Social Security Tribunal of Canada | Tribunal de la sécurité sociale du Canada

Citation: *L. M. v Minister of Employment and Social Development and M. P.*, 2019 SST 426

Tribunal File Number: GP-17-1773

BETWEEN:

L. M.

Appellant (Claimant)

and

Minister of Employment and Social Development

Minister

and

M. P.

Added Party

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

Decision by:	Raymond Raphael
Claimant represented by:	Ron Boivin (at hearing)
Minister represented by:	Laura Dalloo
Added Party:	Self-represented
Zoom videoconference hearing on:	January 23, 24 & 28, 2019
Date of decision:	April 26, 2019

Canada

DECISION

[1] Section 55.1(1)(c) 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) on the basis of her sex and marital status. However, it is demonstrably justified under section 1 of the Charter. The appeal is dismissed.

OVERVIEW

[2] The Claimant and M. P. cohabited in a common-law relationship from July 1991 to December 2008. In April 2016, the Claimant applied for a DUPE (division of unadjusted pension earnings) for the period that she and M. P. cohabited. The Minister denied the application initially and on reconsideration because it was made more than four years after the Claimant and M. P. separated. The Claimant appealed to the Social Security Tribunal.

[3] Section 55.1(1)(c) of the CPP (the impugned provision) provides that an application for a DUPE by a former common-law partner must be made within four years of separation, or later, if both former common-law partners agree to the DUPE in writing.

[4] The Claimant challenges the four-year limit for applying for the DUPE and says that it infringes her equality rights under section 15(1) of the Charter.

[5] Mr. Boivin argues that the four-year limit discriminates against the Claimant on its face on the basis of her marital status because there is no time limit for persons who had married to apply. It also discriminates against her on the basis of her sex: it has an adverse impact on women since they disproportionately benefit from the DUPE because they have historically been the lower earning spouses due to their housekeeping and childcare responsibilities.

[6] Ms. Dalloo acknowledges that the impugned provision on its face distinguishes on the basis of marital status but argues that the Claimant has failed to establish that it has an adverse discriminatory effect on the basis of sex.

[7] Ms. Dalloo relies on the Supreme Court of Canada decisions in *Walsh*[1] and *Quebec v A*[2] for the proposition that it is constitutionally permissible in certain circumstances to have different rules for common-law spouses than those for married spouses because this respects the different choices they have made.

[8] She also argues that there are greater evidentiary burdens in establishing a common-law relationship than a marriage, especially when the application is made long after separation. The existence, start date, and end date of a marriage is clearly established by the marriage and divorce documents, but the existence and period of a common-law relationship may require extensive evidence that may be disputed and may weaken over time.

[9] M. P. argues he believed that all issues between him and the Claimant were finalized when they settled their financial affairs in 2010, and that it is unfair that the Claimant is now making further claims. Neither he nor the Claimant applied for the DUPE within the four-year time limit. Although he was devastated after their separation, he has now "moved on and put his life back together." The four-year limit is appropriate because a common-law relationship is not the same life-long commitment as a marriage.

ISSUES

1. Did the Claimant and M. P. co-habit in a common-law relationship?
2. Does the four-year time limit for a former common-law spouse to apply for a DUPE under section 55.1(1)(c) of the CPP discriminate against the Claimant on the basis of sex and marital status contrary to section 15(1) 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

The Claimant and M. P. cohabited in common-law relationship

[10] The Claimant testified that she and M. P. cohabited for approximately 17 years. They first met in North Bay. She moved with him on several occasions because of his military

[1] *Nova Scotia (Attorney General) v Walsh and Bona*, 2002 SCC 83
[2] *Quebec (Attorney General) v A*, 2013 SCC 5

postings. Despite the moves, she was also able to work in and advance her own career as a dental assistant, registered nurse, and outpost nurse. They had many mutual friends. Their families were close. They jointly signed residential leases and purchased properties. They both contributed to expenses. They shared the same bedroom and had no other partners during the period of cohabitation. He looked after her when she was ill, and she looked after him when he underwent surgery on his knees. They celebrated birthdays and holidays together, travelled together on vacations, and were treated by others in the same way they would have been if they were a married couple. He always introduced her as his wife and she introduced him as her husband.

