Court File No.: A-238-21 (lead)
A-87-21
A-198-20

FEDERAL COURT OF APPEAL

B E T W E E N :

SUSAN HUME SMITH

Applicant

- and -

ATTORNEY GENERAL OF CANADA

Respondent

- and –

JUSTICE FOR CHILDREN AND YOUTH

Intervener

MEMORANDUM OF FACT AND LAW OF THE INTERVENER JUSTICE FOR CHILDREN AND YOUTH

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OVERVIEW

1. Children whose parent receives the Canada Pension Plan Disability Benefit ("CPP-D") are eligible to apply on their own behalf for the Disabled Contributor Children's Benefit ("DCCB"). In the present case, the Applicant's children were eligible for the DCCB benefit from one month after birth. Notwithstanding their entitlement, s. 74(2) of the Canada Pension Plan ("CPP") imposes a 11-month retroactive cap on receipt of these benefits from the date of application.

2. Because of the nature of her disability and her own incapacity, the Applicant did not apply for the benefit until many years after the birth of her children. The children consequently lost many years of their full entitlement to the DCCB.

3. DCCB benefits belong to the child and are intended to alleviate the economic hardship and its attendant impacts on children whose parent cannot work due to their disability. By creating a legislative scheme in which children are unable to access their full entitlement to the benefit, due to their own incapacity and position of dependency, notwithstanding their eligibility, the CPP discriminates against children generally, and specifically against children of a parent with a disability. The law fails to properly account for the actual needs, circumstances, and capacities of those it is intended to benefit in a manner that disproportionately imposes a burden on them, and perpetuates their disadvantage.

4. The General Division of the Social Security Tribunal ("GD"), by reference to the Applicant's evidence of her and her children's own experiences, and judicial notice of relevant contextual and social fact evidence, held that s. 74(2) was discriminatory, and awarded the Applicant's children full retroactive payment of the DCCB.

5. On appeal by the Minister, the Appeal Division ("AD") came to the opposite conclusion, instead re-weighing the evidence before the GD and finding that the Applicant had failed to provide evidence of the disadvantaged position of her own children and evidence that children generally were prevented from accessing the benefit. At the same time, the AD held that Parliament had adequately accounted for the vulnerable position of children in its design of the CPP, despite having no evidence supporting that conclusion before it, and ample evidence suggesting otherwise. The AD collapsed the separate analyses of s. 15 and s. 1, and found that the retroactive cap was a reasonable exercise of government line-drawing. The AD furthermore declined to hear argument on s. 7 of the *Charter*.

6. The retroactive cap creates barriers for children to obtain the full benefit of the DCCB scheme to which they are otherwise entitled, and communicates that children are less worthy of care, concern, and protection under the law, perpetuating their disadvantage and exacerbating the hardship experienced by children of parents with a disability. The AD's failure to appropriately recognize the vulnerable position of children generally and children of a parent with a disability and the perpetuation of that disadvantage by the retroactive cap is wrong in law, and contrary to the guarantee of substantive equality under the *Charter*.

PART I – FACTS

7. JFCY relies on the facts as set out in the Applicant's Memorandum of Fact and Law, at paras 16-81.

8. JFCY was granted leave to intervene in the present applications for judicial review by order of Justice Gleason dated August 18, 2022.

9. The applications for judicial review before this Honourable Court concern a series of decisions made by the AD with respect to an appeal of a decision of the GD regarding the constitutionality of provisions of the *Canada Pension Plan*.

10. The Applicant in these applications for judicial review, Susan Hume Smith, initially applied to the GD for reconsideration of the decision of the Minister of Employment and Social Development (the "Minister") limiting retroactive payment of the DCCB to 11 months. By decision dated October 16, 2018, the GD determined that, insofar as section 74(2) of the *Canada Pension Plan* limits retroactive payments of the DCCB to 11 months from the date of application by a child beneficiary, it infringes section 15 of the *Charter*.

