



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *S. S. v Minister of Employment and Social Development*, 2018 SST 1215

Tribunal File Number: GP-16-1586

BETWEEN:

**S. S.**

Appellant (Claimant)

and

**Minister of Employment and Social Development**

Minister

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**SOCIAL SECURITY TRIBUNAL DECISION**  
**General Division – Income Security Section**

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Decision by: Raymond Raphael

Claimant: Self-represented

Minister: Represented by Sandra Doucette

Teleconference hearing on: September 10, 12, & 13, 2018

Date of decision: October 16, 2018

## DECISION

[1] Subsection 74(2) of the CPP, in so far as it limits retroactive payment of the DCCB to 11 months from the application date (the impugned provision), infringes the equality rights of the Claimant's children under section 15 of the Charter, and the Minister has failed to meet its burden to establish that the retroactive limit is a demonstrably justified limit in a free and democratic society.

[2] The Claimant's children are entitled to the DCCB with payment commencing the month after their birth.

## OVERVIEW

[3] The Claimant suffers from chronic fatigue syndrome. She applied for a *Canada Pension Plan* (CPP) disability benefit in January 1994. Her application was granted in February 1995 retroactive to July 1993. She subsequently had three children who were born in August 1997, June 1999, and October 2002. She states that she was unaware of the Disabled Contributor's Child's Benefit (DCCB) until shortly before she applied for it on behalf of her three children in January 2013. The application was approved with an effective start date of February 2012 (the maximum 11 months retroactivity allowed). The Claimant's request for reconsideration of the start date was denied.

[4] The CPP legislation provides for a maximum of 11 months retroactivity.<sup>1</sup>

[5] The Claimant's position is that the effective start date for payment of the DCCB should be the month after each child was born. She challenges the constitutionality of the impugned provision on the ground that it infringes the equality rights of her children under section 15 of Charter.

[6] The Claimant argues that the impugned provision infringes her children's Charter rights since it has an adverse effect on them because of their age and their dependency on a disabled

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<sup>1</sup> Subsection 74(2) of the CPP provides that the disabled contributor's child benefit shall be payable the later of month commencing with which a disability pension is payable to the contributor and the month next following the month in which the child was born or otherwise became the child of the contributor ... *but in no case shall the benefit be payable earlier than the twelfth month preceding the month following the month in which the application was received.* (emphasis added)

parent, and that the impugned provision perpetuates this disadvantage. She states that although her children were eligible for DCCB starting the month after they were born, they did not have the capacity to apply on their own and were dependent on her to do so on their behalf.

[7] On the other hand, the Minister argues that the Claimant failed to establish a discriminatory distinction on the basis of an enumerated or analogous ground under section 15(1) of the Charter. The Minister also argues that if the impugned provision is found to violate section 15(1) of the Charter, the violation is justified under section 1 of the Charter because it is reasonable and demonstrably justified.

## ISSUES

1. Does the 11-month limitation on retroactivity of DCCB benefits discriminate against the Claimant's children on the basis of age and their being the children of a disabled parent contrary to subsection 15(1) of the Charter?
2. If so, can the violation be demonstrably justified in a free and democratic society under section 1 of the Charter?

## ANALYSIS

### **Does subsection 74(2) of the CPP infringe upon the Claimant's children's section 15 Charter rights?**

[8] Subsection 15(1) of the *Charter* provides that every individual is equal before and under the law and has the right to the equal protection and benefit of the law without discrimination based on race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability.

