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Alberta Court of Queen's Bench
McLeod v. Canada (Attorney General)
Date: 1993-12-10

Harry K. Gajfney, Q.C., and Glenn S. Solomon, for applicant.

James N. Shaw and Barbara S. Ritzen, for respondents.

(Doc. Edmonton 9103-24705)

December 10, 1993.

[1] LEFSRUD J.:– This is an application for a Declaration that ss. 2 and 58 of the *Canada Pension Plan* (R.S.C. 1985, c. C-8) are ultra vires the Parliament of Canada or abridge, limit, infringe, or deny the Applicant the right to equal benefit of the law as guaranteed by s. 15(1) of the *Canadian Charter of Rights and Freedoms*, being Part I of the *Constitution Act, 1982* and enacted by the *Canada Act*, 1982 (U.K.), c. 11 (the "*Charter*" and that pursuant to s. 1 of the *Charter*, said provisions of the *Canada Pension Plan* are not reasonable limits prescribed by law that can be demonstrably justified in a free and democratic society.

[2] The undisputed relevant facts are as follows.

[3] The Applicant and Kenneth McLeod (the "husband") were married on April 14, 1950 and remained married until the husband died on February 5, 1990.

[4] On May 7, 1979 the husband left the matrimonial home permanently and thereafter lived in a common law relationship with another woman until his death, some 11 years later.

[5] During the period of separation, pursuant to an Order of the Provincial Court of Alberta, the husband paid bi-weekly maintenance to the Applicant in the sum of $225; however, at no time during their separation did either of them apply under provincial legislation for a division of matrimonial property.

[6] Upon the death of the husband, the Applicant applied for, but was refused, survivor's benefits on the basis that pursuant to s. 2 of the *Canada Pension Plan* she is not considered to be an eligible "spouse".

[7] Section 2 contains the following definition:

> "spouse", in relation to a contributor, means,
>
> (*a*) except in or in relation to section 55,
>
> (i) if there is no person described in sub-paragraph (ii), a person who is married to the contributor at the relevant time, or

(iii) *a person of the opposite sex who is cohabiting with the contributor in a conjugal relationship at the relevant time, having so cohabited with the contributor for a continuous period of at least one year*, and

(*b*) in or in relation to section 55, a person who is married to the contributor at the relevant time,

and, in the case of a contributor's death, the "relevant time" for greater certainty, means the time of the contributor's death. (my emphasis)

[8] I have not found it necessary to reproduce s. 58 of the Plan because it simply outlines a formula for calculating and determining the amount of a pension payable to an eligible surviving spouse.

[9] Sections 1 and 15(1) of the *Charter* state:

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

[10] To determine this matter it is important and necessary to consider the evolvement as well as the present wording of s. 94A of the *Constitution Act, 1867* which provides:

94A. The Parliament of Canada may make laws in relation to old age pensions and supplementary benefits, including survivors' and disability benefits irrespective of age, but no such law shall affect the operation of any law present or future of a provincial legislature in relation to any such matter.

[11] Section 94A as it currently reads confers on the Federal Parliament the power to make laws in relation to old age pensions and supplementary benefits. It also acknowledges the existence of concurrent provincial power. As a result, this section belongs to a small group of constitutional provisions wherein there is federal and provincial concurrency. In Canada, exclusivity is the rule and concurrency the exception.

[12] In *Constitutional Law of Canada* (Carswell, Toronto, 1992), Professor Peter Hogg points out that when the section was enacted it was the first instance of federal inter-delegation being used by the federal and provincial governments to lend each other needed legislative powers. Specifically, the federal government sought to establish a scheme of old age pensions financed by contributions from employees, the federal government, and the provincial governments. In turn, the provincial governments wanted the power to levy an indirect retail sales tax. The objective was to attack extreme disparities in income across the country and to provide a greater measure of equality of opportunity to all Canadians. A Bill was subsequently introduced in the Nova Scotia

legislature to carry out the provincial side of the inter-delegation scheme. The Bill was then referred to the Supreme Court of Canada for a reference on its constitutionality. In *Nova Scotia (Attorney General) v. Canada (Attorney General)*, [1951] S.C.R. 31 (Nova Scotia Inter-delegation), the Bill was declared to be invalid because it would disturb the scheme of distribution of powers in the Constitution.

