Federal Court Cour fédérale

Date: 20130618

Docket: T-1999-11

Citation: 2013 FC 683

Ottawa, Ontario, June 18, 2013

PRESENT: The Honourable Mr. Justice Scott

BETWEEN:

SHIRLEY NASH

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

and

MARIE-ANNE VALLÉE

Mise-en-cause

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] This is an application for judicial review of a decision rendered by the Public Service Pension Centre (the Pension Centre) of Public Works and Government Services Canada to apportion a survivor allowance between Ms. Shirley Nash (the Applicant) and Ms. Marie-Anne

Vallée (the Mise-en-cause), based on their respective years of cohabitation with the deceased contributor, Mr. Barry Myers (Mr. Myers), in accordance with the *Public Service Superannuation Act*, RSC, 1985, c P-36 [*PSSA*].

[2] The Applicant is also challenging the constitutionality of subsections 3(1), 25(4), 25(4.1) 25(10) and 25(11) of the *PSSA* on the grounds that they infringe subsection 15(1) of the *Canadian Charter of Rights and Freedoms,* Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

[3] For the reasons that follow this application for judicial review and the constitutional challenge are dismissed.

II. The facts

[4] Mr. Myers was a federal public servant and consequently deemed a "contributor" of the Public Service Pension Fund under the *PSSA*.

[5] The Mise-en-cause married Mr. Myers in 1961 and, despite having separated many years earlier, remained legally married to him until his death on February 1, 2009.

[6] On June 20, 2002, the Applicant and Mr. Myers were married believing the divorce between Mr. Myers and the Mise-en-cause had been finalized earlier in 2002.

[7] On March 5, 2010, the Superior Court of Quebec in *Droit de la famille — 10456*, 2010 QCCS 849 [*10456*], declared the divorce between Mr. Myers and the Mise-en-cause null and found that their marriage was only dissolved with Mr. Myers' death on February 1, 2009. As a result, the Court also declared the marriage between the Applicant and Mr. Myers null.

[8] The Applicant filed a motion for putative effects pursuant to section 382 of the *Civil Code of Québec* [*CCQ*]. On February 14, 2012, the Superior Court of Quebec in *Droit de la famille — 12246*, 2012 QCCS 489 [*12246*] found that the Applicant married Mr. Myers in good faith and granted the motion for the putative effects of the marriage including the liquidation of the couple's patrimonial rights. The Court, however, ordered that survivor benefits under the Quebec Pension Plan (Régime des Rentes du Québec) be paid exclusively to the Mise-en-cause.

[9] The Court of Appeal, in its judgment dated March 18, 2013, allowed the appeal filed by Shirley Nash in part and struck paragraphs 73 ,74 and 75 of Justice Piché's decision in *12246* cited above, for want of jurisdiction and reaffirmed that Shirley Nash, the Applicant, married Mr. Myers in good faith on June 20, 2002, and was entitled to both the putative effects of the marriage and the liquidation of the couple's patrimonial rights pursuant to the *CCQ*;

[10] Both the Applicant and the Mise-en-cause applied to the Pension Centre for a survivor allowance under the *PSSA*. On April 12, 2011, the Pension Centre wrote to the Applicant and the Mise-en-cause to inform them that, pursuant to subsections 25(10) and 25(11) of the *PSSA*, the survivor allowance would be apportioned between them based on the number of years each of them

lived with Mr. Myers. The Pension Centre also requested that both the Applicant and the Mise-en-cause provide evidence establishing their respective periods of cohabitation with Mr. Myers.

[11] On May 30, 2011, the Applicant wrote to the Pension Centre specifying that she would not be submitting evidence of cohabitation with Mr. Myers because she was his wife and believed to be entitled to receive the entire survivor allowance.

[12] The Pension Centre notified the Applicant that she wouldn't be considered for any apportionment of the survivor allowance if she failed to submit the evidence requested. The Applicant then complied on August 2, 2011, and sent evidence of her years of cohabitation.