[11] Although M. P. testified to their having a "shared accommodation" arrangement in 1991 and his having rented property in Toronto in the early 1990's because of his temporary posting there, he did not dispute the Claimant's evidence concerning the features of a common-law relationship.

[12] The Claimant also provided documentation to establish the common-law relationship. This included a Revenue Canada child tax benefit notice dated July 20, 1993 indicating M. P. as her spouse; a letter dated August 22, 1994 from Commander R. T. stating the Claimant had accompanied M. P. as his common-law wife when they resided in Virginia starting in July 1994; and a statutory declaration sworn by M. P. in April 2010 stating that he and the Claimant had cohabited from the summer of 1991 to December 2008.[3]

[13] I find that the Claimant and M. P. cohabited in a common-law relationship from July 1991 to December 2008. But for the four-year time limit set out in the impugned provision, the Claimant would be entitled to a division of unadjusted pensionable earnings for the years 1991 to 2007.

Does section 55.1(1)(c) of the Charter infringe upon the Claimant's s. 15(1) Charter rights?

[14] 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.

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[3] GD16-40, 44 & 50

[15] 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?

[16] A contextual analysis is required to determine whether there is an infringement of this section.[4]

[17] 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.[5]

Distinction based on an enumerated or analogous ground

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

[19] Mr. Boivin argues that marital status has been recognized as an analogous ground of discrimination under section 15(1) of the Charter. The imposition of a 4-year time limit on common-law spouses while there is no limitation for separated married and divorces spouses on its face violates the Claimant's equality rights on the ground of marital status. He also argues that there is adverse effect discrimination on the ground of the Claimant's sex. Historically men have been the primary breadwinners and women have had primary responsibility for child and home care. This has resulted in women having lower, or no, earnings during the period of cohabitation,

[4] *Withler v Canada (Attorney General)*,[2011] 1 SCR. 396 at para 30
[5] *Quebec v A*, at paras 331 & 332

and thus less CPP contributions. Woman historically have benefited more from the DUPE. The 4-year limit works against the primary purpose of the DUPE, which is to provide women on the breakdown of the relationship with an equal share of assets accumulated during their cohabitation.

[20] Ms. Dalloo acknowledges that the impugned provision draws a distinction based on marital status but argues that the Claimant has provided no evidence to establish an adverse effect based on sex. She argues that no link has been established between the impugned provision and the historical and systemic financial disadvantage of women. The Claimant must provide specific evidence linking the disparate financial situation and this evidence "must amount to more than a web of instinct."[6]

[21] The law does not draw a distinction in access to the DUPE based on sex since all former common-law spouses, regardless of their sex, are eligible for the DUPE if they apply within 4-years of separation or longer if the other former common-law partner agrees in writing.

My findings

[22] The Minister relies on the SCC decision in *Taypotat*[7] for the proposition that the Claimant must provide evidence that amounts to more than a "web of instinct" establishing the impugned provision has an adverse discriminatory effect based on sex.

[23] In some Charter cases, the claimant provides statistical evidence to establish that the impugned provision infringes s. 15(1). But *Taypotat* states that statistical evidence is not always required; in some cases, the disparate impact on an enumerated ground will be apparent and immediate. I believe that this is such a case.

[24] Andrew Williamson, who gave expert evidence on behalf of the Minister, testified about the rationale for credit splitting. He referred to several reports that followed the 1970 Royal Commission on the Status of Women in Canada. A report titled *Participation of Housewives in the Canada Pension Plan* stated that the problem to be resolved was that under the then existing CPP a "housewife working at home builds up no equity in the Plan for her own account and is

[6] *Kahkewistahaw First Nation v. Taypotat*, [2015] 2 SCR 557
[7] Taypotat, paras 33 &34

therefore financially more vulnerable than her husband." Mr. Williamson also referred to a 1977 statement in the House of Commons by Paul E. McRae, Parliamentary Secretary to the Minister of National Health and Welfare, when credit splitting was introduced. Mr. McCrae stated "that work in the home really does contribute to family income and therefore, to the CPP credits accumulated by the spouse who is in the labor force."

