

COURT OF APPEAL FOR ONTARIO

A proceeding under the *Class Proceedings Act, 1992*

CHARRON, FELDMAN & LANG JJ.A.

B E T W E E N:

GEORGE HISLOP, BRENT E. DAUM,  
ALBERT McNUTT, ERIC BROGAARD  
and GAIL MEREDITH

Plaintiffs  
(Respondents)

- and -

THE ATTORNEY GENERAL OF  
CANADA

Defendant  
(Appellant)

- and -

THE ATTORNEY GENERAL OF  
ONTARIO

Intervener

)  
)  
) David F. O'Connor,  
) R. Douglas Elliott,  
) R. Trent Morris,  
) Victoria A. Paris,  
) Kenneth W. Smith and  
) Sharon Matthews  
) for the plaintiffs  
) (respondents)  
)  
)

)  
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) Monika Lozinska  
) for the defendant  
) (appellant)  
)  
)

)  
)  
) Daniel Guttman and  
) Mark Crow  
) for the intervener  
) The Attorney General of Ontario  
)  
)  
) Heard: June 10 and 11, 2004

**On appeal from the judgment of Justice Ellen M. Macdonald of the Superior Court of Justice dated December 19, 2003, reported at (2003), 234 D.L.R. (4th) 465.**

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## BY THE COURT:

### I. OVERVIEW

[1] In 1999, in the case of *M. v. H.*, [1999] 2 S.C.R. 3, the Supreme Court of Canada struck down the opposite-sex definition of “spouse” in the *Family Law Act*, R.S.O. 1990, c. F.3, as contrary to s. 15(1) of the *Canadian Charter of Rights and Freedoms*<sup>1</sup> (the “*Charter*”), but suspended the declaration of invalidity for six months to give the provincial government the opportunity to enact a constitutionally valid spousal support regime and to consider the effect of the decision on other statutes that relied on the same definition of “spouse”. The federal government also responded to *M. v. H.* by enacting omnibus legislation entitled the *Modernization of Benefits and Obligations Act*, S.C. 2000, c. 12 (“*MOBA*”), which amended sixty-eight pieces of federal legislation for the purpose of providing same-sex couples with the same rights and obligations as opposite-sex couples. The *MOBA* included amendments to a spouse’s right to a survivor’s pension under the *Canada Pension Plan*, R.S.C. 1985, c. C-8 (“*CPP*”).

[2] While the *MOBA* amended the *CPP* by removing the offending definition of spouse, at the same time it imposed a limit on pension eligibility to survivors whose same-sex partners had died on or after January 1, 1998 and made such pension payments payable only from July 2000, the date the *MOBA* came into force, and not retroactively. Furthermore, the *MOBA* amendments did not address two sections of the *CPP* of general application that impose a twelve-month cap on the payment of any pension arrears; in the case of estates, there is also a limitation that runs from the date of death of the surviving partner.

[3] The *MOBA* amendments to the *CPP* and the provisions of general application were challenged in this class action where the members of the plaintiff class are same-sex surviving partners (or their estates) whose spouses died on or after April 17, 1985 and before January 1, 1998 and have not received a *CPP* survivor’s pension.

[4] The issue in this case is whether the *CPP*, as amended by the *MOBA*, contravenes s. 15(1) of the *Charter* because it does not give a fully retroactive pension to all same-sex survivors whose partners died after April 17, 1985, the date that s. 15 of the *Charter* came into force.<sup>2</sup>

### II. JUDICIAL HISTORY

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<sup>1</sup> Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11,

<sup>2</sup> The class was defined this way on the theory that because equality rights only became effective on April 17, 1985, that is the cut-off for any entitlement argument. Arguably, however, if a same-sex survivor’s partner died before April 17, 1985, the survivor’s status would have crystallized on the date of death, and it is only the date of an application for pension that is limited by the coming into force of s. 15(1).

[5] The class action challenges four sections of the *CPP*, two that specifically apply only to same-sex surviving partners and were enacted in the *MOBA* (the “specific sections”), and two that apply generally to all *CPP* claimants (the “general sections”) and were part of the *CPP* before and after the *MOBA*. The specific sections are s. 44(1.1) and s. 72(2), which respectively provide that the contributing same-sex partner must have died on or after January 1, 1998 and that pensions will only begin to be paid to same-sex surviving partners from July 2000 onward, the month the *MOBA* came into force. The general sections are s. 60(2), which provides that the estate of any surviving partner may only receive a maximum of twelve months’ pension and must apply for it within twelve months of the death of the surviving partner, and s. 72(1), which limits the payment of any pension arrears to the twelve months prior to the application regardless of when it is made following the death of the contributing partner.

[6] After a three-week trial, the trial judge held that the *CPP*’s specific sections breached s. 15(1) of the *Charter* and declared them invalid. In addition, under s. 52(1) of the *Constitution Act, 1982, supra*, the trial judge granted same-sex survivors a constitutional exemption from the two general sections. In the result, class members were entitled to survivors’ pensions potentially dating as far as back to April 17, 1985, when s. 15(1) of the *Charter* came into effect. The trial judge also awarded interest on the unpaid survivors’ pensions. The trial judge dismissed the plaintiffs’ claims for symbolic damages of \$20,000 for each class member under s. 24(1) of the *Charter*, and their claims for damages for breach of fiduciary duty and unjust enrichment.

[7] The Crown appeals the declaration of invalidity, the constitutional exemptions, and the award of interest on pension arrears; the Attorney General of Ontario intervenes only on the issue of the remedy of retroactive pension entitlement to April 17, 1985; the class members respond to the appeal and do not cross-appeal.

### III. LEGISLATION

[8] It is helpful at this point to set out the relevant statutory provisions and to review the relevant legislative history relating to the *CPP*.

#### 1. Statutory Provisions

##### (a) *Canada Pension Plan*

[9] The *CPP*, as amended by the *MOBA*, legislates the payment of pensions for a surviving spouse or a common-law partner of a contributor.

[10] The amended s. 2(1) now simply defines a common-law partner as one who cohabited with a *CPP* contributor in a conjugal relationship at the time of the contributor’s death and had so cohabited for at least one year. Before the *MOBA* amendment, s. 2(1) defined “spouse” as someone who was either married to a contributor or someone of the opposite sex who was cohabiting with the contributor in a conjugal

relationship at the time of the contributor's death, and had so cohabited for at least one year.

[11] The *MOBA* also added the specific sections, s. 44(1.1) and s. 72(2), which extend survivors' pensions to same-sex partners, but also limit this pension entitlement. These provisions are reproduced below:

s. 44(1.1) In the case of a common-law partner who was not, immediately before the coming into force of this subsection, a person described in subparagraph (a)(ii) of the definition "spouse" in subsection 2(1) as that definition read at that time, no survivor's pension shall be paid under paragraph (1)(d) unless the common-law partner became a survivor on or after January 1, 1998.

s. 72(2) In the case of a survivor who was the contributor's common-law partner and was not, immediately before the coming into force of this subsection, a person described in subparagraph (a)(ii) of the definition "spouse" in subsection 2(1) as that definition read at that time, no survivor's pension may be paid for any month before the month in which this subsection comes into force.

