] Subsection 3 (2) of the Regulations provides that if a question of procedure that is not dealt with by these Regulations arises in a proceeding, the Tribunal must proceed by way of analogy to these Regulations.

[14] The *Canadian Charter of Rights and Freedoms* provides as follows:

> s.15 (1) Every individual is equal before and under the law and has the right to 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.
>
> (2) Subsection (1) does not preclude any law, program or activity that has as its object that amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

[15] Subsection 48 (1) of the CPP provides that subject to subsections (2), (3) and (4), where a retirement pension becomes payable to a contributor his average monthly earnings are an amount calculated by dividing his total pensionable earnings by the total months in his contributory period or by the basic number of contributory months that are in his contributory period, whichever is the greater.

[16] Paragraph 48 (2) (a) provides for a deduction from the contributory period of the total number of months during which a contributor was a family allowance recipient, and during which the contributor's pensionable earnings were less than his average monthly pensionable earnings. Paragraph 48 (2) (a) provides for a deduction from the total pensionable earnings of the aggregate pensionable earnings attributable to the months deducted.

[17] Paragraph 55.1 (1) (a) provides that, in the case of spouses, a division of unadjusted pensionable earnings shall take place following a judgment granting a divorce, on the Minister being informed of the judgment and receiving the prescribed information.

[18] Subsection 55.1 (4) provides that in determining the period for which the unadjusted pensionable earnings of the person subject to a division shall be divided, only those months

during which the two persons cohabitated shall be considered, and, for the purposes of this subsection months during which the two persons cohabitated shall be determined in the prescribed manner.

[19] Subsection 55.1 (5) provides that before a division of unadjusted pensionable earnings is made under this section, or within the prescribed period after such a division is made, the Minister may refuse to make a division or may cancel the division, as the case may be, if the Minister is satisfied that

a) benefits are payable to or in respect of both parties subject to the division; and

b) the amount of both benefits decreased at the time the division was made or would decrease at the time the division was proposed to be made.

PRELIMINARY MATTER

[20] The Tribunal acknowledges that section 22 of the Regulations had not been complied with since no notice in writing was given to the Appellant of the Tribunal's intent to summarily dismiss the appeal. The Tribunal was satisfied, however, that having regard to subsections 3 (1) and (2) of the Regulations this procedural requirement should be dispensed with. The Appellant was served with the Respondent's notice of motion and supporting materials, and he has filed a detailed written response. He also participated in the teleconference and made oral submissions in response to the motion. The Tribunal is satisfied that the requirements of fairness and natural justice have been met, that the Appellant has had ample notice of the motion to dismiss, and that he has had a full opportunity to respond. Accordingly, there are special circumstances justifying dispensing with the requirement of notice in writing from the Tribunal pursuant to section 22 of the Regulations.

ISSUE

[21] The Tribunal must decide whether the appeal has a reasonable chance of success. Subsection 53 (1) of the DESD Act requires that an appeal be summarily dismissed if the Tribunal is satisfied that the appeal has no reasonable chance of success.

[22] While "no reasonable chance of success" has not yet been defined by a Court for the purposes of the DESD Act, guidance can be obtained from Court decisions dealing with similar provisions in other contexts. In the context of a motion to strike a third party notice, the Supreme Court of Canada in *R. v Imperial Tobacco Ltd*, 2011 SCC 42 at paragraph 17, held that a claim will only be struck if it is plain and obvious, assuming the facts pleaded to be true, that the pleadings disclose no cause of action. The Supreme Court of Canada gave further guidance for applying the test when it stated at paragraphs 19 and 20 as follows:

> The power to strike out claims that have no reasonable prospect of success is a valuable housekeeping measure essential to effective and fair litigation. It unclutters the proceedings, weeding out the hopeless claims and ensuring that those that have some chance of success go on to trial.
>
> This promotes two goods — efficiency in the conduct of the litigation and correct results. Striking out claims that have no reasonable prospect of success promotes litigation efficiency, reducing time and cost. The litigants can focus on serious claims, without devoting days and sometimes weeks of evidence and argument to claims that are in any event hopeless. The same applies to judges and juries, whose attention is focused where it should be — on claims that have a reasonable chance success. The efficiency gained by weeding out unmeritorious claims in turn contributes to better justice. The more the evidence and arguments are trained on the real issues, the more likely it is that the trial process will successfully come to grips with the parties' respective positions on those issues and the merits of the case.

