S.C.C. FILE NO. 33039

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE BRITISH COLUMBIA COURT OF APPEAL)

BETWEEN:

HAZEL RUTH WITHLER and JOAN HELEN FITZSIMONDS

APPELLANTS
(Appellants)

- and -

ATTORNEY GENERAL OF CANADA

RESPONDENT
(Respondent)

- and -

THE ATTORNEY GENERAL OF ONTARIO and
THE ATTORNEY GENERAL OF ALBERTA

INTERVENERS

FACTUM OF THE APPELLANTS
HAZEL RUTH WITHLER and JOAN HELEN FITZSIMONDS
(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

Counsel for the Appellants, Hazel Ruth Withler and Joan Helen Fitzsimonds:

Joseph J. Arvay, Q.C.
John Kleefeld and Elin R.S. Sigurdson
Arvay Finlay
Barristers
1350 – 355 Burrard Street
Vancouver BC V6C 2G8
Telephone: 604.689.4421
Fax: 604.687.1941
Email: jarvay@arvayfinlay.com
johnkleefeld@gmail.com
esigurdson@arvayfinlay.com

Agent:

Jeffrey Beedell
Lang Michener LLP
Barristers and Solicitors
Suite 300 – 50 O'Connor Street
Ottawa ON K1P 6L2
Telephone: 613.232.7171
Fax: 613.231.3191
Email: jbeedell@langmichener.ca

Counsel for the Respondent, Attorney General of Canada:

Donald J. Rennie, Dale Yurka and Kathryn Hucal
Department of Justice
Ontario Regional Office
130 King Street West
Suite 3400, Box 26
Toronto ON M5X 1K6
Telephone: 416.954.8110
Fax: 416.973.5004
Email: drennie@justice.gc.ca
dale.yurka@justice.gc.ca
kathryn.hucal@justice.gc.ca

Agent:

Christopher A. Rupar
Attorney General of Canada
Bank of Canada Building, East Tower
234 Wellington Street, Room 1212
Ottawa ON K1A 0H8
Telephone: 613.941-2351
Fax: 613.954-1920
Email: christopher.rupar@justice.gc.ca

Agent for the Intervener, Attorney General of Ontario:

Robert E. Houston, Q.C.
Burke-Robertson, LLP
70 Gloucester Street
Ottawa ON K2P 0A2
Telephone: 613.566.2058
Fax: 613.235.4430
Email: RHouston@burkerobertson.com

Agent for the Intervener, Attorney General of Alberta:

Henry S. Brown, Q.C.
Gowling Lafleur Henderson LLP
160 Elgin Street, Suite 2600
Ottawa ON K1P 1C3
Telephone: 613.786.0139
Fax: 613.563.9869
Email: henry.brown@gowlings.com

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PART I: OVERVIEW OF POSITION AND STATEMENT OF FACTS

Overview

1. The appellants challenge two federal statutory schemes that give a benefit with one hand and take it away with the other. Beneficiaries of deceased Canadian civil servants and deceased Canadian Forces members receive a “supplementary death benefit” (“SDB”) funded mainly by participants, with a minority contribution by government. Contribution to the plans is mandatory for employed participants, and voluntary for participants who retire or leave service due to disability. In this case, the beneficiaries are the surviving spouses of deceased plan participants.

2. The SDB is a lump sum, and is supplementary to any pension paid to a surviving spouse. The legislation, however, reduces the benefit by 10% for each year over the age of 65 (in the case of Canadian civil servants) or 60 (in the case of Canadian Forces members and civil servants prior to 1999). Thus, by the time a participant reaches age 75 or 70, as the case may be, the SDB is eliminated except for a minimum legislated amount.

3. In a pre-*Charter* review of federal legislation, the Canadian Human Rights Commission found the annual reductions (the “Reduction Provisions”) to be discriminatory and inconsistent with the *Canadian Human Rights Act*. No steps were taken to alter them, even though surpluses in the plans were described by the Office of the Chief Actuary as “excessive” and “exorbitant.”

4. The trial judge held that the SDB has a dual purpose depending on the participant’s age at death: the plan provides temporary income replacement for younger participants whose spouses do not receive a survivor’s pension, and costs of last illness and death for older participants.

5. The evidence is uncontroversial that the costs of last illness and death increase with age and do so dramatically each decade over 65. The evidence is also uncontroversial that wealth declines from 65 onwards. Yet the Reduction Provisions decrease the SDB as an employee ages, precisely when the surviving spouse needs it most to offset the many expenses associated with the participant’s last illness and death. The trial judge accepted that, because of the Reduction Provisions, these costs of last illness and death may not be fully covered.

6. Given the legislative purpose behind the SDB, it is arbitrary and irrational to reduce it as a participant ages. The Reduction Provisions are therefore not at all related to the legislative

goal, nor do they correspond to the needs of the elderly participants and their spouses. Instead they have the effect of perpetuating the belief that the older one becomes, the less one is deserving of the benefit, and the less one is worthy of the state's care or concern. The Reduction Provisions are also based on and perpetuate a stereotypical view that the older one becomes, the less one requires financial assistance. They are thus discriminatory on the basis of age.

7. The Reduction Provisions do not achieve any pressing or compelling legislative objective, and in any event are wholly disproportionate to any legitimate government objective, thus failing to meet the onus on the government under s. 1 of the *Charter*.

8. The appellants seek an order that the Reduction Provisions are of no force or effect and an order that they are entitled to payment of the difference between the SDB they received and the SDB they would have received without the Reduction Provisions, with interest.

The History of Supplementary Death Benefit Plans

9. The *Public Service Superannuation Act*[1] ("*PSSA*") came into force in 1954 and the Public Service *Supplementary Death Benefit Plan* ("SDB") Part II of the *PSSA* came into force a year later.[2] This statute and the *Supplementary Death Benefits Regulations*[3] initially governed superannuation for both Canadian civil servants and Canadian Forces members. In 1966, the Canadian Forces SDB became governed by the Regular Forces Supplementary Death Benefit Plan under Part III (later, Part II) of the *Canadian Forces Superannuation Act*[4] ("*CFSA*") and the *Canadian Forces Superannuation Regulations*.[5] The two plans are referred to herein as the "Civil Service Plan", the "Canadian Forces Plan," respectively and the "Plans" together.

10. The appellant Mrs. Withler, widow of Frederick Withler, brought this claim on her own behalf and under the *Class Proceedings Act*[6], as the representative of the class of persons to whom benefits under the Civil Service Plan were paid or became payable, where the participants

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[1] *Public Service Superannuation Act*, S.C. 1952-53, c. 47, Appellants' Book of Authorities **[ABoA]** Tab 45; *Public Service Superannuation Act*, R.S.C. 1985, c. P-36, as amended [***PSSA***]

[2] *An Act to amend the Public Service Superannuation Act*, S.C. 1953-54, c. 64, s. 2 [***Act to Amend PSSA***]

[3] *Supplementary Death Benefit Regulations*, C.R.C., c. 1360 [***PSSA Regs***]

[4] *Statute Law (Superannuation) Amendment Act*, S.C. 1966, c. 44, ss. 53-54 [***1966 Amendment***]; *Canadian Forces Superannuation Act*, R.S.C. 1985, c. C-17, as amended [***CFSA***]

[5] *Canadian Forces Superannuation Regulations*, C.R.C., c. 396 [***CFSA Regs***]

[6] *Class Proceedings Act*, R.S.B.C. 1996, c. 50

died between April 17, 1985 and September 14, 1999 at age 61 or older, and after September 14, 1999, at age 66 or older. The appellant Mrs. Fitzsimonds, widow of Patrick Fitzsimonds, brought this claim on her own behalf and as representative of the class of persons to whom benefits under the Canadian Forces Plan were paid or became payable, where the participants died after April 17, 1985 at the age of 61 or older.

Purpose of the Plans

11. The SDB's purpose, as originally expressed by the government, was to cover the expenses arising from a Plan participant's last illness and death:

> The benefit will be payable in a lump sum to the surviving spouse or, if there is no surviving spouse, to the estate of the deceased. It is designed to provide funds immediately to cover the inevitable expenses arising out of or consequential upon the last illness and death of a person covered by the plan.… The Bill is not intended to provide for the normal life insurance requirements of individuals. It provides a moderate death benefit of a kind commonly made available to employees by a growing number of large private employers.[7]

12. In Parliament,[8] and in various other contexts over the years, the government characterized the SDB as a death benefit, not "group insurance."[9] The government's representative on discovery agreed that this aptly described the purpose of the SDB.[10]

13. The benefit is "supplementary" to any pension paid to a surviving spouse, the amount being up to half the participant's pension after retirement or permanent disability; for spouses of long-service employees, this amounts to up to 35% of the participant's annual salary,[11] and not 50% as the trial judge incorrectly found.[12] To qualify, requires two years of employment.[13]

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[7] *Minutes of the House of Commons Standing Committee on Banking and Commerce* (First Session—22nd Parliament, 1954, Appendix "A") [***Minutes***], Appellant's Record [**A.R.**] Vol. V, pp. 38-39

[8] *ibid*, A.R. Vol. V, p. 27

[9] Letter from K.W. Taylor to E.B. Armstrong, A.R. Vol. V, p. 5; see also various correspondence 1954-1964 [***Correspondence***], A.R. Vol. V, pp. 6-10, 14, 17, 21-24 and; see, e.g., H.D. Clark, *Report on Supplementary Death Benefits and Survivor Income Insurance* (June 1982), [***Clark Report***], A.R. Vol. V, pp. 146-99; *Draft Policy Development Discussion Paper - Life Insurance – SDB/GLIP* (June 13, 1991) [***Discussion Paper***], A.R. Vol. VI, pp. 1-25, at p. 3

[10] Examination for Discovery Read-ins, A.R. Vol. IV, pp. 160-62, QQ. 51-54

[11] *PSSA*, 11(2.1). Survivors' pensions for the representative plaintiffs and witnesses in this case, where the trial judge stated the amounts, fell between $1,156 and $1,300 per month: Supreme Court of British Columbia Reasons for Judgment (*per* Garson J.) [***Withler, BCSC***], paras. 25-47, A.R. Vol. I, pp. 18-24

[12] *Withler, BCSC*, para. 123, A.R. Vol. I, p. 56

[13] *PSSA*, ss. 12 and 13

14. The trial judge concluded that the SDB has a dual purpose that changes with age: "At the younger ages it provides a limited stream of income for unexpected death where the surviving spouse is not protected by a pension. At older ages [it] is for the expenses associated with last illness and death."[14] This dual purpose is supported by various references in the record,[15] although it ignores the significant portion of the relevant population that is both protected by a survivor's pension and receives an unreduced SDB.

