

CANADA / JUDGMENT

Margolis v. The Queen

2001 FCT 85

COURT

Federal Court

DECIDED

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BETWEEN:

RUTH ANN MARGOLIS and THE ESTATE OF LEO MARGOLIS

PLAINTIFFS

- and -

HER MAJESTY THE QUEEN

DEFENDANT

REASONS FOR ORDER AND ORDER

CAMPBELL J.

- [1] Upon Dr. Leo Margolis' death in 1997 at the age of 69, the Government of Canada paid his surviving spouse a death benefit of \$37,200 which she claims is only 20 per cent of what it should be. The Defendant argues that, since the law provides for the benefit to be two years of Dr. Margolis' salary only up to the age of 60 and, thereafter, reduced by 10 per cent a year, the payment is the maximum allowed. Mrs. Margolis' contention is that the statutory provision which requires the reduction is contrary to s.15 of the Charter. [1] For the reasons which follow, I agree.

A. Agreed facts

- [2] The Plaintiff, Mrs. Ruth Ann Margolis, is the widow of Dr. Leo Margolis and the Executor of his estate, which is also a Plaintiff in the present action. Dr. Margolis was born on December 18, 1927, retired on January 11, 1997 after 45 years of distinguished employment with the Government of Canada as a research scientist, and passed away on January 13, 1997. At the time of his death, his spouse of 45 years was also 69 years of age.
- [3] On December 5, 1996, Dr. Margolis designated Mrs. Margolis as his beneficiary under the Supplementary Death Benefit Plan (the "SDB Plan") which applied to him during his employment and after retirement. Mrs. Margolis, thereby, became entitled to any benefit payable under the SDB Plan.
- [4] On or about February 24, 1997, Mrs. Margolis received from the Superannuation Directorate, Public Works and Government Services Canada, a payment of \$37,200 in accordance with Dr. Margolis' salary on retirement of \$93,000 per year, and the provisions of the Public Service Superannuation Act R.S.C. 1985, c.P-36, as amended by R.S.C. 1992, c.46, s.25 (the "Act") and the Supplementary Death Benefit Regulations C.R.C., c.1360, as amended (the "Regulations"). [2] The letter which accompanied the Payment stated that the payment represented the full benefits available to Mrs. Margolis under the SDB Plan.
- [5] Section 47(1) of the Act and s.15 of the Regulations [3] provided that the benefit payable under the SDB Plan was subject to a reduction of one-tenth for every year of age in excess of 60 attained by a participant. The Payment was calculated by reference to the reduction prescribed by s.47(1) of the Act and s.15 of the Regulations, with the result that Mrs. Margolis received only two-tenths of the benefit under the SDB Plan.

B. The issue

- [6] The question to be answered is whether s.47 of the Act and s.15 of the Regulations are contrary to s.15 of the Charter. It is important to note that, if a Charter breach is found, the Defendant chooses not to raise a justification under s.1 of the Charter.
- [7] As described below, since in the present case the parties agree that s.47 of the Act and s.15 of the Regulations impose differential treatment on the basis of age, the question is answered by determining whether the distinction constitutes discrimination.

C. Guidelines for determining whether a Charter breach exists

- [8] In *Law v. Canada (Minister of Citizenship and Immigration)* [1999] 1 S.C.R. 497 at paragraph 88, Justice Iacobucci suggests guidelines to be used in determining whether an impugned law offends s.15(1) of the Charter [4], and states the exercise to be as follows:

The approach adopted and regularly applied by this Court to the interpretation of s.15(1) focuses upon three central issues: (A) whether a law imposes differential

treatment between the claimant and others, in purpose or effect; (B) whether one or

more enumerated or analogous grounds of discrimination are the basis for the differential treatment; and (C) whether the law in question has a purpose or effect that is discriminatory within the meaning of the equality guarantee. The first issue is concerned with the question of whether the law causes differential treatment. The second and third issues are concerned with whether the differential treatment constitutes discrimination in the substantive sense intended by s.15(1).

- [9] As mentioned, in the present case the parties agree that s.47 of the Act and s.15 of the Regulations impose differential treatment on the basis of an enumerated ground, namely age. It was also agreed in the course of oral argument that, for the purpose of determining the issue in the present case, the treatment received by Dr. Margolis should be compared to that received by "any younger participant who had coverage under the SDB Plan".
- [10] Therefore, the question becomes that as stated in the guidelines in *Law* as follows: Does the differential treatment discriminate, by imposing a burden upon or withholding a benefit from the claimant in a manner which reflects the stereotypical application of presumed group or personal characteristics, or which otherwise has the effect of perpetuating or promoting the view that the individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect, and consideration?
- [11] Thus, given the agreements outlined above, in order to succeed, the Plaintiffs must only prove, on a balance of probabilities, that the effect of the impugned provisions is a violation of essential human dignity.

D. The nature of the SDB Plan

[12] A central feature of the arguments presented in the present case is the intent and purpose of the SDB Plan. On the authority of Law , while it is agreed that the Plaintiffs are not required to prove that the intent of Parliament in enacting the impugned legislation was discriminatory, [5] the Defendant argues that the intent and purpose of the legislation is important to determining whether its effect is discriminatory.

