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2023 FC 138

Air Canada Pilots Association (*Applicant*)

v.

Air Canada and **Roy Bentley** (*Respondents*)

INDEXED AS: AIR CANADA PILOTS ASSOCIATION V. AIR CANADA

Federal Court, Furlanetto J.—By videoconference, May 12, 2022; Toronto, January 30, 2023.

Human Rights — Application for judicial review of Canadian Human Rights Tribunal (C.H.R.T.) decision dismissing request to declare Canadian Human Rights Benefit Regulations (Regulations), ss. 3(b), 5(b) unconstitutional for violating Canadian Charter of Rights and Freedoms, s. 15(1) — Amendments made to collective agreement (Agreement) between applicant, respondent Air Canada in response to legislative amendments repealing provision that permitted mandatory retirement at age of 60 — Agreement included Group Disability Income Plan (GDIP) for pilots on long-term disability — GDIP, provision L75.07 provided that pilots eligible for unreduced pension did not qualify for disability benefits should they become unable to work due to illness or disability — Respondent Roy Bentley becoming eligible to retire, filing human rights complaint — Argued that L75.07 discriminatory on basis of age — Test under Charter, s. 15(1) asking whether impugned provision creating distinction based on enumerated or analogous ground; if so, whether it imposes burdens or denies a benefit in manner having effect of reinforcing disadvantage — C.H.R.T. found that Regulations, ss. 3(b), 5(b) met first part of s. 15(1) test — However, concluded not disadvantaging, prejudicing, or stereotyping claimant group — Ss. 3(b), 5(b) containing two distinct exemptions — Applicant challenged fact that employees at "normal pensionable age under the pension plan of which the employee is a member" (Impugned Provision) cut-off from disability benefits — Of view that this exemption violating Charter, s. 15(1) — Applicant argued that Impugned Provision created distinction based on age — Air Canada asserted that employee's period of employment or years of service not personal characteristic falling under definition of analogous ground — Also asserted that the applicant led no evidence that Impugned Provision created disproportionate impact on members of protected group — Whether Regulations, ss. 3(b), 5(b) violating Charter, s. 15(1) — Those provisions not violating s. 15(1) — Length of employee's service not immutable personal characteristic — Given logical connection between length of service, age, Impugned Provision both directly, indirectly created distinction on basis of age — Contextual analysis remaining part of Court's approach to substantive equality, requiring balancing of interests at play — Purpose of impugned provision in context of broader scheme still meaningful consideration, along with whether lines drawn are generally appropriate having regard to circumstances of groups impacted, objects of scheme (Withler v. Canada (Attorney General), S.C.C.) — Here, ss. 3(b), 5(b) creating distinction when claimant reaches "normal pensionable age" — Issue was whether this drew discriminatory distinction

by denying benefit in manner reinforcing disadvantage — Use of "normal pensionable age" allowing employers to have regard to employee's circumstances, pensionable benefit in line with teachings of Withler — "Normal pensionable age" bona fide distinction — Not targeting groups for illegitimate reasons outside of overall scheme — Here, consistent with Withler, terminating disability benefits when employee reaching normal pensionable age not putting employees in adverse situation — Provisions based on age must also consider natural cycle, "vertical", "horizontal" needs of population as recognized in Withler — Ss. 3(b), 5(b) creating necessary exemption to individualized approach that would otherwise apply under Canadian Human Rights Act — Charter, s. 15 right safeguarded under ss. 3(b), 5(b), Impugned Provision — Application dismissed.

Constitutional Law — Charter of Rights — Equality Rights — Canadian Human Rights Tribunal (C.H.R.T.) dismissing request to declare Canadian Human Rights Benefit Regulations (Regulations), ss. 3(b), 5(b) unconstitutional for violating Charter, s. 15(1) — Amendments made to collective agreement between applicant, respondent Air Canada in response to legislative amendments repealing provision that permitted mandatory retirement at age of 60 — Agreement included Group Disability Income Plan (GDIP) for pilots on long-term disability — GDIP, provision L75.07 provided that pilots eligible for unreduced pension did not qualify for disability benefits should they become unable to work due to illness or disability — Respondent Roy Bentley becoming eligible to retire, filing human rights complaint — Argued that L75.07 discriminatory on basis of age — Test under s. 15(1) asking whether impugned provision creating distinction based on enumerated or analogous ground; if so, whether it imposes burdens or denies a benefit in manner having effect of reinforcing disadvantage — Ss. 3(b), 5(b) containing two distinct exemptions — Applicant challenged fact that employees at "normal pensionable age under the pension plan of which the employee is a member" (Impugned Provision) cut-off from disability benefits — Of view that this violating Charter, s. 15(1) — Applicant argued that Impugned Provision created distinction based on age — Whether Regulations, ss. 3(b), 5(b) violating Charter, s. 15(1) — Those provisions not violating s. 15(1) — Contextual approach still part of Court's approach to substantive equality, requiring balancing of interests at play — Purpose of impugned provision in context of broader scheme still meaningful consideration, along with whether lines drawn are generally appropriate having regard to circumstances of groups impacted, objects of scheme (Withler v. Canada (Attorney General), S.C.C.) — Here, ss. 3(b), 5(b) creating distinction when claimant reaches "normal pensionable age" — Issue was whether this drew discriminatory distinction by denying benefit in manner reinforcing disadvantage — Use of "normal pensionable age" allowing employers to have regard to employee's circumstances, pensionable benefit in line with teachings of Withler — "Normal pensionable age" bona fide distinction — Not targeting groups for illegitimate reasons outside of overall scheme — Here, consistent with Withler, terminating disability benefits when employee reaching normal pensionable age not putting employees in adverse situation — S. 15 ensuring substantive equality for all employees — This not meaning that all workers will have exact same disability coverage — Rather, it requires that all workers be eligible to form of compensation for loss of salary based on disability — This equality right safeguarded under ss. 3(b), 5(b), Impugned Provision.

This was an application for judicial review of a decision of the Canadian Human Rights Tribunal (C.H.R.T.) that dismissed a request to declare paragraphs 3(b) and 5(b) of the *Canadian Human Rights Benefit Regulations* (Regulations) unconstitutional for violating subsection 15(1) of the *Canadian Charter of Rights and Freedoms* (Charter).

In 2012, amendments were made to a collective agreement (Agreement) between the applicant and the respondent Air Canada in response to legislative amendments repealing a provision that permitted mandatory retirement at the age of 60. The amendments provided that pilots were eligible to retire with an unreduced pension at age 60 with 25 years of service, or at age 65 if they did not have 25 years of qualifying service. The Agreement also included a Group Disability Income Plan (GDIP) for pilots on long-term disability. Provision L75.07 of the GDIP provided that pilots who were eligible for an unreduced pension did not qualify for disability benefits should they become unable to work due to illness or disability. In 2014, the respondent Roy Bentley became eligible to retire with an unreduced pension as he had completed more than 25 years of service with Air Canada. When he learned that he would not receive GDIP benefits if he became disabled, he filed a human rights complaint. Before the C.H.R.T., Mr. Bentley argued that L75.07 was discriminatory on the basis of

age. The questions to be asked when assessing a claim under subsection 15(1) of the Charter are whether the impugned provision, on its face or in its impact, creates a distinction based on an enumerated or analogous ground; and, if so, whether it imposes burdens or denies a benefit in a manner that has the effect of reinforcing, perpetuating or exacerbating disadvantage, including a "historical" disadvantage. The C.H.R.T. found that when the effects of L75.07 were taken into account, paragraphs 3(b) and 5(b) of the Regulations created a distinction based on an analogous ground, meeting the first part of the subsection 15(1) test. However, the C.H.R.T. concluded that paragraphs 3(b) and 5(b) did not disadvantage, prejudice, or stereotype the claimant group. Pursuant to section 22 of the *Canadian Human Rights Act* (Act), the terms of an insurance plan do not violate the Act if the discriminatory basis of that insurance plan is permitted by the Regulations. Paragraphs 3(b) and 5(b) contain two distinct exemptions: if the employee is at an age that is not less than 65; or if the employee is the "normal pensionable age under the pension plan". On this judicial review, the applicant challenged the fact that employees at "normal pensionable age under the pension plan of which the employee is a member" (Impugned Provision) are cut-off from disability benefits. It was of the view that this exemption is a violation of subsection 15(1) of the Charter. The applicant argued that, on its face, the Impugned Provision created a distinction based on age, and that this distinction was based on membership in an enumerated group—in this case, older workers. Air Canada asserted that the distinction created by the Impugned Provision was not based on an enumerated or analogous ground, that it referred to the "normal pensionable age", which may be determined by a given period of service, rather than age. Air Canada argued that an employee's period of service is not an immutable characteristic that has the character of an enumerated or analogous ground. An analogous ground is one based on a personal characteristic that is immutable or changeable only at unacceptable cost to personal identity. Air Canada asserted that an employee's period of employment or years of service is not a personal characteristic that falls under this definition. It also asserted that the applicant could not succeed on the first part of the test because it had led no evidence and had not demonstrated that the Impugned Provision created a disproportionate impact on members of a protected group.

