Federal Court of Appeal | Cour d'appel fédérale

**Date: 20210729**

**Docket: A-181-20**

**Citation: 2021 FCA 158**

**CORAM:** **STRATAS J.A.**
**GLEASON J.A.**
**LEBLANC J.A.**

**BETWEEN:**

**ROBENA C. WEATHERLEY**

**Applicant**

**and**

**ATTORNEY GENERAL OF CANADA**

**Respondent**

Heard by online video conference hosted by the Registry on June 30, 2021.

Judgment delivered at Ottawa, Ontario, on July 29, 2021.

REASONS FOR JUDGMENT BY: STRATAS J.A.

CONCURRED IN BY: GLEASON J.A.
LEBLANC J.A.

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## REASONS FOR JUDGMENT

**STRATAS J.A.**

[1] Under the *Canada Pension Plan*, R.S.C. 1985, c. C-8, after a spouse dies, the surviving spouse can receive a survivor's pension. Suppose the surviving spouse remarries and then the second spouse dies. Can the surviving spouse receive two survivor's pensions?

[2] No. Subsection 63(6) of the *Canada Pension Plan* limits the spouse to one survivor's pension, albeit the higher of the two.

[3] The applicant, Robena Weatherley, says this discriminates against her on the basis of sex contrary to section 15(1) of the *Canadian Charter of Rights and Freedoms*, s 7, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11. As a result, before the Social Security Tribunal, she sought two survivor's pensions.

[4] The General Division agreed with her, finding that subsection 63(6) infringed section 15(1) of the Charter in an unjustified way: 2019 SST 122. The Appeal Division reversed, finding no Charter infringement: 2020 SST 147. The applicant now applies for judicial review in this Court, seeking to quash the Appeal Division's decision.

[5] For the reasons that follow, I would dismiss the application for judicial review. Subsection 63(6) of the *Canada Pension Plan* is constitutional. It does not discriminate on the basis of sex.

## A. The Plan

[6] Charter cases call for a careful examination of context. In some contexts, conduct can be discriminatory. In entirely different contexts, it is not. See *Runchey v. Canada (Attorney General)*, 2013 FCA 16, [2014] 3 F.C.R. 227 at para. 109.

[7] A key element of context in this case is the nature of the scheme (hereafter, the "Plan") established and regulated by the *Canada Pension Plan* and the nature of the survivor's pension under the Plan.

**(1) The nature of the Plan**

[8] The Plan is a far-reaching, national, compulsory income insurance scheme. It is a "contributory plan", not "a social welfare scheme": *Granovsky v. Canada (Minister of Employment and Immigration*), 2000 SCC 28, [2000] 1 S.C.R. 703 at para. 9; *Miceli-Riggins v. Canada (Attorney General),* 2013 FCA 158, [2014] F.C.R. 709 at paras. 68-69.

[9] With some minor exceptions, Canadian employees and employers are required to make contributions into the Plan. Individuals who experience an event that is likely to affect their income, such as retirement, disability, the death of a wage-earning spouse or the death of both parents, and who satisfy technical qualification criteria are entitled to payments from the Plan. See *Miceli-Riggins* at paras. 67-74.

[10] Although far-reaching, the Plan was never intended to be comprehensive or "meet the needs of all contributors in every conceivable circumstance": *Miceli-Riggins* at paras. 69 and 73; *Runchey* at paras. 122-125. Instead, it "provide[s] partial earnings replacement in certain circumstances": *Runchey* at para. 122. It was intended to work alongside and compliment other financial planning instruments such as private savings, private pensions, and private insurance policies by providing a partial replacement of earnings: *Granovsky* at para. 9; *Expert Report on*

*CPP Policy & Legislation*, at pp. 4-6 (Respondent's Record at pp. 3645-3647); *Miceli-Riggins* at paras. 69-70; *Runchey* at para. 122. It is not anything like a guaranteed annual income. It is more like modest help for recipients to meet their basic needs.

[11] Benefits under the Plan are part of an interconnected network. Each achieves "various objectives, sometimes conflicting or overlapping objectives": *Runchey* at para. 124. Each has a "forest of detailed eligibility and qualification rules": *Runchey* at para. 124. Each has been introduced into the Plan in a way that interacts with the broader scheme of the *Canada Pension Plan* and the aim that the Plan remain sustainable and affordable for all contributors and beneficiaries: *Expert Report on CPP Policy & Legislation*, at p. 4 (Respondent's Record at p. 3645). Thus, the Plan has been described as a "complex web of interwoven provisions" where "[a]ltering one filament" can "disrupt related filaments in unexpected ways, with considerable damage to legitimate governmental interests": *Miceli-Riggins* at para. 64.

[12] Like many insurance schemes, the Plan is cross-subsidized: all contributors subsidize all benefits. Benefits are paid from direct contributions of employees, employers, and monies earned from the investment of contributory funds not required to pay current benefits: *Miceli-Riggins* at para. 72; *Runchey* at paras. 40-42. Differences in benefits can correlate to the size of contributions. But no individual contributor has a right to benefits commensurate with the level of their contributions. Instead, differences in benefits usually happen as a result of "an intricate scheme with many eligibility and qualification rules": *Runchey* at para. 125. Put another way, just like insurance, "contributions do not always translate into benefits": *Miceli-Riggins* at para.

72; *Runchey* at para. 124. So some who have paid plenty into the Plan might never receive a cent while others who have paid little might get much more.

[13] Also like many insurance schemes, the Plan is self-sustaining. It has no recourse to general government funding such as the consolidated revenue fund. If payments are increased for survivorship benefits, either contributions must increase or payments out must decrease. Giving to some takes from others.

