

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Withler et al v. Attorney General of
Canada,***
2006 BCSC 101

Date: 20060119
Docket: L010910
Registry: Vancouver

Between:

Hazel Ruth Withler

Plaintiff

And

Attorney General of Canada

Defendant

- and -

Docket: L011356
Registry: Vancouver

Between:

Joan Helen Fitzsimonds

Plaintiff

And

Attorney General of Canada

Defendant

Reasons for Judgment

The Honourable Madam Justice Garson

Counsel for the Plaintiffs:

J.J. Arvay, Q.C.
C.J. Parker
C.A. Margolis

Counsel for the Defendant:

D.J. Rennie
D. Yurka
K. Hucal
W. Divoky

Date and Place of Trial:

June 13 – 24,
September 26 – 29, 2005
Vancouver, B.C.

INDEX

<u>HEADING</u>	<u>PARAGRAPH</u>
Introduction	1
Outline	7
Certified Questions	10
Legislation and Legislative History	11
The Impugned Provisions	16
The Class	20
The Representative Plaintiffs and Class Members	22
Margolis Litigation	50
Analysis	64
Certified Question No. 1	64
Do the plaintiff and the class members have standing to allege a breach of <i>Charter</i> rights and to seek a remedy for <i>Charter</i> infringement?	
Certified Question No. 3	94
Do the Reduction Provisions discriminate on the basis of age, contrary to s. 15(1) of the <i>Charter</i> , and, if so, are they saved by s. 1 of the <i>Charter</i> ?	
Section 15 Analysis	94
1. Does the law either draw a distinction or fail to consider the claimant's position in society?	104
2. Is the claimant subject to differential treatment based on one or more enumerated and analogous grounds?	105
3. Does the differential treatment discriminate?	106
Comparator Group	107

<u>HEADING</u>	<u>PARAGRAPH</u>
Legislative Context & Purpose	111
4. Four Contextual Factors	157
1. Pre-existing disadvantage, stereotyping, prejudice, or vulnerability experienced by the individual or group at issue	158
2. The correspondence, or lack thereof, between the ground or grounds on which the claim is based and the actual need, capacity, or circumstances of the claimant or others.	159
3. The ameliorative purpose or effects of the impugned law upon a more disadvantaged person or group in society.	160
4. The nature and scope of the interest affected by the impugned law.	161
Conclusion	163
Does the differential treatment discriminate?	

INTRODUCTION

[1] These two class actions challenge the constitutionality of s. 47(1) of the ***Public Service Superannuation Act***, R.S.C. 1985, c. P-36 (the "***PSSA***") and s. 66(1) of the ***Canadian Forces Superannuation Act***, R.S.C. 1985, c. C-17 as amended (the "***CFSA***").

[2] The ***PSSA***, s. 47(1) provides a supplementary death benefit ("SDB") payment of twice the salary of the participant upon his or her death, "subject to a reduction of 10%, to be made as of the time that the Regulations prescribed, for every year of age in excess of 65 attained by the participant." A similar section is included in the ***CFSA***, S. 60(1) except that the reduction commences at age 60. In this judgment, I will refer to the provisions in both ***Acts***, that stipulate a decreasing death benefit dependant upon the age of the participant at his or her death, as the "Reduction Provisions."

[3] In this litigation, it is the Reduction Provisions which are the subject of the constitutional challenge on the basis of age discrimination, under the ***Canadian Charter of Rights and Freedoms***.

[4] The class consists of the surviving spouses of the plan participants who say that the illogical nature of reducing a death benefit according to the age of the participant on death beyond 65 (or 60 in the case of ***CFSA***) results in a violation of the human dignity of the surviving spouse. The plaintiffs say the effect of the message being communicated to the spouse of the plan participants over the age of

65 (or 60) is that compared to the spouses of younger participants, the death and the financial problems associated with the death of their spouse are not as worthy of concern or support.

[5] The relief sought by the plaintiffs' class includes, a declaration that the Reduction Provisions are inconsistent with the **Charter** and therefore of no force and effect, and judgment to the class of the amount by which the SDB payments to the plaintiffs were reduced by operation of the Reduction Provisions. In respect of the **PSSA**, the defendant's actuary calculated that the cost to retroactively eliminate the Reduction Provisions to 1985 is \$2,308,000,000 (two-thousand, three-hundred and eight-million dollars) (including court ordered interest) if the participants were required to reimburse the unpaid contributions on the increased coverage. The comparable calculation for the **CFSA** Plan is \$285,000,000 (two-hundred and eighty-five million dollars). The plaintiffs' claim judgment for these amounts in their favour.

[6] The defendant in both actions, the Attorney General of Canada, contends that the Reduction Provisions are constitutional. The Attorney General raises a number of defences: class members do not have standing to advance a claim for breach of **Charter** rights of the deceased plan participant; there is no infringement of s. 15 because the law does not have the effect of demeaning the claimants' human dignity, a necessary requirement for a s. 15 infringement claim; and alternatively, the Attorney General contends that the Reduction Provisions are a necessary minimal impairment of s. 15.

OUTLINE

[7] In these Reasons for Judgment, I will describe the plaintiffs and their individual circumstances, the questions that were certified, the legislative provisions and the legislative history. Next, I will review the contextual legislative history. I will then turn to the legal analysis and consider the answers to the certified questions.

[8] Much of the historical evidence that was adduced before me is documentary and was admitted as evidence by agreement. A portion of Hart Clark's affidavit was not admitted into evidence by consent. The Attorney General seeks its introduction despite the fact that Mr. Clark was not available for cross-examination. The circumstances surrounding his unavailability are explained more fully in my Ruling cited at 2005 BCSC 1044.

[9] The plaintiffs objected to the admissibility of portions of the affidavit evidence of Mr. Clark, a senior civil servant responsible for this legislation, because he could not be cross-examined on his affidavit owing to his advanced age and infirmity. I have not found it necessary to rely on those portions of his affidavit in order to decide the issues necessary for the disposition of this case and consequently those portions of the affidavit that were objected to by the plaintiffs have not been admitted into evidence.

CERTIFIED QUESTIONS

[10] Pursuant to Orders of this court in both actions, pronounced on May 16, 2005, and with the consent of the parties, the following questions were certified as common issues:

- (1) Do the plaintiff and class members have standing to allege a breach of *Charter* rights and to seek a remedy for *Charter* infringement?
- (2) Are the plaintiff and class members to whom benefits were paid in respect of elective participants in the Plan precluded from bringing this action by virtue of the fact that the participants voluntarily maintained their coverage under the Plan or did not opt out of or discontinue their coverage under the Plan?
- (3) Do the Reduction Provisions discriminate on the basis of age, contrary to s. 15(1) of the *Charter*, and, if so, are they saved by s. 1 of the *Charter*?
- (4) If the Reduction Provisions discriminate as set out above and are not saved by s. 1, what is the appropriate remedy under the *Charter*?
- (5) If the Reduction Provisions are constitutionally invalid, and if the plaintiff and the class members are not entitled to a remedy under s. 24(1) of the *Charter*, can they claim redress from the Crown for *Charter* infringement under common law or equitable principles?
- (6) If the answer to the above question is “yes”, has the Crown been unjustly enriched through application of the Reduction Provisions?
- (7) If so, are the Withheld Funds* or an amount equivalent to the Withheld Funds, subject to an institutional or remedial constructive trust of an equitable lien in favour of the plaintiff and the class members?
- (8) Is the Crown a fiduciary with respect to the Plan and, if so:
 - (i) in what capacity does it act as fiduciary;
 - (ii) to whom does it owe a fiduciary duty;

- (iii) if owed to plan participants, does the plaintiff have standing to assert a fiduciary claim on behalf of deceased participants;
 - (iv) what is the nature of the duty owed;
 - (v) has that duty been breached; and,
 - (vi) if so, what is the appropriate remedy?
- (9) Can the causes of action advanced and the remedies sought in these proceedings be barred by the ***Crown Liability and Proceedings Act***, R.S.C., 1985, c.c-50, ss. 29 and 32, the provincial limitation periods or the doctrines of laches and acquiescence?

* Funds to which the plaintiffs and the class members would have been entitled but for the Reduction Provisions.

LEGISLATION AND LEGISLATIVE HISTORY

[11] The following is a brief history of the enactment of, and amendments to, the ***Public Service Superannuation Act*** – Supplementary Death Benefit, and the ***Canadian Forces Superannuation Act*** - Supplementary Death Benefit.

Public Service Superannuation Act

[12] The ***Public Service Superannuation Act***, R.S.C. 1985, c. P-36 (“***PSSA***”) was first enacted on January 1, 1954. [S.C. 1952-53, c.47]. The *Supplementary Death Benefit Plan* (“SDB”) was added as an additional benefit in the first set of amendments to the ***PSSA*** a year later, on January 1, 1955. [S.C. 1953-54, c.64, s. 2]. The original provisions of the SDB were as follows;

- **Benefit Amount:** the lesser of \$5,000 or the participant’s annual salary [s. 39(1)(a)];
- **Minimum Benefit:** 1/6 of the participant’s salary [s. 39(1)(a)];

- **Employee Contribution:** 40 cents/\$1000 of coverage [s. 42];
- **Beneficiary:** either the participant's spouse or the estate in the absence of a spouse [s. 44];
- **Reduction:** an annual reduction of 10% after the participants 61st birthday [s. 39(1)(a)];
- **Coverage:** participants could elect to discontinue coverage after retirement [s. 40];
- **Paid-up Benefit:** \$500 at the participant's 65th birthday. The minimum paid-up benefit is the minimum dollar amount to which life insurance can be reduced. At age 65, it becomes a "paid-up" benefit which means there is no longer a financial contribution required from the participant for this portion of the coverage.

[13] Through the years, there have been numerous changes to the SDB, provided in Part II of the *PSSA* and the *Supplementary Death Benefits Regulations*, C.R.C., c. 1360; I highlight the major amendments below.

1960 Amendments [S.C. 1960, c. 38]

- **Minimum Benefit:** increased to the greater of 1/6 of the participant's salary or \$500, not less than \$500 for elective participants [s. 21(1)];
- **Beneficiary:** the spouse of the deceased male participant, or estate if no spouse. For female participants, beneficiary is the estate [s. 26(1)];

1966 Amendments [S.C. 1966-67, c. 44]

- **Benefit Amount:** the maximum of \$5,000 is removed from the **PSSA** [s. 22(1)].

1976 Amendments [S.C. 1974-75, c. 81]

- **Beneficiary:** widened to include participant's estate, anyone over age of 18, charity or benevolent organization, religious or educational organization [ss. 23-24].

1992 Amendments [S.C. 1992, c. 46]

- **Benefit Amount:** doubled to twice the participant's annual salary [s. 25(1)];
- **Minimum Benefit:** increased to not less than 1/3 participant's salary or \$5,000, whichever was greater [s. 25(1)];
- **Employee Contribution:** reduced to 20 cents/\$1000 of coverage [s. 26];
- **Paid-up Benefit:** increased to \$5000 at the participant's 65th birthday [s. 26].

1999 Amendments [S.C. 1999, c. 34]

- **Minimum Benefit:** increased to not less than 1/3 participant's salary or \$10,000 whichever was greater [s. 98(1)] ;
- **Employee Contribution:** reduced to 15 cents/\$1,000 coverage [s. 103];
- **Reduction:** 10% annual reduction delayed until after the participants 66th birthday [s. 98(1)];
- **Paid-up Benefit:** increased to \$10,000 at the participant's 65th birthday [s. 98(1)].

