Citation: *Minister of Employment and Social Development v. B. T.*, 2015 SSTAD 107

Appeal No. CP27183

BETWEEN:

Minister of Employment and Social Development
(Formerly Minister of Human Resources and Skills Development)

Appellant

and

B. T.

Respondent

and

J. S.

Added Party

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division – Appeal Decision

SOCIAL SECURITY TRIBUNAL MEMBER:	J. David Wake, Vice-Chair, Appeal Division
HEARING DATE:	September 10-12, 2014
TYPE OF HEARING:	In Person
DECISION DATE:	January 29, 2015

PERSONS IN ATTENDANCE

Counsel for Appellant	-	Michael Stevenson
Counsel for Respondent	-	Vincent Calderhead Charlene Moore
Expert Witness for the Respondent	-	Dr. Richard Shillington
Expert Witness for the Appellant	-	Marianna Giordano
The Respondent	-	B. T.
The Added Party	-	J. S. by telephone

DISPOSITION

[1] The appeal is allowed and the Respondent's ss. 15(1) *Canadian Charter of Rights and Freedoms* (*Charter*) challenge to ss. 55(1) of the *Canada Pension Plan* (the CPP) is dismissed.

INTRODUCTION AND HISTORY OF THE PROCEEDINGS

[2] The Respondent B. T. was divorced from the Added Party J. S. in February, 1985. More than 18 years later on September 8, 2003, she applied for a CPP division of the unadjusted pensionable earnings (DUPE) between her and her former spouse, J. S. The application was denied on the basis that it was not submitted within 36 months of the day that her marriage was legally terminated as required by ss. 55(1) of the CPP.

[3] As a result, the Respondent brought an application challenging the three year limitation period and the requirement of an application as set out in that provision on the basis that it contravened s. 15 of the *Charter* in that it discriminated against her on the ground of her sex as a woman and on the analogous ground of her marital status as a divorced woman.

[4] The Respondent succeeded in her application before the Office of the Commissioner of Review Tribunals in January 2010. The Minister appealed to the Pension Appeals Board (PAB) which, in March 2012, held that the Respondent's application amounted to a retrospective application of the *Charter*.

[5] The Respondent applied to the Federal Court of Appeal for judicial review of the PAB decision. On November 19, 2012, that Court ruled that there was no retrospective application

of the *Charter*, set aside the decision of the PAB and remitted the matter back to a differently constituted panel of the PAB.

[6] On April 1, 2013, pursuant to the *Jobs, Growth and Long-term Prosperity Act*[1], the PAB's jurisdiction was transferred to the newly created Social Security Tribunal (the Tribunal).

[7] After some delay necessitated by efforts to accommodate the schedules of counsel and their witnesses as well as the Tribunal's availability, this matter was heard by me in Dartmouth, Nova Scotia on September 10, 11 and 12, 2014.

ISSUES

[8] Does the application requirement and three-year limitation period for a credit split under ss. 55(1) of the CPP violate ss. 15(1) of the *Charter*?

[9] If so, can the violation be justified as reasonable in a free and democratic society under s. 1 of the *Charter*?

[10] It is acknowledged by counsel for the Respondent and the Appellant that the present s. 15 claim is one of adverse or indirect discrimination since ss. 55(1) of the CPP is facially neutral. The question then becomes whether the evidence in this case demonstrates that the provision has a disproportionately negative impact on the Respondent that can be identified by factors relating to her sex and marital status as a divorced woman.

STATUTORY PROVISIONS

[11] The following statutory and regulatory provisions are relevant to this appeal:

A. *Canada Pension Plan* R.S.C. 1985, c. C- 8, sections 55, 55.1, 55.2, 60

Section 55

Division of Unadjusted Pensionable Earnings for Divorces and Annulments before the Coming into Force of section 55.1

[1] S.C. 2012, c. 19, s. 50

Application for division

55. (1) Subject to this section, subsections 55.2(2), (3) and (4) and section 55.3, an application for a division of the unadjusted pensionable earnings of former spouses may be made in writing to the Minister by or on behalf of either former spouse, by the estate or succession of either former spouse or by any person that may be prescribed, within 36 months or, if both former spouses agree in writing, at any time after the date of a judgment granting a divorce or of a judgment of nullity of the marriage, rendered on or after January 1, 1978 and before January 1, 1987.

Idem

(2) For the purposes of this section,

(a) notwithstanding paragraphs (*b*) and (*c*), the former spouses must have cohabited for at least thirty-six consecutive months during the marriage before an application made under subsection (1) may be approved by the Minister;

(b) the marriage is deemed to have been solemnized or nullified or a divorce is deemed to have been made final on the last day of the year preceding the registered date of the marriage or the judgment of nullity or the effective date of the judgment granting a divorce; and

(c) the former spouses shall be deemed to have cohabited throughout the year in which the marriage was solemnized, and shall be deemed not to have cohabited at any time during the year of divorce or of annulment of the marriage.

Period of cohabitation

(3) In determining the period for which the unadjusted pensionable earnings of the former spouses shall be divided, only those months during which the former spouses cohabited during the marriage shall be considered and, for the purposes of this section, months during which former spouses cohabited shall be determined in the prescribed manner.

Division of unadjusted pensionable earnings

(4) On approval by the Minister of an application referred to in subsection (1), the unadjusted pensionable earnings for each former spouse for the period of cohabitation attributable to contributions made under this Act, determined in the same manner as the total pensionable earnings attributable to contributions made under this Act are determined in section 78, shall be added and then divided equally and the unadjusted pensionable earnings so divided shall be attributed to each former spouse.

On division unadjusted pensionable earnings under this Act

(5) Where there is a division under subsection (4) and under a provincial pension plan, for the purposes of benefit calculation and payment under this Act, the total unadjusted pensionable earnings of a contributor for a year of division shall be the aggregate of his unadjusted pensionable earnings attributed under subsection (4) and his unadjusted pensionable earnings attributed under a provincial pension plan.

No division

(6) No division of unadjusted pensionable earnings for a period of cohabitation shall be made

(a) where the total unadjusted pensionable earnings of the former spouses in a year does not exceed twice the Year's Basic Exemption;

(b) for the period before which one of the former spouses reached eighteen years of age or after which a former spouse reached seventy years of age;

(c) for the period in which one of the former spouses was a beneficiary of a retirement pension under this Act or under a provincial pension plan; and

(d) for any month that is excluded from the contributory period of one of the former spouses under this Act or a provincial pension plan by reason of disability.

Benefits in pay

(7) Where an application referred to in subsection (1) has been approved and a benefit is payable under this Act to or in respect of either of the former spouses for any month commencing on or before the day of receipt of an application under subsection (1), the basic amount of the benefit shall be calculated and adjusted in accordance with section 45 but subject to the division of unadjusted pensionable earnings made under this section and the adjusted benefit shall be paid effective the month following the month the application referred to in subsection (1) is received.

Notification of division

(8) On approval by the Minister of an application for division of unadjusted pensionable earnings, an applicant and the former spouse or the former spouse's estate shall be notified in a manner prescribed by regulation and, where the applicant or the former spouse or the former

spouse's estate is dissatisfied with the division or the result thereof, the right of appeal as set out in this Part applies.

Regulations

(9) The Governor in Council may make regulations prescribing the time, manner and form of making applications for division of unadjusted pensionable earnings or withdrawal of applications for that division, the procedures to be followed in dealing with and approving those applications and the information and evidence to be furnished in connection therewith.

Section 55.1

Division of Unadjusted Pensionable Earnings

When mandatory division to take place

55.1 (1) Subject to this section and sections 55.2 and 55.3, a division of unadjusted pensionable earnings shall take place in the following circumstances:

(a) in the case of spouses, following a judgment granting a divorce or a judgment of nullity of the marriage, on the Minister's being informed of the judgment and receiving the prescribed information;

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

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

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

(c) in the case of common-law partners, following the approval by the Minister of an application made by or on behalf of either former common-law partner, by the estate or succession of one of those former common-law partners or by any person that may be prescribed, if

(i) the former common-law partners have been living separate and apart for a period of one year or more, or one of the former common-law partners has died during that period, and

(ii) the application is made within four years after the day on which the former common-law partners commenced to live separate and apart or, if both former common-law partners agree in writing, at any time after the end of that four-year period.

Calculation of period of separation

(2) For the purposes of this section,

(a) persons subject to a division of unadjusted pensionable earnings shall be deemed to have lived separate and apart for any period during which they lived apart and either of them had the intention to live separate and apart from the other; and

(b) a period during which persons subject to such a division have lived separate and apart shall not be considered to have been interrupted or terminated

(i) by reason only that either person has become incapable of forming or having an intention to continue to live separate and apart or of continuing to live separate and apart of the person's own volition, if it appears to the Minister that the separation would probably have continued if the person had not become so incapable, or

(ii) by reason only that the two persons have resumed cohabitation during a period of, or periods totalling, not more than ninety days with reconciliation as its primary purpose.

Period of cohabitation

(3) For the purposes of this section, persons subject to a division of unadjusted pensionable earnings must have cohabited for a continuous period of at least one year in order for the division to take place, and, for the purposes of this subsection, a continuous period of at least one year shall be determined in a manner prescribed by regulation.

Period for purposes of division

(4) In determining the period for which the unadjusted pensionable earnings of the persons subject to a division shall be divided, only those months during which the two persons cohabited shall be considered, and, for the purposes of this subsection, months during which the two persons cohabited shall be determined in the prescribed manner.

Minister's discretion

(5) 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 the 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 persons 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.

Section 55.2

55.2 (1) [Repealed, 2000, c. 12, s. 48]

Agreement or court order not binding on Minister

(2) Except as provided in subsection (3), where, on or after June 4, 1986, a written agreement between persons subject to a division under section 55 or 55.1 was entered into, or a court order was made, the provisions of that agreement or court order are not binding on the Minister for the purposes of a division of unadjusted pensionable earnings under section 55 or 55.1.

Agreement binding on Minister

(3) Where

(a) a written agreement between persons subject to a division under section 55 or 55.1 entered into on or after June 4, 1986 contains a provision that expressly mentions this Act and indicates the intention of the persons that there be no division of unadjusted pensionable earnings under section 55 or 55.1,

(b) that provision of the agreement is expressly permitted under the provincial law that governs such agreements,

(c) the agreement was entered into

(i) in the case of a division under section 55 or paragraph 55.1(1)(*b*) or (*c*), before the day of the application for the division, or

(ii) in the case of a division under paragraph 55.1(1)(*a*), before the rendering of the judgment granting a divorce or the judgment of nullity of the marriage, as the case may be, and

(d) that provision of the agreement has not been invalidated by a court order, that provision of the agreement is binding on the Minister and, consequently, the Minister shall not make a division under section 55 or 55.1.

Minister to notify parties

(4) The Minister shall, without delay after being informed of a judgment granting a divorce or a judgment of nullity of a marriage or after receiving an application under section 55 or paragraph 55.1(1)(*b*) or (*c*), notify each of the persons subject to the division, in the prescribed manner, of the periods of unadjusted pensionable earnings to be divided, and of any other information that the Minister considers necessary.

Division of unadjusted pensionable earnings

(5) Where there is a division under section 55.1, the unadjusted pensionable earnings for each person subject to the division for the period of cohabitation attributable to contributions made under this Act, determined in the same manner as the total pensionable earnings attributable to contributions made under this Act are determined in section 78, shall be added and then divided equally, and the unadjusted pensionable earnings so divided shall be attributed to each person.

Effect of division

(6) Where there is a division under section 55.1 and under a provincial pension plan, for the purposes of benefit calculation and payment under this Act, the total unadjusted pensionable earnings of a contributor for a year of division shall be the aggregate of his unadjusted pensionable earnings attributed under subsection (5) and his unadjusted pensionable earnings attributed under a provincial pension plan.

Provincial pension plans

(7) No division under section 55.1 shall be made for any month during which the persons subject to the division cohabited and for which either of them contributed to a provincial pension plan (and, for the purposes of this subsection, months during which the persons cohabited shall be determined in the prescribed manner), unless the unadjusted pensionable earnings attributed to the persons under the provincial pension plan are divided for that month in a manner substantially similar to that described in this section and section 55.1.

No division

(8) No division under section 55.1 for a period of cohabitation of the persons subject to the division shall be made

(a) for a year in which the total unadjusted pensionable earnings of the persons does not exceed twice the Year's Basic Exemption;

(b) for the period before which one of the persons reached eighteen years of age or after which one of the persons reached seventy years of age;

(c) for the period in which one of the persons was a beneficiary of a retirement pension under this Act or under a provincial pension plan; and

(d) for any month that is excluded from the contributory period of one of the persons under this Act or a provincial pension plan by reason of disability.