[13] Following this decision, the federal government decided that the best course for achieving the desired result was constitutional amendment. It then proposed two constitutional amendments: one to confer on the federal government the power to enact a pension scheme and the other to confer on the provincial Legislatures the power to levy an indirect sales tax. The pension amendment was eventually passed with the unanimous consent of the ten provincial governments while the sales tax amendment was not unanimously supported and so died.

[14] In 1951, the Parliament at Westminster enacted s. 94A. Soon after, the *Old Age Security Act, 1951*, was passed. It provided for payment of an old age pension and for the financing of this pension by Federal taxation. In 1964, s. 94A was amended by the *Constitution Act, 1964* (U.K.), R.S.C. 1985, App. II, No. 38, consent having been obtained from all provinces. The wording was altered to enable benefits to be paid to young survivors of disabled contributors. The following year, in 1965, the *Canada Pension Plan* was introduced.

[15] When, in 1966, a system of old age pensions was inaugurated by the Province of Quebec (S.Q. 1965, 13-14 Eliz. II, vol. 1, c. 24), the federal legislation became inoperable in that province by reason of the fact that s. 94A provided for provincial paramountcy where the provincial government passed laws in relation to old age pensions and supplementary benefits which were affected by the federal laws already in place. This exemplifies a situation where a federal law affects a provincial law in relation to old age pensions and supplementary benefits. Such is the case because the Quebec provincial law and federal law are in conflict as they are in relation to the same subject matter - a public pension plan. The result is that the federal legislation is deemed inoperable in this particular provincial jurisdiction.

[16] Turning to the application before me, in applying s. 94A to the present context one must be cognizant of its final words which restrict its application to specific provincial laws: "no such [federal] law shall affect the operation of any law present or future of a provincial legislature *in relation to any such matter*"" [emphasis mine].

[17] The first question then becomes whether s. 2 and s. 58(1) of the *Canada Pension Plan* are legislation in relation to survivors' benefits. If they are, then s. 94A is invoked and must be complied with. In this case, the parties agree that s. 2 and s. 58(1) are, in pith and substance, in relation to survivors' benefits.

[18] The second step to determine is whether the relevant provisions affect the operation of a provincial law in relation to old age pensions and supplementary benefits and, if so, whether the two pieces of legislation conflict. If they are not found to so affect provincial legislation then the federal legislation is valid. However, if it is determined that the provisions affect provincial law in relation to old age pensions and supplementary benefits, then the provincial and federal legislation are in conflict and the federal legislation is invalid as s. 94A provides for provincial paramountcy in the event that federal legislation affects the operation of provincial law.

[19] It is important to note that there are instances in Canadian legislative practice where a subject matter is regulated by both levels of government, even though there is no concurrent jurisdiction. For example, although the provincial government regulates the area of the custody of children, under the federal divorce power there is incidental regulation of that same area. This phenomenon is commonly referred to as evidencing the double aspect of legislation. The practice is not problematic or unconstitutional unless and until the two laws conflict. At that time, one of the laws must be deemed to be paramount. In this application, where federal legislation in relation to old age pensions and supplementary benefits affects provincial legislation, the provincial legislation is paramount.

[20] It is, however, my view that there is no Alberta provincial legislation relating to old age pensions or supplementary benefits that is affected by ss. 2 and 58 of the *Canada Pension Plan.* I have reached this decision for the following reason: Firstly, although there is Alberta legislation regulating occupational pensions, such as the *Employment Pension Plans Act*, S.A. 1986, c. E-10.05, as amended, it does not pertain to a government pension plan but rather private pension plans. As such, this type of provincial legislation is not in conflict with federal legislation - it deals with private employment pensions and supplementary benefits, not public old age pensions and supplementary benefits.

