Federal Court of Appeal

Cour d'appel fédérale

Date: 20130124

Docket: A-243-11

Citation: 2013 FCA 15

CORAM: **NADON J.A.**
DAWSON J.A.
STRATAS J.A.

BETWEEN:

CHRISTIAN MARTIN

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at Toronto, Ontario, on September 18, 2012.

Judgment delivered at Ottawa, Ontario, on January 24, 2013.

REASONS FOR JUDGMENT BY: NADON J.A.

CONCURRED IN BY: DAWSON J.A.
STRATAS J.A.

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REASONS FOR JUDGMENT

NADON J.A.

[1] In April 2009, Paula Critchley, the applicant's spouse, gave birth to twin girls. The issue underlying the questions which we must answer in this proceeding is whether the applicant and his spouse are both entitled to 35 weeks of parental benefits under the *Employment Insurance Act*, S.C. 1996, c. 23 ("the *Act*").

[2] Before us is an application for judicial review of a decision of an Umpire (Mr. Justice Zinn of the Federal Court), CUB 76899, dated May 31, 2011, which allowed the Canada Employment Insurance Commission's ("the Commission") appeal from a decision of the Board of Referees ("the Board") rendered on September 11, 2009.

[3] By its decision, the Board held that the applicant was qualified for a benefit period by virtue of subsection 12(4) of the *Act*. More particularly, the Board was of the view that the applicant was entitled to receive 35 weeks of parental benefits notwithstanding that his spouse had applied and been approved for 35 weeks of parental benefits. In so concluding, the Board reversed the Commission's determination that the applicant was not entitled to 35 weeks of parental benefits. On May 29, 2009, the Commission had written to the applicant explaining its decision in the following terms:

> We are writing to inform you that we cannot pay you parental employment insurance benefits as of April 26, 2009.
>
> This is because you have not proven that you are the parent who will be taking the 35 weeks of parental benefits for this birth. Your children's mother has applied for the 35 weeks of parental [benefits] and you have stated that you are agreeable to her being paid these benefits. I appreciate that you would like to be paid 35 weeks of parental benefits as well due to the fact that your wife gave birth to twins. But a multiple birth or multiple adoption, for purposes of employment benefits, is treated as a single birth or a single adoption.

[4] The Board also held that it had no jurisdiction to deal with the arguments raised by the applicant, and in the alternative, that in denying him the right to parental benefits, the provisions of the *Act* at issue infringed his rights under subsection 15(1) the *Canadian Charter of Rights and Freedom* ("the *Charter*").

[5] In allowing the Commission's appeal from the Board's decision, the Umpire held that the Board had erred in its interpretation of the relevant provisions of the *Act* and that subsection 2(1), and sections 7, 8, 12, and 23 of the *Act* did not infringe the applicant's rights under subsection 15(1) of the *Charter*. The Umpire was also of the view that the Board was correct in its determination that it had no jurisdiction to address the *Charter* issues raised by the applicant.

The Facts

[6] The facts are straightforward and are not disputed.

[7] In April 2009, the applicant and his spouse became parents of twin girls. On April 27, 2009, the applicant filed an application for parental benefits with the Commission, in which he indicated that he was claiming the maximum 35 weeks of benefits available for the care of his children. He further stated that he was employed by Natural Resources Canada and that he was taking parental leave for the period of April 24, 2009 to January 11, 2010. Nine days later, on May 6, 2009, the applicant further wrote to the Commission, requesting that his claim for parental benefits be considered separately from that made by his spouse, whose application for 35 weeks of parental benefits had already been approved by the Commission.

[8] As I have already indicated, the Commission wrote to the applicant on May 29, 2009, advising him that his application for 35 weeks of parental benefits could not be accepted because his spouse's application had already been approved, pointing out to the applicant that the *Act* treated multiple births and adoptions as single births and adoptions.

[9] Not satisfied with the Commission's response, the applicant appealed its decision to the Board which concluded that he and his spouse were separately entitled to 35 weeks of parental benefits under the *Act*. The Board began by stating the question it had to determine, namely, whether the applicant was disqualified for parental benefits for the care of the children because his spouse had already qualified for benefits for their care. The Board determined that the effect of paragraph 12(4)(b) of the *Act* was to limit a claimant to 35 weeks of benefits for the care of a child resulting from a single pregnancy, adding that "this subsection allows for a claim for each pregnancy, and not limited to only one pregnancy".

[10] However, in the Board's view, the combined effect of subsections 12(1) and 12(4) with paragraph 12(3)(b) of the *Act* was that each claimant, *i.e.*, the applicant and his spouse, could make a claim under paragraph 12(3)(b) because a benefit period had been established for each of them and that subsection 12(4) could not be read without reading in the word "to a claimant" at the end of the introductory sentence of the subsection. Consequently, the applicant could claim 35 weeks of parental benefits for one child and his spouse could claim 35 weeks for the other child. Thus, in the Board's view, "the parents' claims are limited to 35 weeks per claimant per child. Two claimants making separate claims for separate children are entitled to make separate 35 week claims".

[11] The Board's decision led to the Commission's appeal before the Umpire, whose decision is now before us in this judicial review application.

<u>The Umpire's Decision</u>

[12] The first issue which the Umpire addressed in his reasons was the interpretation of the *Act*. He began by highlighting the differing interpretations of the *Act* on which the respective positions of the parties depended, namely: in the case of the respondent, that the *Act* allowed 35 weeks of parental leave for each pregnancy, irrespective of the number of children resulting from that pregnancy; and, in the case of the applicant, that the *Act* allowed 35 weeks of parental leave for each child born of a pregnancy, with each parent entitled to a maximum of 35 weeks.

[13] The Umpire then stated that the applicant's interpretation was based on subsection 12(3) of the *Act*, whereas that of the respondent found its support in subsection 12(4). After reproducing both subsections, the Umpire opined that subsection 12(4) clearly supported the respondent's position that the maximum number of weeks of parental benefits allowable was 35 weeks, whether one or more children were born of a single pregnancy. In so concluding, the Umpire stated that he could not agree with the applicant's submission that it was implicit in subsection 12(4) that its purpose was to limit to 35 weeks the benefits payable <u>to a claimant</u> and that, hence, it did not constitute a cap on the benefits payable, irrespective of the number of claimants. In his view, the interpretation proposed by the applicant, which the Board had accepted, would require him to rewrite subsection 12(4) by adding the words "to a claimant" so that the introductory words of the subsection would read as follows: "The maximum number of weeks for which benefits may be paid <u>to a claimant</u>".

[14] As an additional reason for being unable to agree with the applicant's interpretation, the Umpire indicated that such an interpretation would also allow the parents of a single child to each take 35 weeks of parental leave. Thus, in the Umpire's view, "The 35-week maximum clearly

intended to apply to a single child would be eliminated given that subsection 12(4) would apply 'to a claimant', *i.e.* to each claimant individually. Thus, each parent of a single child would be entitled to 35 weeks." (Umpire's decision, page 8).

[15] In the Umpire's view, the *Act* could only be read as saying that each pregnancy gave rise to 35 weeks of parental benefits. The words "for the care of one or more new-born or adopted children as a result of a single pregnancy or placement", found in subsection 12(4), did not leave any doubt on the issue. The Umpire's reasoning on this point appears at page 9 of his decision, where he states:

> Contrary to the respondent's position, what the *Act* really says is that every pregnancy is "worth" 35 weeks. The words "one or more new-born or adopted children as a result of a single pregnancy" (emphasis added) make this clear. If paragraph 12(4)*(b)* was intended to simply limit the benefits payable for each child to 35 weeks, it would read "for the care of a new-born or adopted child is 35." While the pros and cons of the policy choice to grant the same amount of benefits to parents of "one or more" children may be debated, this is a debate properly left to Parliament. As a matter of statutory interpretation, the provisions of the *Act* are clear, and this cannot be changed by arguments relating to the additional burdens that may face the parents of twins.

[16] The Umpire then stated his disagreement with the applicant's submission that subsection 12(4) was there to make clear that the 35 weeks of parental care were available for every new pregnancy and not only once in a claimant's life. Rather, in his opinion, the limitation of 35 weeks of parental care made available by subsection 12(3) was available for each benefit period and, thus, available for a subsequent pregnancy upon establishment of a new benefit period.

[17] The Umpire concluded that part of his decision, at page 12, by stating that the applicant was not entitled to receive parental benefits for the children born in April 2009 because his spouse had

applied for 35 weeks of parental benefits, which application the Commission had approved, and that the applicant had consented to her receiving these benefits. Consequently, in the Umpire's view, the Board had wrongly interpreted the relevant provisions of the *Act* and its decision had to be set aside.

[18] The Umpire then turned to the question of whether the Board had jurisdiction to deal with the applicant's *Charter* arguments. In his view, the matter had already been settled by the Supreme Court of Canada in *Tétreault-Gadoury v. Canada (Canada Employment and Immigration Commission)*, [1991] 2 S.C.R. 22 ("*Tétreault-Gadoury*"), where the Court held that the Umpire and not the Board had jurisdiction to determine whether sections of the *Unemployment Insurance Act*, 1971, infringed upon the *Charter* and that he was bound to follow that decision. Further, he rejected the applicant's submission that the Supreme Court had reversed *Tétreault-Gadoury* in its recent decision of *R. v. Conway*, [2010] 1 S.C.R. 765 ("*Conway*"). He expressed his view as follows at page 17 of his decision:

> Further, given that the Supreme Court in *R. v. Conway* expressly referred to its previous decision in *Tétreault-Gadoury*, had it intended to reverse its finding there, it would have done so more clearly, even though the *Act* was not at issue in *Conway*. It did not, instead choosing to refer to the consolidation and merger of the existing law; in my view, [*sic*] is further evidence that the finding in *Tétreault-Gadoury* was not reversed. Moreover, the exercise in discerning legislative intent undertaken in *Tétreault-Gadoury* is not implicitly overruled by the principles articulated in *Conway*. There is nothing inconsistent between the Board not having jurisdiction to decide questions of law and the institutional inquiry into *Charter* jurisdiction provided for in *Conway*.

