



Citation: *R. W. v Minister of Employment and Social Development*, 2019 SST 122

Tribunal File Number: GP-13-2878

BETWEEN:

**R. W.**

Appellant (Claimant)

and

**Minister of Employment and Social Development**

Minister

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**SOCIAL SECURITY TRIBUNAL DECISION**  
**General Division – Income Security Section**

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Decision by: Raymond Raphael

Claimant : Self-represented

Minister: Represented by Marcus Dimberger

Expert witnesses for Claimant: Gaila Friars and Rosella Melanson

Expert witness for Minister : Andrew Williamson

Videoconference hearing on: October 24 & 25, 2018

Date of decision: January 12, 2019

## **DECISION**

[1] Section 63(6) of the *Canada Pension Plan* (CPP) infringes the Claimant's equality rights under section 15(1) of the *Canadian Charter of Rights and Freedoms* (the Charter), and it is not a demonstrably justified limit in a free and democratic society.

## **OVERVIEW**

[2] The Claimant is 88 years old. She was initially married in 1961 and her first husband died in a helicopter crash in 1969. She received a CPP survivor's pension, but lost it when she remarried in December 1973. Her CPP survivor's pension was terminated because at that time a survivor lost her survivor's pension if she remarried. In 1989 her survivor's pension was reinstated because of amendments made to the CPP that allowed a remarried spouse to continue to receive the pension.

[3] Her second husband died in 2012 and she applied for a second survivor's pension. However, the CPP provisions only allow her to receive one survivor's pension, the larger of the two. She is now receiving a survivor's pension only in relation to her second husband since this was the larger one.

[4] Section 63(6) of the CPP provides that only one survivor's pension shall be payable to a person, the amount of which is the largest of the survivor's pensions that would otherwise be payable. (This is the impugned provision)

[5] The Claimant argues that the impugned provision discriminates against her on the basis of sex and marital status. Her position is that the provision arbitrarily excludes people who have been widowed more than once. It creates a distinction based on sex because women are overwhelmingly and disproportionately represented in the group that receives a survivor's pension. It creates a distinction based on marital status because it prevents women who have been widowed more than once from collecting more than one survivor's pension, even if all of their spouses contributed to the CPP. It is discriminatory because it ignores and denigrates her contributions to her first marriage.

[6] On the other hand, the Minister argues that the Claimant has failed to establish that the provision has an adverse discriminatory effect.

[7] The Minister acknowledges that the provision impacts more women than men, but argues that this alone does not make it discriminatory. It makes no distinction between men and women and the Claimant is not ineligible for two survivor's benefits because of her sex, but because she falls outside the reasonable limits of the benefit. All applicants, regardless of sex, are limited to one benefit. The Claimant has not established discrimination based on marital status because there is no evidence that a person who is twice widowed is historically more disadvantaged than a person who has only been widowed once. Further, the provision creates an advantage for the Claimant compared to widows of only one deceased spouse since she receives the larger survivor's pension.

## **ISSUES**

1. Does the denial of more than one survivor's pension under section 63(6) of the CPP discriminate against the Claimant on the basis of sex and marital status contrary to section 15(1) of the Charter?
2. If so, can the violation be demonstrably justified in a free and democratic society under section 1 of the Charter?

## **ANALYSIS**

### ***Appellant's oral evidence***

[8] The Claimant testified that when she first married in 1961 she worked as a X. After four years she resigned from her position to move to Colorado with her husband, who was completing his Ph.D. The Claimant stated that it was in keeping with the "climate of those times" that she gave up her position to support her husband's career. While they were in Colorado she worked as a X to help support the family. Their daughter L. was born in 1965. After her husband completed his Ph.D. they moved to Calgary for a year, where her husband was offered a faculty position. They then moved to Vancouver where her husband was offered another position.

[9] In 1969 her husband was killed in a helicopter crash when he was on a research trip. She was 38 years old at that time, and applied for and received a survivor's pension. After a year she

started to work as a X at the University of X but her work was limited because she had to be free during the summer to take care of their daughter.

[10] When she remarried in 1973 her survivor's pension was terminated. Her second husband was a research scientist, and they moved to Norway for two years because he had a position there. In 1975 they moved to Toronto where her husband was appointed to the faculty at the University of X. She was diagnosed with cancer in 1978 and underwent a year of chemotherapy. She never returned to gainful employment after this but contributed to the family by managing their home. By doing this, she facilitated her second husband's career just as she had facilitated her first husband's.