[9] The Supreme Court of Canada has set out a two-part test for assessing a section 15(1) claim:

1. does the law create a distinction that is based on an enumerated or analogous ground,
2. and, does the distinction create a disadvantage by perpetuating prejudice or stereotyping.<sup>2</sup>

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<sup>2</sup> *Withler v Canada (Attorney General)*, 2011 SCC 12, para 30

[10] This requires a flexible and contextual inquiry into whether a distinction has the effect of perpetuating arbitrary disadvantage on a claimant because of his or her membership in an enumerated or analogous group. It is an approach which recognizes that persistent systemic disadvantages have operated to limit the opportunities available to members of certain groups in society and seeks to prevent conduct that perpetuates those disadvantages. A section 15 Charter analysis is focused on legislation that draws discriminatory distinctions — that is, distinctions that have the effect of perpetuating arbitrary disadvantage based on an individual’s membership in an enumerated or analogous group. The section 15(1) analysis is accordingly concerned with substantive equity.<sup>3</sup>

### **Distinction on the basis of an enumerated or analogous ground**

[11] The Claimant relies on the enumerated ground of age and the analogous ground of being the child of a disabled parent.

[12] She states that because of her long-standing chronic fatigue syndrome her family has limited mental, physical, and financial means. Her children’s situation has not been ideal; not only because of their limited financial means but also because she has been limited in how much she could do for them. She spends significant time resting and sleeping, has some forgetfulness and difficulty concentrating, and suffers from aches, pains, and headaches. Her children struggled with the fact that their mother was different; she was not able to do things with them and they didn’t have financial and emotional security. All three struggle with significant anxiety issues and she believes that her condition may have been a contributing factor.<sup>4</sup>

[13] Because of her condition she “was unable to conceive of the idea that there were additional benefits available for [her] children let alone research [for their] existence ...” A friend told her about the DCCB shortly before she applied in January 2013.<sup>5</sup> She testified that she is in “survival mode” and is only able to do “basic things.” She now understands that inserts

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<sup>3</sup> *Quebec (Attorney General) v A*, [2013] 1 S.C.R. 61 at paras 331 & 332

<sup>4</sup> K. suffers from anxiety disorder and depression; A. suffers from learning disorders and social anxiety; and W. suffers from post-traumatic stress disorder following a recent assault. All three have required special accommodations at school and are receiving psychiatric care.

<sup>5</sup> Notice of Constitutional Question: GDR8-13

explaining available benefits were enclosed with letters from Service Canada; however, she didn't read these inserts.

[14] On July 7, 2014 Dr. Bystrin, the Claimant's family doctor from 1992 to 2001, stated that the Claimant's chronic fatigue syndrome persisted throughout the time she was her patient, and that she had great difficulty managing day-to-day activities. The Claimant was still suffering from chronic fatigue syndrome when she presented at Dr. Bystrin's office on July 7, 2014; she complained of symptoms of persistent and excessive fatigue that significantly interfered with her daily activities, general malaise, nausea, aches, and pains, as well as difficulty with concentration, short-term memory, and anxiety.<sup>6</sup> On July 18, 2014 Dr. Malcolm, the Claimant's present family doctor, stated that the Claimant is constantly fatigued and struggles to do basic day-to-day necessities for herself and her family.<sup>7</sup>

### **The Claimant's position**

[15] The Claimant argues that even though her children were eligible for DCCB from birth, they did not have the capacity to apply on their own and the limitation on retroactivity imposed an adverse effect on them because of their age: it fails to properly take into account their needs, circumstances and capacities because it presumes that they have the same capacity as adults to apply for their entitlement under the CPP. She further argues that as children of a disabled parent they are particularly disadvantaged: the retroactivity limitation perpetuates their disadvantage since they are dependent on a disabled adult to receive the benefit.

### **The Minister's position**

[16] Ms. Doucette argues that the evidence concerning the Claimant's own and her family's circumstances does not demonstrate a distinction on an enumerated or analogous ground. All CPP benefits have retroactive limits and the Claimant's children are not being treated differently than other applicants for CPP benefits, including other children who are entitled to DCCB benefits. No burden has been imposed on them that is not imposed on others.

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<sup>6</sup> GDR8-23

<sup>7</sup> GDR8-24

[17] Ms. Doucette stated that even though the Minister was not under any legal obligation to inform CPP recipients of potential benefits, it took steps to keep the Claimant informed of her rights and responsibilities. A notice concerning DCCB benefits was on the back of the notice of entitlement sent to her in 1995 when her disability application was approved and letters and newsletters were sent annually to all recipients on an annual basis with their tax information.<sup>8</sup> The Claimant is well educated with a university degree in mathematics and statistics and last worked as X for X. Ms. Doucette submitted that the Claimant should have known about the DCCB before 2013 and her failure to apply for the benefits in a timely manner was her own fault.