The sole substantive issue was whether paragraphs 3(b) and 5(b) of the Regulations violated subsection 15(1) of the Charter.

Held, the application should be dismissed.

Paragraphs 3(b) and 5(b) did not violate subsection 15(1) of the Charter and the C.H.R.T.'s decision was not in error. The length of an employee's service on its own is not an immutable personal characteristic, as it does not describe what a person is, but rather what a person is doing or has done. Employees who are most likely to be impacted by pension eligibility determined by a set period of service are older employees given the length of service required to obtain that eligibility. While limited evidence was advanced regarding the length of service generally required by these plans or the age at which employees in those positions begin working to determine their age of pension eligibility, given the logical connection between length of service and age, it was concluded that the Impugned Provision both directly and indirectly created a distinction on the basis of age.

A contextual analysis remains part of the Court's approach to substantive equality, requiring a balancing of the interests at play. As stated by the Supreme Court in *Withler v. Canada (Attorney General)* (*Withler*), the purpose of the impugned provision in the context of the broader scheme is still a meaningful consideration, along with whether lines drawn are generally appropriate having regard to the circumstances of the groups impacted and the objects of the scheme. Perfect correspondence between a benefit program and the actual needs and circumstances of the claimant group is not required. Allocation of resources and particular policy goals may also be considered. In this case, paragraphs 3(b) and 5(b) of the Regulations create a distinction when a claimant reaches "normal pensionable age". The issue was whether this drew a discriminatory distinction by denying a benefit in a manner that reinforces, perpetuates or exacerbates disadvantage as an employee gets older and reaches pensionable age. The use of "normal pensionable age" allows employers to have regard to the employee's circumstances and pensionable benefit in line with the teachings of *Withler*. The contextual factors demonstrated that the distinction made by "normal pensionable age" is a *bona fide* distinction. It is not targeting groups for illegitimate reasons outside

of the overall scheme. Here, consistent with *Withler* and the goals pursued, terminating disability benefits when an employee has reached normal pensionable age does not put employees in an adverse situation because they are able to collect unreduced pension benefits. There are some inherent distinctions when considering a provision based on age. Provisions based on age must also consider the natural cycle, bearing in mind both the “vertical” and “horizontal” needs of the population as recognized in *Withler*. Even if one were to accept that older workers face stereotypes in the workplace, and have experienced certain disadvantages associated with those stereotypes, there is insufficient evidence of the actual impact of the loss of disability benefits on older workers, or a clear connection in the evidence between the loss of disability benefits to those asserted stereotypes and disadvantages. Paragraphs 3(b) and 5(b) of the Regulations create a necessary exemption to the individualized approach that would otherwise apply under the Act. Section 15 of the Charter ensures substantive equality for all employees. This does not mean that all workers will have the exact same disability coverage because they are workers, or that there will be formal equality between older and younger workers. Rather, it requires that all workers be eligible to a form of compensation for loss of salary based on disability. The C.H.R.T. correctly found that this equality right was safeguarded under paragraphs 3(b) and 5(b), and in effect by the Impugned Provision.

STATUTES AND REGULATIONS CITED

Canadian Charter of Rights and Freedoms, being Part I of the *Constitution Act, 1982*, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44], ss. 1, 15.

Canadian Human Rights Act, R.S.C., 1985, c. H-6, s. 22.

Canadian Human Rights Benefit Regulations, SOR/80-68, ss. 2 “normal pensionable age”, 3(b), 5(b).

Employment Standards Act, 2000, S.O. 2000, c. 41.

Human Rights Code, R.S.O. 1990, c. H-19, s. 25(2.1).

Public Service Superannuation Act, R.S.C., 1985, c. P-36.

CASES CITED

APPLIED:

Fraser v. Canada (Attorney General), 2020 SCC 28, [2020] 3 S.C.R. 113; *National R&D Inc. v. Canada*, 2022 FCA 72, [2022] 2 F.C.R. D-4; *Withler v. Canada (Attorney General)*, 2011 SCC 12, [2011] 1 S.C.R. 12.

CONSIDERED:

Talos v. Grand Erie District School Board, 2018 HRTO 680 (CanLII), 47 C.C.E.L. (4th) 75; *Bekker v. Canada*, 2004 FCA 186, [2004] 3 C.T.C. 183; *Stadler v. Director, St Boniface/St Vital*, 2020 MBCA 46 (CanLII), 456 C.R.R. (2d) 297; *Danson v. Ontario (Attorney General)*, [1990] 2 S.C.R. 1086; *Landau v. Canada (Attorney General)*, 2022 FCA 12, 466 D.L.R. (4th) 550; *Association of Universities and Colleges of Canada v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22, 428 N.R. 297; *Quebec (Attorney General) v. Alliance du personnel professionnel et technique de la santé et des services sociaux*, 2018 SCC 17, [2018] 1 S.C.R. 464; *Weatherley v. Canada (Attorney General)*, 2021 FCA 158, [2021] 3 F.C.R. D-21; *Charles v. Canada (Attorney General)* (1996), 134 D.L.R. (4th) 742 (Ont. Sup. Ct.); *R. v. C.P.*, 2021 SCC 19, [2021] 1 S.C.R. 679; *Healy v. Gregory* (2009), 75 C.C.P.B. 178, [2009] O.J. No. 2562 (QL), 2009 CanLII 31609 (Ont. Sup. Ct.); *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229; *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313.

REFERRED TO:

Canada (Minister of Citizenship and Immigration) v. Vavilov, 2019 SCC 65, [2019] 4 S.C.R. 653; *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*, 2018 SCC 26, [2018] 1 S.C.R. 750; *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654; *Mackay v. Manitoba*, [1989] 2 S.C.R. 357; *Forest Ethics Advocacy Association v. Canada (National Energy Board)*, 2014 FCA 245, [2015] 4 F.C.R. 75; *Khodeir v. Canada (Attorney General)*, 2022 FC 44; *Forest Ethics Advocacy Association v. National Energy Board*, 2014 FCA 88; *Centrale des syndicats du Québec v. Quebec (Attorney General)*, 2018 SCC 18, [2018] 1 S.C.R. 522; *Ontario Public Service Employees Union v. Ontario (Government & Consumer Services)*, 2021 CanLII 19542 (Ont. G.S.B.).

AUTHORS CITED

Canadian Human Rights Commission, *Annual Report 1979*. Ottawa: Supply and Services Canada, 1980.

APPLICATION for judicial review of a decision of the Canadian Human Rights Tribunal (2019 CHRT 37, 51 C.C.P.B. (2d) 267) that dismissed a request to declare paragraphs 3(b) and 5(b) of the *Canadian Human Rights Benefit Regulations* unconstitutional for violating subsection 15(1) of the *Canadian Charter of Rights and Freedoms*. Application dismissed.

APPEARANCES

Christopher Rootham for applicant.

Maryse Tremblay for respondent Air Canada.

No one appearing for respondent Roy Bentley.

SOLICITORS OF RECORD

Nelligan O'Brien Payne LLP, Ottawa, for applicant.

Borden Ladner Gervais LLP, Montréal, for respondent Air Canada.

Hamilton Duncan Armstrong & Stewart, Surrey, British Columbia, for respondent Roy Bentley.