[11] In 1989 she learned that the CPP provisions had been changed, and applied to have her survivor's pension reinstated. Her pension was reinstated and she received partial retroactivity. In 1993 she applied for an early retirement CPP pension and started to receive a combined retirement and survivor's pension. Her second husband was receiving his retirement pension as well as a university pension. He was very ill in his later years, and she was his caregiver.

[12] She applied for another survivor's pension when her second husband died in 2012, but was told that she could only receive one survivor's pension. There was only \$40 per month difference between the two survivor's pensions, and she is now receiving the survivor's pension in relation to her second husband since this has the larger amount. Prior to her second husband's death she had the benefit of both his retirement and university pension, but now she receives only 60% of his retirement pension and a percentage of his university pension. She no longer receives the survivor's pension in relation to her first husband. Her combined CPP survivor's and CPP pension is a little over \$600 per month.

[13] She would be entitled to both survivors' pensions if it was not for section 63(6) of the CPP and it "seems strange" that her survivor's pension has been taken away twice. People who are twice widowed like her are being denied the benefit of both survivor's pensions even though there have been CPP contributions from both of their former spouses. Over 80% of people in her situation are elderly women who are in financial need.

[14] She finds it “hard to accept” that her contribution to her first family household has been taken away. She worked hard to advance from being a X to a X with X, but she gave up her career to put her husband’s career first. This is what was done at that time. Her contributions as a “stay at home” mother facilitated his career. They worked together as a family unit and her situation dramatically changed not only financially, but in many other ways, when her first husband died.

[15] She does not take the position that the needs of a twice-widowed person are different than those of a once-widowed person. Her position is that she is being denied a benefit that she has contributed to. She contributed throughout as a “full partner” to her first marriage and she is being denied the benefit of her contributions to her first family unit. Although she and other women in her situation have financial needs, she considers her claim to an additional survivor’s pension to be a matter of entitlement, not need.

[16] She recognizes the need for a “cap” or maximum amount that can be received for survivor’s pensions, but the total amount of her two survivor’s pensions when combined with her retirement pension does not exceed the maximum permissible amount.<sup>1</sup> It is demeaning that her first survivor’s pension is entirely wiped out.

### ***Expert evidence***

[17] In this case, I was fortunate to have the benefit of evidence from three expert witnesses. All are knowledgeable in their field and gave evidence in a forthright and professional manner.

### ***Gaila Friars***

[18] Gaila Friars is a clinical social worker and a part-time lecturer in social work at St. Thomas University. She has over 30 years’ experience working in and teaching social work.<sup>2</sup>

[19] I determined that she is qualified to provide expert evidence concerning the experiences of female seniors.

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<sup>1</sup> The maximum combined survivor and retirement pension in 2017 was \$1,114.17

<sup>2</sup> Resume: GD29-6 to10

[20] In her written report<sup>3</sup> Ms. Friars stated that the earning potential of women of the Claimant's generation is limited because of historical sexism and discrimination. This has resulted in a gross income inequality for senior women who outlive their spouses. Many of them live below the poverty line and have inadequate housing, nutrition etc. They often have inadequate levels of education and work training, little or no previous work experience, and no pension in their own right.

[21] Women of the Claimant's generation entered into a "social contract" upon marriage. They would be responsible for the care of children and household, and would have either no or limited participation in the paid workforce after they had children. They supported their husband in his role as the sole family income earner.

[22] According to Statistics Canada:

- The labour force participation of women aged 25-54 in 1953 was only 24%.
- This rose to 76% in 1990 and reached 82% in 2014.
- By 2014 women accounted for 47% of the paid labour force, but earned 87% of the amount earned by men for comparable work. Ms. Friars commented that this demonstrated that even today women are "handicapped" by child care and other family responsibilities.
- In 1965 women's average earnings were \$15,700 and in 2014 they were \$37,200. Ms. Friars commented that this "hardly" allows a woman to save for her old age.

[23] At the hearing Ms. Friars testified that the loss of a spouse by senior women depletes their income. Many widowed senior women were not part of their family's financial planning, are in a poor emotional state, and have little family support. Most difficult for them, is the loss of the marital relationship which in most cases can never be replaced. Senior women do not have the financial means to live comfortably unless they were able to build up personal assets. They often have increased expenses for medical care, household maintenance, and transportation costs.

