Federal Court of Appeal | Cour d'appel fédérale

Date: 20230601

Dockets: A-238-21 (Lead)
A-87-21
A-198-20

Citation: 2023 FCA 122

CORAM: **PELLETIER J.A.**
WEBB J.A.
RIVOALEN J.A.

BETWEEN:

SUSAN HUME SMITH

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

and

JUSTICE FOR CHILDREN AND YOUTH

Intervener

Heard at Toronto, Ontario, on January 25, 2023.

Judgment delivered at Ottawa, Ontario, on June 1, 2023.

REASONS FOR JUDGMENT BY: WEBB J.A.

CONCURRED IN BY: PELLETIER J.A.
RIVOALEN J.A.

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REASONS FOR JUDGMENT

WEBB J.A.

[1] There are three applications for judicial review related to the limitation of the payment of the disabled contributor's child benefits (DCCB) under subsection 74(2) of the *Canada Pension*

Plan, R.S.C., 1985 c. C-8 (the CPP) to 11 months prior to an application being made for such benefits. The three applications, and the related decisions of the Appeal Division of the Social Security Tribunal that are the subject of these applications, are:

> **A-198-20** – the decision (Tribunal File Number: AD-19-45) dismissing Mrs. Hume Smith's motion to raise a new argument related to section 7 of the *Canadian Charter of Rights and Freedoms* (the Charter);
>
> **A-87-21** – the decision (2021 SST 117) finding that the General Division had made errors of law in concluding that the limitation on the payment of benefits under subsection 74(2) of the CPP to 11 months prior to the application being made for such benefits infringed subsection 15(1) of the Charter; and
>
> **A-238-21** – the decision (2021 SST 412) allowing the appeal of the Minister of Employment and Social Development (the Minister) and setting aside the decision of the General Division referred to above on the basis that Mrs. Hume Smith had not established that the limitation on the payment of benefits under subsection 74(2) of the CPP violated the equality rights of her children under subsection 15(1) of the Charter.

[2] By the Order of this Court dated February 22, 2022 the three applications were consolidated into one proceeding with file A-238-21 being designated as the lead file. These reasons will be applicable to all three applications. The reasons will be filed in A-238-21 and a copy thereof will be placed in the other two files.

[3] For the reasons that follow, I would dismiss all three applications for judicial review.

I. Background

[4] Mrs. Hume Smith was granted a CPP disability benefit in February 1995. She has three children who were born in 1997, 1999, and 2002. Because she is receiving a disability pension under the CPP, her children were entitled to receive DCCB payments. She received inserts with letters from Service Canada explaining the availability of the DCCB, but she did not read them.

[5] If Mrs. Hume Smith had applied for the DCCB within the first year after each child was born, each child would have received a payment commencing in the month following the month in which that child was born. However, unfortunately, she did not make the appropriate DCCB application until January 2013.

[6] Subsection 74(2) of the CPP provides for the payment of the DCCB for a period of time prior to the application being made. However, subsection 74(2) of the CPP limits the retroactive payment of benefits to the 11-month period prior to the application being received. Mrs. Hume Smith therefore did not receive retroactive payment of the DCCB for each child commencing with the month after the month in which that child was born but rather only received retroactive payments for each child for the 11-month period preceding the month in which her application for these benefits was received. This limitation on the retroactive payment of DCCB to the 11 months preceding the application for these benefits is referred to herein as “the retroactivity cap”.

[7] Mrs. Hume Smith appealed to the General Division on the basis that the retroactivity cap infringed the equality rights of her children under subsection 15(1) of the Charter:

Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.	La loi ne fait acception de personne et s'applique également à tous, et tous ont droit à la même protection et au même bénéfice de la loi, indépendamment de toute discrimination, notamment des discriminations fondées sur la race, l'origine nationale ou ethnique, la couleur, la religion, le sexe, l'âge ou les déficiences mentales ou physiques.

II. Decision of the General Division (Tribunal File Number: GP-16-1586)

[8] As part of its decision that subsection 74(2) of the CPP infringed subsection 15(1) of the Charter, the General Division set out its findings with respect to the differential treatment of Mrs. Hume Smith's children in paragraphs 23 and 24:

> [23] The Claimant's children are in a distinct position from children whose parents are not disabled; they are in a distinct position from children whose disabled parent made an application within 11 months of their birth; they are in a distinct position from children, whether disabled or not, who have claims protected by provincial statutory limitation laws; and they are in a distinct position from adults who are able to apply for CPP benefits on their own behalf.
>
> [24] I find that the Claimant has established a distinction under section 15(1) of [the] Charter with respect to the enumerated ground of age and the analogous ground of her children being the children of a disabled parent.

[9] Having found a distinction based on "age and the analogous ground of her children being the children of a disabled parent", the General Division then considered whether the distinction discriminated "by perpetuating disadvantage or prejudice, or by stereotyping the claimant group" (paragraph 25). The conclusion of the General Division on this point is set out in paragraph 42:

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

[10] As a result, the General Division found that each of Mrs. Hume Smith's children "is entitled to the DCCB with an effective payment date commencing one month after" the month during which that child was born (paragraph 61).

III. Appeal Division Decisions

A. *First Decision of the Appeal Division*

[11] In its first decision, the Appeal Division dismissed Mrs. Hume Smith's motion to raise a new issue before it – whether subsection 74(2) of the CPP infringed section 7 of the Charter:

Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.	Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.

[12] The Appeal Division found that:

> [32] … if the Appeal Division finds that the General Division made an error, and decides to give the decision that the General Division should have given, it has the power to decide whether the Respondent's children have a section 7 Charter right to more than 11 months worth of retroactive benefits.

[13] However, the Appeal Division concluded that it would not exercise its discretion to allow Mrs. Hume Smith to raise this new section 7 argument, as Mrs. Hume Smith had not shown that there would be no prejudice to the Minister if this argument were to proceed (paragraphs 46 to 60). The Appeal Division also concluded that it would not be more efficient to include the section 7 argument in the appeal to the Appeal Division (paragraph 64).

B. *Second Decision of the Appeal Division*

[14] In the second Appeal Division decision, the Appeal Division acknowledged that the General Division correctly stated the two-part test for discrimination as set out by the Supreme Court of Canada in *Withler v. Canada (Attorney General)*, 2011 SCC 12, at paragraph 61 (which is set out in paragraph 61 below). The first part of the test requires a determination of whether the retroactivity cap creates a distinction based on an enumerated or analogous ground. Although a claim for discrimination necessarily involves making comparisons between the affected group and others, "the analysis should not become bogged down in a technical search for a specific comparator group" (reasons of the Appeal Division at paragraph 57).

