Date: 20090126

Docket: A-79-08

Citation: 2009 FCA 22

CORAM: **LINDEN J.A.**
EVANS J.A.
RYER J.A.

BETWEEN:

CYNTHIA HARRIS

Applicant

and

MINISTER OF HUMAN RESOURCES AND SKILLS DEVELOPMENT

Respondent

Heard at Toronto, Ontario, on November 13, 2008.

Judgment delivered at Ottawa, Ontario, on January 26, 2009.

REASONS FOR JUDGMENT BY: EVANS J.A.

CONCURRING REASONS BY: RYER J.A.

DISSENTING REASONS BY: LINDEN J.A.

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REASONS FOR JUDGMENT

LINDEN J.A. (Dissenting Reasons)

[1] The issue in this application for judicial review is whether the applicant, Cynthia Harris, is barred from claiming permanent disability benefits under the Canada Pension Plan, because she did not work outside the home in 1998, in order to take care of her severely disabled son. She raises the question of whether certain provisions of the Plan, known as the Child Rearing Drop-Out provisions (the CRDO) violate section 15(1) of the Charter, as they apply only to parents of children under seven years old who stay at home to provide childcare, and overlook the plight of parents of disabled children seven years and older who must remain at home to look after their children beyond the time that non-disabled children are expected to be in school.

[2] This is an application for judicial review of a decision of the Pension Appeals Board (PAB), which held that the child-rearing drop-out (CRDO) provisions contained in subparagraph 44(2)(*b*)(iv) of the *Canada Pension Plan* and paragraph 77(1)(*a*) of the *Regulations* do not infringe subsection 15(1) of the *Canadian Charter of Rights and Freedoms.* For the reasons that follow, I would allow the application, and find that the CRDO does infringe section 15(1), and is not saved by section 1 of the Charter. I am aware that my colleagues, Evans and Ryer JJ.A., have concluded that there is no section 15(1) violation, but with the greatest of respect, I cannot agree.

[3] This question arises because the Minister denied Ms. Harris's application for a disability pension. Under the Plan, in order to qualify for a disability pension, the claimant must have made contributions to the Plan in at least four out of the last six years (the "recency requirement"). The CRDO was enacted to relax this requirement for parents who temporarily leave the workforce due to child-rearing responsibilities. The provision excludes years in which the claimant was out of the workforce caring for children under the age of seven from being considered as part of the six years. While Ms. Harris contributed to the Plan, she did not meet this recency requirement, and hence was held not to qualify for benefits on that basis.

[4] The respondent's experts provided evidence that Parliament chose the age of seven as the cut-off, as this reflects the age at which most children are able to attend school full-time, easing the burden of childcare on the parent and providing him or her with more flexibility in the labour market. Central to this case are the implications of generalizations about "most children" for the

parents of children who are disabled and who do not fit this mould, as was the situation with Ms. Harris.

RELEVANT LEGISLATIVE PROVISIONS

[5] Subsection 44(2) of the *Canada Pension Plan,* R.S.C. 1985, c. 8, sets out the "recency requirement", discussed above, for eligibility for a disability pension. I have underlined the portions that are relevant to this application:

44. (2) For the purposes of paragraphs (1)(*b*) and (*e*),	**44.** (2) Pour l'application des alinéas (1)*b*) et *e*) :
(*a*) a contributor shall be considered to have made contributions for not less than the minimum qualifying period only if the contributor has made contributions on earnings that are not less than the basic exemption of that contributor, calculated without regard to subsection 20(2),	*a*) un cotisant n'est réputé avoir versé des cotisations pendant au moins la période minimale d'admissibilité que s'il a versé des cotisations sur des gains qui sont au moins égaux à son exemption de base, compte non tenu du paragraphe 20(2), selon le cas :
(i) for at least four of the last six calendar years included either wholly or partly in the contributor's contributory period or, where there are fewer than six calendar years included either wholly or partly in the contributor's contributory period, for at least four years,	(i) soit, pendant au moins quatre des six dernières années civiles comprises, en tout ou en partie, dans sa période cotisable, soit, lorsqu'il y a moins de six années civiles entièrement ou partiellement comprises dans sa période cotisable, pendant au moins quatre années,
(i.1) for at least 25 calendar years included either wholly or partly in the contributor's contributory period, of which at least three are in the last six calendar years included either wholly or partly in the contributor's contributory period, or	(i.1) pendant au moins vingt-cinq années civiles comprises, en tout ou en partie, dans sa période cotisable, dont au moins trois dans les six dernières années civiles comprises, en tout ou en partie, dans sa période cotisable,
(ii) for each year after the month of cessation of the contributor's previous disability benefit; and	(ii) pour chaque année subséquente au mois de la cessation de la pension d'invalidité;
(*b*) the contributory period of a contributor shall be the period	*b*) la période cotisable d'un cotisant est la

(i) commencing January 1, 1966 or when he reaches eighteen years of age, whichever is the later, and	période qui : (i) commence le 1er janvier 1966 ou au moment où il atteint l'âge de dix-huit ans, en choisissant celle de ces deux dates qui est postérieure à l'autre,
(ii) ending with the month in which he is determined to have become disabled for the purpose of paragraph (1)(*b*),	(ii) se termine avec le mois au cours duquel il est déclaré invalide dans le cadre de l'alinéa (1)*b*),
but excluding	mais ne comprend pas :
(iii) any month that was excluded from the contributor's contributory period under this Act or under a provincial pension plan by reason of disability, and	(iii) un mois qui, en raison d'une invalidité, a été exclu de la période cotisable de ce cotisant conformément à la présente loi ou à un régime provincial de pensions,
(iv) in relation to any benefits payable under this Act for any month after December, 1977, any month for which the contributor was a family allowance recipient in a year for which the contributor's unadjusted pensionable earnings are less than the basic exemption of the contributor for the year, calculated without regard to subsection 20(2).	(iv) en ce qui concerne une prestation payable en application de la présente loi à l'égard d'un mois postérieur à décembre 1977, un mois relativement auquel il était bénéficiaire d'une allocation familiale dans une année à l'égard de laquelle ses gains non ajustés ouvrant droit à pension étaient inférieurs à son exemption de base pour l'année, compte non tenu du paragraphe 20(2).

[6] Briefly, subparagraph 42(2)(*a*)(i) provides that a contributor will be eligible for a disability pension if she contributed to the plan for four out of the last six years of her contributory period. The contributory period is then defined by paragraph 42(2)(*b*), generally as the entire time between the contributor's eighteenth birthday, and the time she becomes disabled.

[7] The child-rearing drop-out provision is introduced in subparagraph 42(2)(*b*)(iv), which allows any month to be excluded from the contributory period where two conditions are met: (1) the

contributor is a “family allowance recipient”, as defined in the Regulations; and (2) the contributor has earnings for the year below the basic exemption amount.

