Court 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 -

THE ATTORNEY GENERAL OF CANADA

Respondent
(Respondent)

and -

THE ATTORNEY GENERAL OF ONTARIO and THE ATTORNEY GENERAL OF ALBERTA

Interveners

FACTUM OF THE RESPONDENT, THE ATTORNEY GENERAL OF CANADA

(Pursuant to s. 42 of the Rules of the Supreme Court of Canada)

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PART I – STATEMENT OF FACTS

A. OVERVIEW

1. Age based distinctions permeate Canadian society. They determine when a person can drive, vote, consume alcohol, consent to sexual intercourse, marry, and sell property. Age as a marker becomes all the more prevalent later in life. Canada Pension Plan eligibility begins at age 60 and must be taken at 65, Old Age Security payments begin at 65, RRSPs must be converted to RIFs at 69. All legislated pension plans contain benefit thresholds predicated on age. Such distinctions have frequently been upheld by this Court[1] because, as noted by the Chief Justice in *Gosselin*, "age-based legislative distinctions are a common and necessary way of ordering our society".[2]

2. Invoking the age of their spouses, the appellants call into question a single aspect of a comprehensive group life insurance and pension package designed to address the different needs of current and retired public servants across a broad sweep of age, gender and family status. They seek to upset the complex actuarial balance between age, insurance premiums and benefits, underlying the viability of all group life insurance plans. The average age at retirement in the public service today is 59, in the Canadian Forces it is 45 with 25 years of service.[3] More than 90% of employees in the public service are retired by age 66.[4] Reducing the amount of low cost group life insurance for which plan participants are eligible, at a time when they have reached a normal retirement age and have had their working life to accumulate wealth and pension benefits, ensures a sustainable benefits package at a reasonable cost to all employees.

3. The trial judge clearly understood that to find discrimination under s. 15 of the *Charter* requires more than a distinction based on age, it requires evidence that the distinction perpetuates historical disadvantage, prejudice or stereotyping. Such evidence simply did not exist here. After completing her contextual analysis of the evidence, the

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[1] *A.C. v Manitoba (Director of Child and Family Services)*, 2009 SCC 30 at para. 110, Appellants' Book of Authorities [ABOA], Tab 1.
[2] *Gosselin v. Quebec (Attorney General)*, 2002 SCC 84, [2002] 4 S.C.R. 429 at para. 31 [*Gosselin*], Respondent's Book of Authorities [RBOA], Vol I, Tab 9, p.123.
[3] Evidence of D. Hébert, p.761, ll. 1 -8 and p. 768, ll. 2 - 8, Respondent's Record [R.R.] Vol I, pp.104-105.
[4] Exhibit 50, Appellants' Record [A.R.] Vol. VI, p.127.

trial judge concluded that the impugned provision do "not bear any of the hallmarks of discrimination".[5] The majority of the British Columbia Court of Appeal agreed.

4. The claim arises in the context of interrelated employee benefit plans. The supplementary death benefit[6] ("SDB") is only one component – the group life insurance component- of a suite of benefits available to current and retired public servants and members of the Canadian Forces. All have, at a minimum, a benefits package that consists of a defined benefit pension indexed to inflation, a survivor's pension, medical and dental insurance and group life insurance.[7]

5. Group benefits plans cannot meet the needs of all employees for all time, nor is there any attempt to do so. Rather, these plans provide an affordable benefits package that meets some basic needs. The entire suite of benefits operate in tandem to provide a reasonable measure of protection for plan participants and their dependants.[8]

6. For some plan participants, regardless of their age, this benefits package is more than they need or want. For others, it is not enough and to meet their individual circumstances they may chose to purchase private life or health insurance and save for their retirement. Circumstances change throughout an individual's career and the need for the benefits package will change, but it is not designed to meet all needs for all years of service and retirement.

7. As noted by the trial judge[9] and the majority of the Court of Appeal, the design of employee benefit packages is a balancing exercise:

> ...crafting the correct combination of benefits to meet the needs of current and retired employees across the broad sweep of age, sex, family status

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[5] Reasons for Judgment of Garson J., Supreme Court of British Columbia [Reasons, BCSC], A.R. Vol. I, pp. 70, 72, 74, paras. 158, 163, 170.
[6] *Public Service Superannuation Act ("PSSA")*, R.S.,c.P-36, Part II, RBOA, Vol, II, Tab 30, pp. 381-393; *Canadian Forces Superannuation Act ("CFSA")*, R.S.,c.C-17, Part II, RBOA, Vol. II, Tab 28, pp. 355-364.
[7] Plan participant and survivor pensions are provided under Part I of the *PSSA* and *CFSA*; Exhibit 12, Tabs 14 and 15 have a description of the pensioners' medical and dental insurance, R.R. Vol. I, pp. 148 - 201; the SDB is described to employees as life insurance, Exhibits 28, 29, 30, R.R. Vol. II, p. 262, 282-330 and 331-363 .
[8] Reasons, BCSC, A.R. Vol. I, pp. 55, 56, paras. 121 - 123.
[9] Reasons, BCSC, A.R. Vol. I, p.69 para. 155.

and residence is a daunting task and that such a scheme could not be expected to meet the needs of everyone in all circumstances.[10]

B. THE EVOLUTION OF THE SDB

(i) The Origins

8. In designing the SDB, Parliament sought to provide a reasonable floor of dependents' protection to public servants and members of the Canadian Forces that would help most where death occurred when least expected, that is, in the early employment years. The benefit was intended to supplement and integrate with the survivor's pension payable on under the *Public Service Superannuation Act* ("*PSSA*").[11]

9. The SDB had the following features in 1955 (for both the public service and the Canadian Forces):[12]

(a) Benefit: the lesser of $5,000 or the plan participant's annual salary and was available without a medical examination;[13]

(b) Reduction Provisions: the benefit decreased by 10% per year after the plan participant reached the age of 61 ("reduction provisions"). The reduction sought to achieve a balance between having a sharp drop-off of coverage at retirement and the unacceptably high cost to both plan participants and the government of continuing full coverage after retirement;[14]

(c) Minimum Benefit: For employed participants, the benefit would not be less than one-sixth of the participant's salary;

(d) Compulsory: the plan was compulsory for all public servants and members of the Canadian Forces;

(e) Elective upon retirement: plan participants could elect to continue their coverage;

(f) Contribution Rate: forty cents per $1,000 of coverage regardless of the age, gender or state of health of the plan participant;

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[10] Reasons for Judgment of Ryan and Newburry JJ.A., Court of Appeal of British Columbia [Majority Reasons, BCCA], A.R. Vol. 1, p. 151, para. 180.
[11] Affidavit of Hart Clark [Hart Clark], A.R. Vol. III, pp.63-64, para.34.
[12] *An Act to amend the Public Service Superannuation Act,* S.C.1953-54, c.64, s. 2, RBOA, Vol. II, Tab 27, p.336-342; Reasons, BCSC, A.R. Vol. I, pp. 10, 11, para. 12.
[13] Hart Clark, A.R. Vol. III, pp. 71-72, paras. 51-52.
[14] Hart Clark, Exhibit "K", R.R. Vol. II, p. 413.

(g) Beneficiary: the plan participant's spouse and if there was no spouse, the estate.

(ii) Beneficiary Changes - 1976

10. The SDB was no longer automatically payable to a male plan participant's spouse and therefore, was not necessarily supplemental to the survivor's pension. Plan participants could designate anyone over the age of 18, their estate or a charity or benevolent institution as the recipient of the death benefit.[15] It could continue to supplement a survivor's pension if the plan participant chose to designate his or her spouse as the beneficiary.

(iii) Benefit and Premium Improvements

11. The benefit payable upon the death of a public servant or member of the Canadian Forces has improved since 1954: the cap on the benefit was removed in 1966 and the benefit was increased to two times a plan participant's annual salary in 1992.[16]

12. In 1960, a $500 paid-up benefit was introduced. The paid-up benefit was increased to $5,000 in 1992 for both plans and to $10,000 in 1999 for the public service.[17] The benefit is paid for by the government by way of a single premium when a plan participant reached the age of 65. Upon retirement, a plan participant can elect to continue their SDB coverage and the paid-up benefit is payable if the plan participant dies after the SDB coverage ends. If a plan participant opts-out of SDB coverage, they are still entitled to the paid-up benefit.[18]

13. The premiums payable by plan participants have decreased since 1955. For the Canadian Forces plan, the premiums were reduced to $0.20 per $1,000 of coverage in

[15] Reasons, BCSC, A.R. Vol. I, pp. 11- 12, para. 13. p. 13, para. 15.
[16] Reasons, BCSC, A.R. Vol. I, p. 12, para. 13, p.14, para. 15.
[17] Reasons, BCSC, A.R. Vol. I, p. 11-12, para. 15, p. 14, para. 15.
[18] Public Service Death Benefit Account Actuarial Report as at March 31, 2002 [2002 PS Actuarial Report], R.R. Vol. I pp. 120-122; Actuarial Report on the Regular Force Death Benefit Account as at March 31, 2002 [2002 CF Actuarial Report], R.R. Vol. II, pp. 218-219.

1966 and to $0.10 in 1992. For the public service plan, the premiums were reduced to $0.20 per $1,000 of coverage in 1992 and to $0.15 in 1999.[19]

14. The reduction provisions for the public service plan were amended in 1999 to provide that the reductions would commence at age 66.[20] As the average age of retirement for the public service is 59, the reduction provisions take effect on average 8 years after retirement. For the Canadian Forces, the average age of retirement is 45 and the reduction provisions for the Forces take effect at age 61, on average 16 years after retirement.[21] Members of the Canadian Forces are subject to mandatory retirement regulations based on age, years of service and rank and must retire by the age of 60.[22]

15. Plan participants have been and continue to be consulted about their benefits under the *CFSA* and *PSSA*. There were consultations with employee and pensioner representatives before the 1999 changes were made to the SDB.[23] Both *Acts*[24] require that an advisory committee be established to advise the President of the Treasury Board on matters respecting the administration, design and funding of benefits provided under the *Acts*. The advisory committees consist of employee and Canadian Forces representatives, pensioners and management. The reduction provisions have not been the source of significant concern for plan participants.[25]

(iv) The Supplementary Death Benefit Accounts

16. The PSSA and the *CFSA* provide that there shall be death benefit accounts set up in the public accounts of Canada to provide an annual snapshot of contributions to the plan and the amounts paid in benefits.[26] The accounts and the actuarial reports[27] that are

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[19] Reasons, BCSC, A.R. Vol. I, p13-14, para. 15, p. 12, para. 13.
[20] Reasons, BCSC, A.R. Vol. I, p. 12, para. 13.
[21] *Supra* note 3, 4.
[22] *Queen's Regulations and Orders for the Canadian Forces*, Volume 1, Chap. 15, ss. 15.17 and 15.31, RBOA, Tab 31, pp. 394-438.
[23] Evidence of Joan Arnold, pp. 543-553, R.R. Vol. I, pp. 75 - 85; Exhibits 36 to 41, R.R. Vol. II, pp. 364 - 409.
[24] *PSSA,* s. 41; *CFSA* , s.49.1, RBOA, Vol. II, Tab 28, pp. 353-354.
[25] Reasons, BCSC, A.R. Vol. I, pp. 56 - 57, paras. 124- 126.
[26] *PSSA*, s. 56, RBOA, Vol. II, Tab 30, pp. 389-390; *CFSA*, s. 68, RBOA, Vol. II, Tab 28, pp. 361-362.
[27] *PSSA*, ss. 59, 60, RBOA, Vol. II, Tab 30, p. 391; *CFSA*, ss. 71, 72, RBOA, Vol. II, Tab 28, pp. 362-363; *Public Pensions Reporting Act*, S.C. 1985, c.13 (2ND Supp.), s. 3(1), RBOA, Vol., II, Tab 29, 365-367.

generated based on the information in the accounts are used to report to Parliament, the public and plan participants on the status of the plans.