[18] Although there is considerable force to this submission, I do not believe that this is significant. The benefit belongs to the children and not to the Claimant, and it is their Charter rights that are at issue. The failure by the Claimant to apply in a timely manner illustrates the unique position of vulnerability that her children were in.

### **My Findings**

[19] I find that because of the intersection of the children's age and their being in the care of a disabled parent, they are in a distinctly disadvantaged position. They lacked a realistic capacity to apply for the DCCB on their own and were dependent on their disabled parent to do so. They are members of an identified group that has suffered historical disadvantage because of their membership in that group. These personal characteristics are immutable: they could not change their age and they could not change the reality that they are children of a disabled parent.

[20] This intersectional approach takes into account the historical, social and political context and recognizes the unique experience of an individual based on the intersection of relevant grounds.<sup>9</sup> It allows the particular experience of discrimination, based on the confluence of grounds involved, to be acknowledged and remedied.

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<sup>8</sup> Affidavit of I. M., manager of Canada Pension Plan and Old Age Security Appeals at Service Canada: GDR17-1363 to 1448

<sup>9</sup> C. A. Aylward, Intersectionality: Crossing the Theoretical and Praxis Divide (Paper Distributed at Transforming Women's Future: Equality Rights in the New Century: A National Forum on Equality Rights presented by West Coast Leaf, 4 November 1999) [unpublished] cited in Ontario Human Rights Commission – Policy and Education Branch, "An Intersectional Approach to Discrimination Addressing Multiple Grounds in Human Rights Claims"

[21] It also acknowledges the complexity of how people experience discrimination, recognizes that the experience of discrimination may be unique and takes into account the social and historical account context of the group. It places the focus on society's response to the individual as a result of a confluence of grounds and does not require the person to slot themselves into rigid compartments or categories.<sup>10</sup>

[22] Ms. Doucette further argues that the interest affected is purely economic and that the deprivation of a financial benefit alone is not sufficient to establish an infringement of section 15(1) of the Charter.<sup>11</sup> In this case, however, the children are not only being denied a financial benefit, they are being denied recognition of their unique position as children of a disabled contributor. The fact that they are receiving benefits effective from September 2012 does not make up for the substantial denial of benefits up to that date. K. who was born in August 1997 has been deprived of 15 years of benefits, A. who was born in June 1999 has been deprived of 13 years of benefits, and W. who was born in October 2002 has been deprived of close to 10 years of benefits.

[23] The Claimant's children are in a distinct position from children whose parents are not disabled; they are in a distinct position from children whose disabled parent made an application within 11 months of their birth; they are in a distinct position from children, whether disabled or not, who have claims protected by provincial statutory limitation laws<sup>12</sup>; and they are in a distinct position from adults who are able to apply for CPP benefits on their own behalf.

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(2001) at 3 online (pdf): Ontario Human Rights Commission  
[http://www.ohrc.on.ca/sites/default/files/attachments/An intersectional approach to discrimination%3Addressing multiple grounds in human rights claims.pdf](http://www.ohrc.on.ca/sites/default/files/attachments/An%20intersectional%20approach%20to%20discrimination%3Addressing%20multiple%20grounds%20in%20human%20rights%20claims.pdf)

<sup>10</sup> Ontario Human Rights Commission – Policy and Education Branch, “An Intersectional Approach to Discrimination Addressing Multiple Grounds in Human Rights Claims” (2001) at 5 online (pdf): Ontario Human Rights Commission  
[http://www.ohrc.on.ca/sites/default/files/attachments/An intersectional approach to discrimination%3 Addressing multiple grounds in human rights claims.pdf](http://www.ohrc.on.ca/sites/default/files/attachments/An%20intersectional%20approach%20to%20discrimination%3Addressing%20multiple%20grounds%20in%20human%20rights%20claims.pdf)

<sup>11</sup> *Granovsky v Canada*, 2000 SCC 28, at para 58

<sup>12</sup> Section 6 of the Ontario Limitations Act, 2002 provides that any limitation period established by that Act does not run during any period that a person with the claim is a minor. I understand that all other provinces have a similar provision.

