R. v. Withler (Canada) Attorney-General

Withler v (Canada) Attorney-General[1]

The Facts

A class action suit was brought against the Canadian government by the spouses of deceased members of the Civil Service and the Canadian Armed Forces. They argued that a provision of the *Public Service Superannuation Act* and the *Canadian Armed Forces Superannuation Act*[2] violated their rights to equal treatment under Section 15(1) of the *Canadian Charter of Rights and Freedoms*.[3] Both Acts provided an array of benefits to employees and to the spouses of deceased employees, including a Supplementary Death Benefit paid to spouses of deceased employees. The benefit was paid out as a lump sum to the spouse following the employee's death. At issue in this case was whether a provision that reduced that lump sum payment by 10% a year after the employee reached the age of 65 (for Civil servants) or 60 (for members of the Armed Forces) was discriminatory.[4] The spouses of the deceased employees argued that this reduction violated their right to equal treatment based on age under Section 15(1) of the *Charter*.

Procedural History

The trial judge in this case dismissed the challenge, finding no violation of Section 15(1). A divided British Columbia Court of Appeal upheld that ruling. Both courts struggled with picking a specific group to compare the complainants to – finding an appropriate comparator group was a required aspect of the Supreme Court's approach to Section 15(1) at the time.[5]

Issues

1. Did the reduction of the Supplementary Death Benefit based on age violate the surviving spouse's rights under Section 15(1) of the *Charter*?
2. When undertaking a Section 15(1) analysis, is it necessary to identify a specific group for comparison with the party making the complaint?

Decision

The Supreme Court examined the reduction of the Supplementary Death Benefit in the broader context of the benefit scheme as a whole. Looking at the scheme in its entirety, the Court concluded that the reduction of the Death Benefit was offset by other benefits provided by the scheme, such as a higher pension for older employees and their surviving spouses. Therefore the scheme did not violate the *Charter*. The Court also took the opportunity to rule that a specific comparator group is not necessary for a Section 15(1)

analysis.

Reasoning

Section 15(1) Analysis

The Supreme Court has established a two-step approach to determining whether the equality rights set out in Section 15(1) of the *Charter* have been violated:

1. Does the statute create a distinction based on listed or analogous grounds in Section 15(1)?
2. Does the distinction create a disadvantage by perpetuating prejudice or stereotyping?[6]

Step 1 – Establishing the Distinction - The Comparator Group

Equality is necessarily a comparative concept. Therefore, to assess a person's equality claim it is first necessary to determine whether a distinction has been made between the claimant and another group seeking the same benefit. This is done by selecting a specific group to which the complainant can be compared, which allows the distinction between them to be highlighted. These selected groups are known as 'comparator groups'. For example, in a case where an individual was not permitted to join a Law Society because he was not a citizen of Canada, the proper comparator group was lawyers who were citizens.[7]

a) Comparator Groups: Complications

Identifying a specific group for comparison is not always a simple exercise, as this case demonstrates.*Withler* was a class action suit that involved a complicated scheme covering thousands of individuals of differing ages who received varying levels of benefits:[8] there were those who qualified for the full amount of the Supplementary Death Benefit, those who qualified for a slightly reduced amount depending on the number of years the reduction provision had been in effect, and those who no longer qualified for the lump sum because of their age. The complexity of the scheme made identifying a specific comparator group very difficult. As a result, there was significant disagreement between the Justices on the BC Court of Appeal as to what the appropriate comparator group should be.

b) Comparator Groups: Clarification

The Supreme Court of Canadasimplified this complicated matter. They noted that it was not necessary to identify a specific 'comparator' group. It is more important to determine whether a distinction has been made based on one of the listed or analogous grounds in Section 15(1).[9] Focusing too much on finding a very specific group with which to compare and contrast those making challenges to legislation would risk turning the approach to Section 15(1) into a formalistic and less effective tool for ensuring equality in Canada.[10] Instead, courts need only find a distinction between the claimant group and others based on a protected ground outlined in the section, and move on to the next step of

the analysis. In this case, there was a distinction drawn between the claimants and others based on the age of their spouses at the time of death. Surviving spouses of older employees received reduced benefits, and this was enough to meet the first step of the test.