The following are the reasons for judgment and judgment rendered in English by

[1] FURLANETTO J.: This is an application for judicial review of an August 28, 2019 decision [*Bentley v. Air Canada and Air Canada Pilots Association*, 2019 CHRT 37, 51 C.C.P.B. (2d) 267] (Decision) of the Canadian Human Rights Tribunal (C.H.R.T.) that, *inter alia*, dismissed a request to declare paragraphs 3(b) and 5(b) of the *Canadian Human Rights Benefit Regulations*, SOR/80-68 (Regulations) unconstitutional for violating subsection 15(1) of the *Canadian Charter of Rights and Freedoms*, being Part I of the *Constitution Act, 1982*, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C. (1985), Appendix II, No. 44] (Charter). The C.H.R.T. found that paragraphs 3(b) and 5(b) of the Regulations were a complete defence to complaints filed by the Respondent, Roy Bentley, against Air Canada (AC) and Air Canada Pilots Association (ACPA) that a provision of the collective agreement between AC and ACPA allowing for termination of

long-term disability benefits for pilots who became eligible to receive unreduced pension benefits was age discrimination within the meaning of the *Canadian Human Rights Act*, R.S.C., 1985, c. H-6 (Act).

[2] Mr. Bentley is now retired from AC and has elected not to participate in the current proceedings. He did not file any materials or participate in the hearing of this matter. Instead, ACPA has brought this application to challenge the C.H.R.T.'s finding based on subsection 15(1) of the Charter.

[3] For the reasons set out below, it is my view that the application should be dismissed as ACPA has failed to demonstrate that the phrase "normal pensionable age under the pension plan of which the employee is a member" from paragraphs 3(b) and 5(b) of the Regulations violates the substantive equality norm enshrined in subsection 15(1) of the Charter.

I. Background

[4] In 2011, ACPA and AC entered into a collective agreement (Agreement) that was in force from 2011 to 2016. In 2012, amendments were made to the Agreement in response to legislative amendments repealing a provision that permitted mandatory retirement at the age of 60. The amendments provided that pilots were eligible to retire with an unreduced pension at age 60 with 25 years of service, or at age 65 if they did not have 25 years of qualifying service.

[5] The Agreement also included a Group Disability Income Plan (GDIP) for pilots on long-term disability. Provision L75.07 of the GDIP provided that pilots who were eligible for an unreduced pension did not qualify for disability benefits should they become unable to work due to illness or disability.

[6] Mr. Bentley turned 60 on May 30, 2014. He became eligible to retire with an unreduced pension as he had completed more than 25 years of service with AC. When he learned that he would not receive GDIP benefits if he became disabled, he filed a human rights complaint.

A. *Proceeding before the C.H.R.T.*

[7] Before the C.H.R.T., Mr. Bentley argued that paragraphs 3(b) and 5(b) of the Regulations violated subsection 15(1) of the Charter and were not saved by section 1, and that L75.07 of the GDIP was discriminatory on the basis of age.

[8] Both AC and ACPA initially opposed Mr. Bentley's arguments. However, in May 2018, the Ontario Human Rights Tribunal (O.H.R.T.) released its decision in *Talos v. Grand Erie District School Board*, 2018 HRTO 680 (CanLII), 47 C.C.E.L. (4th) 75 (*Talos*), wherein the O.H.R.T. found that a provision under Ontario human rights legislation violated subsection 15(1) of the Charter and were not to be saved by section 1. After the release of *Talos*, ACPA changed its position to support Mr. Bentley's arguments.

B. *Evidence before the C.H.R.T.*

[9] Before the C.H.R.T., ACPA provided evidence from three former pilots: Mr. Bentley, Robert Lyon and Sandra Anderson. Mr. Bentley was not disabled and was therefore not financially harmed by the provisions. Robert Lyon required six months to recover from a heart attack after his 60th birthday. He took leave without pay after exhausting his vacation and sick days before returning to work. Sandra Anderson required a major surgery four months after her 60th birthday. She retired seven months later after using her accrued sick days and vacation days so she did not have to go without income.

[10] AC also provided an expert report from Peter Gorham (Gorham Report) who was qualified as an expert "with actuarial expertise in the design, implementation, governance, costing and funding of pension plans and employee benefit programs". Mr. Gorham reached two key conclusions in his report:

A. It is appropriate from an actuarial and insurance perspective (i.e., cost effectiveness) to replace loss of income benefits with retirement benefits for workers at some point between age 61 and 65; and

B. Reference to pensionable age is a reasonable proxy to recognize the specific retirement experience at various employers.

[11] In arriving at these conclusions, Mr. Gorham opined that "it [was] not actuarially sound to continue to pay disability income protection after a point at which the majority of workers are likely to have retired. To do so [would] over compensate more than half of the disabled workers."

[12] He noted that to be actuarially sound there needed to be a point where income benefits ceased. However, there was no single correct age at which benefits should stop. Rather, there was a range of ages that could vary based on retirement patterns of Canadians, in general, and of the employer in particular. In his opinion, the use of pensionable age was an appropriate method of setting a point at which disability benefits could cease as it recognized differing employment situations such as those resulting from employees with unreduced early retirement benefits, who tended to retire at younger ages than those without unreduced early retirement pensions.

C. *Decision under review*

[13] The C.H.R.T. found that when the effects of L75.07 are taken into account, paragraphs 3(b) and 5(b) of the Regulations create a distinction based on an analogous ground, meeting the first part of the subsection 15(1) test.

[14] However, the C.H.R.T. concluded that paragraphs 3(b) and 5(b) of the Regulations did not disadvantage, prejudice, or stereotype the claimant group. The termination of disability benefits upon reaching pensionable age was set off with generous retirement benefits, and an unreduced pension. Given the high costs of maintaining disability insurance for older individuals, this compromise was reasonable. The C.H.R.T. did not accept ACPA's reliance on *Talos*. It distinguished *Talos*, which dealt with health, dental, and life insurance benefits rather than disability benefits and explicitly excluded long-term disability insurance and pension plans.

[15] As the C.H.R.T. concluded there was no violation of subsection 15(1) of the Charter, there was no section 1 analysis.

II. Issues and Standard of Review

[16] Pursuant to section 22 of the Act, the terms of an insurance plan do not violate the Act if the discriminatory basis of that insurance plan is permitted by the Regulations. Paragraphs 3(b) and 5(b) of the Regulations contain two distinct exemptions: if the employee is at an age that is not less than 65; or if the employee is the "normal pensionable age under the pension plan". These provisions read as follows:

> **3** The following provisions of a benefit plan do not constitute the basis for a complaint under Part III of the Act that an employer is engaging or has engaged in a discriminatory practice:
>
> …
>
> **(b)** in the case of any disability income insurance plan, provisions that result in an employee being excluded from participation in the plan because the employee has attained the age at which a member of the plan would not be eligible to receive benefits under the plan or has attained that age less the length of the waiting period following the commencement of a disability that must pass before benefits may become payable thereunder, **if that age is not less than 65 or the normal pensionable age under the pension plan of which the employee is a member, whichever occurs first;**
>
> …
>
> **5** The following provisions of an insurance plan do not constitute the basis for a complaint under Part III of the Act that an employer is engaging or has engaged in a discriminatory practice:
>
> …
>
> **(b)** in the case of any disability income insurance plan, provisions that result in differentiation being made between employees because the benefits payable under the plan to an employee cease **when the employee has attained the age of not less than 65, or the normal pensionable age under the pension plan of which the employee is a member,** whichever occurs first; [Emphasis added.]

[17] The Applicant on this judicial review does not challenge the constitutional validity of the exemption from disability insurance plans for employees not less than 65. Nor is it challenging the appropriateness of the GDIP benefits. The sole substantive issue on this application is whether the exemption that employees at "normal pensionable age under the pension plan of which the employee is a member" (Impugned Provision) are cut-off from disability benefits is a violation of subsection 15(1) of the Charter and if so, whether it is saved by section 1 of the Charter.

[18] In addition, AC raises as a preliminary issue whether ACPA should be permitted to advance new arguments and evidence on judicial review that were not before the C.H.R.T., namely with respect to the latter, the introduction of various social science papers in its Book of Authorities (BOA).

[19] There is no standard of review for the preliminary issue.

[20] The standard of review for the substantive issue is correctness. The compatibility of paragraphs 3(b) and 5(b) of the Regulations with the Charter is a constitutional question that falls within an exception to the presumption of reasonableness: *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653, at paragraphs 55–57.

