IN THE MATTER of the ***EMPLOYMENT INSURANCE ACT***

\- and -

IN THE MATTER of a claim by
Christian MARTIN

\- and -

IN THE MATTER of an appeal to an Umpire by the Commission from a decision by the Board of Referees given on September 11, 2009, at Ottawa, Ontario

DECISION

RUSSEL W. ZINN, Umpire

INTRODUCTION

The issue raised in this appeal is whether parents who have given birth to twins and who each otherwise meet the eligibility requirements of the *Employment Insurance Act*, SC 1996, c 23 (the Act), are each entitled to receive 35 weeks of parental benefits or whether they are required to share a single 35-week period of parental benefits.

FACTS AND DECISIONS BELOW

On April 21, 2009, Christian Martin and Paula Critchley became parents of twin girls, Athena Martin and Lucie Martin. Ms. Critchley applied and was approved for 35 weeks of parental benefits. Mr. Martin submitted an on-line application for parental benefits on

April 27, 2009. In an explanatory letter dated May 6, 2009, he made it clear that his application for benefits was separate from his wife's and that his application related to the twin who was not named in his wife's application. He wrote that:

> I am requesting 35 weeks of parental benefits to care for my child Lucie Martin born on April 21, 2009. This request is separate to the one made by my wife Paula Critchley to care for Athena Martin, also born on the same day. Paula's claim has already been processed and accepted, and it is critical that her claim remain unaffected. Reducing her weeks of benefits and allocating them to me is not an option we wish to exercise. My application should be considered on its own merit given the information provided above and in my application.

It is not disputed that Mr. Martin met all of the eligibility requirements to receive parental benefits. From the viewpoint of the Canada Employment Insurance Commission (the Commission), the impediment to Mr. Martin receiving benefits was and remains that his spouse was already in receipt of all of the parental benefits payable as a result of the birth of the twins. The Commission's decision of May 29, 2009, was as follows:

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

Mr. Martin appealed the Commission's decision to the Board of Referees. He submitted that his claim for 35 weeks of parental benefits in addition to his wife's entitlement was valid and in accordance with the provisions of the Act. In the alternative, he submitted that if the Act denied him the right to parental benefits, then its provisions were contrary to the equality guarantee in subsection 15(1) of the *Canadian Charter of Rights and Freedoms* and could not be enforced.

The Board, relying on the decision of the Supreme Court of Canada in *Tétreault-Gadoury v Canada (Canada Employment and Immigration Commission)*, [1991] 2 SCR 22, held that it did not have jurisdiction to deal with the *Charter* submissions. However, it allowed the appeal based on its finding that the Act permitted each parent of twins to claim separately for each child. The Board concluded: "Two claimants making separate claims for separate child [*sic*] are entitled to make separate 35 week claims." The Board reached this conclusion based on its analysis of section 12 of the Act which it said, as a matter of statutory interpretation, was to be "liberally construed with any ambiguities to be resolved in favour of the claimant."

The Board's decision, in relevant part, is as follows:

> Subsection 12(4) states:
> "The maximum number of weeks for which benefits may be paid ... (b) for the care of one or more new-born or adopted children as a result of a single pregnancy or placement is 35".
>
> CUB 22338 ruled that the number of payable weeks is defined in the Act and that rendering a contradictory decision is contrary to law, supported by CUB 70706[.]
>
> CUB 58849 confirmed that the maximum parental benefits is 35 weeks.

The purpose of the Act is clear in cases of a claimant and the birth of children: the benefits are to assist an interruption of earnings as a natural consequence of birth of their children Tomasson v. Canada (Attorney General), 2007 FCA 265.

The Act is to be liberally construed with any ambiguities to be resolved in favour of the claimant. See Sullivan on the Construction of Statutes, 5th ed, at p. 467.

The issue is where the claimant's wife qualifies for parental benefits for one child Athena does this disentitle the claimant's husband for his care of their child Lucie?

It is clear that Subsection 12(4)(b) effectively states that once a claimant claims the 35 weeks associated with that child, the child cannot be used to claim another 35 weeks. The claim is limited to a "single pregnancy", and only a subsequent pregnancy will allow another claim. In other words, this subsection allows for a claim for each pregnancy, and not limited to only one pregnancy.

It is also clear that the Act is structured to benefit a claimant who has paid for his/her insurance coverage. Section 12(1) speaks of benefit periods "for a claimant" and benefits paid "to a claimant". Unfortunately Subsection 12(4) does not specifically refer "to a claimant" in the wording, but there is no other reasonable interpretation of this section.

In this particular appeal, the father and the mother have two children. Father files claim for Lucie, mother for Athena.

Section 12(3)(b) tells the father that the value of his claim is limited to 35 weeks.

Section 12(3)(b) tells the mother that the value of her claim is limited to 35 weeks.

So, the value of their combined claims as claimants is 70 weeks. However, section 12(4)(b) states that the total claim for the care of "one or more ... children" is limited to 35 weeks.

Since father is claiming 35 weeks for Lucie, nobody else can claim 35 weeks of benefits for the care of Lucie.

Since mother is claiming 35 weeks for Athena, nobody else can claim 35 weeks of benefits for the care of Athena.

> The result is that the parents' claims are limited to 35 weeks per claimant per child. Two claimants making separate claims for separate child [*sic*] are entitled to make separate 35 week claims. [bolding omitted]

ISSUES

The following issues were raised by the parties:

1. Does the Act, properly interpreted, permit each parent of twins to receive 35 weeks of parental benefits?
2. Did the Board err in finding that it lacked jurisdiction to consider the *Charter* submissions made by Mr. Martin?
3. Do sections 2(1), 7, 8, 12, and 23 of the Act infringe subsection 15(1) of the *Charter*?
4. If the *Charter* is infringed, is the infringement a reasonable limit prescribed by law that can be demonstrably justified in a free and democratic society under section 1 of the *Charter*?
5. If the infringement of the *Charter* cannot be justified, what is the appropriate remedy in this case?

The first issue is raised by the Commission in its appeal. It submits that the Board erred in the interpretation it gave to the Act. The remaining issues are raised by Mr. Martin in his cross-appeal. He submits that the Board erred in its finding that it had no jurisdiction to consider and apply the *Charter*.

DISCUSSION AND ANALYSIS

1. <u>The Interpretation of the Act</u>

Both parties agree that the relevant sections of the Act must be read and interpreted in the context of the entire statute.