[15] The Appeal Division noted, in paragraph 58 of its reasons, that while the General Division acknowledged that it should not seek to compare the particular group in this case with other comparator groups, it nonetheless identified four groups in paragraph 23 of its reasons (which is quoted in paragraph 8 above). The Appeal Division found that "[t]hese 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" (reasons of the Appeal Division at paragraph 59).

[16] The Appeal Division, in paragraph 60, identified three problems with the comparisons made by the General Division:

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.

[17] The Appeal Division emphasized that it was not suggesting that the General Division was required to find a precise comparator group. Rather, it referred to these groups to illustrate the flaws in the General Division's logic, which undermined the conclusion that the first part of the *Withler* test was met.

[18] With respect to the finding that the retroactivity cap creates or perpetuates a disadvantage by stereotyping children of disabled parents, the Appeal Division found that the General Division committed two errors of law. First, there is no evidence that the retroactivity cap treated children of disabled parents differently from other groups. In the Appeal Division's view, this error meant that the General Division's reasoning in the second part of the test as set out in *Withler* was also incorrect.

[19] The Appeal Division also looked at whether the retroactivity cap undermines a beneficial purpose of the DCCB by depriving children of a benefit that Parliament intended to give them. The Appeal Division summarized the purpose of the DCCB in paragraph 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.

[20] In paragraph 145, the Appeal Division addressed the finding of the General Division that the retroactivity cap undermines the purpose of the DCCB:

> 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.

[21] Since the Appeal Division found that the General Division made errors of law relating to section 15 of the Charter, it did not address the arguments related to section 1 of the Charter. Rather, the Appeal Division sought input from the parties concerning the appropriate remedy that it should grant.

C. *Third Decision of the Appeal Division*

[22] The third Appeal Division decision relates to the remedy. The Appeal Division addressed two arguments made by Mrs. Hume Smith in support of her position that the matter should be returned to the General Division. The first argument was that there was a gap in the recording of the hearing before the General Division and the second argument was that the General Division did not conduct a fair hearing.

[23] The Appeal Division noted that Mrs. Hume Smith did not show how the gap in the recording prevented Mrs. Hume Smith from presenting her case to the Appeal Division. The gap in the recording occurred during part of Mr. Williamson's oral evidence and the opening part of the Minister's argument. The only evidentiary part of the hearing that was missing was some of Mr. Williamson's testimony.

[24] Mr. Williamson was an expert witness for the Minister on the operation and underpinning of the CPP. The Appeal Division noted that Mr. Williamson gave both oral evidence and a written report. His evidence was about the history, purpose and operation of the CPP. He did not provide evidence concerning Mrs. Hume Smith or her children. His evidence

did not address any facts that were in issue. As a result, Mrs. Hume Smith's argument that the gap in the recording of Mr. Williamson's evidence prevented the Appeal Division from making a decision on the application of subsection 15(1) of the Charter to the retroactivity cap was rejected.

[25] The Appeal Division referred to three examples provided by Mrs. Hume Smith of how, in Mrs. Hume Smith's view, the General Division did not allow her the opportunity to fully present her case. These are set out in paragraph 59 of the reasons of the Appeal Division:

> … [Mrs. Hume Smith] says that the General Division:
>
> - Failed to give her more time to go through the many pages of documents the Minister filed;
> - Failed to explain to her the importance of cross-examining a witness; and
> - Frequently interrupted her, or cut her off.

[26] The Appeal Division found that Mrs. Hume Smith was able to effectively engage in the appeal before the General Division. This included the preparation and filing of a 44-page document outlining her evidence and arguments. Mrs. Hume Smith was aware that she could ask for an adjournment if she needed it. She was granted an adjournment to allow her to comply with the legal requirements to make a Charter challenge. The Appeal Division noted that there was nothing to indicate that Mrs. Hume Smith was "reluctant to go ahead with the hearing" (paragraph 73).

[27] While there was a large number of documents for Mrs. Hume Smith to review (over 1,600 pages), the Appeal Division noted that she had these documents for almost a year prior to the hearing. The Appeal Division noted that it is not the role of either the General Division or the Appeal Division to provide legal advice to an unrepresented claimant. In this particular case, although Mrs. Hume Smith is not a lawyer, she submitted a written argument to the General Division that is "articulate and sophisticated" (paragraph 79). The Appeal Division found that there was nothing to indicate that the General Division failed to do anything that could have made a difference to Mrs. Hume Smith's effective participation (paragraph 82).

[28] Mrs. Hume Smith argued that the General Division did not explain the importance of cross-examining Ms. MacNeil (one of the Minister's witnesses). The Appeal Division found, however, that the General Division was not obliged to give advice to Mrs. Hume Smith concerning whether she should cross-examine the witness.

[29] The General Division's response of "not really" to Mrs. Hume Smith's question of whether she was supposed to cross-examine Ms. MacNeil, was found by the Appeal Division to not mean that Mrs. Hume Smith was being discouraged from such cross-examination, but rather simply that she could choose whether to do so.

[30] In any event, there is no indication that Mrs. Hume Smith disagreed with the testimony of Ms. MacNeil. Mrs. Hume Smith did not identify what questions she would have posed to the witness or how the outcome might have been different if she would have cross-examined the witness.

[31] In addressing Mrs. Hume Smith's argument that the General Division frequently interrupted her or cut her off, the Appeal Division referred to three medical reports that were produced by Mrs. Hume Smith. The Appeal Division noted, in paragraph 93, that Mrs. Hume Smith "says that she was not trying to use them to prove that she meets the CPP definition of incapacity".

[32] Mrs. Hume Smith submitted that when she was trying to explain the relevance of the medical reports, the General Division did not let her do so. The Appeal Division, in response to this argument, stated:

> [94] This is not how I interpret the record. Prior to the hearing the Claimant explains the relevance of the medical reports in writing. She sets out how her disability may not meet the CPP definition of incapacity. Then she goes on to say why her disability is relevant to her argument that the DCCB retroactivity cap discriminates against children of disabled parents.
>
> [95] The member did not cut her off at the hearing on September 10, 2018. The recording of the hearing indicates that he had read what she had written and understood it. In fact, he states that he was simply confirming what the Claimant had already set out in writing about the medical reports. The Claimant agrees with him. She then reiterates the reason why she introduced the reports. The recording is clear. The member does not restrict the Claimant from saying what she had to say about her medical reports.
>
> [96] When I look at the hearing, together with the documentary evidence, the Claimant's position on the relevance of the medical reports was set out clearly. It was understood by the member, because it is reflected in his reasons for decision. She has not shown how this exchange led to a gap in the appeal record.