17. For the 2007\08 fiscal year, employees contributed $76,769,559 to the Public Service Death Benefit Account. The government's contribution, consisting of 1\12th of the benefits payable, plus the single premiums for the paid-up benefit, plus an amount representing interest on the balance of the accounts, was $187,349,540.[28] Canadian Forces members contributed $1,487,800 and the government contributed $1,650,300 to the Canadian Forces Death Benefit Account.[29]

18. The amounts shown in the accounts are not invested but the government credits the accounts with investment earning as though net cash flows were invested quarterly in 20-year Government of Canada bonds issued at prescribed interest rates and held to maturity.[30] To a large extent, the actuarial surplus in the Public Service Death Benefit Plan, is attributable to the high rates of interest credited to the Account over the years.[31]

19. It is not anticipated that the actuarial surplus will exist in perpetuity. In the report for the plan year ending March 31, 2002, it was projected that the surplus would continue to increase until plan year 2009 because of excess investment earnings, after which it should steadily decline as total death benefits continue to rise.[32] For the Canadian Forces Death Benefit Account it was projected that the actuarial surplus would gradually vanish and become a deficit in plan year 2016 because the projected benefits would exceed the contributions and projected investment earnings. [33]

20. The actuarial surpluses in the Public Service Death Benefit Account have allowed Parliament to continuously improve the benefit for the public service.[34] The Canadian

[28] ABOA, Tab 41.
[29] ABOA, Tab 39.
[30] 2002 PS Actuarial Report, R.R. Vol. I, p. 123, 2002 CF Actuarial Report, R.R. Vol. II, p. 220.
[31] Other reasons include: contributions from plan participants who leave the public service before becoming entitled to be elective participants; up until 1992, contributions exceed benefit payments; and the privatization of government entities; Exhibit 52, A.R. Vol. VI, pp.160-161.
[32] 2002 PS Actuarial Report, R.R. Vol. I, p. 110-111.
[33] 2002 CF Actuarial Report, R.R. Vol. II, p. 207-208.
[34] Exhibit 43, A.R. Vol. VI, p.33.

Forces benefit has been improved as well despite the lack of a significant surplus in that Account.[35]

(v) Plan Participants in 2008

21. The total number of active and elective participants in both plans, as of March 31, 2008, was 555,738.

22. In the public service plan, 207,489 of the 419,695 plan participants are women. In the Canadian Forces plan, 12,816 of the 136,043 plan participants are women.[36]

C. THE CLASS MEMBERS

23. The class members originally consisted of all persons who had received a reduced SDB, within the class period as defined in the certification orders.[37] The trial judge found that a subset of the class, the surviving spouses, had standing to advance a claim of age discrimination as spouses were likely to be close in age to the deceased plan participants.[38]

24. The seven surviving spouses[39] who testified at trial had very little in common other than the receipt of a reduced death benefit, a fully indexed survivor's pension and enough income so that they did not qualify for a Guaranteed Income Supplement:[40]

(a) Their ages at the date of death of the plan participants ranged from 57 to 70.[41]

(b) Their spouses retired at various ages ranging from 43 to 60.[42]

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[35] Exhibit 11, A.R. Vol. III, pp. 130-131; Evidence of J. Christie, p. 232, ll. 16-37, A.R. Vol. II, p. 94.
[36] Actuarial Report on the Public Service Death Benefit Account as at 31 March 2008, RBOA, pp. 25-27; Actuarial Report on the Regular Force Death Benefit Account as at 31 March 2008, RBOA, pp. 25-28.
[37] Third Amended Statement of Claim, *Withler v. AGC*, R.R. Vol. I , pp. 2 - 12; Order of Garson J., in *Withler v. AGC*, dated November 2, 2001, R.R. Vol. I, pp. 22 - 34; Second Amended Statement of claim, *Fitzsimonds v. AGC*, R.R. Vol. I, pp. 13 - 21; Order of Garson J., in *Fitzsimonds v. AGC*, dated November 2, 2001, R.R. Vol I, pp. 25 - 47.
[38] Reasons, BCSC, A.R. Vol.I, pp. 40-43, paras. 86-93.
[39] Although all were female, by definition the class would include male surviving spouses. Detailed descriptions of their individual circumstances are in Reasons, BCSC, A.R. Vol. I, pp. 16-25, paras. 22-49.
[40] Evidence of R. Brunton, pp. 417-419, R.R. Vol. I, pp. 69 - 71; Exhibit 25, R.R. Vol. II, p. 245.
[41] Evidence of S. McLaren, p. 71, ll. 28-38, A.R. Vol. II, p.20; Evidence of E. Ball, p. 22, ll. 1-5, R.R. Vol. I , p. 48.

(c) The plan participants died in a variety of circumstances ranging from suddenly (while on a canoe trip) to after a prolonged illness.[43]

(d) Some surviving spouses incurred out-of-pocket expenses for the last illness and death of the plan participant and others did not incur any expenses.[44]

(e) The cost of the plan participants' funerals ranged from $800 to $10,000.[45]

(f) The supplementary death benefit received by the surviving spouses ranged from $5,000 to $67,800.[46]

(g) The amount of their survivor's pension ranged from $804 to $1,300 per month.[47]

(h) Some survivors had been employed during their years of marriage, others had not.[48]

(i) Some survivors had acquired and retained assets while others had not.[49]

25. The diversity of circumstances would be even more pronounced within the entire class of surviving spouses. While there was no evidence to establish the age of the class of surviving spouses who received a reduced SDB, it was established that the ages of spouses who received a survivor's pension ranged from 18 to 112.[50]

26. The SDB was not designed to deal with this range of circumstances that beneficiaries find themselves in on the death of a plan participant. As noted by the Minister of Finance when the SDB provisions where given second reading in Parliament:

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[42] Evidence of S. McLaren, p.71, ll. 32-38, p. 72 ll. 7-8, A.R. Vol. II, pp. 20-21; Evidence of E. Ball, p.22, ll. 41-45, R.R. Vol. I, p. 48. One of the plan participants, Mr. Jackson, was still employed at his death at the age of 64: evidence of I. Jackson, p. 42, ll. 2-4, A.R. Vol. II, p. 13.

[43] Evidence of I. Jackson, p. 41, ll. 13-14, R.R. Vol. I , p. 50; Evidence of P. McNaughton, p.137, ll. 27-47, p. 138, ll. 1-19, R.R. Vol. I, pp. 58-59.

[44] Evidence of P. McNaughton, p.139, l. 3 - p. 140, l. 34, A.R. Vol. II, pp. 47-48; Cross-examination of J. Fitzsimonds, p. 65, l. 44-47 - p. 66, l. 1-10, R.R. Vol. , pp. 54-55.

[45] Evidence of S. McLaren, p. 79, ll. 6-13, A.R. Vol. II, p. 25; Evidence of A. Humphreys, p. 106, ll. 3-4, A.R. Vol. II, p. 34.

[46] Evidence of J. Fitzsimonds, p. 56, ll. 30-35, A.R. Vol. II, p. 16; Evidence of I. Jackson, p. 43, ll. 20-23, R.R. Vol. I, p. 51.

[47] Cross-examination of I. Jackson, p. 54, ll. 15-16, R.R. Vol. I, p. 53; Evidence of A. Humphreys, p. 107, ll. 25-29, A.R. Vol. II, p. 35.

[48] Cross-examination of I. Jackson, p. 46, lines 32-40, R.R. Vol. I, p. 52, Cross-examination of H. Withler, p. 129, lines 19-24, R.R. Vol. I, p. 56.

[49] Cross-examination of H. Withler, p. 129, line 47, p. 130, lines 1-47, R.R. Vol. I, p. 56-57; Cross-examination of E. Ball, p. 38, lines 12-13, R.R. Vol. I, p. 49.

> It will be clear from a reading of this bill that it is not intended to provide for the normal life insurance requirements of individuals. It provides only a reasonable and moderate death benefit of a kind commonly made available to employees by a growing number of large private employers. *Public servants, like all other citizens, will continue to make their own provision for their own life insurance requirements in accordance with their individual needs and circumstances.*[51] (emphasis added)

D. THE RELATIVE ECONOMIC WELL-BEING OF THE CLASS MEMEBERS

27. The class members are in a relatively advantageous financial position because their spouses were employees of the federal government or members of the Canadian Forces. Their status as surviving spouses of public servants and members of the Canadian Forces has provided them with a fully indexed survivor's pension and access to inexpensive dental and health insurance. Madam Justice Garson concluded that the class members, as a group of seniors, were better off financially than the average Canadian senior.[52]

28. These findings were well supported by the evidence from the plaintiffs' experts who testified about the financial circumstances of seniors in general and acknowledged the advantages that the class members had because of their status as surviving spouses.

29. Professor Chaykowski, a labour economist, admitted that on average, Government of Canada employees earn about 7-9% more than the equivalent workers in the private sector. The wage advantage is historical and persisting. The same differential applies to public service pensions. Furthermore, as the defined benefit pension plan is backed by Parliament's taxing power, it provides a very secure source of life-time income for both the pensioner and surviving spouse.[53]

30. Professor Forget, an economist with expertise in health care costs, acknowledged that seniors with employer or private health insurance plans coped with the increased

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[50] Exhibit 62, A.R. Vol. VI, p. 189. Note that age 13 on the chart is likely a mistake.
[51] Hart Clark, Exhibit "U", R.R. Vol. II, p 419.
[52] Reasons, BCSC, A.R. Vol. I, p. 70, para. 158.
[53] Reasons, BCSC, A.R. Vol. I, p. 64, para. 146; cross-examination of R. Chaykowski, p. 341, ll. 16-40, p. 346, ll. 45-47, p. 347, ll. 1-7, R.R. Vol. I, pp. 64, 67-68

costs of last illness and death better than those without such plans. The trial Judge accepted Professor Forget's evidence that the costs of last illness and death increase with age, but found that the same costs were not incurred by the class members because they had access to the government's health insurance plan and the SDB.[54]

E. THE TRIAL JUDGMENT

31. The trial judge concluded that although the reduction provisions draw a distinction based on age, the distinction was not discriminatory. The reduction provisions of the SDB do not treat the appellants unfairly, taking into account all of the circumstances of the legislative framework of the impugned law.[55]

32. The trial judge refused to analyze the SDB in isolation divorced from its legislative framework. She found that it was part of an entire package of benefits provided to surviving spouses of any age. In characterizing the purpose of the SDB the court found it was "...not 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 pension benefit plan".[56]

33. Madam Justice Garson found as a fact that the SDB is life insurance and that reduction provisions are common in employer sponsored group life insurance plans.[57] She noted that most Provinces exclude age differentiation in employee insurance plans from the discrimination sections of human rights legislation and found that that was a factor weighing against a finding of discrimination in the context of this case.[58]

34. The trial judge refused to adopt the stereotype of seniors being advocated by the plaintiffs and found that seniors could no longer be considered to be economically disadvantaged members of Canadian society. In reaching this conclusion she relied on the evidence of Professor Chaykowski and the evidence adduced by the Attorney General

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[54] Reasons, BCSC, A.R. Vol. I, p.68, para. 154.
[55] Reasons, BCSC, A.R. Vol. I, p. 74, para. 171.
[56] Reasons, BCSC, A.R. Vol. I, p. 56, para. 123.
[57] Reasons, BCSC, A.R. Vol. I, p. 71, para. 160; p. 64, para. 146; Exhibit 43, A.R. Vol. VI, pp. 37-39.
[58] Reasons, BCSC, A.R. Vol. I, pp. 59-61, paras. 134-136

establishing that the number of low income seniors has decreased since 1983 and that median wealth for seniors has increased since 1984.[59]

F. THE BRITISH COLUMBIA COURT OF APPEAL

35. The majority of the Court of Appeal found no reason to allow the appeal based on Madam Justice Garson's reasonable findings of fact and her application of the law.