[24] I find that the Claimant has established a distinction under section 15(1) of Charter with respect to the enumerated ground of age and the analogous ground of her children being the children of a disabled parent.

### **Discriminatory impact**

[25] A distinction based on an enumerated or analogous ground is not by itself sufficient to establish a violation of section 15(1) of the Charter. A distinction must discriminate by perpetuating disadvantage or prejudice, or by stereotyping the claimant group. The claimant group here is minor children who have a disabled parent.<sup>13</sup>

[26] What is required is not formal comparison with a selected mirror comparator group, but an approach that looks at the full context, including the situation of the claimant group and whether the impact of the impugned law is to perpetuate disadvantage or negative stereotypes about that group. I must take a substantive contextual approach and not a formalistic "treat likes alike" approach. I must ask whether, having regard to all relevant contextual factors, including the nature and purpose of the impugned legislation in relation to the Claimant's children's situation, the impugned distinction discriminates by perpetuating the group's disadvantage or by stereotyping the group.<sup>14</sup>

### **A. W. evidence**

[27] I determined that A. W., a senior legislation officer for CPP policy and legislation, is qualified to provide expert evidence concerning the operation and underpinning of the CPP. His expert report is included in the Minister's record.<sup>15</sup>

[28] He testified that the CPP recognizes that dependent children of a disabled contributor are affected by a contributor's loss of income due to disability. The purpose of the DCCB is to provide financial assistance for dependent children under the age of 18 that would otherwise normally be provided by the disabled contributor. For children between the ages of 18 and 25, it is intended to defray some of the cost of full-time education. The DCCB is only one part of a

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<sup>13</sup> *Withler*, para 34

<sup>14</sup> *Withler*, paras 43 to 54

<sup>15</sup> GDR17 - 1451 to 1615



network of interconnected benefits, and each benefit has been put in place recognizing its relationship within the broader scheme of the Plan, and the need for the Plan to remain sustainable and affordable for all Canadians.

[29] As in all social insurance schemes there is cross-subsidization between contributors: through pooling risks across a wide range of contributors certain groups of contributors subsidize the benefits paid to other groups. Children's benefits are considerably subsidized by all contributors and the degree of subsidization is more pronounced than for other benefits.

[30] The pre-condition that an application be made for the DCCB is common for all CPP benefits except for the post-retirement benefit. This is because the Minister requires information from an applicant to approve the benefit, and it already has the needed information for the post-retirement benefit. Subsection 74(1) of the CPP provides that an application for DCCB may be made by the child or by any other person or agency to whom the benefit, if approved, would be paid. Although the benefit belongs to the child, payment is made to the person or agency having custody or control of a child under 18. Absent evidence to the contrary, the disabled contributor is presumed to be the person with custody and control. In this case, either the Claimant or her children could have applied for the DCCB, which is payable to the Claimant while her children are under 18.

### ***Minister's Position***

[31] Ms. Doucette submitted that there is no evidence to demonstrate that minors as a group have experienced historic disadvantages or that minors in the context of the CPP are disadvantaged; that the DCCB provision benefits minors and simply having a limitation on retroactivity based on date of application does not perpetuate any pre-existing disadvantage or stereotype with respect to minors; that the DCCB corresponds to the Claimant's actual circumstances since it provides for children who have lost the income support of a disabled parent and also provides for an application to be made on behalf of a child; and that the reason the Claimant's children did not receive more benefits was not based on stereotypes related to their age, but because the Claimant did not apply on their behalf at the first opportunity.

[32] She also submitted that the CPP and DCCB provisions are ameliorative since they are designed to provide benefits to contributors and their families upon their becoming disabled, their retirement, and the death of a contributing spouse or guardian. With respect to children of disabled contributors the DCCB provides a flat monthly rate (now \$245) to assist with the loss of income of a disabled parent or guardian. She also argues that the nature of the interest affected is only financial.