[21] Secondly, as a result of the exclusion from consideration of legislation concerning private pension plans, the only Alberta legislation which might be said to be in conflict with ss. 2 and 58 is the *Matrimonial Property Act*, R.S.A. 1980, c. M-9, as amended. This consideration arises because the Act concerns the division of property and

it is well settled law that pensions are matrimonial property, as per *Clarke v. Clarke* (1990), 28 R.F.L. (3d) 113 (S.C.C.).

[22] In my view, the *Matrimonial Property Act* is not in pith and substance legislation in relation to old age pensions and supplementary benefits. Rather, it is involved with the distribution of assets, accumulated during marriage, upon separation, divorce or death. Therefore the Alberta Act is not affected by federal legislation establishing a scheme of old age pension and supplementary benefits. As a result, ss. 2 and 58 of the *Canada Pension Plan* are valid federal legislation which do not affect provincial legislation.

[23] At this juncture I point out the relevant differentiation between private employment pensions and government funded old age pensions. The *Canada Pension Plan* provides for the division of old age pension credits upon the dissolution of marriage. With respect to occupational pensions, their division has been read into the Alberta *Matrimonial Property Act* in *Lenner v. Lenner* (1991), 125 A.R. 231 (C.A.).

[24] Accordingly, the public and private plans operate independently with the hope that together they will provide coverage for all Canadians. The gaps in coverage which currently exist could be filled by either expanding the *Canada Pension Plant Quebec Pension Plan* or by requiring every employer to set up a pension plan. The former would require federal government financing, the latter the introduction of provincial legislation. Alternatively, both the federal government as well as provincial legislatures could take steps to fill gaps in the current regime. These suggestions bear in mind, however, the differences between the nature of public and private plans as well as their respective legal regulation. My comments are intended to draw awareness to both the existence of this distinction as well as its potential implications.

[25] Turning now to s. 15(1), the onus on the Applicant alleging a violation of the equality provision was set out in *Andrews v. Law Society (British Columbia)*, [1989] 1 S.C.R. 143 at 182. In order to establish a violation of the right to equality guaranteed in the *Charter*, she must satisfy this Court of the following: that she has been denied an equality right; that the difference in treatment was based on an enumerated or analogous ground; and that the treatment amounts to discrimination. It should be noted that in *Andrews* McIntyre J., writing for the majority [re s. 15], stated (at p. 164) that:

> It must be recognized at once, however, that every difference in treatment between individuals under the law will not necessarily result in inequality and, as well, that identical treatment may frequently produce serious inequality.

[26] In deciding how to make a determination regarding whether the Applicant has been denied an equality right, I am assisted by Lamer C.J.C. in *R. v. Swain*, [1991] 1 S.C.R. 933 at 992. He stated that:

> The court must first determine whether the claimant has shown that one of the four basic equality rights has been denied (i.e., equality before the law, equality under the law, equal protection of the law and equal benefit of the law). This inquiry will focus largely on whether the law has drawn a distinction (intentionally or otherwise) between the claimant and others, based on personal characteristics.

[27] I must therefore ascertain whether the Applicant is possessed of a personal characteristic which forms a basis for drawing a line distinguishing her from others. In my view, no such characteristic exists on the facts of this application. It is not the Applicant's marital status which led to the denial to her of survivors' benefits but rather the actions of her husband and a third party. Therefore, her marital status alone did not deprive her of a benefit. Although a feature such as one's sex is a personal characteristic, where the actions of two other people are necessary to place one within a particular group, this cannot in my view qualify as a personal characteristic. As a result of this finding I am satisfied and hold that the Applicant's s. 15(1) rights have not been abridged.

[28] Had I found that the definition of "spouse" in the *Canada Pension Plan* drew a distinction based on a personal characteristic, then I would have had to consider whether that characteristic falls within an enumerated or analogous ground. The characteristic in question here, although not a personal characteristic, can be described as that of being a married woman whose husband is living separate and apart from her in a conjugal relationship with another woman for more than one year and continues to cohabit with that woman at the time of his death.