36. The conclusion of the majority aptly sums up the trial judge's decision and their endorsement of her findings:

> This case demonstrates the difficulty that arises when one attempts to isolate for criticism a single aspect of a comprehensive insurance and pension package designed to benefit an employee's different needs over the course of his or her working life. The trial judge concluded that, viewed in context, the supplemental death benefit was part of a larger scheme comprised of group insurance and pensions designed to look after the changing needs of an employee as he or she remained in the workforce and then retired. At the younger ages, the supplementary death benefit provided a limited stream of income for unexpected death where the surviving spouse was not protected by a pension. At older ages, the purpose of the supplementary death benefit is for expenses associated with last illness and death. The comprehensive plan, while not a perfect fit for each individual, did not meet the hallmarks of discrimination given it was a broad-based scheme meant to cover the competing interests of the various age groups covered by the plan.[60]

[59] Reasons, BCSC, A.R. Vol. I, p. 70, para.158.
[60] Majority Reasons, BCCA, A.R. Vol. I, pp.151-152, para. 181.

PART II – POINTS IN ISSUE

37. On August 5, 2009, the Chief Justice stated the following constitutional questions in this appeal:

> 1. 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(1) of the *Canadian Charter of Rights and Freedoms*?
>
> 2. 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 *Canadian Charter of Rights and Freedoms*?
>
> 3. 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(1) of the *Canadian Charter of Rights and Freedoms*?
>
> 4. 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 *Canadian Charter of Rights and Freedoms*?

38. The Attorney General submits that the answer to questions 1 and 3 is no. The impugned provisions are not discriminatory. If this Court finds otherwise, the Attorney General says that any infringement is a reasonable limit that is demonstrably justified in a free and democratic society, such that the answer to questions 2 and 4 is yes.

39. For full consideration of this appeal, the Attorney General submits that the following additional issues arise:

> a) Is the standard of appellate review different for constitutional cases than for other matters? The Attorney General says that the answer is no.
>
> b) Do the appellants have standing to assert a claim under s. 15(1) of the *Charter*? The Attorney General says that the answer is no.
>
> c) If this Court finds that there is an unjustified infringement of s. 15(1), what is the appropriate remedy? The Attorney General says that the only available remedy is a declaration under s. 52 of the *Charter*, and that any declaration given should be suspended for a period of one year.

PART III – ARGUMENT

A. STANDARD OF REVIEW

40. This Court's decision in *Housen v. Nikolaisen*[61] conclusively articulated the standards of appellate review and explained the legal policy rationale for the applicable standards. Contrary to the appellants' suggestion, there is no principled reason to apply a different standard of appellate review in constitutional cases than in any other case.

41. The standard of appellate review on questions of fact is a deferential one, and findings of fact will not be overturned unless it is shown that the trial judge made a "palpable and overriding error." The principles underlying this high degree of deference include limiting the number, length and cost of appeals, promoting the autonomy and integrity of trial proceedings and recognizing the expertise of the trial judge and his or her advantageous position with respect to the evidence.[62] Application of this standard to all findings of fact "has been universally recognized; its applicability has not been made to depend on whether the trial judge's disputed determination relates to credibility, to "primary" facts, to "inferred" facts or to global assessments of the evidence."[63] The standard of appellate review on questions of law is correctness to ensure universality in the application of legal rules and to fulfill the law-making role of appellate courts.[64] The application of a legal standard to a set of facts is a question of mixed fact and law, for which the applicable standard is also palpable and overriding error unless an extricable question of law is involved, to which the correctness standard applies.[65]

42. The constitutional validity of legislation is a question of law, which the trial judge and the majority of the Court of Appeal answered correctly in light of the evidence and the key factual findings of the trial judge. The majority of the Court of Appeal gave appropriate deference to both the trial judge's findings of fact and to her overall assessment of the evidence.

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[61] *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 [*Housen*], RBOA, Vol. I, Tab 13, p. 147-166.
[62] *Ibid.* at paras. 10 – 18, RBOA, Vol, I, Tab 13, pp. 156-157.
[63] *H.L. v. Canada (Attorney General)*, 2005 SCC 25, [2005] 1 S.C.R. 401 at para. 53, RBOA, Vol. I, Tab 12, p. 146.
[64] *Housen, supra* note 61 at paras. 8, 9, RBOA, Vol. I, Tab 13, p. 155.
[65] *Ibid.* at paras. 26 – 37, RBOA, Vol. I, Tab 13, p. 162-166.

B. NO STANDING TO ADVANCE S. 15 INTEREST OF OTHERS

43. The question of whether the appellants have standing to allege a breach of section 15(1) of the *Charter* and to seek a remedy for that breach is a threshold question. The trial judge erred in law in finding that the appellants have standing. No distinction is made based on the personal characteristics of the beneficiaries of the plan participants. Thus, their action for breach of section 15 *Charter* rights should have failed at the outset.

44. It is a settled and unequivocal principle of constitutional law that *Charter* rights and section 15 rights in particular are personal in nature and must therefore be advanced by the person suffering the discrimination.[66] The appellants allege that the reduction provisions "discriminate on the basis of age",[67] contrary to section 15(1) of the *Charter*. The impugned provisions relate to the age of the deceased plan participants, but the claim is being advanced by a particular group of beneficiaries of the plan participants. The class members do not have standing to advance a claim for breach of *Charter* rights, either in their own right or vicariously through the plan participant.

45. Despite the above, the trial judge determined that the appellants have standing. Relying on *Benner*, the trial judge reasoned that the appellants suffered differential treatment as a result of their spouses' ages and that they are the true targets of the impugned provisions.[68] In light of their conclusion on the substantive issue, the majority of the British Columbia Court of Appeal did not address the question.[69]

46. The Attorney General challenges the standing finding, as *Benner* is clearly distinguishable from the present case. Here, the impugned provisions apply to the plan participants, and not the beneficiaries. Access to the benefit is determined by the participant when choosing a beneficiary. The benefit is not one given by the government to the beneficiary, but by the participant, which is highlighted by the fact that the participant can change his or her choice of beneficiary at any time.

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[66] *R. v. Edwards*, [1996] 1 S.C.R. 128 at paras. 44 and 45, RBOA, Vol. II, Tab 20, p. 249-250; *Benner v. Canada (Secretary of State)*, [1997] 1 S.C.R. 358 at para. 78 [*Benner*], RBOA, Vol. I, Tab 4, p. 47.
[67] Factum of the Appellants, para. 64.
[68] Reasons, BCSC, A.R., Vol. 1, p. 41, para. 88, 89.
[69] Majority Reasons, BCCA, A.R., Vol. 1, p. 153, para. 186.

47. Therefore, if there is a section 15 right engaged it is the right of those participants who are over the age of 65, and who, as a consequence will necessarily be leaving a reduced supplementary death benefit to their designated beneficiary. Insofar as the appellants are concerned, there is no distinction based on *their* personal characteristics, which is fundamental to the definition of discrimination originally iterated by McIntyre J. in *Andrews v. Law Society (British Columbia)*[70] and recently reiterated by the Chief Justice and Abella J. in *R . v. Kapp*,[71] as follows:

> I would say then that discrimination may be described as a distinction, whether intentional or not but based on grounds relating to *personal characteristics of the individual or group*, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society: [emphasis added].

48. In *Benner*, certain critical circumstances brought Mr. Benner within the protection of s. 15. Central to this Court's conclusion was the nature of the benefit in question – Mr. Benner's access to Canadian citizenship. As this Court noted, one "cannot imagine an interest more fundamental to full membership in Canadian society than Canadian citizenship."[72] Mr. Benner was the real target of the legislation. The impugned provisions restricted Mr. Benner's access to citizenship as of right based on the gender of his Canadian parent, an immutable characteristic so "intimately connected to and so completely beyond the control of"[73] Mr. Benner, that allowing his invocation of s. 15 was in keeping with the purposes of the equality guarantee. The Court hastened to add that it did not intend to create a general doctrine of "discrimination by association."[74]

49. In stark contrast to *Benner*, the nature of the benefit in question here is the amount of low cost group life insurance available under the *PSSA* and *CFSA* to older civil servants and members of the armed forces.[75]

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[70] *Andrews v. Law Society (British Columbia)*, [1989] 1 S.C.R. 143 at 174 [*Andrews*], ABOA, Tab 4.
[71] *R. v. Kapp*, 2008 SCC 41 at para. 18 [*Kapp*], RBOA, Vol. II, Tab 23, pp. 285-286.
[72] *Benner, supra* note 66 at para. 68., RBOA, Vol. I, Tab 4, pp. 45-46
[73] *Ibid.* at para. 85, RBOA, Vol. I, Tab 4, p. 49 .
[74] *Ibid.* at para. 82, RBOA, Vol. I, Tab 4, p. 48.
[75] Reasons, BCSC, A.R., Vol. 1, pp. 54, 55, paras. 119 – 121.

50. Moreover, the trial judge erred in law in finding that the legislative provision is specifically targeted at surviving spouses.[76] While other provisions in the *PSSA* and the *CFSA* are specifically and explicitly designed to benefit the surviving spouses,[77] the "target" of the SDB is the designated beneficiary chosen by the plan participant.[78] The beneficiary may be the estate of the participant; any person over the age of 18 years; any charitable organization or institution; any benevolent organization or institution; or any eleemosynary religious or educational organization or institution.[79] A participant's spouse's entitlement to the SDB is only if so directed by the participant, which is a choice that may be changed at any time.

51. The initial class definition and the further narrowing of that class by the trial judge highlights that, fundamentally, the appellants are attempting to raise the *Charter* rights of another. As already noted, on certification of these class actions, the class was necessarily defined as a subset of all potential beneficiaries, such that it was limited to "persons".[80] This class did not have any homogenous characteristics – the class members would have been all ages and were not necessarily in a relationship of any proximity to the deceased plan participant. In finding standing, the trial judge further limited the class to the subset of surviving spouses.[81] Membership in the class is not the result of any legislative distinction.

