



Citation: *BH v Minister of Employment and Social Development*, 2025 SST 1032

## Social Security Tribunal of Canada General Division – Income Security Section

# Decision

**Appellant:** B. H.  
**Representatives:** Christine Davies and Benjamin Piper

**Respondent:** Minister of Employment and Social Development  
**Representatives:** Marcus Dirnberger and Dylan Edmonds

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**Decision under appeal:** Minister of Employment and Social Development reconsideration decision dated January 4, 2022 (issued by Service Canada)

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**Tribunal members:** Shannon Russell  
James Beaton  
Wayne van der Meide

**Type of hearing:** Videoconference

**Hearing dates:** May 27-29, 2025

**Hearing participants:** Appellant  
Appellant's representatives  
Appellant's witnesses  
Respondent's representatives  
Respondent's witnesses

**Decision date:** October 6, 2025

**File number:** GP-22-465

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## Decision

[1] The appeal is dismissed.

[2] The Appellant, B. H., isn't eligible for the *Canada Pension Plan* (CPP) death, survivor's, or orphan's benefits.<sup>1</sup> Sections 44(3) and 49 of the CPP don't violate section 15(1) of the *Canadian Charter of Rights and Freedoms* (Charter).<sup>2</sup>

[3] This decision explains why we are dismissing the appeal.

## Overview

[4] The Appellant immigrated to Canada with her husband (W. S.) and two young children on July 30, 2011.<sup>3</sup> In September 2011, the Appellant went to Australia to finish her PhD. While she was away, her husband (the contributor) looked after their two children.

[5] The Appellant returned to Canada in 2014. That same year, the contributor began working full-time at a bank.<sup>4</sup> He continued to work at the bank until 2020, when he was diagnosed with cancer.

[6] The contributor received CPP disability benefits and disabled contributor's child's benefits (DCCB) on behalf of one of his two children from July 2020 to August 2021, when he passed away.<sup>5</sup>

[7] After the contributor died, the Appellant applied for the death, survivor's, and orphan's benefits.<sup>6</sup>

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<sup>1</sup> See the *Canada Pension Plan*, RSC 1985, c C-8.

<sup>2</sup> See the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982 c 11 (Charter).

<sup>3</sup> See pages GD2-14, GD2-18, and GD41-45 to GD41-48.

<sup>4</sup> See page GD41-77.

<sup>5</sup> See pages GD2-22, GD2-23, GD41-49, and GD41-50. The contributor's daughter was over the age of 18 when the contributor's disability pension began, and so the DCCB was paid directly to her. See page GD23-192.

<sup>6</sup> See pages GD41-4 to GD41-7 and GD41-18 to GD41-24.

[8] The Minister of Employment and Social Development (Minister) denied the applications at both the initial and reconsideration levels of review. The Minister denied the applications because the contributor didn't meet the contributory requirements to qualify for those benefits.<sup>7</sup>

[9] The Appellant appealed the Minister's reconsideration decision to the Social Security Tribunal's (SST's) General Division. After the Appellant filed her appeal, she raised an argument under the Charter.

## What the Appellant's Charter argument is about

[10] The Appellant says that sections 44(3) and 49 of the CPP violate her equality rights under section 15(1) of the Charter on the protected ground of national origin, considered alongside age and immigrant experience.<sup>8</sup>

[11] Alternatively, the Appellant says that sections 44(3) and 49 of the CPP violate her equality rights under section 15(1) based on an analogous ground of immigrant experience.

[12] The crux of the Appellant's argument is that the rule about when a person's contributory period starts is discriminatory because it says a person's contributory period includes all the years from when the person reached age 18, regardless of whether that person was in Canada and able to contribute to the CPP.

## What we must decide

[13] This appeal raises the following issues:

1. Is the *Lezau* decision<sup>9</sup> binding in this matter?
2. If not, do sections 44(3) and 49 of the CPP violate section 15(1) of the Charter?

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<sup>7</sup> The Minister's initial decision of September 22, 2021, is at pages GD2-29 and GD41-56. The Minister's reconsideration decision of January 4, 2022, is at pages GD2-16, GD2-26, and GD41-43.

<sup>8</sup> See page GD21-71 and the Appellant's oral argument.

<sup>9</sup> See *Lezau v Canada (Social Development)*, 2008 FCA 99 (CanLII).

3. If so, is the violation saved under section 1 of the Charter?
4. If not, what is the appropriate remedy?

[14] We find that the *Lezau* decision is not binding in this matter. However, we also find that sections 44(3) and 49 of the CPP do not violate section 15(1) of the Charter. So, we don't need to address the third or fourth issues.

## Preliminary matters

### The Appellant has standing to bring a Charter claim

[15] The Supreme Court of Canada (SCC) has said that section 15 Charter rights die with the individual.<sup>10</sup> This usually means that an estate can't raise a section 15(1) Charter argument on behalf of a deceased person after that person has died.

[16] Because the contributor has died, we considered whether the Appellant has standing (a legal right) to bring a Charter claim.

[17] We decided the Appellant has standing. This is because she appears to be arguing that **her** Charter rights have been infringed. In other words, she argues that, as the spouse of a deceased contributor, she has been treated differently. This is the same type of argument that the claimants raised in *Lezau* and the Pension Appeals Board (PAB) accepted that argument. The PAB explained that if a contributor fails to make enough contributions to the CPP, it's the spouses and children who suffer, not the contributors.<sup>11</sup>

### The Appellant raised new arguments after filing her Charter Record

[18] After the Appellant filed her Charter Record, she raised new arguments. We will identify these new arguments later. For now, we'll focus on the timing of the new arguments.

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<sup>10</sup> See *Canada (Attorney General) v Hislop*, 2007 SCC 10 (CanLII) at paragraph 73.

<sup>11</sup> See *Tan v Canada (Minister of Social Development)* (December 8, 2006), CP 20525, CP 21817, CP 22316, CP 22452, CP 22453, and CP 23253 (PAB) at paragraphs 43 to 46.

[19] The Appellant raised her first new argument when she filed her submissions in reply to the Minister's Charter Record.<sup>12</sup> The Appellant raised her second new argument when she filed her Notice of Constitutional Question on the attorneys general on April 25, 2025.<sup>13</sup>

[20] During the hearing, the Minister said the Appellant's new arguments put the Minister at a disadvantage because the Minister didn't have an opportunity to respond in writing to the Appellant's new arguments.

[21] We share the Minister's concern about the timing of the Appellant's arguments. We agree with the Minister that the Appellant's approach put the Minister at a disadvantage.

[22] Despite our concern, we did not restrict the issues in this appeal to only those raised by the Appellant in her Charter Record.

[23] First, when the hearing began, the Minister didn't raise a preliminary issue about the Appellant's recently raised arguments. Instead, the Minister spoke of the disadvantage during oral submissions on day three of the hearing.

[24] Second, the Minister responded orally to the Appellant's arguments during the hearing. The Minister's lawyers also confirmed at the hearing that they did not want an opportunity to reply in writing to the Appellant's recently raised arguments.

## **We invited submissions on the *Brink* decision**

[25] After the parties filed their Charter records, the Federal Court of Appeal (FCA) released its decision in *Brink*.<sup>14</sup>

[26] Before the hearing, we gave each party the opportunity to file supplemental submissions addressing the *Brink* decision.<sup>15</sup>

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<sup>12</sup> See GD31.

<sup>13</sup> See GD44.

<sup>14</sup> See *Brink v Canada*, 2024 FCA 43.

<sup>15</sup> See our letter of March 28, 2025, at GD39.

[27] Each party chose to file submissions on the *Brink* decision, and they did so within their respective deadlines.<sup>16</sup>

## Analysis

### Legislative context

[28] To put things in context, we will begin by explaining the nature of the CPP. Most of this explanation comes from the FCA's decision in *Weatherley* as well as the Minister's Expert Report of CPP Policy and Legislation.<sup>17</sup> We will then describe the nature of the benefits at issue in this appeal.

### The nature of the CPP

[29] The CPP is a far-reaching, national, compulsory income insurance scheme. It is a contributory plan. It is not a social welfare scheme.<sup>18</sup>

[30] Canadian employees and employers are required to contribute to the CPP.<sup>19</sup> Individuals who experience an event that is likely to affect their income, such as retirement, disability, or the death of a wage-earning spouse, are entitled to payments from the CPP so long as the contributory requirements (and other eligibility requirements) are met.<sup>20</sup>

[31] The CPP was never intended to be comprehensive or to meet the needs of all contributors in every conceivable circumstance. Instead, it provides partial earnings replacement in certain circumstances. It was intended to work alongside and complement other financial planning instruments such as private savings, private

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<sup>16</sup> The Appellant's submissions on the *Brink* decision are at GD42. The Minister's submissions on the *Brink* decision are at GD47.

<sup>17</sup> See *Weatherley v Canada (Attorney General)*, 2021 FCA 158 (CanLII). See also the Expert Report of CPP Policy and Legislation starting at page GD23-166.

<sup>18</sup> See *Weatherley v Canada (Attorney General)*, 2021 FCA 158 (CanLII) at paragraph 8, citing *Granovsky v Canada (Minister of Employment and Immigration)*, 2000 SCC 28 at paragraph 9; and *Miceli-Riggins v Canada (Attorney General)*, 2013 FCA 158 at paragraphs 68 and 69.

<sup>19</sup> There are some minor exceptions, but they don't apply in this case.

<sup>20</sup> See *Weatherley v Canada (Attorney General)*, 2021 FCA 158 (CanLII) at paragraph 9, citing *Miceli-Riggins v Canada (Attorney General)*, 2013 FCA 158 at paragraphs 67 to 74. See Expert Report of CPP Policy and Legislation at page GD23-175.

pensions, and private insurance policies. It is not anything like a guaranteed annual income. It is more like modest help for recipients to meet their basic needs.<sup>21</sup>

[32] The CPP benefits are part of an interconnected network. Each benefit achieves various objectives. Each has a “forest of detailed eligibility and qualification rules.” Each has been introduced in a way that interacts with the broader scheme of the CPP and the aim that the CPP remain sustainable and affordable for all contributors and beneficiaries. The CPP has been described as a “complex web of interwoven provisions” where altering one filament on the web can disrupt related filaments in unexpected ways, with considerable damage to legitimate government interests.<sup>22</sup>

[33] The CPP is cross-subsidized. All contributors subsidize all benefits. Benefits are paid from direct contributions of employees, employers, and monies earned from the investment of contributory funds. Differences in benefits can correlate to the size of contributions. But no individual contributor has a right to benefits commensurate with the level of their contributions. This means that contributions do not always translate into benefits. It is possible for someone to have paid a lot into the CPP and never receive a cent in return. It is also possible for someone to have paid little into the CPP and get much more.<sup>23</sup>

[34] The CPP is self-sustaining. It has no recourse to general government funding such as the consolidated revenue fund. If payments are increased for survivor’s

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<sup>21</sup> See *Weatherley v Canada (Attorney General)*, 2021 FCA 158 (CanLII) at paragraph 10, citing *Miceli-Riggins v Canada (Attorney General)*, 2013 FCA 158 at paragraphs 69 and 73; *Runchey v Canada (Attorney General)*, 2013 FCA 16 (CanLII) at paragraphs 122 to 125; and *Granovsky v Canada (Minister of Employment and Immigration)*, 2000 SCC 28 at paragraph 9. See also the Expert Report of CPP Policy and Legislation at pages GD23-165 to GD23-167.

<sup>22</sup> See *Weatherley v Canada (Attorney General)*, 2021 FCA 158 (CanLII) at paragraph 11, citing *Runchey v Canada (Attorney General)*, 2013 FCA 16 (CanLII) at paragraph 124 and *Miceli-Riggins v Canada (Attorney General)*, 2013 FCA 158 at paragraph 64. See also the Expert Report of CPP Policy and Legislation at page GD23-165.

