Social Security Tribunal of Canada | Tribunal de la sécurité sociale du Canada

Citation: *Minister of Employment and Social Development v SH and Justice For Children and Youth*, 2021 SST 117

Tribunal File Number: AD-19-45

BETWEEN:

Minister of Employment and Social Development

Applicant

and

S. H.

Respondent

and

Justice For Children and Youth

Intervener

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Decision by: Paul Aterman

Date of Decision: February 22, 2021

Decision and Reasons

Decision

[1] The Claimant, S. H., receives a disability pension under the *Canada Pension Plan* (CPP).[1] She has three children. Each of the children now receives the Disabled Contributor's Child's Benefit (DCCB). [2]

[2] The children could have received the DCCB right after they were born, but the Claimant only applied for this benefit several years after their birth. She asked to have the benefit paid retroactively, so that they would receive the benefit from when they were born.

[3] The Minister of Employment and Social Development paid retroactive benefits, but only back to 11 months from before the Claimant applied. As a result, the Claimant's children lost out on several years' worth of DCCB benefits that they were otherwise entitled to receive.

[4] The Claimant challenged this decision at the Social Security Tribunal. The Tribunal's General Division decided that the three children were entitled to the DCCB going back to the month after each child's birthdate. It ordered retroactive payment for several years, because it would be contrary to the *Canadian Charter of Rights and Freedoms* (the Charter)[3] to withhold any of the benefit from the children.

[5] The Minister now appeals the General Division decision.

[6] The General Division made the wrong decision. The Claimant's children lost several years' worth of benefits, but not because their Charter rights were breached. The evidence that was before the General Division did not show that an 11 month limit on retroactive payment of the DCCB discriminates against children of disabled parents. These reasons explain why.

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[1] The *Canada Pension Plan*, R.S.C., 1985, c. C-8 can be found at https://laws-lois.justice.gc.ca/eng/acts/C-8/page-1.html.
[2] This is at s 74 of the *Canada Pension Plan*.
[3] The Charter, which is part of the *Constitution Act, 1982*, can be found at https://laws-lois.justice.gc.ca/eng/Const/page-15.html.

Overview

[7] The Claimant has chronic fatigue syndrome. The Minister granted her a CPP disability benefit in February 1995.

[8] The Claimant's three children were born in 1997, 1999 and 2002.

[9] If a parent receives the CPP disability benefit, then each of their dependent children is eligible to receive the DCCB. The benefit assists children of a disabled parent. It makes up for some of the money that the parent could have earned by working, if they were not disabled in the first place.

[10] A child can apply for the DCCB on their own. But in most cases that is not possible or practical, because children are too young to handle their own affairs. So a parent or other person can apply for the DCCB on behalf of the child.

[11] If the application is not made when a child is born, it can still be made later. The Minister will then pay benefits retroactively, but there is a limit to how far back the Minister will make those payments. Under the CPP, it can be no more than 11 months' worth of benefits.[4] I refer to that legal rule as "the retroactivity cap" in these reasons.

[12] In this case, the Claimant applied for the DCCB for all of her children. But she did it in January 2013. That is 15 years and 4 months after her first child was born. The Minister approved the DCCB applications, but only paid them retroactively for 11 months, back to February 2012.

[13] The Claimant appealed this decision to the General Division. She did not have a lawyer.

[14] On her own, she made the argument that she was not aware of the DCCB, until a friend told her about it in 2013. She said that her lack of awareness was because of her disability. It prevented her from looking into what benefits were available for her children, and from making the application sooner. She said that the retroactivity cap discriminates. It violates the rights of her children under section 15 of the Charter, because it deprives them of the equal benefit of the

[4] The 11 month limitation is at s 74(2) of the CPP.

law. They could not apply for the DCCB on their own. And it is unfair that they should lose out on the benefit, just because she was also unable to apply for it.

[15] The General Division agreed with her. It decided that the Charter equality rights of the children were breached.

[16] A law that breaches a person's Charter rights can still be upheld as valid. But to do this, section 1 of the Charter requires the government to show that the law infringing a person's rights imposes a reasonable limit that can be "demonstrably justified in a free and democratic society".

[17] The General Division decided that the Minister did not show that the breach was justified under section 1.

[18] It ruled that the DCCB benefit should be paid retroactively, starting one month after the birth of each of the three children. The General Division directed the Minister to pay 173 months' worth of benefit to the oldest child, 151 to the middle child and 111 to the youngest of the Claimant's children.

What needs to be decided in this appeal?

[19] The Minister argues that the General Division made numerous errors when it found that the equality rights of the Claimant's children were breached.

[20] First, it says that the General Division made an error in how it applied the law relating to discrimination under section 15 of the Charter. Specifically, the Minister claims that the General Division was wrong:

- when it decided that the retroactivity cap created a distinction based on age and being the child of a disabled parent;
- when it decided that the retroactivity cap disadvantages children of disabled parents; and
- when it decided that the cap perpetuates the historical disadvantage of children of disabled parents.

[21] Second, it says that the General Division made an error of law when it decided that the government had not shown that the retroactivity cap was a reasonable limit on the equality rights of the children under section 1 of the Charter.

[22] Third, it claims that the General Division made wrong findings of fact. Specifically, it ignored the fact that the children's father could have applied for the DCCB on their behalf. It also made a wrong finding about the way laws that limit the time to bring a lawsuit work in some provinces.

[23] Finally, it says that the General Division acted unfairly, because it relied on evidence that it found on its own. The General Division did not share the evidence with the parties, and considered it without letting the parties make comments on it. The evidence is a discussion paper produced by the Ontario Human Rights Commission titled "An Intersectional Approach to Discrimination: Addressing Multiple Grounds in Human Rights Claims".[5]

[24] The Claimant defends the decision of the General Division. She says that this is a case of indirect discrimination. Even though the provision of the CPP which sets the retroactivity cap says nothing about the age of a claimant or about being the child of a disabled parent, it discriminates against children of disabled parents in the way it works in practice.

[25] In an earlier decision, I granted permission to an organisation called Justice for Children and Youth (JFCY) to intervene in this appeal. It does not take a position on the outcome of this appeal, but it agrees with the Claimant that the General Division's analysis of the Charter issues should be upheld.

[26] I have decided that the General Division made errors of law relating to section 15 of the Charter. As a result, I do not need to consider the Minister's argument about section 1 of the Charter.

[27] I do not find that the General Division made an error of fact when it failed to consider whether the children's father could have applied for the DCCB on behalf of the children.

[5] This is found on the Ontario Human Rights Commission website at: http://www.ohrc.on.ca/en/intersectional-approach-discrimination-addressing-multiple-grounds-human-rights-claims.

[28] In my view, the other arguments made by the Minister would not have an impact on the outcome of this appeal, so I deal with them briefly at the end of this decision.

