Federal Court of Appeal  Cour d'appel fédérale

Date: 20130614

Docket: A-52-12

Citation: 2013 FCA 158

CORAM: **EVANS J.A.**
STRATAS J.A.
WEBB J.A.

BETWEEN:

SHERRIE A. MICELI-RIGGINS

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at Toronto, Ontario, on December 13, 2012.

Judgment delivered at Ottawa, Ontario, on June 14, 2013.

REASONS FOR JUDGMENT BY: STRATAS J.A.

CONCURRED IN BY: EVANS J.A.
WEBB J.A.

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REASONS FOR JUDGMENT

STRATAS J.A.

A. Introduction

[1] Ms. Miceli-Riggins (the "applicant") applies for judicial review of the decision of the Pension Appeals Board dated January 3, 2012 (appeal CP22528).

[2] In that decision, the Board found the applicant did not qualify for disability benefits under the *Canada Pension Plan*, R.S.C. 1985, c. C-8, as amended (the "*Plan*"). Certain provisions of the *Plan*, described below, stood in her way.

[3] However, before the Board, the applicant also submitted that these provisions discriminated against her, contrary to section 15 of the Charter. A majority of the Board rejected her submissions, finding no infringement of section 15. One member dissented. He would have "grant[ed]…[an] amendment" to the *Plan* and would have granted her disability benefits.

[4] For the reasons set out below, there is no infringement of section 15 of the Charter. The relevant provisions of the *Plan* apply to the applicant as written. Under those provisions, she does not qualify for disability benefits. Therefore, I would dismiss the application.

B. The applicant, her work history and her declining health

[5] The applicant worked and contributed under the *Plan* from 1986 to 1993, in 1996 and again in January 1997. The two-year gap in contributions in 1994 and 1995 happened when the applicant left the workforce to attend school.

[6] On January 25, 1997, the applicant had a baby three months prematurely. She left work to care for the baby.

[7] Before the birth of the child, the applicant suffered two car accidents. Her health deteriorated from that time.

[8] At the time of the birth of the child in January 1997, the applicant was in "fair" health. But she was not "disabled" within the meaning of the *Plan* and, thus, was not entitled to disability benefits: dissenting reasons of the Board, at paragraphs 13 and 26.

[9] However, after the birth of the child, the applicant's health worsened gradually, and this is well supported by medical reports. Her ability to do housework declined toward the end of 1998. Only in 1998 did she see a doctor. Her last employment ended in 1999. By 2000, the applicant had difficulty walking and lifting her child and she could no longer do housework. In September 2000, her doctor diagnosed her with fibromyalgia, triggered by the two earlier car accidents and the childbirth. He opined that she was incapable of working.

[10] As if that was not enough, the applicant had another car accident in October 2002. From that time, her condition worsened appreciably, to the point where she needed physical assistance to get in and out of the bathtub.

[11] By the time of the hearing before the Board, her health was "terrible," and she always experienced pain. At the present time, she "is not doing much of anything." See the dissenting reasons of the Board, at paragraph 14.

C. The applicant's application for disability benefits

[12] On November 7, 2000, the applicant applied for disability benefits under the *Plan*. To receive those benefits, the applicant had to demonstrate two things – the presence of disability on the relevant date and sufficient attachment to the workforce. To qualify for benefits, the applicant must have met both of these requirements at the same time

(1) The first requirement: the presence of disability

[13] First, the applicant had to establish that she was disabled and that her disability was "severe" and "prolonged" as defined under paragraph 42(2)(*a)* of the *Plan*.

[14] As is well-known, the test under paragraph 42(2)(*a*) of the *Plan* is difficult to meet. A disability is "severe" only if the person is not regularly able to pursue any substantially gainful employment. The severity is judged not by the severity of the disease or ailment afflicting the claimant. Rather, it is judged according to whether the claimant is unable to work.

[15] And the "unable to work" standard is most difficult to meet. In order to meet it, the claimant must demonstrate more than just an inability to perform his or her former job. Instead, the claimant must show that he or she cannot engage in "substantially gainful employment." This includes modified activities at the claimant's usual workplace, any part-time work whether at the claimant's usual workplace or elsewhere, or sedentary jobs.

[16] In her application for benefits, the applicant stated that she could no longer work because of her medical condition in August 1999. She did not dispute that she could have worked before 1999.

[17] Indeed, before the Board, the applicant testified that she could have worked in 1997 despite the premature birth of the child in January 1997. Her husband testified that the applicant was "normal" for at least part of 1997. Based both on this evidence and the applicant's application for benefits, the Board found that the applicant was not disabled by December 31, 1997: see paragraph 4 of its reasons. The applicant does not challenge this finding in this Court.

[18] As we shall see, this date, December 31, 1997, becomes most important to the applicant's entitlement to disability benefits.

[19] The dissenting Board member accepted that the applicant's health condition became "severe" and "prolonged" in the year 2000. However, as I shall now explain, the majority of the Board did not accept that, as of December, 2000, the applicant still satisfied the workforce attachment requirement. Rather, the last time she met this requirement was December 31, 1997.

(2) The second requirement: sufficient workforce attachment

[20] Under the *Plan*, sufficient workplace attachment is shown by contributions of a certain amount under the *Plan* for a number of years during a defined period of time. In the parlance of the *Plan*, this period is known as the minimum qualifying period or MQP.