[19] The Umpire then turned to the applicant's *Charter* arguments and, more particularly, that subsection 2(1) and sections 7, 8, 12 and 23 of the *Act* infringed subsection 15(1) of the *Charter*.

[20] First, the Umpire reviewed the Supreme Court's decisions in *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143 ("*Andrews*"), *Law v. Canada*, [1999] 1 S.C.R. 497 ("*Law*"), and *R. v. Kapp*, [2008] 2 S.C.R. 483 ("*Kapp*"). More particularly, he drew attention to the Supreme Court's decision in *Kapp*, where the Court set out the applicable test for section 15 inquiries: *i.e.*, whether the law created a distinction based on an enumerated or analogous ground, and whether the distinction created a disadvantage by perpetuating prejudice or stereotyping.

[21] The Umpire then discussed the first part of the *Kapp* test. His examination of the relevant facts in the light of the Supreme Court's decisions in *Law, Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203, *Andrews*, *Delisle v. Canada (Deputy Attorney General)*, [1999] 2 S.C.R. 989, *Miron v. Trudel*, [1999] 2 S.C.R. 14, and *Withler v. Canada (Attorney General*), [2011] 1 S.C.R. 396 ("*Withler*"), led him to conclude that "[b]eing the parent of twins is an immutable personal characteristic; this appears to be sufficient to establish this status as an analogous ground of discrimination" (Umpire's decision, page 24).

[22] He then turned his attention to whether a distinction had been made on the basis of the applicant's immutable personal characteristic. He answered that question by concluding that the scheme of the *Act* drew a distinction between the parents of twins and other parents. He reasoned as follows at pages 29 and 30:

> Here, by assigning benefits based on "a single pregnancy", the scheme fails to take into account the true characteristics of the parents of twins because their "single pregnancy" results in double the number of children without any increase in benefits. This, in effect, is a distinction.

[23] He then addressed the second part of the *Kapp* test, and asked himself whether the distinction created a disadvantage by perpetuating prejudice or stereotyping. The Umpire concluded that it did not.

[24] In reaching that conclusion, the Umpire analysed the four contextual factors which the Supreme Court in *Law* and *Kapp* set forth as aids to determine whether the distinction created a disadvantage which perpetuated prejudice or stereotyping, namely: (a) pre-existing disadvantage of the claimant; (b) the needs, capacities and circumstances of the claimant and other groups; (c) whether the benefit has an ameliorative effect for a more disadvantaged group; and (d) the nature of the interest affected.

[25] With regard to the first contextual factor, the pre-existing disadvantage of the claimant, the applicant argued that there was strong evidence that treating the birth of twins and the birth of a single child identically for the purposes of parental benefits perpetuated a distinction and disadvantage. The Umpire disagreed with this submission. In his view, although parental benefits constituted a recognition that children require a period of care following their birth, the purpose of the *Act* was to provide temporary partial income replacement to a claimant when there was an interruption of earnings due to the birth or placement of a child, adding that what was insured were the earnings of a claimant, and that it was the parents who received the benefits, not the child or children.

[26] The Umpire noted that the scheme of the *Act* did not consider the burden or difficulty of a particular birth, in that it allowed a claimant a number of weeks of benefits, irrespective of "the

amount of care a child or children will require" (Umpire's decision, page 32). In other words, the Umpire was satisfied that the *Act* sought to address the need felt by parents to stay at home with a child or children after the birth by providing them with benefits to compensate an interruption of earnings while they cared for their children. At page 32 of his decision, the Umpire stated:

> There is no evidence that parents of twins are subject to unfair treatment in society by virtue of the fact that they are parents of twins or that they are not given equal concern, consideration or respect. The fact that caring for twins may involve more work than caring for a single newborn does not prove historical disadvantage that perpetuates prejudice and stereotyping. There is certainly no evidence, in the context of the *Act*, that parents of twins have experienced historical disadvantage, stereotyping, vulnerability or prejudice caused by their being parents of twins.

[27] The Umpire then turned to the second *Kapp* factor, *i.e.*, the correspondence between the grounds and the claimant's actual needs, capacity or circumstances. First, he stated that the main issue which had to be determined was whether the *Act* took into account the particular situation of those affected and, if it did, then it was less likely to rest on a stereotype.

[28] In his discussion, the Umpire examined subsections 23(4) and 23(5) of the *Act*, and noted that there was sufficient flexibility in the *Act* to address the needs and circumstances of most claimants. In particular, he pointed to the fact that under subsection 23(4), parents could divide the weeks of parental benefits, as long as the 35-weeks per single pregnancy were not exceeded. The Umpire added that, similarly to the situation in *Canada (Attorney General) v. Lesiuk*, [2003] 2 F.C. 677, leave to appeal to the Supreme Court of Canada dismissed, 2003 SCCA 94, the matter before him was not one where an entire group or a significant portion of a group had been excluded from benefits, but rather, "that <u>some</u> claimants should receive <u>more</u> benefits than others by virtue of the fact that they are parents of twins" (Umpire's decision, page 34).

[29] In the Umpire's view, considering the various circumstances that could arise in different families, it was not possible to devise a system of parental benefits whereby the needs of every family would be met. In his view, however, "[t]he flexibility inherent in the *Act* does accommodate, to some extent, the needs of parents of children who impose a relatively greater burden than other children, even though the scheme is not precisely attuned to Mr. Martin's situation" (Umpire's decision, page 34).

[30] As a result, the Umpire was of the view that the second factor was neutral in the circumstances.

[31] With regard to the third *Kapp* factor, *i.e.*, the ameliorative purpose or effects of the law or program, the Umpire was of the view that that factor was not relevant since the crux of the applicant's submission was that his group, parents of twins, was disadvantaged relative to others, and that there was "no other more relatively disadvantaged group that the *Act* targets" (Umpire's decision, page 35).

[32] Finally, the Umpire turned to the nature of the interest affected, the last contextual factor, and referred to the Supreme Court's decision in *Granovsky v. Canada (Minister of Employment and Immigration*, [2001] 1 S.C.R. 703 ("*Granovsky*"), where the Court indicated that the real question was not whether a claimant had been deprived of a financial benefit, but whether the deprivation promoted the view that persons with temporary disabilities are 'less capable, or less worthy of recognition or value as human beings or, as members of Canadian society, equally deserving of concern, respect and consideration (*Granovsky*, paragraph 58).

[33] This led the Umpire to state that the only interest affected in the present matter was of an economic nature, adding that the applicant had not succeeded in showing that the denial of benefits "has affected his access to fundamental institutions or a basic aspect of his full membership in Canadian society" (Umpire's decision, page 36). Consequently, the applicant's economic interests did not result in discrimination. The Umpire's rationale appears at page 36 of his decision, where he states:

> The real issue in this case is the fact that the *Act* does not entitle Mr. Martin and his spouse to receive twice as many weeks of parental benefits as the parents of a single child. Contrary to what he submits, he was not excluded from the parental benefits scheme. Rather, he simply chose not to avail himself of the parental benefits so that his spouse could receive the maximum amount of benefits available. I find that the denial of an additional 35 weeks of parental benefits does not result in a denial of access to a fundamental social institution nor does it constitute a complete non-recognition of a group.

[34] In considering the above four factors, the Umpire pointed out that he had kept in mind the Supreme Court's admonition in *Kapp* that the contextual factors were not to be rigidly applied as they were simply aids useful in determining whether a distinction resulted in discrimination. Whether one approached the matter from the perspective of a demeaning of dignity, as in *Law*, or whether one approached the issue, as in *Andrews* and *Kapp*, by determining whether the distinction created a disadvantage through the perpetuation of prejudice or stereotyping, there could be no doubt, in the Umpire's opinion, "… that discrimination necessarily entails some offence to the way a group is treated in society. Courts must determine whether a distinction impairs the substantive equality section 15 protects" (Umpire's decision, page. 37).

[35] The Umpire then stated his view that the applicant had not shown that the *Act* and the scheme contained therein offended the *Charter*'s promise of substantive equality. He explained his position as follows, at pages 37 and 38:

> The employment insurance scheme does not fail to recognize the concern, respect and consideration due to the parents of twins as members of Canadian society. Although Mr. Martin has presented evidence of the burdens occasioned by the birth of his children, the fact that the *Act* does not grant his family double benefits falls short of demonstrating that the scheme suggests he is less worthy of respect. The importance of context, recognized as a core part of the section 15 analysis at para. 43 of *Withler*, cannot be overstated here. Mr. Martin has failed to demonstrate that the parents of twins have faced or do face historical disadvantage, prejudice or stereotyping in Canadian society. Looking to other factors, the financial interest affected here does not impair Mr. Martin's full participation in all fundamental aspects of Canadian society, and the benefits to which the Martin-Critchley family are entitled, although not precisely corresponding to their enhanced needs as parents of twins, do include them to a significant extent in the employment benefit scheme. From the perspective of a reasonable person in Mr. Martin's position, and considering all of the factors discussed above, it simply cannot be said that the employment insurance scheme perpetuates prejudice and stereotyping.

[36] The Umpire then went on to emphasize that not every distinction in treatment at law amounted to a violation of section 15. He reasoned as follows at page 38 of his decision:

> … The classifying of individuals and groups, the implementation of different provisions respecting such groups, and the application of different rules, regulations, requirements and qualifications to different persons is necessary for the governance of modern society. The Supreme Court and the Federal Court of Appeal have held that complex social benefits programs, such as the employment insurance program, often make distinctions in order to deliver these programs properly, and that Parliament must be accorded some flexibility in the extension of social benefits. It is entirely legitimate for the government to make choices in the allocation of benefits and it should be permitted a degree of latitude in so doing, as it is an exercise which is almost bound to seem arbitrary to those falling on the wrong side of the line (citations omitted).

[37] Finally, relying on the Supreme Court's decision in *Withler*, the Umpire pointed out that policy considerations could be a relevant factor in regard to the second part of the *Kapp* test, noting

that the parental benefits allowed by the *Act* were not needs-based, in that the benefits were not the mirror reflection of the burden or difficulties imposed upon parents by a child's birth. The Umpire then added that the scheme put forward by Parliament was subject to the usual financial constraints faced by all government programs, and that the fact that the *Act* did not grant greater benefits to the parents of twins did not amount to a failure by Parliament to recognize the additional burden imposed upon parents of twins or triplets, since the *Act* was blind or neutral to the different burdens imposed by the birth of a child or children.