11. In particular, the GD 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 GD found that the provision violated section 15 of the *Charter* and was not saved by section 1.[1]

12. The Minister appealed that decision to the Appeal Division. JFCY applied to intervene in the appeal, and was granted Intervener status by decision dated March 19, 2020.[2]

13. On appeal, the AD reversed the decision of the GD, finding that no violation of s. 15 had been demonstrated.

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[1] *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.
[2] *Minister of Employment and Social Development v Susan Hume Smith*, Tribunal File No. AD-19-45, decision dated 19 March 2020.

PART II – STATEMENT OF ISSUES

14. The within submissions of the Intervener provide context and argument with respect to the following issues before the Court in these applications for judicial review:

a. The appropriate standard of review of the AD's decision concerning the interpretation of s. 15 is correctness. With respect to the AD's decision not hear arguments concerning s. 7, the standard of review is reasonableness. With respect to the standard of review concerning the AD's exercise of its statutory powers is correctness, or in the alternative, reasonableness.

b. The AD was wrong in law with respect to its interpretation of s. 15 of the *Charter*.

c. The AD improperly reweighed the evidence before the GD, including evidence of the Applicant's own experience and evidence which was properly the subject of judicial notice, and ignored the evidence capable of grounding the GD's decision that s. 74(2) violates s. 15 of the *Charter*.

d. The AD unreasonably dismissed the Applicant's request to raise s. 7 of the *Charter* on appeal.

PART III – LAW AND ARGUMENT

A. THE APPROPRIATE STANDARD OF REVIEW IS CORRECTNESS

15. *Vavilov* established that the standard of review is presumed to be reasonableness, unless the rule of law requires the standard of correctness to be applied, including constitutional questions.[3]

16. The interpretation of s. 15 of the *Charter* unquestionably attracts a standard of review of correctness, being both a constitutional question and one that is of central importance to the legal system as a whole.

[3] *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 53-56, 63-64.

17. Questions concerning the appropriate jurisdiction of the AD as compared to the GD, particularly concerning the re-weighing of evidence, is arguably a question concerning the jurisdictional boundaries between the AD and GD, for example, the degree of deference owed to the GD's findings of fact that could attract a correctness standard. However, even on a reasonableness standard, administrative decision-makers do not have free rein in interpreting the scope of their statutory powers, and cannot expand them beyond what the statue allows[4]. For example, a reasonableness standard of review does not mean that the AD is permitted to substantially re-weigh the evidence before the GD, absent an erroneous finding of fact made in a perverse or capricious manner or without regard for the material before it, simply because the AD disagreed with the conclusions drawn on the basis of that evidence. Similarly, this Court need not defer to the findings of fact of the AD where they are speculative and unfounded.

B. THE SECTION 15 ANALYSIS MUST TAKE APPROPRIATE ACCOUNT OF CHILDREN'S VULNERABILITY AND PRE-EXISTING DISADVANTAGE

18. The AD's decision focused largely on the perceived failure of the GD to refer to evidence to ground its conclusion that s. 74(2) violates s. 15 of the *Charter*.

19. There is, however, 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 that faces pre-existing disadvantage, in Canadian society.[5]

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[4] *Vavilov, supra,* at para 68.
[5] *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.

20. As the Supreme Court of Canada noted in *DB,* young people have heightened vulnerability, less maturity, and a reduced capacity for judgment[6]. 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.[7] They are likely to be less aware of their legal rights and entitlements, and less able to assert them.[8]

21. 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.[9] The *UNCRC* is the most universally accepted human rights instrument in history, and an important source for interpreting children's rights domestically.[10]

22. Children are furthermore dependent on adults, generally their parents, for their material and developmental needs as their capacities evolve and they grow towards independence.[11] Their reliance on adults to provide for their needs heightens their vulnerability and susceptibility to disadvantage. Children's pre-existing disadvantage and vulnerable position in society is widely recognized and incontrovertible.