[14] All of this means that the government must continually monitor the Plan's financial health. It conducts actuarial calculations based on scores of demographic and economic factors to try to predict future contributions and benefits: *Expert Report on CPP Policy & Legislation,* at pp. 41-42 and 47 (Respondent's Record at pp. 3682-3683 and 3688). If the calculations show the Plan's financial health is in jeopardy, the cure is not easy. The *Canada Pension Plan* can be amended but only by joint agreement of Parliament and a majority of provincial governments: s. 114; *Expert Report on CPP Policy & Legislation,* at p. 7 (Respondent's Record at p. 3648). If joint agreement is not reached and contributions become insufficient to sustain the Plan, ss. 113.1(11.05) of the Act kicks in and automatically increases the amount that all contributors, rich or poor, young or old, must pay: see also *Expert Report on CPP Policy & Legislation*, at p. 47 (Respondent's Record at 3688). For example, in the mid-1990's, a higher-than-expected amount of disability payments meant that contributions were increased and the eligibility and calculation of disability benefits were tightened: *Expert Report on CPP Policy & Legislation*, at pp. 45-46 (Respondent's Record at pp. 3686-3687).

**(2) The nature of the survivor's pension under the Plan**

[15] The eligibility for and calculation of the survivor's pension under the Plan is governed by sections 58, 63 and 72 of the *Canada Pension Plan*.

[16] Anyone over the age of 35 who survives a married or common law spouse who contributed to the Plan is eligible for a survivor's pension. The amount is calculated partly in relation to the amount of the deceased spouse's contributions to the Plan. There are other factors: a flat-rate component for survivors under the age of 65, reductions for young survivors, and certain adjustments if the survivor has dependant children. The amount of the pension may also be adjusted downwards if the survivor is receiving other benefits, such as a disability pension: see s. 58(6).

[17] Subsection 63(6) fits amongst these factors. If an individual has survived two spouses, the amount of the survivor's pension is capped at one pension. Only the greater of the contributions of the two deceased spouses is used to calculate the survivor's pension. This reflects the insurance nature of the scheme: an individual can only lose one wage-earning spouse at a time.

**B. The nature of the discrimination claim in this case**

[18] The applicant claims that the subsection 63(6) cap discriminates against her on the basis of sex. While she raised the ground of being twice-widowed before the Social Security Tribunal, she abandoned that ground in oral argument before this Court.

[19] This was wise. The status of being twice-widowed is not a recognized analogous ground and there was insufficient evidence to support it becoming one. Without sufficient evidence, this Court cannot recognize a new analogous ground: *Kahkewistahaw First Nation v. Taypotat*, 2015 SCC 30, [2015] 2 S.C.R. 548 at paras. 24-26; *Fraser v. Canada (Attorney General*), 2020 SCC 28, 450 D.L.R. (4th) 1 at para. 117.

[20] On its own, the General Division of the Social Security Tribunal raised the ground of age, an enumerated ground under section 15(1) of the Charter. This it should not have done. The ground of age was not pleaded before it. As well, it drew factual conclusions from an article that was not in the record and did not disclose it to the respondent. As the Appeal Division found, this was a severe breach of procedural fairness: see also *Taypotat* at paras. 25-27 and *R. v. Mian*, 2014 SCC 54, [2014] 2 S.C.R. 689 (a discussion of courts raising new issues but equally applicable to administrative decision-makers in this context).

[21] Thus, sex is the only ground of discrimination advanced before us. The analysis will proceed on that basis.

## C. Analysis

### (1) Section 15(1) of the Charter

[22] Section 15(1) provides that "[e]very individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability".

[23] Under the *Canada Pension Plan*, Parliament has made difficult decisions allocating scarce benefits among recipients. In case after case, the Supreme Court has said that benefits plans such as this are difficult to strike down under section 15(1) of the Charter. These cases have never been overruled and still bind us.

[24] In *Gosselin v. Quebec (Attorney General)*, 2002 SCC 84, [2002] 4 S.C.R. 429 at para. 55, the Supreme Court held that courts cannot insist on "[p]erfect correspondence between a benefit program and the actual needs and circumstances of [an] applicant group." While exclusion from participation in benefits programs "attracts sympathy", 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" (at para. 55).

[25] This led the Supreme Court in *Gosselin* to hold that an infringement of section 15(1) of the Charter cannot be deduced simply from the fact that benefits legislation leaves a group, even a vulnerable group, outside a benefits scheme (at para. 55):

> The fact that some people may fall through the 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 all distinctions contained in the law amount to discrimination in the substantive sense intended by s. 15(1).

[26] To the same effect is the Supreme Court's decision in *Law v. Canada*, [1999] 1 S.C.R. 497, 170 D.L.R. (4th) 1 at para. 105. This Court described *Law*'s contribution to our understanding of section 15(1) and the Plan in this way:

> …[B]enefits legislation, like the [*Canada Pension*] *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.

(*Miceli-Riggins* at para. 56.)

[27] More recently, in *Withler v. Canada (Attorney General)*, 2011 SCC 12, [2011] 1 S.C.R. 396, the Supreme Court held that the assessment whether benefits legislation offends section 15(1) must be conducted sensitively, keeping front of mind the challenge of allocating scarce resources (at para. 67):

> 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 applicant group is not required. Allocation of resources and particular policy goals that the legislature may be seeking to achieve may also be considered.

In *Withler*, the Supreme Court also instructed (at paras. 38 and 66) that courts should give some margin of appreciation under section 15(1) to the judgment calls made by legislators when assessing whether their benefits legislation improperly discriminates.