[24] She has rarely met a senior woman who is able to draw the maximum combined retirement and survivor's pension. Even if they made their own CPP contributions, they are likely to have been less than those made by their husband because they earned less and made

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<sup>3</sup> GD29-1 to 3

smaller CPP contributions. In many cases, retirement pensions that they were relying on were reduced or even eliminated after their husband's death.

[25] She stated that the CPP is a contributory plan that is not means tested. The contributions made by the Claimant's first husband have been "wiped out" because of her twice widowed status. This is unjust because she made unpaid contributions to the household and her unpaid work enabled her husband to earn money and make CPP contributions.

***Rosella Melanson***

[26] Rosella Melanson has a diploma in applied information technology from the Information Technology Institute in Moncton and a Master's degree in journalism from the University of Western Ontario. She has worked as the executive director of the New Brunswick Advisory Council on the Status of Women and as a senior policy adviser to the Women's Issues Branch of the government of New Brunswick. Much of her over 40-year career has focused on women's issues.<sup>4</sup>

[27] I determined that she is qualified to provide expert evidence concerning policy development on women's issues and gender based analysis.

[28] Ms. Melanson testified the pre-1987<sup>5</sup> law which eliminated the survivor's pension when a woman remarried was based on a sexist view: namely, that when a woman remarried she no longer needed the survivor's pension because she had a new man to take care of her. Her survivor's pension was considered to be a replacement for a man taking care of her, as opposed to being an entitlement that she had earned.

[29] The 1987 amendments rejected this view by allowing a widow to retain her survivor's pension on remarriage as a matter of entitlement. But because of the limit of only one survivor's pension, her contributions to her first household are ignored. This limit is contrary to the "spirit" of the 1987 amendments. When questioned by Mr. Dimberger, she acknowledged that no gender based analysis has been done for once-widowed as compared to twice-widowed survivors.

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<sup>4</sup>Resume: GD30-2 to 3

<sup>5</sup> The amendments were made in 1986 but did not come into force until 1987

[30] In her report she stated that the limit on payment to only one survivor's pension is arbitrary and not in keeping with the CPP being a contributory earnings-related insurance plan. Such arbitrariness is not based "on a principle that would survive" present day scrutiny.<sup>6</sup>

[31] She referred to a Statistics Canada table that established that 75% of twice or more widowed spouses in 2011 were women.<sup>7</sup>

***Andrew Williamson***

[32] Andrew Williamson is a senior legislative officer for CPP policy and legislation. He has extensive knowledge and experience with the history of the CPP, its legislative intent, its present policy intent, and its current operation.

[33] I determined that he is qualified to provide expert evidence concerning the purpose and scope of the CPP. His report is included in the Minister's record.<sup>8</sup>

[34] His most significant evidence is set out under the section 1 analysis, below.

***Does section 63(6) of the Charter infringe upon the Claimant's section 15(1) Charter rights?***

[35] 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.

[36] The Supreme Court of Canada (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?

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<sup>6</sup> GD229-5

<sup>7</sup> GD4-30

<sup>8</sup> GD24-3 to 965



[37] A contextual analysis is required to determine whether there is an infringement of this section.<sup>9</sup>

[38] This analysis requires a flexible and contextual inquiry into whether a distinction has the effect of perpetuating arbitrary disadvantage on a claimant because of his or her membership in an enumerated or analogous group. It recognizes that persistent systemic disadvantages have operated to limit the opportunities available to members of certain groups in society and seeks to prevent conduct that perpetuates those disadvantages. A section 15 Charter analysis is focused on legislation that draws discriminatory distinctions — that is, distinctions that have the effect of perpetuating arbitrary disadvantage based on an individual’s membership in an enumerated or analogous group. The section 15(1) analysis is accordingly concerned with substantive equity.<sup>10</sup>

### **Distinction on the basis of an enumerated or analogous ground**

[39] The Claimant relies on the enumerated ground of sex and the analogous ground of marital status.