[13] After reviewing the evidence submitted by the Applicant and the Mise-en-cause, the Pension Centre decided that the survivor allowance (approximately $ 2 567.77 CAD per month) be apportioned between the survivors on a 21: 14 ratio in favour of the Mise-en-cause. The Applicant and Mise-en-cause were informed of the decision by letters dated December 16, 2011 and December 20, 2011 respectively.

III. Legislation

[14] The applicable sections of the *Public Service Superannuation Act*, RSC, 1985, c P-36 and of the *Canadian Charter of Rights and Freedoms,* Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 are appended to this decision.

IV. Issues and standard of review

A. Issues

1. ***Did the Pension Centre err in apportioning the survivor allowance between the Applicant and the Mise-en-cause?***
2. ***Do subsections 3(1), 25(4), 25(4.1), 25(10) and 25(11) of the PSSA violate subsection 15(1) of the Charter in a manner not justified by section 1?***

B. Standard of review

[15] The first issue involves the application of the law to a set of facts and is therefore a question of mixed fact and law. The applicable standard of review is reasonableness (see *Public Service Alliance of Canada v Canada (Attorney General)*, 2008 FC 474 at para 18; *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47 [*Dunsmuir*]).

[16] The Charter challenge is raised by the Applicant for the first time in this judicial review. The Tribunal's decision did not deal with the Charter challenge and consequently, there is no applicable standard of review (see *Warman v Tremaine,* 2008 FC 1032 at para 13).

V. Parties' submissions

A. Applicant's submissions

[17] The Applicant submits that the Pension Centre erred in splitting the survivor allowance under subsection 25(10) of the *PSSA* because it was outside of the Pension Centre's jurisdiction to determine the validity of the Applicant's marriage to Mr. Myers. The Pension Centre should have relied on the marriage certificate between the Applicant and Mr. Myers dated June 20, 2002 and the decision in *12246*, cited above and not divide the survivor pension benefits between the Applicant and the Mise-en-cause. The Applicant asserts that she is the only survivor spouse of Mr. Myers and, as a result, subsection 25(10) of the *PSSA* was not relevant in attributing the survivor pension benefits.

[18] The Applicant also argues that the Pension Centre failed to observe the principles of natural justice after it was notified that the she was bringing a motion for putative effects before the Superior Court of Quebec. According to the Applicant, the Pension Centre should have waited until a judgment had been rendered on that motion. By failing to do so, the Pension Centre prevented the Applicant from presenting all of her evidence. The Applicant submits that the Pension Centre "should have suspended [its] decision in order to have complete proof before rendering a decision" (Applicant's Memorandum, para 19).

[19] The Applicant also contends that subsections 3(1), 25(4.1), 25(10) and 25(11) of the *PSSA* are unconstitutional because they violate section 15 of the *Charter* as these provisions create a

distinction based on marital status. According to the Applicant, the aforementioned subsections make "a distinction between a survivor spouse that is legally married and a survivor spouse whose effects were given by a Judgement as the putative spouse (spouse in good faith)" (Applicant's Memorandum, para 12). The Applicant submits that the challenged provisions are silent on the possibility of receiving survivor pension benefits when a spouse is declared a putative spouse (Applicant's Memorandum, para 10).

[20] The Applicant also argues that the decision from the Pension Centre is inequitable because despite being entitled to all the effects of a putative marriage, pursuant to the decision of the Quebec Court of Appeal, she is being treated as a common law spouse and consequently, only entitled to 40% of the survivor benefits contrary to Mr. Myers' wishes.

B. Respondent's submissions

[21] The Respondent submits that the Applicant's contention that she should be regarded as Mr. Myers' only married spouse under subsection 3(1) of the *PSSA* "simply because she was given the putative effects of marriage would result in the disentitlement of the lawful wife of the contributor, the Mise-en-cause" (Respondent's Memorandum, para 39).