Canadian Forces Superannuation Act

[14] The **Canadian Forces Superannuation Act** (“**CFSA**”), R.S.C. 1985, c. C-17, was amended to provide SDB coverage to regular forces participants in 1966 [S.C. 1966, c. 44]. Until then, regular forces participants had been covered by the SDB provisions in the **PSSA**. The introductory SDB provisions in the **CFSA** were similar to those in the **PSSA**, except for the following;

- **Benefit Amount:** one year’s salary [s. 53];
- **Employee Contribution:** 20 cents/\$1,000 coverage [s. 53];
- **Reduction:** 10% annual reduction after the participants 60th birthday [s. 53];

[15] After 1966, the legislative evolution of the **CFSA** and the **PSSA** diverged. The major amendments to the **CFSA** and the corresponding regulations, **Canadian Forces Superannuation Regulations**, C.R.C., c. 396 are highlighted below.

1975 Amendments [S.C. 1975, c. 81]

- **Beneficiary:** the widow of the participant unless she predeceases him or he names his estate or another beneficiary [ss. 45-46].

1977 Amendments [S.C. 1976-77 s. 28, C.P.C. 1360, s. 26(1) (1978)]

- **Beneficiary:** widened to include the widow of the participant, the participant’s estate, anyone over age of 18, charity or benevolent organization, religious or educational organization.

1992 Amendments [S.C. 1992, c.46]

- **Benefit Amount:** increased to twice the participant’s salary [s. 52(1)];
- **Minimum Benefit:** increased to not less than \$5,000 [s. 52(1)];
- **Employee Contribution:** reduced to 10 cents/\$1,000 coverage [s. 52(1)];
- **Paid-up Benefit:** increased to \$5000 at the participant’s 65th birthday [s. 54].

THE IMPUGNED PROVISIONS

[16] The challenged provision of the **PSSA** is as follows:

s. 47(1) “basic benefit”, with respect to a participant, means an amount equal to twice the salary of the participant, if that amount is 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 (emphasis added)

...

[17] The challenged provisions of the **Supplementary Death Benefit Regulations**, C.R.C., c. 1360 are as follows:

15. The reduction referred to in the definition “basic benefit” in subsection 27(1) of the *Act* shall be made on April 1st and October 1st of each year, whichever date immediately follows the participant’s birthday. SOR/78-785, s.; SOR/92-716, ss. 7(F), 8(F), 9(F), 11; SOR/99-378, s. 6.

16. The reduction in the amount that certain participants are required to contribute pursuant to s. 53 of *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. SOR/92-716, s. 11.

[18] The challenged provisions of the **CFSA** are as follows:

60(1) “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 dollar, or an amount equal to the nearest multiple of two hundred and fifty dollars bout 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... (emphasis added)

[19] The challenged provisions of the **Canadian Forces Superannuation Regulations**, C.R.C., c. 396 are as follows:

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 (emphasis added)
- (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. SOR/92-717, ss. 9(F), 10. (emphasis added)

THE CLASS

[20] In the Withler action the class is defined as:

The class is persons (other than charitable, benevolent, eleemosynary religious or educational organizations or institutions) presently resident in Canada to whom benefits under the Supplementary Death Benefit Plan (the “Plan”) enacted in Part II of the **Public Service**

Superannuation Act, R.S.C. 1985, c. P-36, as amended, were paid or became payable where:

- (a) the participants in respect of whom the benefits were paid or payable died between April 17, 1985 and November 2, 2001, and
- (b) the amount of the benefit was reduced due to the age Reduction Provisions of the Plan.

“Participant” has the meaning set out in s. 47(1) of the **Public Service Superannuation Act**.

[21] In the Fitzsimonds action the class is defined as:

The class can be described as persons (other than charitable, benevolent, eleemosynary religious or educational organizations or institutions) presently resident in Canada to whom benefits under the Supplementary Death Benefit Plan (the “Plan”) enacted in Part II of the **Canadian Forces Superannuation Act**, R.S.C. 1985, c. C-17, as amended, were paid or became payable, where:

- (a) the participants in respect of whom the benefits were paid or payable died between April 17, 1985 and November 2, 2001, and
- (b) the amount of the benefit was reduced due to the age Reduction Provisions of the Plan.

“Participant” has the same meaning as in s. 60(1) of the **Canadian Forces Superannuation Act**.

(On April 17, 1985, s. 15 of the **Canadian Charter of Rights and Freedoms** came into force)

THE REPRESENTATIVE PLAINTIFFS AND CLASS MEMBERS

[22] The representative plaintiffs, Mrs. Withler in respect to the **PSSA** and Mrs. Fitzsimonds in respect to the **CFSA**, and the plaintiff class members who testified are all widows who received the SDB either because they were personally

named as beneficiaries or their husband's estate was named and they received the SDB upon distribution of the estate. In each case, the payment was reduced by a percentage based on the age of their respective spouse, the plan participant, at the time of his death. I describe the evidence of the representative plaintiffs and the other class members because it is relevant to aspects of the discrimination claim. It is relevant to the question of pre-existing disadvantage that the plaintiffs allege elderly surviving spouses suffer and it is relevant to the question of whether the Reduction Provisions perpetuate the view that elderly surviving spouses are less worthy of recognition or value. It is also relevant to the plaintiffs' argument that the SDB does not correspond to its purpose.

Mrs. Withler

[23] Mrs. Withler is 80 years old. Her husband died of cancer in June 1986, at the age of 63. He had previously retired in 1982 at age 59. At his death Mrs. Withler received a SDB of \$38,325. She paid \$5,000 for the funeral.

[24] Mr. Daniel Hébert, Senior Actuary in the Office of the Chief Actuary (OCA), calculated the total amount of contributions Mr. Withler, an elective participant in the SDB Plan, made towards his life insurance coverage to be \$3,761. He then compared that amount to the actual value of the life insurance benefit Mrs. Withler received of \$38,325 and concluded that Mrs. Withler received \$34,564 of excess benefit over the amount contributed. Mr. Hébert made similar calculations for the class members who testified.

Mrs. Withler testified that when she received her SDB cheque, she did not have any reaction to the amount, "I took what I got and did not question it at the time". She said she later felt disappointed and possibly cheated by the SDB reduction.

[25] As to her financial circumstances, Mrs. Withler sold the marital home after her husband's death and purchased a condominium outright with no mortgage and banked the excess of \$60,000. She recently sold another property for \$350,000, some of the proceeds of which she distributed to her children; she retains \$160,000 in a savings account, has GIC's worth \$125,000. She takes month-long vacations every year (within the last five years travelling to Ecuador, China and Mexico numerous times) and she has no debts. Mrs. Withler currently receives half of her late husband's federal pension, about \$1,287 a month

Mrs. Fitzsimonds

[26] Mrs. Fitzsimonds is 74 years old. Her husband died of cancer in 2000 at the age of 71. Mr. Fitzsimonds served in the Canadian Forces (CF) for 30 years and retired in 1976 at the age of 47. At retirement, Mr. Fitzsimonds chose to continue to participate in the SDB Plan.

[27] In 1971, prior to his retirement, Mr. Fitzsimonds and his wife purchased a home for \$26,000 with a \$6,000 mortgage, which they paid off in four years. Subsequently, the home was sold for \$235,000 and Mrs. Fitzsimonds purchased a townhouse for \$241,000. After retiring from the CF, Mr. Fitzsimonds had a succession of careers; he was a property manager for five years; owned and

operated a janitorial service with his wife and then owned and operated a wine store until 1994 when he turned 65 and retired for the second time.

[28] During this same period (1976-1994), he continued to collect his indexed pension from the CF which was directly deposited into an RRSP. He was hospitalized for one week prior to his death. He incurred no nursing home or home care expenses. His funeral cost was \$3,800. Mrs. Fitzsimonds received the \$2,500 benefit provided by CPP.

[29] Mrs. Fitzsimonds received a SDB of \$5,000 which, according to Mr. Hébert amounted to an excess benefit of \$2,492 over the amount contributed by Mr. Fitzsimonds. She testified that her husband was aware of the reduction aspect of the SDB Plan and was not concerned and never purchased other life insurance. Mrs. Fitzsimonds testified that when she received her SDB cheque for \$5,000 she was “very disappointed” because she thought she would be receiving more.

[30] Mrs. Fitzsimonds says that she is financially “ok”. Her Notices of Assessment from the Canada Customs and Revenue Agency reveal that since 1997 her total income has increased from \$10,360 to \$38,631 in 2003. Mrs. Fitzsimonds has a mortgage of about \$39,000 on her townhouse and about \$35,000 in savings. Mrs. Fitzsimonds has taken three trips since her husband’s death; a Caribbean cruise in 2001, a trip to China in 2002, and a trip to Italy in 2003. She paid for these trips with the \$299 monthly withdrawals she is required to make from her RIF account. Mrs. Fitzsimonds also receives half her late husband’s pension from the CF, about \$1,215 a month.

CLASS MEMBERS

E. B.

[31] Mrs. B. is 76 years old. Her husband died of a heart attack in 1999 at age 69. He retired at age 60 after being on disability since age 54. Mrs. B. cared for him at home. During his illnesses, he was prescribed medication costing approximately \$700 - 800 monthly. Prior to age 65, the Federal Health Care Plan, reimbursed eighty percent of the costs; after age 65, the costs were covered mostly by the provincial medical plan, and eighty percent of the balance by the federal employer plan.

[32] Mr. B. was in hospital 7 days before he died. He incurred no nursing home expenses and no home care expenses. The only expense attributable to Mr. B.'s last illness was the twenty percent deductible of the prescription drug cost. The cost of his funeral was approximately \$1,200, which was covered by the \$2,500 survivor benefit provided under CPP.

[33] Mrs. B. received a SDB of \$6,675 upon her husband's death. According to Mr. Hébert, this was an excess benefit of \$2,776 over the amount contributed by Mr. B. Mrs. B. testified that her reaction to receiving the reduced SDB was one of embarrassment and shame because she thought she was entitled to more.

[34] Mrs. B. is in difficult financial circumstances. She testified that debts resulted from her husband's serious problem with manic depression and poor handling of money. Her home is worth \$125,000. It is mortgaged in the amount of \$93,000.

She has \$400 in her bank account. She cannot afford basic repairs to her home.

Mrs. B. currently receives half of her late husband's federal pension.

I. J.

[35] Mrs. J. is 71 years old. Mrs. J.'s husband died suddenly in 1994 at age 64.

He was still employed by the federal government at the time of his death. He died

without incurring any last illness expenses. The cost of her husband's funeral was

\$2,500, equal to the value of the \$2,500 survivor's benefit under CPP, for which

Mrs. J. was eligible.

[36] Mrs. J. is also a public servant, and her husband initially had private life

insurance. They cancelled it when they started working for the Government of

Canada because they had superannuation and "a good government pension".

[37] At his death, Mrs. J. received a SDB of \$67,000, an excess benefit of \$63,515

over the amount contributed by Mr. J. Mrs. J. testified that her reaction to receiving

the SDB was one of surprise, since she didn't know she was going to receive a

death benefit.

[38] Mrs. J. also received monies totalling \$110,000 from her husband's union and

various benefits from her husband's employment with the Yukon government.

Mrs. J. also receives her late husband's federal pension. She gave \$100,000 to her

children and invested the balance in a GIC. Mrs. J. currently owns a home worth

\$150,000, which is mortgaged for \$77,000. She has \$21,000 in RIF's and \$6,000 in

her bank account, and travels five to six weeks per year.

S. M.

[39] Mrs. M. is 64 years old. Mrs. M.'s husband died in 2000 at age 69. Mr. M. retired from the CF in 1978, at approximately 43 years old. In 1979 he began working at a pulp mill on Vancouver Island, where he continued to work for 21 years. He was on disability for 5 years prior to his death during which time he suffered two heart attacks, a stroke and from diabetes among other ailments. Mrs. M. gave up her job in order to stay home and care for her husband. He had no nursing home or home care expenses. The cost of his funeral was \$800.