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[6] *R v DB,* [2008] 2 S.C.R. 3, 2008 SCC 25 at paras 61–64.
[7] *AC v Manitoba (Director of Child and Family Services),* 2009 SCC 30, [2009] 2 S.C.R. 181 at para 71.
[8] *R v LTH*, 2008 SCC 49, [2008] 2 S.C.R. 739 at para 24.
[9] United Nations *Convention on the Rights of the Child, Can TS 1992 No 3 [UNCRC],* Preamble.
[10] *R v Sharpe*, 2001 SCC 2, [2001] 1 S.C.R. 45,at para 175, 178.
[11] *Canada (Attorney General) v. Campbell*, 2005 FCA 420 at para 34.

23. This is the legal context in which the GD's decision must be read, and the s. 15 analysis must proceed.

24. The GD accordingly did not proceed in the absence of evidence or on the basis of mere assumption or intuition, as the AD alleged. Rather, the GD's decision, which recognizes the vulnerable place of children in society and particularly with respect to their ability to access their legal entitlements, is entirely in keeping with legal authority and consensus.

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

25. The AD takes issue with the GD's reference to children who have claims protected by other legislative schemes. However, the AD misapprehends the significance of this comparison. Rather than intended as a direct comparator, the GD's reference to these schemes indicates an important consideration for determining whether a particular legislative provision or scheme appropriately takes account of children's vulnerable position, and the types of measures that may be required to achieve substantive equality.

26. 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".[12]

27. 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 CPP.

[12] *Michel v Graydon,* 2020 SCC 24, at para 77.

28. 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"[13]. 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.[14]

29. 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 proceedings.[15]

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[13] *UNCRC*, *supra*, Article 3(1).

[14] 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].

[15] *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).

30. Children have been recognized as having a constitutional right to a separate criminal justice system – as enacted by the *Youth Criminal Justice Act*[16] – as a consequence of their heightened vulnerability, less maturity, and therefore diminished moral culpability.[17] 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.[18]

31. The inherent vulnerability of children is also recognized in the civil context, as canvassed by the GD. 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 found, the Office of the Children's Lawyer may be appointed to ensure that children's rights, interests, and entitlements are appropriately safeguarded.[19]

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[16] *Youth Criminal Justice Act,* S.C. 2002, c. 1 [*YCJA*].
[17] *R v DB, supra.*
[18] *R v LTH, supra*; *YCJA,* at s 146.
[19] Ontario, RRO 1990, Reg 194: Rules of Civil Procedure, at r 7.

32. 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.[20]

33. 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.

34. The Supreme Court of Canada 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[21] and that barring these claims is inconsistent with the best interests of the child and contributes to systemic inequalities for women and children.[22] It is unfair to prevent a child

[20] 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.

[21] *Michel v Graydon, supra*, at para 85.

[22] *Ibid.*

from accessing her full entitlement because a parent could not access justice earlier.[23] The reasoning of Justice Martin is directly applicable in the case at bar where the payor is the CPP.

35. 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.

36. These examples lend useful context to the GD's consideration of the ways in which children are provided special protection under the law in order to obtain their legal entitlements on equal footing with others, and how the CPP fails to appropriately consider the special circumstances of children

37. The AD, however, misapprehended the GD's analysis regarding legal protections for children under other legislative schemes as being essential to the achievement of substantive equality, treating it as a comparator group, rather than important contextual evidence regarding the vulnerability of children.

D. COURTS AND TRIBUNALS MAY PROPERLY TAKE JUDICIAL NOTICE OF THE PRE-EXISTING DISADVANTAGE OF CHILDREN AND THE DISPROPORTIONATE IMPACT ON THEM OF LEGISLATIVE MEASURES

38. The AD held that there was no evidence of discrimination before the GD. This finding ignores the experience of the Applicant and her children – which is indeed relevant evidence capable of grounding a claim of discrimination - and furthermore significantly misapprehends the appropriate use of judicial notice, particularly in cases concerning the *Charter*. There was in

[23] *Ibid.*

fact extensive evidence available to GD, both directly and by way of judicial notice, capable of grounding a decision that s. 74(2) infringes s. 15 of the *Charter*.