Basic Features of the Plans

15. The SDB - termed the "basic benefit" - has been based on a multiple of one or two times the participant's annual salary at death or retirement. Since 1992, it has been twice the annual salary for both Plans. The Plans have also had minimum and maximum payments that have varied over time and a portion of the benefit that is "paid-up" for life by the time the participant reaches 65. The paid-up benefit is the amount for which no further contributions are required from the participant. It has ranged from $500 to $10,000, depending on the Plan, and has served as a minimum benefit if death occurs any time on or after age 65.[16]

16. For employed participants - also referred to as "non-elective," "working," or "active" participants - membership in the Plans and contribution to them is mandatory; one cannot opt out even on grounds of conscience or religion.[17] On retirement or permanent disability, such participants may continue membership, in which case they become "elective" participants, also called "retired" or "non-active" participants. Plan members, both elective and non-elective, do not need to undergo medical assessment to be included in a Plan, a feature that lets the government avoid administrative and professional staff costs and the "more involved group insurance type of plan which the Government was determined to avoid in the first place."[18]

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[14] *Withler, BCSC*, para. 170, A.R. Vol. I, p. 74

[15] *Clark Report*, A.R. Vol. V, p. 156; Affidavit of H.D. Clark, paras. 16-17, A.R. Vol. III, pp. 56-57 (referring to the need for a floor of protection for those dying in the early employment years); *Minutes*, A.R. Vol. V, p. 27, *Correspondence*, A.R. Vol. V, pp. 5-10; 14-17, 21-24; see, e.g., letter of W.L. Gordon, Minister of Finance (January 6, 1964), A.R. Vol. V, pp. 21-24

[16] D. Hébert, *Report on the Estimated Cost to the Public Service Supplementary Death Benefit Plan if Age Reduction Eliminated* [***Hébert Report #1***], A.R. Vol. VI, pp. 122-23; D. Hébert, *Report on the Estimated Cost to the Regular Force Supplementary Death Benefit Plan if Age Reduction Eliminated* [***Hébert Report #2***], A.R. Vol. VI, pp. 133-34

[17] *PSSA*, ss. 47 and 53 and *CFSA*, ss. 60(1) and 65 (defining "participant" and stipulating that "[e]very participant shall contribute..."); *Correspondence*, A.R. Vol. V, p. 11 (documenting refusal to allow exemptions based on principled objections to benefiting from life insurance of any sort)

[18] *Clark Report*, A.R. Vol. V, p. 159

Beneficiaries and Plaintiff Class

17. The Plans initially restricted who could be appointed as a beneficiary; by the mid-1970s, the restrictions were relaxed such that the beneficiary could be the deceased participant's spouse, anyone over 18, the estate, or a charitable, religious or educational organization.[19]

18. The beneficiary is usually the surviving spouse. There is a close relationship between the participant's and spouse's ages.[20] The trial judge narrowed the class to comprise only surviving spouses who received a reduced SDB, on the basis that only they had standing to bring a *Charter* claim.[21] The appellants did not contest the narrower class definition on appeal.

Reduction Provisions

19. Both Plans have always required that the SDB be reduced by 10% for each year that the participant exceeds a certain age at death. From 1954 to 1999, the Reduction Provisions triggered at age 61 for civil servants; from 1999, at age 66. For Canadian Forces members, the Reduction Provisions have always triggered at age 61. In both cases, the SDB is eliminated after ten years except for the paid-up amount, currently $10,000 for the Civil Service Plan and $5,000 for the Canadian Forces Plan.

Funding of the Plans

20. Both Plans have always been funded solely from contributions, chiefly by participants (elective and non-elective) and to a much lesser extent by government. Participant contributions have been reduced over the years, declining from 40 to 10 cents per month for every $1,000 of benefit entitlement, depending on the Plan.[22] Government contributions have always been between one and two months' benefit-equivalent plus interest on participant contributions. Until 1992, the government contribution was 1/6 of the death benefit payable at the time of a

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[19] *Statute Law (Superannuation) Amendment Act*, S.C. 1975, c. 81 [***1975 Amendment***], s. 23-24; *Miscellaneous Statute Law Amendment Act, 1977,* 25 & 26 Elizabeth II, c. 28, s. 6; *PSSA Regs*, s. 26(1)

[20] *Withler, BCSC,* paras. 69, 86, A.R. Vol. I, pp. 31, 40; Evidence of J. Arnold, p. 635, ll. 1-5, A.R. Vol. II, p. 168; Examination for Discovery of J. Arnold, A.R. Vol. VI, pp. 185-88

[21] *Withler, BCSC,* para. 92, A.R. Vol. I, p. 42

[22] For the Civil Service Plan, the participant's contribution is defined in terms of the benefit entitlement; for the Canadian Forces Plan, in terms of the salary: *PSSA*, s. 53; *CFSA*, s. 65. For comparative purposes, the CFSA definition has been restated in terms of benefit entitlement. See also *Hébert Report #1,* A.R. Vol. VI, p. 122; *Hébert Report #2,* A.R. Vol. VI, p. 133.

participant's death. When the SDB was doubled in 1992, the government contribution remained unchanged, becoming 1/12 of the death benefits payable thereafter.

21. The government contribution is very low, particularly compared to private benefit plans. Mr. Argue, the defendant's expert, conceded that in none of the plans he reviewed - government or private - did the employer contribute as little as the federal government contributes to the Civil Service Plan, and concluded that most plans were entirely employer-funded.[23]

Plan Surpluses

22. In every year the Civil Service Plan has operated, receipts have exceeded payments, and the account balance has always been in surplus. In 2002, the Civil Service Plan surplus was $1.466 billion,[24] by 2004, $1.6 to $1.7 billion.[25] By 2008, it had grown to $2.570 billion.[26] The coverage ratios resulting from these surpluses were described by the Office of the Chief Actuary ("OCA") as "excessive" and "exorbitant,"[27] language that the government's actuary said he had never seen in government actuarial reports.[28] Over the years, the OCA recommended various measures to reduce the surplus. The government's witness Mr. Hébert said it is not necessary to maintain a reserve greater than 1.5 times the benefits payable.[29] The ratio of reserves to benefits in 1977 was 2.6; in 1980, 3.8; in 1983, 5.4; in 1986, 10.2; in 1989, 15.7; and in 1996, 11.6.[30] The doubling of the SDB, increase in the paid-up portion, and reduction in contribution rates all

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[23] Evidence of G. Argue, p. 684, ll. 1-33; p. 685, ll. 27-46; p. 688, ll. 23-47; p. 689, ll. 28-32; p. 694, ll. 27-46; p. 695, ll. 20-22, A.R. Vol. II, pp. 171-76; *Opinion of G. Argue* (April 15, 2005) [***Argue Opinion***], A.R. Vol. VI, p. 38

[24] *Actuarial Report on the Public Service Death Benefit Account as at March 31, 2002*, A.R. Vol. IV, p. 39

[25] Evidence of J. Christie, p. 203, ll. 36-44, A.R. Vol. II, p. 97

[26] Treasury Board of Canada Secretariat, *Report on the Public Service Pension Plan, for the Fiscal Year Ended March 31, 2008*, http://www.tbs-sct.gc.ca/reports-rapports/pspp-rrfp/2008/rpspp-rrrfp-eng.pdf, p. 64 [***2008 PSSA Report***], ABoA Tab 41

[27] Letter from G.W. Poznanski, Chief Actuary, A.R. Vol. V, pp. 82-83; *Discussion Paper*, A.R. Vol. VI, p. 4

[28] Evidence of D. Hébert, p. 810, ll. 10-23, A.R. Vol. III, p. 10

[29] Evidence of D. Hébert, p. 807, l. 47 - p. 808, l. 5, A.R. Vol. III, pp. 7-8

[30] **[1977]** Evidence of D. Hébert, p. 807, ll. 24-41, A.R. Vol. III, p. 7; *Public Service Death Benefit Account Actuarial Report As at December 31, 1977*, A.R. Vol. III, p. 167; **[1980]** Evidence of D. Hébert, p. 808, l. 38 – p. 809, l. 5, *Public Service Death Benefit Account Actuarial Report as at December 31, 1980*, A.R. Vol. III, p. 170; **[1983]** Evidence of D. Hébert, p. 809, ll. 22-44, A.R. Vol. III, p. 9; *Public Service Death Benefit Account Actuarial Report as at December 31, 1983*, A.R. Vol. III, p. 175; **[1986]** Evidence of D. Hébert, p. 809, l. 45 - p. 810, l. 9, A.R. Vol. III, pp. 9-10, *Public Service Death Benefit Account Actuarial Report as at December 31, 1986*, A.R. Vol. III, p. 187; **[1989]** Evidence of D. Hébert, p. 810, ll. 24-31, A.R. Vol. III, p. 10; *Public Service Death Benefit Account Actuarial Report as at December 31, 1989*, A.R. Vol. IV, p. 4; **[1996]** Evidence of **D.** Hébert, p. 812, ll. 2-29, A.R. Vol. III , p. 12; *Public Service Life Insurance Plan, Actuarial Report 31 March 1996*, A.R. Vol. IV, p. 21

helped to reduce the surplus, but it continues to grow. While less "exorbitant," the Canadian Forces Plan has maintained a surplus, with receipts exceeding payments in every year. The 2002 surplus was $117.8 million; by 2008, this had grown to $196.7 million.[31]

Summary of SDB Features Over the Life of the Plans

23. Table 1 summarizes the SDB features of the Civil Service Plan. Table 2 describes the Canadian Forces Plan.

Table 1: Summary of SDB Features for Civil Service Plan

Time Span	**1954-60**[32]	**1960-92**	**1992-99**[33]	**1999-present**[34]
Benefit Amount	participant's annual salary (maximum of $5,000; for employed participants, minimum of 1/6 of the salary)	participant's annual salary (for employed participants, minimum[35] of the greater of 1/6 of the salary or $500; for elective participants, minimum of $500)[36]	twice the participant's annual salary (for employed participants, minimum of the greater of 1/3 of the salary or $5,000; for elective participants, minimum of $5,000)	twice the participant's annual salary (for employed participants, minimum of the greater of 1/3 of the salary or $10,000; for elective participants, minimum of $10,000)
Beneficiary	spouse or estate in absence of a spouse	estate, anyone over 18, charitable, religious or educational organization[37]	estate, anyone over 18, charitable, religious or educational organization	estate, anyone over 18, charitable, religious or educational organization
Participant's Contribution	40 cents/month per $1,000 of benefit	40 cents/month per $1,000 of benefit	20 cents/month per $1,000 of benefit	15 cents/month per $1,000 of benefit
Government's Contribution	1/6 of cost of benefit, paid at time of death	1/6 of cost of benefit, paid at time of death	1/12 of cost of benefit, paid at time of death	1/12 of cost of benefit, paid at time of death
Age for Triggering 10% Reduction	61	61	61	65
Paid-Up Benefit at 65	$500	$500	$5,000	$10,000

