Unofficial English translation of the judgment of the Court

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| R.O. c. Ministre de l'Emploi et de la Solidarité sociale | | | | | 2021 QCCA 1185 |
| COURT OF APPEAL | | | | | |
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| CANADA | | | | | |
| PROVINCE OF QUEBEC | | | | | |
| REGISTRY OF | | | MONTREAL | | |
| No.: | 500-09-029206-208 | | | | |
| (500-17-105698-180) | | | | | |
|  | | | | | |
| DATE: | July 23, 2021 (corrected July 28, 2021) | | | | |
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| CORAM: | | THE HONOURABLE | | MARIE-FRANCE BICH, J.A.  PATRICK HEALY, J.A.  STÉPHANE SANSFAÇON, J.A. | |
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| R. O. | | | | | |
| APPELANT – applicant | | | | | |
| c. | | | | | |
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| **MINISTRE DE L’EMPLOI ET DE LA SOLIDARITÉ SOCIALE** | | | | | |
| RESPONDENT – impleaded party | | | | | |
| and | | | | | |
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| **ATTORNEY GENERAL OF QUEBEC** | | | | | |
| **IMPLEADED PARTY** – impleaded party | | | | | |
| and | | | | | |
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| **ADMINISTRATIVE TRIBUNAL OF QUEBEC (SOCIAL AFFAIRS DIVISION)** | | | | | |
| IMPLEADED PARTY – defendant | | | | | |
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| CORRECTED JUDGMENT | | | | | |
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1. The appellant appeals from a corrected judgment of the Superior Court, District of Montreal (the Honourable Marc St-Pierre), which, on November 9, 2020, granted in part his application for judicial review of a decision of the Administrative Tribunal of Quebec which had dismissed the appellant’s action contesting the respondent’s administrative decision against him.
2. For the reasons of Bich, J.A., with which Healy and Sansfaçon, JJ.A. agree, **THE COURT**:
3. **GRANTS** the application for leave to appeal and **GRANTS** leave to appeal, without legal costs;
4. **DISMISSES** the appeal, without legal costs.

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|  | | MARIE-FRANCE BICH, J.A. |
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|  | | PATRICK HEALY, J.A. |
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|  | | STÉPHANE SANSFAÇON, J.A. |
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| Mtre Julius Grey  Mtre Arielle Corobow | | |
| GREY & CASGRAIN | | |
| For the appellant | | |
|  | | |
| Mtre Marie Couture Clouâtre | | |
| BERNARD ROY (JUSTICE QUÉBEC) | | |
| For the respondent and impleaded party Attorney General of Quebec | | |
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| Date of hearing: | May 4, 2021 | |

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| REASONS OF BICH, J.A. |
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1. Because of their effect on the exercise of the rights set out in the *Act respecting the Quebec Pension Plan*, [[1]](#footnote-1) do ss. 63 and 66 of the *Individual and Family Assistance Act*[[2]](#footnote-2) violate s. 15(1) of the *Canadian Charter of Rights and Freedoms*[[3]](#footnote-3) and s. 10 of the *Charter of human rights and freedoms*?[[4]](#footnote-4) That is the question raised in this appeal, although it cannot be answered fully because of the significant -- indeed, insurmountable -- gaps in the evidence in the appeal record.

**I. Background**

1. Since December 2001, the appellant, who had worked for a long time and had therefore paid into the *Quebec Pension Plan*, has been receiving social assistance under the program that is now governed by the *Individual and Family Assistance Act*.[[5]](#footnote-5) In December 2004, the appellant turned 60 and, pursuant to s. 106.3 *A.Q.P.P.*, became eligible for the retirement pension provided by this statute. He chose not to claim payments immediately, however, preferring to wait until he reached the age of 65. He explains that this was so that he could then receive a higher monthly benefit.
2. However, the respondent Minister of Employment and Social Solidarity (the “Minister”), relying on the legislative provisions in force at the time,[[6]](#footnote-6) demanded that the appellant exercise the right conferred by the *Act respecting the Quebec Pension Plan* immediately or his welfare benefits would be discontinued. The appellant refused to comply. On March 6, 2007, the Minister (through the local employment centre) told him that his payments would indeed be terminated as of April 1, 2007.
3. Believing he was the victim of a discriminatory penalty based on his social condition that deprived him of the possibility of enhancing his pension like any other contributor to the Québec Pension Plan, the appellant contested this decision by way of an application for administrative review, which was dismissed on April 4, 2007. [[7]](#footnote-7)
4. The appellant subsequently went before the Administrative Tribunal of Quebec (“ATQ”) under s. 110 *et seq*. of the *Act respecting administrative justice*, [[8]](#footnote-8) impugning the validity of ss. 63 and 66 of the *I.F.A.A.* in view of s. 15(1) of the *Canadian Charter of Rights and Freedoms* and s. 10 of the *Charter of human rights and freedoms*.[[9]](#footnote-9) In December 2007, the ATQ suspended the execution of the Minister’s impugned decision retroactively to April 5, 2007,[[10]](#footnote-10) temporarily restoring payments.
5. On October 26, 2018, the ATQ dismissed the appellant’s action.[[11]](#footnote-11) In its view, although social condition may be considered an analogous prohibited ground of discrimination under s. 15(1) of the *Canadian Charter*, just as it is an expressly prohibited ground under s. 10 para. 1 of the *Quebec Charter*, ss. 63 and 66 of the *I.F.A.A.* do not infringe these provisions. Therefore:

[translation]

[33] The applicant party would like the Tribunal to compare his situation with that of a person who is 60 years of age who does not receive last resort financial assistance. However, it is not appropriate to do so, because such a person obtains none of the benefits provided under the *Individual and Family Assistance Act* and therefore is in no way subject to the obligations imposed by this *Act*.

[34] It is therefore reasonable to recognize that there may be differential treatment between a person covered by a last resort financial assistance regime and another who is alien to such a regime, without characterizing it as discriminatory. Moreover, all beneficiaries of last resort financial assistance who are entitled to a retirement pension when they reach the age of 60 are treated the same way.

[35] The *Act* does not deny the applicant rights that are granted to other Quebecers and, accordingly, the applicant suffers no disadvantage. All Quebecers who request last resort financial assistance must exhaust their other recourses to provide for their needs, including their entitlement to a retirement pension if they are 60 years of age. In exercising its jurisdiction, the legislature decided to subject the payment of last resort financial assistance to the requirement that a person exercise all residual recourses before seeking government assistance. This is a legitimate objective, and the obligation it imposes on beneficiaries to exercise their rights when they are realized affects their eligibility for financial assistance is a foreseeable feature of the last resort financial assistance regime. A person’s essential needs must be covered by relying on available resources first; only after this is done may the state take charge under the law.

[36] The impugned provision would be discriminatory if it imposed on certain categories of beneficiaries the obligation to exercise their rights or obtain benefits they are entitled to under a different statute, while exempting other categories of beneficiaries from this obligation. This is in no way the case, however. Sections 63 and 66 of the *Individual and Family Assistance* *Act* apply to all beneficiaries and, in the situation invoked in this case, all of those who reach the age of 60 and are entitled to a retirement pension.

1. And further:

[translation]

[48] Accepting the applicant’s assertions would be tantamount to allowing a contestation of the last resort financial assistance program as it exists. Because this is a last resort financial assistance program, it follows that this assistance is provided only once other recourses available to the person seeking it are exhausted. What the applicant seeks is, for all intents and purposes, the creation of a financial assistance program that does not exist: one that would grant government financial assistance without its recipient being required to exercise rights or recourses that could meet the recipient’s immediate needs.

1. It was also found that the appellant also did not establish that [translation] “the obligation imposed on a last resort financial assistance recipient who is 60 years old to exercise his or her rights under the Act *respecting the Québec Pension Plan* perpetuates a prejudice or is based on stereotypical characterizations of the situation of such people”.[[12]](#footnote-12)
2. That being the case, the ATQ concluded that the impugned provisions did not infringe the appellant’s equality rights guaranteed by the charters. In any event, it added, if they did breach s. 15(1) of the *Canadian Charter*, the treatment of last resort financial assistance beneficiaries that they require can be justified under s. 1.[[13]](#footnote-13)
3. Not only did the ATQ dismiss the appellant’s action, it also ordered him to repay the financial assistance he had received since the suspension that had been ordered earlier became effective.[[14]](#footnote-14) Invoking lack of jurisdiction and *ultra petita*, the appellant unsuccessfully sought a review of this order under s. 154 of the *Act respecting administrative justice*.[[15]](#footnote-15)

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1. Unhappy with the outcome, the appellant applied for a judicial review, arguing that the ATQ erred in its October 2018 decision in several respects. He alleged that it erred (1) by comparing the appellant’s situation to that of other social assistance beneficiaries, whereas the comparison should have been made with all persons eligible for a retirement pension under the *Act respecting the Québec Pension Plan*, (2) by ignoring the development of the case law, which no longer requires that *Charter*-infringing discrimination be based on the perpetuation of prejudice or stereotyping, and (3) by assigning undue importance to the objective of the *Individual and Family Assistance Act*, since this objective should not be considered at the stage of determining whether equality rights have been infringed. As he had done in his prior application for judicial review, the appellant also faults the ATQ for acting without jurisdiction and *ultra petita* by ordering him to repay the social assistance payments he had received since April 2007.
2. In a short judgment dated October 15, 2020, corrected on November 9, 2020,[[16]](#footnote-16) the Superior Court allowed the appellant’s appeal solely to quash the ATQ’s order to repay (the reasons for quashing the order were not explained). As for the remainder of the issues, the judgement concluded, in the following order:

- “Social condition” is not an analogous ground under s. 15(1) of the *Canadian Charter*, and it is not a prohibited ground of discrimination under that provision, because [translation] “although the Court might be ready to admit that the condition of social assistance beneficiaries is a characteristic that is changeable only at an unacceptable cost, since the applicant must renounce last resort financial assistance payments to be able to obtain a pension at age 65 [reference omitted], it is of the view that this condition is not related to personal identity in the way that conjugal status, for example, would be.” [[17]](#footnote-17) This finding ended the debate on s. 15 of the *Canadian* *Charter*.