<sup>23</sup> See *Weatherley v Canada (Attorney General)*, 2021 FCA 158 (CanLII) at paragraph 12, citing *Miceli-Riggins v Canada (Attorney General)*, 2013 FCA 158 at paragraph 72; and *Runchey v Canada (Attorney General)*, 2013 FCA 16 (CanLII) at paragraphs 40 to 42 and 124 to 125. See the Expert Report of CPP Policy and Legislation at pages GD23-166 and GD23-179 to GD23-180.

benefits, either contributions must increase, or payments out must decrease. Giving to some, takes from others.<sup>24</sup>

[35] To ensure sustainability, the government must continually monitor the financial health of the CPP. Major amendments to the CPP can only be done by joint agreement of Parliament and the governments of at least two-thirds of the provinces representing two-thirds of the population.<sup>25</sup>

### **The nature of the CPP death, survivor's, and orphan's benefits**

[36] The CPP death, survivor's, and orphan's benefits are supplementary benefits.<sup>26</sup>

[37] The **CPP death benefit** is a lump sum benefit that is paid to the estate of the deceased contributor who made the requisite number of years of contributions to the CPP. It is intended to help with funeral expenses. If there is no estate, the benefit can be paid to the person who paid for the funeral expenses, the survivor of the deceased contributor, or the next of kin.<sup>27</sup>

[38] The **CPP survivor's pension** is a monthly benefit that is paid to the survivor of a deceased contributor who made the requisite number of years of contributions to the CPP. The survivor is the legally married spouse, unless the contributor was in a common-law relationship at the time of the contributor's death. For survivors who have not reached age 65, the amount of the pension is made up of two parts: a flat rate and an earnings-related amount equal to 37.5% of the deceased contributor's retirement pension.<sup>28</sup>

[39] The **CPP orphan's benefit** is a flat-rate monthly benefit that is paid to the dependent child of a deceased contributor who has made the requisite number of years

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<sup>24</sup> See *Weatherley v Canada (Attorney General)*, 2021 FCA 158 (CanLII) at paragraph 13.

<sup>25</sup> See *Weatherley v Canada (Attorney General)*, 2021 FCA 158 (CanLII) at paragraph 14. See the Expert Report of CPP Policy and Legislation at page GD23-172.

<sup>26</sup> See the Expert Report of CPP Policy and Legislation at page GD23-175.

<sup>27</sup> See the Expert Report of CPP Policy and Legislation at page GD23-176.

<sup>28</sup> See the Expert Report of CPP Policy and Legislation at page GD23-177.

of contributions to the CPP. The original purpose of the benefit was to provide financial support to a contributor's dependents in the case of death.<sup>29</sup>

### **Why context is important to a section 15 Charter claim**

[40] The Appellant characterizes the death, survivor's, and orphan's benefits as ancillary benefits that have a social benefits purpose. She says they are mostly not contributory in nature. She also says they are mostly flat-rate benefits that address a social problem of caring for the spouses and children of deceased workers. They mitigate the effects of the loss of a breadwinner.

[41] We acknowledge that the CPP is social benefits legislation.<sup>30</sup> Its focus is to ameliorate the conditions of particular groups. We also acknowledge that the death, survivor's, and orphan's benefits are supplementary benefits.<sup>31</sup>

[42] But this doesn't make it easier to find a Charter infringement. The FCA has said that there is a need for a cautious approach to deciding whether social benefits legislation is discriminatory. This is because social reality is complex. Because of this, section 15 of the Charter doesn't require legislation to correspond perfectly with social reality. This context means that distinctions arising under social benefits legislation will not lightly be found to be discriminatory. In other words, provisions in social benefits legislation are difficult to strike down under section 15(1) of the Charter.<sup>32</sup>

### **The Appellant doesn't qualify for benefits without a successful Charter challenge**

[43] There is no dispute between the parties that, without a successful Charter challenge, the Appellant doesn't qualify for benefits.

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<sup>29</sup> See the Expert Report of CPP Policy and Legislation at page GD23-178.

<sup>30</sup> See *Villani v Canada (Attorney General)*, 2001 FCA 248 at paragraph 28.

<sup>31</sup> See the reference to supplementary benefits in section 44(3) of the *Canada Pension Plan*.

<sup>32</sup> See *Miceli-Riggins v Canada (Attorney General)*, 2013 FCA 158 (CanLII) at paragraphs 56 to 59.

[44] Even though this isn't disputed between the parties, we will explain, for contextual purposes, what the CPP says about the contributory requirements and why the contributor didn't meet those requirements.

### **The contributory rules for the three benefits are the same**

[45] The contributory rules for the CPP death, survivor's, and orphan's benefits are the same.<sup>33</sup>

[46] The CPP legislation says that these benefits can only be paid if the contributor made contributions to the CPP for not less than the minimum qualifying period (MQP).<sup>34</sup>

[47] To meet the MQP, a contributor must have made contributions during their contributory period for:

- at least 3 years and for at least one-third of the total number of years included either wholly or partly within their contributory period, or
- at least 10 years<sup>35</sup>

[48] A person's contributory period starts the **later** of January 1, 1966 (when the CPP began) or the month after the person's 18th birthday.<sup>36</sup>

[49] A person's contributory period ends the **earliest** of:

- the month before the month the contributor reached age 70,
- the month the contributor died, or
- the month before the month the contributor's CPP retirement pension began<sup>37</sup>

[50] There are two circumstances in which a person can shorten their contributory period. In each case, the contributory period is shortened by excluding (dropping) certain months from that period.

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<sup>33</sup> See sections 44(1)(c)(d) and (f) and 44(3) of the *Canada Pension Plan*.

<sup>34</sup> See sections 44(1)(c)(d) and (f) of the *Canada Pension Plan*.

<sup>35</sup> See section 44(3) of the *Canada Pension Plan*.

<sup>36</sup> See sections 2(2) and 49 of the *Canada Pension Plan*.

<sup>37</sup> See section 49(b) of the *Canada Pension Plan*.

[51] The first type of exclusion is the **disability exclusion**. This type of exclusion applies to people who received the CPP disability benefit.<sup>38</sup>

[52] The second type of exclusion is the **child rearing exclusion**. This type of exclusion applies to people who:

- received family allowance payments for a child under the age of seven or qualified for the Canada Child Tax Benefit (now called the Canada Child Benefit) for a child under the age of seven; and
- didn't make a sufficient contribution to the CPP for the year or years in question<sup>39</sup>

[53] If a person doesn't meet the contributory requirements based on their contributions to the CPP, then they might qualify for benefits under a social security agreement (SSA). For example, if a person comes to Canada later in life from a country with which Canada has an SSA, then depending on the terms of that SSA, that person may be able to qualify for benefits in Canada by combining their contributions under the CPP and the foreign pension program.

### **Why the contributor didn't meet the contributory rules**

[54] Our findings about why the contributor didn't meet the contributory rules differ slightly from what the Minister found. Nothing turns on this. Either way, the contributor didn't make enough years of contributions to the CPP to qualify his estate for benefits.

[55] The contributor was born in January 1973, so his contributory period began in February 1991 (the month after his 18th birthday).

[56] The contributor died in August 2021 at the age of 48. This means his contributory period ended in August 2021.

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<sup>38</sup> See section 49(c) of the *Canada Pension Plan*.

<sup>39</sup> See section 49(d) of the *Canada Pension Plan* and section 77 of the *Canada Pension Plan Regulations*.

[57] Before exclusions, the contributor had 31 calendar years, included wholly or partly, in his contributory period.<sup>40</sup>

[58] Both types of exclusions apply in this case.

[59] The contributor received the CPP disability benefit from July 2020 to August 2021. Even though the contributor's disability payments began in July 2020, he was found disabled in March 2020. (Disability payments start four months **after** the date of disability).<sup>41</sup> The period from March 2020 to August 2021 is 18 months. This means the disability exclusion removes 18 months from the contributor's contributory period.

[60] Before he died, the contributor confirmed he stayed home to care for his children from July 30, 2011, to September 8, 2014.<sup>42</sup> The children were born in July 2002 and October 2007.<sup>43</sup> A total of 27 months can be removed from the contributor's contributory period for child rearing purposes.<sup>44</sup>

[61] After the exclusions, the contributor had 28 years, included wholly or partly, in his contributory period: 1991 to 2011 (21 years) and 2014 to 2020 (7 years).<sup>45</sup>

[62] One-third of 28 is 9.3. Even though 9.3 is closer to 9 than it is to 10, the law doesn't allow us to round down.<sup>46</sup> This means the contributor was required to make at least 10 years of contributions to the CPP to qualify his estate for benefits.<sup>47</sup>

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<sup>40</sup> The Minister determined the contributor had 30 years, included wholly or partly, in his contributory period. See pages GD23-193 and GD41-44.

<sup>41</sup> See section 69 of the *Canada Pension Plan*.

<sup>42</sup> See pages GD2-32 and GD41-59.

<sup>43</sup> See pages GD1-14, GD1-15, and GD41-21.

<sup>44</sup> The months are October 2011 to and including December 2013. This relates to the contributor's youngest child. The oldest child was over the age of seven in 2011. No months can be removed in 2014 because the contributor made CPP contributions in that year.

<sup>45</sup> The Minister determined the contributor's contributory period totaled 27 years.

<sup>46</sup> See *Canada (Minister of Human Resources Development) v Skoric* (2000), A-709-97.

<sup>47</sup> The Minister says the contributor was required to make at least nine years of contributions.

[63] The contributor's record of earnings shows he contributed to the CPP for seven years, from 2014 to 2020.<sup>48</sup> This means he didn't make enough contributions to the CPP to qualify his estate for benefits.

[64] An SSA isn't helpful here. This is because the contributor's previous work history was in China, where he was born. Canada has an SSA with China, but it is limited.<sup>49</sup> The SSA doesn't have provisions to help people who have lived or worked in Canada or China to qualify for pension benefits by combining the years they worked in both countries.<sup>50</sup>

### **Is the *Lezau* decision binding in this matter?**

[65] The Minister says the Appellant's Charter argument can't succeed because the FCA already affirmed in a case called *Lezau* that section 49 of the CPP doesn't infringe the Charter in the way the Appellant argues.<sup>51</sup> The Minister argues that the *Lezau* decision is binding on us.

[66] The Appellant disagrees. She argues that *Lezau* isn't binding because it was decided using a formal rather than a substantive approach to equality. In other words, it was based on section 15(1) jurisprudence that has effectively been overruled by subsequent case law from the SCC, particularly the decision in *Fraser*.<sup>52</sup> The Appellant argues that the analytical approach to substantive equality under section 15(1) of the Charter has evolved significantly since 2008, when *Lezau* was decided. She believes that if *Lezau* were decided today, it would be decided differently.

### **What the *Lezau* decision is about**

[67] In 2006, the PAB heard six appeals together. The PAB was a predecessor to the SST. Each of the six appeals involved a woman whose immigrant husband had died.

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<sup>48</sup> See pages GD2-24 and GD41-51.

<sup>49</sup> See the *Agreement on Social Security Between the Government of Canada and the Government of the People's Republic of China*.

<sup>50</sup> See page GD23-193.

<sup>51</sup> See *Lezau v Canada (Social Development)*, 2008 FCA 99 (CanLII).

<sup>52</sup> See *Fraser v Canada (Attorney General)*, 2020 SCC 28 (CanLII).

[68] Each woman applied for the CPP survivor's pension but was denied because their immigrant husband didn't make enough contributions to the CPP. Each husband was from a country that didn't have an SSA with Canada.