[29] It is not necessary for me to make a determination as to whether marital status is an analogous ground for the purpose of s. 15(1) - an area of law which is controversial as demonstrated by decisions such as *Schachtschneider v. R.*, Fed. Ct. of Appeal, July 6, 1993 [reported 105 D.L.R. (4th) 162], and *Zurich Insurance Co. v. Ontario* (*Human Rights Commission*), [1992] 2 S.C.R. 321. That question does not arise here because it is my opinion, as stated above, that the characteristic under scrutiny in this application is not that of marital status but is a more discrete group than all married people or even all married women. The methodology which uses the personal characteristic to configure the analogous ground was employed in *Schachtschneider*, supra. There, Mahoney J.A. held the following at pp. 10-11 [p. 173 D.L.R.]:

> In other words, whether or not it finds discrimination offensive to s. 15(1), a court is not invited to proclaim an analogous ground as a broad category, perhaps pleaded,

> in the fashion the enumerated grounds themselves have been expressed; rather, it is invited to define the grounds in terms of the discrete and insular minority identified by the evidence. What is required to be identified is not, strictly speaking, an "analogous ground" in the ordinary sense of the phrase; rather it is a discrete and insular minority, distinguished by a personal characteristic analogous to those of the enumerated grounds.

[30] It is my view that the characteristic which forms the basis for the distinction in this case cannot be considered to be an analogous ground. Further, there is no evidence or argument before me that married women whose husbands reside with other women in a conjugal relationship for more than one year and who continue to reside in that relationship at the time of death form a group who have experienced historical disadvantage. Although it may be true that married women, in respect of their property rights, are a historically disadvantaged group in Canada, it is not for me to decide, because the group to which the Applicant belongs is more limited than all married women.

[31] In the final analysis the Applicant has failed to establish that the distinction under consideration here is based on a ground analogous to those enumerated in s. 15(1) of the *Charter.*

[32] Had I concluded that the Applicant possessed a personal characteristic analogous to those of the enumerated grounds, I would have turned to an assessment of whether the distinction was discriminatory. Discrimination for the purpose of a s. 15(1) analysis is defined in *Andrews*, supra (at p. 174):

> ... discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society.

[33] In this context it is important to note that the legal spouse is in a stronger position under the definition of "spouse" found in s. 2 than the common law or statutory spouse. This is demonstrated by the fact that a statutory or common law spouse who lived with a married contributor for forty years would not be eligible for survivors' benefits if the contributor was no longer cohabiting with that spouse at the time of his death, regardless of the length of time which elapsed following the departure of the contributor from the relationship.

[34] Clearly, under this legislation, there are benefits available to the legal spouse which are not available to the statutory spouse. Given the advantaged position of the legal spouse vis-a-vis the statutory or common law spouse, it is my view that the legislation

cannot be said to be discriminatory on the basis that it withholds or limits access to opportunities available to other members of society.

[35] In conclusion, for the reasons set out above, I find that the Applicant's s. 15(1) equality rights are not violated by ss. 2 and 58 of the *Canada Pension Plan.*

[36] Finally, had I found that s. 15(1) was violated by ss. 2 and 58 of the *Canada Pension Plan* then I would have engaged in a s. 1 analysis to determine whether the legislation is a reasonable limit prescribed by law and can be demonstrably justified in a free and democratic society. The burden in such an inquiry rests on the party seeking to uphold the limitation.

[37] In *O.P.S.E.U. v. Ontario (Attorney General)* (1988), 52 D.L.R. (4th) 701 (H.C.), it was determined that where a s. 1 inquiry is undertaken in the context of specific provisions which form part of a regulatory scheme, it should be applied by looking at each impugned provision not in isolation but in its context in the regulatory scheme as a whole. It is therefore important to bear in mind the purpose of these sections within the *Canada Pension Plan*, as well as that Plan's function with respect to the federal income security scheme.