[38] The Umpire concluded his reasoning as follows at page 40:

> … The policy of the *Act* is to grant a set amount of parental leave benefits after birth regardless of need or burden imposed. As such, it cannot reasonably be construed as making any suggestion as to the concern, respect and consideration that the parents of twins deserve.

<u>Relevant Legislation</u>

[39] The relevant provisions of the *Act* and of the *Employment Insurance Regulations*, SOR/96-352 ("*Regulations*"), read as follows:

The *Act*	**La *Loi***
12. (1) If a benefit period has been established for a claimant, benefits may be paid to the claimant for each week of unemployment that falls in the benefit period, subject to the maximums established by this section.	12. (1) Une fois la période de prestations établie, des prestations peuvent, à concurrence des maximums prévus au présent article, être versées au prestataire pour chaque semaine de chômage comprise dans cette période.
(2) The maximum number of weeks for which benefits may be paid in a benefit period because of a reason other than those mentioned in subsection (3) shall be determined in accordance with the table in Schedule I by reference to the regional rate of unemployment that	(2) Le nombre maximal de semaines pendant lesquelles des prestations peuvent être versées au cours d'une période de prestations — à l'exception de celles qui peuvent être versées pour l'une des raisons prévues au paragraphe (3) — est déterminé selon le tableau de

applies to the claimant and the number of hours of insurable employment of the claimant in their qualifying period.

l'annexe I en fonction du taux régional de chômage applicable au prestataire et du nombre d'heures pendant lesquelles il a occupé un emploi assurable au cours de sa période de référence.

(3) The maximum number of weeks for which benefits may be paid in a benefit period
(a) because of pregnancy is 15;
(b) because the claimant is caring for one or more new-born children of the claimant or one or more children placed with the claimant for the purpose of adoption is 35;
(c) because of a prescribed illness, injury or quarantine is 15; and
(d) because the claimant is providing care or support to one or more family members described in subsection 23.1(2), is six.

(3) Le nombre maximal de semaines pendant lesquelles des prestations peuvent être versées au cours d'une période de prestations est :
a) dans le cas d'une grossesse, quinze semaines;
b) dans le cas de soins à donner à un ou plusieurs nouveau-nés du prestataire ou à un ou plusieurs enfants placés chez le prestataire en vue de leur adoption, 35 semaines;
c) dans le cas d'une maladie, d'une blessure ou d'une mise en quarantaine prévue par règlement, quinze semaines;
d) dans le cas de soins ou de soutien à donner à un ou plusieurs membres de la famille visés au paragraphe 23.1(2), six semaines.

(4) The maximum number of weeks for which benefits may be paid
(a) for a single pregnancy is 15; and
(b) for the care of one or more new-born or adopted children as a result of a single pregnancy or placement is 35.

(4) Les prestations ne peuvent être versées pendant plus de 15 semaines, dans le cas d'une seule et même grossesse, ou plus de 35, dans le cas de soins à donner à un ou plusieurs nouveau-nés d'une même grossesse ou du placement de un ou plusieurs enfants chez le prestataire en vue de leur adoption.

(4.01) If a claim is made under this Part in respect of a child or children referred to in paragraph (4)(b) and a claim is made under section 152.05 in respect of the same child or children, the maximum number of weeks of benefits payable under this *Act* in respect of the child or children is 35.

(4.01) Si une demande de prestations est présentée au titre de la présente partie relativement à un ou plusieurs enfants visés au paragraphe (4) et une demande de prestations est présentée au titre de l'article 152.05 relativement au même enfant ou aux mêmes enfants, les prestations prévues par la présente loi relativement à celui-ci ou à ceux-ci ne peuvent être versées pendant plus de

trente-cinq semaines.

…

[…]

(8) For the purposes of this section, the placement with a major attachment claimant, at the same or substantially the same time, of two or more children for the purpose of adoption is a single placement of a child or children for the purpose of adoption.

(8) Pour l'application du présent article, le placement auprès d'un prestataire de la première catégorie, au même moment ou presque au même moment, de deux enfants ou plus en vue de leur adoption est considéré comme un seul placement d'un ou plusieurs enfants en vue de leur adoption.

…

[…]

23. (1) Notwithstanding section 18, but subject to this section, benefits are payable to a major attachment claimant to care for one or more new-born children of the claimant or one or more children placed with the claimant for the purpose of adoption under the laws governing adoption in the province in which the claimant resides.

23. (1) Malgré l'article 18 mais sous réserve des autres dispositions du présent article, des prestations sont payables à un prestataire de la première catégorie qui veut prendre soin de son ou de ses nouveau-nés ou d'un ou plusieurs enfants placés chez lui en vue de leur adoption en conformité avec les lois régissant l'adoption dans la province où il réside.

(2) Subject to section 12, benefits under this section are payable for each week of unemployment in the period
(a) that begins with the week in which the child or children of the claimant are born or the child or children are actually placed with the claimant for the purpose of adoption; and
(b) that ends 52 weeks after the week in which the child or children of the claimant are born or the child or children are actually placed with the claimant for the purpose of adoption.

(2) Sous réserve de l'article 12, les prestations visées au présent article sont payables pour chaque semaine de chômage comprise dans la période qui :
a) commence la semaine de la naissance de l'enfant ou des enfants du prestataire ou celle au cours de laquelle le ou les enfants sont réellement placés chez le prestataire en vue de leur adoption;
b) se termine cinquante-deux semaines après la semaine de la naissance de l'enfant ou des enfants du prestataire ou celle au cours de laquelle le ou les enfants sont ainsi placés.

…

[…]

(4) If two major attachment claimants

(4) Si deux prestataires de la première

are caring for a child referred to in subsection (1), or one major attachment claimant and an individual who claims benefits under section 152.05 are both caring for a child referred to in that subsection, weeks of benefits payable under this section, under section 152.05 or under both those sections, up to a maximum of 35 weeks, may be divided between them.

catégorie prennent soin d'un enfant visé au paragraphe (1) — ou si un prestataire de la première catégorie et un particulier qui présente une demande de prestations au titre de l'article 152.05 prennent tous deux soin d'un enfant visé à ce paragraphe —, les semaines de prestations à payer en vertu du présent article, de l'article 152.05 ou de ces deux articles peuvent être partagées entre eux, jusqu'à concurrence d'un maximum de trente-cinq semaines.

(4.1) For greater certainty, if, in respect of the same child, a major attachment claimant makes a claim for benefits under this section and another person makes a claim for benefits under section 152.05, the total number of weeks of benefits payable under this section and section 152.05 that may be divided between them may not exceed 35 weeks.

(4.1) Il est entendu que dans le cas où un prestataire de la première catégorie présente une demande de prestations au titre du présent article et où un particulier présente une demande de prestations au titre de l'article 152.05 relativement au même enfant, le nombre total de semaines de prestations à payer au titre du présent article et de l'article 152.05 qui peuvent être partagées entre eux ne peut dépasser trente-cinq semaines.

…

[…]

152.05 (1) Subject to this Part, benefits are payable to a self-employed person to care for one or more new-born children of the person or one or more children placed with the person for the purpose of adoption under the laws governing adoption in the province in which the person resides.

152.05 (1) Sous réserve de la présente partie, des prestations doivent être payées à un travailleur indépendant qui veut prendre soin de son ou de ses nouveau-nés ou d'un ou plusieurs enfants placés chez lui en vue de leur adoption en conformité avec les lois régissant l'adoption dans la province où il réside.

…

…

(15) If a self-employed person makes a claim under this Part and another person makes a claim under section 22 or 23 in respect of the same

(15) Si un travailleur indépendant présente une demande de prestations au titre de la présente partie et qu'une autre personne présente une demande

child or children and one of them has served or elected to serve their waiting period, then

(a) if the self-employed person is not the one who served or elected to serve the waiting period, the self-employed person is not required to serve a waiting period; or

(b) if the person making the claim under section 22 or 23 is not the one who served or elected to serve the waiting period, the person may have his or her waiting period deferred in accordance with section 23.

…

de prestations au titre des articles 22 ou 23 relativement au même enfant ou aux mêmes enfants et que l'un d'eux a purgé son délai de carence ou a choisi de le purger, les règles suivantes s'appliquent :

a) dans le cas où le travailleur indépendant ne l'a pas purgé ou n'a pas choisi de le purger, il n'est pas tenu de le faire;

b) dans le cas où la personne qui présente une demande de prestations au titre des articles 22 ou 23 ne l'a pas purgé ou n'a pas choisi de le purger, elle peut faire reporter cette obligation en conformité avec l'article 23.

…

152.09 (1) If an individual qualifies for benefits under this Part as a self-employed person and for benefits under Part I as an insured person, the individual may receive benefits under one Part only and, to do so, the individual must, in the prescribed manner, at the time of making an initial claim for benefits, elect under which Part benefits are to be paid.

(2) The election is binding on the individual in respect of the initial claim for all benefits payable, for any of the following reasons, during the benefit period established in relation to the initial claim:

(a) pregnancy;

(b) caring for one or more new-born children of the self-employed person, or one or more children placed with the self-employed person for the purpose of adoption;

(c) a prescribed illness, injury or quarantine; and

(d) providing care or support to one or

152.09 (1) S'il remplit les conditions requises pour recevoir des prestations à la fois à titre de travailleur indépendant au titre de la présente partie et d'assuré au titre de la partie I, un particulier ne peut les recevoir qu'au titre d'une seule de ces parties et doit choisir, selon les modalités réglementaires, au moment de présenter sa demande initiale, la partie aux termes de laquelle les prestations seront versées.