[40] After his death, Mrs. M. received a SDB of \$5,000. She also receives his full annual pension of \$10,744 from BC Forest Products and will continue to do so for 8 more years when it expires. Mr. M.'s pension from the CF was \$21,802. At his death, this was reduced by half and became a survivor's benefit of \$11,620 annually for Mrs. M. She will receive this benefit until her death. She was also able to sell a second property, a condominium, at below cost to her grandson for \$65,000 and bank the proceeds.

A. H.

[41] Mrs. H. is 71 years old. Mr. H. died in 1996 at age 64. He retired in 1989 at age 57 and was an elective participant in the SDB Plan. Mrs. H. testified that no medical expenses were incurred at the time of her spouse's death. Mr. H.'s funeral cost \$10,000.

[42] At the time of her husband's death Mrs. H. received an SDB of \$59,550 (reduction of 40%), which is an excess benefit of \$55,637 over the amount contributed by Mr. H. Mrs. H. testified that when she first received the SDB cheque she had no negative reaction to it; she didn't feel embarrassed or cheated by the amount, she agreed that she thought she was "fine with it".

[43] She continued to own a house until she was no longer able to navigate the stairs. She then sold the house and purchased a two-bedroom condominium, which she still owns as an investment and rents to her daughter for a nominal \$200 per month. The condominium currently has a mortgage of \$47,000. At the same time she is able to fully fund the retirement living home in which she now resides. Mrs. H. enjoys travelling and has over the past five years taken trips to Bend, Oregon on three occasions and to Las Vegas, Nevada. Mrs. H. currently receives \$1,300 a month from her late husband's federal pension.

P. M.

[44] Mrs. M. is 68 years old. Her husband died of cancer in 1994 at age 64. Mrs. M. and her husband retired to Florida in 1981; she at age 45 and he at age 55. Mr. M.'s funeral and cemetery costs totalled \$3,500. Mrs. M. applied for and received the \$2,500 in CPP death benefits.

[45] Mr. M. elected to continue as a SDB Plan participant and continued to pay into the Federal Health Care Plan. Mrs. M. testified that \$3,500 in out-of-pocket medical expenses were incurred in the last months of her spouse's life, as medical costs in the United States were not fully covered by either their U.S. medical plan or

the Federal Health Care Plan; in addition, upon their move back to Canada after his medical diagnosis, the only medical coverage for the three-month waiting period was the Federal Health Care Plan. Mr. M. received two and half months of home care paid for under the federal government medical plan. After that coverage expired, he was hospitalized against his wishes because Mrs. M. could not care for him herself and could not afford nursing care.

[46] At Mr. M.'s death, Mrs. M. received a SDB of \$14,000, which is an excess benefit of \$11,524 over the amount contributed by Mr. M. Mrs. M. testified that when she received the reduced SDB she was, "Very angry. Very angry because if I had gotten the full amount, my husband would have died at home...So I was hurt."

[47] Mrs. M. has a current income of approximately \$60,000, of which \$28,800 is salary. She also receives \$1,156 a month from her late husband's federal pension. She has saved approximately \$50,000 in the past few years, but does not own a home. Mrs. M. travels annually, having spent a month in each of France, Hawaii, Greece and Italy over the past five years. She has been diagnosed with lung cancer.

I. M.

[48] Mrs. M. is 74 years old. Her husband died in 1999 at age 78 of a heart attack. Mr. M. retired from the CF at age 57 after 33 years of service. Prior to his heart attack he had had cancer which necessitated a number of surgeries and he had a heart pacemaker. He also had cataract surgeries. Mrs. M. received a

minimum paid up benefit of \$5,000. Mrs. M. receives half her late husband's federal pension, about \$1,230 a month.

[49] Mrs. M. testified as a witness, but is not a class member because her husband elected to reduce his coverage at age 67 to the minimum (then) \$500 paid up benefit. At retirement, plan participants are able to elect, at anytime after their retirement, not to continue the SDB Plan coverage beyond the minimum paid-up benefit. As she received the minimum paid-up benefit as a result of Mr. M.'s election to reduce coverage to the minimum, and not through the Reduction Provisions of the SDB Plan, Mrs. M. does not meet the class member definition.

MARGOLIS LITIGATION

[50] Mrs. Margolis brought an action in the Federal Court for damages for breach of equality rights under the **Charter**. She claimed that because her husband, a retired federal civil servant, died at age 69, she received, by virtue of the Reduction Provisions, only 20% of the maximum SDB. On February 16, 2001, Campbell J. awarded judgment to Mrs. Margolis for the amount equal to the reduction in her SDB. His Reasons for Judgment are reported at, ***Margolis v. Canada***, [2001] F.C.J. No. 402, 2001 FCT 85.

[51] On November 2, 2001, in the Withler action, this court ordered that the following question be tried as a certified common issue:

By virtue of the decision in *Margolis v. Canada* is the defendant estopped or otherwise barred from defending this action on the basis that:

- (i) the Reduction Provisions do not discriminate on the basis of age, contrary to section 15(1) of the *Charter*, or
- (ii) the Reduction Provisions are saved by section 1 of the *Charter*?
- (iii) the plaintiffs or the class do not have standing to allege a breach of the *Charter* and to seek a remedy under section 24 of the *Charter*?

That question was tried on May 28 and 29, 2002.

[52] At ¶ 62 of my Reasons for Judgment, [2002] B.C.J. No. 1395, 2002 BCSC 820 I found that "...I ought not exercise my discretion to apply the doctrine of abuse of process to prevent re-litigation of the constitutionality of the Reduction Provisions. The interests at stake, the public as opposed to private law nature of the action, and the potential for inconsistent results in the companion Fitzsimonds litigation weigh in favour of permitting the Withler litigation to go forward to be decided on its merits."

[53] Accordingly, the plaintiffs' application to strike the defence of the Attorney General in the Withler action was dismissed.

[54] While not challenging my earlier Judgment, the plaintiffs do contend that the evidence in the trial before me is not such that I should depart from the reasoning of The Honourable Justice Campbell in the *Margolis* litigation.

[55] In *Margolis*, Campbell J. considered the question of whether the Reduction Provisions constitute discrimination. He found that the plaintiff had met the burden of showing, on a balance of probabilities, that the effect of the Reduction Provisions is a violation of human dignity. The plaintiffs say there is no reason for this court to depart from Campbell J.'s findings in this regard.

[56] In *Margolis* Campbell J. held:

I find that the illogical nature of reducing a “death” benefit according to the age of the participant on death beyond 60, indeed, results in a violation of the human dignity of that participant and his or her surviving spouse. The effect of the message being communicated to the participant in such a plan over the age of 60 is that, compared to younger participants, your death, and the financial problems to be experienced by your surviving spouse on your death, are not as worthy of concern or support.....

...

The effect of the message being communicated on this issue to a participant in the SDB Plan over the age of 60 is that, compared to younger participants, even though on your death your spouse will be economically vulnerable, merely because of your age on death, he or she is not as worthy of concern and support. For this reason, I also find that, as a violation of the human dignity of the participant and his or her surviving spouse, the reduction aspect of the SDB Plan is contrary to s. 15 of the *Charter*.

***Margolis*, at para. 31 & 34**

[57] Campbell J. noted that the parties before him disagreed on the proper characterization of the benefit. He stated:

Thus, the Plaintiff argues that the SDB Plan is a death benefit scheme with attributes of a term life insurance plan, while the Defendant argues that the SDB Plan is a term life insurance plan with attributes of a death benefit scheme.

***Margolis*, at para. 13**

[58] Campbell J. concluded on this point:

Thus, I find from the record that, from the beginning, the SDB Plan was intended to be two things at the same time: a one time death benefit payment to meet expenses incurred on account of death, and term insurance which would have a large payout before the age of 60, and a reduced payout thereafter. Therefore, it is not possible to characterise the benefit to be paid under the plan as either a death benefit or a term

insurance benefit; it is a single concept which combines two dissimilar ideas.

Margolis, at para. 17

[59] Later he stated:

In my opinion, the conflict created by marrying a death benefit feature to a term insurance feature within a benefit concept such as the SDB Plan, leads to the result that the reduction aspect introduced by the term insurance feature contaminates the whole scheme relative to s. 15 of the *Charter*.

Margolis, at para. 30

[60] The plaintiffs submit that there was no evidence put before this court which would justify departing from Campbell J.'s findings in this regard. Indeed, they say the evidence before this court strengthens Campbell J.'s finding that the SDB Plan was intended as, and described to participants as, a "death benefit", that is, a one time payment to cover the inevitable expenses arising from last illness and death.

[61] The plaintiffs submit there is also evidence before this court which strengthens Campbell J.'s finding that the reduction of such a benefit on the basis of age is illogical. While Campbell J. made that finding based on the common sense conclusion that there would be no reason for these expenses to be less for older persons, the plaintiffs say, there is now undisputed evidence before this court that such expenses are actually higher for older persons.

Margolis, at para. 29

[62] Campbell J. also found that the defendant's assertion that survivors over the age of 60 have a decreased need for the benefit had not been proved. In this case,

the plaintiffs submit that there is evidence before this court that the economic well being of older persons is less than that of younger persons, such that there is no decreased need for any benefit - whether it be characterized as “life insurance” or a “death benefit”.

***Margolis*, at para. 32, Exhibit 16.**

[63] The ***Margolis*** case was heard in one day. I do not believe the court heard any viva voce testimony. In contrast, this court heard evidence and submissions for fourteen days. From ¶ 14 of the reasons in ***Margolis***, I infer that the court had the benefit of at least some of the historical documents that are in evidence before me. I do not believe Campbell J. had the benefit of the expert evidence and evidence from numerous plaintiffs, as well as civil servant administrators of the SDB Plan. It is not clear to me if the standing argument was made. Mrs. Margolis and the estate of Dr. Margolis, the plan participant, were both plaintiffs. In ***Margolis*** the ***Charter*** infringement seems to have been argued on the basis that the Reduction Provisions violated the ***Charter*** rights of the deceased participant and the surviving spouse. In the case before me the plaintiffs do acknowledge that an estate cannot maintain an action for breach of the ***Charter***. For these reasons, as well as those set out in my earlier ruling on this matter, I conclude that I ought to consider this matter afresh.

ANALYSIS

CERTIFIED QUESTION NO. 1

Do the plaintiffs have standing to challenge the Reduction Provisions under s. 15 of the Charter?

[64] The question of whether the class members have standing to allege a breach of their **Charter** rights and claim a remedy for that breach, is a threshold question in this **Charter** analysis. If the class members do not have standing, their action for breach of s. 15 of the **Charter** fails.

Position of the Attorney General on standing

[65] The Attorney General says that the class members allege that the Reduction Provisions “discriminate on the basis of age”, contrary to s. 15(1) of the **Charter**. The Attorney General contends that because the Reduction Provisions are triggered by the age of the deceased plan participant, 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.

[66] The impugned provisions relate to the age of the deceased plan participants, but the claim is being advanced by the beneficiaries of the plan participants. The Attorney General says the class members, as designated beneficiaries of the SDB Plan, do not have standing to advance a claim alleging discrimination on the basis of age contrary to s. 15(1) of the **Charter** because the infringement alleged is discrimination against someone other than the plaintiffs. Similarly, s. 24(1) clearly

requires that a plaintiff or applicant suffer a personal infringement or denial of a **Charter**-based right. The class members do not meet this requirement based on an allegation of discrimination suffered by the deceased plan participants.

Position of the Plaintiffs on standing

[67] The plaintiffs argue that they have standing to allege a breach of a **Charter** right and to seek a remedy under s. 24(1) because their **Charter** rights have been violated.

[68] Section 24.(1) states:

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.

[69] The plaintiffs say that the Reduction Provisions clearly draw a distinction on the basis of age, and the effect of that distinction is to deny the claimants the equal benefit of the law. It does not matter that the legislative distinction turns on the age of the participant and not the beneficiary. Most of the beneficiaries were spouses, and there is a correspondence between the age of the spouses and the age of the beneficiaries. Most widowed spouses are older. The plaintiffs contend that the spousal relationship between the beneficiary and the participant is sufficiently close that distinctions drawn on the basis of the age of one affects the dignity of the other.