[28] For these reasons, the Supreme Court has suggested that only something quite discernable or concrete—such as an illegitimate or arbitrary "singling out" of a particular group—can prompt the Court to find that benefits legislation infringes section 15(1):

> It is not open to Parliament or a legislature to enact a law whose policy objectives and provisions single out a disadvantaged group for inferior treatment: *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203. On the other hand, a legislative choice not to accord a particular benefit absent demonstration of discriminatory purpose, policy or effect does not offend this principle and does not give rise to s. 15(1) review. This Court has repeatedly held that the legislature is under no obligation to create a particular benefit. It is free to target the social programs it wishes to fund as a matter of public policy, provided the benefit itself is not conferred in a discriminatory manner….
>
> Where stereotyping of persons belonging to a group is at issue, assessing whether a statutory definition that excludes a group is discriminatory, as opposed to being the legitimate exercise of legislative power in defining a benefit, involves consideration of the purpose of the legislative scheme which confers the benefit and the overall needs it seeks to meet. If a benefit program excludes a particular

> group in a way that undercuts the overall purpose of the program, then it is likely to be discriminatory: it amounts to an arbitrary exclusion of a particular group. If, on the other hand, the exclusion is consistent with the overarching purpose and scheme of the legislation, it is unlikely to be discriminatory. Thus, the question is whether the excluded benefit is one that falls within the general scheme of benefits and needs which the legislative scheme is intended to address.

(*Auton (Guardian ad litem of) v. British Columbia (A.G.)*, 2004 SCC 78, [2004] 3 S.C.R. 657 at paras. 41-42.)

[29] But even then, a section 15(1) claimant may still not have enough to succeed. This is because "[c]rafting a social assistance program…is a complex problem, for which there is no perfect solution" and "[n]o matter what measures the government adopts, there will always be some individuals for whom a different set of measures might have been preferable": *Gosselin* at para. 55. In the same vein, this Court has put it this way:

> When presented with an argument that a complex statutory benefit scheme, such as unemployment insurance, has a differential adverse effect on some applicants contrary to section 15, the Court is not concerned with the desirability of extending the benefits in the manner sought. In the design of social benefit programs, priorities must be set, a task for which Parliament is better suited than the courts, and the Constitution should not be regarded as requiring judicial fine-tuning of the legislative scheme.

(*Krock v. Canada (Attorney General)*, 2001 FCA 188, 89 C.R.R. (2d) 170 at para. 11.)

[30] This Court has also said that "constitutional tinkering with complex, interlocking statutory provisions" in order "to cure an apparent arbitrariness in the operation of a justifiable

cut-off in a benefits scheme" is "likely to create unforeseen anomalies of its own": *Nishri v. Canada*, 2001 FCA 115, 84 C.R.R. (2d) 140 at para. 43.

[31] As can be seen from this analysis of earlier section 15(1) cases in the area of benefits legislation, the applicant faces a high hurdle. Subsection 63(6) of the *Canada Pension Plan* does not suffer from any of the severe deficiencies identified in cases such as *Auton*. Whatever detrimental effects result from subsection 63(6)—and as we shall see, the evidence suggests there are none—they are likely to be "a consequence of…complicated rules within a complicated scheme in support of a Plan that is not a general social welfare scheme available to all in every circumstance", not a consequence of discrimination: *Runchey* at para. 126.

[32] To establish that subsection 63(6) infringes section 15(1) of the Charter, the applicant must show that subsection 63(6) creates a distinction based on an enumerated or analogous ground and subsection 63(6) imposes burdens or denies a benefit in a manner that has the effect of reinforcing, perpetuating or exacerbating disadvantage: *Fraser* at para. 27.

[33] The applicant's claim fails at the first step of the analysis. The evidence filed before the Social Security Tribunal does not establish that subsection 63(6) draws a distinction on the basis of sex or denies a benefit.

[34] On its face, subsection 63(6) does not discriminate between men and women. But section 15(1) requires us to go beyond the face of a law. A law seemingly neutral on its face may be discriminatory if, in effect, it has a disproportionate, adverse effect on women: *Andrews v. Law*

*Society of British Columbia*, [1989] 1 S.C.R. 143, 56 D.L.R. (4th) 1 at 182 S.C.R. We must focus on substantive equality not facial superficialities.

[35] The Supreme Court has described substantive equality in the following way:

> Substantive equality, unlike formal equality, rejects the mere presence or absence of difference as an answer to differential treatment. It insists on going behind the facade of similarities and differences. It asks not only what characteristics the different treatment is predicated upon, but also whether those characteristics are relevant considerations under the circumstances. The focus of the inquiry is on the actual impact of the impugned law, taking full account of social, political, economic and historical factors concerning the group. The result may be to reveal differential treatment as discriminatory because of prejudicial impact or negative stereotyping. Or it may reveal that differential treatment is required in order to ameliorate the actual situation of the applicant group.

(*Withler* at para. 39.)

[36] Here is where the applicant takes her stand. She says that the seemingly neutral law in subsection 63(6) indirectly places women at a disadvantage. She claims adverse effects discrimination or a violation of substantive equality: see *Fraser* at para. 30.

[37] But nothing in Supreme Court case law, new or old, eliminates her obligation to adduce evidence in support of her claim.

[38] Recently, the majority of the Supreme Court provided a “clear account of how to identify adverse effects discrimination”, including the nature of the evidence a claimant is required to adduce: *Fraser* at para. 50.

