



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *Minister of Employment and Social Development v R. W.*, 2020 SST 147

Tribunal File Number: AD-19-291

BETWEEN:

Minister of Employment and Social Development

Appellant
(Minister)

and

R. W.

Respondent
(Claimant)

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Neil Nawaz

DATE OF DECISION: February 17, 2020

DECISION AND REASONS

DECISION

[1] The appeal is allowed. The Claimant is not entitled to a Canada Pension Plan survivor's pension based on her first husband's contributions.

OVERVIEW

[2] This case is about whether the *Canada Pension Plan* (CPP) discriminates against twice-widowed women.

[3] R. W., the Claimant, is 89 years old. She married in 1961, and her first husband died in a helicopter crash in 1969. She received a CPP survivor's pension, but she lost it when she remarried in December 1973. At the time, a CPP survivor's pension ended if the recipient remarried. In 1989, her survivor's pension was reinstated because of amendments made to the CPP that allowed a remarried spouse to continue to receive the pension.

[4] The Claimant's second husband died in 2012, and she applied for a second survivor's pension. However, section 63(6) of the CPP (the disputed provision) allows a person to receive only one survivor's pension, the amount of which is the larger of the survivor's pensions that would otherwise be payable.

[5] The Appellant, the Minister of Employment and Social Development (Minister), determined that it could pay the Claimant a survivor's pension relating to her second husband only, since it was larger than the survivor's pension that she was receiving relating to her first.

[6] In April 2013, the Claimant appealed the Minister's decision to the Tribunal's General Division. She argued that section 63(6) of the CPP infringed her equality rights under section 15(1) of the *Canadian Charter of Rights and Freedoms* (the Charter). Section 15(1) of the Charter protects people against discrimination based on their sex and marital status. In the Claimant's view, the Minister's decision to cancel her survivor's pension from her first husband discriminated against her based on her sex and marital status. So the Claimant challenged section 63(6) of the CPP, arguing that it was unconstitutional because it went against her Charter

rights. In this case, I will refer to section 63(6) of the CPP as the “disputed provision”¹ because it is the part of the CPP that the Claimant challenged.

[7] In October 2018, the General Division held a hearing by videoconference. During the videoconference, the Claimant and the Minister introduced evidence from expert witnesses.

[8] In a decision dated January 12, 2019, the General Division allowed the appeal. The General Division found that section 63(6) of the CPP infringed the Claimant’s equality rights under section 15(1) of the Charter. It also found that the infringement could not be demonstrably justified in a free and democratic society.

[9] The Minister is now appealing the General Division’s decision to the Tribunal’s Appeal Division. The Minister argues that the General Division made numerous errors when it found that the CPP discriminates against women who have been widowed twice.

[10] I have reviewed the parties’ written submissions and heard their oral arguments. I agree with the Minister’s position. I also agree that the best remedy in this case is to give the decision that the General Division should have given and find the Claimant ineligible for a second CPP survivor’s pension.

[11] These are the reasons for my decision.

ISSUES

[12] In this appeal, I must answer the following questions:

Issue 1: Did the General Division fail to observe a principle of natural justice by relying on material that was not in the record? In particular, did it use an intersectional analysis without providing the Minister with an opportunity to address it?

¹ The General Division decision refers to the challenged provision as the “impugned provision.”

- Issue 2: Did the General Division make an error in law by misapplying the test for discrimination under section 15 of the Charter? In particular, did it incorrectly find that the disputed provision creates a distinction?
- Issue 3: Did the General Division make an error in law when it found that the disputed provision perpetuated prejudice or stereotyping? In particular, did it ignore or misapply contextual factors?
- Issue 4: Did the General Division base its decision on erroneous findings that the disputed provision has a negative impact on twice-widowed women and that the purpose of the survivor's pension is to recognize a widow's non-monetary household contributions?
- Issue 5: Did the General Division make an error in law by misapplying the reasonable limits test under section 1 of the Charter?

ANALYSIS

[13] Having considered the parties' submissions on all the issues, I have concluded that the General Division made an error in at least three ways. Since these errors, by themselves, defeat the General Division's decision, I see no need to address the Minister's remaining submissions.

Possible Grounds of Appeal

[14] Under section 58(1) of the *Department of Employment and Social Development Act* (DESDA), there are only three grounds of appeal to the Appeal Division: The General Division (a) failed to observe a principle of natural justice; (b) erred in law; or (c) based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.²

[15] Administrative tribunals such as the Appeal Division must take guidance from the wording of their particular governing law: "The textual, contextual and purposive approach

² *Department of Employment and Social Development Act* (DESDA), s 58(1).

mandated by modern statutory interpretation principles provides us with all the necessary tools to determine the legislative intent.”³

[16] Applying this approach to the DESDA shows that sections 58(1)(a) and (b) do not define what constitutes errors of law or breaches of natural justice, which suggests that the Appeal Division should hold the General Division to a strict standard on matters of legal interpretation. In contrast, the wording of section 58(1)(c) suggests that the General Division should be given deference on its factual findings. The decision must be **based** on the allegedly erroneous finding, which itself must be made in a “perverse or capricious manner” or “without regard for the material before [the General Division].” This language suggests that the Appeal Division should intervene when the General Division commits a significant factual error that is not merely unreasonable, but extreme or clearly at odds with the record.

The Test for Discrimination

[17] To raise an equality argument, a claimant must first show that the law treats one group differently from another. Section 63(6) of the CPP reads:

Where, but for this subsection, more than one survivor’s pension would be payable concurrently to a person under this Act, or a survivor’s pension would be payable concurrently to a person under this Act and under a provincial pension plan, only one survivor’s pension shall be payable to that person, the amount of which shall be the greatest or greater of the survivor’s pensions that would, but for this subsection, be payable to that person.

[18] Section 15(1) of the Charter states:

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.

³ *Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93.

[19] Discrimination under section 15 must be analyzed according to a two-part test set out by the Supreme Court of Canada in *Withler v Canada (Attorney General)*:⁴

- Does the law create a distinction based on an enumerated (listed) or analogous (implied) ground?
- Does the distinction create a disadvantage by perpetuating prejudice or stereotyping?

[20] At the first step of the discrimination analysis, a claimant must establish that they are denied a benefit that others are granted or carry a burden that others do not because of a personal characteristic that falls within the enumerated or analogous grounds of discrimination under section 15(1).⁵

[21] At the second step of the analysis, a claimant must establish that the law denies “substantive equality.” This means that the claimant must establish that a disadvantage is imposed and that this disadvantage is unfair. The fact that the disadvantage perpetuates prejudice or stereotypes often demonstrates this.⁶ The central question is not whether one person receives less than another, but whether one person obtains less than another as a result of prejudice or stereotyping.

[22] Contextual factors must guide determining whether a distinction amounts to discrimination. Such factors include but are not limited to: (i) any pre-existing historical disadvantage of a group to which the claimant belongs; (ii) the degree of correspondence between the distinction or differential treatment that the disputed provision and the needs, capacities, and circumstances of the claimant create; (iii) the ameliorative⁷ purpose of the disputed provision on a more disadvantaged group in society; and (iv) the nature and scope of the interest that the disputed provision affects.⁸

[23] The particular contextual factors relevant to the question of substantive equality at the second step will vary with the nature of the case. The factors mentioned above may be helpful,

⁴ *Withler v Canada (Attorney General)*, 2011 SCC 12 at para 30.

⁵ *Withler*, *supra* note 4 at para 62.

⁶ *Withler*, *supra* note 4 at para 67.

⁷ A word that describes anything done with the intention to make an improvement.

⁸ *Withler*, *supra* note 4 at para 65. The contextual approach was first set out in *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497.

but they need not be expressly discussed in every case to fully and properly determine whether a particular distinction is discriminatory.⁹

Issue 1: Did the General Division fail to observe a principle of natural justice by relying on material that was not in the record?