[70] The plaintiffs contend that, the relationship between the spouses is of a “particularly unique and intimate nature” such that the age of the spouse is “as

personal and immutable” to a person as one’s own age. Marital status has been recognized as an analogous ground of discrimination. The plaintiffs point out that if they do not have standing because on the defendant’s theory, the only proper claimants are dead, the legislation is insulated from any constitutional review.

[71] The plaintiffs also say that courts have recognized that discrimination on the basis of the age of a family member may constitute discrimination on the basis of an analogous ground.

[72] The plaintiffs contended that similarly, in this case, recognizing the combined grounds of marital status and age, or the analogous ground of those who are married to older spouses, will promote the purpose of s. 15.

[73] Finally, the plaintiffs argued that the Reduction Provisions are targeted at the beneficiaries. It is their **Charter** rights of the living beneficiaries, not the claimants, which are at stake.

Analysis of the Standing Issue

[74] In *R. v. Edwards*, [1996] 1 S.C.R.128 at ¶ 45, the Supreme Court of Canada stated that s. 8 and s. 24(2) **Charter** rights are personal rights and a claim for relief can only be advanced by the person whose rights have been infringed. In *Edwards* the police searched the apartment of the accused's girlfriend. The court held that the accused could not object to the legality of the search, because he had no right to privacy in her apartment.

[75] The courts in several provinces and the Federal Court have consistently applied *Edwards* noting that equality rights are personal in nature and must be advanced by the person who has suffered discrimination.

[76] In *Stinson Estate v. British Columbia*, (1999) 70 B.C.L.R. (3d) 233 (B.C.C.A.), (leave to appeal to SCC dismissed), the British Columbia Court of Appeal held that an estate could not maintain an action for a declaration that the deceased's equality rights under the **Charter** had been violated by the provisions of the **Workers Compensation Act**. The court held that s. 15 equality rights were personal in nature and terminated on death and could not be advanced by artificial entities such as estates. At ¶ 11, Finch J.A., as he then was, held:

S. 15 protects the equality rights of "every individual". The rights guaranteed are personal, and the power to enforce the guarantee resides in the person whose rights have been infringed. Here it is the estate of the deceased which seeks a remedy for the alleged breach of Mrs. Stinson's right. Such a claim is not open to the estate, as a third party, under the language of the *Charter*.

[77] In ***Collins v. Abrams***, [2004] B.C.J. No. 376 at ¶ 19-21, the British Columbia Court of Appeal held that Mrs. Collins did not acquire a right to commence or to continue a constitutional challenge based on the alleged violation of her deceased husband's s. 7(1)(b) ***Charter*** rights to publish certain material. The court denied her claim even though Mr. Collins had instituted the action before his death and even though she was his beneficiary and the action would have had a direct impact on his estate.

[78] In ***Deol v. (Canada) Minister of Citizenship and Immigration***, 2002 FCA 271 at ¶ 54, the applicant alleged discrimination on the grounds of disability because her father was not admitted into Canada due to his medical condition. Mr. Justice Evans, writing for the Federal Court of Appeal, found that the applicant had no standing to assert her father's rights under s. 15 of the ***Charter***. He said at ¶ 54-56:

In order to answer these questions it is important to recall at the outset that Ms. Deol is the person whose equality rights are alleged to have been violated. She has no standing to assert her father's rights under section 15, even assuming that the *Charter* applied to him while he was abroad. Nor can a person establish that he or she has been denied their section 15 rights simply by proving discrimination against another: *R. v. Edwards*, [1996] 1 S.C.R. 128, at page 145.

Nonetheless, I also recognize that, in some circumstances, a child's section 15 rights may be violated as a result of discrimination against a parent. Thus, in *Benner v. Canada (Secretary of State)*, [1997] 1 S.C.R. 358, a section 15 claim was made by a person who did not acquire Canadian citizenship by virtue of being the child born in wedlock outside Canada prior to February 15, 1977, of a Canadian mother and a non-Canadian father. Had his father been a Canadian citizen, Mr. Benner would have acquired Canadian citizenship automatically by descent. As Iacobucci J. put it, *supra*, at paragraph 82:

The link between child and parent is of a particularly unique and intimate nature. A child has no choice who his or her parents

are. Their nationality, skin colour, or race is as personal and immutable to a child as his or her own.

Thus, to put this statement into the analytical framework of Law, *supra*, a person may invoke section 15 if denied a benefit by virtue of a personal characteristic of a parent that demeans the human worth of that person. However, in my opinion, the fact that Ms. Deol is the child of a parent who has been refused a visa because of a medical condition that is expensive to treat does not reflect adversely on her individual worth or otherwise violate her human dignity. It does not ascribe to her a disability or any other personal characteristic by virtue of her parentage. Hence, Ms. Deol has not established the necessary link between the basis on which her father was refused a visa and discrimination against her in the constitutional sense.

[79] Similarly, in *Veleta v. (Canada) Minister of Citizenship and Immigration*, 2005 FC 572 at ¶ 64-66, the Federal Court distinguished the case from *Benner* and rejected the applicants' attempt to rely on the infringement of their grandparent's rights for their own benefit, noting that:

"In *Benner* and *Augier*, the applicants themselves were deemed less worthy of Canadian citizenship by virtue of the circumstances of their own births, whereas in this case, the applicants are not the primary target of the discrimination mandated by the former legislation".

[80] In *Levesque v. Levesque Estate*, [1989] N.B.J. No. 359, an estate attempted to advance an argument that a provision of the *Marital Property Act* violated the s. 15(1) *Charter* rights of the deceased. The New Brunswick Court of Queen's Bench held that an estate is not an individual under s. 15(1) of the *Charter* and therefore could not advance the *Charter* claim. As noted by Savoie J.:

Various cases and commentaries have underlined the fact that subs. 15(1) uses the word "individual" while other sections of the *Charter* use the word "everyone".

A number of cases have also ruled that the word "individual" in subs. 15(1) relates only to human beings. The purpose of the

subsection is to enhance and preserve human dignity and it expands only to natural persons.

[81] The plaintiffs rely on *Benner v. Canada (Secretary of State)*, [1997] 1 S.C.R. 358. In *Benner*, the citizenship application process that was in issue was dependant upon the gender of the applicant's Canadian parent. The court held that the impugned provisions targeted Benner himself, rather than his parents and therefore he was not depending on the rights of his mother to form the basis of his action for violation his *Charter* rights. The court granted standing to enable Benner to raise discrimination upon an enumerated ground because it was consistent with the purpose of the s. 15 guarantee due to the "particularly unique and intimate nature" of the parent and child relationship. As noted by Iacobucci J. at ¶ 85:

Where access to benefits such as citizenship is restricted on the basis of something so intimately connected to and so completely beyond the control of the applicant as the gender of his or her Canadian parent, that applicant may, in my opinion, invoke the protection of s. 15.

[82] The Attorney General contends that *Benner* is distinguishable because in the case at bar the impugned provisions apply to the plan participants not the beneficiaries. Secondly, there may or may not be a particularly unique and intimate relationship between the plan participant and the beneficiaries. Most significantly, the beneficiary is chosen by the plan participant and can be changed at any time.

[83] In *Benner*, Iacobucci J. stated at ¶ 78-80:

It now appears to be settled law that a party cannot generally rely upon the violation of a third party's *Charter* rights: *R. v. Edwards*, [1996] 1 S.C.R. 128, at p. 145; *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342, at p. 367. If the appellant were truly attempting to raise his

mother's s. 15 rights, he would not have the requisite standing. I am not convinced, however, that he is attempting to do so. The impugned provisions of the Citizenship Act are not aimed at the parents of applicants but at applicants themselves. That is, they do not determine the rights of the appellant's mother to citizenship, only those of the appellant himself. His mother is implicated only because the extent of his rights is made dependent on the gender of his Canadian parent.

This is surely very different from the situations in *Edwards* and *Borowski*. The appellant in *Edwards* was attempting to invoke s. 24(2) to prevent the introduction at his trial of evidence found in his girlfriend's apartment. Cory J. found that the appellant had no reasonable expectation of privacy in the apartment, and that he could therefore not rely on a breach of someone else's privacy rights to prevent evidence from being admitted at his trial. The appellant had no connection to the apartment, other than the fact that he chose to hide evidence there. The search of the apartment did not affect his rights in any way. It was, in other words, a true attempt to assert the rights of a third party. Similarly, in *Borowski*, the appellant wished to raise the rights of fetuses. He had no connection with these fetuses other than concern for their well-being, and his own rights were not implicated by the legislation in question. Again, it was a clear example of attempting to raise the rights of third-parties.

In this case, on the other hand, there is a connection between the appellant's rights and the differentiation made by the legislation between men and women. The impugned provisions clearly make Mr. Benner's citizenship rights dependent upon whether his Canadian parent was male or female. In these circumstances, I do not believe permitting s. 15 scrutiny of the respondent's treatment of his citizenship application amounts to allowing him to raise the violation of another's *Charter* rights. Rather, it is simply allowing the protection against discrimination guaranteed to him by s. 15 to extend to the full range of the discrimination. This is precisely the "purposive" interpretation of *Charter* rights mandated by this court in many earlier decisions: see, e.g., *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 344; *Andrews*, supra, at p. 169. If it were not so, applicants would be unable to challenge a law which prevented them from acquiring citizenship, not because, for example, they were Italian, but because their parents were Italian. A Parliament or legislature intent on circumventing the protections of s. 15 could insulate legislation from *Charter* review by providing for this kind of indirect discrimination rather than mentioning its targets directly. I draw support for this view from several other courts that have reached similar conclusions, both in Canada and in the United States.

[84] Iacobucci J. did address the issue of whether extending the range of the discrimination brings into play human dignity. At ¶ 82–86 he stated:

I hasten to add that I do not intend by these reasons to create a general doctrine of "discrimination by association". I expressly leave this question to another day, since it is not necessary to address it in order to deal with this appeal. The link between child and parent is of a particularly unique and intimate nature. A child has no choice who his or her parents are. Their nationality, skin colour, or race is as personal and immutable to a child as his or her own. In *Miron*, supra, McLachlin J. wrote at p. 495 that the fundamental consideration in identifying analogous grounds under s. 15 is:

...whether the characteristic may serve as an irrelevant basis of exclusion and a denial of essential human dignity in the human rights tradition. In other words, may it serve as a basis for unequal treatment based on stereotypical attributes ascribed to the group, rather than on the true worth and ability or circumstances of the individual?

One indicator suggested by McLachlin J. that a characteristic may be able to serve as a basis for such unequal treatment is the personal nature of the characteristic. As McIntyre J. wrote at pp. 174-75 in *Andrews*, supra:

Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed.

This was echoed in the reasons of Cory J. and myself in *Egan*, supra, at p. 599, and also those of Gonthier J. in *Miron*, supra, at p. 435. Cory J. and I wrote that the main issue underlying the analogous grounds analysis was "whether the basis of distinction may serve to deny the essential human dignity of the *Charter* claimant". I agree with McLachlin J. that the personal or immutable nature of a characteristic may indicate that it falls into this category. While this case is not, strictly speaking, about analogous grounds but rather the extension of standing to raise discrimination upon an enumerated ground, I believe similar considerations may nevertheless be applied, in keeping with what McLachlin J. called in *Miron*, supra, at pp. 486-87, "the overarching purpose" of the s. 15 guarantee of equality, namely:

. . . to prevent the violation of human dignity and freedom by imposing limitations, disadvantages or burdens through the

stereotypical application of presumed group characteristics rather than on the basis of individual merit, capacity, or circumstance.

