

# Case Law Update: Withler v Canada (Attorney General)

March 30, 2011

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2011 SCC 12 (Released March 4, 2011)

## Charter of Rights and Freedoms Equality Rights Age Discrimination Use of Comparator Groups

The appellants, who were representative plaintiffs in a class action against the Crown, were widows whose federal supplementary death benefits were reduced because of their husbands' ages. The appellants submitted that the age-based benefit reduction, which was part of a statutory death benefit scheme for certain federal government employees, violated section 15 of the *Charter*.

While the Supreme Court of Canada ultimately dismissed the widows' appeal, it rejected the Crown's argument that because their husbands were the actual subjects of the alleged discrimination, the widows lacked standing. The court granted the widows standing on the basis that as surviving spouses they suffered the alleged discriminatory effect. Furthermore, federal employees were unlikely to challenge the scheme of their own accord.

With respect to the widows' substantive claim, the court emphasized that section 15 only prohibits substantive discrimination on the grounds set out therein, or on an analogous ground. Substantive discrimination can be made out by showing that the impugned law, in purpose or effect, perpetuates prejudice and disadvantage to members of a group on the basis of personal characteristics caught by section 15(1), or by showing that the disadvantage perpetuated by the law is based on a stereotype that does not correspond to the actual circumstances and characteristics of the claimant or claimant group. The court emphasized that the focus of a section 15 analysis is the actual impact of the differential treatment, and therefore the analysis requires a contextual consideration of the impact of the legislation or state action.

After canvassing recent jurisprudence, the court cautioned against the formalistic use of comparator groups as part of this contextual assessment. The court noted that the probative value of a comparative analysis varies depending on the nature of the claim and, as a result, such an analysis is not always required in considering whether substantive discrimination is made out.

In the claim at issue, the court concluded that the focus must be on the nature of the benefit. A contextual assessment revealed that the age-based benefit reduction did not breach section 15. The scheme was designed to benefit a number of different groups, and the benefit reductions reflected the reality that different groups of survivors have different needs. In support of its conclusion, the court noted that the impugned benefit was not meant to provide a long-term income scheme for older surviving spouses, as such a scheme is provided by a distinct pension benefit. The court explicitly rejected the dissenting opinion of Rowles J.A. of the British Columbia Court of Appeal, whose narrower comparative analysis failed to consider the impugned benefit reductions within the context of the entire package of available benefits.

Having found that section 15(1) was not breached by the benefit scheme, the court did not perform a section 1 analysis.

This decision is part of a trend, reflected in earlier decisions such as *Kapp*, toward a more contextual analysis of the existence of substantive discrimination in assessing whether a legislative scheme is discriminatory.

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