[21] The legislated rules that determine eligibility for a disability pension under the *Plan* are strict and inflexible.

[22] For those disabled on or before December 31, 1997, the rule was that a claimant had to have contributed under the Plan in five of the last ten years. In the applicant's case, had she been disabled in1997, she would have had sufficient workplace attachment. She would have met the "five of ten" rule because she had made contributions from 1988 to 1993 and then in 1996.

[23] However, for those disabled after December 31, 1997, a different rule applied. The applicant was disabled after December 31, 1997 and, thus, was subject to the different rule. Under that rule, the applicant had to have contributed under the *Plan* in four of the last six years: *Plan*, subparagraph 44(2)(*a*)(i). In order for a particular year to "count" in that calculation, a minimum amount must be contributed under the *Plan* in that year. In 1997, the minimum amount was equal to $3,500. See section 19 and paragraph 44(2)(*a*) of the *Plan*.

[24] The foregoing can be illustrated in a chart setting out the applicant's work and contribution history through to 2004:

Year	**Contribution made at minimum required level?**	**Comments**
1986 to 1993	Yes	
1994	No	The "five of ten" rule is satisfied. If disabled in this year, the applicant would have sufficient workforce attachment.
1995	No	The "five of ten" rule is satisfied. If disabled in this year, the applicant would have sufficient workforce attachment.

1996	Yes	The "five of ten" rule is satisfied. If disabled in this year, the applicant would have sufficient workforce attachment.
1997	No	The applicant worked until childbirth on January 25, 1997. She made contributions under the *Plan* during January, but they failed to meet the minimum amount required for the year. But throughout 1997, the "five of ten" rule is satisfied. If disabled in 1997, the applicant would have sufficient workforce attachment.
1998 to 2004	No	The workplace attachment rule changed: it is now "four of six." "Four of six" rule not satisfied.

[25] This, however, is not the end of the story. The *Plan* contains two additional provisions that mitigate unfair effects: the CRDO provisions and the proration provision in section 19 of the *Plan*.

(3) The CRDO provisions

[26] People might not be able to work and make contributions under the *Plan* for good reason. For example, parents may need to stay at home to care for a child. Even today, this scenario continues to disproportionately occur with women rather than men.

[27] Leaving the workforce to care for a child could have consequences for benefits under the *Plan*. The failure to make contributions under the *Plan* in a given year may reduce the benefits payable in the future. It may also affect the operation of rules such as the "four in six" rule described above.

[28] To eliminate these potentially unfair effects, the *Plan* allows certain periods to be excluded from the contributory period. These are known as the "dropout provisions" in the *Plan*. There are three types of dropout provisions: the general dropout provisions, the disability dropout provisions and the child rearing dropout provisions ("CRDO").

[29] The CRDO is designed to ensure that a person who stays home to raise a child under the age of seven is not penalized during that time for having low or no earnings. It protects eligibility for benefits and preserves the level of benefits eventually paid out under the *Plan*. As the dissenting reasons of the Board note, "[t]his feature of the design of the [*Plan*] plays a vital role in advancing the financial security of women who have their work interrupted by child rearing."

[30] The CRDO provisions related to the workplace attachment test for disability benefits are available to all eligible contributors, irrespective of gender, who stay home to care for children under the age of seven and have pensionable earnings in a particular year below the minimum amount of contribution required for that year: *Plan*, subparagraph 44(2)(*b*)(iv). Specifically, the CRDO provisions allow any month to be excluded from the contributory period where: (1) the contributor is a "family allowance recipient" as defined in the *Plan* Regulations; and (2) the contributor has earnings for the year below the minimum amount of contribution required for that year.

[31] In this case, the applicant was a Child Tax Benefit recipient from February 1997 to January 2004 (when her child turned seven years of age) and thus, during that time, was regarded as a "family allowance recipient" under the *Plan* Regulations. Therefore, the period from February 1997

to January 2004 was excluded from the applicant's contributory period under the CRDO. This exclusion may have the effect of increasing the amount of benefits she might receive under the *Plan*.

[32] We must now update the chart setting out the applicant's work and contribution history through to 2004, taking into account the operation of the CRDO provisions in the applicant's case. As can be seen, the application of CRDO by itself does not change the applicant's situation:

Year	**Contribution made at minimum required level?**	**Comments**
1986 to 1993	Yes	
1994	No	The "five of ten" rule is satisfied. If disabled in this year, the applicant would have sufficient workforce attachment.
1995	No	The "five of ten" rule is satisfied. If disabled in this year, the applicant would have sufficient workforce attachment.
1996	Yes	The "five of ten" rule is satisfied. If disabled in this year, the applicant would have sufficient workforce attachment.
1997	No	The applicant worked until childbirth on January 25, 1997. She made contributions under the *Plan* during January, but they failed to meet the minimum amount required for the year. But throughout 1997, the "five of ten" rule is satisfied. If disabled in 1997, the applicant would have sufficient workforce attachment. By operation of the CRDO provisions, the period from February 1997 does not count in the applicant's contribution history.
1998 to 2003	These years do not count for this purpose due to operation of CRDO provisions	The workplace attachment rule changed: it is now "four of six." "Four of six" rule not satisfied. The CRDO provisions apply: this year does not count in the applicant's

		contribution history. Appellant has contributed only three of the last six years.
2004	No	Her child turned seven on January 25, 2004. Under the *Plan*, the benefit of the CRDO provisions ends on January 31, 2004.