[8] “Family allowance recipient” is in turn defined by paragraph 77(1)(*a*) of the *Canada Pension Plan Regulations*, C.R.C. c. 385, as including:

(*a*) the spouse of a person, where the person is described in that definition as having received or being in receipt of an allowance or a family allowance, if the spouse remains at home and is the primary care giver for a child under seven years of age, and where the other spouse cannot be considered a family allowance recipient for the same period;	*a*) du conjoint d’une personne qui, selon cette définition, reçoit ou a reçu une allocation ou une allocation familiale, lorsque le conjoint reste à la maison et est la principale personne qui s’occupe d’un enfant âgé de moins de sept ans, et que l’autre conjoint ne peut être considéré comme bénéficiaire d’une allocation familiale pour la même période;

[9] Thus a parent who remains out of the paid workforce, and in the home, to care for a child under the age of seven, is entitled to drop the years she does so from her contributory period. This has the benign effect of preserving a contributor’s eligibility for a CPP disability pension, even though she is not working (and thus not contributing to the Plan), because of her child-rearing responsibilities.

[10] I turn now to consider the particular circumstances of the applicant, Cynthia Harris.

FACTS

[11] Ms. Harris's son, Bradley, was born in 1989. Her second child, Jessica, was born in 1991. While Ms. Harris had returned to work briefly in 1991, between the birth of her children, when Jessica was born she and her husband decided that she would stay at home full-time to care for the children until they reached school age.

[12] In 1996, Bradley suffered a number of strokes. Between 1996 and 1998, Bradley was severely disabled, and had to re-learn basic activities such as walking and using his hands and arms. Ms. Harris cared for her son full-time during this period. Her evidence was that he could only attend school for the equivalent of two days a week, and that she could not afford to hire a baby-sitter qualified to deal with Bradley's special needs.

[13] By the fall of 1998, Bradley had largely recovered and was able to begin attending school full-time, albeit with his mother attending with him at least three times per week. Ms. Harris returned to the paid workforce in 2001.

[14] In 1997, Ms. Harris was diagnosed with multiple sclerosis (MS). In 2002, she stopped working due to impairments caused by MS, and made her application for a disability pension.

[15] Pursuant to the CRDO, the years 1990 and 1992-1997 were dropped from her contributory period, Jessica having turned 7 in 1998. Thus, the six years that were considered to determine if Ms. Harris met the recency requirement were 2002, 2001, 2000, 1999, 1998, and 1991. Ms. Harris made

contributions in only three of those years (1991, 2001, 2002). Therefore, she was deemed ineligible for a disability pension. That decision was affirmed upon reconsideration by the Minister.

[16] They key point here is that if 1998, a year in which Ms. Harris was engaged in providing care for her disabled son, is also dropped from the contributory period, she would be eligible for a disability pension. In that scenario, the six years of her contributory period would be 2002, 2001, 2000, 1999, 1991, and 1989, and she would have made contributions in four of those years (2002, 2001, 1991, and 1989), which would have allowed her to qualify. My colleague Ryer J.A. is correct to note that Ms. Harris would also be eligible for a disability pension if she had worked between the fall of 1998 (when Bradley returned to school) and 2001. However, this does not negate the fact that but for her inability to "drop-out" 1998, when she was providing necessary full-time care for Bradley, she also would have been eligible.

ISSUES AND STANDARD OF REVIEW

[17] The issue in this application is whether the CRDO cut-off violates section 15(1) of the Charter, and if so, whether it can be saved by section 1. Section 15(1) reads as follows:

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.	**15.** (1) La loi ne fait acception de personne et s'applique également à tous, et tous ont droit à la même protection et au même bénéfice de la loi, indépendamment de toute discrimination, notamment des discriminations fondées sur la race, l'origine nationale ou ethnique, la couleur, la religion, le sexe, l'âge ou les déficiences mentales ou physiques.

[18] Ms. Harris argues that the cut-off is discriminatory because it is rooted in norms about able-bodied children and when they are able to begin attending school, and fails to take into account the circumstances faced by her as a parent and caregiver to a severely disabled child. The respondent, on the other hand, submits that the cut-off is based only on the age of the child and is neutral to the issue of disability.

[19] The parties agree that the standard of review for constitutional questions is correctness (*Dunsmuir v. New Brunswick*, 2008 SCC 9 at paragraph 58).

A REFOCUSED EQUALITY ANALYSIS

[20] The treatment of section 15 has posed a unique challenge for courts since its coming into force in 1985. The approach that has been employed over the years has been refined and adjusted, but we have still not definitively crystallized and stabilized the correct approach. The most recent Supreme Court decision to address the framework for equality cases is *R. v. Kapp*, 2008 SCC 41. Justice Abella, writing for the majority, referred back to Justice McIntyre's statement in the very first section 15 case, *Andrews v. Law Society of British Columbia,* [1989] 1 S.C.R. 143, explaining that the purpose of the guarantee is to promote substantive, rather than merely formal equality. He cautioned against an approach focused on treating "likes" alike, writing (at paragraph 26):

> In simple terms, then, it may be said that a law which treats all identically and which provides equality of treatment between "A" and "B" might well cause inequality for "C", depending on differences in personal characteristics and situations. To approach the ideal of full equality before and under the law -- and in human affairs an approach is all that can be expected -- the main consideration must be the impact of the law on the individual or the group concerned. Recognizing that there will always be an infinite variety of personal

> characteristics, capacities, entitlements and merits among those subject to a law, there must be accorded, as nearly as may be possible, an equality of benefit and protection and no more of the restrictions, penalties or burdens imposed upon one than another. In other words, the admittedly unattainable ideal should be that a law expressed to bind all should not because of irrelevant personal differences have a more burdensome or less beneficial impact on one than another.

[21] Thus, in *Andrews,* the majority articulated a two-part test for establishing discrimination within the meaning of section 15(1): (1) does the impugned law create a distinction based on an enumerated or analogous ground; and (2) does that distinction create a disadvantage by perpetuating prejudice or stereotyping?

[22] Subsequently, in *Law v. Canada (Minister of Employment and Immigration),* [1999] 1 S.C.R. 497, the court attempted to address the schisms in the jurisprudence that followed *Andrews. Law* articulated a three-part test for finding discrimination: the courts were to ask (1) did the impugned law make a distinction on the basis of one or more personal characteristics or fail to take into account the claimant's already disadvantaged position in Canadian society; (2) was that distinction based on an enumerated or analogous ground; and (3) was the distinction discriminatory, in the sense of perpetuating or promoting the view that the claimant was less capable or worthy of recognition or value as a human being or as a member of Canadian society? However, as the court later noted in *Kapp*, the *Law* test was essentially the same as the two-part test from *Andrews*.

[23] However, in *Law,* the court suggested that the last part of the inquiry, determining whether a distinction resulted in discrimination within the meaning of section 15(1), should

focus on whether an impugned law negatively affected a claimant's "human dignity". It articulated four contextual factors to assist this analysis: (1) any pre-existing disadvantage suffered by the group; (2) the degree of correspondence between the impugned law and the actual needs, circumstances, and capacities of the group; (3) whether the law or program has an ameliorative purpose or effect; and (4) the nature of the interest affected (at paragraphs 62-75).