[39] In *Fraser*, as a general matter, the majority of the Supreme Court instructs us that "[t]wo types of evidence" are "especially helpful in proving that a law has a disproportionate impact on members of a protected group": first, "evidence about the situation of the claimant group" and, second, "evidence about the results of the law" (at para. 56) or the "results of a system" (at para. 58). On the second type of evidence, what must be shown is "a disparate pattern of exclusion or harm" from the law "that is statistically significant and not simply the result of chance" (at para. 59). Inherent in this is a requirement to lead some evidence that the law being challenged causes or at least contributes to the impact. In other words, there should be "evidence…about the results produced by the challenged law" (at para. 60). Both types of evidence are not always required and evidentiary standards should not be applied too rigorously: *Fraser* at paras. 61 and 67. But claimants still have to lead some evidence to support their claim.

[40] This makes sense. After all, "courts are courts and have to act like courts": *Canada (Citizenship and Immigration) v. Canadian Council for Refugees*, 2021 FCA 72, 79 Imm. L.R. (4th) 1 at para. 59. The general rule is that courts act only on the basis of evidence unless a legislative provision creates a factual presumption or the doctrine of judicial notice, a very narrow, restricted doctrine, applies: *Pfizer Canada Inc. v. Teva Canada Limited*, 2016 FCA 161, 483 N.R. 275 at paras. 79-80; *Canada v. Kabul Farms*, 2016 FCA 143, 13 Admin. L.R. (6th) 11 at para. 38.

[41] This is so under the Charter. Under the Charter, courts, "firmly grounded in the discipline of the common law methodology", deal "only with the challenge the Charter challengers have advanced and…the evidence the parties have offered concerning that challenge": *MacKay v.*

*Manitoba*, [1989] 2 S.C.R. 357, 61 D.L.R. (4th) 385 at 363 S.C.R.; *Danson v. Ontario (Attorney General)*, [1990] 2 S.C.R. 1086, 73 D.L.R. (4th) 686 at 1099-1101 S.C.R.; *Canadian Council for Refugees* at para. 59; Brian Morgan, "Proof of Facts in Charter Litigation," in Robert J. Sharpe, ed., *Charter Litigation* (Toronto: Butterworths, 1987), 159 at 162. As we shall see, the Supreme Court's most recent section 15(1) pronouncements in *Fraser* and *Taypotat* do not uproot *MacKay* and *Danson*, foundational cases regularly relied upon over the last three decades by every court in the country.

[42] As well, from the earliest days of the Charter, claimants have been required to demonstrate, through evidence, some sort of nexus between a particular action of the state, such as legislation, and an infringement of a Charter right or freedom: see, *e.g.*, *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573, 33 D.L.R. (4th) 174; *Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441, 18 D.L.R. (4th) 481 at 447 and 490 S.C.R.; *Symes v. Canada*, [1993] 4 S.C.R. 695, 110 D.L.R. (4th) 470 at 764-765 S.C.R.; *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 S.C.R. 307 at para. 60; *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101 at paras. 73-78; *Kazemi Estate v. Islamic Republic of Iran*, 2014 SCC 62, [2014] 3 S.C.R. 176 at paras. 126, 131-134; *R. v. Kokopenace*, 2015 SCC 28, [2015] 2 S.C.R. 398 at paras. 251-253; *Canadian Council for Refugees* at para. 57.

[43] Decades of unbroken Supreme Court case law forbids courts from getting around that evidentiary requirement through judicial notice, assumptions or guesswork: *MacKay*, above; *Danson* at 1101 S.C.R.; *Moysa v. Alberta (Labour Relations Board)*, [1989] 1 S.C.R. 1572, 60

D.L.R. (4th) 1; *Stoffman v. Vancouver General Hospital*, [1990] 3 S.C.R. 483, 76 D.L.R. (4th) 700 at pp. 549-50 S.C.R.; *R. v. Penno*, [1990] 2 S.C.R. 865, 59 C.C.C. (3d) 344 at pp. 881-82 S.C.R.; *Waldick v. Malcolm*, [1991] 2 S.C.R. 456, 83 D.L.R. (4th) 114 at pp. 472-73 S.C.R.; *Symes*; *R. v. Find*, 2001 SCC 32, [2001] 1 S.C.R. 863; *R. v. Malmo-Levine*, 2003 SCC 74, [2003] 3 S.C.R. 571 at para. 28; *R. v. Spence*, 2005 SCC 71, [2005] 3 S.C.R. 458 at para. 68.

[44] Unsurprisingly, the Supreme Court has applied these longstanding and fundamental principles to equality claims under section 15(1): *Symes* at para. 134; *Fraser*; *Taypotat*. As *Fraser* puts it (at paras. 57 and 60), there should be evidence grounded in the actual situation of the discrimination claim including "the circumstances of the claimant group" and "evidence…about the results produced by the challenged law" on that group: see also *Taypotat* at paras. 24, 27 and 31-32. If a court does not have this—for example, where a claimant under section 15(1) has offered insufficient evidence and is relying on nothing more than a "web of instinct"—it must reject the section 15(1) claim: *Taypotat* at para. 34; *Fraser* at para. 60.

[45] A classic example of a claimant relying on only a "web of instinct" is where the claimant files general evidence about other groups and the evidence "is silent" about the individuals actually affected by the impugned law: *Taypotat* at para. 27. General statistical data that says nothing about particular individuals affected by the impugned law, here subsection 63(6), is simply not helpful: *Taypotat* at para. 31. Evidence that "captures a vastly larger, more diverse population than the community affected" by the impugned law is also not helpful at all: *Taypotat* at para. 32.

[46] That aptly describes the evidentiary record here. The nature and quality of the evidence is just as general and unduly broad as that filed in support of the section 15(1) claim in *Taypotat*. It is sparse and unhelpful to boot.