[25] Mr. Williamson testified that credit splitting was introduced to the CPP in 1977 to "recognize the contributions of homemakers to the accumulation of assets during the marriage." It was intended to ensure a fair share of an asset accumulated by the couple during the marriage for the "spouse at home" as well as some income protection in the event of retirement, disability, or death.[8]

[26] The credit splitting provisions were introduced to benefit women who historically have had the primary responsibility for child and home care. Although no evidence was led on the historical financial and earnings disadvantage that women have experienced during cohabitation, this is not in dispute. I am taking judicial notice of this historical disadvantage and of the fact that women overwhelmingly benefit from the DUPE. Since the 4-year time limit in the impugned provision provides a barrier to collecting the DUPE, it has a disproportionately adverse effect on women. Although the full extent of this effect may not be known, there can be no doubt that it exists. This amounts to more than a "web of instinct."

[27] I find that the Claimant has established a distinction under section 15(1) of Charter not only with respect to the analogous ground of marital status (which the Minister acknowledges) but also with respect to the enumerated ground of sex.

Discriminatory impact

[28] Distinctions based on enumerated or analogous grounds are not by themselves sufficient to establish a violation of section 15(1) of the Charter. The distinctions must discriminate by perpetuating disadvantage or prejudice, or by stereotyping the claimant group.[9]

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[8] Williamson expert report: GD25-14 to 16
[9] *Withle*r, para 34

[29] A formal comparison with a selected mirror comparator group is not required as it is too rigid. Rather I should look at the full context. This includes looking at the situation of the claimant group and at 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" view of equality. 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.[10]

Should public policy considerations be considered under section 15(1)?

[30] Based on my review of the SCC decisions in the *Walsh* and *Quebec v A*, I have determined that in this case public policy considerations such as preserving freedom of choice and personal autonomy should not be considered in the s. 15(1) analysis. Those considerations are, however, central to the s.1 analysis.

The Walsh decision

[31] In *Walsh*, the majority of the SCC (eight out of nine judges) determined that the exclusion of common-law partners from the presumption, applicable to married spouses, of an equal division of matrimonial property under the *Nova Scotia Matrimonial Property Act* (*MPA*) was not discriminatory within the meaning of section 15(1) of the Charter. The SCC majority stated that although in some cases the functional similarities between married and unmarried cohabitants may be substantial, reliance solely on functional similarities does "not adequately address the full range of traits, history and circumstances" of common-law relationships.

[32] The SCC majority reasoned[11]:

> In the present case, then, the inquiry can be stated as whether a reasonable heterosexual unmarried cohabiting person, taking into account all of the relevant contextual factors, would find the *MPA*'s failure to include him or her in its ambit has the effect of demeaning his or her dignity...

[10] *Withler*, paras 43 to 54
[11] Walsh, paras 38 to 61

> Although the courts and legislatures have recognized the historical disadvantages suffered by unmarried cohabiting couples, where legislation has the effect of dramatically altering the legal obligations of partners, choice must be paramount. The decision to marry or not is intensely personal. Many opposite sex individuals in conjugal relationships of some permanence have chosen to avoid marriage and the legal consequences that flow from it. To ignore the differences among cohabiting couples presumes a commonality of intention and understanding that simply does not exist. This effectively nullifies the individual's freedom to choose alternative family forms and to have that choice respected by the state....
>
> ... People who marry can be said to freely accept mutual rights and obligations. A decision not to marry should be respected because it also stems from a conscious choice of the parties...

[33] The SCC concluded that the application of the *MPA* to married persons but not common-law partners was not discriminatory because "the distinction reflects and corresponds to the differences between these relationships and...respects the fundamental personal autonomy and dignity of the individual." [12]

The Quebec v A decision

[34] In *Quebec v A* the SCC considered the provisions of the *Quebec Civil Code* that excluded *de facto* (common-law spouses) from its mandatory spousal support and property division provisions. Those provisions applied to married spouses and civil union spouses. The SCC upheld the constitutionality of the provisions; however, there was considerable divergence of opinion.

The Four Concurring Judges

[35] The four concurring judges were in the minority on s. 15(1), but in the majority in finding that the challenged provisions were constitutional.