[33] Mrs. Hume Smith also submitted that the Minister was allowed to make an opening statement but she was not allowed to do so. The Appeal Division found, however, that

Mrs. Hume Smith informed the General Division that what she had intended to say in her opening statement was included in her written submissions, which the General Division had read.

[34] The Appeal Division also noted that opening statements are less common in administrative tribunals than in courts because the hearing is generally shorter and not meant to be formal. The Appeal Division noted that even though "it might have been preferable for the member not to have asked the Minister to give an opening statement either", Mrs. Hume Smith "has not explained how this different treatment of the parties led to any gaps in the appeal record. She does not point to anything of substance that she would have said, but didn't because of the way the hearing unfolded" (paragraphs 101 and 102).

[35] Mrs. Hume Smith submitted that when she was questioning Mr. Williamson, the General Division member told her that her questions were arguments that she should make the following day, which was the day set aside for argument. The Appeal Division found that Mrs. Hume Smith was told that if she had any arguments related to Mr. Williamson's testimony, she should raise them in oral argument. The General Division member also asked her if she had any evidence that she wanted to introduce in reply to Mr. Williamson's evidence. She indicated that she did not have any such evidence.

[36] On the day scheduled for making oral submissions, Mrs. Hume Smith indicated that "she did not feel up to making her arguments orally that day" (paragraph 104 of the third decision of the Appeal Division) but rather would be relying on her written submissions.

[37] With respect to the particular question posed to Mr. Williamson, the point Mrs. Hume Smith wanted to make was that it was unfair to limit the retroactive payment of the DCCB to ensure the long-term viability of the CPP. The Appeal Division found that Mrs. Hume Smith made this point in her written submissions and there was nothing to indicate what she would have added to the written submissions if she had made oral submissions.

[38] The Appeal Division concluded that "[t]he member certainly did not limit her right to present her case fully" (paragraph 113).

[39] As a result, the Appeal Division decided that the matter should not be returned to the General Division, but rather that the Appeal Division would make the decision that the General Division should have made.

[40] The Appeal Division first addressed the question of whether the retroactivity cap creates a distinction based on age. In particular, whether this cap "has a disproportionate impact on children … [*i.e.* whether] children are denied benefits more often than other groups because of the retroactivity cap" (paragraph 123).

[41] The Appeal Division found that Mrs. Hume Smith did not produce any evidence to show that the impugned law has a disproportionate impact on children. The only evidence produced related to the impact of the retroactivity cap on Mrs. Hume Smith's children.

[42] While the Appeal Division accepted the "general proposition that children are inherently vulnerable" (paragraph 140), this did not satisfy the requirement to show that the retroactivity cap has a disproportionate impact on children.

[43] The Appeal Division concluded that Mrs. Hume Smith had failed to establish that "the retroactivity cap has a disproportionate impact on children because of their age" (paragraph 141).

[44] The Appeal Division also found that being a child of a disabled parent is not an analogous ground for the purposes of section 15 of the Charter. The Appeal Division noted that, even if it was wrong in making this finding, the evidence did not support a finding that the retroactivity cap has a disproportionate impact on children of disabled parents. As part of this analysis, the Appeal Division found that it could not take official notice of certain studies published in academic journals that were submitted by the intervener. These studies were not introduced at the General Division hearing. In the Appeal Division's view, these studies should have been introduced as evidence at the General Division hearing.

[45] The Appeal Division therefore allowed the Minister's appeal and set aside the decision of the General Division. The children of Mrs. Hume Smith were only entitled to the retroactive DCCB payment as prescribed by subsection 74(2) of the CPP.

IV. Issues in the Applications to this Court

[46] Mrs. Hume Smith, in Part III of her memorandum, identifies four issues:

> **ISSUE 1:** What is the appropriate standard of review?
>
> **ISSUE 2:** Was the [Appeal Division] correct when it held that there were errors made by the [General Division] that warranted the [Appeal Division's] intervention?; And if so what is the appropriate remedy?
>
> **ISSUE 3:** Was the [Appeal Division] unreasonable when it decided to make the decision the [General Division] ought to have made? And if so, what is the appropriate remedy? and
>
> **ISSUE 4:** Was the [Appeal Division] unreasonable in dismissing Ms. Hume Smith's request to argue a violations [*sic*] of s. 7 of the Charter?

[47] Although Mrs. Hume Smith indicated that the standard of review is a separate issue in this appeal, a particular standard of review was incorporated into each of the other issues. The question of the appropriate standard of review for a particular issue will be addressed in these reasons when the issue to which it relates is addressed.

[48] Mrs. Hume Smith raises the issue of whether the Appeal Division erred in finding that the General Division committed errors of law and whether the Appeal Division erred in deciding to make the decision the General Division should have made. However, Mrs. Hume Smith does not, in her memorandum, raise or address the issue of whether the Appeal Division erred when it determined that subsection 74(2) of the CPP did not infringe section 15 of the Charter. This will be discussed more fully below in addressing Mrs. Hume Smith's argument submitted in relation to what Mrs. Hume Smith identified as "Issue 3".

[49] Since each application for judicial review is an application to review a particular decision of the Appeal Division, it is important to focus on the particular decision made by the Appeal

Division that is the subject of the related application and to identify the issue (or issues) raised by Mrs. Hume Smith with respect to each such decision. The issues raised by Mrs. Hume Smith in her memorandum can be linked to the particular decisions of the Appeal Division and the related applications for judicial review. The issues that will be addressed are:

1. Whether the Appeal Division erred in dismissing Mrs. Hume Smith's motion to raise a new argument related to section 7 of the Charter (A-198-20 and Mrs. Hume Smith's Issue 4);

2. Whether the Appeal Division erred in finding that the General Division made errors of law (A-87-21 and Mrs. Hume Smith's Issue 2); and

3. Whether the Appeal Division erred in not referring the matter back to the General Division and in deciding to make the decision the General Division should have made (A-238-21 and Mrs. Hume Smith's Issue 3).

V. Analysis

A. *Dismissal of the Motion to add Section 7 of the* Charter *(A-198-20) – First Decision of the Appeal Board*

[50] The parties agree that the standard of review for the decision of the Appeal Division to dismiss Mrs. Hume Smith's motion to raise a new issue with respect to section 7 of the Charter is reasonableness. This was a discretionary decision of the Appeal Division and I agree that the standard of review is reasonableness.