(2) Le choix lie le particulier à l'égard de la demande initiale pour toutes les prestations qui doivent lui être payées, pour les raisons ci-après, au cours de la période de prestations établie à l'égard de cette demande :

a) grossesse;

b) soins à donner par le travailleur indépendant à son ou ses nouveau-nés ou à un ou plusieurs enfants placés chez celui-ci en vue de leur adoption;

c) maladie, blessure ou mise en quarantaine prévue par règlement;

d) soins ou soutien à donner à un ou

more family members.

plusieurs membres de sa famille.

The Regulations

76.21 (1) Subsection (2) applies in respect of two persons who are caring for the same child or children and who do not reside in the same province at the time the first one of them makes an application under section 22 or 23 of the *Act* or an application for provincial benefits.

(2) Subject to subsection (3), where one of the two persons referred to in subsection (1) has applied for and is entitled to receive benefits under section 23 of the *Act* (referred to in this section as "the claimant") and the other person has applied for and is entitled to receive provincial benefits (referred to in this section as "the provincial applicant"), unless they have entered into an agreement as to the number of weeks of such benefits they will each respectively apply for or there is a court order respecting the sharing of those weeks of benefits,
(a) if the number of weeks of benefits that the claimant would otherwise be entitled to receive under section 23 of the *Act* is an even number, the number of weeks of benefits payable to the claimant is half that number; and
(b) if that number is an odd number,
(i) where the claimant made the earlier application, one week of those benefits plus half of the remaining weeks of benefits is payable to the claimant, and
(ii) where the provincial applicant made the earlier application, half the number of weeks of benefits remaining, after deducting one week, are payable

Le Règlement

76.21 (1) Le paragraphe (2) s'applique aux personnes qui prennent soin du même enfant ou des mêmes enfants, mais qui ne résident pas dans la même province au moment où la première d'entre elles fait une demande de prestations en vertu des articles 22 ou 23 de la Loi ou une demande de prestations provinciales.

(2) Sous réserve du paragraphe (3), dans le cas où l'une des personnes visées au paragraphe (1) a demandé et est en droit de recevoir des prestations en vertu de l'article 23 de la Loi (ci-après appelée « prestataire ») et que l'autre personne a demandé et est en droit de recevoir des prestations provinciales (ci-après appelée « demandeur provincial »), à moins qu'il n'existe une entente sur le nombre de semaines de telles prestations que l'une et l'autre demanderont respectivement ou qu'il n'existe une ordonnance d'un tribunal sur le partage de ces semaines de prestations, le nombre de semaines de prestations à payer est établi de la façon suivante :
a) dans le cas où le nombre de semaines de prestations que le prestataire serait par ailleurs en droit de recevoir en vertu de l'article 23 de la Loi est un nombre pair, le prestataire a droit à la moitié des semaines de prestations;
b) dans le cas où ce nombre est impair :
(i) si le prestataire a fait le premier la demande, il a droit à une semaine de prestations en plus de la moitié des semaines qui restent,
(ii) si le demandeur provincial a fait le premier la demande, le

to the claimant.	prestataire a droit à la moitié des semaines de prestations qui restent après déduction d'une semaine.
(3) The maximum number of weeks of benefits that may be paid to the claimant under section 23 of the *Act* shall not be greater than the maximum number of weeks for which benefits may be paid under paragraph 12(3)(b) of the *Act*, less the number of weeks of provincial benefits that are paid to the provincial applicant, taking into account any weeks of provincial benefits that are paid at the accelerated rate referred to in subsection 76.19(2), if applicable.	(3) Dans tous les cas, le nombre maximal de semaines de prestations pouvant être versées au prestataire au titre de l'article 23 de la Loi ne peut excéder le nombre maximal de semaines prévu à l'alinéa 12(3)b) de la Loi moins le nombre de semaines de prestations provinciales qui ont été versées au demandeur provincial compte tenu, le cas échéant, des semaines de prestations qui sont versées selon le mode de versement accéléré visé au paragraphe 76.19(2).

<u>The Issues</u>

[40] This application for judicial review raises the following issues:

1. Whether the Umpire erred in concluding that the *Act* did not allow each parent of twins to receive 35 weeks of parental benefits.

2. Whether the Umpire was correct in determining that the Board did not have jurisdiction to decide *Charter* issues.

3. Whether the Umpire erred in determining that the parental benefit provisions of the *Act* did not infringe subsection 15(1) of the *Charter*.

4. If the Umpire erred in determining that the parental benefit provisions of the *Act* did not infringe subsection 15(1) of the *Charter*, whether the infringement was a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under section 1 of the *Charter*.

Analysis

[41] Before addressing the first issue, a few words concerning the applicable standard of review are in order.

[42] First, the parties are in agreement that with regard to *Charter* issues, the applicable standard is that of correctness and that the same standard applies to the question of whether the Board had jurisdiction to decide *Charter* issues. I see no reason to disagree with the position taken by the parties

[43] Second, with respect to the interpretation of the *Act*, the applicant submits that the issues are issues of law which are reviewable on a standard of correctness. In its Memorandum, the respondent, on the basis of the Supreme Court's recent decisions in *Canada (Human Rights Commission and Donna Mowat) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 S.C.R. 471, and *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654, asserted that the applicable standard was that of reasonableness. However, prior to the hearing of the application, the applicant, in view of this Court's decision in *Chaulk v. Attorney General of Canada*, 2012 FCA 190, abandoned the position taken in its Memorandum and conceded that the standard of review to be applied by this Court to the Umpire's interpretation of the provisions at issue is that of correctness.

[44] I now turn to the first issue.

A. The First Issue: Whether the Umpire erred in concluding that the Act did not allow each parent of twins to receive 35 weeks of parental benefits.

[45] The applicant submits that the Umpire erred in adopting a wrong approach to the interpretation of the provisions at issue. More particularly, the applicant says that the judge read paragraph 12(4)*(b)* of the *Act* out of context and without resort to proper principles of interpretation, *i.e.* without taking into account the entirety of the *Act* and the purpose thereof. In support of his view, the applicant refers us to *Sullivan on the Construction of Statutes*, 5th ed., at page 1, where the learned author says:

> Today there is only one principled approach, namely, the words of an *Act* are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the *Act*, the object of the *Act*, and the intention of Parliament.

The applicant also refers us to the Supreme Court of Canada's decision in *Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27, at paragraphs 20 to 23, where the Court adopted the above principle and further relied on section 10 of the *Interpretation Act*, R.S.C. 1985, c. I-21, which provides that every statute should be given a fair, large and liberal construction so as to ensure "the attainment of the object of the *Act* according to its true intent, meaning and spirit".

[46] As a consequence of his criticism of the Umpire's approach to the interpretation of the provisions at issue, the applicant says that a proper interpretation of the *Act* leads to the conclusion that he and his spouse are entitled to two parental leaves. First, the applicant sets out the underlying premise to his proposed interpretation, namely, that his interpretation is in accord with the *Act*'s purpose that recognizes legitimate interruptions of employment to care for children, in that it allows two eligible claimants who both interrupted their employment to care for their children to receive the same benefit as other dual-eligible claimants caring for two or more children and, in doing so,

promotes the needs of children, one of the key reasons for the existence of the parental leave benefits. The applicant further states that in ensuring that one child results in one parental leave claim and two or more children always results in two claims, his interpretation leads to a clear, consistent interpretation of the *Act* and best fulfills the purpose of parental leave, adding that contrary to the interpretation accepted by the Umpire, it gives effect to the whole of section 12 and Part I of the *Act*.

[47] I now turn to the applicant's specific views on the interpretation of the provisions at issue. He begins by making the point that paragraph 12(4)*(b)* of the *Act* is "a small piece of a much larger and complex benefits scheme" (Applicant's Memorandum, paragraph 32). First, he states that sections 6 to 11 establish the pre-conditions to the making of a parental leave claim, *i.e.*, working the required number of hours necessary to pay a sufficient amount of premiums during a qualifying period of approximately one year prior to an interruption of earnings. Once these conditions have been met, the applicant says that the *Act* establishes two overlapping but different periods during which parental benefits may be paid to a claimant, the first period being the 52-73 week benefit period found in sections 9 and 10 of the *Act*. The second period, which the applicant characterizes as being "a more amorphous period" (Applicant's Memorandum, paragraph 35), is that which is found at subsection 23(2) and entitled "Weeks for which benefits may be paid". According to the applicant, this period can differ from the first period as the start and length thereof is triggered by a number of factors, including the hospitalization of a child or a parent's service in the armed forces.

[48] This leads the applicant to assert that section 12, which sets out the benefits payable, begins to make sense when it is read with the two above distinct time periods in mind. More particularly,

the applicant says that section 12 should be read as providing a 35-week maximum benefit period to a claimant rather than in respect of a single pregnancy, adding that the purpose of paragraph 12(3)*(b)* is to limit a claimant to 35 weeks of parental benefits in his benefit period, while paragraph 12(4)*(b)* serves to limit a claimant to 35 weeks of benefits in a period during which parental benefits may be paid.

[49] The applicant then goes on to assert that since he and his wife are eligible claimants in their own right, each of them is individually subject to the maximums set out in subsections 12(3) and 12(4), which means that each of them has a 35-week claim maximum. The applicant says that "[t]wo claimants means two (2) claims, each with a maximum of 35 weeks" (Applicant's Memorandum, paragraph 39). Thus, in the applicant's view, reading the 35-week benefits maximums in subsections 12(3) and 12(4) as "claimant-centered" is consistent with the whole of section 12. According to the applicant, it necessarily follows that adding "the words of s. 12(1) right before those in sub-ss. 12(3) and 12(4) [which was clearly intended], the fact that sub-ss. 12(3) and 12(4) create 'per claimant' maximums becomes apparent" (Applicant's Memorandum, paragraph 41).

[50] The applicant further says that the interpretation that he is putting forward is consistent with the purpose and object of the *Act* and its parental benefits provisions. More particularly, he says that in considering the benefits maximums set out in subsections 12(3) and 12(4) as amounts payable per claimant, his interpretation is consistent with the claimant-focus purpose of providing claimants with amounts to supplement the incomes lost due to their interruption in earnings and that it is also

consistent with the social purpose of the *Act* inherent in supplementing a claimant's income when he or she interrupts work to care for children.