[33] As is apparent from this chart, the CRDO provisions do not alter the fact that the applicant was not in compliance with the "four of six" rule on January 1, 1998.

(4) The proration provision in section 19 of the *Plan*

[34] The proration provision in section 19 of the *Plan* is an ameliorative provision designed to mitigate possible harsh results.

[35] Section 19 of the *Plan* is designed to ensure that a contributor is not disadvantaged when the contributor cannot make sufficient contributions in a year. Under proration, the contributor's required contribution level for the year is reduced in proportion to the number of months the contributor was able to work.

[36] Proration is available when a contributor reaches 70 years of age, dies, becomes disabled, or the *Plan* retirement pension is payable. It is also available when a person turns 18 years of age or ceases to receive a disability pension under the *Plan* or provincial counterparts. It is not available when a person gives birth to a child, or becomes or ceases to be eligible for the CRDO.

[37] Thus, for 1997, the applicant's required contribution could not be prorated because she did not meet the conditions contained in section 19 of the *Plan*, as written.

(5) The applicant's Charter submission

[38] The applicant invokes section 15 of the Charter, the equality rights guarantee. She targets the CRDO provisions, the proration provisions in section 19 of the *Plan*, the "four of six years" rule, and the use of the calendar year for calculation. Collectively, these work together to deny women equal access to a disability pension. She left the workforce to have a child early in the year before she could make contributions at the minimum required level – a circumstance that only a woman, not a man, can experience.

[39] In support of her section 15 claim, the applicant also notes the following:

- Women are generally more likely to stop working to care for a child, making it harder to meet the minimum contribution level for the year, especially following the birth of a child;

- Childbirth physically disrupts a women's participation in the workforce. As a result, it is harder to satisfy the minimum contribution level required in years where a woman gives birth;

- Women generally earn less money than men, making it generally harder to satisfy the minimum contribution level required for the year;

- Pregnancy carries risks of disability, meaning that women who give birth may not return to the workforce.

[40] The appellant asks that the Court read in "eligibility under the CRDO provisions" as a circumstance that allows a person to prorate under section 19 of the *Plan*.

[41] If given that relief, the last day of the applicant's MPQ moves to January 31, 2004, the end of the month when her child became seven years old and the benefit of the CRDO provisions ended. This is shown by the following chart, revised to show the situation should the applicant's Charter submission be accepted:

Year	**Contribution made at minimum required level?**	**Comments**
1986 to 1993	Yes	
1994	No	The "five of ten" rule is satisfied. If disabled in this year, the applicant would have sufficient workforce attachment.
1995	No	The "five of ten" rule is satisfied. If disabled in this year, the applicant would have sufficient workforce attachment.
1996	Yes	The "five of ten" rule is satisfied. If disabled in this year, the applicant would have sufficient workforce attachment.
1997	Yes	The applicant worked until childbirth on January 25, 1997. She made contributions under the *Plan* during January, but they failed to meet the minimum level of contributions required. She made

		contributions under the *Plan* during January. But prorationing, as sought by the applicant, would allow this year to count as a contribution year. The applicant would meet the "four of six" rule that applied after December 31, 1997
1998 to 2003	These years do not count for this purpose due to operation of CRDO provisions	The workplace attachment rule changed: it is now "four of six." The "four of six" rule is satisfied. The CRDO provisions apply: this year does not count in the applicant's contribution history. Applicant has contributed four of the last six years.
2004	No	Her child turned seven on January 25, 2004. Under the *Plan*, the benefit of the CRDO provisions ends on January 31, 2004.

[42] On this basis, the applicant alleges that the last day of her MQP should be in January, 2004. As she was disabled at that time, she would be entitled to disability benefits.

D. Analysis

(1) General principles

[43] Traditionally, courts adjudicating section 15 challenges have considered two questions:

(1) Does the legislation create a distinction based on an enumerated or analogous ground?

(2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping?

In other words, is there discrimination?

See generally *Law v. Canada*, [1999] 1 S.C.R. 497; *R. v. Kapp*, 2008 SCC 41 at paragraph 17, [2008] 2 S.C.R. 483; *Withler v. Canada (Attorney General)*, 2011 SCC 12 at paragraph 30, [2011] 1 S.C.R. 396.

[44] Different or unequal treatment alone does not infringe section 15 of the Charter. Instead, section 15 is aimed at preventing discrimination. *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143 at page 182; *Law, supra* at paragraph 51; *Ermineskin Indian Band and Nation v. Canada*, 2009 SCC 9 at paragraph 188, [2009] 1 S.C.R. 222. Put another way, "equality is not about sameness and s. 15(1) does not protect a right to identical treatment": *Withler*, *supra* at paragraph 31.

[45] In many cases, the Supreme Court has attempted to describe the meaning of discrimination. Discrimination is an elusive concept and so, not surprisingly, it is not possible to find exact common ground in the descriptions of discrimination in those cases. Like a prism, discrimination is a single item, but it can look quite different and cast different types of light when viewed from different angles. The Supreme Court's descriptions, different as they may be, are all helpful in understanding the nature of discrimination.