[24] As we will see, the General Division struggled to show that twice-widowed women were at a disadvantage compared with once-widowed women, twice-widowed men, or any other group. Perhaps conscious that sex and marital status were insufficient grounds on which to base a finding of discrimination, the General Division introduced a third: age. The Claimant did not specifically identify age as a ground of discrimination under section 15(1) of the Charter, but she relied on expert evidence to show she is part of a generational cohort that was adversely affected by stereotypical assumptions underlying the CPP when it was established. Rosella Melanson, a senior advisor to the government of New Brunswick on women's issues, testified that the disputed provision was a sexist leftover from another era. The CPP survivor's pension was conceived, she said, not as an entitlement that a woman had earned from the contributions to her first household but as a replacement for the income of the man who had been taking care of her.¹⁰ The General Division wholly accepted this evidence, but then it went further:

Because of the intersection of the Claimant's sex and marital status she is in a distinctly disadvantaged position. Although age (which is also an enumerated ground) was not specifically raised by the Claimant as a ground of discrimination under section 15(1), I believe that it is also significant because women belonging to the Claimant's generation have experienced greater historical disadvantages than those belonging to younger generations.¹¹

The General Division added:

This intersectional approach takes into account their [twice-widowed women's] historical, social, and political context and recognizes the unique experience of an individual based on the intersection of relevant grounds. It allows the particular experience of discrimination, based on the confluence of grounds involved, to be acknowledged and remedied.

⁹ *Withler*, *supra* note 4 at para 66.

¹⁰ General Division decision, paras 28 and 29.

¹¹ General Division decision, para 46.

It also acknowledges the complexity of how people experience discrimination and recognizes that the experience of discrimination may be unique. It places the focus on society's response to the individual as a result of a convergence of grounds and does not require the person to slot themselves into rigid compartments or categories.¹²

[25] In support of these statements, the General Division cited two position papers on intersectionality that the Ontario Human Rights Commission adopted in the early 2000s.¹³ These papers were not on the record when the General Division issued its decision, and the Claimant's experts never referred to intersectionality in their submissions. It appears that the General Division member found this information on his own initiative and used it to support his point that all three grounds of discrimination had to be viewed in the appropriate historical, social, and political contexts.

[26] Case law already recognizes that categories of discrimination may overlap.¹⁴ It is possible that the General Division was simply making this point when it invoked intersectionality, but it seems to have had something larger in mind. The General Division could have cited case law. Instead, it chose to cite two lengthy and substantive papers about a conceptual tool, developed to analyze institutional structures, that in recent years has bloomed into an academic discipline in its own right.

[27] Procedural fairness demands that parties know the case against them. I am satisfied that the General Division breached a principle of natural justice by relying on specialized material that was not on the record. In particular, the material was not shared with the Minister. As a result the Minister did not have the opportunity to make relevant submissions.

¹² General Division decision, paras 48 and 49.

¹³ The General Division cited the following paper: C. A. Aylward, *Intersectionality: Crossing the Theoretical and Praxis Divide* (Paper Distributed at Transforming Women's Future: Equality Rights in the New Century: A National Forum on Equality Rights presented by West Coast Leaf, 4 November 1999) [unpublished]. This paper was cited in "An Intersectional Approach to Discrimination Addressing Multiple Grounds in Human Rights Claims," a paper found on the Ontario Human Rights Commission's website and written by its Policy and Education Branch. The link the General Division provided does not work anymore. However, I was able to find the second paper elsewhere on the Ontario Human Rights Commission's website. The first paper appears to be widely available from various sources on the Internet.

¹⁴ See, for example, *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497.

Issue 4: Did the General Division base its decision on erroneous findings of fact?

[28] In my view, the General Division had a weak basis for finding the disputed provision discriminatory. I have concluded that the General Division based its decision on the following erroneous findings of fact, made without regard for the record.

The General Division based its decision on an erroneous finding that twice-widowed women are a historically disadvantaged group.

[29] The General Division found that twice-widowed women of a certain age are a historically disadvantaged group, but it offered no evidence to support this position.¹⁵ It is true that individuals from this group were denied meaningful roles in the labour market, but the General Division was unable to show how the disputed provision perpetuated this inequity or made it worse. There was nothing on the record to demonstrate that twice-widowed women received less than once-widowed women or twice-widowed men. In fact, the available evidence indicated that twice-widowed women collectively received more than any other group.

[30] More importantly, there was nothing to demonstrate that, as a result of prejudice or stereotypes, twice-widowed women received less than they would have otherwise received had section 63(6) not existed. The General Division recognized the Claimant's non-monetary contributions to her first marriage as a stay-at-home wife and mother. It also recognized contributions that the Claimant might have made to the CPP had she been able to pursue a career during her first marriage.¹⁶ However, both findings displayed a misunderstanding of the nature and purpose of the survivor's pension, the disputed provision, and their function within the CPP program as a whole.

The General Division based its decision on an erroneous finding that the *impugned* provision disadvantaged the Claimant based on her sex, age, and marital status.

[31] The General Division found that section 63(6) created a distinction based on three overlapping grounds: age and sex, which are both listed in section 15(1), and marital status,

¹⁵ General Division decision, para 64.

¹⁶ General Division decision, paras 53, 54, 64, 65, and 66.

which the Supreme Court of Canada has found to be an analogous ground. In paragraph 54 of its decision, the General Division wrote:

The Claimant is a member of a distinct group of woman survivors of more than one spouse who are being denied an additional survivor's benefit even though all of their former spouses contributed to the CPP. Her age is also significant since senior women are the majority of survivor's pension beneficiaries, and they have experienced a greater historical disadvantage than younger women.

[32] It appears that the General Division relied on overlapping grounds because it could not establish a distinction based on any one ground. On its face, section 63(6) of the CPP is gender neutral and does not discriminate based on sex: a twice-widowed man cannot receive two survivor's pensions any more than a twice-widowed woman can. Although the General Division declared that the disputed provision creates a distinction based on sex,¹⁷ whatever distinction that exists on this ground heavily **favours** women. The General Division cited statistics that show that women recipients of the survivor's pension outnumber men by four-to-one and take 81 percent of all payouts.

[33] The General Division also could not find a distinction based on age alone. The disputed provision does not distinguish between survivors who lose their spouse when they are young and those who lose their spouse when they are old. Again, to the extent that there is a distinction—in terms of who actually benefits from the survivor's pensions—the CPP not surprisingly **favours** individuals, such as the Claimant, who have lived long enough to survive their partners. There was no information on the record to indicate that the disputed provision disadvantaged older women. Indeed, as the General Division noted, the Claimant did not specifically raise age as a ground of discrimination.

[34] Finally, marital status, the third of the General Division's overlapping grounds, was not enough to establish a distinction on its own. There was no evidence on the record to show that people who were twice-widowed—regardless of sex or age—were more negatively impacted by the disputed provision than people who were once-widowed. In fact, since section 63(6) defaults to a survivor's pension based on the higher of the deceased spouses' contributions, the available

¹⁷ General Division decision, para 50.

information showed that the disputed provision generally resulted in twice-widowed women receiving a higher survivor's pension. Moreover, statistics showed that, despite the effect of section 63(6), survivor's pensions for twice-widowed people were, on average, higher than those of once-widowed people.

[35] In its decision, the General Division acknowledged that the disputed provision did not financially disadvantage women who had been widowed more than once but found that the absence of adverse effect evidence was outweighed by contextual factors:

The main thrust of the Minister's submission that the evidence does not establish a distinction with respect to historical disadvantage between twice-widowed and one-widowed survivors. **This may be true**, but I do not consider this to be significant when a "contextual" as opposed to a "mirror group" approach is taken [emphasis added].¹⁸

However, case law requires that, to allege of adverse effect discrimination, there must be a causal link between the alleged ground of discrimination and the precise burden that the disputed legislation allegedly imposes.¹⁹ The Supreme Court of Canada has indicated that, while the evidentiary burden to establish adverse impact "need not be onerous, the evidence must amount to more than a web of instinct."²⁰

[36] In the absence of evidence that section 63(6) adversely affects individuals who are (i) twice-widowed, (ii) women, or (iii) twice-widowed women, the General Division nevertheless concluded that the disputed provision created a distinction based on sex and marital status:

Although the impugned provision appears to be neutral, it is not neutral in its impact since it disproportionately and negatively affects women. Women are the majority of people who have been denied an additional survivor's benefit, to which they would otherwise have been entitled.²¹

What the General Division did not say is that any limit on the CPP survivor's benefit disproportionately affects women because they have longer life expectancies and thus receive more benefits over time. Since women have a demographic advantage when it comes to

¹⁸ General Division decision, para 52.

¹⁹ *Kahkewistahaw First Nation v Taypotat*, 2015 SCC 30 at paras 24 and 34.

²⁰ *Ibid* at para 34.