52. The expansive scope given to s. 15 amounts to acceptance of a doctrine of "discrimination by association". However, the expansion is not necessary to achieve the anti-discrimination purposes of s. 15 of the *Charter*. The provision is open to challenge by any plan participant who has reached the age at which he or she is impacted by the legislative reduction in the amount of low cost group life insurance to direct towards his

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[76] *Ibid.* at p. 41, para. 88.
[77] *PSSA,* Part I, s. 3(1) definition of "survivor", ss. 12, 13, 25, RBOA, Vol. II, Tab 30, pp. 368-380; *CFSA*, Part I, s.2(1) definition of "survivor", ss. 25, 25.1, 26, 26.1, 29, RBOA, Vol. II, Tab 28, pp. 343-352.
[78] *PSSA*, Part II, s. 55(1), RBOA, Vol. II, Tab 30, p. 388; *CFSA*, Part II, s. 67(1), RBOA, Vol. II, Tab 28, p. 360.
[79] *Supplementary Death Benefits Regulations*, C.R.C., c. 1360, s. 26(5), RBOA, Vol. III, Tab 32, p. 442.
[80] Reasons, BCSC, A.R., Vol. 1, pp. 15, 16, paras. 20, 21.
[81] *Ibid.* p. 42, para. 92.

or her chosen beneficiary. Unlike in *Benner*, here there is no insulation from *Charter* scrutiny. In any event, the Attorney General says that there is no discrimination.

C. SECTION 15(1)

(i) Judgments Below Consistent with General Principles

53. Fundamentally, s. 15(1) is "aimed at preventing discriminatory distinctions that impact adversely on members of groups identified by the grounds enumerated in s. 15 and analogous grounds." Discriminatory distinctions are those which perpetuate group disadvantage or prejudice, or impose disadvantage on the basis of stereotyping. Section 15 is a guarantee of substantive, rather than formal equality, which is grounded in the idea that "equality does not necessarily mean identical treatment".[82]

54. This Court's recent decision in *Kapp* began by stressing the importance of substantive equality and its constancy in the jurisprudence since its first s. 15 decision in *Andrews*. *Andrews* "set the template for this Court's commitment to substantive equality...which subsequent decisions have enriched but never abandoned."[83] Later, "*Law* made an important contribution to our understanding of the conceptual underpinnings of substantive equality."[84] The factors in *Law* serve to focus the analysis in a particular case on the central concern of s. 15 – combating discrimination.[85]

55. In applying *Law*,[86] the trial judge properly focused on the factors relevant to identifying whether an impact amounting to discrimination exists – historical disadvantage, prejudice and stereotyping. The trial judge recognized the substantive equality objectives of s. 15 of the *Charter*. The concept of human dignity was not used as an additional hurdle. Rather, the contextual factors noted in *Law* were appropriately used to answer the question of whether the age-based legislative distinction discriminates by perpetuating prejudice or stereotyping. Following this contextual analysis of the

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[82] *Kapp, supra* note 71 at paras. 14 – 25, RBOA, Vol. II, Tab 23, p. 284-287.
[83] *Ibid.* at para. 14, RBOA, Vol. II, Tab 23, p. 284.
[84] *Ibid.* at para. 20, RBOA, Vol. II, Tab 23, p. 286.
[85] *Ibid.* at paras. 23, 24, RBOA, Vol. II, Tab 23, pp. 286-287.
[86] *Law v. Canada (Minister of Employment and Immigration*, [1999] 1 S.C.R. 497 [*Law*], ABOA, Tab 20.

evidence, the trial judge concluded that the impugned provision, "does not bear any of the hallmarks of discrimination".[87]

56. The majority of the Court of Appeal viewed the trial judge's decision through the lens of this Court's decision in *Kapp*, and found no reason to depart from any of her factual findings or legal conclusions.

(ii) Comparator Group Analysis Used Below Remains Relevant

57. Beginning with *Andrews*, this Court has consistently recognized that equality is a comparative concept. In *Kapp*, concomitant with its re-emphasis of the contextual analysis articulated in *Andrews*, the Court noted criticism of the use of *artificial* comparators that could detract from the attainment of substantive equality.[88] Comparisons, however, remain essential to the discrimination analysis, as is evident from this Court's most recent s. 15(1) cases.[89]

58. Further, the guidance on the appropriate means to identify a suitable comparator, provided by this Court in *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*[90] remains applicable. As was explained by the Chief Justice,

> ... the comparator group should mirror the characteristics of the claimant or claimant group relevant to the benefit or advantage sought, except for the personal characteristic related to the enumerated or analogous ground raised as the basis for the discrimination. The comparator must align with both the benefit and the "universe of people potentially entitled" to it and the alleged ground of discrimination: [citation omitted].[91]

59. In this case, for the reasons given by the majority of Court of Appeal, the trial judge's decision to accept the comparator group then proposed by the appellants was correct.[92] That comparator group was "all civil servants and members of the armed

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[87] Reasons, BCSC, A.R., Vol. 1, p. 74, para. 170.
[88] *Kapp*, *supra* note 71 at para. 22, RBOA, Vol. II, Tab 23, p. 286.
[89] See for example *Ermineskin Indian Band and Nation v. Canada*, 2009 SCC 9, [2009] 1 S.C.R. 222 at para. 185 [*Ermineskin*], RBOA, Vol. I, Tab 8, p. 101.
[90] *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, 2004 SCC 78, [2004] 3 S.C.R. 657, RBOA, Vol, I, Tab 2, pp. 19-26.
[91] *Ibid.* at para. 53, RBOA, Vol, I, Tab 2, pp. 25-26.
[92] Majority Reasons, BCCA, A.R., Vol. 1, p. 147, para. 170.

forces who received the full supplementary death benefit, not reduced on the basis of age".

60. More importantly, the trial judge's overall approach, approved of by the majority of the Court of Appeal, was to examine the impugned distinction in the larger social, political and legal context, which is entirely consistent with both this Court's original and most recent jurisprudence. In *Ermineskin*, this Court emphasised "the importance of addressing the broader context of a distinction in a substantive equality analysis."[93] The appellants' submissions impugning the trial judge's use of other comparisons to complete the contextual analysis effectively amount to criticism of the trial judge for *not* getting bogged down in a technical, rigid and "artificial comparator analysis focussed on treating likes alike."

61. Ironically, the narrowing of the comparator group by the dissenting justice of the Court of Appeal, which the appellants now adopt, is the type of artificial comparator analysis that fails to wholly reflect the full extent of comparisons that must be made to determine whether the differential treatment is discriminatory. In any event, the appellants' claim is not particularly improved by their new choice of comparator group, being all civil servants and members of the Canadian forces who received a full SDB, not reduced on the basis of age, *and who are eligible for a survivor's pension.* The relevant question for the purposes of comparison is not whether the comparator group is also eligible for survivors' pensions, but whether the amount of those pensions is comparable to those received by the claimant group. It is still the case that younger civil servants will have had less time to build up their pension credits. Thus, even if eligible for a survivor's pension, the surviving spouse of a younger civil servant who dies unexpectedly will receive a much smaller survivor's pension and, consequently, will have an acute need for an unreduced SDB. The result of the contextual analysis remains the same – the distinction is not discriminatory.

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[93] *Ermineskin, supra* note 89 at para. 194, RBOA, Vol. I, Tab 8, p. 102.

(iii) No Discrimination

62. The appellants wholly failed to establish that they had suffered from either real disadvantage or wrongful stereotyping. This Court's decision in *Kapp* explained that, "in *Andrews*, McIntyre J. viewed discriminatory impact through the lens of two concepts",[94] which were described as follows:

> (1) the perpetuation of prejudice or disadvantage to members of a group on the basis of personal characteristics identified in the enumerated and analogous grounds; and
>
> (2) stereotyping on the basis of these grounds that results in a decision that does not correspond to a claimant's or group's actual circumstances and characteristics.[95]

63. This Court further explained in *Kapp* that the four contextual factors described in *Law* - 1) pre-existing disadvantage, if any, of the claimant group; (2) degree of correspondence between the differential treatment and the claimant group's reality; (3) whether the law or program has an ameliorative purpose or effect; and (4) the nature of the interest affected – "are based on and relate to the identification in *Andrews* of perpetuation of disadvantage and stereotyping as the primary indicators of discrimination." Factors one and four in *Law* speak to perpetuation of disadvantage and prejudice. The third factor, while largely speaking to s. 15(2), may also be relevant to the question of whether the effect of the law is to perpetuate disadvantage. Factor two speaks to stereotyping.[96]

64. As noted above, the trial judge conducted a full contextual analysis of the evidence, and properly focused on the factors relevant to identifying discriminatory impact. The majority of the Court of Appeal found no reason to depart from the trial judge's conclusion that the reduction provisions do not discriminate on the basis of age.

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[94] *Kapp*, *supra* note 71 at para. 18, RBOA, Vol. II, Tab 23, pp. 285-286.
[95] *Ibid.*
[96] *Ibid.* at para 23, RBOA, Vol. II, Tab 23, pp. 286-287.

(a) No Perpetuation of Disadvantage or Prejudice

65. The trial judge reached the only conclusion that was open to her on the evidence – the appellants, as a group do not suffer from "pre-existing disadvantage, stereotyping, prejudice or vulnerability based on their economic well-being."[97] The majority of the Court of Appeal properly concluded that there was no basis to interfere with the trial judge's conclusion.

66. Distinctions based on age are not inherently associated with prejudice or discrimination. As this Court has noted, the correlation between historical disadvantage and many of the enumerated grounds is not present for age. The Chief Justice explained this in *Gosselin*:

> ....unlike race, religion, or gender, age is not strongly associated with discrimination and arbitrary denial of privilege. This does not mean that examples of age discrimination do not exist. But age-based distinctions are a common and necessary way of ordering our society. They do not automatically evoke a context of pre-existing disadvantage suggesting discrimination and marginalization under this first contextual factor, in the way that other enumerated or analogous grounds might.[98]

67. The interests affected by the reduction provisions are financial. The evidence before the trial judge was that the financial situation of Canadian seniors has improved dramatically in recent years. Statistics Canada calculates that between 1983 and 1998 the number of single elderly Canadians living on a low income reduced from 47.9 to 21.3%. Between 1984 and 1999, Canadians over the age of 65 saw a 50.5% increase in their median wealth, which was greater than any other demographic sector.[99]

68. The appellants' own expert testified that the historical correlation between age and poverty has declined.[100] Professor Chaykowski conceded in his expert report that seniors on average had a high level of wealth relative to the general population.[101] The inception of government benefit programs largely directed to seniors aged 65 and over,

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[97] Reasons, BCSC, A.R., Vol. 1, p. 70, para. 158.
[98] *Gosselin, supra* note 2 at para. 31, RBOA, Vol. I, Tab 9, p. 123-124.
[99] Reasons, BCSC, A.R., Vol. 1, pp. 62, 63, 65, 66, paras. 141, 148.
[100] Reasons, BCSC, A.R., Vol. 1, p. 63, paras. 145.

such as the *Canada Pension Plan* ("*CPP*"), *OAS* and *GIS*, have substantially ameliorated the historical economic disadvantage of the overall elderly population.[102]

69. The appellants, as a group, are not economically disadvantaged.[103] All the appellants are recipients of inflation indexed survivor's pensions provided by Parliament. The pensions are defined benefit plans, based on the average salary of the plan participants in the five years prior to retirement. The pension payments are indexed to the cost of living, adjusted annually and backed by the solvency of the Government of Canada. The pension benefit and the SDB are an integrated aspect of the employment benefits package. They form Parts I and II of the same legislation.