[40] The Claimant submits that the provision arbitrarily excludes and “singles out” a particular group: people who have been widowed more than once, who are overwhelmingly and disproportionately women. Women who have been widowed more than once are the cohort overwhelmingly affected by this provision

[41] She argues that the impugned provision creates a distinction on the basis sex because women are overwhelmingly and disproportionately represented in the group that receives a CPP survivor’s pension. She argues that it also creates a distinction on the basis of marital status because it prevents women who have been widowed more than once from collecting more than one survivor’s pension, even though all of their spouses contributed family income to the CPP.

[42] Mr. Dimberger acknowledges that women are overwhelmingly in the group that receives a CPP survivor’s pension, but argues that a provision that impacts more women than men is not on this basis alone discriminatory under section 15(1).

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<sup>9</sup> *Withler v Canada (Attorney General)*, [2011] 1 SCR. 396 at para 30

<sup>10</sup> *Quebec (Attorney General) v A*, [2013] 1 SCR. 61 at paras 331 & 332

[43] He submits that numbers alone are not sufficient and the evidence must be qualitative, not just quantitative. The Claimant does not distinguish between once widowed and twice widowed spouses when discussing financial hardship and there is no evidence that there is more financial hardship by being widowed twice as opposed to only once.

[44] All applicants regardless of sex are limited to one survivor's pension. An otherwise neutral provision cannot be said to discriminate on the basis of sex, simply because it affects more members of one sex than the other. The focus is not on the numbers, but on the nature and effect; on quality rather than quantity.<sup>11</sup>

[45] Mr. Dimberger further argues that widows of more than one contributing spouse are at an advantage compared to widows of one deceased spouse because they receive the larger of the survivor's pensions. Recent statistics demonstrate that in cases where a second survivor's pension becomes payable, the majority of the beneficiaries benefit from the provision providing for the payment of the larger of the two pensions and have a higher average monthly payment than other survivors. The overwhelming majority of individuals who benefit from this are women.<sup>12</sup>

### ***My findings***

[46] Because of the intersection of the Claimant's sex and marital status she is in a distinctly disadvantaged position. Although age (which is also an enumerated ground) was not specifically raised by the Claimant as a ground of discrimination under section 15(1), I believe that it is also significant because women belonging to the Claimant's generation have experienced greater historical disadvantages than those belonging to younger generations.

[47] There is no dispute that women are the overwhelming majority of survivor's benefit recipients and a large majority of them are seniors. There is also no dispute concerning the historical financial and earning disadvantages that women have experienced, especially senior women from the Claimant's generation.

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<sup>11</sup> Minister's written submissions: GD22-15, paras 34 to 36

<sup>12</sup> Williamson expert report: GD24-34 to 35

[48] This intersectional approach takes into account their historical, social, and political context and recognizes the unique experience of an individual based on the intersection of relevant grounds.<sup>13</sup> It allows the particular experience of discrimination, based on the confluence of grounds involved, to be acknowledged and remedied.

[49] It also acknowledges the complexity of how people experience discrimination and recognizes that the experience of discrimination may be unique. It places the focus on society's response to the individual as a result of a convergence of grounds and does not require the person to slot themselves into rigid compartments or categories.<sup>14</sup>

[50] The impugned provision creates a distinction based on sex. Women are by a wide margin the main beneficiaries of the survivor's pension and the percentage of women who receive survivor's benefits has always exceeded that of men. In addition, they are the majority of people who have applied for a second survivor's pension.<sup>15</sup>

- In December 1997, 88% of all survivor pensions were paid to women;
- In January 2015, 81% of all survivor pensions were paid to women. Women aged 80 and over comprised the highest number of survivor's beneficiaries, accounting for about a third of all beneficiaries;
- In 2015 the average age of an individual who applied for the survivor's pension was 71. This was the same for men and women.
- Between 2010 and 2016 women were the majority of people who applied for a second survivor's pension.

