

**SOCIAL SECURITY TRIBUNAL OF CANADA**

B E T W E E N :

**MINISTER OF EMPLOYMENT AND SOCIAL DEVELOPMENT**

Appellant

- and -

**SUSAN HUME SMITH**

Respondent

- and -

**JUSTICE FOR CHILDREN AND YOUTH**

Intervener

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**WRITTEN SUBMISSIONS OF THE INTERVENER,  
JUSTICE FOR CHILDREN AND YOUTH**

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**JUSTICE FOR CHILDREN AND YOUTH**  
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## **PART I – OVERVIEW**

1. Children are inherently and particularly vulnerable as a result of their relative immaturity, their lack of sophistication, and their dependency on adults, particularly their parents, to provide for their developmental, emotional, and physical needs. Their vulnerability is exacerbated where their parents' ability to provide for them is compromised by their own experience of systemic disadvantage as the result of disability. Children are entitled to special protections under the law that appropriately correspond to their needs and capacities to ensure that they are able to meaningfully exercise their rights and obtain benefits due to them under the law, such as the CPP-D children's benefit, consistent with international and domestic law. The failure to account for children's disadvantage which results in the denial of benefits to which they are otherwise entitled is contrary to their best interests, to Canada's international obligations, and to the guarantee of substantive equality under the *Charter*.

## **PART II - FACTS**

2. This appeal arises from a decision of the Social Security Tribunal – General Division. The Respondent in this appeal, Susan Hume Smith, applied to the General Division for reconsideration of the decision of the Minister of Employment and Social Development (the "Minister") limiting retroactive payment of the Disabled Contributor's Child's Benefit to 11 months. The General Division determined that, insofar as section 74(2) of the *Canada Pension Plan* limits retroactive payments of the CPP-D children's benefit to 11 months from the date of application by a child beneficiary, it infringes section 15 of the *Charter*.

3. In particular, the General Division found that the provision imposes a distinction on the basis of age and the intersecting analogous ground of being the child of a disabled parent. This

distinction has the effect of perpetuating the disadvantage experienced by children of a parent with a disability. The General Division found that the provision violated section 15 of the *Charter* and was not saved by section 1.<sup>1</sup> The Minister sought leave to appeal of that decision, which was granted March 7, 2019. Justice for Children and Youth (“JFCY”) sought leave to intervene in the appeal, which was granted March 19, 2020.

### **PART III – ISSUES**

4. JFCY takes no position on the disposition of this appeal. JFCY requests that, in deciding the substance of the appeal, the Social Security Tribunal:
- a. Have regard to the Supreme Court of Canada’s recent decision in *Fraser* with respect to the analytical framework for substantive equality under section 15 of the *Charter*;
  - b. Consider the pre-existing disadvantage of children and particularly of children of parents with disabilities, as established by Canadian and international law and by reference to social facts concerning the disadvantages experienced by children of parents with disabilities;
  - c. Consider the special legal protections provided to children in various legal contexts to ensure that they are able to realize their legal rights and entitlements;
  - d. Consider the ways in which the CPP-D legislative scheme imposes disproportionate impact on children of parents with disabilities by failing to account for the unique circumstances, and developmental, social, and familial realities, exacerbating their inherent disadvantage.

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<sup>1</sup> *Susan Hume Smith v Minister of Employment and Social Development*, Tribunal File No. GP-16-1586, decision dated October 16, 2018 at para 19-23, 37-42, 54-60.

## PART IV – ARGUMENT

### A. *FRASER* AND ADVERSE EFFECTS DISCRIMINATION UNDER SECTION 15

5. As Intervener, JFCY will not repeat the analytical framework articulated by the parties with respect to the interpretation and application of section 15 of the *Charter* to the specific facts of this case, but adds the following additional argument and observations.

6. In particular, the Intervener adopts the submissions of the Respondent, Ms. Hume Smith, with respect to the interpretation and application of section 15 of the *Charter* in this case. These submissions will accordingly provide additional context and argument with respect to the disadvantage experienced by children, in particular children of parents with a disability, and the appropriate legal protections that may be required to ensure that they benefit equally from the CPP-D benefits to which they are entitled.