[13] The Plaintiffs argue that the SDB Plan is designed to be a contributory death benefit scheme which allows a surviving spouse to pay expenses consequent of the death of the employee, such as debts incurred by illness just preceding death, funeral expenses, and for other immediate family needs. The Defendant does not disagree with the Plaintiffs' characterization, but argues that the SDB Plan is really a type of group term life insurance. Thus, the Plaintiff argues that the SDB Plan is a death benefit scheme with attributes of a term life insurance plan, while the Defendant argues that the SDB Plan is a term life insurance plan with attributes of a death benefit scheme.

1. The historical context of the SDB Plan

[14] To prove the history of the SDB Plan, by agreement, numerous authentic government documents dating back to 1952 were admitted as evidence. In particular, I accept one of these documents as providing valuable and accurate information about the circumstances under which the SDB Plan came into existence and its evolution over years. Thus, as proof of the historical context of the SDB Plan, attached in the Appendix to these reasons is the filed extract from the document "Report on Supplementary Death Benefits and Survivor Income Insurance prepared for the Treasury Board of Canada, authored by H.D. Clark, dated June 1982. [6]

[15] It is agreed that the "Report" provides evidence that the dual purpose in introducing the SDB Plan was primarily to provide group life insurance, and at the same time, a death benefit.

[16] However, it is interesting to note that upon its introduction as legislation, the SDB Plan was described as a scheme of "contributory death benefits" with the reduction aspect being coined a "detail". In this respect, the following is an excerpt from the Hansard for the debate of May 26, 1954 quoting the Honourable Douglas Abbott, Minister of Finance, on the introduction of amendments which would put the SDB Plan into effect:

Mr. Speaker, the purpose of this bill is to supplement or round out the pension benefits provided under the Public Service Superannuation Act and the Defence Services Pension Act by adding to them a scheme of contributory death benefits.

It covers all public service employees who are contributing or who have completed their contributions under the superannuation act and all members of the regular armed forces.

...

This plan is primarily designed to provide funds which will be readily available to pay the inevitable expenses arising out of or consequential upon the last illness and death of a contributor. The contributions are designed to cover the benefits under the plan on a month-to-month basis.

...

The government contribution will take the form of the payment of one-sixth of the benefits of those who die while in the service or who had qualified for an immediate annuity upon retirement. This will replace the present gratuity of two months' salary on death which the government has been paying under section 58 of the Civil Service Act.

...

One further general point: It will be clear from a reading of this bill that it is not intended to provide for the normal life insurance requirements of individuals. It provides only a reasonable and moderate death benefit of a kind commonly made available to employees by a growing number of large private employers. Public servants, like all other citizens, will continue to make their own provision for their own individual life insurance requirements in accordance with their individual needs and circumstances.

Turning now to some of the details of the plan, I might mention that the amount of the benefit will be subject to reduction of one-tenth of the nominal maximum for that participant for each year that the participant's age exceeds 60. This is subject, however, to an over-all minimum of one-sixth of the salary while the person is still employed. A person who elects to contribute after retirement will be subject to the same reduction so that there will be no benefit available once that person is 70.

...

This step has been taken on the grounds that it is not usual for an employer to provide individual policies for his employees and that the introduction of this new plan of supplementary death benefits provides the best means of meeting the minimum financial needs on the death of an employee over and above the indirect protection given by other legislation. All policies issued under the Civil Service Insurance Act will, of course, remain in full force and effect. [7]

[17] Thus, I find from the record that, from the beginning, the SDB Plan was intended to be two things at the same time: a one-time death benefit payment to meet expenses incurred on account of death, and term insurance which would have a large payout before the age of 60, and a reduced payout thereafter. Therefore, it is not possible to characterize the benefit to be paid under the plan as either a death benefit or a term insurance benefit; it is a single concept which combines the two dissimilar ideas.

[18] As discussed below, the introduction of the two features of "life insurance" and "death benefit" in the same scheme under the label of "supplementary death benefits" is the source of the SDB Plan's weakness in the context of human rights legislation and the Charter.

[19] Whatever its intent and purpose, and however it is described, it is agreed that the basic salient features of the history of the SDB Plan as they affect the present claim are these: it came into force on January 1, 1955 as a replacement for the payment of a two month of salary "gratuity on the death of a public servant, and a then existing scheme of providing the option to civil servants to purchase individual life insurance; initially the new plan provided for the lump sum payment of a benefit of an amount equal to the annual salary of the participant up to a maximum of \$5,000; in 1960, the minimum benefit was set at \$500; in 1966, the \$5,000 maximum was removed; by 1985, the amount payable was equal to the salary of the participant, but the minimum benefit could not be less than one-sixth of salary or \$500, whichever was greater [8]; in 1992, the amount payable was increased to two times salary payable to both active employees and some former public servants, and the minimum payable increased to one-third of salary or \$5,000 whichever was greater [9]; and from the inception of the SDB Plan the basic benefit payable was subject to a reduction of ten percent for each year of age attained by the participant in excess of 60.