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[31] **[2002]** *Actuarial Report on the Regular Force Death Benefit Account as at 31 March, 2002,* A.R. Vol. IV, p. 70; [**2008**] National Defence, *2007-2008 Annual Report, Canadian Forces Pension Plans*, http://www.admfincs.forces.gc.ca/doc/dcf-dsp/ar-ra-0708-eng.pdf, p. 79, ABoA Tab 39

[32] *Act to Amend PSSA*; *PSSA Regs*

[33] *Public Service Superannuation Act*, S.C. 1992, c. 46, ss. 25(1), 26 [***1992 Amendment***]

[34] *Public Sector Pension Investment Board Act*, S.C. 1999, c. 34, ss. 98(1), 103

[35] Maximum of $5,000 removed in 1966 (*1966 Amendment*, s. 22)

[36] *An Act to amend the Public Service Superannuation Act*, S.C. 1960, c. 38, s. 21

[37] Amended in 1960 to spouse of deceased *male* participant or estate in the absence of a spouse, then in 1976 to the present language, *1975 Amendment*, s. 24; *PSSA Regs*, s. 26(5)

Table 2: Summary of SDB Features for Canadian Forces Plan

Time Span	**1954-66**[38]	**1966-92**[39]	**1992-present**[40]
Benefit Amount	$3,000 for those below the rank of chief petty officer in the Navy and equivalent ranks in the Army and Air Force; $5,000 for all others	participant's annual salary (for employed participants, minimum of $3,000 for those below warrant officer and minimum of $5,000 for all others; for elective participants, minimum of $500)	twice participant's annual salary (for employed participants, minimum of $3,000 for those below warrant officer and minimum of $5,000 for all others; for elective participants, minimum of $500)
Beneficiary	participant's spouse or estate in absence of a spouse	estate, anyone over age 18, charity, benevolent, religious or educational organization[41]	estate, anyone over age 18, charity, benevolent, religious or educational organization
Participant's Contribution[42]	40 cents/month per $1,000 of benefit	20 cents/month per $1,000 of benefit	10 cents/month per $1,000 of benefit
Government's Contribution	1/6 of cost of benefit, paid at time of death	1/6 of cost of benefit, paid at time of death	1/12 of cost of benefit, paid at time of death
Age for Triggering 10% Reduction	61	61	61
Paid-Up Benefit at 65	$500	$500	$5,000

Sustainability of the Plans Without the Reduction Provisions

24. Both the government's expert, Mr. Hébert, and the appellants' expert, Mr. Christie, opined on Plan sustainability if the Reduction Provisions were to be removed. They reached different conclusions based on the time horizons implicit in the word "sustainability,"[43] but each concluded that the Plans could continue in some modified form under a variety of different

[38] *Act to Amend PSSA*; *PSSA Regs*
[39] *1966 Amendment*, ss. 53-55; *CFSA Regs*
[40] *1992 Amendment*, ss. 52-57 (no subsequent amendments)
[41] Amended in 1960 and again in 1976 to the present language
[42] See note 22 above
[43] *John Christie's Comments on Reply Report by Daniel Hébert dated May 25, 2005* [***Christie #3***], A.R. Vol. IV, p. 78 (concluding that 20 years, as opposed to 65 to 80 years, was long enough to assess Plan sustainability)

scenarios.[44] Table 3 shows their three directly comparable scenarios, with the estimates for "Year When Account Surpluses Would be Exhausted" serving as proxies for sustainability.[45]

Table 3: Year When Surpluses Would be Exhausted Under Three Scenarios

Scenario	**Civil Service Plan**		**Canadian Forces Plan**	
	Christie Estimate	**Hébert Estimate**	**Christie Estimate**	**Hébert Estimate**
#1 Reduction Provisions and paid-up benefits eliminated in 1985;[46] participant and government contribution rates *maintained* at 1985 levels; SDB doubled in 1992.	2016	2022	2011	2009
#2 Reduction Provisions and paid-up benefits eliminated in 1985; participant and government contribution rates *restored* to 1985 levels; SDB doubled in 1992; cost of eliminating Reduction Provisions for past deaths financed from source outside SDB Accounts.	>2020	2038	2009	2010
#3 Reduction Provisions and paid-up benefits eliminated in 1985; participant and government contribution rates *restored* to 1985 levels; SDB doubled in 1992 *but restored to a multiple of one times salary*; all or part of cost of eliminating Reduction Provisions for past deaths financed from source outside SDB Accounts.	>2020[a]	2012[b] 2066[c]	2018[a]	2004[b] 2017[c]

[a] One-third of cost financed from outside SDB Account.
[b] Entire cost financed from SDB Account.
[c] Entire cost financed from outside SDB Account.

25. While the plaintiffs' expert Mr. Christie and the government's expert Mr. Hébert disagreed over the time frame required for a sustainable plan – 20 years and 65 years respectively – the Canadian Forces Plan has never been considered sustainable for more than 20

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[44] *Hébert Report #1*, A.R. Vol. VI, p. 125 and *Hébert Report #2*, A.R. Vol. VI, p. 135; *Report on Supplemental Death Benefit Plan, Part II of the Public Service Superannuation Act by John M. Christie, F.C.I.A.* [***Christie Report #1***], A.R. Vol. III, pp. 111-20; and *Report on Supplemental Death Benefit Plan, Part II of the Canadian Forces Superannuation Act by John M. Christie, F.C.I.A.* [***Christie Report #2***]. A.R. Vol. III, p. 143; *Reply Report by D. Hébert* [***Hébert Report #3***], A.R. Vol. VI, pp. 143-48; Evidence of J. Christie, pp. 207-59, A.R. Vol. II, pp. 69-121; Evidence of D. Hébert, pp. 815-49, A.R. Vol. III, pp. 13-47; Graphs and Charts (Exhibits 54-57), A.R. Vol. VI, pp. 177-84

[45] *Christie Report #3*, A.R. Vol. IV, p. 82 (results summarized from the prior Christie Reports #1 & 2 and Hébert Reports # 1 and 2, with the Christie Scenario 1 revised to correct for an earlier error.) See footnote 209 Re: Projected surplus without reductions

[46] As explained further below, the Canadian Human Rights Commission had recommended repeal of both the Reduction Provisions and the age-based criterion for the paid-up benefit. The rationale for removing the paid-up benefit altogether for this scenario is that it provides a floor in light of the fact that the death benefit is reduced by 10% from age 66 or 61, as the case may be. With the Reduction Provisions removed, there is no need for the floor: see *Hébert Report #1*, A.R. Vol. VI, p. 125, *Hébert Report #2*, A.R. Vol. VI, p. 136.

years, and there has never been any effort made to change its terms to make it sustainable any longer.[47]

Review of Legislation Under *Canadian Human Rights Act* and *Charter*

26. The Canadian Human Rights Commission has a mandate to review federal legislation. The Commission reported in 1980 to then Justice Minister Chrétien on pension provisions it considered to be inconsistent with federal non-discrimination principles,[48] concluding that the Reduction Provisions in the *PSSA* and *CFSA* were discriminatory. Accordingly, it recommended repealing them, along with the age-based criteria for the paid-up benefit, in the next amendment.[49] A concurrent memorandum[50] suggested that reductions might be based on age or sex if determined actuarially, that there was uncertainty as to whether that was so for some pension benefits, but that for the SDB, "it seems clear that at least for active employees, the reduction in SDB coverage at age 60 is not permitted."[51]

27. A Treasury Board advisory committee later recommended that no immediate action be taken, but that the areas of discrimination be considered in a full review of survivor benefits then under way; the Minister agreed to this proposal to defer action.[52] Additional impetus for review came from Prime Minister Trudeau in 1982, who asked for Treasury Board cooperation in bringing legislation, regulations and practices into conformity with the new *Charter*.[53] Follow-up correspondence referred to the Commission's recommendations, noting that "change could be easily and desirably effected" but that amendments "have not been possible to date because of national pension reform implications; while others have been delayed by virtue of the necessity to

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[47] Assumptions underlying the basis for projections become increasingly unreliable and uncertain with projection into the future, a process Mr. Christie described as the "expanding funnel of doubt": evidence of J. Christie, pp. 244-46, at p. 245, ll. 24-34, A.R. Vol. II, pp. 106-08

[48] Canadian Human Rights Commission, *Report Under Sections 47 and 48 of the Canadian Human Rights Act* (May 27, 1980) and cover letter to J. Chrétien (May 28, 1980) [***CHRC Report***], A.R. Vol. V, pp. 87-100

[49] *CHRC Report,* A.R. Vol. V, pp. 87-88; Memorandum to President of the Treasury Board (July 17th 1980) stating it was the "presumption of needs based on age which is contrary to human rights legislation", A.R. Vol. V, p. 106

[50] Memo from A. Gravelle and L. Gendron to M.F. Taylor (May 28, 1980) [***Gravelle Memorandum***], A.R. Vol. V, p. 101

[51] *Gravelle Memorandum*, A.R. Vol. V, p. 105. See also *Christie Report #1,* A.R. Vol. III, p. 102 and *Christie Report #2*, A.R. Vol. III, pp. 129-30 (concluding that no actuarial connection exists between the death benefits and the size of the SDB accounts) and *Hébert Report #1,* A.R. Vol. VI, p. 128 and *Hébert Report* #2, A.R. Vol. VI, p. 139 (showing the lack of actuarial connection between participant contributions and age or sex)

[52] Letter re: Advisory Committee Report (August 12, 1981), A.R. Vol. V, p. 125; *Discussion Paper,* A.R. Vol. VI, p. 6; *Clark Report,* A.R. Vol. V, p. 155

await the outcome of broad studies."[54] A similar report concluded that "the decision to defer amendments to remove the discriminatory features... is not because of any disagreement with the Canadian Human Rights Commission but simply a matter of appropriate timing in order to make those amendments coincide with others which may result from the general study of survivor benefits which is now under way."[55]

Costs of Last Illness and Death

28. Professor Forget, a health economist,[56] explained that dying people, particularly the elderly, often have complex and chronic health challenges, making it hard to precisely identify "last illness." Researchers thus settle on health care costs in the last six months of life as costs associated with death.[57] This makes estimates conservative, since health may decline for much longer than six months,[58] and "what is written on the death certificate is very often not what most people would identify as the last illness."[59]