[36] They found that the analysis by the majority in *Walsh* properly served as a precedent for their s. 15(1) analysis. They stated that the legislation did not favour "one form of union over another…it made consent the key to changing the spouse's mutual patrimonial relationship…

[12] Walsh, para 62

[and] preserved the freedom of those who wish to organize their patrimonial relationships outside the mandatory statutory framework." They also stated that that the challenged provisions did not express or perpetuate prejudice against *de facto* spouses rather they respected the personal autonomy and freedom of *de facto* spouses to organize their relationships based on their needs.

[37] The four concurring judges concluded that although the challenged provisions drew a distinction based on marital status between *de facto* spouses and married or civil union spouses, they did not create a disadvantage by expressing or perpetuating prejudice or by stereotyping. They accordingly did not find it necessary to proceed to a section 1 Charter analysis.[13]

Chief Justice McLachlin

[38] Chief Justice McLachlin concurred in result with the four concurring judges, but differed in her s. 15(1) analysis.

[39] She stated that it was important to maintain the analytical distinction between section 15(1) and section 1 of the Charter and that the public policy basis for legislation has a limited relevance to the s.15 (1) analysis. She agreed with Justice Abella that the *Walsh* decision was not binding. It involved a different issue (division of property only) and was decided at an earlier point in the SCC's evolving appreciation of section 15(1). She further stated that the public interest considerations of freedom of choice and personal autonomy are better considered at the s.1 stage of analysis.[14]

[40] Chief Justice McLachlin then concluded that the challenged provisions made discriminatory distinctions that limited the equality right of *de facto* spouses, because they denied them protections available to married and civil spouses based on the analogous ground of marital status. In addition, they created a disadvantage since *de facto* spouses did not automatically benefit from the provisions that ensured an equitable division of property and continued financial support at the end of the relationship. They were also discriminatory from the point of view of a reasonable person in the circumstances similar to A's. They showed less

[13] Paras 226, 256, 267 & 281
[14] Paras 412 to 423

concern for people in A's position than for married and civil union spouses on break-up of a relationship. They also perpetuated the effects of the historical disadvantage rooted in prejudice and rests on a false stereotype of choice rather than on the realty of the Claimant's situation.[15]

[41] However, Chief Justice McLaughlin then went on find that the challenged provisions were saved under section 1 of the Charter because they promoted the objective of preserving choice and personal autonomy for spouses with respect to property division and support. She found that the challenged provisions also met the rational connection and minimal impairment tests.[16]

[42] Since Chief Justice McLaughlin concurred in result with the four concurring judges, the challenged provisions were found to be constitutional with respect to both spousal support and division of property.

Justice Abella

[43] Justice Abella dissented as to the result.

[44] She stated that the "choice not to marry" analysis should not be addressed under the section 15(1) analysis but at the section 1 stage. She declined to follow the *Walsh* decision because she believed that the SCC's section 15(1) analysis had substantially evolved since that decision.

[45] She then proceed to a s. 15(1) analysis "untethered" from *Walsh*.[17] She determined that the exclusion of *de facto* spouses from both the spousal and property division provisions of the *Quebec Civil Code* perpetuated historical disadvantage against them based on their marital status.[18] She accepted the objective of preserving freedom of choice and personal autonomy as a pressing and substantial objective for the purposes of a s.1 analysis and that there was a rational connection between the challenged provisions and that objective. But she determined that the total exclusion of *de facto* spouses from both the support and division of property provisions was

[15] Paras 426 to 428
[16] Paras 432 to 439
[17] Paragraphs 338 to 343
[18] Para 357

not minimally impairing. Accordingly, she determined that the challenged provisions were not saved under s. 1 of the Charter.[19]

The Three Dissenting in Part Judges

[46] Three judges dissented in part as to result.

[47] They agreed with Chief Justice McLaughlin and Justice Abella that freedom of choice and personal autonomy only become relevant at the s.1 stage. They also agreed that the challenged provisions created a discriminatory distinction because of marital status. They further agreed that the objective or promoting personal autonomy was pressing and substantial.