Payment of benefit

(9) Where there is a division under section 55.1 and a benefit is or becomes payable under this Act to or in respect of either of the persons subject to the division for a month not later than the month following the month in which the division takes place, the basic amount of the benefit shall be calculated and adjusted in accordance with section 46 and adjusted in accordance with subsection 45(2) but subject to the division, and the adjusted benefit shall be paid effective the month following the month in which the division takes place but in no case shall a benefit that was not payable in the absence of the division be paid in respect of the month in which the division takes place or any prior month.

Notification of division

(10) Where there is a division under section 55.1, both persons subject to the division, or their respective estates, shall be notified in the prescribed manner.

Regulations

(11) The Governor in Council may make regulations prescribing

(a) the time, manner and form of making applications for a division of unadjusted pensionable earnings or withdrawal of applications for such division;

(b) the procedures to be followed in dealing with and approving such applications and the information and evidence to be furnished in connection therewith; and

(c) the effective dates of the approval or taking place of a division and of the attribution of pensionable earnings following a division.

Section 60

Division C

Payment of Benefits: General Provisions Application for benefit

60. (1) No benefit is payable to any person under this Act unless an application therefor has been made by him or on his behalf and payment of the benefit has been approved under this Act.

Application for post-retirement benefit deemed to be made

(1.1) An application for a post-retirement benefit under subsection (1) is deemed to be made on January 1 of the year following the year of the unadjusted pensionable earnings referred to in section 76.1 if

(a) the person is a beneficiary of a retirement pension on that day; and

(b) the Minister has the information necessary to determine whether a post-retirement benefit is payable to them.

Application for benefit by estate, etc.

(2) Notwithstanding anything in this Act, but subject to subsections (2.1) and (2.2), an application for a benefit, other than a death benefit, that would have been payable in respect of a month to a deceased person who, prior to the person's death, would have been entitled on approval of an application to payment of that benefit under this Act may be approved in respect of that month only if it is made within 12 months after the death of that person by the estate, the representative or heir of that person or by any person that may be prescribed by regulation.

Certain applications may not be approved

(2.1) An application referred to in subsection (2) in respect of a disability benefit may not be approved if the application is received after December 31, 1997.

Restriction — retirement pension

(2.2) An application referred to in subsection (2) in respect of a retirement pension may only be approved in respect of a month after the deceased contributor had reached age 70.

Exception

(3) Where a disabled contributor's child's benefit would, if the application had been approved, have been payable to a child of a disabled contributor on application made prior to the death of the child or an orphan's benefit would, if the application had been approved, have been payable to an orphan of a contributor on application made prior to the death of the orphan and the child or orphan dies after December 31, 1977, not having reached eighteen years of age, and no application has been made at the time of the death of the child or orphan, an application may be made within one year after the death by the person or agency having custody and control of the child or orphan at the time of the death or, where there is at that time no person or agency having custody and control, by such person or agency as the Minister may direct.

Benefits payable to estate or other persons

(4) Where an application is made pursuant to subsection (2) or (3), a benefit that would have been payable to a deceased person referred to in subsection (2) or a deceased child or orphan referred to in subsection (3) shall be paid to the estate or such person as may be prescribed by regulation.

Application deemed to have been received on date of death

(5) Any application made pursuant to subsection (2) or (3) is deemed to have been received
(a) on the date of the death of a person who, prior to his death, would have been entitled, on approval of an application, to payment of a benefit under this Act; or

(b) on the date of the death of a child or an orphan referred to in subsection (3) where the person having custody and control of the child or orphan did not make an application prior to the death of the child or orphan.

How application to be made

(6) An application for a benefit shall be made to the Minister in prescribed manner and at the prescribed location.

Consideration of application and approval by Minister

(7) The Minister shall forthwith on receiving an application for a benefit consider it and may approve payment of the benefit and determine the amount thereof payable under this Act or may determine that no benefit is payable, and he shall thereupon in writing notify the applicant of his decision.

Incapacity

(8) Where an application for a benefit is made on behalf of a person and the Minister is satisfied, on the basis of evidence provided by or on behalf of that person, that the person had been incapable of forming or expressing an intention to make an application on the person's own behalf on the day on which the application was actually made, the Minister may deem the application to have been made in the month preceding the first month in which the relevant benefit could have commenced to be paid or in the month that the Minister considers the person's last relevant period of incapacity to have commenced, whichever is the later.

Idem

(9) Where an application for a benefit is made by or on behalf of a person and the Minister is satisfied, on the basis of evidence provided by or on behalf of that person, that

(a) the person had been incapable of forming or expressing an intention to make an application before the day on which the application was actually made,

(b) the person had ceased to be so incapable before that day, and

(c) the application was made

(i) within the period that begins on the day on which that person had ceased to be so incapable and that comprises the same number of days, not exceeding twelve months, as in the period of incapacity, or

(ii) where the period referred to in subparagraph (i) comprises fewer than thirty days, not more than one month after the month in which that person had ceased to be so incapable, the Minister may deem the application to have been made in the month preceding the first month in which the relevant benefit could have commenced to be paid or in the month that the Minister considers the person's last relevant period of incapacity to have commenced, whichever is the later.

Period of incapacity

(10) For the purposes of subsections (8) and (9), a period of incapacity must be a continuous period except as otherwise prescribed.

Application

(11) Subsections (8) to (10) apply only to individuals who were incapacitated on or after January 1, 1991.

Making claim or providing information in person

(12) The Minister may require an applicant or other person or a group or class of persons to be at a suitable place at a suitable time in order to make an application for benefits in person or to provide additional information about an application.

B) *Canada Pension Plan Regulations*, C.R.C., c. 385, sections 43, 52, 53, 54

Section 43

Application for Benefits, for Assignment of a Retirement Pension and for Division of Unadjusted Pensionable Earnings

43. (1) An application for a benefit, for a division of unadjusted pensionable earnings under section 55 or 55.1 of the Act or for an assignment of a portion of a retirement pension under section 65.1 of the Act shall be made in writing at any office of the Department of Human Resources Development or the Department of Employment and Social Development.

(1.1) Where an application for a disability pension has been denied, and the applicant has reached 60 years of age between the time of the application and the time of its denial or would have been entitled to a retirement pension if he had applied therefor at the time of application for the disability pension, that application shall, on request made by or on behalf of the applicant, be deemed to be an application for a retirement pension if the request is made

(a) in writing at the location of any office of the Department of Human Resources Development; and

(b) within 90 days following the month in which the applicant is notified of the denial or, where the denial is finally confirmed on appeal, within 90 days after the day on which the applicant is notified of the confirmation.

(2) Where by reason of section 80 of the Act and an agreement under that section with a province providing a comprehensive pension plan the whole amount of any benefit payable to an applicant is deemed to be payable under that plan or where the division of unadjusted pensionable earnings can be determined under that plan in accordance with the

agreement, the Minister shall, as soon as possible after an application is received, forward the application, together with a statement of the date on which it was received, to the authority charged under that plan with the duty of receiving applications, calculating the division of unadjusted pensionable earnings and paying benefits.

Section 52

Information and Evidence Required to be Furnished by an Applicant or Beneficiary

52. For the purposes of determining the eligibility of an applicant for a benefit, the amount that an applicant or beneficiary is entitled to receive as a benefit or the eligibility of a beneficiary to continue to receive a benefit, the applicant, the person applying on his behalf, or the beneficiary, as the case may be, shall, in the application, or thereafter in writing when requested to do so by the Minister, set out or furnish the Minister with the following applicable information or evidence:

(a) the name at birth and present name, sex, address and Social Insurance Number of

(i) the applicant or beneficiary,

(ii) the disabled or deceased contributor,

(iii) the spouse or common-law partner of the disabled contributor or the survivor of the deceased contributor,

(iv) each dependent child of the disabled or deceased contributor, and

(v) any former spouse or former common-law partner, where known to the applicant;

(b) the date and place of birth of

(i) the applicant or beneficiary,

(ii) the disabled or deceased contributor,

(iii) the survivor of the deceased contributor, and

(iv) each dependent child of the disabled or deceased contributor;

(c) the date and place of death of the contributor;

(d) whether a dependent child of the contributor has died since

(i) the date on which the contributor claims to have become disabled, or

(ii) the death of the contributor;

(*e*) [Repealed, SOR/86-1133, s. 10]

(f) whether the deceased contributor was married at the time of his death and, if so, to whom, and the date and place of the marriage;

(g) whether the deceased contributor was separated or divorced at the time of his death;

(h) whether there is a personal representative of the estate of the deceased contributor, and the name and address of any such personal representative;

(i) whether a dependent child of the disabled or deceased contributor

(i) is his child,

(ii) is his legally adopted child or was adopted in fact by him or is a legally adopted child of another person,

(iii) was legally or in fact in his custody and control,

(iv) is in the custody and control of the disabled contributor, the survivor of the contributor or another person or agency,

(v) is living apart from the disabled contributor or the survivor, or

(vi) is or was maintained by the disabled contributor;

(j) where a dependent child of the disabled or deceased contributor is 18 or more years of age, whether that child is and has been in full-time attendance at a school or university;

(k) whether the applicant or beneficiary who is the survivor of a contributor maintains wholly or substantially one or more dependent children of the deceased contributor;

(*k.1*) [Repealed, SOR/2013-83, s. 2]

(l) a statement evidencing the amount of the contributory salary and wages and of the contributory self-employed earnings of a disabled or deceased contributor for the year in which the contributor became disabled or died and for any preceding year;

(m) whether the applicant, beneficiary or deceased contributor is or was in receipt of or has applied for a benefit under the Act or under a provincial pension plan or a pension under the *Old Age Security Act*; and

(n) such additional documents, statements or records that are in the possession of the applicant or beneficiary or are obtainable by him that will assist the Minister in ascertaining the accuracy of the information and evidence referred to in paragraphs (*a*) to (*m*).

Section 53

53. For the purposes of determining whether any months during which a contributor was a family allowance recipient should not be included in his contributory period, the applicant shall, in the application or thereafter in writing when requested to do so by the Minister, set out or furnish the Minister with such of the following additional information or evidence as is applicable:

(a) the name and date of birth of all children in respect of whom the contributor received family allowance benefits or Child Tax Benefits;

(b) the Social Insurance Number, if any, of each of those children;

(c) the periods during which the contributor received family allowance benefits or Child Tax Benefits in respect of those children;

(d) the province in which the contributor resided while in receipt of family allowance benefits or Child Tax Benefits in respect of those children;

(e) the Social Insurance Number of the contributor to whom family allowance benefits or Child Tax Benefits were paid in respect of those children;

(f) if known, the name and Social Insurance Number of any other person who received family allowance benefits or Child Tax Benefits in respect of those children; and

(g) such additional documents, statements or records that are in the possession of the applicant or are obtainable by him that will assist the Minister in ascertaining the accuracy of the information and evidence referred to in paragraphs (*a*) to (*f*).

Section 54

54. (1) For the purposes of determining whether an application for a division of unadjusted pensionable earnings pursuant to section 55 or paragraph 55.1(1)(*b*) or (*c*) of the Act may be approved, the applicant

shall, in the application or thereafter in writing when requested to do so by the Minister, set out or furnish the Minister with the information required under section 52 in the case of an application for a benefit, subject to such modifications as the circumstances may require, and with such of the following additional information or evidence as is applicable:

(a) the name at birth and present name, the sex, address and Social Insurance Number of each spouse, former spouse or former common-law partner;

(b) the date and place of birth of each spouse, former spouse or former common-law partner;

(c) whether the spouse, former spouse or former common-law partner is or was in receipt of or has applied for a benefit under the Act or under a provincial pension plan;

(d) the date and place of marriage of the spouses or former spouses and their certificate of marriage;

(e) the date and place of the dissolution of the marriage of the former spouses;

(f) documentary evidence of any such dissolution of marriage, including the decree absolute of divorce, the judgment granting a divorce under the *Divorce Act*, or the judgment of nullity;

(g) the address of all residences where the spouses, former spouses or former common-law partners lived together;

(h) the dates of any periods when the spouses, former spouses or former common-law partners did not live together and whether the separations or any of them were for any reason set out in paragraph 78(2)(*a*) or subsection 78.1(3);

(i) the date that the spouses, former spouses or former common- law partners commenced to live separate and apart;

(j) the dates of all periods when the spouses, former spouses or former common-law partners lived together in a conjugal relationship;

(k) a copy of any written agreement between persons subject to a division that was entered into before June 4, 1986 or any written agreement between such persons that was entered into on or after that date and contains a provision that is binding on the Minister under subsection 55.2(3) of the Act; and

(l) such additional documents, statements or records that are in the possession of, or are obtainable by, the applicant as will assist the

Minister in ascertaining the accuracy of the information and evidence referred to in paragraphs (*a*) to (*k*).