[12] In addition to the limits placed on entitlement by the two specific sections, same-sex survivor's pensions are also limited by s. 60(2) and s. 72(1) of the *CPP*. These general sections were not added by the *MOBA* and apply to everyone entitled to approved pensions. These provisions are reproduced below:

s. 60(2) Notwithstanding anything in this Act, but subject to subsections (2.1) and (2.2), an application for a benefit, other than a death benefit, that would have been payable in respect of a month to a deceased person who, prior to the person's death, would have been entitled on approval of an application to payment of that benefit under this Act may be approved in respect of that month only if it is made within 12 months after the death of that person by the estate, the representative or heir of that person or by any person that may be prescribed by regulation.

s. 72(1) Subject to subsection (2) and section 62, where payment of a survivor's pension is approved, the pension is payable for each month commencing with the month following

(a) the month in which the contributor died, in the case of a survivor who at the time of the death of the contributor had reached thirty-five years of age or was a survivor with dependent children,

(b) the month in which the survivor became a survivor who, not having reached sixty-five years of age, is disabled, in the case of a survivor other than a survivor described in paragraph (a), or

(c) the month in which the survivor reached sixty-five years of age, in the case of a survivor other than a survivor described in paragraph (a) or (b),

but in no case earlier than the twelfth month preceding the month following the month in which the application was received.

**(b) *Constitution Act, 1982***

**(i) *Part I – Canadian Charter of Rights and Freedoms***

[13] The *Charter* guarantees certain rights and freedoms and, if they are breached without justification, provides certain remedies. The following provisions are relevant in this case:

s. 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.

s. 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.

s. 24(1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

s. 32(2) Notwithstanding subsection (1), section 15 shall not have effect until three years after this section comes into force

[14] As a result of s. 32(2), s. 15 of the *Charter* did not come into force until April 17, 1985.

**(ii) Part VII – General**

[15] Section 52(1) of the *Constitution Act, 1982* permits courts to declare legislation unconstitutional to the extent of any constitutional inconsistency:

s. 52(1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

**2. Legislative History**

**(a) Canada Pension Plan**

[16] The *CPP* came into force on January 1, 1966. Retirement pensions were payable beginning in 1967, survivors' pensions in 1968, and disability benefits in 1970. The *CPP* is a mandatory universal social insurance program that, together with the Old Age Security Plan, and employer-sponsored pension plans and Retirement Savings Plans, form the three fundamental pillars of Canada's retirement income system.

[17] Over the years the *CPP* has been amended to reflect changing social values. Two years after its enactment, it was amended to provide survivors' pensions to the surviving spouses of married and, in 1975, opposite-sex common-law relationships. Also in 1975, following the Royal Commission on the Status of Women, "widows" and "widowers" pensions were replaced with "survivors" pensions, so that male survivors became entitled to pensions on the same basis as female survivors. Under those amendments, the new widower's eligibility criteria were retrospective; pension payments were prospective. Accordingly, the widower of a female contributor who had died before the amendments would be entitled to a pension, but only prospectively from the date the amendments came into force.

[18] In 1987, other amendments increased the number of beneficiaries eligible for pensions. There too, new beneficiaries were eligible retrospectively, but only entitled to receive pension payments prospectively: see *An Act to Amend the Canada Pension Plan and the Federal Court Act*, S.C. 1986, c. 38.

[19] Since its inception, the *CPP* has been funded by premiums paid by Canada's employees and employers, whether those employees have been heterosexual, gay or lesbian, married, common-law partners, or single. Those premiums, together with investment income earned thereon, sufficed to fund the *CPP* fully. It receives no financial assistance of any kind from tax revenues, nor may its assets be diverted for other government purposes. It is completely self-contained: a closed pension plan.

**(b) Modernization of Benefits and Obligations Act**

[20] The extension of survivors' pensions under the *CPP* to same-sex partners followed *M. v. H., supra*. After study, the federal government responded to the decision in February 2000 with proposed amendments to sixty-eight statutes, all included in the *MOBA*. Although the *MOBA* substituted "common-law partner" for "spouse" in the *CPP*, and defined such partners to include same-sex partners, same-sex partners were still not eligible for a survivor's pension if their partner died before January 1, 1998, and those who were eligible were only granted prospective pensions from August 2000.

[21] In a letter dated December 8, 2000, the then Minister of Human Resources Development Canada ("HRDC"), Jane Stewart, explained the January 1, 1998 eligibility cut-off date on the basis that the government was showing sensitivity to those who had lost a same-sex common-law partner by delineating an earlier date for eligibility than the effective date of the legislation. The Minister also stated that the January 1, 1998 date reflected a balance of extending both the benefit and obligations of pensions to same-sex couples, including obligations under the *Income Tax Act*. However, there does not appear to be any interrelationship between the *CPP* amendments and other statutes and the appellant has not sought to justify the 1998 date on that basis.

**IV. THE POSITIONS OF THE PARTIES AT TRIAL**

[22] The class members took the position that they had been unlawfully excluded from their survivors' pensions and that they should be entitled to those pensions not from January 1, 1998, or from July 2000, but from one month after the date of death of the contributing partner, if the partner died after April 15, 1985, the date s. 15 of the *Charter* came into force.

[23] The class members argued that their *Charter* rights had been breached and that they were entitled to equality with opposite-sex survivors prospectively from when these rights came into force on April 15, 1985, and that this entitlement was not weakened by the fact that Canadian society did not initially recognize that discrimination based on sexual orientation was contrary to the *Charter*. Further, they argued that the government's unsuccessful attempt to remedy that inequality with the enactment of the *MOBA* did not detract from these *Charter* rights. In that sense, they argued, there was nothing retroactive about their requested relief, as they were entitled to the relief from April 17, 1985 onward.

[24] The Crown's defence of the s. 15(1) challenge rested on three main points. First, the different treatment of same-sex survivors is not based on their sexual orientation, but on a temporal distinction between two groups of same-sex survivors. Such a distinction is not prohibited by s. 15(1). The legislative distinction in s. 44(1.1) of the *CPP* is between survivors of same-sex relationships whose partners died before January 1, 1998, and survivors of such relationships whose partners died after that date. The legislative distinction in s. 72(2) of the *CPP* is between survivors of same-sex common-law

relationships whose partners died on or after January 1, 1998 and survivors of such common-law relationships whose partners died in or after July 2000.

[25] Second, the *Charter* should be interpreted in a manner that recognizes the evolving nature of societal values. Same-sex survivors did not have equality rights to survivors' pensions until the issue was identified by gays and lesbians themselves, by Parliament, and by the courts, which did not occur until the late 1990s. In this way, the chosen time limitations in the *MOBA* amendments in s. 44(1.1) and s. 72(2) were consistent with *Egan v. Canada*, [1995] 2 S.C.R. 513, which considered a challenge to the exclusion of same-sex persons from entitlement to a spousal allowance under the *Old Age Security Act*, R.S.C. 1985, c. O-9. While *Egan* was the first case to declare sexual orientation as an analogous s. 15(1) ground, the majority of the court also endorsed an "incremental approach" to the extension of social benefits to different social groups.

[26] In further support of this point, the Crown noted that same-sex human rights and *Charter* litigation initially focused on basic personal protections for same-sex individuals, such as in the areas of employment and housing. It was not until the mid- to late-1990s that same-sex litigation changed its focus from individual issues to relationship issues. This focus on relationship issues only matured when *M. v. H.*, *supra*, struck down the opposite-sex definition of "spouse".

[27] Third, the Crown argued that the granting of a remedy from April 17, 1985 would amount to an impermissible retroactive application of the *Charter*.

## V. THE TRIAL JUDGE'S REASONS

[28] In her review of the evidence, the trial judge found all five of the representative plaintiffs had been in loving conjugal relationships with their same-sex partners for a number of years, ranging from twenty-seven years for Mr. Hislop to a little more than two years for Mr. Daum. As well, due to their sexual orientation and their same-sex partnerships, the representative plaintiffs suffered harassment and discrimination throughout their lives and were excluded from full participation in civil society.