39. Consideration of the evidence of the Applicants' own experience and the consequent disadvantage to her children does not amount to proceeding on the basis of assumptions or intuition, as the AD held, and so finding inappropriately discounts the significance and evidentiary value of claimants' own lived experiences, to the detriment to their ability to establish otherwise meritorious claims, contrary to the Supreme Court's direction in *Fraser*[24].

40. Tribunals may furthermore 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 or "social framework"[25] evidence provides necessary context and has important explanatory value, and may be properly considered by courts and tribunals.[26] It was appropriate for the GD to take judicial notice of such evidence, and an error for the AD to ignore it.

41. 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[27] and in such cases claimants may rely heavily on their own evidence and experience.

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[24] *Fraser v Canada (Attorney General),* 2020 SCC 28, paras 57 and 58.
[25] *R v JM,* 2021 ONCA 150, at para 32.
[26] *R v Spence,* 2005 SCC 71, [2005] 3 S.C.R. 458 at para 57.
[27] *Fraser, supra* at paras 57 and 58.

42. Courts and tribunals may appropriately consider evidence that a) is so accepted within a particular community as not be the subject of dispute among reasonable persons and b) those that are capable of immediate and accurate demonstration be resorting to readily accessible sources of indisputable accuracy. Judicial notice may be tacit or informal, which involves a trier of fact drawing on common experience, common sense, or common knowledge to interpret and understand the formal evidence presented at trial.[28] Evidence concerning the relatively disadvantaged position of children, and of children of a parent with a disability, is such evidence and the appropriate subject of judicial notice, as the following demonstrates.

a. Relative disadvantage of children of parents with disabilities

43. Contrary to the AD's assessment that the GD proceeded without evidence, in addition to the Applicants' own evidence, there is ample social science research to support the conclusion that children of parents with disabilities are a disadvantaged group in society, so much so that it is sufficiently beyond controversy. This is a matter of common sense and everyday experience, and it was appropriate for the GD to take notice of and rely on this fact. The AD either misapprehended the GD's analysis in this regard, or ignored this context entirely.

44. Children will obviously be disadvantaged if their caregiver's ability to meet their needs is compromised as a result of her 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 the systemic disadvantage experienced by the parent, and the consequent impact on the dependent child.

45. Economic hardship experienced by parents with disabilities – e.g. those who are unable to work and earn income - has a consequential impact on their children. Poverty risk for adults

[28] *R v JM*, *supra* at paras 31-33.

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.[29]

46. 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.[30] 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.[31] 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 parents throughout their life course.[32]

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[29] 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.
[30] Chen (2019), *supra*, 1403-4.
[31] 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.
[32] 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.

47. 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"[33]. Disadvantages experienced by children of disabled mothers, for example, are not attributable to family dynamics or the quality of the parent-child relationship.[34] 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.[35]

48. The GD's findings regarding the pre-existing disadvantage of children of parents with disabilities are therefore consistent with the literature. The GD did not simply assume that this was so, as the AD charges[36]; its conclusions are aligned with common experience borne out by research, and appropriately the subject of judicial notice, per the Court's commentary in *R v JM*.

b. Section 74(2) imposes a distinction on children generally and on children of parents with a disability specifically

49. Section 74 of the CPP provides as follows:

> 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.
>
> (2) Subject to section 62, where payment of a disabled contributor's child's benefit or orphan's benefit in respect of a contributor is approved, the benefit is payable for each month commencing with,
>
> (a) in the case of a disabled contributor's child's benefit, the later of

[33] 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].
[34] Hogan, at 1015.
[35] 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.
[36] Appeal Division Decision, para 42.

> (i) the month commencing with which a disability pension is payable to the contributor under this Act or under a provincial pension plan or a post-retirement disability benefit is payable under this Act, and
>
> (ii) the month next following the month in which the child was born or otherwise became a child of the contributor, and
>
> (b) in the case of an orphan's benefit, the later of
>
> (i)the month following the month in which the contributor died, and
>
> (ii) the month next following the month in which the child was born,
> but in no case earlier than the twelfth month preceding the month following the month in which the application was received
>
> but in no case earlier than the twelfth month preceding the month following the month in which the application was received.[37]

50. CPP disability benefits 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. The benefit belongs to the child and is for their benefit, in part demonstrated by Parliament's intention that the application may be made by the child.[38]

51. While the 11-month retroactive cap is facially neutral, it in fact limits the ability of children to access their full entitlement to the benefit, unless a parent or caregiver applies on their behalf, because children will not know about and will likely lack capacity to apply on their own behalf. Per the GD:

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

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[37] *Canada Pension Plan*, s. 74.
[38] Ibid.
[39] General Division Decision, para 39.