[69] The claimants argued that the contributory rules infringed their section 15(1) Charter rights, as spouses of deceased immigrant contributors. They said it was discriminatory to require the contributory period to start at age 18 when immigrant contributors often arrived in Canada at an older age and couldn't start contributing to the CPP as early as non-immigrant contributors. They alleged discrimination on the grounds of national origin and colour.

[70] The PAB held that the CPP treated contributors who had made sufficient contributions differently from those who had not. But the PAB said this is an attribute of any social benefit legislation that requires a person to qualify for benefits by meeting certain criteria.

[71] The PAB decided that the CPP contributory requirements didn't infringe section 15(1) of the Charter because they didn't create differential treatment between non-immigrant and immigrant contributors. The PAB said that any disadvantage which the surviving spouses suffered occurred because they and their spouses chose to immigrate to Canada after the contributory clock began to run, not because of any personal characteristics. The PAB also said the contributory rules didn't target immigrant workers because of their national origin or colour. The rules applied to all immigrants of every national origin or colour as well as non-immigrants.<sup>53</sup>

[72] The PAB commented on the proposed remedy and concluded that, if the contributory clock began running only when immigrants arrived in Canada, then each immigrant would be treated differently from non-immigrants and from other immigrants who arrived in Canada at an earlier age.<sup>54</sup>

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<sup>53</sup> See *Tan v Canada (Minister of Social Development)* (December 8, 2006), CP 20525, CP 21817, CP 22316, CP 22452, CP 22453, and CP 23253 (PAB) at paragraph 52.

<sup>54</sup> See *Tan v Canada (Minister of Social Development)* (December 8, 2006), CP 20525, CP 21817, CP 22316, CP 22452, CP 22453, and CP 23253 (PAB) at paragraph 54.

[73] After the PAB released its decision, one of the claimants (Lezau) applied for judicial review of that decision. The FCA heard the application on March 12, 2008, and released a short decision the next day. The FCA upheld the PAB's decision. In other words, the FCA determined that the PAB had correctly applied the right principles to the facts of the case and didn't make any errors that warranted intervention.<sup>55</sup>

### **When can legal precedent be revisited?**

[74] The doctrine of *stare decisis* (to stand by things decided) requires lower courts to follow precedents on the same or closely related issues from higher courts. For tribunals, this means that we must apply the decisions of the courts to the facts of the case before us.

[75] Both parties agree that the principle of *stare decisis* is not absolute. In other words, the parties agree that there are exceptions to the strict application of *stare decisis*. The parties also agree that the test to determine whether *stare decisis* applies is the test set out by the SCC decisions of *Bedford* and *Carter*.<sup>56</sup>

[76] In those cases, the SCC said that there are two situations where decision makers can revisit a settled ruling: (1) where a new legal issue is raised; and (2) where there is a change in the circumstances or evidence that fundamentally shifts the parameters of the debate.<sup>57</sup>

[77] The parties disagree about how the test from *Bedford* and *Carter* applies to this case.

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<sup>55</sup> See *Lezau v Canada (Social Development)*, 2008 FCA 99 (CanLII).

<sup>56</sup> See *Canada (Attorney General) v Bedford*, 2013 SCC 72 (CanLII); and *Carter v Canada (Attorney General)*, 2015 SCC 5 (CanLII).

<sup>57</sup> See *Canada (Attorney General) v Bedford*, 2013 SCC 72 (CanLII) at paragraph 42; and *Carter v Canada (Attorney General)*, 2015 SCC 5 (CanLII) at paragraph 44.

## What the parties say about how *Bedford* and *Carter* should be applied

[78] The parties' arguments refer to formalistic and substantive approaches to equality.

[79] **Formal equality** requires that everyone, regardless of their individual circumstances, be treated in an identical fashion. **Substantive equality** recognizes that in some circumstances it is necessary to treat different individuals differently, in order that true equality may be realized.<sup>58</sup>

[80] We turn now to the parties' arguments.

[81] The Appellant argues that this case falls within the second exception established by *Bedford* and *Carter*. To keep things simple, we will call this the **fundamental shift exception**.

[82] The Appellant asks us to focus on how the section 15(1) jurisprudence has evolved since *Lezau* was decided. She argues that the recent SCC decision in *Fraser* clarified the section 15(1) test and emphasized an approach animated by the promotion of substantive equality to address both direct as well as indirect forms of discrimination.

[83] The Appellant says the PAB effectively used a formal equality approach as opposed to a substantive equality approach to the section 15(1) test. She points out that the PAB didn't find differential treatment even though a greater proportion of immigrants might fail to meet the contributory requirements. She adds that the PAB used a "comparator group" approach and considered factors such as individual choices and human dignity. But since then, these elements have been removed from the section 15(1) test.

[84] The Minister argues that the fundamental shift exception doesn't apply here. They point out that the exception is narrow and that the SCC has cautioned that this

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<sup>58</sup> See *Canadian Doctors for Refugee Care v Canada (Attorney General)*, 2014 FC 651 at paragraph 712.

narrow exception is not a general invitation to reconsider binding authority based on **any** type of evidence.<sup>59</sup>

[85] The Minister says the Appellant is wrong to say that *Lezau* relied on a formalistic rather than a substantive approach to section 15(1). The Minister argues:

- it wasn't the *Fraser* decision that made the substantive equality approach part of the section 15(1) test. The substantive approach to equality was already firmly established in the law by the time *Lezau* was heard and decided.
- the SCC had rejected the formalistic approach in favour of a substantive equality approach in the *Law* decision of 1999.<sup>60</sup> The SCC reaffirmed this in *Granovsky*<sup>61</sup> and *Withler*.<sup>62</sup> Also, in *Canadian Doctors*,<sup>63</sup> the Federal Court (FC) explicitly noted that the *Law* decision aimed to avoid a formalistic approach.

### **The fundamental parameters of the debate have shifted**

[86] We agree that the threshold for departing from precedent is high—it's not an easy one to reach.<sup>64</sup> Certainty and stability in the law must be promoted.

[87] We also agree that the substantive equality approach to section 15(1) isn't new. The SCC endorsed the principle of substantive equality in the *Andrews* decision of 1989.<sup>65</sup> Ten years later, the SCC emphasized in *Law* the need for a purposive and contextual approach to the section 15(1) analysis to avoid the pitfalls of a formalistic or mechanical approach.<sup>66</sup>

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<sup>59</sup> The Minister cites *R v Comeau*, 2018 SCC 15 (CanLII) at paragraph 31.

<sup>60</sup> See *Law v Canada (Minister of Employment and Immigration)*, 1999 (CanLII) 675 (SCC).

<sup>61</sup> See *Granovsky v Canada (Minister of Employment and Immigration)*, 2000 SCC 28.

<sup>62</sup> See *Withler v Canada (Attorney General)*, 2011 SCC 12 (CanLII).

<sup>63</sup> See *Canadian Doctors for Refugee Care v Canada (Attorney General)*, 2014 FC 651.

<sup>64</sup> See *Canada (Attorney General) v Bedford*, 2013 SCC 72 (CanLII) at paragraph 44.

<sup>65</sup> See *Andrews v Law Society of British Columbia*, 1989 CanLII 2 (SCC) at page 171.

<sup>66</sup> See *Law v Canada (Minister of Employment and Immigration)*, 1999 CanLII 675 (SCC) at paragraph 88.

[88] Nonetheless, this is a case where it is appropriate to revisit legal precedent. Since *Lezau* was decided, there has been a change in the circumstances that fundamentally shifts the parameters of the debate. At this stage, the question is not whether the **outcome** of the case would be different; the question is whether the **framework** for deciding the case would be fundamentally different. If it is, it means the *Lezau* decision is not binding in this matter.

### **What is the fundamental shift?**

[89] We agree with the Appellant that the approach to the section 15(1) analysis has evolved significantly since *Lezau* was decided in 2008. This change is marked by four key developments in the law. In our view, these developments, taken together, constitute a change in the circumstances that fundamentally shifts the parameters of the debate.<sup>67</sup>

[90] In essence, the fundamental shift is about how decision makers understand the legal question at issue. It's not about offering a different perspective on a previously decided outcome.

[91] As a starting point, it's useful to look at what the section 15(1) test was when *Lezau* was decided and what the test is now according to the SCC's recent decision in *Sharma*.<sup>68</sup> Both parties agree that *Sharma* accurately reflects the current state of the section 15(1) jurisprudence.

[92] In *Lezau*, the PAB applied the section 15(1) test from the *Law* decision of 1999. In *Law*, the SCC set out a three-part test for section 15(1):

First, does the impugned law (a) draw a formal distinction between the claimant and others on the basis of one or more personal characteristics, or (b) fail to take into account the claimant's already disadvantaged position within Canadian society resulting in substantively differential treatment between the claimant and

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<sup>67</sup> See *Canada (Attorney General) v Bedford*, 2013 SCC 72 (CanLII) at paragraph 42; *Carter v Canada (Attorney General)*, 2015 SCC 5 (CanLII) at paragraph 44.

<sup>68</sup> See *R. v Sharma*, 2022 SCC 39.

others on the basis of one or more personal characteristics? If so, there is differential treatment for the purpose of section 15(1).

Second, was the claimant subject to differential treatment on the basis of one or more of the enumerated and analogous grounds? and

Third, does the differential treatment discriminate in a substantive sense, bringing into play the purpose of section 15(1) of the Charter in remedying such ills as prejudice, stereotyping, and historical disadvantage? The second and third inquiries are concerned with whether the differential treatment constitutes discrimination in the substantive sense intended by section 15(1).<sup>69</sup>

[93] In *Sharma*, the SCC said that to prove a violation of section 15(1), a claimant must show that the impugned law:

1. Creates a distinction based on enumerated or analogous grounds, on its face or in its impact; and
2. Imposes a burden or denies a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating disadvantage.<sup>70</sup>

[94] We now turn to the four developments that collectively result in a change in the circumstances that fundamentally shifts the parameters of the debate.<sup>71</sup>

### **Human dignity is no longer part of the legal test**

[95] In *Law*, the SCC reviewed the different ways that the purpose of section 15(1) had been described in prior cases. The SCC acknowledged that no single word or phrase can fully describe the content and purpose of section 15(1), and said the focus is really about assuring **human dignity** by remedying discriminatory treatment.<sup>72</sup> The court then set out four contextual factors to consider on this issue.<sup>73</sup>

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<sup>69</sup> See *Law v Canada (Minister of Employment and Immigration)*, 1999 CanLII 675 (SCC) at paragraph 39.

<sup>70</sup> See *R v Sharma*, 2022 SCC 39 at paragraph 28.

<sup>71</sup> See *Canada (Attorney General) v Bedford*, 2013 SCC 72 (CanLII) at paragraph 42; and *Carter v Canada (Attorney General)*, 2015 SCC 5 (CanLII) at paragraph 44.

<sup>72</sup> See *Law v Canada (Minister of Employment and Immigration)*, 1999 CanLII 675 (SCC) at paragraph 52.

<sup>73</sup> See *Law v Canada (Minister of Employment and Immigration)*, 1999 CanLII 675 (SCC) at paragraph 88.

[96] A few years later, the SCC in *Gosselin* highlighted the emphasis on human dignity, by framing the section 15(1) question as whether a reasonable person in circumstances similar to those of the claimant would find that the challenged legislation has the effect of demeaning his or her dignity having regard to the individual's or group's traits, history, and circumstances.<sup>74</sup>

[97] In 2008, the SCC in *Kapp* removed human dignity from the legal test for a section 15(1) analysis. The SCC explained that, although human dignity is an essential value underlying the section 15(1) equality guarantee, it is an abstract and subjective notion that can become confusing and difficult to apply. It had also proven to be an additional burden on claimants seeking to prove adverse-effects discrimination.<sup>75</sup>

[98] The *Kapp* decision was released just a few months after the FCA upheld *Lezau*. In *Lezau*, the FCA noted the PAB's view that there was no violation of human dignity.<sup>76</sup>

### **The need for a comparator group has been rejected**

[99] The first step in the section 15(1) test set out in *Law* required the establishment of a comparator group. The task was to assess if the impugned provision created a distinction between the claimant and some other group that mirrored their characteristics, except for the alleged ground of discrimination.