[29] The trial judge noted that, although their partners had paid premiums to the *CPP*, any inquiries or applications made by the representative plaintiffs about survivors' pensions were met with the government response that gays and lesbians were ineligible because their partners were not of the opposite sex, or were of the "wrong" sex. Those who received this response were not advised of any right to take their request further, including any right of appeal.

[30] The trial judge accepted evidence that Mr. Hislop inquired about applying for a survivors' pension after his partner's death in 1986, but he was advised that it was not available for same-sex partners. He made a formal application in February 2001, but it was denied based on s. 44(1.1) of the *CPP*. Mr. Daum did not apply for a survivor's pension after his partner died in October 1993 because he was told that he would not get the benefit because his partner was of the same sex. Ms. Meredith formally applied for a

survivor's pension in August 2000, eight years after her partner's death, but was denied based on s. 44(1.1). Mr. Brogaard formally applied for a survivor's pension following his partner's death in 1993 but was denied; he reapplied in April 2000 and was again rejected, although this time he appealed the decision. Finally, Mr. McNutt formally applied for a survivor's pension in August 1993 and was refused because his partner was the same sex. As a result of this evidence, the trial judge found as a fact that the class members did not "sit on their rights" (para. 120).

[31] As well, the trial judge heard evidence of the apparent lack of horizontal equity when the federal government (following the release of *M. v. H.*, *supra*, in May 1999) implemented a settlement strategy giving back-payments of survivors' pensions to some same-sex survivors, while refusing them to others. Under the settlement strategy, the government sought to settle all appeals by same-sex survivors where their applications were received prior to February 11, 2000, the *MOBA*'s introduction date. Those same-sex survivors whose claims were settled, including those whose partners died before January 1, 1998, each received a pension beginning the later of the month following the death of their partner or eleven months prior to receipt of the application. Even though they were otherwise in the same circumstances, class members were refused similar settlements because they had not filed formal applications before February 11, 2000.

[32] The trial judge rejected the Crown's submissions that gays and lesbians had not taken strong exception to the temporal restrictions on the *MOBA*'s introduction in Parliament, and that such silence indicated acceptance of these restrictions. The trial judge found as a fact that at least one major gay and lesbian organization, the Canadian AIDS Society, was not provided with a copy of the proposed legislation, was unaware of its proposed temporal restrictions until June 2000 and, in any event, was not in a position to make submissions on such issues. The trial judge also held that the question of gay and lesbian alleged acceptance of the *MOBA*'s parameters was irrelevant. She noted: "Whether a person or group opposed or supported the *MOBA* amendments cannot derogate from the Crown's responsibility to legislate in accordance with the *Charter*" (para. 56).

[33] As well, the trial judge found that, contrary to the Crown's submissions, gays and lesbians were concerned not just about their individual rights but also about relationship rights and discriminatory experiences "at least as early as 1985" (para. 64). However, although the trial judge found that the Crown was lethargic in its response to these issues, she also concluded that the Crown's lethargy did not amount to bad faith.

[34] Having determined that the lack of societal recognition of the equality of same-sex relationships was not relevant, the trial judge then addressed the Crown's interpretation of the jurisprudence. In particular the Crown cited *Egan*, *supra*, to support its position that same-sex partners were not entitled to the same benefits as opposite-sex couples before the January 1, 1998 cut-off date for pension eligibility.

[35] The trial judge held that the Crown could not rely on *Egan* to justify the temporal restrictions in the *MOBA*. She distinguished *Egan* on the basis that it was concerned with

the public purse through a tax-funded social insurance scheme, while in the case at bar, the *CPP* is funded entirely by employer and employee contributions. In addition, the trial judge noted that “the majority’s s. 1 analysis in *Egan* has been effectively overruled by subsequent cases such as *Vriend* and *Rosenberg*.” The trial judge noted that the government itself, through its settlement strategy, had not followed a consistent path with respect to survivors’ pensions for gay and lesbian couples.

[36] The trial judge went on to consider the Crown’s argument that the class members’ claim amounted to an impermissible retroactive application of the *Charter*. The Crown had argued that a *Charter* remedy could only operate prospectively and that, had the Legislature not included s. 44(1.1) in the *MOBA*, entitlement to same-sex pensions would have been restricted to those survivors whose same-sex partners died after July 2000.

[37] In rejecting the Crown’s argument, the trial judge relied on *Benner v. Canada (Secretary of State)*, [1997] S.C.R. 358. In *Benner*, the Supreme Court of Canada considered a *Charter* challenge to the *Canadian Citizenship Act*, S.C. 1974-75-76, c. 108, which prescribed more stringent citizenship requirements for persons born outside Canada before 1977 to Canadian mothers, as opposed to those whose fathers were Canadian. The Crown argued that *Benner*, who was born before 1977 to a Canadian mother, was seeking an impermissible retroactive or retrospective application of the *Charter*. In rejecting the Crown’s argument, Iacobucci J. distinguished between discrimination that is based on discrete facts that occurred before the *Charter* came into force and discrimination that is based on a person’s ongoing and immutable status. Iacobucci J. stated as follows regarding the application of the *Charter* in these two different scenarios (at para. 44):

Section 15 cannot be used to attack a discrete act which took place before the *Charter* came into effect. It cannot, for example, be invoked to challenge a pre-*Charter* conviction: *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713; *Gamble, supra*. Where the effect of a law is simply to impose an on-going discriminatory status or disability on an individual, however, then it will not be insulated from *Charter* review simply because it happened to be passed before April 17, 1985. If it continues to impose its effects on new applicants today, then it is susceptible to *Charter* scrutiny today: *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143.

[38] The trial judge concluded (at para. 99) that *Benner* was “a complete answer to the arguments raised by the Crown”. In her view, “[t]his is not a case in which a new statute is being applied to a past event”; rather “the plaintiffs have suffered from discrimination based on sexual orientation, an immutable status, and that discrimination was experienced after the coming into force of s. 15 of the *Charter*”.

[39] The trial judge went on to consider whether the specific sections, s. 44(1.1) and s. 72(2) of the *CPP*, breached s. 15(1) of the *Charter*, using the three-part analysis set out in *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497. She rejected the Crown's submission that the appropriate comparator group was survivors whose partners died after January 1, 1998. She stated that the plaintiffs had the right to choose the comparator group, subject to the court's discretion to do otherwise, and found the plaintiffs' choice of married heterosexual couples was appropriate. She concluded that same-sex survivors whose partners died before January 1, 1998 were denied pensions that were available to heterosexual couples. Hence, she found differential treatment between opposite-sex and same-sex couples on the basis of a personal characteristic. This distinction was based on the analogous ground of sexual orientation and was discriminatory and offensive to s. 15(1).

[40] The trial judge next asked whether the specific sections could be saved under s. 1 of the *Charter*. In arguing that any s. 15(1) breach was justified under s. 1 of the *Charter*, the Crown reprised the same arguments it had raised with respect to s. 15(1). The Crown argued that the distinction was based on temporal considerations (as opposed to sexual orientation), and that the evolution of the recognition of same-sex relationships justified any *Charter* breach. As the trial judge had rejected these arguments in her s. 15 analysis, she again rejected them under s. 1. She found that the Crown had failed to demonstrate that the exclusion of same-sex survivors' pensions was a reasonable limit on the class members' *Charter* rights. An important consideration in so finding was that the Crown had conceded that a successful claim by the class members would have no significant impact on the solvency of the *CPP*. The trial judge accepted the government's expert evidence that the *CPP* would suffer no significant financial impact in the event of an award of back-payment of pensions to 1985 or for interest awarded thereon.

[41] The trial judge then turned to the remedies claimed by the class members under both s. 24(1) of the *Charter* (individual remedies) and under s. 52(1) of the *Constitution Act, 1982* (declarations of invalidity). She struck the specific sections of s. 44(1.1) and s. 72(2) of the *CPP* in their entirety under s. 52(1) of the *Constitution Act, 1982* and refused to grant a suspension of the declaration of invalidity, noting that the *CPP* was the only statute requiring amendment and that those amendments would not be complex.