(2) The information relating to the marriage in question as provided in accordance with paragraph 55.1(1)(*a*) of the Act shall be such of the following information as is applicable:

(a) the name at birth and present name, the sex, address and Social Insurance Number of each of the former spouses;

(b) the date and place of marriage of the former spouses and their certificate of marriage;

(c) the date and place of the dissolution of the marriage of the former spouses;

(d) a copy of the decree or judgment referred to in that paragraph;

(e) the addresses of all residences where the former spouses lived together;

(f) the dates of any periods when the former spouses did not live together and whether the separations or any of them were for any reason set out in paragraph 78(2)(*a*) or subsection 78.1(3);

(g) the date that the former spouses commenced to live separate and apart;

(h) the dates of all periods when the former spouses lived together in a conjugal relationship; and

(i) a copy of any written agreement between persons subject to a division that was entered into before June 4, 1986 or any written agreement between such persons that was entered into on or after that date and contains a provision that is binding on the Minister under subsection 55.2(3) of the Act.

C) *Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.)*, sections 1, 15, 52

Section 1

Rights and freedoms in Canada

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

Section 15

Equality Rights

Equality before and under law and equal protection and benefit of law

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

Affirmative action programs

(2) Subsection (1) does not preclude any law, program or activity that has as its object the 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.

Section 52

Primacy of Constitution of Canada

52. (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

Constitution of Canada

(2) The Constitution of Canada includes

(a) the *Canada Act 1982*, including this Act;

(b) the Acts and orders referred to in the schedule; and

(c) any amendment to any Act or order referred to in paragraph (*a*) or (*b*).

Amendments to Constitution of Canada

(3) Amendments to the Constitution of Canada shall be made only in accordance with the authority contained in the Constitution of Canada

FACTUAL BACKGROUND

[12] Counsel agree that the underlying facts are largely not in dispute. The parties still have some lingering disagreements which animate them concerning the reasons for their separation and divorce but these are irrelevant for the purpose of this appeal.

[13] The Respondent, B. T., testified in person. She was born in Halifax in February, 1954. She met J. S. and began cohabiting with him on January 15, 1975. She had a child from a previous relationship born in 1971 whom Mr. J. S. adopted after they were married in September 1976.

[14] The parties had another child after their marriage born February, 1977.

[15] During their marriage the Respondent primarily worked inside the home although she did work "a little bit" as a short order cook. Her husband worked throughout the marriage.

[16] The parties separated in December 1984 and were divorced very soon thereafter on February 11, 1985. Both parties were represented by legal counsel for the divorce proceeding which contained the following entry in the *Decree Nisi* which was made Absolute at the hearing:

> IT IS FURTHER ORDERED, ADJUDGED AND DECREED That as to the $10,000.00 Pension Plan of the Petitioner a provision is included in this decree that the Respondent, B. T. may apply at a future date under the provisions of the Canada Pension Plan for a division of credits in the said pension amount and for a division of credits in that amount which has accujulated (*sic*) during the period of the marriage.

[17] After the divorce the Respondent worked sporadically but had to rely on social assistance for some time over the next twenty years. She was hospitalized as well for an undefined nervous condition.

[18] She had a third child from another relationship in 1990 who lives with her to this day since he suffers from autism.

[19] In 2003, during a period of illness she decided to apply for CPP disability when she was advised that she could not apply to split her ex-spouse's CPP credits because she had not

applied in time. She testified that "if I had known I had to sign or when I would have". She maintained that no one had ever told her about the limitation period when she went through the divorce proceedings.

[20] She did not apply for CPP disability but instead worked full-time from 2004 at a seniors' residence as a housekeeper for three and a half years. She had to leave due to heart problems in 2007 but returned to the same seniors' retirement residence in 2009 where she is presently employed as a valet or casual housekeeper. She works 25 to 30 hours per week at $11.02 per hour.

[21] When asked whether she could work more hours she replied that she was unable to do so due to her son's autism which required her not to be away from him for too long.

[22] Since February, 2014, when she turned 60, she has been in receipt of a CPP retirement pension in the amount of $89 per month which supplements her employment income. Her son also receives disability income and they live in low rent subsidized housing which costs $426 per month.

[23] J. S. testified by teleconference from his home in Port Hawkesbury. A year after the divorce he was let go by his employer for what seems to have been a general or partial staff reduction at the facility where he had worked from 1976 to 1986.

[24] He was unsuccessful in finding alternative employment since he was not a skilled worker. He suffered from anxiety and panic attacks and had to rely on social assistance until 1989 when he succeeded in obtaining a CPP disability pension retroactive to 1987. He was required to turn his retroactive cheque over to Welfare authorities who had sustained him during the period while his CPP disability application was outstanding.

[25] At the time of the hearing Mr. J. S. was 69. When he turned 65 in January, 2010, his CPP disability pension was converted into a monthly retirement pension of $618.25. Together with Old Age Security of $558 per month that is his only income.

[26] When asked whether he would be able to repay any overpayment resulting from a retroactive credit-splitting should his ex-spouse be successful in her application he replied that he would have to go back on welfare.

[27] Mr. J. S. acknowledged that sometime after 2003 he received a request from his former spouse to, in effect, waive the limitation period and allow credit-splitting to take place. He checked with CPP officials and after confirming that he was under no legal obligation to do so he declined.

EXPERT EVIDENCE

[28] By agreement of the parties the Respondent called her evidence first, however for the sake of coherence in these Reasons I have set out the Appellant's expert's evidence first since the Respondent's expert's report was made in reply to the report submitted by the Appellant's expert.

[29] Both the Appellant and the Respondent relied on expert evidence. The Appellant called Marianna Giordano who was qualified as an expert in CPP legislation and its history. Marianna Giordano is the Director for CPP policy and legislation for the Department of Employment and Social Development.

[30] Ms. Giordano filed an extensive report with two addenda to which she referred in her evidence. At the outset, she corrected the period of cohabitation for CPP purposes in this case set out on pages 19-20 of her report as January 1975 to December 1983 which should have read January 1976 to December 1983.

[31] Ms. Giordano outlined the features of the *Canada Pension Plan*. It is not a social welfare scheme but rather it is a compulsory social insurance plan designed to provide social insurance to Canadians who experience loss of earnings owing to retirement, disability, or the death of a wage-earning spouse or parent. The Plan is funded by the contributions of employees, employers and self-employed persons, as well as revenue earned on CPP investments.

[32] The Plan is administered by the federal government but amendments require the approval of Parliament and at least two-thirds of the provinces with at least two-thirds of the population of Canada.

[33] Although the primary benefit under the Plan is a retirement pension it also provides for other benefits, including a disability pension, a death benefit, a survivor's pension, an orphan's benefit and a disabled contributor's child benefit.

[34] In order for one to receive a benefit, one must apply unless the Minister already has the necessary information on file to approve and pay a benefit.

[35] Ms. Giordano then directed her evidence to the history of the division of unadjusted pensionable earnings (DUPE) or credit-splitting which is the crux of the matter in this appeal.

[36] As a result of a number of studies and reports in the 1970's, Parliament set out to recognize under the CPP the contributions of homemakers, who at the time were primarily women, to the accumulation of assets during a marriage. At the same time, as stated by Minister Lalonde in the House of Commons Debates (May 9, 1977), p. 5411 referred to in Ms. Giordano's report, the aim was to retain "the basic, compulsory earnings- related and contributory characteristics of the Plan. Of course, there was a difficulty inherent in achieving these two aims. That difficulty arises because work in the home by one spouse is unpaid employment, and there are thus no earnings on which to base pension plan contributions and benefits".

[37] The idea of attempting to attach some notional value to work in the home was therefore eschewed in favour of a scheme which permitted the splitting of credits accumulated in the CPP by spouses during their marriage. The Minister proclaimed that this would "assure to each spouse a fair share of an asset to which they have both, in reality, contributed".

[38] In 1977, Parliament enacted the amendments to the CPP for effect on January 1, 1978. The amendments entitled spouses divorced on or after that date, upon application made within thirty-six months of the decree absolute of divorce, to a split of CPP pension credits. The amendments required that credit-splitting applied only to marriages that lasted three or more years and where there were at least three consecutive years of cohabitation. Also, credit-

splitting cannot be made for periods where the total unadjusted pensionable earnings of the former spouses in a year do not exceed twice the Yearly Basic Exemption (YBE).

[39] Ms. Giordano submitted in her report (page 11) that the rationale for improving these conditions were explained when the Bill was presented for second reading in the House of Commons. Mr. Paul McRae (Parliamentary Secretary to the Minister of National Health and Welfare) advised that:

> In order for the spouses to be eligible, the marriage would have to have lasted at least three years and the spouses would have to have lived together for at least three consecutive years. This is to ensure that the financial effects of credit splitting will actually be significant. As well, the application for the split will have to be made within three years of the effective date of the divorce or annulment, otherwise the administration of the provision would be virtually impossible.

[40] In addition, Ms. Giordano noted that some of the anticipated administrative problems were outlined in a paper presented by Marc Lalonde, Minister of National Health and Welfare to the House of Commons Standing Committee on Health, Welfare and Social Affairs attached to her report at Tab 8, *Discussion Paper on Housewives and the Canada Pension Plan,* April 4, 1974.

[41] The list of anticipated administrative problems to a credit-splitting scheme as set out in the Paper, which was not intended to be exhaustive, are set out below:

> If it were concluded that this option should be favoured, there are a number of difficult technical questions for which answers would have to be found before implementation could proceed. The following list of some of the questions and problems which are associated with this approach will serve to illustrate this point:
>
> 1. When would a marriage breakdown be considered as having taken place?
>
> - would it be the date of official separation or legal divorce?
>
> - what recognition would be given to foreign divorces?
>
> - how would desertions be handled?

- what recognition, generally would be given to common- law arrangements, and how would one determine the beginning or end of such arrangements?

2. How would the Department find out that a marriage had broken down so that it could alter the contributor's record of earnings? This would be a particularly difficult problem with respect to Canadians emigrating from Canada.

3. What provision, if any, should be made when divorce occurs after payment of a benefit commences?

   - would the Canada Pension Plan Administration split the benefit, or

   - would it leave the matter to the courts, who normally allocate income to the partners of divorce?

   It might be noted that if the pension credits were split in a case where disability benefits were being paid, the base that was used to calculate the recipients benefit would, as a consequence, be retroactively altered; this would mean that the recipient had been overpaid and, under current legislation, he would be required to refund the amount of the overpayment.

4. A further complication arises when a divorce occurs after one partner has retired while the other is still working and making contributions.

5. Splitting of pension credits for low income earners could have the effect of reducing the pension credits of each party to a level that is below the Plan's basic exemption. This could deprive both parties of Canada Pension Plan coverage.

6. What effect would the splitting of pension credits in the case of marriage breakdown have upon the formulae that private pension plans have adopted for their integration with the Canada Pension Plan?

   These problems are no doubt solvable, and if this option were to command general support, appropriate solutions would be sought. However, the list should serve to demonstrate that the adoption of a concept like this is not necessarily a straight- forward matter; substantial study would be required, and very complex amendments to the legislation would have to be developed, before this alternative could be instituted.

[42] Ms. Giordano further noted in her report that the credit-splitting provisions also stipulated that no division of pensionable earnings could be made for the following periods:

a) where the total unadjusted pensionable earnings of the former spouses in a year did not exceed twice the YBE;

b) for the period before which one of the spouses reached age 18 or after which one of the spouses reached age 70;

c) for the period in which one of the spouses was a beneficiary of a retirement pension; and

d) for any month that is excluded from the contributory period of one of the spouses by reason of disability.

She explained the reason for these provisions was to ensure that only those months during which both spouses were eligible to contribute to the CPP could be divided.

[43] Ms. Giordano, relying on her experience in program development for ten years, explained that in building a new program you must do so on the best assumptions from the data and resources available at the time. She noted that in 1977, the level of automation available to administer a credit-splitting scheme would have been limited. In addition, the concept of credit-splitting was fairly novel. She believed that in 1977 only West Germany had any experience with it so it was understandable that the government would put boundaries on the program.