The Commission submits that the relevant provisions of the Act clearly establish that not more than 35 weeks of parental benefits can be paid in respect of a single pregnancy, irrespective of the number of children born of that pregnancy or the number of claimants seeking benefits as a result of that pregnancy. It says that when the words of sections 12 and 23 of the Act are read in context and in their grammatical and ordinary sense they cannot be interpreted to allow a total of 70 weeks of parental benefits for the birth of twins.

Mr. Martin submits that he suffered an interruption of earnings as he took a leave of absence from his employment for the purpose of caring for his daughter Lucie. In his view, the Act is structured to focus on the need of claimants to receive an amount to supplement income lost due to an interruption of earnings. Because he suffered an interruption of earnings due to the birth of his children, and particularly because of his care for Lucie, he argues that he is entitled to claim 35 weeks of benefits.

The fundamental difference between the parties' interpretations is that the appellant says that 35 weeks of parental leave is permitted on a per pregnancy basis, regardless of the number of children born as a result of that pregnancy, whereas the respondent says that 35 weeks of parental leave is permitted for each child born, with each

claimant entitled to a maximum of 35 weeks. The appellant's interpretation focuses on subsection 12(4) of the Act, whereas the respondent's interpretation focuses on subsection 12(3). These provisions read as follows:

> 12(3) The maximum number of weeks for which benefits may be paid in a benefit period
>
> (*a*) because of pregnancy is 15;
>
> (*b*) because the claimant is caring for one or more new-born children of the claimant or one or more children placed with the claimant for the purpose of adoption is 35;
>
> (*c*) because of a prescribed illness, injury or quarantine is 15; and
>
> (*d*) because the claimant is providing care or support to one or more family members described in subsection 23.1(2), is six.
>
> 12(4) The maximum number of weeks for which benefits may be paid
>
> (*a*) for a single pregnancy is 15; and
>
> (*b*) for the care of one or more new-born or adopted children as a result of a single pregnancy or placement is 35.

In my view, subsection 12(4) is clear and unambiguous and supports the appellant's position. The maximum number of weeks of parental benefits payable, regardless of whether there is one or more than one child born from a single pregnancy, is 35 weeks.

I do not agree with the submission of the respondent that it is implicit in subsection 12(4) that it is speaking to benefits paid to a claimant. He says that paragraph 12(4)(b) should be interpreted as if it

read: "The maximum number of weeks for which benefits may be paid to a claimant for the care of one or more new-born or adopted children as a result of a single pregnancy or placement is 35." This interpretation was accepted by the Board. However, in my view, there is no principled basis for reading subsection 12(4) as if the words "to a claimant" were included in the provision. This reading in would completely alter the meaning of the provision. If the legislature had intended that each claimant is entitled to 35 weeks of benefits, it would have indicated so through the use of language like that suggested by the respondent, namely by using the words "to a claimant."

The legislative text is clear and unambiguous and resort to subsidiary principles of statutory interpretation is unnecessary. Justice Lamer's judgment in *R v McIntosh*, [1995] 1 SCR 686, at para. 26, cited by numerous subsequent cases as well as by Ruth Sullivan in *Statutory Interpretation*, 2d ed. (Toronto: Irwin Law, 2007), at page 115, succinctly summarizes the impermissible type of interpretation Mr. Martin is seeking here:

> The Crown is asking this Court to read words into s. 34(2) which are simply not there. In my view, to do so would be tantamount to amending s. 34(2), which is a legislative and not a judicial function.

A further reason the respondent's proposed interpretation cannot be accepted is that the reading in of the words "to a claimant" would allow not only parents of twins to take 35 weeks of benefits each, but would allow the parents of a single child to do the same. The 35-week maximum clearly intended to apply to a single child would be eliminated given that subsection 12(4) would apply "to a claimant," i.e. to each claimant individually. Thus each parent of a single child would be entitled

to 35 weeks. This cannot be the correct interpretation. Indeed, the respondent himself acknowledges, at para. 35 of his memorandum, that:

> ... [S]ection 12(4) also clarifies that once a claim is made for the care of a child, the value of that claim for that child is limited to 35 weeks. Without this restriction, two parents of a single child could each claim that they are eligible claimants and that because each is caring for that one child, each is entitled to make their own separate 35 week claim. ...

If subsection 12(4) was read as applying to a claimant, as the respondent suggests it should be, then the restriction in subsection 12(4), which the respondent himself acknowledges, would be eliminated.

The remainder of para. 35 of the respondent's memorandum reads as follows:

> ... Section 12(4)(b) puts a stop to [parents each claiming 35 weeks for a single child] by effectively saying that every child is "worth" 35 weeks: once a claimant claims the 35 weeks associated with that child, the child cannot be used to create another 35 week claim for anyone else.

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

Furthermore, I cannot agree with the respondent's suggestion that subsection 12(4) "is designed to clarify that each child born in a subsequent pregnancy resets the clock," and that without subsection 12(4) "there would be a danger that claimants would be limited to one 35 week claim in their lifetimes." It is clear that the 35-week limitation provided for under subsection 12(3) relates to "a benefit period," thus enabling a claimant to make a subsequent claim for a subsequent pregnancy once a new benefit period is established.

In my view, the structure and interpretation of the Act as it relates to benefits payable upon the birth of children is as follows.

Paragraph 12(3)(b) provides that "the maximum number of weeks for which benefits may be paid in a benefit period because the claimant is caring for one or more new-born children of the claimant or one or more children placed with the claimant for the purpose of adoption is 35." Benefit periods are claimant-specific in that a benefit period is established for each claimant. Each pregnant claimant will have a benefit period established. If that woman has twins, paragraph 12(3)(b) makes it clear that she cannot be paid for two periods of parental benefits in that benefit period, i.e. she cannot claim 35 weeks of parental benefits for each child. Regardless of the number of children born from that pregnancy, the mother receives a maximum of 35 weeks of parental benefits (this is distinct from the 15 weeks of maternity benefits under paragraph 12(3)(a)).

The father may also establish his own benefit period if he has an interruption of earnings to care for one or more of his new-born children. Like the mother, paragraph 12(3)(b) limits the father to a maximum of 35 weeks of parental benefits.