70. The pensions, as noted, are a function of the salary earned by the plan participant. As the appellants' own expert Professor Chaykowski conceded, there is a 7-9% salary advantage in favour of Federal Government employees to comparable occupations in the private sector, and that this "wage advantage" which is historic, is increasing.[104]

71. The evidence also indicates that the appellants are better situated than most Canadians to cope with increased medical costs associated with old age, because the entire benefits package includes dental, extended health, and prescription drug plans. Moreover, access for the appellants to new drugs does not depend on the decision of a provincial government to list the drug in the Provincial Formulary. The Federal Drug Plan covers the cost of all approved drugs regardless of whether they are listed in the Formulary.[105] Consequently through the combined interaction of the Federal Drug Plan and Pharmacare, a retired public servant in British Columbia, or his or her surviving spouse, with an annual income of $30,000 would pay a maximum of $200 per annum for their prescription drug costs.[106]

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[101] Exhibit 16, A.R., Vol. IV, p. 92.
[102] Cross-examination of R. Chaykowski, p. 343, ll. 32-47, p. 344, ll. 1-16, R.R. Vol. I, pp. 65-66; Special Senate Committee on Aging – Final Report, Canada's Aging Population: Seizing the Opportunity (April 2009), Chapter 5: Eliminating Poverty, p. 93, RBOA, Vol. III, Tab 35, p. 537.
[103] Reasons, BCSC, A.R., Vol. 1, pp. 64, 65, 66, paras. 147, 149.
[104] Evidence of R. Chaykowski, p. 341, ll. 23-47, R.R. Vol. I, p. 64.
[105] Evidence of J. Arnold, p.531, ll.32-44, R.R. Vol. I, p. 74.
[106] Evidence of G. Argue, p. 678, ll.12-43, R.R. Vol. I, p. 103; Exhibit 44, A.R. Vol. VI, p.117.

72. The appellants equally failed to establish the presence of any prejudice in the legislative choices made. Rather, Parliament sought to balance the competing needs of its current and former employees. The SDB provides insurance in the case of premature death, and must be examined as an integral part of the overall benefit package provided to employees. The appellants cannot divorce themselves from the survivor benefit under the pension plan by focusing only on a single component of the overall compensation package. This Court's contextual approach mandates regard for a broader perspective.

73. Parliament has provided a survivor's benefit of 50% of the pension accumulated by the plan participant. In the case of a death of a young employee who has accumulated no pension or a very small pension that cannot pay an adequate survivor's benefit, the SDB plays a complementary and essential role in the overall benefit scheme and addresses a clear and pressing need. It is entirely appropriate in the discrimination inquiry to consider whether a benefit which is denied in one part of an Act is replaced by compensation in another part of the same Act, or in another federal statute.[107]

74. "[L]ogic and common sense" also support the structure of the SDB plan. "The very essence of group life insurance is the egalitarian nature of the cost and the coverage."[108] The inter-generational risk sharing inherent in group-life insurance makes a larger benefit available to young families early in their careers. Similarly, the elderly benefit from life insurance which would otherwise be prohibitively expensive were they to purchase it privately.

75. While recognizing that there is no ameliorative purpose as contemplated by s. 15(2) here, the trial judge considered group life insurance to have an ameliorative effect, by benefiting different people in different ways at different times in their lifecycle.

76. Maintaining the cost-effectiveness of group-life insurance actually promotes the values inherent in s. 15. Group-life insurance, like the SDB, makes no distinction

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[107] *Egan v. Canada*, [1995] 2 S.C.R. 513 at para. 154 [*Egan*], RBOA, Vol. I, Tab 7, p. 90. See also, *Bear v. Canada (Attorney General)*, [2003] 3 F.C. 456 (F.C.A.) at paras. 33 – 35, leave to appeal to SCC refused, [2003] S.C.C.A. No. 115, RBOA, Vol. I, Tab 3, pp. 36-38.
[108] Reasons, BCSC, A.R., Vol. 1, p. 71, para. 160.

between employees with some form of pre-existing medical condition or disadvantage and those who do not. The SDB provides a benefit to all employees, regardless of their health, and ensures that all employees are protected to some degree against a known but unpredictable risk.

77. Finally, the constitutional and societal significance of the interest(s) adversely affected further confirms the absence of any perpetuation of disadvantage or prejudice of the appellants. Relevant to this consideration is whether the distinction "constitute(s) a complete non-recognition of a particular group" or "restricts access to a fundamental social institution", or "affects a basic aspect of full membership in Canadian society."[109] The SDB does not even begin to trench on any of these interests. The interest affected is purely economic in the context of a group of relatively financially secure claimants and therefore insufficient to constitute discrimination.[110] Consequently the trial judge found that any disadvantage suffered by the appellants as a result of the reduction provision was not severe, impliedly finding that none of the above considerations were engaged.

(b) No Stereotyping

78. The degree of correspondence between the differential treatment and the claimant group's reality confirms the absence of any negative or invidious stereotyping on the basis of age. Thus, this marker of discrimination is also absent.

79. The trial judge found that the SDB is insurance the purpose of which varies as the employee ages. 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 assists with expenses associated with last illness and death. The trial judge[111] and the majority of the Court of Appeal[112] concluded that the purpose of the SDB corresponds to the needs of the beneficiaries, even though it may do so imperfectly in some circumstances.

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[109] *Law*, *supra* note 86 at para. 74, *Egan*, *supra* note 107 at para. 64, RBOA, Vol. I, Tab 7, p. 88.
[110] *Granovsky v. Canada (Minister of Employment and Immigration)*, 2000 SCC 28, [2000] 1 S.C.R. 703 at paras. 58, 69, RBOA, Vol., I, Tab 10, pp. 131-132.
[111] Reasons, BCSC, A.R., Vol. 1, p. 69, para. 156.
[112] Reasons, BCCA, A.R., Vol. 1, p. 149 – 50, para. 176.

80. The appellants ask this Court to reject the factual finding that the needs of the beneficiaries are generally met. To do so the Court has to ignore the legislative context within which the SDB is provided, ignore the fact of the survivor's pension which increases in value with each year of employment, ignore the entire suite of benefits to which these appellants are entitled, and ignore the evidence of the actual expenses associated with last illness and death incurred by the representative appellants and class members.

81. The appellants' testimonial evidence indicates there was a substantial correspondence between the amount of the SDB and the expenses incurred. In fact, there was no evidence that any of the appellants were unable to meet funeral or last illness expenses. Only one of the appellants' spouses had home care and that spouse was covered under the federal government medical plan. None of the appellants' spouses were in nursing homes.[113]

82. The appellants ask this Court to ignore the evidence of their actual experience of substantial correspondence. Instead, they ask the Court to focus on the fact that costs associated with last illness and death increase with age, for which the Federal Health Care Plan does not provide 100% coverage, in particular the cost of long term and homecare, and conclude that as a consequence and as a matter of law the reduction provisions in the SDB are discriminatory.

83. This argument must fail because section 15 does not require that benefit legislation satisfy every need of a claimant group. As the Chief Justice noted in *Gosselin*:

> Perfect correspondence between a benefit program and the actual needs and circumstances of the claimant group is not required to find that a challenged provision does not violate the Canadian *Charter*. The situation of those who, for whatever reason, may have been incapable of participating in the programs attracts sympathy. Yet the inability of a given social program to meet the needs of each and every individual does not permit us to conclude that the program failed to correspond to the actual needs and circumstances of the affected group. As Iacobucci J. noted in *Law*, supra, at para. 105, we should not demand "that

[113] Reasons, BCSC, A.R., Vol. 1, pp. 17-25, paras. 23-49.

> legislation must always correspond perfectly with social reality in order to comply with s. 15(1) of the Charter."[114]

84. There is no doubt that crafting the correct combination of benefits to meet the needs of current and retired public servants across the broad sweep of age, gender, and family status is a daunting task. That it will fail to meet the needs of everyone in all circumstances can be assumed. No matter what plans are in place, a different configuration will better suit the preference of some.[115] As Mr. Argue testified:

> ...if you look at each benefit provision in isolation you could find a lot of issues and a lot of difficulties with each individual provision. But our experience is that plan sponsors try and elevate the—the review to a higher level and create some level of aggregate equity.[116]

85. Perfect correspondence between the needs and circumstances of all plan participants would be impossible to achieve, as a practical matter. Moreover, a group insurance scheme that provides unreduced benefits would be financially prohibitive, thereby destroying the viability of the plan itself. The evidence of Mr. Argue demonstrates this point perfectly:

> ..if a group life program - - either because of the contribution required from younger employees or the tax attribution if it's employer paid, if either of those become too high or out of sync with what they could go out and buy insurance for on the street, then the whole plan becomes a disincentive.[117]

86. As will be discussed in greater detail in the section 1 minimal impairment analysis, the very nature of group life insurance depends on characteristics of the group as a whole, and the assessment that Canadians generally make about the need to insure against the risk of early death. These generalizations are rooted in actuarial and life expectancy tables, and not stereotyping.

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[114] *Gosselin, supra* note 2 at para. 55, RBOA, Vol. I, Tab 9, p. 125.
[115] *Ibid.*
[116] Evidence of G. Argue, p. 675, ll. 35-45. R.R. Vol. I, p.102.
[117] Evidence of G. Argue, p. 671, ll. 27-37, R.R. Vol. I, p. 101.

87. The Court in *Gosselin* noted that, "[t]he legislator is entitled to proceed on informed general assumptions without running afoul of s. 15 ... provided these assumptions are not based on arbitrary and demeaning stereotypes."[118]

88. In this regard, the assumption inherent in the 10% annual reduction - that the need for insurance declines later in life - is justified by our common experience. As the evidence at trial demonstrated, employers have to make choices as to where to spend scarce resources to obtain the maximum benefit for the greatest number of employees. While age is an explicit criterion in all group life insurance plans, an implicit criterion is to ensure coverage is provided to the greatest number of people at a reasonable cost.[119]

89. The provision in question does not make any assumptions regarding older people, per se. Rather it assumes that people who have reached a normal age for retirement have the benefit of the wealth and pension accumulated over the course of their years of public service, or combined public service and other employment, and have made provisions for any of their dependants. There is no indication that this assumption is based on stereotypes of any kind, let alone the negative, invidious stereotypes that are the markers of discrimination. Ironically, the appellants are asking this Court to adopt an out-dated stereotype of older people as economically disadvantaged, which is no longer the case.

90. In this case, were the reduction provisions to be eliminated it would guarantee that the full payment of 2 times salary would be made in all cases. Not only would this increase the costs of the plan, it would place a greater burden on younger employees to fund the plan. Elimination of the reduction provisions would also change the characterization of the SDB. Instead of providing insurance in the case of unforeseen death, it would be insurance against certain death.

91. To view the purpose of the SDB in such a manner is not only incorrect but also ignores that the provision of a full benefit to those who die prior to age 66 is designed to address the increased vulnerability of individuals, families and partners who are in

[118] *Gosselin, supra* note 2 at para. 56, RBOA, Vol. I, Tab 9, p. 125-126.
[119] Evidence of G. Argue, p. 675, ll. 35-45, R.R. Vol. I, p. 102.

unusual and difficult circumstances. More significantly the appellants' perspective also ignores that the appellants enjoyed this same level of protection at that time of their lives. To require adherence to a uniform degree of coverage has the effect of creating inequality, rather than achieving equality.[120]

D. THE REDUCTION PROVISIONS ARE A REASONABLE LIMIT ON S. 15

92. In the event that this Court finds that the reduction provisions are discriminatory, the Attorney General says that they are a demonstrably justifiable limit on the appellants' rights.