[44] Ms. Giordano also reviewed other provisions of the CPP including the Child Rearing Provision (CRP) which Parliament approved in 1977, proclaimed in force in 1983 retroactive to January 1, 1978. The provision allowed persons who withdrew from the workforce, either fully or partially, to raise children under the age of seven to drop these years of low or nil earnings from the calculation of the amount of their retirement benefit. Ms. Giordano explained that the Respondent would have been able to drop the years of her marriage to Mr. J. S. under this provision since she was raising children under the age of seven for almost the entire period they cohabited during their marriage. However, in the Respondent's case, since she had relatively low earnings and contributions during the rest of her eligible earning period she would benefit more from a credit split than from relying on the CRP. In other situations the child rearing

spouse might benefit more by relying on the CRP which would effectively drop the credits acquired through credit-splitting.

[45] Ms. Giordano then outlined the amendments to the CPP passed by Parliament in 1986 effective January 1, 1987 which allowed separated spouses and former common-law partners their share of credits accumulated during their period of cohabitation; however, former common- law partners must apply within four years after cohabitation ceased. With respect to separated spouses the application must be made within three years after the death of one of the spouses.

[46] For divorced spouses credit-splitting became mandatory upon the Minister being informed of the termination of the marriage and upon receiving the prescribed information relating to that marriage, unless the parties previously waived claims on each other's pension rights and only where the agreement is permitted by provincial law. Subsequent to the 1986 amendments the provinces of British Columbia, Québec, Alberta and Saskatchewan have enacted legislation permitting such agreements.

[47] The effect of making credit-splitting mandatory upon divorce was to remove the three year limitation period which is the subject of this litigation but only for parties divorced on or after January 1, 1987.

[48] Ms. Giordano noted that the recommendation of the 1986 amendments came from the Parliamentary Committee on Equality Rights which was set up to ensure that the CPP was consistent with the *Charter of Rights and Freedoms*. Specifically, the amendment removing the application requirement, and as a consequence the three year limitation period, was seen by the Committee as addressing an important question of access in relation to the 1978 provisions. To quote the Committee's recommendation as set out in Ms. Giordano's report:

> …access to these provisions, which were introduced as a means of assuring some measure of equality between the spouses, would be greatly improved if the division occurred automatically upon termination of the relationship.

[49] Ultimately the legislation did not provide for automatic credit splits because, Ms. Giordano explained, the National Divorce Registry has never contained sufficient information

to allow automatic credit splits, so the legislation makes the credit splits mandatory upon divorce but not automatic.

[50] Ms. Giordano provided calculations in the event the Respondent succeeded in her claim. Mr. J. S.'s monthly income would be reduced and Ms. B. T.'s income would increase but not on a dollar for dollar basis. Specifically Mr. J. S.'s monthly pension would drop by $134.36 from $668.14 to $533.78. Ms. B. T.'s monthly pension would increase by $87 from $86.67 to approximately $174.

[51] Although Ms. Giordano did not provide specific calculations she confirmed that should the Respondent's claim succeed Mr. J. S.'s disability pension would have to be recalculated retroactively to 1987 from when he began to receive it until it was replaced by his retirement pension in 2010. Similarly the retirement pension would also have to be recalculated from when he began to receive it. Overpayments for both the disability pension and the retirement pension would be incurred effective upon attribution of credits. Ms. Giordano stressed that the Minister is obliged under the terms of the Financial Administration Act to recover any debt owing to the Crown. Ms. Giordano explained that when a debtor is already "in pay" collection is simple and requires only two key strokes. The Department's policy on overpayments allows for remission of debt in hardship cases but rarely when the debtor is in pay. A monthly recovery can be negotiated with the debtor.

[52] Ms. Giordano then reviewed what has been referred to in these proceedings as the take-up rate, that is, the number of divorced couples who split their credits in a given year as a percentage of divorces for that year. Reference was made to a graph included at Tab 18 of her report which demonstrates that the take-up rate was seemingly low in 1978, 3% when credit-splitting was introduced and remains in single digits today, 7% for the last year of the graph, 2005. Ms. Giordano reported that it dropped to 6% in 2008 which is the last year this statistic was available.

[53] In her opinion, the statistics show that after the time limitation was removed in 1987 the take-up rate did not increase significantly. It reached its zenith of 14% in the mid-nineties before falling again to its current level.

[54] Ms. Giordano referred to a 1998 departmental study prepared by one J. Berger which identified factors that could contribute to the take-up rate. The Berger report is attached as Tab 1 to Addendum 2 to Ms. Giordano's report.

[55] In her report Ms. Giordano has summarized the factors in the Berger study to which she testified that she had no reason to challenge, as follows:

> **1. Credit-Splitting Take-up Rate: Alternative Causal Explanations**
>
> A 1998 departmental study identified a number of causal factors that could contribute to the observed take-up rate for Canada Pension Plan (CPP) credit splitting.[2]
>
> - Where spousal contributions are similar, particularly for the period of time they lived together in a conjugal relationship, there would be few credits to share. Therefore, the importance of a credit split will depend on the spouses' respective levels of earnings, labour force attachment, and work history.
>
> - The data indicate that a greater proportion of women are in the paid labour force than in the past.
>
> - Women are not a homogeneous group. Differences among women in their labour force participation and earned income mean that credit-splitting may be of differential value to different groups of women. Credit-splitting may be of greater significance to women in older age cohorts where fewer participated in the labour force and many took time off work to raise children.
>
> - Some women remove themselves from the paid labour force in order to care for children, and in doing so may benefit from the CPP's child-rearing provision (or a child rearing drop-out-CRDO). Consideration may be given to the fact that a credit split would result in pension credits being acquired and then dropped, and effectively lost to both former spouses.
>
> - Patterns of divorce and characteristics of divorcing couples indicate that credit-splitting on marriage breakdown may not be of significant benefit to many divorcing spouses. Many relationships are of short duration, and those of short duration tend to be among younger couples who are likely to have had a shorter work history than those who are older. These factors would tend to limit the potential amount of credits to be split.
>
> - Provinces can enact legislation that enables divorcing couples to "opt out" of credit-splitting upon divorce. Within the context of marriage breakdown, most aspects of the division of family property may be subject to agreement. One

[2] "Credit Splitting on Divorce, Separation, Breakdown of Common Law Relationship," J. Berger, CPP Program Direction, 1998; Tab 1, Addendum 2 to Appellant's Expert's Report.

spouse may waive or assign rights to one asset in exchange for sole rights to another. Presumably the spouse will not waive rights to a pension except for adequate compensation.

- Even in provinces where there is no legislation to opt out of credit-splitting upon divorce, CPP pension credits may be indirectly traded off in exchange for other assets in the division of matrimonial property. That CPP pension credits are considered in the division of family property is reflected in the fact that spousal agreements are still being drawn up with explicit agreements between spouses not to apply for a credit split upon divorce, even though the province has not enacted legislation that authorizes this opt-out.

[56] Ms. Giordano noted the concerns raised by persons in the years immediately following implementation of credit-splitting including those of the Health and National Welfare Minister, Monique Bégin, about what was seen as a low take-up rate. She outlined the steps taken by the Minister and the department to make people more aware of the provisions, including letters to the Canadian Bar Association, Legal Aid and notices in local media outlets.

[57] In cross-examination Ms. Giordano was asked to comment on the legislative reference to the reason for the three year limitation period put forward by Paul McRae, the Parliamentary Secretary to the Minister of National Health and Welfare that "otherwise the administration of the provision would be virtually impossible." Ms. Giordano testified that she could not critically assess the accuracy of that statement because it was difficult for her to put herself back more than thirty years to a time when the level of automation was not what it is today.

[58] Ms. Giordano was questioned as to how she concluded in her report that finality was a factor for the legislation when it was not specifically referred to in the legislative record. She replied that it was the same situation as for common law spouses under current legislation and was the only conclusion she could come to in the absence of a reference in the legislative record. Also, it related to the retroactivity concerns expressed in the 1974 CPP Advisory Committee Report.

[59] Although finality was not specifically referred to in the debates retroactivity was, although Ms. Giordano acknowledged that it was not from a government member but rather from an opposition member, Lincoln Alexander.

[60] Ms. Giordano acknowledged that those who missed the limitation period would be disproportionately women however she was unaware of how many applicants were rejected for this reason or how many persons in total would have been affected by the three year limitation period.

[61] Ms. Giordano was unable to comment on a department paper prepared by one Peter Wray which concluded that 3.7 billion dollars had not been the subject of credit-splitting due to the low take-up rate, since she was unaware of the scenarios or methodology used to come up with the figures used in the paper.

[62] Dr. Richard Shillington was called as an expert witness for the Respondent. The parties agreed and I found that Dr. Shillington is an expert in statistical analysis and social policy particularly as it relates to poverty.

[63] Dr. Shillington submitted a Reply Report to the expert evidence report of Ms. Giordano filed by the Appellant. He focused primarily on a "reference period" of January 1, 1978 through December 31, 1986.

[64] Dr. Shillington addressed each of the factors set out in the Berger report both in his report and in his testimony. He noted that the Berger report covered a period until 1998 which was more than 12 years after his "reference period" ended in 1986.

[65] Dr. Shillington acknowledged that there was truth to most of the factors but collectively he felt that they might account for a take-up rate of 90% as opposed to rates of less than 10%.

[66] With respect to the first point raised in the Berger report that former spouses with similar CPP contributions made credit-splitting applications less beneficial, Dr. Shillington noted that in the vast majority of cases males would still have the higher income. When asked in examination- in-chief to venture a guess he indicated that 90% would be males.

[67] In reviewing Figure 1 in his report which tracks females as a percentage of CPP contributors and contributions, he corrected the period referred to in his conclusion which should have read 1966 through 1989. Women's share of contributions rose from 20% to 37%

through this period but he noted that it still reflected the unequal economic situation of men and women.

[68] While Dr. Shillington accepted the first point in the Berger report and agreed that there were some former spouses whose CPP contributions were similar he concluded from the data on CPP contributions that they were in the minority.

[69] At this point I pause in the review of the evidence to note that neither expert considered a scenario where there might be a difference in the incomes of the former spouses but both incomes exceeded the maximum pensionable earnings throughout cohabitation so that no benefit would be derived from a credit split by the lower earning spouse. There is, of course, no evidence to indicate how many former spouses would have fit into this scenario.

[70] Dr. Shillington's report addressed the Berger report suggestion that the possibility of credit-splitting being waived may have contributed to a lower take-up rate. He theorized that the *Preece* decision which recognized the right of parties to opt out of credit-splitting only dated from 1983 and provincial legislation in four provinces occurred later than that so he concluded that this could not have been a factor at all for low take-up rates in the early years. I will return to this conclusion in the analysis section of these reasons.

[71] Dr. Shillington took exception to the statement in Ms. Giordano's report which claimed that "statistics show that after the time limitation was removed in 1987, the take-up rate did not increase significantly." He maintained in his report and in examination in chief that on the basis of the data of take-up rates shown in Exhibit 18 referred to above the take-up rate doubled from 4% in 1986 to 8% the next year and tripled to 12 % in 1990 which he would consider to be significant.

[72] In cross-examination Mr. Stevenson, counsel for the Appellant, suggested that although the three year limitation period was removed in 1987 for couples divorcing on or after January 1, 1987 it continued to apply to couples who divorced prior to 1987. Therefore, he suggested the removal of the three year limit did not have an effect until 1989 so that the earliest an impact would have been noted from the removal of the three year limit was 1990. On the basis of the data from the chart the take-up rate in 1989 was 11% and in 1990 12 % reflecting only a

1% increase. Dr. Shillington, in fairness, conceded that Mr. Stevenson's argument had some weight.

[73] Dr. Shillington attributed the most significant reason for the low take-up rate in the reference period to the low awareness level of the credit-splitting program. He was critical of the government's lack of action in making the credit-splitting program better known to the public and noted the Health and National Welfare Minister, Monique Bégin's concerns about low awareness and the need for more to be done. He claimed that "in Quebec this does not happen – they phone people." His own view on the obligation of government was expressed in this way:

> If legislators have gone to the trouble of passing social legislation then they should be proactive [about making people aware of it].

[74] While Dr. Shillington attributed the increase in the 1990's of the take-up rate to greater systemic information dissemination, as did Berger, he was unable to posit a theory as to why the take-up rate declined to levels approximately the same as those seen in the reference period – most recently at 6 %.

[75] In cross-examination Dr. Shillington acknowledged that he did not know how many persons applied and were rejected for missing the limitation period or for any of the other statutory requirements, e.g. the marriage was less than three years, cohabitation was for less than three consecutive years or the total unadjusted pensionable earnings of the former spouses in the years of cohabitation did not exceed twice the YBE.