29. Professor Forget said that, on average, a person spends a year in a long term facility and "might spend many years in lower levels of care, assisted living." In her report, she calculated only the costs associated with last illness and death for a six-month period, but said that these underestimated the real costs. For the elderly, health often declines for a much longer period and costs of last illness and death are much higher.[60] Professor Forget's calculations were based on individuals' costs (not covered by government insurance plans),[61] and she concluded that costs of dying are substantial, often unrecognized, and increase with age.[62]

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[53] Letter from P.E. Trudeau to D. Johnston, President of the Treasury Board (April 5, 1982), A.R. Vol. V, pp. 126-28

[54] Memorandum from J. Martin to J.W. Quinn (April 22, 1982), A.R. Vol. V, pp. 129-30

[55] *Clark Report*, A.R. Vol. V, pp. 158, 189 (the government estimated its cost of these "human rights amendments" as a percentage of insured salary levels, *viz*, 0.048%)

[56] Evelyn Forget, "Health Care Costs Associated with Death" (April 15, 2005) [***Forget Report***] A.R. Vol. III, pp. 75-77

[57] *Forget Report*, A.R. Vol. III, p. 77

[58] *Forget Report*, A.R. Vol. III, p. 77

[59] Evidence of E. Forget, p. 160, ll. 33-43, A.R. Vol. II, p. 55

[60] Evidence of E. Forget, p. 160, ll. 1-47, p. 170, ll. 7-12, A.R. Vol. II, pp. 55, 58; *Forget Report*, A.R. Vol. III, p. 77

[61] Prof. Forget's results were by sex, age bracket and cost category. For males, total mean per capita costs in the last six months of life ranged from a low of $4,344 (ages 35-44) to a high of $33,775 (ages 85+). For females, the same costs were higher in every age bracket, ranging from a low of $9,998 (ages 35-44) to a high of $42,021 (ages 85+); *Forget Report*, A.R. Vol. III, pp. 77, 84, 85

[62] *Forget Report*, A.R. Vol. III, p. 78

30. Professor Chaykowski, an economist and policy analyst,[63] concluded that, apart from income, the most significant factor affecting seniors' economic wellbeing is health status: both theirs and their spouses.[64] He reported that Canadian seniors account for a disproportionately high fraction of both total health expenditures and private health expenditures;[65] that private and total *per capita* health expenditures increase with age, especially among those 65 and over;[66] and that private and total health care expenditures are higher in the last year of life than other years.[67]

31. Professor Chaykowski noted that private out-of-pocket costs borne by seniors associated with long term care and home care requirements increase with age. This is due to increasing health care requirements with age, including likelihood of chronic illness, increased dependency, increased likelihood of institutionalization, and incomplete public funding coverage for long term care and home care.[68]

32. The government's health care plan does not cover the most significant costs associated with last illness and death, providing only $15,000 toward nursing care (if prescribed by a physician), and nothing for home care or long term care.[69] As Professor Forget said: "[t]he biggest fear for older people and certainly the biggest component of cost is the long-term care facility, the sort of thing that's not paid for by any supplementary health scheme"[70]

33. No government health care plan covers what might be described as the "hidden costs" of last illness and death. Foremost among those costs is the cost of informal health care. Many of the appellants who testified recounted how they left paid employment to stay home and take care of their ailing spouses.[71] Professor Forget costed informal care for men and women at Tables 1

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[63] R.P. Chaykowski, "Report on the Economic Well-Being of Seniors in Canada" (15 April 2005) [***Chaykowski Report***], A.R. Vol. IV, pp. 88-105

[64] *Chaykowski Report*, A.R. Vol. IV, p. 95

[65] *Chaykowski Report*, A.R. Vol. IV, pp. 95-96; See also the Special Senate Committee on Aging – Final Report, *Canada's Aging Population: Seizing the Opportunity*, (April 2009) http://www.parl.gc.ca/40/2/parlbus/commbus/senate/com-e/agei-e/rep-e/AgingFinalReport-e.pdf [***Senate Report on Aging***], pp. 63-64, ABoA Tab 40

[66] *Chaykowski Report*, A.R. Vol. IV, p. 96

[67] *Chaykowski Report*, A.R. Vol. IV, p. 102

[68] *Chaykowski Report*, A.R. Vol. IV, p. 101

[69] Evidence of G. Argue, p. 731, ll. 1-9; p. 738, ll. 22-30, A.R. Vol. II, pp. 185, 192

[70] Evidence of E. Forget, p. 170, ll. 1-6; p. 171, ll. 1-26, A.R. Vol. II, pp. 58-59

[71] Evidence of J. Fitzsimonds, p. 55, ll. 31-37, A.R. Vol. II, p. 15; Evidence of E. Ball, p. 24, ll. 31-47; p. 25, ll. 1-14, A.R. Vol. II, pp. 1-2; Evidence of McNaughton, p. 141, ll. 20-30, A.R. Vol. II, p. 50; Evidence of S. McLaren, p. 73, ll. 1-47, p. 75, ll. 1-10, A.R. Vol. II, pp. 22-23

and 2 of her report, and explained that "older women tend to have nobody left to take care for them… and go into personal care homes."[72] Professor Forget said that "older people, who are no longer in the labour force, tend to incur costs in the form of reductions in their own health status. They injure themselves. They wear themselves out taking care of family members."[73]

34. The other hidden costs of last illness and death borne by surviving spouses are the costs of living alone. Many of the witnesses at trial testified that they now needed to hire people to do work around the house that their husbands had tended to do. Elderly people often incur the added expense of having security systems installed in their homes to deal with the fear of living alone. Almost all the witnesses spoke about the loneliness and despair they faced living alone and how, for many of them, travel provided some solace or consolation. These extra costs were also attested to by Professor Chaykowski.[74]

35. Mr. Crean, a British Columbia funeral director, testified about funerary and burial costs, which the trial judge found could be $8,500,[75] but with particular options could be even higher.[76]

Economic Wellbeing of Seniors

36. The appellants adduced the uncontradicted opinion of Professor Chaykowski on the economic wellbeing of seniors (defined as 65 or older). His approach was from both an income and a wealth perspective. On income, he concluded that: seniors' average income is lower than that of non-seniors and declines steadily with age; the median income of female seniors is less than that of male seniors; and any income reduction arising from a spouse's death is likely to reduce the

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[72] Evidence of E. Forget, p.169, ll. 1-8, A.R. Vol. II, p. 57; *Forget Report*, A.R. Vol. III, pp. 84-85

[73] Evidence of E. Forget, p. 168, ll. 21-34, A.R. Vol. II, p. 56

[74] Evidence of J. Fitzsimonds, p. 58, ll. 37-47; p. 59, ll. 1-16, A.R. Vol. II, pp. 17-18; Evidence of E. Ball, p. 26, ll. 31-47, A.R. Vol. II, p. 3; Evidence of I. Jackson, p. 44, ll. 16-33, A.R. Vol. II, p. 14; Evidence of P. McNaughton, p. 143, ll. 24-41; p. 144, ll. 14-21, A.R. Vol. II, pp. 52-53; Evidence of Munro, p. 85, ll. 38-47; p. 86, ll. 1-6, A.R. Vol. II, pp. 26-27; Evidence of R. Chaykowski, p. 317, ll. 20-43, A.R. Vol. II, p. 128

[75] *Withler*, *BCSC*, para. 153, A.R. Vol. I, p. 68

[76] In 2005, the cost of a simple cremation with a memorial service at his funeral home would be $1,700; the cost of the least expensive funeral service, $2,300. He testified that the same costs would be up to 40 percent higher at chain funeral homes across the country: Evidence of T. Crean p. 381, ll. 29-45, p. 382, ll. 1-5, ll. 12-15, A.R. Vol. II, pp. 144-45. Additional costs can be incurred for such items as visitation and prayer services ($500), casket ($2,200 for a "modest" one), flowers ($200), burial plot ($6,000), cement liners ($600 to $800), vaults ($1,000 to $8,000), plaques ($500) or markers ($3500), newspaper notices ($350) and GST on these items: Evidence of T. Crean, pp. 382-86, A.R. Vol. II, pp. 145-49.

economic well being of the surviving partner.[77] He also opined that seniors are tending to live longer and thus eroding savings or consuming less in order to have more income to cope with future needs.[78] He says that consumption is very relevant to economic well-being since older persons have much higher levels of expected health related and thus *necessary* expenditures as they age if they are to maintain even a very basic standard of well being.[79] On wealth, he concluded: the *average* wealth of seniors was lower than that of persons aged 55-64 or 45-54; *median* assets rose steadily with age to about 55-59, after which they declined to a much lower level (after 80 to about the level of persons in their mid-30s); and median assets of female seniors are less than those of male seniors.[80]

37. Professor Chaykowski concluded that seniors' economic wellbeing is, on average, "at most close to, and most likely to be lower than, the economic well-being of younger persons" and that the combination of higher expected health care costs and lower median income and wealth for female seniors "would result in lower levels of economic well-being among senior women than among senior men."[81] The trial judge said that "putting the plaintiffs' case on its strongest footing, the economic well being of the elderly is about 'the same and most likely less than younger persons'."[82] The trial judge appeared, however, to have accepted Professor Chaykowski's opinion that economic wellbeing declines at advanced ages, and relied on "Table 5," which reveals that the average wealth of those over 65 is less than that of those in the 45-54 and 55-64 age brackets.[83]

38. Professor Chaykowski cautioned against comparing the entire under- and over-65 groups since there is such variation within those groups. He said that "the focus on very broad age groups that essentially dichotomize the population masks important variations in consumption, savings and expected liabilities across ages." He added that "comparisons tend to be more valid when

[77] *Chaykowski Report,* A.R. Vol. IV, pp. 92-93 [Findings are based on 2000 data]
[78] Evidence of R. Chaykowski, p. 327, ll. 22-46, A.R. Vol. II, p. 131
[79] R. Chaykowski, "Opinion on the Report of Professor D. Allen", A.R. Vol. IV, p. 132 [***Chaykowski Reply Report***]; and Evidence of R. Chaykowski, p. 320, A.R. Vol. II, p. 130
[80] *Chaykowski Report,* A.R. Vol. IV, p. 94 [Findings are based on 1999 data]; Statistics Canada report entitled "Wealth Inequality" by René Morrisette, Xuelin Zhang and Marie Drolet, A.R. Vol. IV, p. 140; Evidence of R. Chaykowski, pp. 359-61, 375-79, A.R. Vol. II, pp. 135-37, 139-43
[81] *Chaykowski Report,* A.R. Vol. IV, pp. 104-05; Evidence of R. Chaykowski, pp. 314-18, 320, 327-30, A.R. Vol. II, pp. 125-33
[82] *Withler, BCSC,* para. 147, A.R. Vol. I, pp. 64-65

comparing persons who are not members of significantly different age groups" and agreed with the expert opinion of Professor Allen (whom the respondent chose not to call) that "a comparison between those who are 'elderly' versus those aged 55-65 would be appropriate… [where] one finds… the net worth of those aged 65 and over is <u>less than</u> those aged 55-64."[84]

The Plaintiffs

39. The trial judge summarized the facts that pertained to the representative plaintiffs and other class members or witnesses who testified in support of the claim,[85] though there is more to their evidence than was summarized. Some described significant financial hardship associated with a spouse's last illness and death. Many gave up jobs to stay home and care for their ailing spouses. Most continue to carry mortgages. All testified as to uncertainty about their financial future and a need to be careful with finances. Some face great challenges over their health and ability to live independently. All are concerned about not becoming a burden on their families.[86]

PART II: STATEMENT OF QUESTIONS IN ISSUE

40. Do s. 47(1) of the *Public Service Superannuation Act*, R.S.C. 1985, c. P-36, and ss. 15 and 16 of the *Supplementary Death Benefits Regulations*, C.R.C., c. 1360, infringe s. 15 of the *Canadian Charter of Rights and Freedoms*; being Schedule B to the *Canada Act 1982*, (U.K.) 1982, c. 11 (the "*Charter*")? If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Charter*?