[42] The trial judge also granted the class members a constitutional exemption from the two general sections, s. 60(2) and s. 72(1) of the *CPP*. As a result of the trial judge's decision, each class member would receive full arrears on their pensions, depending on the date of their partner's death, going as far back as 1985, plus the prospective *CPP* survivor's pension.

[43] The trial judge exercised her discretion to award interest under the *Courts of Justice Act*, R.S.O. 1990, c. C-43 and similar legislation in the other provinces where class members reside. In accordance with s. 31 of the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C.50, she awarded interest from February 1, 1992 or one month after the date of death of the class member's contributing partner, whichever is later, up to the

date of judgment. In making this award, the trial judge said (at para. 121): “I do not mix the concepts of interest and damages. It is well known that they serve different purposes.”

[44] Finally, the trial judge declined to award the symbolic damages sought by the plaintiffs. She reasoned that any such award could only be given under the authority of s. 24(1) of the *Charter*, a precondition of which would be a finding of bad faith against the Crown, a finding that she was not prepared to make. Similarly, on the plaintiffs’ claims for breach of fiduciary duty and unjust enrichment, the trial judge held that the class members had failed to establish the required elements to support such claims.

[45] As a result of the trial judgment, the class members became eligible to receive prospective survivors’ pensions and survivors’ pensions in arrears calculated from one month following the death of their partner, plus interest. It is necessary, of course, that each class member be otherwise eligible for a pension under the *CPP*. Although the effect of the trial judgment has been stayed pending this appeal, we were informed that the trial judge, in exercising her supervisory role under s. 25 and s. 26 of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6, has encouraged class members to come forward and file their application under the *CPP*. The federal government has agreed to process the applications, leaving any final assessment and payment to be determined in accordance with the judgment of this court.

## VI. ISSUES

[46] The Crown has raised several grounds in its notice of appeal. In essence, it has appealed the trial judge’s decision to strike down the specific sections, s. 44(1.1) and s. 72(2); the trial judge’s decision to grant class members a constitutional exemption from the general sections, s. 60(2) and s. 72(1); and the trial judge’s decision to grant full pensions arrears and interest to class members back to 1985. The respondents do not challenge the trial judge’s disposition regarding symbolic damages, breach of fiduciary duty or unjust entitlement.

[47] After the argument of this appeal, we queried why the trial judge considered the general sections, s. 60(2) and s. 72(1), only in her analysis of remedy and did not review them in her s. 15(1) or s. 1 analyses. We were told that the trial judge’s analysis followed the argument as presented at trial by the class members’ counsel.

[48] In subsequent written submissions requested by the court, counsel for the class members and for the Crown provided arguments as to the constitutional validity of the two general sections and agreed that this court has the necessary factual foundation and the jurisdiction to address the general sections as part of the constitutional analysis. We agree. In our view, all four impugned sections must be subjected to a s. 15 and a s. 1 analysis in order to determine what remedy may flow from a finding that any of these sections is contrary to the *Charter*. Accordingly, our approach is to first address whether the two specific sections contravene the *Charter*, and then to consider whether the two

general sections contravene the *Charter*. Depending on the result of both analyses, we will then consider the appropriate remedy.

## VII. ANALYSIS

### 1. Introduction

[49] Before embarking on a constitutional analysis of the impugned *CPP* provisions, it is important to remember that this constitutional challenge arises out of Parliament's response to the Supreme Court of Canada's decision in *M. v. H.*, *supra*. In *R. v. Mills*, [1999] 3 S.C.R. 668, the Supreme Court of Canada considered the new *Criminal Code* provisions regulating the disclosure of personal information in sexual assault cases, which Parliament had enacted following the court's decision in *R. v. O'Connor*, [1995] 4 S.C.R. 411. The court commented as follows (at para. 20) in regard to legislative responses to judicial decisions:

The law develops through dialogue between courts and legislatures: see *Vriend v. Alberta*, [1998] 1 S.C.R. 493. Against the backdrop of *O'Connor*, Parliament was free to craft its own solution to the problem consistent with the *Charter*.

[50] When considering responsive remedial legislation, the court must recognize that the new legislation is a good faith attempt by Parliament to respond to a problem identified by the court, and that such a response must take into account the full panoply of considerations that Parliament must factor into any legislative action. What is clear from this passage in *Mills*, however, is that when assessing such remedial response legislation, although Parliament is accorded some leeway when creating its legislative solution, that solution must still pass *Charter* scrutiny: see also *Sauvé v. Canada (Chief Electoral Officer)*, [2002] 3 S.C.R. 519 at para. 17; *R. v. Hall*, [2002] 3 S.C.R. 309 at paras. 123-28 (per Iacobucci J., dissenting).

[51] In this case, the option Parliament chose to respond to *M. v. H.*, *supra*, was to remove the opposite-sex definition of spouse, but impose temporal restrictions on the right of same-sex survivors to claim their pensions. The question is whether these measures stand up to a *Charter* analysis.

### 2. Section 15 Test

[52] The s. 15(1) *Charter* analysis begins with *Law v. Canada*, *supra* at paras. 39 and 88, as summarized by this court in *Halpern v. Canada*, (2003), 65 O.R. (3d) 161 (C.A.). This analysis must be undertaken in a purposive and contextual manner, keeping the strong remedial purpose of s. 15(1) in the forefront of consideration, and mindful of the pitfalls of a formalistic or mechanical approach: see *M. v. H.*, *supra* at para. 47.

[53] In a s. 15(1) analysis under *Law*, a court makes three broad inquiries:

- (1) 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?
- (2) Is the claimant subject to differential treatment based on one or more enumerated or analogous grounds?
- (3) 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?

[54] In conducting this s. 15(1) analysis, the court must not be sidetracked by considerations that more appropriately belong in the s. 1 or remedy analysis. At the s. 15(1) stage, the only considerations are those set out in *Law and Halpern*; that is, establishing whether there is differential treatment, whether that treatment is based on an enumerated or analogous ground, and whether the law in question has a discriminatory purpose or effect contrary to the protection of human dignity: see *Lovelace v. Ontario*, [2000] 1 S.C.R. 950 at para. 54.

### **3. The Purpose of the *CPP* and the *MOBA***

[55] The *CPP* was enacted to give Canadians “an opportunity to retire in security and with dignity” in the hope that it would “cover the widest possible range of citizens” and be “inflexible only in its main purpose.”<sup>3</sup> Its fundamental objective was to provide a secure government-controlled pension for retired persons in their senior years, and thereafter to provide for their surviving spouses and partners. The categories of beneficiaries under the *CPP* were not carved in stone. Parliament intended that, over time, benefits would be extended as became appropriate.

[56] *M. v. H.*, *supra*, provided the impetus for Parliament to include same-sex surviving partners in the *CPP* regime, and the *MOBA* is its response legislation enacted for the purpose of ensuring that the *CPP* complies with the *Charter*'s equality provision. As the Crown states in its factum: “This was a proactive measure that recognized legal and social evolution with respect to same-sex common law relationships” (para. 8).

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<sup>3</sup> As stated by Judy LaMarsh, then Minister of Health and Welfare: *House of Commons Debates*, Vol. III (July 18, 1963) at 2340-41.