Submissions of the Parties

A. Submissions of counsel for the Respondent

[76] Counsel for both parties filed extensive *Charter* briefs. At the hearing of this matter the parties agreed to present their oral submissions first by counsel for the Respondent, Mr. Calderhead who later replied to Mr. Stevenson's submissions. The added party, Mr. J. S., was given an opportunity to make submissions but they were limited and merely reiterated his evidence. His submission will not be reviewed here.

[77] Both the Respondent and the Appellant agreed that the present s. 15 claim is one of adverse effects discrimination since the impugned provisions are neutral on their face.

[78] Mr. Calderhead has conveniently set out a summary of points and principles relied on in the s. 15 *Charter* claim in paragraph 73 of his written submissions which is reproduced below:

> 73. The equality right claim is based on the following points and principles:
>
> - As a result, upon divorce, *housewives* were left with little or nothing by way of the CPP credits that had been accumulated during their marriage: men were left with most if not all the CPP credits;
>
> - In order to respond to this situation, s.55(1) of the CPP was enacted as a mechanism to gain access (invariably by women) to the combined CPP credits that were accumulated during a marriage so as to "ensure" that women obtained an equal split of the CPP credits accumulated during a marriage.
>
> - Because of flaws in the design and implementation of the credit-splitting regime, the mechanism essentially did not accomplish its goal. In fact, 97% of the time it served to perpetuate the *status quo ante* – with men being the overall gainers from the legislation.
>
> - The focus of this s. 15 challenge is the effect of the flawed mechanism for sharing CPP credits.
>
> - The mechanism's flaws consisted of: i) an application process which ii) expired after three years of divorce as well as poor program promotion;
>
> - The effect of the operation of the law, i.e., the actual results was that, during the relevant period (1978-1986), some 97-98% of divorced women did not obtain a split of the accumulated CPP credits. Conversely, only 2-3% of divorced men were required to share their CPP credits.
>
> - Taking into account the realities of the CPP credit *ownership* upon divorce, the purpose of the credit-splitting legislation and the needs of divorced women, the flawed legislation not simply failed to take divorced women's situation into account but, thereby, effectively perpetuated the *status quo*, failing to promote women's substantive equality.
>
> - In short, the characteristics of the credit splitting program failed divorced women and served to entrench their inequality under the CPP.
>
> - These barriers to, and hence the failure of, credit splitting were acknowledged in the 1986 amendments, but the remedy was only partial, to divorces from 1987 onward.

[79] When Mr. Calderhead was asked how to reconcile the assertion in the summary above, as well as in paragraphs 17 and 58 of his brief, that the government's poor promotion of the credit split provisions was a cause of the low take-up rate, with the Federal Court of Appeal decision in *Le Corre v. Canada (Attorney General)*,[3] at paragraph 26 which held that there is no legal duty on the government to inform potential recipients of benefits to which they may be entitled, he replied that it was not an essential ingredient of his case.

[80] Mr. Calderhead characterized the 1978 credit-splitting program as a failure which was acknowledged by the 1986 amendments but only for divorces from 1987. He found it profoundly significant that the amendments can be traced to the formation of a Parliamentary Committee on Equality Rights which reviewed laws, including the CPP, to ensure they were consistent with s. 15 of the *Charter of Rights and Freedoms* which came into effect April 17, 1985. The Committee's report, *Equality for All* (October 1985) noted that few former spouses had taken advantage of the credit-splitting program. It recommended that the credits be split equally between the spouses automatically upon marriage breakdown. Mr. Calderhead noted that the Minister's own expert characterized this recommendation in her report as being advanced "in order to ensure the CPP was consistent with the *Charter of Rights and Freedoms"*.

[81] Mr. Calderhead submitted that the flaw in the 1987 amendment was that it applied prospectively only and did not apply to women who were divorced during the April 17, 1982 to December 31, 1986 period. He submitted that this was itself a violation of the *Charter* and that s. 55 of the CPP ought to have been amended to be in compliance with s. 15.

[82] Mr. Calderhead was critical of governments which argue and, sometimes, courts which "have held improperly that there is no s. 15 violation because of what are variously characterized as the justification, reasonableness, purpose or context of the impugned

[3] 2005 FCA 127

legislation. These are all considerations properly considered under s. 1 and must not be imported into the s. 15 analysis where the government does not bear the onus".[4]

[83] It was submitted that since well over 97% of divorced women did not receive credit-splitting that they were obviously burdened by the impugned provisions and disproportionately so in comparison to divorced men. Thus, it was argued, the first step in *Law Society of British Columbia v. Andrews*[5] was met.

[84] With respect to the second step of *Andrews*, the perpetuation of disadvantage, Mr. Calderhead reiterated his argument that the 1986 amendment confirmed the disadvantage produced by s. 55(1) by eliminating the application requirement and the three year limitation period. He drew a parallel between this case and the Supreme Court's decision in *Canada (Attorney General) v. Hislop*[6] which considered amendments to the CPP which extended survivor benefits to same-sex couples as a remedial response to the Supreme Court's ruling in *M v. H*[7] in which the opposite sex definition in the Ontario Family Law Act was struck down as discriminatory. The Court in *Hislop* found that a temporal limitation excluding same-sex partners who had died prior to a certain date continued the prior discrimination that the remedial legislation was intended to rectify and was thus a violation of s. 15.

[85] In his written submissions Mr. Calderhead acknowledged that the jurisprudence has set out some contextual factors which may be considered in addressing the issue of whether a distinction, once established on an enumerated or analogous ground, is discriminatory. The submissions on those factors are summarized below :

(i) Pre-existing Disadvantage

[86] Mr. Calderhead outlined at some length the historic disadvantage that divorced women as a group have experienced, however this factor is really not in dispute. The issue remains whether the impugned provisions perpetuate that disadvantage to meet the test for

[4] Paragraph 89, Respondent's *Charter* Brief
[5] [1989] 1 S.C.R. 143
[6] 2007 SCC 10
[7] [1999] 2 S.C.R. 3

discrimination. Mr. Calderhead submitted that they did by virtue of what he characterized as the "abject failure of the government's own credit-splitting program".

(ii) Relationship Between Grounds and the Claimant's Characteristics or Circumstances

[87] Mr. Calderhead submitted that the three year limitation period resulted in an extremely low take-up rate among women in the Respondent's situation and thus the effect of the provisions disproportionately resulted in the exact problem credit-splitting was intended to eliminate- unequal access between men and women post-divorce.

(iii) Ameliorative Purpose and Effect

[88] Mr. Calderhead submitted that in the present case this factor is neutral / inapplicable since the CPP credit-splitting scheme was not designed to improve the condition of any other disadvantaged group.

(iv) Nature of the Interest Affected

[89] Mr. Calderhead submitted that the present case is the same as *M. v. H.* in that a group has been excluded from obtaining a benefit. The limitation period, he argued, has had the effect of divorced women being almost completely excluded from accessing CPP credits accumulated by their husbands during marriage. The societal effect of this exclusion, he maintained, promotes the view that divorced women are less worthy of recognition and protection within society. The interest itself, as in *M. v. H.*, is fundamental – the ability of divorced women to meet basic financial needs following the breakdown of their marriages.

[90] On the basis of these arguments Mr. Calderhead submitted that ss. 55(1) of the CPP violates s. 15(1) of the *Charter*. Submissions on s. 1 of the *Charter* were deferred until reply and will be dealt with later in these reasons.

B. Submissions of Counsel for the Appellant

[91] Counsel for the Appellant, Mr. Stevenson, submitted that the Respondent's submissions ignore the fundamental principle that s. 15(1) of the *Charter* does not implore a positive

obligation on the government to provide services to ameliorate the symptoms of systemic or general inequality.

[92] Since there is no constitutional obligation to introduce credit-splitting into the CPP the Respondent's challenge is distinguishable from *Hislop* on which the Respondent relies.

[93] Similarly the Respondent's argument that the failure of the post-1986 credit-splitting provisions to apply retrospectively was a violation of s. 15(1) of the Charter is based on the erroneous assumption that there is a constitutional right to a mandatory credit split.

[94] Mr. Stevenson stressed that in adverse effects discrimination cases there is an evidentiary burden on the claimant to show that the impugned provisions have a disproportionately negative impact based on factors relating to enumerated or analogous grounds. He submitted that in this case the Respondent has not demonstrated a causal link in the evidence between the impugned provisions – the application requirement and the three year limitation period – and the alleged inability of divorced women to access a credit split. The take-up rate data is inconclusive at best and fails to establish the required causal link. Rather the evidence, he submitted, indicates that the take-up rate is likely the result of numerous independent, pre-existing, social realities as well as the various requirements under the CPP other than failure to apply within three years, e.g. the marriage must have lasted for at least three years and there were at least three consecutive years of cohabitation.

[95] Mr. Stevenson followed up the point he made in cross-examination of Dr. Shillington that after the 1987 amendments, which removed the three year limitation period, the first year an impact would have been made on the pool of people eligible for a credit split would have been 1990 and there was no appreciable increase in the take-up rate, on the data relied upon by Dr. Shillington, between 1989 to 1990. Overall the take-up rate, after spiking in the mid 1990's to *16.3%,* soon returned to the same single digit level of the most recent years, strongly suggests that the application requirement and three year limitation period were not the cause of the perceived low take-up rate in the first place. Accordingly, it is submitted that since the Respondent has not shown that the impugned provisions created a distinction on an enumerated or analogous ground, the first step in the two part test for establishing a s. 15 *Charter* violation has not been met and the claim should be rejected.

[96] Should his argument on the first step be unsuccessful and a distinction be found on an enumerated or analogous ground, Mr. Stevenson submitted that consideration of the second step – whether the distinction creates a disadvantage by perpetuating prejudice or false stereotyping, is still informed by the contextual analysis outlined in *Withler v. Canada (Attorney General)*.[8] While he acknowledged that in the more recent Supreme Court decision of *Quebec (Attorney General) v. A.*,[9] the majority indicated that a claimant would not have to prove the perpetuation of prejudice or stereotyping to establish substantive discrimination, nevertheless the Supreme Court held that they may still serve as useful guides in determining whether a provision amounts to discrimination.

[97] Mr. Stevenson maintained that consideration of the purpose of the impugned provision as part of its wider legislative context continues to be part of the s. 15(1) analysis as set out in *Withler*, and that *Quebec v. A.* does not signal that this consideration should be made solely under s. 1. To the extent that Mr. Calderhead has suggested the contrary he disagreed.

[98] In applying a contextual analysis under the second step Mr. Stevenson submitted the following:

i) The special context of social benefits legislation

[99] The CPP is not a welfare scheme. In order to sustainably provide the various benefits expected by contribution, only those who meet eligibility requirements receive a benefit.

[100] The requirements to submit an application is a standard feature of the CPP. Although the requirement to submit an application for credit-splitting was removed for divorces occurring after January 1, 1987 information must still be provided to the Minister to determine eligibility e.g. the length of cohabitation.

[101] The three year limitation period for credit-splitting after divorce was part of the original provision as a means of avoiding administrative difficulties. Other limitation periods for credit-splitting continue to exist e.g. three years after the death of a separated spouse and for former

[8] 2011 SCC 12
[9] 2013 SCC 5

common law spouses four years after they have stopped cohabiting and have been living apart for at least one year.

ii) Pre-existing disadvantage is not perpetuated by the credit-splitting provisions

[102] Although Mr. Stevenson does not dispute that women as a group have experienced historic disadvantage it is submitted that the Respondent has not established in the particular context of the CPP that the three-year limitation period and the application requirement layered disadvantage or vulnerability onto her or those in similar situations. This submission is akin to the submission in relation to step one in that the inconclusive nature of the reasons for the perceived low take-up rate fail to establish that the impugned provisions perpetuated pre-existing disadvantage experienced by women.

iii) Correspondence between the grounds and the claimant's actual needs, capacity and circumstances

[103] It is submitted that *Withler, supra* at paragraph 71, stands for the proposition that in complex benefits schemes the central question is whether the lines drawn are generally appropriate having regard to the circumstances of the groups impacted and the objects of the schemes. It is submitted that no reasonable time limit could perfectly correspond to the Respondent's needs since she took 18 years from the date of her divorce to apply. The CPP would have had to provide for a fully automatic credit-splitting system from its inception. It is submitted that in the context of a complex statutory scheme Parliament must be given a degree of latitude in determining where to draw the line.

iv) Respondent's actual circumstances

[104] Mr. Stevenson noted that the Respondent was represented at the time of her divorce and that the *Decree Nisi* made reference to her right to apply for CPP credit-splitting although there was no reference to the three year limitation period. The requirement of an application posed no difficulty for the Respondent because she did in fact apply and stated in evidence that she would have applied sooner if she had known she had to do so.

v) Ameliorative purpose

[105] It is acknowledged that by enacting the credit split provision Parliament clearly intended the provisions to have an ameliorative effect on women which has been recognized by the Federal Court of Appeal in *D.R. v. Canada (Attorney General)*[10] *and Murray v. Canada (Minister of Health and Welfare).*[11]

[106] The statement in *R. v. Kapp* [12] is relied upon to the effect that in implementing ameliorative programs or laws, the government should be allowed some flexibility to make changes since, as stated in *Kapp* "the effects of a program in its fledgling stages cannot always be ascertained".