If there was no other provision relating to parental benefits other than paragraph 12(3)(b), then each of the mother and father could claim 35 weeks of parental benefits, even if only one child was born from the pregnancy, provided each parent was engaged in caring for that new-born child. The interpretation proffered by the respondent for paragraph 12(4)(b) would not impact that result; in fact it would support it. However, paragraph 12(4)(b), read plainly and without the addition of the wording the respondent suggests, does provide a limit to the parental benefits. It makes it clear that there is a maximum amount of benefits payable; namely, no more than 35 weeks will be paid for the care of the child or children born of a single pregnancy. This is so regardless of whether it is one parent or two parents who are claiming the benefits. The single mother of twins cannot collect 35 weeks of benefits for each child, nor can the father of a single child collect 35 weeks for the child born of the pregnancy if his wife is also receiving the 35 week period of benefits. Likewise, the parents of twins cannot collect more than 35 weeks of parental benefits between them.

This is not to say that the parents of one or more new-born children cannot share the 35 weeks of parental benefits; they can. This is expressly provided for in subsection 23(4) of the Act which provides that "If two major attachment claimants are caring for a child referred to in

subsection (1) ... weeks of benefits payable under this section ... may be divided between them."

In this case, because of paragraph 12(4)(b) Mr. Martin could not receive parental benefits for any child born of his wife's pregnancy as she had already been approved and he agreed that she was to receive all 35 weeks of benefits. Accordingly, I find that the Board of Referees erred in its interpretation of the Act and its decision must be set aside.

2. The Jurisdiction of the Board of Referees to Apply the *Charter* to the *Employment Insurance Act*

The parties are in agreement that as Umpire I have jurisdiction to apply the *Charter* and the respondent asks that I do so in this case, in light of the interpretation I have given to the relevant statutory provisions. Nonetheless, the respondent also asks that I deal with the issue of whether the Board has jurisdiction to consider and apply the *Charter* and whether it erred in holding that it did not. The appellant urges me not to consider the jurisdictional question because, in its view, it is not necessary because the respondent is not asking that the decision be referred back to the Board for decision, but rather is asking that I make a substantive decision on his *Charter* submissions.

One of the submissions of the respondent puts him somewhat on the horns of a dilemma. Although he asks that I deal with the issue of whether the Board may apply the *Charter*, and he submits that it can, he also asks that I not refer the *Charter* question back to the Board for that determination. At the same time, he refers to the decision

of the Supreme Court in *Tétreault-Gadoury* at para. 28, where the Supreme Court indicated that where the tribunal below has jurisdiction to apply the *Charter*, the reviewing court ought not to make any final determination of the *Charter* question but should refer the question back to the tribunal for a decision on the *Charter* issue. The exception is where there are compelling reasons of pubic policy and expediency not to refer the matter back but to deal with it, as was done by the Supreme Court in that case.

The respondent says that there are compelling public policy reasons in this case. He points out that the issue of the Board's *Charter* jurisdiction is a matter that will continue to arise in cases before the Board and that it needs to be determined whether the Board does or does not have such jurisdiction. However, he submits that if umpires follow the submissions made by the appellant and deal directly with the *Charter* issue while holding that it is therefore unnecessary to determine whether the Board has that jurisdiction, then it will never be dealt with by a higher level decision-maker.

There is a practical attractiveness to the submission of the respondent. However, any decision by me on the *Charter* determination requires, if the Board has any *Charter* jurisdiction, that I either ignore the Board's jurisdiction or supplant it and render the decision on the *Charter* that it ought to have made. Neither is very palatable, in my view. On the other hand, if the Board has no *Charter* jurisdiction, then an umpire is unfettered by such considerations and is able to fully explore the issue. For these reasons, I am of the view that it is appropriate that the question of the Board's *Charter* jurisdiction be considered and ruled upon.

The appellant submits that the Board and I as Umpire are bound by the decision of the Supreme Court in *Tétreault-Gadoury* which held that the Board has no *Charter* jurisdiction. The respondent submits that the statement of the Court in *Tétreault-Gadoury* that the Board does not have *Charter* jurisdiction is *obiter* and therefore is not binding, and furthermore that even if it is part of the *ratio* of that decision, it has now been overruled by the Supreme Court in its more recent decisions.

In spite of counsel's creative analysis of the *Tétreault-Gadoury* decision, I am unable to agree that I can simply ignore the finding of the Supreme Court that a Board of Referees has no jurisdiction to apply the *Charter*. Justice La Forest, at paragraph 1 of his reasons, clearly sets out the primary issue before the Court, namely "the constitutional validity of s. 31 of the Unemployment Insurance Act, 1971." However, Justice La Forest also clearly stated, at para. 2, that notwithstanding the primary question of constitutional validity issue before the Court, there was a "preliminary issue" that had to be addressed, namely the jurisdictional question:

> The appeal also raises the preliminary issue of whether the Board of Referees or an umpire established pursuant to the Unemployment Insurance Act, 1971 has jurisdiction to consider a challenge to the constitutional validity of a section of that Act, and the consequent jurisdiction of the Federal Court of Appeal. (emphasis added)

Therefore, the jurisdictional issue was squarely before the Court, and was not merely *obiter*. The Court's finding at para. 22 that an Umpire and not the Board had jurisdiction to determine whether sections of the Act

violated the *Charter* is binding on me and on the Board, unless it has been reversed by the Supreme Court.

The respondent submits that recent pronouncements of the Supreme Court, and in particular in *R v Conway*, 2010 SCC 22, make it clear that the Court has effectively overruled its decision in *Tétreault-Gadoury.* He relies, in part, on the following statement of the Court from Justice Abella at paras. 20-23:

> We do not have one *Charter* for the courts and another for administrative tribunals (*Cooper v. Canada (Human Rights Commission)*, [1996] 3 S.C.R. 854, *per* McLachlin J. (in dissent), at para. 70; *Dunedin*; *Douglas College*; *Martin*). This truism is reflected in this Court's recognition that the principles governing remedial jurisdiction under the *Charter* apply to both courts *and* administrative tribunals. It is also reflected in the jurisprudence flowing from *Mills* and the *Cuddy Chicks* trilogy according to which, with rare exceptions, administrative tribunals with the authority to apply the law have the jurisdiction to apply the *Charter* to the issues that arise in the proper exercise of their statutory functions.
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> The jurisprudential evolution has resulted in this Court's acceptance not only of the proposition that expert tribunals should play a primary role in the determination of *Charter* issues falling within their specialized jurisdiction, but also that in exercising their statutory discretion, they must comply with the *Charter.*
>
> All of these developments serve to cement the direct relationship between the *Charter*, its remedial provisions and administrative tribunals. In light of this evolution, it seems to me to be no longer helpful to limit the inquiry to whether a court or tribunal is a court of competent jurisdiction only for the purposes of a particular remedy. The question instead should be institutional: Does this particular tribunal have the jurisdiction to grant *Charter* remedies generally? The result of this question will flow from whether the tribunal has the power to decide questions of law. If it does, and if *Charter* jurisdiction has not been excluded by statute, the tribunal will have the jurisdiction to grant *Charter* remedies in relation to *Charter* issues arising in the course of carrying out its statutory mandate (*Cuddy Chicks* trilogy; *Martin*). A