93. Recently in *Alberta v. Hutterian Brethren of Wilson Colony*,[121] this Court reiterated that deference throughout the s. 1 analysis is appropriate where the impugned provision arises in the context of a complex legislative scheme aimed at addressing a complex issue. As the Chief Justice stated:

> This Court has recognized that a measure of leeway must be accorded to governments in determining whether limits on rights in public programs that regulate social and commercial interactions are justified under s. 1 of the *Charter*. Often, a particular problem or area of activity can reasonably be remedied or regulated in a variety of ways. The schemes are typically complex, and reflect a multitude of overlapping and conflicting interests and legislative concerns. They may involve the expenditure of government funds, or complex goals like reducing antisocial behaviour. The primary responsibility for making the difficult choices involved in public governance falls on the elected legislature and those it appoints to carry out its policies. Some of these choices may trench on constitutional rights.[122]

94. Here, the SDB is one portion of the global compensation and benefits package offered to members of the public service and Canadian forces. The reduction provisions are one feature of the SDB, arising within the full package of integrated employment benefits available to active and retired members. The entire scheme is complex,

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[120] Exhibit 43, A.R. Vol. VI, pp.46-47.
[121] *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37 [*Hutterian Brethren*], RBOA, Vol. I, Tab 1, pp. 1-18.
[122] *Ibid.* at para. 35, RBOA, Vol. I, Tab 1, pp. 11-12.

reflecting both overlapping and conflicting interests. "A degree of deference is therefore appropriate".[123]

(i) Pressing and Substantial Objective

95. The first part of the *Oakes* test requires asking whether the objective, which the measures responsible are designed to serve, is of sufficient importance to warrant overriding a constitutionally protected right or freedom.[124] At a minimum an objective must relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important.[125]

96. The objective of the government in seeking to provide a form of group life insurance for its employees is self-evident. So too is the interface between the provision of group life insurance and the provision of a pension. Ensuring that the public service of Canada remains a vibrant employer, capable of attracting the skilled and qualified individuals necessary to deal with the issues facing Canadian society is undoubtedly an important and pressing objective. As Ms. Arnold elaborated in her testimony, the Government of Canada compensation package, including pensions and benefits, is directed to ensure that the Government remains a competitive employer.[126]

97. The SDB is an important aspect of the interconnected overall compensation package. Insurance, and in particular, group life insurance, is common among Canadian employers. In any group insurance plan, younger members effectively subsidize the older ones; otherwise premium rates would necessarily escalate with age. The object in structuring group life insurance generally, and the SDB in particular, is to provide viable insurance coverage to participants at a reasonable cost,[127] which furthers the substantial objective that the complete compensation package is designed to serve.

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[123] *Ibid.* at para. 37, RBOA, Vol. I, Tab 1, p. 12.
[124] *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, p. 352, RBOA, Vol, II, Tab 18, p. 235, as cited in *R. v. Oakes*, [1986] 1 S.C.R. 103 [*Oakes*], ABOA Tab 31.
[125] *Oakes, ibid.* at 138-39.
[126] Evidence of J. Arnold, p. 499, ll. 23-47, p. 500, ll. 1-17, R.R. Vol. I, pp. 72-73.
[127] Hart Clark, A.R., Vol. III. pp. 69 – 74, paras. 46 - 57

(ii) Rational Connection

98. This Court has repeatedly indicated that the government need not prove a rational connection with precision or certainty. It is sufficient for the government to establish that the means it has chosen are linked to, or may help to bring about the objective.[128] This rational connection may be found "on the basis of reason or logic".[129] Moreover, imperfect attainment of the objective does not detract from a demonstrated connection, a point most recently explained by this Court in *R. v. Bryan*.[130]

99. The question here is whether reducing the amount of low cost group life insurance for which plan participants of the ages specified in the *PSSA* and *CFSA* are eligible furthers the objective of providing a competitive benefit package at a reasonable cost to employees while ensuring that the benefit package is sustainable. Reason, logic and the evidence all evince an affirmative answer.

100. Providing full coverage to active employees when they need it most - when their wealth is minimal - and still providing some benefit to older, largely retired, employees when their wealth is highest, is common practice among employers that generally parallel the characteristics of the Government of Canada's workforce. Restricting benefits to the latter category of plan members is rationally connected to providing reasonably and competitively priced group life insurance for employees, because "the cost of providing benefits beyond normal retirement age is very significant compared to the cost of extending similar coverage to employees in younger age brackets."[131]

(iii) Minimal Impairment

101. The question at this stage of the s. 1 analysis is whether the limit on the appellants' equality rights imposed by the reduction provisions is reasonably tailored to

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[128] *Canada (Attorney General) v. JTI-MacDonald*, 2007 SCC 30, [2007] 2 S.C.R. 142 at para. 40 [*JTI-MacDonald*], RBOA, Vol. I, Tab 6, p. 75.
[129] *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199 at paras. 153, 154 [*RJR-MacDonald*], RBOA, Vol. II, Tab 24, p. 305. See also *Hutterian Brethren, supra* note 121 at para. 48, RBOA, Vol. I, Tab 1, p. 13.
[130] *R. v. Bryan*, 2007 SCC 12, [2007] 1 S.C.R. 527 at para. 40 [*Bryan*], RBOA, Vol. II, Tab 19, p. 243.
[131] Exhibit 43, A.R., Vol. VI, pp. 36 – 38, 45 – 47, quote at 46; Evidence of G. Argue, p. 656, ll. 36 to p. 670, ll. 30, R.R. Vol. I, pp. 86 - 100.

the pressing and substantial goal of providing a competitive benefit package at a reasonable cost to employees while ensuring that the benefit package is sustainable.

102. In *Bryan*, this Court confirmed that the standard for this stage of the analysis is still best encapsulated by the following passage from *RJR-MacDonald*:

> The impairment must be "minimal", that is, the law must be carefully tailored so that rights are impaired no more than necessary. The tailoring process seldom admits of perfection and the courts must accord some leeway to the legislator. If the law falls within a range of reasonable alternatives, the courts will not find it overbroad merely because they can conceive of an alternative which might better tailor objective to infringement . . .[132]

103. In *Hutterian Brethren*, after citing the above passage, this Court emphasized that the legislative goal grounds the minimal impairment analysis.[133] Where that legislative goal mediates between conflicting interests and claims of different groups, the government will inevitably be called upon to draw lines. In a situation such as this,

> [i]f the legislature has made a reasonable assessment as to where the line is most properly drawn, especially if that assessment involves weighing conflicting scientific evidence and allocating scarce resources on this basis, it is not for the court to second guess. That would only be to substitute one estimate for another.[134]

104. According leeway to the legislator when the measure in question is one that attempts to strike a balance between legitimate but competing claims has been a consistent theme throughout this Court's jurisprudence. This is stated to be so because "it is by no means easy to determine with precision where the balance is to be struck."[135] Second guessing the legislative choices is inappropriate as "[t]he courts are not called upon to substitute judicial opinions for legislative ones as to the place at which to draw a precise line".[136]

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[132] *RJR-MacDonald, supra* note 129 at para. 160, RBOA, Vol., II, Tab 24, p. 307, as cited in *Bryan, supra* note 130 at para. 42, RBOA, Vol. II, Tab 19, pp. 243-244.
[133] *Hutterian Brethren, supra* note 121 at paras. 54, 55, RBOA, Vol. I, Tab 1, p. 14-15.
[134] *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927 at 990, RBOA, Vol. I, Tab 14, p. 180.
[135] *McKinney v University of Guelph*, [1990] 3 S.C.R. 229 at para. 67, RBOA, Vol. II, Tab 17, p. 228.
[136] *R. v. Edwards Books and Art Limited,* [1986] 2 S.C.R. 713 at 781-82, RBOA, Vol. II, Tab 21, pp. 264-265.

105. More recently on the same theme, Iacobucci J. stated the following in *M. v. H.*:

> This Court has often stressed the importance of deference to the policy choices of the legislature in the context of determining whether the legislature has discharged its burden of proof under s. 1 of the Charter: ... As a general matter, the role of the legislature demands deference from the courts to those types of policy decisions that the legislature is best placed to make.[137]

106. Parliament is best situated to determine the range and extent of benefits necessary to ensure a vibrant and competitive public service. This involves a complex balance between political accountability for the use of public money and the critical objective of ensuring that a career in the public service is attractive and competitive. As Mr. Argue noted, all employers are faced with difficult choices in the allocation of resources for wages and benefits. Here, as between the choice of eliminating insurance entirely after employment (the choice of many employers) or extending to age 76 without reduction (the choice of no employer), a gradual reduction based on a generalized assessment of declining need is a rational and logical choice. It is also well rooted in actuarial principles, ensuring coverage across a broad demographic of employees at a competitive rate.

107. Notably, options other than a gradual reduction were identified in a 1982 report prepared by Mr. Clark for Treasury Board, partially in response to the 1980 report issued by the Canadian Human Rights Commission. After noting the substantially higher costs of post-retirement coverage, the report squarely raised the balancing issue: "A philosophical question arises as to whether the need for coverage is so great during retirement as to justify its effects on the premium rates for younger active employees."[138] Various options were then proposed, including: a significant reduction or elimination of post-retirement coverage, or a substantial and immediate reduction in coverage.[139] If Parliament had chosen to substantially reduce or eliminate the SDB on *retirement*, there would have been no basis for a s. 15 claim. Yet, adoption of either option would have

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[137] *M. v. H.*, [1999] 2 S.C.R. 3 at para. 78, RBOA, Vol., I, Tab 15, p. 197.
[138] Exhibit 24, Tab 29, A.R., Vol. V, p. 181.
[139] *Ibid.* at 181, 182.

resulted in a vast majority of the class members receiving either a *lower or no* SDB.[140] Fortunately for the appellants, Parliament did not choose to draw these lines.

108. The issue of discrimination in insurance was specifically dealt with by this Court in *Zurich Insurance Co. v. Ontario (Human Rights Commission)*.[141] At issue in *Zurich* was the practice of charging higher auto insurance rates for young single males than any other group. Writing for the majority, Mr. Justice Sopinka recognized the inevitable clash between insurance practices and human rights law. The determination of insurance rates and benefits are set based on statistics, not individual assessments of merit and needs. However, he concluded that an insurer was exempt from liability for discrimination if the discriminatory practice was reasonable. A practice would be reasonable if it is based on sound and accepted insurance practice.[142]

109. In the present case, the SDB provided by statute is designed to provide inexpensive insurance to all employees. This requires accommodating and balancing competing claims across the broad community of public servants whether newly recruited, at the height of their career, or in retirement. The plan attempts to respond to the various needs of employees at different ages. Any further benefit given to the appellants necessarily means amending the plan provisions for current participants either by raising the premium or reducing the benefit. As recognised by Justice Sopinka in *Egan* where a scheme for pension benefits was under attack, the "government must be accorded some flexibility in extending social benefits... It is not realistic for the Court to assume that there are unlimited funds to address the needs of all."[143]

(a) Appellants' Evidence on Minimal Impairment

110. The appellants' actuarial expert, Mr. Christie, advocated elimination of the reduction provision, arguing the provision of the SDB would still be feasible. He

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[140] All but one of the spouses of the class members that testified was retired at the time of death, para. 24 above, and *supra* note 42. See also average ages of retirement at para. 14, above.
[141] *Zurich Insurance Co. v. Ontario (Human Rights Commission)*, [1992] 2 S.C.R. 321, RBOA, Vol. II, Tab 26, pp. 321-335.
[142] *Ibid.* at 338, 339, 342, RBOA, Vol. II, Tab 26, pp. 332-334.
[143] *Egan*, *supra* note 107 at para. 104, RBOA, Vol. I, Tab 7, p. 89.

proposed seven different funding scenarios for the public service plan and five different funding scenarios for the Canadian Forces plan in support of his position. All of the scenarios assumed that the government's rate of contribution would increase. All but one of the scenarios also assumed that the participants' rate of contribution would increase, often substantially, and in four scenarios the benefit would decrease by half. [144]

111. However, as noted by the Attorney General's insurance expert, Mr. Argue, "the previous rate of 40 cents per $1,000 of coverage that was charged to employees under the SDB plan, prior to the 1992 amendments to Part II of the *PSSA*, would be viewed by the industry and employees as non-competitive".[145]

112. The funding scenarios suggested by the appellants' expert would thus necessarily deny the employee participants a competitively priced benefit. Additionally, for four of the scenarios proposed by Mr. Christie to be feasible, the amount of benefit provided would be *reduced* to one year of salary instead of the current two years for all participants, past and current.[146] The appellants' expert seeks to second-guess Parliamentary choice, something that this Court has declined to do.