52. As the GD held, the failure to provide an alternative means for children to obtain the full benefit to which they are entitled does not correspond to their actual needs, capacities and circumstances; there is no mechanism by which a child can access their full entitlement, unless a parent or caregiver applies on their behalf.

53. The AD's analysis of the adverse effect of the retroactive cap appears to proceed on the basis that the fact that a parent or caregiver can apply on a child's behalf means that the scheme achieves correspondence with the needs and capacities of children.[40]

54. In doing so, the AD ignored the evidence of the Applicant and her own children, by logical extension that children generally, and those whose parent's disability interferes with their ability to apply, will be disproportionately impacted by the retroactive cap. The AD ignored evidence of the vulnerability and disadvantage of children in accessing their legal entitlements, as above.

55. The AD further erred by requiring evidence that children lose benefits more than any other group of CPP recipients[41], and faulted the GD for failing to identify evidence to support this claim. Notwithstanding its reference to substantive equality, and that the search for a precise comparator should be avoided as in *Withler*, the AD's reasons in this regard resemble a formal analysis.

56. In this regard, the AD stated that "[t]here is no evidence that children who are eligible for the DCCB are more likely to be penalized by the retroactivity cap than any other group of CPP recipients. If such evidence exists, it may or may not support an inference that the CPP

[40] Appeal Division Decision, para 74-77
[41] Appeal Division Decision, para 73-77

retroactivity cap treats children different than adults."[42] The AD's requirement that the Applicant provide evidence that children miss out on more benefits that others is unreasonable, given that this type of evidence is beyond the capacity of any individual litigant to marshal, and is precisely the sort of evidence that is likely to be under-documented.[43]

57. 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"[44].

58. Claimants need not show that the impugned law affects all members of a protected group in the same way.[45] The fact that some parents or some children are able to access the benefit does 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. 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.

59. The retroactive cap is a limiting measure that impairs the ability of a child to claim this benefit on their own behalf. 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

[42] Appeal Division Decision, para 98.
[43] *Fraser, supra,* at para 57.
[44] *Fraser, supra,* at para 57.
[45] *Fraser, supra,* at para 72.

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.

60. This is further support by social science evidence, which demonstrates that income support for children of 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.[46] Higher benefits lead to greater improvements in development, behaviour, and mental health, particularly in children with a mother who is disabled.[47] 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.

61. The relevant analysis at the s. 15 stage is whether reliance on a parent or caregiver to make the application is sufficient to ensure that children who are eligible for the benefit are not arbitrarily excluded from receiving it.

62. The evidence before the GD demonstrated that it is not. 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 or unwilling 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. It is a matter of experience and logic that some children will miss out on benefits because of a parent's capacity, ability, or willingness to apply.

63. The measure therefore infringes s. 15 of the *Charter* by failing to correspond to the actual needs and capacities of children, and of children of a parent with a disability, and thereby

[46] Chen (2019), at 1419-1429; Chen (2015), at 873, 905-6.
[47] Chen (2015), at 905.

perpetuates their disadvantage. 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.[48] An 11-month retroactive cap fails to give effect to Canada's international commitments and children's human rights.

