



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *M. S. v Minister of Employment and Social Development and the Estate of O. H.*,
2018 SST 1346

Tribunal File Number: GP-17-1272

BETWEEN:

M. S.

Appellant (Claimant)

and

Minister of Employment and Social Development

Minister

and

The Estate of O. H.

Added Party

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

Decision by: Raymond Raphael

Claimant: Self-represented

Minister: Represented by Sylvie Doire

Videoconference hearing on: October 4 & 5, 2018

Date of decision: December 19, 2018

DECISION

[1] The definitions of common-law partner and survivor in the *Canada Pension Plan* (CPP) do not infringe the Claimant's rights under sections 15(1) and 7 of the *Canadian Charter of Rights and Freedoms* (the Charter).

OVERVIEW

[2] The Claimant cohabited in a common-law relationship with the late V. H. (V. H.) for 22 years. They separated in December 1999 because he was physically abusive, and remained separated until V. H. died in December 2010. In November 2012 the Claimant applied for a CPP survivor's pension. The Minister denied the application both initially and on reconsideration, and the Claimant appealed to the Social Security Tribunal.

[3] On April 26, 2016 the General Division dismissed the appeal. On May 3, 2017 the Appeal Division allowed the appeal and returned this matter to the General Division for a hearing on only the Charter issues.

[4] V. H. was married to O. H. prior to his common-law relationship with the Claimant. They did not divorce and a survivor's pension was paid to O. H. until she died in April 2013.

[5] A survivor's pension is payable to the survivor of a deceased contributor who, in this case, is V. H.¹ A survivor is defined as the person who was the deceased's contributor's common-law partner at the time of his death.² If there was no such common-law partner, the survivor's pension goes to the person to whom he was married. A common-law partner is a person who had been cohabiting in a conjugal relationship with the deceased contributor for a continuous period of at least one year at the time of his death.³ (These are the impugned provisions)

[6] The Claimant's position is that she is a survivor of domestic violence and that the impugned provisions discriminate against her on the basis of "marital status" contrary to her equality rights under section 15(1) of the Charter. She stated that she is being treated differently

¹ Section 44(1)(d) of the CPP

² Section 42(1) of the CPP

³ Section 2(1) of the CPP

than a “married spouse” because married spouses are not required to continue to cohabit with their spouse for at least one year prior to his death to qualify for the survivor’s benefit. She also argues that her section 7 Charter rights to life, liberty and security are being infringed. She is being subjected to cruel and unusual punishment because she was forced to choose between remaining with a violent and physically abusive spouse and losing her entitlement to the survivor’s pension.

[7] On the other hand, the Minister argues that the Claimant is not being discriminated against on the basis of marital status because she was not V. H.’s common-law partner at the time of his death. She was his former common-law partner and is being treated in the same manner as former married spouses who are divorced at the time of their former spouse’s death. With respect to section 7, the Minister argues that the denial of an economic benefit such as the CPP survivor’s pension does not breach an individual’s right to life, liberty and security of the person.

ISSUES

1. Do the impugned provisions discriminate against the Claimant on the basis of marital status contrary to section 15(1) of the Charter?
2. Do they violate her right to life, liberty and security contrary to section 7 of the Charter?
3. If so, can the violation be demonstrably justified in a free and democratic society under section 1 of the Charter?

ANALYSIS

Section 15(1) of the Charter

[8] Section 15(1) of the *Charter* provides that every individual is equal before and under the law and has the right to the equal protection and benefit of the law without discrimination based on race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability.

[9] A contextual analysis is required to determine whether there is an infringement of this section.

[10] Discrimination is a distinction based on ground relating to personal characteristics which has the effect of imposing burdens obligations and disadvantages not imposed on others and which withhold or limits access to opportunities benefits advantages available to other members of society.

Although the Hodge case is not conclusive, it is persuasive

[11] The Minister argues that the Supreme Court of Canada (SCC) decision in *Hodge*⁴ is conclusive of the Claimant's section 15(1) Charter appeal since it stands for the principle that the CPP eligibility requirements for the survivor pension do not discriminate against former common-law partners on the basis of marital status.

[12] The Minister submits that the facts of this case are virtually indistinguishable from those in *Hodge*. In *Hodge* the SCC determined that Mrs. Hodge was the deceased contributor's former common-law partner even though they had been separated only four months when he died. In the case before me the Claimant had been separated from V. H. for ten years when he died. In both cases there had been a lengthy common-law relationship (in the *Hodge* case 21 years and in this case 22 years). In both cases the survivor left the relationship because of physical abuse.