[46] At its root, discrimination is state action, state inaction or legislation that perpetuates disadvantage and stereotyping: *Kapp*, *supra* at paragraph 24; *Withler*, *supra* at paragraph 37. A classic statement of discrimination is found in *Andrews*, *supra* at pages 174-75:

> …discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to

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

[47] Discrimination works a personal sting upon the individual, assaulting his or her dignity by labelling the individual, for reasons outside of his or her control, as being unworthy of equal respect, equal membership or equal belonging in Canadian society: *Law*, *supra* at paragraphs 47-53.

[48] Particularly useful on the definition of discrimination is the Supreme Court's decision in *Withler*, *supra*. There, the Supreme Court described two different types of discrimination. These types, their characteristics, and the types of evidence that are relevant to them, are as follows:

(1) *The perpetuation of prejudice or disadvantage to members of a group on the basis of personal characteristics identified in the enumerated and analogous grounds.* This can happen when the law treats a historically disadvantaged group in a way that underscores the very characteristics that have caused its disadvantage. Key to proving this sort of discrimination is "evidence that goes to establishing an applicant's historical position of disadvantage or to demonstrating existing prejudice against the applicant group, as well as the nature of the interest that is affected": *Withler*, at paragraph 38.

(2) *The creation or perpetuation of disadvantage based on a stereotype that does not correspond to the actual circumstances and characteristics of the applicant or applicant group*. Here, historic disadvantage is not required. As explained in

> *Withler*, "a group that has not historically experienced disadvantage may find itself the subject of conduct that, if permitted to continue, would create a discriminatory impact on members of the group…by stereotyping members of the group" (at paragraph 36). The sort of evidence to be considered here includes "whether there is correspondence with the applicants' actual characteristics or circumstances," and "the ameliorative effect of the law on others and the multiplicity of interests [the law] attempts to balance": *Withler*, at paragraph 38.

[49] In considering whether discrimination is present, narrow matters of form and "overly technical" matters are to be cast aside: *Auton (Guardian ad litem of) v. British Columbia (A.G.)*, 2004 SCC 78 at paragraph 25, [2004] 3 S.C.R. 657.

[50] Rather, courts are to embark on a broader "contextual" analysis, "looking at the circumstances" of members of the group and "the negative impact of the law on them." The emphasis is on the "actual situation of the group and the potential of the impugned law to worsen their situation." See *Withler, supra* at paragraph 37.

[51] The contextual approach means that in some cases, a measure may be discriminatory. In others, not. An important part of the context, as we shall see, is the nature of the legislation that creates the impugned distinction. In the present case, the Court is dealing with the provision of benefits under complex social benefits legislation, a context many courts, including the Supreme Court, have considered to be special.

[52] By adopting a substantive, not formal, approach to the matter and by viewing the substance of the matter in its proper context, courts are able to address whether, in the circumstances of the case, substantive equality is present. The promotion and attainment of substantive equality is key to section 15.

[53] In *Withler, supra* the Supreme Court described substantive equality as follows (at paragraph 39):

> Substantive equality, unlike formal equality, rejects the mere presence or absence of difference as an answer to differential treatment. It insists on going behind the facade of similarities and differences. It asks not only what characteristics the different treatment is predicated upon, but also whether those characteristics are relevant considerations under the circumstances. The focus of the inquiry is on the actual impact of the impugned law, taking full account of social, political, economic and historical factors concerning the group. The result may be to reveal differential treatment as discriminatory because of prejudicial impact or negative stereotyping. Or it may reveal that differential treatment is required in order to ameliorate the actual situation of the applicant group.

[54] In assessing whether an impugned provision promotes or perpetuates disadvantage and stereotyping, the Supreme Court has suggested that four contextual factors can be helpful:

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

(2) The relationship or correspondence between the ground(s) on which the claim is based and the actual need, capacity, or circumstances of the applicant or others;

(3) The ameliorative effects of the impugned legislation upon a more disadvantaged person or group in society; and

(4) The nature and scope of the interest affected by the impugned legislation.

(See generally *Law*, *supra* at paragraphs 62-75; *Kapp*, *supra* at paragraph 19.)

[55] The four contextual factors are not to be used as a rigid template in every case. A "rigid template risks consideration of irrelevant matters on the one hand, or overlooking relevant considerations on the other": *Withler*, *supra* at paragraph 66; see also *Kapp*, *supra*. Rather, the four contextual factors are to be used as a helpful guide in the analysis.

(2) The special context of social benefits legislation

[56] Social benefits legislation, like the *Plan*, is aimed at ameliorating the conditions of particular groups. However, social reality is complex: groups intersect and within groups, individuals have different needs and circumstances, some pressing, some not so pressing depending on situations of nearly infinite variety. Accordingly, courts should not demand "that legislation must always correspond perfectly with social reality in order to comply with s. 15(1) of the Charter": *Law*, *supra* at paragraph 105.

[57] This context means that distinctions arising under social benefits legislation will not lightly be found to be discriminatory. The Supreme Court has confirmed this over and over again.

[58] Courts cannot insist on "[p]erfect correspondence between a benefit program and the actual needs and circumstances of the applicant group." While exclusion from participation in benefits programs "attracts sympathy," the "inability of a given social program to meet the needs of each and every individual does not permit us to conclude that the program failed to correspond to the actual needs and circumstances of the affected group." See *Gosselin v. Quebec (Attorney General)*, 2002 SCC 84 at paragraph 55, [2002] 4 S.C.R. 429.