[51] The applicant makes the further point that the Umpire's interpretation of the *Act* "rises to the level of an absurdity" in that it results in only one parental leave being granted if two or more children are born from a single pregnancy, but two parental leaves being granted if there are two pregnancies or a pregnancy and an adoption. The applicant adds that Parliament cannot have created a singleton maximum in paragraph 12(4)*(b)* when it expressly addressed that situation in subsection 23(4). The applicant completes his reasoning by saying that the Umpire's determination that paragraph 12(4)*(b)* was intended to limit dual claimants to a single 35-week claim for a single child has the effect of assigning to paragraph 12(4)*(b)* a limitation already spelled out in subsections 23(4) and 23(4.1), adding that it cannot be assumed that Parliament created a singleton maximum in paragraph 12(4)*(b)* when it expressly addressed that situation in subsection 23(4).

[52] The applicant concludes his submissions on this issue by saying at paragraph 58 of his Memorandum:

> 58. Instead of this tautologous interpretation [the Umpire's interpretation], the Applicant's interpretation assigns meaning to s. 12(1) (the sub-ss. 12(3) and 12(4) maximums are per claimant), additional meaning to s. 12(3) (maximums per "benefit period"), additional meaning to s. 12(4) (maximums during the different s. 23 period post-birth when a parental leave claim can be made), and meaning to sub-ss. 23(4) and 23(4.1) (one shared 35 weeks leave claim where a singleton is born).

[53] In my view, the interpretation proposed by the applicant cannot be right as it flies in the face of Parliament's clear intention in enacting the provisions at issue. I cannot see any basis to conclude

that the Umpire's interpretation results from an error on his part. The Umpire's decision is the correct interpretation of the *Act*. I so conclude for the following reasons.

[54] I begin with an examination of sections 12 and 23 of the *Act* which are at the heart of these proceedings.

[55] Subsection 12(1) provides that benefits shall be payable to a claimant for each week of unemployment falling within a benefit period that has been established for the claimant. The availability of the benefits is subject to the maximums established by section 12. Of particular interest are the maximums set out in subsections 12(3) and 12(4).

[56] Paragraph 12(3)*(b)* provides that the maximum number of weeks for which benefits may be paid to a claimant, in a benefit period, for the care of one or more newborn children is 35. As to paragraph 12(4)*(b)*, it provides that the maximum number of weeks for which benefits may be paid for the care of one or more newborn children "as a result of a single pregnancy" is 35.

[57] I understand these provisions to mean the following. First, a claimant may receive, during a benefit period, benefits for a maximum period of 35 weeks for the care of one or more newborn children (paragraph 12(3)*(b)*). Benefit periods are established for an individual claimant and are thus claimant specific. Consequently, during that benefit period, paragraph 12(3)*(b)* limits to one period of 35 weeks the benefits that a mother or father, as individual and separate claimants, can receive for the care of children. This limit, however, is subject to a further limit found in paragraph 12(4)*(b)*.

Were it not for this limit, the applicant and his spouse would each be entitled to 35 weeks of parental benefits to care for their twins.

[58] Paragraph 12(4)*(b)* restricts or limits the period in which parental benefits may be paid for the care of one or more newborn children. That restriction is a maximum of 35 weeks for the care of all children born of a single pregnancy.

[59] I now turn to subsection 23(1) which provides that parental benefits will be available to major attachment claimants for the care of one or more newborn children of these claimants.

[60] Subsection 23(2) provides that, subject to section 12 of the *Act*, parental benefits payable under section 23 shall be payable in the period that commences with the week in which a child or children are born and ends 52 weeks after that week.

[61] Subsections 23(3) to 23(3.3) provide for exceptions to subsection 23(2) and provide for limited extensions of the 52-week period in which the parental benefits may be paid.

[62] Subsection 23(4) is of greater relevance to these proceedings. It addresses the situation where two major attachment claimants "are caring for a child referred to in subsection (1)", allowing them to divide between them up to 35 weeks for the care of their child or children, as the case may be.

[63] My understanding of section 23 is as follows. Benefits are available to a major attachment claimant to care for one or more newborn children and, where two major attachment claimants are caring for one or more newborn children of theirs, they may share up to 35 weeks of benefits which are to be divided between them. Thus, there can be no doubt that what the section is saying is that two parents who interrupt work to care for one or more newborn children are entitled to a maximum of 35 weeks of benefits which they may divide howsoever they please.

[64] When one reads sections 12 and 23 together, the only possible conclusion is that 35 weeks of parental benefits are available in respect of the child or children born of a single pregnancy. In other words, irrespective of the number of children born of a single pregnancy and irrespective of the number of claimants seeking benefits as a result of that pregnancy, the maximum number of weeks available is 35.

[65] The approach which I have taken here is the one taken by the Umpire. The applicant submits that this approach is unsatisfactory: the Umpire erred because he did not take into account the entirety of the *Act* and its purpose. In my view, that criticism is unfounded since the Umpire's interpretation is entirely consistent with the purpose of the parental benefits established by the *Act* and the nature of the employment scheme.

[66] An interruption of earnings occurs when a claimant has a reduction of earnings by more than 40% because he or she ceases to work, or reduces his or her work, to care for a child or children as described in subsection 23(1). Consequently, the purpose of the parental benefits is to compensate parents for the interruption of earnings which occurs when they cease to work or reduce their work

to care for a child or children. The scheme is clearly not driven by the needs of the parents or the number of children resulting from a pregnancy. The purpose thereof is clearly to compensate parents for the interruption of their earnings resulting from their taking time off to care for a child or children. Put another way, the *Act* provides to the parents temporary partial income replacement for 35 weeks. Other than the specific provisions of the *Act* which I have discussed hereinabove, there are other provisions of the *Act* which provide indicia that the Umpire arrived at the correct conclusion.

[67] First, there is subsection 12(8) of the *Act*. That provision provides, in unequivocal terms, that the placement with a major attachment claimant of two or more children for the purpose of adoption constitutes a single placement of a child or children for the purpose of adoption. In other words, the placement of two children with a claimant gives rise to a maximum benefit period of 35 weeks. Considering this clear enactment of Parliament's intent, it would be odd to construe subsections 12(3) and 12(4) as allowing each parent of twins to claim 35 weeks while, at the same time, the adoption of two or more children at the same time is treated as one placement for the purposes of section 12.

[68] Second, section 76.21 of the *Regulations* also supports the Umpire's interpretation. It sets out the maximum number of weeks of parental benefits payable under the *Act* where one person claims parental benefits under the *Act* and a second person claims similar benefits under provincial law. In that case, the benefits payable under the *Act* are limited to 35 weeks less the number of weeks of provincial benefits payable to the other parent under provincial law. Failing an agreement between the parents, subsection 76.21(2) provides the mechanism by which their dispute will be

settled. In any event, subsection 76.21(3) provides that the benefits payable to a claimant under section 23 “shall not be greater than the maximum number of weeks for which benefits may be paid under paragraph 12(3)(b) of the *Act*, less the number of weeks of provincial benefits that are paid to the provincial applicant [the other parent]”.

[69] Consequently, the *Act* makes it clear that in the case of separate claims being made under different regimes, the number of weeks during which parental benefits may be paid for the care of a child or children cannot exceed 35 weeks per single pregnancy.

[70] Finally, there is subsection 12(4.1) of the *Act*, which deals with claims for parental benefits for the care of a child or children made pursuant to sections 12 and 23, and a claim for the same child or children made pursuant to section 152.05, which allows self-employed persons to receive benefits for the care of one or more newborn children of that person. Subsection 12(4.1) makes it clear that in such a situation, no more than 35 weeks of benefits are payable under the *Act* in respect of the care of a child or children. Like paragraph 12(4)*(b)* of the *Act*, subsection 12(4.1) does not limit the maximum number of weeks payable “to a claimant”. Rather, like paragraph 12(4)*(b)*, the subsection must mean that the maximum limit of 35 weeks applies to situations where there is more than one claimant.

[71] When one considers all of these provisions together, there is only one possible conclusion: where, as here, two parents/claimants interrupt their earnings to care for their child or children, they cannot jointly receive more than 35 weeks in respect of children born of a single pregnancy. I am

therefore of the opinion that the provisions at issue do not allow for the payment of 70 weeks of benefits in the case of twins.

[72] Before concluding, I wish to address the applicant's argument that the intention of Parliament in enacting subsections 12(3) and 12(4) was to restrict to 35 weeks the maximum number of weeks "payable to a claimant". In other words, the applicant contends that paragraph 12(4)(b) of the *Act* should read as follows:

(4) The maximum number of weeks for which benefits may be paid **TO A CLAIMANT** … (b) for the care of one or more new-born or adopted children as a result of a single pregnancy or placement is 35.	12. (4) Les prestations ne peuvent être versées **À UN PRESTATAIRE** pendant… plus de 35, dans le cas de soins à donner à un ou plusieurs nouveau-nés d'une même grossesse ou du placement de un ou plusieurs enfants chez le prestataire en vue de leur adoption.

[73] More particularly, as I indicated earlier, the applicant argues that the *Act* establishes two periods of benefits, *i.e.* a benefit period under sections 9 and 10 of the *Act* and an amorphous period under subsection 23(2) and submits that, when these provisions are read together, section 12 can be read as allowing a 35-week benefits maximum to a claimant rather than in respect of a single pregnancy. The applicant further says that paragraph 12(3)*(b)* is intended to limit the claimant to 35 weeks of parental benefits in his benefit period, whereas paragraph 12(4)*(b)* is meant to limit a claimant to 35 weeks of benefits in a period during which parental benefits may be paid.

[74] In my view, that approach is an erroneous one.

[75] Although there can be no doubt that the benefit period established pursuant to sections 9 and 10 of the *Act* is specific to a claimant, the period in which parental benefits may be paid under subsection 23(2) is not. That period is tied to the birth of a child or children (see: subsection 23(2)). Therefore, even though two claimants can make a claim for parental benefits for the care of one or more children and each claimant must separately establish his or her own benefit period, the parental benefits that will be paid can only be paid during the period set out in subsection 23(2), regardless of when a claimant's benefit period commences and ends.