> tribunal which has the jurisdiction to grant *Charter* remedies is a court of competent jurisdiction. The tribunal must then decide, given this jurisdiction, whether it can grant the particular remedy sought based on its statutory mandate. The answer to this question will depend on legislative intent, as discerned from the tribunal's statutory mandate (the *Mills* cases).
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> This approach has the benefit of attributing *Charter* jurisdiction to the tribunal as an institution, rather than requiring litigants to test, remedy by remedy, whether it is a court of competent jurisdiction. It is also an approach which emerges from a review of the three distinct constitutional streams flowing from this Court's jurisprudence. As the following review shows, this Court has gradually expanded the approach to the scope of the *Charter* and its relationship with administrative tribunals. These reasons are an attempt to consolidate the results of that expansion.

The question that arises first is whether the Board has jurisdiction to decide questions of law, and if it does, is it is one of the rare tribunals that cannot apply the *Charter.*

It is evident from the decision in *Tétreault-Gadoury* that the Supreme Court found that the Board does not have jurisdiction to apply the law. Justice La Forest, at para. 14, notes that although the Act "does not specifically address the issue whether the Board of Referees has jurisdiction to consider all relevant law, such jurisdiction is expressly conferred upon the Umpire, to whom an appeal from the Board of Referees may be made." He then refers to the maxim *expressio unius est exclusion alterius* and finds that "It is unlikely, therefore, that the failure to provide the Board of Referees with a power similar to that given the umpire was merely a legislative oversight." He concludes at paras. 21-22 that jurisdiction to interpret the law, and accordingly the *Charter*, did not fall within the jurisdiction of the Board; it was reserved to umpires under

the Act. Although the respondent has made a number of submissions regarding the practical capacity of the Board to decide questions of law, this was clearly considered by the Court in *Tétreault-Gadoury*, at para. 21:

> While this assessment of the comparative expertise or practical capability of the Board may well be correct, it cannot outweigh the intention expressed by the legislature to give the power to interpret law to the umpire and not the Board of Referees.

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

3. <u>Do sections 2(1), 7, 8, 12, and 23 of the Act infringe subsection 15(1) of the *Charter*?</u>

Subsection 15(1) of the *Charter* guarantees that "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."

In *Andrews v Law Society of British Columbia,* [1989] 1 SCR 143, at para. 25, the Supreme Court held that the essence of this right is equality without discrimination. Subsection 15(1) does not guarantee absolute equality or identity of treatment; it protects only against inequality caused by the application or operation of laws which are discriminatory in their effect.

The discrimination contemplated by section 15 of the *Charter* is a distinction based on grounds in relation to personal characteristics of an individual or a group; however, to constitute discrimination this distinction must also result in the imposition of disadvantages on that individual or group which are not imposed upon others. Only certain legislative distinctions attract the scrutiny of section 15, namely, those involving enumerated or analogous grounds.

In *Law v Canada*, [1999] 1 SCR 497, the Supreme Court held that the underlying inquiry in determining the existence of discrimination is whether the differential treatment offends human dignity. Legislation which provides for differential treatment between individuals or groups will violate this fundamental purpose where those who are subject to differential treatment fall within one or more enumerated or analogous grounds, and where the differential treatment "reflects the stereotypical application of presumed group or personal characteristics, or ... otherwise has the effect of perpetuating or promoting the view that the individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society ..."

More recently, in *R v Kapp,* 2008 SCC 41, the Supreme Court re-examined the test for establishing an infringement of subsection 15(1), and both rearticulated and affirmed the approach it had taken in *Andrews* and *Law.* Specifically, it stated that the test involves a two-part inquiry:

> (1) Does the law create a distinction based on an enumerated or analogous ground?
>
> (2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping?

In *Kapp*, the Court acknowledged that several difficulties had resulted from the attempt in *Law* to employ human dignity as a legal test for discrimination. The Court, at paras. 21 and 22, stated as follows:

> ... There can be no doubt that human dignity is an essential value underlying the s. 15 equality guarantee. In fact, the protection of all of the rights guaranteed by the *Charter* has as its lodestar the promotion of human dignity. As Dickson C.J. said in *R. v. Oakes*, [1986] 1 S.C.R. 103:
>
> > The Court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society. [p. 136]
>
> But as critics have pointed out, human dignity is an abstract and subjective notion that, even with the guidance of the four contextual factors, cannot only become confusing and difficult to apply; it has also proven to be an *additional* burden on equality claimants, rather than the philosophical enhancement it was

> intended to be. 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.

The Supreme Court went on at paras. 23-24 to hold 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 as identified in *Andrews*; combating discrimination, defined in terms of perpetuating disadvantage and stereotyping.

> The analysis in a particular case, as *Law* itself recognizes, more usefully focuses on the factors that identify impact amounting to discrimination. The four factors cited in *Law* are based on and related to the identification in *Andrews* of perpetuation of disadvantage and stereotyping as the primary indicators of discrimination. Pre-existing disadvantage and the nature of the interest affected (factors one and four in *Law*) go to perpetuation of disadvantage and prejudice, while the second factor deals with stereotyping. ...
>
> Viewed in this way, *Law* does not impose a new and distinctive test for discrimination, but rather affirms the approach to substantive equality under s. 15 set out in *Andrews* and developed in numerous subsequent decisions. 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 s. 15 identified in Andrews -- combatting discrimination, defined in terms of perpetuating disadvantage and stereotyping. (emphasis added)

With these principles in mind, I turn to the test developed in the equality jurisprudence and restated in *Kapp*.

(1) *Does the law create a distinction on an enumerated or analogous ground?*

The respondent alleges that the Act creates a distinction between the parents of multiples and other parents. This alleged distinction is not one based on an enumerated ground; at best it must be an analogous ground. Even if family status and parental status are accepted as analogous grounds, what Mr. Martin is effectively asking is that I recognize a narrower and more specific characteristic as an analogous ground: the characteristic of being a parent of multiple children born from the same pregnancy.