[29] To reach these conclusions, I have divided these reasons into five sections:

1. The first explains the role of the Appeal Division when it hears an appeal from a General Division decision;
2. The next section sets out the legal test for discrimination under section 15 of the Charter. This includes a discussion of the approach the law requires when the Charter challenge is about social benefits legislation;
3. The third section applies the test to the General Division's analysis of discrimination. This section includes a discussion of the purpose of the DCCB. It concludes by explaining why there was no evidence of discrimination before the General Division;
4. The fourth section deals with whether the General Division made an error by not deciding that the children's father could have applied for the DCCB; and
5. The final section deals with the Minister's other arguments, summarises my decision and sets out the next steps in this appeal.

1. The role of the Appeal Division

[30] When a party wishes to challenge a decision of the General Division, they have to identify at least one ground of appeal. There are three possible grounds of appeal. They are set out in subsection 58(1) of the *Department of Employment and Social Development Act* (DESDA).[6] The Appeal Division can intervene if the General Division:

- acted unfairly by not respecting a principle of natural justice, by making a decision it had no power to make, or by failing to make a decision it should have made;
- made an error of law; or
- based its decision on a wrong finding of fact.[7]

[6] S.C. 2005, c.34, https://laws-lois.justice.gc.ca/eng/acts/h-5.7/FullText.html

[7] I am paraphrasing the legalistic language of subsection 58(1). The actual wording is: "The only grounds of appeal are that (a) the General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction; (b) the General Division erred in law in making its decision, whether or not the error

[31] In practice, this means that the Appeal Division will hold the General Division to a strict standard when it comes to how it has applied the law and the principles of natural justice. The General Division makes an error if it applies the wrong legal test[8] or fails to respect a principle of natural justice.

[32] But the Appeal Division will not interfere with a finding of fact by the General Division, unless the decision was based on a significant factual error. The error has to be more than just unreasonable.[9] It has to be extreme or clearly at odds with the evidence on the file. This can include ignoring or not dealing with evidence that is important to deciding the case.[10]

[33] If there was no error by the General Division, the appeal must be dismissed. But if there was an error relating to any of the three grounds of appeal, the Appeal Division has options in deciding how best to deal with the appeal:

- it can give the decision which the General Division should have made; or
- return the appeal to the General Division for reconsideration; or
- confirm, rescind or vary all or part of the General Division's decision.[11]

2. The test for discrimination under section 15 of the Charter

There is a legal test that applies to all section 15 Charter cases

[34] The purpose of subsection 15(1) of the Charter is to promote equality and to prevent discrimination. It states:

> Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without

appears on the face of the record; or (c) the General Division based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it."

[8] See *Canada (Attorney General) v Landry*, 2008 FC 810, at para 17; and *Canada (Attorney General) v Lemoine*, 2003 FCA 330, at para 1.

[9] See *Rouleau v Canada (Attorney General)*, 2017 FC 534, at paras 41 and 57; see also *Marlow v Canada (Attorney General)*, 2009 FCA 102, at para 11.

[10] This is explained in *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 8667 (FC), at para 17.

[11] This is found at subsection 59(1) of the DESDA.

> discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

[35] A law can discriminate explicitly. This is called direct discrimination.

[36] A law can also discriminate in its effect on people. In such cases, the law looks like it is neutral, yet it ends up treating a group unequally and unfairly in the way it works in practice. This is called indirect discrimination, or adverse effect discrimination.

[37] Whether the claim is that the discrimination is direct or indirect, the test for finding it is the same.[12] It is called the *Withler* test, and it requires two questions to be answered:

- Does the law create a distinction based on an enumerated or analogous ground?
- If it does, then does that distinction create a disadvantage by perpetuating prejudice or stereotyping?[13]

[38] An enumerated ground is one of the grounds of discrimination listed in section 15 of the Charter. As we can see above, age is an enumerated ground in section 15.

[39] An analogous ground is a ground that is not listed in section 15. But it is one that is implied because it is an important personal characteristic, and the overall purpose of section 15 is to eliminate discrimination based on such characteristics. An analogous ground is a "deeply personal characteristic that is either unchangeable, or changeable only at unacceptable personal costs" to the individual.[14]

[40] The General Division decided that the retroactivity cap discriminates on two grounds: the enumerated ground of age, and the analogous ground of being a child of a disabled parent.[15]

[41] Analogous grounds of discrimination under section 15 are created through decisions of courts and tribunals. In *Fraser*, the Supreme Court of Canada emphasizes the need for caution in

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[12] This point is made by the Supreme Court of Canada in *Fraser v Canada (Attorney General)*, 2020 SCC 28 (CanLII), <http://canlii.ca/t/jb370, at paragraph 48.
[13] This is explained by the Supreme Court of Canada in *Withler v Canada (Attorney General)*, 2011 SCC 12 (CanLII), at paragraph 30, <http://canlii.ca/t/2g0mf>.
[14] This is set out at page 528 of the Supreme Court of Canada's decision in *Egan v Canada*, 1995 CanLII 98 (SCC), <http://canlii.ca/t/1frkt>.
[15] This is set out at paragraph 19 of the General Division decision.

creating new analogous grounds of discrimination. An adjudicator would benefit from evidence and arguments before deciding to create a new ground of discrimination.[16]

[42] The General Division did not have evidence or arguments before it on the question of whether being a child of a disabled parent is an analogous ground under section 15. It simply assumed that this was so.

[43] When it made this assumption, the General Division may have made an error of law. However, I do not think it is necessary to decide this point, because the General Division made other errors of law in its section 15 analysis, as I explain below.

There is a specific approach to analyzing the law when the section 15 challenge is about social benefits legislation

[44] A claim of discrimination can be made about a law, an action of government or a failure of government to act. The two *Withler* questions have to be answered to find out if a discrimination claim is valid. However, in addition to answering those questions, the law requires a particular approach in cases where the claim is that a law that grants social benefits discriminates.

[45] The reason for this is that when government creates a social benefits program, it has to make complex choices about the purpose of the program and who should benefit from it.

[46] Often there are competing pressures on government in making such decisions. How broad should the scope of the program be? What conditions should be set to decide eligibility for a benefit? How much will it cost? Might there be unintended negative consequences for the economy? Or for the welfare of citizens?

[47] These are only some of the considerations that a government has to take into account when designing and administering a social benefits program.

[16] See *Fraser v Canada (Attorney General)*, 2020 SCC 28 (CanLII), <http://canlii.ca/t/jb370, at paragraphs 114-123.

[48] In a democracy, these are the kinds of decisions which elected officials have to make, because they are accountable to the people for such choices.

[49] Members of administrative tribunals have no expertise in designing social benefits programs. They are also not in a legitimate position to make design choices about social policy. This is because they are appointed, not elected. The role of a tribunal is to see whether the law contravenes the Charter. If it does, then it must say so. But its role is not to dream up ways of changing the design of the program, based on its own ideas about how the program might work in the best or fairest way.

