Federal Court of Appeal | Cour d'appel fédérale

**Date: 20220125**

**Docket: A-270-20**

**Citation: 2022 FCA 12**

**CORAM:** **STRATAS J.A.**
**DE MONTIGNY J.A.**
**LASKIN J.A.**

**BETWEEN:**

**REVA LANDAU**

**Applicant**

**and**

**ATTORNEY GENERAL OF CANADA**

**Respondent**

Heard by online video conference hosted by the Registry on January 25, 2022.
Judgment delivered from the Bench at Ottawa, Ontario, on January 25, 2022.

REASONS FOR JUDGMENT OF THE COURT BY: STRATAS J.A.

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**REASONS FOR JUDGMENT OF THE COURT**
**(Delivered from the Bench at Ottawa, Ontario, on January 25, 2022).**

**STRATAS J.A.**

[1] The applicant seeks an order quashing the decision dated October 1, 2020 of the Social Security Tribunal–Appeal Division in file AD-20-658 (*per* V.H. Parker). The Appeal Division dismissed the appeal from the decision dated March 23, 2020 of the Social Security Tribunal–General Division (*per* R. Raphael).

[2] Before both the General Division and the Appeal Division, the applicant argued that she is entitled to an increased retirement pension under the *Canada Pension Plan*, R.S.C. 1985, c. C-8 (the "Plan") because of section 15(1) of the Charter. In her view, the Plan discriminates against her and other single persons—a group she defines as people who never married and never cohabited with a deceased contributor—by denying them a survivor's pension and by forcing them to subsidize the pension of others. Under the Plan, a survivor's pension is available only in certain circumstances to the survivor of a deceased spouse or deceased cohabitee.

[3] The General Division was prepared to analyze the applicant's claim on the basis that she, as a single person, belonged to an analogous or enumerated group under section 15(1) of the Charter and, thus, could advance a section 15(1) claim. However, the General Division found that in denying the applicant a survivor's pension or an increase in her pension to compensate for her ineligibility for a survivor's pension, the Plan did not make any distinction under section 15(1).

[4] The Appeal Division dismissed the applicant's appeal from the General Division. The Appeal Division's task was limited under subsection 58(1) of the *Department of Employment and Social Development Act*, S.C. 2005, c. 34 (the "Act") to examining whether the General Division erred in law in making its decision. It found that the General Division did not so err. In so finding, it substantially agreed with the General Division's legal analysis. The applicant now applies for judicial review of the Appeal Division's decision.

[5] Before considering the merits of the application, the Court must deal with some preliminary issues.

[6] As part of her judicial review in this Court, the applicant seeks a declaration that paragraphs 44(1)(*a*) and (*d*) and section 46 of the Plan are constitutionally invalid. She did raise the constitutional validity of these provisions in the General Division and the Appeal Division.

[7] However, now, the applicant also seeks a declaration from this Court that sections 2(1), 42(1), 58, 72 and 73 of the Plan are constitutionally invalid. She did not challenge the constitutional validity of these provisions in the General Division and the Appeal Division, though the applicant did refer to a couple of them in passing.

[8] As well, in support of her request for a declaration concerning all of the above provisions, the applicant adduces evidence in this Court that was not before the General Division or the Appeal Division—in other words, fresh evidence. It takes the form of three tabs in the book of authorities which, in part, are evidentiary material about the Plan.

[9] This Court cannot entertain the applicant's request for a declaration of invalidity against the provisions of the Plan that she did not challenge in the General Division and the Appeal Division. Nor can this Court receive fresh evidence in support of any of the applicant's challenges against the provisions of the Plan.

[10] In the General Division and the Appeal Division, the applicant could have asserted her constitutional arguments against these provisions she now wishes to challenge. She could have offered evidence in support. She could have asked the General Division and the Appeal Division to disregard any unconstitutional provisions. See *Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur*, 2003 SCC 54, [2003] 2 S.C.R. 504; s. 64(1) of the Act (both Divisions have the power to decide questions of law and, thus, on the authority of *Martin*, the power to decide constitutional questions). In the case of sections 2(1), 42(1), 58, 72 and 73 of the Plan, the applicant did not do so. Accordingly, on the clear authority of the Supreme Court in *Okwuobi v. Lester B. Pearson School Board*, 2005 SCC 16, [2005] 1 S.C.R. 257, she cannot now seek a declaration of invalidity in this Court against them.

[11] To the extent that fresh evidence is adduced in support of the challenges against sections 2(1), 42(1), 58, 72 and 73 of the Plan, it is inadmissible in this Court because the challenges are not available in this Court. To the extent the fresh evidence is adduced in support of the challenge against paragraphs 44(1)(*a*) and (*d*) and section 46 of the Plan, it is inadmissible on the ground that, absent a recognized exception, new evidence, even on constitutional issues, is not admissible in this Court: *Association of Universities and Colleges of Canada v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22, 428 N.R. 297, citing numerous cases and applied by many more; on new evidence offered on constitutional issues, see *Forest Ethics Advocacy Association v. Canada (National Energy Board)*, 2014 FCA 245, [2015] 4 F.C.R. 75 at paras. 40-46. The General Division and the Appeal Division are the merits-deciders under this legislative scheme and, thus, normally only they may receive evidence and consider it:

see, most recently, *Portnov v. Canada (Attorney General)*, 2021 FCA 171, citing numerous cases that, in turn, cite many more.

[12] Incidentally, fresh evidentiary material should never be put to the Court in a book of authorities: *Forest Ethics Advocacy Association v. National Energy Board*, 2014 FCA 88 at para. 14, citing *Public School Boards' Association of Alberta v. Alberta (Attorney General)*, [1999] 3 S.C.R. 845.