Step 2 - Does the distinction create a disadvantage by perpetuating prejudice or stereotyping

Many laws create distinctions, and many of these distinctions are based on the grounds outlined in Section 15(1) of the *Charter*. This alone does not mean that a law is discriminatory.[11] Thus the Supreme Court held that it is important, in particular when considering the provision of a benefit scheme, to consider a piece of legislation in its entirety before determining if the distinction "creates a disadvantage by perpetuating a prejudice or stereotype"[12].

In this case the Supreme Court looked at the purpose of the Supplementary Death Benefit, namely: to financially assist those individuals whose spouses were younger and therefore either not yet entitled to a pension or whose pension would be smaller than those of older employees. It was not specifically enacted to assist older employees. In looking at the entire benefit scheme, it was important to note that the Supplementary Death Benefit is merely one of several different benefits that included medical and dental insurance, pension supplements, and education subsidies for the children of deceased employees.[13]Thus, older employees have access to a number of other benefits which need to be considered. The reduction in the Supplementary Death Benefit was offset by the higher pensions paid out to the spouses of deceased older employees.[14] As such, the Supreme Court ruled that the reduction in the death benefit did not discriminate against the claimants.

Impact/Going Forward[15]

The removal of a rigid comparator groups approach from Section 15(1) analyses might make challenges under this section easier to prove. Less time and preparation will be required to demonstrate that a distinction has been made under the first part of the test; more time will now be spent discussing whether that distinction is discriminatory under the second part of the test. With discrimination now being defined as perpetuating stereotype or disadvantage, it remains to be seen what success claimants will have in the future. The Court noted in this case that a key factor will be a history of discrimination that a claimant has suffered, while leaving the notion of stereotyping undefined.[16] While they state clearly that a history of discrimination is not the only factor, this does indicate a focusing of Section 15(1) on this train of inquiry.[17]The law surrounding the approach to this section continues to evolve and the Supreme Court and scholars must continue to discuss an effective approach to this essential right.

Further Reading

Pratten v. British Columbia (Attorney General), 2011 BCSC 656 (CanLII).

Sheila McIntyre and Sanda Rodgers, eds, *Diminishing Returns: Inequality and the Charter*

of Rights and Freedoms. Markham, Ont: LexisNexis, 2006.

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[1] *Withler v Canada (Attorney General)*, 2011 SCC 12 .

[2] *Public Service Superannuation Act*, RSC 1985, c P-36, s 47(1); and *Canadian Forces Superannuation Act*, RSC 1985, c C-17, s 60(1).

[3] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B of the*Canada Act 1982* (UK), c 11 [the *Charter*]. Section 15(1) reads in full: "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."

[4] *Withler*, supra note 1 at para 6.

[5] *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143 at 174-75 and *Withler*, *supra*note 1 at paras 29-34. See generally *Hodge v Canada (Minister of Human Resources Development)*, [2004] 3 SCR 357, 2004 SCC 65.

[6] *Withler*, *supra* note 1 at para 30. See generally *Andrews*, *supra* note 5.

[7] *Andrews*, *supra* note 5. See also Peter W. Hogg, *Constitutional Law of Canada*, 5 ed supp, vol 2, loose-leaf (consulted on 31 May 2011) (Toronto: Carswell-Thomson Reuters, 2011) at 55-32.2.

[8] *Withler*, *supra* note 1 at para 3.

[9] *Ibid* at para 40.

[10] *Ibid* at para 55.

[11] *Ibid* at para 31.

[12] *Ibid* at para 30.

[13] *Ibid* at para 8.

[14] *Ibid* at para 76.

[15] The views in this following section represent the opinion of the author and not necessarily the Centre for Constitutional Studies.

[16] *Ibid* at para 35. See also Daphne Gilbert, "Time to Regroup: Rethinking Section 15 of the Charter" (2003) 48 McGill L.J. 627 ["Time to Regroup"]; it seems the Court may be

heeding Gilbert’s advice.

[17] See Gilbert, “Time to Regroup, *supra* note 16.