[100] Since *Lezau* was decided, the SCC has rejected the need for a mirror comparator group. In *Withler*, the SCC explained that the use of a comparator group may fail to capture substantive inequality, may become a search for sameness, may shortcut the second stage of the substantive equality analysis, and may be difficult to apply.<sup>77</sup>

[101] In *Fraser*, the SCC reiterated that a mirror comparator analysis must be avoided.<sup>78</sup> But the SCC expanded on what was said in *Withler* by recognizing that courts

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<sup>74</sup> See *Gosselin v Québec (Attorney General)*, 2002 SCC 84 (CanLII) at paragraph 25.

<sup>75</sup> See *R v Kapp*, 2008 SCC 41 (CanLII) at paragraph 22.

<sup>76</sup> See *Lezau v Canada (Social Development)*, 2008 FCA 99 (CanLII) at paragraph 10.

<sup>77</sup> See *Withler v Canada (Attorney General)*, 2011 SCC 12 (CanLII) at paragraph 60.

<sup>78</sup> See *Fraser v Canada (Attorney General)*, 2020 SCC 28 (CanLII) at paragraphs 94 and 128.

may need to use more than one comparator.<sup>79</sup> This is significant for cases about adverse-effects discrimination because multiple comparisons may increase the chance of recognizing adverse-effects discrimination.

[102] In *Lezau*, the PAB decided that the appropriate comparator group was all immigrants who came to Canada from a country with which Canada didn't have an SSA.<sup>80</sup> This was a puzzling description of the comparator group since it encompassed the group to which the claimants belonged.

### **More focus on impact of the law rather than prejudice or stereotyping**

[103] In 2013, the SCC clarified, in *Quebec v. A*, that *Kapp* and *Withler* don't establish an additional requirement on claimants to prove that a distinction will perpetuate prejudicial or stereotypical **attitudes** towards them. The court reiterated that the focus should be on the discriminatory **impact**.<sup>81</sup>

[104] In 2015, the SCC said in *Taypotat* that the focus of the second part of the section 15(1) analysis is on arbitrary (or discriminatory) disadvantage. The SCC said arbitrary disadvantage occurs when the impugned law fails to respond to the actual capacities and needs of the claimant group.<sup>82</sup> With this approach, the focus was on the government's purpose.

[105] However, in *Fraser*, the SCC said that claimants don't need to prove arbitrary disadvantage. The SCC explained that a law can be discriminatory even if it's relevant to a pressing and substantial objective. Instead of focusing on the law's purpose, the SCC said the focus should be on the impact of the law on disadvantaged groups.<sup>83</sup>

[106] We acknowledge that arbitrariness can still be relevant. The SCC said in *Sharma* that arbitrariness, like other factors, may help show a law has negative effects on the

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<sup>79</sup> See *Fraser v Canada (Attorney General)*, 2020 SCC 28 (CanLII) at paragraphs 25 and 94.

<sup>80</sup> See *Tan v Canada (Minister of Social Development)* (December 8, 2006), CP 20525, CP 21817, CP 22316, CP 22452, CP 22453, and CP 23253 (PAB) at paragraph 42.

<sup>81</sup> See *Quebec (Attorney General) v A*, 2013 SCC 5 (CanLII) at paragraphs 327 to 330.

<sup>82</sup> See *Kahkewistahaw First Nation v Taypotat*, 2015 SCC 30 (CanLII) at paragraph 20.

<sup>83</sup> See *Fraser v Canada (Attorney General)*, 2020 SCC 28 (CanLII) at paragraphs 79 and 80.

claimant group.<sup>84</sup> Our point here though, is that there has been a clear shift in the second step of the section 15(1) analysis to focus more on the **impact** of the law, rather than on prejudice or stereotyping.

[107] In *Lezau*, the focus was on whether there was specific targeting towards the claimant group.<sup>85</sup>

### **Equality is not about individual choice**

[108] In *Fraser*, the SCC reminded us that a section 15(1) analysis is not to focus on an individual's choice. The SCC explained that differential treatment can be discriminatory even if it is based on choices made by the affected individual or group.<sup>86</sup>

[109] In *Lezau*, the PAB focused on the claimants' choice when assessing disadvantage. The PAB said that any disadvantage suffered wasn't because of personal characteristics. Instead, it was because the claimants and their spouses **chose** to immigrate to Canada after the contributory clock began to run.<sup>87</sup>

### **Other decisions have recognized the fundamental shift**

[110] The Appellant's representative pointed to other decisions that have refused to follow precedent because the section 15(1) framework has changed.

[111] More than 10 years ago, the SCC decided, in *Quebec v. A*,<sup>88</sup> not to follow its earlier decision in *Walsh*.<sup>89</sup> The SCC explained that *Walsh* had applied the *Law* analysis and that, since then, the equality analysis under section 15(1) of the Charter has **evolved substantially**.<sup>90</sup> That was in 2013. The law has continued to evolve since then.

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<sup>84</sup> See *R. v Sharma*, 2022 SCC 39 (CanLII) at paragraph 53.

<sup>85</sup> See *Tan v Canada (Minister of Social Development)* (December 8, 2006), CP 20525, CP 21817, CP 22316, CP 22452, CP 22453, and CP 23253 (PAB) at paragraph 48; *Lezau v Canada (Social Development)*, 2008 FCA 99 (CanLII) at paragraph 10.

<sup>86</sup> See *Fraser v Canada (Attorney General)*, 2020 SCC 28 (CanLII) at paragraph 86.

<sup>87</sup> See *Tan v Canada (Minister of Social Development)* (December 8, 2006), CP 20525, CP 21817, CP 22316, CP 22452, CP 22453, and CP 23253 (PAB) at paragraph 48.

<sup>88</sup> See *Quebec (Attorney General) v A*, 2013 SCC 5 (CanLII) at paragraph 338.

<sup>89</sup> See *Nova Scotia (Attorney General) v Walsh*, 2002 SCC 83 (CanLII).

<sup>90</sup> See *Quebec (Attorney General) v A*, 2013 SCC 5 (CanLII) at paragraph 338.

[112] More recently, the SST's General Division, in *LC*, refused to be bound by two decisions from the FCA (*Sollbach* and *Miller*).<sup>91</sup> This was, in part, because those decisions were decided under the *Law* framework and that framework had since changed.<sup>92</sup> On appeal, the SST's Appeal Division held that the General Division didn't make an error on this issue because, among other things, **significant changes** had been made to the analytical framework that applies to cases involving section 15(1) of the Charter.<sup>93</sup>

## **Do sections 44(3) and 49 violate section 15(1) of the Charter?**

### **Adverse impact discrimination: what it means and how to prove it**

[113] To recap, to prove a violation of section 15(1), the Appellant must show that the impugned law:

1. Creates a distinction based on enumerated or analogous grounds, on its face or in its impact; and
2. Imposes a burden or denies a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating disadvantage.<sup>94</sup>

[114] Discrimination can be direct or indirect.

[115] **Direct discrimination** happens when the law explicitly targets members of a group based on an enumerated or analogous ground.

[116] **Indirect discrimination** (or adverse impact discrimination) happens when a seemingly neutral law has a disproportionate impact on members of groups protected on the basis of an enumerated or analogous ground. Instead of explicitly singling out

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<sup>91</sup> See *Sollbach v Canada (Attorney General)*, 1999 CanLII 9146 (FCA); and *Miller v Canada (Attorney General)*, 2002 FCA 370.

<sup>92</sup> See *LC, EB, KG, VD, MT and CL v Canada (Employment Insurance Commission)*, 2022 SST 8 at paragraph 55.

<sup>93</sup> See *Canada (Employment Insurance Commission) v LC et al.*, 2024 SST 24 (CanLII) at paragraph 16. We acknowledge this decision is currently before the FCA.

<sup>94</sup> See *R v Sharma*, 2022 SCC 39 at paragraph 28.

those who are in the protected groups for differential treatment, the law indirectly places them at a disadvantage.<sup>95</sup>

[117] The Appellant isn't arguing direct discrimination. She is arguing adverse impact discrimination.

[118] As such, the first issue in the section 15(1) analysis is whether the Appellant has shown that sections 44(3) and 49 of the CPP, **through their impact**, create a distinction based on a protected ground.

[119] The word "distinction" means that the claimant is treated differently than others.<sup>96</sup> A law creates a distinction through its effects if it has a **disproportionate impact** on members of a protected group based on an enumerated or analogous ground.<sup>97</sup>

[120] All laws are expected to impact individuals, and so it's not enough for a claimant to show that a law impacts a protected group. The claimant must provide sufficient evidence to prove that the impugned law, in its impact, **creates** or **contributes** to a disproportionate impact based on a protected ground.<sup>98</sup> This is a causation requirement.

[121] As an example, a law may include seemingly neutral rules, restrictions or criteria that operate in practice as "built-in headwinds" for members of protected groups.<sup>99</sup> In other cases, the problem is not "headwinds" built into a law, but the absence of accommodation for members of protected groups.<sup>100</sup>

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<sup>95</sup> See *Fraser v Canada (Attorney General)*, 2020 SCC 28 (CanLII) at paragraph 30.

<sup>96</sup> See *Withler v Canada (Attorney General)*, 2011 SCC 12 (CanLII) at paragraph 62.

<sup>97</sup> See *Fraser v Canada (Attorney General)*, 2020 SCC 28 (CanLII) at paragraph 30.

<sup>98</sup> See *R v Sharma*, 2022 SCC 39 at paragraphs 40 and 42.

<sup>99</sup> See *Fraser v Canada (Attorney General)*, 2020 SCC 28 (CanLII) at paragraph 53.

<sup>100</sup> See *Fraser v Canada (Attorney General)*, 2020 SCC 28 (CanLII) at paragraph 54.

[122] While the causation requirement means a claimant must establish a link or nexus between the impugned law and the discriminatory impact,<sup>101</sup> a claimant **doesn't** need to show that:

- the impugned law was the only or dominant cause of the disproportionate impact. (It will be enough for a claimant to show that the impugned law was a cause of the disproportionate impact);<sup>102</sup> or
- the criteria, characteristics or other factors used in the impugned law affect all members of a protected group in the same way.<sup>103</sup>

[123] In *Fraser*, the court identified two types of evidence as being especially helpful in proving that a law has a disproportionate impact on members of a protected group.

[124] The first is evidence about the situation of the claimant group. This is evidence about the physical, social, cultural or other barriers which provide the full context of the claimant group's situation. This type of evidence may come from the claimant, from expert witnesses, or through judicial notice.

[125] The second is evidence about the results of the law. This is evidence about the outcomes that the impugned law has produced in practice which could provide concrete proof that members of protected groups are being disproportionately impacted.<sup>104</sup>

## What the parties say about the differential treatment

### The Appellant's arguments

[126] The Appellant's arguments shifted over the course of these proceedings. When the Appellant filed her Charter Record, her sole argument was that sections 44(3) and 49 of the CPP create a distinction based on the contributor's **national origin**.<sup>105</sup>

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<sup>101</sup> See *R v Sharma*, 2022 SCC 39 at paragraph 44.

<sup>102</sup> See *R v Sharma*, 2022 SCC 39 at paragraph 49.

<sup>103</sup> See *Fraser v Canada (Attorney General)*, 2020 SCC 28 (CanLII) at paragraph 72.