[47] In this case, two documents form much of the support of the applicant's section 15(1) claim. They are authored by a social worker and by a political commentator/executive director of a provincial advisory council on the status of women: Applicant's Record at 496-500 and 503-504. They are one or two pages in length. They present sweeping, often impressionistic observations, mainly about elderly women who have lost their spouse. They say nothing about women who have remarried and have lost their second spouse, which is what subsection 63(6) addresses: Applicant's Record at 491-493 and 495. The Appeal Division did not find this evidence persuasive. Nor should we.

[48] Also in evidence are two analyses from Statistics Canada covering the periods 1993-2003 and 1990-2001 (up to 31 years ago) about the plight of widows and elderly women generally: Applicant's Record at pp. 393-403 and 405-416. They say that women who lose their spouse, on average, experience a greater loss of net-family income than similarly situated men. They identify pension as one source of net-family income that is reduced, but the figures look at all pensions lumped together, not just those under the Plan: Applicant's Record, pp. 401 and 416. There is also a single page of statistics from Statistics Canada in 2011. None of these materials contain information about the specific individuals affected by subsection 63(6), *i.e.*, the situation of twice-widowed women. This sort of evidence is not the type of "clear and consistent statistical" evidence that the Supreme Court in *Fraser* (at paras. 62 and 63) considered sufficient

to ground a section 15(1) claim. Further weakening the applicant's claim against subsection 63(6)—and perhaps explaining the paucity of evidence about twice-widowed women—is the fact that she "does not take the position that the needs of a twice-widowed person are different than those of a once-widowed person": 2019 SST 122 at para. 15.

[49] As a primary fact-finder in this case, the Appeal Division of the Social Security Tribunal did not find the evidence sufficient to establish a violation of section 15(1). As a reviewing court, nor should we. The factually suffused findings of administrators deserve respect. Here, at best, all we have is some evidence about a much broader, more general group than the claimants and the applicant invites us, on a "web of instinct", to guess that subsection 63(6) disadvantages twice-widowed women. That is not our role.

[50] In saying this, I have front of mind the warning in *Fraser* (at paras. 61 and 67) that courts must not impose unimportant or unnecessary evidentiary requirements that claimants cannot meet. As well, *Fraser* instructs us (at para. 57) that in some circumstances, anecdotal evidence might be sufficient. In *Fraser* itself, the majority of the Supreme Court accepted (at paras. 6-7) specific, anecdotal evidence about the situation of the women who elected to job-share. That evidence addressed the "disadvantages women with children face in the labour force" (at para. 21), not just disadvantages faced by women generally.

[51] But here we do not have even anecdotal evidence from the applicant about her situation or the situation of twice-widowed persons like her. Much of the evidence in this case addresses only the disadvantages faced by widows generally. Some of it is not even specific to widows.

None of it addresses twice-widowed women like the applicant. Also some of it focuses on reductions in net-family income—the combined family income divided by the number of family members. That is not relevant to a scheme such as the Plan, which intends only to provide minimum income replacement.

[52] Assuming for the moment the relevance of net-family income, some of the evidence shows that marriage is a strong predictor of higher net-family income. This suggests that as a result of remarrying, twice-widowed women are better off than once-widowed women. This rebuts the allegation of disadvantage.

[53] Further, the respondent has offered some evidence that shows that twice-widowed survivors actually benefit from subsection 63(6): in 2011, the amount paid to new twice-widowed survivors was, on average, larger than that paid to new once-widowed survivors. In finding that twice-widowed survivors did not suffer disadvantage, the Appeal Division accepted and relied upon this evidence (at para. 34). That factually suffused finding deserves a measure of deference. The bottom line is that although twice-widowed women do not receive as much as they might if they were permitted to collect two survivor's benefits at the same time, they still do better than many recipients of the survivor's pension.

[54] The applicant submits that subsection 63(6) draws a distinction based on sex because the majority of people who are twice-widowed are women. She says this case is analogous to *Fraser* in which the Supreme Court found the RCMP job-sharing program created a distinction based on

sex because the majority of participants in that program were women. But this case and *Fraser* are not analogous.

[55] In *Fraser*, there was a sex-based discrepancy between the demographics of the group affected by the law and the group that could be affected by the law. In *Fraser*, almost all participants in the job-sharing program were women: *Fraser* at paras. 10, 21, 85; *Fraser v. Canada (Attorney General)*, 2018 FCA 223, [2019] 2 F.C.R. 541 [*Fraser FCA*] at para. 18. But this did not reflect the demographics of the RCMP at large.

[56] Moreover, the majority of the Supreme Court in *Fraser* concluded that the women who participated in the job-sharing program suffered a disadvantage compared to those who took leave without pay and were offered the pension buy-back option, even though there was no evidence to demonstrate that the pecuniary value of the salary, benefits and pension accrual for the job-sharers was less than the pecuniary value of the pension and benefits package offered to those who took leaves without pay (*Fraser FCA* at paras. 15-16). The majority of the Supreme Court also assumed that the option of leave without pay was disproportionally taken up by men, as it concluded that the job sharing package disproportionately disadvantaged women. It is not for this Court to question whether these assumptions were ones it was open to the Supreme Court to have made. However, based on these assumptions, the Supreme Court concluded that the impugned measures in *Fraser* showed *prima facie* discrimination.

[57] Here there is no similar sex-based discrepancy in the demographics of the group the law could apply to, *i.e.*, once-widowed survivors, and the demographics of the group the law did

apply to, *i.e.*, twice-widowed survivors. The evidence before us, limited as it is, shows that the demographics of these two groups are nearly identical. Figures from Statistics Canada provided by the applicant show that in 2011, 74.7% of first-time survivors were women, where as 73.9% of second-time survivors were women: Applicant's Record at p. 505. This is materially different from *Fraser* where the Supreme Court found that the impugned measure adversely and disproportionately affected women.