7. In the recent case of *Fraser*, the Supreme Court of Canada has clarified and helpfully elaborated upon the law and principles with respect to adverse effects discrimination, defined as “discrimination [which] occurs when a seemingly neutral law has a disproportionate impact on members of groups protected on the basis of enumerated or analogous grounds. Rather than singling members of protected groups out for differential treatment, the law indirectly places them at a disadvantage”.<sup>2</sup>

8. The Court in *Fraser* noted the shift towards an effects-based understanding of discrimination, which critically examines systems, structures, and their impact on disadvantaged groups, and the need for governments to be “particularly vigilant about the effects of their own

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<sup>2</sup> *Fraser v Canada (Attorney General)*, 2020 SCC 28 [*Fraser*] at para 30.

policies”<sup>3</sup>. Neutral laws may result in serious inequality where laws ignore the “true characteristics of a group which act as headwinds to the enjoyment of society’s benefits”<sup>4</sup> or where they fail to appropriately accommodate members of protected groups<sup>5</sup>. Remedying adverse effects discrimination requires an examination of the way institutions and structures must be changed to ensure they are “available, accessible, meaningful and rewarding” for members of diverse groups<sup>6</sup>.

9. The first step in the analysis is to establish disproportionate impact, which is established where members of protected groups are denied benefits or forced to take on burdens more frequently than others.<sup>7</sup>

10. The second step of the inquiry asks whether the law has the effect of reinforcing, perpetuating, or exacerbating disadvantage. The Court has cautioned against rigid template of factors to be considered; the focus is on the protection of historically disadvantaged groups from harm, which may include “economic exclusion or disadvantage, social exclusion, psychological harm, physical harm, or political exclusion”<sup>8</sup>.

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<sup>3</sup> *Fraser* at para 31.

<sup>4</sup> *Fraser* at para 47, quoting *Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241, at para 67.

<sup>5</sup> *Fraser* at para 54

<sup>6</sup> *Fraser*, quoting Shelagh Day and Gwen Brodsky, “The Duty to Accommodate: Who Will Benefit?” (1996), 75 *Can. Bar Rev.* 433, at p. 462.

<sup>7</sup> *Fraser* at para 55.

<sup>8</sup> *Fraser* at para 76-78.

**B. CHILDREN, ESPECIALLY CHILDREN OF PARENTS WITH DISABILITIES, ARE A PARTICULARLY AND INHERENTLY VULNERABLE GROUP**

**a. Children are widely recognized as inherently vulnerable and as facing pre-existing disadvantage**

11. There is broad social and legal consensus that children are a particularly and inherently vulnerable group in society, occasioned by their reduced mental and physical maturity, their relative lack of sophistication, and their dependency on adults. Courts have repeatedly recognized children as a vulnerable group, facing pre-existing disadvantage, in Canadian society.<sup>9</sup>

12. As the Supreme Court of Canada has noted, “[r]ecognition of the *inherent* vulnerability of children has consistent and deep roots in Canadian law. . . . The law attributes the heightened vulnerability based on chronology, not temperament”.<sup>10</sup> As the Court noted in *DB*, young people have heightened vulnerability, less maturity and a reduced capacity for judgment<sup>11</sup>. The Court has also noted that “while many adolescents may have the technical ability to make complex decisions, this does not always mean they will have the necessary maturity and independence of judgment to make truly autonomous decisions” as a consequence of their developing cognitive capacities.<sup>12</sup> They are likely to be less aware of their legal rights and entitlements, and less able

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<sup>9</sup> *Canadian Foundation for Children, Youth and the Law*, 2004 SCC 4, [2004] 1 SCR 76 at para 225 per Deschamps, J., dissenting on other grounds; *R v Sharpe*, [2001] 1 SCR 45, 2001 SCC 2 at para 170-178.

<sup>10</sup> *AB v Bragg Communications*, [2012] 2 SCR 46, 2012 SCC 46 at para 17 (emphasis in original).

<sup>11</sup> *R v DB*, [2008] 2 S.C.R. 3, 2008 SCC 25 at paras 61–64.