- For the purposes of s. 10 of the *Quebec Charter*, which recognizes social condition as a prohibited ground, to respond to the question raised by the appellant, a last-resort financial assistance recipient should be compared to that of a person who is not such a recipient and retains the choice to benefit from the Quebec pension plan at the age of 65 instead of 60, because [translation] “common sense dictates that the person’s situation be compared with those who may do it without a “penalty””.[[18]](#footnote-18)

- An *Act* (or legislative provision) is discriminatory within the meaning of s. 10 where there is infringement of a right identified under the *Quebec Charter*, which in this case is not the s. 4 right to dignity but the s. 45 right, which guarantees governmental financial assistance to any person in need, However, s. 52, which prevents the legislature from derogating from ss. 1 to 38 of the *Quebec Charter*, does not apply to s. 45. It is therefore allowed to adopt, [translation] “under the *Charter* itself, a discriminatory measure like s. 63 of the *Individual and Family Assistance* Act without having to justify it.”[[19]](#footnote-19)

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1. The appellant, as unhappy with this judgment as he was with the ATQ’s decision, appeals to this Court. Because in his view the case puts in issue the specific rights of the State within the meaning of art. 30 para. 1 and art. 75 of the C.C.P., he believes he is entitled to an appeal as of right. However, as a precaution, concomitantly with his notice of appeal, he has filed an application for leave to appeal *de bene esse*, which will be referred to the Court so that it may decide on the nature of the right of appeal, while also hearing the parties on the merits of the appeal.[[20]](#footnote-20)
2. It should be noted that the conclusions in the notice of the appeal, the application for leave to appeal, and the appellant’s memorandum do not perfectly coincide with those presented for the appeal before the Superior Court. Essentially, the appellant asks this Court to declare ss. 63 and 66 *I.F.A.A.* inoperative in whole or in part, whereas at first instance, he asked for those provisions to be declared invalid [translation] “in relation with s. 106.3 of the *Act respecting the Québec Pension Plan*.”[[21]](#footnote-21) I can immediately affirm that, if the disputed provisions must be declared invalid or inoperative, this may be done only in connection with the debate raised here, which concerns strictly the exercise of the right to the retirement pension at the age of 60 enshrined in the *Act respecting the Québec Pension Plan*. The provisions cannot be completely invalidated so long as they concern rights that are not at issue in this case and that have never been debated before the ATQ or the Superior Court (and are also not invoked in the appellant’s memorandum).
3. The respondent and the impleaded party[[22]](#footnote-22) have not appealed the Superior Court’s quashing of the order to repay in the ATQ’s October 2018 decision.

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1. Finally, it is noted that, when the appellant turned 65 years old in December 2009, he claimed and obtained his retirement pension. At the hearing before the ATQ he testified that he was receiving $804 per month.[[23]](#footnote-23)

**II. Analysis**

1. The appeal therefore raises the following questions:

(1) Is the appeal as of right or is leave required?

(2) Do ss. 63 and 66 *I.F.A.A.* infringe s. 15(1) of the *Canadian Charter* and s. 10 of the Quebec *Charter*?

**A. Appeal as of right or with leave**

1. This question is rooted in art. 30 C.C.P. The first paragraph of this provision states that an appeal is as of right when it concerns the “special rights of the State”, which is defined very broadly in arts. 75 to 81 C.C.P. and in art. 76 in particular, which is echoed in art. 529 para. 2(1). [[24]](#footnote-24) In contrast, subparagraph 5 of the second paragraph of art. 30 requires prior leave for an appeal from “judicial review judgments of the Superior Court relating to ... a decision made by a person or body or a judgment rendered by a court that is subject to judicial review by the Superior Court”, or in other words, a power governed in principle by art. 529 para.1(2) C.C.P.. But what is required when an appeal targets the decision of an entity subject to judicial review by the Superior Court on the grounds of the invalidity or inapplicability of one of the normative instruments listed in art. 76 para.1 and art. 529 para.1(1) C.C.P. (law, regulation, government order, etc.), thereby putting in issue the special rights of the State?
2. The Court has already answered this question: In such circumstances, the appeal is subjected to the regime created by art. 30 para. 2(5) C.C.P. and requires prior leave. Thus, in *Road to Home Rescue Support c. Ville de Montréal*,[[25]](#footnote-25) which itself is grounded on *Municipalité de Saint-Colomban c. Boutique de golf Gilles Gareau inc.*, [[26]](#footnote-26) among other things, the Court wrote:

[translation]

[13] Put another way, in an application for judicial review of a (jurisdictional or administrative) decision concerning an individual, when the Superior Court considers the validity of a normative instrument, it nevertheless finds itself having to rule on “a decision made by a person or body or a judgment rendered by a court that is subject to judicial review by the Superior Court/*une décision prise par une personne ou un organisme ou [u]n jugement rendu par une juridiction assujetti à ce pouvoir de contrôle*” as set out in art. 30 para. 2(5) [reference omitted]. Leave to appeal is therefore required.

1. In short, where an application for judicial review is contemplated by art. 529 para. 1(2) C.C.P.,[[27]](#footnote-27) the right to appeal the Superior Court judgment is governed by art. 30 para. 2(5), even if the application puts in issue the validity, applicability, or operability of one of the instruments listed in art. 529 para.1(1) (which in this respect coincides with art. 76 para.1 C.C.P.).
2. In this case, the application for judicial review concerns precisely a decision of the ATQ, a body subject to the Superior Court’s superintending power. In that case, the ATQ was ruling on the application contesting an earlier ministerial decision terminating the appellant’s social assistance payments, an application that was based on the alleged invalidity of ss. 63 and 66 *I.F.A.A.* (which was claimed to violate the *Canadian Charter* and the *Quebec Charter*). Whether the rights of the State are affected by this contestation does not change the subject of the dispute before the Superior Court, however, which remains the decision of a body subject to the superintending and reforming power of the Superior Court. The appellant’s application for judicial review therefore clearly falls under art. 529 para.1(2) C.C.P. and, accordingly, the right to appeal the Superior Court judgment is available only under art. 30 para.2(5) C.C.P., that is to say, with leave.
3. Should the leave the appellant seeks be granted? Certainly. Despite the outcome that I ultimately reserve for the appeal, the issues raised *a priori* meet the requirements of art. 30 para.3 C.C.P.

**B. Validity of ss. 63 and 66 I.F.A.A. under the charters**

1. I will take the liberty of making three preliminary remarks.
2. *First remark.* Although the appeal puts in issue a decision of the ATQ that was undoubtedly acting within its jurisdiction, the presumption in favour of the reasonableness standard of review is rebutted in this case. The issue of the dispute is constitutional (validity of a statute under the *Canadian Charter*) or can be characterized as a “general question of law of central importance to the legal system as a whole” (validity of the said law under the *Quebec Charter*). The consideration of that question therefore must obey the standard of correctness.[[28]](#footnote-28) The parties have in fact argued on this basis before the Court, as they appear to have also done before the Superior Court.
3. *Second remark.* The appellant’s memorandum, which is not very detailed, makes little reference to s. 10 of the *Quebec Charter*. This subject seems to have become marginal, and this impression was not dispelled at the appeal hearing. Moreover, the appellant does not appear to contest the judge’s statement about the effect of s.52 of the *Quebec Charter* on the application of s. 10 to art. 45 (right to financial assistance and other social measures intended to ensure an acceptable standard of living).[[29]](#footnote-29) On the contrary, it appears to support that statement by connecting (with hardly any arguments) the discriminatory treatment he complains of with s. 4 or s. 12 of the *Quebec* *Charter*. Nevertheless, out of an abundance of caution, I will not completely exclude s. 10 from the following analysis, although I will not personally deal with s. 52 or the impact of s. 10 on s. 45, other than by allusion, due to the evidentiary problem I will describe below.
4. *Third remark.* I noted the gaps in the evidence in the appeal record above, without explanation.[[30]](#footnote-30) I will address this here.
5. The problem is that the appellant’s memorandum does not reproduce the testimony or documentary evidence adduced before the ATQ. What we know is therefore limited to the summary in the ATQ’s decision.[[31]](#footnote-31) The decision tells us that the appellant testified and, using various tables he prepared himself, he apparently tried to establish the following: If he had complied with the Minister’s request and exercised his rights under the *Act respecting the Quebec Pension Plan* when he turned 60, he would have received payments of $495 per month (which would have made him eligible for residual social assistance payments) and, when he was 73 years old (that is, when the hearing before the ATQ took place), he would have been receiving only $560 per month instead of the $804 he was being paid. Whatever the case may be, neither this testimony nor the documents filed by the appellant appear in the record of appeal.
6. An actuary from Retraite Québec also testified before the ATQ. He explained, among other things, that receiving a more modest pension at the age of 60, in accordance with certain actuarial imperatives, is not in itself disadvantageous and may even be profitable, depending on the contributor’s circumstances. It all depends on the individual’s situation. Furthermore, by the end of life, the total amount received by a contributor who began collecting his pension at 60 and the person who began at 65 will be overall the same. Unfortunately, this testimony does not appear in the appeal record, and if documents were filed by the witness (which we also do not know), they do not appear either.
7. As we will see, the absence of this evidence from the appeal record will be an impediment to the appellant’s claim, such that the appeal cannot succeed.