[21] As noted by AC, when applying the correctness standard, the Court must remain alert to the structural limitations of a judicial review, which is concerned with the legality of the underlying decision (*Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*, 2018 SCC 26, [2018] 1 S.C.R. 750, at paragraph 13) and determining whether reviewable errors were committed. As explained by the Federal Court of Appeal in *Bekker v. Canada*, 2004 FCA 186, [2004] 3 C.T.C. 183 (*Bekker*), at paragraph 11, the judicial review is not a *de novo* hearing:

> Judicial review proceedings are limited in scope. They are not trial *de novo* proceedings whereby determination of new issues can be made on the basis of freshly adduced evidence. As Rothstein J.A. said in *Gitxsan Treaty Society v. Hospital Employees Union*..."the essential purpose of judicial review is the review of decisions" and, I would add, to merely ascertain their legality....This is the reason why, barring exceptional circumstances such as bias or jurisdictional questions, which may not appear on the record, the reviewing Court is bound by and limited to the record that was before the judge or the Board. Fairness to the parties and the court or tribunal under review dictates such a limitation.[Footnotes and emphasis deleted.]

III. Analysis

A. *Should ACPA's new evidence and arguments be permitted?*

[22] AC asserts that arguments and evidence advanced by ACPA before this Court were not made before the C.H.R.T. and as such are improperly raised.

[23] As noted by AC and referenced earlier, in its initial submissions to the C.H.R.T., ACPA supported AC's position that the amendment to the Agreement was shielded by paragraphs 3(b) and 5(b) of the Regulations and that these subsections did not violate the Charter. In doing so, they relied fully on the Gorham Report. However, after a request for further submissions from the C.H.R.T. Hearings Officer because of the O.H.R.T.'s decision in *Talos*, ACPA changed its position, asserting that paragraphs 3(b) and 5(b) were contrary to subsection 15(1) of the Charter. In these further submissions, ACPA made little independent argument, essentially adopting the O.H.R.T.'s analysis and asserting it applied equally to the matter before the C.H.R.T.

[24] Before the Court now, ACPA seeks to critique aspects of the Gorham Report in support of its argument that paragraphs 3(b) and 5(b) are unconstitutional.

[25] Further, AC asserts that ACPA raises a new argument at paragraph 33 of the Applicant's memorandum of fact and law that is broader than the issues before the C.H.R.T. In this paragraph, ACPA characterizes the issue as "whether the mere existence of a pension plan excuses the complete denial of disability benefits—no matter what benefits the pension plan's terms provide."

[26] AC argues that this paragraph is a recharacterization of the issues before the C.H.R.T. that widens the scope of the analysis beyond the GDIP and has denied the Respondent the opportunity to file relevant evidence on different pension plans and how they interact with paragraphs 3(b) and 5(b) of the Regulations. AC similarly asserts that it has been denied the opportunity to address the difference between defined benefit plans and defined contribution plans, which would be relevant to this broader issue.

[27] ACPA argues that this is not a situation where a new issue is being raised before the Court that was not before the C.H.R.T. Rather, in this case, the subsection 15(1) issue was clearly before the C.H.R.T., and a decision on the issue was rendered by the C.H.R.T. Thus, the decision maker was provided with an opportunity to express an opinion on the Charter issue.

[28] I agree with AC that the issues as framed cannot be broader than the matters that were before the C.H.R.T.: *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654, at paragraph 26. However, I do not agree that ACPA is foreclosed from challenging the C.H.R.T.'s findings on subsection 15(1) or from advancing arguments that relate to those made by Mr. Bentley before the C.H.R.T. or that encompass what the C.H.R.T. would have considered as a result of the post-hearing submissions and its consideration of *Talos*.

[29] With respect to evidence, AC impugns ACPA's criticisms of the Gorham Report, the reliance on expert evidence from decisions such as *Talos*, and the introduction of social science articles in its BOA that were not introduced via expert testimony before the C.H.R.T.

[30] I agree with ACPA that the reliance and criticisms of the Gorham evidence is not new evidence. ACPA is not seeking to introduce competing evidence to the opinions given by Mr. Gorham. Rather, they are seeking to point to certain aspects of Mr. Gorham's evidence and are asking this Court to draw a different legal conclusion on that evidence than the one drawn by the C.H.R.T.

[31] Regarding the reliance on expert evidence from other decisions, such evidence cannot be taken as evidence of first instance and can only be viewed in context. This will be dealt with further, where necessary, when addressing the parties' specific arguments under the subsection 15(1) analysis.

[32] With respect to ACPA's reference to secondary source social science articles, ACPA asserts that it is not relying on these articles as evidence, but rather to put the existing evidence in context. ACPA argues that this is consistent with the approach taken in other cases; such as, *Stadler v. Director, St Bonifact/St Vital*, 2020 MBCA 46 (CanLII), 456 C.R.R. (2d) 297 (*Stadler*) and *Fraser v. Canada (Attorney General)*, 2020 SCC 28, [2020] 3 S.C.R. 113 (*Fraser*).

[33] AC asserts that ACPA is trying to introduce evidence that was not before the C.H.R.T. because ACPA did not dispute the Gorham Report before the C.H.R.T. AC takes issue with the secondary references found at items 35 to 45 of ACPA's BOA, with the exception of items 38 and 44, which it asserts relate to a government report and government newsletter, respectively.

[34] It is well established that Charter cases cannot be determined in a factual vacuum: *Mackay v. Manitoba*, [1989] 2 S.C.R. 357, at page 361. As stated in *Danson v. Ontario (Attorney General)*, [1990] 2 S.C.R. 1086, at page 1101:

> ….In general, any *Charter* challenge based upon allegations of the unconstitutional effects of impugned legislation must be accompanied by admissible evidence of the alleged effects. In the absence of such evidence, the courts are left to proceed in a vacuum, which, in constitutional cases as in nature, has always been abhorred.

[35] As noted in *Bekker*, at paragraphs 12–14, the concerns that are relevant to a challenge under section 15 require a complex, multi-factored contextual inquiry by the reviewing court as to whether the impugned legislation not only creates differential treatment, but also if it is discriminatory in the constitutional sense. This may include social science and statistical data of which cross-examination may be necessary as well as the filing of evidence in rebuttal.

[36] Such analysis is shown in *Fraser* starting at paragraph 98, where the Court reviewed commission reports, judicial decisions and academic work in order to assess the assertions of the applicant that women had historically borne the overwhelming share of childcare responsibilities, that part-time workers in Canada were disproportionately women, and that they were far more likely than men to work part-time due to childcare responsibilities resulting in less stable employment and periods of "'scaling back at work'". However, *Fraser* does not speak to the introduction of such evidence.

[37] While in *Stadler*, the Court referred to four articles, which it permitted an intervener, the Social Planning Council, to file when it was granted leave to intervene; in my view, this cannot be taken as authority for the proposition that parties are routinely permitted to file new evidence in the form of secondary articles at the Court level.

[38] It is trite law that absent a recognized exception, new evidence, even on constitutional issues, is not admissible on judicial review: *Landau v. Canada (Attorney General)*, 2022 FCA 12, 466 D.L.R. (4th) 550 (*Landau*), at paragraph 11; *Association of Universities and Colleges of Canada v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22, 428 N.R. 297 (*Access Copyright*), at paragraph 20; *Forest Ethics Advocacy Association v. Canada (National Energy Board)*, 2014 FCA 245, [2015] 4 F.C.R. 75 (*Forest Ethics*), at paragraphs 40–46.

[39] There is no dispute that the secondary articles sought to be introduced were not before the C.H.R.T. and none of this evidence falls within the exceptions enumerated in *Access Copyright* at paragraph 20. It does not constitute general background information, address procedural defects before the C.H.R.T., nor demonstrate that there was an absence of evidence underlying a finding of the C.H.R.T.

[40] The academic articles relied on by ACPA speak to negative stereotypes about older workers, ageism, and the security of employment in old age. This evidence goes to the merits of ACPA's subsection 15(1) argument. They relate to contested facts and are not articles to which judicial notice can be taken: *Khodeir v. Canada (Attorney General)*, 2022 FC 44, at paragraphs 21, 26 and 27.