#### 4. Section 15 Analysis of the Specific Sections (s. 44(1.1) and s. 72(2))

##### (a) *The Existence of Differential Treatment: The Appropriate Comparator Group*

[57] In responding to *M. v. H.*, *supra*, as it applied to same-sex survivors' pensions, Parliament enacted a legislative response that only partially conformed to the traditional legislative norms of a prospective application. As it had done historically, the federal government formulated the *CPP* amendments to pay pensions to same-sex surviving partners from the enactment of the legislation forward, but contrary to past practice, eligibility for the pension was limited to cases where the same-sex contributing partner died after January 1, 1998. Accordingly, survivors' pensions would be payable prospectively, but eligibility would be retrospectively limited.

[58] Essential to the question of differential treatment is the choice of comparator group. Indeed, the trial judge's s. 15(1) analysis was not challenged except with respect to that issue. In choosing the comparator group, consideration must be given to the subject matter, purpose, and effect of the legislation, in the context of all the circumstances. While generally the claimant chooses the comparator group, a court may refine the comparison within the scope of the pleadings and will change the group where the differential treatment is between other groups: *Law*, *supra* at paras. 57-59 and 88; *Lovelace*, *supra* at paras. 62-64. The court's discretion to review the claimant's choice of comparator group is not a "residual" one, as asserted by the representative plaintiffs in this case. Rather, the correctness of the choice of comparator group is a matter of law: *Granovsky v. Canada (Minister of Employment and Immigration)*, [2000] 1 S.C.R. 703 at paras. 47, 52 and 64; *Hodge v. Canada (Minister of Human Resources Development)*, 2004 SCC 65 at para. 21.

[59] The latest discussion by the Supreme Court on the issue of how to properly define comparator groups is *Hodge*, *supra*, a case that also involved the *CPP*. In that case, Binnie J. stated at para. 23:

The appropriate comparator group is the one which mirrors the characteristics of the claimant (or claimant group) relevant to the benefit or advantage sought, except that the statutory definition includes a personal characteristic that is offensive to the *Charter* or omits a personal characteristic in a way that is offensive to the *Charter*. An example of the former is the requirement that spouses be of the opposite sex; *M. v. H.*, *supra*. An example of the latter is the omission of sexual orientation from the Alberta *Individual's Rights Protection Act*; *Vriend v. Alberta*, [1998] 1 S.C.R. 493.

[60] Binnie J. points out (at para. 25) that in identifying the appropriate comparator group, the court's goal is to identify "the universe of people potentially entitled to equal treatment in relation to the subject matter of the claim." However, he cautions that in a government benefits case, "the initial focus is on what the legislature is attempting to accomplish. It is not open to the court to rewrite the terms of the legislative program except to the extent the benefit is being made available or the burden is being imposed *on a discriminatory basis*" [emphasis added].

[61] The claimants in this case, the surviving partners of same-sex contributors to the *CPP*, chose as the comparator group the survivors of heterosexual married couples.

[62] The Crown argues that with respect to s. 44(1.1), the comparison should be between same-sex survivors whose partners died on or after January 1, 1998 compared to same-sex survivors whose partners died before January 1, 1998. With respect to s. 72(2), in its factum, the Crown phrases the distinction as "between survivors of same-sex common-law relationships whose partners died on or after January 1, 1998 and survivors of such common-law relationships whose partners died in or after July 2000." If these "temporal" comparator groups are employed, s. 15 would have no application, as such groups are not protected by the *Charter*, either expressly or by analogy.

[63] We set out the two specific sections again for ease of reference:

s. 44(1.1) In the case of a common-law partner who was not, immediately before the coming into force of this subsection, a person described in subparagraph (a)(ii) of the definition "spouse" in subsection 2(1) as that definition read at that time, no survivor's pension shall be paid under paragraph (1)(d) unless the common-law partner became a survivor on or after January 1, 1998.

s. 72(2) In the case of a survivor who was the contributor's common-law partner and was not, immediately before the coming into force of this subsection, a person described in subparagraph (a)(ii) of the definition "spouse" in subsection 2(1) as that definition read at that time, no survivor's pension may be paid for any month before the month in which this subsection comes into force.

[64] Although the goal of the legislative provisions was to remove the distinction between opposite-sex and same-sex partners for the purpose of receiving *CPP* survivors' pensions, on the plain reading of s. 44(1.1), the distinction being made is not between different groups of same-sex survivors, as suggested by the Crown, but between opposite-sex (the old definition of spouse) and same-sex (the new definition of spouse) partners. An opposite-sex survivor is unaffected by the date of death of his or her partner, while only same-sex surviving partners are affected by that date. Again in s. 72(2),

commencement of payment of pension is determined by the application of the old or new definition of spouse, and not by any reference to the date of death of the contributing spouse, as suggested by the Crown.<sup>4</sup>

[65] After the enactment of s. 44(1.1), the survivors of opposite-sex couples continued to receive pensions whether their spouse died before or after January 1, 1998. The survivors of same-sex couples did not: gay and lesbian survivors only received pensions if their contributor-partner died after January 1, 1998. That date was determinative for a same-sex survivor; it was not determinative for a heterosexual survivor.

[66] With respect to s. 72(2), the same comparator group is applicable. The predominant distinction is not between same-sex survivors who received pensions before and after July 2000. The essence of the distinctive treatment imposed on same-sex survivors lies in comparison to opposite-sex survivors. Opposite-sex survivors under the *CPP*, before and after the *MOBA* amendments came into force, received pensions from the date of their application, with a maximum of twelve months in arrears. Same-sex survivors, under the *MOBA* amendments, were denied survivors' pensions before August 1, 2000.

[67] We agree with the trial judge that the appropriate comparator group is the one chosen by the respondents, that is, opposite-sex surviving partners. The universe of people potentially entitled to survivors' benefits is all surviving partners. Although the impugned sections contain temporal distinctions, those distinctions apply only to same-sex surviving partners and not to opposite-sex survivors. Both s. 44(1.1) and s. 72(2) treat same-sex spouses differently from their comparator group.

**(b) *Sexual Orientation as an Analogous Ground***

[68] Sexual orientation is an immutable personal characteristic intrinsic to the individual that is now recognized as an analogous ground under s. 15(1) of the *Charter*: *Egan*, *supra* at para. 5; *M. v. H*, *supra* at paras. 63-64.

**(c) *The Existence of Discrimination***

[69] The third question under *Law* asks whether the identified differential treatment discriminates in a substantive sense, taking into consideration the purposes of the

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<sup>4</sup> In fairness to the Crown's position, the incidental effect of s. 72(2) as it operates in conjunction with s. 44(1.1) is that same-sex survivors of partners who die after July 2000 are treated like every other person in terms of eligibility to collect the pension, depending on the date the application is made, while those same-sex survivors whose partners die between January 1998 and July 2000 are potentially deprived of two year's worth of pension if they apply for it before July 2000. Having said that, it is difficult indeed to contemplate how such a distinction between same-sex survivors can be said to have a legitimate legislative purpose, nor does the material before the court suggest that it was the legislative purpose of s. 72(2). It therefore cannot be the basis for the comparator group in the s. 15(1) analysis.

*Charter*'s equality provision, including correcting historical prejudice. *Law* requires the court to look at contextual factors. The four factors identified are: (1) pre-existing disadvantage of the affected group; (2) correspondence between the grounds for the claim of discrimination and the extent to which the dignity of the claimants is addressed; (3) any ameliorative purpose of the impugned legislation for another disadvantaged group; and (4) the nature and scope of the interest affected by the impugned law.