[76] I also cannot subscribe to the applicant's argument that a reading of subsection 12(1) makes the reading in of the words "to a claimant" inevitable in the reading of paragraph 12(4)*(b)*. I agree entirely with the Umpire that one would have to rewrite the provision in total disregard of Parliament's intention. In any event, subsections 12(4.1), 12(8) of the *Act* and section 76.21 of the *Regulations* make it apparent that the applicant's interpretation cannot be right. In the end, what the applicant is asking us to do is to, in effect, amend the legislation to achieve the purpose which the applicant says Parliament intended, *i.e.* to ensure a particular level of care based on the number of children born of a single pregnancy and on the individual needs of parents in caring for these children. In any event, even accepting that there may be a debate as to the true purpose of the *Act*, the purpose of the *Act* cannot override or displace Parliament's intent in enacting specific provisions of the *Act*. In *Barrie Public Utilities v. Canadian Cable Television Association*, 2003 SCC 28, [2003] 1 S.C.R. 476, Gonthier J., writing for the majority of the Supreme Court, said at paragraph 42:

> The consideration of legislative objectives is one aspect of the modern approach to statutory interpretation. Yet, courts and tribunals must invoke statements of legislative purpose to elucidate, not to frustrate, legislative intent. In my view, the CRTC relied on policy objectives to set aside Parliament's discernable intent as

> revealed by the plain meaning of ss. 43(5), s. 43 generally and the *Act* as a whole. In effect, the CRTC treated these objectives in power-conferring provisions. This was a mistake.

[77] I now turn to the second issue.

B. ***The Second Issue: Whether the Umpire was correct in determining that the Board did not have jurisdiction to decide Charter issues.***

[78] The Umpire held that the Board was correct in deciding that it had no jurisdiction to address the *Charter* issues raised by the applicant. In his view, the matter had been settled by the Supreme Court in *Tétreault-Gadoury* and he was bound by that decision. He further rejected the applicant's argument that the Supreme Court had reversed *Tétreault-Gadoury* in *Conway*.

[79] The applicant argues, as he did before the Umpire, that *Tétreault-Gadoury* is no longer good law in view of the Supreme Court's recent decisions and, in particular, that rendered in *Martin v. Nova Scotia (Worker's Compensation Board)*, 2003 SCC 54, [2003] 2 S.C.R. 504 ("*Martin*"). He says that in these cases, the Supreme Court "affirmed the practical benefits of having the tribunal most familiar with the statute and that hears the evidence and prepares the Record provide its views on the statute's constitutionality" (Applicant's Memorandum, paragraph 68).

[80] In support of his view, the applicant says that the Board does decide questions of law as it could not do its job otherwise, adding that in *Tétreault-Gadoury*, the Supreme Court stated that there were practical considerations favouring the granting of *Charter* jurisdictions to the Board. The applicant concludes by saying that since the Board has the power to determine questions of law, it has an obligation to consider his *Charter* arguments.

[81] The respondent disagrees. He submits that *Tétreault-Gadoury* remains good law and that the Umpire was correct in finding that he was bound by it. The respondent reminds us that the *Act* expressly gives the Umpire, not the Board, the power to decide questions of law, adding that Parliament could have corrected *Tétreault-Gadoury* by amending the *Act*, had that been its intention.

[82] Further, the respondent says the Supreme Court has continued, since *Tétreault-Gadoury*, to reaffirm the primacy of Parliament's intention. Although other tribunals operating under different statutory schemes may have *Charter* jurisdiction, that does not deter from the fact that in *Tétreault-Gadoury*, the Supreme Court clearly held that the Board did not have jurisdiction to decide *Charter* issues.

[83] In my view, the respondent is right. The Supreme Court's subsequent decisions have not expressly overturned *Tétreault-Gadoury*, even though clear opportunities to do so were given to it. I come to this view for the following reasons.

1. The Law Pre-Conway

[84] Before *Conway*, the courts applied different tests to consider the authority of administrative tribunals in relation to section 52 of the *Constitution Act* and subsection 24(1) of the *Charter*. As a result, I will focus on cases considering section 52 and omit those that focus on subsection 24(1), *e.g.*, *R. v. Mills*, [1986] 1 S.C.R. 863, in which it was decided that a judge sitting at a preliminary

hearing is not considered a court of competent jurisdiction for the issuance of a stay under subsection 24(1) of the *Charter*.

[85] The consideration of the section 52 administrative tribunal cases begins with the "Cuddy Chicks Trilogy" of *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 S.C.R. 570 ("*Douglas College*"), *Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)*, [1991] 2 S.C.R. 5 ("*Cuddy Chicks*"), and *Tétreault-Gadoury*. These cases addressed the question of whether or not the statute gave express power to the tribunal to consider questions of law. If the statute did not expressly grant that power, an implicit reading was insufficient to extend authority to make s. 52 determinations.

[86] The first case, *Douglas College*, considered whether a labour arbitrator, who had been appointed in accordance with the parties' collective agreement and whose actions were constrained by the framework of the *Industrial Relations Act*, R.S.B.C. 1979, c. 212, had the jurisdiction to consider the constitutionality of the collective agreement. The Supreme Court extended jurisdiction to the arbitrator, finding that there were clear advantages to allowing a tribunal that was empowered to consider law to truly consider all of the law. La Forest J. noted that: "it would be anomalous if tribunals responsible for interpreting the law on the issue were unable to deal with the issue in its entirety, subject to judicial review" (page 599 of *Douglas College*, quoted in *Conway* at paragraph 51). There were additional advantages recognized in bringing forward the issue at first instance, in the context in which it arose—the tribunal—as opposed to having to resort to a time-consuming, expensive process in the superior court system. Moreover, the specialized expertise of the tribunal and its familiarity with the record were seen as useful in assessing constitutional questions. As La

Forest J. explained: "specialized competence can be of invaluable assistance in constitutional interpretation" (page 605 of *Douglas College*, quoted in *Conway* at paragraph 51).

[87] The next case, *Cuddy Chicks*, extended the authority to determine constitutional questions to the Ontario Labour Relations Board. The reasoning relied on cases in which labour boards had been found to have jurisdiction to consider questions relating to their own jurisdiction. As La Forest J. wrote at page 19 of the decision:

> What these cases speak to is not only the fundamental nature of the Constitution, but also the legal competence of labour boards and the value of their expertise at the initial stages of complex constitutional deliberations. These practical considerations have compelled the courts to recognize a power, albeit a carefully limited one, in labour tribunals to deal with constitutional issues involving their own jurisdiction. Such considerations are as compelling in the case of *Charter* challenges to a tribunal's enabling statute. Therefore, to extend this "limited but important role" of labour boards to the realm of the *Charter* is simply a natural progression of a well established principle.

[88] Finally, *Tétreault-Gadoury* considered the very question that is before us in this case, *i.e.*, whether the Board was empowered by the *Unemployment Insurance Act, 1971* to consider questions of law. Given that the *Act* did not mention that power in its section on the Board, but did expressly provide that power to the Umpire, La Forest J. concluded that it did not have the authority to consider questions of law on the basis of the statutory interpretation maxim *expressio unius est exclusio alterius*. He explained his view as follows, at page 33:

> The maxim *expressio unius est exclusio alterius*, like all general principles of statutory interpretation, must be applied with caution. However, the power to interpret law is not one which the legislature has conferred lightly upon administrative tribunals, and with good reason. Although curial deference will not be extended to an administrative tribunal's holding on a *Charter* issue, such deference is generally applied to the interpretation of a statute within the tribunal's area of expertise, when the tribunal has been given the power to interpret law. It is unlikely, therefore, that the failure to provide the Board of Referees with a power similar to that given to the Umpire was merely a legislative oversight.

[89] La Forest J. also engaged with the idea that the right to answer questions of law was something that Parliament grants carefully and judiciously. Absent express legislative intent, it was not appropriate to conclude that tribunals were empowered to engage with and pronounce upon questions of law.

[90] Thus, the unifying theme in all three Cuddy Chicks cases was that express statutory jurisdiction to consider questions of law was required before a tribunal could begin engaging with a constitutional question.

[91] The departure point from this principle occurred in *Martin*, where the Supreme Court again considered when an administrative tribunal had jurisdiction to consider the validity of a constitutional provision. In its view, a tribunal that had the authority to interpret laws also had the related authority to assess whether those laws were constitutionally valid. If they were found to be invalid, the necessary result was that the tribunal had to decline to apply those laws. Yet, the tribunal did not have the power to declare laws to be invalid. Consequently, its decisions on constitutional questions would not be binding on subsequent tribunals.

[92] In *Martin*, the assessment of whether a tribunal had the authority to interpret laws was considered on a basis of either explicit or implied statutory authority. This broadened the law from how it was conceived of in the Cuddy Chicks trilogy. Gonthier J.'s analysis was animated by considerations of accessibility, *i.e.*, that Canadians should be able to assert their constitutional rights in accessible forums; and that reviewing courts would benefit from the analysis of the tribunal.

Judicial review would remain a possibility and be better informed by the special expertise of the tribunal accustomed to interpreting its own statute. This reasoning is not dissimilar from that of *Douglas College*.

2. *The Martin Test*

[93] In *Martin*, the Supreme Court enunciated a modified two-step test, which is:

> 1. Begin by asking whether the tribunal has the power to decide questions of law. If it does, this creates a presumption that it can answer questions of constitutional law per s. 52 of the *Constitution Act*.
>
> 2. Has the presumption been rebutted? (*e.g.*, express authority elsewhere in the *Act* or by necessary implication)

3. *How Conway Changed the Law*

[94] In *Conway*, the Supreme Court merged the subsection 24(1) and the section 52 inquiries into a single line of inquiry that considers the same foundational concepts in a unified approach. Under the framework developed in *Conway*, the relevant question remains whether a tribunal has the statutory authority to consider questions of law.

[95] As such, it does not serve as a true departure point from the earlier jurisprudence on questions of constitutional interpretation. It is more helpful in considering whether tribunals have authority to grant remedies under subsection 24(1). If anything, it seems to adopt reasoning very similar to that of *Martin*, thus collapsing any residual distinction in the different types of constitutional inquiry.