[41] Further, rather than submit this evidence through an expert affidavit, ACPA has filed this evidence as part of its BOA. In *National R&D Inc. v. Canada*, 2022 FCA 72, [2022] 2 F.C.R. D-4, at paragraph 14, the Federal Court of Appeal commented on the impermissibility of this type of practice (see also *Landau*, at paragraph 12 and *Forest Ethics Advocacy Association v. National Energy Board*, 2014 FCA 88, at paragraphs 12–14):

> ... In support, the appellant relies on an article contained in the book of authorities. This, in my view, is an impermissible attempt to establish, through the back door, a fact that should be a matter of evidence at trial. If there is a critical distinction in the methodology used in the applied as opposed to natural sciences, then the appellant is required to establish that fact in evidence (*Public School Boards' Assn. of Alberta v. Alberta (Attorney General)*, [1999] 3 S.C.R. 845, 180 D.L.R. (4th) 670). What is written in an academic journal cannot be taken on faith. Matters of social, applied and natural sciences must be adduced through experts, and who must be made available for cross-examination, as it is through cross-examination that the credibility of the expert and the reliability of the evidence is tested (*Canada (Citizenship and Immigration) v. Ishaq*, 2015 FCA 151, [2016] 1 F.C.R. 686 at para. 21).

[42] By proceeding in this manner, ACPA has effectively insulated the evidence from cross-examination and rendered it impossible for this Court to determine its reliability: *Forest Ethics*, at paragraph 42. Additionally, in some instances the reference is only to an excerpt of the article such that the full context of the article is not even present. I agree with AC, these secondary articles cannot be admitted.

B. *Is the Impugned Provision contrary to subsection 15(1) of the Charter*

[43] Subsection 15(1) of the Charter provides that:

> **Equality before and under law and equal protection and benefit of law**
>
> **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.

[44] As set out in *Fraser*, at paragraph 42, "substantive equality is the 'animating norm' of the s. 15 framework ... substantive equality requires attention to the 'full context of the claimant group's situation', to the 'actual impact of the law on that situation', and to the 'persistent systemic disadvantages [that] have operated to limit the opportunities available' to that group's members".

[45] When assessing a claim under subsection 15(1) of the Charter, the Court asks two questions (*Centrale des syndicats du Québec v. Quebec (Attorney General)*, 2018 SCC 18, [2018] 1 S.C.R. 522, at paragraph 22; *Fraser*, at paragraph 27): (1) Does the impugned provision, on its face or in its impact, create a distinction based on an enumerated or analogous ground; and, if so, (2) Does it impose burdens or deny a benefit in a manner that has the effect of reinforcing, perpetuating or exacerbating disadvantage, including a "historical" disadvantage?

(1) *Does the Impugned Provision draw a distinction based on age?*

[46] As summarized in *Quebec (Attorney General) v. Alliance du personnel professionnel et technique de la santé et des services sociaux*, 2018 SCC 17, [2018] 1 S.C.R. 464, at paragraph 26, the purpose of the first part of the subsection 15(1) analysis is to ensure that subsection 15(1) is accessible to those whom it was designed to protect, and exclude claims that have nothing to do with substantive equality because they are not based on enumerated or analogous grounds that are constant markers of potential discrimination. It does not require consideration of discriminatory impact, but focusses on the grounds of distinction.

[47] In order for a provision to create a distinction based on a prohibited ground through its effects, it must have a disproportionate impact on members of a protected group: *Fraser*, at paragraph 52.

[48] ACPA asserts that the first stage of the subsection 15(1) test is easily met in this case. It argues that, on its face, the Impugned Provision creates a distinction based on age—i.e., whether an employee has met the "normal pensionable age under the pension plan". It argues that this distinction is based on membership in an enumerated group—in this case, older workers.

[49] AC emphasizes the contextual nature of the subsection 15(1) analysis and its focus on substantive rather than formal equality. It asserts that the distinction created by the Impugned Provision is not based on an enumerated or analogous ground. The Impugned Provision refers to the "normal pensionable age", which may be determined by a given period of service, rather than age. It argues that an employee's period of service is not an immutable characteristic that has the character of an enumerated or analogous ground.

[50] An analogous ground is one based on a personal characteristic that is immutable or changeable only at unacceptable cost to personal identity: *Withler v. Canada (Attorney General)*, 2011 SCC 12, [2011] 1 S.C.R. 12 (*Withler*), at paragraph 33. AC asserts that an employee's period of employment or years of service is not a personal characteristic that falls under this definition.

[51] AC argues that in order to satisfy the first part of the subsection 15(1) test, the Applicant was required to adduce evidence to establish that there is a disproportionate impact on the members of the asserted group that includes evidence about the situation of the claimant group and evidence about the results of the law. It refers to the comments of the Federal Court of Appeal in *Weatherley v. Canada (Attorney General)*, 2021 FCA 158, [2021] 3 F.C.R. D-21 (*Weatherley*), at paragraph 39, which refers to the Court in *Fraser*:

> In *Fraser*, as a general matter, the majority of the Supreme Court instructs us that "[t]wo types of evidence" are "especially helpful in proving that a law has a disproportionate impact on members of a protected group": first, "evidence about the situation of the claimant group" and, second, "evidence about the results of the law" (at para. 56) or the "results of a system" (at para. 58). On the second type of evidence, what must be shown is "a disparate pattern of exclusion or harm" from the law "that is statistically significant and not simply the result of chance" (at para. 59). Inherent in this is a requirement to lead some evidence that the law being challenged causes or at least contributes to the impact. In other words, there should be "evidence…about the results produced by the challenged law" (at para. 60). Both types of evidence are not always

required and evidentiary standards should not be applied too rigorously: *Fraser* at paras. 61 and 67. But claimants still have to lead some evidence to support their claim.

[52] AC asserts that ACPA cannot succeed on the first part of the test because it has led no evidence and has not demonstrated that the Impugned Provision creates a disproportionate impact on members of a protected group.

[53] Section 2 of the Regulations defines “normal pensionable age” as:

> **2 (1)** …
>
> …
>
> ***normal pensionable age*** under a pension plan, means the earliest date specified in the plan on which an employee can retire from his employment and receive all the benefits provided by the plan to which he would otherwise be entitled under the terms of the plan, without adjustment by reason of early retirement, whether such date is the day on which the employee has attained a given age or on which the employee has completed a given period of employment; (*âge normal ouvrant droit à la pension*)

[54] I agree with AC that the length of an employee’s service on its own is not an immutable personal characteristic as it does not describe what a person is, but rather, what a person is doing or has done: *Charles v. Canada (Attorney General)* (1996), 134 D.L.R. (4th) 742 (Ont. Sup. Ct.) (*Charles*), at paragraph 45.

[55] However, unlike in *Charles* where the alleged disparate impact was solely based on years of service (*Charles*, at paragraphs 42–46), in this case, the definition of “normal pensionable age” includes pensions that start paying benefits at a specific age, creating a distinction on age, although the age is not specifically identified, as well as those where the employee has completed a given period of employment.

[56] As a matter of common sense, employees who are most likely to be impacted by pension eligibility determined by a set period of service are older employees given the length of service required to obtain that eligibility.

[57] While limited evidence was advanced regarding the length of service generally required by these plans or the age at which employees in those positions begin working to determine their age of pension eligibility, given the logical connection between length of service and age, in my view it can be concluded that the Impugned Provision both directly and indirectly creates a distinction on the basis of age. Further, for this part of the test and without opining on merits, I accept ACPA’s reliance on the facts relating to Sandra Anderson and Robert Lyon as proposed evidence as to the results of the law.

(2) *Does the Impugned Provision violate the substantial guarantee of equality?*

[58] The parties acknowledge that there has been a development in the law since their memoranda were filed. Specifically, they note that the Supreme Court’s decision in *Fraser* altered the second stage of the section 15 analysis in subtle ways. As set out at paragraphs 76–81 of *Fraser*:

This brings us to the second step of the s. 15 test: whether the law has the effect of reinforcing, perpetuating, or exacerbating disadvantage (*Alliance*, at para. 25). This inquiry will usually proceed similarly in cases of disparate impact and explicit discrimination. There is no "rigid template" of factors relevant to this inquiry (*Quebec v. A*, at para. 331, quoting *Withler*, at para. 66). The goal is to examine the impact of the harm caused to the affected group. The harm may include "[e]conomic exclusion or disadvantage, [s]ocial exclusion … [p]sychological harms … [p]hysical harms … [or] [p]olitical exclusion", and must be viewed in light of any systemic or historical disadvantages faced by the claimant group (Sheppard (2010), at pp. 62-63 (emphasis deleted)).