<sup>12</sup> *AC v Manitoba (Director of Child and Family Services)*, 2009 SCC 30, [2009] 2 S.C.R. 181 at para 71.

to assert them.<sup>13</sup>

13. There is furthermore international consensus about the vulnerable position of children. The *United Nations Convention on the Rights of the Child*, to which Canada is signatory and which is specifically incorporated in Canadian legislation, specifically recognizes that childhood is entitled to special care and assistance and that children, by reason of their relative immaturity, need special safeguards and care, including appropriate legal protection.<sup>14</sup> The *UNCRC* is the most universally accepted human rights instrument in history, and an important source for interpreting children's rights domestically.<sup>15</sup>

14. Children are furthermore dependent on adults, generally their parents, for their material and developmental needs as their capacities evolve and they grow towards independence.<sup>16</sup> Their reliance on adults to provide for their needs heightens their vulnerability and susceptibility to disadvantage.

15. Children's pre-existing disadvantage and vulnerable position in society is widely recognized and not a matter of controversy.

**b. Courts and tribunals may properly take judicial notice of the heightened disadvantage experienced by children of parents with disabilities**

16. Just as children's pre-existing disadvantage and vulnerability is not a matter of controversy, the further disadvantage experienced by children of parents with disabilities is beyond reasonable dispute, and appropriately the subject of judicial notice.

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<sup>13</sup> *R v LTH*, 2008 SCC 49, [2008] 2 S.C.R. 739 at para 24.

<sup>14</sup> United Nations *Convention on the Rights of the Child*, *Can TS 1992 No 3 [UNCRC]*, Preamble.

<sup>15</sup> *R v Sharpe*, 2001 SCC 2, [2001] 1 S.C.R. 45, at para 175, 178.

<sup>16</sup> *Canada (Attorney General) v. Campbell*, 2005 FCA 420 at para 34.

17. Tribunals may appropriately take judicial notice of the heightened disadvantage experienced by children of parents with disabilities. The fact of their disadvantage not only accords with everyday experience and common sense, but further is supported by readily accessible and reliable sources, including social science research. Such social fact evidence provides necessary context and has important explanatory value, and may be properly considered by courts and tribunals.<sup>17</sup> It is appropriate for the Tribunal to take judicial notice of such evidence. Moreover, in *Fraser*, the Supreme Court noted that “[c]ourts will benefit from evidence about the physical, social, cultural or other barriers which provide the ‘full context of the claimant group’s situation’” which may come from “the claimant, from expert witness, or through judicial notice”. The Court further noted that issues which affect certain groups may be under-documented<sup>18</sup> and in such cases claimants may rely heavily on their own evidence and experience.

**c. Children of parents with disabilities face further disadvantage**

18. The relatively disadvantaged position of children of parents with disabilities is supported not only by the Respondent’s own personal experience, but by social science research. It is sufficiently beyond controversy that a tribunal may properly take judicial notice of it.<sup>19</sup>

19. Children will obviously be further disadvantaged if their caregiver’s ability to meet their needs is compromised as a result of their own vulnerabilities, including disability. Importantly, this disadvantage is not due to the personal failings on the part of the parent, but as a matter of

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<sup>17</sup> *R v Spence*, 2005 SCC 71, [2005] 3 S.C.R. 458 at para 57.

<sup>18</sup> *Fraser*, *supra* at paras 57 and 58.

<sup>19</sup> *R v Spence*, *supra*, at para 66.



the systemic disadvantage experienced by the parent, and the consequent impact on the dependent child.