<sup>104</sup> See *Fraser v Canada (Attorney General)*, 2020 SCC 28 (CanLII) at paragraphs 56 to 58.

<sup>105</sup> See GD21.

[127] Later, when the Appellant filed a reply to the Minister's Charter Record, she raised the additional argument of a distinction based on an analogous ground of **immigrant experience**.<sup>106</sup>

[128] More recently, when the Appellant filed her Notice of Constitutional Question and in oral submissions, she argued that sections 44(3) and 49 of the CPP create a distinction based on the contributor's **national origin considered alongside age and immigrant experience**.<sup>107</sup> She said we should take an intersectional approach to our analysis of section 15(1).

[129] The way the Appellant's argument shifted, makes it challenging to summarize in detail.

[130] That said, the Appellant's main argument is that the requirement for the contributory period to include the entire period since the contributor reached age 18, including years before he arrived in Canada, has a disproportionate impact on the claimant group. The claimant group is defined by national origin, age, and immigrant experience.

[131] To see the discriminatory effect of sections 44(3) and 49 of the CPP, the Appellant urges us to compare the contributor's circumstances against the situation of a Canadian-born person who worked the same number of years in Canada and who contributed the same amount to the CPP.

[132] The Appellant says the hypothetical Canadian would have turned 18 in 2011 and would have been able to access Canadian employment and contribute to the CPP immediately. He would have been a family allowance recipient for four years and then worked for all or part of seven years, between 2014 and 2020, just like the contributor. In 2020, the hypothetical Canadian would have become ill with cancer, received a disability pension for one year and died in 2021.

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<sup>106</sup> See page GD31-28.

<sup>107</sup> See page GD44-9.

[133] The Appellant argues the law treats these two people differently based on arbitrary and discriminatory criteria – their country of origin. She says that even though the two people have the same work record in Canada, the hypothetical Canadian would meet the contributory requirements for benefits, but the contributor would not. This is because the contributor would need to work more years in Canada to qualify for benefits. He would be required to count the years in his contributory period after he turned 18 and before he arrived in Canada even though he had no opportunity to work and contribute to the CPP.<sup>108</sup>

[134] The Appellant asserts that this example makes it very clear that immigrants face a clear and demonstrable disadvantage when compared to a Canadian-born person who worked the same number of years in Canada.

[135] Turning to age, the Appellant says that the disproportionate impact is not on all individuals born abroad. It's only on those who arrive in Canada and become eligible to work after age 18. In other words, she is only asking us to consider a claimant group that consists of people who come to Canada as adults.

[136] The Appellant urges us to consider the claimant group in the context of their immigrant experience. She says the experience of immigrants who arrive in Canada as adults is one of discrimination and disadvantage, notably in employment and economic integration. She points out that it takes many years for adult immigrants to approach income parity with native-born Canadians. She says the immigrant experience shapes one's economic prospects, identity, and life trajectory in a meaningful and long-lasting way.

[137] The Appellant points to several decisions where government programs that provided lesser benefits based on a person's country of origin were found to be

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<sup>108</sup> See pages GD21-88 to GD21-89.

discriminatory.<sup>109</sup> These decisions are *Lavoie*,<sup>110</sup> *Canadian Doctors*,<sup>111</sup> *YZ*,<sup>112</sup> and *Feher*.<sup>113</sup> We will address these decisions later.

[138] The Appellant also urges us to closely review the other cases on national origin, particularly the recent *Brink* decision and the decisions cited within it.<sup>114</sup> She argues that the claimant group in this case addresses the concern that cases like *Brink* have identified about taking an overly broad approach to the enumerated ground of national origin.

[139] As for the relevancy of SSAs, the Appellant has provided alternative arguments.

[140] On the one hand, she argues that the claimant group is made up of all individuals who arrive in Canada after age 18, regardless of whether they come from a country with an SSA or without an SSA. Here, she argues that it is irrelevant that Canada has struck SSAs with some countries because:

- a) the law recognizes that there may be heterogeneity (diversity) within a claimant group and a section 15(1) breach doesn't require that all members of a group be affected at all or to the same degree. Distinctions don't stop being discriminatory simply because some immigrants may be less disadvantaged in accessing CPP benefits by reason of an SSA with their country of origin.
- b) under older case law, a narrow comparison may have been done between the contributor (and other immigrants from countries **without** SSAs with Canada) and immigrants arriving from countries **with** SSAs with Canada. But more recent case law has rejected this formalistic "comparator group" approach. As such, discrimination in this case must be assessed more contextually, by looking at the contributor as a new immigrant, both

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<sup>109</sup> See pages GD21-85 to GD21-87.

<sup>110</sup> See *Lavoie v Canada*, 2002 SCC 23 (CanLII).

<sup>111</sup> See *Canadian Doctors for Refugee Care v Canada (Attorney General)*, 2014 FC 651.

<sup>112</sup> See *YZ v Canada (Citizenship and Immigration)*, 2015 FC 892.

<sup>113</sup> See *Feher v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 335.

<sup>114</sup> See *Brink v Canada*, 2024 FCA 43.

broadly and as an immigrant arriving from a country that doesn't have an SSA with Canada.

- c) the Appellant isn't seeking any relief that affects the operation of SSAs. She is not suggesting that the contributor should receive credit for the years he worked in China before coming to Canada. Instead, she is simply arguing that the contributor shouldn't be disadvantaged in qualifying for CPP benefits as compared with another Canadian-born person or immigrant from another country based on the years he worked in Canada.<sup>115</sup>

[141] On the other hand, the Appellant argues that the claimant group consists only of immigrants from countries that don't have SSAs. Here, the Appellant says the SSAs are used to narrow and more carefully define the claimant group.

### **The Appellant's experts**

[142] The Appellant retained two experts to demonstrate the systemic discrimination faced by immigrants resulting from the operation of sections 44(3) and 49 of the CPP.<sup>116</sup>

[143] These experts filed reports and testified at the hearing.

[144] Dr. Edward Koning holds a PhD in political studies and is an associate professor of political science at the University of Guelph.<sup>117</sup> He provided evidence about the disadvantages immigrants face in Canada.

[145] Dr. Koning explained that immigrants who were selected based on economic criteria and who arrive in Canada after the age of 18 experience three main challenges in accessing opportunities in the Canadian labour market. The challenges are:

- a lack of professional networks
- difficulties with having foreign qualifications and work experience recognized

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<sup>115</sup> See pages GD21-89 to GD21-91.

<sup>116</sup> See page GD21-76.

<sup>117</sup> Dr. Koning's CV is at pages GD21-17 to GD21-28.

- discrimination within the Canadian labour market such as a hesitation to hire people with foreign qualifications or foreign-sounding names<sup>118</sup>

[146] Dr. Koning explained that immigrants who were not selected based on economic criteria experience even more challenges, including language and cultural challenges.

[147] Dr. Koning said that a person's age at the time of immigration to Canada matters. People who immigrate to Canada as children and pursue at least some of their education in Canada tend to avoid the problems with lack of networks and difficulties having foreign credentials recognized. They are also not as impacted by a "socialization period" that is associated with immigrant integration. This is because younger people tend to be more adaptable to their surroundings than older people.

[148] Dr. Koning said there is a strong connection between the economic disadvantage experienced by immigrants who arrive in Canada after age 18 and access to public pensions that reward a long residence or work history in Canada, such as the Old Age Security (OAS), CPP, and Québec Pension Plan (QPP) programs. Dr. Koning explained that, compared to native-born citizens, immigrants are less likely to qualify for OAS, CPP, or QPP, and if they do qualify, they tend to receive less income from these programs.

[149] In the specific context of CPP death, survivor's, and orphan's benefits, Dr. Koning said the disadvantage for recently arrived immigrants – especially for those arriving from countries with which Canada does not have an SSA – is obvious. This is because they can only contribute to the CPP after immigrating to Canada, so it's harder for them to meet the MQP than it would be for native-born citizens of the same age.

[150] Dr. Koning looked at the 2021 census data and noted that the top ten places of birth for immigrants to Canada include six countries that don't have a reciprocal SSA with Canada. Those countries are China, the United Kingdom, Pakistan, Hong Kong, Iran, and Vietnam.

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<sup>118</sup> See Dr. Koning's testimony.

[151] We turn now to the evidence of Dr. Josh Curtis, who is a quantitative political sociologist with expertise in social, political, and economic inequality. He is an assistant professor of sociology at the University of Calgary.<sup>119</sup>

[152] Dr. Curtis provided evidence about how Canadian immigrants experience unequal economic, social, and policy access, compared to Canada's native-born population.

[153] Dr. Curtis explained that immigrants have unequal access to the Canadian labour market for several reasons including non-recognition or discounting of foreign human capital (education, training and work experience) and an adjustment period upon immigration – the “entry effect.” Dr. Curtis explained that these barriers lead to underemployment, low income, or both. He pointed to a study from 2003 that found that it takes years for immigrants to reach income parity with Canadian-born workers. The study showed that immigrants from China took 17.7 years to reach income parity.

[154] Dr. Curtis acknowledged that immigrants who come to Canada under the skilled worker program (as the contributor did) tend to be more socially and economically integrated, though it may still take years for first-generation immigrants to reach income parity with Canada's native born.

[155] Dr. Curtis also acknowledged that Canada offers a broad system of social policies that are meant to serve as a social safety net to help Canadians in times of economic hardship. But he added that many new immigrants experience direct, indirect, and informal mechanisms of social policy exclusion which limit their ability to use these safety nets to counterbalance the economic hardship they experience during the entry effect post-migration.

[156] On the issue of accessing CPP death, survivor's, and orphan's benefits, Dr. Curtis said that contributory social programs like the CPP disproportionately benefit those who have been in Canada all their life over those who have arrived recently. The

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<sup>119</sup> Dr. Curtis' CV is at pages GD21-61 to GD21-69.

CPP program disproportionately excludes new immigrants who come from countries without bilateral SSAs during their early years post-immigration to Canada.

### **The Minister's arguments**

[157] The Minister says the Appellant's claim faces a fatal preliminary issue: she has not established a claim based on an enumerated or analogous ground of discrimination under section 15(1).<sup>120</sup>

[158] The Minister points to the various ways the Appellant has described the targeted group and argues that the Appellant says virtually nothing about being from China. The Minister says the thrust of the Appellant's arguments is oriented towards, or premised on, immigration status, not national origin. So too are the materials in her expert reports. The Minister argues this is fatal to the Appellant's claim because immigration status has repeatedly been rejected in the case law as an analogous ground of discrimination.<sup>121</sup>

[159] The Minister argues that the decisions the Appellant relies on as examples (where government programs have been found discriminatory based on national origin) should be distinguished from the facts in this case. Again, we will address these cases later.

[160] The Minister acknowledges that heterogeneity within a claimant group doesn't necessarily defeat a claim of discrimination. However, the Minister says the difficulty with the Appellant's claim is that it is not just based on a heterogeneous group. It's based on a grouping that is so broad and so disparate that it defies definition: section 49 of the CPP applies to Chinese citizens and non-citizens alike, Canadian citizens and non-citizens alike, immigrants and non-immigrants alike no matter where they come from.<sup>122</sup>

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<sup>120</sup> See page GD27-14.

<sup>121</sup> See pages GD27-14 and GD27-15.

<sup>122</sup> See page GD27-18.