113. Consequently, the legislative goal of striking a balance between the needs of competing groups of employees and promoting or protecting the interests of the less advantaged – those younger employees, who do not have their best earning years behind them, who do not have a full death benefit under the CPP, a full survivor's benefit under the CPP, a pension under the CPP, superannuation, Old Age Security, and RRSPs at their disposal - would be recalibrated to favour the interests of retired employees and consequently frustrate the intention of Parliament. It would also make for poor public policy, as it would deny public servants a benefit available elsewhere in the private sector.

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[144] Cross-examination of J. Christie, p. 276, ll 36-47, p. 277, ll. 1-8, p. 280, ll. 41-47, p. 281, ll. 1-3, R.R. Vol. I, pp. 60-63.
[145] Exhibit 43, A.R., Vol. VI, p. 46.
[146] Exhibit 10, A.R. Vol. V, pp. 114, 115, 116, Exhibit 11, A.R. Vol. V, p. 144.

114. The evidence is clear that of those employers who elect to continue to provide benefits into retirement, most reduce the benefit either based on age alone or a combination of age and years of service. In fact most plans reduce benefits immediately at age 65 by a significantly greater amount than 10%.[147]

115. This is not surprising when one remembers that the cost of $1,000 of insurance for a 65 year old is approximately 17 times that of a 35 year old male and 22 times that of a 35 year old female.[148]

116. The employer objective of providing a competitively priced group life insurance benefit is more difficult to achieve when the benefit is extended to retirees because the premium rate paid by the retiree is the same as that paid by active employees. However, the mortality rate of the retiree is significantly higher than the rate for the active employee. Therefore in order to minimize the negative cost impact upon the majority of the employees in the plan, most employers limit the amount of the benefit provided to retirees by reducing the benefit to a minimum level or reducing it to terminate at a certain age. Many employers eliminate the benefit entirely.[149]

(iv) Proportionality of Salutatory and Deleterious Effects

117. The distinct role fulfilled by this final stage of the assessment was recently reiterated by this Court. Here there is a "broader assessment of whether the benefits of the impugned law are worth the cost of the rights limitation."[150] The "inquiry focuses on the practical impact of the law. What benefits will the measure yield in terms of the collective good sought to be achieved? How important is the limitation on the right? When one is weighed against the other, is the limitation justified?"[151]

118. The objective of the benefit is to provide life insurance at a reasonable rate to all employees, but in particular the newer employee with dependants who has not been

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[147] Exhibit 43, A.R., Vol. VI, pp. 36 – 44.
[148] *Ibid.* p. 46.
[149] *Ibid.* pp. 36 – 44.
[150] *Hutterian Brethren*, *supra* note 121 at paras. 72 – 78, esp. 77, RBOA, Vol. I, Tab 1, pp. 16-18.
[151] *JTI-MacDonald*, *supra* note 128 at para. 45, RBOA, Vol. I, Tab 6, p. 76.

working for very many years. This employee has a greater need for the full benefit. He or she has not had the opportunity to live and work for a substantial period, during which the employee would have had the opportunity to earn and save for many more years, consequently having two pension plans – one from CPP and one from the employer – and with a survivor benefit of much greater value. As well, it is only in the later years that individuals receive Old Age Security and, if necessary, a Guaranteed Income Supplement.[152] In these circumstances, the provision of a lesser benefit to the beneficiaries of those participants of a certain age is a limitation that is proportional to the importance of the objective.

119. The adverse effect of the challenged law is that it does not extend the same amount of coverage at the same cost to all participants at death regardless of age. The result produced by the challenged law is that the plan participant has less comfort or assurance then they would have if the benefit was not reduced. They may choose to mitigate this effect by putting their financial affairs in order and/or purchasing private insurance.

120. There is proportionality between the government's objective and the effects of any infringement on the appellants' *Charter* rights. The gradual reduction is consistent with the general expectation and practice that, by the time citizens retire, their financial needs will have diminished, and the risks, against which the insurance was to guard, will have diminished.

E. REMEDIES - A SUSPENDED DECLARATION IS REQUIRED

121. Section 52 of the *Charter* is engaged when a law is held to be unconstitutional. In the event that this Court finds the reduction provisions to be an unjustified infringement of s. 15(1) of the *Charter*, the only appropriate remedy is a declaration of invalidity under s. 52(1) coupled with a suspension of that declaration for a period of 1 year.

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[152] Provided to those who meet the financial requirements, *supra* note 40.

122. A suspended declaration is necessary to provide Parliament with an opportunity to consider how best to address the impact of the s. 52(1) declaration on all past, present and future plan participants – young and old. Equally, a suspended declaration is necessary to allow Parliament an opportunity to address the significant fiscal impact on the SDB Accounts – an impact in excess of 2 billion dollars –that would flow from an immediate declaration of invalidity.[153]

123. The permutations and computations as to how the benefits may otherwise be structured are numerous. Substantive policy choices will be required, such as answering the "philosophical question … as to whether the need for coverage is so great during retirement as to justify its effects on the premium rates for younger active employees."[154] Consultation will be required with the current active and elective plan participants, who will be directly impacted. Actuarial science will be required to assess those precise effects under various possible revised benefits structures, such that a sustainable group life insurance plan may continue to be provided at a reasonable cost, but without the discriminatory distinction.

124. In *Schachter v. Canada*,[155] this Court provided substantive guidelines as to when various remedial options are appropriate. In doing so, the Court explicitly noted the importance of respect for the role of the legislature in the benefits context, stating that:

> In some cases, it will not be a safe assumption that the legislature would have enacted the constitutionally permissible part of its enactment without the impermissible part. For example, in a benefits case, it may not be a safe assumption that the legislature would have enacted a benefits scheme if it were impermissible to exclude particular parties from entitlement under that scheme.[156]

125. *Schachter* also provided specific guidelines as to when a suspended declaration of invalidity would be appropriate. In identifying under-inclusive benefits cases as one of those circumstances, two situations were described. This case falls squarely into the

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[153] *Canada (Attorney General) v. Hislop*, 2007 SCC 10, [2007] 1 S.C.R. 429 at paras. 82, 83, 86 [*Hislop*], RBOA, Vol. I, Tab 5, pp. 58-60.
[154] Exhibit 24, Tab 28, A.R., Vol. V, p. 181.
[155] *Schachter v. Canada*, [1992] 2 S.C.R. 679 [*Schachter*], RBOA, Vol. II, Tab 25, pp. 308-320.
[156] *Ibid.* at 700, RBOA, Vol. II, Tab 25, p. 318.

second where – "if there is no obligation on the government to provide the benefits in the first place, it may be inappropriate to go ahead and extend them."[157] In this circumstance, "[t]he logical remedy is to strike down but suspend the declaration of invalidity to allow the government to determine whether to cancel or extend the benefit."[158]

126. This Court has recently reiterated the need to guard against inappropriate intrusions into the legislative sphere in *R v. Ferguson.*[159] In *Ferguson*, the Court considered whether a constitutional exemption from a mandatory minimum sentence was an appropriate remedy in the circumstances there present. In doing so, the Court discussed the principles applicable to granting alternative remedies such as severance and reading in, including respect for the institutional division of labour. The Court stated:

> If it is not clear that Parliament would have passed the scheme with the modifications being considered by the court — or if it is probable that Parliament would *not* have passed the scheme with these modifications — then for the court to make these modifications would represent an inappropriate intrusion into the legislative sphere.[160]

127. Here, severing the impugned provisions with immediate effect would extend an unreduced SDB to all beneficiaries of plan participants. This would foist the burden of paying extraordinary benefits onto current plan participants, which is at odds with Parliament's intent. Both the legislation and the evidence suggest that Parliament would not have enacted the SDB in this manner. Thus, a suspension of any declaration of invalidity is the only appropriate remedy.

128. With respect to the appellants' request for a retroactive remedy, as this Court noted in *Hislop*, "to allow the claimants to recover concurrent retroactive relief would be at cross-purposes with the Court's decision to grant a suspended declaration if invalidity".[161] This concern is particularly apposite in the context of class action lawsuits.

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[157] *Ibid.* at pp. 715, 716, RBOA, Vol. II, Tab 25, pp. 319-320.
[158] *Ibid.*
[159] *R. v. Ferguson*, 2008 SCC 6, [2008] 1 S.C.R. 96, RBOA, Vol., II, Tab 22, pp. 266-271.
[160] *Ibid.* at para. 51, RBOA, Vol., II, Tab 22, p. 271.
[161] *Hislop*, *supra* note 153 at para. 92, RBOA, Vol., I, Tab 5, p. 61.

129. Similarly, any resort to s. 24(1) to grant the class members their desired remedy would have the same effect. Moreover, this Court has repeatedly indicated that damages under s. 24(1) will not be granted with a s. 52(1) declaration of invalidity in the absence of bad faith, malice or abuse of power[162] – none of which are present here. In *Hislop*, the Court specifically recognized that the same principles of qualified immunity regarding unconstitutional statutes should apply to claims for retroactive benefits under s. 15(1) of the *Charter*.

130. The appellants' reliance on *Kingstreet Investments Ltd. v. New Brunswick (Finance)*[163] is equally misplaced. The SDB is part of a benefits scheme, which this Court has explicitly distinguished from unconstitutional taxes.[164] The SDB premiums are in no way akin to a tax. The factual distinctions are obvious. As noted above, the total SDB Account funds comprise participant and government contributions combined, including interest.[165] Moreover, under the tax analogy, the appellants could only be entitled to a return of any premiums paid in excess of the benefit received, yet every class member who testified, for whom information was available, received a benefit in excess of the amount contributed by their spouse.[166]

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[162] *Ibid.* at para. 102, RBOA, Vol., I, Tab 5, pp. 62-63; *Mackin v. New Brunswick (Minister of Finance)*, 2002 SCC 13, [2002] 1 S.C.R. 405 at paras. 79 – 83, RBOA, Vol. I, Tab 16, pp. 205-206; *Guimond v. Quebec (Attorney General)*, [1996] 3 S.C.R. 347 at paras. 17 – 20, RBOA, Vol. I, Tab 11, pp. 136-137.
[163] *Kingstreet Investments Ltd. v. New Brunswick (Finance)*, 2007 SCC 1, [2007] 1 S.C.R. 3 [ABOA, Tab 17]
[164] *Hislop*, *supra* note 153 at para. 108, RBOA, Vol. I, Tab 5, pp. 64-68.
[165] See para.17, above.
[166] Reasons, BCSC, A.R., Vol. 1, pp. 17, 19 – 21, 23, 24, paras. 24, 29, 33, 37, 42, 46.