2. Forewarning of problems

[20] Prior to the passage of the SDB Plan, the reduction aspect came under criticism by the civil servants it was intended to benefit. Contained in a submission to the Parliamentary Standing Committee on Banking and Commerce presented by the then President of the Civil Service Association of Canada, I find the following passage to be a concise statement of an obvious flaw in the scheme:

Again, I would call your attention to the emphasis placed on the statement that this plan is primarily designed to provide funds which will be readily available to pay the inevitable expenses arising out of or consequential upon the last illness and death of a contributor. I am sure you will agree that these inevitable expenses do not become gradually less and less after age 60, and disappear entirely after age 70. If there is the need for \$5,000 to cover such expenses at age 60, surely there is the same or almost the same need for \$5,000 to cover these expenses at age 65, or age 70, or age 75. Why does a civil servant need a lesser amount, or nothing at all, for expenses of last illness or death when he may be retired on pension and his income much lower? This does not seem to make sense. [10]

[21] In addition, by 1980, the Canadian Human Right Commission identified the reduction aspect to be inconsistent with the then Human Rights Act, resulting in the Chief Commissioner of the Commission, R.G.L. Fairweather, writing to the then Minister of Justice, the Honourable Jean Chrétien, to voice this concern. [11]

[22] In addition, following the passage of the Charter, it appears that the Government of Canada was well aware of the opinion that, not only was the reduction aspect inconsistent with human rights principles, but it was in probable contravention of s.15 of the Charter as well. [12] Nothing turns on this proof of knowledge except that my reasons in this decision should not come as a surprise, in particular, since the Defendant is not raising justification of the reduction aspect under s.1 of the Charter.

E. Application of the Guidelines to the facts of the present case

- [23] While agreeing with the general intent of the SDB Plan advanced by the Plaintiffs, the Defendant's basic argument that the reduction on account of age is not a violation to the dignity of Mr. Margolis before he died, or his surviving spouse after his death, since the SDB Plan is a type of group term life insurance, and the reduction aspect is to be expected and accepted without complaint.
- [24] The Defendant's basic argument is supplemented by two ancillary arguments: the SDB Plan must be assessed as part of a sufficient package of survivor benefits which, in addition to the SDB Plan, includes a yearly benefit of 35 percent of the deceased's salary, and Canada Pension Plan benefits; and, assuming that an employee and his or her spouse are of the same relative age, survivors over the age of 60 have a general decreased need for a financial benefit.
- [25] The heart of the Plaintiffs' violation of human dignity argument is primarily concerned with the second of the Defendant's ancillary arguments.

F. Proof of discrimination

- [26] The central question in the present action is whether s.47 of the Act and s.15 of the Regulations are contrary to s.15 of the Charter by virtue of the reduction aspect of the SDB Plan.
- [27] As Justice Iacobucci in *Law* sets out in the summary of guidelines, the focus of a s.15(1) inquiry must be purposive and contextual in order to determine whether the age distinction in question demeans human dignity. One of the contextual factors influencing whether s.15(1) has been infringed is a pre-existing disadvantage, stereotype, prejudice, or vulnerability experienced by the individual or group concerned. While such a finding is not determinative of a violation of the Charter, the existence of such a pre-existing condition will favour a finding that s.15(1) has been infringed.
- [28] With respect to the burden on the Plaintiffs to prove discrimination, *Law* establishes that proof can be based on judicial notice of notorious and undisputed facts, combined with logical reasoning. [13] As a result, in the present case, apart from expert evidence on the features of Federal superannuation benefits, no viva voce evidence was presented.
- [29] No proof is needed to know that the Civil Service Association of Canada concern about the reduction aspect of the SDB Plan as quoted above is most apt. Of course the "death benefit" needs of a surviving spouse are the same whether a participant dies at age 60 or 70. In my opinion, it is illogical to maintain the contrary.

- [30] In my opinion, the conflict created by marrying a death benefit feature to a term insurance feature within a benefit concept such the SDB Plan, leads to the result that the reduction aspect introduced by the term insurance feature contaminates the whole scheme relative to s.15 of the Charter.
- [31] I find that the illogical nature of reducing a "death" benefit according to the age of a participant on death beyond 60, indeed, results in a violation of the human dignity of that participant and his or her surviving spouse. The effect of the message being communicated to the participant in such a plan over the age of 60 is that, compared to younger participants, your death, and the financial problems to be experienced by your surviving spouse on your death, are not as worthy of concern and support. I find that, having regard to s.15 of the Charter, this is untenable.
- [32] With respect to the argument that survivors over the age of 60 have a general decreased need for a financial benefit, I find that, even as the SDB Plan is one component of a package of survivor benefits, the premise has not been proved. Indeed, I find the opposite to be the case.
- [33] To prove this point, I do not need to rely on judicial notice, given the factual findings made in Law that there is increasing difficulty with which one can find and maintain employment as one grows older,[14] and that older surviving spouses, like surviving spouses who are disabled or who care for dependent children, are more economically vulnerable to the long-term effects of the death of a spouse. [15]
- [34] The effect of the message being communicated on this issue to a participant in the SDB Plan over the age of 60 is that, compared to younger participants, even though on your death your spouse will be economically vulnerable, merely because of your age on death, he or she is not as worthy of concern and support. For this reason, I also find that, as a violation of the human dignity of the participant and his or her surviving spouse, the reduction aspect of the SDB Plan is contrary to s.15 of the Charter.