[51] As noted by the Supreme Court in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, at paragraph 85:

> … a reasonable decision is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker. The reasonableness standard requires that a reviewing court defer to such a decision.

[52] The Appeal Division, in dismissing Mrs. Hume Smith's motion, referred to paragraph 23 of the decision of the Supreme Court in *Guindon v. Canada*, 2015 SCC 41, in which the Supreme Court noted that the test for allowing a party to raise a new issue on an appeal is very strict:

> … The burden is on the appellant to persuade the Court that, in light of all of the circumstances, it should exercise its discretion to hear and decide the issue. There is no assumption of an absence of prejudice. The Court's discretion to hear and decide new issues should only be exercised exceptionally and never unless the challenger shows that doing so causes no prejudice to the parties.

[53] The Appeal Division found that Mrs. Hume Smith had not raised section 7 of the Charter as an issue in her appeal to the General Division. The Appeal Division also found that the legal and factual matrix related to a challenge made under section 7 is not necessarily the same as for a challenge under section 15 of the Charter. The Appeal Division found that Mrs. Hume Smith had not satisfied her burden to show that there would be no prejudice to the Minister if the section 7 argument were to proceed before it.

[54] Mrs. Hume Smith submits, in paragraph 199 of her memorandum, that "[t]he [Appeal Division] acted unreasonably in the exercise of its discretion by failing to point to specific

prejudice to which the Minister would have been subjected". In my view, this argument is contrary to the decision in *Guindon*, which noted that there is "no assumption of an absence of prejudice" and that the discretion should never be exercised "unless the challenger shows that doing so causes no prejudice to the parties" (paragraph 23 of *Guindon*). Mrs. Hume Smith had the onus to show that there would be no prejudice to the Minister. The decision of the Appeal Division that she failed to satisfy this onus was reasonable.

[55] It should be noted that section 58.3 of the *Department of Employment and Social Development Act*, S.C. 2005, c. 34 (the DESDA) now provides that an appeal from the Income Security Section (the applicable section in this matter) is to be heard and determined as a new proceeding. However, this provision was added to this statute by S.C. 2021, c. 23, s. 229, after the Appeal Division rendered its decision on July 14, 2020.

[56] I would therefore dismiss the application for judicial review of the decision of the Appeal Division dismissing Mrs. Hume Smith's motion to raise the section 7 Charter issue.

B. *Did the General Division Make Errors of Law (A-87-21)? – Second Decision of the Appeal Board*

[57] This application focuses on the Appeal Division's determination that the General Division made errors of law in finding that subsection 74(2) of the CPP infringed the equality rights of Mrs. Hume Smith's children under subsection 15(1) of the Charter by limiting their right to receive retroactive payments of the DCCB to the 11-month period preceding the month in which the application is made.

[58] Mrs. Hume Smith focused on section 58 of the DESDA which sets out the grounds for an appeal from a decision of the General Division to the Appeal Division:

58 (1) The only grounds of appeal of a decision made by the Employment Insurance Section are that the Section	**58 (1)** Les seuls moyens d'appel d'une décision rendue par la section de l'assurance-emploi sont les suivants :
(*a*) failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;	*a*) la section n'a pas observé un principe de justice naturelle ou a autrement excédé ou refusé d'exercer sa compétence;
(*b*) erred in law in making its decision, whether or not the error appears on the face of the record; or	*b*) elle a rendu une décision entachée d'une erreur de droit, que l'erreur ressorte ou non à la lecture du dossier;
(*c*) based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.	*c*) elle a fondé sa décision sur une conclusion de fait erronée, tirée de façon abusive ou arbitraire ou sans tenir compte des éléments portés à sa connaissance.

[59] Mrs. Hume Smith submits that there is no ground of appeal, as the General Division did not commit any of the errors stipulated in subsection 58(1) of the DESDA and, in particular, did not commit any error of law. However, in order to find that there was a valid appeal to the Appeal Division, it is only necessary to find that the General Division committed one error of law.

[60] Both parties submit that the standard of review for the question of whether the General Division made errors of law in relation to the Charter is correctness. In *Vavilov*, the Supreme Court confirmed in paragraph 53 that constitutional questions are reviewed on the standard of

correctness. Therefore, the question of whether the General Division erred in law in relation to the application of the Charter will be reviewed on the correctness standard.

[61] Both the General Division and the Appeal Division referred to the decision of the Supreme Court in *Withler*. While the Supreme Court in *Withler* eliminated the requirement to find a comparator group, it noted that a claim for discrimination still requires a comparison:

> [61] The substantive equality analysis under s. 15(1), as discussed earlier, proceeds in two stages: (1) Does the law create a distinction based on an enumerated or analogous ground? and (2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping? (See *Kapp* [*R. v. Kapp*, 2008 SCC 41], at para. 17.) Comparison plays a role throughout the analysis.
>
> [62] The role of comparison at the first step is to establish a "distinction". Inherent in the word "distinction" is the idea that the claimant is treated differently than others. Comparison is thus engaged, in that the claimant asserts that he or she is denied a benefit that others are granted or carries a burden that others do not, by reason of a personal characteristic that falls within the enumerated or analogous grounds of s. 15(1).

[62] In *Withler*, the distinction in that case was addressed in paragraphs 68 and 69:

> [68] The first step in the s. 15(1) analysis is to determine whether the law, on its face or in its apparent effect, creates a distinction on the basis of an enumerated or analogous ground. In this case the question is whether the pension schemes at issue deny a benefit to the claimants that others receive. The answer to this question is clear in this case.
>
> [69] The Reduction Provisions reduce the supplementary death benefit payable to the surviving spouses of plan members over either 60 or 65 years of age. Surviving spouses of plan members who die before they reach the prescribed ages are not subject to the Reduction Provisions. This age-related reduction in pension legislation constitutes a distinction for purposes of s. 15(1): *Law* [*Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, [1999] S.C.J.

> No. 12]. It is obvious that a distinction based on an enumerated or analogous ground is established.

[63] The General Division, in paragraphs 23 and 38, sets out its conclusion that those who were subject to the retroactivity cap in subsection 74(2) of the CPP were treated differently from others:

> [23] The Claimant's children are in a distinct position from children whose parents are not disabled; they are in a distinct position from children whose disabled parent made an application within 11 months of their birth; they are in a distinct position from children, whether disabled or not, who have claims protected by provincial statutory limitation laws; and they are in a distinct position from adults who are able to apply for CPP benefits on their own behalf.
>
> …
>
> [38] I have already determined that the claimant group is being treated differently than:
>
> - children whose parents are not disabled, disabled children whose parent made an application within 11 months of their birth;
> - children, whether disabled or not, who have claims protected by provincial statutory limitation laws;
> - and adults who are able to apply for CPP benefits on their own behalf.