[23] This Tribunal has also been guided by the decision of the Federal Court of Appeal in *Fotinov et al v. Royal Bank of Canada*, 2014 FCA 70 which indicates that the test for preliminary dismissal of an appeal is high, that for such a motion to succeed it must be plain and obvious that the appeal has no reasonable chance of success, and that it is clearly bound to fail. The Tribunal has been further guided by the decision of the Trial Division of the Federal Court in *Imperial Cabinet (1980) Co. Ltd v. Her Majesty the Queen in Right of Canada*,[1995] 1 FC 260 which indicates that for there to be a reasonable chance of success, "It must be shown that there is something to the case so that, if sent to trial, there is some realistic prospect that the action will succeed."

RESPONDENT'S SUBMISSIONS ON MOTION

[24] Ms. Randell submitted that pursuant to subsection 53 (1) of the DESD Act the Tribunal must summarily dismiss the appeal if there is no reasonable chance of success. She noted that this provision is mandatory. She referred to the decisions of the Federal Court of Appeal in *Runchey v. Canada (Attorney General)*, 2013 FCA 16 and *Upshall v. Canada (Attorney General)*, 2013 FCA 14 and submitted that these cases represent new developments in the law, which completely resolve the issues raised in the Charter challenge. She stated that the Appellant should be precluded from relitigating identical issues decided by a court, such as the Federal Court of Appeal, which has binding authority over the Tribunal.

[25] Ms. Randell submitted that these two cases settle the law in this area by finding that the interaction of the CRP and DUPE, provisions in so far as they split pension credits with the Appellant's ex-wife for the CRP period, are not discriminatory. These decisions reject the Appellant's position that the CRP should be applied before the DUPE.

[26] Ms. Randell noted that although Justice Stratas in the *Runchey* decision concluded that the interaction of the CRP and DUPE provision "does create a gender-based distinction, a qualitatively subtle one, but nonetheless a distinction" [paragraph 99], he determined that the distinction was not a discriminatory one in accordance with general constitutional principles [paragraph 117].

[27] Ms. Randell referred the Tribunal to paragraph 127 of that decision which states:

> 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 characteristics described in *Auton, supra.*

[28] Ms. Randell argued that this statement is equally applicable to all of the arguments raised by the Appellant on his Charter challenge.

[29] Ms. Randell noted that in the *Upshall* case, Mr. Upshall argued (as the Appellant in this case does) that the pension credits should be adjusted before the DUPE was implemented by first applying the CRP provision to his ex-spouse, and that the failure of s.55.1 of the CPP to permit this was discriminatory and contrary to s. 15 (1) of the Charter. Ms. Randell submitted that the Upshall case [paragraph 6] determined that Mr. Upshall's argument must fail for two reasons:

1) Mr. Upshall did not provide any evidence to establish that the interacting provisions discriminate in the sense described by the Supreme Court of Canada in *Wither v Canada (Attorney General)*, 2001 SCC 12, [2011] 1 S.C. R. 396; and

2) Mr. Upshall's argument is identical to that of the unsuccessful applicant in *Runchey* where the Court rejected the applicant's submissions that the interacting provisions discriminate under section 15.

[30] Ms. Randell further argued that the situations in *Runchey* and *Upshall* are precisely similar to the situation in this Charter challenge in that there is no evidence to support the Charter challenge, and that the same Charter arguments are put forth. She submitted that this Charter challenge is not distinguishable on the basis that the Appellant is arguing on the grounds of age and marital status discrimination (as opposed to gender discrimination), because the analysis based on the interaction between the CRP and DUPE provisions is equally applicable. She argued that the principles set out in paragraphs 119 to 130 of the *Runchey* decision, which were summarily applied in the *Upshall* decision, are applicable to and determinative of all of the issues raised in this Charter challenge.

[31] Ms. Randell referred to the Appellant's written response to the motion (at GT1-194) wherein he argued that age was an enumerated or analogous ground of discrimination under s. 15 of the Charter. The Appellant stated "this is largely a question of timing. When I applied for my CPP at age 60, my ex-spouse was 58. Accordingly, since she was not eligible for CPP benefits at that age, performing the DUPE at this time does not benefit either one of us. In fact, this timing results in the CPP retaining a portion of the pension that would otherwise have been payable to me…, at least until she is eligible for and applies for her pension. At that point, it is my submission that the CRP should be applied and then the DUPE. Then, my age

(i.e. the fact that I am older than my ex-spouse) would not be putting me at a disadvantage relative to the older member of a non-divorced couple (comparative group).”