[24] In *Kapp*, the court acknowledged that while *Law* was an attempt to unify the law, "human dignity" has proved to be a difficult concept to apply in legal analysis. The human dignity analysis was born in Justice L'Heureux-Dubé's dissenting reasons in *Egan v. Canada*, [1995] 2 S.C.R. 513, where she advocated that the equality analysis focus on whether legislation exacerbated the pre-existing disadvantage of oppressed groups, and de-emphasized the role of the enumerated and analogous grounds. This strand of her analysis was later incorporated into the third prong of the *Law* test and its focus on whether the impugned law promoted a view that the claimant was less capable or worthy of respect, thus perpetuating the disadvantage of oppressed groups. However, it was clear that the need to identify an enumerated or analogous ground remained significant to the analysis.

[25] Scholars have suggested that the concept of "human dignity", which Justice L'Heureux-Dubé described as the underlying value of section 15, was transformed into an additional hurdle which claimants had to overcome to establish discrimination (see Daphne Gilbert, "Time to Regroup: Rethinking Section 15 of the Charter" (2003), 48 McGill L.J. 627). It was said that claimants were forced not only to establish that they felt subjectively demeaned by a distinction, but also had to satisfy the court that their perceptions were "objectively" reasonable.

[26] While the promotion of human dignity is undoubtedly the ultimate objective of section 15 (and indeed, the Charter as a whole), it has proved problematic as a legal standard. The Court in *Kapp* recognized this in suggesting that "the factors cited in *Law* should not be read literally as if they were legislative dispositions, but as a way of focussing on the central concern of section 15 identified in *Andrews* – combatting discrimination, defined in terms of perpetuating disadvantage and stereotyping" (*Kapp* at paragraph 24).

[27] In my view, in *Kapp* the Supreme Court calls for a recommitment to the ideal of substantive equality. We must focus on the perspective of the claimant, that is, to view the situation through the eyes of the claimant. We should heed the words of Justice Frankfurter (then of the United States Supreme Court), who once cautioned "it was a wise man who said that there is no greater inequality than the equal treatment of unequals" (*Dennis v. United States*, 339 U.S. 162 (1950) at 184). This court must ensure that the *Law* factors are not used as a mere cloak for formalism. As for disabled individuals, to honour this principle it may be necessary for legislation to provide something extra to level the playing field in order to truly treat people equally. I have approached the following analysis with these directives in mind.

THE PURPOSE OF THE CPP AND THE CRDO

[28] As the Supreme Court has stated in numerous cases, the section 15 inquiry should begin with an understanding of the purposes of the impugned legislation (*Hodge v. Canada (Minister of Human Resources Development),* [2004] 3 S.C.R. 357, 2004 SCC 65 at paragraph 26).

[29] The Plan is a federally-administered social insurance plan based on compulsory contributions. Its purpose is to provide a reasonable level of income replacement on the retirement, disability, or death of a contributor. This income *replacement* function makes prior participation in the workforce by beneficiaries an important basis of eligibility.

[30] The admirable purpose of the CRDO provision is not contentious. As was stated in the House of Commons, its purpose is to:

> …ensure that a contributor who remains home to care for young children will not be penalized for that period during which he or she has low or zero earnings. The provision would protect eligibility for CPP benefits which the contributor has earned through contributions before, during and after the period devoted to raising young children. Again, this provision will provide a measure of real economic recognition and financial security to work in the home, and it will do so without compromising the basic contributory earnings-related structure of the Plan.

[31] The expert report of Marianna Geordano (which was before the PAB in this case) also addressed the cut-off of age seven:

> Age seven is the age by which children would most likely be expected to be enrolled in school on a full time basis. Once children are in school parents would have greater labour market flexibility and a wider range of options with respect to childcare.

[32] On the basis of the evidence, the CRDO has the purpose of according recognition (economic, and to some degree, social) to work performed in the home, primarily by women. It also recognizes the fact that child-rearing responsibilities do impose a certain lack of labour market flexibility on parents, particularly mothers. The cut-off age of seven reflects a common

understanding of a stage where that burden is significantly lessened, as most children are cared for during the day at school. While many parents do continue to remain out of the workforce as full-time caregivers even after their children enter school, the cut-off seems to reflect a notion that this is a choice or preference on the part of the parent, rather than an inherent necessity of child-rearing.

[33] The problem I find with the CRDO, as will become clear, is that it treated Ms. Harris as though she had a real choice to re-enter the work force, when in fact she had none. Faced with a child who needed special care, a public school system that could not accommodate him, and insufficient finances to hire a professional caregiver, she did what many parents in her situation do: she remained out of the workforce to be a full-time caregiver. Unfortunately, now that Ms. Harris is herself disabled, she finds that she is being penalized for having served this indispensable caregiving role.

THE SECTION 15 INQUIRY

[34] Applying the framework discussed by the Supreme Court in *Kapp*, the first stage of the inquiry is to ask whether the CRDO creates a distinction based on an enumerated or analogous ground. Contrary to the finding of the PAB, I find that it does.

The proper comparator group

[35] In *Kapp*, the majority noted that "criticism has also accrued for the way *Law* has allowed the formalism of some of the Court's post-*Andrews* jurisprudence to resurface in the form of an

artificial comparator analysis focussed on treating likes alike" (at paragraph 22). From this teaching, at the very least, this court should be cautious not to accept a comparator group that would give rise to a formalistic analysis.

[36] It may also be that the Supreme Court in *Kapp* has signalled that it may be rethinking the comparator group-based analysis, given the emphasis it placed on stereotyping and disadvantage more generally. If that were so, and, if the analysis of this case were not channelled through the comparator group framework, the discriminatory nature of the CRDO becomes much clearer. This is a case where discrimination is apparent on the basis of the disproportionate and prejudicial economic impact of the legislation on an already-disadvantaged group, the caregivers of disabled children. On this fresh approach, it is obvious to me that the disabled have once again been overlooked by well-meaning legislators.

[37] To the extent that comparator groups are still relevant, however, it is essential to define the comparator group in a way that reflects the claimant's perspective (*Law* at paragraph 59). For this reason, I would reject the PAB's choice of comparator group, which is supported by the Minister in this application: parents of non-disabled children seven and older who stay out of the workforce to care for their children. The PAB found, using this comparator, that the CRDO does not make a distinction, since the parents of non-disabled children seven and over are also not eligible for the drop-out. I agree with the applicant that this comparator group does not reflect the *full* universe of people potentially entitled to the benefit of the CRDO, namely, parents.

[38] Further, as discussed above, the purpose of the CRDO is to avoid penalizing parents for the lack of labour market flexibility imposed by child-rearing responsibilities; in my view, the burden imposed by child-rearing, not the age of the child *per se*, is the relevant characteristic for the inquiry.