[161] The Minister asserts that the Appellant's claim is not based on national origin because it is irrelevant that the contributor was from China.<sup>123</sup> According to the Minister, what matters is **when** the contributor began working and making contributions to the CPP, not where he was from. The Minister says there is binding precedent (the *Pawar* decision) that says that coming to Canada later in life before starting to work is not an enumerated or analogous ground of discrimination.<sup>124</sup>

[162] The Minister argues the Appellant's proposed comparison between the contributor and a hypothetical Canadian is essentially a mirror-comparator exercise. This is exactly what the courts have said we're not supposed to do. In addition, the Minister says the comparison is flawed because it doesn't compare two individuals in a comparable situation. The Appellant shouldn't compare a 38-year-old with an 18-year-old. The Minister invites us to look more broadly and add more comparisons to the mix so that we get away from a mirror-comparator approach.

[163] The Minister argues that even if we find a sufficient basis on the enumerated ground of national origin, the Appellant's claim must still fail because she hasn't shown, with the type of robust evidence the law requires, that section 49 of the CPP creates or contributes to a disproportionate impact on the basis of national origin.<sup>125</sup>

[164] According to the Minister, the Appellant can't show a disproportionate impact because section 49 of the CPP applies equally to everyone.<sup>126</sup>

[165] The Minister argues that the Appellant's evidence showing that immigrants to Canada have historically faced social and economic disadvantage as compared to native-born Canadians is all legally irrelevant because immigration is not an enumerated ground.

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<sup>123</sup> The Minister referred to the Appellant coming from China rather than the contributor (page GD27-18). This appears to be a typographical error because the next sentence clarifies that the Minister was referring to the contributor.

<sup>124</sup> See pages GD27-18 and GD27-19. The Minister cites *Pawar v Canada (TD)*, [1999] 1 FC 158 at paragraph 24.

<sup>125</sup> See page GD27-19.

<sup>126</sup> See page GD27-20. The Minister cites *Tan v Canada (Minister of Social Development)* (December 8, 2006), CP 20525, CP 21817, CP 22316, CP 22452, CP 22453, and CP 23253 (PAB) at paragraph 27.

[166] The Minister says the Appellant suggests that the disadvantages experienced by late-arriving immigrants are made worse by how the contributory requirements operate. But there is no evidence to support this. Instead, this is a situation where the government has failed to remedy a pre-existing disadvantage. In other words, there are factors outside of the legislation that create an unfortunate situation for late-arriving immigrants. The government knows about the situation and responds with SSAs. For reasons that are outside the government's control, that response (the SSAs) doesn't cover the contributor in this appeal.

[167] The Minister says that the Appellant ignores this reality. She argues that she should be put in the same place as Canadian-born individuals who have worked and contributed longer or even in the same place as immigrants who are covered by an SSA. It's essentially an argument that everyone has to have the same results. But that is not what the Charter case law says. The causal test is not met where there is a failure to remedy a pre-existing disadvantage. The law is clear that a provision is not discriminatory simply because it fails to proactively redress long-standing and pre-existing disadvantages.<sup>127</sup>

## **Our findings**

### **There is no distinction based on a protected ground**

[168] We turn now to step one of the section 15(1) analysis. The Appellant hasn't shown that sections 44(3) and 49 of the CPP create a distinction based on a protected ground.

### **What is the claimant group?**

[169] In our view, the claimant group consists of individuals whose spouses or partners could not meet the MQP for the death, survivor's, or orphan's benefits because those spouses or partners came to Canada later in life from a country that doesn't have an SSA with Canada or has a limited SSA with Canada.

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<sup>127</sup> See page GD27-20. The Minister cites *Weatherley v Canada (Attorney General)*, 2021 FCA 158 (CanLII) at paragraph 64; and *R v Sharma*, 2022 SCC 39 at paragraph 40.

### **What is meant by national origin?**

[170] Because the Appellant's argument is anchored in national origin, it's important for us to look closely at what this term means.

[171] The term "national origin" isn't defined in the Charter. So, we must look at how this term has been interpreted by the courts.

#### **- The *Pawar* decision**

[172] In *Pawar*,<sup>128</sup> the FCA heard an appeal from the FC's decision to dismiss a class action. The class action was brought by claimants who were born outside of Canada. They argued that the residency requirement of the *Old Age Security Act* violated their rights under section 15(1) of the Charter on the grounds of "the length and the timing of the residence in Canada," "being born abroad," and what the court called "the acquisition of credits under plans that exist in the countries where they have resided before coming to Canada."

[173] None of the claimants' arguments were successful. The first ground wasn't about national origin, but as a point of interest the FCA affirmed that "the length and the timing of the residence in Canada" is not an enumerated or analogous ground.

[174] The FCA also held that "being born abroad" is not an enumerated ground, is not embraced in the concept of "national and ethnic origin" and is not an analogous ground.

[175] Finally, the FCA acknowledged a distinction between those born abroad in countries with SSAs with Canada and those born abroad in countries without SSAs with Canada. But the FCA said the distinction (the acquisition of credits under plans that exist in the countries where they resided before coming to Canada) is not an enumerated ground because it has nothing directly to do with "national or ethnic origin" and is not an analogous ground.

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<sup>128</sup> See *Pawar v Canada*, 1999 CanLII 8760 (FCA).

– **The *Lavoie* decision**

[176] The Appellant asked us to look at *Lavoie*.<sup>129</sup> However, this case is about citizenship and not national origin.

[177] In *Lavoie*, the court was faced with a question of discrimination on the grounds of citizenship. The claimants were foreign nationals who wanted to work in the Public Service. They challenged a provision of the *Public Service Employment Act* that gave the Public Service Commission the discretion to prefer Canadian citizens in open competitions for employment. Because this case is about citizenship, it's not helpful in our assessment of what is meant by national origin.

– **The *Veffer* decision**

[178] In *Veffer*,<sup>130</sup> the claimant applied for a Canadian passport and asked that his passport identify his place of birth as “Jerusalem, Israel.” The Government of Canada denied his request based on a policy that prohibits Canadian citizens born in Jerusalem from indicating a country of birth on their passport. In other words, the policy required the place of birth either be omitted or simply indicated as “Jerusalem.” The claimant applied for judicial review of the Minister’s decision and argued, among other things, that the Government’s policy violated his section 15(1) rights based on his place of birth.

[179] The FC recognized a distinction between passport applicants born in Jerusalem and other passport applicants on the analogous ground of place of birth. However, the FC determined the distinction was not discriminatory.<sup>131</sup> On appeal, the parties agreed that “place of birth” was an analogous ground. The FCA accepted that the policy created a distinction based on place of birth.<sup>132</sup> However, the FCA dismissed the appeal, finding that a reasonable person would not conclude that the passport policy denied the claimant his fundamental human dignity.<sup>133</sup>

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<sup>129</sup> See *Lavoie v Canada*, 2002 SCC 23 (CanLII).

<sup>130</sup> See *Veffer v Canada (Minister of Foreign Affairs)*, 2007 FCA 247 (CanLII).

<sup>131</sup> See *Veffer v Canada (Minister of Foreign Affairs)*, 2006 FC 540 (CanLII).

<sup>132</sup> See *Veffer v Canada (Minister of Foreign Affairs)*, 2007 FCA 247 at paragraph 53.

<sup>133</sup> See *Veffer v Canada (Minister of Foreign Affairs)*, 2007 FCA 247 at paragraphs 49, 58, and 72.

– **The Canadian Doctors decision**

[180] In *Canadian Doctors*,<sup>134</sup> the FC heard Charter challenges to changes the government made to the Interim Federal Health Program (IFHP) for refugee claimants. The changes to the IFHP had the effect of denying benefits to certain groups and creating different tiers of coverage based on various factors, including whether an individual was from a “Designated Country of Origin” (DCO).

[181] The FC found, among other things, that the changes to the IFHP violated section 15(1) of the Charter on the enumerated ground of the national origin of the refugee claimants. This was because the changes to the IFHP provided a lesser level of health insurance coverage to refugee claimants from DCOs in comparison to the coverage provided to refugee claimants from non-DCOs.

[182] The FC said that the plain meaning of the term “national origin” is broad enough to include people who are not only born in a particular country, but who come from that country.<sup>135</sup> The FC reasoned that interpreting national origin to include people who come from a particular country is consistent with the term “designated countries of origin,” used in the *Immigration and Refugee Protection Act* (IRPA). The FC explained that in immigration and refugee law, the term “country of origin” is used to refer to a refugee’s country of citizenship or country of habitual residence.

[183] The FC considered the *Pawar* decision and distinguished it. The FC explained that the distinction drawn by the changes to the IFHP was based entirely on the country that the refugee claimants came from, whereas the distinction in *Pawar* wasn’t based on the particular country where the individual previously lived.<sup>136</sup>

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<sup>134</sup> See *Canadian Doctors for Refugee Care v Canada (Attorney General)*, 2014 FC 651.

<sup>135</sup> See *Canadian Doctors for Refugee Care v Canada (Attorney General)*, 2014 FC 651 at paragraph 767.

<sup>136</sup> See *Canadian Doctors for Refugee Care v Canada (Attorney General)*, 2014 FC 651 at paragraphs 753 to 755.

– **The YZ and *Feher* decisions**

[184] The Appellant referred us to other DCO cases, as examples where government programs that provided lesser benefits based on a resident's country of origin were found discriminatory on the basis of national origin.

[185] In *YZ*,<sup>137</sup> the claimants challenged a recently added provision of the IRPA that denied refugees from DCOs an appeal to the Refugee Appeal Division. The court found the provision violated section 15(1) on the ground of national origin. The court explained that the provision drew a clear and discriminatory distinction between refugee claimants from DCO countries and those from non-DCO countries, by denying the former a right to appeal a decision.<sup>138</sup>

[186] The *Feher* decision<sup>139</sup> involved a challenge from refugee claimants from DCOs. In *Feher*, the claimants challenged a provision of the IRPA that precluded a refugee claimant from a DCO from applying for a pre-removal risk assessment before 36 months had passed from the last risk assessment. The court found that provision violated section 15(1) as it was discriminatory on its face based on national origin.

– **The *Bjorkquist* decision**

[187] The *Bjorkquist* decision<sup>140</sup> was about Charter challenges to the *Citizenship Act* because it prevented Canadian citizens who were born abroad from passing on their citizenship to their children if those children were also born abroad.

[188] The Ontario Superior Court held that the relevant provision of the *Citizenship Act* created a distinction between people who became Canadians at birth because they were born in Canada and people who obtained their Canadian citizenship by descent on their birth outside of Canada. The court further held that the distinction was based on national origin.

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<sup>137</sup> See *YZ v Canada (Citizenship and Immigration)*, 2015 FC 892.

<sup>138</sup> See *YZ v Canada (Citizenship and Immigration)*, 2015 FC 892 at paragraph 130.

<sup>139</sup> See *Feher v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 335.

<sup>140</sup> See *Bjorkquist et al. v Attorney General of Canada*, 2023 ONSC 7152 (CanLII).

[189] The court relied on *Canadian Doctors* to find that national origin includes two separate groups – a person’s country of birth and a person’s country of origin (where that person comes from). The court then held that if section 15(1) of the Charter protects against discrimination on the basis of country of birth, then on the plain meaning of the phrase it must protect against discrimination on **whether** one was born in Canada or in a different country.<sup>141</sup>

[190] The court acknowledged its decision was inconsistent with *Pawar* but distinguished it for the same reasons it was distinguished in *Canadian Doctors*. The court in *Bjorkquist* also said that the trial judge in *Pawar* didn’t examine the scope of “national and ethnic origin” and that the FCA only offered a “conclusory statement in a five-paragraph decision.”

– **The *Brink* decision**

[191] In *Brink*,<sup>142</sup> the FCA had to decide whether the FC erred in law when the FC decided to strike the appellants’ statement of claim because it failed to disclose a reasonable cause of action.