The Commission notes that the Supreme Court has not recognized family status as an analogous ground under the *Charter*, and argues that even if it were an analogous ground, the personal characteristic of being a parent of multiples is too remote to fall under the umbrella of family or parental status. According to the Commission, the scope of family status is not broad enough to encompass the specific and narrow basis for distinction alleged by Mr. Martin. The Commission also submits that the concept of family status is not intended to cover every possible difference between families, but, if it is an analogous ground, is limited to aspects of family relationships that are used in stereotypical decision making.

Helpful guidance regarding the recognition of new analogous grounds was provided by the Supreme Court in *Law*, at para. 93:

> ... Where a party brings a discrimination claim on the basis of a newly postulated analogous ground, or on the basis of a combination of different grounds, this part of the discrimination inquiry must focus upon the issue of whether and why a ground or confluence of grounds is

> analogous to those listed in s. 15(1). This determination is made on the basis of a complete analysis of the purpose of s. 15(1), the nature and situation of the individual or group at issue, and the social, political and legal history of Canadian society's treatment of the group. A ground or grounds will not be considered analogous under s. 15(1) unless it can be shown that differential treatment premised on the ground or grounds has the potential to bring into play human dignity. If the court determines that recognition of a ground or confluence of grounds as analogous would serve to advance the fundamental purpose of s. 15(1), the ground or grounds will then be so recognized. (references omitted)

Less than two months later, the Court provided further clarity in *Corbiere v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203, at para. 13:

> ... It seems to us that what [the enumerated] grounds have in common is the fact that they often serve as the basis for stereotypical decisions made not on the basis of merit but on the basis of a personal characteristic that is immutable or changeable only at unacceptable cost to personal identity. This suggests that the thrust of identification of analogous grounds at the second stage of the Law analysis is to reveal grounds based on characteristics that we cannot change or that the government has no legitimate interest in expecting us to change to receive equal treatment under the law. ...

It is clear from these decisions and others that the substantive purposes of the equality guarantee in section 15 have been considered in the context of identifying analogous grounds; see, in addition to *Law* and *Corbiere*, *Andrews*, and *Delisle v Canada (Deputy Attorney General)*, [1999] 2 SCR 989, at para. 44. However, consideration of substantive factors such as dignity and stereotyping is not a prerequisite for establishing new analogous grounds. In *Miron v Trudel*, [1995] 2 SCR 418, after reviewing a number of the potentially relevant considerations when determining whether to recognize an analogous ground, Justice

McLachlin, as she then was, wrote, at para. 149, that:

> All of these may be valid indicators in the inclusionary sense that their presence may signal an analogous ground. But the converse proposition -- that any or all of them must be present to find an analogous ground -- is invalid.

I am also mindful of Chief Justice McLachlin's guidance, at paras. 145-149 of *Miron*, that the approach to considering new analogous grounds should be generous and flexible.

More recent decisions would appear to suggest that the identification of analogous grounds should not focus on whether the proposed analogous ground could have a discriminatory impact; rather, questions of stereotyping and prejudice should be dealt with separately. This can be gleaned from the Supreme Court's statement in *Corbiere* that the "thrust" of identifying analogous entails considering "characteristics that we cannot change or that the government has no legitimate interest in expecting us to change," from the structure of the test articulated in *Kapp*, where questions of prejudice and stereotyping are dealt with under a discrete second branch, and, most recently, the following passage from *Withler v Canada (Attorney General)* , 2011 SCC 12, at paras. 33-34, where the discussion of analogous grounds only addressed the "personal characteristics" mentioned in *Corbiere*:

> The first step in the s. 15(1) analysis ensures that the courts address only those distinctions that were intended to be prohibited by the *Charter*. In *Andrews*, it was held that s. 15(1) protected only against distinctions made on the basis of the enumerated grounds or grounds analogous to them. An analogous ground is one based on "a personal characteristic that is immutable or changeable only at unacceptable cost to personal identity": *Corbiere v. Canada (Minister of Indian and*

> Northern Affairs), [1999] 2 S.C.R. 203, at para. 13. Grounds including sexual orientation, marital status, and citizenship have been recognized as analogous grounds of discrimination.
>
> However, a distinction based on an enumerated or analogous ground is not by itself sufficient to found a violation of s. 15(1). At the second step, it must be shown that the law has a discriminatory impact in terms of prejudicing or stereotyping in the sense expressed in *Andrews*. (emphasis added)

Being the parent of twins is an immutable personal characteristic; this appears to be sufficient to establish this status as an analogous ground of discrimination. Of course, this alone does not establish Mr. Martin's claim under section 15; he must still establish that a distinction has been made on the basis of this ground and that the distinction amounts to discrimination.

Further support for the proposition that being the parent of twins can constitute an analogous ground can be found by looking beyond the specific analogous grounds endorsed by the Supreme Court (sexual orientation, marital status, aboriginality-residence, and citizenship). Although the appellant is correct that the Supreme Court has not recognized either family or parental status as analogous grounds, the Federal Court of Appeal has. At para. 37 of *Canada (Attorney General) v Lesiuk*, 2003 FCA 3, the Court of Appeal wrote that:

> ... There is no doubt that the Umpire concluded that parental status is an analogous ground within the meaning of section 15. I believe it is fair to say, on a careful reading of his decision, that he combined it with gender to form one analogous ground: women in a parental status. I agree with him that that status is immutable until the time comes when the children are no longer in need of a caregiver. The period of immutability is, in my view, sufficiently long to satisfy the criteria for

> identifying new analogous grounds because the recognized ground in this case is "based on characteristics that we cannot change or that the government has no legitimate interest in expecting us to change to receive equal treatment under the law": see Corbiere, supra, at paragraph 13 per McLachlin and Bastarache JJ.

The Federal Court of Appeal also recognized parental status as an analogous ground in *Périgny v Canada (Attorney General)*, 2003 FCA 94, at para. 44.

In the human rights context, where "family status" is enumerated as a prohibited ground of discrimination, the Federal Court has suggested that specific elements of family status can support a claim of discrimination. In *Gardner v Canada (Attorney General)*, 2004 FC 493, aff'd 2005 FCA 284, Justice Gibson, although he decided against an applicant alleging the Canadian Human Rights Commission had erred by dismissing her complaint, wrote at para. 20 that:

> ... "family size" might reasonably be argued to be an element of "family status", and "family status" is a prohibited ground of discrimination under subsection 3(1) of the Canadian Human Rights Act. Thus, it is not surprising to the Court that the Applicant expresses some astonishment that her complaints were dismissed in the absence of an explanation, or at least a more fulsome explanation, in support of the decision of the Commission.