[59] Accordingly, one cannot simply conclude there is a section 15 violation from the fact that social benefits legislation leaves a group, even a vulnerable group, outside the benefits scheme:

> The fact that some people may fall through the program's cracks does not show that the law fails to consider the overall needs and circumstances of the group of individuals affected, or that all distinctions contained in the law amount to discrimination in the substantive sense intended by s. 15(1).

(*Gosselin*, *supra* at paragraph 55.)

[60] In *Withler*, *supra*, the Supreme Court held that the assessment whether social benefits legislation offends section 15 must be conducted sensitively, keeping front of mind the social challenges the architects of the legislation attempted to solve (at paragraph 67):

> In cases involving a pension benefits program such as this case, the contextual inquiry at the second step of the s. 15(1) analysis will typically focus on the purpose of the provision that is alleged to discriminate, viewed in the broader context of the scheme as a whole. Whom did the legislature intend to benefit and why? In determining whether the distinction perpetuates prejudice or stereotypes a particular group, the court will take into account the fact that such programs are designed to benefit a number of different groups and necessarily draw lines on factors like age. It will ask whether the lines drawn are generally appropriate, having regard to the circumstances of the persons impacted and the objects of the scheme. Perfect correspondence between a benefit program and the actual needs and circumstances

> of the applicant group is not required. Allocation of resources and particular policy goals that the legislature may be seeking to achieve may also be considered.

See paragraphs 38 and 66 of *Withler* for further admonitions by the Supreme Court that some margin of appreciation should be given when assessing whether social benefits legislation is discriminatory.

[61] In light of these considerations, the Supreme Court on occasion has required that something quite discernable or concrete, such as an illegitimate "singling out" of a particular group, must be present before social benefits legislation will be adjudged to be discriminatory:

> It is not open to Parliament or a legislature to enact a law whose policy objectives and provisions single out a disadvantaged group for inferior treatment: *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203. On the other hand, a legislative choice not to accord a particular benefit absent demonstration of discriminatory purpose, policy or effect does not offend this principle and does not give rise to s. 15(1) review. This Court has repeatedly held that the legislature is under no obligation to create a particular benefit. It is free to target the social programs it wishes to fund as a matter of public policy, provided the benefit itself is not conferred in a discriminatory manner….

(*Auton*, *supra* at paragraph 41.)

[62] Another *indicium* of discrimination is an inconsistency between the purpose of the legislative scheme and the provision said to be discriminatory:

> Where stereotyping of persons belonging to a group is at issue, assessing whether a statutory definition that excludes a group is discriminatory, as opposed to being the legitimate exercise of legislative power in defining a benefit, involves consideration of the purpose of the legislative scheme which confers the benefit and the overall needs it seeks to meet. If a benefit program excludes a particular group in a way that undercuts the overall purpose of the program, then it is likely to be discriminatory: it amounts to an arbitrary exclusion of a particular group. If, on the other hand, the exclusion is consistent with the overarching purpose and scheme of the legislation, it is unlikely to be discriminatory. Thus, the question is

> whether the excluded benefit is one that falls within the general scheme of benefits and needs which the legislative scheme is intended to address.

(*Auton*, *supra* at paragraph 42.)

[63] However, the finding of an inconsistency is not enough. Courts must bear in mind that "[c]rafting a social assistance program to meet the needs of young adults is a complex problem, for which there is no perfect solution" and "[n]o matter what measures the government adopts, there will always be some individuals for whom a different set of measures might have been preferable": *Gosselin*, *supra* at paragraph 55.

[64] Put another way, at a general level, social benefits programs often are expressed in a complex web of interwoven provisions. Altering one filament of the web can disrupt related filaments in unexpected ways, with considerable damage to legitimate governmental interests. This Court said as much in *Krock v. Canada (Attorney General)*, 2001 FCA 188 at paragraph 11:

> When presented with an argument that a complex statutory benefit scheme, such as unemployment insurance, has a differential adverse effect on some applicants contrary to section 15, the Court is not concerned with the desirability of extending the benefits in the manner sought. In the design of social benefit programs, priorities must be set, a task for which Parliament is better suited than the courts, and the Constitution should not be regarded as requiring judicial fine-tuning of the legislative scheme.

[65] "Constitutional tinkering with complex, interlocking statutory provisions" in order "to cure an apparent arbitrariness in the operation of a justifiable cut-off in a benefits scheme" is "likely to create unforeseen anomalies of its own": *Nishri v. Canada*, 2001 FCA 115 at paragraph 43.

[66] For this reason, the Supreme Court has emphasized that it will not rewrite the terms of benefits legislation or adjust qualifying provisions in it unless it has been established that discrimination is present: *Hodge v. Canada (Minister of Human Resources Development)*, 2004 SCC 65, [2004] 3 S.C.R. 357.

(3) The nature of the *Plan*

[67] The nature of the *Plan* is an important part of the context in which the applicant's challenge must be assessed. Care must be taken not to transform the *Plan* into something it is not and was never intended to be.

[68] At paragraph 91 of her memorandum of fact and law, the applicant describes the *Plan* as being part of Canada's "social system." Insofar as the applicant suggests the *Plan* is a general social welfare regime intended to bestow benefits upon all, I disagree.

[69] Some general statements about the Plan are apposite. The *Plan* is not supposed to meet everyone's needs. Instead, it is a contributory plan that provides partial earnings-replacement in certain technically-defined circumstances. It is designed to be supplemented by private pension plans, private savings, or both. See *Granovsky v. Canada (Minister of Employment and Immigration*), 2000 SCC 28 at paragraph 9, [2000] 1 S.C.R. 703.