20. Economic hardship experienced by parents with disabilities has a consequential impact on their children. Poverty risk for adults with disabilities is high and increases with the severity of disability. Households headed by adults with disabilities tend to have lower incomes, greater financial needs, and less available free time than other households. These impacts on income, the burden of extra expenses, and additional time demands reduce parents' access to and their ability to invest in the goods, services, and time helpful for the development of children. The stress and trauma associated with disability and low income can further deplete the emotional resources available for supportive parenting behaviours, with impacts on them and their children well beyond the direct effects of low income.<sup>20</sup>

21. Children of a parent with a disability are less likely to graduate high school and go on to post-secondary education, and more likely to experience social and behavioural problems and mental health issues, such as anxiety. They are almost twice as likely to experience poverty.<sup>21</sup> Because mothers are often responsible for caregiving and domestic labour within the home, mothers with disabilities may disproportionately struggle to provide care to and maintain a positive developmental environment for their children.<sup>22</sup> Factors such as constraints on a parent's ability to provide care and lack of educational opportunities are closely associated with the intergenerational transfer of poverty, and the ongoing disadvantage of children of disabled

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<sup>20</sup> Kelly Chen et al, "Unequal opportunities and public policy: The impact of parental disability benefits on child postsecondary attendance" (2019) 52:4, *Canadian Journal of Economics* 1401 ["Chen (2019)"] at 1402-3.

<sup>21</sup> Chen (2019), *supra*, 1403-4.

<sup>22</sup> Dennis P. Hogan et al, "Family development risk factors among adolescents with disabilities and children of parents with disabilities" (2007) 30 *Journal of Adolescence* 1001 ["Hogan"] at 1003.

parents throughout their life course.<sup>23</sup>

22. Research indicates that the disadvantage experienced by children of parents with a disability results from their exposure to economic hardship, rather than assumed “parenting deficits”<sup>24</sup>. Disadvantages experienced by children of disabled mothers, for example, are not attributable to family dynamics or the quality of the parent-child relationship.<sup>25</sup> These findings are further supported by research that demonstrates the ameliorative and mitigating impact of income supports for children of a parent with a disability.<sup>26</sup>

### **C. CHILDREN ARE ENTITLED TO SPECIAL ASSISTANCE AND PROTECTION UNDER THE LAW**

23. As the Supreme Court has recently noted, children are “individuals who, as full rights bearers and members of a group made vulnerable by dependency, age, and need, merit society’s full protection”.<sup>27</sup>

24. In recognition of children’s vulnerability and pre-existing disadvantage, children have been found to be entitled to special legal protections in a variety of legal contexts. These protections are intended to correspond to their particular vulnerabilities and to ensure that they are able to fully and meaningfully realize their legal entitlements. These provide important context for the analysis of substantive equality under the *Canada Pension Plan*.

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<sup>23</sup> Caroline Harper et al, “Enduring Poverty and the Conditions of Childhood: Lifecourse and Intergenerational Poverty Transmissions” (2003) 31:3 *World Development* 535 at 544, 546.

<sup>24</sup> Lindsay Hahn, *The Well-Being of Youth Brought Up by Parents with Disability: A Longitudinal Population-Based Study*, (Doctor of Philosophy in Rehabilitation Science, University of Alberta, 2020) [unpublished].

<sup>25</sup> Hogan, at 1015.

<sup>26</sup> Chen (2019), at 1419-1429; Kelly Chen et al, “Inter-generational effect of disability benefits: evidence from Canadian social assistance programs” (2015) 28:4 *Journal of Population Economics* 873 [“Chen (2015)”] at 873, 905-6.

<sup>27</sup> *Michel v Graydon*, 2020 SCC 24, at para 77.

25. Article 3 of the *UNCRC* provides that “in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration”<sup>28</sup>. States parties are further required to take appropriate legislative and administrative measures to provide care and protection to children as is necessary for their well-being. The principle of the best interests of the child is a substantive right and a fundamental legal and interpretive principle that applies to all administrative, judicial, and legislative decisions, imposing duties on decision-makers to consider the particular needs and capacities of children when enacting legislation or determining children’s rights and entitlements.<sup>29</sup>

26. The *UNCRC* is specifically incorporated into Ontario’s child welfare legislation, the *Child, Youth and Family Services Act* (“*CYFSA*”), which has its over-arching goal the promotion of children’s best interests, protection and well-being. The *CYFSA* provides for accommodations and special protections to ensure that children are able to exercise and fully realize their rights under that Act. For example, the Act specifically delineates the rights to be afforded to children receiving services from and in the care of Children’s Aid Societies, including the right to meaningful participation in decision-making about them and the right to be informed of their various rights and entitlements under the Act in language suitable to their understanding. They are furthermore entitled to legal representation by the Office of the Children’s Lawyer in various

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<sup>28</sup> *UNCRC*, *supra*, Article 3(1).