41. Do s. 60(1) of the *Canadian Forces Superannuation Act*, R.S.C. 1985, c. C-17, and s. 52 of the *Canadian Forces Superannuation Regulations*, C.R.C., c. 396, infringe s. 15 of the

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[83] *Withler, BCSC*, paras. 147-48, A.R. Vol. I, pp. 64-66

[84] *Chaykowski Reply Report*, A.R. Vol. IV, p. 134-135 Evidence of R. Chaykowski p. 320, ll. 1-15; p. 314, ll. 27-41; p. 329, ll. 16-45, A.R. Vol. II, pp. 130, 125, 132

[85] *Withler, BCSC*, paras. 22-49, A.R. Vol. I, pp. 16-25

[86] Evidence of H. Withler, p. 124, ll. 30-47; p. 125, ll. 43-47; p. 126, ll. 1-35; p. 133, ll. 23-28; p. 134, ll. 26-35, A.R. Vol. II, pp. 43-47; Evidence of J. Fitzsimonds, p. 56, ll. 30-38; p. 70, ll. 36-47; p. 71, l. 1, A.R. Vol. II, pp. 16, 19-20; Evidence of E. Ball; pp. 25-32; p. 37, ll. 8-44; p. 39, ll. 7-29, A.R. Vol. II, pp. 2-9, 11-12; Evidence of I. Jackson, p. 42, ll. 8-17; p. 44, ll. 16-33, A.R. Vol. II, pp. 13-14; Evidence of S. McLaren, pp. 71-72; p. 73, ll. 1-45; p. 75, ll. 38-47; p. 78, ll. 1-47; p. 79, ll. 1-4, A.R. Vol. II, pp. 20-25; Evidence of A. Humphreys, pp. 102-05; p. 106, ll. 1-6; p. 109, ll. 1-18; p. 110, ll. 36-47; p. 112, ll. 24-47; p. 113, ll. 1-30, A.R. Vol. II, pp. 30-39; Evidence of P. McNaughton, pp. 139, ll. 37-47; p. 140, ll. 1-3 and ll. 28-41; p. 141, ll. 20-30; p. 142, ll. 15-47; p. 143, ll. 6-11 and ll. 24-41; p. 144, ll. 7-20 and l. 47; p. 145, ll. 1-4, A.R. Vol. II, pp. 48-54

Charter? If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Charter*?

PART III: STATEMENT OF ARGUMENT

42. The Reduction Provisions impose disadvantage on the basis of age in a manner that has the effect of promoting the prejudicial view that older people are less worthy or deserving of government benefits or that relies on stereotypical views respecting their needs.

43. Following this Court's decisions in *R. v. Kapp*[87] and *A.C. v Manitoba*,[88] the test for discrimination under s. 15 of the *Charter* is: (i) does the law create a distinction based on an enumerated or analogous ground; and (ii) if so, does the distinction create a disadvantage by perpetuating prejudice or stereotyping. The trial judge and the Court of Appeal held that the Reduction Provisions created a distinction based on age or grounds analogous to age.[89] There is no question that the Reduction Provisions create a disadvantage: they deny an important statutory benefit, one designed for government employees and, importantly, mostly paid for by the employees themselves.

44. As this Court said in *Kapp*: "the focus is on *preventing* governments from making distinctions… that have the effect of perpetuating group disadvantage and prejudice; or *impose disadvantage* on the basis of stereotyping."[90]

45. The enumerated and analogous grounds are markers of suspect distinctions.[91] It should be a rare case where a law that differentiates on an enumerated or analogous ground is not

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[87] *R. v. Kapp*, [2008] 2 S.C.R. 483, 2008 SCC 41 [***Kapp***], ABoA Tab 30

[88] *A.C. v. Manitoba (Director of Child and Family Services),* [2009] 7 W.W.R. 379, 2009 SCC 30 [***A.C.***], ABoA Tab 1

[89] *Withler, BCSC*, paras. 91, 105, A.R. Vol. I, pp. 42, 47-48; Court of Appeal Reasons for Judgment [***Withler, BCCA***] (*per* Rowles J.A.), para. 56, A.R. Vol. I, p. 98; *Withler, BCCA* (*per* Ryan J.A.), para. 166, A.R. Vol. I, pp. 143-44

[90] *Kapp*, para. 25, ABoA Tab 30. On the meaning and significance of "stereotyping" see *Law v. Canada (Minister of Employment and Immigration),* [1999] 1 S.C.R. 497 [***Law*]**, para. 64, ABoA Tab 20, and also see Sophia R. Moreau*: The Wrongs of Unequal Treatment*, (Summer, 2004) 54 Univ. of Toronto L.J. 291 [***Wrongs of Unequal Treatment***], (Q.L.), p. 5, ABoA Tab 44

[91] *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203, [***Corbiere***] para. 11, ABoA Tab 7; *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143 [***Andrews***], p. 175, ABoA Tab 4. The enumerated grounds do, however, reflect the most common and probably the most socially destructive and historically practised bases of discrimination and must, in the words of s. 15(1), receive particular attention.

discriminatory.[92] Age is an enumerated ground, and while it may not be immediately evocative of the same invidious discrimination as other grounds, it still demands judicial vigilance. Stereotypical assumptions about aging are undergoing significant reconsideration both in Canada[93] and throughout the developed world.[94]

46. The following passage from Bastarache J. in *Gosselin v. Quebec*,[95] is instructive:

> **227** …. While distinctions based on age may often be justified, they are nonetheless equally suspect. While age is a ground that is experienced by all people, it is not necessarily experienced in the same way by all people at all times. Large cohorts may use age to discriminate against smaller, more vulnerable cohorts. A change in economic, historical or political circumstances may mean that presumptions and stereotypes about a certain age group no longer hold true. Moreover, the fact remains that, while one's age is constantly changing, it is a personal characteristic that at any given moment one can do nothing to alter. Accordingly, age falls squarely within the concern of the equality provision that people not be penalized for characteristics they either cannot change or should not be asked to change.

47. A law that denies benefits or imposes burdens on the *elderly* should be held to be discriminatory, leaving its justification to s. 1. As the majority in *Gosselin* explained:

> **32** … [P]re-existing disadvantage and historic patterns of discrimination against a particular group do form part of the contextual evaluation of whether a distinction is discriminatory, as called for in *Law*. Concerns about age-based discrimination typically relate to discrimination against people of advanced age who are presumed to lack abilities that they may in fact possess. Young people do not have a similar history of being undervalued.[96]

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[92] *Andrews*, pp. 173-74, ABoA Tab 4; *Law*, paras. 26, 72, ABoA Tab 20

[93] *Senate Report on Aging*, One of the Committee's themes was "countering ageism", pp. 11-13, ABoA Tab 40

[94] The second UN World Assembly on Aging was held April 8-12, 2002 and included the mandate to address equality of people of all ages: *United Nations Report of the Second World Assembly on Ageing*, Madrid, 8-12 April 2002: http://daccessdds.un.org/doc/UNDOC/GEN/N02/397/51/PDF/N0239751.pdf?OpenElement, pp. 1-4, ABoA Tab 42; *Mangold v. Helm*, [2006] All ER (EC) 383, ABoA Tab 21 (holding that age discrimination is contrary to principles of international law); Council of Europe, Recommendation CM/Rec (2009)6 of the Committee of Ministers to member states on ageing and disability in the 21st century: sustainable frameworks to enable greater quality of life in an inclusive society, ABoA Tab 38 (s. 3.4, addressing discrimination on the basis of age and disability, stating that "equal rights of access to social services and legal protection should be guaranteed throughout the whole country, including in countries with a federal structure"); *Age Concern England v. Secretary of State for Business, Enterprise and Regulatory Reform*, [2009] All ER (EC) 619, ABoA Tab 2 (addressing the permissibility of mandatory retirement regulation); *R (on the application of) v. Secretary of State for Business, Innovation & Skills & Ors* [2009] EWHC 2336 (Admin), ABoA Tab 32 (finding that but for the government's intention to review the default retirement age, relief would have been granted as the chosen age of 65 was not capable of reasonable and objective justification)

[95] *Gosselin v. Québec (Attorney General)*, [2002] 4 S.C.R. 429, 2002 SCC 84 [***Gosselin***], para. 227, ABoA Tab 12, Bastarache J, in dissent (the majority in agreement on most, if not all, matters save whether the plaintiff had met her burden of proof:, paras. 18 and 19)

[96] *Gosselin*, para. 32, ABoA Tab 12

48. In *McKinney*, this Court had no difficulty in concluding that a law requiring a person to retire at what was thought of as "normal retirement age" violated s. 15, leaving to s. 1 any consideration of its rationale.[97] In *Tétreault-Gadoury*, a law that terminated unemployment insurance benefits at age 65 was held to be discriminatory, leaving any justification to s. 1.[98]

49. In *A.C.*, age 16 was used as "a reasonable proxy for independence" or maturity. The law was held not to violate s. 15 because it was construed to allow a child under the age of 16 to lead evidence of maturity.[99] Thus maturity, not age, determined the claimant's right to make medical choices. Age was only a rebuttable indicator of immaturity.[100] In the present case it is neither a proxy[101] nor rebuttable.