Justice Gibson's suggestion that it may be appropriate to look at the elements of family status rather than simply the status of having children supports Mr. Martin's position. In my view, the Commission's argument that being the parent of twins is "too remote" to fall within the ground of family status or to be recognized as an analogous

ground itself posits an unduly restrictive vision of the scope of family status, and grounds of discrimination generally, where the only inquiry would be whether the person has family status when the reality is that every person has such status. This in itself leads to a conclusion that family status must mean more than simply being in a family relationship.

Further, the narrow approach proposed by the Commission is inconsistent with Supreme Court jurisprudence holding that equality claimants in the human rights context need not establish that the discrimination they face results from their membership in a larger group, each of the members of which faces that discrimination. In *B v Ontario (Human Rights Commission)*, 2002 SCC 66, the Court wrote, at paras. 46 and 57, that:

> In common with all federal and provincial human rights legislation and with the equality guarantee in the Canadian Charter, the primary purpose of the Ontario Code is to eradicate discrimination on the basis of enumerated and (in the case of the Canadian Charter) analogous grounds. We have concluded that the words of the Code support the view that the enumerated grounds of marital and family status are broad enough to encompass circumstances where the discrimination results from the particular identity of the complainant's spouse or family member. Although the jurisprudence on the scope of marital status in the context of human rights legislation is uneven at best, the weight of judicial consideration also favours an approach that focuses on the harm suffered by the individual, regardless of whether that individual fits neatly into an identifiable category of persons similarly affected.
>
> ...
>
> Accordingly, it is a misconception to require the complainant to demonstrate membership in an identifiable group made up of only those suffering the particular manifestation of the discrimination. It is sufficient that the individual experience differential treatment on the basis of an irrelevant personal

> characteristic that is enumerated in the grounds provided in the Code. It is not necessary to embark on the artificial exercise of constructing a disadvantaged sub-group to which the complainant belongs in order to bring one's self within the ambit of marital or family status within the meaning of the Code. (emphasis added)

By this reasoning, Mr. Martin is able to benefit from protection under the analogous ground of family status without the need to establish that parents of twins represent a sub-group. As suggested by *B v Ontario*, the identity of Mr. Martin's family members – his twin children – is sufficient to bring him within the analogous ground of family status.

As noted above, even accepting that being the parent of twins can be an analogous ground under section 15 of the *Charter*, to meet the first stage of the *Kapp* test, it is still necessary to show that the *Employment Insurance Act*, in the circumstances here, results in a distinction based on this ground.

It should first be noted that there is no basis for Mr. Martin's argument that he and his daughter Lucie have been excluded from the employment insurance scheme. It is Mr. Martin's very status as a parent that entitles him to parental benefits in the first place, and if he and his spouse had opted to share them, then he would have received some or all of the parental benefits that flowed from the pregnancy. Contrary to his submissions, he was not "utterly" excluded from the parental benefits scheme. Rather, the evidence shows that he qualified for parental benefits but made the choice not to take advantage of the flexibility offered within the parental benefits scheme and divide the weeks of parental benefits with his children's mother. In conjunction with the

maternity benefits, Mr. Martin and his spouse could have divided the weeks of parental benefits so as to allow both of them to stay home with the twins concurrently for up to 25 weeks.

Furthermore, there is no basis for Mr. Martin's submission that his daughter Lucie's exclusion is arbitrary and inconsistent with the structure of the scheme. The Act does not dictate any division of benefits as between Lucie and Athena, and Mr. Martin's interpretation of the scheme in a way that highlights his position that an additional child is an additional burden does not assist him in establishing a distinction because the Act does not assign benefits based on the burden imposed by a given birth. Rather, it grants a set amount of benefits per pregnancy and allows parents to determine how best to apply the benefits to their situation. The parental benefits scheme in the Act is inherently flexible; parents can choose how to allocate weeks of parental benefits depending on their personal circumstances. There are myriad individual circumstances that can arise in the context of childbirth and adoption. If parents have a single child, or twins or a higher number of multiples, or if their children suffer from emotional, physical, psychological or developmental difficulties, then personal decisions have to be made. This includes decisions regarding how many weeks of parental benefits each parent will take and whether they will take them concurrently or consecutively.

However, even though it is clear that neither Mr. Martin nor Lucie has been excluded from the scheme, the scheme does draw a distinction between the parents of twins and other parents. While *Withler* signals a shift away from the necessary use of comparator groups in section 15 analyses, comparison is still an inherent feature of assessing

the existence of discrimination. Indeed, at para. 62 of *Withler*, the Court wrote that:

> The role of comparison at the first step is to establish a "distinction". Inherent in the word "distinction" is the idea that the claimant is treated differently than others. Comparison is thus engaged, in that the claimant asserts that he or she is denied a benefit that others are granted or carries a burden that others do not, by reason of a personal characteristic that falls within the enumerated or analogous grounds of s. 15(1).

Here, the first comparator group proposed by Mr. Martin, a couple who have given birth and adopted at the same time, effectively demonstrates the distinction drawn by the Act. The parents of the dual birth/adoption would be able to each claim 35 weeks of benefits, while the parents of twins would have to share 35 weeks of benefits. While the frequency of a near-simultaneous birth and adoption may be low, further support for a finding that a distinction has been made can be seen in the fact that parents of twins receive fewer per-child weeks of benefits than parents of singletons. It matters not that through the use of "a single pregnancy" as a criteria for awarding benefits an express distinction is avoided; it is appropriate to look at the adverse effects of a rule neutral on its face to determine if a distinction exists. As explained at para. 36 of *Law*:

> ... In [cases of adverse effect discrimination], it is the legislation's failure to take into account the <u>true characteristics</u> of a disadvantaged person or group within Canadian society (i.e., by treating all persons in a formally identical manner), and not the express drawing of a distinction, which triggers s. 15(1). ... (emphasis added)

Here, by assigning benefits based on "a single pregnancy," the scheme fails to take into account the true characteristics of the

parents of twins because their "single pregnancy" results in double the number of children without any increase in benefits. This, in effect, is a distinction.

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

Despite my finding that the scheme creates a distinction based on an analogous ground, the distinction does not meet the second branch of the *Kapp* test. The employment insurance scheme does not perpetuate prejudice or stereotype and, considering both the substantive purposes of section 15 and the necessary line-drawing that must occur in the design of any benefits system, does not amount to discrimination.

Kapp teaches that even if a distinction or differential treatment is found to exist, for this distinction to constitute discrimination a claimant still needs to prove that the distinction creates a disadvantage by perpetuating prejudice or stereotyping. Therefore, I turn to consider whether the distinction amounts to discrimination.