[192] The case involved challenges to the fee charged under the *Immigration and Refugee Protection Regulations* for permanent resident status in Canada and the fee charged under the *Citizenship Regulations* for Canadian citizenship. The claimants argued the fees were discriminatory against individuals who were not born in Canada and who were subject to those fees. They argued that the fees created a distinction based on national or ethnic origin or country of origin. They later expanded their argument to say the fees created a distinction based on analogous grounds of citizenship, birth, or place of birth.

[193] The FC recognized a distinction between those who must pay the fees and those who don’t have to pay the fees. However, the FC held that the distinction wasn’t based on a prohibited ground of discrimination.

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<sup>141</sup> See *Bjorkquist et al. v Attorney General of Canada*, 2023 ONSC 7152 (CanLII) at paragraph 77.

<sup>142</sup> See *Brink v Canada*, 2024 FCA 43 (CanLII).

[194] On the question of “national origin,” the FC held that the term refers to the nation where a person was born, or more broadly, where that person’s ancestors came from. The FC said that the distinction wasn’t based on national origin because there are persons in each group with a variety of national origins, and some with the same national origin.

[195] On appeal, the claimants’ main argument was that the FC erred in law by failing to find that it was at least arguable that being “non-Canadian born” could qualify as an analogous protected ground. The claimants acknowledged that their primary complaint of discrimination was about being born outside of Canada.

[196] The FCA considered whether the challenged law discriminated based on national origin, ethnic origin, or country of origin, including country of birth. The FCA concluded that “national and ethnic origin” doesn’t include a person’s place of birth outside of Canada. The FCA also concluded that being born outside of Canada isn’t an analogous ground.<sup>143</sup>

[197] In reaching this decision, the FCA addressed *Veffer, Pawar, and Bjorkquist*.

[198] The FCA distinguished *Veffer*. The FCA said that the alleged discrimination in *Veffer* was based upon the claimant having a **particular** place of birth – the city of Jerusalem. The claimant group was a discrete and insular minority as compared to a diffuse and disparate group.

[199] The FCA held that a claim based on a particular place of birth is not the same as a claim based on being born outside of Canada. The FCA went on to say that because they are not the same thing, the claimants’ “head tax” analogy couldn’t succeed. By “head tax” analogy, the claimants had tried to draw an analogy between the fees at issue and the shameful practice in Canada’s past where migrants from China (and no other country) were required to pay a monetary amount (known as a “head tax”) in order

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<sup>143</sup> See *Brink v Canada*, 2024 FCA 43 at paragraph 99.

to come to Canada. The FCA said that a more apt analogy to a head tax could arise if the fees were only charged to people born in a particular country.<sup>144</sup>

[200] Turning to *Pawar*, the FCA noted that the distinction in *Pawar* was not based on **the particular country** where the claimant group had previously resided, but rather on whether those countries had entered into SSAs with Canada. The FCA added that *Pawar* was binding on the FC, meaning the FC was required to find that “being born abroad” is not an analogous ground and is not subsumed within the enumerated grounds of national or ethnic origin.<sup>145</sup>

[201] As for *Bjorkquist*, the FCA distinguished it and said it was incorrect.<sup>146</sup> In distinguishing it, the FCA said that *Bjorkquist* was about differential treatment that applied only to individuals born outside of Canada, whereas the fees at issue in *Brink* are payable by anyone – wherever they were born (including Canada) – who applies for permanent residency or Canadian citizenship. The law doesn’t differentiate between applicants born in Canada and those born outside of Canada.

[202] The FCA said that *Bjorkquist* relied on the FC’s decision *Canadian Doctors* and then elaborated on it. In *Canadian Doctors*, the FC found that national origin is broad enough to include people who are born in a particular country as well as people who come from a particular country. However, the court in *Bjorkquist* went on to find that if discrimination based on country of birth is protected under section 15, it must also protect against discrimination based on whether one was born in Canada or in a different country.

[203] The FCA also said that to the extent that *Bjorkquist* is inconsistent with *Pawar* that being born abroad is not an analogous ground, *Pawar* governs.<sup>147</sup>

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<sup>144</sup> See *Brink v Canada*, 2024 FCA 43 at paragraph 88.

<sup>145</sup> See *Brink v Canada*, 2024 FCA 43 at paragraph 96.

<sup>146</sup> See *Brink v Canada*, 2024 FCA 43 at paragraph 117.

<sup>147</sup> See *Brink v Canada*, 2024 FCA 43 at paragraph 126.

### **There is insufficient evidence about China**

[204] To create a distinction based on national origin, the case law tells us that the distinction must be based on being born in a particular country or coming from a particular country.<sup>148</sup> National origin is not about being born abroad. In other words, national origin isn't invoked in the Charter context simply because someone wasn't born in Canada.<sup>149</sup> Being born outside of Canada is not a protected ground of its own. It's not an enumerated ground and it is not an analogous ground.<sup>150</sup>

[205] The reason the contributor couldn't contribute to the CPP in the years after his 18<sup>th</sup> birthday and the reason the Appellant was unable to qualify for benefits after the contributor died have nothing to do with national origin. In other words, there is nothing unique about being born in or coming from the particular country of China that affected the contributor's ability to meet the MQP.

[206] The Appellant has not established an evidentiary basis for the disproportionate impact she asserts. There is very little evidence about what it is specifically about being from China that makes it harder to meet the contributory requirements set out in sections 44(3) and 49 of the CPP.

[207] The Appellant mentions that the record, and specifically section 2.1 of Dr. Curtis' report, attests to the economic disadvantage experienced by immigrants, with immigrants from China suffering especially in this regard.<sup>151</sup>

[208] This section of Dr. Curtis' report talks about the unequal access that immigrants have to the Canadian labour market and the rise of immigrant economic inequality over time. Dr. Curtis explains that the main economic problem for new racial minority immigrants is finding adequate employment. He said that new immigrants face a notable earnings disadvantage when entering the labour market. He points to a study

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<sup>148</sup> See *Canadian Doctors for Refugee Care v Canada (Attorney General)*, 2014 FC 651; and *Brink v Canada*, 2024 FCA 43.

<sup>149</sup> See *Pawar v Canada (TD)*, [1999] 1 FC 158; and *Brink v Canada*, 2024 FCA 43.

<sup>150</sup> See *Pawar v Canada (TD)*, [1999] 1 FC 158; and *Brink v Canada*, 2024 FCA 43.

<sup>151</sup> See page GD31-21. The Appellant's reference to "immigrants from Canada" is clearly a typographical error.

from 2003 that found that it took immigrants from China 17.7 years to reach income parity with Canadian-born workers.<sup>152</sup>

[209] We don't know how the findings from the 2003 study cited by Dr. Curtis compare to 2011, when the contributor immigrated to Canada, or even to today. However, assuming for the sake of argument that the findings remain about the same, we are still left with a missing link between coming from the particular country of China and being able to meet the MQP requirements.

[210] Reaching income parity is not what sections 44(3) and 49 are about. The annual income threshold to make a valid contribution to the CPP for death, survivor's, and orphan's benefits is very low and has been frozen at \$3,500 since at least 1998.

[211] What's more, the study of 2003 that Dr. Curtis referenced found that immigrants from other areas (West Asia and South Asia) also took years to reach income parity to Canadian-born workers, though not as many years as immigrants from China.<sup>153</sup>

– **The group of countries without SSAs with Canada don't fall within the scope of national origin**

[212] The Appellant argues that discrimination can happen when a particular subset of countries is singled out. She points to *Canadian Doctors* where the FC held that discrimination doesn't require that one particular country be singled out.

[213] The Appellant acknowledges that *Canadian Doctors* was about direct discrimination, but she argues that the analytical approach would be the same if the discrimination had been indirect. In other words, a neutral requirement can result in a differential impact on individuals from certain specific countries. The Appellant refers to *Bjorkquist* as an example of a claimant group facing substantive discrimination.

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<sup>152</sup> See pages GD21-37 to GD21-43.

<sup>153</sup> See page GD21-38.

[214] We acknowledge that national origin doesn't require a singling out of just one specific country. The DCO cases are an example of distinctions based on national origin despite the targeting of several countries.

[215] However, a focus on only the group of countries that don't have an SSA with Canada isn't helpful to the Appellant's case.

[216] First, the FCA has already decided in *Pawar* that the distinction between those born abroad in countries with SSAs with Canada and those born abroad in countries without SSAs with Canada has nothing directly to do with national origin (and is not an analogous ground).<sup>154</sup>

[217] Second, the FCA confirmed in the *Brink* decision that *Pawar* remains good law.<sup>155</sup> In *Brink*, the FCA explained that the distinction at issue in *Pawar* was not based on the **particular country** where class members had previously resided, but rather on whether those countries had entered into SSAs with Canada.<sup>156</sup> The FCA also pointed out that a few years after *Pawar* was decided, a differently constituted panel of the FCA came to the same conclusion in *Shergill*.<sup>157</sup>

– **The crux of the Appellant's argument is about grounds that are not protected under the Charter**

[218] Although the Appellant says that her argument is about discrimination based on national origin, the substance of the argument is about grounds that have not been recognized as protected grounds under the Charter. The first is immigration status.

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<sup>154</sup> See *Pawar v Canada (TD)*, [1999] 1 FC 158.

<sup>155</sup> See *Brink v Canada*, 2024 FCA 43 at paragraphs 93 to 99.

<sup>156</sup> See *Brink v Canada*, 2024 FCA 43 at paragraph 91.

<sup>157</sup> See *Brink v Canada*, 2024 FCA 43 at paragraph 95. See *Shergill v Canada*, 2003 FCA 468 (CanLII).

– **Immigration status is not a protected ground**

[219] The focus of the Appellant’s arguments is on how the law has a disproportionate impact on immigrants. For example, she says:

- When they chose to immigrate to Canada, they didn’t know of the differential treatment of **new immigrants** in accessing CPP benefits.<sup>158</sup>
- **New immigrants** to Canada from **any** migrant country face significant social and economic disadvantage as compared with native-born Canadians.<sup>159</sup>
- Her expert evidence shows that while qualification for CPP benefits is neutral on its face, the criteria operate to exclude **immigrants** by rewarding life experiences that **immigrants** are unlikely to have as a result of limited time spent in Canada post-migration.<sup>160</sup>
- Section 49 contains “built-in headwinds” for **newer immigrants** which do not exist for those who have resided in Canada for longer.<sup>161</sup>
- The contributory period for **new immigrants** should take into account their actual opportunities to work in Canada.<sup>162</sup>

[220] Immigration status is not an enumerated ground. And it is settled law that immigration status is not an analogous ground. This is because immigration status is not a personal characteristic that is immutable or changeable only at great personal cost.<sup>163</sup>

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<sup>158</sup> See page GD21-74.

<sup>159</sup> See page GD21-79.

<sup>160</sup> See page GD21-89.

<sup>161</sup> See page GD31-20.

<sup>162</sup> See page GD27-20.

<sup>163</sup> See *Brink v Canada*, 2024 FCA 43 at paragraph 100.

– **Timing and length of residence in Canada is not a protected ground**

[221] As we said before, what matters here is the contributor's immigration to Canada later in life from a country with a limited SSA with Canada. The contributor's immigration to Canada at age 38 affected the amount of time he could contribute to the CPP.

[222] It is settled law that timing and length of residence in Canada is not a protected ground under section 15(1) of the Charter. It is not about national origin, and it is neither an enumerated nor an analogous ground.<sup>164</sup>

[223] The Appellant acknowledges that length and timing of residence in Canada is a factor in assessing the disproportionate impact in this case. But she says it in no way diminishes her claim based on national origin. She argues that inherent to the whole notion of adverse impact discrimination is that the impugned law targets a characteristic other than the protected ground. Adverse impact discrimination occurs when the targeting of that characteristic has a disproportionate impact based on the protected ground. The Appellant says that the characteristic that is targeted is the timing and length of residence in Canada.<sup>165</sup>

[224] In our view, timing and length of residence in Canada is more than an indirect target. It's **the link** between sections 44(3) and 49 of the CPP and the alleged disproportionate impact on the claimant group.