[58] In addition, unlike *Fraser*, the evidence in this case shows that the twice-widowed benefit from subsection 63(6): see discussion in paragraphs 52-53 above. As well, in *Fraser*, the evidence was said to be clear and compelling: *Fraser* at paras. 1, 10, 21, 83 and 97. That is unlike here, where the evidence is sparse-to-non-existent, little more than the web of instinct found to be insufficient in *Taypotat*: see discussion in paragraphs 45-51 above.

[59] The applicant also submits that subsection 63(6) denies a benefit because, without it, she would receive symbolic recognition for non-monetary contributions she made to her first marriage. This submission overlooks the nature of the Plan as an insurance scheme. The survivor's pension is not intended to provide symbolic recognition of non-financial contributions made to a marriage. Instead, it is designed to provide a minimum income supplement, related in part to contributions made to the Plan by the spouse and not just the contributions made during marriage.

[60] Lastly, the applicant makes an overarching submission concerning *Fraser*. She says it is not necessary for her to show that subsection 63(6) caused or contributed to a disproportionate

effect on women. In her view, *Fraser* says that it is enough to show that subsection 63(6) perpetuates a pre-existing impact based on sex in the sense that it has not redressed that pre-existing effect.

[61] Some of the applicant's submissions and evidence about the status of widows generally may be relevant to the constitutionality of the provisions granting survivor pensions for first-time survivors. But rather than challenging those provisions, the applicant attacks subsection 63(6) on the basis that, in the case of second-time widows, subsection 63(6) perpetuates that adverse and disproportionate impact by doing nothing to redress it.

[62] If the applicant's submission were accepted—that any legislative provision that perpetuates a pre-existing disadvantage and does not redress it is liable to be struck down—many provisions in the *Canada Pension Plan* that perpetuate disadvantage by not redressing it will be under threat of invalidity. Under the applicant's view of the matter, all of the provisions of the *Canada Pension Plan* would have to be read for situations where they do not address pre-existing disadvantage based on any of the section 15(1) grounds. In all of those situations, subject to section 1, the *Canada Pension Plan* would have to positively redress it.

[63] Not only would this end Parliament's ability to design the sort of Plan it did—a contributions-based, insurance scheme designed to provide minimum, partial income supplements. It would also require Parliament to design and positively implement a sweeping scheme designed to eradicate all pre-existing inequality, whether or not caused by government, in all foreseeable circumstances. Over and over again, the Supreme Court has told us that section

15(1) does not extend that far: *Auton*, at paras. 2 and 41; *Quebec (Attorney General) v. Alliance du personnel professionnel et technique de la santé et des services sociaux*, 2018 SCC 17, [2018] 1 S.C.R. 464 at para. 42; *Andrews* at 163-164, 171 and 175 S.C.R.; *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229, 76 D.L.R. (4th) 545 at 318 S.C.R.; *Lovelace v. Ontario*, 2000 SCC 37, [2000] 1 S.C.R. 950 at paras. 90-92.

[64] And in the search for legislative provisions that fail to redress pre-existing disadvantage based on any of the section 15(1) grounds, why restrict oneself to the *Canada Pension Plan*? Why not look through the *Income Tax Act*? The *Income Tax Act* fails to redress the pre-existing disadvantage the applicant says exists in this case by, for example, giving twice-widowed women a special tax break. Are we to find a section 15(1) infringement in the *Income Tax Act* on account of its failure to redress the pre-existing disadvantage of the applicant and other twice-widowed persons, pick up the legislator's pen, and scrawl into it a section granting them a tax break?

[65] This Court has already rejected doing that very sort of thing in the *Income Tax Act* in similar circumstances in *Public Service Alliance of Canada v. Canada (Revenue Agency)*, 2012 FCA 7, 428 N.R. 240. That would be contrary to the explicit text of sections 91-95 of the *Constitution Act, 1867*, (U.K.), 30 & 31 Vict., c. 3, s. 91, reprinted in R.S.C. 1985, Appendix II, No. 5, which gives our legislators, not the courts, the exclusive power to legislate. It would also be contrary to the principle that the Charter does not displace or amend that exclusive assignment of legislative power: *Paul v. British Columbia (Forest Appeals Commission)*, 2003 SCC 55, [2003] 2 S.C.R. 585 at para. 24; *Adler v. Ontario*, [1996] 3 S.C.R. 609, 140 D.L.R. (4th)

385; *Gosselin (Tutor of) v. Quebec (Attorney General)*, 2005 SCC 15, [2005] 1 S.C.R. 238 at para. 14; *Canada (Attorney General) v. Northern Inter-Tribal Health Authority Inc.*, 2020 FCA 63, [2020] 3 F.C.R. 231 at para. 31.

[66] Nevertheless, the applicant suggests that *Fraser* does that very thing. In support of this, she relies upon isolated portions of paragraphs 70 and 71 of *Fraser* and suggests that subsection 63(6) need not have any connection whatsoever to any disproportionate adverse effect on women. Instead, it need only be shown that it perpetuates it by not eliminating it.

[67] The parts of paragraphs 70 and 71 of *Fraser* the applicant relies upon are as follows:

> [70] [I]f claimants successfully demonstrate that a law has a disproportionate impact on members of a protected group, they need not independently prove that the protected characteristic 'caused' the disproportionate impact.…
>
> [71] It is also unnecessary to inquire into whether the law itself was responsible for creating the background social or physical barriers which made a particular rule, requirement or criterion disadvantageous for the claimant group.

The applicant submits that these words eliminate the need for her to prove any connection between subsection 63(6) and section 15(1) of the Charter.