50. In *A.C.*, Justice Abella for the majority relied on *Gosselin* and noted that, while all age-based distinctions have a kind of arbitrariness, that alone does not invalidate them "[p]rovided that the age chosen is reasonably related to the legislative goal**.**"[102]

51. In this case, the key propositions are as follows: the Reduction Provisions create distinctions and impose disadvantages based on age or grounds analogous to age and also have a disproportionate adverse effect on elderly women[103] and those disabled by age. The case thus involves intersecting grounds of discrimination.[104]

52. The trial judge characterized the SDB as "life insurance"[105] but said that "the purpose of SDB is more important than what it is called."[106] The trial judge further found that at older ages the purpose of the SDB is "for the expenses associated with last illness and death."[107]

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[97] *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229, pp. 295-98, 389-93, ABoA Tab 24

[98] *Tétrault-Gadoury v. Canada (Employment and Immigration Commission)*, [1991] 2 S.C.R. 22 [***Tétrault-Gadoury***], pp. 38-41, ABoA Tab 34; see also *Vilven v. Air Canada*, 2009 FC 367, paras. 322-28 , ABoA Tab 35 (holding s. 15(1)(c) of the *Canadian Human Rights Act* violates s. 15 of the *Charter*)

[99] *A.C.*, para. 111, ABoA Tab 1

[100] *A.C.*, paras. 111, 114-15, ABoA Tab 1

[101] See para. 106 of this factum and accompanying references

[102] *A.C.*, para. 110, ABoA Tab 1

[103] *Withler, BCSC*, paras. 89-90, 92, 152, A.R. Vol. I, pp. 41-42, 67-68

[104] *Law*, para. 94, ABoA Tab 20; *Corbiere*, para. 61, ABoA Tab 7

[105] *Withler, BCSC*, para. 160, A.R. Vol. I, p. 71

[106] *Withler, BCSC*, paras. 120 and 156 A.R. Vol. I, pp. 54, 69

[107] *Withler, BCSC*, para. 170, A.R. Vol. I, p. 74

53. The evidence is uncontroversial that the costs of last illness and death increase with age and do so “dramatically in each decade over 65.”[108] The evidence is also uncontroversial that wealth declines from the age of 65 onwards.[109] Yet the Reduction Provisions decrease the SDB as an employee ages precisely when the surviving spouse needs it most to offset expenses consequential upon or associated with the last illness and death of a spouse. In fact, the trial judge accepted that by reason of the Reduction Provisions the costs of last illness and death for the claimants may not be fully covered.[110] Given its purpose, it is therefore arbitrary and irrational to reduce and eliminate the SDB with a participant’s age. The Reduction Provisions are thus not at all related to the legislative goals behind the SDB.

54. This is not a case where a different age or cut-off age would have been preferable.[111] Given the dual purposes of this law, there should have been no age at which the SDB was eliminated. It was needed for all ages – particularly for the groups at the two ends of the age spectrum - but for different reasons. One class member, Mrs. Ethel Ball, captured this point eloquently: When the government’s counsel suggested to her that she would not need the same SDB when she was older that she would when younger, she said:

> “And you don’t think I need it now? … Q: But you would have needed it [when younger] a lot, wouldn’t you? A: Both times dear, then and now… both times. Then, when I was younger, and now that I’m older. Different set of circumstances, different set of expenses, but still trying circumstances.”[112]

55. Nor is this a case, as in *Gosselin*, where “some people may fall through the program’s cracks,” [113] but where most of those under the stipulated age would not have needed the benefit, whereas some might have.[114] This case is the converse: most, if not all, persons over the age of 65 need the SDB, and need it more as time goes on.

56. Government programs need not be available for all ages, but given the purpose of this program (benefit for last illness and death for active and retired employees), it is irrational to

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[108] *Withler, BCSC,* para. 154, A.R. Vol. I, pp. 68-69; see Facts at paras. 28-34
[109] See Facts at paras. 36-38
[110] *Withler, BCSC,* para. 154, 170, A.R. Vol. I, pp. 68-69, 74
[111] *Gosselin*, para. 57, ABoA Tab 12
[112] Evidence of E. Ball, p. 37, ll. 34-39, A.R. Vol. II, pp. 11-12
[113] *Gosselin*, para. 55, ABoA Tab 12
[114] *Gosselin,* paras. 53-54, ABoA Tab 12

terminate it *before* the last illness and death of employees over 60 or 65. The Reduction Provisions convey the prejudicial message that the older one gets the less one *deserves* the SDB. The Reduction Provisions perpetuate the invidious reality, still prevalent in our society, that the more elderly one becomes the more one is treated as invisible, forgotten or cast aside.

57. Stereotyping and prejudice, while distinct concepts, are at the same time closely related. If there is any “rationale” for the law, it is based on an uninformed, inaccurate, simplistic and harmful stereotypical premise: that the older one gets the less one *needs* the benefit. Stereotypes that falsely portray the needs of the elderly, when relied on to their disadvantage, are no less harmful than those that falsely portray the needs of the disabled, women, or other minorities. Assuming or even believing that the elderly are less in need than younger people, when that is false, is an indication of disregard for their true worth and value. A law that presumes on the basis of unjustly attributed characteristics that the elderly do not need a benefit is not very different from a law that wantonly disregards their needs.

58. In *Margolis*, Justice Campbell captured both the prejudicial and stereotypical nature of the Reduction Provisions:

> **31** … The effect of the message being communicated to the participant… is that, compared to younger participants, your death, and the financial problems to be experienced by your surviving spouse on your death, are not worthy of concern and support….
>
> **32** With respect to the argument that survivors over the age of 60 have a general decreased need for a financial benefit, I find that, even as the SDB Plan is one component of a package of survivor benefits, the premise has not been proved. Indeed, I find the opposite to be the case.[115]

59. That such stereotypes are prevalent was recognized in *Laronde v. New Brunswick* [116]:

> **[11]** … For example, younger members of society may perceive older members as being better off financially and, therefore, do not have the financial needs possessed by the younger….

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[115] *Margolis v. Canada* (2001), 201 F.T.R. 55, 2001 FCT 85 [***Margolis***], paras. 31, 32; and see also para. 34, ABoA Tab 22

[116] *Laronde v. New Brunswick (Workplace Health, Safety and Compensation Commission)* (2007), 280 D.L.R. (4th) 97, 2007 NBCA 10, para. 11 [***Laronde***], ABoA Tab 18

60. This perception is incorrect: as Mrs. Withler put it, "there is a myth that as you get older, you need less."[117]

61. The prejudicial effect of the provisions, and the stereotypical rationale on which the Reduction Provisions are based, readily establish a s. 15 violation. While both are present it is also the case that neither prejudice nor stereotyping is essential to make out a s. 15 claim when, as here, the gravamen of the appellants' claim is a lack of correspondence between the Reduction Provisions and the needs and circumstances of the appellants.[118] Indeed in *Kapp*, this Court said that the lack of correspondence factor "deals with stereotyping."[119]

62. Inasmuch as any *other* "packages of benefits" are relevant to explain or justify the Reduction Provisions, these should be considered under s. 1.[120]

63. Nor is a more complicated "comparator group" analysis required. While this Court in *Kapp* acknowledged "that equality is an inherently comparative concept,"[121] it is enough here to establish that Parliament has differentiated between two groups based solely on age and for reasons unrelated to the legislative goal.[122]

64. The Reduction Provisions discriminate on the basis of age not just because some (younger people who are also eligible for the government's employment package) receive an unreduced SDB - although that would be enough - but also because *the older the employee*, the more reduced is the SDB, despite the fact that the older the employee, the greater the need. *To achieve true substantive equality, the law would provide an increasing SDB with each year, certainly not less*.

65. This approach accords with *Andrews* but is also fully consonant with a *Law*-type analysis as Justice Rowles conclusively demonstrated. Rowles J.A.'s reasons are supplemented below.

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[117] Evidence of H. Withler, p. 126, ll. 27-28, A.R. Vol. II, p. 45

[118] *Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board v. Laseur*, [2003] 2 S.C.R. 504, 2003 SCC 54 [***Martin***], para. 91, ABoA Tab 28

[119] *Kapp*, para. 23, ABoA Tab 30

[120] See footnote 161

[121] *Kapp*, para. 15, ABoA Tab 30

[122] See *Wrongs of Unequal Treatment*, at pp. 7-13, ABoA Tab 44; and see other articles referred to in *Kapp*, para. 22, footnote 2, ABoA Tab 30

66. Before applying the *Law* factors, we first address the majority reasons of the Court of Appeal, in which Ryan J.A. said:

> **[152]** … Through the testimony of both experts and individual claimants the appellants attempted to show that the cost of final illness and death increased with age, that financial well-being declines with age, that employment is more difficult to find, and that to decrease a death benefit simply on the basis of age, at a time when it is most needed, is unreasonable and discriminatory. *The trial judge either did not accept these assertions* or found that they were offset by other benefits. The appellants say that the trial judge reached the wrong conclusions on these points because she failed to properly analyze the contextual factors, and consistently applied the wrong comparator group.
>
> **[153]** As I will develop in these reasons, I am of the view that the conclusions reached by the trial judge were not unreasonable and were not the result of faulty reasoning or use of the wrong comparator group.[123]

67. These conclusions indicate several significant errors. First, the majority erred in stating that the trial judge did not accept these "assertions." These were not simply assertions, but facts based on evidence that the trial judge accepted. On the issue of the increase in cost of final illness and death with age, the trial judge said: "I accept this evidence… that the costs of last illness do increase with age. In particular costs of last illness and death increase quite dramatically in each decade over 65."[124] Second, on the question of whether "financial well-being declines with age" the trial judge's reasons, while somewhat confusing because of her choice of comparator group, clearly accept that the financial wellbeing of seniors declines with age.[125] Third, on the issue of stable employment being more difficult to find and maintain with increasing age, this was uncontroversial. Nowhere did the trial judge decline to accept that fact. It was not only supported by the expert evidence[126] and by the evidence of the lay witnesses,[127] this Court took judicial notice of it in *Law*[128].

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[123] *Withler, BCCA* (*per* Ryan J.A.), paras. 152-53, A.R. Vol. I, pp. 136-37
[124] *Withler, BCSC,* para. 154, A.R. Vol. I, pp. 68-69
[125] *Withler, BCSC*, paras. 147-49, A.R. Vol. I, pp. 64-66
[126] *Chaykowski Report*, A.R. Vol. IV, pp. 93, 104, Evidence of R. Chaykowski, p. 316, ll. 1-38; p. 317, ll. 23-30; p. 318, ll. 29-41, A.R. Vol. II, pp. 127-29
[127] e.g. Evidence of P. McNaughton, p. 143, ll. 6-11, A.R. Vol. II, p. 52
[128] *Law*, para. 101, ABoA Tab 20

68. The majority distilled from the reasons of the trial judge what it considered the "critical findings of fact."[129] The appellants do not take issue with any of these findings,[130] although they submit that these were not the only critical facts. What is notable about the Court's findings of fact is that not one of them, with the possible exception of the sixth, in any way explains, let alone justifies, the Reduction Provisions. At most, they attempt to explain why those well *under* the age of 60 (or 65) do *not* have their SDB reduced. As to the sixth finding,[131] the appellants have never argued that the purpose of the SDB was to give them a "long-term" income stream, since they accepted the trial judge's conclusion that this is the purpose of the survivor's pension, albeit half of what would have been the participant's pension.[132]

69. While the appellants accept that the purpose of the SDB for the elderly is chiefly to offset the costs of last illness and death, it is incorrect to suggest that loss of the participant's income may not also be part of those costs. Given that the participant would die either while employed and earning a salary or while retired and collecting a pension and given that the surviving spouse receives only half of what would be the retirement pension, the SDB thus also provides a small temporary supplement for the significant reduction of the participant's regular salary or pension.