[22] The Respondent contends that the rights of a putative spouse are subject to those of a lawful married spouse. Such was the conclusion of the Supreme Court of Canada in *Stephens v Falchi*, [1938] SCR 354, where at page 368, Chief Justice Duff found the following:

> "My view summarized in a word is that the marriage between the respondent and the putative wife, having been a marriage in good

> faith, a putative marriage in the sense of the Italian law as well as of the law of Quebec, the civil effects of which the putative husband is entitled to the benefit do not necessarily rest upon the hypothesis that he acquired the status of husband of Marguerite Claire Stephens, or that she acquired his nationality or his domicile, but simply upon the fact that the marriage was entered into in good faith a fact which has certain juridical consequences. These consequences would appear (*Berthiaume v. Dastous*)[15], to include quoad property such consequences of a real marriage as are consistent with the nonexistence of a real marriage and, in the case of a bigamous marriage, such as are consistent with the continued existence and recognition of the status and rights of the lawful husband arising out of the lawful marriage." [Emphasis added by the Respondent]

[23] The Respondent summarizes the Applicant's claim as "[i]n essence, […] asking this Court to confer more legal rights to a "putative spouse" whose marriage is null than to a lawful married spouse" (Respondent's Memorandum, para 43). In light of the above, the Respondent concludes that the Pension Centre could not award the full survivor allowance to the Applicant on the basis that she was the only married spouse of Mr. Myers under subsection 3(1) of the *PSSA*.

[24] Regarding the Applicant's *Charter* challenge, the Respondent argues that the Applicant's subsection 15(1) claim fails to pass the first step of the test reaffirmed by the Supreme Court of Canada in *Withler v Canada (Attorney General)*, [2011] 1 SCR 396 [*Withler*]. In order for the Applicant's challenge to succeed, she must show that: 1) the *PSSA* provisions create a distinction based on an enumerated or analogous ground; and 2) the distinction creates a disadvantage by perpetuating prejudice or stereotyping (see *Withler*, cited above, at para 30). The Respondent submits that the alleged distinction between a legally married spouse and a putative spouse) is not an analogous ground of discrimination within the meaning of subsection 15(1) of the *Charter*.

[25] While the Respondent acknowledges that marital status is an analogous ground of discrimination, that ground was used to describe the legal distinction between married and common law spouses. The Supreme Court in *Miron v Trudel*, [1995] 2 SCR 418 [*Miron*], found that marital status was an analogous ground using, among other reasons, the following indicators: 1) discrimination on the basis of marital status impacts an individual's sense of worth and dignity in the sense that it touches a person's "freedom to live life with the mate of one's choice in the fashion of one's choice" (*Miron*, cited above, at para 151); 2) "[p]ersons involved in an unmarried relationship constitute an historically disadvantaged group" (*Miron* at para 152); and 3) "marital status often lies beyond the individual's effective control" (*Miron* at para 153) and is, in that sense, an immutable characteristic.

[26] The Respondent maintains that, unlike common law spouses, putative spouses do not constitute a historically disadvantaged group, nor is that status an immutable characteristic. Section 382 of the CCQ has a remedial purpose, it does not create a disadvantage, nor does it create a legal distinction which violates the dignity and freedom of individuals. Finally, the treatment the Applicant received under the *PSSA* was not due to the status of her relationship with Mr. Myers but to the continued validity of the Mise-en-cause's marriage to him.

[27] The Respondent submits that, in this context, a subsection 15(1) claim "should focus on determining whether the *PSSA* creates a distinction between married spouses and cohabiting spouses" (Respondent's Memorandum, para 57). The Respondent argues that the *PSSA* does not create such a distinction in treatment based on marital status. Under the *PSSA*, married and cohabitating partners receive equal treatment. For example, in cases like the one at bar where a

married and a cohabitating spouse co-exist at the time of the contributor's death, each spouse is awarded a portion of the survivor allowance based on the number of years they respectively lived with the deceased. Indeed, had Mr. Myers and the Mise-en-cause been divorced at the time of Mr. Myers' death, the Applicant would have been entitled to the entire survivor allowance. The Respondent concludes that the impugned provisions do not create a distinction based on marital status and the Applicant is not the subject of discrimination.