[13] Now to the merits of the applicant's constitutional challenge.

[14] The applicant's challenge overlooks the nature and role of the Plan. The nature and role of the Plan rebuts allegations that it creates salient distinctions under section 15(1) or that any distinctions are discriminatory under section 15(1) or unjustified under section 1 of the Charter. This scheme was designed to provide partial earnings replacement in certain circumstances and was never meant to be comprehensive or meet the needs of all contributors in every conceivable circumstance: *Weatherley v. Canada (Attorney General)*, 2021 FCA 158 at para. 10. It is much like an insurance scheme full of cross-subsidization where some come out ahead and some do not. This sort of scheme also requires that clear and rigid criteria be drawn and specified for contributions and benefits. As well, as explained in *Weatherley*, an increase in benefits or reduction of contributions for some often must result in the reduction of benefits or increase in contributions or both for others; and many of these others are needy and vulnerable and also arguably fall under section 15(1) of the Charter. On these points, see also *Granovsky v. Canada (Minister of Employment and Immigration)*, 2000 SCC 28, [2000] 1 S.C.R. 703 at para. 9;

*Weatherley* at paras. 8-14; *Miceli-Riggins v. Canada (Attorney General)*, 2013 FCA 158, [2014] 4 F.C.R. 709 at paras. 68-69; *Runchey v. Canada (Attorney General)*, 2013 FCA 16, [2014] 3 F.C.R. 227 at para. 109. On benefits plans similar to the Plan and the difficulty in attacking *bona fide* distinctions under those plans, see similar comments in various Supreme Court cases such as *Law v. Canada*, [1999] 1 S.C.R. 497, 170 D.L.R. (4th) 1 at para. 105, *Gosselin v. Quebec (Attorney General)*, 2002 SCC 84, [2002] 4 S.C.R. 429 at para. 55, *Withler v. Canada (Attorney General)*, 2011 SCC 12, [2011] 1 S.C.R. 396 and *Auton (Guardian ad litem of) v. British Columbia (A.G.)*, 2004 SCC 78, [2004] 3 S.C.R. 657.

[15] *Auton*, in particular, recognizes the necessity of line-drawing and certainty in benefits schemes such as this so that the schemes can achieve their purposes. It suggests (at para. 42) that section 15(1) claims like this are possible only where the legislative scheme targets groups for illegitimate reasons extraneous to the scheme. This is not the case here.

[16] The recent Supreme Court case of *Fraser v. Canada (Attorney General)*, 2020 SCC 28, 450 D.L.R. (4th) 1, analyzed and discussed in *Weatherley*, above, does not overrule or cast doubt on any of the above cases.

[17] This application is on all fours with *Weatherley*, which binds us. We note that the applicant in this case did not take issue, directly or indirectly, with *Weatherley*, its exposition and analysis of the relevant principles under section 15(1), its treatment of *Fraser*, or the result it reached.

[18] In *Weatherley*, this Court held that the denial of a benefit, a second survivor's pension under the Plan, to a person whose second spouse is deceased did not infringe section 15(1) of the Charter. For many of the same reasons expressed in *Weatherley*, the denial by the Plan of a survivor's pension or its financial equivalent to a person who has never had an eligible spouse or cohabitee does not infringe section 15(1) of the Charter.

[19] In oral argument, the applicant attempted to distinguish *Weatherley* on its factual record and her reliance on direct discrimination in this case. We are not persuaded that the factual record in this case is sufficiently different to distinguish *Weatherley*. In fact, this case is rather close to *Weatherley*. Both concern the denial of benefits concerning survivorship to particular groups and both have statistical and background evidence concerning the denial—in a number of respects the same or substantially similar evidence. As for the alleged distinction between direct and indirect discrimination, *Fraser* (at para. 76) suggests that the relevant analysis under section 15(1), set out in *Weatherley* and other section 15(1) cases, is the same whether the discrimination is direct or indirect.

[20] Overall, we agree with the Appeal Division's conclusion that the General Division did not err in law. We agree with much of its supporting analysis.

[21] Therefore, we will dismiss the application for judicial review. The Attorney General does not seek costs and so none shall be awarded.

"David Stratas"

J.A.

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

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|---|---|
| **DOCKET:** | A-270-20 |

**AN APPLICATION FOR JUDICIAL REVIEW OF THE DECISION OF THE SOCIAL SECURITY TRIBUNAL (APPEAL DIVISION) DATED OCTOBER 1, 2020, NO. AD-20-658**

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| **STYLE OF CAUSE:** | REVA LANDAU v. ATTORNEY GENERAL OF CANADA |
| **PLACE OF HEARING:** | Heard by online video conference hosted by the Registry |
| **DATE OF HEARING:** | JANUARY 25, 2022 |
| **REASONS FOR JUDGMENT OF THE COURT BY:** | STRATAS J.A.<br>DE MONTIGNY J.A.<br>LASKIN J.A. |
| **DELIVERED FROM THE BENCH BY:** | STRATAS J.A. |

**APPEARANCES:**

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| Tina Lie<br>Catherine Fan | FOR THE APPLICANT |
| Marcus Dirnberger | FOR THE RESPONDENT |

**SOLICITORS OF RECORD:**

| | |
|---|---|
| Paliare Roland Rosenberg Rothstein LLP<br>Toronto, Ontario | FOR THE APPLICANT |
| A. François Daigle<br>Deputy Attorney General of Canada | FOR THE RESPONDENT |