²¹ General Division decision, para 51.

benefitting from the survivor's pension, they also have a corresponding disadvantage when it comes to any legislative attempt to impose restrictions, qualifications, or conditions on eligibility. Here, the General Division found that the prohibition against dual pensions hurts women more than men. But the General Division found this only because it glossed over the fact that women disproportionately benefit from the survivor's pension in the first place. The survivor's pension is a two-sided coin, but the General Division considered only one of those sides.

The General Division based its decision on a misunderstanding of the nature and scope of the CPP, the survivor's pension, and the disputed provision.

[37] In my view, the General Division misconstrued an important contextual factor when it determined that section 63(6) subjected the Appellant, and all twice-widowed women of her generation, to prejudice and stereotyping.

[38] The four contextual factors described above²² do not have to be formulaically applied in every case. However, the Supreme Court has suggested that, in cases involving pension benefits programs, the second step of the section 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.²³

[39] In its decision, the General Division rightly noted that it had to consider the nature and purpose of the disputed provision.²⁴ However, in doing so, General Division misunderstood what the CPP survivor's pension is for and how the disputed provision aligns with the pension's

²² See para 22.

²³ *Withler*, *supra* note 4 at para 67.

²⁴ General Division decision at para 57.

purpose. The General Division based its decision on the assumptions that (i) the CPP survivor's pension recognizes unpaid contributions to the household and (ii) what a person contributes to the CPP corresponds to what that person (or their beneficiary) receives. However, neither premise is rooted in fact.

[40] At the General Division hearing, the Minister presented expert evidence from Andrew Williamson, a senior legislative officer for CPP policy and legislation, who has extensive knowledge and experience with the CPP. Mr. Williamson submitted an expert report that outlined the history of the CPP and Parliament's intentions when it was enacted and each time it was significantly reformed.²⁵

[41] The expert report indicates that the overarching purpose of the CPP is to provide contributors and their families with a minimum income replacement on the retirement, disablement, or death of a wage earner. All CPP benefits, including the survivor's pension, are paid from a single pool of funds contributed by working Canadians:

[I]t is important to keep in mind that this benefit is only one portion of a network of interconnected benefits and each one has been put in place recognizing its relationship and interaction within the broader scheme of the [Canada Pension] Plan, and the need for the [Canada Pension] Plan to remain economically sustainable and affordable for all Canadians. As in other social insurance programs, this involves a degree of cross-subsidization among contributors while providing a graduated reasonable minimum level of coverage. Through pooling risks across a wide range of contributors, one group, in effect, "subsidizes" the benefits paid to another group. Survivor's benefits are considerably subsidized by all contributors. For example, individuals who do not have a spouse or common-law partner at the time of death subsidize the benefits payable to those who do. Similarly, due to the fact that they generally live longer, women tend to receive a higher rate of return on their contributions than do men. The degree of cross-subsidization is more pronounced in the provision of the survivor's pension than, for example, the retirement pension. And the degree of cross-subsidization is most pronounced for survivors under age 65, given the inclusion of a flat-rate component in the pension, unrelated to earnings. Given that survivors may receive a lifetime benefit without having contributed to the [Canada Pension] Plan, it is in this sense

²⁵ Employment and Social Development Canada (ESDC) Expert Report of CPP Policy & Legislation – Survivor's Pension under the Canada Pension Plan, GD24-3.

that the Honourable Judy LaMarsh noted above that “the most expensive benefits in the whole plan are those benefits for survivors.”²⁶

[42] This passage makes it clear that the CPP is a pension scheme, but it is also an insurance plan. Like any insurance plan, some beneficiaries receive more than what they paid into the plan; others receive less. Who “wins” and who “loses” depends on many variables, including the participants’ risk of disability and death. These risks are, in turn, dependent on factors associated with a participant’s demographic profile—whether they are male or female, young or old, single or married, etc.

[43] In its decision, the General Division noted that the CPP contained a “group insurance component that involves cross-subsidization” and that “[m]aking contributions does not necessarily mean that there will be a benefit paid.”²⁷ However, it did not consider the implications of these realities. Some demographic categories may benefit from the CPP more or less than others, but that does not necessarily mean that individuals within those categories are victims of discrimination. As noted, the evidence showed that widowed women as a group disproportionately benefited from the CPP, and there was no evidence to suggest that twice-widowed women benefited any less than once-widowed women. The Claimant’s complaint was that she benefited less than she would have **if** the disputed provision were not in place.

[44] The General Division saw merit in this complaint, finding that cancelling the pension from the Claimant’s first husband nullified his contributions to the CPP and, by extension, her unpaid contributions to the household:

The impugned provision, however, treats the Claimant unequally since she, unlike a once-widowed survivor, does not receive the benefits of her contributions to all of the household units to which she has contributed. But for the impugned provision, all survivor claimants would be treated equally. They would all receive the benefits of all household units to which they contributed subject to the maximum permissible amount.²⁸

²⁶ *Ibid*, GD24-33.

²⁷ General Division decision, para 60.

²⁸ General Division decision, para 93.

[45] This passage mischaracterizes the survivor's pension. Like the orphan's benefit, it replaces income when a contributor unexpectedly dies, but it was never intended to recognize unpaid domestic work or to correct historical wrongs. It is based purely on financial need, within reasonable limits that are applicable to all recipients regardless of sex, age, or marital status. The General Division adopted the Claimant's view that CPP contributions are a type of asset that can persist even after a contributor dies and after the benefit derived from their contributions are paid out. However, the CPP does not work that way, nor does any life or disability policy. That said, the CPP does permit contributions to be split under limited circumstances, but the rules governing credit splitting²⁹ apply only when a contributor divorces or separates—not when a contributor dies. This is an exception that confirms the rule.

[46] The General Division also misconstrued evidence about the legislative history of the CPP and the rationale for the disputed provision. The survivor's pension was intended to benefit spouses in a continuing union who had lost their partner. As the General Division noted, it is true that the survivor's pension, as originally conceived, was rooted in a discriminatory assumption that women should receive support from a sole, male breadwinner. However, the survivor's pension, along with the rest of the CPP, evolved in tandem with changing societal attitudes.

[47] In 1975, survivor's provisions were amended to eliminate differential treatment of male and female spouses. The terms "widow" and "widower" were eliminated throughout the legislation and replaced by "survivor." Provisions applicable to the wife and children of a male contributor also applied to the husband and children of a female contributor. The period of cohabitation required to qualify as the survivor of a common-law partner was reduced from seven to three years. Since this last provision made it easier for common-law partners to claim survivor's benefits, the disputed provision was introduced to close a loophole in the CPP.

[48] At the time, a survivor who remarried lost the survivor's pension. On the death of the second spouse, the survivor received a survivor's pension relating to the second marriage only. However, a survivor who entered into a common-law relationship could receive an additional survivor's pension on the death of the common-law spouse. This resulted in an inequitable

²⁹ The CPP provision that governs credit splitting is called the "Division of Unadjusted Pensionable Earnings."

situation—hence the need for a blanket prohibition on receiving more than one survivor’s pension at a time.

[49] In 1987, following extensive public consultations, the CPP was amended to comply, as far as possible, with the equality rights that had recently been enshrined in the Constitution. Among other things, the amendments permitted a survivor to continue to receive a survivor’s pension despite remarriage. This reinforced Parliament’s intent to limit eligibility to the most recent spouse in situations where there was more than one former spouse. The amendments also placed common-law survivors on an equal footing with married survivors by legislating a specific definition of “spouse.” That definition required the survivor to have been cohabiting with the contributor in a conjugal relationship at the time of the contributor’s death for a continuous period of at least one year. If there was no such person, the surviving spouse could be the person who had applied for the benefit and who was married to, but not living with, the contributor at the time of death.

[50] In its decision, the General Division viewed the disputed provision as a remnant of the sexism that originally informed the CPP:

The provision terminating the survivor’s benefit on remarriage was based on the now discredited view that when a woman remarried she no longer needed the survivor’s benefit because she had a new man to take care of her. The 1987 amendments rejected this view when it allowed a widow to continue to receive survivor’s benefits despite remarriage. However, the impugned provision, which was also based on this now discredited view, remained.

I have already determined that the impugned provision is rooted in the view that the purpose of the survivor’s pension is to replace income lost because a woman was financially reliant on a sole male breadwinner. The 1987 amendments rejected that view and recognized that a widow is entitled to the survivor’s benefits because of her contributions to the family unit.