<sup>29</sup> UN Committee on the Rights of the Child (CRC), *General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para 1)*, 29 May 2013, CRC/C/GC/14, available at <https://www.refworld.org/docid/51a84b5e4.html> [accessed 19 October 2020].

proceedings.<sup>30</sup>

27. Children have been recognized as having a constitutional right to a separate criminal justice system – as enacted by the *Youth Criminal Justice Act*<sup>31</sup> – as a consequence of their heightened vulnerability, less maturity, and therefore diminished moral culpability.<sup>32</sup> The *YCJA* provides enhanced procedural protections for young people at every stage of their involvement with the criminal justice system, from contact with police through sentencing and disposition, and beyond. For example, given their vulnerability in interactions with police and the likelihood that they do not understand their legal rights as well as adults and are less likely to assert them, the *YCJA* imposes on police officers additional requirements when taking statements from children to ensure that they are cautioned as to their rights to counsel and to silence in a manner appropriate to their age and understanding.<sup>33</sup>

28. The inherent vulnerability of children is also recognized in the civil context, as canvassed by the Respondent and the General Division. Additionally, limitation periods do not run against minors who may be potential plaintiffs, preserving their right to claim and recover for damages suffered while a child, recognizing that children may lack the knowledge, resources, or capacity to commence a claim. In Ontario, in cases where a litigation guardian is required, their appointment is subject to court oversight and, where no appropriate litigation guardian can be

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<sup>30</sup> *Child, Youth and Family Services Act*, 2017, SO 2017, c 14, Sched 1, at Preamble, s 3, 8, 9, 10, 77, 78(5), 138(2), 171(1), 180(7).

<sup>31</sup> *Youth Criminal Justice Act*, S.C. 2002, c. 1 [YCJA].

<sup>32</sup> *R v DB*, *supra*.

<sup>33</sup> *R v LTH*, *supra*; *YCJA*, at s 146.

found, the Office of the Children’s Lawyer may be appointed to ensure that children’s rights, interests, and entitlements are appropriately safeguarded.<sup>34</sup>

29. The Office of the Children’s Lawyer may also act for children in wills, estates, and trusts matters and *must* be served in cases concerning children’s property rights, the rationale being the safeguarding of the child’s rights and entitlements under law.<sup>35</sup>

30. Provincial legislation also generally makes provision for child support, which may be accessed by a parent or by a child on their own behalf in certain circumstances.

31. The Supreme Court has recently clarified that such support may be awarded retroactively to fulfill historical claims, recognized to be the existing and unfulfilled legal responsibility of a payor parent, ongoing throughout the child’s life. Child support is unquestionably the right of the child and the responsibility of parents, intended to ensure that children enjoy the same standard of living that they otherwise would, but for their family situation, and to shelter them from the economic consequences of family separation. As the Supreme Court has recently affirmed in *Michel v Graydon*, courts should not lightly find a jurisdictional bar to historical claims for child support, the “purpose and promise” of which is to “protect the financial entitlements due to children by their parents”. Justice Martin, in her concurring reasons supporting children’s ability to claim historical support, notes that there may be reasons why making an earlier application is impracticable or inaccessible in their circumstances<sup>36</sup> and that barring these claims is inconsistent

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<sup>34</sup> Ontario, RRO 1990, Reg 194: Rules of Civil Procedure, at r 7.

<sup>35</sup> For a discussion of the role of the Office of the Children’s Lawyer see: Ministry of the Attorney General “Office of the Children’s Lawyer: Frequently Asked Questions” 16 November 2018, online: Office of the Children’s Lawyer [http://www.attorneygeneral.jus.gov.on.ca/english/family/ocl/faq/civil\\_litigation\\_estates\\_and\\_trusts.php](http://www.attorneygeneral.jus.gov.on.ca/english/family/ocl/faq/civil_litigation_estates_and_trusts.php).