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<sup>13</sup> C. A. Aylward, Intersectionality: Crossing the Theoretical and Praxis Divide (Paper Distributed at Transforming Women's Future: Equality Rights in the New Century: A National Forum on Equality Rights presented by West Coast Leaf, 4 November 1999) [unpublished] cited in Ontario Human Rights Commission – Policy and Education Branch, “An Intersectional Approach to Discrimination Addressing Multiple Grounds in Human Rights Claims” (2001) at 3 online (pdf): Ontario Human Rights Commission [http://www.ohrc.on.ca/sites/default/files/attachments/An intersectional approach to discrimination%3Addressing multiple grounds in human rights claims.pdf](http://www.ohrc.on.ca/sites/default/files/attachments/An%20intersectional%20approach%20to%20discrimination%20addressing%20multiple%20grounds%20in%20human%20rights%20claims.pdf)

<sup>14</sup> Ontario Human Rights Commission – Policy and Education Branch, “An Intersectional Approach to Discrimination Addressing Multiple Grounds in Human Rights Claims” (2001) at 5 online (pdf): Ontario Human Rights Commission [http://www.ohrc.on.ca/sites/default/files/attachments/An intersectional approach to discrimination%3 Addressing multiple grounds in human rights claims.pdf](http://www.ohrc.on.ca/sites/default/files/attachments/An%20intersectional%20approach%20to%20discrimination%20addressing%20multiple%20grounds%20in%20human%20rights%20claims.pdf)

<sup>15</sup> Williamson expert report, GD24-27 to 36

- In January 2017 4.3 times more women than men were paid a survivor's pension. The total number of survivor's pensions paid to women was 886,127, and to men it was 204,737.
- The average monthly survivor's pension paid to women was over twice that paid to men. The total amount in survivor's pensions being paid to women was over nine times the amount being paid to men.
- The margin is decreasing over time primarily as a result of increased labour force participation by women, which results in increased eligibility for survivor's pensions payable to their spouses or partners upon their death. Other demographic factors include differential changes in mortality rates, and declining difference in age at marriage or partnership.
- It is expected that women will continue to receive the substantial majority of survivor's pensions through to 2075 when women will continue to collect more than 75% of those pensions.<sup>16</sup>

[51] Although the impugned provision appears to be neutral, it is not neutral in its impact since it disproportionately and negatively affects women. Women are the majority of people who have been denied an additional survivor's benefit, to which they would otherwise have been entitled.

[52] The main thrust of the Minister's submission that the evidence does not establish a distinction with respect to historical disadvantage between twice-widowed and one-widowed survivors. This may be true, but I do not consider this to be significant when a "contextual" as opposed to a "mirror group" approach is taken.

[53] The impugned provision creates a distinction on the basis of marital status since it denies survivors of more than one spouse the survivor's pensions to which they would otherwise be entitled.

[54] The Claimant is a member of a distinct group of woman survivors of more than one spouse who are being denied an additional survivor's benefit even though all of their former spouses contributed to the CPP. Her age is also significant since senior women are the majority

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<sup>16</sup> Notice of Constitutional Question: GD35-2

of survivor's pension beneficiaries, and they have experienced a greater historical disadvantage than younger women.<sup>17</sup>

[55] I find that the Claimant has established a distinction under section 15(1) of Charter with respect to the enumerated ground of sex and the analogous ground of marital status.

### **Discriminatory impact**

[56] A distinction based on an enumerated or analogous ground is not by itself sufficient to establish a violation of section 15(1) of the Charter. A distinction must discriminate by perpetuating disadvantage or prejudice, or by stereotyping the claimant group.<sup>18</sup>

[57] What is required is not formal comparison with a selected mirror comparator group, but an approach that looks at the full context, including the situation of the claimant group and whether the impact of the impugned law is to perpetuate disadvantage or negative stereotypes about that group. I must take a substantive contextual, not a formalistic "treat likes alike" approach. I must ask whether, having regard to all relevant contextual factors, including the nature and purpose of the impugned legislation in relation to the Claimant's situation, the impugned distinction discriminates by perpetuating the group's disadvantage or by stereotyping the group.<sup>19</sup>

[58] The Claimant argues that the impugned provision is discriminatory because it perpetuates the historical disadvantages experienced by twice-widowed women in three ways. First, it perpetuates the poverty experienced by widows. Second, it undervalues the economic contributions that women make within their marriage. Third, it is rooted in a discriminatory assumption that women should receive support from a sole, male breadwinner.

[59] The Minister argues that the impugned provision is not discriminatory. All claimants are limited to one survivor's pension and it applies equally to every claimant regardless of personal characteristics. There is no evidence of a disadvantage faced by once-widowed survivors compared to twice-widowed survivors. In fact, twice-widowed survivors are advantaged because

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<sup>17</sup> See evidence of Gaila Friars, paras 20-24, above

<sup>18</sup> *Withler*, para 34

<sup>19</sup> *Withler*, paras 43 to 54

their survivor's pension is based on the contributions of the spouse who made the larger contributions.