[28] The Respondent submits in the alternative that should the Court find that the impugned provisions do create a distinction, then that distinction is not discriminatory because the provisions do not serve to perpetuate a prejudice against or reinforce stereotypes of cohabitating spouses. The apportionment of the survivor pension between a married and a cohabitating spouse is not meant to imply that the latter's relationship is less worthy of recognition. The provisions simply address the fact that both spouses may be economically dependent on the contributor at the time of his death. Indeed, both the Supreme Court and the Federal Court of Appeal have recognized that, barring a formalized separation and related financial settlement, married but separated spouses still owe each other financial obligations (see *Hodge v Canada (Minister of Human Resources Development)*, 2004 SCC 65 at para 41; *Roy v Canada*, 2003 FCA 320 at paras 81-83).

[29] While the Respondent recognizes that, in this particular situation, it is understandable that the Applicant takes issue with the apportionment of the survivor allowance, the Supreme Court of Canada has found that "it is in the nature of a pension benefits scheme that it must balance different claimants' interests, and cannot be perfectly tailored to every individual's personal circumstances" (*Withler*, cited above, at para 73).

[30] Finally, should this Court find that the impugned provisions violate subsection 15(1), the Respondent submits that they are justified under section 1 of the *Charter*.

C. Mise-en-cause's submissions

[31] The Mise-en-cause submits that the Pension Centre's decision to apportion the survivor pension between the Applicant and the Mise-en-cause pursuant to subsection 25(10) of the *PSSA* was reasonable. Both the Mise-en-cause and the Applicant are survivors as defined by subsections 3(1) and 25(4) of the *PSSA*. The Pension Centre correctly applied the *PSSA* to the facts of this case and there is no reason for the Court to intervene.

[32] The Mise-en-cause also submits that even if the Applicant was recognized as a married spouse under paragraph 3(1)(*a*) of the *PSSA*, the survivor pension would still have to be apportioned in accordance with subsection 25(1). Mr. Myers would then have been married to two people at the time of his death and the survivor pension would be apportioned between them. The result would not change. Ignoring, as the Applicant suggests, the Superior Court of Quebec's decision in *10456* cited above, declaring the divorce between Mr. Myers and the Mise-en-cause null would have rendered the Pension Centre's decision unreasonable.

[33] On the Applicant's *Charter* challenge, the Mise-en-cause argues that the impugned provisions do not subject the Applicant to different treatment due to her marital status. On the

contrary, they ensure that she receives the same treatment as the Mise-en-cause, namely, a right to a portion of the survivor pension based on the number of years of cohabitation with Mr. Myers.

[34] The Mise-en-cause submits the *PSSA* does not create any discriminatory distinction between married and common law spouses and that the Applicant has failed to demonstrate any such distinction disadvantaged her. The Mise-en-cause insists that it is the existence of her marriage to Mr. Myers, and not the *PSSA*, that is the source of the Applicant's problems. Declaring the impugned provisions unconstitutional would not solve the Applicant's problem but would risk removing the right to receive a portion of the survivor pension from future cohabitating spouses.

VI. Analysis

1. Did the Pension Centre err in apportioning the survivor allowance between the Applicant and the Mise-en-cause?

[35] The Court finds that the Pension Centre's decision to apportion the survivor allowance between the Applicant and the Mise-en-cause pursuant to subsection 25(10) was reasonable and sees no reason to intervene.

[36] The Superior Court of Quebec, in *10456* cited above, determined that the Mise-en-cause was Mr. Myer's lawful wife at the time of his death and is, therefore, a survivor under paragraph 3(1)(*a*) of the *PSSA*. The Applicant fulfills the criteria of subsection 25(4) and is therefore a survivor pursuant to paragraph 3(1)(*b*) of the *PSSA*. Given that Mr. Myers had two survivors, the Pension

Centre correctly applied subsection 25(10) of the *PSSA* and divided the survivor allowance based on the number of years each survivor cohabitated with him.