[39] The proper comparator group must reflect the sociological fact central to this claim—that while free full-time schooling is available to non-disabled and less-severely-disabled children over six, severely disabled children may continue to require full-time parental caregiving beyond age six. The respondent's proposed comparator group gives rise to an analysis that is formalistic and not responsive to the claimed ground of discrimination, disability, or to the experiences of disabled people and their families, whose difficulties are totally ignored.

[40] I would adopt the comparator group proposed by counsel for Ms. Harris at the hearing: the parents of all non-disabled children six years and under, and the parents of children seven and older, whose disabilities are not severe enough that they are prevented from attending school full-time.

Differential treatment

[41] Having considered the appropriate comparator group, I find that the CRDO cut-off does impose differential treatment on Ms. Harris. While parents in the comparator group are entitled to the benefit of the CRDO for the full period that their labour choices are restricted by having to care for children at home full-time, a parent in her position is only so entitled for part of that time, until

her youngest child reaches the age of seven. Since the "recency requirement" of the CPP makes the availability of a disability pension an "all-or-nothing" prospect, in Ms. Harris's case the CRDO cut-off translated into the total unavailability of a pension. This must be considered differential treatment.

[42] I note briefly that even if I had accepted the PAB's comparator group, I would have also found differential treatment on the basis of the disproportionate impact of the cut-off on parents of severely disabled children, following the Supreme Court's reasoning in *Vriend v. Alberta*, [1998] 1 S.C.R. 493. In that case, it was argued that the exclusion of sexual orientation as a prohibited ground of discrimination under Alberta's human rights legislation did not amount to a distinction, since neither heterosexuals nor homosexuals were able to claim discrimination on the basis of sexual orientation. Justice Cory, writing on this point for the majority, rejected this formalistic reasoning, pointing out the unlikelihood that a heterosexual person would be discriminated against on the basis of sexual orientation.

[43] The same logic applies in the instant case. While the parents of non- or less-severely disabled children are no longer confronted with the burden of a child who requires full-time care in the home once they reach the age of seven, the parents of severely disabled children over the age of seven are. The CRDO cut-off has a disproportionate impact on these parents because it fails to address their very real needs, ignoring their already-disadvantaged position.

Distinction based on an enumerated or analogous ground

[44] I also find that this differential treatment is based on an enumerated ground, the disability of Ms. Harris's son, Bradley. It was argued that a parent cannot claim discrimination on the basis of her child's personal characteristics. However, this is not a case where a parent is merely trying to reassert a claim of discrimination made in the name of her child, as the Ontario Court of Appeal found in *Wynberg v. Ontario* (2006), 82 O.R. (3d) 561 at paragraphs 205-206. This is a case where a parent is the "real" and only target of a law that embodies allegedly discriminatory attitudes towards her child, similar to the case of *Benner v. Canada (Secretary of State),* [1997] 1 S.C.R. 358.

[45] In *Benner,* the Supreme Court held the relationship between a parent and child is of a "particularly unique and intimate nature", such that the characteristics of a child's parent (such as race or nationality) were as immutable to him as his own (at paragraph 82). Thus, a law that imposed a burden on Mr. Benner as the result of the gender of his parent was found to discriminate against him on the basis of gender, even though it was neutral as to his own gender.

[46] The reverse proposition should also apply. A parent has no more control than the child over whether the child is disabled. Further, because of the special care disabled children require, even over and above the dependent relationship all children have with their parents, the child's disability affects the parent in a way that is profound and unchangeable. I therefore conclude that the differential treatment is based on an enumerated ground, disability.

[47] This finding does not represent an extension of the principle from *Benner*, on my reading. The Supreme Court was clear that it was not introducing a broad doctrine of "discrimination by association", and that this was a question for another day. Specifically, it left open whether its analysis could extend "to situations where, for example, the association is voluntary rather than involuntary, or where the characteristic of the parent in question upon which the differential treatment is founded is not an enumerated or analogous ground" (at paragraph 82). The instant case does not raise either of these questions, but involves the same type of relationship (parent-child) and a claim centred on an enumerated ground of discrimination (disability).

The distinction is discriminatory

[48] I now turn to the second part of the *Kapp* test, the issue of whether the differential treatment is discriminatory within the meaning of the equality guarantee. In her landmark *Royal Commission Report on Equality in Employment* (1984), Justice Abella (then of the Ontario Family Court), at page 2, wrote that where disadvantage was suffered by a particular group, this was a *prima facie* indicator of discrimination:

> It is not a question of whether this discrimination is motivated by an intentional desire to obstruct someone's potential, or whether it is the accidental by-product of innocently motivated practices or systems. If the barrier is affecting certain groups in a disproportionately negative way, it is a signal that the practices that lead to this adverse impact may be discriminatory.

[49] Further, she explained:

> Sometimes equality means treating people the same, despite their differences, and sometimes it means treating them as equals by accommodating their differences.

> Formerly, we thought that equality only meant sameness and that treating persons as equals meant treating everyone the same. We now know that to treat everyone the same may be to offend the notion of equality. Ignoring differences may mean ignoring legitimate needs. It is not fair to use the differences between people as an excuse to exclude them arbitrarily from equitable participation. (at page 3)
>
> For disabled persons, there must be as full accommodation as possible and the widest range of human and technical supports…Pension and benefit schemes must be adjusted so as to encourage disabled persons to join the workplace… (at page 5)
>
> Equality under the Charter, then is a right to integrate into the mainstream of Canadian society based on, and notwithstanding, differences. It is acknowledging and accommodating differences rather than ignoring and denying them. (at page 13)

[50] It is important to note that that this claim is based on the ground of disability. Because persons with disabilities will often require accommodation, sometimes requiring that something extra be provided, this court must be particularly vigilant not to adopt an analysis that focuses on "treating likes alike". Laws that discriminate on the basis of disability will often do so not because they draw formal distinctions between disabled people and non-disabled people, but rather because they "[fail] to take into account the already disadvantaged position" of the former, as contemplated in *Law* (at paragraph 39).

[51] Equality rights have proven to be a difficult area for courts. As evidenced by the above discussion of the evolving section 15 framework, even the Supreme Court has struggled to define the scope of the right with precision. The ground of disability is additionally complicated, as the Supreme Court acknowledged in *Eaton v. Brant County Board of Education,* [1997] 1 S.C.R. 241 at paragraph 69, because there are endless differences between disabled individuals, in terms of the type and severity of their disabilities, and many options available to accommodate those differences.

[52] With these complexities, it is no surprise that it is difficult to discern a unified theory underlying the Supreme Court's disability jurisprudence. Sometimes the court interferes, as in *Eldridge v. British Columbia (Attorney General)*, [1997] 3 SC.R. 624, where the court found that the government had a duty to accommodate deaf patients by providing sign-language interpreters under the auspices of the province's health services plan.