[13] The Minister further submits the Claimant was a former common-law partner when V. H. died and her situation was similar to that of a divorced spouse (who is a former spouse) and not to that of a separated spouse. There is a fundamental difference between married partners and common-law partners. The legal reality of marriage survives until divorce even though there is no longer a conjugal relationship. A common-law relationship ends when there is a settled intention to terminate the conjugal relationship. In this case it is clear that there was a settled intention to terminate the conjugal relationship when the Claimant left in 1999 because of physical abuse. The fact that she had no practical alternative because of the threat to her life and safety does not detract from the reality that the common-law partnership terminated at that time.⁵

[14] In *Hodge* the SCC stated that the proper comparator group for Mrs. Hodge was divorced spouses, not separated spouses. Mrs. Hodge was physically separated from her former spouse

⁴ *Hodge v Canada* (Minister of Human Resources Development), 2004 SCC 65

⁵ *Hodge*, paras 40 to 42

when he died and intended to make the physical separation permanent. At the time his death she was not a “separated” common law spouse but a “former” common law spouse. Former common law spouses, like divorced spouses, are no longer spouses in any legal sense. In neither case are they eligible for the CPP survivor’s pension.⁶

[15] The Claimant argues that her case is distinguishable from the *Hodge* decision. First, in her case the physical abuse was confirmed by a conviction and restraining orders. Second, she continued to have a legal relationship with V. H. since he was required to pay her court ordered spousal support.

[16] K. C., the Claimant’s daughter, stated that there is a difference between physically leaving a relationship and giving up a relationship. Her mother left because she had no option and it is unreasonable to require her to remain in the relationship in order to retain her entitlement to the survivor’s pension.

[17] I find that there is no significant factual difference between *Hodge* and this case as it relates to the existence or not of a common law relationship. Both cases deal with long term common-law relationships that had terminated before the contributor’s death. The facts of the *Hodge* case may be more compelling than those in this case since the separation period had been only four months as opposed to 10 years.

[18] Although the motivation for separation was physical abuse, the Claimant states that in this case there is documentary proof of the abuse and in the *Hodge* case it was only alleged. I do not think this is a significant distinction. Further, I do not think that the motive for the separation is relevant. The CPP does not make distinctions between different classes of former common-law partners and provide different benefits to those who separate because of physical abuse as opposed to those who separate for other reasons. Such an approach would require the CPP to assess the motives for separation of common-law partners in complex human relationships where many motives may be present.

⁶ Hodge, para 45

[19] The law is clear that a common-law relationship ends when either party regards it as being finished and demonstrates by his or her conduct, that the decision to end it is a settled one.⁷ In this case the Claimant had been physically separated from V. H. for 10 years when he died and it is clear that she had a settled intention never to return.

[20] In addition, I do not agree that V. H.'s court ordered obligation to pay monthly spousal support and the Claimant's financial dependence extends the common-law relationship. The payment of court-ordered spousal support is indicative of the termination of the common-law relationship not its continuance. I recognize that economic dependence may continue in the cases of common-law partners who separate.⁸ But, this does not extend a common-law relationship that has come to an end.

[21] I agree with the Minister that the facts of this case are virtually indistinguishable from those in *Hodge*.

[22] Ms. Doire acknowledged that since the *Hodge* decision there has been an evolution in Charter law moving away from a formalistic mirror group analysis to a substantive contextual analysis which asks whether, having regard to all relevant contextual factors, including the nature and purpose of the legislation, the impugned provisions discriminate by perpetuating the group's disadvantage or by stereotyping the group.⁹

[23] For this reason, I do not believe that the *Hodge* decision can be considered conclusive of the subsection 15(1) issue.

[24] However, I agree with Ms. Doire that the reasoning and findings in *Hodge* are persuasive for this case. The most significant findings were that Mrs. Hodge was a former common-law spouse and not a separated spouse, and that her situation was similar to that of a divorced spouse. In *Hodge* the SCC stated:

The respondent may have had a measure of financial dependence, but she no longer had any legal relationship. A reasonable claimant in her position would, I think, not feel demeaned by being treated the same as other "former" spouses. In fact, as

⁷ *Hodge*, para 42

⁸ *Hodge*, para 44

⁹ *Withler v Canada (Attorney General)*, 2011 SCC 12, paras 43 to 54

counsel for the appellant pointed out, the effect of the remedy sought by the respondent would itself create a form of inequality by providing survivor's pensions to former common law spouses that are not available to former married spouses.¹⁰

[25] These findings are applicable to the Claimant's situation. She is a former common-law spouse and not a separated spouse. She no longer had a legal relationship with V. H. when he died. Her situation is similar to that of a divorced spouse.