<sup>36</sup> *Michel v Graydon*, *supra*, at para 85.

with the best interests of the child and contributes to systemic inequalities for women and children.<sup>37</sup> It is unfair to prevent a child from accessing her full entitlement because a parent could not access justice earlier.<sup>38</sup> The reasoning of Justice Martin is directly applicable in the case at bar where the payor is the CPP.

32. These are but a few examples among many of the ways in which legislators and decision-makers have seen fit to ensure that children are not denied their legal entitlements as a result of age, dependency, and life circumstances, and that they are instead provided ways to meaningfully exercise their rights and fully realize the benefit of the law's protection.

**D. FAILURE TO ADEQUATELY RESPOND TO CHILDREN'S NEEDS, CAPACITIES, AND CIRCUMSTANCES IMPERMISSIBLY IMPOSES DISPROPORTIONATE IMPACTS ON THEM AND PERPETUATES THEIR DISADVANTAGE**

33. Laws which fail to account for children's vulnerability and disadvantage risk negatively and disproportionately impacting them, perpetuating their disadvantage and running afoul of the *Charter's* equality guarantee.

**a. The 11-month retroactive cap creates a disproportionate impact on children**

34. The CPP-D children's benefits provided by the *Canada Pension Plan* are intended to alleviate the economic disadvantage faced by persons who are unable to work by reason of a disability by providing a basic income. The children's benefit is plainly aimed at alleviating the attendant disadvantage suffered by children of a disabled parent.

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<sup>37</sup> *Ibid.*

<sup>38</sup> *Ibid.*

35. Simply because a law or provision is intended to be ameliorative, however, is not sufficient to shield a law from a claim of discrimination<sup>39</sup> where the law either imposes burdens not experienced by others on, or fails to accommodate the needs and capacities of, a protected group. As the Supreme Court held in *Fraser*, disproportionate impact may be proven by the claimant's own experience, judicial notice about the situation of the claimant group, or by evidence regarding the results of a system, which may reveal that seemingly neutral policies are "designed well for some and not for others"<sup>40</sup>.

36. As the foregoing demonstrates, and as the General Division observed, given children's pre-existing disadvantage, dependency, lack of sophistication, and vulnerability, it is unreasonable to expect that even the most sophisticated child will have the knowledge, skills, and capacities to be in a position to apply on their own behalf while still a child. There is accordingly ample evidence available that the 11-month retroactive cap disproportionately impacts them by virtue of the age and attendant vulnerabilities.

37. It is no answer to say that an adult can apply on their behalf, given that the relevant adults may themselves lack capacity or be otherwise rendered unable to apply as a result of the impacts of their disability, or are otherwise unable to act in the child's best interest. Children of parents with a disability that impacts their ability to access benefits on their behalf will similarly be disproportionately impacted by the 11-month retroactive cap.

38. Claimants need not show that the impugned law affects all members of a protected group in the same way.<sup>41</sup> The fact that some parents or some children are able to access the benefit does

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<sup>39</sup> *Fraser, supra*, at para 69.

<sup>40</sup> *Fraser, supra*, at para 57.

<sup>41</sup> *Fraser, supra*, at para 72.

not change the fact that children of parents with a disability are likely to be disproportionately impacted, both by their own characteristics and by the nature of their parent's disability.

39. Children are eligible for the CPP-D children's benefit from birth and the language of the statute provides that the entitlement specifically belongs to the child. By failing to take account of the social, familial, and developmental realities of children, section 74(2) renders these benefits illusory and denies the child the opportunity to access their full entitlement.

**b. The disproportionate impact on children perpetuates their disadvantage**

40. This unquestionably has the effect of perpetuating their disadvantage. Social science research demonstrates that income support for disabled parents significantly mitigates the inequality of opportunity and outcome for children, and can significantly improve such metrics as educational attainment and therefore life chances.<sup>42</sup> Higher benefits lead to greater improvements in development, behaviour, and mental health, particularly in children with a mother who is disabled.<sup>43</sup> The effect of economic hardship and poverty is not purely financial, as the Minister suggests, but is felt in all aspects of a child's life and development, throughout their life course, and intergenerationally.