[53] In other cases, disability claimants have been unsuccessful. As Professor Peter Hogg summarizes, these cases (including *Eaton, Granovsky v. Canada (Minister of Employment and Immigration)*, [2000] 1 S.C.R. 703, and *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, [2004] 3 S.C.R. 657), involved legislative schemes that already attempted to accommodate persons with disabilities; the claimants alleged that the accommodations were not extended far enough or were otherwise inappropriate. Professor Hogg concludes that the Supreme Court has generally been willing to show deference to the legislatures' attempts to accommodate disability (*Constitutional Law in Canada*, 5th ed. (looseleaf), (Toronto: Carswell, 2007) at 55-74).

[54] On the other hand, in *Nova Scotia (Workers' Compensation Board) v. Martin*, [2003] 2 S.C.R. 504, the court found a legislative scheme which denied workers' compensation to chronic pain sufferers discriminated against them on the basis of disability. The unanimous court found that the blanket denial of benefits to chronic pain sufferers, without any assessment of their individual circumstances, ignored the very real needs of these individuals and perpetuated stereotyping of

persons claiming chronic pain as malingerers (see especially at paragraph 86). Since *Martin*, it is much less clear how much deference is owed to legislative attempts to accommodate disability.

[55] Even the Supreme Court has struggled with issues of disability, in addition to its grappling with section 15 more generally, most recently in *Kapp*. Despite these difficulties, Justice Sopinka gave some useful guidance in this area in his judgment in *Eaton* (at paragraph 67):

> Exclusion from the mainstream of society results from the construction of a society based solely on "mainstream" attributes to which disabled persons will never be able to gain access. Whether it is the impossibility of success at a written test for a blind person, or the need for ramp access to a library, the discrimination does not lie in the attribution of untrue characteristics to the disabled individual. The blind person cannot see and the person in a wheelchair needs a ramp. Rather, it is the failure to make reasonable accommodation, to fine-tune society so that its structures and assumptions do not result in the relegation and banishment of disabled persons from participation, which results in discrimination against them. The discrimination inquiry which uses "the attribution of stereotypical characteristics" reasoning as commonly understood is simply inappropriate here. It may be seen rather as a case of reverse stereotyping which, by not allowing for the condition of a disabled individual, ignores his or her disability and forces the individual to sink or swim within the mainstream environment. It is recognition of the actual characteristics, and reasonable accommodation of these characteristics which is the central purpose of s. 15(1) in relation to disability.

[56] Similarly, in *Gosselin v. Quebec (Attorney General)*, [2002] 4 S.C.R. 429, 2002 SCC 84 at paragraph 37, Chief Justice McLachlin wrote, "a law that imposes restrictions or denies benefits on account of presumed or unjustly attributed characteristics is likely to deny essential human worth and to be discriminatory".

[57] There can be no doubt that in this case, the CRDO cut-off is based on a presumed characteristic, that children seven years of age and older are capable of attending school full-time.

As counsel for the Minister sets out in the memorandum of fact and law, “the cut-off age reflects the norm that once children are in school full-time, parents have more flexibility to participate in the paid workforce and a reduced need for childcare”. This view was also reflected in the Geordano report. This lays bare the discriminatory nature of the cut-off, which reflects assumptions based on the capabilities of non-disabled children, without any regard for the different circumstances of disabled children who are not able to attend school full-time and continue to require ongoing full-time home care.

[58] It may be true, as the respondent argues, that age-based cut-offs are often arbitrary and must be based on generalizations. Yet the CRDO cut-off is not arbitrary. The Minister admits it is rooted in assumptions about the capabilities of “most” children—that is, non-disabled children. These norms are not neutral to the issue of disability, and reinforce a worldview that is “relentlessly oriented to the able-bodied”, to borrow a phrase from *Granovsky* (at paragraph 30). To say that the cut-off is based only on age is to gloss over this “reverse stereotyping”, as it was described by Justice Sopinka in *Eaton*. Such an approach is the very essence of formalism, and must be rejected, for it totally overlooks the plight of the disabled, perpetuating their disadvantaged situation.

[59] Further, the applicant has adduced considerable evidence about the economic and psychological disadvantages suffered by parents who are forced to remain out of the workforce to care for disabled children. The CRDO was enacted in acknowledgement of the burdens imposed on parents when child-rearing responsibilities require them to leave the workforce temporarily. Surely, parents who must remain out of the workforce for even longer due to their child’s special needs

must suffer this disadvantage to an even greater degree. However, by not extending the same benefit to parents who are forced to remain out of the workforce for longer due to their child's disability, the Minister has allowed the stereotyping and disadvantage of the disabled to be perpetuated, another indicator of discrimination.

[60] Finally, the CRDO cut-off reflects an understanding that parents who stay home to care for their children after the age of seven do so as a matter of choice, as the burden of full-time caregiving is normally relieved by the school system. This provision fails to reflect the fact that many parents in the position of Ms. Harris simply do not have this choice, and therefore fails to recognize that the work performed by such parents is just as essential as the caregiving work performed by the parents of children who have not yet reached school age. This failure to accord this same recognition to the necessary caregiving role performed by parents whose disabled children cannot attend school also suggests that the cut-off is discriminatory.

[61] My colleague, Evans J.A., concludes that the Supreme Court's decision in *Granovksy* is "virtually dispositive" of Ms. Harris's application. In *Granovsky*, the court held that another CPP drop-out provision was not discriminatory (and thus did not violate section 15(1) of the Charter) simply because it benefited only the permanently disabled, and excluded the temporarily disabled. Writing for the court, Justice Binnie concluded that it was open to Parliament to target more severely disabled individuals than Mr. Granovsky, those with permanent disabilities. The drop-out provisions in issue in that case were already an attempt to accommodate the disabled; in the absence of evidence that Parliament's line-drawing had stimgatized or demeaned persons with temporary

disabilities, the court would not find the limits of this accommodation discriminatory. Mr. Granovsky was excluded from the drop-out not because his needs were being marginalized or ignored by Parliament, but rather because he was a member of a more advantaged group than those it sought to assist.

[62] With respect to Evans J.A., in my view this case differs from *Granovsky*. The CRDO drop-out may have an ameliorative purpose, but it is not one directed at easing the plight of the disabled, or parents of disabled children. It is a scheme that seeks to assist a vulnerable group, stay-at-home parents of young children, but in doing so wholly fails to consider the needs of an even more disadvantaged group, the parents of young disabled children. This is not a case where Parliament has already attempted to accommodate disability, and the courts are being called upon to force it to go further. This is a case where an admittedly well-meaning legislative scheme has, as a result of stereotyping, totally ignored and failed to offer any accommodation for the parents of disabled children.

[63] For these reasons, I conclude that the distinction both reflects prejudicial attitudes and perpetuates economic disadvantage, which to use the "philosophically enhancing" phrase, demeans the human dignity of these disabled individuals. It is therefore discriminatory within the meaning of section 15(1) of the Charter. As there was no issue raised with regard to section 15(2), there is no need to consider it here.