[50] The Federal Court of Appeal explains the need for this cautious approach to deciding whether social benefits legislation is discriminatory:

> Social benefits legislation, like the *Plan*, is aimed at ameliorating the conditions of particular groups. However, social reality is complex: groups intersect and within groups, individuals have different needs and circumstances, some pressing, some not so pressing depending on situations of nearly infinite variety. Accordingly, courts should not demand "that legislation must always correspond perfectly with social reality in order to comply with s. 15(1) of the Charter": *Law, supra* at paragraph 105.
>
> This context means that distinctions arising under social benefits legislation will not lightly be found to be discriminatory. The Supreme Court has confirmed this over and over again.[17]

[51] And later in the same decision, the Court of Appeal says:

> …at a general level, social benefits programs often are expressed in a complex web of interwoven provisions. Altering one filament of the web can disrupt related filaments in unexpected ways, with considerable damage to legitimate governmental interests.[18]

[52] The General Division did not approach the analysis of the issues before it with this need for caution in mind. Its description of Parliament's purpose in creating the DCCB is not accurate. This contributed to the legal errors it made in dealing with the second part of the *Withler* test. I will return to that later. Before that, I deal with how the General Division approached the first part of the *Withler* test.

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[17] This is set out at paragraphs 56-58 of the decision in *Miceli-Riggins v Canada (Attorney General)*, 2013 FCA 158 (CanLII).
[18] This is at paragraphs 64-66 of *Miceli-Riggins v Canada (Attorney General)*.

3. The General Division made errors of law relating to section 15 of the Charter

[53] The General Division correctly stated the two-part test for discrimination that the Supreme Court of Canada set out in *Withler*. In this case, the first part of the test asks the following question:

> **Does the retroactivity cap create a distinction based on age and being a child of a disabled parent?**

- **There needs to be evidence that the same law treats groups differently**

[54] Under the first part of the *Withler* test, the claimant group has to show that the law they are challenging has a disproportionate impact on them, when compared to how it treats others. When someone claims that a law treats them differently, they have to demonstrate this through reliable evidence. The reason for this requirement is to show that the outcome they are complaining of is not the result of a chance event, or of a cause that has nothing to do with the way the law works.[19]

[55] In its decision in *Fraser*, the Supreme Court of Canada explains what kind of evidence may show that the law has a disproportionate impact:

> Courts will benefit from evidence about the physical, social, cultural or other barriers which provide the "full context of the claimant group's situation" (*Withler*, at para. 43; see also para. 64). This evidence may come from the claimant, from expert witnesses, or through judicial notice (see *R. v. Spence*, 2005 SCC 71 (CanLII), [2005] 3 S.C.R. 458). The goal of such evidence is to show that membership in the claimant group is associated with certain characteristics that have disadvantaged members of the group… These links may reveal that seemingly neutral policies are "designed well for some and not for others" (*Meiorin*, at para. 41). When evaluating evidence about the group, courts should be mindful of the fact that issues which predominantly affect certain populations may be under-documented. These claimants may have to rely more heavily on their own

[19] This is explained at paragraphs 59-60 of the Supreme Court of Canada decision in *Fraser v Canada (Attorney General)*, 2020 SCC 28 (CanLII), <http://canlii.ca/t/jb370.

> evidence or evidence from other members of their group, rather than on government reports, academic studies or expert testimony.
>
> Courts will also benefit from evidence about the outcomes that the impugned law or policy (or a substantially similar one) has produced in practice. Evidence about the "results of a system" may provide concrete proof that members of protected groups are being disproportionately impacted…[20]

- **Different treatment can be shown by comparing how different groups are treated**

[56] The General Division identified children of disabled parents as the group that is discriminated against.[21] It relied on the enumerated ground of age, and the analogous ground of being in the care of a disabled parent to conclude that the retroactivity cap operates in a way that treats this group differently from other groups. This involves comparing children of disabled parents to other groups.

[57] At this point, it is important to note that making comparisons is not supposed to be a narrow, technical exercise in searching for an appropriate group to compare with the complainant group. In *Withler*, the Supreme Court of Canada explains that analyzing claims of discrimination necessarily involves making comparisons. Discrimination is always about how one group is treated relative to others.[22] But the analysis should not become bogged down in a technical search for a specific comparator group.[23]

[58] The General Division acknowledged this in its reasons at paragraph 26. However, just before that (in paragraph 23) the General Division chose to make specific comparisons with four groups:

> 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

[20] This is at paragraphs 57-58 of the Supreme Court of Canada decision in *Fraser v Canada (Attorney General)*, 2020 SCC 28 (CanLII), <http://canlii.ca/t/jb370>.
[21] This is at paragraph 19 of the General Division decision.
[22] See paragraphs 41- 43 in *Withler v Canada (Attorney General)*, 2011 SCC 12 (CanLII), <http://canlii.ca/t/2g0mf>.
[23] See paragraphs 61- 67 in *Withler*.

> laws, and they are in a distinct position from adults who are able to apply for CPP benefits on their own behalf.[24]

[59] These comparisons appear to be the basis on which the General Division concluded (at paragraphs 24 and 38) that the first part of the *Withler* test was met.

[60] The Claimant argues that these are valid points of comparison. However, I think the General Division's conclusion is wrong. There are three problems with the comparisons it made:

1. children whose parents are not disabled, and children whose civil claims are protected by limitation laws, are not affected by the CPP retroactivity cap in the first place;
2. children whose disabled parents made timely applications are in a distinct position from the Claimant's children, but this is because of the timing of the applications, not because of how the retroactivity cap works; and
3. there was no evidence before the General Division that the retroactivity cap works in a way that treats children of disabled parents differently from adult CPP recipients.

[61] In criticizing these comparisons, I am not suggesting that the law required the General Division to find a precise comparator group. As we have seen, *Withler* says that is not necessary. Rather, I am pointing out the flaws in the General Division's own logic when it chose to make these comparisons. Those flaws undermine its conclusion on the first part of the *Withler* test.

- **The General Division drew comparisons that are irrelevant**

[62] In relation to the first point, the General Division compares the Claimant's children to children whose parents are not disabled. But this is not a valid comparison. Children whose parents are not disabled are not entitled to the DCCB. This is because their parents are not disabled. Neither those parents, nor their children have any claim to CPP benefits. The retroactivity cap does not treat the two groups differently, because the comparator group has no claim to CPP benefits in the first place. If the group cannot even claim CPP benefits, then it cannot possibly be affected by how the retroactivity cap works.

[24] This is at paragraph 23 of the General Division decision.

[63] The same is true of another group that the General Division compares the Claimant's children to: "children, whether disabled or not, who have claims protected by provincial statutory limitation laws". The General Division refers to an Ontario law that says that if a minor has a claim, the limitation period on bringing a lawsuit does not operate for as long as that person is a minor.