In view of this amendment, the initial basis of the impugned provision, namely that a woman who remarried no longer needed the survivor’s benefit because she had a new man to take care of her, cannot now be said to meet a pressing and substantial objective. If anything it is

contrary to the now accepted view that a widow is entitled to the survivor's benefit because she has earned it [emphasis added].³⁰

[51] However, I do not think that the available evidence supports the General Division's analysis. The rule ending the survivor's pension on remarriage may have been based on a discredited view that women were necessarily dependant on men, but I see no indication that the same was true for the disputed provision, which was enacted nine years later. As noted, the disputed provision was designed to close a loophole open to survivors who later entered into common-law relationships, but there is no evidence that it was "rooted" in the sexism that underpinned the survivor's pension as originally conceived.

[52] The 1987 amendments were intended to bring the CPP into compliance with the Charter. Those amendments had emerged from a parliamentary advisory committee report, which recommended discarding the rule that ended survivors' pensions on remarriage. However, it did so, not because the rule discriminated based on sex, but because it discriminated based on marital status.³¹ It is notable that, although the parliamentary committee thoroughly examined all aspects of the survivor's pension, it was silent about the disputed provision.

[53] None of this stopped the General Division from tarring the disputed provision with the brush of sexism. In my view, this amounted to an erroneous finding of fact. As we have seen, the disputed provision was enacted for a very specific reason—to bar a common-law partner from receiving a double pension. However, I fail to see how it was informed by harmful stereotypes about women's dependency on men.

[54] The General Division also found that the 1987 amendments recognized a widow's entitlement to the survivor's pension based on her unpaid contributions to the family unit. Again, I do not think that the record supports this finding. During its consultations, the parliamentary advisory committee looked specifically at a proposal—the so-called "homemaker pension"—that would have explicitly accomplished the goal of recognizing housework for pension purposes. While all members agreed that "the problem of poverty among elderly women must be dealt with," the committee rejected the homemaker pension for logistical and philosophical reasons:

³⁰ General Division decision, paras 88–90.

³¹ Equality for All: Report on the Parliamentary Committee on Equality Rights, October 1985, GD24-777.

“Some members of the Committee are not convinced that the Canada Pension Plan is the most appropriate vehicle for recognizing the homemaker’s work. Others feel strongly that the *Canada Pension Plan* denies a benefit to homemakers that is available to other workers and that it should be amended to provide a pension for homemakers.”³²

[55] In the end, the government accepted most, if not all, of the parliamentary advisory committee’s recommendations. It allowed survivors to keep their pensions on remarriage, and it kept the disputed provision, presumably because it had not raised any Charter red flags during consultations. The government also declined to implement a homemaker pension. In doing so, it maintained a status quo in which the CPP, for better or worse, does not recognize unpaid household contributions.

REMEDY

The Appeal Division is positioned to give the decision that the General Division should have given

[56] The DESDA sets out the Appeal Division’s powers to remedy General Division errors. Under section 59(1), I may give the decision that the General Division should have given; refer the matter back to the General Division for reconsideration in accordance with directions; or confirm, rescind, or vary the General Division’s decision. Furthermore, under section 64 of the DESDA, the Appeal Division may decide any question of law or fact that is necessary to dispose of any application made under the DESDA.

[57] The Tribunal must conduct proceedings as quickly as the circumstances and the considerations of fairness and natural justice allow. In addition, the Federal Court of Appeal has stated that a decision-maker should consider the delay in bringing a disability pension application to conclusion. The Claimant’s second husband died more than seven years ago, and she has been seeking clarity on her entitlement to the survivor’s pension ever since. If this matter were referred back to the General Division, it would only lead to further delay.

³² *Ibid*, GD24-779 and 780.

[58] In their respective submissions, the Claimant and the Minister agreed that, if I were to find an error in the General Division's decision, the appropriate remedy would be for me to give the decision that the General Division should have given and make my own assessment of this matter on its merits. Of course, the parties had different views on the merits of the Claimant's Charter argument. The Minister argued that, if the General Division had correctly followed the law and properly assessed the expert evidence, it would have concluded that the disputed provision did not breach the Claimant's equality rights. The Claimant denied that the General Division had committed any errors and argued that, even if it had, they did not change the fact that she, as a twice-widowed woman, was being treated differently and unfairly.

[59] I am satisfied that the record before me is complete. Both parties were capably represented at the General Division. Both parties had an opportunity to prepare detailed briefs and solicit expert evidence in support of their positions. I have access to all of this material, as well as to the recordings of oral testimony and arguments at the General Division's hearings last year. I doubt that the parties' submissions would be significantly different if this matter were heard again.

[60] As a result, I can assess the evidence that was on the record before the General Division and give the decision that it would have given, had it not made an error. In my view, if the General Division had not relied on extraneous material or based its Charter analysis on erroneous findings of fact, then the result would have been different. My own assessment of the record leads me to conclude that the disputed provision does not violate the Claimant's equality rights.

Section 63(6) of the CPP does not violate section 15(1) of the Charter

What issues does the Claimant's Charter challenge raise?

[61] If I am to decide the Claimant's Charter challenge on its merits, I must answer two questions:

- (i) Does denying the Claimant more than one survivor's pension under section 63(6) of the CPP discriminate against her based on sex and marital status, contrary to section 15(1) of the Charter?

- (ii) If so, can the violation be demonstrably justified in a free and democratic society under section 1 of the Charter?

[62] The Claimant has the burden of establishing on a balance of probabilities that her rights have been infringed. Only if she is successful does the burden shift to the Minister to show that the limit imposed by the disputed provision is justified under section 1 of the Charter.³³

[63] As noted, a two-part test must be used to assess a section 15(1) claim.³⁴ At the first step, a claimant must establish that they have been denied a benefit that others are granted or carry a burden that others do not because of a personal characteristic that falls within the enumerated or analogous grounds of section 15(1). At the second step of the analysis, the claimant must establish that the law denies substantive equality. This means that the claimant must establish that a disadvantage is imposed and that this disadvantage is unfair, which is often demonstrated by the fact that the disadvantage perpetuates prejudice or stereotypes. The central question is not whether one person receives less than another, but whether one person obtains less than another as a result of prejudice or stereotyping. At this step, it may be useful to compare a claimant to other groups to reveal the extent to which a claimant receives less and how that result flows from the claimant's place within a legislative scheme and within society at large.³⁵

The parties' submissions

[64] The Claimant argues that, as a twice-widowed woman, her survivor's pension does not recognize the CPP contributions of her first husband, whereas a once-widowed woman would

³³ *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497.

³⁴ *Withler*, *supra* note 4 at para 65.

³⁵ I note that the Federal Court of Appeal has already considered and upheld the constitutionality of section 63(6) of the CPP in *Audet-Fortier v Canada (Minister of Employment and Immigration)*, 1995 FCJ No 1712 (QL) (FCA) (GD22, Part 2, page 720) upholding *Audet-Fortier v Minister of Employment and Immigration*, April 27, 1994 CP 2824 (PAB) (GD21-197). In that case, the claimant argued that, because a second survivor's pension was unavailable to her, she had suffered discrimination, under section 15(1) of the Charter, based on the analogous ground of being twice-widowed. The Pension Appeals Board ruled against her, noting that the goal of the survivor's pension is to provide a reasonable level of income to widows and widowers: "If a legislative goal is to be achieved, it will inevitably be achieved to the detriment of some." The Federal Court of Appeal later endorsed this result, but I am not inclined to regard this case as binding precedent. First, *Audet-Fortier* is distinguishable because the claimant, unlike the one in this case, did not argue that the disputed provision discriminated against her based on sex. Second, there has been considerable evolution in the jurisprudence surrounding section 15(1) since the mid-1990s.

benefit from all the CPP contributions of her late spouse. She alleges that the disputed provision arbitrarily excludes people who have been widowed more than once, creating a distinction based on sex, because women are overwhelmingly and disproportionately represented in the group that receives a survivor's pension. She also alleges that the disputed provision creates a distinction based on marital status because it prevents women who have been widowed more than once from collecting more than one survivor's pension, even if all of their spouses contributed to the CPP. In her view, section 63(6) is discriminatory because it ignores and belittles her unpaid contributions to her first marriage.