[107] Mr. Stevenson, citing *Ferrel et al. v. Ontario (Attorney General)*[13] submitted that to hold governments to a standard of perfection in the effectiveness of ameliorative programs in their fledgling stages would have an inhibiting effect on legislatures enacting experimental legislation in areas of complex social benefits.

vi) Nature of the interest affected is financial

[108] It is submitted that the interest affected in this case is purely economic. The fact that the Respondent may receive a smaller retirement pension as a result of her inability to access a credit split does not amount to being denied access to a "fundamental social institution" or by missing the limitation period it cannot be viewed as impacting a "basic aspect of full membership in Canadian Society" or "a complete non-recognition of a particular group" as expressed in *Law v. Canada (Minister of Employment and Immigration)*[14].

[109] It was therefore submitted that the Respondent has not shown with reference to these contextual factors that the impugned provisions amount to substantive inequality under s. 15(1) of the *Charter*.

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[10] 2013 FCA 16
[11] [1998] F.C.J No. 612
[12] 2008 SCC 41, at paragraph 47
[13] (1998), 42 O.R. (3d) 97 (Ont.C.A.)
[14] [1999] 1 S.C.R. 497, at paragraph 74

C. Respondent's reply submissions

[110] Mr. Calderhead characterized Mr. Stevenson's submissions with respect to *Kapp* as being part of what he termed a "complexification" strategy designed to encourage deference being given to the government's credit-splitting regime in the s. 15 analysis when it ought to be considered under s. 1 where the government bears the onus.

[111] With respect to Mr. Stevenson's argument as to the lack of evidence and inconclusive nature of the take-up rates to establish a causal link between the impugned provisions and the alleged inability of divorced women to access a credit split, Mr. Calderhead seems to resile from the position he took in his written submissions. In those submissions he submitted that the impugned provisions had an adverse effect on women which could be inferred from what he claimed to be a low take-up rate.

[112] Mr. Calderhead now argues that the low take-up rate is only a factor to be considered but it is the "stripping of a legal entitlement" which is the adverse effect on which the focus should be placed. He argues that there is no question that the three year limitation period took away an entitlement so no statistical data or evidence is required.

ANALYSIS

i) Comments on the parties' submissions

[113] Before embarking on the two part test for establishing a s. 15 *Charte*r violation as set out in *Withler* I wish to review several points of contention in the submissions of counsel.

a) How is the *Withler* two part test affected by *Quebec v. A?*

[114] The source of any disagreement between counsel on this question appears to be Mr. Calderhead's statement in paragraph 89 of his written submissions:

> 89. In the same way that comparator groups were sometimes used to have equality claims summarily rejected, similarly, governments have argued and, sometimes courts have help (*sic*) improperly that there is no s. 15 violation because of what are variously characterized as the justification, reasonableness, purpose or context of the impugned legislation. These are all considerations

> properly considered under s. 1 and must not be imported into the s. 15 analysis where the government does not bear the onus.

[115] Mr. Stevenson acknowledged that in *Quebec v. A.* the majority of the Court indicated that under the second part of the test, a claimant will not have to prove the perpetuation of prejudice or stereotyping to establish substantive discrimination, although the existence of either may still serve as a useful guide in determining whether a provision amounts to discrimination.

[116] Mr. Stevenson characterized Mr. Calderhead's statement as a suggestion that *Quebec v. A.* "signals that the consideration of the legislative purpose of an impugned provision as part of the contextual analysis under s. 15 should now be eschewed in favour of consideration solely under s. 1 of the Charter."[15]

[117] Although Mr. Calderhead argued in his reply submissions that Mr. Stevenson was attempting to import a "justification" argument for deference in the s. 15 analysis, as opposed to doing so under s. 1, I did not take his argument to be that contextual factors are to be ignored altogether in the s. 15 analysis. In fact later in his written submissions at paragraph 128 he cited *Withler, supra,* paragraph 54:

> 128. 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.

[118] Mr. Calderhead also reviewed the four contextual factors in his submissions, although he did so without reference to the restated principles of *Kapp* and *Withler* of the original test set in *Andrews, supra,* and preferred to reference the contextual factors as set out in the decision of *Law.*

[119] In summary, I find that while *Quebec v. A.* emphasized that there must be an analytical distinction between s. 15 and s. 1, the public policy basis for legislation as stated by McLachlin,

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[15] Appellant's *Charter* brief, paragraph 81.

C.J., still has a limited relevance to the s. 15 analysis. In fact McLachlin, C.J applied all four contextual factors in her s. 15(1) analysis in *Quebec v. A.*

b) Is there a positive obligation on the government to ameliorate free-standing societal disadvantage?

[120] I agree with Mr. Stevenson's submission that s. 15(1) of the *Charter* does not oblige the state to take positive actions such as to provide services to ameliorate the symptoms of systemic or general inequality.

[121] The nature of the s. 15(1) guarantee was described by McIntyre J., for the majority in *Andrews, supra,* as follows at page 163:

> Section 15(1) of the Charter provides for every individual a guarantee of equality before and under the law, as well as the equal protection and equal benefit of the law without discrimination. This is not a general guarantee of equality; it does not provide for equality between individuals or groups within society in a general or abstract sense, nor does it impose on individuals or groups an obligation to accord equal treatment to others. It is concerned with the application of the law.

[122] To the extent that Mr. Calderhead's submissions suggest that there was a constitutional right to a mandatory credit split this position would be incorrect. Nevertheless it is clear from *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*[16], that once the government does enact legislation to ameliorate systemic or general inequality it must do so fairly and on a non-discriminatory basis. Its attempt to do so then becomes subject to s. 15 considerations.

[123] Since there was no constitutional obligation to introduce the credit-splitting regime into the CPP the present case is distinguishable from *Hislop* which is relied on by the Respondent. In *Hislop* the Supreme Court held that a prior finding of discrimination (in *M. v. H*) led to remedial legislation which itself was found to be insufficiently inclusive and discriminatory. In the present case there was no prior finding of discrimination against women for which the government was required to introduce a credit-splitting regime.

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[16] 2004 SCC 78

c) Recommendations of the Parliamentary Committee on Equality Rights

[124] It is Mr. Calderhead's position that the 1986 amendments recognized the prior discrimination of the credit-splitting program. In fact, he finds some support for this position in the Appellant's expert's report where she stated:

> In order to ensure that the CPP was consistent with the Charter of Rights and Freedoms, the Parliamentary Committee on Equality Rights recommended that CPP credits earned during a marriage be split equally between spouses **automatically** upon marriage breakdown. The Committee noted that the existing credit splitting provisions "raise an important question of access" and concluded that
>
> > … access to these provisions, which were introduced as a means of assuring some measure of equality between the spouses, would be greatly improved if the division occurred automatically upon termination of the relationship.

[125] A closer reading of the Committee's report, *Equality for All* (October 1985), reveals that the Committee did not suggest that the existing credit-splitting regime was inconsistent with the *Charter*. In fact it states the opposite:

> …the pension credit-splitting provisions raise an important question of access. The division of credits is now available on application by a former spouse. The split is not automatic. We would not suggest that s. 15 requires that the split be automatic. However, it is our view that these provisions, which were introduced as a means of assuring some measure of equality between the spouses, would be greatly improved if the division occurred automatically upon termination of the relationship. [Emphasis added]

[126] Therefore the recommendation of the Committee should not be seen as the prelude to a constitutional remedy but rather as a suggestion for an improvement to the credit-splitting program. The recommendation flowed from the observation that very few former spouses had taken advantage of the program but there was no suggestion that the program as it existed was not in compliance with the *Charter*.

d) Credibility finding

[127] The parties agree that the relevant background facts are not in dispute except, perhaps, for Ms. B. T.'s assertion that she was unaware of the three year limitation period. Mr. J. S. testified that it had been mentioned by the judge at the divorce hearing but it was not referred to in the *Decree Nisi* and Mr. J. S. had not referred to it in his earlier testimony before the Review Tribunal. His recollection of what was said at the divorce hearing was not precise. Ms. B. T. maintained that her lawyer never told her that she had to apply within three years of the divorce. In the absence of any evidence from her lawyer to the contrary I have no reason to disbelieve her on this point and find it more likely than not to be the case.

ii) The Section 15(1) Challenge

a) The Onus of Proof

[128] As with all other claims alleging an infringement of the *Charter* the person alleging discrimination under s. 15(1) has the burden of establishing on a balance of probabilities that their rights have been violated by an impugned provision. Once established the onus shifts to the government to show on a balance of probabilities that the limits imposed by the provision in question are justified under s. 1 of the *Charter*.

b) The two part test

[129] Recently in *Withler, supra,* at paragraphs 30-40 the Supreme Court reaffirmed the two part test for establishing a s. 15 violation. The first step is determining whether the law creates a distinction based on an enumerated or analogous ground such as sex and marital status in the present case. The second step is determining whether the distinction creates a disadvantage by perpetuating prejudice or stereotyping.

[130] Since the CPP provision in question establishing a credit-splitting scheme is facially neutral the parties agreed that the case is one of adverse effects or indirect discrimination. This form of discrimination was explained in *Withler, supra,* at paragraph 64 as follows:

> 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.

Part 1: Does s. 55(1) of the CPP create a distinction based on sex or marital status

[131] Mr. Calderhead has argued that the credit- splitting program was designed primarily for the benefit of divorced women, that a very low number of spouses applied for credit-splitting and that this was as a result of the three year limitation period and the application requirement.

[132] The argument found favour with the Review Tribunal which found, at paragraph 90:

> The statistics following the 1978 amendment show a take up rate of 2% or 3% of divorced spouses took advantage of the DUPE within the limitation period. The need to apply and the limitation period has resulted in 97% of divorced spouses being shut out of the DUPE, and of the divorced spouses, it was primarily women who had to apply because the credits were not already in their name.

[133] The difficulty with this argument is that it is presented as a tautology and it is not based on evidence but rather on an assumption that the impugned provisions were the cause of the perceived low take- up rate.

[134] In adverse effects discrimination cases evidence is particularly important. In *Symes v. Canada* the Supreme Court stated:

> If the adverse effects analysis is to be coherent, it must not assume that a statutory provision has an effect which is not proved. We must take care to distinguish between effects which are wholly caused, or are contributed to, by an

> impugned provision, and those social circumstances which exist independently of such a provision.[17]

[135] Similarly in *S. M.-R .v. Canada (Attorney General),*[18] an adverse effects claim that the Child Rearing Provision (CRP) had a disproportionate negative impact on women was rejected by the Federal Court of Appeal because there was no evidence that the effect of the legislation was related to an enumerated or analogous ground. The Court stated at paragraph 76 "we cannot just assume that the impugned provision is responsible".

[136] The only evidence relied on by the Respondent is the take-up rate data but that data I find to be inconclusive and even contraindicative to the Respondent's position.

[137] I agree with Mr. Stevenson's submission that the Respondent has provided no evidence of a causal link between the take-up rate and the impugned provisions. The take-up rate data does not provide the number of credit- splitting applications that were received in a year, only the number that were actually granted. There is no evidence of how many applications there actually were, and how many were denied and for what reason.

[138] Ms. Giordano's evidence outlined a number of statutory requirements like the three year length of the marriage and the three consecutive years of cohabitation. The data does not indicate how many applications were denied due to one of these requirements not being met nor, of course, would there be any data as to how many persons chose not to apply because they knew these requirements had not been met.

[139] The evidence suggested that there were a number of other factors unrelated to the impugned provisions which may have contributed to what was perceived to be a low take-up rate. Dr. Shillington acknowledged that each of the factors may have reduced the take-up rate although he would have put the collective effect of all factors set out in the Berger report as accounting for a reduction in the rate in the neighborhood of 10% and not in excess of the 90%reduction which actually occurred. With respect, I find that this number is dependent on too much guesswork as opposed to evidence to be persuasive.

