

Synopsis of Hislop et al. v. Attorney General of Canada

OVERVIEW

On June 10 and 11, 2004, a panel of the Court of Appeal for Ontario composed of Justices Charron, Feldman and Lang heard an appeal from the trial decision of Justice Ellen Macdonald of the Ontario Superior Court involving a class-action constitutional challenge to four sections of the *Canada Pension Plan* (“CPP”).

This class action was brought by the surviving partners of same-sex couples, or their estates, whose contributing partners died after April 17, 1985, the date that s. 15(1) of the *Canadian Charter of Rights and Freedoms* (the “*Charter*”) came into force. In 2000, the federal government passed legislation in response to *M. v. H.*, the 1999 decision in which the Supreme Court of Canada struck down as unconstitutional the opposite-sex definition of “spouse” in the Ontario *Family Law Act*.

The class members challenged two specific sections of that new legislation that applied only to same-sex survivors and not to opposite sex survivors. Those specific sections precluded the same-sex survivors from receiving survivors’ *CPP* pensions retroactive to the month following the contributing partner’s death. Two other general sections of the *CPP*, which existed prior to the new legislation, apply to all pension claimants and impose a cap on the ability of any survivor, whether same sex or opposite sex, to collect more than twelve months of pension arrears.

The basis for the class members’ constitutional challenge was s. 15(1) of the *Charter*.

In a decision released on December 19, 2003, the trial judge concluded that the two new *CPP* sections breached the s. 15(1) *Charter* rights of the class members. She struck down those sections and granted the class members a constitutional exemption from the other two sections of general application. As a result of the trial judge’s decision, the class members became entitled to pension arrears dating back to one month after the death of their contributing partners who died after April 17, 1985, plus interest on pension arrears from 1992.

The Attorney General of Canada appealed the trial judge’s decision. The Attorney General of Ontario intervened on the question of remedy.

In a unanimous judgment released today, the Court of Appeal allowed the appeal in part. The court upheld the trial judge's decision to strike down as unconstitutional the two *CPP* sections that specifically applied only to same-sex survivors. The court observed that in formulating remedial legislation responsive to a successful *Charter* challenge, one of the key issues that Parliament must address is the extent to which the recognition of the *Charter* right will have retrospective application and effect. In so doing, the remedial legislation must itself be constitutional. This legislation was not. The court also upheld the trial judge's decision awarding the class members pre-judgment interest on any pension arrears.

The court, however, allowed the Attorney General of Canada's appeal with respect to the other two *CPP* sections that were of general application and set aside the constitutional exemption granted by the trial judge.

As a result of the court's decision today, the class members will receive retroactive survivors' pensions, limited in accordance with the sections of general application, subject to the further proceedings of the class members before the trial judge

THE CHALLENGED SECTIONS

Four sections of the *CPP* were at issue. Two new sections, the specific sections, s. 44(1.1) and s. 72(2), were added to the *CPP* as a result of the *Modernization of Obligations and Benefits Act* ("*MOBA*"). The *MOBA* reflects the federal government's response to *M. v. H.* It was passed in July 2000 and is omnibus legislation that amended sixty-eight federal statutes for the purpose of providing same-sex couples the same rights and obligations as opposite-sex couples.

The *MOBA* amended the *CPP* by removing the opposite-sex definition of "spouse". At the same time, the *MOBA* amendments introduced specific sections that applied only to same-sex survivors. Those specific sections provided as follows:

- for a surviving same-sex partner to receive a survivor's pension, the contributing partner must have died on or after January 1, 1998 (s. 44(1.1)), and
- pensions would not be paid for any month before July 2000, the month the *MOBA* came into force (s. 72(2)).

Further, the *MOBA* amendments did not address two sections of the *CPP* of general application, the general sections, s. 60(2) and s. 72(1), that were already part of the *CPP*. These general sections provide as follows:

- the estate of any surviving partner may only receive a maximum of twelve months' pension and must apply for it within twelve months of the death of the surviving partner (s. 60(2)), and
- the payment of any pension arrears is limited to the twelve months prior to the application for a survivor's pension (s. 72(1)).

POSITIONS OF THE PARTIES

The Attorney General of Canada:

The Attorney General of Canada's defence of the s. 15(1) challenge rested on three main arguments:

- (1) The different treatment of same-sex survivors in the specific sections is not based on their sexual orientation. Rather, the legislative distinction is based on the date of death of the contributing same-sex partner, which is not a distinction prohibited by s. 15(1) of the *Charter*.
- (2) The *Charter* should be interpreted in a manner that recognizes the evolving nature of societal values. The time limitations in the *MOBA* amendments in s. 44(1.1) and s. 72(2) were consistent with societal and judicial recognition of the rights and obligations of partners in same-sex couples. Same-sex survivors did not have equality rights to survivors' pensions until the issue was identified by gays and lesbians themselves, by Parliament, and by the courts, which did not occur until the late 1990s.
- (3) Granting the class members retroactive pensions from as early as April 17, 1985 would amount to an impermissible retroactive application of the *Charter*.