[60] The Claimant's argument that the Claimant's first husband made CPP contributions is not valid since under the CPP there is a group insurance component that involves cross-subsidization. Making contributions does not necessarily mean that there will be a benefit paid. Further, section 15(1) of the Charter does not address a purely financial interest and the Claimant's Charter claim is rooted in a claim to a financial interest in her first husband's CPP contributions.

### ***My Findings***

[61] I have already determined that the Claimant is a member of a distinct group of women survivors of more than one spouse, who are being denied an additional survivor's benefit even though all of their former spouses contributed to the CPP.

[62] The SCC has determined that the second part of the section 15(1) analysis "focuses on arbitrary-or-discriminatory-disadvantage that is whether the impugned law fails to respond to the actual capacities and needs of the members of the group and instead imposes burdens or denies a benefit in a manner that has the effect of reinforcing, perpetuating or exacerbating their disadvantage."<sup>20</sup>

[63] The SCC reiterated the following statement from its *Quebec v. A* decision:

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. If the state conduct widens the gap between the historically disadvantaged group and the rest of society rather than narrowing it, then it is discriminatory.<sup>21</sup>

[64] The Claimant is a member of a historically disadvantaged group and the impugned provision denies her the benefit of a survivor's pension to which she would otherwise be entitled. She does not take the position that her financial needs are different than those of a once-widowed spouse. Rather, her position is that she is being denied the benefit of her contributions to her first family household which facilitated her first husband's CPP contributions. She would have made

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<sup>20</sup> *Kahkewistahaw First Nation v. Taypotat*, [2015] 2 SCR 557, para 20

<sup>21</sup> *Quebec (Attorney General) v A*, [2013] 1 SCR 61, para 332

more CPP contributions and as such, have a higher retirement pension, if she had not stayed home to raise her family and support her husband in accordance with the mores, norms and values of her generation.

[65] The Claimant's claim is more than a financial claim as argued by the Minister. She is being denied the recognition of her contributions to her first family household. This is a refusal to recognize a fundamental aspect of her personal history.

[66] It is rooted in the view that the purpose of the survivor's pension is to replace lost income because a woman was financially reliant on a sole male breadwinner, not to pay an entitlement that she had earned. The limit of one survivor's pension perpetuates the historical failure to recognize women's non-employment contributions to the family.

[67] The SCC has recognized that the ability of women to meet their basic needs after a marriage characterized by intimacy and economic dependence engages a "fundamental" interest.<sup>22</sup>

[68] It is somewhat self-contradictory that the CPP now recognizes that the Claimant was entitled to receive a survivor's benefit in relation to her first husband while her second husband was alive, but took the entitlement away when he died. If she was entitled to a survivor's pension in relation to her first husband because of her contributions to the family, there is no principled basis for her to lose that entitlement when her second husband died.

[69] I find that the impugned provision discriminates against the Claimant.

### **Section 1 of the Charter**

[70] Having found that section 63(6) of the CPP infringes the Claimant's Charter rights I must decide whether the infringement can be justified under section 1 of the Charter.

[71] Section 1 of the Charter 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.

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<sup>22</sup> M. v H., [1999] 2 SCR. 3, para 3

[72] The government has the burden of demonstrating that a discriminatory provision is a reasonable limit on a section 15(1) Charter right. If it meets this burden, the law will be saved as being a demonstrably justified reasonable limit on that right.<sup>23</sup>

[73] The framework for a section 1 analysis is the *Oakes*<sup>24</sup> test which may be formulated as two main tests with subtests under the second branch. It is easier, however, to think of this in terms of four independent tests. If the impugned provision fails under any one of the tests, it cannot be justified. The four tests ask the following questions:

1. Is the objective of the legislation pressing and substantial?
2. Is there a rational connection between the government's legislation and its objective?
3. Does the government's legislation minimally impair the Charter right or freedom at stake?
4. Is the deleterious effect of the Charter breach outweighed by the salutary effect of the legislation?<sup>25</sup>

***Mr. Williamson's evidence***

[74] The purpose of the CPP is to make reasonable levels of income available to people at normal retirement ages, to people who become disabled, and to dependents of people who die. It was designed to provide social insurance for Canadians who experience loss of earnings owing to retirement, disability, or the death of a wage-earning spouse or parent. Although the plan is intended to be as comprehensive as practicable it is necessary to ensure its affordability and sustainability. Accordingly, there are many limitations because of policy considerations and/or the need to limit expenditures in light of the legislated contributory rates.