Where access to benefits such as citizenship is restricted on the basis of something so intimately connected to and so completely beyond the control of an applicant as the gender of his or her Canadian parent, that applicant may, in my opinion, invoke the protection of s. 15. As Linden J.A. noted in dissent in the Federal Court of Appeal, at p. 277, "[i]n this situation, the discrimination against the mother is unfairly visited upon the child. This is surely as unjust as if the discrimination were aimed at the child directly".

In fact, as I stated above, the guarantees of s. 15 regarding race, skin colour, or ethnic background could otherwise be rendered nugatory by consistently making the parent of the actual target the focus of discrimination rather than the target him- or herself. Whether, however, this analysis should extend to cover situations where, for example, the association is voluntary rather than involuntary, or where the characteristic of the parent in question upon which the differential treatment is founded is not an enumerated or analogous ground are questions for another day.

[85] In *Lemke v. Juckes Estate*, [2000] A.J. No. 1290 (Q.B.) the court considered a challenge to the *Alberta Fatal Accidents Act*. Under that *Act*, parents of a child under 26 who was not cohabiting with the parent were entitled to an automatic payment of \$40,000 upon the death of a child without having to prove loss of care and companionship. Parents of older children were not entitled to the automatic payment. The court held that this constituted discrimination on an analogous ground at ¶ 35:

Age is an enumerated ground of distinction in s. 15(1) of the *Charter*. However, there the reference is to the age of the person allegedly discriminated against, whereas in this case the governing factor is the age of the deceased child at the time of death. In my view this distinction based on age is an analogous ground to age as enumerated in s. 15(1) of the *Charter*. In *Law Iacobucci J.* commented in para 93:

Where a party brings a discrimination claim on the basis of a newly postulated analogous ground, or on the basis of a combination of different grounds, this part of the discrimination inquiry must focus upon the issue of whether and why a ground or confluence of grounds is analogous to those listed in s. 15(1). This determination is made on the basis of a complete analysis of the purpose of s. 15(1), the nature and situation of the individual or group at issue, and the social, political and legal history of Canadian society's treatment of the group. A ground or grounds will not be considered analogous under s. 15(1) unless it can be shown that differential treatment premised on the ground or grounds has the potential to bring into play human dignity: see *Egan*, supra, at para. 52, per L'Heureux-Dubé J. If the court determines that recognition of a ground or confluence of grounds as analogous would serve to advance the fundamental purpose of s. 15(1), the ground or grounds will then be so recognized: see, e.g., *Turpin*, supra, at pp. 1331-33.

I have noted in para 32 *supra* that there was no differential treatment of the parents of deceased children based on the age of the children at the time of death in the *Fatal Accidents Act* as it read prior to the 1994 amendments. Further, the Institute in its Reports Nos. 12 and 66 recognized a benefit to parents being entitled to damages under section 8(2)(b) without being subjected to the rigors of testifying in court as to the extent of their grief. **In my opinion this differentiation in parents' entitlement based on the age of the deceased child at the time of death has the potential to bring into play human dignity and, considering the wording of s. 8(2)(b) of the Fatal Accidents Act and the extent of the lost benefit determined by the deceased child's age at the time of death, recognition of age of the deceased child as used in section 8(2)(b) as an analogous ground would serve to advance the fundamental purpose of s. 15(1).** [Emphasis added]

...

I also note that the older deceased child at the time of death (i.e. over 25 years of age) would, in most cases, have older parents than a younger child. Although this is not true in all cases, it would in many cases have the effect of discriminating against the parents on the basis of the enumerated ground of age.

[86] Similar concerns arise in this case, where there is a correspondence between the age of the spouses.

[87] The purpose of the **PSSA** and the **CFSA** is to provide pensions and benefits to employees of the federal civil service and the Canadian Armed Forces and their surviving spouses or dependents. The Reduction Provisions are contained within statutes that provide for the entire package of pensions and benefits for federal employees. The legislation is designed to benefit the employee participants in the various plans, but its purpose is also to benefit their families. For instance pensions, as well as dental and extended health are provided to surviving spouses.

[88] In this case the spouses of plan participants are directly provided for under the **PSSA** and the **CFSA**. In part, the legislation is designed to protect them by providing for various survivor benefits. It cannot be said that the legislation affects only the participant. That portion of the legislation containing the Reduction Provisions is specifically targeted at the surviving spouses.

[89] The question is whether a spouse of the participant has standing to bring this action challenging legislation designed to benefit her, on the basis of age discrimination associated to her spouse's age, rather than her own age. In other words, the right that is infringed is not really the right of the participant. He or she is dead. It is the right of the survivor that is the target of the legislation.

[90] The plan participant could allege discrimination prior to his death but his claim would at that point be hypothetical because he or she would not know if the Reduction Provisions would affect his spouse. I agree with the plaintiffs that if they are denied standing, effectively this legislation might be insulated from any **Charter** scrutiny.

[91] As was the case in *Benner*, there is a connection made between the plaintiff's rights and the differentiation made by the legislation on the basis of the spouses' age. Surely if the legislation provided for payments in differing amounts dependent upon the ethnicity of the participant, the surviving spouse would not be without standing to assert an infringement of the *Charter*.

[92] I therefore find that the plaintiff members of the class do have standing to assert a claim based on age discrimination that is associated with the age of their deceased spouse. To be clear, I should add that my conclusion is not that a spouse may assert a *Charter* right based on "discrimination by association", rather in this specific case, where the target of the impugned provision is the plaintiff and it is the plaintiff who suffers the discrimination associated with her spouse's age, the plaintiff should have standing. The age of their spouses at death is a personal characteristic of the plaintiffs. There is a connection between the plaintiffs' rights and the differentiation made by the legislation between spouses whose husbands died before age 65 (or 60) and those whose husbands died after age 65 (or 60). I do not think that standing can be extended to all beneficiaries of the deceased plan participants because the basis on which I have granted standing was the close relationship of the spouses, who to some extent share the same characteristic, advanced age. Thus standing must be limited to surviving spouses who received the reduced benefit.

[93] I therefore conclude that the first certified question, "Do the plaintiff and class members have standing to allege a breach of *Charter* rights and to seek a remedy

for **Charter** infringement?” should be answered in the affirmative, but with the limitation I just mentioned..

CERTIFIED QUESTION No. 3

Do the Reduction Provisions discriminate on the basis of age, contrary to s. 15(1) of the Charter, and, if so, are they saved by s. 1 of the Charter?

Section 15 Analysis

In view of the fact that certified question No. 3 may be dispositive of this case, I will deal with it next. The question is, “Do the Reduction Provisions discriminate on the basis of age, contrary to s. 15(1) of the **Charter**, and if so, are they saved by s. 1 of the **Charter**?”

[94] Subsection 15(1) of the **Charter** states as follows:

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.

[95] The leading authority on section 15 of the **Charter** is the Supreme Court of Canada’s decision in **Law v. Canada (Minister of Employment and Immigration)**, [1999] 1 S.C.R. 497 (**Law v. Canada**). The appellant, a 30 year-old widow, challenged the survivor’s benefits provisions of the Canada Pension Plan, arguing the reduction provisions which deny benefits for those under age 35 at the time of their spouse’s death violated her **Charter** right to equality. In **Law v. Canada**, the court delineated the purpose of s. 15 of the **Charter** and established the approach to

be used by courts when determining a claim under the equality provisions of the **Charter**.

[96] The court directed that a discrimination claim must be analyzed by a court in a purposive and contextual way. I understand “purposive” to mean that the analysis must be done by comparing the alleged discriminatory law to the purpose of s. 15(1). It is important to examine the purpose of s. 15(1) as a starting point to the analysis of a discrimination claim because not every legal distinction (even those based on enumerated grounds) will be found to engage the purpose of the **Charter** guarantee (**Law v. Canada**).

[97] Iacobucci J. noted at ¶ 41 of **Law v. Canada**:

Since the beginning of its s. 15(1) jurisprudence, this Court has recognized that the existence of a conflict between an impugned law and the purpose of s. 15(1) is essential in order to found a discrimination claim.

[98] A recognition of the purpose of s. 15(1) is essential before proceeding to the next stage of the analysis, that is a determination of whether the Reduction Provisions conflict with the purpose of s. 15(1).

[99] The purpose of s. 15(1) is described in **Law v. Canada** by Iacobucci J. as follows at ¶ 51:

... It may be said that the purpose of s. 15(1) is to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration.

Legislation which effects differential treatment between individuals or groups will violate this fundamental purpose where those who are subject to differential treatment fall within one or more enumerated or analogous grounds, and where the differential treatment reflects the stereotypical application of presumed group or personal characteristics, or otherwise has the effect of perpetuating or promoting the view that the individual is less capable, or less worthy of recognition or value as a human being or as a member of Canadian society. Alternatively, differential treatment will not likely constitute discrimination within the purpose of s. 15(1) where it does not violate the human dignity or freedom of a person or group in this way, and in particular where the differential treatment also assists in ameliorating the position of the disadvantaged within Canadian society.

[100] He answered the next question, that is, what is human dignity? at ¶ 53:

...There can be different conceptions of what human dignity means. For the purpose of analysis under s. 15(1) of the *Charter*, however, the jurisprudence of this Court reflects a specific, albeit non-exhaustive, definition. As noted by Lamer C.J. in *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519, at p. 554, the equality guarantee in s. 15(1) is concerned with the realization of personal autonomy and self-determination. Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits. It is enhanced by laws which are sensitive to the needs, capacities, and merits of different individuals, taking into account the context underlying their differences. Human dignity is harmed when individuals and groups are marginalized, ignored, or devalued, and is enhanced when laws recognize the full place of all individuals and groups within Canadian society. Human dignity within the meaning of the equality guarantee does not relate to the status or position of an individual in society per se, but rather concerns the manner in which a person legitimately feels when confronted with a particular law. Does the law treat him or her unfairly, taking into account all of the circumstances regarding the individuals affected and excluded by the law?

[101] In *Law v. Canada*, Iacobucci J. set out the analytical framework for determining whether there has been a violation of section 15 of the *Charter*. In summary, the court must make three broad inquiries;

1. Does the impugned law;
 - a. Draw a formal distinction between the claimant and others on the basis of one or more personal characteristics, or
 - b. Fail to take into account the claimant's already disadvantaged position within Canadian society resulting in substantively differential treatment between the claimant and others on the basis of one or more personal characteristics?
2. Is the claimant subject to differential treatment based on one or more enumerated and analogous grounds? And;
3. Does the differential treatment discriminate, by imposing a burden upon or withholding a benefit from the claimant in a manner which reflects the stereotypical application of presumed group or personal characteristics, or which otherwise has the effect of perpetuating or promoting the view that the individual is less capable or worthy of recognition or value as a human being or a member of Canadian society, equally deserving of concern, respect, and consideration?

[102] At the third stage, the court must consider four contextual factors in order to determine if the impugned law demeans the complainant's dignity. The relevant test is that of a reasonable person, in circumstances similar to those of the claimant, who takes into account the contextual factors relevant to the claim, which are;

1. Pre-existing disadvantage, stereotyping, prejudices or vulnerability experienced by the individual or group at issue;
2. The correspondence, or lack thereof, between the ground or grounds on which the claim is based and the actual need, capacity, or circumstances of the claimant or others;
3. The ameliorative purpose or effects of the impugned law upon a more disadvantaged person or group in society than the complainants; and
4. The nature and scope of the interest affected by the impugned law.

[103] I propose to follow the template described by Justice Iacobucci in *Law v. Canada* in my analysis of this case to the extent that it is applicable.

1. Does the law either draw a distinction or fail to consider the claimant's position in society?

[104] I would answer "yes" to this question on the basis that the plaintiffs do have standing to bring this action. The impugned law does draw a formal distinction between the surviving spouses on the basis of a personal characteristic of their deceased spouse - age.