[68] I reject this submission. The applicant is taking the words in paragraphs 70 and 71 of *Fraser* in isolation and out of context. Properly read in context, they are intended to buttress the instruction given earlier (at paras. 61 and 67) that courts should not frustrate substantive equality claims by imposing evidentiary requirements that deserving section 15(1) claimants cannot meet.

[69] The opening words of paragraph 70 of *Fraser* explicitly state that claimants must "successfully demonstrate" that the law itself being challenged "has a disproportionate impact on members of a protected group". That means that in this case the applicant must successfully demonstrate that subsection 63(6) itself has a disproportionate adverse effect on women.

[70] The remaining words of paragraphs 70 and 71 of *Fraser* merely add that once the disproportionate adverse effect on a group is demonstrated, claimants need not go further and show exactly why the law being challenged has a disproportionate effect. In other words, if there were clear and consistent statistical evidence of the sort discussed at paras. 62-63 of *Fraser* that demonstrates that subsection 63(6) has a disproportionate adverse effect on women, the claimant need not go further and explain why subsection 63(6) causes that disproportionate effect.

[71] This reading of paragraphs 70 and 71 of *Fraser* is confirmed by the three cases the majority of the Supreme Court cites in those paragraphs, namely *Homer v. Chief Constable of West Yorkshire Police*, [2012] UKSC 15, [2012] 3 All E.R. 1287 at paras. 12-14, *Essop v. Home Office (U.K. Border Agency)*, [2017] UKSC 27, [2017] 3 All E.R. 551 at paras. 24-27 and *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971):

- In *West Yorkshire Police*, the Supreme Court of the United Kingdom confirmed that the burden lies on a claimant to show that a measure causes disadvantage. But "all that is needed is [to show] a particular disadvantage when compared to other people who do not share the characteristic in question": *West Yorkshire Police* at

para. 14. Requiring more would impose a "need for statistical comparisons [and explanations] where no statistics might exist": *West Yorkshire Police* at para. 14.

- In *Essop*, immigration officials had to pass a "core skills assessment" in order to be promoted. Statistics showed that racial minorities and older candidates were less likely to pass the assessment. This was enough to demonstrate a connection between the impugned government measure, the requirement of passing a "core skills assessment", and disadvantage based on protected characteristics: *Essop* at paras. 24-27. It was not necessary for the claimant to go further and show why this was so. In the words of the Supreme Court of the United Kingdom (at para. 33), a claimant does not need to "establish the reason for the particular disadvantage to which the group is put". In the course of its reasons in *Essop*, the Supreme Court of the United Kingdom offered an example to illustrate its point. There is no generally accepted explanation for why women on average have achieved lower grades as chess players than men. But "a requirement to hold a high chess grade will put them at a disadvantage": *Essop* at para. 24. In such a case, all that is required is to demonstrate that the requirement will put them to disadvantage. The claimant need not demonstrate why.

- In *Griggs*, the Supreme Court of the United States held that requiring high school education for employment in the particular circumstances of the case was discriminatory. Statistics showed that the requirement disproportionately denied

employment to persons on the basis of race. That was enough; there was no need for the claimant to go further and explain why the racial disparity was happening.

[72] The above interpretation of paragraphs 70-71 of *Fraser* is also confirmed by what the majority of the Supreme Court says in *Fraser* about what sort of evidence a claimant must adduce. As mentioned above, the Supreme Court draws a distinction between two types of cases:

- On the one hand, if the Court does not have evidence on the result produced by the challenged law—*i.e.*, if it only has "evidence about the claimant group's situation, on its own"—then the evidence may rise no higher than showing a "web of instinct" that is "too far removed from the situation in the actual workplace, community or institution subject to the discrimination claim": *Fraser* at para. 60, citing *Taypotat* at para. 34. In that circumstance, such a case, like the case we have here, must be dismissed.

- On the other hand, where the Court does have evidence on the result produced by the challenged law, "clear and consistent statistical disparities can show a disproportionate impact on members of protected groups, even if the precise reason for that impact is unknown": *Fraser* at para. 62. Citing an academic commentator, the majority of the Supreme Court in *Fraser* adds that claimants should not be required "to show the 'reason why'" a policy, set of criteria or practice "disadvantages the group as a whole": *Fraser* at para. 62. If "there are clear and consistent statistical disparities in how a law affects a claimant's group",

> there is “no reason for requiring the claimant to bear the additional burden of explaining *why* the law has such an effect” [emphasis in original]: *Fraser* at para. 63. This is because “the statistical evidence is itself a compelling sign that the law has not been structured in a way that takes into account the protected group’s circumstances”: *Fraser* at para. 63.

For the reasons set out above, the case before the Court falls into the former category, not the latter.

[73] The applicant’s interpretation of paragraphs 70 and 71 of *Fraser* runs counter to this instruction. It also runs counter to the overall instruction in *Fraser* that claimants should adduce evidence of disproportionate adverse effect, though that requirement may be relaxed in some cases. More broadly, it runs counter to the unbroken, decades-long authority at paragraphs 40-44 above that requires some nexus between the state action being attacked, in this case subsection 63(6), and the violation of the Charter.

[74] It is inconceivable that the majority of the Supreme Court in *Fraser* would speak about *Taypotat*, “webs of instinct” and minimum evidentiary burdens out of one side of its mouth and then, out of the other side of its mouth, say something entirely different in paragraphs 70 and 71. That would be incoherent, illogical nonsense.

[75] The last thing an intermediate appellate court should do is rip the Supreme Court’s words from their context, read them literally and in isolation, and then apply that reading uncritically,

regardless of whether it makes sense. Instead, where possible, an intermediate appellate court should read the Supreme Court's words as the Supreme Court intends them: part of a logical, coherent whole intended to make sense, consistent with its previously decided cases unless it expressly says to the contrary.