[33] She further submitted that the distinction should be considered in the context of the ameliorative purpose of the CPP; that in this case the Claimant continues to receive CPP disability and her children continue to receive DCCB; and that they have been treated the same as all other CPP recipients. All contributors who apply for CPP benefits have a statutory retroactive limitation period, and no burden has been imposed on the Claimant or her children that is not imposed on other CPP recipients. She emphasized that the CPP is a benefits conferring legislation and that the purpose of the impugned provision should be viewed in the broader context of the scheme as a whole, and that the government should be awarded considerable deference in the design of a complex benefits scheme.

***The Claimant's position***

[34] The Claimant submitted that her children are being denied the full retroactivity of a benefit that they would otherwise be eligible for if they had been able to apply for it on their own. She also submitted that the impugned provision is perpetuating their disadvantage; fails to account for their capabilities and circumstances; and communicates that they are less entitled than adults to exercise their right to a CPP benefit. She acknowledged that Parliament is entitled to develop a legislative scheme to administer CPP benefits and needs to draw lines; however, she submitted that it is not entitled to do so in a manner that perpetuates the disadvantage of children who don't have the ability to access the DCCB benefit without relying on their disabled parent.

[35] She further submitted that the purpose of the DCCB is to assist a vulnerable group with a clear pre-existing disadvantage due to their age and their dependency on a disabled parent. The retroactivity limitation exacerbates the income vulnerability of children of a disabled parent, which is contrary to the purpose of the DCCB.

### *My Findings*

[36] There are four contextual factors which relate to the identification of the perpetuation of disadvantage and stereotyping as indicia of discrimination:

- pre-existing disadvantage, if any of the claimant;
- degree of correspondence between the differential treatment and the circumstances of the claimant and other groups;
- whether the law or program has an ameliorative purpose;
- nature of the interest affected.<sup>16</sup>

[37] I have already determined that because of the intersectional disadvantage the Claimant's children are subject to due to their age and their being in the care of a disabled parent, they are in a disadvantaged position. From the perspective of a reasonable person, the 11-month limitation on retroactivity perpetuates the disadvantage because it denies each of her children a substantial portion of the DCCB to which they would otherwise be entitled.

[38] I have already determined that the claimant group is being treated differently than:

- children whose parents are not disabled, disabled children whose parent made an application within 11 months of their birth;
- children, whether disabled or not, who have claims protected by provincial statutory limitation laws;
- and adults who are able to apply for CPP benefits on their own behalf.

[39] This differential treatment does not correspond to their circumstances since from a realistic perspective they are incapable of making the application on their own behalf and they are dependent on an adult to do so on their behalf. It is inconceivable that infants, toddlers, or very young children could make the application on their own behalf. It is unrealistic to expect pre-teenagers or teenagers to think about or make such an application on their own behalf. The

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<sup>16</sup> *R v Kapp*, 2008 SCC 41, para 23 citing *Law*

provision in the CPP that allows the child to make the application is impractical with respect to children under 18.

[40] There is no question that the DCCB has an ameliorative purpose. It provides financial assistance for children of a disabled parent; however, the 11-month limitation on retroactivity detracts from its ameliorative purpose by denying the Claimant's children a substantial portion of the DCCB to which they would otherwise be entitled.

[41] I have already determined that the interest affected is not purely economic and that the Claimant's children are being denied recognition of their unique position as children of a disabled contributor. I have considered the circumstances of members of the claimant group, the negative impact of the impugned provision on them, and taken a contextual, non-formalistic approach, grounded in their actual situation and the potential of the impugned provision to aggravate their already precarious situation.<sup>17</sup> I have also considered how the application of the impugned provision has the effect of perpetuating arbitrary disadvantage on the children.

[42] Bearing in mind the full context, I find that subsection 74(2) of the CPP, in so far as it limits the maximum retroactivity date for payment of DCCB to 11 months, discriminates against the Claimant's children because they are part of a historically disadvantaged group whose socio-economic situation has been exacerbated by the limitation on retroactivity.