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[17] [1993] 4 S.C.R. 695 at paragraph 134
[18] 2013 FCA 158

[140] Dr. Shillington was dismissive of the factors set out in the Berger report and referred to them as "a mix of speculative, theoretical and unquantified factors which, on examination, failed to provide compelling explanations for the low take-up rate during the reference period". However this is precisely the problem with relying on the take-up rate data to prove the fact at issue. The explanation for the rate has not been supported in evidence on any objective or scientific basis so that it makes it very difficult to conclude, as the Respondent contends, that the impugned provisions were the cause of the rate being what it was.

[141] Dr. Shillington made it quite clear that in his view the main obstacle to what he would regard as an appropriate take-up rate was a lack of awareness of the credit-splitting program. He suggested that the government was not as proactive as it should have been in communicating the program to the public. There was a considerable amount of evidence presented by the Appellant as to the efforts the government took to publicize the program. In light, however, of the Federal Court of Appeal decision in *LeCorre v. Canada, supra* which was followed by the Federal Court in *Lee v. Canada (Attorney General)* [19] that there is no obligation on the government to inform potential recipients of benefits to which they might be entitled and Mr. Calderhead's concession that poor program promotion was not an essential ingredient of his case, there is no need to make a finding on whether the government promoted credit-splitting appropriately.

[142] There still remains, however, the question of whether lack of awareness was a factor in the perceived low take-up rate. For Ms. B. T. it likely was. There is no data which would suggest the degree to which it was a factor. In the first phase of the program between 1978 and 1986 the perceived low take-up rate certainly was taken by the Health and Welfare Minister of the day as an indicator that more had to be done to make the public aware of the program. The Parliamentary Committee report, *Equality for All*, certainly took notice of the rate which informed its recommendation to improve access to the program by making it automatic.

[143] The perception that lack of awareness was a factor in the take-up rate may have been a reasonable one in the early years before the 1986 amendments but the experience subsequent to the amendments, both immediately thereafter and also over the more than three decades of the

[19] 2011 FC 689

program's existence would tend to indicate that lack of awareness was not a significant factor at all.

[144] First, as demonstrated by Mr. Stevenson's cross-examination of Dr. Shillington, the first year after the amendments, which removed the application requirement and the three year limitation period, in which one might expect to see a significant change in the take-up rate, if the impugned provisions were the reason for a low take-up rate, was 1990.The difference, however, between 1989 and 1990 on Dr. Shillington's data was a rise of only 1% and on the data provided in Ms. Giordano's report the rate actually went down.

[145] Second, we have now had over three decades of experience with the credit-splitting program and yet the most recent rate is 6%, comparable to what it was in the early days of the program. During the three decades of the program's existence the take-up rate in each decade has averaged less than 10%.It would be difficult to accept an argument that the public's awareness of credit-splitting is any less today than it was thirty years ago and yet the take-up rates are comparable. This suggests that lack of awareness has never been a significant factor in the take- up rate.

[146] Dr. Shillington was unable to offer a theory as to why the take-up rate remains at the current level which he would regard as low. I would suggest that one possibility is that he attributed insufficient weight to the factors set out in the Berger report. In particular, I have some difficulty accepting his analysis concerning waiver of credit-splitting in general and the significance of the *Preece* decision in particular. At page 13 of his report under what he terms to be Claim F he states the following:

> While opting out is cited, in Addendum 2, as a reason why credit- splitting take-up might be lower than expected, the *Preece* decision only dates from 1983 and the consequential provincial legislation (in BC, Alta., Saskatchewan and Quebec) was even later. That is, this could not have been a factor at all for low take-up rates in the early years of the reference period and, at most, of limited significance through to the end of the period.

[147] The *Preece* decision to which Dr. Shillington refers was a decision by the Pension Appeals Board in four appeals: *Minister of National Health and Welfare v. Laurence Preece et*

al.[20] The decision held that where complete releases had been given in a separation agreement, minutes of settlement or a consent judgment then spouses are precluded from subsequently applying for and receiving a CPP credit split.

[148] The provincial legislation to which Dr. Shillington referred in the four indicated provinces, took place as a consequence to the 1986 CPP amendments (now s. 55.2) which effectively overturned *Preece* for written agreements entered into after June 4, 1986 unless expressly permitted under the provincial law governing the agreement. Although each of the provinces in question passed their respective legislation between 1987 (Saskatchewan) and 2005 (Alberta) each provided that a written agreement entered into on or after June 4, 1986 may provide for a waiver of CPP credit splits.

[149] The fact that the *Preece* decision was not released until 1983 does not mean that couples who were going through a divorce between 1978 and 1983 were not bargaining the right to a credit split during this period as suggested by Dr. Shillington. *Preece* merely confirmed that the agreements negotiated by the parties who had engaged in the practice before the decision were valid and enforceable.

[150] Also, the fact that the provincial legislation occurred after *Preece* is irrelevant. Opting out was valid until June 4, 1986, just before the application requirement and the three year limitation period were removed effective January 1, 1987. The legislation in each of the four provinces provided that written agreements on or after June 4, 1986 could provide for a waiver of CPP credit-splitting. In those four provinces, at least, agreements on credit-splitting were always valid and enforceable, either by virtue of *Preece* for agreements before June 4, 1986 or by virtue of provincial legislation for agreements after that date.

[151] The fact that four provinces saw fit to enact legislation permitting parties to negotiate agreements involving their CPP credits suggests not only that there was an interest in the practice but that it must have been occurring in those provinces prior to the 1986 amendment which removed the right to the practice absent provincial legislation.

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[20] C.C.H. Canadian Employment Benefits and Pension Reports (1983), No. 8914

[152] Although I am not able to accept Dr. Shillington's analysis with respect to the impact of either the *Preece* decision or the provincial legislation which continued its ruling I accept his conclusion on page 13 of his report that "while not a statistical point, it is evident that, during the reference period, the existence of credit-splitting provided some value to some women (if they was (*sic*) aware of it), and, thereby, some bargaining power in their negotiations with their former spouses".

[153] It may, however, have had a greater impact on the take –up rate than Dr. Shillington was prepared to concede.

[154] None of the suggestions in the Berger report or from the evidence e.g. spouses with different incomes but both exceeding the maximum earnings for contributions, are put forward by the appellant as a definitive explanation, either individually or collectively, for the rates being what they have been. However, they do suggest that there are a number of factors which have caused the rates to be at those levels so that it cannot be assumed that there is a causal link between the take-up rates and the application requirement and the three year limitation period.

[155] The fact that the rate has remained at relatively the same single digit level both before and after the impugned provisions were removed (with the exception of the mid-nineties when it spiked to the mid- teens before quickly returning to single digits again) suggests that there is no causal link between the impugned provisions and the take-up rate. At least I am not satisfied that the evidence has demonstrated such a link which was the basis of the Respondent's initial argument that the impugned provisions impacted women so as to create a distinction on an enumerated or analogous ground.

[156] This finding would be sufficient to dispose of this appeal so that there would be no need to go on to the second step in the analysis; however, in Reply submissions at the hearing, Respondent's counsel, Mr. Calderhead, argued that the focus should be placed on the "stripping of a legal entitlement" by the impugned provisions which is the adverse effect. Since the impugned provisions speak for themselves and took away a legal entitlement then, he argued, no statistical data or evidence would be required.

[157] Assuming, for the moment, that it is accepted that the limitation period stripped a legal entitlement to the benefits of credit-splitting from women because the vast majority of persons who would benefit from a credit split would be women and thus the distinction would be established on an enumerated ground, there must still be evidence to demonstrate that women suffered an adverse effect as a result of the limitation period.

[158] I am not satisfied on the evidence that the law does create a distinction on the basis of sex or marital status in this case between a divorced woman and a divorced man. However since the issue has been fully litigated and in the event that I am found to have been wrong in my conclusion on the first step I am prepared to move to the second step and consider whether such a distinction brought about by the impugned legislation creates a disadvantage by perpetuating prejudice or stereotyping.

Part 2: Does the distinction perpetuate disadvantage or prejudice, or stereotype the claimant group

A. Introduction to the contextual analysis

[159] In *Withler*, the Supreme Court of Canada rejected the former reliance on mirror comparator groups in the contextual analysis under s. 15(1) while recognizing that the role of comparison was to determine whether the claimant was denied a benefit granted to others.

[160] In *Quebec v. A., supra,* at paragraph 327 the Court cautioned that *Kapp* and *Withler* should not be treated as "establishing an additional requirement on claimants to prove that a distinction will perpetuate prejudicial or stereotypical attitudes towards them".

[161] As noted earlier in these reasons I see nothing in *Quebec v. A.,* the Supreme Court of Canada's most recent decision on s. 15, which alters the contextual approach set out in *Withler*. The four contextual factors developed in *Law* and *Kapp* are:

> (1) Pre-existing disadvantage, stereotyping, prejudice, or vulnerability experienced by the individual or group at issue;
>
> (2) The relationship or correspondence between the ground(s) on which the claim is based and the actual need, capacity, or circumstances of the applicant or others;

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

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

[162] In paragraph 66 of *Withler* it is made clear that the contextual factors are not to be used as a rigid template in every case. Also at paragraph 418 of *Quebec v. A.*, McLachlin, C.J. outlined that what is required to determine what constitutes discrimination is a contextual analysis taking into account the factors in *Kapp* and *Withler* including the ameliorative impact or purpose of the law.

B. Contextual Analysis under Part 2

i) Social benefits legislation

[163] In *S.M.-R. v. Canada (Attorney General), supra*, Stratas, J.A. at paragraphs 56-66 reviewed the jurisprudence involving social benefits legislation and s. 15(1) of the *Charter*. After citing *Law*'s admonition that courts should not demand "that legislation must always correspond perfectly with social reality in order to comply with s. 15(1) of the *Charter*" he concluded at paragraph 57:

> This context means that that distinctions arising under social benefits legislation will not lightly be found to be discriminatory. The Supreme Court has confirmed this over and over again.

[164] Another example is provided in *Gosselin v. Quebec (Attorney General)*[21] where it was stated that "the inability of a given social program to meet the needs of each and every individual does not permit us to conclude that the program failed to correspond to the actual needs and circumstances of the affected group."

[165] In *Withler*, the Supreme Court emphasized that the contextual inquiry in social benefits legislation involving pension benefits such as the present case will focus on the purpose of the

[21] 2002 SCC 84, at paragraph 55

impugned provision **viewed in the broader context of the scheme as a whole [**emphasis added**].** At paragraph 67 the Court stated:

> In cases involving a pension benefits program such as this case, the contextual inquiry at the second step of the s. 15(1) analysis will typically focus on the purpose of the provision that is alleged to 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.

[166] In *S.M.-R.,* the contributory requirements of the CPP were challenged under s. 15(1) of the *Charter*. The Federal Court of Appeal held that the Applicant's failure to meet contributory requirements resulted from her personal circumstances and not from a distinction between her and others under the Plan. The nature of the Plan was considered and the holding of the Supreme Court of Canada in *Granovsky v. Canada (Minister of Employment and Immigration)*[22] that the Plan was not a social welfare scheme was cited. Stratas, J.A. made the following general statements about the Plan which are helpful to the inquiry in the present case:

> [70] Indeed, it cannot even be said that the *Plan* is intended to bestow benefits upon demographic groups of one sort or another. Instead, it is best regarded as a contributory-based compulsory insurance and pension scheme designed to provide some assistance – far from complete assistance – to those who satisfy the technical qualification criteria.
>
> [71] Like an insurance scheme, benefits are payable on the basis of highly technical qualification criteria. Based on personal circumstances, some can make contributions, others not.

[22] 2000 SCC 28

ii) Pre-existing disadvantage, if any, of the claimant group

[167] There is no dispute that women as a group have experienced historic disadvantage. What is disputed is whether the Respondent has established that the application requirement and three year limitation period perpetuated pre-existing disadvantage experienced by women given the inconclusive nature of the reasons for the perceived low take-up rate as discussed above.

[168] I am not satisfied on the evidence that the Respondent has established that the impugned provisions have perpetuated pre-existing disadvantage experienced by women. Similarly I am not persuaded by Mr. Calderhead's Reply submissions that the impugned provisions "stripped a legal entitlement" to credit- splitting which was obvious on the face of the legislation and required no statistical data or evidence to prove other than the given fact that a large majority of those who stood to gain by credit- splitting were women. As stated earlier, even if that were to be assumed there must still be evidence to demonstrate that women suffered an adverse effect as a result of the limitation period and application requirement.

[169] There is another basis on which I cannot accept the argument other than the evidentiary one. If the argument were to be extended it would mean that many of the eligibility and qualification rules of an intricate social insurance scheme would be subject to the same challenge which I find would be untenable. For example, paragraph 44(2)(b) of the CPP provides that a successful claimant for a disability is deemed not to have been disabled earlier than fifteen months prior to the date of the claimant's application (subject to certain exceptions) notwithstanding that the claimant may have been found to be disabled for a much longer period.