THE SECTION 1 INQUIRY

[64] The test for justifying an infringement of a Charter right under section 1 was outlined in *R. v. Oakes*, [1986] 1 S.C.R. 103. The respondent must establish first that there is a "pressing and substantial" legislative objective behind the impugned provisions. Then, it must establish that the infringement of the applicant's section 15 rights are rationally connected to that objective, that the infringement is minimally impairing of the right, and finally that there is proportionality between the deleterious effects and the salutary effects of the limit on Ms. Harris's Charter rights. All of these tests must be met for section 1 to apply and save the violation.

[65] The respondent states rightly that the objective of the CRDO is pressing and substantial—that is, to protect the eligibility for Plan benefits earned by contributors who leave or reduce their participation in the workforce to care for young children. However, the cut-off cannot be rationally connected to this purpose, because, in reality, it is a limit placed on the realization of this objective by some parents of some young children that need consideration, the disabled.

[66] I would adopt another statement of the CRDO's purpose from the respondent's written submissions, "to protect the eligibility of contributors who leave the paid work force to care for young children while still ensuring the *Plan* remains sustainable and accessible to most wage earners" (emphasis mine). The cut-off is ostensibly oriented at limiting the drop-out provisions in order to ensure that the CPP remains financially viable. Hence it can be said to be rationally connected to that objective, so that the first two tests of section 1 are met.

[67] In my view, however, the cut-off is not minimally impairing of the applicant's section 15 rights. As the Review Tribunal noted, the respondent's actuarial expert admitted that the extension of the CRDO to parents who remain out of the workforce to care for severely disabled children would not have a serious impact on the financial viability of the Plan. His report indicated that if the CRDO were extended to parents with children aged 7 to 24 who are disabled, that this would increase annual CPP expenditures by only 0.1%. Such a long extension, to age 24, is not necessary in this case, so the costs would be significantly less. All that is sought is to extend it to the parents of young disabled children until they can attend school full-time.

[68] Although it may be possible for the government to justify section 15 infringements where the financial consequences would be very severe, the Supreme Court has also cautioned that justification arguments based on cost should be viewed with scepticism (*Newfoundland (Treasury Board) v. N.A.P.E.*, [2004] 3 S.C.R. 381, 2004 SCC 66 at paragraph 72).

[69] Notably, the Minister has not attempted to justify this infringement on the basis of the expense involved. Its minimal impairment argument is based on the fact that there are other provisions in the Plan that it claims would help provide women in Ms. Harris's position some measure of financial security. This does not strengthen the respondent's argument that the cut-off itself is minimally impairing of her equality rights, especially since these other provisions have actually proved to be of no assistance to her. The fact remains that, as a direct result of the CRDO, Ms. Harris, because she was the mother of a disabled child in 1998, has found herself completely ineligible for a disability pension, despite the professed purpose of these provisions.

[70] Given the expert evidence that the CRDO could be extended without jeopardizing the financial viability of the Plan (the objective of the cut-off), I conclude that the artificial cut-off at seven years of age is not minimally impairing to Ms. Harris. I would, therefore, without the need to consider the fourth stage of the *Oakes* test, find that the infringement of Ms. Harris's section 15 rights is not justified under section 1 of the Charter.

CONCLUSION

[71] For the foregoing reasons, I would allow this application, and conclude that the CRDO provision infringes section 15(1) of the Charter, and is not saved by section 1. The cut-off, while on its face based only on the age of a child, discriminates against disabled children and their parents. Through its foundation in norms pertaining to non-disabled children, the CRDO ignores the needs of workers who, by virtue of discrimination on the basis of their children's disabilities, are denied the choice of returning to the paid workforce once their children reach the age of seven. This is a case, as Justice McIntyre contemplated in *Andrews*, where purportedly equal treatment has produced serious inequality.

THE APPROPRIATE REMEDY

[72] Ms. Harris has asked this court to declare that the CRDO be extended to her, by ordering that 1998 be dropped from her contributory period, making her eligible for a disability pension. Essentially, she is suggesting that the words "or where the child is a person with a disability, until

that child is able to attend school full-time" be read into paragraph 77(1)(*a*) of the Regulations. However, in the circumstances, this would be too hasty and simplistic a solution.

[73] The Canada Pension Plan is a sophisticated statutory scheme, and Parliament would have a number of legislative choices in response to this ruling. The requirement that two thirds of the provinces comprising two thirds of Canada's population must consent to any amendment to the Plan also demonstrates the complexity of this area. In these circumstances, reading in would represent an improper intrusion by this court into Parliament's role (*Schachter v. Canada,* [1992] 2 S.C.R. 679 at paragraph 52).

[74] The only option is to declare invalid the offending paragraphs. I would therefore strike down subparagraph 44(2)(*b*)(iv) of the *Canada Pension Plan*, and paragraph 77(1)(*a*) of the Regulations.

[75] However, a temporary suspension of a declaration of invalidity is appropriate in cases such as this where benefit schemes are found to be underinclusive, because striking down the provisions immediately would have the harsh effect of denying benefits to deserving persons already entitled (*Schachter*, at paragraph 79).

[76] In the result, I would declare invalid and strike down subparagraph 44(2)(*b*)(iv) of the *Canada Pension Plan*, and paragraph 77(1)(*a*) of the Regulations. In the circumstances, I would

grant a one-year suspended declaration of invalidity, to allow Parliament to formulate an appropriate legislative response to this decision.

"A.M. Linden"

J.A.

EVANS J.A.

[77] I have had the great benefit of reading the reasons of my colleague, Linden J.A., who concludes that the child rearing drop-out (CRDO) provisions of the Canada Pension Plan (CPP) are unconstitutionally under inclusive because they discriminate on the ground of disability against parents who stay at home to care for children over the age of seven with a disability that prevents them from attending full-time public school.

[78] I gratefully accept my colleague's account of the relevant facts of this case and his description of the statutory scheme. However, I respectfully disagree with his conclusion. In my view, the CRDO provisions do not infringe Ms Harris's rights under section 15 of the *Canadian Charter of Rights and Freedoms*.

[79] The basis of our disagreement concerns the definition of the purposes of the impugned CRDO provisions and the nature of the benefit that they provide. My colleague says that these provisions ensure that parents' CPP benefits are not jeopardised by their decision to stay at home to care for their children while they are unable to attend full-time public school. Parliament has relaxed the CPP "recency requirement", he reasons, for the benefit of parents of children under the age of seven because that is the age at which "normal" children can go to school. Subsequently, the parent who had been looking after them at home (generally, the mother) will have more flexibility, which enables her to return to the labour market.

[80] The problem with limiting the relaxation to parents of children under the age of seven, Linden J.A. says, is that Parliament has thereby defined eligibility on the basis of a stereotype: the able-bodied child who can attend school at age seven. Parliament has thus denied to parents of children who cannot attend school at that age because of a disability the benefit enjoyed by other parents, namely, the right to stay at home to look after children who cannot attend school without prejudicing their eligibility for CPP benefits.

[81] In my respectful view, this is too broad a view of the purpose of the legislation and the benefit that it provides. As I see it, Parliament has decided to relax the "recency requirement" in favour of parents who temporarily leave employment to look after *young* children: see the Expert Report of Marianna Giordano, Respondent's Record, vol 1 at 22, para. 10.