[75] CPP survivor's benefits have been available since the CPP began in 1966 but the legislation has evolved to reflect equality, family law considerations, and evolving societal standards. The significant amendments for the purposes of this Charter appeal are:

- Initially a widow's survivor's pension was terminated when she remarried.

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<sup>23</sup> *Canada (Attorney General) v. Hislop*, 2007 SCC 10, para 43

<sup>24</sup> *R. v Oakes*, [1986] 1 SCR 103, paras 68 to 71

<sup>25</sup> *Hislop*, para 44



- In 1975 the legislation was amended to explicitly clarify that there could only be one survivor's pension at a time. The amendment allowed for the payment of the larger of the otherwise available survivor's pensions.
- This amendment closed an anomaly in the original legislation which allowed a survivor to receive two survivor's pensions if they entered into a common-law relationship after their first spouse died, and their common-law partner subsequently died.
- This provision has remained unchanged since 1975 and is currently section 63(6) of the CPP, which is the provision that the Claimant challenges in her Charter appeal.
- In 1986 the legislation was amended so that survivor's benefits were no longer terminated on remarriage. Individuals like the Claimant whose survivor's benefits had previously been terminated on remarriage could apply to have their benefit reinstated.

[76] In the social environment when the CPP survivor benefit was created in 1966, husbands were expected to be the primary financial providers for their families. Most married women were homemakers with dependent children; they either had no employment earnings of their own or had low-wage occupations outside the house. Given this dependency on their husband, it was assumed that his death would create a need on the part of the survivor.

[77] In 1986 there was a change in attitude because of the introduction of the Charter. There was a government review of all statutes to determine if they conformed to the Charter. The termination of the survivor's benefit on remarriage was removed because of a change of attitude. The benefit was now considered to be "as of right" and it was regressive to think that a woman should be forced to take economic considerations into account when she remarried; for example, she could have entered into a relationship with a person who was disabled or had a low income but be reluctant to remarry because she would lose her survivor's benefit.

[78] The reason for the limit to the larger of the survivor's pensions is related to the nature of the benefit. It takes into account what is lost at the time of the contributor's death. The rationale is that all survivors should be treated the same way. The survivor's benefit is intended to mitigate an unexpected "point in time event" and to replace lost household income at the time of the contributor's death. All survivors are treated the same way because they are facing the same unforeseen event, a loss of income at the time of death.

[79] The provision allows payment of the larger survivor's benefits as a matter of fairness. Usually the second survivor benefit is higher than the first because the second marriage is at a later date and most people have higher earnings at that time of their life.

[80] The key events for the calculation of the Claimant's benefit amount are:

- She initially received a survivor's pension in September 1969 payable with respect to her first husband who died in August 1969;
- In July 1993 she started to receive an early retirement pension with respect to her own contributions. Her survivor's pension was combined with her retirement pension.
- In October 2012, upon the death of her second husband, her combined survivor's/retirement pension was re-determined. She received the survivor's pension for her second husband since this was the larger of the two survivor pension amounts.
- In October 2012 her combined survivor's/retirement pension was \$451.75. By 2017 this had increased to \$603.07.<sup>26</sup>

[81] In 2017 the maximum survivor benefits available were:

- \$604 per month to a survivor under 65.
- \$668.50 per month to a survivor over 65.
- \$1114.17 per month to an individual who had made their own contributions and was receiving a combined survivor's and retirement benefit.
- \$1,313.66 per month to an individual who had made their own contributions and was receiving a combined survivor's and disability benefit.

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<sup>26</sup> GD24-50 to 52

***Minister's position***

[82] The Minister argues that maintaining the sustainability and affordability of the CPP as well as ensuring that all survivor Claimants are treated equally are pressing and substantial issues.