[37] The fact that the Applicant received a judgment granting her the putative effects of marriage does not alter the Mise-en-cause's legal status, she qualifies as a survivor under paragraph 3(1)(*a*) of the *PSSA*. The Pension Centre correctly applied its legislation to the facts of the case. The Pension Centre did not have the power or discretion to ignore the still valid marriage between the Mise-en-cause and Mr. Myers because of the unusual circumstances of this case.

[38] The Applicant's claim that the Pension Centre failed to observe the principles of natural justice by not waiting for the judgment of the Superior Court of Quebec on the putative effects to come down before rendering its decision is without merit. The putative effects decision of the Superior Court had no bearing on the Pension Centre's. The principles of natural justice did not require it to wait.

[39] While the situation in the present case is unfortunate, the Pension Centre's decision "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, cited above, at para 47).

2. Do subsections 3(1), 25(4), 25(4.1), 25(10) and 25(11) of the PSSA violate subsection 15(1) of the Charter in a manner not justified under section 1?

[40] For the reasons that follow, the Court finds that the impugned provisions are not discriminatory and do not violate the subsection.

[41] The Supreme Court of Canada recently clarified the test to be applied for subsection 15(1) challenges in *Quebec (Attorney General) v A*, 2013 SCC 5 [*A*] by reconfirming its commitment to the test set out in *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143 [*Andrews*] and summarized it as follows at paragraph 323:

> "In sum, the claimant's burden under the *Andrews* test is to show that the government has made a distinction based on an enumerated or analogous ground and that the distinction's impact on the individual or group perpetuates disadvantage. If this has been demonstrated, the burden shifts to the government to justify the reasonableness of the distinction under s. 1. As McIntyre J. explained, "any justification, any consideration of the reasonableness of the enactment; indeed, any consideration of factors which could justify the discrimination and support the constitutionality of the impugned enactment would take place under s. 1" (p. 182)".

[42] Writing for the majority of the Court on subsection 15(1), Justice Abella stressed that the decisions in *R. v Kapp*, [2008] 2 SCR 483 and *Withler*, cited above, did not establish "an additional requirement on section 15 claimants to prove that a distinction will perpetuate prejudicial or stereotypical attitudes towards them" (*A*, cited above, at para 327).

[43] The Court's task in this case, then, is to verify whether: 1) the impugned provisions impose a distinct treatment based on an enumerated or analogous ground; and 2) whether that distinct treatment's impact on the individual or group perpetuates a disadvantage.

[44] The Applicant contends that the impugned provisions of the *PSSA* violate subsection 15(1) of the *Charter* by imposing a distinct treatment on the basis of marital status. More specifically, the provisions treat married and putative spouses differently. The *PSSA* is under-inclusive in that it does not mention whether putative spouses can be considered survivors under paragraph 3(1)(*a*).

[45] Insofar as the Applicant is contending that the impugned provisions are discriminatory because they do not give priority to putative spouses over legally married spouses, her claim has no basis. A putative spouse will always co-exist with a legally married spouse until the situation is rectified. Subsection 15(1) ensures the equal treatment of similarly situated groups. There is no discrimination in not assigning more rights to the putative spouse than to the lawful spouse. The Applicant is asking the Court to deprive the Mise-en-cause of her legal rights, something this Court cannot do.