41. What section 15 – and substantive equality – requires is a meaningful recognition of the myriad reasons why children are unable to access the benefit, from infancy through adolescence, and a legislative and regulatory response that adequately accounts for these impediments. The 11-month retroactive cap, while administratively convenient, fails to address the inherent disadvantage that children will face in obtaining their full entitlement to benefits.

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<sup>42</sup> Chen (2019), at 1419-1429; Chen (2015), at 873, 905-6.

<sup>43</sup> Chen (2015), at 905.



42. Not only does this violate children’s right to substantive equality, it is contrary to the best interests of children and Canada’s international obligations under the *UNCRC*, which lend important interpretive context to *Charter* rights. Not only are legislatures, administrators, and courts required to consider the impact on children’s best interests in all matters concerning them, they are furthermore required to recognize the right of every child to benefit from social security and social insurance, to take necessary measures to achieve the full realization of this right, and to take into account the resources and circumstances of the child and their caregivers. An 11-month retroactive cap fails to give effect to Canada’s international commitments.

**c. Numerous policy options exist that could produce a *Charter* compliant scheme**

43. There is scant evidence to suggest that Parliament in fact considered the degree to which the legislative scheme for access to CPP-D children’s benefits in fact corresponds to the actual needs, circumstances, and capacities of children. It is certainly possible to imagine numerous possibilities that would result in a *Charter* compliant scheme.

44. For example, under the Ontario Disability Support Program, no separate application is required for children to form part of the benefit unit – notice to the caseworker is sufficient - and there is no apparent retroactive limitation on their inclusion.<sup>44</sup> They are also automatically enrolled in ancillary benefit programs.<sup>45</sup>

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<sup>44</sup> Ontario, O Reg 222/98: General, s 1(1), 2(3), 12(1); Ontario Disability Support Program – Income Support, “Directive 2.2: Who is Eligible: Dependent Children”. May 2018, available online at: [https://www.mcass.gov.on.ca/en/mcass/programs/social/directives/odsp/is/2\\_2\\_ODSP\\_IS\\_Directives.aspx](https://www.mcass.gov.on.ca/en/mcass/programs/social/directives/odsp/is/2_2_ODSP_IS_Directives.aspx) [accessed 19 October 2020].

<sup>45</sup> “Teeth cleaning, check-ups and dental treatment for kids”, *Government of Ontario*, July 3 2020, online: <https://www.ontario.ca/page/get-dental-care>.

45. Under the *Quebec Pension Plan*, while there is a presumptive retroactive cap of 36 months, the statute provides discretion to use instead the date of application for the disability pension, “where circumstances justify it”<sup>46</sup>. This exercise of discretion – and an attendant opportunity for review – could well result in a *Charter* compliant scheme which adequately accounts for the special circumstances of children.

46. There is furthermore no reason to believe – and no evidence proffered by the Minister to suggest – that the long-term sustainability of the CPP is threatened or compromised by allowing children to claim their full retroactive entitlement. There is no suggestion that the CPP is underfunded or unable to absorb increased demand for benefits. A CPP-D scheme that automatically or proactively sought to ensure the inclusion of children by actual notice to parents or children would guard against situations where children’s entitlement to benefits remains unfulfilled and retroactive benefits would become due.

47. The ability to claim their full entitlement is consistent with children’s best interests, Canada’s obligations under international law, and the *Charter*’s guarantee of substantive equality.

48. Achieving substantive equality for children under the *Canada Pension Plan* in any case requires a legislative and policy response that adequately considers and accommodates the heightened vulnerability and disadvantage experienced by children and children of parents with disabilities in Canada, so that they may realize their legal rights and entitlements, and their recognition as equally worthy of protection and care under the law.

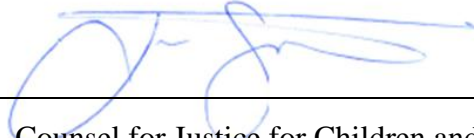
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<sup>46</sup> *An Act respecting the Quebec Pension Plan*, CQLR c R-9, s 172-172.1.

**PART V – ORDER REQUESTED**

49. JFCY takes no position with respect to the disposition of this appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 21st day of October, 2020.