[64] The parties disagree about whether all provincial laws in Canada actually work this way, but in my view that does not matter. Even if all provincial laws work in the way that the General Division said they do, the comparison of limitation periods in civil law to the limitation on retroactivity under the CPP is also not valid.

[65] It is invalid because the legislative purpose in setting how limitation periods work in civil law is very different from the legislative purpose in designing the CPP. Comparing the two tells us nothing about whether the CPP retroactivity cap has a disproportionate impact on children of disabled parents.

[66] A meaningful comparison is one that looks at how different groups are treated under laws that have the same, or a largely similar purpose. This principle is explained by the Supreme Court of Canada in a case called *Battlefords and District Co-operative Ltd. v Gibbs:*

> The first step is to determine, in all the circumstances of the case, the purpose of the disability plan. Comparing the benefits allocated to employees pursuant to different purposes is not helpful in determining discrimination – it is understandable that insurance benefits designed for disparate purposes will differ. If, however, benefits are allocated pursuant to the same purpose, yet benefits differ as a result of characteristics that are not relevant to this purpose, discrimination may well exist.[25]

[67] Here the General Division compared two groups that are dealt with differently under two completely different statutes that have completely different purposes. This is not a meaningful comparison.

[25] This is at paragraph 33 of the decision. The link to the case is 1996 CanLII 187 (SCC). The underlining in the passage above is mine.

- **The General Division compared the Claimant's children to other DCCB recipients**

[68] In relation to the second point, the General Division compared the Claimant's children to children whose disabled parent made a DCCB application within 11 months of the child's birth.

[69] But comparing the Claimant's children to other DCCB recipients whose parents made their applications on time does nothing to show that the retroactivity cap results in different treatment of the Claimant's children. This is because – by definition – DCCB recipients are all part of one and the same group. These are not two distinct groups with distinct characteristics. They are all children of disabled parents. They are all eligible for the DCCB. They are all subject to the same rules that govern the DCCB. The retroactivity cap operates in exactly the same way in relation to all of them.

[70] The only thing that differentiates them is that some children lose out on the full benefit, while others do not. But this is only because of the timing of the applications that are made by disabled parents. It has nothing to do with the law operating differently as between these two groups.

[71] The intervener, JFCY, makes the point that just because some children of disabled parents do not lose out on DCCB benefits, this does not mean that there is no discrimination in the way the law works. I agree that a law does not have to affect all members of a protected group identically in order to be found discriminatory. It can disadvantage some, but not others, within the same group, and still end up treating that group differently, compared to other groups who are subject to the same law.

[72] But this was not the point that the General Division was making when it compared DCCB recipients who get the full benefit with the Claimant's children. It was treating them as if they were different groups who were subject to the same law. In fact, they are members of the same group. There is no basis for a comparison here.

- **The General Division drew a conclusion that is not supported by evidence**

[73] The third point of comparison is how the law treats children of disabled parents, and how it treats adult recipients of CPP benefits.

[74] The retroactivity cap rule applies to both groups equally. But the large majority of adult CPP recipients apply for benefits on their own. By contrast, the large majority of DCCB recipients depend on someone else to make the application for them.

[75] Does this fact result in different treatment of the two groups? In other words, is there evidence that DCCB recipients miss out on benefits more than adult CPP recipients because they depend on someone else to make a timely application for them?

[76] The General Division discusses this issue in paragraphs 19-24. But it does not refer to any evidence that shows that children of disabled parents lose benefits more than any other group of CPP beneficiaries.

[77] Instead, it appears to conclude that because most DCCB beneficiaries depend on adults to apply for them, and because the Claimant applied late in this particular case, then the law must have a differential impact on DCCB beneficiaries generally. But this is an assumption about how the law operates. It assumes that the law has a differential impact on a whole group – children of disabled parents – because of what happened to the children of one disabled parent – the Claimant.

[78] As I explain below, this assumption is not supported by evidence.

[79] On this point, the General Division reasons are difficult to follow. This is because there are two ways to read the reasons. One is that the children are treated differently because of the combined effect of their age and the fact that their mother is disabled. The other is that the mother's disability does not matter, and that age alone is what caused the children to be treated differently.

[80] On the one hand, the Claimant has consistently said that chronic pain made it impossible for her to form the intention to apply for the DCCB in a timely way. She has a university

education, but she states that her disability turned every task into a challenge. She was unable to initiate new tasks, and lived in what she described as "survival mode".

[81] The General Division decision refers to medical reports from the Claimant's former and current family doctors. These reports support the Claimant's statements that she had difficulty in managing the activities of daily living in the past, and still does.

[82] On the other hand, the Minister argued that the Claimant was able to form the intent to apply for the DCCB from the time her children were born. The evidence shows that the government repeatedly sent the Claimant information about the DCCB.[26] She received information every year from 1995 until 1997. Then she received a newsletter for all CPP recipients in 2001, and then in every year from 2003 until she applied for the DCCB in 2013. The information encourages CPP recipients to seek out all the benefits they are entitled to under the CPP, including the DCCB. The Claimant does not dispute that she received this information. Her evidence is that she was unable to take the information in, and act on it. She received the government pamphlets, but never read them.

[83] In its written submissions, the Minister argued that the Claimant was quite capable of applying for the DCCB. The Minister said that many documents in the file show she was able to manage her affairs and those of her family throughout this period of time. The Minister's written submission states:

> … an analysis of the Appellant's activities from 1994 until 2013 reveals that she was not incapacitated within the meaning of the CPP. In stark contrast to mental incapacity, the analysis reveals that she was able to do many things, including:
>
> - care for her children;
> - attend medical appointments and participate in her medical treatment;
> - communicate with her Member of Parliament;
> - obtain and discharge mortgages;
> - operate a line of credit and credit cards;
> - manage an increasing debt load; and,
> - manage daily activities.[27]

[26] These pamphlets are attached to the affidavit of Isabel MacNeil, found at GDR17, from pages 1363-1449.
[27] This is found at GDR17-11.

[84] In that submission, the Minister refers to a specific meaning of "incapacity" under the law governing the CPP.

[85] I agree with the Claimant that the General Division did not have to decide whether the CPP definition of incapacity is relevant to this appeal. The Claimant's own description of her condition is that her disability stopped her from looking at the government information about the DCCB, and acting on it. So, the issue the General Division had to decide was not whether the CPP definition of incapacity was engaged. It was whether her own statements about the effects of her disability were reliable evidence, when compared with the actions that the Minister has listed in the paragraph above.

[86] In other words, the General Division had some evidence before it that supported the Claimant's position that her disability stopped her from applying for the DCCB. It also had evidence that contradicted her position.