[76] For the foregoing reasons, the applicant's section 15(1) claim must be dismissed.

**(2) Section 1 of the Charter**

[77] If the analysis above is somehow wrong and subsection 63(6) of the *Canada Pension Plan* somehow violates section 15(1), subsection 63(6) is a reasonable limit in a free and democratic society and, thus, is saved under section 1.

[78] Key to the section 1 analysis are the previous judicial observations and holdings about the *Canada Pension Plan* and the nature of the Plan set out in it: see paragraphs 8-14 and 22-31, above.

[79] In this sort of case, where Parliament is mediating between competing interests as it allocates scarce resources, section 1 is applied more deferentially: *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, 58 D.L.R. (4th) 577 at 993-94; *McKinney* at 305; *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, 127 D.L.R. (4th) 1 at paras. 69-70.

[80] As mentioned above, the Plan is a closed system and has no recourse to the consolidated revenue fund. Because it is a closed system, any increase in the amount flowing out to one group will cause a reduction in benefits to another group, an increase in contributions by all, and/or a shift of the burden of sustaining the Plan to future generations.

[81] Also in a number of cases the Supreme Court has urged caution in finding that legislation such as this violates section 15(1) simply because it does not implement perfection: *Law*, above at para. 105; *Gosselin* (2002), above at para. 55. Those considerations apply equally at the section 1 analysis.

[82] The applicant submits that the objective of subsection 63(6) is cost-saving and administrative convenience. She submits that this objective is neither pressing nor substantial. However, the record before the Court and the analysis of the nature of the Plan shows that the objective behind subsection 63(6) is more profound. At a general level, the objective of subsection 63(6) is to further the general purpose of the *Canada Pension Plan*—the provision of minimum income support to a wide variety of needy and deserving recipients while maintaining a careful balancing of contributions and benefits: see paragraphs 8-14 of these reasons. At a specific level, the objective of subsection 63(6) is to limit all survivor to one pension to achieve equity amongst survivors and reflect the common circumstance faced by survivors: loss of a current wage earner. These objectives are pressing and substantial and are capable of justifying any intrusion on section 15(1) rights in this case.

[83] The respondent correctly says the pension was only ever intended to make-up for the loss of one wage-earner and it would be unfair to some recipients if others could receive simultaneous benefits for two wage-earners. Baked into this is a concern for the long-term health of the Plan in light of the fact that it is a closed system. Allowing individuals to stack survivor's pensions on top of one another would undermine the insurance nature of the Plan and may place survivors of more than one spouse at an advantage as compared to survivors of only one spouse.

[84] This objective can be illustrated by looking at survivor's pensions for people under the age of 65. These individuals receive a flat-rate as a portion of their pension: see *Canada Pension Plan*, subpara. 58(1)(*a*)(i). Without subsection 63(6), this group could receive a windfall by collecting two flat-rates.

[85] Not much needs to be said about rational connection. Subsection 63(6) has a rational connection to this objective as it limits each survivor to one survivor's pension.

[86] Subsection 63(6) is also minimally impairing. Parliament could have achieved its objective of ensuring a fair distribution of survivor benefits that reflected the insurance purpose of the *Canada Pension Plan* by limiting entitlement to only the most recent spouse or to the spouse with the smallest retirement pension. Instead, it has allowed individuals the greater of the two pensions.

[87] Finally, the beneficial effects of subsection 63(6) outweigh the deleterious effects of any rights infringement.

[88] For many individuals, the alleged infringement in this case will only result in a modest reduction of their survivor's pension. For some individuals, those who are already at the ceiling amount of the pension, subsection 63(6) will have no effect at all on the size of their pension. The minimal nature of the infringement is also buoyed by the fact that the Plan is only intended to be a supplementary source of income security. The Plan was never intended to be comprehensive or all-encompassing.

[89] This modest infringement is outweighed by the beneficial effects of subsection 63(6). These effects include the maintenance of the insurance-like nature of the Plan, ensuring that there are clear and bright-line rules that govern the distribution of benefits, and ensuring the integrity of the actuarial predictions on which the Plan is based.

## D. Proposed disposition

[90] For the foregoing reasons, I would dismiss the application. Appropriately, the parties have agreed that there shall be no costs.

[91] Although the applicant, Ms. Weatherley, now in her nineties, is unsuccessful in her section 15(1) challenge, the panel salutes her initiative, courage and intelligence in bringing and prosecuting it, at first as an unrepresented litigant and, later, with the assistance of counsel.

"David Stratas"
J.A.

"I agree
Mary J.L. Gleason J.A."

"I agree
René LeBlanc J.A."

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

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| **DOCKET:** | A-181-20 |

**JUDICIAL REVIEW OF THE DECISION DATED FEBRUARY 17, 2020 OF THE SOCIAL SECURITY TRIBUNAL OF CANADA (APPEAL DIVISION), NO. AD-19-291**

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| **STYLE OF CAUSE:** | ROBENA C. WEATHERLEY v. ATTORNEY GENERAL OF CANADA |
| **PLACE OF HEARING:** | HEARD BY ONLINE VIDEO CONFERENCE HOSTED BY THE REGISTRY |
| **DATE OF HEARING:** | JUNE 30, 2021 |
| **REASONS FOR JUDGMENT BY:** | STRATAS J.A. |
| **CONCURRED IN BY:** | GLEASON J.A.<br>LEBLANC J.A. |
| **DATED:** | JULY 29, 2021 |

**APPEARANCES:**

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