

SMITH & HUGHES WORKING ON SAME SEX BENEFITS CASE

Kenneth W. Smith is pleased to be working with other lawyers across Canada on a Class Action lawsuit which challenges the denial of CPP pensions to lesbian and gay surviving spouses. Working with J.J. Camp, Q.C. and Sharon Matthews a suit was commenced in British Columbia on November 27, 2001. A separate class action, based on the same grounds was commenced in Toronto on the same day. The other lawyers involved are the firm of McGowan Elliott & Kim in Toronto, lead by Doug Elliott, Dawna Ring, Q.C. of Halifax, Micheal Law, of Winnipeg, William Selnes of Melfort, Saskatchewan, and Martha McCarthy of Toronto.

This is believed to be the first class action lawsuit addressing sexual orientation discrimination in the world.

When the Federal Government changed many laws in 2000 to include sexual orientation in order to conform with the Charter of Rights and Freedoms, the benefits under the CPP for survivors were limited to those survivors of same sex couples who lost their partners *after January 1, 1998*. The lawsuits allege that the January 1, 1998 cut off date was purely arbitrary and without legal justification. The lawsuit also alleges that while the federal government and its agencies collect CPP contributions from all Canadians regardless of their sexual orientation, it does not provide equal benefits on that basis.

Gays and lesbians have dutifully paid into the plan since its inception, but have been discriminated against by being excluded from some of its benefits. It is important to note that this case is not about taxpayers' money. The CPP is funded by the contributions of working Canadians and the investment of that money. There is no government money in the Plan.

The case was first certified to go to trial in British Columbia, after several objections by the government were dealt with. As matters proceeded with the Ontario case, a proposal was agreed to between the lawyers for the Class and the lawyers for the federal government that the two cases, in B. C. and Ontario, should be combined into a single national Class Action. It was agreed the case would proceed in Toronto.

The Representative Plaintiffs from B. C., Eric Brogaard and Gail Meredith joined George Hislop of Toronto, Albert McNutt of Truro, Nova Scotia, and Brent Daum of Melfort, Saskatchewan as the plaintiffs in the case.

All of these plaintiffs had loving, supporting relationships with their deceased partners but have been excluded from the survivor's benefit because their partner died before January 1, 1998. The number of people in the class is expected to be approximately 1500.

The trial of this claim was set for September of 2003.

BACKGROUND

Same Sex Benefits Class Action Lawsuit

What is a class action?

A law suit started by one or more persons seeking relief on behalf of a defined class of persons.

Why Start a class action?

There may be a number of people who are impacted in a similar way by the action of another person or institution.

There are efficiencies in grouping the claims under one lawsuit as opposed to having each person start their own lawsuit.

The people in the class can have their claims adjudicated together.

There is no possibility of inconsistent judgments for the members of the class.

There may be a greater possibility of a settlement for the entire class due to a “level playing field”.

The Act provides a notification process that ensures that everyone who has rights will receive notice of their entitlement.

What are the steps in a class action?

The first step is to issued the Statement of Claim with the Court.

When the Statement of Claim has been issued, the person commencing the action must obtain a court order certifying the proceeding as a class proceeding and appointing the person as the class representative.

Once the class proceeding has been certified, the members of the class are given notice of the class proceeding.

After these steps, the action is litigated in the usual course, with examinations for discovery, and so on, proceeding to a trial.

What is this class action about?

The federal government has excluded the class members from receiving a survivor’s pension under the *Canada Pension Plan* because of their sexual orientation.

The lawsuit claims pensions and pension arrears that were not paid because of discrimination on the basis of sexual orientation is prohibited under the *Charter of Rights and Freedoms*.

Who are the class members?

These class members were in same sex relationships that have been generally recognized under federal law under Bill C-23 that was passed following M v H.

All of them had common law partners who died before January 1, 1998 and who contributed to the CPP throughout their working lives.

When their common law partners died, they applied for a CPP survivor’s pension.

They were denied a CPP survivor’s pension because of their sexual orientation.

How many people are in the class?

Approximately 5,000 people could be in the national class

- Over 400 people have already contacted the legal team
- there have been few inquiries from estates of deceased class members
- in some instances both partners have died
- a variable percentage of individuals entitled to a benefit from a class action decision actually claim it
- there is confusion between CPP survivor and death benefits
- the Government estimates the class size at 1,500.

What is a CPP survivor's pension?

Under the Canada Pension Plan, a contributor to the plan receives a pension income upon retirement.

The contributor's spouse or common law partner is also entitled to receive a survivor's pension when the contributor dies, however, this does not apply to the class members.

Didn't the federal government extend benefits to same sex couples?

In July 2000, the federal government introduced legislation which extended certain rights and obligations to same sex couples.

Under this legislation, same sex couples are defined under the heading of "common law partner".

The legislation changed certain aspects of the CPP so that a person in a same sex relationship is entitled to receive a CPP survivor's pension, but only if their partner died on or after January 1, 1998.

This limitation does not apply to heterosexuals, whether married or cohabiting in common law relationships.

Is there a class action in Quebec?

Quebec has its own plan which may be the subject of litigation there.