[96] The applicant argues that the Board has the ability to consider questions of law, despite the express statement to the contrary in *Tétreault-Gadoury*. In his view, the Supreme Court's inquiry into the authority of the tribunal to consider questions of law under s. 117 of the *Act* was unduly constrained by the manner in which it situated the inquiry. Given that *Tétreault-Gadoury* was decided in 1991, the approach which the Supreme Court took to these types of questions was different than it is today. The manner in which it approached the problem was coloured by the fact that elsewhere in the statute, there was a grant of explicit power to the Umpire to consider questions of law.

[97] The applicant further argues that this requirement of an express power limited the scope of the inquiry and should not remain a binding precedent. Moreover, the applicant asserts that the line of reasoning that has emerged from the Supreme Court since that time, including *Martin*, *Conway*, and *Doré v. Barreau du Québec*, 2012 SCC 12, has overtaken the rationale that won the day in *Tétreault-Gadoury*. In his view, the application of today's standard from *Martin*, which allows authority to consider questions of law to be drawn from either an express grant of statutory authority or an implied authority based on the whole of the statutory scheme, differently informs the Court and leads to the opposite result.

[98] I cannot agree. The nature of the inquiry is still based upon whether or not the tribunal has the authority to consider questions of law. It is only if that question is answered affirmatively that the shift in the jurisprudence has impact on the nature of the inquiry. If the statute bars the tribunal from considering questions of law, it is not relevant whether it can or should consider constitutional questions.

[99] As described above, the very question that the Supreme Court was asked to consider in *Tétreault-Gadoury* was whether the Board had the ability to consider questions of law. La Forest J. was unequivocal in answering this question in the negative. The statutory scheme clearly demarcated separate roles for the Board and the Umpire: the Board was not empowered to consider questions of law. Those questions were instead forwarded to the Umpire, appropriate particularly because Umpires are often judges or retired judges. Because the *Act* affirmatively gives this responsibility to the Umpire, and is silent on the role of the Board with respect to questions of law, the necessary conclusion is that the Board does not have this authority.

[100] Accordingly, the shift in jurisprudential reasoning advocated by the applicant does not come into play. These arguments are relevant only if it is first identified that a tribunal has the authority—either expressly or implicitly—to consider questions of law.

[101] In *Conway*, Abella J. reviewed the facts and findings of *Tétreault-Gadoury* and other case law on the authority of tribunals regarding constitutional questions. She discussed *Tétreault-Gadoury* at some length and did not move to expressly overturn the precedent it set. Moreover, discussion of *Tétreault-Gadoury* and subsequent cases constitutes the foundation for the statement she makes at paragraph 78:

> The jurisprudential evolution tends to the following two observations: first, that administrative tribunals with the power to decide questions of law, and from whom constitutional jurisdiction has not been clearly withdrawn, have the authority to resolve constitutional questions that are linked to matters properly before them. […]

[102] In my view, Abella J. was alive to the manner in which *Tétreault-Gadoury* informed the case law and she did not expressly overturn it. Her conclusion that only tribunals with the power to consider questions of law may answer constitutional questions rests equally on *Tétreault-Gadoury* as it does on other cases that were subsequently decided. If Abella J. indeed sought to change the law, she would and should, in my respectful view, have stated so expressly. This is especially true given the definitive way in which La Forest J. decided the issue in *Tétreault-Gadoury*:

> While this assessment of the comparative expertise or practical capability of the Board may well be correct, it cannot outweigh the intention expressed by the legislature to give the power to interpret law to the Umpire and not the Board of Referees. In other words, I find that, notwithstanding the practical capability of the Board of Referees, the particular scheme set up by the legislature in the Unemployment Insurance *Act*, 1971 contemplates that the constitutional question should more appropriately have been presented to the Umpire, on appeal, rather than to the Board itself.
>
> Applying the test set forth in Douglas College and Cuddy Chicks, I find that, while the Board of Referees had jurisdiction over the parties in this case, it did not have jurisdiction over the subject matter and the remedy. The subject matter before the Board concerned not simply the determination of the respondent's eligibility for benefits, but also the determination of whether s. 31 of the Unemployment Insurance *Act*, 1971 violated s. 15 of the *Charter*. Similarly, the remedy would have required the Board to disregard s. 31 when awarding the respondent benefits, assuming it found s. 31 to be inconsistent with the *Charter*. As I indicated above, under the legislative scheme described in the *Act*, such a determination rested within the jurisdiction of the Umpire, not the Board of Referees.

[103] It is trite law that the Supreme Court may overturn its precedents, especially given its recent discussion of *stare decisis* in *Canada v. Craig*, 2012 SCC 43 ("*Craig*"). In *Craig*, the Supreme Court considered a decision on appeal from this Court in which we declined to apply a binding Supreme Court precedent, *Moldowan v. Canada*, [1978] 1 S.C.R. 480 ("*Moldowan*"). This Court instead chose to follow its own decision in *Gunn v. Canada*, 2006 FCA 281, which, in diverging

from *Moldowan,* took into account the significant criticism that *Moldowan* had garnered from the tax bar. While the Supreme Court ultimately dismissed the appeal and took it upon itself to reverse *Moldowan*, this was not without comment that the Federal Court of Appeal should not have disregarded binding precedent. Rothstein J., for a unanimous court, wrote:

> [18] There is no doubt that Dickson J.'s interpretation of s. 13(1) in *Moldowan*, is a precedent binding on the Federal Court of Appeal and the Tax Court of Canada. While *Gunn* agreed with much of what Dickson J. wrote in *Moldowan*, on the crucial question of whether farming as a source of income could be subordinate to another source and still avoid the loss deduction limitation of s. 31(1), Gunn departed from *Moldowan*, a precedent binding on the Federal Court of Appeal.
>
> [19] One of the fallouts from *Gunn* is that it left the Tax Court of Canada and the Federal Court of Appeal itself in the difficult position of facing two inconsistent precedents and having to decide which one to follow. The uncertainty which the application of precedent is intended to preclude is seen in the decisions since *Gunn*, in which the Tax Court has acknowledged *Moldowan* as the leading case while also feeling bound to follow *Gunn: Stackhouse v. R.*, 2007 TCC 146, [2007] 3 C.T.C. 2402, *Falkener v. R.*, 2007 TCC 514, [2008] 2 C.T.C. 2231*, Loyens v. R.*, 2008 TCC 486, [2009] 1 C.T.C. 2547*, Johnson v. The Queen*, 2009 TCC 383, 2009 D.T.C. 1245, *Scharfe v. The Queen*, 2010 TCC 39, 2010 D.T.C. 1078, and *Turbide v. The Queen*, 2011 TCC 371, 2011 D.T.C. 1347. And of course the Federal Court of Appeal followed *Gunn* in the instant case.
>
> [20] It may be that Gunn departed from *Moldowan* because of the extensive criticism of *Moldowan*. Indeed, Dickson J. himself acknowledged that the section was "an awkwardly worded and intractable section and the source of much debate". Further, that provision had not come before the Supreme Court for review in the three decades since *Moldowan* was decided.
>
> [21] But regardless of the explanation, what the court in this case ought to have done was to have written reasons as to why *Moldowan* was problematic, in the way that the reasons in *Gunn* did, rather than purporting to overrule it.

> [22] The Federal Court of Appeal, on the basis of its prior decision in *Miller v. Canada (Attorney General),* 2002 FCA 370, 220 D.L.R. (4th) 149, in which that court reaffirmed the rule that it would normally be bound by its own previous decisions, followed *Gunn*, and not *Moldowan*. The application of *Miller* and the question of whether the Federal Court of Appeal should have followed *Gunn* simply did not arise, in view of the *Moldowan* Supreme Court precedent.
>
> [23] The Federal Court of Appeal's purported overruling of *Moldowan* does not, however, affect the merits of this appeal or the core question of whether *Moldowan* should in fact be overruled.

[104] Consequently, with respect to the contrary view, it is not up to us to overturn *Tétreault-Gadoury*, particularly where the Supreme Court, although given many opportunities to do so, has not overturned that decision. Also, I need not speculate as to whether the Supreme Court would decide *Tétreault-Gadoury* differently if it were given the opportunity today. *Tétreault-Gadoury* was decided in 1991 and remains binding precedent until the Supreme Court decides that it is no longer good law.

[105] For these reasons, I conclude that *Tétreault-Gadoury* remains good law and that, as a result, the Umpire made no error in determining that he was bound by it.

C. ***The Third Issue: Whether the Umpire erred in determining that the parental benefits provisions did not infringe subsection 15(1) of the Charter***

[106] The applicant argues that to the extent that the provisions at issue are read to contain a "per pregnancy restriction", they violate subsection 15(1) of the *Charter*.

[107] While agreeing with the Umpire that the first part of the *Kapp* test was met, *i.e.*, that the *Act* drew a distinction between a multiple birth and a two-child situation and that the distinction was based on the analogous ground of parental or family status, the applicant takes issue with the Umpire's determination with regard to the second part of the test.

[108] More particularly, he says that the Umpire disregarded the differential impact the *Act* had on parents of multiple birth children and the children themselves and how the parents and the children are affected by differential access to parental benefits, adding that the main cause of the differential impact was "the attention/presence (or lack thereof) from parents in their first year" (Applicant's Memorandum, paragraph 88). Thus, in the applicant's view, restricting the benefits available to parents of twins to those available to parents of a singleton birth leads to the aforesaid differential impact.

[109] The respondent takes the position that the Umpire was correct in concluding that the parental provisions of the *Act* were not discriminatory and thus did not infringe the appellant's *Charter* rights under subsection 15(1).

[110] More particularly, although critical of the Umpire's finding under the first part of the *Kapp* test that the *Act* created a distinction between parents of twins and others on the basis of parental or family status, the respondent says that the Umpire's determination under the second part of the test is faultless, *i.e.* that the Umpire concluded correctly that the parental benefits scheme of the *Act* did not perpetuate prejudice or stereotypes.