[170] In this case I find that the Respondent was unsuccessful in obtaining a credit split not because she was a woman but because she did not meet one of the qualification requirements of the Plan, possibly because the lawyer who negotiated her divorce settlement did not advise her of the requirement. The following statement in *S.M.-R., supra*, is apposite to the present case:

> When a person is denied benefits under a complex and intricate social benefits scheme such as this, one does not conclude that the person is not an equal member of Canadian society, is deserving of less worth, or does not belong with the rest of us. One concludes that, like so many others, the person did not get

> benefits under a non-universal scheme because technical qualification requirements were not met.[23]

[171] The Respondent was not singled out for different treatment. The evidence also discloses that there were many other divorced women who did receive benefits from CPP credit splits. Tab 18 of the Appellant's expert report indicates that over 10,000 women received credit splits in the three years following the Respondent's divorce while she was eligible to apply.

[172] For these reasons I find that this factor does not tend towards a finding of discrimination.

iii) Degree of correspondence between the grounds and the claimant's actual needs, capacity or circumstances

[173] Under this heading the application of the impugned provisions must be looked at in the context of the broader legislative scheme of credit-splitting. As stated in *Withler* at paragraph 71:

> 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 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.

[174] I am mindful of the limitation on this part of the s. 15(1) analysis as recently set out in *Quebec v. A.* by McLachlin, C.J. at paragraph 421 that the analytical distinction between s. 15(1) and s. 1 must be maintained. Nevertheless, as stated in *Withler supra*, the question of whether the lines drawn by the legislation are appropriate still has some relevance to the s. 15 analysis.

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[23] S.M.-R., *supra*, at paragraph 84

[175] In the present case a three year limitation period was inserted into the pension scheme to avoid what the government perceived at the time to be administrative difficulties as stated by Paul McRae, the Parliamentary Secretary to the Minister of National Health and Welfare during the second reading of the bill introducing the credit-splitting scheme. There was reference during the debate on that bill by a member of the opposition, Lincoln Alexander, to the problem which would occur if lengthy periods of retroactive calculations had to be made. It must be remembered, as Ms. Giordano testified, that these considerations were taking place at a time in the mid 1970's when automation was not what it soon thereafter became. We were still in the carbon paper era so any determination of whether the lines were drawn appropriately in the credit-splitting scheme first introduced into Parliament must be seen in that context.

[176] As stated in *Nishri v. Canada (Attorney General)*[24] Parliament should be given a degree of latitude in determining where to draw the line in a complex statutory scheme.

[177] There was nothing uncommon about the requirement to submit an application for a benefit. There are many other provisions of the CPP which require the same.

[178] Ms. Giordano stated in her evidence that the limitation period was a boundary placed on a new legislative scheme to ensure finality in the disposition of claims between spouses. Mr. Calderhead criticized Ms. Giordano's evidence on the basis that the finality consideration had not been in her report and there was nothing in the legislative record to demonstrate that it was ever a consideration for inserting it into the bill. It may be, however, that the absence of a reference to finality may have been more likely because the purpose of a limitation period was well known and need not have been referenced in the debate.

[179] Limitation statutes have been with us since the common law courts of the 18th and 19th centuries described them as "statutes of repose" or "statutes of peace".[25]

[180] In *M.(K.) v. M.(H.)* the Supreme Court of Canada set out the rationale for limitation statutes as follows:

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[24] 2001 FCA 115, at paragraph 42

[25] See *Tolson v. Kaye* (1822), 3 *Brod. & Bing*. 217, 129 *E.R.* 1267. See also *Deaville v. Boegman* (1984), 48 O.R. (2d) 725 (Ont. C.A.)

> There are three [purposes], and they may be described as the certainty, evidentiary, and diligence rationales…
>
> Statutes of limitations have long been said to be statutes of repose… The reasoning is straightforward enough. There comes a time, it is said, when a potential defendant should be secure in his reasonable expectation that he will not be held to account for ancient obligations…
>
> The second rationale is evidentiary and concerns the desire to foreclose claims based on stale evidence. Once the limitation period has lapsed, the potential defendant should no longer be concerned about the preservation of evidence relevant to the claim…
>
> Finally, plaintiffs are expected to act diligently and not "sleep on their rights"; statutes of limitation are an incentive for plaintiffs to bring suit in a timely fashion. [26]

[181] In *Murphy v. Welsh*, Major, J. stated "a limitations scheme must attempt to balance the interest of both sides".[27]

[182] With respect to the DUPE provisions, the first and third rationales in *M.(K.) v. M.(H.)* apply to the Respondent B. T. and the Added Party J. S. In addition, the limitation period addresses the concerns for administrative efficiencies of the credit-splitting scheme itself. This case demonstrates the administrative difficulty which would flow from the absence of a limitation period. An application for a credit split made more than eighteen years after the parties were divorced, where one of the former spouses had been in receipt of a CPP disability pension for a number of years before it was converted into a retirement pension when he attained the age of 65, would result not only in the administrators of the Plan having to calculate the retroactive payments to the applicant but also to calculate the extent of the overpayment made to the recipient of the disability and retirement benefits.

[183] Although it has been argued that credit- splitting is performed at a neutral cost to the Plan that is certainly not always the case. The evidence demonstrates that Mr. J. S.'s pension would be reduced, before any consideration of the overpayment, more in dollar terms than what Ms. B. T. would receive. The Plan would stand to gain. However collection of the overpayment of Mr. J. S.'s disability pension from 1987 would be problematic. Technically it could be

[26] [1992] 3 S.C.R. 6
[27] [1993] 2 S.C.R. 1069, at paragraph 11

accomplished quite easily since Mr. J. S. is "in pay" and the overpayment can be deducted from his retirement pension. In reality it would mean the Plan administrators would have to negotiate a repayment schedule which would involve financial hardship considerations arising from the recalculation of his benefits. The Plan might never recover the full overpayment.

[184] The second rationale of a limitation period, to avoid stale evidence, may have no application to the parties in this case since the period of their cohabitation was not in dispute however in cases where the cohabitation period is in dispute, either to establish the three year qualification period or to determine the number of years subject to a credit split, Ms. Giordano explained that a hearing would have to be conducted and evidence presented to establish over what period the parties cohabited. Obviously the greater distance in time between the cohabitation period and the hearing the greater the risk that the evidence relied on by the parties will have become stale or non-existent making the task of the trier of fact more difficult.

[185] Mr. Calderhead suggests that concerns about finality were gone by 1986 when the amendments were brought forth inferring that they were never a concern in the first place. It must be remembered that the Parliamentary Committee on Equality Rights was still recommending an automatic splitting of credits which would have removed the purpose for a limitation period as set out above so it never entered into the debate. Automatic credit-splitting, however, was not possible since the Minister still required information before the split could be effected such as the period of cohabitation and the parties' social insurance numbers. The divorce registry was never linked to provide this information, some of which may not even have been included in the divorce information itself. For this reason the final wording of the amendments was for a mandatory credit split but not an automatic one. The information required to effect the credit split must still come from one or both parties or another source. The result is that the risks and difficulties which were designed to be met by the insertion of a limitation period are still present today although the administrative calculation of retroactivity has been attenuated with the advent of automation, however the concerns for finality still remain.

[186] I appreciate that this discussion concerning the purpose of the limitation period in the 1978 credit-splitting provisions might be amplified in the s. 1 analysis. I have tried to confine

the discussion to the s. 15 analysis set out in *Withler* to determine whether the three year limitation period in a complex social benefit scheme was a line drawn by Parliament that should be given a degree of latitude as suggested in *Nishri*.

[187] I am prepared to find for the reasons stated above that those lines were drawn appropriately in this case and that the impugned provisions did not impact divorced women, as stated in *Auton, supra,* "in a way that undercuts the overall purpose of the program".[28]

[188] With respect to the Respondent's actual circumstances, as viewed by a reasonable person in her situation, the fact is that the credit- splitting provisions did afford her the opportunity to access a credit split for three years following her divorce during a time frame when, as indicated above, thousands of other divorced women did so.

[189] On the evidence it is not at all clear as to how many other divorced women or divorced men for that matter may have been affected, if at all, by the impugned provisions.

[190] For these reasons I am prepared to find that this factor does not tend towards a finding of discrimination.

iv) Whether the law or program has an ameliorative purpose or effect on disadvantaged groups

[191] The Appellant's counsel, Mr. Stevenson, submitted that the impugned provisions and the CPP are ameliorative in nature. Mr. Calderhead submitted that this contextual factor is neutral/inapplicable in this case since the scheme was not designed to improve the condition of any other disadvantaged group.

[192] There is no question that the DUPE provisions have an ameliorative effect on women: *D.R. v. Canada (Attorney General), supra,* by enabling them to participate equally in the accumulation of CPP credits during the marriage.

[28] 2004 SCC 78, at paragraph 42

[193] Mr. Stevenson submitted that the impugned provisions are but one branch in the CPP's "forest" of overlapping provisions and objectives, each governed by intricate eligibility criteria and rules: see *D.R., supra,* at paragraph 174.

[194] I agree with Mr. Calderhead's argument, in oral submissions, that the focus on whether the law is ameliorative must be on the impugned provisions themselves, *albeit* against the broad backdrop of the pension credit-splitting scheme.

[195] I have some difficulty accepting that the limitation period alone has an ameliorative effect on divorced women other than, perhaps, to have made the credit- splitting initiative more viable to the government which introduced that initiative and which had expressed concern about administrative difficulties in the absence of a limitation period.

[196] I do accept Mr. Stevenson's submission that the fact the 1986 changes were made to the credit-splitting scheme does not mean that the original scheme was a failure. The fact is that the initial credit- splitting scheme was intended to ameliorate inequity experienced by divorced women who worked in the home for all or part of their marriage. The 1986 amendments must be seen as an attempt to make the overall scheme more effective. This is consistent with the principles in *Kapp, supra,* and *Ferrel et al., supra,* which hold that governments should be given some leeway to create new programs and revise them to make them more effective without the revision necessarily being considered an admission that the original program was either a failure or violated s. 15 of the *Charter*.

[197] I find that this factor does not have the same significance as it did in *Kapp*, for instance. On the whole I am prepared to consider this factor as being relatively neutral but certainly not tending towards discrimination.

v) Nature of the interest affected

[198] Recently the Federal Court of Appeal in *Runchey v. Canada (Attorney General)*[29] considered a claim that the interaction of the Child-Rearing provisions and the DUPE provisions of the CPP treated men differently from women and discriminated against men

[29] 2013 FCA 16

contrary to s. 15 of the *Charter*. One of the contextual considerations made by the Court was the nature and scope of the interest affected by the impugned legislation. At paragraphs 145 and 146 the Court stated the following:

> [145] Here, the men's interest affected is purely economic- the size of the benefit they receive after a credit split.
>
> [146] This underscores the nature of the distinction here as being a natural consequence of a partial income replacement scheme- an economic supplement-with very detailed and complicated eligibility and qualification rules, rather than some comment on the worth, membership or belonging of men in Canadian society.

[199] There is a distinction between this type of financial interest and the one set out in *M. v. H.* on which Mr. Calderhead relies. That decision held that meeting financial needs was fundamental following a breakdown of a relationship of intimacy and economic dependence. It involved the failure of the legislation to provide same-sex couples the right to seek support as was provided to unmarried opposite sex couples. Same –sex couples were entirely ignored by the statute and the Court held that this promoted the view that persons involved in same-sex relationships were less worthy of recognition or protection. I find that the type of financial interest in the present case is much more akin to that in *Runchey* than in *M. v. H.* As a result, I find that this factor, as in *Runchey*, does not tend towards a finding of discrimination.

CONCLUSION

[200] I conclude that on the evidence before me, for the reasons stated above under the first step of the analysis, I am not satisfied that the impugned provisions create a distinction based on sex or marital status.

[201] I further conclude, for the reasons stated under the second step, some of which overlap with each other and the reasons under the first step, that after an examination of the contextual factors any distinction created by the impugned provisions would not be discriminatory.

[202] In light of these conclusions I find that ss. 55(1) of the CPP does not violate s. 15 of the *Charter* and accordingly it is not necessary to proceed to an analysis under s. 1 of the *Charter*.

DISPOSITION

[203] As stated in paragraph 1 above the appeal is allowed and the Respondent's ss. 15(1) *Charter* challenge to ss. 55(1) of the CPP is dismissed.

J. David Wake
Vice-Chairperson, Appeal Division