[46] The Respondent argues that because the analogous ground of marital status was recognized based on factors specifically related to common law spouses it cannot be invoked by other marital status groups (e.g. putative spouses) who do not share the same characteristics. As compelling as the Respondent's argument is, it has already been rejected by the Supreme Court of Canada. The same argument was made in *Roy v Canada*, 2002 FCT 233 (CanLII), [2002] 4 FC 451 in an attempt to prevent divorced spouses from invoking marital status. At paragraph 61 of that decision, Justice McKeown noted that the argument had already been rejected by the Supreme Court of Canada:

> 61 The defendant argues that marital status is not necessarily an analogous ground, and that the fact that unmarried cohabitants comprise a group identified as an analogous ground in *Miron* does not mean that all of the other possible marital status groups, which could include single, married, or widowed people, are automatically entitled to subsection 15(1) protection. I disagree with this

> submission. In *Collins*, Rothstein J. relies on the decision in *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, 1999 CanLII 687 (SCC), [1999] 2 S.C.R. 203, which held that once something is found to be an analogous ground, it is so in all cases. There McLachlin and Bastarache JJ. state at paragraph 8:
>
> > Just as we do not speak of enumerated grounds existing in one circumstance and not another, we should not speak of analogous grounds existing in one circumstance and not another. The enumerated and analogous grounds stand as constant markers of suspect decision making or potential discrimination. What varies is whether they amount to discrimination in the particular circumstances of the case.
> >
> > We therefore disagree with the view that a marker of discrimination can change from case to case, depending on the government action challenged. It seems to us that it is not the ground that varies from case to case, but the determination of whether a distinction on the basis of a constitutionally cognizable ground is discriminatory. Sex will always be a ground, although sex-based legislative distinctions may not always be discriminatory. [Emphasis added]
>
> Since marital status was found to be a ground in *Miron*, *supra*, I find that it is a ground in this case as well. The real issue is whether it is discriminatory, which is addressed in the third stage of the analysis.

[47] Since a putative spouse (or “spouse in good faith”) status is a marital status, the Court accepts that it is an analogous ground in this case. The Court accepts that the *PSSA* imposes a distinction between putative and married spouses by not including the former in the definition of a survivor. The Court notes that several provincial pension related statutes recognize putative or good faith spouses as a “spouse” in their acts. For example, the definition of spouse in paragraph 2(1)(*m*) of the *Teachers' Pensions Act*, SNL 1991, c 17 is as follows

> 2(1)
>
> . . .
>
> (m) "spouse" means a person who

(i) is married to the teacher or pensioner,

(ii) is married to the teacher or pensioner by a marriage that is voidable and has not been voided by a judgment of nullity, or

(iii) has gone through a form of a marriage with the teacher or pensioner, in good faith, that is void and is cohabiting or has cohabited with the teacher or pensioner within the preceding year;

[48] Not all putative spouses necessarily fall into paragraph 3(1)(*b*) of the *PSSA*. That is to say, it is theoretically possible for a putative spouse to not have lived with a contributor for a year prior to his death (a "non-3(1)(*b*) putative spouse"). In such cases, a putative spouse could suffer a disadvantage by not being able to receive or share in their putative spouse's survivor allowance under the *PSSA*.

[49] The problem for the Applicant in the present case, however, is that she is not a non-3(1)(*b*) putative spouse. The Applicant lacks standing to bring this challenge because she is essentially claiming a breach of the *Charter* rights of others (i.e. non-3(1)(*b*) putative spouses). As noted above, the Applicant was recognized as a survivor under paragraph 3(1)(*b*) and her rights are not being breached by the purported "under-inclusiveness" of the *PSSA*. If the impugned sections of the *PSSA* were found to violate subsection 15(1) in a manner that is unjustified by section 1 of the *Charter* and putative spouses were added as survivors under subsection 3(1), the Applicant would not be better situated. As a putative spouse who is also a cohabitating spouse, the *PSSA* does not disadvantage her in any way.

[50] The Applicant cannot be said to have public interest standing either. In *Hy and Zel's Inc v Ontario (Attorney General); Paul Magder Furs Ltd v Ontario (Attorney General)*, 1993 CanLII 30

(SCC), [1993] 3 SCR 675 at para 13, the Supreme Court of Canada summarized the conditions under which a court may exercise its discretion to grant standing:

> 13 Following this Court's earlier decisions, in order that the Court may exercise its discretion to grant standing in a civil case, where, as in the present case, the party does not claim a breach of its own rights under the Charter but those of others, (1) there must be a serious issue as to the Act's validity, (2) the appellants must be directly affected by the Act or have a genuine interest in its validity, and (3) there must be no other reasonable and effective way to bring the Act's validity before the court.