2. Is the claimant subject to differential treatment based on one or more enumerated and analogous grounds?

[105] Although age is an enumerated ground, in this case the surviving spouses' claim discrimination based on the age of their spouse's death. I would characterize the claim as an analogous ground, or as Iacobucci J. said in *Benner* at ¶ 82 the

plaintiffs have extension of standing to raise discrimination upon an enumerated ground.

3. Does the differential treatment discriminate?

[106] I propose to answer this question by first considering the comparator group selected by the plaintiffs and deciding if that is the appropriate comparator group. I will then consider the context within which the impugned legislation impacts the plaintiffs. I will discuss the purpose of the legislation. Then I will turn to the four contextual questions posed in *Law v. Canada* in order to draw my conclusions concerning the alleged discrimination of the impugned law.

Comparator group

[107] In *Auton (Guardian ad litem of) v. British Columbia (Attorney General)* [2004] 3 S.C.R. 657, McLachlin C.J. described the method to select the comparator group at ¶ 50:

The law pertaining to the choice of comparators is extensively discussed in *Hodge, supra*, and need not be repeated here. That discussion establishes the following propositions.

51 First, the choice of the correct comparator is crucial, since the comparison between the claimants and this group permeates every stage of the analysis. "[M]isidentification of the proper comparator group at the outset can doom the outcome of the whole s. 15(1) analysis": *Hodge, supra*, at para. 18.

52 Second, while the starting point is the comparator chosen by the claimants, the Court must ensure that the comparator is appropriate and should substitute an appropriate comparator if the one chosen by the claimants is not appropriate: *Hodge, supra*, at para. 20.

53 Third, 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: *Hodge, supra*, at para. 23. The comparator must align with both the benefit and the "universe of people potentially entitled" to it and the alleged ground of discrimination: *Hodge*, at paras. 25 and 31.

[108] The comparator group selected by the plaintiffs is all civil servants and members of the armed forces who received the full SDB, not reduced on the basis of age.

[109] The Attorney General says in its written brief "...the plaintiffs have chosen a comparator group of other beneficiaries who have received an unreduced benefit." The Attorney General says: "...this is not a legitimate comparator group for the purpose of s. 15; the group lacks any degree of cohesiveness, similarity, antecedence or discreteness so as to have the elements of a comparator group; the group proposed is random, it is simply those beneficiaries who are fortunate or unfortunate to have received the unreduced proceeds of the SDB because the plan participant died prior to age 66; it is not a "group" linked by a common personal characteristic. The beneficiary may be 20, 30, 40 or 50. The beneficiary may not even be an individual."

[110] The plaintiffs' choice of comparator group does expose a difficulty with the plaintiffs' discrimination claim. The plaintiff class as defined by the certification order is not a group closely tied to a common personal characteristic that is discrete, because the age, sex and circumstances, of the surviving spouses at the time of their spouses death vary so significantly. Later in these reasons I consider evidence about poverty of seniors. The class definition incorporates all those surviving

spouses whose spouses died after age 65 (or earlier if the death occurred before the 1999 amendments to the SDB). But as will be seen below income, wealth, expenses and poverty for seniors is not a common characteristic for all age levels over age 65. The question of whether advanced age is associated with poverty, and therefore reduction of benefits tied to advancing age is discrimination, requires consideration of this evidence. However, I will accept, for the now, the plaintiffs' choice of comparator groups. There seems no other more appropriate group.

Legislative Context and Purpose

[111] The importance of examining legislative context was colourfully illustrated by McLachlin C.J. in ***Gosselin v. Attorney General of Quebec***, [2002] 4 S.C.R. 429 at

¶ 24:

To determine whether a distinction made on an enumerated or analogous ground is discriminatory, we must examine its context. As Binnie J. stated in *Granovsky, supra*, at para. 59, citing U.S. Supreme Court Marshall J.'s partial dissent in *Cleburne v. Cleburne Living Centre, Inc.*, 473 U.S. 432 (1985): "[a] sign that says 'men only' looks very different on a bathroom door than a courthouse door". In each case, we must ask whether the distinction, viewed in context, treats the subject as less worthy, less imbued with human dignity, on the basis of an enumerated or analogous ground.

[112] I shall now proceed to examine the context of the impugned legislation and in doing so I shall examine its purpose, which in turn requires an historical overview.

[113] Hart Clarke, a retired public servant, deposed in his affidavit detailing the history of the development of the SDB in the late 1940s. He was charged with responsibility to design the plan and consult with the various stakeholders. He

deposed that in the first half of the 20th century, group life insurance became increasingly popular because of its broad coverage without medical examination at a modest and stable cost from the first day of employment. He said that by the middle of the 20th century employer sponsored group life insurance was common and there was pressure on the government to follow suit. One of the problems that group life insurance addressed according to Mr. Clark was “for a great many junior civil servants who, before their superannuation credit is built up, need some protection such as term insurance which they generally cannot obtain from private companies unless they have a considerable sum of ordinary life insurance.” In a memorandum dated in September 1952, exhibited to his affidavit and authored by the chief government actuary Richard Humphrys, a scheme of group insurance providing one year’s salary on death was recommended. Mr. Humphrys recommended that the existing two months’ salary gratuity paid on death be folded into the proposed group life insurance. On the topic of termination of service, Mr. Humphrys noted “the unacceptable cost of continuing coverage after retirement in light of substantial death benefits ... available at retirement under the **Superannuation Act**. However, it is generally undesirable to have any sharp breaks in the amount of benefit – for example, \$5,000 of insurance one day and nothing the next day – so it would be desirable to allow the insurance to run off gradually. This might be accomplished by stepping it down in equal steps between, say, ages 61 and 70.” He continued: “There is a strong argument for this arrangement if the group insurance is looked on as only one part of the insurance program. It is designed to replace about one year’s income; the **Superannuation Act** provides permanent protection to the

widow after a considerable period of service has been built up;...” This memorandum appears to be the genesis of the present design of the SDB.

[114] Mr. Clark deposed that Mr. Humphrys also considered that the integration of the two plans (the group life and superannuation) would temper criticism from the insurance industry, which might otherwise see the Government as trenching upon its preserve in implementing a self-administered group insurance plan.

[115] The historical record discloses an increasing sensitivity of the government not to be seen to be “trenching” on the preserve of the private life insurers. The evidence discloses a number of excerpts from parliamentary debate and various committees studying the proposed amendments to the ***Superannuation Act*** in which the Minister responsible says that the plan is not to be called life insurance but rather it should be characterized as a death benefit. I find that the primary motivation in doing so, as disclosed in the historical record, was to placate the life insurance industry, and is not compelling evidence about the intended purpose of the SDB.

[116] The Minutes of the Standing Committee on Banking and Commerce of June 1954 include the debate on the proposed amendments to the ***Superannuation Act***. One of the speakers was the President of the Civil Service Association of Ottawa. His comments are somewhat prescient. The submissions made in this law suit some fifty years later are similar to the submissions made by the 1954 President of the Civil Service Association. He said that his association “heartily supported” the principle of group life insurance. His association objected to the proposed Reduction

Provisions. He explained that "...This plan is primarily designed to provide funds which will be readily available, to pay the inevitable expenses arising out of or consequential upon the last illness and death of a contributor. I am sure you will agree that these inevitable expenses do not become gradually less and less after age 60, and disappear entirely after age 70. If there is the need for \$5,000 to cover such expenses at age 60, surely there is the same or almost the same need for \$5,000 to cover these expenses at age 65, or age 70, or age 75. Why does a civil servant need a lesser amount, or nothing at all, for expenses of last illness or death when he may be retired on pension and his income much lower: This does not seem to make sense." He continued with the recognition of the cost of extending coverage and added that "most civil servants would be prepared to pay a bit more for something that would be of more use to them."

[117] At the same committee hearing the superintendent of insurance emphasized that the SDB was integrated with regular dependent's coverage under the **Superannuation Act** and that that coverage was small in earlier years of less service and "provides considerable justification for grading down the supplementary death benefit at the higher ages where the dependents' coverage is substantial under the **Superannuation Act**."

[118] The plaintiffs sought in their evidence and arguments to establish that the supplementary death benefits paid under both plans are not insurance, but are more akin to a death benefit. There is some importance to this distinction because it appears that there has been some legislative recognition of legitimate age differentiation in insurance plans. I expand on this later.

[119] The characterization and legislative development are also relevant in this case to formulating an understanding of the purpose of the legislation. In this case, there is no issue about the interpretation of the legislation. The purpose of the legislation is a relevant consideration to a s. 15 analysis. The Attorney General contends that if there is uncertainty about the purpose of the legislation, then the court must examine the evidence about the historical development of the SDB Plan in its broad context. The plaintiffs say the purpose of the SDB is to pay the expenses of last illness and health, the Attorney General says it is life insurance and may be used for any purpose.

[120] The Attorney General relied on the expert report of Gordon Argue. Mr. Argue was qualified as an expert in employee benefits with specialization in life insurance and health care plans. He testified that he would characterize the SDB as insurance. He compared the Government of Canada benefits to other large Canadian employers. He concluded that of those employers who choose to provide continuation of benefits at any level to employees beyond normal retirement, virtually all will restrict benefits because of the cost and also because, “As individuals progress through their typical life cycle, most accumulate assets and also reduce debt and/or expenses. As a result, younger employees typically have a greater need for insurance benefits. Therefore, plan sponsors seeking to allocate limited resources in an optimum fashion would concentrate the insurance protection within their plan in the area of greatest need, that is, among younger employees.” I conclude that the purpose of SDB is more important than what it is called.

[121] The SDB is a mandatory part of the employment package offered to all civil servants and members of the armed forces. But upon retirement the decision to continue coverage is optional. Most retirees continue the coverage because, according to Joan Arnold (the Director of Pension Legislation Development in the Pensions and Benefit section of the Treasury Board Secretariat), coverage is high and cheap compared to private plans. If the retired employee elects not to continue coverage, and thus not to pay the premiums, he or she will receive only the paid up basic coverage on death.

[122] The Attorney General contends, and I agree, that the SDB must be considered within its legislative framework. It is part of a package of employment benefits provided in Part II of the **PSSA**. The **PSSA** provides for a Survivor's Pension upon the plan member's death, which is generally one half of the plan member's unreduced pension. The **PSSA** provides for the *Public Service Health Care Plan* to provide health care coverage to plan members and their spouses and dependant children. The plan supplements the provincial and territorial health care plans and provides 80% reimbursement for extended health expenses. The **PSSA** also provides the *Public Service Dental Care Plan* which covers plan members as well as their spouses and dependants. The plan covers up to a tariff amount for a wide variety of dental procedures. Coverage for both the *Dental Care* and *Health Care* plans continues as long as the plan member is employed or receiving a pension benefit. The survivor spouses of plan members are also covered, provided the spouse is in receipt of a survivor benefit. Where a plan member dies leaving minor children, the surviving spouse is eligible for a Children's Allowance amounting

to one fifth of the plan member's pension. The plan also provides for a Student's Allowance payable to the children aged 18-25 of a deceased plan member. To be eligible, the child must be enrolled in full-time post-secondary education and must apply annually for the allowance. The Survivor's Pension and the Children's and Student's Allowances are all indexed annually to the cost of living.

[123] The Attorney General submits, and it is not disputed, that all the plaintiffs are the recipients of survivor's pensions provided by Parliament. The pensions are defined benefit plans, paying 50% of 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 pensions are an integrated and integral aspect of the employment relationship. Considering the entire package of benefits available to surviving spouses of any age, I conclude that the SDB is not intended to be a long term stream of income for older surviving spouses because their long term income security is guaranteed by the surviving spouse portion of their defined benefit pension plan.

[124] Joan Arnold testified, and it is not disputed, that information about the various pensions and benefits is distributed annually to government employees and pensioners and she has never received a letter complaining about the Reduction Provisions.