G. The remedy

- [35] For the breach of the Plaintiffs' s.15 rights under the Charter, the Plaintiffs claim as damages the sum of \$148,800, being the difference between \$186,000, being the full amount of the benefit due under the SDB Plan without the reduction aspect, and the amount of the payment already received by the Plaintiffs, being \$37,200.
- [36] However, in oral argument, counsel for the Plaintiffs agreed that, if they are successful, since Dr. Margolis only paid premiums for the much reduced amount already paid to his surviving spouse, the damage claim should be recalculated to take account of the premiums that would have been due if the reduction aspect was not part of the SDB Plan. The Defendant agreed with this proposal. I believe that the most convenient way to arrive at the final damage award is to refer the calculation to a reference.

ORDER

For the reasons provided, I find that s.47(1) of the Public Service Superannuation Act R.S.C. 1985, c.P-36, as amended by R.S.C. 1992, c.46, s.25, and s.15 of the Supplementary Death Benefit Regulations C.R.C., c.1360, as amended, infringe the Plaintiffs' rights under s.15 of the Charter.

Accordingly, pursuant to s.24(1) of the Charter, I find it to be appropriate and just to award the Plaintiffs damages in the sum of \$148,800, less the amount of premiums that would have been paid under the impugned provisions without the reduction aspect specified in s.47(1).

Pursuant to Rule 153 of the Federal Court Rules, for the purpose of arriving at the final amount of the damage award, I refer to a reference, the matter of calculating the final damage award in accordance with the reasons provided herein.

"D.R. Campbell"

Judge

VANCOUVER

Appendix

Public Service Superannuation Act

R.S.C. 1985, c.P-36 as amended by R.S.C. 1992, c.46, s.25.

PART II

SUPPLEMENTARY DEATH BENEFITS

Interpretation

47(1) Definitions

47. (1) In this Part,

"basic benefit", with respect to a participant, means an amount equal to twice the salary of the participant, if that amount is a multiple of two hundred and fifty dollars, or an amount equal to the nearest multiple of two hundred and fifty dollars above twice the salary of the participant, if the first-mentioned amount is not a multiple of two hundred and fifty dollars, subject to a reduction of ten per cent, to be made as of such time as the regulations prescribe, for every year of age in excess of sixty attained by the participant, except that

- (a) in the case of a participant who is employed in the Public Service, the basic benefit shall not be less than
- (i) an amount equal to one third of the participant's salary, if that one-third is a multiple of two hundred and fifty dollars, or an amount equal to the nearest multiple of two hundred and fifty dollars above one third of the participant's salary, if that one-third is not a multiple of two hundred and fifty dollars, or

(ii) five thousand dollars,

whichever is the greater,

- (b) subject to paragraphs (c), in the case of an elective participant who, on ceasing to be employed in the Public Service, or to be a member of the regular force, was entitled under Part I to an immediate annuity, the basic benefit shall not be less than two hundred and fifty dollars, and
- (c) in the case of an elective participant who makes an election under subsection 52(2), the basic benefit shall be five hundred dollars.

Loi sur la pension de la fonction publique

PARTIE II

PRESTATIONS SUPPLÉMENTAIRES DE DÉCÈS

Définitions et interprétation

47(1) Définitions

47. (1) Les définitions qui suivent s'appliquent à la présente partie.

« *_prestation de base_* » Soit le montant égal au double du traitement du participant si ce montant est un multiple de deux cent cinquante dollars, soit le montant égal au plus petit multiple de deux cent cinquante dollars qui dépasse le double du traitement du participant si le montant mentionné en premier n'est pas un multiple de deux cent cinquante dollars, sous réserve d'une déduction de dix pour cent, faite à compter de la date prévue par les règlements, pour chaque année de l'âge du participant ultérieure à soixante ans, sauf que_ :

- a) pour un participant employé dans la fonction publique, la prestation de base ne peut être inférieure au plus élevé des montants suivants_:
- (i) un montant égal au tiers de son traitement si ce tiers est un multiple de deux cent cinquante dollars, ou un montant égal au plus petit multiple de deux cent cinquante dollars qui dépasse le tiers de son traitement si ce tiers n'est pas un multiple de deux cent cinquante dollars,

(ii) cinq mille dollars;

- b) sous réserve des alinéas c), dans le cas d'un participant volontaire qui, au moment où il a cessé d'être employé dans la fonction publique ou au moment où il a cessé d'être un membre de la force régulière, avait droit, aux termes de la partie I, à une pension immédiate, la prestation de base ne peut être inférieure à cinq mille dollars;
- c) dans le cas d'un participant volontaire qui effectue un choix en vertu du paragraphe 52(2), la prestation de base est de cinq cents dollars.

Supplementary Death Benefit Regulations

C.R.C., c.1360, as amended.