**Is the infringing provision saved by section 1 of the Charter?**

[43] The effect of the impugned provision is to limit the retroactivity of DCCB benefits to 11-months prior to an application being made. The effect is also to perpetuate the discrimination and intersectional oppression these children are subject to because of their age and the stigma attached to being children of a disabled parent.

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

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<sup>17</sup> *Withler*, paragraph 37

[45] Under section 1, the government has the burden to demonstrate that a discriminatory provision is a reasonable limit on a section 15(1) Charter right. If it meets this burden, the law will be saved as being a demonstrably justified reasonable limit on that right.<sup>18</sup>

[46] The frame work for a section 1 analysis is the *Oakes*<sup>19</sup> test which may be formulated as two main tests with subtests under the second branch. It is easier, however, to think of this in terms of four independent tests. If the impugned provision fails under any one of the tests, it cannot be justified. The four tests ask the following questions:

1. Is the objective of the legislation pressing and substantial?
2. Is there a rational connection between the government's legislation and its objective?
3. Does the government's legislation minimally impair the Charter right or freedom at stake?
4. Is the deleterious effect of the Charter breach outweighed by the salutary effect of the legislation?<sup>20</sup>

### **The Minister's position**

[47] Ms. Doucette submitted that the entire Act should be taken into consideration when determining whether legislation meets the four requirements. She expressed her position in three points. First the CPP as a whole serves the pressing and substantial objective of creating a compulsory social insurance plan providing contributors and their families with reasonable income replacement on retirement, disability, or death of a wage earner. Second the DCCB serves the pressing and substantial objective of addressing the needs of dependent children by providing them with financial assistance that normally would be provided by the disabled contributor. Third the limit on retroactivity serves the pressing and substantial objective of insuring the long-term sustainability and viability of the CPP.

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<sup>18</sup> *Canada (Attorney General) v. Hislop*, 2007 SCC 10, para 43

<sup>19</sup> *R. v Oakes*, [1986] 1 S.C.R 103, paras 68 to 71

<sup>20</sup> *Hislop*, para 44

## **The Claimant's position**

[48] The Claimant acknowledged that the government is entitled to develop a legislative scheme to administer CPP benefits and that it needs to draw lines: however, she submitted that it should not be permitted to do so in a way that perpetuates the disadvantage of minor children who don't have the ability to access their benefit without depending on an adult. She referred to other situations such as the Canada Revenue Agency permitting retroactive reassessments for the Child Disability Benefit for up to 10 years, and the *Ontario Limitations Act* which provides that any limitation period established by that Act does not run during any period that a person with the claim is a minor.

### **A. W.'s evidence**

[49] A. W. testified that the CPP is a compulsory social insurance plan which is financed solely through contributions from employers and employees as well as revenue from CPP investments. All approved CPP benefits are subject to the same 11-month limitation on retroactivity. This 11-month retroactive period allows a "grace period" for applicants to learn about the benefit and gather information. There could be no certainty with respect to CPP liabilities if there were no limit on retroactivity. The limitation provides predictability and enables the managers of the CPP to assess their liabilities on a year to year basis. There must be predictability of benefits payable at any point in order to guarantee the sustainability of the Plan and to ensure that sufficient funding is available. The only two exceptions to the 11-month limitation are incapacity<sup>21</sup> and erroneous advice and administrative error.<sup>22</sup>

[50] In addition, the CPP does not exist in isolation from other programs. The limitation avoids unintended interactions with other federal, provincial, or municipal income-tested programs. For example, if the 11-months limitation were not in place individuals could delay receipt of CPP benefits in order to receive other types of income tested benefits (such as the

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<sup>21</sup> Subsections 60(8) and (9) of the CPP. These provisions allow the Minister to deem an application to be made at an earlier time if the evidence indicates that the person was incapable of forming or expressing an intention to apply for the benefit.