[48] They concluded that although the exclusion was justified under s. 1 with respect to the division of property it was not justified with respect to support. This was because the exclusion of *de facto* spouses from the mandatory spousal support provisions affected a vital interest to persons who had been in a relationship of interdependence: namely, the satisfaction of needs resulting from the breakdown of a relationship of interdependence created while the spouses lived together as a family unit.[20]

My findings

[49] Five of the nine judges in *Quebec v A* determined that they should not follow the *Walsh* approach to s. 15(1). They agreed it was important to maintain the analytical distinction between s. 15(1) and s.1 of the Charter. They also agreed public policy considerations such as preserving freedom of choice and personal autonomy should be considered at the s.1 stage. In view of this, the *Walsh* decision has been overruled by *Quebec v A* in so far as it considered public policy considerations as part of the s. 15(1) analysis.

[50] I find that in this case public policy considerations should not be considered as part of the s. 15(1) analysis.

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[19] Paras 358 to 362
[20] Paras 394 to 397

Does the impugned provision discriminate under s. 15(1) of the Charter?

[51] I have already determined that the Claimant has established a distinction under section 15(1) of Charter not only with respect to the analogous ground of marital status (which the Minister acknowledges) but also with respect to the enumerated ground of sex.

[52] The SCC has determined that the second part of the section 15(1) analysis "focuses on arbitrary-or-discriminatory-disadvantage: 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." [21]

[53] 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.[22]

The Claimant's Position

[54] Mr. Boivin argues the impugned provision unnecessarily imposes arbitrary restrictions on the ability of former common-law partners to obtain CPP pension credits that should belong to them. It is substantively discriminatory because unmarried spouses have diminished access to financial resources in retirement because of their marital status. This sends a message that they are less worthy of respect, consideration, or equality under law.

The Minister's Position

[55] Ms. Dalloo argues that marriage is a legal status intended to be permanent. A marriage certificate proves its existence. A divorce certificate proves its termination. Although a common-law relationship is intended to be of "some permanence", it is distinguishable from marriage on several grounds. It does not exist until there is cohabitation for a period of time. There is no presumption of an equal sharing of accumulated property as there is in a marriage. Only the

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[21] *Taypotat*, para 20
[22] *Quebec v A*, para 332

partners know when the common-law relationship begins and ends. In addition, they agree to be bound by provincial law, which may be less favourable to common-law spouses than to married spouses.

[56] She further argues that the impugned provision when considered in its entire context is beneficial to the Claimant. She is given access to a CPP benefit to which she would otherwise not be entitled provided she applies within four years of separation, and for a longer period if both former partners consent. The provision provides access to the DUPE for the lower earning common-law spouse, who usually is a woman, while being respectful of the choice that common-law partners have made, namely, not to become subject to the rules of marriage

My Findings

[57] I have already determined that public policy considerations should not be considered in the s. 15(1) analysis.

[58] The impugned provision makes a discriminatory distinction. It puts a four-year time limit after separation to apply for a DUPE on former common-law spouses, but it does not put this limit on former married or separated married spouses.

[59] The Claimant cohabited with M. P. for 17 years in a relationship that was in almost all respects similar to marriage.[23] The impugned provision is discriminatory from the point of view of a reasonable person in her circumstances because it shows less concern for her as a former common-law spouse than it does for former married or separated married spouses. It fails to respond to her needs as a former common-law spouse. She is a member of a group that has been historically disadvantaged both because she is a woman and because she was a common-law spouse. Moreover, by limiting the access to a DUPE by former common-law spouses it has the effect of reinforcing, perpetuating, and exacerbated this historical disadvantage.

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

[23] See paragraphs 10 to 13 above

Section 1 of the Charter

[61] Having found that section 55.1(1)(c) of the CPP infringes the Claimant's Charter rights, I must decide whether the infringement can be justified under section 1 of the Charter.

[62] 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.

[63] 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.[24]

[64] The framework for a section 1 analysis is the *Oakes* [25] test that 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? [26]

[24] *Canada (Attorney General) v. Hislop*, 2007 SCC 10, para 43
[25] *R. v Oakes*, [1986] 1 SCR 103, paras 68 to 71
[26] *Hislop*, para 44

The Minister's evidence

[65] The Minister called two witnesses.

Pierre Milloy

[66] Pierre Milloy is a senior program advisor for CPP Business Operations. He has held numerous positions with the CPP since May 1999 and now provides guidance and advice about the processing of CPP claims.[27] He has adjudicated approximately 100 DUPE claims and has provided guidance and advice on a couple of hundred.