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1. To properly delineate the dispute, let us first consider ss. 105(a), 106.3, and 120.1*A.Q.P.P.,* para. 1:[[32]](#footnote-32)

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| **105.** Retraite Québec shall, subject to the rules laid down in this Act, pay the following pensions and benefits: | **105.** Retraite Québec doit, selon les règles établies dans la présente loi, payer les rentes et prestations suivantes : |
| *a)*  *a retirement pension to a qualified contributor and an additional amount for disability after retirement to the beneficiary of a retirement pension who becomes a qualified disabled contributor;* | *(a)  une rente de retraite à un cotisant admissible et un montant additionnel pour invalidité après la retraite au bénéficiaire de la rente de retraite qui devient un cotisant invalide admissible*; |
| … | […] |
| **106.3.** A contributor is qualified for a retirement pension from the age of 60. | **106.3.** Un cotisant est admissible à une rente de retraite à compter de 60 ans. |
| However, no contributor qualifies for a retirement pension before the age of 65 if an indemnity referred to in section 105.1 or 105.2 is payable to the contributor, unless the retirement pension has become payable to the contributor before that indemnity. Exclusion from entitlement to a retirement pension for the beneficiary of an indemnity referred to in section 105.1 applies only if the contributor otherwise qualifies for a disability pension. | Toutefois, nul cotisant n’est admissible à la rente de retraite avant l’âge de 65 ans si une indemnité visée à l’article 105.1 ou 105.2 lui est payable, à moins que la rente de retraite ne lui soit devenue payable avant cette indemnité. L’exclusion du droit à la rente de retraite pour le bénéficiaire d’une indemnité visée à l’article 105.1 ne s’applique cependant que si le cotisant est par ailleurs admissible à la rente d’invalidité. |
| **120.1.** The monthly amount of a retirement pension which becomes payable to a contributor on a date other than that of his sixty-fifth birthday is equal to the basic monthly amount of the retirement pension, adjusted as follows: | **120.1.** Le montant mensuel de la rente de retraite qui devient payable à un cotisant à une date autre que celle de son soixante-cinquième anniversaire, est égal au montant mensuel initial de la rente de retraite, ajusté comme suit : |
| (1)  reduced, in the case of a pension that becomes payable after 31 December 2013, by 0.5%, to which is added an adjustment factor multiplied by the ratio between 25% of the average base monthly pensionable earnings of the contributor, calculated as provided in sections 116.1 to 116.5, for the year in which the retirement pension becomes payable and the maximum base monthly retirement pension for the year, calculated as provided in section 116.6, for each month of the period that falls between the date, prior to the contributor’s sixty-fifth birthday, on which the pension becomes payable and the date of the contributor’s sixty-fifth birthday; or | 1°  soit réduit, dans le cas d’une rente qui devient payable après le 31 décembre 2013, de 0,5% auquel est ajouté un coefficient d’ajustement multiplié par le rapport entre 25% de la moyenne mensuelle des gains admissibles de base du cotisant calculée selon les articles 116.1 à 116.5 pour l’année au cours de laquelle la rente de retraite devient payable et le maximum mensuel de base de la rente de retraite pour l’année calculé selon l’article 116.6, pour chaque mois de la période comprise entre la date, antérieure à son soixante-cinquième anniversaire, à laquelle cette rente lui devient payable et celle de cet anniversaire; |
| (2)  increased by 0.7% in the case of a pension that becomes payable after 31 December 2013, for each month of the period that falls between the date of the contributor’s sixty-fifth birthday and the date, subsequent to the contributor’s sixty-fifth birthday, on which the pension becomes payable, up to a maximum of 60 months. | 2°  soit augmenté de 0,7% dans le cas d’une rente qui devient payable au cotisant après le 31 décembre 2013, pour chaque mois de la période comprise entre la date de son soixante-cinquième anniversaire et celle, postérieure à cet anniversaire, à laquelle cette rente lui devient payable, jusqu’à concurrence de 60 mois. |
| For the purposes of this section, the adjustment factor is 0.03% if the retirement pension becomes payable in 2014, 0.06% if it becomes payable in 2015 and 0.1% if it becomes payable in 2016 or in any subsequent year. | Pour l’application du présent article, le coefficient d’ajustement est de 0,03% si la rente de retraite devient payable en 2014, de 0,06% si elle devient payable en 2015 et de 0,1% si elle devient payable en 2016 ou lors d’une année subséquente. |

1. Within these parameters, contributors choose when to claim payment of their retirement pensions: they may claim at the age of 60, or between the ages of 60 and 70, and this choice affects the monthly amounts received, in accordance with the provisions of s. 120.1 *A.Q.P.P.* Contributors make this choice on the basis of need, the state of their personal finances, the state of their health, their life expectancy, the tax impact of receiving the pension, the interrelationship of the pension with other retirement plans, whether public (such as the Canadian Old Age Security and Guaranteed Income Supplement regimes, for example, starting at age 65) or private (such as a supplemental pension plan) and other personal factors.
2. It should be noted that the *Act* *respecting the Québec Pension Plan* does not differentiate between contributors according to whether or not they receive last resort financial assistance under the *Individual and Family Assistance Act*. If any distinction is made among contributors, it arises from the latter *Act*. And that is where ss. 63 and 66 *I.F.A.A.* – the provisions applicable to beneficiaries of the Social Assistance Program (s. 44 *I.F.A.A.*) and the Social Solidarity Program (s. 67 *I.F.A.A*.), both of which are last resort assistance programs)[[33]](#footnote-33) – come into play:

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| **63.** An independent adult or the members of a family must exercise their rights or take advantage of other statutory benefits when the exercise of such rights or the receipt of such benefits would affect the adult’s or the family’s eligibility for a financial assistance program, or reduce the amount of assistance. | **63.** L’adulte seul ou les membres de la famille doivent exercer leurs droits ou se prévaloir des avantages dont ils peuvent bénéficier en vertu d’une autre loi lorsque la réalisation de ces droits et avantages aurait un effet sur l’admissibilité de l’adulte ou de la famille à un programme d’aide financière ou réduirait le montant de cette aide. |
| In the case of an adult who is not deemed to receive a parental contribution under the second paragraph of section 57, the Minister is subrograted by operation of law in the rights of the adult to have support payments fixed or varied, unless the adult has elected to exercise his or her remedy for support. The Minister may also exercise the rights of any other creditor of support to have support payments fixed or varied if the Minister is of the opinion that the creditor’s circumstances place the exercise of such rights in jeopardy. | Toutefois, dans le cas d’un adulte qui n’est pas réputé recevoir une contribution parentale en vertu du deuxième alinéa de l’article 57, le ministre est, à moins que l’adulte n’ait choisi d’exercer son recours alimentaire, subrogé de plein droit aux droits de ce dernier pour faire fixer une pension alimentaire ou pour la faire réviser. Le ministre peut également exercer les droits de tout autre créancier d’une obligation alimentaire aux fins d’une telle fixation ou révision s’il estime que la situation de ce dernier compromet l’exercice de ces droits. |
| The fact that an adult or a member of the adult’s family engages in activities as a volunteer with a non-profit organization does not constitute failure to fulfil the obligations imposed by the first paragraph. | Ne constitue pas un manquement aux obligations prévues au premier alinéa le fait pour un adulte ou un des membres de la famille de réaliser des activités bénévoles auprès d’un organisme sans but lucratif. |
| **66.** When there is failure to fulfil any of the obligations imposed by sections 30, 31, 36, 63 and 64, the Minister may refuse or cease to pay financial assistance or reduce it. | **66.** Le ministre peut, lorsqu’il y a manquement à l’une des obligations prévues aux articles 30, 31, 36, 63 et 64, selon le cas, refuser ou cesser de verser une aide financière ou la réduire. |
| The Minister may also refuse or cease to pay financial assistance or reduce it when there is failure to fulfil the obligation under section 65, in the cases and under the conditions prescribed by regulation. | Il peut également, en cas de manquement à l’article 65, refuser ou cesser de verser une aide financière ou la réduire, dans les cas et conditions prévus par règlement. |
| Decisions made by the Minister under this section must include reasons and be communicated in writing to the person concerned. | Dans tous les cas où une décision est rendue par le ministre en application du présent article, celle-ci doit être motivée et communiquée par écrit à la personne concernée. |
|  | [Emphasis added] |

1. Were it not for these two provisions, contributors who are also last resort financial assistance beneficiaries could, like all other contributors, choose when to begin receiving the pension as they wish, based on their personal preference. This latitude is restricted, however, by s. 63 *I.F.A.A.*, which requires last resort financial assistance beneficiaries to claim their retirement pensions as soon as possible, since the pension is a right or benefit they enjoy under another statute, within the meaning of this provision. Contributors who do not do so may be penalized under s. 66 *I.F.A.A.*: last resort financial assistance may cease or be reduced (or applications for assistance may be refused). In reality, therefore, this provision offers contributors no choice but to claim their pensions even if they are not yet 65 years of age. Pursuant to s. 120.1 para.1 *A.Q.P.P.*, the consequence is that the amount the contributor will receive at that age will be reduced compared to the amount they would have received if they had waited until the age of 65 only (or even 70).[[34]](#footnote-34) Sections 63 and 66 I.F.A.A., therefore, when taken together, neutralize in practice the freedom of choice granted contributors under the *Act respecting the Québec Pension Plan*.
2. Is this discriminatory treatment within the meaning of s. 15(1) of the *Canadian Charter* or s. 10 of the *Quebec Charter*?

\* \*

1. First, let us recall the burden incumbent on the party alleging a violation of these provisions, which burden also provides an analytical framework (which was, moreover, accurately set out in the ATQ decision).
2. Regarding s. 15(1) of the *Canadian Charter*, recently in *R. v. C.P*.,[[35]](#footnote-35) Wagner, C.J, wrote:

[141] A law or a government action will contravene this guarantee: (1) if, on its face or in its impact, it creates a distinction based on enumerated or analogous grounds; and (2) if it imposes burdens or denies a benefit in a manner that has the effect of reinforcing, perpetuating or exacerbating a disadvantage *(Fraser v. Canada (Attorney General*), 2020 SCC 28, at para. 27*; Kahkewistahaw First Nation v. Taypotat*, 2015 SCC 30, [2015] 2 S.C.R. 548, at paras. 19‑20).

1. In separate reasons, Abella J. repeated the same test, [[36]](#footnote-36) which was also applied in more detail in *Ontario (Attorney General) v. G.*, [[37]](#footnote-37) this time by Karakatsanis J., for the majority:

[40] The Court asks two questions in determining whether a law infringes s. 15(1). First, does the challenged law, on its face or in its impact, draw a distinction based on an enumerated or analogous ground? If a law is facially neutral, it may draw a distinction indirectly where it has an adverse impact upon members of a protected group. Second, if it does draw a distinction, does it impose “burdens or [deny] a benefit in a manner that has the effect of reinforcing, perpetuating or exacerbating . . . disadvantage”, including “historical” disadvantage? (See *Centrale des syndicats du Québec v. Quebec (Attorney General)*, 2018 SCC 18, [2018] 1 S.C.R. 522, at para. 22, citing *Kahkewistahaw First Nation v. Taypotat*, 2015 SCC 30, [2015] 2 S.C.R. 548, at paras. 19-20, and *Quebec v. A*, at paras. 323-24 and 327; see also *Quebec v. A*, at para. 332, *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 paras. 25‑28, and *Fraser v. Canada (Attorney General)*, 2020 SCC 28, at paras. 27 and 30, per Abella J.)

[41] The first step — whether the law creates a distinction based on enumerated or analogous grounds — is not a preliminary merits test or “an onerous hurdle designed to weed out claims on technical bases” (*Quebec v. Alliance*, at para. 26). It is aimed at ensuring that those who access the protection of s. 15(1) are those it is designed to protect (*Alliance*, at para. 26). In cases involving laws that draw distinctions in their impact, the disproportionate impact on a protected group is enough — the disproportionate impact need not be caused by the protected ground (*Fraser*, at para. 70).