PART IV – COSTS

131. The Attorney General of Canada requests that this Court grant an Order awarding the costs of this appeal to the Crown.

PART V – NATURE OF ORDER SOUGHT

132. The Attorney General of Canada requests that this Court grant an Order that the finding that the appellants have standing to pursue this action be set aside, and dismissing the appeal with costs to the Crown.

133. In the alternative, if this Court finds that the appellants have standing, the Attorney General of Canada requests that this Court grant an Order answering the first and third question in the negative, and dismissing the appeal with costs to the Crown.

134. In the further alternative, if this Court answers the first and third question in the affirmative, the Attorney General of Canada requests that this Court grant an Order answering the second and fourth question in the affirmative, and dismissing the appeal with costs to the Crown.

135. If unsuccessful, the Attorney General of Canada requests that this Honourable Court grant an Order that issuance of a s. 52 declaration of invalidity be suspended for a period of 1 year.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated this 8th day of January, 2010.

Donald J. Rennie Dale Yurka Sharlene Telles-Langdon

PART VI – TABLE OF AUTHORITIES

Legislative Provisions

Statutes:

Regulations

Other References

PART VII – LEGISLATIVE PROVISIONS DIRECTLY IN ISSUE

Sections 1, 15(1), 24(1) of *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.	**1.** La *Charte canadienne des droits et libertés* garantit les droits et libertés qui y sont énoncés. Ils ne peuvent être restreints que par une règle de droit, dans des limites qui soient raisonnables et dont la justification puisse se démontrer dans le cadre d'une société libre et démocratique.
15.(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.	**15.(1)** La loi ne fait acception de personne et s'applique également à tous, et tous ont droit à la même protection et au même bénéfice de la loi, indépendamment de toute discrimination, notamment des discriminations fondées sur la race, l'origine nationale ou ethnique, la couleur, la religion, le sexe, l'âge ou les déficiences mentales ou physiques.
24.(1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.	**24.(1)** Toute personne, victime de violation ou de négation des droits ou libertés qui lui sont garantis par la présente charte, peut s'adresser à un tribunal compétent pour obtenir la réparation que le tribunal estime convenable et juste eu égard aux circonstances.

Section 52(1) of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11

52.(1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.	**52.(1)** La Constitution du Canada est la loi suprême du Canada; elle rend inopérantes les dispositions incompatibles de toute autre règle de droit.

Section 41(1) of the *Public Service Superannuanation Act*, R.S.C. 1985, c. P-36

41.(1) In this Part,

"basic benefit"

"basic benefit", with respect to a participant, means an amount equal to twice the salary of the participant, if that amount is a multiple of one thousand dollars, or an amount equal to the nearest multiple of one thousand dollars above twice the salary of the participant, if the first-mentioned amount is not a multiple of one thousand dollars, subject to a reduction of ten per cent, to be made as of the time that the regulations prescribe, for every year of age in excess of sixty-five attained by the participant, except that

(*a*) in the case of a participant who is employed in the public service, the basic benefit shall not be less than

(i) an amount equal to one third of the participant's salary, if that one-third is a multiple of one thousand dollars, or an amount equal to the nearest multiple of one thousand dollars above one third of the participant's salary, if that one-third is not a multiple of one thousand dollars, or

(ii) ten thousand dollars,

whichever is the greater,

(*b*) subject to paragraphs (*c*) and (*d*), in the case of an elective participant who, on ceasing to be employed in the public service, on ceasing to be a member of the regular force or on ceasing to be required to contribute to the Retirement Compensation Arrangements Account by section 8 or 9 of the *Retirement Compensation Arrangements Regulations, No. 1*, was

41.(1) Les définitions qui suivent s'appliquent à la présente partie,

« prestation de base » Soit le montant égal au double du traitement du participant si ce montant est un multiple de mille dollars, soit le montant égal au plus petit multiple de mille dollars qui dépasse le double du traitement du participant si le montant mentionné en premier n'est pas un multiple de mille dollars, sous réserve d'une déduction de dix pour cent, faite à compter de la date prévue par les règlements, pour chaque année de l'âge du participant ultérieure à soixante-cinq ans, sauf que :

a) pour un participant employé dans la fonction publique, la prestation de base ne peut être inférieure au plus élevé des montants suivants :

(i) un montant égal au tiers de son traitement si ce tiers est un multiple de mille dollars, ou un montant égal au plus petit multiple de mille dollars qui dépasse le tiers de son traitement si ce tiers n'est pas un multiple de mille dollars,

(ii) dix mille dollars;

b) sous réserve des alinéas *c*) et *d*), dans le cas d'un participant volontaire qui, au moment où il a cessé d'être employé dans la fonction publique, a cessé d'être un membre de la force régulière ou a cessé d'être astreint à contribuer au compte de régimes compensatoires par les articles 8 ou 9 du *Règlement n° 1 sur le régime compensatoire*, avait droit à une pension immédiate ou à une allocation annuelle immédiate, la prestation de base ne peut être inférieure à dix mille dollars;

entitled to an immediate annuity, or an immediate annual allowance, the basic benefit shall not be less than ten thousand dollars,

(*c*) in the case of an elective participant who makes an election under subsection 52(2), the basic benefit shall be five hundred dollars,

(*d*) in the case of an elective participant who makes an election under subsection 52(2.1), the basic benefit shall be five thousand dollars, and

(*e*) in the case of an elective participant who makes an election under subsection 52(2.2), the basic benefit shall be subject to a reduction of ten per cent, to be made as of the time that the regulations prescribe, for every year of age in excess of sixty attained by the participant;

c) dans le cas d'un participant volontaire qui effectue un choix en vertu du paragraphe 52(2), la prestation de base est de cinq cents dollars;

d) dans le cas d'un participant volontaire qui effectue un choix en vertu du paragraphe 52(2.1), la prestation de base est de cinq mille dollars;

e) dans le cas d'un participant volontaire qui effectue un choix en vertu du paragraphe 52(2.2), la prestation de base fait l'objet d'une déduction de dix pour cent, et ce à compter de la date prévue par les règlements, pour chaque année de l'âge du participant ultérieure à soixante ans.

Sections 15, 16 of the *Supplementary Death Benefits Regulations*, C.R.C. c. 1360

15. The reduction referred to in the definition "basic benefit" in subsection 47(1) of the Act shall be made on April 1st and October 1st of each year, whichever date immediately follows the participant's birthday.

16. The reduction in the amount that certain participants are required to contribute pursuant to section 53 of the Act shall commence on April 1st or October 1st, whichever date immediately follows the anniversary of the birthday of the participant on which he became eligible for the reduction.

15. La déduction visée dans la définition de « prestation de base » au paragraphe 47(1) de la Loi est faite le 1er avril ou le 1er octobre de chaque arrivée, selon celle de ces dates qui suit de plus près l'anniversaire du participant.

16. La déduction du montant que certains participants sont tenus de payer conformément à l'article 53 de la Loi s'effectue le 1er avril ou le 1er octobre, en prenant la date qui suit de plus près l'anniversaire de naissance du participant où il est devenu admissible à la réduction.

Section 60(1) of the *Canadian Forces Superannuanation Act*, R.S.C. 1985, c. C-17

60.(1) In this Part,

basic benefit", with respect to a participant, means an amount equal to twice the salary of the participant, if that amount is a multiple of two hundred and fifty dollars, or an amount equal to the nearest multiple of two hundred and fifty dollars above twice the salary of the participant, if the first-mentioned amount is not a multiple of two hundred and fifty dollars, subject to a reduction of ten per cent, to be made as of such time as the regulations prescribe, for every year of age in excess of sixty attained by the participant, except that

(*a*) in the case of an elective participant who has not made an election under subsection 64(2) and who, on ceasing to be a member of the regular force or on ceasing to be employed in the Public Service, was entitled under Part I or under the *Defence Services Pension Continuation Act*, chapter D-3 of the Revised Statutes of Canada, 1970, to an immediate annuity or pension, the basic benefit shall not be less than five thousand dollars, and

(*b*) in the case of an elective participant who makes an election under subsection 64(2), the basic benefit shall be five hundred dollars;

60.(1) Les définitions qui suivent s'appliquent à la présente partie.

« prestation de base » Soit le montant égal au double du traitement du participant si ce montant est un multiple de deux cent cinquante dollars, soit le montant égal au plus petit multiple de deux cent cinquante dollars qui dépasse le double du traitement du participant si le montant mentionné en premier n'est pas un multiple de deux cent cinquante dollars, sous réserve d'une réduction de dix pour cent, faite à compter de la date prévue aux règlements, pour chaque année de l'âge du participant ultérieure à soixante ans, sauf que :

a) dans le cas d'un participant volontaire qui n'a pas effectué le choix prévu au paragraphe 64(2) et qui, au moment où il a cessé d'être membre de la force régulière ou d'être employé dans la fonction publique, avait droit, aux termes de la partie I ou de la *Loi sur la continuation de la pension des services de défense*, chapitre D-3 des Statuts revisés du Canada de 1970, à une annuité immédiate ou à une pension, la prestation de base ne peut être inférieure à cinq mille dollars;

b) dans le cas d'un participant volontaire qui a effectué le choix prévu au paragraphe 64(2), la prestation de base est de cinq cents dollars.

Section 52 of the *Canadian Forces Superannuation Regulations*, C.R.C. c. 396

52. The times when the reductions referred to in the definition "basic benefit" in subsection 60(1) of the Act shall be made are as follows:

(*a*) in the case of an elective participant who ceased to be a member of the regular force and to whom an annuity or pension is not payable under the Act or the *Defence Services Pension Continuation Act*, each reduction shall be made on each anniversary of the day (that is on or that follows the 61st birthday of the participant, whichever occurs first), on which an annual contribution under the Act is payable; and

(*b*) in any case, other than the case mentioned in paragraph (*a*), each reduction shall be made on the first day of April or the first day of October whichever date immediately follows each anniversary of the birthday of the participant commencing with his 61st birthday.

52. Les époques auxquelles se feront les réductions prévues à la définition « prestations de base » au paragraphe 60(1) de la Loi sont les suivantes :

a) dans le cas d'un participant volontaire qui a cessé d'être membre des forces régulières et qui n'a pas droit à une annuité ou à une pension en vertu de la Loi ou de la *Loi sur la continuation de la pension des services de défense*, chaque réduction se fera à chaque anniversaire du jour (qui est ou qui suit le 61^{e} anniversaire de naissance du participant, suivant celui qui survient le premier), auquel une contribution annuelle en vertu de la Loi est payable; et

b) dans tout cas, autre que les cas mentionnés à l'alinéa *a*), chaque réduction se fera le premier jour d'avril ou le premier jour d'octobre, soit celle de ces dates qui suit immédiatement chaque anniversaire de naissance du participant à partir de son 61^{e}.