[65] The Minister argues that the Claimant failed to establish that the disputed provision has an adverse discriminatory effect. The Minister acknowledged that the provision affects more women than men, but argued that this alone does not make it discriminatory. The Minister said, the provision makes no distinction between men and women, and the Claimant is ineligible for two survivor's pensions not because of her sex, but because she falls outside the reasonable limits of the benefit. The Minister added that the Claimant had not established discrimination based on marital status because there is no evidence that people who are twice-widowed are historically more disadvantaged than people who are once-widowed. Indeed, the disputed provision actually creates an advantage for people who are twice-widowed because they could potentially receive a larger survivor's pension.

My finding in a nutshell: Insurance plans create “winners” and “losers,” but that does not necessarily make them iniquitous.

[66] Any scheme that pools risk across numerous individuals inevitably leads to some of them (or their beneficiaries) collecting more than others. The Claimant might find it unfair that people who have been married for as long, or longer, than she has receive higher CPP survivor's pensions, but that does not mean her section 15(1) equality rights have been violated.

[67] The Claimant had been married to her first husband for eight years when he died tragically in 1969. He was not far into his career and, in any event, the CPP had only been in operation since 1966 at that point. He therefore had only four years of CPP contributions, and the CPP survivor's pension derived from those contributions was well below the maximum allowable amount.

[68] The Claimant's second husband was born and educated outside of Canada. She married him in 1973, when he was in mid-career, and he immigrated to Canada in 1975. He retired in 1993, giving him 18 years of CPP contributions. The survivor's pension derived from those contributions was higher than the Claimant's first survivor's pension but still well below the maximum allowable amount.

[69] Even though her two husbands had a combined 22 years of CPP contributions, the Claimant receives a lower survivor's pension than would a hypothetical once-widowed individual whose sole spouse also had 22 years of contributions. The Claimant receives less, but this is not because of her age, sex, marital status, or some combination of all three. It is because of her second husband's specific profile—he was an individual who happened to have had no CPP contributions, from which the Claimant might have otherwise benefited, that dated from **before** their marriage.

[70] I find it useful to imagine what would have happened if the Claimant's second husband had contributed to the CPP, not for just 18 years, but for the maximum 40 years. If the Claimant had married her second husband, not in midlife, but shortly before his death, then she would have benefited from all 40 years of his contributions, even though she would, at that point, have been his spouse for only a fraction of the time that he was a contributor. Under such a scenario, the Claimant would have come out a "winner," from a financial standpoint, according to the CPP's rules, even though her sex (female), age (82 at the time of her second husband's death), and marital status (twice-widowed) would have been, in all respects, identical to her current reality.

Step 1: The Claimant has not demonstrated that the disputed provision imposes differential treatment between herself and others on enumerated or analogous grounds

[71] The Claimant alleges that section 63(6) of the CPP discriminates against twice-widowed women, but I cannot agree.

[72] It is true that **some** twice-widowed women receive less money from the survivor's pension than once-widowed women who were married for the same number of cumulative years, but it is also true that other twice-widowed women receive more. The reason for such differentials has nothing to do with systemic discrimination and everything to do with the

particular profile of the Claimant's second husband. The Claimant was left better off financially when her second husband died. She would have been even better off if her second husband had made more contributions to the CPP, and she would have benefited from all of his contributions—even those he made before they were married.

The Claimant has not demonstrated differential treatment.

[73] All CPP recipients, including the Claimant, are limited to one survivor's pension. This limit never results in claimants receiving fewer benefits following the death of a second spouse. Survivors of more than one contributing spouse, such as the Claimant, will never receive less than, and will often receive more than, survivors of only one contributing spouse, all else being equal. The limitation applies regardless of age, marital status, or sex. There is no distinction on an enumerated or analogous ground.

[74] In determining whether there is a distinction based on a protected ground, *Withler* urged caution in making comparisons between groups, stating: “[i]t is unnecessary to pinpoint a particular group that precisely corresponds to the claimant group except for the personal characteristic or characteristics alleged to ground the discrimination.”³⁶ However, *Withler* did not rule out making appropriate comparisons if they helped determine whether a claimant was the subject of differential treatment that had denied them a benefit.

[75] In this case, comparisons reveal no substantive difference in treatment. The disputed provision applies equally to widowed women as it does to widowed men. It prohibits a double pension whether the recipient is young or old. It does not ignore twice-widowed claimants but specifically addresses them and sets out rules that leave them no worse off than when they were once-widowed. The Claimant has not shown that she was worse off after the death of her second husband except as compared to a hypothetical individual: one whose single deceased spouse made CPP contributions equaling the combined contributions of the Claimant's two husbands. More importantly, the Claimant has not shown that twice-widowed women, as a group,

³⁶ Here, the Court discarded the so-called “mirror comparator” approach to Charter analysis. See *Withler*, *supra* note 4 at para 63.

collectively receive less in CPP survivor pension payments than once-widowed women or once-widowed spouses generally.

[76] No Canadian, regardless of sex, age, or marital status, is eligible for more than one survivor's pension. The rules governing the CPP survivor's pension, including the disputed provision, treat the Claimant as well or better than others—men, once-widowed spouses, the young, or any combination of the three. The Claimant has not established that the CPP treats her differently or that it does so because of a personal characteristic that falls within the enumerated or analogous grounds of section 15(1).

The Claimant has not demonstrated discrimination causing adverse effects

[77] Having alleged discrimination, the Claimant must provide specific evidence that the disputed provision has a disproportionately negative impact based on factors relating to marital status or sex.

[78] The disputed provision appears to be neutral: It limits everyone to a single survivor's pension regardless of personal characteristics. However, the Claimant argues that limiting all claimants to one survivor's pension has a disproportionate effect on twice-widowed women. She insists that what appears to be a neutral rule actually discriminates on the combined grounds of sex and marital status.

[79] Among other things, the Claimant alleges that limiting a survivor to a single pension fails to consider the actual circumstances of widows. In her view, widows of more than one contributing spouse are at a disadvantage because they are barred from receiving a survivor's pension for each deceased contributing spouse. However, the Claimant has not provided any evidence that twice-widowed women are in fact financially disadvantaged compared to once-widowed women.

[80] The Claimant argues that it is reasonable to assume that twice-widowed women are at a disadvantage to other widows given the historical disadvantages women, and widows in particular, have faced. She argues that this disadvantage is made worse by the disputed provision and its ban on receiving two simultaneous survivor's pensions. However, she offers no evidence for either argument. As noted, section 63(6) ensures that twice-widowed survivors can never

receive less than their first survivor's pension. Moreover, the Minister's expert evidence indicates that twice-widowed survivors receive more, on average, than once-widowed women. In 2010 to 2016, women comprised more than 80 percent of the survivors who received a greater survivor's pension following the death of a second spouse.³⁷ The CPP survivor's pension is intended to replace some measure of income on the death of a spouse, and it appears to largely accomplish that objective. It may not precisely meet the needs of all claimants but, then again, it is not required to do so.

[81] The Claimant argues that twice-widowed survivors should receive two survivor's pensions because two spouses made contributions. As noted, this ignores how the survivor's pension is funded. Survivor's pensions are part of the CPP, which is a cross-subsidized, insurance-like program. Cross-subsidization means that no one can necessarily expect to receive even an approximation of what they contribute to the CPP. Some classes of recipients will inevitably pay more into the plan and get less; others will pay less and get more. Pooling risk is essential to the system's goals of balancing affordable contributions with robust benefits.³⁸

[82] Many contributors pay into the CPP. Only some contributors will have spouses, and only some of those spouses will survive the contributors. Many contributors will not see their contributions go to a surviving spouse. Many spouses will not receive a survivor's pension.³⁹ The cross-subsidization creates no indirect discrimination for twice-widowed women.

[83] In *Thibaudeau v Canada (Minister of National Revenue)*,⁴⁰ the Federal Court of Appeal found that a provision of the *Income Tax Act* discriminated against women, but it also held that an otherwise neutral provision of the *Income Tax Act* could not be said to discriminate based on sex simply because it affected more members of one sex than of the other. The focus "is not on the numbers but on the nature of the effect; on quality rather than quantity." The Court stated that, "[i]f legislation which adversely affects women has the same adverse effect upon men, even though their numbers may be smaller or the likelihood of their suffering be less, it cannot logically be said that the ground of discrimination is sex."

³⁷ ESDC Expert Report, GD24-36.

³⁸ ESDC Expert Report, Minister's Charter Brief, Vol. III, Part 11, GD24-33.

³⁹ ESDC Expert Report, GD24-30.

⁴⁰ *Thibaudeau v Canada (Minister of National Revenue)*, (1994) 2 FC 189.