[83] The Claimant is receiving the same survivor's benefit as all other claimants, since no one can receive two at the same time. The CPP has to consider all of the limits on survivor pension benefits and not break them into "watertight" compartments: it is important to have reasonable limits and not keep finding groups to which more can be given. The Claimant is in no worse position than a woman who has been once-widowed; she is actually better off because she receives the larger of the two available survivor's pensions.

[84] There should be considerable deference to the government's policy choices in ameliorative legislation such as the CPP which addresses competing needs and a broad array of interests. The standard that the legislator must meet is not perfection, but reasonableness. The CPP addressed the Claimant's needs by always providing her with the survivor's benefit. The limit to one survivor's benefit at a time is minimally impairing because the Claimant receives the benefit of the largest of the available benefits. The Tribunal should avoid judicial fine-tuning and not look only at the Claimant's situation

***Claimant's position***

[85] The Claimant recognizes that there is pressing and substantial objective in maintaining the sustainability and affordability of the plan, but submits that this objective is addressed by the "cap" or maximum survivor amount available.<sup>27</sup> The survivor's pensions to which a woman with multiple deceased spouses would be entitled will always be limited to the maximum monthly amount. In her case the total amount available if she were receiving two survivor's pensions would be less than the maximum amount.

[86] The government can achieve its objective of managing costs without infringing her Charter rights. The discriminatory effects of the impugned provision are grossly disproportionate to and not justified by cost considerations.

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<sup>27</sup> See paragraph 81, above

***My Findings***

[87] The impugned provision was introduced in 1975 to close an anomaly in the original legislation. Under that legislation, a survivor who remarried lost the survivor's pension. Upon the death of the second spouse, the survivor received a survivor's pension only with respect to the second marriage. On the other hand, a survivor who entered into a common-law relationship could receive an additional survivor's pension upon the death of the common-law spouse. This resulted in an inequitable situation.

[88] The provision terminating the survivor's benefit on remarriage was based on the now discredited view that when a woman remarried she no longer needed the survivor's benefit because she had a new man to take care of her. The 1987 amendments rejected this view when it allowed a widow to continue to receive survivor's benefits despite remarriage. However, the impugned provision, which was also based on this now discredited view, remained.

[89] I have already determined that the impugned provision is rooted in the view that the purpose of the survivor's pension is to replace income lost because a woman was financially reliant on a sole male breadwinner. The 1987 amendments rejected that view and recognized that a widow is entitled to the survivor's benefits because of her contributions to the family unit.

[90] In view of this amendment, the initial basis of the impugned provision, namely that a woman who remarried no longer needed the survivor's benefit because she had a new man to take care of her, cannot now be said to meet a pressing and substantial objective. If anything it is contrary to the now accepted view that a widow is entitled to the survivor's benefit because she has earned it.

[91] There is no question that maintaining the sustainability and affordability of the CPP is a pressing and substantial objective; however, this object is addressed by the "cap" on the amount of survivor's or combined survivor's benefit. The Claimant will not be entitled to receive a combined benefit that exceeds the maximum retirement benefit.

[92] Further cost and/or administrative convenience alone have not traditionally been accepted by the SCC as a pressing and substantial objective for the justification of an infringement.<sup>28</sup>

[93] There is also a pressing and substantial objective in ensuring that all claimants be treated equally. The impugned provision, however, treats the Claimant unequally since she, unlike a once-widowed survivor, does not receive the benefits of her contributions to all of the household units to which she has contributed. But for the impugned provision, all survivor claimants would be treated equally. They would all receive the benefits of all household units to which they contributed subject to the maximum permissible amount.

[94] The Minister has the burden of proof and I find that it has failed to establish, on the balance of probabilities, a pressing and substantial objective to justify the limit of one survivor's benefit pursuant to section 63(6) of the CPP.

[95] Since the Minister has failed to establish a pressing and substantial objective to justify the limitation, it cannot meet the other three components of the Oakes test set out in paragraph 73, above.

## **CONCLUSION**

[96] Section 63(6) of the CPP infringes the Claimant's equality rights under section 15(1) of the Charter and the Minister has failed to meet its burden to establish that it is a demonstrably justified limit in a free and democratic society. The impugned provision is of no force and effect in so far as it relates to the Claimant. She is entitled to the survivor's pension in relation to both of her marriages.

[97] The appeal is allowed.

Raymond Raphael  
Member, General Division - Income Security

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<sup>28</sup> *Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia*, [2007] 2 SCR 391, para 147