E. THE AD'S ANALYSIS OF SECTION 15 IMPROPERLY COLLAPSES THE *OAKES* ANALYSIS

64. The AD failed to grapple with this evidence and instead embarked on a balancing exercise, both proceeding without evidence, and collapsing the analysis of s. 1 into the s. 15 analysis, an approach that has received scholarly criticism and places an unattainable burden on claimants to demonstrate a s. 15 violation.[49]

65. According to the AD, "[w]e have to assume that Parliament was aware of the dependence of children when it designed the DCCB" and that the retroactive cap is essentially a reasonable exercise of government line-drawing.[50]

66. There was no evidence to support this assertion before the AD, and in fact the evidence that was before the GD demonstrated the opposite:

> The only parliamentary discussion that he was aware of on retroactivity is the excerpt from the 1965 House of Commons debate at Tab 20 of his report. This excerpt relates

[48] *UNCRC,* Article 26.
[49] Mary Eberts & Kim Stanton, "The Disappearance of the Four Equality Rights and Systemic Discrimination from Canadian Equality Jurisprudence" National Journal of Constitutional Law (2018) 38:1, 89-124.
[50] Appeal Division Decision, para 135.

> primarily to a discussion about retirement pensions and the concern about older people applying for the retirement pension who may not have known their exact age. There was, however, comment by Minister LaMarsh about not wanting Canadians to "lose any part of these pensions simply because they had not heard of them.
>
> Mr. Williamson was not aware whether Parliament addressed its mind to the appropriateness of a limitation on retroactivity for the children's benefit. He was not aware of any parliamentary discussion about this limitation and he was no aware of any elaboration of the rationale for this limitation in any of the clause by clause description of the CPP provisions. The Minister did not provide any evidence of the total costs to the CPP of the DCCB benefits or of the estimated costs of removing the limit on retroactivity.[51]

67. This evidence, and the impact of the scheme on the Applicant and her children by operation of the law, indicates that Parliament did not adequately consider the impact on children's ability to access the benefit to which they would be otherwise entitled.

68. The AD erroneously considered the need to limit government's fiscal liability as being part of the purpose of the CPP scheme, rather than a limitation of it. It is incorrect, and unsupported by evidence, to suggest that Parliament intended that only limited benefits would be provided to children; rather, the eligibility scheme comtemplates that all eligible children will be entitled to the full benefit. The benefit is aimed at alleviating the economic hardship associated with being a child of a parent with a disability, and is theoretically available to the child from the time their parent becomes disabled. For the Applicants' children, they were eligible since birth.

69. Accordingly, and contrary to the AD's apparent characterization[52], this is not a case like *Gosselin* where the eligibility criteria operate to exclude some people. Rather, this is case where eligible recipients of a benefit – children of a parent with a disability - are arbitrarily excluded from accessing it because the means by which Parliament ostensibly made the benefit available –

[51] General Division Decision, paras 52-53.
[52] Appeal Division Decision, para 144-145.

application by a parent or caregiver – do not actually correspond to the needs, characteristics, and circumstances of the protected group.

70. The appropriate place for analysis of whether the retroactive limit on entitlement is reasonable belongs in a s. 1 *Oakes* analysis[53], and it is an error to collapse this distinct analysis into s. 15.

71. There was no evidence to suggest that there is a pressing and substantial need to limit access to retroactive benefits, nor evidence demonstrating that the retroactive cap is in fact rationally connected to this objective. There was no evidence concerning the potential liability that would result from paying out the retroactive entitlements to eligible children, nor any evidence to suggest that this would present a threat to the sustainability of the CPP. Rather, given that the benefit is intended to be available from the date a parent is eligible for their own CPP-D benefit, this is precisely the sort of expenditure that can be predicted and planned.

72. Further, the evidence demonstrated that the retroactive entitlement even for claimants like the Applicants' own children is comparatively small. There is accordingly no evidence that fiscal sustainability is in fact achieved by limiting children's retroactive entitlement.

73. There is furthermore no evidence to suggest that the measure chosen is minimally impairing of children's equality right.

74. Indeed, 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 could result in a *Charter* compliant scheme.

[53] *R v Oakes*, [1986] 1 SCR 103.

75. 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 retroactive limitation on their inclusion and discretion to determine the date of eligibility from which benefits will be paid.[54] They are also automatically enrolled in ancillary benefit programs.[55]

76. 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"[56]. 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.

77. The evidence of the salutary effects of the retroactive cap before the AD was therefore merely speculative, while the evidence of the significant discriminatory impact on child claimants was patent.