[42] The second step asks whether the challenged law imposes a burden or denies a benefit in a manner that is discriminatory. Importantly, it does not matter to either step of the analysis whether the challenged law created the social, political or legal disadvantage of protected groups (*Centrale des syndicats*, at para. 32, citing *Vriend v. Alberta*, 1998 CanLII 816 (SCC), [1998] 1 S.C.R. 493, at paras. 84 and 97; *Fraser*, at para. 71). If the law reinforces, perpetuates, or exacerbates their disadvantage, it violates the equality guarantee and thereby gives discrimination the force of law.

[43] The ultimate issue in s. 15(1) cases is whether the challenged law violates the animating norm of substantive equality (*Quebec v. A*, at para. 325, citing *Withler v. Canada (Attorney General)*, 2011 SCC 12, [2011] 1 S.C.R. 396, at para. 2; *Fraser*, at para. 42; *R. v. Kapp*, 2008 SCC 41, [2008] 2 S.C.R. 483, at para. 14). Substantive equality focuses both steps of the s. 15(1) analysis on the concrete, material impacts the challenged law has on the claimant and the protected group or groups to which they belong in the context of their actual circumstances, including historical and present‑day social, political, and legal disadvantage. An appreciation of the role substantive equality has played in our jurisprudence is necessary to understand why many of the arguments the Attorney General presented to this Court must be rejected.

1. As Abella J. states on behalf of the majority judges in *Fraser v. Canada (Attorney General)*,[[38]](#footnote-38) the issue of prejudice and stereotyping, about which much has already been written in the case law of the Supreme Court, becomes less important at the second stage of analysis under s. 15(1):

[76] 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)).

[77] 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]. [para. 332]

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

[78] 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.)

[Emphasis added]

1. It is therefore not essential to establish the existence of prejudice or stereotyping to prove disadvantage and discrimination, although evidence of such can be an eloquent indicator.[[39]](#footnote-39)
2. The requirement for a specific violation of dignity has also faded into the background since *Kapp*, with the emphasis now placed on discriminatory effect and the factors to identify it.[[40]](#footnote-40)
3. Finally, it is not at the stage of determining whether a legislative measure is discriminatory that the legislative objective should be considered, since this matter falls under the justification under s. 1 of the *Canadian Charter*. [[41]](#footnote-41)
4. In short, as the Supreme Court wrote in *Withler*: [[42]](#footnote-42)

[37] Whether the s. 15 analysis focusses on perpetuating disadvantage or stereotyping, the analysis involves looking at the circumstances of members of the group and the negative impact of the law on them. The analysis is contextual, not formalistic, grounded in the actual situation of the group and the potential of the impugned law to worsen their situation.

1. Regarding s. 10 of the *Quebec Charter*, the analytical framework applicable to determining the existence of discriminatory treatment and the burden on the party alleging it was explained by Wagner J., as he then was, and Côté J., in joint reasons:

[35] First, s. 10 requires that the plaintiff prove three elements: “(1) a ‘distinction, exclusion or preference’, (2) based on one of the grounds listed in the first paragraph, and (3) which ‘has the effect of nullifying or impairing’ the right to full and equal recognition and exercise of a human right or freedom” (*Forget*, at p. 98; *Ford*, at pp. 783‑84; *Devine v. Quebec (Attorney General)*, 1988 CanLII 20 (SCC), [1988] 2 S.C.R. 790, at p. 817; *Bergevin*, at p. 538).[[43]](#footnote-43)

1. Adding to the third element, Wagner and Côté JJ. wrote:

[53] Lastly, the plaintiff must show that the distinction, exclusion or preference affects the full and equal exercise of a right or freedom guaranteed to him or her by the *Charter*. The *Charter*, unlike the *Canadian Charter*, does not protect the right to equality per se; this right is protected only in the exercise of the other rights and freedoms guaranteed by the Charter: see, inter alia, *Ruel v. Marois*, 2001 CanLII 27967 (QC CA), [2001] R.J.Q. 2590 (C.A.), at para. 129; *Velk v. McGill* *University*, 2011 QCCA 578, at para. 42 (CanLII); see also *Ford*, at pp. 786‑87.

[54] This means that the right to non‑discrimination cannot serve as a basis for an application on its own and that it must necessarily be attached to another human right or freedom recognized by law. However, this requirement should not be confused with the independent scope of the right to equality; the Charter does not require a “double violation” (right to equality and, for example, freedom of religion), which would make s. 10 redundant: see, *inter alia*, D. Robitaille, “Non‑indépendance et autonomie de la norme d’égalité québécoise: des concepts ‘fondateurs’ qui méritent d’être mieux connus” (2004), 35 R.D.U.S. 103.[[44]](#footnote-44)

[Emphasis added]

1. As can be seen, the two analytical frameworks are similar in that, first, they require double proof of a distinction based on a prohibited ground, which in the case of s. 10 is one element from an exhaustive list, and in the case of s. 15(1) is included in an open-ended list, which implicitly comprises analogous grounds. Second, they both require proof of a negative impact, of harm, in the form of the imposition of a burden or obligation, the deprivation or limitation of an advantage, or the infliction of a disadvantage, penalty, unfavourable treatment, or harm, which, pursuant to s. 10 of the *Quebec* *Charter*, undermines the exercise of a right otherwise guaranteed (under ss. 1 to 9 and 21 to 48, or under 10.1 to 2.1).[[45]](#footnote-45) Not every distinction is are *ipso facto* discriminatory: it must create or contribute to harm.
2. What is the situation here?
3. In my view, the appellant’s action must fail. Even if it were found that he has made a *prima facie* case of distinction (see *infra*, para. [51] *et seq*.) and established that it is based on a prohibited ground under the charters (see *infra* at para. [56] *et seq*., the appeal record as constituted does not ground the conclusion that the impugned provisions have a negative impact on him and persons in a situation similar to his and that they penalize him or impose on him a burden or deny him a benefit “in a way that reinforces, perpetuates or exacerbates a disadvantage”, within the meaning of 15 of the *Canadian Charter*, or that they have “the effect of nullifying or impairing the right to full and equal recognition and exercise of a human right or freedom” within the meaning of s. 10 of the *Quebec* *Charter*. Let us consider this.

\* \*

1. First, has the appellant established a distinction?
2. The notion of distinction for the purposes of s. 15(1) of the *Canadian Charter* expresses a relationship of otherness based intrinsically on comparison, which makes it possible to identify differential treatment[[46]](#footnote-46) between groups and to verify whether it is based on a prohibited ground. Distinction and comparison are in this sense inextricably linked.[[47]](#footnote-47) However, the search for a comparator group is no longer the focus of the exercise, and the case law of the Supreme Court since *Withler* [[48]](#footnote-48) has preferred a broader and more contextual approach focussing on substantive equality. As De Montigny J. stated in *Begum v Canada*,[[49]](#footnote-49) “What is crucial at the first stage, however, is not that a claimant identify a particular group that does not share the disqualifying characteristic that sets him or her apart, but rather that the claimant be able to establish that he or she is treated differently than others”.[[50]](#footnote-50)
3. These remarks can be transposed, *mutatis* *mutandis*, to the notions of distinction, exclusion, or preference in s. 10 of the *Quebec Charter*.
4. In this case, it is certain that, if we agree with the respondent and the impleaded party, and if we compare the appellant with everyone who, like him, receives last resort financial assistance (and more specifically everyone who has contributed to the Québec Pension Plan and is now receiving last resort financial assistance), our conclusion on this point (as the ATQ decision makes clear) would be very different from what it would be if we compared the appellant generally to all contributors to the Québec Pension Plan, and specifically to all contributors who do not receive last resort financial assistance.
5. In my view, considering the teachings of the Supreme Court since *Withler*, and considering the legal proposition formulated by the appellant, it seems that we must make a choice between these hypotheses: as the trial judge explained (and contrary to what the ATQ decided), we may legitimately compare the appellant’s situation with that of contributors who do not receive last resort financial assistance under the *Individual and Family Assistance Act*.[[51]](#footnote-51) The appellant is in actual fact complaining that the *Act* imposes on him the obligation (because it is one, as we have already seen) to claim his retirement pension as soon as possible, in his case at the age of 60, which is an obligation not borne by other contributors, who are free to claim payment when they deem it appropriate (within the general limits provided in the *Act respecting the Québec Pension Plan*). The appellant, like all contributors in situations similar to his, is therefore deprived of the room to manoeuvre that other contributors enjoy, with the resulting financial consequences that, if he begins to collect his retirement pension before the age of 65, the amount he will receive once he turns 65 will be lower, at least for a period.[[52]](#footnote-52) This difference – this substantive difference – is what he believes is discriminatory and this is the difference we must consider, which will require us first to verify whether it is based on a prohibited ground.