[32] Ms. Randell submitted that this argument is an acknowledgement by the Appellant that his complaint is not based on age, but rather on the timing of the credit split, which is not a ground for discrimination under s. 15 of the Charter.

[33] Ms. Randell also referred to the Appellant’s calculations at GT1-169 set out below:

Married Couple Combined Benefits

Benefits before Child Rearing Provision:		Benefits after Child Rearing Provision:
High Earner	$960.00	$960.00
Caregiver	$850.00	$960.00
Totals	$1,810.00	$1,920.00

Divorced Persons Combined Benefits

Benefits before Child Rearing Provision:		Benefits after Child Rearing Provision:
High Earner	$960.00	$905.00*
Caregiver	$850.00	$960.00
Totals	$1810.00	$1865.00

*less 50% of Child Rearing difference @ credit split as an approximation

[34] Ms. Randell noted that the Appellant acknowledged that these calculations are “entirely hypothetical” and submitted that this demonstrates that the Appellant has not established any factual basis for his Charter challenge. Ms. Randell referred to *MacKay v. Manitoba,* [1989] 2 SCR 357, *Danson v. Ontario (AG),* [1990] 2 SCR 1086, and *Bekker v. Canada,* 2004 FCA 186 which establish that constitutional challenges should not be decided in factual vacuum. Ms. Randell also submitted that the Appellant’s alleged ground for discrimination based on marital status was flawed because married people are never subject to a DUPE.

[35] Ms. Randell also referred to paragraph 139 of the *Runchey* decision and submitted that this establishes that the CRP and DUPE provisions are ameliorative provisions within s.15 (2) of the Charter and accordingly they cannot be the subject of a Charter challenge under s. 15 (1).

[36] Ms. Randell summarized the three factors supporting the motion to summarily dismiss the appeal to be as follows:

1) The Appellant has not established a factual foundation for his Charter challenge;
2) The *Runchey* and *Upshall* cases settle the law and are binding on the Tribunal;
3) The CRP and DUPE are ameliorative provisions under s. 15 (2) of the Charter and, accordingly, cannot be found to discriminatory pursuant to s. 15 (1).

THE APPELLANT'S SUBMISSIONS ON MOTION

[37] The Appellant disputed that the gender argument was "one and the same" as his "marital status" and "age" arguments and submitted that the distinction is very substantial. He submitted that married spouses can be the comparative group, and that in comparison with divorced spouses, there is no loss of benefits when one spouse applies for the CRP and that both married spouses receive full payments based on their contributions. He submitted that where there is a credit split for CRP eligible years, the ex-husband's portion of contributions are split with his ex-wife, and then "thrown out", when the ex-wife applies for CRP. He stated that this occurs because the child rearing lower earning spouse (usually the wife), is entitled to the CRP dropout.

[38] He referred to the statement approving the DUPE (see GT1-181) and noted that 12 years of credits were transferred to his ex-wife during the time period that she was entitled to CRP. He stated that this transfer was of no practical benefit to his ex-wife since her CRP would exempt those lower earning years. He submitted that the transferred credits during his ex-spouses CRP eligible years "vanish."

[39] He argued that the *Upshall* decision did not turn on a constitutional argument because no notice of constitutional question was served, and no evidence to establish discrimination was presented. He further argued that the *Runchey* decision is not applicable since that case dealt with "gender discrimination" and this case involves "marital status" and "age" discrimination. He noted that no evidence or argument was presented in the *Runchey* decision dealing with either "marital status" or "age" discrimination. He argued that it is not appropriate for his case to be dismissed in reliance on cases that are based on entirely different grounds.

[40] He submitted that the reference to timing in his written response to the motion (see paragraphs 31 & 32 above), was not put forward as a basis for discrimination, but as a proposed administrative procedure that could resolve the "age discrimination." This was not put forward as a ground of discrimination, but simply as a potential solution to the age discrimination. He submitted that the Tribunal should look at the bigger picture, namely, at what the CPP program is intended to do, which is collect premiums and pay benefits and stated that divorced spouses should not receive less than married spouses.

[41] The Appellant objected to the granting of the motion, and "strongly feels" that he should be given the opportunity to proceed to a hearing where he can present evidence to support his claim. He stated that if more evidence is required, he should be given the opportunity to present the required statistical analysis.