[51] While the Court is willing to accept that the exclusion of putative spouses from the notion of survivor under the *PSSA* raises a serious subsection 15(1) validity issue, the Applicant is not directly affected by its under-inclusiveness.

[52] As a result of the above, the Applicant lacks standing to bring a subsection 15(1) challenge to the impugned provisions.

[53] Even if the Court found that the Applicant has standing, her claim would not succeed. Once the Court finds that a distinction has been made on an analogous ground, the next step is to determine whether the distinction in the legislation is discriminatory (i.e. whether it “perpetuates disadvantage”). In *A*, cited above, Justice Abella described the discrimination inquiry at paragraphs 331 and 332:

> [331] *Kapp* and *Withler* guide us, as a result, to a flexible and contextual inquiry into whether a distinction has the effect of perpetuating arbitrary disadvantage on the claimant because of his or her membership in an enumerated or analogous group. As *Withler* makes clear, the contextual factors will vary from case to case — there is no “rigid template”:

> The particular contextual factors relevant to the substantive equality inquiry at the second step [of the Andrews test] will vary with the nature of the case. A rigid template risks consideration of irrelevant matters on the one hand, or overlooking relevant considerations on the other: Kapp. Factors such as those developed in Law — pre-existing disadvantage, correspondence with actual characteristics, impact on other groups and the nature of the interest affected — may be helpful. However, they need not be expressly canvassed in every case in order to fully and properly determine whether a particular distinction is discriminatory . . . .[Emphasis added; para. 66].
>
> [332] 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. . . .

[54] The significant problem with the Applicant's claim is that putative spouses do not comprise a historically disadvantaged group; indeed, their status results from a remedy that reflects society's approval of their situation. It results from a judgment (received upon a motion) relieving an individual of certain consequences of failing to contract a valid marriage because they entered into it in good faith. The *PSSA* is not perpetuating an historical disadvantage or prejudice by not including them in subsection 3(1). While non-3(1)(*b*) putative spouses may be deprived of a financial benefit, the Supreme Court in *Granovsky v Canada (Minister of Employment and Immigration)*, 2000 SCC 28 (CanLII), [2000] 1 SCR 703 at para 58 determined that it "is not just whether the appellant has suffered the deprivation of a financial benefit" and that something more is required to establish a violation of subsection 15(1) of the *Charter*. That additional historical prejudice or discriminatory element is lacking in this case. For these reasons, the Court concludes that the impugned provisions do not violate subsection 15(1) of the *Charter*.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review and the constitutional challenge of subsections 3(1), 25(4), 25(4.1), 25(10) and 25(11) of the *PSSA* as infringing on subsection 15(1) of the *Charter* are dismissed with costs.

"André F.J. Scott"

Judge

ANNEX

Public Service Superannuation Act, RSC 1985, c P-36	*Loi sur la pension de la fonction publique*, LRC 1985, c P-36
Definitions	Définitions
3. (1) In this Part,	3. (1) Les définitions qui suivent s'appliquent à la présente partie.
…	[…]
"survivor", in relation to a contributor, means	« survivant » Personne qui :
(*a*) a person who was married to the contributor at the time of the contributor's death, or	*a*) était unie au contributeur par les liens du mariage au décès de celui-ci;
(*b*) a person referred to in subsection 25(4);	*b*) est visée au paragraphe 25(4).
Lump sum payments	Paiements en une somme globale
25.	25.
…	[…]
Person considered to be the survivor	Personne réputée survivant
(4) For the purposes of this Part, when a person establishes that he or she was cohabiting in a relationship of a conjugal nature with the contributor for at least one year immediately before the death of the contributor, the person is considered to be the survivor of the contributor.	(4) Pour l'application de la présente partie, a la qualité de survivant la personne qui établit que, au décès du contributeur, elle cohabitait avec lui dans une union de type conjugal depuis au moins un an.
Person considered to be married	Personne réputée mariée
(4.1) For the purposes of this Part, when a contributor dies and, at the time of death, the contributor was married to a person with whom the contributor had been cohabiting in a relationship of a conjugal nature for a period immediately before the	(4.1) Pour l'application de la présente partie, lorsque le contributeur décède alors qu'il était marié à une personne avec qui il avait cohabité dans une union de type conjugal jusqu'à leur mariage, celle-ci est réputée s'être mariée au contributeur à la