[84] Although the Supreme Court of Canada later reversed the result in *Thibaudeau* for other reasons,⁴¹ it implicitly allowed that a provision having a disproportionate impact on women, or any other enumerated or analogous ground, might not amount to discrimination. In *Miron v Trudel*,⁴² decided in parallel with *Thibaudeau*, the Supreme Court of Canada held that differential treatment that disadvantages a claimant is discriminatory only if it conflicts with the purpose of section 15 of the Charter. The Supreme Court of Canada explained that the purpose of section 15 is “to prevent the violation of human dignity and freedom through the imposition of limitations, disadvantages or burdens through the stereotypical application of presumed group characteristics, rather than on the basis of merit, capacity or circumstance.”⁴³

[85] This Tribunal has also found that provisions affecting women more than men are not, by this fact alone, discriminatory under section 15(1). In *Minister of Employment and Social Development v BT*,⁴⁴ the claimant maintained that the three-year limitation period and the application requirement for a credit split under the CPP was discriminatory to women. Since the majority of persons seeking a credit split were women, the limitation period and application requirement impacted more women than men. Despite this, the disputed provision in that case was held to not have a disproportionate, negative impact on women and to not infringe section 15(1) of the Charter.

[86] In *BT*, women predominately benefited from an ameliorative provision (credit splitting), but, when they did not qualify for the benefit, their ineligibility was not due to their sex. In that regard, this case resembles *BT*: Women are more likely to receive the survivor’s pension. However, when a woman is not allowed to receive a second pension, it is not because of sex discrimination but because she falls outside a reasonable limitation on the survivor’s pension—one that applies to all applicants, regardless of sex.

[87] In *Symes v Canada*, the Supreme Court of Canada held that a statutory provision cannot be assumed to have a discriminatory effect.⁴⁵ In that case, the claimant alleged discrimination based on sex because she was unable to deduct child care expenses under the *Income Tax Act*.

⁴¹ *Thibaudeau v Canada*, [1995] SCR No 42.

⁴² *Miron v Trudel*, [1995] 2 SCR 418.

⁴³ *Miron v Trudel*, [1995] 2 SCR 418 at para 140.

⁴⁴ *Minister of Employment and Social Development v BT*, 2015 SSTD 107.

⁴⁵ *Symes v Canada*, [1993] 4 SCR 695 at para 134.

She argued that women were adversely affected because they disproportionately bear the burden of child care expenses. The Supreme Court of Canada held that, while it was clear that women faced a disproportionate social burden of child care, the claimant had failed to provide evidence showing that, because of this social burden, women were more likely to pay for child care expenses. The Supreme Court placed the evidentiary burden on claimants alleging discrimination. It required them to prove a causal link between the alleged ground of discrimination and the precise burden or disadvantage allegedly imposed by the disputed legislation.⁴⁶ The Supreme Court highlighted the importance of distinguishing “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.”⁴⁷

[88] In *R v Nur*, the Ontario Superior Court relied on *Symes* to dismiss a section 15(1) Charter challenge to mandatory minimum sentence provisions in the *Criminal Code*. In that case, the plaintiff was unable to show that the over-representation of his group (black males) in the criminal justice system was caused by the disputed provision itself, rather than by social circumstances existing independently of mandatory minimum sentencing.⁴⁸

[89] In *Miceli-Riggins v Canada (Attorney General)*,⁴⁹ the claimant alleged that the combination of the CPP’s child-rearing and proration provisions had a disproportionately negative effect on women. The Federal Court of Appeal held that, in alleging indirect discrimination, the applicant had to produce evidence showing that the disputed provision, and not other circumstances, was responsible for the negative effect. The Court stated, “We cannot just assume that the impugned provision is responsible.”⁵⁰

[90] In this case, if there is an income disparity between men and women, the survivor’s pension and its limit of one pension per widow does not cause or contribute to it. The Claimant has not provided any evidence that economic hardship faced by women, senior women, or

⁴⁶ *Ibid* at paras 133–134.

⁴⁷ *Ibid*.

⁴⁸ *R v Nur*, 2011 INSC 4874 at para 79, affirmed 2013 ONCA 677.

⁴⁹ *Miceli-Riggins v Canada (Attorney General)*, 2013 FCA 158 at para 76.

⁵⁰ *Ibid* at paras 80–81.

twice-widowed women was caused or heightened by the disputed provision. In fact, the available evidence suggests otherwise:

- More women than men receive a survivor's pension. There is no evidence that more women than men are twice-widowed. As such, there is nothing from which to infer that limiting survivors to one survivor's pension impacts more women than men. Even if it could be proved that more women than men are twice-widowed, that would not mean the disputed provision discriminates against women. Twice-widowed women benefit from the disputed provision because it grants them a survivor's pension based on the greater contributions of the respective deceased contributing spouses or common-law partners.
- Although women have less income than men, this broad fact does not prove that limiting all claimants to one survivor's pension is discriminatory. A claim of adverse effects discrimination must show that the disputed provision **itself** caused or worsened a pre-existing disadvantage. No such evidence exists in this case.
- Women see a greater loss in income after being widowed as compared to men, and widows over age 65 suffer greater declines in income compared to married women over age 65. That said, these income gaps are evidence of societal biases, not evidence that the survivor's pension is discriminatory. In fact, the survivor's pension is precisely intended to address such income gaps.

[91] The above information shows the existence of the inequality that the survivor's pension—including the disputed provision—was designed to address. However, it does not show a discriminatory distinction that would amount to an infringement of section 15(1) of the Charter. The Claimant has failed to provide specific evidence that demonstrates that women or twice-widowed women are disadvantaged by the provision limiting claimants to one survivor's pension. She has not provided evidence that compares the financial circumstances of widows to widowers, twice-widowed women to twice-widowed men, and twice-widowed women to once-widowed women. It is not even clear that she suffers compared to other twice-widowed women, since her only comparator is to a hypothetical version of herself that was allowed to collect two survivor's pensions.

[92] Above all, the Claimant has failed to provide evidence demonstrating how the disputed provision widens, rather than narrows, “the gap between the historically disadvantaged group and the rest of society.”⁵¹ Again, the evidence shows that twice-widowed spouses are in a better financial position than one-widowed spouses. Women make up the vast majority of twice-widowed survivor’s pension recipients. For each year between 2010 and 2016, women made up more than 80 percent of twice-widowed claimants. For each year between 2010 and 2016, the amount received by twice-widowed claimants exceeded the average survivor’s pension for all new claimants.⁵² There is no evidence that limiting all claimants to one survivor’s pension **negatively** affects a greater proportion of women than men. The Claimant’s evidence makes it clear that women face greater loss of income following the death of a spouse or common-law partner, but the survivor’s pension—including the disputed provision—benefits more women than men. A provision cannot be said to discriminate based on sex simply because it affects more members of one sex than of the other.

Step 2: The Claimant has failed to demonstrate that section 63(6) creates a disadvantage by perpetuating prejudice and stereotyping.

[93] Even if the Claimant had succeeded in demonstrating that the disputed provision creates a distinction based on an enumerated or analogous ground, she has failed to show that the disputed provision creates a disadvantage by perpetuating prejudice and stereotyping.

[94] As noted, there are four main contextual factors to consider when determining whether substantive inequality exists. These factors are (i) a claimant’s pre-existing disadvantage; (ii) the needs, capacities, and circumstances of the claimant and other groups; (iii) ameliorative effects for a more disadvantaged group; and (iv) the nature of the interest affected.⁵³ These four factors should not be applied as a rigid formula and are intended as a helpful analytical guide.⁵⁴

[95] A decision-maker may also consider other contextual factors in determining whether substantive inequality exists. These include (i) the broader legislative purpose of the disputed legislation; (ii) the multiple interests that a benefits scheme attempts to balance; and (iii) other

⁵¹ *Quebec (Attorney General) v A*, 2013 SCC 5 at para 332.

⁵² ESDC Expert Report, Minister’s Charter Brief, Vol. III, GD24, Part 11, GD24-33.

⁵³ *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497 at para 92.

⁵⁴ *R v Kapp*, 2008 SCC 41 at paras 19 and 23.

benefits that form part of that benefits scheme.⁵⁵ In the end, the main question is whether the “lines drawn are generally appropriate,” having regard to the circumstances of the impacted group and the objects of the scheme. Furthermore, the government should be given leeway in how it designs complex benefits schemes.⁵⁶

The survivor’s pension does not perpetuate any pre-existing disadvantage.