[67] Ms. Dalloo did not ask that he be qualified as an expert witness and stated that he would testify about how the CPP credit splitting provisions are administered in practice.

[68] Mr. Milloy stated that a record of an individual's unadjusted pension earnings (CPP credits) is maintained by Revenue Canada and reflected on their Record of Earnings. This information is available to the CPP to process a DUPE. All divorced couples, married couples who have been separated for at least one year, and former common-law spouses are eligible for the DUPE provided they cohabitated for at least one year, and one of them has sufficient contributions for at least one year during the cohabitation period. The unadjusted pension earnings for the period of cohabitation are shared equally.

[69] The information required for each of the three categories is different.

[70] Divorces are easier from an administrative viewpoint since the DUPE is mandatory and the divorce judgement will validate the dates of marriage and divorce. However, information such as social insurance numbers and the period of cohabitation is usually not available from the divorce registry. These DUPEs are rarely contested and easier to process.

[71] For marital separations, a formal application and statutory declaration are required. The statutory declaration confirms the period of separation and the period of cohabitation. The CPP also requests one piece of supporting documentation. The CPP then sends a letter to the non-

[27] Pierre Milloy's work experience: GD44-2 to 46

applicant spouse informing them that the DUPE application has been made, and inquiring whether they agree to the period of cohabitation. If both parties agree and there is at least one piece of supporting documentation, the CPP does not question the period of cohabitation. If they disagree, the CPP asks each individual for additional supporting documentation. The CPP then makes a decision which is usually based on who has the stronger documentation. This is a bit of a "judgment call" and court documents, tax returns, and children's benefits documents are considered "strong" evidence.

[72] For former common-law spouses a formal application, statutory declaration, and one piece of supporting documentation are required. If the application is not made within four years of separation and there is no waiver from the non-applying former spouse, a denial letter is sent out since there is no need to examine the documentation. If the application is within four years, the same procedures and investigations will be pursued as those for separated married spouses.

[73] The CPP responds in the same way if the applicant is a woman or a man, and if the couples are separated married spouses or former common-law spouses. In most cases, the applicant and non-applicant agree on the period of cohabitation. The challenge arises when applicant and non-applicant disagree on the period of cohabitation. In his experience the longer the period of time between the relationship ending and the application being made, the more challenging it is for persons to provide the required documents.

[74] Mr. Milloy acknowledged that the challenge in obtaining documents when there is a lengthy period of time between the breakdown of the relationship and the application is the same for separated married spouses and former common-law spouses. He also acknowledged that even in divorce situations it is still necessary to determine the period of cohabitation to process the DUPE.

Andrew Williamson

[75] 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.[28]

[76] I determined that he is qualified to provide expert evidence concerning the legislative history and administration of the CPP program. His report and addendum report are included in the hearing file.[29]

[77] Mr. Williamson reviewed the history of CPP, the evolution of the credit splitting provisions, the significant statutory and regulatory provisions, the Hansard records, and the Ministerial briefing documentation.

[78] The CPP was proclaimed in force in May 1965 and the first contributions were made in January 1966. It is a compulsory social insurance plan. Its purpose is to provide all contributors and their families with reasonable minimum income replacement upon retirement, disability, or death of a wage earner. The primary benefit is a retirement pension but there are also other benefits including a post-retirement benefit, disability pension, death benefit, survivor's pension, orphan's benefit, and disabled contributor's child's benefit.

[79] Since 1978 the CPP has permitted a DUPE between divorced spouses or those whose marriage was legally annulled. This was initially restricted to divorced spouses and those whose marriage had been annulled. The application had to be made within three years of the divorce or annulment.

[80] The DUPE was one of the earliest of a series of federal and provincial legislative reform initiatives that recognized the rights of spouses on marriage breakdown to an equal share of assets accumulated by a couple during their marriage.