\* \*

1. The appellant submits that there is such a ground in this case, namely, social condition, which includes the fact that he is a recipient of last resort financial assistance or another similar form of government assistance. This double claim is at the heart of the debate between the parties.
2. It goes without saying – because it is clearly spelled out by the legislature – that “social condition / *condition* *sociale*” is a prohibited ground under s. 10 of the *Quebec* *Charter*. The legislature does not specify what it means by this term, however, and leaves this task to the courts. As long ago as 1978, Tôth J. of the Superior Court proposed the following definition, which has been generally approved by Quebec case law and our Court in particular:

[translation]

...in common parlance, [translation] “social condition” refers to the rank, place, or position occupied by an individual in society – by birth, income, level of education, or occupation – or to all the circumstances and events that cause a person or group to occupy such a situation or position in society. The Court agrees with this proposition.[[53]](#footnote-53)

1. In the guidelines it adopted in this respect in 1995, the Commission des droits de la personne et des droits de la jeunesse defined social condition and its indicators, basing itself in particular on the case law of the Human Rights Tribunal:

[translation]

The new proposal for guidelines runs along the same continuum as the current guidelines. It is based on three premises: (1) social condition refers to [translation] “the rank, place, or position occupied by an individual in society [citation omitted]…”; (2) a person’s education, occupation, and income, among other criteria, help to determine their social condition; (3) social condition is not an inherent characteristic of individuals; it is attributed based on characteristics possessed by or attributed to the person. Social condition therefore includes an **objective aspect** referring to an identifiable if not measurable socioeconomic characteristic on the basis of which the attribution is made, and a subjective aspect determining the value judgment underlying the attribution. …

…

* The **objective** aspect refers to economic class, that is to say, society as a configuration of hierarchical, distinct, and opposable categories (economic “classes”) into which individuals are classified based on the market power indicated by their income, occupation, or education.
* The **subjective** aspect refers to status, that is to say, the value assigned to individuals on the basis of social representation, negative or positive stereotypes associated with, *inter* *alia*, their education, their occupation, or their income. [citation omitted][[54]](#footnote-54)

1. Quite recently, this Court reiterated and confirmed this vision of social condition. [[55]](#footnote-55)
2. Although the concept need not be defined exhaustively, it can certainly be said that the fact that he is the recipient of financial support like that offered under the *Individual and Family Assistance Act* (support that is granted under s. 45 of the *Quebec* *Charter*, in the chapter on economic and social rights) is a strong sign (if not to say a stigma) of social condition. Furthermore, this has already been recognized by this Court, in particular in *Quebec (Attorney General) c. Lambert*:[[56]](#footnote-56)

[translation]

[78] There is no doubt that the fact that a person is an income security recipient is an integral part of his or her social condition [reference omitted]

1. This Court also recognized it in *Aluminerie de Bécancour inc. c. Commission des droits de la personne et des droits de la jeunesse (Beaudry et autres*),[[57]](#footnote-57) per Thibeault and Lévesque JJ.:

[translation]

[47] Yet, according to the case law, social condition is the result of characteristics generally attributed to a person because of socio-economic criteria and the underlying idea that the person occupies a lower position due, in particular, to his or her income, such as those receiving social assistance, students, refugees, etc. Overall, we note that Quebec case law has favoured the protection of various categories of persons who generally – but not always – have as a common denominator a low income or a precarious economic situation.

…

[52] Applying the definition set out above, it is apparent that students, people receiving social assistance, refugees, etc. are identifiable social groups in the community.

[Emphasis added.]

1. There is little need to say more, insomuch as this fact, whether permanent or temporary, is a stereotyped marker of social condition and so well-known as to be a matter for judicial notice (art. 2808 C*.*C.Q*.*).[[58]](#footnote-58)
2. Section 15 of the *Canadian Charter*, on the other hand, does not refer to “social condition” or mention (as certain provincial statutes do[[59]](#footnote-59)) the “receipt of public assistance”,[[60]](#footnote-60) “income”, “source of income”, [[61]](#footnote-61) or “social disadvantage” [[62]](#footnote-62) (elements often held up as indicators of social condition) as prohibited causes of discrimination. The list of grounds in this provision is not exhaustive, however, as we know: Can social condition or the condition of being a social assistance recipient be an analogous prohibited ground?
3. The case law on the subject is not clear, but there are a few judgments (none from the Supreme Court[[63]](#footnote-63)) that reject social condition or dependence on government assistance (if this latter element is to be distinguished from the former) as an analogous ground[[64]](#footnote-64) because in essence it is not a permanent and immutable state or characteristic or one that can be changed only at an unacceptable cost, when considered from the standpoint of personal identity, a requirement set out in *Corbiere v. Canada (Minister of* *Indian and Northern Affairs).*[[65]](#footnote-65)
4. For my part, I am inclined to follow the example of Laskin J. in *Falkiner v. Director, Income Maintenance Branch*[[66]](#footnote-66) and, for the same reasons, to answer the question in the affirmative, since in my view it goes without saying that social condition and, within it, the (even transitory) state of “receipt of social assistance” (a term itself that carries negative stereotypes) relate to a circumstances that are admittedly contextual and multifactorial but that also that meet the tests developed in such matters by the Supreme Court[[67]](#footnote-67) (which has already recognized citizenship or the lack thereof,[[68]](#footnote-68) Aboriginality-residence,[[69]](#footnote-69) sexual orientation,[[70]](#footnote-70) and matrimonial status[[71]](#footnote-71) as analogous grounds.[[72]](#footnote-72)
5. Without a doubt, as the respondent and the impleaded party note, we may not (and we must not) make “social assistance” or, more generally, social condition a definitional aspect of personal identity. Nevertheless, in the eyes of others, these characteristics have a definitional impact, without regard to the merits or needs of the individual. As I stated above, the negative stereotyping of social assistance recipients is still well-established in our society[[73]](#footnote-73) and if there is any group – one might be tempted to say “class” – of vulnerable individuals who may be characterized as a distinct and isolated minority [[74]](#footnote-74) and who are victims of persistent political or social prejudice as well as unjust generalizations and malicious insinuations, this group certainly is one.[[75]](#footnote-75) These are all indicators that should *a priori* favour the recognition of social condition or the receipt of social assistance (and other terms designating this reality) as an analogous ground for the purposes of s. 15(1) of the *Canadian* *Charter*. In a legal system that promotes substantive equality as opposed to formal equality, this would not appear to be an unreasonable conclusion.[[76]](#footnote-76) Regarding the criteria of immutability or quasi-immutability, I will merely remark that some of the grounds enumerated in s. 15 are not immutable; age is but one example. The analogous grounds of citizenship and the absence of citizenship or matrimonial status are also not immutable, even though they are characteristics that are not solely the result of the individual’s will, as the Supreme Court notes in *Andrews*. This is also the case, it seems to me, with social condition, including the status of being a social assistance recipient. To find otherwise would in fact validate the stereotype afflicting persons who receive such assistance.
6. I nevertheless speak in the conditional, because the prudence the Supreme Court urges the courts to adopt in matters regarding the recognition of “analogous grounds”[[77]](#footnote-77) ultimately persuades me not to rule formally on the existence of such a ground in this case, since it is not essential for the purposes of ruling on this appeal.
7. Even if we know that social condition, or simply the state of someone who receives financial support under the *Individual and Family Assistance Act* or other support of a similar kind is a prohibited ground under s. 10 of the *Charter*, and if we suppose that it is also, by analogy, an illicit ground for the purposes of s. 15 of the *Canadian Charter*, the analysis does not stop there: the appellant must also establish, on the one hand, a connection between the distinction to which he is subjected and the prohibited ground, and further, that this distinction, that is to say, the differential treatment of which he complains, has a prejudicial effect and, in the case of s. 10 of the *Quebec* *Charter*, that it undermines the exercise of the rights granted by this provision.[[78]](#footnote-78)
8. On the first point, the appellant easily discharges his burden of proof: at the risk of repeating what I said earlier, the obligation to exercise his right conferred by the *Act* *respecting the Québec Pension Plan* once he turns 60, which is an obligation that other contributors do not have, is directly based on his status as a recipient of the assistance regime established by the *Individual and Family Assistance Act*, which penalizes failure through the loss, suspension, or reduction of the assistance in question. The differential treatment stems directly from the combination of ss. 63 and 66 *I.F.A.A.*
9. But the second point is where the problem arises, where the appellant fails to establish that this obligation causes him harm. In this case, the appellant believes that he was deprived of the freedom to choose that is recognized for every other Quebec contributor and that he was thereby prevented from maximizing the pension that his previous contributions could have generated at the age of 65 had he not been forced to claim it at the age of 60. He believes that he is thereby being unduly condemned to greater poverty than would otherwise be the case.
10. Even in the broadest and most generous sense, in the interests of substantive and not simply formal equality, I find that the Court cannot conclude here that there has been a genuine disadvantage that violates the *Canadian* *Charter* or, in the case of the *Quebec* *Charter*, undermines the full and equal exercise of the rights recognized by ss. 4, 12 or 45.
11. Of course, the fact that the appellant lost the social assistance benefits he was entitled to because of s. 66 *I*.*F.A.A*. caused him prejudice, within the narrow sense of the term. But that is not the question. Rather, the question is whether the obligation, thus penalized, imposed on the appellant and other last resort financial assistance recipients by s. 63 I.F.A.A. to claim their pension as soon as they turn 60 (and, more generally, before age 65) constitutes a burden or the denial of a benefit.[[79]](#footnote-79) As I have already noted, surely there is a difference between the appellant (and persons in similar situations) and contributors who do not receive last resort financial assistance: the former, unlike the latter, cannot choose when to claim their pension. But does this difference create a disadvantage?
12. Unfortunately, the statement the appellant makes before us begs the question.
13. We should recall that when the appellant appeared before the ATQ, when he was over age 65, he declared that he was receiving a pension of $804 per month ($9,648/year).[[80]](#footnote-80) How much would he have received on that same date if he had claimed his pension as soon as he turned 60? According to his calculations, which the ATQ reports, this amount would have been $560, not $804. Is this mathematical difference enough to find that a disadvantage exists? The answer must be no. As I stated above, the appeal record does not reproduce the testimony or the appellant’s calculations on paper, and it is obviously impossible to assess the contents or evaluate the reliability or credibility of that testimony and those calculations.[[81]](#footnote-81) We cannot even rely on the ATQ, whose decision was silent on this subject and merely summarized the elements without commenting on them, other than to state that the appellant’s estimates were never validated by Retraite Québec, since he always refused to contact Retraite Québec.[[82]](#footnote-82) We therefore do not know what the appellant would have been paid in retirement pension between the ages of 60 and 65 if he had claimed it; we also do not know what he would have received in residual social assistance before or after age 65 if he had claimed his retirement pension at the age of 60; we do not know what he receives or would have received in payment under other plans (old age security, guaranteed income supplement) as of the age of 65, and what his total income would have amounted to at that time; and finally, we do not know if or how his total income was affected in each different scenario. It should be pointed out that the respondent and the impleaded party admit none of the appellant’s factual claims.
14. The appeal record, as we know, also does not reproduce the testimony of Charles Cossette, interim head of Retraite Québec development and administration. According to what the ATQ says on the subject, while conceding that, because of s. 120.1 *A.Q.P.P*., the pension obtained at the age of 65 by a person who asked for it before that age would indeed be a lower amount. Mr. Cossette explains, however, that this does not necessarily mean a disadvantage: it may have a neutral effect or even constitute an economic advantage (including in the case of a last resort financial assistance recipient), in particular thanks to the impact of the other support regimes for which the appellant and persons in his situation are eligible as of the age of 65. Placing ourselves at the end of the contributors’ lives, thanks to adjustments and indexations, there is also an actuarial equivalence between the amounts received by the contributor who claims their pension before the age of 65 and that received by a person who claims at age 65. Did witness Cossette file a report on this subject, explanatory tables, or comparative scenarios illustrating concrete short-, medium-, and long-term effects of payment of a pension before the age of 65 and of payment starting at that age, taking into account the impact on social assistance payments? If such documents were filed (which the ATQ decision does not mention), the appeal record does not reproduce them.
15. That said, is witness Cossette right? Although they appear plausible, the Court cannot precisely measure the value or accuracy of his explanations, on which the ATQ also does not comment, even though, if we read between the lines, it might be concluded that the administrative judges received them favourably.
16. From the ATQ’s account, it also appears that Mr. Cossette’s testimony tends to establish that the question as to whether there was a benefit or a disadvantage depends on the specific situation of each contributor, and that it is impossible to generalize. In theory, then, the appellant’s situation may have been disadvantageous without it being necessary to conclude by extrapolation that the same is true for all, or most, or even a significant portion of the last resort financial assistance recipients who are former contributors to the Québec Pension Plan.[[83]](#footnote-83) Of course, the fact that a measure does not affect every member of a group or does not affect each member of the group in the same way is not a sign that there is no disadvantage, but that is not the question here, when (1) it is not possible to verify that the appellant personally suffered a genuine disadvantage, and (2) there is no evidence of the more general effect of the impugned measure on the group of persons who, like the appellant, contributed to the Quebec pension plan before and were receiving last resort financial assistance when they became eligible for payment of that pension.[[84]](#footnote-84)
17. In short, at best, the Court is faced with contradictory evidence of which it has only indirect and piecemeal knowledge and is consequently unable to observe the presence or absence of an advantage or a disadvantage, or a prejudicial or negative effect on the appellant, or, more generally, on beneficiaries of programs established under the *Individual and Family* *Assistance Act* (and in particular social assistance and social solidarity programs). The fact that these beneficiaries, under ss. 63 and 66 *I.F.A.A.* are obligated to claim their retirement pension between the ages of 60 and 65 and are therefore subjected to the consequences of s. 120.1 *A.Q.P.P.* does not, on its own, justify concluding that they suffer as a result or that they suffer generally or in significant numbers, and it does not meet the requirement of evidence on a balance of probabilities supported otherwise than by intuition or estimates.[[85]](#footnote-85) It is also not a determination likely to be made on the basis of judicial notice or simple logical reasoning.[[86]](#footnote-86) The deficiency of the appeal record in this regard irreparably precludes any finding on the reality of the disadvantage alleged by the appellant and deprives the Court of the possibility of moving its analysis of the ATQ’s decision forward.
18. It is true that this decision does not answer the question as to the disadvantage other than by arguing that there can be no prejudice where the individual actually obtains a benefit – the one provided under the *Individual and Family Assistance Act* in this case -- which requires the individual to comply with the conditions set out in that statute, conditions that anyone who hopes to access those benefits must respect. Although this is a serious argument, we nevertheless regret that the ATQ did not rule on the evidence adduced before it to draw conclusions regarding whether the disadvantage alleged by the appellant truly existed, even if only to note that the evidence was deficient, if that was the case. In any event, the fact remains that, before the Court, the appellant is the one who has failed to discharge his burden of showing how the evidence establishes on a balance of probabilities the existence of such a disadvantage, that is, a disadvantage arising from the obligation to claim his retirement pension before the age of 65 and flowing from the conjunction of ss. 63 and 66 *I.F.A.A.* and 120.1 (1) *A.Q.P.P*.To do so, he would at least have had to file in the appeal record the testimonial and documentary evidence adduced before the ATQ, which he did not do.
19. However, is the simple fact that he cannot determine the date on which he may claim his retirement pension as he sees fit a disadvantage in itself that is sufficient to support the appellant’s claim that the impugned provisions are discriminatory? I do not believe so, absent proof of any other negative impact. Moreover, from the perspective of this limited hypothesis, the obligation imposed on last resort financial assistance recipients cannot be taken in isolation from the benefit they receive and the general context of the assistance measures set out in the *Individual and Family Assistance Act.* As the Supreme Court has often reiterated, not all distinctions or differential treatments are necessarily prohibited, particularly when they are accompanied by the granting of a benefit (in this case last resort assistance, which is itself provided by s. 45 of the *Quebec* *Charter*). It is true that a government that decides to confer such a benefit must do so in a non-discriminatory manner,[[87]](#footnote-87) but “a legislative choice not to accord a particular benefit [in this case, that of the freedom to choose to claim a retirement pension] absent demonstration of discriminatory purpose, policy, or effect does not offend this principle and does not give rise to a s. 15 review”. [[88]](#footnote-88) This remark can be transposed to s. 10 of the *Quebec Charter*.
20. That being the case, it is impossible to proceed any further with the assessment of this file, and it is pointless to revisit whether social condition in general or the social condition of a last resort financial assistance recipient is an analogous ground under s. 15 of the *Canadian Charter*, or whether ss. 63 and 66 *I.F.A.A.* nullify or impair a right recognized by the *Quebec* *Charter*, within the meaning of s. 10 of that charter. *A fortiori,* it is not possible or appropriate to ask whether s. 1 of the *Canadian* *Charter* can justify such discrimination, or what the effect of s. 52 of the *Quebec* *Charter* is on a violation of s. 10, based on s. 45 (right to financial support from the government) or even s. 4 (right to dignity).