[70] As we understand the Crown's position, it is that the incremental recognition by society and the courts of sexual orientation as an analogous ground under s. 15(1) since 1985, first in the context of individual rights and later in the context of relationship rights, justified the government's choice of January 1998 for *CPP* pension eligibility rights and July 2000 for payment rights for same-sex surviving partners. The Crown further takes the position that this incremental recognition of same-sex rights is relevant to all aspects of the court's s. 15(1) analysis regarding the *MOBA* amendments to the *CPP*, including the appropriate comparator group; the question of whether there was discrimination based on sexual orientation; the justification under s. 1; and the remedy. The Crown's position was based on the overarching argument that in crafting the remedial legislative response to *M. v. H.*, *supra*, Parliament was entitled to limit any retroactive application of that decision and therefore to deny or limit the granting of retroactive pension eligibility or entitlement.

[71] In our view, it is most appropriate to address the Crown's "incremental recognition" argument, including the fact that the *MOBA* is remedial legislation, as part of the analysis of the contextual factors under the third question in *Law*, *supra*, - the existence of discrimination.

[72] The Crown, with respect to the s. 15(1) and s. 1 analyses, as well as with respect to remedy, argued that the *CPP* eligibility cut-off dates in s. 44(1.1) and s. 72(2) were chosen as dates by which societal attitudes had evolved to recognize and accept equality for same-sex partners. The trial judge, however, found that same-sex relationship recognition had indeed been on the "radar screen" since 1985.

[73] On appeal, the Crown added that, during public hearings on the *Constitution of Canada*, the central issue for gays and lesbians was the inclusion of sexual orientation as an enumerated ground in the equality provision of the *Charter*. Ultimately, the government declined to enumerate sexual orientation, but left s. 15 open ended, the Minister of Justice then opining that sexual orientation might be read into s. 15, but that such a determination was up to the courts. In other words, while the federal government recognized at an earlier time that it was unconstitutional to discriminate against gays and lesbians as individuals, it believed it was still justified in discriminating with respect to same-sex relationship issues.

[74] In addition, the Crown argued that the courts had not recognized a same-sex relationship entitlement until the mid-to late-1990s. It was only with the Supreme Court of Canada's release of its decision in *M. v. H.*, *supra*, that discrimination was recognized in same-sex relationship issues.

[75] The Crown's argument essentially said that Parliament, at the time ignorant about the unconstitutionality of discrimination against gays and lesbians, relied upon the courts with respect to that issue. The Crown noted that between 1985 and 1998, there was no judicial acceptance of a *Charter* obligation on Parliament to treat same-sex common-law relationships as analogous to opposite-sex common-law relationships. According to the Crown, the fact that the courts now recognize same-sex relationship discrimination to be unconstitutional does not mean that it was also unconstitutional in 1985.

[76] Having summarized the Crown's submissions, it is clear that the *MOBA* is only the latest step in a long historical process in which the rights of gays and lesbians have come to be recognized by society, by the courts, and by the legislatures as deserving of equal recognition and protection by the law. The Crown says that this history demonstrates that the *MOBA* is not discriminatory. Seen in the context of the historical evolution of gay rights, the preclusion of retroactive *CPP* pension rights for same-sex survivors does not affect the dignity of the claimants.

[77] However, it is difficult to see how this historical evolution has any bearing on the analysis of whether the *MOBA* amendments to the *CPP* constitute discrimination. An examination of the four contextual factors from *Law* demonstrates that s. 44(1.1) and s. 72(2) do, in fact, offend s. 15(1) of the *Charter*.

[78] First, same-sex surviving partners, by reason of their sexual orientation, were already a vulnerable group, and one subject to stereotyping as a result of that orientation. They had the same need for survivors' pensions as opposite-sex survivors. The denial of those survivors' pensions, without any corresponding ameliorative benefit to a more disadvantaged group, perpetuated the view that same-sex survivors were less worthy of recognition than opposite-sex survivors, when in fact same-sex survivors were equally deserving of concern, recognition, and respect. Further, the denial of pensions to same-sex surviving partners increased their vulnerability and perpetuated such stereotyping. Finally, same-sex surviving partners were denied recognition of both the emotional and financial loss resulting from the death of their partners.

[79] The partners of same-sex survivors contributed to the *CPP*, yet their surviving partners were denied access to the federal pension program, a program that is, as already described, a fundamental pillar of Canada's retirement income system. The denial of equal access to such a fundamental social institution constituted a complete non-recognition of these same-sex survivors as full members of Canadian society.

[80] The question is whether the Crown's argument that there was no recognition of same-sex relationship rights until 1998 mitigates these effects of the *CPP*, *as amended by the MOBA*, and justifies the government's decision to limit pension eligibility for same-sex survivors when it is not so limited for opposite-sex survivors. In our view, it does not.

[81] The first problem for the Crown is that after considering the full legislative record as well as the oral evidence presented, the trial judge found as a fact that the Crown failed to demonstrate "that relationship issues were not in the minds of activists, politicians and

society until the mid 1990s” (para. 85). Although the Crown argues that the trial judge erred in this very important conclusion, we are satisfied that there was evidence to support the trial judge’s finding and that it is a finding to which this court must defer.

[82] Second, the incremental approach to the recognition of the *Charter* right to equality, suggested in *Egan, supra*, was subsequently rejected in *Vriend v. Alberta*, [1998] 1 S.C.R. 493, in which Iacobucci J. stated at para 122:

In my opinion, groups that have historically been the target of discrimination cannot be expected to wait patiently for the protection of their human dignity and equal rights while governments move toward reform one step at a time. If the infringement of the rights and freedoms of these groups is permitted to persist while governments fail to pursue equality diligently, then the guarantees of the *Charter* will be reduced to little more than empty words.

[83] Therefore, as a matter of fact, and as a matter of law, the history of the evolution of same-sex relationship rights cannot justify the temporal restrictions in s. 44(1.1) and s. 72(2).

[84] However, the Crown also relies on the historical record as the context within which Parliament fashioned its response to *M. v. H., supra*. The Crown argues that the limited retroactive eligibility rights that Parliament included in s. 44(1.1) were in effect an accommodation to same-sex survivors because without it, the remedial legislation would operate prospectively only, as legislation normally does.

[85] We agree that in formulating remedial legislation responsive to a successful *Charter* challenge, one of the key issues that Parliament must address is the extent to which the recognition of the *Charter* right will have retrospective application and effect. This is particularly true when the matter is benefits legislation. Professors Roach and Choudhry point out in “Putting the Past Behind Us? Prospective Judicial and Legislative Constitutional Remedies”, (2003), 21 S.C.L.R. (2d) 205 at 242-43, that legislatures have generally treated responsive *Charter* remedial legislation in the same way as other legislation, that is as operating only prospectively, but that because *Charter* rights are involved, the issue of who will be benefited by the remedial legislation, including the claimants in the original action, is a critical component of the *Charter* remedy and must therefore be addressed by the legislature. We agree with this.

[86] Here, Parliament did consider the issue of retrospective effect, and must be accorded some deference in its choice, as long as that choice is constitutional.

[87] As the Crown pointed out, when the *CPP* has been amended in the past to include new groups such as widowers, although the amendment operated prospectively for payments, eligibility was not limited in the same way. In other words, a widower became eligible for a survivor’s pension no matter when his spouse had died, but he only began to

receive the pension from the date the amendment came into effect. The same approach was taken when the reach of the *CPP* was again extended in 1987. Entitlement to payments was prospective only, but eligibility was unrestricted.

[88] In contrast, s. 44(1.1) and s. 72(2) not only make the pension payable prospectively, but also limit eligibility depending on the date of death of the contributing partner. Furthermore, because the date chosen for the eligibility cut-off is January 1, 1998, it is fair to say that eligibility was drastically limited, and of course, completely removed for the class members. Because this approach was taken only for same-sex surviving partners and not for any other persons who are entitled to *CPP* survivors' pensions, the effect is clearly discriminatory, while the impugned incremental recognition of same-sex rights does not provide a contextual validity to Parliament's choice.