70. The majority's selection of "critical facts" omits other critical findings of fact, including that: (a) costs of last illness and death increase with age; (b) wealth declines after the age of 65; and (c) "older people bear a higher burden than younger people in terms of health care expenses because their needs are greater yet the coverage [from the government's extended health care plan] remains the same."[133] That being the case, how can it make sense to conclude other than "to decrease a death benefit simply on the basis of age, at a time when it is most needed, is unreasonable and discriminatory?"[134]

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[129] *Withler, BCCA* (*per* Ryan J.A.), para. 167, A.R. Vol. I, pp. 144-46

[130] As to the fourth finding, the trial judge's more accurate characterization of the purpose was: "At older ages the purpose of the SDB is for the expenses associated with last illness and death," A.R. Vol. I, p. 146; A.R. Vol. I, p. 74

[131] "Considering the entire package of benefits available to surviving spouses of any age, the supplemental death benefit is not intended to be a long term stream of income for older surviving spouses because their long term income security is guaranteed by the surviving spouse portion of their defined benefit pension plan." A.R. Vol. I, p. 145

[132] This reduction is significant: As one plaintiff testified, her husband asked the doctors and nurses to keep him alive as long as possible "even if I'm a vegetable" because of the difference between his pension and a survivor's pension: Evidence of S. McLaren, p. 78, ll. 25- 42, A.R. Vol. II, p. 24

[133] *Withler, BCCA* (*per* Rowles J.A.), para. 77, A.R. Vol. I, pp. 106-107; Evidence of G. Argue, p. 739, ll. 24-28, A.R. Vol. II, pp. 193

[134] *Withler, BCCA* (*per* Ryan J.A.), para. 152, A.R. Vol. I, pp. 136-37

71. Another significant error made by the majority of the Court of Appeal is in the standard of review applied in reviewing the trial judge's decision. As noted above, the majority was "of the view that the conclusions reached by the trial judge were not unreasonable and were not the result of faulty reasoning or use of the wrong comparator group."[135] But a trial judge must be correct in concluding that impugned provisions are not discriminatory: it is not enough that his or her conclusion be "reasonable."[136]

72. A constitutional case may be further complicated when the question involves both inferences of fact and questions of mixed law and fact. This Court was divided on those questions in *Housen v. Nikolaisen*,[137] a negligence case. When the law in question is the *Constitution*, questions of mixed law and fact should attract a correctness standard. To paraphrase the dissent, which we submit should find favour with this Court: "In many cases, viewing the facts through the legal lens of [the *Constitution*] gives rise to a policy-making or law-setting function that is the purview of both the trial and appellate courts."[138]

73. As the decision of the majority of the Court of Appeal was essentially an affirmation of the reasoning of the trial judge with respect to the appropriate comparator group and the four contextual factors of *Law*, we turn now to those issues and those findings. Even if any of those issues or findings are to be reviewed on a standard of reasonableness, then for all of the reasons submitted here, the trial judge's conclusions were not reasonable

Comparator Group

74. In *Hodge*,[139] the Court said that "a misidentification of the proper comparator group at the outset can doom the outcome of the whole section 15 analysis." This is particularly apposite here. The trial judge accepted the appellants' choice of comparator "for the now,"[140] but then

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[135] *Withler, BCCA* (*per* Ryan J.A.), para. 153, A.R. Vol. I, p. 137

[136] *Multani v. Commission scolaire Marguerite-Bourgeoys*, [2006] 1 S.C.R. 256, 2006 SCC 6, para. 20, ABoA Tab 26; *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, 2008 SCC 9 [***Dunsmuir***], paras. 58 and 124, ABoA Tab 71

[137] *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, 2002 SCC 33 [***Housen***], ABoA Tab 16

[138] paraphrasing *Housen*, para. 106 (substituting "Constitution" for "standard of care"), ABoA Tab 16

[139] *Hodge v. Canada (Minister of Human Resources Development)*, [2004] 3 S.C.R. 357, 2004 SCC 65, para. 18 [***Hodge***], ABoA Tab 14

[140] *Withler, BCSC*, paras. 108 and 110, A.R. Vol. I, pp. 49-50, the appellants said the comparator was "all civil servants and members of the armed forces who receive the full SDB, not reduced on the basis of age."

applied many different comparator groups. For instance, the trial judge at different times identified the comparator group to be "the entire under 65 age population;"[141] "the statistical average;"[142] "all other age groups perhaps ranging in age from about 20-65;"[143] "the overall population;"[144] "the universe of elderly persons;" or even persons "in the private sector."[145] The majority saw no error in this, even though it acknowledged that the trial judge's reasons "mentioned all of these groups" and seemed to say it was proper for her to simply reference "other age groups."[146]

75. To the extent that a formal comparator group analysis is still required after *Kapp* and subsequent decisions,[147] the appellants rely on the approach of Justice Rowles who held: "the description of the comparator group ought properly to be stated as '*all civil servants and members of the armed forces who received a full SDB, not reduced on the basis of age, and who are eligible for a survivor's pension*'."[148]

76. Employing this comparator group, the distinction between the claimants and the comparators is discriminatory on the basis of age:

> **[52]** An application of the revised comparator group would render the fact that members of the claimant group receive survivor's pensions and other government benefits under the Plans irrelevant. The resulting comparison would reveal two groups of surviving spouses receiving similar pensions and benefits, with one group subject to the Reduction Provisions and the other group not, solely on the basis of the age of their spouse. In light of the fact that the trial judge accepted that the purpose of the legislation is to provide for the costs associated with last illness and death, and that the costs of last illness increase

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[141] *Withler, BCSC*, para. 149, A.R. Vol. I, p. 66

[142] *Withler, BCSC*, para. 158, A.R. Vol. I, p. 70

[143] *Withler, BCSC*, para. 147, A.R. Vol. I, pp. 64-65

[144] *Withler, BCSC*, para. 146, A.R. Vol. I, p. 64

[145] *Withler, BCSC*, para. 140, A.R. Vol. I, p. 62

[146] *Withler, BCCA* (*per* Ryan J.A.), para. 173, A.R. Vol. I, p. 149

[147] See e.g. *McIvor v. Canada (Registrar, Indian and Northern Affairs)* (2009), 306 D.L.R. (4th) 193, 2009 BCCA 153, para. 76 [***McIvor***], ABoA Tab 23 where the B.C. Court of Appeal recently held that all the claimant need show, in order to pass the first stage of analysis of a s. 15 claim, "is that there is at least one appropriate comparator group which is afforded better treatment than the one to which he or she belongs"

[148] *Withler, BCCA* (*per* Rowles J.A.), para. 32, A.R. Vol. I, p. 90 [*emphasis added*]. While the appellants had advanced at the trial and appeal a comparator group that omitted the qualifier "who are eligible for a survivor's pension" that is because, *inter alia*, they were proceeding on the basis that virtually all of the surviving spouses in the comparator group were eligible for a survivor's pension – a point that was not in dispute. Hence Rowles J.A.'s comment that the comparator group that the appellants put forward "was not fully stated," para. 31.

dramatically with age in each decade over 65, the logic of reducing the benefit provided on the basis of age becomes questionable.[149]

Contextual Factor 1: Pre-Existing Disadvantage

77. A claimant group need not show that it is more disadvantaged than a comparator group, as such an inquiry would involve a "race to the bottom." It is therefore enough for the appellants to prove, as they did, that the claimants and their spouses, as elderly persons, suffer from both real disadvantage and wrongful stereotyping.[150] Seniors are victims of unfair false stereotyping; ranging from negative views that they are, by age alone, physically and mentally incapable, to positive ones that they all live carefree lives of leisure playing bridge and golf.[151]

78. The reality for the elderly is that with age comes a decline in health, which in turn constricts choices of how to work and live. Chronic health conditions increase with age and lead eventually to death of spouses and consequential loneliness, despair, and financial and emotional insecurity for the surviving spouse. Ample evidence in the record supports these facts.[152]

79. Regarding their financial disadvantage, seniors have lower income than the rest of the population, their average income declines with age, and the source of their income is uncertain; seniors' wealth level also declines with age.[153]

80. That the elderly may not generally be living "in poverty" or the same degree of poverty they may have in the past is no more relevant to this stage of the s. 15 analysis than if there were less discrimination today against visible or other minorities than in the past. While the number of single elderly Canadians considered to be living on a low income has gone from 47.9% to

[149] *Withler, BCCA* (*per* Rowles J.A.), para. 52, A.R. Vol. I, pp. 96-97

[150] *Martin*, para. 88, ABoA Tab 28, citing *Lovelace v. Ontario*, [2000] 1 S.C.R. 950, 2000 SCC 37, para. 69

[151] Evidence of A. Humphreys, pp. 113-16, A.R. Vol. II, pp. 39-42

[152] Evidence of S. McLaren p. 72, ll. 20-47; p. 78, ll. 40-47; p. 79, ll. 1-4, A.R. Vol. II, pp. 21, 24-25; Evidence of I. Munro, p. 88, ll. 8-43; p. 90, ll. 7-44, A.R. Vol. II, pp. 28-29; Evidence of H. Withler, p. 125, ll. 43-47; p. 126, ll. 1-20, A.R. Vol. II, pp. 44-45; Evidence of I. Jackson, p. 44, ll. 23-33, A.R. Vol. II, p. 14; Evidence of E. Ball, p. 32, ll. 40-47; p. 33, ll. 1-15, A.R. Vol. II, pp. 9-10; Evidence of A. Humphreys, pp. 107-13, A.R. Vol. II, pp. 35-39

[153] *Chaykowski Report*, A.R. Vol. IV, pp. 92-94, 104-05; Evidence of R. Chaykowski, pp. 313- 18, A.R. Vol. II, pp. 124-29; see Facts at paras. 36-38