[38] The test to be applied in s. 1 analysis is set out in *R. v. Oakes*, [1986] 1 S.C.R. 103. The first criteria to be met by the Crown Respondent is that the impugned law has a sufficiently important objective. As Dickson C.J.C. said in *Oakes* (at p. 138):

> First, the objective, which the measures responsible for a limit in a *Charter* right or freedom are designed to serve, must be "of sufficient importance to warrant overriding a constitutionally protected right or freedom"...

[39] The objective of the *Canada Pension Plan* is to make reasonable minimum levels of income replacement available to workers at normal retirement age, when they become disabled, or to their dependents when they die. This is, in my view an extremely important objective and is both "pressing" and "substantial". The particular sections of the Plan which are under scrutiny here, ss. 2 and 58, provide that where someone is living in a conjugal relationship with another person of the opposite sex for more than one year, upon the death of the contributor, that "common law" or "statutory" spouse can claim survivors' benefits despite the existence of a legal spouse.

[40] This section is consistent with the objective outlined above in so far as it first establishes that a dependent is someone who has been living with the deceased for more than one year and then proceeds to entitle that dependent to survivors' benefits. In addition, the provision of these benefits must be seen in the context of the *Canada*

Pension Plan as one component of a three-tiered system encompassing Old Age Security and private pension plans.

[41] Next, the inquiry turns to the proportionality test which was described in *Oakes* in the following way (at p. 139):

> ... once a sufficiently significant objective is recognized, then the party invoking s. 1 must show that the means chosen are reasonable and demonstrably justified. This involves "a form of proportionality test" ... There are, in my view, three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair "as little as possible" the right or freedom in question ... Third, there must be a proportionality between the *effects* of the measures which are responsible for limiting the *Charter* right or freedom, and the objective which has been identified as of "sufficient importance". [Emphasis in original.]

[42] With respect to the rational connection element of the test, the provision which defines "spouse" has evolved over time in an attempt to recognize new family circumstances and changing forms of relationship. As such it represents an attempt to sensibly apportion benefits to the person who was dependent on the deceased contributor at the time of death. Although there are a number of possible ways to make this determination, the chosen method is rationally connected to the objective set out above and is neither arbitrary nor based on groundless considerations.

[43] The second aspect of the proportionality assessment is whether the means infringe as little as possible the right in question. In a recent case, *R. v. Downey*, [1992] 2 S.C.R. 10 [2 Alta. L.R. (3d) 193], the Supreme Court of Canada clarified what is meant by "as little as possible". Cory J. writing for the majority held that Parliament is not required to choose the least intrusive alternative in order to satisfy this component of the test. The issue is not whether Parliament could reasonably have chosen an alternative means but whether the chosen method falls within the range of means which impair *Charter* rights as little as is reasonably possible.

[44] In this case the Applicant's claim is in direct competition with the statutory spouse, presuming that there is only one beneficiary for survivors' benefits. Given the small monthly amount of the benefit and administrative costs, I would accept that the decision made by the administrators and legislators to give the benefit to one person instead of splitting it among multiple beneficiaries is reasonable. As such, I am satisfied that the adopted method found in s. 2 of the *Canada Pension Plan* of distinguishing among

potential beneficiaries falls within the range of possibilities which impair *Charter* rights as minimally as is feasibly possible.

[45] The third branch of the proportionality test requires a balance between the effect of the measure under consideration and the objective which was earlier identified as sufficiently important. I accept that the impugned provisions are an integral part of an overall scheme of old age pensions and supplementary benefits. I further find that the effects of the limiting measure do not so severely encroach upon the Applicant's rights so as to outweigh the importance of the legislative objective of providing income security for dependents of deceased contributors.

[46] It is therefore my opinion that had I found a breach of s. 15(1), the legislation would have been saved by s. 1 as it is a reasonable limit prescribed by law and can be demonstrably justified in a free and democratic society.

[47] For the foregoing reasons, the within application is dismissed. Costs may be spoken to if necessary.

Application dismissed.