[87] Yet the General Division did not weigh this evidence, and then decide whether the Claimant could have applied for the DCCB on time. Nowhere does the General Division squarely address this point and make a finding. It appears to have just ignored the evidence.

[88] At one point, the General Division refers to the Minister's argument. But then it says that this issue does not matter:

> 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 way illustrates the unique position of vulnerability that her children were in.[28]

[89] In this paragraph, the General Division sidesteps the Minister's argument that the Claimant was capable of applying for the DCCB on time. It says that the cause of the Claimant's failure to apply on time is irrelevant. All that matters is that the children did not get their full entitlement to benefits.

[90] The implication of this conclusion is that the discriminatory impact of the retroactivity cap is linked only to age. In other words, whether or not the Claimant was incapable of applying

[28] This is at paragraph 18 of the General Division decision.

on time because of her disability, the cap discriminates for the sole reason that children have to depend on adults to apply on their behalf.

[91] But then in the next paragraph, the General Division ties the failure of the children to get their full entitlement to both their age and the fact that their mother is disabled. It says:

> 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.[29]

[92] This conclusion is repeated at paragraph 24 of the General Division reasons.

[93] So, on the one hand the General Division says that the retroactivity cap treats the Claimant's children differently because of their age alone. On the other hand, it says it treats them differently because of their age and their status as children of a disabled parent, but it does not explain how the Claimant's disability had any impact on her failure to apply for the DCCB on time.

[94] On what basis did the General Division decide that the retroactivity cap treats children of disabled parents differently? Is it the combination of age and the status of having a disabled parent? Or is it age alone?

[95] If it is the first of those two possibilities, then the General Division made its conclusion by ignoring relevant evidence. The Claimant argues that the General Division accepted her assertion that her disability stopped her from applying for the DCCB on behalf of her children.[30] But the problem with this argument is that the General Division did not weigh the evidence in favour and against the Claimant's assertion that her disability prevented her from applying for the DCCB on time. It seems like the General Division just assumed this to be true, because there is no analysis of this issue in the reasons.

[96] If so, then this an error of law, because a decision-maker cannot come to a conclusion that ignores relevant evidence.[31]

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[29] This is at paragraph 19 of the General Division decision.
[30] This is at ADN38-15 (paragraph 62).
[31] This is explained by the Supreme Court of Canada in *Canada (Director of Investigation and Research) v Southam Inc.*, 1997 CanLII 385 at para 41.

[97] If it is the second of those two possibilities (that the distinction is based on age alone), then the General Division also made an error of law. Here the error does not come from ignoring the available evidence. Rather, the error is that the General Division came to its conclusion without any evidence before it.[32]

[98] There is no evidence that children who are eligible for the DCCB are more likely to be penalized by the retroactivity cap than any other group of CPP recipients. If such evidence exists, it may or may not support an inference that the CPP retroactivity cap treats children different from adults.

[99] I say this knowing how difficult it is for an unrepresented appellant to put together the evidence that is necessary to support a Charter challenge. The Claimant did a valiant job presenting her appeal to the General Division on her own. But this does not change the requirement under the law that she had the burden of proof at the General Division. She had to bring forward evidence to show that the retroactivity cap treats children of disabled parents differently from other groups.

[100] In *Fraser*, the Supreme Court of Canada states that:

> The goal of such evidence is to show that membership in the claimant group is associated with certain characteristics that have disadvantaged members of the group…When evaluating evidence about the group, courts should be mindful of the fact that issues which predominantly affect certain populations may be under-documented. These claimants may have to rely more heavily on their own evidence or evidence from other members of their group, rather than on government reports, academic studies or expert testimony.[33]

[101] Both the Claimant and JFCY point to this passage to assert that the General Division had sufficient evidence to conclude that children of disabled parents are treated differently by the retroactivity cap.

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[32] This is explained by the Supreme Court of Canada in *R. v J.M.H.*, 2011 SCC 45 (CanLII), [2011] 3 SCR 197, <https://canlii.ca/t/fnbb2> at paragraph 25. The Federal Court also sets out this principle in the context of an SST decision in *Murphy v Canada (Attorney General)*, 2016 FC 1208 (CanLII), <https://canlii.ca/t/gvl2d>at paragraph 36.

[33] This is found at paragraph 57 of *Fraser* <http://canlii.ca/t/jb370>.

[102] However, the Claimant did not bring forward evidence about the situation of the broader group of children of disabled parents. The only evidence before the General Division was about the single experience of the Claimant and her children. But the Claimant's own experience is not a sufficient basis to conclude that the retroactivity cap treats the group of children of disabled parents differently. Otherwise, how else are we to know that this was not an isolated incident confined to the circumstances of her case?

[103] As JFCY points out, our highest courts have recognised that children are inherently vulnerable.[34] However, it does not follow from the fact that children are generally vulnerable that this particular law works in a way that treats children of disabled parents differently from other groups who are subject to the retroactivity cap.

[104] Evidence is needed to prove that point, assumptions will not do.

[105] As I read the General Division reasons, the member appears to have simply assumed that because most children rely on an adult to make the DCCB application for them, the retroactivity cap must surely disqualify more children from CPP benefits than adults. This seems to me to be nothing more than a hunch.

[106] The Supreme Court of Canada cautions against relying on a "web of instinct" to conclude that a law has a differential impact on groups. In *Kahkewistahaw First Nation v Taypotat*, the Court says that intuition is not a sufficient basis to provide a foundation for a Charter violation:

> I think intuition may well lead us to the conclusion that the provision has some disparate impact, but before we put the Kahkewistahaw First Nation to the burden of justifying a breach of s. 15 in its *Kahkewistahaw Election Act*, there must be enough evidence to show a *prima facie* breach. While the evidentiary burden need not be onerous, the evidence must amount to more than a web of instinct.[35]

[34] The intervener makes this point in its written submissions at ADN42-7.
[35] This is found at paragraph 34 of the decision. The reference is 2015 SCC 30 (CanLII), <https://canlii.ca/t/gj637>.

[107] The General Division decided that the retroactivity cap operates in a way that treats children of disabled parents differently from other groups. But its conclusion on the first part of the *Withler* test is wrong, because its decision is based on assumptions, not evidence.

[108] I now look at how the General Division applied the second part of the *Withler* test.

Does the retroactivity cap create or perpetuate a disadvantage by stereotyping children of disabled parents?

[109] There is no doubt that the Claimant's children lost out on a significant amount of DCCB benefit. There is also no doubt that, practically speaking, they were not in a position to apply for it themselves. And then when they were granted the benefit, they only received a part of what they were otherwise eligible to get since birth.

[110] The General Division decided that it is inappropriate to characterise the lost benefit as merely a financial loss. The loss of these benefits had a negative effect on the development of the children, and therefore on their dignity. I see no error in the General Division's reasoning on that point.