21.3%, Professor Chaykowski noted that "poverty is still a major issue amongst the elderly."[154] As Rowles J.A. put it: "Less disadvantage" does not necessarily equal "no disadvantage."[155]

Contextual Factor 2: Lack of Correspondence

81. The trial judge[156] and majority of the Court of Appeal[157] held that the Reduction Provisions corresponded to the claimants' or groups' actual circumstances and thus were not based on stereotypes. The trial judge conceded that there was not "perfect correspondence between the fact that the costs of last illness increase with age and the reducing nature of the SDB" but said that "when combined with the entire benefit package, including pension, dental prescription, and extended health as well as other universal government programs, I find that *the law* does not fail to take into account the plaintiffs' actual situation."[158]

82. The majority of the Court of Appeal likewise held:

> The trial judge accepted that the costs of health care were higher for the elderly but, since other aspects of the employment package were intended to assist with a percentage of such costs, the supplementary death benefit did not need to take that fact into account.[159]

83. There is much wrong with this approach. First, referencing the "employment package" or "the law" (instead of the impugned provision) is not "context" of the kind that may be taken into account in assessing discrimination under s. 15,[160] but rather a purported "justification" of the Reduction Provisions, which is a matter to be considered under s. 1, where the government must adduce evidence and argument to prove an infringement can be justified.[161]

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[154] Evidence of R. Chaykowski, p. 318, ll. 27-28, A.R. Vol. II, p. 129

[155] *Withler, BCCA* (*per* Rowles J.A.), para. 72, A.R. Vol. I, p. 104

[156] *Withler, BCSC*, para. 159, A.R. Vol. I, pp. 70-71

[157] *Withler, BCCA* (*per* Ryan J.A.), para. 176, A.R. Vol. I, pp. 149-50

[158] *Withler, BCSC*, para. 159, A.R. Vol. I, pp. 70-71 [emphasis added]

[159] *Withler, BCCA* (*per* Ryan J.A.), para. 176, A.R. Vol. I, pp. 149-50

[160] *Ermineskin Indian Band and Nation v. Canada*, [2009] 1 S.C.R. 222, 2009 SCC 9, paras. 193-201, ABoA Tab 10

[161] *Andrews*, pp. 177-78, ABoA Tab 4*; Lavoie v. Canada*, [2002] 1 S.C.R. 769, 2002 SCC 23, paras. 47-48 [***Lavoie***], ABoA Tab 19; *McIvor*, paras. 114-15, ABoA Tab 23; *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, [2004] 1 S.C.R. 76, 2004 SCC 4, *per* Binnie J, paras. 97-99, 101, ABoA Tab 6; *Canada (Attorney General) v. Hislop*, [2007] 1 S.C.R. 429, 2007 SCC 10, paras. 47-55 [***Hislop***], ABoA Tab 5 where the government tried to use a "matching" of benefits argument for justification under s. 1; *Withler, BCCA* (*per* Rowles J.A.), para. 81, A.R. Vol. I, pp. 108-09

84. Second, the government cannot rely on the claimants' survivor's pension as justification for a reduced SDB. Not only did the participants *earn* the survivor's pension, but their spouses *need* that pension more than younger spouses.[162] The reasons of Rowles J.A. provide a complete and compelling answer to this position:[163]

> **[78]** The respondent argues that the claimants' higher pension levels compensate for the reduced provisions, which presumes that the claimants have less need for their pension than those in the comparator group. In fact, the opposite is true. As the Court noted in *Law*, older people have more difficulty replacing a deceased spouse's income over the longer term and this economic vulnerability requires they receive a higher pension than younger people (*Law* at paras. 103-04). *The Reduction Provisions do not just fail to consider the needs of surviving spouses over the age of 60 or 65 - they directly conflict with the claimants' actual needs related to the costs of last illness and death.* By forcing the claimants to fall back on their pensions, the Reduction Provisions undermine the purpose for which pensions were provided in the first place, i.e., to counteract their economic vulnerability with long-term income replacement.[164]

85. Third, reliance on the "employment package" is no answer at all given that everyone in the comparator group receives the same benefits. The trial judge and majority of the Court of Appeal ignored the fact that almost everyone who received an unreduced SDB was eligible for a survivor's pension on the death of their spouse (since eligibility was triggered after only two years employment) and everyone received the same dental and extended health plan. It bears emphasizing that many spouses would have received only the minimum SDB: $5,000 or $10,000. This amount might cover funeral costs, but it provides virtually nothing for the costs associated with the last and lingering illness, prior to death, beyond those covered by the health plan.[165]

86. Fourth, and even assuming these benefits are relevant at the s. 15 stage, it is evident that dental and extended health care benefits do not come close to covering the real costs associated with last illness and death, mainly because they do not cover costs of home care or long term care or the hidden costs of last illness and death.[166]

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[162] *Law*, paras. 103-04, ABoA Tab 20

[163] *Withler, BCCA* (*per* Rowles J.A.), paras. 74-82, A.R. Vol. I, pp. 105-09

[164] *Withler, BCCA* (*per* Rowles J.A.), paras. 77-78, A.R. Vol. I, pp. 106-07 [emphasis added]

[165] Evidence of T. Crean, pp. 381-86, A.R. Vol. II, pp. 144-49; *Minutes*, A.R. Vol. V, p. 27

[166] Facts at paras. 28-34, Evidence of A. Humphreys, p. 113, ll. 1-14, A.R. Vol. II, p. 39; Evidence of H. Withler, p. 125, ll. 43-47; p. 126, ll. 1-3, A.R. Vol. II, pp. 44-45

87. Furthermore, except for hospital and basic health care provisions, the health care plan does not cover 100% of even medically required goods or services, that coverage ranging from 50% to 90%. There is also a cap on the amount that can be spent for any particular medical service or good.[167] It is also significant that these benefits are not only not "statutory" but they are constantly up for negotiation, and where cost containment will always be an issue and the single most expensive feature drug costs.[168]

88. All of these issues are properly considered in s. 1, where the government would have the onus of proving that the appellants' costs of last illness and death were covered by the employment package (signaling minimal impairment) – an onus it did not even attempt to discharge.[169]

89. Here the proper issue is whether the Reduction Provisions correspond with the appellants' circumstances[170]: the trial judge acknowledged that they do not. Rowles J.A. held:[171]

> **[77]** … [I]t can hardly be said that the Reduction Provisions correspond to the needs of the *claimants*, namely, surviving spouses over the age of 60 or 65. The law is intended to provide older surviving spouses with assistance covering the costs of last illness and death. The evidence before the trial judge demonstrated that older people bear a higher burden than younger people in terms of health care expenses because their needs are greater and yet the coverage is the same. If Parliament had properly considered the actual needs and circumstances of the claimants in this regard, the law would have provided them with *more* or at least *equal* assistance than younger surviving spouses, rather than *less.*

90. In sum, the costs associated with last illness and death – the very reason for the SDB for the elderly – are still greater for the claimant group than the comparator group, even if some of

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[167] G. Argue, "Reply Re: Health Care Costs Associated with Death", A.R. Vol. VI, pp. 102-05

[168] Evidence of J. Arnold, p. 628, ll. 17-31; p. 629, ll. 38-42, A.R. Vol. II, pp. 164-65

[169] *Withler, BCSC*, para. 154, A.R. Vol. I, pp. 68-69. That said the Court should be careful to distinguish the "objective" of an impugned provision and an "explanation" for it: *Vriend v. Alberta*, [1998] 1 S.C.R. 493, para. 114, ABoA Tab 36. The "employment package" might only explain and not justify the Reduction Provisions. Significantly the government has never sought to justify the Reduction Provision under s. 1 on this basis.

[170] Not the comparator group as the respondent argued (see *Withler, BCCA* (*per* Rowles J.A.), para. 76, A.R. Vol. I, p. 106) and see *Ferraiuolo v. Olson,* (2004), 246 D.L.R. (4th) 225, 2004 ABCA 281, para. 108 [***Ferraiuolo***], ABoA Tab 11. "[T]he inquiry here is not directed to whether the legislation corresponds to the needs of those whom it benefits, *but whether it corresponds to the needs of those in the claimant group*, that is those excluded based on proscribed grounds" [emphasis added]

[171] *Withler, BCCA* (*per* Rowles J.A.), para. 77, A.R. Vol. I, p. 106-07

those costs are covered by the government's health care plan. The trial judge accepted that by reason of the Reduction Provisions, "those costs may not be fully recovered."[172]

91. While there need not be perfect correspondence, neither should a flawed correspondence be tolerated, as such a flaw is at the heart of inequality. This is particularly so where, as here, the government conducted no studies to attempt to achieve correspondence. Indeed, in *Law*, the Court recognized the importance of a more "precise correspondence" when the law disadvantages the "already disadvantaged or vulnerable within Canadian society" and the elderly, more so than the young, fall into that category.[173]

Contextual Factor 3: Lack of Ameliorative Purpose

92. The trial judge correctly noted that the "ameliorative purpose mentioned in *Law* was probably not intended to capture the type of effects I mention here," yet concluded that there is a "parallel reasoning in that the effect of group life insurance benefits different people in different ways at different times in their life cycle."[174]

93. The trial judge held that the essence of group insurance is that "every member of the group pays the same cost and receives the same coverage." But because of the Reduction Provisions, elderly participants do not receive the same coverage. From their perspective, the Reduction Provisions have no ameliorative aspect. Furthermore, providing reduced benefits to the elderly in order to provide increased coverage, at a lower premium, to the young, is not a relevant ameliorative purpose and is itself an affront to human dignity.[175]

94. The majority of the Court of Appeal provided no independent support for the conclusions of the trial judge on this factor, saying only that they were not "unreasonable."[176] The appellants rely on the reasoning of Rowles J.A. at paragraphs 83-86 and, in particular, the following conclusion:

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[172] *Withler, BCSC*, para. 154, A.R. Vol. I, pp. 68-69; See also Egan v. Canada, [1995] 2 S.C.R. 513, paras. 152-157 [***Egan***], ABoA Tab 9

[173] *Withler, BCSC*, paras. 159, 156, A.R. Vol. I, pp. 70-71, 69; *Law*, para. 106, ABoA Tab 20; Evidence of J. Arnold, p. 635, ll. 29-47; p. 636, ll. 1-29, A.R. Vol. II, pp. 168-69; Evidence of G. Argue, p. 706, ll. 23-47, p. 707, ll. 1-10, A.R. Vol. II, pp. 179-80

[174] *Withler, BCSC*, para. 160, A.R. Vol. I, p. 71

[175] *Ferraiuolo*, para. 116, ABoA Tab 11

[176] *Withler, BCCA* (*per* Ryan J.A.), para. 178, A.R. Vol. I, p. 150