Section 15

Reductions in Benefits and Contributions

15. The reductions referred to in the definition « basic benefit » in subsection 39(1) of the Act shall be made,
- (a) in the case of an elective participant who ceased to be employed in the Public Service without having become entitled to an immediate annuity or annual allowance under Part I of the Act, on each anniversary of the day on which an annual contribution is payable by the participant, following or corresponding to the 61st birthday of the participant, whichever is the earlier; and
 - (b) in the case of a participant, other than a participant described in paragraph (a), who has attained the age of 61 years, on April 1st and October 1st of each year, whichever date immediately follows the anniversary of the birthday of the participant.

Règlements sur les prestations supplémentaires de décès

Article 15

Déductions des prestations et des contributions

15. Les déductions dont il est question dans la définition de la « prestation de base » donnée au paragraphe 39(1) de la Loi s'effectuent,
- a) dans le cas d'un participant par choix qui a cessé d'être employé dans la Fonction publique sans avoir droit à une pension à jouissance immédiate ou à une allocation annuelle en vertu de la Partie 1 de la Loi, à chaque anniversaire de la date à laquelle il doit payer une contribution annuelle, qui suit son 61^e anniversaire de naissance ou qui y correspond, en prenant la date la plus rapprochée; et
 - b) dans le cas d'un autre participant que celui visé à l'alinéa a), qui a atteint l'âge de 61 ans, le 1^{er} avril ou le 1^{er} octobre de chaque année, en prenant la date qui suit de plus près l'anniversaire de naissance du participant.

Law v. Canada (Minister of Citizenship and Immigration) [1999] 1 S.C.R. 497

The approach to analysing a claim of discrimination under s.15(1) of the Charter consists of three broad inquiries as set out by Justice Iacobucci in *Law v. Canada (Minister of Citizenship and Immigration)* [1999] 1 S.C.R. 497 at paragraph 88 as follows:

- (1) It is inappropriate to attempt to confine analysis under s. 15(1) of the Charter to a fixed and limited formula. A purposive and contextual approach to discrimination analysis is to be preferred, in order to permit the realization of the strong remedial purpose of the equality guarantee, and to avoid the pitfalls of a formalistic or mechanical approach.

(2) The approach adopted and regularly applied by this Court to the interpretation of s. 15(1) focuses upon three central issues:

(A) whether a law imposes differential treatment between the claimant and others, in purpose or effect;

(B) whether one or more enumerated or analogous grounds of discrimination are the basis for the differential treatment; and

(C) whether the law in question has a purpose or effect that is discriminatory within the meaning of the equality guarantee.

The first issue is concerned with the question of whether the law causes differential treatment. The second and third issues are concerned with whether the differential treatment constitutes discrimination in the substantive sense intended by s. 15(1).

(3) Accordingly, a court that is called upon to determine a discrimination claim under s. 15(1) should make the following three broad inquiries:

(A) Does the impugned law (a) draw a formal distinction between the claimant and others on the basis of one or more personal characteristics, or (b) fail to take into account the claimant's already disadvantaged position within Canadian society resulting in substantively differential treatment between the claimant and others on the basis of one or more personal characteristics?

(B) Is the claimant subject to differential treatment based on one or more enumerated and analogous grounds?

and

(C) Does the differential treatment discriminate, by imposing a burden upon or withholding a benefit from the claimant in a manner which reflects the stereotypical application of presumed group or personal characteristics, or which otherwise has the effect of perpetuating or promoting the view that the individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect, and consideration?

Purpose

(4) In general terms, the purpose of s. 15(1) is to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration.

(5) The existence of a conflict between the purpose or effect of an impugned law and the purpose of s. 15(1) is essential in order to found a discrimination claim. The determination of whether such a conflict exists is to be made through an analysis of the full context surrounding the claim and the claimant.

Comparative Approach

- (6) The equality guarantee is a comparative concept, which ultimately requires a court to establish one or more relevant comparators. The claimant generally chooses the person, group, or groups with whom he or she wishes to be compared for the purpose of the discrimination inquiry. However, where the claimant's characterization of the comparison is insufficient, a court may, within the scope of the ground or grounds pleaded, refine the comparison presented by the claimant where warranted. Locating the relevant comparison group requires an examination of the subject-matter of the legislation and its effects, as well as a full appreciation of context.

Context

- (7) The contextual factors which determine whether legislation has the effect of demeaning a claimant's dignity must be construed and examined from the perspective of the claimant. The focus of the inquiry is both subjective and objective. The relevant point of view is that of the reasonable person, in circumstances similar to those of the claimant, who takes into account the contextual factors relevant to the claim.
- (8) There is a variety of factors which may be referred to by a s. 15(1) claimant in order to demonstrate that legislation demeans his or her dignity. The list of factors is not closed. Guidance as to these factors may be found in the jurisprudence of this Court, and by analogy to recognized factors.
- (9) Some important contextual factors influencing the determination of whether s. 15(1) has been infringed are, among others:
- (A) Pre-existing disadvantage, stereotyping, prejudice, or vulnerability experienced by the individual or group at issue. The effects of a law as they relate to the important purpose of s. 15(1) in protecting individuals or groups who are vulnerable, disadvantaged, or members of "discrete and insular minorities" should always be a central consideration. Although the claimant's association with a historically more advantaged or disadvantaged group or groups is not per se determinative of an infringement, the existence of these pre-existing factors will favour a finding that s. 15(1) has been infringed.
- (B) The correspondence, or lack thereof, between the ground or grounds on which the claim is based and the actual need, capacity, or circumstances of the claimant or others. Although the mere fact that the impugned legislation takes into account the claimant's traits or circumstances will not necessarily be sufficient to defeat a s. 15(1) claim, it will generally be more difficult to establish discrimination to the extent that the law takes into account the claimant's actual situation in a manner that respects his or her value as a human being or member of Canadian society, and less difficult to do so where the law fails to take into account the claimant's actual situation.