[111] Many people might see the loss of these benefits as the law operating harshly. But not every harsh result in law is the product of a Charter violation.

[112] The issue for the General Division was not whether the result might be harsh, it was whether there was a breach of the Charter according to the *Withler* test. First, it had to decide whether the retroactivity cap was the cause of differential treatment of the children of disabled parents. Then it had to decide whether that differential treatment was discriminatory because it created or perpetuated their disadvantage.

[113] The General Division made two errors of law in applying the second part of the *Withler* test.

[114] First, a correct analysis on the first part of the test lays the foundation for the second part of the test. If there is no evidence of differential treatment, then there can be no conclusion that there is discrimination. I have explained above that the evidence before the General Division does not show that that the retroactivity cap treated children of disabled parents differently from

other groups. As a result, the error that the General Division made on the first part of the *Withler* test means that its reasoning on the second part of the test is also incorrect.

[115] Second, the General Division concluded that the retroactivity cap undermines the beneficial purpose of the DCCB by depriving children of a benefit Parliament meant to give them. As I explain below, I think this was also an error.

What is the purpose of the DCCB?

[116] The General Division states that the purpose of the DCCB is to better the condition of children of disabled parents. I agree, as far as that goes. But, the General Division's analysis of the purpose of the DCCB was insufficient. Because of this, I disagree with its conclusion that the retroactivity cap undermines that beneficial purpose.

[117] In order to analyse how the General Division applied the second part of the *Withler* test, the starting point is to identify the purpose of the DCCB. What did Parliament intend when it designed this benefit for the children of disabled parents?

[118] The Supreme Court of Canada explains why looking at the purpose of a benefits program is important:

> In cases involving a pension benefits program such as this case, the contextual inquiry at the second step of the s. 15(1) analysis will typically focus on the purpose of the provision that is alleged to discriminate, viewed in the broader context of the scheme as a whole. Whom did the legislature intend to benefit and why? In determining whether the distinction perpetuates prejudice or stereotypes a particular group, the court will take into account the fact that such programs are designed to benefit a number of different groups and necessarily draw lines on factors like age. It will ask whether the lines drawn are generally appropriate, having regard to the circumstances of the persons impacted and the objects of the scheme. Perfect correspondence between a benefit program and the actual needs and circumstances of the claimant group is not required. Allocation of resources and particular policy goals that the legislature may be seeking to achieve may also be considered.[36]

[36] This is set out at paragraph 67 of the Supreme Court of Canada's decision in *Withler v Canada (Attorney General),* 2011 SCC 12 (CanLII), <http://canlii.ca/t/2g0mf>.

[119] Deciding the purpose of the DCCB requires a legal analysis. It involves interpreting the meaning of the CPP. The analysis is assisted by looking not just at the text of the CPP, but also at the evidence that was before the General Division relating to the intent of the legislation.

[120] That evidence consists of a report provided by the Minister that sets out the legislative history of the CPP, including the amendments to it.[37] It also consists of the oral evidence given by Andrew Williamson, an employee of the Minister who specialises in legislative policy.

[121] The content of the report and Mr. Williamson's evidence about the design and purpose of the CPP and DCCB were not challenged during the hearing at the General Division.

[122] The CPP consists of a suite of different benefits. Its overall purpose is to provide a basic level of financial protection against loss of earnings that arises because a contributor retires, becomes disabled or dies.

[123] As the report and the General Division note, the DCCB is "…one part of a 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."[38]

- **The conditions and limitations on the DCCB help us to understand its purpose**

[124] At paragraphs 27-30 of its decision, the General Division describes how the DCCB fits into the overall scheme of the CPP. However, it does not offer an analysis of what Parliament intended when it designed the DCCB, other than to say (at paragraph 40) that it wanted to benefit the children of disabled parents.

[125] In deciding the purpose of the DCCB, it is not enough to just identify what the benefit is and who its intended recipients are. It is also necessary to look at the conditions or limitations on receiving the benefit. This is because those conditions can tell us how generous Parliament

[37] This is found at GDR17-1451.
[38] This is at paragraph 28 of the General Division decision.

wanted to be in granting the benefit. Or they can tell us where Parliament wanted to draw the line by limiting the costs to the government in administering the benefit.

[126] The DCCB is a benefit for the children of a disabled contributor. The benefit is payable to the child[39], and the tax system treats it as income that belongs to the child.[40]

[127] The benefit makes up for some of the income that a disabled contributor has lost, and that they would have spent on raising their children. It provides assistance for dependent children who are under 18. It is also available to children between the ages of 18-25, if they are in full-time education.

[128] The DCCB is a recognition by Parliament that children are adversely affected by the inability of a parent to work because of disability. But the DCCB is not intended to compensate for all losses to children that arise from the parent's inability to work. This is because the intent of the CPP as a whole has never been to function as a complete income replacement program.[41]

[129] Another indicator of the purpose of the DCCB is the fact that other contributors to the CPP subsidize this benefit. For example, the amount that a pensioner gets from the retirement benefit of the CPP depends on the level of contributions that individual made. In that sense, the retirement benefit operates like a savings plan.

[130] By contrast, the DCCB is a fixed monthly amount that is the same for all recipients.[42] It does not vary based on the level of past contributions made by each disabled parent. It is also not adjusted based on factors such as the actual need of individual recipients, or the impact on an individual disabled parent's ability to earn a living. What this tells us is that Parliament wanted all children of disabled parents to get the same basic level of support, regardless of their individual circumstances.

[39] This is found at s.44(1)(e) of the CPP.
[40] This is found at section 56(1)(a)(i)(B) of the *Income Tax Act*, R.S.C., 1985, c.1(5th Supp.).
[41] This is made clear GDR17-1456, where the purpose of the CPP is explained as being a partial income replacement program that Canadians can supplement through other sources of support.
[42] This is explained at GDR17-1463.

[131] The CPP allows for retroactive payment of the DCCB for up to 11 months before the time of the application. The same rule applies to all other monthly benefits under the Plan.[43]

[132] The retroactivity cap is another indicator of Parliament's purpose. The reason for having a retroactive period is to give applicants enough time to assemble their documents and make their application. But the reason that the retroactive period is capped at 11 months, is to ensure program integrity and fiscal sustainability.