The impugned provisions do not infringe the Claimant's section 15(1) Charter rights

[26] The SCC has set out a two-part test for assessing a section 15(1) claim:

1. Does the law create a distinction that is based on an enumerated or analogous ground?
2. If so, does the distinction create a disadvantage by perpetuating prejudice or stereotyping?¹¹

[27] The Claimant has not demonstrated the impugned provisions create a distinction based on an enumerated or analogous ground.

[28] Discrimination has a specific meaning and a situation appearing to be unfair under particular circumstances does not amount to discrimination.

[29] There is no question that marital status is an analogous ground of discrimination when used in a discriminatory way. However, in this case the Claimant is not being denied the survivor benefit because of her status as a common-law spouse. She is being denied the benefit because she was no longer a common-law spouse. She was a former common-law spouse.¹²

[30] The Claimant argued that the impugned provisions discriminate between separated married spouses and separated common-law spouses. As a survivor of violence by a common-law spouse she is being treated differently than women who are survivors of violence by a married spouse. She is being denied the survivor's benefit because she was no longer co-habiting with her abusive spouse at the time of his death, while married women who have left their

¹⁰ *Hodge*, para 47

¹¹ *Withler*, para 30

¹² *Hodge*, paras 39 to 45

abusive husband are not. Requiring her to remain in a physically abusive relationship to retain her right to a survivor's benefit violates her human dignity and freedom of choice.

[31] She emphasised the unfairness of O. H. being given the survivor's benefit. O. H. had not lived with V. H. for over 33 years at the time of his death and they only remained married for religious reasons. On the other hand, she was for all "intents and purposes" his wife for 22 years until she was forced to leave in 1999. She continued to be financially dependent on, and in a legal relationship with him, until his death because he was paying her spousal support.

[32] Ms. Doire argued that CPP survivor's benefits are not designed for the Claimant's situation since she was not V. H.'s spouse when he died. She was his former common-law spouse and therefore her situation was similar to that of a divorced woman who was a former spouse at the time of her former husband's death.

[33] I have already determined that the reasoning in the *Hodge* decision is persuasive for this case. The Claimant no longer had a legal relationship with V. H. when he died and her situation was similar to that of a divorced spouse. There is no question that she is survivor of domestic violence but that in itself does not establish a distinction on an enumerated or analogous ground under section 15(1) of the Charter.

[34] She is being treated the same as former married spouses who are divorced at the time of their former spouse's death. In both cases the CPP survivor benefit is not paid.

[35] Since the Claimant has not established a distinction based on an analogous or enumerated ground, she cannot establish a discriminatory distinction. Therefore, step two of the Charter test does not need to be addressed.

[36] I find that the Claimant has failed to establish, on the balance of probabilities, an infringement of her section 15(1) Charter rights.

Section 7 of the Charter

[37] Section 7 of the Charter provides that everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

The impugned provisions do not infringe the Claimant's section 7 Charter rights?

[38] The Claimant argues that the impugned provisions subject her to cruel and unusual punishment because they require her to remain with a violent and abusive spouse if she is to be entitled to the survivor's benefit.

[39] The Minister argues that the law does not say that she had to stay with her abusive spouse, and the CPP serves her in other ways that correspond to her reality. The Claimant has received both CPP disability benefits and CPP retirement benefits. If she had applied within four years of separation she would also have been entitled to a division of unadjusted pensionable earnings for 1977 to 1983, when she started to receive CPP disability benefits.

[40] The Minister also argues that section 7 targets government actions that deprive an individual of life, liberty or security of the person. It does not place a positive obligation on governments to enhance an individual's life, liberty or security.¹³

[41] I agree with the Minister.

[42] In this case, if the Claimant was being deprived of life, liberty or security, it was because of the violent conduct of her former common-law spouse. She is not being deprived of this by reason of any government action and certainly not by the impugned provisions of the CPP.

[43] I find that the Claimant has failed to establish, on the balance of probabilities, an infringement of her section 7 *Charter* rights.

Section 1 of the Charter

[44] Having found no Charter violation, I need not decide if any violation can be justified under section 1 of the Charter.

¹³ *Scott v Canada (Attorney General)*, 2017 BCCA 422, para 83.

CONCLUSION

[45] The appeal is dismissed.

Raymond Raphael
Member, General Division - Income Security