[82] The extent of the relaxation was defined by reference to the *age* at which children in Canada can attend public school. Viewed in this light, the CRDO provisions apply equally to all. Thus, parents of children under the age of seven, regardless of whether or not they have a disability, are eligible for the benefit of the CRDO, while parents of children over the age of seven are not.

[83] This is not a case where it is more difficult for those with a personal characteristic protected by section 15 to qualify for a statutory benefit: all children take the same length of time to reach the age of seven. Nor is it a case where some parents are prejudiced because their children must be older than seven before they can go to school. Bradley Harris was unable to attend school in 1998 because of his disability, not because of his age.

[84] Counsel for Ms Harris says that, for the CRDO provisions to comply with section 15, they must apply regardless of the age of a child whose disability prevents them from attending school and their parent from returning to work. Thus, on the facts of this case, if Bradley had not recovered sufficiently to go to school, Ms Harris would have been entitled to drop from the "recency requirement" every year that she stayed at home to care for him until he reached the age of 18.

[85] In my view, this underlines the fact that Ms Harris's complaint is not that she was excluded from the benefit of the relaxation of the "recency requirements" available to the parents of children without a disability that prevented them from attending school. In other words, her argument is that the Constitution prevents Parliament from designing a program for the benefit of the parents of pre-school age children, without also extending it to those whose children, regardless of age, are unable to attend school by virtue of a disability. And, if Ms Harris is right, why might a section 15 claim not also be made by a person who stayed at home to care for a child over the age of 18, a parent, or a sibling, who had a serious disability and for whom no publicly provided care was available?

[86] In my view, whether the CRDO provisions should extend to parents who are at home looking after children with disabilities beyond the age of seven is a matter of social and economic policy and priorities to be decided in the political realm, not of constitutionally guaranteed human rights to be determined by the courts.

[87] First, it is neither inappropriate nor unsurprising for Parliament to design a program that recognizes the particular needs of young children for nurture, and the demands that these place on

parents. Other programs are similarly directed, such as the monthly allowance paid to all parents of pre-school age children**:** see *Universal Child Care Benefit Act*, S.C. 2006, c. 4, section 168.

[88] The age of seven in the CRDO provisions is not merely a proxy for a child's being in full-time school. Rather, it was chosen by Parliament to define when a child is no longer young enough to require a parent to stay at home, without prejudicing her ability to satisfy the "recency requirement" for eligibility for CPP. That the rationale of the selection of the age was that children are then old enough for full-time school, and their parents can thus more easily return to work, does not mean that the program should be divorced from the age of the children.

[89] Second, the CPP is a self-funded, contributory, and compulsory social insurance program, in which the period of insured coverage is related to the date when a contributor ceases to pay premiums. The CRDO provisions are designed to extend the period of CPP coverage for a relatively short and well-defined period of time. They do this by directing the benefit to parents who stay at home with pre-school age children, that is, who temporarily leave employment for a maximum of seven years. A program aimed at all parents who leave employment to care for a child with a disability, for a maximum of another 12 years, would constitute such an extension of the period of coverage that the program would be qualitatively different from the one enacted.

[90] Third, the Supreme Court of Canada has observed that eligibility for benefits under the CPP, and other social benefit programs, inevitably involves the somewhat arbitrary drawing of lines in complex schemes involving the balancing of competing interests. Hence, courts have been reluctant

to conclude that Parliament has drawn those lines at constitutionally impermissible points. In order to ensure that Parliament has sufficient room to manoeuvre, courts should not define at too high a level of generality the legislative purpose underlying a particular benefit.

[91] Thus, in *Granovsky v. Canada (Minister of Citizenship and Immigration)*, [2000] 1 S.C.R 703, 2000 SCC 28, at para. 79 (*Granovsky*), the Court rejected a section 15 challenge to other CPP drop out provisions. The claimant in that case unsuccessfully argued that the provisions were discriminatory because they benefited only the permanently disabled, and not to the temporarily disabled. In my view, *Granovsky* is virtually dispositive of this application.

[92] I am prepared to accept for the purpose of this application that "parents of a child with disabilities" constitute an analogous ground for the purpose of section 15. Nonetheless, this application in my view falls at the first hurdle of the section 15 analysis. The CRDO provisions do not create a difference on the ground of disability, even if the comparator group is defined as Ms Harris suggests, namely, parents whose children, over the age of seven, do not have a disability that requires a parent to stay out of the workforce in order to care for them at home. Ms Harris is treated no differently from these parents: none are entitled to the benefit of the CRDO. While age is a constitutionally prohibited ground of discrimination under section 15, it is not alleged that the CRDO provisions discriminate on the ground of age.

[93] In reaching this conclusion, I am mindful of the financial and other difficulties experienced by Ms Harris, and other parents, who stay at home to care for children with a disability that prevents

them from attending school. The facts of this case are particularly compelling because Ms Harris needs to drop only one additional year in order to be eligible for a long-term disability pension (an all-or-nothing benefit, which is not prorated) and, thanks in large part to her efforts, Bradley made an excellent recovery and was soon able to go to school.

[94] The applicant submitted evidence indicating that, since relatively few children have disabilities which cannot be accommodated in school, the cost to the CPP of extending the CRDO provisions in the manner urged by counsel is relatively modest. This evidence would be relevant at the section 1 stage of a Charter the analysis and in the political process. However, it is not relevant here because Ms Harris's claim does not get past section 15.

[95] Ms Harris has argued her case in this Court, as she must, as one of constitutional legal principle, and this is the basis on which it has to be decided. The Constitution cannot erase all the financial and other hardships suffered by parents of a child with a disability which prevents the child from attending school. It can only ensure that the law does not treat them in a discriminatory manner, which in my view, the present CRDO provisions do not. See *Granovsky* at para. 33.

[96] For these reasons, I would dismiss the application for judicial review.

"John M. Evans"

J.A.

RYER J.A. (Concurring Reasons)

[97] I have reviewed the reasons of my colleague Linden J.A. and except to the extent otherwise indicated, I adopt his description of the relevant facts and the statutory scheme. I cannot agree with his conclusion with respect to the disposition of this application. I am in agreement with the conclusion reached by Evans J.A., although for reasons that differ from his.

[98] Paragraph 44(1)(*b*) of the *Canada Pension Plan*, R.S. 1985, c. C-8 (the "Plan") sets out a number of conditions that must be met before a contributor will qualify to receive a disability pension. Pursuant to subparagraphs 44(1)(*b*)(i) and 44(2)(*a*)(i) of the Plan, a contributor is required to establish that he or she has made contributions of stipulated amounts for at least four of the last six years (the "4 of 6 contribution requirement") in the contributory period that ends in the month that the contributor becomes disabled.