**III. Conclusion**

For these reasons, I would dismiss the appeal, but without legal costs, given the nature of the debate and the appellant’s circumstances.

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| MARIE-FRANCE BICH, J.A. |

1. CQLR, c R-9 (or “*A.Q.P.P.*”). [↑](#footnote-ref-1)
2. CQLR, c A-13.1.1 (or “*I.F.A.A.*”), effective date January 1, 2007. [↑](#footnote-ref-2)
3. *Constitution Act, 1982*, Part I, being Schedule B to the *Canada Act 1982*, c 11 (UK) (”*Canadian Charter*”). [↑](#footnote-ref-3)
4. CQLR, c C-12. [↑](#footnote-ref-4)
5. The Social Assistance Program is one of the financial aid programs provided under this *Act* (s. 44 *et seq*), which also includes the Social Solidarity Program (s. 67 *et seq.*), the Aim for Employment Program (s. 83.1 *et seq.*) as well as various specific programs (s. 79 *et seq*). In accordance with s. 3, para. 2, *I.F.A.A.*, “[a]ny reference to a last resort financial assistance program refers to the Social Assistance Program or the Social Solidarity Program” (ss. 44 and 67), [↑](#footnote-ref-5)
6. These were ss. 41 and 54 of the *Act respecting income support, employment assistance and social solidarity*, CQLR, c S-32.001, which became, ss. 63 and 66 *I.F.A.A*., respectively. [↑](#footnote-ref-6)
7. Decision dated April 4, 2007, signed by André Hétu, reviewer, Ministère de l’Emploi et de la Solidarité sociale, Department of Review and Representation before the ATQ, Western Sector. [↑](#footnote-ref-7)
8. CQLR, c. J-3. [↑](#footnote-ref-8)
9. Which explains the notice the appellant sent the impleaded Attorney General of Quebec, under what was then art. 95 C.C.P. and what is today art. 76 C.C.P.. [↑](#footnote-ref-9)
10. *Ordonnance en vertu de l’article 107 de la Loi sur la justice administrative* (Order under s. 107 of the *Act respecting Administrative justice*), SAS-M-130348-0704, Administrative Judge Christine Truesdell (13 December 2007). [↑](#footnote-ref-10)
11. *R.O. c. Ministre de l'Emploi et de la Solidarité sociale*, 2018 QCATQ 10667 (or “ATQ decision”). The record does not reveal why the proceeding the appellant brought in 2007 was decided in 2018. [↑](#footnote-ref-11)
12. *Ibid.* at para*.*  39. [↑](#footnote-ref-12)
13. *Ibid.* at para*.*  41. [↑](#footnote-ref-13)
14. See above at para. [8] *in fine* and footnote 10. [↑](#footnote-ref-14)
15. *R.O. c. Ministre du Travail, de l'Emploi et de la Solidarité sociale*, 2019 QCTAQ 09538. [↑](#footnote-ref-15)
16. *R.O. c. Tribunal administratif du Québec (section des affaires sociales)*, 2020 QCCS 4256. [↑](#footnote-ref-16)
17. Trial judgment at para. 18. [↑](#footnote-ref-17)
18. *Ibid. at para.*  22. [↑](#footnote-ref-18)
19. Trial judgment at para. 30. [↑](#footnote-ref-19)
20. *R.O. c. Ministre de l'Emploi et de la Solidarité sociale*, 2020 QCCA 1611 (single judge). [↑](#footnote-ref-20)
21. See the originating application (”Judicial review power (conclusions in review of a decision), art. 529 paragraph 1(2) C.C.P.) (26 November 2018) at 6. [↑](#footnote-ref-21)
22. In these reasons, the term “impleaded party” refers solely to the Attorney General of Quebec, because the Administrative Tribunal of Quebec did not take part in the appeal. [↑](#footnote-ref-22)
23. *R.O. c. Ministre de l'Emploi et de la Solidarité sociale*, *supra* note 11 at para. 10. [↑](#footnote-ref-23)
24. These are the provisions that make up Title IV (”The Special Rights of State”) of Book I (”General Framework of Civil Procedure”) of the *Code of Civil* *Procedure*. [↑](#footnote-ref-24)
25. 2019 QCCA 2174. [↑](#footnote-ref-25)
26. 2019 QCCA 2187. [↑](#footnote-ref-26)
27. This would also be the case in an application for judicial review governed by s. 529 para.1(3) (*mandamus*), although this is not at issue in this case. [↑](#footnote-ref-27)
28. See *Canada (Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at paras. 17, 53, 55–62 (majority reasons). Regarding the *Quebec Charter* and what remains of it after *Vavilov*, see also *Mouvement laïque québécois c. Saguenay (Ville)*, [2015] 2 S.C.R. 3 at para. 51 in particular (majority reasons of Gascon J.). On this subject, moreover, the question calls up the same standard of review as it would if it were a Human Rights Tribunal decision, which can be appealed directly to the Court of Appeal under s. 132 of the *Quebec Charter*. [↑](#footnote-ref-28)
29. However, there a lot of things to be said about that, at least in principle. See in this respect, Daniel Proulx, “Droit à l’égalité” in Stéphane Beaulac & Jean-François Gaudreault-Desbiens (eds.), *JurisClasseur Québec*, Droit public” collection, vol. “Droit constitutionnel”, fasc. 9 (Montreal: Lexis Nexis, 2011) (loose-leaf edition, updated 18 November 2020) at para. 113 at 9/67-68. [↑](#footnote-ref-29)
30. See above at para. [4]. [↑](#footnote-ref-30)
31. *R.O. c. Ministre de l'Emploi et de la Solidarité sociale*, *supra* note 11 at paras. 10 to 12. [↑](#footnote-ref-31)
32. These provisions are those of the *Act respecting the Québec Pension Plan* as it is today, but equivalent or similar provisions have existed in the past. They even provided for the same possibility of obtaining a retirement pension at age 60, in exchange for certain reductions in the contribution amount. [↑](#footnote-ref-32)
33. See *supra* note 5. Section 63 para.1 *I.F.A.A.* also applies to those who benefit from the Aim for Employment program, where the sanction for a breach is provided in s. 83.11 *I.F.A.A.* (the sanction is analogous to that under s. 66). [↑](#footnote-ref-33)
34. As a result of s. 120.1 para. 2 *A.Q.P.P.*, the monthly pension paid to a contributor who requests their retirement pension only at the age of 70 is higher than that of a contributor who draws their retirement pension at the age of 65. Section 63 *I.F.A.A.* does not permit contributors who are also last resort financial assistance beneficiaries to delay the request until that age, any more than it allows them to wait until they turn 65 before claiming payment. However, the appellant never raised this hypothesis, and I will not refer to it again. [↑](#footnote-ref-34)
35. 2021 SCC 19. [↑](#footnote-ref-35)
36. *Ibid. at para.*  56. [↑](#footnote-ref-36)
37. 2020 SCC 38. [↑](#footnote-ref-37)
38. 2020 SCC 28. [↑](#footnote-ref-38)
39. *Québec (Attorney General) c. A*, [2013] 1 S.C.R. 61 at para.325 (dissenting reasons of Abella J.). See also *Fraser v. Canada (Attorney General)*, *supra* note 38 at para. 78; *Withler v. Canada (Attorney General)*, [2011] 1 S.C.R. 396 at paras. 37–38. [↑](#footnote-ref-39)
40. [2008] 2 S.C.R. 483 at para.21 *et seq*. [↑](#footnote-ref-40)
41. See e.g., *Fraser v. Canada (Attorney General)*, *supra* note 38 at para. 79 (majority reasons of Abella J.); *Centrale des syndicats du Québec v. Québec (Attorney General)*, [2018] 1 S.C.R. 522 at para. 35 (reasons of Abella J.). [↑](#footnote-ref-41)
42. *Withler v. Canada (Attorney General)*, *supra* note 39. [↑](#footnote-ref-42)
43. *Quebec (Commission des droits de la personne et des droits de la jeunesse) c. Bombardier Aerospace Training Center*,[2015] 2 S.C.R. 789. [↑](#footnote-ref-43)
44. *Bombardier Aerospace Training Center*), supra note 43.