The purpose of the inquiry is to keep s. 15(1) focussed on the protection of groups that have experienced exclusionary disadvantage based on group characteristics, as well as the protection of those "who are members of more than one socially disadvantaged group in society" (Colleen Sheppard, "Grounds of Discrimination: Towards an Inclusive and Contextual Approach" (2001), 80 *Can. Bar Rev.* 893, at p. 896; see also *Withler*, at para. 58). As the Court noted in *Quebec v. A* when discussing the second stage of the s. 15 test:

> The root of s. 15 is our awareness that certain groups have been historically discriminated against, and that the perpetuation of such discrimination should be curtailed. [para. 332]

(See also *Taypotat*, at para. 20.)

Notably, the presence of social prejudices or stereotyping are not necessary factors in the s. 15(1) inquiry. They may assist in showing that a law has negative effects on a particular group, but they "are neither separate elements of the *Andrews* test, nor categories into which a claim of discrimination must fit" (*Quebec v. A*, at para. 329), since

> [w]e must be careful not to treat *Kapp* and *Withler* as establishing an additional requirement on s. 15 claimants to prove that a distinction will perpetuate prejudicial or stereotypical attitudes towards them. Such an approach improperly focuses attention on whether a discriminatory *attitude* exists, not a discriminatory impact, contrary to *Andrews*, *Kapp* and *Withler*. [Emphasis in original; para. 327.]

(See also paras. 329-31.)

The perpetuation of disadvantage, moreover, does not become less serious under s. 15(1) simply because it was *relevant* to a legitimate state objective. I agree with Dean Mayo Moran that adding relevance to the s. 15(1) test — even as one contextual factor among others — risks reducing the inquiry to a search for a "rational basis" for the impugned law .... The test for a *prima facie* breach of s. 15(1) is concerned with the discriminatory impact of legislation on disadvantaged groups, not with whether the distinction is justified, an inquiry properly left to s. 1 ....

Similarly, there is no burden on a claimant to prove that the distinction is arbitrary to prove a *prima facie* breach of s. 15(1). It is for the government to demonstrate that the law is *not* arbitrary in its justificatory submissions under s. 1 ....

In sum, then, the first stage of the s. 15 test is about establishing that the law imposes differential treatment based on protected grounds, either explicitly or through adverse impact. At the second stage, the Court asks whether it has the effect of reinforcing, perpetuating, or exacerbating disadvantage (*Alliance*, at para. 25).

[59] ACPA contends that *Fraser* emphasizes the heavy importance on the discriminatory impact of the provision in question, by asking whether the impugned

provision “has the effect of reinforcing, perpetuating, or exacerbating disadvantage” (at paragraph 81). ACPA asserts that the allocation of resources and goal of the legislation discussed at paragraph 68 of the Decision and paragraph 71 of *Withler* are accordingly no longer relevant. It argues that arbitrariness is no longer necessary to the section 15 analysis, but is instead relevant to section 1.

[60] AC concedes that *Fraser* refined aspects of the analysis under this part of the test; however, it refers to *R. v. C.P.*, 2021 SCC 19, [2021] 1 S.C.R. 679 (*CP*), decided after *Fraser*, at paragraph 145, which continues to refer to the contextual approach mandated in *Withler* as establishing the framework for the analysis:

> In other words, it is the actual impact of the provision in its full context that should govern the analysis, and s. 37(10) should not be divorced from its entire legislative context. An approach requiring line-by-line parity with the *Criminal Code* without reference to the distinct nature of the underlying scheme of the *YCJA* would indeed be contrary to the contextual approach mandated in *Withler v. Canada (Attorney General)*, 2011 SCC 12, [2011] 1 S.C.R. 396, at paras. 73, 76 and 79. The analysis instead requires a “contextual understanding of a claimant’s place within a legislative scheme and society at large”; the court must ask “whether the lines drawn are generally appropriate, having regard to the circumstances of the persons impacted and the objects of the scheme” (paras. 65 and 67). Understanding the distinct legislative scheme underlying s. 37(10) is crucial to the assessment of the *actual* impact of the law on young persons (see P. J. Monahan, B. Shaw and P. Ryan, *Constitutional Law* (5th ed. 2017), at p. 469).

[61] AC asserts, and I agree, a contextual analysis remains part of the Court’s approach to substantive equality, requiring a balancing of the interests at play. As stated by the Supreme Court at paragraph 153 of *CP*:

> .... The inquiry under s. 15(1) of the *Charter* into the perpetuation of a disadvantage requires attention to “the full context of the claimant group’s situation” and to “the actual impact of the law on that situation” (*Withler*, at para. 43; see also *Taypotat*, at para. 17). The result of this contextual inquiry may in turn be to reveal that differential treatment is discriminatory because it perpetuates disadvantage, that it is neutral, or “that differential treatment is required in order to ameliorate the actual situation of the claimant group” (*Withler*, at para. 39). This Court must, therefore, in assessing the actual impact of a leave requirement, have regard to the full context of the situation of young persons, which, I find, includes the fact that a structurally prolonged appellate review can be more prejudicial to them.

[62] In my view, the purpose of the impugned provision in the context of the broader scheme is still a meaningful consideration, along with whether lines drawn are generally appropriate having regard to the circumstances of the groups impacted and the objects of the scheme: *Withler*, at paragraph 71. Perfect correspondence between a benefit program and the actual needs and circumstances of the claimant group is not required. Allocation of resources and particular policy goals may also be considered: *Withler*, at paragraph 67. Contrary to the assertions of ACPA, I do read *Fraser* as changing this aspect of the law, particularly in view of the statements made in *CP*.

[63] In this case, paragraphs 3(b) and 5(b) of the Regulations create a distinction when a claimant reaches “normal pensionable age”. The issue is whether this draws a discriminatory distinction by denying a benefit in a manner that reinforces, perpetuates or exacerbates disadvantage as an employee gets older and reaches pensionable age.

[64] As acknowledged in *CP* at paragraph 142, “[i]n this respect, it should also be borne in mind that age-based distinctions are generally a ‘common and necessary way of ordering our society’ and are ‘not strongly associated with discrimination and arbitrary denial of privilege’ (*Gosselin v. Quebec (Attorney General)*, 2002 SCC 84, [2002] 4 S.C.R. 429, at para. 31)”.

[65] AC asserts that when one does a contextual analysis it arrives at the same analysis set out in *Weatherley*; that disability plans act as a form of insurance for workers where termination of compensation is necessary at some point.

[66] As noted in *Weatherley* at paragraphs 24–29, an infringement of subsection 15(1) of the Charter cannot be deduced simply from the fact that legislation leaves a group, even a vulnerable group, outside a benefits scheme:

> In *Gosselin v. Quebec (Attorney General)*, 2002 SCC 84, [2002] 4 S.C.R. 429 at para. 55, the Supreme Court held that courts cannot insist on “[p]erfect correspondence between a benefit program and the actual needs and circumstances of [an] 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” (at para. 55).
>
> This led the Supreme Court in *Gosselin* to hold that an infringement of section 15(1) of the Charter cannot be deduced simply from the fact that benefits legislation leaves a group, even a vulnerable group, outside a benefits scheme (at para. 55):
>
> > 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).
>
> To the same effect is the Supreme Court’s decision in *Law v. Canada*, [1999] 1 S.C.R. 497, 170 D.L.R. (4th) 1 at para. 105. This Court described *Law*’s contribution to our understanding of section 15(1) and the Plan in this way:
>
> > …[B]enefits legislation, like the [*Canada Pension*] *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.
>
> (*Miceli-Riggins* at para. 56.)
>
> More recently, in *Withler v. Canada (Attorney General)*, 2011 SCC 12, [2011] 1 S.C.R. 396, the Supreme Court held that the assessment whether benefits legislation offends section 15(1) must be conducted sensitively, keeping front of mind the challenge of allocating scarce resources (at para. 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.

In *Withler*, the Supreme Court also instructed (at paras. 38 and 66) that courts should give some margin of appreciation under section 15(1) to the judgment calls made by legislators when assessing whether their benefits legislation improperly discriminates.

For these reasons, the Supreme Court has suggested that only something quite discernable or concrete—such as an illegitimate or arbitrary "singling out" of a particular group—can prompt the Court to find that benefits legislation infringes section 15(1):

> 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….
>
> 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 (Guardian ad litem of) v. British Columbia (A.G.)*, 2004 SCC 78, [2004] 3 S.C.R. 657 at paras. 41-42.)