[99] Pursuant to paragraph 44(2)(*b*) of the Plan, the contribution period generally begins on the eighteenth birthday of the contributor and ends in the month in which the contributor is determined to have become disabled. Importantly, in this case, subparagraph 44(2)(*b*)(iv) of the Plan, in conjunction with paragraph 77(1)(*a*) of the *Canada Pension Plan Regulations*, C.R.C. c. 385 (the "Plan Regulations"), permits a contributor to exclude from the contributory period any month that the contributor provides at-home care for a child under the age of seven.

[100] The applicant urges the Court to declare that subparagraph 44(2)(*b*)(iv) of the Plan and paragraph 77(1)(*a*) of the Plan Regulations (the "CRDO Provisions") are unconstitutional and to strike them down because they discriminate against her in a manner that contravenes subsection 15(1) of the *Canadian Charter of Rights and Freedoms*, Schedule B to the *Canada Act 1982* (U.K.) 1982, c. 11 (the "Charter"). Subsection 15(1) of the Charter reads as follows:

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.	15. (1) La loi ne fait acception de personne et s'applique également à tous, et tous ont droit à la même protection et au même bénéfice de la loi, indépendamment de toute discrimination, notamment des discriminations fondées sur la race, l'origine nationale ou ethnique, la couleur, la religion, le sexe, l'âge ou les déficiences mentales ou physiques.

[101] In their reasons, Justices Linden and Evans disagree as to the purpose behind the CRDO Provisions. Both agree that those provisions provide a benefit in terms of a relaxation of the 4 of 6 contribution requirement. To that extent, I am in agreement with them. Evans J.A. postulates that the purpose of the CRDO Provisions is to provide the benefit to a parent who leaves the work force to provide at-home care to "young children" – those under the age of seven. Linden J.A. views the purpose of the CRDO Provisions more broadly. In his view, those provisions should be regarded as having been intended to permit a contributor to "drop out" as many months of at-home care for a disabled child as may be required until that child is able to go to school. In terms of these divergent views with respect to the purpose of the CRDO Provisions, I am in agreement with the view stated by Evans J.A.

[102] However, with respect to my colleagues, I am of the view that the applicant's constitutional challenge to the CRDO Provisions should be dealt with on a simpler basis, one that does not require a consideration of the purpose of that impugned legislation.

[103] In this case, the subsection 15(1) challenge is based on an allegation that the applicant was not provided with "equal benefit of the law without discrimination". In my view, this challenge requires the applicant to identify the impugned legislation and the benefit provided thereunder. Thereafter, the applicant must establish that the benefit was denied to her and that the basis for the denial was discrimination on the grounds enumerated in subsection 15(1) or analogous grounds.

[104] The impugned legislative provisions are subparagraph 44(2)(*b*)(iv) of the Plan and paragraph 77(1)(*a*) of the Plan Regulations. In my view, the benefit provided by this legislation is the entitlement of a disability pension claimant to exclude from the determination of the claimant's contributory period, for the purposes of the 4 of 6 contribution requirement, each month of at-home care for a child under the age of seven, subject to certain other criteria that are not in issue in this application. In short, the benefit of the impugned legislation is the entitlement to exclude or "drop out" up to seventy-two months of absence from the work force, due to at-home child care, for the purpose of determining whether the 4 of 6 contribution requirement has been met.

[105] The next step is to determine whether the claimant was denied the benefit that is provided by the impugned legislation. It is at this point, in my view, that the applicant meets an insurmountable obstacle. At the hearing, the applicant conceded that in her application for a disability pension, she

in fact excluded the maximum number of months permitted by the CRDO Provisions in attempting to demonstrate that she met the 4 of 6 contribution requirement. Unfortunately for the applicant, she did not meet that requirement, notwithstanding that she claimed and received the maximum benefit that the impugned legislation provided.

[106] In my view, the applicant's admission that she *received* the maximum benefit provided by the CRDO Provisions makes it impossible for her to establish that she has been *denied* the benefit provided by the law that she wishes to have declared unconstitutional. Accordingly, her application must fail.

[107] This conclusion appears to be consistent with the concept of equality under subsection 15(1) of the Charter that was described by McIntyre J. at paragraph 26 of his decision in *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143. In that paragraph, he stated:

> Recognizing that there will always be an infinite variety of personal characteristics, capacities, entitlements and merits among those subject to a law, there must be accorded, as nearly as may be possible, an equality of benefit and protection and no more of the restrictions, penalties or burdens imposed upon one than another. In other words, the admittedly unattainable ideal should be that a law expressed to bind all should not because of irrelevant personal differences have a more burdensome or less beneficial impact on one than another.
>
> [Emphasis added]

The underlined portion of this quotation, in my view, reinforces my conclusion by informing that a law may be susceptible to challenge under subsection 15(1) of the Charter where that law has a "less beneficial impact upon one than the other". To me, this indicates that where a person has received the full extent of the beneficial impact of a particular law, that person has not been denied equality of the benefit of that law. In this regard, it is important to keep in mind that in

Andrews, the complainant was denied the benefit of membership in the Law Society of British Columbia because he lacked Canadian citizenship.

[108] It seems to me that the applicant's claim is not that she has been denied any "benefit of the law". Instead, her complaint is that the impugned legislation should have provided more of a benefit than it does. Similar assertions were rejected by the Supreme Court of Canada in *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, [2004] 3 S.C.R. 657, *Hodge v. Canada (Minister of Human Resources Development)*, [2004] 3 S.C.R. 357 and *Granovsky v. Canada (Minister of Employment and Immigration)*, [2000] 1 S.C.R. 703. While it may well be debatable as to whether the CRDO Provisions should impart more extensive benefits than they currently do, in my view, that debate should be held in Parliament, not in the courts.

[109] It follows, in my view, that the question of whether discrimination is afoot is not one that needs to be addressed in this appeal. If it did, the arguments between my colleagues as to the purpose of the impugned legislation might well become live issues. In *Hodge*, Binnie J. stated, at paragraph 24:

> 24 The usual starting point is an analysis of the legislation (or state conduct) that denied the benefit or imposed the unwanted burden. While we are dealing in this appeal with access to a government benefit, and the starting point is thus the *purpose* of the legislative provisions, a similar exercise is required where a claim is based on the effect of an impugned law or state action.

This passage indicates that an analysis of the purpose of the impugned legislation will be relevant where there has been a denial of the benefit of the law. It seems to follow that where the full benefit

of the impugned law has been enjoyed by the person challenging the law, no such analysis should be necessary.

[110] I wish to make an observation with respect to certain factual characterizations that appear in the reasons of my colleague Linden J.A. In particular, in paragraphs 33 and 59 of his reasons, Linden J.A. intimates that the reason that the applicant was unable to meet the 4 of 6 contribution requirement was because she was forced to provide full-time at-home care for her son. In that regard, I would observe that the applicant's son was able to go to school in the fall of 1998 but she did not return to the work force until 2001. That period of absence from the work force cannot be attributed to a requirement to provide at-home care to her son and if she had worked for a year during that period, she would have met the 4 of 6 contribution requirement.

[111] For these reasons, I would dismiss the application.

"C. Michael Ryer"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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