[89] Finally, when analyzing the context of Parliament's decision to impose an eligibility cut-off date for same-sex surviving partners as part of its remedial legislation in order to limit the retroactive application of the new definition of spouse in the *CPP*, one other factor must be considered. When formulating the remedial legislation, Parliament already had in place s. 72(1), the general section that limits the ability of any survivor who claims a pension to twelve months' arrears of payments. The effect of this section on same-sex surviving partners, had they been entitled to apply for a survivor's pension no matter when their partner died, would have been to limit any pension they received to twelve months' arrears plus payments going forward. This would have limited any retroactive effect of the amendment of the definition of spouse in a way that was wholly consistent with similar limitations on any other surviving partner.

[90] This built-in limit on any retroactive effect for the remedial legislation undermines the cogency of Parliament's decision to further limit the retroactive remedial aspect of the *CPP* amendments by imposing an eligibility limit only on same-sex surviving partners, and by making all payments prospective (so that those whose partners died between January 1, 1998 and July 31, 2000 are denied the benefit of the general section for twelve months' arrears from the date of the application for the death benefit).

[91] We therefore agree with the trial judge's conclusion that the specific sections 44(1.1) and 72(2), which were introduced by the *MOBA* in order to remedy discrimination against gays and lesbians, instead themselves violated the equality provisions of the *Charter*.

## **5. Section 1 Analysis of the Specific Sections (s. 44(1.1) and s. 72(2))**

[92] The Crown took the same approach on the appeal as it did before the trial judge in dealing with s. 1, which was to rest most of its s. 1 justification on the arguments it made under s. 15(1). That is, that the distinction made in the specific sections is merely temporal and therefore does not infringe the *Charter*, but that, if it does discriminate, the court should defer to Parliament's choice for implementing legislative change, particularly given the context of the evolution of same-sex relationship rights over time.

[93] The Crown also suggested that the fact that there will be some financial impact on the *CPP* is part of the context for the court to consider at the s. 1 stage, although it does not suggest that financial impact alone justified imposing the infringement in this case. However, this is not a situation where there is any significant fiscal consequence to according full retroactive benefits, and the Crown conceded this point both at trial and on the appeal. The minimal potential financial impact on the *CPP* is in stark contrast to the “financial crisis” that was held to justify the infringement of s. 15(1) in the recent Supreme Court case, *Newfoundland (Treasury Board) v. N.A.P.E.*, 2004 SCC 66.

[94] Under s. 1, the Crown has the burden of demonstrating that the discriminatory law is a reasonable limit on the s. 15(1) *Charter* right that is being infringed according to four criteria: (a) the objective of the law must be pressing and substantial; (b) the rights violation must be rationally connected to the objective of the law; (c) the impugned provisions must minimally impair the *Charter* right; and (d) there must be proportionality between the effect of the law and its objective so that the attainment of the objective is not outweighed by the abridgment of the right: see *R. v. Oakes*, [1986] 1 S.C.R. 103 at 138-40.

[95] There is clearly a pressing and substantial purpose for the *MOBA*. However, the Supreme Court of Canada has stated that, “when dealing with underinclusive legislation it is important also to consider the impugned omission when construing the objective”: *M. v. H.*, *supra* at para. 100. Here, that requires a consideration of the government’s objective in inserting the temporal restrictions in s. 44(1.1) and s. 72(2).

[96] In its factum, the Crown argues that the further objective of excluding all same-sex survivors whose partners died before January 1, 1998 and of making payment entitlements prospective beginning in July 2000 was to recognize the evolution of s. 15 *Charter* rights for this group and at the same time to be consistent with how the *CPP* was amended in the past to include new groups. As discussed above, both these rationales have been discredited in this case. The evolution of rights argument has been rejected both by the trial judge in this case and by the Supreme Court of Canada in *Vriend*, *supra*, and past amendments to the *CPP* have never imposed eligibility limitations, although they have made new payment entitlement provisions prospective. Therefore, to the extent that the Crown suggests that the exclusion of same-sex survivors in s. 44(1.1) is part of the pressing and substantial purpose of legislation, that submission must fail.

[97] While the limit in s. 72(2) is consistent with the approach taken to past amendments to the *CPP*, we are not prepared to find that mere conformity with a legislative drafting norm, without more, can constitute a pressing and substantial objective in the *Charter* era. Although the reason for the drafting norm – i.e., it allows the government to control the costs that result from the expansion of a benefit entitlement – may suggest a pressing and substantial objective in some cases, this is not such a case.

[98] There is also no rational connection between the temporal restrictions and the important objective of the *MOBA*, which is to include same-sex survivors as recipients of *CPP* survivors’ pensions. The violation of s. 15(1) was the result of a decision to limit the

retroactive effect of the legislation, but the manner in which it was done, by excluding many of those who were intended to be included, is not rationally connected to the objective of the law, which is to end the discriminatory exclusion of same-sex partners from *CPP* benefits.

[99] The impairment of the rights of same-sex survivors cannot be said to be minimal. On the contrary, it is significant, and once the rationale of the incremental evolution of same-sex relationship rights is removed, it is also arbitrary. We agree with the trial judge that the fact that Canada can be said to be ahead of other countries in the extension of rights to persons in same-sex relationships does not support the argument that Parliament's exclusion of many same-sex survivors from the effects of the remedial legislation can constitute minimal impairment.

[100] Neither does the Crown meet its burden on the proportionality assessment. As discussed above, Parliament could have achieved its goal of extending rights to same-sex survivors without making benefits payable retroactively to 1985 simply by amending the definition of spouse as required by *M. v. H.*, *supra*, and allowing the general sections, s. 60(2) and s. 72(1) to operate as they do on all other claimants, thereby limiting the claims of estates to twelve months from the date of death of the contributing partner and the claims of surviving partners to twelve months of arrears from the date they apply for the pension. To further limit the application of the law in the case of same-sex surviving partners only, constitutes a disproportionate response resulting in the abridgment of the rights outweighing the attainment of the objective of the remedial legislation.

## **6. Section 15 Analysis of the General Sections (s. 60(2) and s. 72(1))**

[101] As we noted above, the trial judge approached these two sections by addressing them only in the context of the s. 15(1) breach that she found in relation to s. 44(1.1) and s. 72(2). As part of the remedy for this *Charter* breach, the trial judge gave the class members a constitutional exemption from the application of these two general provisions. In our view, no constitutional remedy can apply to a statutory provision unless that provision itself contravenes the *Charter*, either on its own or when read in conjunction with other offending provisions. Accordingly our approach is to separately analyze the two impugned general sections under s. 15(1) of the *Charter*. If they are found to breach the *Charter* and are not saved by s. 1, then the appropriate remedy can be considered.

### **(a) Section 60(2)**

[102] Section 60(2) of the *CPP* is set out again for ease of reference:

s. 60(2) Notwithstanding anything in this Act, but subject to subsections (2.1) and (2.2), an application for a benefit, other than a death benefit, that would have been payable in respect of a month to a deceased person who, prior to the person's death, would have been entitled on approval of an application

to payment of that benefit under this Act may be approved in respect of that month only if it is made within 12 months after the death of that person by the estate, the representative or heir of that person or by any person that may be prescribed by regulation.

[103] The section allows the estate of a surviving partner who dies without collecting the survivor's pension, to apply for a survivor's benefit within twelve months of the death of the surviving partner. Section 15(1) of the *Charter* applies only to individuals. In *Stinson Estate v. British Columbia* (1999), 70 B.C.L.R. (3d) 233 (C.A.), leave to appeal to S.C.C. refused, [2000] S.C.C.A. No. 169, the British Columbia Court of Appeal held that as s. 15(1) rights are personal, these rights die with the person and cannot be enforced by a person's estate, a separate and artificial entity. We agree. As a result, the survivors' estates enjoy no s. 15(1) rights and there is no basis to assess whether such rights are breached by s. 60(2).