[64] Although the General Division recites this list of persons who are treated differently from the claimant group, there is no explanation or discussion of how the retroactivity cap in subsection 74(2) of the CPP creates a distinction or difference between any of these identified

persons and the claimant group. As noted by the Supreme Court, it is still necessary to find that "the law create[s] a distinction based on an enumerated or analogous ground" (*Withler*, at paragraph 61).

[65] The determination of the correct question of law is a question of law (*Housen v. Nikolaisen*, 2002 SCC 33, at paragraph 101). In examining the distinctions identified by the General Division, it is evident that it was not applying the correct legal test, *i.e.* the General Division was not identifying a distinction created by the retroactivity cap in subsection 74(2) of the CPP that is based on an enumerated or analogous ground.

[66] The General Division stated that a relevant distinction was between Mrs. Hume Smith's children and children whose parents are not disabled. However, the issue in this matter is the denial of benefits that could have been received if her application had been made earlier. The retroactivity cap under subsection 74(2) of the CPP denies the payment of the DCCB for the period prior to the 11th month preceding the month of the application. There is no denial of a benefit that children whose parents are not disabled are entitled to receive, as children whose parents are not disabled do not receive any DCCB payments at all. The retroactivity cap in subsection 74(2) of the CPP does not create any distinction between Mrs. Hume Smith's children and children of parents who are not disabled.

[67] The difference between children of disabled parents who make a timely application for the DCCB (and therefore do not lose any benefits) and children of disabled parents who do not

make a timely application (and therefore are subject to the retroactivity cap) is the timing of the application. The timing of an application is not an enumerated or analogous ground.

[68] As support for its comparison between children whose claims are protected under provincial statutory limitation laws, the General Division, in footnote 12, referred to section 6 of the *Limitations Act, 2002*, S.O. 2002, c. 24, Schedule B. The General Division stated "[s]ection 6 of the Ontario Limitations Act, 2002 provides that any limitation period established by that Act does not run during any period that a person with the claim is a minor". However, the General Division did not include the actual wording of this section. Section 6 of the *Limitations Act, 2002* states:

6 The limitation period established by section 4 does not run during any time in which the person with the claim,	**6** Le délai de prescription créé par l'article 4 ne court pas pendant toute période au cours de laquelle le titulaire du droit de réclamation :
(*a*) is a minor; and	*a*) d'une part, est mineur;
(*b*) is not represented by a litigation guardian in relation to the claim.	*b*) d'autre part, n'est pas représenté par un tuteur à l'instance à l'égard de la réclamation.

[69] The suspension of the limitation period does not apply if the minor is represented by a litigation guardian in relation to the claim. Therefore, there is no suspension of the limitation period if there is a person who can make the claim on behalf of the minor.

[70] Subsection 74(1) of the CPP provides that a claim for the DCCB can be made by another person:

74 (1) An application for a disabled contributor's child's benefit or orphan's benefit may be made on behalf of a disabled contributor's child or orphan by the child or orphan or by any other person or agency to whom the benefit would, if the application were approved, be payable under this Part.	**74 (1)** Une demande de prestation d'enfant de cotisant invalide ou une demande de prestation d'orphelin peut être faite, pour le compte d'un enfant de cotisant invalide ou pour celui d'un orphelin, par cet enfant ou par cet orphelin, ou par toute autre personne ou tout autre organisme à qui la prestation serait, si la demande était approuvée, payable selon la présente partie.

[71] The CPP provides that another person can make a claim for the DCCB on behalf of the child. Therefore, the more accurate comparison of the CPP to the *Limitations Act, 2002* would be to a minor who has a litigation guardian appointed under the *Limitations Act, 2002* who can make the claim on behalf of the minor. Since there is no suspension of the limitation period under the *Limitations Act, 2002* for minors if a litigation guardian is appointed, the CPP does not create a difference in comparison to the *Limitations Act,* 2002.

[72] In stating that there is a difference between the claimant group and adults who are able to apply for CPP benefits (other than the DCCB) on their own behalf, it should be noted that there is a retroactivity cap that applies to adults. For example, paragraph 67(3.1)(*c*) of the CPP provides a retroactivity cap on adults who apply for a pension:

(3.1) For a retirement pension that commences to be payable on or after January 1, 2012 and if the applicant is not an estate, subject to section 62, if payment of the retirement pension is approved, the pension is payable for each month commencing with the latest of	**(3.1)** En ce qui concerne une pension de retraite qui devient payable à compter du 1er janvier 2012, si les requérants ne sont pas des ayants droit et sous réserve de l'article 62, la pension dont le paiement est approuvé est payable mensuellement

	à compter du dernier en date des mois suivants :
(*a*) the month in which the applicant reached sixty years of age,	*a*) le mois au cours duquel le requérant atteint l'âge de soixante ans;
(*b*) the month following the month in which the application was received if they were under sixty-five years of age when they applied,	*b*) le mois suivant celui au cours duquel la demande du requérant a été reçue, s'il n'avait pas atteint l'âge de soixante-cinq ans au moment de la réception;
(*c*) the eleventh month preceding the month in which the application was received if they have reached sixty-five years of age when they applied, but in no case earlier than the month in which they reached sixty-five years of age, and	*c*) le onzième mois précédant celui au cours duquel la demande du requérant a été reçue, s'il a atteint l'âge de soixante-cinq ans avant la réception, ce onzième mois ne pouvant en aucun cas être antérieur à celui au cours duquel il a atteint l'âge de soixante-cinq ans;
(*d*) the month chosen by the applicant in their application.	*d*) le mois que choisit le requérant dans sa demande.

[73] Therefore, the provision related to the payment of a regular CPP pension to adults includes the same retroactivity cap for individuals 65 or older (11 months prior to the month in which the application is made). For individuals under 65, there is no retroactive payment for individuals and, therefore, no need for a retroactivity cap. There is no distinction between the claimant group and adults applying for a regular pension who are entitled to a retroactive payment of benefits. As noted by the Appeal Division in paragraph 134 and footnote 43 of its reasons, similar retroactivity caps apply to other benefit payments under the CPP.

[74] As noted by the Appeal Division, if the General Division based this distinction (between Mrs. Hume Smith's children and adult applicants for other benefits) on the factual finding that

the retroactivity cap has a disproportionate impact on children, when compared with adults applying for other benefits, there is no evidence as to the disproportionate impact to support this conclusion. To make a finding without any evidence to support that finding is an error of law (*R. v. J.M.H.*, 2011 SCC 45, at paragraph 25).