[125] Ms. Arnold also testified, and it is not disputed, that at the October 1, 1998, meeting of the Technical Committee studying reforms to the government of Canada pension plans the representative of the federal superannuates stated that they were

“not seeing any pressure to have the age reduction feature changed.” Similarly in earlier consultations in 1992 and again in 1999 no concern was voiced about the Reduction Provisions except for the 1992 statement by the Public Service Alliance. The 1992 statement by the Public Service Alliance was made in the context of increasing benefits to use up the substantial surplus. I conclude from this evidence that the various representative bodies of federal civil servants and members of the armed forces have not complained that the Reduction Provisions were discriminatory before this and the ***Margolis*** law suits were launched.

[126] The absence of complaints about the Reduction Provisions is important evidence that is relevant to the question of whether the law violates the human dignity of the plaintiffs. The absence of complaints suggests that very few SDB beneficiaries felt that their dignity was violated by the Reduction Provisions.

[127] On May 27, 1980, the Canadian Human Rights Commission issued a report on its review of the ***PSSA***. The Commission found that certain provisions in the ***Act*** and regulations contravened the ***Canadian Human Rights Act***, including the Reduction Provisions. In subsequent correspondence between the Commission and the Treasury Board, the Commission wrote:

You inquired on page 2 of the memorandum why coverage declined after age 60 under the Supplementary Death Benefit Plan. In part, the 10% per annum decrease in coverage is based on the assumption that by age 60, a public servant will have built up other benefits for his survivors, notably a surviving spouse’s allowance under the ***Public Service Superannuation Act***. The Death Benefit Plan is a companion benefit to the pension plan, and in its original design the general idea was that as credits increased under the pension plan, coverage would decrease under the insurance plan. The other major assumption made in setting the original policy was that in the majority of cases the need

for life insurance coverage declines after age 60. It is the presumption of needs based on age which is contrary to human rights legislation.

[128] There is in evidence a series of memoranda and reports including one in which the government acknowledges that the SDB does not comply with the **Canadian Human Rights Act**, R.S.C. 1985, c. H-6 but the government appeared undecided about how to remedy the problem. Ms. Arnold testified that various management personnel responsible for pension reform had some doubts about the correctness of the Canadian Human Rights Commission conclusions. It appears that no action was taken to propose amendments to conform with the report of the Commission.

[129] In June of 1982, Hart Clark wrote in a report to Treasury Board that the reason for the delay in implementing the changes was not because of any disagreement with the Human Right Commission. He said that he anticipated that the amendment would remove the Reduction Provisions so long as the participant was employed. This means that the Reduction Provisions would remain in place for retired participants.

[130] In the result, no action was ever taken to amend the plan owing to the concerns about its non-compliance with the **Canadian Human Rights Act**.

[131] In this action I am not required to decide if the Reduction Provisions violate the **Canadian Human Rights Act**.

[132] Courts should exercise caution when using human rights legislation to consider the content and applicability of **Charter** rights because of significant

differences in the requirements for the determination of rights. [*Miron v. Trudel*, [1995] 2 S.C.R. 418. See also *Gould v. Yukon Order of Pioneers, Dawson Lodge No. 1*, [1991] Y.J. No. 637, *Vriend v. Alberta*, [1994] 6 W.W.R. 414 (Alta. Q.B.), aff'd [1998] 1 S.C.R. 493, *Canada (Human Rights Commission) v. M.N.R. F.C.*, [2004] 1 F.C.R. 679].

[133] With respect to equality rights in particular, a significant distinction exists between human rights legislation and the **Charter**. While human rights legislation generally requires only that a distinction be made based on enumerated grounds for a finding of discrimination, the requirements of s. 15 of the **Charter**, at least since *Law v. Canada*, are more rigorous and more nuanced. In a s. 15 **Charter** analysis, the court is required to undertake a purposeful consideration of contextual factors, including the correspondence of the distinction to the needs and capabilities of the group or individual alleging discrimination. For this reason, I conclude that the fact the Canadian Human Rights Commission has found that the Reduction Provisions offend the **Canadian Human Rights Act** is not indicative of a violation of the **Charter**. The question before this court is whether the SDB violates the **Charter**. The test for infringement of the **Charter** is not the same as for a violation of the **Canadian Human Rights Act**.

[134] It is also interesting to note that most Provinces exclude age differentiation in employee insurance plans from the discrimination sections of the legislation.

[135] The **British Columbia Human Rights Code**, R.S.B.C. 1996, c. 210 states:

- 13(1) A person must not
- (a) refuse to employ or refuse to continue to employ a person, or
 - (b) discriminate against a person regarding employment or any term or condition of employment because of the race, colour, ancestry, place of origin, political belief, religion, marital status, family status, physical or mental disability, sex, sexual orientation or age of that person or because that person has been convicted of a criminal or summary conviction offence that is unrelated to the employment or to the intended employment of that person.
- (2) An employment agency must not refuse to refer a person for employment for any reason mentioned in subsection (1).
- (3) Subsection (1) does not apply
- (a) as it relates to age, to a bona fide scheme based on seniority, or
 - (b) as it relates to marital status, physical or mental disability, sex or age, to the operation of a bona fide retirement, superannuation or pension plan or to a bona fide group or employee insurance plan.
- (4) Subsections (1) and (2) do not apply with respect to a refusal, limitation, specification or preference based on a bona fide occupational requirement.

[136] Similar provisions are found in human rights legislation of the Provinces of Alberta, Saskatchewan, Manitoba, Ontario, Quebec, Nfld. and PEI. [*Alberta Human Rights, Citizenship and Multiculturalism Act*, R.S.A. 2000, c. H-14, s.7, *Saskatchewan Human Rights Code*, R.S.S., c. S-24.1, ss.15-16, *Manitoba Human Rights Code*, C.C.S.M. 1987, c. H175, s.15, *Ontario Human Rights Code*, R.S.O. 1990, c. H.19, s.22 & 25(2), *Quebec Charter of Human Rights and Freedoms*, R.S.Q., c. C-12, s.20.1, *Newfoundland Human Rights Code*, R.S.N.L.

1990, c. H-14, s.9, **Human Rights Act**, R.S.P.E.I. 1988, H-12, s.11.] There is not a similar provision in the **Canadian Human Rights Act** R.S.C. 1985, c. H-6 (see s. 20 and 22). I do think that the existence of these provisions in almost every province is a legislative recognition that age differentiation in insurance schemes is not considered discriminatory. I find the provincial human rights legislation is one factor weighing against a finding of discrimination.

[137] Part of the discrimination analysis includes consideration of whether the plaintiff group suffers from a pre-existing disadvantage, stereotyping, prejudice or vulnerability. In this case, the plaintiffs argue that older surviving spouses are disadvantaged compared to younger spouses. The plaintiff relies on the judgment in **Law v. Canada** where Iacobucci J. said "...those who are younger when they lose a spouse are more able to replace the income lost from the death of a spouse."(¶ 103,104)

[138] Part of the government's consideration of the entire benefit package payable to retired civil servants and members of the armed forces is the demographics of the public service. The evidence at this trial established that the average age of retirement for civil servants is 58 or 59 and that 50% retire before age 59. The average age of retirement from the armed forces is 45 after 25 years of service.

[139] The legislation includes consideration of the younger working public servants whose spouses may have to contend with an unexpected death. The surviving spouses of younger civil servants who die unexpectedly may not have a pension to rely upon. Essentially, the plaintiffs argue that the elderly are poor and therefore the

benefit does not meet their needs. But the SBD was never intended to provide income security for the aged. That is the purpose of Part 1 of the same **PSSA**, the pension provisions.

[140] The alleged discriminatory legislation must also be considered in the context of the advantages this plaintiff group has in comparison, not to the comparator group but to the universe of elderly persons. The plaintiffs tendered expert evidence of Professors Chaykowski and Forget in an effort to prove that elderly persons are a disadvantaged group and that the Reduction Provisions are a perpetuation of the poverty and discrimination suffered by the elderly. This contention must be examined in relationship to these plaintiffs and also in respect to the accuracy of the suggested proposition that the aged on average are poor when compared to the general population. The Attorney General submits that the plaintiffs ask this court to adopt a stereotype of the elderly living in poverty that is no longer applicable in Canadian society and certainly does not apply to the plaintiffs who are more advantaged than many other seniors. Prof. Chaykowski acknowledged that there is a 7 – 9% salary advantage in favour of Federal Government employees to comparable occupations in the private sector. He also noted that the federal government “wage advantage” is historic and increasing.

[141] The accuracy of the stereotype of elderly members of Canadian society living in poverty as alleged by the plaintiffs is called into question by evidence adduced by the Attorney General. Statistics Canada calculates that between 1983 and 1998 the number of single elderly Canadians who were considered to be living on a low income reduced from 47.9 to 21.3%. Median wealth for over age 65 Canadians rose

between 1984 and 1999 by 56%. No other demographic sector had a similar increase. None of the plaintiffs receive the Guaranteed Income Supplement because their incomes are too high.

[142] The plaintiffs also rely on the opinions of Professors Forget and Chaykowski for the proposition that the SDB does not correspond to the greater needs of the elderly because of the Reduction Provisions.

[143] Prof. Chaykowski is a labour economist.

[144] Prof. Chaykowski was asked by Mr. Arvay, counsel for the plaintiffs, to provide his opinion on the following questions: What in your opinion is the economic well-being of older persons, aged 65 – 85, as compared to the economic well-being of persons younger than that age group? Is the answer different for those aged 75 and over? Is the answer different if we focus on women?

[145] His answer to these questions was provided in his expert report tendered in evidence at trial. His “overall opinion” is that “the economic well-being of persons aged 65 and older, as compared to the economic well-being of persons younger than that age group, to be at most about the same and most likely less than that of younger persons, and I expect the economic well-being of seniors to decline at older ages.” He concluded that seniors aged 75 and older have assets that are substantially lower than seniors aged 65 to 74. In agreement with the Statistics Canada survey mentioned above he also concluded that the proportion of individuals age 65 and older living in low income has declined over recent years. He testified that the historical correlation between age and poverty has declined.

[146] He agreed that age 65 is the normal age of retirement. He acknowledged that his own group life insurance policy at Queen's University includes Reduction Provisions similar to those that are the subject of this litigation, which does underscore Mr. Argue's evidence that Reduction Provisions are commonplace in the private life insurance market. In respect to the economic well-being of the plaintiff group compared to the overall population Prof. Chaykowski testified that it would be hard to find a source of income more stable and more secure than the Government of Canada pension. As already noted he acknowledged that on average Government of Canada employees earn about 7 -9% more than equivalent workers in the private sector and that the same differential applies therefore to their pension income.

[147] I conclude from the plaintiffs' submissions that the purpose of Prof. Chaykowski's evidence was to prove that seniors suffer from a pre-existing disadvantage or stereotyping or are vulnerable owing to their low level of income and wealth, a necessary part of providing infringement of s. 15. Poverty cannot be assessed by income alone. Particularly with respect to seniors, wealth and expenditure levels must be considered. Prof. Chaykowski attempted to include considerations of wealth and expenditure levels in his assessment of the economic well-being of elderly Canadians. Putting the plaintiffs' case on its strongest footing, Prof. Chaykowski opined only that the economic well-being of the elderly is about "the same and most likely less than that of younger persons". I do not conclude from this evidence that elderly Canadians are economically disadvantaged on average compared to all other age groups. I do not conclude that the plaintiffs as a group are

economically disadvantaged compared to the comparator group or that they suffer from a negative stereo-typing related to their economic well-being compared to the comparator group. The choice of comparator group is problematic because that group includes all ages and one cannot, on the evidence before me, make any useful comparison between the economic well-being of the plaintiffs compared to all other age groups perhaps ranging in age from about 20 to 65. Furthermore, Prof. Chaykowski opined that there is a decline in economic well-being at advanced ages, that is the over-75 age group, however the task for this court in discrimination analysis is to compare the plaintiff class (as one group) to the comparator (as another group). The plaintiffs' expert evidence proved that within the plaintiff class there are very different levels of economic well-being.