[133] The report describes the program integrity issue as follows:

> The limit also avoids unintended interactions with other federal, provincial or municipal income-tested benefits. For example, if a one-year limit were not in place, individuals could delay receipt of CPP benefits to receive other types of income-tested benefits (such as the Guaranteed Income Supplement) for years that they would not otherwise be entitled to if they were receiving CPP benefits. This would have cost implications for many programs.[44]

[134] And the report describes the fiscal sustainability issue as follows:

> In addition, without imposing a limit on retroactivity, there would be no certainty with respect to the liabilities of the CPP. As mentioned, the CPP is financed solely through the contributions from employers, employees and self-employed persons as well as revenue from the CPP investments. There must be predictability of the benefits payable at any point in time in order to guarantee the sustainability of the Plan and to ensure that sufficient funding is available.
>
> The current limitations on retroactivity are consistent with similar programs in Canada, including other income support programs, such as the Alberta Seniors Benefit Program, British Columbia's Senior's Supplement, the Ontario Guaranteed Annual Income, and benefits under the QPP.[45]

[135] Parliament's decision to apply the retroactivity cap to all benefits under the CPP shows that it saw no reason to make an exception to this rule when it designed the DCCB. This is so, even though the beneficiaries of the DCCB are children who usually cannot make the application

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[43] This is found at GDR17-1470. The CPP actually specifies the 11 months retroactivity in different (and confusing) ways. DCCB and orphan's benefit: 12th month preceding the month after the month of application (s 74(2)); retirement pension: 11th month preceding month of application (s. 67(3.1)(c)); CPPD and PRDB: 4th month after deemed disability which cannot go back more than 15 months from the application (ss 42(2)(b) & 69); survivor's pension: 12th month preceding month after month of application (s. 72).
[44] This is at GDR17-1470.
[45] This is also at GDR17-1470.

on their own. Most rely on an adult to make the application in a timely way. If the application is made late, an affected child will lose out on some benefits because of the retroactivity cap. We have to assume that Parliament was aware of the dependence of children on adults when it designed the DCCB.

[136] In the General Division hearing, Mr. Williamson was asked if the government had ever considered the impact of removing the retroactivity cap for DCCB benefits. He did not know whether the government had ever considered this possibility. In my view, that exchange does not shed any further light on the legislative purpose of the DCCB. If anything, all it does is reinforce the interpretation that Parliament's purpose is not to treat the DCCB any differently from other CPP benefits when it comes to the question of retroactivity.

[137] Finally, like all CPP benefits (except the post-retirement benefit), the DCCB starts with an application. The government does not take it upon itself to seek out eligible recipients, and provide the benefit without being asked. You have to apply for it. Again, this is a choice that Parliament made, even though most DCCB beneficiaries depend on an adult to make the application for them. Parliament has designed a benefit which some children, who would otherwise be eligible, may never receive if their parents or guardians fail to apply on their behalf.

[138] To summarise, the purpose of the DCCB is to provide a basic level of income support to children of parents receiving a CPP disability pension. The amount is fixed and is the same for all recipients. It is not granted automatically. If an application is never made, an otherwise eligible child will not receive the benefit. And the child may receive less than their full entitlement if it is made late. These limiting conditions reflect a choice by Parliament to balance the granting of the benefit with cost considerations, and considerations related to the appropriate operation of other, related benefit programs.

[139] I have set out this description of the purpose of the DCCB in order to properly frame the question that was at the heart of the appeal before the General Division: Is the design of the DCCB discriminatory because children have to depend on adults, who are often disabled, to make the applications for them?

[140] This takes us back to the need for caution in examining the design of social benefits programs that I refer to earlier.

- **If there is no evidence of discrimination, then a limitation on the availability of a benefit is a legitimate choice by Parliament**

[141] When it created the DCCB, Parliament decided to provide a benefit that offers partial, rather than complete, compensation to children for the loss of family income because a parent is disabled. It was also a decision to offer the benefit to every eligible child.

[142] But it was not a decision to guarantee that every eligible child would receive it. This is because each child has to apply for it, either on their own or through a parent or guardian. And it was a decision to balance the cost of the benefit against program integrity and fiscal considerations. This is why the Minister allows for retroactive payment, but puts a cap on how much retroactive payment can be made.

[143] The retroactivity cap does not undermine the purpose of the DCCB. Instead, it is an integral feature of it. It reflects the choice of Parliament to provide a benefit to children of disabled parents, but to limit the extent of the government's fiscal liability by placing conditions on the benefit. One of those conditions is to cap retroactive payments.

[144] There may be cases where a recipient is deprived of a benefit because of the way the law governing the benefits program operates. That is the case here. But that does not mean that the law has undercut Parliament's purpose in designing the program. The Supreme Court of Canada makes this point as follows:

> Perfect correspondence between a benefit program and the actual needs and circumstances of the claimant group is not required to find that a challenged provision does not violate the *Canadian Charter*. The situation of those who, for whatever reason, may have been incapable of participating in the programs attracts sympathy. Yet the inability of a given social program to meet the needs of each and every individual does not permit us to conclude that the program failed to correspond to the actual needs and circumstances of the affected group. As Iacobucci J. noted in *Law*, *supra*, at para. 105, we should not demand "that legislation must always correspond perfectly with social reality in order to comply with s. 15(1) of the *Charter*". Crafting a social assistance plan to meet the needs of young adults is a complex problem, for which there is no perfect solution. No matter what measures the government adopts, there will always be some

> individuals for whom a different set of measures might have been preferable. The fact that some people may fall through a program's cracks does not show that the law fails to consider the overall needs and circumstances of the group of individuals affected, or that distinctions contained in the law amount to discrimination in the substantive sense intended by s. 15(1).[46]

[145] The General Division's analysis fails to recognize that the group that the retroactivity cap allegedly discriminates against – children of disabled parents – coincides precisely with the group that the DCCB was designed to help in the first place. Not all of the potential DCCB beneficiaries receive their full entitlement. Some may lose out because their application was made late, and the retroactivity cap limits their entitlement. But the General Division's decision does not show that this happens because the law is discriminatory. For this reason, its conclusion that the retroactivity cap undermines the purpose of the DCCB is wrong.

[146] To summarise, the General Division made errors of law in relation to section 15 of the Charter. On the first part of the *Withler* test, it found that the retroactivity cap treats children of disabled parents differently from other groups, but it did not have evidence to support this conclusion. This error undermined its analysis of the second part of the *Withler* test. It also found that the retroactivity cap operates in a way that undermines the beneficial purpose of the DCCB. But it could only come to that conclusion properly if it had evidence that the retroactivity cap operates in a way that is discriminatory. It did not have that evidence before it, and this undermined its conclusion that the retroactivity cap undercuts the purpose of the DCCB.

[147] Because the General Division made errors of law regarding section 15 of the Charter, it is not necessary for me to look at its analysis of section 1 of the Charter. I would only have had to do this if its application of section 15 had been correct.

[148] I turn now to the Minister's claim that the General Division made errors of fact.

[46] This is set out at paragraph 55 of the decision in *Gosselin v Québec (Attorney General)*, 2002 SCC 84 (CanLII), <https://canlii.ca/t/1g2w1>.

4. The General Division did not look at whether the father could have applied for the DCCB, but this was not an error

[149] The Minister argues that the General Division made a wrong finding of fact. The General Division concluded that the children were dependent on the Claimant to apply for the DCCB on their behalf.[47] The Minister says the General Division ignored the evidence that the children's father was also responsible for the children.[48] The Minister says that if the Claimant could not apply for the DCCB because of her disability, then the father could have done so instead.