But even then, a section 15(1) claimant may still not have enough to succeed. This is because "[c]rafting a social assistance program…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* at para. 55. In the same vein, this Court has put it this way:

> 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.

(*Krock v. Canada (Attorney General)*, 2001 FCA 188, 89 C.R.R. (2d) 170 at para. 11.)

[67] ACPA asserts that the focus of the analysis in this case is distinct from the focus in *Withler* on which the C.H.R.T. relied and from *Weatherley*. It notes that *Withler* was a challenge to the terms of a pension benefits plan, which were codified under statute, and *Weatherley* was based on a challenge to a benefits scheme. The present application does not challenge the terms of the GDIP. It asserts that the challenge in this application is about whether the linkage between "normal pensionable age" and a disability plan is inappropriate.

[68] AC argues that the same principles apply to the choices made with respect to paragraphs 3(b) and 5(b) of the Regulations; the rules are not narrowly applicable to social benefits legislation, but to insurance schemes more generally.

[69] As argued by AC, an example of this is set out in *Landau* at paragraphs 14–16, where the Court made a parallel of the plan at issue in that case to an insurance scheme where some come out ahead and some do not, finding that private insurance schemes do not change the logic as set out in *Weatherley*:

> The applicant's challenge overlooks the nature and role of the Plan. The nature and role of the Plan rebuts allegations that it creates salient distinctions under section 15(1) or that any distinctions are discriminatory under section 15(1) or unjustified under section 1 of the Charter. This scheme was designed to provide partial earnings replacement in certain circumstances and was never meant to be comprehensive or meet the needs of all contributors in every conceivable circumstance: *Weatherley v. Canada (Attorney General)*, 2021 FCA 158 at para. 10. It is much like an insurance scheme full of cross-subsidization where some come out ahead and some do not. This sort of scheme also requires that clear and rigid criteria be drawn and specified for contributions and benefits. As well, as explained in *Weatherley*, an increase in benefits or reduction of contributions for some often must result in the reduction of benefits or increase in contributions or both for others; and many of these others are needy and vulnerable and also arguably fall under section 15(1) of the Charter. ...
>
> *Auton*, in particular, recognizes the necessity of line-drawing and certainty in benefits schemes such as this so that the schemes can achieve their purposes. It suggests (at para. 42) that section 15(1) claims like this are possible only where the legislative scheme targets groups for illegitimate reasons extraneous to the scheme. This is not the case here.
>
> The recent Supreme Court case of *Fraser v. Canada (Attorney General)*, 2020 SCC 28, 450 D.L.R. (4th) 1, analyzed and discussed in *Weatherley*, above, does not overrule or cast doubt on any of the above cases.

[70] As noted by the C.H.R.T., the Gorham Report supports a view that the scheme provided by paragraphs 3(b) and 5(b) of the Regulations and the concept of "normal pensionable age" is consistent with an income insurance scheme.

[71] As set out at paragraphs 59, 63, and 67 to 69 of the Gorham Report:

> By definition, insurance is to provide compensation for a loss. Disability insurance is to provide compensation for lost wages as a result of a disability. It follows that if a disabled worker would not have been working in the absence of the disability, then there should be no compensation for lost wages.

...

> In order to provide compensation using the principles of insurance, it is necessary to make an assumption about when work would have ended and to apply that assumption as a condition of coverage.
>
> ...
>
> One way an insurance company protects against losses is to ensure that a person is only covered against the possibility of an *actual* loss. Providing income during a disability when there is no financial loss to the person would act to encourage potential abuse of disability coverage. Consequently, benefits are limited to periods when a person has a reasonable probability to have remained employed in the absence of the disability.
>
> Even if retirement was not a reason to limit the age at which disability benefits are payable the cost charged by the insurer would result in a limit. If disability benefits continued for life, the costs of the insurance would be so high that employers would likely refuse to provide the benefit at all or demand something cheaper which would result in benefits ceasing at some specified age. ...
>
> ... At any time when more than half of them are still working, then providing benefits is expected to over compensate fewer than 50% of the injured workers. At any time when less than half are still working, then providing benefits is expected to cover compensate more than 50% of the injured workers. The balance point is where half are expected to have stopped working.

[72] The uncontested evidence, as recognized by the C.H.R.T., was that indefinite disability benefit plans are not viable. Without a limit, the cost of insurance would be too high. Plans become unviable when workers are between the age of 61 and 65.

[73] However, ACPA now contests Mr. Gorham's additional finding recognized by the C.H.R.T. that "cessation of disability benefits at a lower age could be appropriate where the employment situation differs from the average for Canada, such as ...where the plan provides for an unreduced pension prior to age 65 in some circumstances" [Decision, at paragraph 74]. As explained by Mr. Gorham [at paragraphs 133–135]:

> To be actuarially sound, there needs to be a point at which income benefits cease. In my opinion, there is no single correct age at which benefits should stop. There is a range of ages that could vary based on retirement patterns of Canadian in general and of the employer in particular. Based on Canadian employment statistics, I believe that an appropriate range is between about age 61 and 65.
>
> In my opinion, and ignoring any legislated restrictions, that should not preclude an employer adopting an earlier or later age to cease disability income benefits if the employment situation differs from the average for Canada. One such situation would be providing a pension plan with unreduced early retirement pensions that are payable earlier than age 61. Another situation would be a workplace where employees routinely work past age 65.
>
> In my opinion, the use of pensionable age is one appropriate method of setting a point at which disability benefits could cease. It recognises differing employment situations. For example, employees who have generous unreduced early retirement pensions will have an earlier pensionable age than those with less generous or no unreduced early retirement pensions. In my experience, employees with unreduced early retirement benefits generally

> retire, on average, at younger ages than those with unreduced early retirement pensions. So using pensionable age as the cessation point can recognize differences in retirement patterns between different employers.

[74] I agree with AC that the use of "normal pensionable age" allows employers to have regard to the employee's circumstances and pensionable benefit in line with the teachings of *Withler*, 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 claimant group is not required. Allocation of resources and particular policy goals that the legislature may be seeking to achieve may also be considered.

[75] As noted by the C.H.R.T. in the Decision, the Regulations were based on recommendations from stakeholders after lengthy consultations, which included balancing the interests of employers, employer organizations, underwriters of benefits plans, benefit consulting firms, other human rights administrators and interested organizations.

[76] The goal of the Canadian Human Rights Commission in creating exceptions to the prohibition on discrimination in benefit plans was to recognize that "some differentiation with respect to age, sex, marital status or physical handicap is not always undesirable in such plans" (Canadian Human Rights Commission, *Annual Report*, *1979*, section 3.1.1).

[77] In this case, the contextual factors demonstrate that the distinction made by "normal pensionable age" is a *bona fide* distinction. It is not targeting groups for illegitimate reasons outside of the overall scheme. Here, consistent with *Withler* and the goals pursued, terminating disability benefits when an employee has reached normal pensionable age does not put employees in an adverse situation because they are able to collect unreduced pension benefits.

[78] As noted by the C.H.R.T., this is in contrast with *Talos* where the termination of benefits at age 65 was not set-off by any other compensatory arrangement. As summarized by the C.H.R.T., *Talos* dealt with subsection 25(2.1) of Ontario's *Human Rights Code*, R.S.O. 1990, c. H-19 (Code), in conjunction with the *Employment Standards Act, 2000* (S.O. 2000, c. 41) and its Regulations, and specifically carved out 65 and older workers from protections with respect to different treatment in benefits plans, pension and other workplace plans, in a bid to maintain flexibility in the workplace for parties to make arrangements that would respect the financial viability of those plans. The adjudicator found that a benefit differential that was only explained by the age of the employee would be *prima facie* age discrimination under the Code. Accordingly, she held that a legislative provision that prevented a worker age 65 and older from being able to challenge any reduction or elimination of access to workplace

benefits as age discrimination was *prima facie* a violation of subsection 15(1) of the Charter.