[70] Indeed, it cannot even be said that the *Plan* is intended to bestow benefits upon demographic groups of one sort or another. Instead, it is best regarded as a contributory-based compulsory

insurance and pension scheme designed to provide some assistance – far from complete assistance – to those who satisfy the technical qualification criteria.

[71] Like an insurance scheme, benefits are payable on the basis of highly technical qualification criteria. Based on personal circumstances, some can make contributions, others not.

[72] Benefits are paid from direct contributions of employees, employers, and monies earned from the investment of contributory funds not required to pay current benefits. As a general matter, the quantum of benefits under the *Plan* is related to earnings. Like most insurance schemes, over time some contributors get significant benefits and can say they got their money's worth in terms of benefits received. Others, due to their personal circumstances, can contribute for years and get little in return.

[73] Far from providing universal welfare benefits, writ large, the *Plan* provides six specific benefits: retirement pension, disability pension, death benefits, survivor's pension, disabled contributor's child benefits, and benefits for the child of a deceased contributor. What's more, the *Plan* was never intended to meet all needs of persons receiving those benefits, but rather was designed to provide only partial benefits.

[74] In the words of the Supreme Court,

> The *Plan* was designed to provide social insurance for Canadians who experience a loss of earnings due to retirement, disability, or the death of a wage-earning spouse or parent. It is not a social welfare scheme. It is a contributory plan in which Parliament has defined both the benefits and the terms of entitlement, including the level and duration of an applicant's financial contribution.

(*Granovsky, supra* at paragraph 9.)

(4) Application of these principles to the facts of this case

[75] In my view, the applicant's section 15 challenge must fail. Based on the foregoing summary of the law, there are a number of reasons for this.

– I –

[76] The applicant alleges that the impugned provisions have a disproportionately negative impact upon women. In making out this claim, an indirect discrimination claim, the applicant must adduce evidence showing that the impugned provision is responsible for the effect, not other circumstances: *Canada (Attorney General) v. Lesiuk*, 2003 FCA 3. We cannot just assume that the impugned provision is responsible:

> If the adverse effects analysis is to be coherent, it must not assume a statutory provision has an effect which is not proved. We must take care to distinguish between effects which are wholly caused, or are contributed to, by an impugned provision, and those social circumstances which exist independently of such a provision.

(*Symes v. Canada*, [1993] 4 S.C.R. 695 at paragraph 134.)

[77] The applicant asserts there is a relationship between her gender and failing to meet the contributory requirements of the *Plan*. But at one time she did meet the contributory requirements of the *Plan*, having made contributions for five years out of the ten between 1988 and 1997, and that gave her a MQP of December 31, 1997. At later dates, on the "four of six" rule, she failed to meet the contributory requirements of the *Plan* not because she was a woman, but because of her personal circumstances.

[78] For example, had the applicant not decided to take two years off to study and, instead, made the requisite level of *Plan* contributions in those years, she would have qualified for benefits. Indeed, had she elected to pursue a one year study program rather than two, and had she made the requisite level of *Plan* contributions in that year, she would have qualified for benefits. Further, had she returned to work in 1997, 1998 and the first part of 1999, her MQP would have shifted to the end of 1999 and she would have qualified for disability benefits.

[79] Indeed, if one were to ask in this case why the applicant did not receive disability benefits, the answer would not be "discriminatory legislative provisions in the *Plan*," but rather the confluence of circumstances unique to the applicant and not shared by many women at all. The circumstances unique to the applicant include her decision to take two years off to study, the timing of that study period, her decision not to work for part of the year in those two study years resulting in a lack of contribution in those years, the fact that her child was not born towards the end of the year, and the fact that her medical condition deteriorated to the point of "disability," as that is defined in the *Plan*, only later.

[80] In the case of section 19 of the *Plan*, proration is allowed in some circumstances but not in others. The applicant has not shown that these circumstances are related to an enumerated or analogous ground. Without evidence such as that, the court cannot tell whether section 19 has contributed to or caused an adverse effect upon women: *Nadeau v. M.N.R.*, 2003 FCA 400 at paragraphs 37 to 39.

[81] It is true that there is evidence in the record to suggest that women face a disproportionate burden of leaving the workforce to care for a young child. But the applicant has not established that the impugned provisions cause or contribute to that burden. Indeed, evidence in the record shows that for many women, leaving the workforce to care for a child is a temporary event that does not definitively end the contributory period: see appeal book, pages 483 and 664.

[82] The applicant argues that the statutory provisions have the effect of making it easier for the father of the child than the mother to take advantage of the benefit of the CRDO provisions. This is because a father can elect to cease work to care for the child after meeting the contribution requirement for that year, while a mother is limited by the timing of the child's birth.

[83] This argument does not establish discrimination for the purpose of section 15. For one thing, in order to be eligible to the benefit of the CRDO provisions, the father would have to rebut the presumption that the mother is the primary caregiver of the child. And for another, this differential impact in the operation of the impugned provisions of this complex statutory scheme does not

satisfy the essential elements of discrimination in the constitutional sense that I have described in these reasons.

– II –

[84] When a person is denied benefits under a complex and intricate social benefits scheme such as this, one does not conclude that the person is not an equal member of Canadian society, is deserving of less worth, or does not belong with the rest of us. One concludes that, like so many others, the person did not get benefits under a non-universal scheme because technical qualification requirements were not met. That is the case here.