[111] In support of his submission, the respondent points to the purpose and objectives of the provisions of the *Act* at issue and says that when these provisions are examined in their proper light, it becomes apparent that the scheme does not violate subsection 15(1) of the *Charter*. Specifically, the respondent says that the benefits payable under the scheme are there to provide limited income support to claimants who are absent from the workforce to, *inter alia*, care for one or more children, emphasizing that there is no correlation between parental benefits and the number of children, the expenses associated with childcare, or the particular needs or circumstances of individual claimants. In other words, the *raison d'être* of the scheme set out in the *Act* is to provide to claimants temporary partial replacement of their income on the basis of uniform eligibility and entrance requirements.

[112] In my opinion, the Umpire made no error in determining, under the second part of the *Kapp* test, that the distinction made by the *Act* between the parents of twins and others did not create a disadvantage by perpetuating prejudice or stereotyping. Consequently, I need not address the respondent's criticism of the Umpire's finding under the first part of the test. As I substantially agree with the reasons given by the Umpire (which I have set out at some length in these Reasons), I will only address a number of specific points raised by the applicant. In all other respects, I adopt the Umpire's reasons.

[113] In order to answer the question of whether the distinction made by the *Act* created a disadvantage by perpetuating prejudice or stereotypes, the Umpire considered the four contextual factors which the Supreme Court enunciated in *Law* and *Kapp*. With regard to the first factor, he found that the parents of twins had not experienced pre-existing disadvantage, stereotyping,

vulnerability or prejudice. The applicant argues that parents of multiple birth children feel isolated, are isolated, receive little by way of public support compared to the majority of parents, and assume an enormous financial and emotional responsibility; "these are the classic marks of a discrete and insular minority" (Applicant's Memorandum, paragraph 111).

[114] The applicant further says that parents like him and his spouse, in addition to sharing the hardship suffered by all parents of newborn children, suffer additional hardship by reason of a multiple birth and, hence, that this group, this minority, "is particularly vulnerable before and after childbirth" (Applicant's Memorandum, paragraph 113), more so because they experience higher pre-term issues, additional medical problems, increased parental depression and stress, and lower levels of cognitive ability or social skills in the case of the children. Consequently, in the applicant's submission, the parents of twins must inevitably leave their work temporarily to provide a reasonable level of care for their children. In the applicant's view, he and his spouse were "forced to choose between serious potential problems for their children or the income they desperately need to raise their children" (Applicant's Memorandum, paragraph 113).

[115] Thus, the applicant asserts that parents of multiple birth children suffer from pre-existing disadvantage and vulnerability and that, in not specifically addressing their interests, the *Act* sends a strong signal that the law perpetuates prejudice through disadvantage.

[116] I cannot agree. The essence of the Umpire's determination, with which I agree entirely, is that there was no evidence demonstrating that parents of twins were subject to unfair treatment in society and that they had consequently experienced historical disadvantage, stereotyping,

vulnerability or prejudice based on their status. To this I would add that although the care of twins or, for that matter, any other multiples, necessarily involves more work than caring for a single child, it does not establish the kind of historical disadvantage that perpetuates prejudice or stereotyping as contemplated by the Supreme Court in *Law*.

[117] In my view, as the Umpire correctly pointed out, the scheme of the *Act* was not intended to address the particular burdens or difficulties experienced by parents, but rather it was concerned with compensating parents for the interruption of their earnings resulting from their taking time off to care for their children. There is no basis whatsoever to assert, as the applicant does, that his group suffers from pre-existing disadvantage and vulnerability and that the scheme of the *Act* sends a message which perpetuates prejudice through disadvantage.

[118] I now turn to the second contextual factor, *i.e.*, the relationship between the grounds upon which the claim was based and the actual needs, capacity or circumstances of the claimant or others targeted by the legislation.

[119] Although there is no evidence that the parents of twins have been historically disadvantaged, the applicant may nonetheless demonstrate that any disadvantage resulting from the law is premised on a stereotype that does not correspond to the actual circumstances of his group. In *Withler*, the Supreme Court recognized that complex benefit schemes, such as the one before us in this matter, are designed for a number of groups in different circumstances and with different interests. Consequently, the question is whether the boundaries drawn by Parliament are reasonable, having regard to the circumstances of the groups affected and the object of the scheme.

[120] Although the applicant accepts, as he must, that it is in Parliament's power to draw the line in a complex benefit scheme and that perfect correspondence is not the purpose of section 15, he says that the "per pregnancy" restriction affects everyone in his group and, consequently, the lines drawn by Parliament are not appropriate.

[121] The applicant also challenges the Umpire's assertion, found at page 34 of his decision, that the applicant could not provide "clear boundaries for the future in terms of access to parental benefits". In his view, there was an easy remedial boundary and that was the one already adopted by Parliament when two children came into the care of their parents from two events. Thus, two parental leave benefits, or one per child to a maximum of two, given that there were two claimants.

[122] Finally, at paragraph 128 of his Memorandum, the applicant sets out the substance of his arguments regarding the second factor:

> 128. Absent any evidence for the "per pregnancy" restrictions, it is hard to see how the Applicant and his group, comprised exclusively of parents who meet all of the insurance requirements in the *EI Act*, can be told that, at the level of setting the quantum of benefits, the number of children matters in all cases except in theirs, without feeling that somehow their multiple birth is being regarded as less worthy of recognition by a system that otherwise tries to respect parental choices to interrupt work to care for children. The fact that all multiples' parents and their children are differentially impacted heightens the unfairness and the sense that the multiples' family, despite meeting all the same criteria as other two-parent families, is less worthy of the *EI Act*'s attempts to help parents care for and nurture their children.

[123] I begin by reiterating what I have already said, and that is that the parental benefits scheme set out in the *Act* is not a social welfare program in which the financial needs or circumstances of each individual participant is considered in determining eligibility, entitlement and the rate of

weekly benefits. Rather, the *Act* intends to benefit different kinds of claimants by providing temporary partial income replacement to those who suffer an interruption of earnings and in regard to which they must meet the eligibility and entrance requisites.

[124] It is therefore in that context that the Umpire correctly found that there was sufficient flexibility in the *Act* to accommodate, albeit not in a perfect way, the needs of parents of children who impose a greater burden than other children. I can see no basis to disagree with the Umpire. In my respectful view, the thrust of the applicant's assertion is that he and others in his group should receive greater benefits than those which they are entitled to under the *Act* because those in his group, the parents of multiple birth children, must assume a greater burden than the parents of singletons. With respect, I do not understand how a complex scheme such as that found in the *Act* can meet those expectations. In other words, it is impossible for the scheme to meet the particular needs and circumstances of all the different claimants. In my view, it certainly cannot be said that the lines drawn by Parliament are inappropriate.

[125] Again I see nothing in the provisions at issue that would lead me to conclude that they operate by way of stereotypes. It also cannot be said that because those in the applicant's group do not receive 70 weeks of parental benefits for the care of their children, the legislation considers them less worthy than the parents of singletons.

[126] In closing on this factor, a few words concerning the applicant's criticism of the Umpire's statement that he could provide no clear boundaries for the future in terms of access to parental

benefits. In my view, that criticism is unfounded. The simple answer is found in the respondent's Memorandum, at paragraphs 134 to 136, where the respondent says:

> While the Applicant's proposal may have intuitive appeal, this remedy is neither simple nor confined as the Applicant suggests. Rather, it fails to provide any parameters with respect to how the parental benefits scheme would operate if the individual needs of parents were taken into account when determining how many weeks of parental benefits should be paid.
>
> For example, how many weeks of benefits should be paid in respect of triplets or quadruplets? Would the EI Commission, in recognition of the increased need, be required to provide parental benefits to a third party caregiver, such as a family member? Surely claimants in these situations would argue that their increased needs are no less worthy of consideration than the needs of parents of twins.
>
> This remedy further fails to address the question of how the EI Commission should treat other parents who may encounter increased needs because of a characteristic of their family or children. For instance, single parents would likely argue that their circumstances warrant an increase in benefits due to the particular challenges of raising children alone.

[127] I agree entirely with the respondent's submissions which, in my view, provide strong support for the view taken by the Umpire that there was sufficient flexibility in the *Act* to accommodate, in an appropriate manner, the needs and circumstances of those in the applicant's group.

[128] With respect to the third contextual factor, *i.e.*, the ameliorative effect of the law or program, both sides agree with the Umpire's conclusion that this factor was not relevant in the present matter.

[129] I now turn to the last contextual factor, *i.e.*, the nature of the interest affected.

[130] With respect to this factor, the Umpire found that the only interest affected was one of an economic nature and that the applicant had failed to show that in denying him parental benefits, the

provisions at issue had in not in any way affected his "access to fundamental institutions or a basic aspect of his full membership in Canadian society" (Umpire's decision, page 36). As a result, he opined that the applicant's economic interest was insufficient to justify a finding of discrimination.

[131] In the applicant's view, the Umpire "downgraded" the interest which he and his group had at stake in these proceedings, adding that because the *Act* was an important part of Canada's social fabric, its effect impacted on all of our working lives, from sickness to pregnancy, the care of children and relatives and, consequently, its imprint went to the core of human identity. Consequently, since those in the applicant's group were similarly treated differently from others, *i.e.* one parental benefit, their case represented what he characterizes as "a classic example of severe and localized consequences". Thus, he submits that the denial to his group of full access to an important marker of membership in Canadian society constitutes a significant sign of discrimination.

[132] In conclusion, the Umpire carefully considered the evidence and the submissions put forward by the applicant. In doing so, he considered the contextual factors enunciated by the Supreme Court in *Law* and *Kapp*, and he kept in mind that these factors were not meant to lead to a rigid examination but, on the contrary, were meant to facilitate an inquiry as to whether the impugned law undermined or violated the equality guarantee found in subsection 15(1) of the *Charter*. In my respectful opinion, the Umpire made no reviewable error in concluding that the provisions at issue were not discriminatory and, hence, did not violate subsection 15(1) of the *Charter*.

Disposition

[133] For these reasons, I would dismiss the application for judicial review. As the respondent is not seeking costs, I would make no award in regard thereto.

"M. Nadon"

J.A.

"I agree.
Eleanor R. Dawson J.A."

"I agree.
David Stratas J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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