[81] Initially the DUPE did not apply to separated married spouses or to former common-law partners. This was because divorces are definitively final, while separations or terminated common-law relationships are less definitively final and may be followed by a reconciliation. It did not apply to common-law partners in particular because it was anticipated there would be

[28] Andrew Williamson's work experience: GD37-2 to 4
[29] GD25 & GD38-25 to 92

substantial administrative costs in adjudicating whether there was a common-law relationship, and if so, determining the dates when the relationship began and ended.

[82] Since 1987 the DUPE has been available to those involved in marital separations and terminated common-law relationships. The 3-year time limit for applying was removed for divorced spouses, did not apply to marital separations. A 4-year time limit was imposed for terminated common-law relationships. This 4-year time limit is the subject matter of the current charter appeal.

[83] Since 1995 the DUPE has been available for pre-1987 divorces after the 3-year period for applying if both former spouses consent in writing.

[84] Since 2000 the DUPE has been available for former same sex common-law or married partners.

[85] Since 2007 the DUPE has been available for former common-law spouses after the 4-year period for applying if both former spouses consent in writing.

[86] Mr. Williamson's opinion is that the 4-year limit for applications by former common-law spouses has two purposes. First, it provides a degree of closure and finality for both former common-law spouses so they can plan their financial future. Second, there is an evidentiary problem because evidence is required to both establish a common-law relationship in accordance with the CPP and also the period of cohabitation. This contrasts with divorced and separated married spouses, where the existence of the relationship can be confirmed by the marriage documents.

[87] Over time there is a tendency for evidence to "decay" since documentary evidence and contact with potential witnesses may be lost, and memories become faded. He acknowledged that married couples may be separated for a long time and that there may be similar evidentiary problems to establish the end date of their relationship. But with a former common-law relationship there may also be evidentiary difficulty in establishing the existence of a common-law relationship.

Minister's position

[88] Ms. Dalloo argues that the impugned provision is saved because it has two substantial and compelling objectives.

[89] First, the four-year limitation meets the objective of the need for 1) the government to establish with certainty, using various indicia, that there was a common-law partnership, 2) the need for evidence establishing the cohabitation period, and 3) an individual's right to finality in winding up their affairs within a reasonable time. It meets the evidentiary concerns arising from the greater evidentiary burden in establishing a common-law relationship than a marriage, especially when the application is made long after separation. The existence, start date, and end date of a marriage is clearly established by the marriage and divorce documents, but the existence and period of a common-law relationship may require extensive evidence that may be disputed and may weaken over time.

[90] Second, it meets the objective of respecting spouses choice of either undertaking obligations consistent with a marriage or those consistent with a common-law relationship, while also providing protection to the lower earning common-law partner on break-up if they apply for the DUPE within four years of separation, or longer if both former partners agree in writing. The difference in treatment arises from the distinct legal nature of a marriage and a common-law relationship. This objective has been described in SCC jurisprudence as preserving freedom of choice and personal autonomy.

The Claimant's position

[91] Mr. Boivin disputes the Minister's position that the limit is justified because there are greater evidentiary challenges to establish the DUPE for common-law relationships. The same issue is present for both married and common-law relationships, namely, the period of cohabitation. This rarely coincides with the period of marriage. In all DUPE claims the critical question is the start and end date for cohabitation.

[92] He argues that the Minister's position that the DUPE for a common-law relationship is more difficult to document doesn't "hold water." In both common-law and marriage situations the Claimant has to establish the same thing – the beginning and end of the period of

cohabitation. In many cases, the marriage date is not the same date as the beginning date, and in almost all cases, the divorce date is not the end of cohabitation date.

[93] Mr. Boivin also disputes that the four-year limit is justified because it respects the individual choices and autonomy of common-law partners. Parliament decided to extend the DUPE to unmarried spouses and the Claimant has the right to expect to be treated equally. There is no credible basis for the government to "turn around" and apply a four-year limit to common-law spouses. Common-law spouses should have the same protection as married spouses.

My findings

[94] The Minister has failed to meet its evidentiary burden with respect to the first objective set out in paragraph 89, above.

[95] The existence of evidentiary hurdles does not in itself amount to a pressing and substantial objective. Many CPP disability benefits involve potential factually complicated issues that go back for a lengthy period. One common example is complex disability claims that have an old MQP (last date of qualification for disability). Given the lengthy period between the MQP and the application, the medical evidence is often more difficult to obtain and memories fade. However, the potential evidentiary hurdle is not considered to be a justification for a time limit on CPP disability applications.