(C) The ameliorative purpose or effects of the impugned law upon a more disadvantaged person or group in society. An ameliorative purpose or effect which accords with the purpose of s. 15(1) of the Charter will likely not violate the human dignity of more advantaged individuals where the exclusion of these more advantaged individuals largely corresponds to the greater need or the different circumstances experienced by the disadvantaged group being targeted by the legislation. This factor is more relevant where the s. 15(1) claim is brought by a more advantaged member of society.

and

(D) The nature and scope of the interest affected by the impugned law. The more severe and localized the consequences of the legislation for the affected group, the more likely that the differential treatment responsible for these consequences is discriminatory within the meaning of s. 15(1).

(10) Although the s. 15(1) claimant bears the onus of establishing an infringement of his or her equality rights in a purposive sense through reference to one or more contextual factors, it is not necessarily the case that the claimant must adduce evidence in order to show a violation of human dignity or freedom. Frequently, where differential treatment is based on one or more enumerated or analogous grounds, this will be sufficient to found an infringement of s. 15(1) in the sense that it will be evident on the basis of judicial notice and logical reasoning that the distinction is discriminatory within the meaning of the provision.

REPORT ON SUPPLEMENTARY DEATH BENEFITS

AND SURVIVOR INCOME INSURANCE

prepared for

Treasury Board of Canada

H.D. Clark

June, 1982 [16]

HISTORICAL BACKGROUND

The introduction of the Supplementary Death Benefit Plan (SDB) as an additional fringe benefit for contributors under the new Public Service Superannuation Act (PSSA) was brought about by the first amendment to that Act in 1954. This step was taken in part as another of a series of measures to provide both "temporary" employees and "permanent" employees with the same types of benefits. The amending legislation was extended to cover members of the regular forces and, originally, had been intended to cover the RCMP as well. However, that Force was not covered because it decided to introduce a plan of its own, insured by private underwriters, without waiting for the SDB plan to be developed in final form.

Prior to the coming into force of the PSSA on January 1st, 1954, only permanent employees had been covered for pension purposes by the Civil Service Superannuation Act. Similarly, life insurance coverage had been available under the Civil Service Insurance Act only to permanent employees. All that temporary employees were able to do under those two older Acts was to contribute under the Superannuation Act to the Retirement Fund, which was no more than a compulsory savings scheme from which a return of contributions with interest was payable on termination of employment. Prior to 1955 a gratuity of two months' salary had been payable under the Civil Service Act in respect of either a permanent or a temporary employee who died after the completion of two years of service.

The Committee of senior civil servants, which had prepared the report in 1869 which led to the first Superannuation Act for permanent employees in 1870, included a recommendation that life insurance be provided at the same time as part of a general superannuation scheme. However this recommendation was not accepted by the government of the day. It was not until 1893 that the Civil Service Insurance Act was introduced to provide permanent employees with the opportunity to purchase individual life insurance policies of various types on a voluntary basis. As time went on, the favourable rates used in setting the premiums, as well as the assumption of the costs of administration, meant that this insurance plan was being subsidized by the Government to an increasing degree even though it did not pay a specific share of the individual premium cost.

As a result, in part, of the growing concern over this development, plans to revise the Civil Service Insurance Act by reducing the subsidies and otherwise bringing it up to date were well advanced at the same time as the policy of extending existing benefit programs to temporary employees was gaining acceptance. Concurrently, however, there were increasing numbers of requests from different groups of employees for the introduction of group life insurance plans similar to those which were becoming commonly, though not generally, accepted in the private sector in the years immediately following World War II. These requests came primarily from groups of employees who had been excluded from the old Civil Service Superannuation Act. The advantages of the lower administrative and premium costs of such group plans, in comparison with the individual policy approach under the Civil Service Insurance Act, were readily apparent.

THE INITIAL SDB PLAN

Not surprisingly, the resolution of these various proposals for change was the termination of the issue of new policies under the Civil Service Insurance Act and the introduction of what was really a group life insurance plan under Part II of the PSSA which came into force on January 1st, 1955. It was decided as a matter of government policy to refer to it as a scheme of supplementary death benefits after titles of separate Acts such as a Public Service Insurance Act and a Public Service Death Benefit Act had been considered and rejected.

The provisions of this new plan were finalized after confidential discussions with the National Joint Council of the Public Service of Canada, which endorsed the broad outlines of the plan as a whole, making a number of suggestions, most of which were incorporated in the legislation.

The plan covered all public service employees who were contributing or had completed their contributions under the Superannuation Act, unless they were employed on July 1, 1954 and opted out before November 1, 1954. Similar conditions of eligibility applied to members of the regular forces.