[75] Mrs. Hume Smith, in paragraphs 124 to 127 of her memorandum, addressed the Appeal Division's criticism of the comparisons selected by the General Division and defended the distinctions identified by the General Division:

> 124. The [Appeal Division], in applying a formalistic approach, asserts that these comparator groups are not relevant on the basis that children whose parents are not disabled and children whose claims are protected by provincial statutory limitation laws are not affected by the retroactivity cap. And, that children whose disabled parents made an application on time are in a "distinct position" due to the "timing of the applications, not how the retroactively caps works" [*sic*]
>
> 125. Rather, using the appropriate contextual approach, the [General Division's] comparison to children of parents who are not disabled is a valid comparator group because, while these children are not eligible for the DCCB specifically, it is not possible that the parent on whom they rely be unable to apply for any other benefit to which they are entitled because of disability.
>
> 126. The next comparator group, children whose parent makes [an] application for the DCCB within 11 months of their birth is valid because it is not possible for these children to lose access to a benefit because of the disability of the parent on whom they rely.
>
> 127. Finally, the [General Division's] comparison to children who have claims protected by provincial statutory limitation laws is valid because the provincial limitation laws recognize the legal incapacity of children, and ensure that a person who is capable and will act in the best interests of the child is available to step in on their behalf. These limitation laws include requirements of government or court oversight – to ensure a child is not left behind simply <u>because their responsible parent may be unable to act due to disability.</u>

[emphasis added]

[76] There are two issues with respect to Mrs. Hume Smith's attempt in paragraph 125 to support the General Division's reference to children of parents who are not disabled. The first is the reference to the parent's ability (or inability) to apply for benefits. As noted above, in paragraph 93 of its decision to not refer the matter back to the General Division, the Appeal Division found that Mrs. Hume Smith was not trying to use the medical reports that she submitted to the General Division to "prove that she meets the CPP definition of incapacity". This finding has not been challenged in the judicial review application related to this decision.

[77] Incapacity is addressed in subsection 60(8) of the CPP:

(8) Where an application for a benefit is made on behalf of a person and the Minister is satisfied, on the basis of evidence provided by or on behalf of that person, that the person had been incapable of forming or expressing an intention to make an application on the person's own behalf on the day on which the application was actually made, the Minister may deem the application to have been made in the month preceding the first month in which the relevant benefit could have commenced to be paid or in the month that the Minister considers the person's last relevant period of incapacity to have commenced, whichever is the later.	**(8)** Dans le cas où il est convaincu, sur preuve présentée par le demandeur ou en son nom, que celui-ci n'avait pas la capacité de former ou d'exprimer l'intention de faire une demande le jour où celle-ci a été faite, le ministre peut réputer cette demande de prestation avoir été faite le mois qui précède celui au cours duquel la prestation aurait pu commencer à être payable ou, s'il est postérieur, le mois au cours duquel, selon le ministre, la dernière période pertinente d'incapacité du demandeur a commencé.

[78] Incapacity, for the purposes of the CPP, would mean that a person is incapable of forming or expressing an intention to make an application for benefits, *i.e.* the person is unable to apply for benefits. There is no dispute that Mrs. Hume Smith was disabled for the purposes of the CPP and, therefore, that her children were entitled to the DCCB. However, the test for disability is not the same as for incapacity.

[79] In this matter, Mrs. Hume Smith was not attempting to prove that she was incapacitated for the purposes of the CPP. There was no finding of the General Division that Mrs. Hume Smith was incapacitated for the purposes of the CPP. Mrs. Hume Smith acknowledged during oral argument in this judicial review application that she was not claiming that she was incapacitated for the purposes of the CPP at the relevant times. There was no finding by the General Division that Mrs. Hume Smith was unable to apply for the DCCB in this case (paragraph 87 of the second decision of the Appeal Division). Therefore, there is no basis for Mrs. Hume Smith, in paragraph 125, to refer to a parent who is unable to apply for benefits.

[80] The second issue with Mrs. Hume Smith's attempted support of the General Division's reference to children of parents who are not disabled, is the reference to "it is not possible that the parent on whom [children of parents who are not disabled] rely be unable to apply for any other benefit to which they are entitled because of disability". While Mrs. Hume Smith acknowledges that children of parents who are not disabled "are not eligible for the DCCB specifically", she has not identified any "other benefit to which *they* are entitled because of disability" (emphasis added). Mrs. Hume Smith's submission in paragraph 125 does not support the General Division's finding that the different treatment of Mrs. Hume Smith's children and

children of parents who are not disabled is a relevant distinction for the purposes of subsection 15(1) of the Charter.

[81] In paragraph 126, Mrs. Hume Smith attempts to support the General Division's finding that the different treatment of children whose parents apply for the DCCB within 11 months of their birth is a relevant distinction for the purposes of section 15 of the Charter. However, as noted by the Supreme Court in paragraph 61 of *Withler*, the distinction must be based on enumerated or analogous grounds. The only distinction between children whose disabled parents apply for the DCCB within 11 months of their birth and those whose disabled parents apply later, is the timing of the application. The timing of the application is not an enumerated or analogous ground. This submission therefore does not support a finding that the General Division applied the correct test.

[82] The last paragraph in Mrs. Hume Smith's memorandum in which she attempts to support the comparisons conducted by the General Division is paragraph 127. In this paragraph, Mrs. Hume Smith is referring to a person stepping in to act on behalf of a minor. Mrs. Hume Smith refers to paragraph 23 of the General Division's decision. The entire paragraph 23 and the related footnote 12 of the decision of the General Division are as follows:

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

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

[emphasis added]

[83] The General Division did not refer to the appointment of any person to act on behalf of a minor. The only comparison referenced by the General Division was the suspension of the limitation period while the claimant is a minor (subsection 6(*a*) of the *Limitations Act, 2002 (Ontario)*). The General Division did not acknowledge that the limitation period is not suspended if a minor is represented by a litigation guardian. As a result, the General Division's comparison was inapt as the limitation period under the *Limitations Act, 2002* continues to run when a responsible person can act on behalf of the minor. The General Division's comparison applied the wrong test, and was therefore an error of law, when it ignored the effect of the appointment of a litigation guardian.

[84] In any event, the distinction now being raised by Mrs. Hume Smith is the requirement of government or court oversight of a person appointed to act on behalf of a minor under provincial statutory limitation laws. Having government or court oversight is not an enumerated or analogous ground for the purposes of section 15(1) of the Charter. This new distinction (which was not identified by the General Division) does not, in any event, support a finding that the General Division applied the correct legal test.