[225] The comparison the Appellant urged us to consider between the contributor and a Canadian-born contributor is premised on the length of the contributor's time in Canada, not his national origin.

[226] Had the contributor come to Canada five years earlier, he would likely have met the MQP for the benefits in question, even if it took him about three years after his arrival to find a job. In this example, he would have come to Canada in 2006, begun

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<sup>164</sup> See *Pawar v Canada (TD)*, [1999] 1 FC 158.

<sup>165</sup> See page GD31-23. The Appellant cites *Fraser v Canada (Attorney General)*, 2020 SCC 28 (CanLII) at paragraphs 30, 32, 34, 38, 46, 70, and 106.

working in 2009, and continued working until becoming ill in 2020. His CPP contributions from 2009 to 2020 would exceed 10 years.

[227] Moreover, even if we were to accept the Appellant's argument about length and timing of residence in Canada being a characteristic that is indirectly targeted, the evidence doesn't show a disproportionate impact **based on national origin**.

[228] There is nothing to show, for example, that immigrants from China come to Canada later in life, compared to immigrants from other countries.

### **No distinction based on national origin, considered alongside age and immigrant experience**

[229] The Appellant acknowledges the case law about national origin and in particular the concern about the claimant group being too broad and too diverse. She says this concern can be addressed by narrowing the claimant group by age and by only looking at the group of claimants who come to Canada from a country without an SSA with Canada.

[230] The Appellant's proposed ground can't succeed.

### **Refining the protected ground doesn't resolve the problems we identified with national origin**

[231] The Appellant's intersectional ground includes national origin. As we've explained previously, the disproportionate impact in this case has nothing to do with national origin.

### **The link to age is tenuous**

[232] The Appellant says that the contributor's inability to meet the MQP for the benefits in question is tied to his age (and national origin and immigrant experience).

[233] We don't agree. The contributor's inability to meet the MQP wasn't tied to his age. It was his immigration to Canada later in life from a country with a limited SSA with Canada that negatively affected his ability to meet the MQP.

### **Immigrant experience is predicated upon immigration status**

[234] The Appellant recognizes that immigration status is not a protected ground. She says the focus should be on immigrant experience and not immigration status. We acknowledge the immigrant experience, as described by the Appellant's experts. But we find that, to have immigrant experience, a person must first have immigration status. It's the fact of immigrating to Canada as a mature adult (as opposed to the immigrant experience) that forms the basis of the distinction.

[235] The Appellant's oral arguments repeatedly refer to the claimant group as those who arrived **and became eligible to work in Canada** after age 18. It's the immigration status and not the immigrant experience that made the contributor eligible to work in Canada.

[236] Even if we saw the link between sections 44(3) and 49 and the disproportionate impact based on immigrant experience (which we don't), there is an evidentiary challenge that we can't ignore.

[237] There is insufficient evidence to show that the contributor couldn't begin working upon his arrival in Canada at a job that provided an annual salary of at least \$3,500 **because of his immigrant experience**.

[238] We acknowledge that after arriving in Canada, the contributor didn't work for the next three years. But we don't know how much of a role immigrant experience played in that because the contributor's family circumstances were such that he was caring for his young children and taking courses to improve his English language skills.<sup>166</sup> What we do know is that the contributor had been able to get jobs outside of China before he immigrated to Canada in 2011.

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<sup>166</sup> See the Appellant's testimony.

[239] The Appellant and contributor lived in England from 2004 to December 31, 2009, and then they lived in Australia until 2011. The contributor worked two jobs in England, though not in his chosen field. We acknowledge the contributor hadn't immigrated to England and even if he had, the immigrant experience described in the evidence before us is unique to Canada. Our point here is just that the contributor had shown an ability to get a job in a country outside of China before coming to Canada in 2011.

### **Immigrant experience is not an analogous ground**

[240] As we said earlier, the Appellant first raised the argument about the analogous ground of immigrant experience when she filed her reply submissions.

#### **- How to establish an analogous ground**

[241] The law allows claimants to invoke more than one ground of discrimination.<sup>167</sup>

[242] To establish an analogous ground, the Appellant must show that the proposed ground is a personal characteristic that is immutable (like race) or is a characteristic that a person should not be asked to change to receive equal treatment under the law (like religion).<sup>168</sup>

[243] Factors to consider when assessing whether a characteristic should be recognized as an analogous ground include whether the group is a discrete and insular minority, whether the group has historically been discriminated against, and whether the proposed ground is included in federal and provincial human rights codes.<sup>169</sup>

[244] When determining whether to recognize an analogous ground, we are not to engage in a context-dependent fact-based approach.<sup>170</sup> This means that once

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<sup>167</sup> See *Law v Canada (Minister of Employment and Immigration)*, 1999 CanLII 675 (SCC); and *Kahkewistahaw First Nation v Taypotat*, 2015 SCC 30 at paragraph 19.

<sup>168</sup> See *Corbiere v Canada (Minister of Indian and Northern Affairs)*, 1999 CanLII 687 (SCC) at paragraph 13; *Almadhoun v Canada*, 2018 FCA 112 at paragraph 28; and *Brink v Canada*, 2024 FCA 43 at paragraph 100.

<sup>169</sup> See *Corbiere v Canada (Minister of Indian and Northern Affairs)*, 1999 CanLII 687 (SCC) at paragraphs 13 and 60.

<sup>170</sup> See *Corbiere v Canada (Minister of Indian and Northern Affairs)*, 1999 CanLII 687 (SCC); *Withler v Canada (Attorney General)*, 2011 SCC 12 (CanLII); *Canadian Doctors for Refugee Care v Canada (Attorney General)*, 2014 FC 651; and *Lavoie v Canada*, 2002 SCC 23 (CanLII).

recognized, an analogous ground must always stand as a constant marker of potential legislative discrimination. Its status as an analogous ground doesn't change based on the context.<sup>171</sup>

[245] The SCC has recently said that sufficient evidence and submissions are required to establish an analogous ground.<sup>172</sup>

– **What the parties say about the proposed analogous ground**

[246] The Appellant says that immigrant experience bears all the hallmarks of analogous grounds. This is because it serves as the basis for stereotypical decisions made not on the basis of merit but on the basis of a personal characteristic that is immutable or changeable only at unacceptable cost to personal identity.<sup>173</sup>

[247] The Appellant says she has put forward evidence showing that immigrants to Canada are vulnerable to discrimination and disadvantage, notably in employment. The evidence shows that immigrants to Canada have historically faced social and economic disadvantage as compared to native-born Canadians. She says the immigrant experience is immutable in the sense that it continues to shape one's economic prospects, identity and trajectory regardless of one's changing legal status in Canada. She points to the expert evidence that shows that new immigrants face both initial and long-term economic disadvantage.<sup>174</sup>

[248] The Appellant says that the case law that finds that immigration status is not an analogous ground doesn't speak to the immigrant experience, but rather to particular forms of legal status that immigrants may hold. They all decided that legal immigration status is a characteristic that can change.

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<sup>171</sup> See *Corbiere v Canada (Minister of Indian and Northern Affairs)*, 1999 CanLII 687 (SCC) at paragraph 10; *Canadian Doctors for Refugee Care v Canada (Attorney General)*, 2014 FC 651 at paragraphs 868 to 869.

<sup>172</sup> See *Fraser v Canada (Attorney General)*, 2020 SCC 28 (CanLII) at paragraphs 117 to 123.

<sup>173</sup> The Appellant cites *Corbiere v Canada (Minister of Indian and Northern Affairs)*, 1999 CanLII 687 (SCC) at paragraph 13.

<sup>174</sup> The Appellant cites Dr. Curtis' report at pages 8 and 9. These pages are at GD21-37 and GD21-38.

[249] The Appellant says that it would be entirely consistent with the purpose of section 15(1) to treat the immigrant experience as an analogous ground. This is because of the nature and situation of immigrants in Canada, the challenges they experience in achieving economic and social integration and the persistence of those challenges.

[250] The Minister says that the Appellant hasn't provided the type of robust evidence and submissions the law requires to establish an analogous ground.

– **Why immigrant experience is not an analogous ground**

[251] We are unable to find that immigrant experience is an analogous ground.

[252] The SCC has said recently that detailed evidence and submissions are required to establish an analogous ground.<sup>175</sup>

[253] We recognize we are not a court. Any ground we recognize as analogous won't have implications for others. But this doesn't diminish the need for evidence and submissions on why the proposed ground should be recognized as analogous.

[254] The Appellant hasn't provided the type of submissions needed for us to find that immigrant experience is an analogous ground.

[255] For example, we don't have submissions on how the term would be defined or on whether that definition would be workable. We also don't have submissions on the scope of the proposed ground and whether and how it would be a discrete and insular minority.

[256] The immigrant experience, as described by the evidence in this appeal, is mainly about economic disadvantage and difficulties getting a job especially a job that offers timely income parity with those who were born in Canada. But the courts have already

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<sup>175</sup> See *Fraser v Canada (Attorney General)*, 2020 SCC 28 (CanLII) at paragraphs 117 to 123.

decided that economic status<sup>176</sup> and occupational status<sup>177</sup> are not analogous grounds. Why would immigrant experience be different?

[257] In *Fraser*, the SCC said it didn't receive any submissions or evidence on how or whether the recognition of the proposed analogous ground (family/parental status) would affect protection for women above and beyond that available under the enumerated ground of sex.<sup>178</sup> A similar issue arises here. How would an analogous ground of immigrant experience interact with other protected grounds, like race, national or ethnic origin, colour, and citizenship?

[258] We acknowledge that part of the immigrant experience is the discrimination that occurs, particularly for visible minorities and those with foreign-sounding names. But this component of the experience makes the argument somewhat circular. The argument would be akin to saying something like the discriminatory element of the immigrant experience serves as a basis for stereotypical decisions.

[259] Lastly, we have concerns about whether immigrant experience can accurately be characterized as immutable. We acknowledge that the effects of the immigrant experience may be long-lasting, even permanent. But the experience itself may be temporary.

[260] Dr. Koning acknowledged that immigrants get more economically established over time. He was asked if there is any identifiable point that marks the end of the immigrant experience. He said that, as far as the economic disadvantage is concerned, there are probably a lot of studies that try to estimate the length of time involved. But he didn't have that type of information readily available to him.

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<sup>176</sup> See *Boulter v Nova Scotia Power Incorporation*, 2009 NSCA 17; *Chénier v Canada (Attorney General)*, 2005 CanLII 23125 (ON SC) at paragraph 53; *R. v Banks*, 2007 ONCA 19 (CanLII) at paragraph 104; and *Toussaint v Canada (Minister of Citizenship and Immigration)*, 2011 FCA 146 at paragraph 59.

<sup>177</sup> See *Baier v Alberta*, 2007 SCC 31; *Health Services and Support—Facilities Subsector Bargaining Assn v British Columbia*, 2007 SCC 27 at paragraph 165.

<sup>178</sup> See *Fraser v Canada (Attorney General)*, 2020 SCC 28 (CanLII) at paragraph 120.

## Conclusion

[261] The Appellant isn't entitled to the CPP death, survivor's, or orphan's benefits.

[262] The contributor didn't make enough years of contributions to the CPP to qualify the Appellant for these benefits.

[263] The Appellant hasn't shown that sections 44(3) and 49 of the CPP violate section 15(1) of the Charter. This is because the Appellant hasn't shown that these provisions create a distinction based on an enumerated or analogous ground.

[264] The appeal is dismissed.

Shannon Russell

James Beaton

Wayne van der Meide

Members, General Division – Income Security Section