[42] He concluded that he would be very disappointed if his case were to be dismissed, after waiting over three years, without his being given the opportunity to have a full hearing.

[43] The Appellant advised the Tribunal, that if the Charter challenge is dismissed, there are no other issues that he wished to pursue.

THE ADDED PARTY'S SUBMISSIONS

[44] The Added Party was present throughout the argument of the motion and indicated that she did not have any submissions.

ANALYSIS

[45] In determining this motion the Tribunal has been mindful that this is a preliminary motion to dismiss prior to a full hearing on the merits. As set out in paragraphs 22 & 23 above, the Tribunal must determine whether the appeal has no reasonable chance of success, assuming that the facts alleged by the Appellant are true. The primary allegation by the Appellant is that because of the interaction of the CRP and DUPE, and the failure of s. 55.1 of the CPP to provide that the CRP provisions are to be applied before the DUPE, the total pension amount received by him and his ex-wife will be less than the total that they would have received if they had remained married. For the purposes of this analysis, the Tribunal has assumed that the Appellant's factual allegations are true.

[46] The Respondent argues that there is no factual foundation for the Charter challenge in the Appellant's Charter submissions and referred to the case law which establishes that constitutional challenges should not be decided in a factual vacuum. The Tribunal noted that in his Charter submissions the Appellant acknowledged that the calculations and scenario he was relying on are "entirely hypothetical." The Appellant stated that this was because the Respondent has not responded to his multiple requests for calculations regarding the scenario. The Appellant, however, has the burden of proof and the Respondent is not required to respond to his request for calculations. If this matter were to proceed to a hearing, it would be the Appellant's responsibility to provide statistical and/or other expert evidence to establish his allegations. He cannot discharge this burden on the basis that the Respondent has not responded to his requests.

[47] The difficulty with the Respondent's position on this ground, however, is that this is a preliminary motion. The cases relied on by the Respondent (see paragraph 34 above) are either after a trial where oral evidence was presented or on an Application in which affidavit evidence was filed. The Appellant's obligation to establish a factual foundation is at the hearing.

[48] Subsection 20 (1) of the Regulations provides that where a party raises a constitutional issue, he must file a notice setting out the provision that is at issue, and any submissions in support of the issue that is raised. The "submissions" referred to in this

provision are intended to be brief. However, once the requirement under 20(1)(a) is met, parties are usually asked, through an Order of the Tribunal, to provide their fulsome record, which should include their evidence, submissions, and the authorities that they intend to rely upon. Given the complexity of Charter cases, if supporting evidence is presented for the first time at the hearing, the other parties may be unable to rebut or respond adequately to this new evidence.

[49] There is an air of plausibility to the Appellant's allegation that, at least in this case, the total amount received by him and his ex-wife will be less than what they would have received if they were still married. The Appellant's pension is obviously reduced by the DUPE since his credits during the period of cohabitation are equalized with those of his lower earning ex-spouse (see details of credit split at GT1-181). To the extent that any years or months are dropped from his ex-wife's contributory period because of the CRP, there would be a reduction in the Appellant's pension amount with no increase in his ex- wife's. It would be the Appellant's obligation at a hearing to establish the extent to which this occurs in the circumstances of this case. It would also be his obligation to establish that this is a systemic and widespread circumstance, and if it is, that it represents constitutional discrimination infringing s. 15 (1) of the Charter.

[50] This circumstance was considered by Justice Stratas in the *Runchey* decision (at paragraphs 94-99) as follows:

> [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 pensions 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 the 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.
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> [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 parties, and the point of the credit split itself is lost": Respondent's Record, Vol. I, 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 circumstances.

[51] If this motion were grounded solely on the basis that there is insufficient factual foundation in the Charter submissions, the Tribunal would not have dismissed the Charter challenge and would have ordered the Appellant to file amended Charter submissions in compliance with paragraph 48 above.

[52] The difficulty with the Appellant's Charter challenge, however, is that even if his allegations are accepted as true, the recent developments in the law as set out in *Runchey* and affirmed in *Upshall* resolve the issues. They establish that the interaction of the CRP and DUPE provisions, even if they reduce the working parent's pension with no benefit to the child-rearing parent's, do not amount to discrimination contrary to s. 15 (1) of the Charter.

[53] In paragraphs 119 -130 of the *Runchey* decision, Justice Stratas reviews in detail the context and purposes of the CPP Plan and describes the Plan as "a contributory-based compulsory social insurance plan created by a federal statute and administered by the federal government" that is "not supposed to meet everyone's needs, but rather provide partial earnings replacement in certain circumstances."