[85] As the cases, above, demonstrate, there must be something more that takes the case outside of being a mere artifact of a complex benefits scheme and into the realm of discrimination. For example, an invidious singling out of a category of person for detrimental treatment might trigger a finding of discrimination. That is not the case here.

[86] The fact that in this circumstance the *Plan* treats the applicant differently from others is best seen as an artifact of a complex and intricate scheme with many eligibility and qualification rules, rather than a singling out of her, or persons like her, for different treatment, as was described in *Auton, supra*.

[87] Indeed, the analysis, above, shows that a detrimental effect is caused upon only some women, namely the women in the applicant's highly unusual circumstance, with her particular contribution history. It does not affect all women, not even all women who have a child.

[88] This underscores the finding, above, that the *Plan* does not "single out" women in an invidious way. Nor is there "discriminatory purpose, policy or effect" of the sort said to be required in *Auton*, supra at paragraph 41. Rather, the detrimental effect caused on the applicant – a member of a very narrow class of women – is a consequence of the interaction of complicated rules within a complicated scheme that is *not* a general social welfare scheme available to all in every circumstance.

[89] One cannot help but have tremendous sympathy for the applicant and the plight she finds herself in. A different set of rules or conditions under the *Plan* might be preferable. However, the *Plan* cannot meet the circumstances of every contributor in every conceivable situation. Its failure to do so, by itself, does not mean that the *Plan* violates section 15.

– III –

[90] There is another way of putting the point made in the previous section.

[91] The applicant's failure to meet the contributory requirements at a date later than her established minimum qualifying period was as a result of the specific factual circumstances of her case and not on the basis of any distinction made between her and others under the *Plan*. The

provisions do not create a distinction between her and others on the basis of an enumerated and analogous ground of discrimination.

[92] One could say that the true point of complaint by the applicant is the operation of the CRDO provisions in cases where a woman gives birth early in the calendar year, thus reducing the number of months in the year of birth in which to make valid contributions under the *Plan*. This is shown by the fact that the applicant would have demonstrated sufficient workplace attachment had she given birth in, say, December 1996 or September1997. In short, on the applicant's view of the matter, the CRDO provisions do not kick in soon enough.

[93] The month in which a child is born is not an enumerated or analogous ground under section 15 of the Charter, nor is it a personal characteristic upon which the applicant was denied a benefit under the *Plan*.

– IV –

[94] We are to assess "whether the lines drawn are generally appropriate, having regard to the circumstances of the persons impacted and the objects of the scheme" and we need not insist on "perfect correspondence between a benefit program and the actual needs and circumstances of the applicant group": *Withler*, supra at paragraph 67.

[95] In my view, the lines drawn are generally appropriate. And in the words of *Auton*, quoted above, the *Plan* does not impact women "in a way that undercuts the overall purpose of the

program," nor does it single out women in any invidious way. Rather, this particular woman, owing to her particular circumstances – some of which were in her control and others not – simply does not qualify under the technical criteria of the *Plan*.

– V –

[96] The evidence before us shows that women have historically suffered from social and economic disadvantage concerning child rearing. However, the CRDO provisions and the proration provisions in section 19 of the *Plan* do not contribute to or worsen any pre-existing disadvantage for the applicant, nor do they worsen any pre-existing disadvantage for women in general. Nor are they based on any stereotypes of women.

[97] In this regard, the case at bar bears a resemblance to *Nishri, supra*. In that case, this Court rejected a claim that a statutory cap on parental benefits under the *Employment Insurance Act* was discriminatory. Even if the statutory cap adversely affected women, this Court held (at paragraph 43) that the cap could not "reasonably be regarded as pernicious stereotyping or the denial of a birth mother's worth."

[98] This case also is similar to *Lesiuk, supra*, where a female applicant was denied benefits under the *Employment Insurance Act*. In order to receive benefits, she had to have worked 700 hours within a particular qualification period. She fell just three hours short because of childbirth.

[99] This Court rejected her claim that the 700-hour requirement was discriminatory against women. Any reasonable person looking at her case would conclude that an "unfortunate confluence of events" had conspired to defeat her claim, not discriminatory legislative standards (at paragraph 45):

> These requirements do not create or reinforce a stereotype that women should stay home and care for children. Nor do these requirements affect the dignity of women by suggesting that their work is less worthy of recognition. Anyone who works the requisite number of hours in their qualifying period will qualify. It would stretch reason to imagine that reasonable persons in the respondent's situation would feel themselves any less valuable as a worker or as a member of society by the mere fact of having narrowly fallen short of qualifying for EI benefits in a given year. Rather, I would imagine that a reasonable person would simply feel that they had narrowly missed qualifying because of an unfortunate confluence of events.

[100] Bound as I am by these cases, I must apply them to the circumstances of the applicant's case. As in *Lesiuk*, regrettably she is denied benefits because of an "unfortunate confluence of events," not discriminatory legislative standards.

– VI –

[101] Far from being detrimental, the impugned provisions are best regarded as ameliorative.

[102] The CRDO provisions are aimed at accommodating and assisting those who stay at home because of child rearing responsibilities. Most who leave the workforce to care for young children are women and they often suffer economically as a result. In the words of the applicant's expert, the CRDO provisions "came into force to accommodate the needs of female workers who were more

likely to experience a work history that includes disruption to their labour force participation": appeal book, page 481.