<sup>22</sup> Subsection 66(4) of the CPP. This provides further retroactive benefits if the Minister is satisfied that, as a result of erroneous advice or administrative error, an individual was denied a benefit, or a portion thereof.

Guaranteed Income Supplement) for years that they would not otherwise have been entitled to if they were receiving CPP benefits.

[51] A. W. was not aware of any statistical analysis of the effect of allowing full retroactivity on the sustainability of the CPP and, more significantly for this case, of the effect of allowing full retroactivity for the DCCB.

[52] The only parliamentary discussion that he was aware of on retroactivity is the excerpt from the 1965 House of Commons debate at Tab 20 of his report.<sup>23</sup> This excerpt relates primarily to a discussion about retirement pensions and the concern about older people applying for the retirement pension who may not have known their exact age. There was, however, comment by Minister LaMarsh about not wanting Canadians to “lose any part of these pensions simply because they had not heard of them.”

[53] A. W. was not aware whether Parliament addressed its mind to the appropriateness of a limitation on retroactivity for the children’s benefit. He was not aware of any parliamentary discussion about this limitation and he was not aware of any elaboration of the rationale for this limitation in any of the clause by clause description of the CPP provisions. The Minister did not provide any evidence of the total costs to the CPP of the DCCB benefits or of the estimated costs of removing the limit on retroactivity for this benefit.

### **My Findings**

[54] There may be cases in which the pressing and substantial objective of legislation and the impugned provisions are obvious and may be deduced from the legislation itself. However, in the majority of cases, in order to satisfy the pressing and substantial objective test, the government must adduce some evidence to support its argument.<sup>24</sup>

[55] I recognize that there is considerable force to the Minister’s argument that a general limit on retroactivity is a pressing and substantial objective for the CPP and that this may be obvious from the overall scheme of the legislation. However, in this case we are dealing with the unique situation of benefits for disadvantaged minor children who are dependent on an adult to apply on

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<sup>23</sup> GDR17-1596 to 1597

<sup>24</sup> *Withler*, para 49

their behalf. There is no evidence that the government addressed its mind to this issue, no statistical analysis of the effect of allowing full retroactivity for DCCB benefits, and no evidence of the cost of the DCCB and of the estimated costs of allowing full retroactivity for that benefit.

[56] A. W. speculated that there might be undesirable consequences to unlimited retroactivity of the DCCB when considered in the broader context of other social benefits schemes. He surmised that some claimants might delay applying for CPP benefits in order to continue to receive means-tested provincial and/or federal benefits. There is, however, no evidence that this is a significant concern and, if so, that it could not be addressed by obtaining information concerning any other benefits that may have been received and implementing appropriate provisions.

[57] In Ontario, the Claimant's home province, it is common for the Ontario Disability Support Program, the Workplace Safety Insurance Board, and Long Term Disability insurers to require recipients to make CPP claims and to claw-back CPP benefits that are approved. The federal Old Age Security and Guaranteed Income Support plans only apply to seniors over the age of 65, and it is difficult to envision that the DCCB for minor children would be a significant factor. There is no evidence that these potential undesirable consequences are applicable to the circumstances of this case.

[58] The Minister has the burden of proof and I find that it has failed to establish, on the balance of probabilities, a pressing and substantial objective to justify the 11-month limitation on retroactivity for DCCB benefits.

[59] Since the Minister has failed to establish a pressing and substantial objective to justify the limitation, it cannot meet the other three tests set out in paragraph 46, above.

## **CONCLUSION**

[60] Subsection 74(2) of the CPP, in so far as it limits retroactive payment of DCCB to 11 months from the application date, infringes the equality rights of the Claimant's children under section 15 of the Charter, and the Minister has failed to meet its burden to establish that this is a demonstrably justified limit in a free and democratic society.



[61] The impugned provision is of no force and effect in so far as it relates to the Claimant's children. Each of her children is entitled to DCCB with an effective payment date commencing one month after their birth: for K. September 1997; for A. July 1999; and for W. November 2002.

[62] The appeal is allowed.

Raymond Raphael  
Member, General Division - Income Security