78. Consequently, the intended beneficiaries of the DCCB are arbitrarily excluded from full enjoyment of the benefit because of a scheme that does not adequately correspond to their needs and circumstances, with no proportionate benefit to government's ability to administer the CPP.

F. COURTS AND TRIBUNALS SHOULD TAKE A FLEXIBLE APPROACH TO CONSIDERATION OF NEW *CHARTER* ARGUMENTS ON APPEAL

79. The AD declined to consider the Applicant's arguments on s. 7 raised for the first time on

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[54] 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.mcss.gov.on.ca/en/mcss/programs/social/directives/odsp/is/2_2_ODSP_IS Directives.aspx [accessed 19 October 2020].

[55] "Teeth cleaning, check-ups and dental treatment for kids", *Government of Ontario,* July 3 2020, online: https://www.ontario.ca/page/get-dental-care.

[56] *An Act respecting the Quebec Pension Plan*, CQLR c R-9, s 172-172.1.

appeal, despite having the discretion to do so, solely out of concern for potential prejudice to the Minister. This was an unreasonable exercise of the AD's discretion in the circumstances of this case.

80. The AD has affirmed its discretion to hear new arguments on appeal. In *M.A.*, the Appeal Division specifically considered whether a party is entitled to put forward new argument on appeal and held that "[t]he parties are not limited to argument an error in interpreting or applying jurisprudence as they had previously presented it to the General Division."[57] The Appeal Division has further held that, following *Guindon*, it has discretion to hear a new *Charter* argument on appeal, though it may exercise its discretion to decline to do so.[58]

81. The AD has jurisdiction to consider questions of law by virtue of section 58 of the *Department of Employment and Social Development Act*. Constitutional jurisdiction has not been clearly withdrawn from it. Accordingly, the AD, like other similarly situated administrative tribunals, "ha[s] the authority to resolve constitutional questions that are linked to matters properly before them."[59] The Ontario Court of Appeal has explicitly held that the Social Security Tribunal has the jurisdiction to consider the constitutional validity of any provision of the Canada Pension Plan.[60]

82. Despite the section 7 argument not having been raised at first instance, the AD, like all tribunals, is obligated to exercise its powers and to make orders in a manner consistent with the *Charter* and its underlying values.[61]

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[57] *M.A. et al. v. Canada Employment Insurance Commision*, 2018 SST 64 (AD) at para 64.
[58] *M.S. v. Canada Employment Insurance Commission*, 2019 SST 1272 (AD) at para 11; *C.F. v. Minister of Employment and Social Development*, 2016 CanLII 33338 (SST AD) at para 43, 51.
[59] *R. v. Conway*, 2010 SCC 22 at para 78.
[60] *Landau v. Canada (Attorney General)*, 2017 ONSC 2938 at para 18-20.
[61] *Slaight Communications Inc. v Davidson*, [1989] 1 SCR 1038 at para 90; *Gehl v. Canada (Attorney General)*, 2017 ONCA 319 at para 38

83. In this case, the interests of justice and fairness favoured allowing the s. 7 argument to heard, consistent with the AD's obligation to consider the Charter and Charter values and the special position of children and children's legal interests.

84. The guarantees of the Charter, whether ss. 7 or 15, are fundamentally aimed at the protection and promotion of human dignity. As the Supreme Court of Canada stated in *Blencoe*, "respect for the inherent dignity of persons is clearly an essential value in our free and democratic society which must guide the courts in interpreting the Charter" and further that dignity is "viewed as finding expression in rights, such as equality, privacy or protection from state compulsion". Dignity is the underlying value at protected by both section 15 and section 7, and at the core of the General Division's finding that retroactivity provisions infringed the Charter.

85. At the heart of this case is the constitutional validity of s. 74(2), specifically whether the barriers that children of parents with disabilities face in accessing the benefit impose a constitutionally impermissible disadvantage on this vulnerable claimant group. While the General Division characterized this disadvantage in terms of equality under section 15, the same or similar interests arise under s. 7.