[79] ACPA argues that the C.H.R.T. was not correct in its analysis of *Talos* and that the logic of *Talos* is compelling and should be followed. It contends that this logic can be applied equally well to the facts of this case, even though the same benefits are not at play. It asserts that whether an employee has a good pension is not relevant to their equality rights. Similarly, it argues that the following reasoning held in *Talos*, at paragraph 234 applies equally well to the circumstances of Sandra Anderson in this case:

> ... absent healthcare benefits, an injured or ill worker who is 65 or over could be forced to retire because she cannot afford the healthcare supports ... that would assist with her day to day health maintenance so that she is fit to remain at work, with or without accommodated duties. By removing healthcare benefits at age 65, it logically follows that older workers are deprived of the supports available to their younger co-workers to maintain their fitness for work.

[80] However, I disagree that such a parallel cannot be made. Rather, as argued by AC, the experience of Ms. Anderson while imperfect is consistent with the expectations set out in *Withler,* which recognizes perfect correspondence between a program and the actual needs and circumstances of a claimant group is not required so long as its objectives are met. In Ms. Anderson's case, she was still able to obtain compensation for lost wages as a result of her disability. As noted by the C.H.R.T. [at paragraph 67]:

> In this case, I find from the evidence that the disability benefits were designed to provide a measure of income loss to plan members should they become disabled and unable to work. However, if the member were eligible for an unreduced pension, then although their disability benefits were no longer available to them, if they became disabled, they could choose to use their sick days and vacation and possibly unpaid leave before returning to work. That was the option chosen by Robert Lyon. Their other choice was to retire and collect their unreduced pension. That was the option chosen by Sandra Anderson.

[81] ACPA argues that the C.H.R.T.'s reference to "choice" is problematic. It notes that the Court has consistently held that differential treatment can be discriminatory even if it is based on choices made by the affected individual or group: *Fraser*, at paragraphs 86–-87; *Ontario Public Service Employees Union v. Ontario (Government & Consumer Services)*, 2021 CanLII 19542 (Ont. G.S.B.) (*OPSEU*), at paragraphs 101–102.

[82] However, I agree with AC that these comments must be considered in context, as must the Impugned Provision. I do not read the Decision as suggesting that the choices made by Sandra Anderson somehow affected the impact of paragraphs 3(b) and 5(b) of the Regulations and how they should be perceived.

[83] ACPA argues that there are fundamental human rights problems with linking the eligibility of disability benefits with pension plans. Particularly, it assumes that there will be a generous pension plan that substitutes for income lost through disability benefits which is often not the case in a defined contribution plan. The provisions of the Regulations refer to disability plans generally not just long-term disability plans, regardless of how long the disability is expected to last. Further, not all pension plans

offer full benefits at an age range of 61–65; some provide for a much earlier age. The effect of the Impugned Provision places control in the hands of the pension drafter, who is often unilaterally the employer. All of which it asserts is inconsistent with the broader equality guarantee.

[84] The problem with ACPA's arguments, however, is that they are not grounded in any evidence nor the objective of the Regulations. ACPA provides no evidence regarding the actual payouts of defined contribution plans or what constitutes a "generous" plan in these circumstances, or any others. It has advanced no evidence on the application of the provisions of the Regulations to the termination of short-term disability benefits or any impacts of the termination of those plans on older workers. Further, the only pension plans referenced by ACPA are collective agreements like those at issue in *Healy v. Gregory* (2009), 75 C.C.P.B. 178, [2009] O.J. No. 2562 (QL), 2009 CanLII 31609 (Ont. Sup. Ct.) , or legislated pension plans as in the *Public Service Superannuation Act*, R.S.C., 1985, c. P-36. There is no evidence before the Court regarding pension plans in non-unionized contexts, or that such plans are being abused by employers in those settings.

[85] The arguments made by ACPA are insufficient to challenge the evidence presented by Mr. Gorham, which was the evidence before the C.H.R.T.

[86] Mr. Gorham provided that the vast majority of long term disability plans provided by employers terminated benefits at age 65, which was the age that retirement benefits typically become available without reduction. He noted this was because of historical patterns.

[87] He found that the appropriate statistic to use in determining when to change from wage loss replacement to retirement income was the point at which about half the workforce had retired. He opined that from an actuarial and insurance standpoint, it was appropriate to replace loss of income benefits with retirement benefits at some point between ages 61 and 65 and that pensionable age was a reasonable proxy.

[88] Further, ACPA's arguments fail to recognize that there are some inherent distinctions when considering a provision based on age. As noted in *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229, at page 297:

> ….To begin with there is nothing inherent in most of the specified grounds of discrimination, e.g., race, colour, religion, national or ethnic origin, or sex that supports any general correlation between those characteristics and ability. But that is not the case with age. There is a general relationship between advancing age and declining ability .... while we must guard against laws having an unnecessary deleterious impact on the aged based on inaccurate assumptions about the effects of age on ability, there are often solid grounds for importing benefits on one age group over another in the development of broad social schemes and in allocating benefits....

[89] Provisions based on age must also consider the natural cycle, bearing in mind both the "vertical" and "horizontal" needs of the population as recognized in *Withler*, at paragraph 76:

> Garson J. explained that the government's statutory benefit package must account for the whole population of civil servants, members of the armed forces and their families.

> Each part of the package is integrated with other benefits and balanced against the public interest. The package will often target the same people through different stages of their lives and careers. It attempts to meet the specific needs of the beneficiaries at particular moments in their lives. It applies horizontally to a large population with different needs at a given time, and vertically throughout the lives of the members of this population. For younger employees, it acts as group life insurance by insuring against unexpected death at a time when the surviving spouse would not be protected by a pension. For older employees, it is intended to assist with the costs of last illness and death. While it treats different beneficiaries differently depending on where they find themselves on this vertical scale, it is discriminatory neither in purpose nor effect.

[90] ACPA refers to the fundamental importance of work in a person's life, as an "essential component of his or her sense of identity, self-worth and emotional well-being": *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313, at page 368. ACPA argues that the impact of the Impugned Provision on a claimant group will perpetuate stereotypes and reinforce that older workers are less flexible, more resistant to change and less motivated. It asserts that it does this by assuming that older workers are less engaged with their employment and more likely to retire at the earliest opportunity. It relies on *OPSEU* and *Talos* as examples where provisions were found to constitute age discrimination and to perpetuate this negative stereotype. However, none of these decisions relate to long-term disability plans. ACPA's further reference to secondary sources in support of its argument is impermissible, as noted earlier, as none of these secondary sources were before the C.H.R.T. nor admitted properly.

[91] Even if one were to accept that older workers face stereotypes in the workplace, and have experienced certain disadvantages associated with those stereotypes, there is insufficient evidence of the actual impact of the loss of disability benefits on older workers, or a clear connection in the evidence between the loss of disability benefits to those asserted stereotypes and disadvantages.

[92] As acknowledged by ACPA at the hearing before the C.H.R.T., paragraphs 3(b) and 5(b) of the Regulations create a necessary exemption to the individualized approach that would otherwise apply under the Act. Paragraphs 3(b) and 5(b) "recogniz[e] the validity of insurance principles, the necessity of those principles in coming up with a viable insurance scheme, and recogniz[e] that those principles are not based on stereotypes in the human rights language; they're based on statistical analysis" (C.H.R.T. Transcript, page 1369, lines 14–21).

[93] Section 15 ensures substantive equality for all employees. This does not mean that all workers will have the exact same disability coverage because they are workers, or that there will be formal equality between older and younger workers: *Withler*, at paragraphs 2 and 71; *Fraser*, at paragraph 40. Rather, it requires that all workers be eligible to a form of compensation for loss of salary based on disability. In my view, the C.H.R.T. correctly found that this equality right was safeguarded under paragraphs 3(b) and 5(b) of the Regulations, and in effect by the Impugned Provision.

[94] In my view, there is no violation of the substantive equality right under subsection 15(1) of the Charter by the Impugned Provision of paragraphs 3(b) and 5(b) of the Regulations, as these paragraphs permit an acceptable balance that does not perpetuate a discriminatory disadvantage based on age.

IV. Conclusion

[95] For all of these reasons, it is my view that the application should be dismissed. As I have concluded that paragraphs 3(b) and 5(b) of the Regulations do not violate subsection 15(1) of the Charter and the Decision is not in error, there is no basis for me to continue with a section 1 Charter analysis.

[96] The parties have agreed that costs should be fixed in an amount of $3 000 (all inclusive) and I agree that this amount shall be awarded.

JUDGMENT in T-1588-19

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. The Respondent shall be awarded costs in an amount fixed at $3 000.