[148] To illustrate the increase in wealth of the over-65 population relative to other segments of the population, I reproduce part of a table from a report titled "Wealth Inequality" published in February 2002. Prof. Chaykowski relied on data from this report. The Attorney General relies on this report.

Table 5: Median and average wealth by characteristics of the major income recipient, all families

Age	Average Wealth		
	1984	1999	Change
24 or younger	32,300	32,900	2.0
25 to 34	69,900	67,300	-3.8
Not a University graduate	62,600	49,800	-20.3
University Graduate	102,100	112,100	9.8

35 to 34	164,900	194,300	17.8
Not a University Graduate	153,200	156,000	1.8
University Graduate	218,700	312,300	42.8
35 to 44	137,600	151,900	10.4
45 to 54	202,400	247,800	22.4
55 to 64	210,300	303,900	44.5
65 or older	140,700	211,900	50.5

[149] In summary, I find the plaintiffs have not proven that the plaintiff class is less economically well-off than the comparator group, which is the entire under age 65 population.

[150] The plaintiffs rely on the evidence of Professors Forget and Chaykowski as proof of the proposition that the costs of last illness and death increase with age. In other words, the plaintiffs say, the whole notion that life insurance should decrease with age is illogical. They say that if the purpose of the SDB is to provide for the costs associated with last illness and death then the Reduction Provisions defeat that purpose. I have heard a great deal of evidence on this topic. It is important that the court hear evidence that places the legislation in context in order to decide if it is discriminatory. Part of that analysis is a consideration of the purpose of the legislation. However, it is not a part of the analysis of the constitutionality of the impugned legislation to question the wisdom of Parliament. This is what McLachlin J. said in *Gosselin* at ¶ 56, “The 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.” The evidence

that part of the benefit package is not generous as compared to other large employers and that the employer contribution to the SDB is less than industry average is irrelevant to my analysis.

[151] Prof. Forget is a health care economist. She calculated the health care costs incurred in the last six months of life and compared those costs across five age groups as follows:

AGE	INFORMAL CARE	TOTAL
35-44	\$0	\$4344
45-64	\$600	\$6193 - \$7503
65-74	\$2550	\$8614 - \$12269
75-84	\$5250	\$11511 - \$19036
85+	\$10800	\$18025 - \$33775

[152] I have reproduced her table for males. The table for females illustrates similar trends. Insofar as most of the plaintiffs are widows, it is the costs of the last illness of males that is most relevant. Prof. Forget defines informal care as the voluntary care that is usually provided by a spouse or other family member. The range of costs in this table is largely attributable to the difference between the cost of a public long term care facility as opposed to a private facility. She includes in her costs the cost of prescription drugs which for civil servants and members of the armed forces are largely covered by their employer-sponsored benefits or provincial pharmacare programs. She says that the reason that health care costs escalate with age is attributable to the multi-faceted nature of last illnesses of the elderly. The table reproduced above is not illustrative of costs that the plaintiff group would incur

because Prof. Forget did not examine the extended health plan available to the plaintiffs. She opined that generally the health of seniors in the 65 – 75 age group is excellent with no disability and the ability to live independently.

[153] To consider estimates of the cost of last illness and death one must add to Prof. Forget's calculations the costs of a funeral. CPP covers \$2500 for funeral costs and most of the plaintiffs who testified incurred funeral costs for their spouses in that range. Funeral costs can range upwards. The plaintiffs tendered evidence that a funeral can cost \$8500.

[154] I understand the point of this evidence to prove that the costs of last illness and death do in fact increase with age and particularly for the over-75 age group the costs may exceed the payment under the SDB, and therefore that the plaintiffs' say there is no correspondence between the needs of the plaintiffs and the benefit provided to them by the SDB. I note these are current costs and the current paid up benefit is \$10,000. I accept this evidence of Prof. Forget that the costs of last illness do increase with age. In particular costs of last illness and death increase quite dramatically in each decade over 65. I accept her calculations but not their applicability to the plaintiffs because of their coverage for prescription drugs and also for private duty nurses, and various medical services and equipment under the various provisions of the government of Canada benefit plans. Neither party attempted to recalculate Prof. Forget's figures based on the Government of Canada extended health and benefit plan. I accept that some plaintiffs may have incurred some costs not covered by the SDB or other coverage available to them, however I do not know the average quantum of these costs across the plaintiff group. It has not

been proven. Prof. Forget's calculations illustrate that there are very significant differentiations between the costs of last illness and death for each decade of life after age 65.

[155] The failure of legislation to fulfill its purpose may be a marker of a discriminatory effect but in this case I do not find that the legislation fails to meet its purpose. The design of the whole benefit package is a balancing exercise that takes into account the whole population of civil servants, and members of the armed forces. It is integrated with all the other benefits and also balances the interests of the public to ensure that the civil service is treated equitably but not over generously.

[156] In *Gosselin* at ¶ 31 McLaughlin J. said, "Age-based distinctions are a common and necessary way of ordering our society." McLaughlin J. also quoted, with approval, Prof. Hogg, "[e]ach individual of any age has personally experienced all earlier ages and expects to experience the later ages." (P.W. Hogg, *Constitutional Law of Canada* (loose-leaf ed.) vol. 2 at p. 52-54). As noted above age-based distinctions in group insurance are recognized in the human rights legislation mentioned above as necessary and not discriminatory. Although I conclude that the SDB is insurance, that is not determinative of the question of discrimination. The more important question is whether the purpose of the insurance corresponds with the needs of the beneficiaries, and I find that it does. It may do so imperfectly but there still is a correspondence between needs and the payment, when examined in the context of the other pensions and benefits to which the plaintiffs are entitled.

Four Contextual Factors

[157] I now return to the four contextual factors from the third stage of the *Law v. Canada* analysis to determine if the impugned law demeans the complainants dignity.

1. Pre-existing disadvantage, stereotyping, prejudice, or vulnerability experienced by the individual or group at issue.

[158] Much of the evidence I heard from Professors Forget and Chaykowski about poverty of the elderly was largely irrelevant to the plaintiff group because they, as a group, are better off than the statistical average. But even using the average income and wealth for elderly Canadians it can no longer be said that a majority of elderly Canadians are a disadvantaged group in Canada compared to all other age groups. I conclude that the plaintiffs have failed to prove that the elderly suffer from stereotyping, prejudice, or vulnerability based on their reduced income. The plaintiffs have failed to prove that, as a group, they suffer from pre-existing disadvantage, stereotyping, prejudice or vulnerability based on their economic well-being.

2. The correspondence, or lack thereof, between the ground or grounds on which the claim is based and the actual need, capacity, or circumstances of the claimant or others.

[159] The plaintiffs' argument is that the Reduction Provisions fail to take into account their actual situation. As I have already discussed the law must be examined in its full context. The reduction in the amount received by a surviving spouse is offset to some degree by the survivors' pension which does assure the

survivor spouse of a long term stream of income. There is not perfect correspondence between the fact that costs of last illness increase with age and the reducing nature of the SDB, but when combined with the entire benefit package including pension, dental, prescription, and extended health as well as the other universal government programs, I find the law does not fail to take into account the plaintiffs' actual situation.

3. The ameliorative purpose or effects of the impugned law upon a more disadvantaged person or group in society.

[160] I have found above that the SBD is life insurance. The very essence of group life insurance is the egalitarian nature of the cost and the coverage. Every member of the employee group pays the same cost and receives the same coverage. This has an ameliorative purpose for the younger members of the employee group in terms of coverage, and an ameliorative purpose for the older member of the group in terms of cost. As Ms. Arnold testified, the cost of comparable private coverage after age 65 is more than the plaintiffs' spouses were required to pay. The ameliorative purpose mentioned in *Law v. Canada* was probably not intended to capture the type of effects I mention here. But there is a parallel reasoning in that the effect of group life insurance benefits different people in different ways at different times in their life cycle.

4. The nature and scope of the interest affected by the impugned law.

[161] I would not characterize the disadvantage to the plaintiffs as severe. There was much testimony that they are more advantaged when considering the whole

package of employment benefits than other seniors. When compared to the comparator group, although they receive a lesser SDB they receive a greater survivor pension.

[162] Lastly I return to the third question posed in the *Law v. Canada* analysis.

CONCLUSION

Does the differential treatment discriminate?

[163] As mentioned above the purpose of s. 15(1) is to remedy the “imposition of unfair limitations upon opportunities, particularly for those persons or groups who have been subject to historical disadvantage, prejudice, and stereotyping” (*Law v. Canada* ¶ 42).

[164] The evidence that Ms. Arnold has never received a complaint from anyone about the Reduction Provisions, and her evidence about the absence of objection from employee groups, (other than one proposal that the Reduction Provisions be eliminated to use up the surplus) is indicative of an absence of evidence that the Reduction Provisions impact the dignity of the surviving spouses. None of the plaintiffs except E. B. and P.M. testified that they felt their dignity was infringed by the payment of the reduced amount.

[165] Mr. Arvay said in his closing submissions that I should strike down the Reduction Provisions in their entirety. In the alternative he said I should “read in” the Reduction Provisions so that in respect to the *PSSA* the Reduction Provisions would be triggered at the later of age 65 or retirement. Mr. Arvay explained his submission

by asserting that there is no stigma attached to losing some benefit on the basis of retirement but he said “There’s a horrible stigma attached to losing a benefit based on your age, particularly when you’re an elderly person and you think, well I need it as much as anybody else needs it.” He said also that if the benefits were cut off at retirement, then age could be used to extend benefits without violating the constitution.

[166] As already noted, the average age of retirement from the armed forces is 45 and for public servants the average age of retirement is 58.

[167] Consequently, if the SDB plan was amended in the manner contended for by Mr. Arvay, in his alternative argument, it is unlikely to have more than a negligible effect on Canadian Armed Forces personnel and a quite modest impact on public servants.

[168] However, Mr. Arvay’s argument on this point demonstrates to me that the premise of the plaintiffs’ case is flawed. Section 15 of the **Charter** is designed to redress substantive discriminatory violations of the **Charter**. The plaintiffs’ case was argued on the basis that the purpose of the SDB was to assist with the expenses associated with last illness and death of the plan participant and that the Reduction Provisions did not correspond with that purpose because the expenses increased, not decreased, with age. Amending the legislation in the manner contended for by Mr. Arvay would do nothing to redress this substantive complaint. I do not agree that a reasonable person would view these provisions as stigmatizing the surviving spouses.

[169] Moreover, the contextual analysis above proves that the Reduction Provisions operate within the context of a much larger employee benefit program which takes into account the need for a continuation of a stream of income and for coverage of medical expenses upon the death of the spouse.

[170] The purpose of the SDB varies somewhat as the covered 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 the purpose of the SDB is for the expenses associated with last illness and death. I conclude that the fact that the reduction means those costs may not be fully covered is not discrimination. It does not bear any of the hallmarks of discrimination as set out in the *Law v. Canada* analysis. I do not mean to say I am unsympathetic to the plight of the surviving widows who testified before me. Their loneliness and despair was quite apparent and understandable. The fact that they feel their loneliness and despair was compounded by the receipt of a reduced SDB does not fulfill the requirement of a claim based on a breach of the *Charter*. In my view, it is within the prerogative of Parliament to enact legislation that incorporated a plan of life insurance with the usual hallmarks of employee group insurance taking into account the competing interests of the various age groups and the public interest.

[171] I conclude that the Reduction Provisions do not treat the plaintiffs unfairly, taking into account all of the circumstances of the legislative framework of the impugned law. (*Law v. Canada* ¶ 53).

[172] The answer to the third certified question is no. It is therefore unnecessary to consider the remaining certified questions.

[173] The plaintiffs' claims in both actions are dismissed.

The Honourable Madam Justice Garson