[103] Other expert evidence before us shows that women benefit from this provision more than men: appeal book, page 889. 45.9% of women have the CRDO provisions applied to the calculation of their retirement benefits, as opposed to 0.3% of men: appeal book, page 471. From this, we see that women are 153 times more likely than men to rely upon the CRDO provisions in the calculation of their retirement benefits: appeal book, page 482. The operation of the CRDO provisions positively affects 53% of female retirement beneficiaries and 66% of female disability beneficiaries. In the case of retirement benefits, a woman who takes advantage of CRDO on average receives benefits that are 24% higher. In the case of disability benefits, a woman who takes advantage of the CRDO provisions on average receives benefits that are 7% higher. This shows that the CRDO provisions actually mitigate the social disadvantage women may face when they withdraw from the workforce to care for young children.

[104] Those who stay at home rearing children usually earn little or no income. Since pension benefits are calculated in part on the basis of a person's average pensionable earnings, the person primarily responsible for child rearing – usually a woman – is at risk of receiving lower pension benefits. Seen against this backdrop, the CRDO provisions are ameliorative: in certain circumstances it excludes from the calculation of benefits years of little or no income due to child rearing.

[105] Put another way, the CRDO provisions reflect the recognition that both partners in a family contribute equally in their role as a partner and a parent. The CRDO provisions recognize that both partners in a union may not be participating in the workforce to the same extent and so some protection is needed in order to protect eligibility for, and the level of, *Plan* benefits eventually paid to such a contributor.

[106] Under the CRDO provisions, parents can remove from their contributory periods under the *Plan* time spent caring for young children. In this way, the CRDO provisions ensure that parents who leave or reduce their workforce participation to raise pre-school age children are not penalized in determining future pension benefits: *Harris v. Canada (Minister of Human Resources and Skills Development)*, 2009 FCA 22 at paragraphs 89 and 101.

[107] Indeed, I would note that the CRDO provisions operate to favour women because of related provisions that have the effect of presumptively considering them, not men, the primary caregivers in certain circumstances: *Income Tax Act*, R.S.C. 1985 c. 1 (5th Supp), paragraph 122.6(*f*), incorporated by reference in the *Plan* Regulations.

[108] On the whole, the CRDO provisions fit alongside a number of other features of the *Plan* that are designed to protect the financial well-being of women. These include provisions dealing with credit-splitting upon separation, divorce or the dissolution of a common-law union, the assignment of the retirement pension between spouses and common-law partners, and survivors' benefits.

[109] The proration provision under section 19 of the *Plan* is intended to ensure that where a contributory period ends by virtue of advanced age, disability, entitlement to certain retirement provisions or death, a person is not disadvantaged by virtue of the fact that they could not work and contribute under the *Plan* for any month after that event. This, too, is ameliorative.

[110] On the basis of the authorities canvassed above, particularly *Withler, supra* at paragraphs 38 and 45, the ameliorative nature of the CRDO provisions and the proration provision in section 19 leads to the conclusion that the applicant has not established the presence of discrimination.

– VII –

[111] Indeed, the fact that the CRDO provisions and the proration provision in section 19 of the *Plan* are ameliorative in nature may have other consequences for the section 15 analysis. To the extent that they are aimed at ameliorating or remedying the condition of women, a subsection 15(1) enumerated group, they may be said to be a "law, program or activity" within the meaning of subsection 15(2). In such a case, they cannot be found to be discriminatory under subsection 15(1): *Kapp*, *supra* at paragraph 41; *Lovelace v. Ontario*, 2000 SCC 37 at paragraphs 84-87, [2000] 1 S.C.R. 950.

– VIII –

[112] The applicant cites *Vriend v. Alberta*, [1998] 1 S.C.R. 493 for the proposition that underinclusive legislation can be discriminatory. She submits that *Vriend* is on all fours with her case.

[113] But *Vriend* is distinguishable. *Vriend* concerned the exclusion of a ground – sexual orientation – from a general anti-discrimination scheme. The Act gave a wide benefit – protection from discrimination on a number of grounds – to most people while denying it to persons having same-sex orientation.

[114] Here, the *Plan* does not bestow a general benefit of proration. Instead, section 19 of the *Plan* prorates the basic exemption in a limited set of circumstances.

– IX –

[115] Finally, I note that the foregoing analysis is consistent with that adopted in *Runchey v. Canada (Attorney General)*, 2013 FCA 16, a decision released by this Court after argument in this appeal.

E. Proposed disposition

[116] For the foregoing reasons, I conclude that the impugned provisions do not infringe section 15 of the Charter. Therefore, I would dismiss the applicant's application for judicial review. The respondent Crown does not seek its costs and so none shall be awarded.

"David Stratas"

J.A.

"I agree
John M. Evans J.A."

"I agree
Wyman W. Webb J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-52-12
APPLICATION FOR JUDICIAL REVIEW OF THE DECISION OF THE PENSION APPEALS BOARD DATED JANUARY 10, 2012	
STYLE OF CAUSE:	Sherrie A. Miceli-Riggins v. Attorney General of Canada
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	December 13, 2012
REASONS FOR JUDGMENT BY:	Stratas J.A.
CONCURRED IN BY:	Evans J.A. Webb J.A.
DATED:	June 14, 2013

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