[85] As a result, although the General Division referred to the decision in *Withler*, it did not apply the legal test as set out in *Withler*. As stated in paragraph 61 of *Withler*, the first stage of

the substantive equality analysis is the determination of whether the law creates a distinction based on an enumerated or analogous ground. The examples of the alleged distinction cited by the General Division either fail to disclose any distinction created by the law in question, or, if a distinction is identified, that distinction is not based on an enumerated or analogous ground. Therefore, the General Division did not apply the correct legal test for the first stage of the substantive equality analysis.

[86] In finding that there is a distinction between Mrs. Hume Smith's children and adult applicants for other benefits under the CPP (who also have a retroactivity cap), the General Division erred in law as there is no evidence to support a finding that there is any disproportionate impact of the retroactivity cap on Mrs. Hume Smith's children, in comparison to the impact of the retroactivity cap on adult applicants for other benefits.

[87] The errors of law made by the General Division in not applying the correct legal test for the first stage of the substantive equality analysis satisfy the requirement for a ground of appeal for an appeal to the Appeal Division as provided in subsection 58(1) of the DESDA (in particular the ground identified in paragraph (*b*)). Since the errors of law were made in relation to the first stage of the substantive equality analysis, it is not necessary to review or comment on the analysis completed by the General Division or the Appeal Division in relation to the second stage of the substantive equality analysis.

[88] As a result, I would dismiss this application for judicial review of the decision of the Appeal Division that the General Division made errors of law.

C. *Decision to Not Refer the Matter Back to the General Division (A-238-21) – Third Decision of the Appeal Board*

[89] The third application for judicial review is the review of the decision of the Appeal Division to not refer the matter back to the General Division, but rather to make the decision that the General Division should have made.

[90] Mrs. Hume Smith's submissions in relation to this decision are in paragraphs 166 to 182 of her memorandum. Mrs. Hume Smith commences these submissions by stating "[t]here are a number of concerns regarding procedural fairness at the [Appeal Division]". However, all of the alleged procedural fairness issues arose at the hearing before the General Division, not the Appeal Division:

- The absence of a recording of part of the hearing before the General Division (paragraphs 168 to 172);

- Mrs. Hume Smith's difficulties in reviewing all of the material before the General Division hearing and the lack of guidance concerning the importance of responding to the Minister's evidence (paragraph 175);

- Mrs. Hume Smith's allegations that she did not have a fulsome opportunity to review the evidence and submissions of the Minister or to cross-examine the Minister's witness at the hearing before the General Division (paragraphs 176 and 177);

- Mrs. Hume Smith's allegations that she was interrupted or cut off by the General Division member and that she was not allowed to make an opening statement or explain fully why she wanted to introduce the medical reports (paragraph 178);

- The statement by the General Division that Mrs. Hume Smith's questions to a witness were arguments and the failure of the General Division to advise Mrs. Hume Smith that the arguments she was attempting to ask as questions could be made during closing argument (paragraph 179); and

- The assurance by the General Division that she did not need to provide any additional evidence (paragraph 180).

[91] None of these alleged breaches of procedural fairness relate to the hearing before the Appeal Division.

[92] Mrs. Hume Smith submits that the standard of review for the issue of procedural fairness in relation to the hearing before the General Division is correctness. The Crown submits that the standard of review for the findings of the Appeal Division in relation to the questions raised concerning whether the proceeding before the General Division was procedurally fair is reasonableness. In my view, however, the issue related to the decision of the Appeal Division to not refer the matter back to the General Division, but rather to render the decision that the General Division should have made, is not whether the proceeding before either the General Division or the Appeal Division was procedurally fair. The issue is whether the Appeal Division had an adequate record to render the decision that the General Division should have made. Mrs. Hume Smith is not seeking to overturn the decision of the General Division, as she was successful before the General Division. None of the alleged incidents of breaches of procedural fairness prevented Mrs. Hume Smith from convincing the General Division that the retroactivity cap in subsection 74(2) of the CPP infringed subsection 15(1) of the Charter.

[93] In my view, the issue is not procedural fairness but rather the adequacy of the record before the Appeal Division. The standard of review for the decision of the Appeal Division that the record was adequate is reasonableness.

[94] The Appeal Division addressed each of the alleged breaches of procedural fairness. The conclusions of the Appeal Division are set out in paragraphs 112 to 114:

> [112] When I listen to the recording of the General Division hearing as a whole, including the pre-hearing conference and the adjourned May 2, 2018 hearing, I conclude that the member conducted the hearing fairly. He was sensitive to the Claimant's need to proceed in a series of shorter sessions. He tried to put her at ease. He did not run the hearing in a way that was formal or technical. He tried to make an inherently complex process as simple as possible in the circumstances. He also did not sit in silence. He asked her questions about her circumstances and her family. Because he asked her those questions, her answers then amplified the points she was trying to make.
>
> [113] The member certainly did not limit her right to present her case fully.
>
> [114] None of this alters the fact that the Claimant was at a disadvantage. But the disadvantage comes from being a self-represented appellant trying to present a constitutional challenge to legislation. This disadvantage is a flaw in our legal system. In this case it comes from the Claimant being self-represented, not from how the General Division member conducted this hearing. The Claimant had a fair opportunity to gather evidence and present her case.

[95] Mrs. Hume Smith has not established that the decision of the Appeal Division that she was able to present her case fully was unreasonable. Therefore, the Appeal Division had an adequate record to make the decision that the General Division should have made.

[96] None of Mrs. Hume Smith's concerns with respect to the conduct of the hearing before the General Division relate to any attempt by her to introduce additional evidence that would have addressed the concerns raised by the Appeal Division. In making the decision the General Division should have made, the Appeal Division found that Mrs. Hume Smith had not established that "the retroactivity cap has a disproportionate impact on children because of their age" (paragraph 141).

[97] The only evidence presented by Mrs. Hume Smith was related to her own children. There is no indication that Mrs. Hume Smith has any other evidence that she wanted to introduce at the General Division hearing concerning the impact on other children of a disabled parent. This lack of evidence with respect to children, other than Mrs. Hume Smith's children, was also the basis for dismissing Mrs. Hume Smith's claim based on treating a child of a disabled parent as an analogous ground. The Appeal Division addressed this issue in the event it was wrong that being a child of a disabled parent is not an analogous ground.