The Class Members:

The class members took the position that they are entitled to survivors' pensions not from January 1, 1998 or from July 2000 (as prescribed by s. 44(1.1) and s. 72(2)), but from one month after the date of death of the contributing partner, if the partner died after s. 15 of the *Charter* came into force. They argued that the challenged sections breach their equality rights under s. 15(1) of the *Charter* by disentitling them from receiving survivors' pensions equal with opposite-sex survivors from when their equality rights came into force on April 17, 1985.

The class members argued that their entitlement is not weakened by the fact that Canadian society did not initially recognize that discrimination based on sexual orientation was contrary to the *Charter*. Further, they argued that the federal government's unsuccessful attempt to remedy this inequality with the enactment

of the *MOBA* did not detract from these *Charter* rights. In that sense, they argued, there was nothing retroactive about their requested relief, as they were entitled to the relief from April 17, 1985 onward. Furthermore, as conceded by the government, the *CPP* fund would not be adversely affected in any significant way by payment of retroactive pensions to the class members.

CONSTITUTIONALITY OF THE SPECIFIC SECTIONS

This court upheld the trial judge's decision that the specific sections, s. 44(1.1) and s. 72(2), violated the class members' equality rights under s. 15(1) of the *Charter* and cannot be justified under s. 1, because the temporal distinctions in those sections apply only to same-sex survivors and not to opposite-sex survivors.

Further, the court observed that same-sex surviving partners, by reason of their sexual orientation, are already a vulnerable group, and one subject to stereotyping as a result of that orientation. They have the same need for survivors' pensions as opposite-sex survivors whose partners died before 1998 and who are receiving their pensions. The denial of those survivors' pensions perpetuated the view that same-sex survivors were less worthy of recognition than opposite-sex survivors, when in fact, same-sex survivors were equally deserving of society's concern, recognition, and respect. The partners of same-sex survivors contributed to the *CPP*, yet their surviving partners were denied access to the federal pension program, a program that is a fundamental pillar of Canada's retirement income system. The denial of equal access to such a fundamental social institution constituted a non-recognition of these same-sex survivors as full members of Canadian society.

As well, the evolutionary history of the equality rights of same-sex couples does not assist the Attorney General of Canada. The trial judge found as a fact that the Attorney General of Canada failed to demonstrate that same-sex relationship issues were not in the minds of organizations, politicians and society until the 1990s and this court was satisfied that there was evidence to support this finding. Further, the Supreme Court of Canada has rejected the incremental approach to recognition of equality rights urged by the Attorney General of Canada. Therefore, while the new sections may have been part of the federal government's attempt to recognize the equal rights of same-sex couples following *M. v. H.*, the time restrictions that the federal government included in the *MOBA* violated those same rights and cannot stand.

Last, the court also upheld the trial judge's decision to strike the specific sections entirely and not to suspend the declaration of invalidity. Striking down these specific sections does not leave any void that needs to be filled by Parliament and,

on the particular facts of this case, does not have any adverse effect on the *CPP* fund or the public purse.

In the result, and subject to the general sections discussed below, the survivors of same-sex partners may apply for and are entitled to survivors' pensions on the same basis as the survivors of opposite-sex partners.

CONSTITUTIONALITY OF THE GENERAL SECTIONS

This court held that the trial judge erred by granting a remedy against the general sections, s. 60(2) and s. 72(1), when the constitutionality of these sections was not challenged. The court overturned the trial judge's remedy regarding s. 60(2) and s. 72(1) of the *CPP* by setting aside the constitutional exemptions granted to the class members by the trial judge from those sections.

With respect to s. 60(2), which deals with the rights of estates to survivors' benefits, the court held that, because s. 15(1) rights are personal, they cannot be enforced by estates, which are artificial entities, like corporations, and therefore do not have equality rights under s. 15(1) of the *Charter*. This is in accordance with established case law.

The court also concluded that s. 72(1) does not violate s. 15(1). The sections that prevented the class members from receiving survivors' pensions during the period between 1985 and 2000 were the opposite-sex definition of spouse that was in place before the *MOBA* amendments and the specific sections of the *MOBA*, not the cap on arrears (s. 72(1)), nor the limitation in respect of estate claims (s. 60(2)). Section 72(1) and s. 60(2) are non-discriminatory in their purpose and effect.

Having concluded that s. 60(2) and s. 72(1) did not violate s. 15(1) of the *Charter*, this court set aside the constitutional exemption granted by the trial judge.

The court left to the trial judge the question of what arrears are, in the result, owing to each class member.

INTEREST

The court concluded that the trial judge properly exercised her discretion to grant the class members pre-judgment interest on any pension payments that she finds owing to them.