[150] The Claimant says that the role of the children's father is irrelevant. The CPP creates a legal presumption that she is the person who has custody and control of the children.[49] To displace this legal presumption, there has to be evidence that she does not have custody and control of the children. She says that there was no such evidence before the General Division. So the General Division made no error on this point.

[151] The reasons of the General Division do not address these conflicting arguments, but that does not mean it came to the wrong conclusion.

[152] In section 74, the CPP allows for any person to apply for the DCCB, but only if that person is someone "…to whom the benefit would, if the application were approved, be payable…"

[153] In section 75, the CPP requires the DCCB to be paid "…to the person or agency having custody and control of the child…" And then it specifies that the disabled contributor is presumed to be the person who has custody and control of the child, unless the evidence shows otherwise.

[154] The evidence before the General Division is that both parents have custody and control of the children. The family lives together. The Claimant is the parent who deals with financial and

[47] This is set out at paragraph 19 of the General Division. The paragraph only considers the Claimant as a possible person to make the DCCB application for the children. The father is not considered as a potential applicant.
[48] This point is argued at paragraphs 65-68 of ADN1-45, which is the Minister's argument for leave to appeal.
[49] The CPP states that the disabled contributor is presumed to be the person with care and control of the children. This is set out at section 75.

administrative matters in the family. The father helps with physical care, such as cooking, but does not deal with mail and paperwork.

[155] But the fact that both parents are responsible for the children does not displace the presumption that the CPP sets up. That is that the Claimant is the custodial parent for the purposes of the DCCB. The General Division did not look at whether the father could have applied for the DCCB because it was applying the law to the facts. It presumed that the Claimant is the custodial parent based on evidence that she manages the children's affairs.

[156] In order to conclude that the father should have applied for the DCCB, there would have to be evidence that the Claimant did not have custody and control of the children. There is no such evidence, so the General Division did not make an error of fact. I reject the Minister's argument on this point.

5. Summary of my findings, and next steps

- The Minister's remaining arguments

[157] The Minister has two remaining arguments, which I will deal with briefly.

[158] One is that the General Division made an error of fact when it concluded that all provincial laws governing limitation periods in civil law operate in the same way when it comes to protecting the rights of children to sue. It raised this issue in relation to the first part of the *Withler* test.

[159] The Minister should have framed this as an error of law. Misquoting or misreading Canadian statutes is an error of law, not an error of fact.

[160] As I indicate above, whether the General Division was right or wrong on this point does not matter, because the comparison between children's rights under civil law, and their rights under the DCCB is not a valid comparison in the first place. For this reason, there is no need to decide this issue.

[161] The other argument is that the General Division acted unfairly because it looked at some evidence without letting the parties see it and make comments on it. The document in question is a discussion paper that the Ontario Human Rights Commission produced.

[162] In many cases, a person complaining of discrimination will do so on the basis of more than one personal characteristic. Often the person may be discriminated against because of a combination of characteristics – for example, their race and disability. This can have the effect of compounding the discrimination, or of making the person's experience different than if they were discriminated against on one ground alone.

[163] The paper argues that the recognition of the intersection of grounds of discrimination is essential if human rights statutes and the Charter are to be effective instruments in protecting and promoting equality. It also documents how the law has evolved towards greater use of an intersectional analysis in determining whether a claim of discrimination has been demonstrated. This includes decisions of the Supreme Court of Canada.[50]

[164] It is never a good idea for a tribunal to consider evidence, but not to tell the parties about it or give them a chance to comment on it. This offends basic principles of fairness. The General Division clearly should not have acted the way it did. But in this case, no real harm was done.

[165] Even though the paper may be seen as evidence, the General Division's reliance on it did not cause harm to the Minister's case. This is because the paper is nothing more than legal commentary. It contains nothing relevant to the facts of this case, or the way in which the CPP or DCCB work. All that the paper does is discuss an analytical framework for applying the law relating to discrimination. That analytical framework is now generally recognised and applied in Canadian law.

[166] So, instead of relying on the discussion paper, the General Division could just as easily have quoted any one of the many Supreme Court of Canada decisions which deal with intersectional analysis. This would have allowed the General Division to rely on an intersectional analysis in a way that was transparent, and that did not raise fairness concerns. The Minister

[50] The Supreme Court of Canada has applied an intersectional analysis to discrimination claims in *Law v Canada (Minister of Employment and Immigration)*, 1999 CanLII 675 (SCC), <https://canlii.ca/t/1fqh9>. *Withler* is another example, and most recently it has done so in *Fraser*.

would then have had no reason to complain on this point. As a result, there was no real harm done to the Minister's case, and I would not overturn the General Division's decision on this ground alone.

[167] To summarise my findings, the General Division made errors of law relating to section 15 of the Charter, as I outline above. Having found that the General Division made errors of law in its section 15 analysis, there is no need for me to consider the arguments relating to section 1 of the Charter.

[168] I disagree with the Minister that the General Division made an error of fact when it decided that the Claimant was the parent to make the application on behalf of the children. I also find that the other arguments raised by the Minister do not make a difference to the final result.

- **Next steps**

[169] The remaining issue to be decided is what remedy should be granted. At the hearing of this appeal, I indicated that I would release this decision, and the parties and the intervener would then have an opportunity to make arguments on the remedy.

[170] In order to bring appeals to a close in an efficient way, the Appeal Division will generally make the decision that the General Division should have made, unless the record before it is incomplete. In other words, the Appeal Division will not send an appeal back to the General Division in order to let a party strengthen their case by introducing evidence that they could have produced at the first hearing. It will normally only send an appeal back if the General Division made an error that caused the record to be incomplete at the first hearing.

[171] The parties and the intervener should address this question in their arguments on remedy. Their arguments should also address what is the correct start date for the Claimant's children to received the DCCB, in case I decide to give the decision that the General Division should have given.

[172] In their written and oral arguments, the parties and the intervener have already had an opportunity to address the issue of judicial notice. This includes whether the Appeal Division

should take notice of any social facts that the Claimant and the intervener refer to in their submissions. There is no need to repeat these in dealing with the remedy.

[173] The submissions should be in writing. There is no need to schedule another hearing to hear oral arguments, because the remedy issue is straightforward, and the issue of judicial notice has already been addressed in written and oral argument.

[174] The Tribunal will be in touch with the parties and the intervener to set a timetable for arguments on the remedy.

Conclusion

[175] The General Division made errors of law. The parties and the intervener may provide written arguments on the remedy.

Paul Aterman
Member, Appeal Division

REPRESENTATIVES:	Tiffany Glover, for the Appellant David Baker, for the Respondent Jane Stewart, for the Intervener