Initially the amount of the death benefit in the case of a public service employee was the employee's annual salary adjusted upwards where necessary to make it an even multiple of \$250, but with an upper limit of \$5,000. A simpler approach was taken for members of the regular forces where the benefit was \$3,000 for those below the rank of Chief Petty Officer in the navy and equivalent ranks in the army and the air force, and \$5,000 for all others.

An employee could elect to remain covered as an elective participant upon retirement or earlier termination of service following a minimum of five years of service substantially without interruption immediately prior to that time.

The amount of the benefit for both active and former employees was subject to a reduction of one-tenth of the nominal full amount of benefit for each participant for each year that the participant's age exceeded 60, subject also to an overall minimum of one-sixth of the salary while the participant was still employed regardless of age. In the case of a former employee, no benefit was payable after that person had attained the age of 70.

The rate of contribution for active employees and elective participants who retired with immediate annuities at age 60 or over, or because of disability, was 10 cents a month for each \$250 of benefit coverage, i.e., 40 cents per \$1,000 per month. Any other elective participant had to cover the actual cost at a rate related to age on ceasing to be employed and to sex. The Government contribution took the form of paying one-sixth of the benefits of those who died in service or after qualifying for an immediate annuity on retirement. This replaced the gratuity of two months' salary payable on death of an employee under the Civil Service Act, as mentioned earlier, and thus was designed so as not to create any substantial increase in cost to the government in respect of employees.

The Minister of Finance, who introduced the legislation, explained that this "death benefit" plan was intended to provide funds which would be readily available to pay the inevitable expenses arising out of or consequential upon the last illness and death of a participant. The Minister made it clear that these death benefits were not intended to provide for the normal life insurance requirements of individuals.

CHANGES IN THE SDB PLAN

While there have been several changes in the SDB since it commenced in 1955, few of these could be called major changes.

The first change in the benefit structure occurred in 1960 when it was provided that in no case would the benefit be less than \$500. Another amendment in that year provided a paid-up benefit of \$500 to participants who have attained age 65, who have retired with immediate annuities or are still employed and have five years of employment in the Public Service, five years of service in the regular armed forces, or five years as a participant in the SDB, or any combination of these, substantially without interruption. This paid-up benefit does not terminate at age 70 but is retained for life at no cost to the participant, whose contributions drop immediately by 20 cents a month. The Government contributes the lump sum amount required to purchase the paid-up benefit when each participant becomes eligible for it.

The second substantial change took place in 1966 when the \$5,000 ceiling on the salaries used to determine benefit and contribution levels was removed. In that year, also, the coverage of regular forces participants under the PSSA ceased on the enactment of a corresponding Part III of the Canadian Forces Superannuation Act (CFSA).

There has been no change in the basic employee contribution rate of 40 cents per \$1,000 of benefit protection and, according to the latest actuarial report on this plan as of December 31st, 1977, none is warranted. The actuaries have stated that, while at present an employee contribution rate of 331 per \$1,000 would be sufficient for the portion of the cost not provided by the Government, the current rate of 40 ¢ should be retained in order to build up contingency reserves.

CURRENT PRESSURES FOR CHANGE

The absence of any substantial developments under the SDB Plan during the last fifteen years should not be regarded as indicating that participants in the plan have been completely satisfied with it. In fact, the situation is quite the reverse, although it should be recognized that some of the pressure and need for change has been reduced by the availability of group insurance plans to members of various employee organizations as well as by the introduction of the Public Service Management Insurance Plan (PSMIP) in 1968 for public servants not eligible for inclusion in bargaining units.

A combination of other considerations was initially responsible for the absence of change in this plan in recent years. These considerations arose in part out of the report on "Employer-Employee Relations in the Public Service of Canada" by Mr. Jacob Finkelman who recommended, in effect, that Part II of the PSSA, which consists of the SDB Plan, be made subject to collective bargaining under the Public Service Staff Relations Act. While the Government, as employer, did not object to that recommendation, action arising out of the recommendation in the Finkelman Report regarding death benefits has not been taken.

The second major delaying factor was the uncertainty as to which benefit provisions would be regarded as discriminatory under the provisions of the Canadian Human Rights Act of 1977 and the Benefit Regulations made thereunder, which came into effect on March 1st, 1980. In accordance with Section 47 of that Act, the Canadian Human Rights Commission has made a Report to Parliament through the Minister of Justice on the provisions of the PSSA, inter alia, which are inconsistent with the principles of the human rights legislation.

The two provisions of the SDB Plan which the Commission reported as being discriminatory between employees arise out of differentiation on grounds of age, namely:

- (1) the reduction of the amount of the basic death benefit by one-tenth for every year of age in excess of sixty of an employee; and
- (2) the reduction of 20 cents a month in the premium payable by employees who have attained age 65 and qualified for the paid-up death benefit of \$500.

The President of the Treasury Board referred the Report of the Commission to his Advisory Committee on the PSSA. The Committee recommended that no immediate action be taken with regard to those particular areas of discrimination which it preferred to consider in the course of the full scale review of survivor benefits under the various public pension statutes which is presently under way. The Minister agreed to this proposal to defer action to deal with these discriminatory features of the SDB Plan. However a point to bear in mind in this regard is that any proposal to amend any benefit provisions should be considered in the light of its acceptability under human rights legislation before going too far in the development of the details of such an amendment.