The determination of whether a distinction amounts to discrimination is guided by four contextual factors, which are based on, and relate to, the perpetuation of disadvantage and stereotyping as the primary indicators of discrimination (*Kapp*, at para. 23). These four factors, originally enumerated in *Law*, are (a) pre-existing disadvantage of the claimant; (b) the needs, capacities and circumstances of the claimant and other groups; (c) whether the benefit has an ameliorative effect for a more disadvantaged group; and (d) the nature of the interest affected.

(a) Pre-existing disadvantage of the claimant

This factor considers whether pre-existing disadvantage and prejudice is experienced by the claimant or claimant group. As explained by the Supreme Court in *Law*, although the existence of historical disadvantage is not conclusive or determinative, this factor is relevant because, to the extent that a claimant is already subject to unfair circumstances or treatment in society by virtue of personal characteristics or circumstances, persons like the claimant have often not been given equal concern, respect and consideration. As stated in *Kapp* at para. 55, "'Disadvantage' under s. 15 connotes vulnerability, prejudice and negative social characterization."

Mr. Martin submits that there is ample evidence from which I can find that treating singleton births the same as the birth of twins for the purposes of parental benefits under the Act will perpetuate a distinction and disadvantage. I do not agree.

Although children may be the indirect beneficiaries when their parents receive parental benefits, there is no "treatment of children" under the parental provisions of the Act. The objective of the Act is to insure an interruption of earnings of the parent(s). Although the rationale behind parental benefits is the recognition that children require a period of care following their birth, the Act simply considers uniform entrance and eligibility requirements with respect to the parents. The purpose of parental benefits is to provide temporary partial income replacement when there is an interruption of earnings due to the birth or placement of a child

or children. It is the earnings that are insured, not the children, and it is the parent(s) who receive(s) the benefit from the Commission, not the child or children. As suggested by the appellant, the employment insurance scheme does not take into consideration the burden a particular birth imposes; rather, it provides for a set number of weeks of benefits regardless of the amount of care a child or children will require. The nature of the scheme is such that it addresses the general need of parents to take time away from work after the birth of children by providing some relief from the associated interruption of earnings.

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

I agree with the Commission that if one accepts Mr. Martin's submission that the additional work required to care for twins or multiples should be reflected in the parental benefits received, then one must equally consider extending the benefits for parents of difficult or challenged new-born children who require more attention and care than is usually the case. Given that the employment insurance scheme does not contain any evaluative element considering the different burdens imposed by different children, the additional burden imposed by the birth of twins,

just like the additional burden imposed by difficult newborns, is irrelevant. The logical extension of the respondent's position would add elements of social policy into the Act which it was not intended to address.

(b) *Correspondence between the grounds and the claimant's actual needs, capacity or circumstances*

This factor examines the relationship between the ground upon which the claim is based and the actual needs, capacity or circumstances of the claimant or others targeted by the legislation. The main issue to be determined is whether the Act takes into account the particular situation of those affected. If it does, then it is less likely to rest on a stereotype.

In the present case, the parental benefit provisions of the Act appear to be flexible enough to address most claimants' needs and circumstances. As noted, pursuant to subsection 23(4), parents can divide the weeks of parental benefits in any way they like, as long as they do not exceed 35 weeks per single pregnancy or placement. For example, there is nothing preventing both parents from receiving parental benefits at the same time or preventing a father from receiving parental benefits while the mother is receiving maternity benefits. When the parents opt to share parental benefits, pursuant to subsection 23(5) of the Act, the waiting period for the second parent is deferred if it has already been served by the other parent for a claim related to the same child or children. Section 38 of the *Employment Insurance Regulations*, SOR/96-332, allows claimants to receive top-up from their employers with no claw back and subsection 19(2) of the Act allows claimants to work, up to a certain amount, before their parental benefits are affected.

Mr. Martin seeks an extension of employment insurance parental benefits but does so in circumstances that provide no clear boundaries for the future in terms of access to parental benefits. In *Granovsky v Canada (Minister of Employment and Immigration)*, 2000 SCC 28, the appellant sought the relaxation of Canada Pension Plan contribution requirements imposed on more able-bodied members of the work force for all individuals suffering severe disabilities. One of the concerns noted by the Court at the outset of the judgment was the lack of clear boundaries in the appellant's vision of how the CPP should accommodate his temporary disability. The Supreme Court held that the proper constitutional actor to make such policy determinations was Parliament, as long as the line drawn did not violate the Constitution. A similar concern was noted by the Federal Court of Appeal in *Lesiuk*, where the claimant sought the elimination or substantial lowering of the eligibility requirements for the employment insurance system without providing adequate parameters for the future.

As in *Lesiuk*, the present case is not a case where an entire group or significant portion of a group is excluded from benefits. This case involves a claim that some claimants should receive more benefits than others by virtue of the fact that they are parents of twins. Given the many possible circumstances that can arise in different families, it is not possible to design a parental benefits system that meets all the individual needs of every family. The flexibility inherent in the Act does accommodate, to some extent, the needs of parents of children who impose a relatively greater burden than other children, even though the scheme is not precisely attuned to Mr. Martin's situation. In my view, this

factor is not determinative one way or the other.

(c) Ameliorative purpose or effects of the law or program

The employment insurance scheme is not a program that is specifically targeted to a group or groups that are uniformly disadvantaged in Canadian society; this factor is not relevant in the present case. As emphasized at para. 72 of *Law*:

> ... this factor will likely only be relevant where the person or group that is excluded from the scope of ameliorative legislation or other state action is more advantaged in a relative sense.

This factor is inapplicable here. The essence of the respondent's case is that the group he is a part of, parents of twins, is disadvantaged relative to others. There is no other more relatively disadvantaged group that the Act targets.

(d) Nature of the interest affected

This contextual factor involves an evaluation of the economic, constitutional and societal significance attributed to the interest affected as well as a consideration of whether the distinction restricts access to a fundamental social institution or affects a basic aspect of full membership in Canadian society. In *Granovsky* the Supreme Court emphasized, at para. 58, that deprivation of an economic benefit alone may not be sufficient to establish a violation of subsection 15(1) of the *Charter*:

> The question therefore is not just whether the appellant has suffered the deprivation of a financial benefit, which he has, but whether the deprivation promotes the view that persons with temporary disabilities are "less capable, or less worthy of recognition or value as human

> beings or as members of Canadian society, equally deserving of concern, respect and consideration."