[96] According to the Claimant, women have experienced historic economic disadvantages and are hit particularly hard by the loss of income caused by the death of a spouse or common-law partner.⁵⁷ I accept that. However, the Claimant has not established that limiting applicants to one survivor’s pension puts women at a further disadvantage.

[97] The Claimant argues that it is reasonable to infer that women who have been widowed more than once are at an even greater disadvantage.⁵⁸ However, she offers no evidence to support this inference. The Claimant acknowledges that she has not produced any evidence regarding twice-widowed women, except to note that they far exceed twice-widowed men by number.⁵⁹ More to the point, she has not produced any evidence comparing the financial status of once-widowed women to twice-widowed women. Nor has she produced any evidence that twice-widowed women have any greater need than once-widowed women.

[98] No one can deny that women make a far higher proportion of the twice-widowed than men. However, the available evidence seems to show that twice-widowed women are not more disadvantaged than comparable groups. They receive a survivor’s pension calculated based on the higher of the contributions of their two deceased spouses. They receive more CPP benefits than other claimants in total. The Federal Court has cautioned against inferring discrimination in the absence of direct evidence that a disputed provision has perpetuated a historic disadvantage

⁵⁵ *Withler*, *supra* note 4 at paras 38, 67, 71 and 74.

⁵⁶ *Withler*, *supra* note 4 at paras 38, 66, 67.

⁵⁷ Claimant’s written submissions, GD21-184.

⁵⁸ Claimant’s written submissions, GD21-184.

⁵⁹ Table: “Widowed/widowed or common-law relationships ending in death by sex, 2011,” GD30-4.

or vulnerability.⁶⁰ In this case, the Claimant has not established that women who have been widowed more than once experience a pre-existing disadvantage. Even if there is a disadvantage, the Claimant has not established that limiting survivors to one survivor's pension perpetuates it.

The Claimant has failed to show a correspondence between her grounds of appeal and her actual needs, capacity, or circumstances.

[99] This contextual factor examines the relationship between the ground on which the claim is based and the actual needs, capacity, or circumstances of the claimant or others that the legislation targets.⁶¹ There does not have to be a perfect correspondence between the grounds, the needs, and the capacities of the claimant. The inability of a given social program to meet the needs of each and every individual does not mean that the program has failed to correspond to the actual needs and circumstances of the affected group.⁶² Government benefits cannot be fully customized to the needs of all individuals. A general approach is necessary for administrative efficiency and to ensure fairness in processing large numbers of claims.⁶³ The question at this stage is whether the CPP draws lines that are generally appropriate, keeping in mind the circumstances of the affected groups and the objectives of the scheme.⁶⁴

[100] The Claimant argues that the disputed provision does not correspond to her needs because she was married twice to contributing spouses. However, she has not explained how she, or any other twice-widowed woman, has higher expenses than someone who has been widowed once.

[101] The Claimant also argues that denial of a second survivor's pension negates her first husband's CPP contributions and, by extension, her own unpaid contributions to their household in the 1960s. This argument misunderstands the nature of the CPP, which is an insurance plan that pools risk across many demographic categories. No beneficiary can reasonably expect that their benefits will correspond, even approximately, to whatever contributions have been paid into

⁶⁰ *Collins v Canada*, [2000] 2 FC 3 at para 46.

⁶¹ *Withler*, *supra* note 4 at para 36.

⁶² *Withler*, *supra* note 4 at paras 67 and 71.

⁶³ *Nova Scotia (Workers' Compensation Board) v Martin; Nova Scotia (Workers' Compensation Board) v Laseur*, 2003 SCC 54 at para 82.

⁶⁴ *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497 para 74.

the plan over the years. Contributions are not transferrable except under one circumstance, and this exception proves the rule.

[102] In support of her view that contributions are, in effect, credits that can be transferred from one person to another, the Claimant points to sections 55 and 55.1 of the CPP. These provisions allow for the division of unadjusted pensionable earnings. They allow splitting CPP contributions between spouses. However, they apply only when the spouses are separating or divorcing. Spouses can leave each other in only one of two ways: by death or by separation and divorce. Death triggers payment of a survivor's pension to a beneficiary, just as it would trigger a payout in any life insurance policy. However, separation or divorce in effect cancels the CPP survivor's pension, and it is for this reason that Parliament adopted the extraordinary measure of treating contributions as credits that could be divided between a couple when their relationship breaks down.

[103] When a once-widowed woman's husband dies, she receives a survivor's pension; when a twice-widowed woman's husband dies, she also receives a survivor's pension. In both cases, the survivor receives a pension based on all of the CPP contributions made by one man—whether those contributions were made before or during their marriage. The Claimant argues that survivor's pensions could not simply be accumulated because CPP pensions are limited to a maximum allowable amount. However, even with such a cap, an individual would still be nominally receiving two pensions of the same kind. Allowing survivors of more than one deceased spouse to “stack” multiple survivor's pensions might be seen as unfair by survivors of only one spouse. Moreover, such an outcome would be at odds with the goals of a program designed to provide reasonable income replacement.

[104] Here, the rules governing the CPP survivor's pension reasonably correspond to the needs of the Claimant, but it is important to bear in mind that no conceivable benefits scheme could perfectly address the needs of all women, all survivors, or all survivors of multiple contributing spouses. The reason the Claimant could not obtain a second survivor's pension is not based on stereotypes about her as a woman. No claimant is eligible for more than one survivor's pension, and there is no evidence that this restriction imposes a burden on women or the twice-widowed that is heavier than any other group.

[105] In the context of a complex statutory scheme, such as the CPP, Parliament must have the freedom to determine where to draw the line, even where the exercise is likely to seem arbitrary to those falling on the wrong side of that line.⁶⁵ In this case, Parliament drew a line when it allowed survivors only one survivor's pension. This limit meets the objective of providing financial assistance to survivors while balancing the cost of paying a survivor's pension in respect of each of a survivor's contributing partners.

The CPP has an ameliorative purpose that serves Canadians who have suffered sudden economic loss.

[106] The purpose of the CPP is to provide a minimum level of financial protection against the loss of earnings normally associated with the retirement, disability, or death of a wage earner.⁶⁶ The CPP was never intended to meet all of the needs of beneficiaries, but rather to provide partial earnings-replacement to assist in meeting very basic income needs. Each CPP benefit, including the survivor's pension, is part of a network of interconnected benefits, and each one has been put in place recognizing its relationship and interaction within the broader scheme of the CPP and the need for the CPP to control expenditures so that the CPP benefits the broadest possible cross-section of the public.

[107] The survivor's pension has an ameliorative purpose. Its prohibition against stacked benefits is designed, like other restrictions and limitations to remain sustainable and affordable for all contributors and beneficiaries.

The nature and scope of the interest affected by the disputed provision is purely financial.

[108] Another contextual factor used to determine whether the disputed legislation amounts to discrimination is the nature and scope of the interest the legislation affects. This involves assessing the economic, constitutional, and societal significance attributed to the interest affected

⁶⁵ *Nishri v Canada*, 2001 FCA 115 at para 42.

⁶⁶ ESDC Expert Report, GD24-7.

as well as a consideration of whether the distinction restricts access to a fundamental social institution or affects a basic aspect of full membership in Canadian society.⁶⁷

[109] Denial of a financial benefit alone is not enough to establish an infringement of section 15(1) of the Charter. The denial must support the view that the people denied are “less capable, or less worthy of recognition or value as human beings or as members of Canadian society, equally deserving of concern, respect, and consideration.”⁶⁸

[110] In this case, the interest affected is purely economic. The Claimant has not been denied access to a “fundamental social institution” by her inability to qualify for a second survivor’s pension. The denial of a second survivor’s pension cannot be viewed as impacting a “basic aspect of full membership in Canadian society” or “a complete non-recognition of a particular group.”⁶⁹ She is simply receiving a lower survivor’s pension amount than she expected. She argues that her first husband’s contributions, and thus the survivor’s pension from it, recognize her unpaid domestic work during her first marriage, but even this argument is fundamentally about economics.

[111] Since the Claimant’s survivor’s pension is now based on the contributions of her second husband, she has benefited from an opportunity created by the disputed provision to improve her situation—an opportunity that is unavailable to survivors of only one contributing spouse. The denial of a second pension does not negatively impact the Claimant, as compared to others. It does not signal that she is less worthy of recognition as a person.⁷⁰

The CPP and the survivor’s benefit have a broader ameliorative legislative purpose.