[54] In paragraphs 123-125 he stated:

> [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 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 roles, 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.

[55] At paragraph 127 Justice Stratas concludes:

> [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.*

[56] The Appellant argues that the *Runchey* case is distinguishable because in it Mr. Runchey argued "gender discrimination" and that in this appeal he is arguing "marital status" and "age discrimination." The Tribunal disagrees and does not believe that there is a principled distinction. A careful reading of the *Runchey* decision establishes that it considers the interaction of the DUPE and CRP provisions, and the potential effect of the DUPE reducing the working parent's pension with no increase to the child-rearing parent's pension for the CRP years. This corresponds precisely with the Appellant's complaint, and the principles enunciated in *Runchey* as detailed above, are equally applicable to this appeal.

[57] There are also problems with the Appellant's alleged grounds for discrimination. The Tribunal agrees that the Appellant's written submissions in response to the motion (see GT1-194) make reference to the "timing" of the pension amounts as opposed to the actual "age" of the Appellant. He seems to want the scheme to be implemented in a specific manor in which he would receive a higher pension amount (with no CRP applied for his ex-spouse) until his ex-spouse applies for her pension, and then a precisely calculated amount depending on the extent to which the CRP applies to his ex-wife's pension. As Justice Stratas indicated in paragraph 123 of the *Runchey* decision, "the Plan cannot meet the preferences of every contributor in every conceivable circumstance."

[58] With respect to marital status, the Appellant's comparison to married spouses fails to take into account that married spouses are not subject to the DUPE. Further, the relationship between divorced couples is not analogous to that between married couples. In fact, the relationships are in many respects totally dissimilar since the divorced couple has chosen to sever their marriage relationship and their assets. The DUPE is simply one aspect of that severance which usually includes an equal division of assets (such as CPP pension credits) accumulated during cohabitation. To consider those relationships to be comparable would involve the exercise of an uncritical comparison of dissimilar groups against which the Supreme Court of Canada in *Miron v. Trudel*, [1995] 2 S.C.R. 418 at paragraph 88 admonished as follows:

> The guarantee of equality in s.15 does not require that the entire, collective, heterogeneous group of non-married persons be compared against the essentially homogenous group of married persons. In fact, uncritical comparison of dissimilar groups can undermine the purposes of s.15 of the Charter rather than further them. Comparison is only a fruitful exercise when carried out between groups that possess sufficient analogous qualities to make the exercise of comparison meaningful in respect of the distinction being examined.

[59] A further barrier to the Charter challenge is s.15 (2) of the Charter. Justice Stratas discusses the ameliorative nature of the CRP and DUPE provisions in paragraphs 131-139 of *Runchey*. He refers to and relies on excerpts from the 1970 Report of the Royal Commission on the Status of Women in Canada and the 1983 Report of the House of Commons Parliamentary Task Force on Pension Reform. At paragraph 132, he states that, "the CRP is aimed at accommodating and assisting those who stay home because of child rearing

responsibilities." At paragraph 136, he states that "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 or rear children."

[60] At paragraph 139 Justice Stratas concludes as follows:

> 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.

[61] The Tribunal has taken this statement into consideration in determining that the Charter appeal has no reasonable prospect of success.

[62] The Tribunal's determinations are summarized as follows:

a) The Tribunal would not have summarily dismissed the Charter appeal on the ground that the Charter submissions lack sufficient evidentiary foundation. If this were the sole ground for the motion, the Tribunal would have ordered the Appellant to file amended Charter submissions.

b) The Tribunal has determined that the *Runchey* and *Upshall* decisions establish that although the interaction of the CRP and DUPE provisions may create distinctions, the distinctions do not amount to constitutional discrimination within the ambit of s. 15(1) of the Charter.

c) The Tribunal has also taken into consideration Justice Stratas' statement in *Runchey* that to the extent that the CRP and DUPE 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), and that, accordingly, they cannot be found to be discriminatory under s. 15 (1).

CONCLUSION

[63] The Respondent's motion to dismiss the constitutional challenge is allowed. During his oral submissions on the motion, the Appellant indicated that if the Charter challenge is dismissed, there are no further issues that he proposes to raise on the appeal.

[64] Accordingly, the appeal is summarily dismissed.

Raymond Raphael
Member, General Division