The interest affected in this case is an economic one. Mr. Martin has not demonstrated that the denial of employment insurance benefits has affected his access to fundamental institutions or a basic aspect of his full membership in Canadian society. In these circumstances, the economic interest engaged is not sufficient to demonstrate discrimination.

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

In considering these four factors, I have kept in mind *Kapp*'s admonition that that these factors must not be considered rigidly for fear of undermining the purposes of the equality guarantee by imposing an additional legal burden on equality claimants. These factors remain, however, useful signposts on the path to assessing whether a distinction contains the elements that make it discrimination. Whether the elements are conceptualized as a demeaning of dignity, as in *Law*, or as the creation of a disadvantage through the perpetuation of prejudice or

stereotyping, as in *Andrews* and *Kapp*, it is clear that discrimination necessarily entails some offence to the way a group is treated in society. Courts must determine whether a distinction impairs the substantive equality section 15 protects. Here, the respondent has not established that the employment insurance scheme offends the *Charter*'s promise of substantive equality. As explained by Justice McIntyre in *Andrews* and reaffirmed in *Kapp*, at para. 15:

> The promotion of equality entails the promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration.

The perspective from which this equality guarantee is to be considered was explained in *Law* at para. 75:

> An infringement of s. 15(1) of the Charter exists if it can be demonstrated that, from the perspective of a reasonable person in circumstances similar to those of the claimant who takes into account the contextual factors relevant to the claim, the legislative imposition of differential treatment has the effect of demeaning his or her dignity: see Egan, supra, at para. 56, per L'Heureux-Dubé J. (emphasis added)

The employment insurance scheme does not fail to recognize the concern, respect and consideration due to the parents of twins as members of Canadian society. Although Mr. Martin has presented evidence of the burdens occasioned by the birth of his children, the fact that the Act does not grant his family double benefits falls short of demonstrating that the scheme suggests he is less worthy of respect. The importance of context, recognized as a core part of the section 15 analysis at para. 43 of *Withler*, cannot be overstated here. Mr. Martin has failed to demonstrate that the parents of twins have faced or do face

historical disadvantage, prejudice or stereotyping in Canadian society. Looking to other factors, the financial interest affected here does not impair Mr. Martin's full participation in all fundamental aspects of Canadian society, and the benefits to which the Martin-Critchley family are entitled, although not precisely corresponding to their enhanced needs as parents of twins, do include them to a significant extent in the employment insurance benefits scheme. From the perspective of a reasonable person in Mr. Martin's position, and considering all of the factors discussed above, it simply cannot be said that the employment insurance scheme perpetuates prejudice or stereotyping.

Moreover, it is important to recall that not every distinction or differentiation in treatment at law will transgress the *Charter*'s equality guarantee. The classifying of individuals and groups, the implementation of different provisions respecting such groups, and the application of different rules, regulations, requirements and qualifications to different persons is necessary for the governance of modern society. The Supreme Court and the Federal Court of Appeal have held that complex social benefits programs, such as the employment insurance program, often make distinctions in order to deliver these programs properly, and that Parliament must be accorded some flexibility in the extension of social benefits. It is entirely legitimate for the government to make choices in the allocation of benefits and it should be permitted a degree of latitude in so doing, as it is an exercise which is almost always bound to seem arbitrary to those falling on the wrong side of the line. See *Egan v Canada*, [1995] 2 SCR 513; *Granovsky v Canada (Minister of Employment and Immigration)*, [2000] 1 SCR 28; *Lovelace v Ontario*, [2000] 1 SCR 37; *Sollbach v Canada* (1999), 252 NR 137 (FCA); *Canada*

(Attorney General) v Brown, 2001 FCA 385; *Krock v Canada (Attorney General)*, 2001 FCA 188; *Nishri v Canada,* 2001 FCA 115; *Miller v Canada (Attorney General),* [2002] FCJ No 1375 (CA).

In *Gosselin v Québec (Attorney General),* 2002 SCC 84, at para. 55, Chief Justice McLachlin, writing for the majority of the Supreme Court, stated:

> Perfect correspondence between a benefit program and the actual needs and circumstances of the claimant group is not required to find that a challenged provision does not violate the *Canadian Charter.* The situation of those who, for whatever reason, may have been incapable of participating in the programs attracts sympathy. Yet 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. As Iacobucci J. noted in *Law, supra*, at paragraph 105, we should not demand "that legislation must always correspond perfectly with social reality in order to comply with subsection 15(1) of the Charter". Crafting a social assistance plan to meet the needs of young adults is a complex problem, for which there is no perfect solution. No matter what measures the government adopts, there will always be some individuals for whom a different set of measures might have been preferable. The fact that some people may fall through a 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 distinctions contained in the law amount to discrimination in the substantive sense intended by subsection 15(1).
> (emphasis added)

Similarly, in *Krock v Canada (Attorney General),* 2001 FCA 188, at para. 11, the Federal Court of Appeal observed much the same in the context of the employment insurance scheme:

> When presented with an argument that a complex statutory benefits scheme, such as unemployment insurance, has a differential adverse effect on some claimants 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.

These principles were recently reaffirmed, with an emphasis on the importance of questions of resources and policy, in *Withler*, at para. 71:

> The question is whether the lines drawn are generally appropriate, having regard to the circumstances of the groups impacted and the objects of the scheme. Perfect correspondence is not required. Allocation of resources and legislative policy goals may be matters to consider.

It is important to take heed of *Withler*'s guidance that policy considerations can be a relevant factor when considering the second part of a section 15 analysis under *Kapp*: see *Withler* at paras. 67 and 71. The parental benefits provided in the employment insurance scheme is not needs-based. It does not calibrate benefits according to the burden imposed by a particular child's birth. The scheme balances a multiplicity of interests, operates within the financial constraints any government program faces, and provides some flexibility in determining child care arrangements. The Act's failure to provide an additional benefit to the parents of twins does not suggest a failure to acknowledge the additional burden an additional child imposes because the Act is blind to the variation in the burdens imposed on different families. The policy of the Act is to grant a set amount of parental leave benefits after birth regardless of need or burden imposed. As such, it cannot reasonably be construed as making any suggestion as to the concern, respect and consideration that the parents of twins deserve.

In light of these findings, the fourth and fifth issues, which are premised on a finding that the Act offends the *Charter*, need not be addressed.

For the above reasons, the Commission's appeal before the Umpire is allowed and Mr. Martin's cross-appeal is dismissed.

Russel W. Zinn

UMPIRE

OTTAWA, Ontario
May 31, 2011

OTTAWA, ONTARIO
June 2, 2011

CUB 76899

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