[112] The courts have recognized the CPP as an ameliorative benefits scheme not only in design but in practice.⁷¹ The CPP is designed to provide social insurance for Canadians who experience a loss of earnings owing to retirement, disability, or the death of a wage-earning spouse or parent. The CPP is a contributory regime in which “Parliament has defined both the

⁶⁷ *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497 at para 74.

⁶⁸ *Granovsky v Canada (Minister of Employment and Immigration)*, 2000 SCC 28 at para 58, quoting *Egan v Canada*, [1995] 2 S.C.R. 513.

⁶⁹ *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497 at para 74.

⁷⁰ *Granovsky*, *supra* note 67 at paras 68-70.

⁷¹ *Miceli-Riggins*, *supra* note 49 at para 56.

benefits and the terms of entitlement, including the level and duration of an applicant's financial contribution."⁷² It was not designed to achieve perfect equality between men and women in all circumstances.⁷³

[113] Given this context, distinctions arising under benefits legislation should not be found discriminatory unless there is a sound evidentiary basis to do so.⁷⁴ The survivor's pension is a monthly pension payable to the surviving spouse or common-law partner of a deceased contributor who made sufficient contributions to the CPP. The age of the survivor, the number of the survivor's dependent children, and whether the survivor is disabled are all criteria to be considered when assessing eligibility and the amount of benefits. However, the sex of the survivor is not a factor.⁷⁵ The survivor's pension is paid to survivors aged 35 or more. Those under age 35 are ineligible to receive a survivor's pension unless they are disabled or have a dependent child or a disabled child over age 18. Benefits increase in proportion to the age of a survivor up to age 65. A beneficiary can receive the survivor's pension on its own or it can be combined with a survivor's own disability or retirement pension.⁷⁶

[114] The survivor's pension has evolved to reflect changing views on gender roles.⁷⁷ When the CPP was launched in 1966, most married women did not work outside the home. Policymakers recognized that the death of a husband, who at the time was viewed as the primary family breadwinner, would trigger a financial need. The widow's (or widower's) pension, as it was then known, provided a modest replacement income, but it was no longer payable if the recipient remarried. In 1975, the CPP replaced "widow" and "widower" with the more gender-neutral term "survivor," and the legislation was amended to prevent a claimant from receiving more than one survivor's pension. In 1987, recipients of a survivor's pension were permitted to keep that benefit if they remarried.

[115] As noted, the 1975 amendment was intended to close a perceived loophole whereby a survivor who later entered into a common-law relationship could again become a survivor and

⁷² *Granovsky*, *supra* note 67 at para 9.

⁷³ ESDC Expert Report, Minister's Charter Brief, Vol. III, GD24, Part 11.

⁷⁴ *SM-R v Canada (Attorney General)*, 2013 FCA 158 at para 13.

⁷⁵ CPP, s 58(1).

⁷⁶ ESDC Expert Report, Minister's Charter Brief, Vol. III, GD24, Part 11.

⁷⁷ *Kapp*, *supra* note 54 at para 47.

collect a second pension.⁷⁸ The Claimant suggested that this amendment reinforced the rule that terminated the survivor's pension on remarriage and thus perpetuated the sexist stereotypes embedded in that rule. As discussed above, I do not see it that way. I acknowledge that now-outdated views about a woman's place guided the policy to cut off the survivor's pension on remarriage. However, I do not see how gender bias was necessarily connected to the CPP's prohibition against receiving two survivor's pensions at once. I note that the CPP explicitly bans doubling up same or similar pensions elsewhere. For example, a contributor cannot receive a retirement and disability pension at the same time, even though that contributor was in effect "paying" for both benefits.

[116] The Claimant has pointed to the CPP orphan's benefit, noting that it is possible for a child to receive two pensions based on the contributions of both parents, if deceased.⁷⁹ However, I find this comparison superficial. Children naturally have two parents, and both parents are expected to support them. It is only reasonable that this reality would be reflected in how the orphan's benefit is structured. By contrast, while a person might have more than one spouse over their lifetime, no one can reasonably expect to be supported by two or more spouses simultaneously. I also note that the CPP allows a maximum of two orphan's benefits per child, thereby imposing what some might call an arbitrary limit—one that ignores the possibility that a child could be orphaned three or more times.

[117] The purpose of the survivor's pension is to provide reasonable minimum income replacement on the death of a wage earner. The amount paid out for the survivor's pension must be balanced against the funds that are available for all CPP benefits. Any limitations on eligibility and the amount of those benefits must be consistent with the CPP's objectives while keeping the plan affordable and sustainable for current and future contributors and beneficiaries.

[118] The survivor's pension predominantly benefits women, but twice-widowed women are in no more need of assistance than any other comparable group, including once-widowed women. Three-quarters of the more than \$40 billion paid out by the CPP annually are retirement pensions. The second largest benefit, by combined dollar value, is the survivor's pension, which

⁷⁸ ESDC Expert Report, Minister's Charter Brief, Vol. III, GD24, Part 11, GD24-16 and 17.

⁷⁹ Expert report prepared for Claimant by Gaila Friars, GD29-2.

paid out \$4.35 billion dollars in 2015.⁸⁰ While the provisions governing the survivor's pension are gender neutral, beneficiaries are, by virtue of their longer lifespans, overwhelmingly women. As of 2017, 81 percent of the value of all survivor's pensions go to women, with 4.3 times more women receiving the benefit than men. The amount of the pension paid to women also tends to be higher than what is paid to men, with women receiving \$372 per month on average, as opposed to men receiving \$174.⁸¹

Section 15 of the Charter is not meant to address systemic or general inequality

[119] The Claimant maintains that the Charter promises equality imposes an obligation on the Minister to allow widows to keep all CPP survivor pensions derived from their deceased contributing spouses or common-law partners. She forgets that section 15(1) of the Charter does not impose any obligation on the government to cure pre-existing societal disadvantages experienced by women, widows, or any other group.

[120] Section 15(1) creates no positive obligation to ameliorate societal disadvantage. It 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.”⁸² Section 15(1) of the Charter requires only “that the government not be the source of further inequality.”⁸³

[121] In this case, the disputed provisions and programs regarding survivor's pension can be characterized as ameliorative within the meaning of section 15(2). As recognized by the courts, section 15(2) protects the government from allegations of discrimination when it chooses to enact ameliorative programs for disadvantaged groups, such as the survivor's pension and the protection it offers to widows and widowers. Section 15 does not guarantee equality or force the

⁸⁰ ESDC Expert Report, Minister's Charter Brief, Vol. III, GD24, Part 11, GD24-25.

⁸¹ ESDC Expert Report, Minister's Charter Brief, Vol. III, GD24, Part 11, GD24-16 and 17.

⁸² *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143, page 163.

⁸³ *Thibaudeau v Canada*, *supra* note 41 at para 38.

government to ameliorate disadvantages in society that would exist independent of the ameliorate program.⁸⁴

There is no need to consider section 1 of the Charter.

[122] Since the disputed provision does not violate the Claimant's equality rights under section 15(1) of the Charter, section 1 is not applicable.

CONCLUSION

[123] I am allowing this appeal. The General Division based its decision on erroneous findings of fact when it determined that section 63(6) of the CPP violated the Claimant's Charter equality rights based on sex, age, and marital status.

[124] I decided to remedy this breach by giving the decision that the General Division should have given. In making my own assessment of the material that was already on the record, I concluded that the Claimant had failed to show that the disputed provision created a distinction on any enumerated or analogous ground and, in any event, did not create a disadvantage by perpetuating prejudice or stereotyping. In this case, the disputed provision actually placed the Claimant, as a survivor of more than one deceased contributing spouse, at an advantage compared to survivors of one deceased contributing spouse. This advantage arises from the very characteristic—being widowed more than once—that the Claimant alleged was the basis of adverse effects discrimination. The Claimant received a survivor's pension following the death of her first husband and continued to receive a survivor's pension following the death of her second husband. In this regard, she was not treated differently than any other Canadian.

[125] Some demographic categories may benefit from the CPP more or less than others, but that does not necessarily mean that individuals within those categories are victims of discrimination.

⁸⁴ *Kapp*, *supra* note 54.



Member, Appeal Division

HEARD ON:	October 7, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	Marcus Dirnberger, Representative for the Appellant R. W., Respondent