[98] In her memorandum, Mrs. Hume Smith did not provide any further submissions concerning this decision of the Appeal Division and, in particular, she did not provide any submissions on why the Appeal Division erred in finding that she had failed to establish that the retroactivity cap has a disproportionate impact on children of a disabled parent.

[99] The Appeal Division also found that being the child of a disabled parent is not an analogous ground. The Appeal Division concluded that even if it was wrong in finding that being a child of a disabled parent is not an analogous ground, Mrs. Hume Smith had not demonstrated

that children of disabled parents are disproportionately affected by the retroactivity cap. The only evidence produced by Mrs. Hume Smith was the evidence related to her own children.

[100] The standard of review for the question of whether being a child of a disabled parent is an analogous ground is correctness, as this is a question of law related to the application of the Charter. The standard of review for the question of whether the Appeal Division erred in finding that the evidence was insufficient to support a claim based on treating a child of a disabled parent as an analogous ground, is reasonableness, as this is a finding of fact.

[101] Mrs. Hume Smith has also not established that the Appeal Division's decision that, even if being a child of a disabled parent is an analogous ground, Mrs. Hume Smith's evidence failed to establish that this group is disproportionately affected by the retroactivity cap. Since Mrs. Hume Smith has not established that children of a disabled parent were disproportionately affected by the retroactivity cap, the question of whether being a child of a disabled parent is an analogous ground does not arise.

[102] In oral submissions, Mrs. Hume Smith referred to subsection 60(8) of the CPP (quoted in paragraph 77 above). In effect, if this subsection applies, there would be no retroactivity cap. As noted above, the Appeal Division found that Mrs. Hume Smith was not trying to introduce evidence to show that she was incapacitated for the purposes of this subsection. This finding has not been challenged.

[103] The relevance of subsection 60(8) to Mrs. Hume Smith's argument that subsection 74(2) of the CPP discriminates against children in applying a retroactivity cap is unclear. It should be noted that, as a result of the application of subsection 74(1) and section 75 of the CPP, the application for the DCCB can be made by the person who has custody and control of the child. Therefore, the lack of the child's capacity to apply for the benefit does not result in a denial of the benefit.

[104] In responding to the question of whether the argument is that the distinction being drawn is that there are relieving provisions available to incapacitated adults, but not to children who are legally incapacitated, Mrs. Hume Smith's response was that the argument was not limited to incapacity but rather to various relieving provisions applicable to adults that are not available to provide relief from the retroactivity cap for DCCB payments.

[105] However, it is far from clear what relieving provisions Mrs. Hume Smith is basing her argument on. Mrs. Hume Smith referred to paragraph 23 of the General Division decision as support for her argument that adults were treated differently from children. Paragraph 23 of the General Division decision states:

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

[106] The General Division did not elaborate on how Mrs. Hume Smith's children are in a distinct position from adults applying for their own benefits. As noted above, adults applying for benefits under different provisions of the CPP are also subject to a retroactivity cap.

[107] Mrs. Hume Smith, in oral argument, referred to the deeming provision and waiver under subsections 60(1.1) and (1.2) that are applicable to other benefit payments for adults under the CPP:

(1.1) An application for a post-retirement benefit under subsection (1) is deemed to be made on January 1 of the year following the year of the unadjusted pensionable earnings referred to in section 76.1 if	**(1.1)** Pour l'application du paragraphe (1), une demande visant l'obtention d'une prestation après-retraite est réputée avoir été faite le 1er janvier de l'année suivant celle, visée à l'article 76.1, au cours de laquelle des cotisations sont versées relativement à des gains non ajustés ouvrant droit à pension par le bénéficiaire d'une pension de retraite à cette date si le ministre détient à son égard les renseignements nécessaires pour déterminer si une telle prestation lui est payable.
(*a*) the person is a beneficiary of a retirement pension on that day; and	
(*b*) the Minister has the information necessary to determine whether a post-retirement benefit is payable to them.	
(1.2) The Minister may waive the requirement under subsection (1) for an application for a retirement pension to be made by a person or on their behalf if the Minister is satisfied that	**(1.2)** Le ministre peut dispenser toute personne de l'obligation de présenter une demande visant l'obtention d'une pension de retraite prévue au paragraphe (1), s'il est convaincu que la personne, à la fois :
(*a*) the person is a contributor;	*a*) est un cotisant;
(*b*) the person is 70 years old or more; and	*b*) est âgée d'au moins soixante-dix ans;
(*c*) at least one of the following applies in respect of the person:	*c*) remplit au moins l'une des conditions suivantes :
(i) the person is in receipt of a benefit under this Act, the *Old*	(i) elle reçoit une prestation en vertu de la présente loi, de la *Loi*

Age Security Act or a provincial pension plan, and	*sur la sécurité de la vieillesse* ou d'un régime provincial de pensions,
(ii) a return of income was filed by the person or on their behalf under the *Income Tax Act* in respect of the year before the year in which the Minister considers waiving the requirement.	(ii) elle a produit, conformément à la *Loi de l'impôt sur le revenu*, une déclaration de revenu pour l'année d'imposition précédant l'année au cours de laquelle le ministre envisage d'octroyer la dispense.

[108] However, there are additional conditions that must be satisfied in order for either the deeming rule in subsection 60(1.1) or the waiver provided in subsection 60(1.2) to be applicable. For the deeming rule to be applied, the person must already be a beneficiary of a pension and the Minister must have all of the necessary information. For the waiver to be available, the person must be a contributor and either in receipt of a benefit under one of the identified statutes or the person must have filed a tax return for the prior year. The distinction for the availability of the deeming rule or a waiver is not an enumerated or analogous ground as the receipt of a pension or benefit, or the filing of a tax return is not an enumerated or analogous ground.

[109] Mrs. Hume Smith has not established that the Appeal Division erred in finding that it would not refer the matter back to the General Division, but rather that it could make the decision that the General Division should have made. Mrs. Hume Smith has also not established that the Appeal Division erred in making the decision that the retroactivity cap, as provided in subsection 74(2) of the CPP, does not infringe subsection 15(1) of the Charter. I would therefore dismiss this application for judicial review of the decision of the Appeal Division allowing the Minister's appeal and setting aside the decision of the General Division.

VI. Conclusion

[110] I would dismiss the three applications for judicial review. The respondent is not seeking costs. Mrs. Hume Smith requested costs, regardless of the outcome. I would not, however, award any costs.

"Wyman W. Webb"
J.A.

"I agree.
J.D. Denis Pelletier J.A."

"I agree.
Marianne Rivoalen J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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CONCURRED IN BY:	PELLETIER J.A. RIVOALEN J.A.
DATED:	JUNE 1, 2023

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