[96] There is no principled basis for this to justify a time limit on DUPE applications. A Claimant has the burden of proof. If she is unable to provide evidence to establish her claim (in DUPE cases, the period of cohabitation) her claim will not succeed. Where the period of cohabitation is in dispute, the Minister usually makes its decision based on the strength of the documentation presented. Each party has a right of appeal to the Social Security Tribunal where a hearing will conducted and both sworn oral and documentary evidence will be considered.

[97] Further, there is no significant difference in terms of evidence between claims by former common-law spouses and divorced or separated married spouses. In every case, a period of cohabitation of at least one year must be established, and the critical issue is the period of cohabitation. Claims may be made long after separation for all of these situations and the same evidentiary hurdle will exist.

[98] I do not accept the Minister's argument that in common-law relationships the existence of the common-law relationship must be established as opposed to a marriage where the existence of the marriage is established by the marriage certificate.

[99] The existence of a common-law relationship will be established by the period of cohabitation since the parties could not have been in a common-law relationship unless there was a period of cohabitation in accordance with the CPP definition. Under all three situations, the critical issue is the period of cohabitation. Further, in the marriage situation not only must the marriage be established, but the Claimant will also have to establish a period of cohabitation for at least one year and that the spouses have been separated for at least one year. In addition, there in no reason why an individual's wish for certainty is more important in a former common-law relationship than in a former married or separated married ones. If there is no four-year time limit, each person will know with certainty what their situation is – they are subject to a DUPE for the period of cohabitation.

[100] I am, however, satisfied that the Minister has met its evidentiary burden with regards to the objective of preserving freedom of choice and personal autonomy.

[101] I am bound by the overwhelming weight of the SCC decisions in *Walsh* and *Quebec v A* on this issue. The DUPE provisions provide an equal sharing of a property (CPP credits) accumulated during the period of cohabitation. This is comparable to a division of property considered in the SCC decisions.

[102] In the *Walsh* decision eight of the nine SCC judges determined that freedom of choice and personal autonomy were determinative considerations, although they considered this under their s. 15(1) analysis. Four of the SCC judges in *Quebec v A* agreed with the Walsh analysis. All five of the other SCC judges in *Quebec v A* agreed this was a substantial and pressing objective, and that there was a rational connection between the challenged provisions and the objective. Four of those judges determined that this justified the challenged provisions with respect to division of property under s. 1.

[103] The facts of this case are also informative on this issue. There is no evidence as to why the parties did not marry, but both chose to live together in a common-law relationship for 17

years. M. P. had been previously married and testified that he had been in both a married and a common-law relationship, and "knew the difference." The Claimant had been previously married, and married again after her common-law relationship with M. P.

[104] The provision in this case is less exclusionary than those in the *Walsh* and *Quebec v A* decisions. In both of those cases, there was a total exclusion from the division of property provisions. In this case, there is a limited exclusion since the Claimant had an undisputed entitlement to the DUPE if she applied within four years of separation. The impugned provision is minimally impairing and represents a balanced approach designed to meet evolving societal circumstances while also respecting freedom of choice and personal autonomy.

[105] Since the impugned provision is minimally impairing and represents a balanced approach, I am satisfied that the deleterious effect of the breach is outweighed by its salutary effect. It is true that persons such as the Claimant lose their entitlement to the DUPE if they don't apply for it within four years of separation; but this is the result of their not having applied within the 4-year time limit, not the impugned provision. The Claimant in this case settled her financial issues within two years of separation and had independent legal advice. Four years provided ample time for her to apply for the DUPE. Her loss of this entitlement flows from the choice made by both her and M. P. not to apply for the DUPE within the 4-year time limit.

[106] I find that the impugned provision is demonstrably justified in a free and democratic society because it meets the substantial and pressing objective of preserving freedom of choice and personal autonomy

CONCLUSION

[107] Although section 55.1(1)(c) of the CPP infringes the Claimant's s. 15(1) equality rights, it is saved because it is demonstrably justified in a free and democratic society.

[108] The appeal is dismissed.

Raymond Raphael
Member, General Division - Income Security