Specific recommendations for two benefit improvements have been made by the former President of the Public Service Alliance of Canada. The first of these would double the basic benefit level with the additional coverage being voluntary. The second recommendation would increase the paid-up benefit at age 65 from \$500 to \$2,500. The benefit improvements under this proposal were to be subject to an unspecified degree of employer-employee cost-sharing of any additional premiums required.

There have been requests also for the introduction of an income continuation insurance type of plan which would provide benefits in the form of annuity income instead of additional lump sum benefits to compensate surviving dependents of deceased shorter service employees for the loss of income before substantial survivor annuity benefits are available under the PSSA.

The need for an increase in the basic benefit or the introduction of a new survivor income benefit type of plan is seen to be greatest in the case of generally younger employees with young families with relatively short pensionable service and consequently small survivor benefits under the PSSA.

Thus while employees are seeking improved benefits in the event of death, they are also seeking greater flexibility in the choice of those benefits by being given the option of higher lump sum benefits or of survivor income benefits depending on their needs as circumstances change from time to time during their careers. Requests have been made as well for additional life insurance for employees subject to special risks and on accidental death.

In addition there have been repeated questions over the need to maintain the present level of SDB contribution rates. These questions have been encouraged by the lower overall rates of contribution required under corresponding death benefit plans for provincial civil servants, coupled with the fact that under those plans the employers contribute 50% and sometimes more, which represent higher shares of the premium cost than the employer contributes under the SDB. A summary of the provincial plans is given in Appendix A, which suggests that the higher costs under the federal plan arise from the degree to which the federal pensioners' premiums are subsidized by the active employees' premiums as shown in Table I on page 7. Appendix A also shows that, except for Quebec, the provincial plans are underwritten by private insurance companies. This in turn raises the question as to whether the SDB should not be underwritten in the same way.

Appendix B gives a summary of the life insurance plan for federal government employees in the U.S.A. which provides another basis for comparison. It should be noted that the higher benefits available to employees under age 45 in that plan would contravene the requirements of Canadian human rights legislation.

VIEW OF POSSIBLE CHANGES

Discrimination under Human Rights Legislation

It is understood that the decision to defer amendments to remove the discriminatory features from the SDB plan is not because of any disagreement with the Canadian Human Rights Commission but simply a matter of appropriate timing in order to make those amendments coincide with others which may result from the general study of survivor benefits which is now under way. Accordingly, in the following review of other possible changes, it is assumed that the reductions in the amount of the basic amount of the death benefit after attaining age sixty will not occur so long as a participant in the plan is employed in the Public Service. The cost of this is estimated to be about 0.048% of the insured salary levels under the plan. It is also assumed that the paid-up death benefit will not be provided to those participants who are otherwise eligible until the later of retirement or attainment of age 65. A very small reduction in cost will result from this change.

[1]

The present action concerns the following sections of the Canadian Charter of Rights and Freedoms: Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, C. 11.

1. The Canadian Charter of Rights and Freedoms 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.
15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Charte canadienne des droits et libertés:

1. La Charte canadienne des droits et libertés garantit les droits et libertés qui y sont énoncés. Ils ne peuvent être restreints que par une règle de droit, dans des limites qui soient raisonnables et dont la justification puisse se démontrer dans le cadre d'une société libre et démocratique.
15. (1) La loi ne fait acception de personne et s'applique également à tous, et tous ont droit à la même protection et au même bénéfice de la loi, indépendamment de toute discrimination, notamment des discriminations fondées sur la race, l'origine nationale ou ethnique, la couleur, la religion, le sexe, l'âge ou les déficiences mentales ou physiques.
- [2] These provisions are quoted in the Appendix to these reasons.
- [3] A further amendment has been made by R.S.C. 1999, c.34, s.98(1), but as this occurred after the death of Dr. Margolis, this most recent amendment is not relevant in the present case.
- [4] The lengthy summary of the guidelines as stated by Justice Iacobucci in Law found at paragraph 88 of the decision is quoted in the Appendix.
- [5] Law, paragraph 80.
- [6] Plaintiffs' Brief of Documents, Tab 10.
- [7] Ibid, Tab 3.
- [8] Public Service Superannuation Act R.S.C. 1985, c.P-36, s.47.
- [9] R.S.C. 192, c.46, s.25. By R.S.C. 1999, c.34, s.98(1) the benefit now payable is an amount equal to twice the salary of the participant with a minimum benefit of not less than one-third of the participant's salary or \$10,000, whichever is greater.
- [10] Ibid, Tab 4.
- [11] Ibid, Tab 5. This concern was mentioned in the 1982 "Report on Supplementary Death Benefits and Survivor Income Insurance" mentioned above.
- [12] Ibid, Tab 13, "Draft Policy Development Discussion Paper, Life Insurance - SDB/GLIP", p.5.
- [13] Law, paragraph 77.

[14] Ibid, paragraph 101.

[15] Ibid, paragraph 103.

[16] Plaintiffs' Brief of Documents, Tab 10.

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