86. Section 74(2), by imposing a burden on children of parents with disabilities that deprives them of access to a government-created benefit, engages not only the equality interest, but the life, liberty, and security of the person interests under section 7. A state-imposed deprivation of a benefit to which a person would otherwise be entitled by a procedurally unfair or arbitrary process – as in the present case - may rise to the level of a violation of the s. 7 guarantee.[62]

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[62] *Leroux v. Ontario*, 2018 ONSC 6452 at para 47-55; *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44 (CanLII), [2000] 2 SCR 307; *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35 (CanLII), [2005] 1 SCR 791 at para 104; *Wareham v. Ontario (Minister*

87. Evidence concerning the impact of the retroactive limit and the disadvantage experienced by the claimants was already before the AD, as it was GD. Given that similar interests underpin both ss. 15 and 7, the evidence of infringement of those rights is also similar, and the s. 1 *Oakes* test that the Minister must meet remains constant. There is accordingly no prejudice to the Minister in considering whether the evidence that was before the General Division that established a breach of section 15 also establishes a deprivation under s. 7.

88. The consideration of the potential impact on the s. 7 right is particularly important given the inherent vulnerability of the claimant group. As above, children are recognized as being among the most vulnerable members of society and courts, administrative authorities, and legislative bodies have a duty to recognize, advance and protect their interests.[63] Tribunals should accordingly be especially concerned that they are presented with comprehensive submissions concerning the implications for children's *Charter* rights.

89. This is particularly so where an Intervener participates, as occurred for the first time on appeal to the AD in this matter. Courts have recognized that interveners should be given latitude to approach legal argument from a different perspective that may or may not have been previously argued.[64] In *Stadler*, for example, the intervener sought to raise an additional ground of disadvantage under section 15 that had not been previously pled by the parties. The Court allowed the arguments to be heard, finding that they were part of the full context of the claim.[65]

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of Community & Social Services), 2008 ONCA 771 at para 29-32; *Wareham v. Ontario (Community and Social Services)*, 2008 CanLII 1179 at para 44-49.

[63] *Ontario (Children's Lawyer) v. Ontario (Information and Privacy Commissioner)*, 2018 ONCA 559 at para 64;

[64] *Canada (Minister of Justice) v Khadr*, 2008 SCC 29 at para 18.

[65] *Stadler v. Director, St. Boniface/St. Vital*, 2020 MBCA 46 at para 46-50.

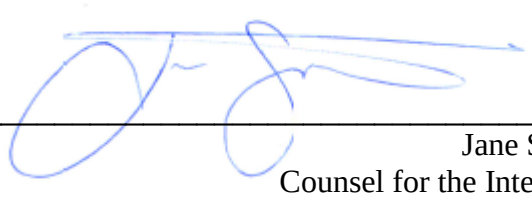
90. By contrast, while the Minister argued that it would be prejudiced by the consideration of the s. 7 argument without the opportunity to present additional evidence, it gave no indication of the evidence it would have presented had the argument been raised at first instance, nor the actual prejudice to its position. Indeed, the same evidence would be relied upon under the *Oakes* analysis regardless of the nature of the violation being considered. Moreover, any prejudice could have been easily remedied by allowing the Minister to adduce additional evidence if necessary.

91. Given the minimal prejudice to the Minister's position, and the strong public interest in ensuring that the impact on vulnerable claimants' *Charter* rights is comprehensively understood by an adjudicator, it was accordingly unreasonable for the AD to deny the Applicant and Intervener the opportunity to advance the s. 7 arguments.

PART IV – ORDER SOUGHT

92. The Intervener takes no position on the disposition of these applications for judicial review, but suggests that the appropriate remedy would be to refer the matter back to the tribunal for reconsideration by a differently constituted panel.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 23rd day of September, 2022.



Jane Stewart
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SCHEDULE A – LIST OF AUTHORITIES

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

SCHEDULE B – LEGISLATION

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
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Court File No.: A-238-21 (lead)
A-87-21
A-198-20

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FEDERAL COURT OF APPEAL

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