A handwritten signature in blue ink, appearing to be 'Jane Stewart', is written over a horizontal line. The signature is stylized and cursive.

Jane Stewart, Counsel for Justice for Children and Youth

## PART VI – TABLE OF AUTHORITIES

<b><i>Case Law</i></b>
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<a href="#"><i>R v Sharpe</i></a> , [2001] 1 SCR 45, 2001 SCC 2
<a href="#"><i>AB v Bragg Communications</i></a> , [2012] 2 SCR 46, 2012 SCC 46
<a href="#"><i>R v DB</i></a> , [2008] 2 S.C.R. 3, 2008 SCC 25
<a href="#"><i>AC v Manitoba (Director of Child and Family Services)</i></a> , 2009 SCC 30, [2009] 2 S.C.R. 181
<a href="#"><i>R v LTH</i></a> , 2008 SCC 49, [2008] 2 S.C.R. 739
<a href="#"><i>R v Sharpe</i></a> , 2001 SCC 2, [2001] 1 S.C.R. 45
<a href="#"><i>Canada (Attorney General) v. Campbell</i></a> , 2005 FCA 420
<a href="#"><i>R v Spence</i></a> , 2005 SCC 71, [2005] 3 S.C.R. 458
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<b><i>Secondary Sources</i></b>
Kelly Chen et al, “Unequal opportunities and public policy: The impact of parental disability benefits on child postsecondary attendance” (2019) 52:4, Canadian Journal of Economics 1401
Dennis P. Hogan et al, “Family development risk factors among adolescents with disabilities and children of parents with disabilities” (2007) 30 Journal of Adolescence 1001
Lindsay Hahn, <a href="#"><i>The Well-Being of Youth Brought Up by Parents with Disability: A Longitudinal Population-Based Study</i></a> , (Doctor of Philosophy in Rehabilitation Science, University of Alberta, 2020) [unpublished]
Kelly Chen et al, “Inter-generational effect of disability benefits: evidence from Canadian social assistance programs” (2015) 28:4 Journal of Population Economics 873 at 873, 905-6
UN Committee on the Rights of the Child (CRC), <a href="#"><i>General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para 1)</i></a> , 29 May 2013, CRC/C/GC/14, available at <a href="https://www.refworld.org/docid/51a84b5e4.html">https://www.refworld.org/docid/51a84b5e4.html</a> [accessed 19 October 2020]

Ministry of the Attorney General “[Office of the Children’s Lawyer: Frequently Asked Questions](#)” 16 November 2018, online: Office of the Children’s Lawyer [http://www.attorneygeneral.jus.gov.on.ca/english/family/ocl/faq/civil\\_litigation\\_estates\\_and\\_trusts.php](http://www.attorneygeneral.jus.gov.on.ca/english/family/ocl/faq/civil_litigation_estates_and_trusts.php).

Ontario Disability Support Program – Income Support, “[Directive 2.2: Who is Eligible: Dependent Children](#)”. May 2018, available online at: [https://www.mcass.gov.on.ca/en/mcass/programs/social/directives/odsp/is/2\\_2\\_ODSP\\_IS\\_Directives.aspx](https://www.mcass.gov.on.ca/en/mcass/programs/social/directives/odsp/is/2_2_ODSP_IS_Directives.aspx) [accessed 19 October 2020]

“[Teeth cleaning, check-ups and dental treatment for kids](#)”, *Government of Ontario*, July 3 2020, online: <https://www.ontario.ca/page/get-dental-care>.

### ***Statutes***

[United Nations Convention on the Rights of the Child](#), 20 November 1989, 1577 UNTS 3, Can TS 1992 No 3 (entered into force 2 September 1990)

[Child, Youth and Family Services Act](#), 2017, SO 2017, c 14, Sched 1

[Youth Criminal Justice Act](#), S.C. 2002, c. 1

Ontario, RRO 1990, Reg 194: [Rules of Civil Procedure](#)

Ontario, O Reg 222/98: [General](#)

[An Act respecting the Quebec Pension Plan](#), CQLR c R-9