    More generally, on the burden of proof incumbent on the person alleging discrimination, see also *Droit de la famille — 191850*, 2019 QCCA 1484 (leave to appeal to SCC refused, 38912 (30 April 2020) at paras. 209–211; *Procureure générale du Québec c. Association des juristes de l'État*, 2018 QCCA 1763 at paras. 57–58; *Procureure générale du Québec c. Association des juristes de l'État*, 2017 QCCA 103 at paras. 34 and 36. [↑](#footnote-ref-44)
45. See e.g., *Droit de la famille — 191850*, 2019 QCCA 1484 (leave to appeal to SCC refused, 38912 (30 April 2020) at paras. 223–224. [↑](#footnote-ref-45)
46. And I include in the term “treatment” that which emerged from the effect of a measure, provision, rule, or act, because of both what it imposes and what it omits (see especially *Law. v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497 at para. 25, *in* *fine*: “Differential treatment, in a substantive sense, can be brought about either by a formal legislative distinction, or by a failure to take into account the underlying differences between individuals in society.” [↑](#footnote-ref-46)
47. See e.g., *Procureure générale du Québec c. Association des juristes de l'État*, 2018 QCCA 1763 at para. 58-61 and paras. 58 and 59 in particular. See also D. Proulx, supra note 29at para. 17 at . 9/16 *Charte canadienne*), and para. 91 at 9/44 (*Charte québécoise*). [↑](#footnote-ref-47)
48. *Withler v. Canada (Attorney General)*, *supra* note 39. See also *Québec (Attorney General) v. Alliance du personnel professionnel et technique de la santé et des services sociaux*, [2018] 1 S.C.R. 464 at paras. 27–28 (majority reasons of Abella J.). [↑](#footnote-ref-48)
49. 2018 FCA 181 at para. 52 (leave to appeal to SCC refused, 38439 (18 April 2019). [↑](#footnote-ref-49)
50. Similarly, see also *Stadler v. Director, St Boniface/St Vital*, 2020 MBCA 46 (leave to appeal to SCC refused, 39269 (26 November 2020) at paras. 58 and 65. [↑](#footnote-ref-50)
51. See *supra* at paras. [35] and [36]. [↑](#footnote-ref-51)
52. I must make this qualification, since the appeal record does not reveal what happens in the longer term. The evidence adduced before the ATQ perhaps made it clear but since this evidence was not reproduced in the appeal record, the ATQ decision does not refer to it, and the parties do not mention it, we know nothing of it. [↑](#footnote-ref-52)
53. *Commission des droits de la personne du Québec c. Centre hospitalier St-Vincent-de-Paul de Sherbrooke* St-François, 450-05-000856-78, 7 September 1979, Thôt J. (Sup. Ct.) at 3. This definition was repeated in *Ordre des comptables généraux licenciés du Québec c. Québec (Procureur général)*, [2004] R.J.Q. 1164 (C.A.) at para. 69; *Lévesque c. Québec (Procureur général)*, [1988] R.J.Q. 223 (C.A.) at 229 (reasons of Bisson J., citing the following judgment); *Johnson c. Commission des affaires* sociales, [1984] C.A. 61 at 69-70. See also generally: *Whittom c. Commission des droits de la personne*, [1997] R.J.Q. 1823 (C.A.) at 1827 (reasons of Brossard J.A. and reasons of Fish J.A.). [↑](#footnote-ref-53)
54. Commission des droits de la personne et des droits de la jeunesse, *Lignes directrices sur la condition sociale* (31 March 1994) Cat. 2.120.8.4 at 4–5 and 6.

    It is worth mentioning in passing that, like the *Quebec* *Charter*, the New Brunswick *Human Rights Act*, RSNB 2011, c 171, s. 2(o), also refers to “social condition / *condition sociale*” as a prohibited ground of discrimination and defines it in s. 1 as follows:

    |  |  |
    | --- | --- |
    | **1.**   The following definitions apply in this Act. : | **1.**  Les définitions qui suivent s’appliquent à la présente loi. |
    | … | […] |
    | “social condition”, in respect of an individual, means the condition of inclusion of the individual in a socially identifiable group that suffers from social or economic disadvantage on the basis of his or her source of income, occupation or level of education. *(condition sociale)* | « condition sociale » La condition d’un individu résultant de son inclusion au sein d’un groupe social identifiable et socialement ou économiquement défavorisé fondée sur sa source de revenu, sa profession ou son niveau d’instruction. *(social condition)* |

    As we will see, this definition is conceptually similar to the one that has been accepted in Quebec case law and by the Commission des droits de la personne et des droits de la jeunesse. We note that s. 9 of the New Brunswick statute provides that “[d]espite any provision of this Act, a limitation, specification, exclusion, denial or preference on the basis of social condition shall be permitted if it is required or authorized by an Act of the Legislature”.

    The *Human Rights Act* of the Northwest Territories, SNWT 2002, c 18, s. 5, also refers to “social condition” as a prohibited ground of discrimination and offers the following definition which is also quite similar to the one accepted by Quebec courts and tribunals:

    |  |  |
    | --- | --- |
    | **1.**(1)  In this Act. : | **1.**(1)  Les définitions qui suivent s’appliquent à la présente loi. |
    | … | […] |
    | "social condition", in respect of an individual, means the condition of inclusion of the individual, other than on a temporary basis, in a socially identifiable group that suffers from social or economic disadvantage resulting from poverty, source of income, illiteracy, level of education or any other similar circumstance; *(condition sociale)* | « condition sociale » Condition d’un individu résultant de son inclusion, autrement que de façon temporaire, au sein d’un groupe social identifiable et socialement ou économiquement défavorisé pour des causes liées à la pauvreté, à la source de revenu, à l’analphabétisme, au niveau d’instruction ou à d’autres circonstances similaires. *(social condition)* |

    These statutes do not have the breadth of the *Quebec Charter*, but the use they make of the term “social condition” is nonetheless useful for the purposes of comparison. [↑](#footnote-ref-54)
55. *Aluminerie de Bécancour inc. c. Commission des droits de la personne et des droits de la jeunesse (Beaudry et autres)*, 2021 QCCA 989 at para. 50 *et seq*. See also D. Proulx, supra note 29 at 9/59, para. 109. [↑](#footnote-ref-55)
56. [2002] R.J.Q. 599 (C.A.; application for leave to appeal to SCC refused, 29227 (17 April 2003). [↑](#footnote-ref-56)
57. *Supra* note 55. [↑](#footnote-ref-57)
58. On the courts’ awareness of certain stereotypes, see in particular *Aluminerie de Bécancour inc. c. Commission des droits de la personne et des droits de la jeunesse (Beaudry et autres)*, *supra* note 55 at para. 49. [↑](#footnote-ref-58)
59. Which of course do not have the constitutional weight of s. 15 of the *Canadian Charter*, but they nevertheless reflect a reality of which various provincial legislatures, like the one in Quebec, have taken note. [↑](#footnote-ref-59)
60. The laws of New Brunswick and the Northwest Territories, which include social condition as a prohibited ground of distinction (*supra* note 54), propose a definition that certainly includes receiving this type of financial assistance. The Saskatchewan *Human Rights Code*, 2018 SS 2018, c. S-24.2 s. 2, for its part, explicitly includes “receipt of public assistance” among the prohibited grounds of discrimination (s. 2(n). This is also the case with the Ontario *Human Rights Code*, R.S.O. 1990, c. H.19, s. 2, which also expressly states that “the receipt of public assistance*”* is a prohibited ground of discrimination, but only with respect to occupancy of accommodation. [↑](#footnote-ref-60)
61. See e.g., Alberta *Human* *Rights Act*, R.S.A. 2000, c. A-25.5, Preamble and ss. 3(1), 4, 5(1), 7(1), 8(1) and 9 in particular; *Human Rights Code* (British Columbia), RSBC 1996, c. 210, s, 10 (in accommodation matters only); *Human* *Rights Act* (Nova Scotia), R.S.N.S. 1989, c. 214, s. 5; *Human* *Rights* *Act* (Nunavut), CSNu. 2003, c. 12, s. 7(1) (which uses the specific expression “lawful source of income / source de revenue légitime”; Prince Edward Island *Human* *Rights* *Act*, R.S.P.E.I. 1988, c. H-12, Preamble and s. 1(1)(d); *Human* *Rights* *Act* (Yukon), RSY 2002, c. 116, s. 7(l). The Newfoundland and Labrador *Human* *Rights* *Act*, SNL 2010, c. H-13.1, s. 9(1), adds “social origin” to “source of income” (defined as “the receipt of income or employment support under the *Income and Employment* *Support Act*” in s. 2) [↑](#footnote-ref-61)
62. The Manitoba *Human Rights Code* (Manitoba), C.P.L.M., c. H175, includes “social disadvantage / *désavantage social*” as a prohibited characteristic for discrimination for some purposes, defining it as follows:

    |  |  |
    | --- | --- |
    | **1.**   In this Code : | **1.**  Les définitions qui suivent s’appliquent au présent code. |
    | … | […] |
    | “social disadvantage” means diminished social standing or social regard due to | « désavantage social » Situation d'une personne dont la position ou la valeur sociale est amoindrie pour le motif : |
    | (a)  homelessness or inadequate housing; | a) qu’elle est sans logement ou habite un logement inadéquat; |
    | (b)  low levels of education; | b) qu'elle est peu scolarisée; |
    | (c)  chronic low income; or | c)  que ses revenus sont toujours faibles; |
    | (d)  chronic unemployment or underemployment; (« désavantage social ») | d)  qu’elle est chroniquement en chômage ou sous-employée. (“social disadvantage”) |

    [↑](#footnote-ref-62)
63. *Gosselin v. Québec (Attorney General)*, [2002] 4 S.C.R. 429, which dealt with the issue of the validity under ss. 7 and 15 of the *Canadian* *Charte*r of a regulatory measure enacted what was then the *Social Aid Act*, does not deal with this subject. The impugned measure distinguished persons under the age of 30 and those 30 years old and over. Regarding s. 15, the Supreme Court ruled on the matter on the basis of age (enumerated ground) and did not rule on social condition or status of social assistance recipient. It also considered the matter from the perspective of s. 45 of the *Quebec* *Charter*, which “requires the government to provide social assistance measures, but it places the adequacy of the particular measures adopted beyond the reach of judicial review” (para. 88 of the majority reasons of McLachlin CJ; see also paras. 302, 396, and 415, respectively, of the dissenting reasons of Arbour and LeBel JJ.). We note, however, that the issue related to s. 45 of the *Quebec* *Charter* is discussed without reference to s. 10 of that same *Charter*.

    For a recent critique of *Gosselin* from the perspective of s. 7 of the *Canadian Charter*, see Martha Jackman, “One Step Forward and two Steps Back: Poverty, the *Charter* and the Legacy of *Gosselin”* [2019] 32 N.J.C.L. 85 and “Un pas en avant, deux pas en arrière: la pauvreté, la *Charte canadienne des droits et libertés* et l'héritage de l'affaire Gosselin c. Québec” (2020) 61 *C. de D.* 427. [↑](#footnote-ref-63)
64. See e.g., *Begum v. Canada*, *supra* note 49 at para. 81; *Boulter v. Nova Scotia Power Inc.*, 2009 NSCA 17, leave to appeal to SCC refused, 33124 (10 September 2009) at para. 33 *et seq*.; *Toussaint v. Canada (Minister of Citizenship and Immigration)*, 2011 FCA 146 (leave to appeal to SCC refused, 34336 (3 November 2011) at para. 59(3) (in *obiter*); *Guzman v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1134 (appeal dismissed for mootness, 2007 FCA 358, leave to appeal to SCC refused, 32409 (3 July 2008) at paras. 19 and 21; *MacKay v. Min. of Social Development*, 2002 BCSC 338 (leave to appeal to SCC refused, 29765 (25 September 2003) at para. 42; *Masse v. Ontario (Minister of Community and Social Services*), (1996) 134 D.L.R. (4th) 20 (Ont. Ct. (Gen. Div.), Div. Ct.; leave to appeal to the Ont. C.A. refused, 25462 (5 December 1996) at paras. 81–83; *A.M. c. Ministre du Travail, de l’Emploi et de la Solidarité sociale*, 2020 QCTAQ 03125 (application for judicial review pending (Montreal) 500-17-112290-203 (Sup Ct). [↑](#footnote-ref-64)
65. [1999] 2.S.C.R 203, in particular para. 13 (majority reasons of McLachlin J., as she then was, and Bastarache J.). [↑](#footnote-ref-65)
66. [2002] O. J. No. 1771 (Ont. C.A.) at paras. 84-92 (receiving social assistance is an analogous ground of discrimination under s. 15 of the *Canadian Charter*). [↑](#footnote-ref-66)
67. See e.g., *Law v. Canada (Minister of Employment and Immigration)*, *supra* note 46; *Fraser v. Canada (Attorney General)*, *supra* note 38. [↑](#footnote-ref-67)
68. *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143. [↑](#footnote-ref-68)
69. *Corbiere v. Canada (Minister of Indian and Northern Affairs Canada)*, *supra* note 65. [↑](#footnote-ref-69)
70. See *Vriend v. Alberta*, [1998] 1 S.C.R. 493. [↑](#footnote-ref-70)
71. See *Quebec (Attorney General) v. A*, *supra* note 39; *Miron v. Trudel*, [1995] 2 S.C.R. 418. [↑](#footnote-ref-71)
72. Level of education may also be mentioned. See *Kahkewistahaw First Nation v. Taypotat*, [2015] 2 S.C.R. 548; *Lovelace v. Ontario*, [2000] 1 S.C.R. 950. [↑](#footnote-ref-72)
73. This stereotype can sometimes be found in the case law, as noted by Professor Jackman in her article cited above: M. Jackman, *supra* note 63 at 103–106. [↑](#footnote-ref-73)
74. This is the expression used by McIntyre J. in *Andrews v. Law Society of British Columbia*, *supra* note 68 at 183, which has been repeated elsewhere in the case law of the Supreme Court. [↑](#footnote-ref-74)
75. This is a group that overlaps with or superimposes on other vulnerable groups (women, racialized persons, persons living with a disability, and others), but that nevertheless has its own specificity. [↑](#footnote-ref-75)
76. It is also consistent with Canada’s international commitments: Article 26 of the *International Covenant on Civil and Political Rights* (on which the wording of s. 15 of the *Canadian Charter* is partly based) guarantees the equality of all persons before the law and equal protection by the law without discrimination based on, *inter* *alia*, social origin, property, birth, or other status, all terms that refer to a certain idea of social condition. At the same time, the *Universal Declaration of Human* *Rights* (articles 2, 22, and 25) and the *International Covenant on Economic, Social and Cultural Rights* (articles 2, 9, and 11) ensure everyone’s right to social security and an adequate standard of living, without discrimination based on, again, social origin, property, birth, or other status.

    More generally, on the question of the nature of the relationship between the *Canadian* *Charter* (and the *Quebec* *Charter*) and poverty or the condition of being a social assistance recipient, as well as the attitude of the courts in this respect, see: Hélène Tessier, “Pauvreté et droit à l’égalité : égalité de principe ou égalité de fait?” (1998) 98 *Développements récents en droit administratif* 45, especially at 59 *et seq*. [↑](#footnote-ref-76)
77. See e.g., *Fraser v. Canada (Attorney General)*, *supra* note 38 at paras. 115–117 (majority reasons of Abella J.); *Kahkewistahaw First Nation v. Taypotat*, *supra* note 72; *Lovelace v. Ontario*, [2000] 1 S.C.R. 950 at para. 67. [↑](#footnote-ref-77)
78. As I stated above (*supra*, para. [28]), in his memorandum and at the appeal hearing, the appellant also raises –without really supporting his remarks – s. 12 of the *Quebec Charter* which at first glance hardly appears to apply to the impugned situation in this case. He also invokes – again quite generically – s. 4 (right to dignity), a catch-all provision that tends to be invoked every time discrimination under the *Quebec* *Charter* is alleged. However, he does not invoke s. 45. [↑](#footnote-ref-78)
79. See above at para. [55]. [↑](#footnote-ref-79)
80. See above at para. [30] *et seq*. [↑](#footnote-ref-80)
81. And, given the passage of time, a “back calculation” is not possible under the parameters of s. 120.1 *A.Q.P.P*.; in any event, it would say nothing about the overall resources to which the appellant may have access. [↑](#footnote-ref-81)
82. ATQ decision at para. 60. [↑](#footnote-ref-82)
83. *Fraser v. Canada (Attorney General)*, *supra* note 38 at paras. 72 and 75 (majority reasons of Abella J.). [↑](#footnote-ref-83)
84. On this second point, see in particular: *Kahkewistahaw First Nation v. Taypotat*, *supra* note 72 at paras. 24, 27, 33–34. See also *Fraser v. Canada (Attorney General)*, *supra* note 38 at para. 60. [↑](#footnote-ref-84)
85. *Kahkewistahaw First Nation v. Taypotat*, *supra* note 72 at paras. 24, 27, 33–34; *Québec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. Bombardier Aerospace Training Center*), *supra* note 43 at paras. 3 and 55 *et seq*. [↑](#footnote-ref-85)
86. See e.g., *Kahkewistahaw First Nation v. Taypotat*, *supra* note 72 at para. 31; *Law v. Canada (Minister of Employment and ’Immigration)*, *supra* note 46 at paras. 77–79, 83 and 95. Generally, see *Newfoundland (Treasury Board) v. N.A.P.E*, [2004] 3 S.C.R. 381 at paras. 56 *et seq*. [↑](#footnote-ref-86)
87. See e.g., *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, [2004] 3 S.C.R. 657 at paras. 28 and 41. [↑](#footnote-ref-87)
88. *Ibid.* at para. 41. [↑](#footnote-ref-88)