marriage, that person is considered to have become married to the contributor on the day established as being the day on which the cohabitation began.

date établie comme celle à laquelle la cohabitation a commencé.

…

[…]

Apportionment of allowance when two survivors

(10) When an annual allowance is payable under paragraph 12(4)(a) or 12.1(5)(a) or subsection 13(2) or 13.001(2) and there are two survivors of the contributor, the total amount of the annual allowance shall be apportioned so that

(*a*) the survivor referred to in paragraph (a) of the definition “survivor” in subsection 3(1) is entitled to receive the proportion of the annual allowance that the total of the number of years that he or she cohabited with the contributor while married to the contributor and the number of years that he or she cohabited with the contributor in a relationship of a conjugal nature bears to the total number of years that the contributor so cohabited with the survivors; and

(*b*) the survivor referred to in paragraph (*b*) of that definition is entitled to receive the proportion of the annual allowance that the number of years that he or she cohabited with the contributor in a relationship of a conjugal nature bears to the total number of years that the contributor cohabited with the survivors, either while married or while in a relationship of a conjugal nature.

Répartition du montant de l’allocation s’il y a deux survivants

(10) Si une allocation annuelle doit être versée au titre des alinéas 12(4)a) ou 12.1(5)a) ou des paragraphes 13(2) ou 13.001(2) à deux survivants, le montant total de celle-ci est ainsi réparti :

a) le survivant visé à l’alinéa a) de la définition de « survivant » au paragraphe 3(1) a droit à une part de l’allocation en proportion du rapport entre le nombre total d’années de cohabitation avec le contributeur dans le cadre du mariage, d’une part, et dans une union de type conjugal, d’autre part, et le nombre total d’années de cohabitation des survivants avec celui-ci dans le cadre du mariage et dans une union de type conjugal;

b) le survivant visé à l’alinéa *b*) de cette définition a droit à une part de l’allocation en proportion du rapport entre le nombre d’années où il a cohabité avec le contributeur dans une union de type conjugal et le nombre total d’années où les survivants ont cohabité avec lui dans le cadre du mariage et dans une union de type conjugal.

Years

(11) In determining a number of years for the purposes of subsection (10), part of a year shall be counted as a full year if the

Arrondissement

(11) Pour le calcul des années au titre du paragraphe (10), une partie d’année est comptée comme une année si elle est égale

part is six or more months and shall be ignored if it is less.

ou supérieure à six mois; elle n’est pas prise en compte dans le cas contraire.

The Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c 11

Loi constitutionnelle de 1982, Annexe B de la Loi de 1982 sur le Canada (R-U), 1982, c 11

PART I
CANADIAN CHARTER OF RIGHTS AND FREEDOMS

PARTIE I
CHARTE CANADIENNE DES DROITS ET LIBERTÉS

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.

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.

…

[…]

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1999-11
STYLE OF CAUSE:	SHIRLEY NASH v ATTORNEY GENERAL OF CANADA and MARIE-ANNE VALLÉE
PLACE OF HEARING:	Montreal, Quebec
DATE OF HEARING:	May 6, 2013
REASONS FOR JUDGMENT AND JUDGMENT:	SCOTT J.
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APPEARANCES:

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