**(b) Section 72(1)**

[104] Again, we set out s. 72(1) for ease of reference:

72(1) Subject to subsection (2) and section 62, where payment of a survivor's pension is approved, the pension is payable for each month commencing with the month following

(a) the month in which the contributor died, in the case of a survivor who at the time of the death of the contributor had reached thirty-five years of age or was a survivor with dependent children,

(b) the month in which the survivor became a survivor who, not having reached sixty-five years of age, is disabled, in the case of a survivor other than a survivor described in paragraph (a), or

(c) the month in which the survivor reached sixty-five years of age, in the case of a survivor other than a survivor described in paragraph (a) or (b),

but in no case earlier than the twelfth month preceding the month following the month in which the application was received.

[105] This is a section of general application that was not added by the *MOBA* but existed in the *CPP* before the *MOBA* and continues in force after the *MOBA*. On its own,

this provision does not affect any group of claimants differently than any other group. Before *M. v. H.*, *supra*, the opposite-sex definition of “spouse” in the *CPP* was the provision that excluded same-sex surviving partners from any entitlement to a survivor’s pension. The *MOBA* eliminated this opposite-sex definition of spouse, leaving same-sex surviving partners eligible for pensions, subject to s. 44(1.1) and s. 72(2). Those sections then excluded from eligibility all surviving same-sex partners whose partners died before January 1, 1998, and made payments for all same-sex surviving partners prospective only. Consequently, it was those specific sections added to the *CPP* by the *MOBA* that limited the rights of same-sex surviving partners. Section 72(1) did not limit same-sex survivors’ rights.

[106] It is only once s. 44(1.1) and s. 72(2) are declared unconstitutional that s. 72(1) may have an adverse effect on members of the plaintiff class, by limiting their entitlement to pension to twelve months of arrears, no matter when their partner died. Most members of the class did not apply for the survivor’s pension when their partners died, because they were not entitled under the *CPP* to apply. As a result, they will now only receive a fraction of the total amount they would have received had they been able to apply at the time of their partner’s death.

[107] The trial judge found that the purpose of the limitation in s. 72(1) is to control the predictability of claims on the fund by limiting those who have sat on their rights to twelve months arrears following the death of their partner. She also found that the plaintiffs, as a class, did not sit on their rights.

[108] There is no doubt that a law may be unconstitutional even if it is neutral on its face and enacted for a valid purpose. It is sufficient if a claimant can establish that the *effect* of the legislation infringes his or her s. 15 *Charter* rights and cannot be saved under s. 1: see, for example, *R. v. Big M. Drug Mart*, [1985] 1 S.C.R. 295; *British Columbia (Public Services Employee Relations Commission) v. British Columbia Government and Service Employees’ Union*, [1999] 3 S.C.R. 3 at para. 47; and *Law*, *supra* at para. 80. However, here, s. 72(1) had no effect on the claimants either before or after the *MOBA* was enacted. Rather, the complaint lies with the application of this provision to the class members in respect of the period between 1985 and 2000. However, the only provisions that were inconsistent with the *Charter* for that period of time were the opposite-sex spousal definition before the *MOBA* amendments, and s. 44(1.1) and s. 72(2) after the *MOBA* amendments, not the cap on arrears, nor the limitation in respect of estate claims.

[109] The general sections were, and still are, non-discriminatory in their purpose and their effect. The true cause of the adverse effect is not the general sections, but rather, the fact that the class members were altogether excluded from the *CPP* regime both before and after the *MOBA* amendments.

[110] Furthermore, as the respondents point out in their supplementary submissions, it is unclear at this stage of the proceedings to what extent s. 72(1) will limit the entitlement of any particular class member. This issue may turn both on the tolling of the limitation period for the class under s. 28 of the *Class Proceedings Act*, S.O. 1992, c. 6, as well as

on the findings of the trial judge in the proceedings that will be held in order to determine the extent of each class member's entitlement to a pension.

[111] We conclude that s. 72(1) does not violate s. 15(1) of the *Charter* because, in the context of the *MOBA*, it had no adverse effect on the claimants, and at this stage, it is not clear that it will have an adverse effect on the class. There is, therefore, no need to consider s. 1.

## VIII. REMEDY

### 1. The Remedy Granted at Trial

[112] As discussed earlier in these reasons, the trial judge held that s. 44(1.1) and s. 72(2) of the *CPP* infringed s. 15(1) of the *Charter* and could not be justified under s. 1. On the basis of this finding, she granted the class members the following remedies: an immediate declaration of invalidity in respect of s. 44(1.1) and s. 72(2); a constitutional exemption from the application of s. 60(2) and s. 72(1); and interest from February 1, 1992 or one month after the death of the contributor, whichever is later. The trial judge also granted the class members their costs of the action, which have been fixed, on consent, at approximately \$1.3 million. The question of entitlement to the costs may be subject to review by this court following the release of these reasons.

[113] The trial judge's reasons on the remedy were brief and are reproduced in full below:

#### XI. Remedy

The plaintiffs seek remedies under both s. 24 and s. 52. Section 24 provides individual remedies, while s. 52 concerns declarations of invalidity.

As noted in *Halpern*, the leading authority on constitutional remedy remains *Schachter v. Canada*, [1992] 2 S.C.R. 679. The determination of the appropriate remedy or remedies involves a three part analysis. The first step is to define the extent of the impugned law's inconsistency with the *Charter*. The second step is to select the remedy that best corrects the inconsistency. Third, the court should consider whether or not it should suspend the remedy for a period of time.

I find that s. 44(1.1) and s. 72(2) offend s. 15(1) of the *Charter*. They are unconstitutional in their entirety. The best remedy would be a combination of striking down the sections of the *CPP* which are in direct contravention of the *Charter*, and the granting of a constitutional exemption to the class members of the impugned provisions of general application. Both remedies are granted under the authority of s. 52 of the

*Charter*. This means that the class members shall be entitled to prospective pensions and to arrears to one month following the death of their partner/contributor in the same manner as opposite sex couples qualify for survivors' benefits.

Sections 60(2) and 72(1) are provisions of general application. They limit the payments of arrears to one year prior to the date of the application. The purpose of these provisions is clearly to disallow claimants or potential claimants from "sitting on their rights". The class members however did not sit on their rights. Those who actually did inquire about benefits by telephone were told that they would not be eligible. There are likely many class members who did not even make a telephone inquiry, because they recognized the futility of doing so. The court has the power to grant a constitutional exemption to provisions of general application under s. 52 of the *Charter*. (See *Eurig Estate (Re)*, [1998] 2 S.C.R. 565). Such a remedy is appropriate in this case.

...

#### Suspension of Remedy

The Crown has argued that if a remedy is granted, it should be suspended for a period of time. In *M. v. H.*, the court suspended the remedy for 6 months. However, as the court stated in that case, time was needed because the judgment would necessitate changes to a number of statutes. In this case, no suspension is necessary. The amendments required of the *CPP* to bring it in line with these reasons for judgment should not be complex. There will be no need to make changes to any other statutes. I choose to take the approach followed in *Halpern*. I order that the effect of these reasons be implemented immediately.

## **2. The Positions of the Parties**

[114] The Crown argues that the remedy ought to have been limited to a suspended declaration of invalidity in respect of s. 44(1.1) and s. 72(2), allowing a period of time for the legislature to rectify the constitutional defect. The Crown takes the position that the additional remedy of constitutional exemptions in respect of s. 60(2) and s. 72(1) had the effect of providing an individual and retroactive remedy to each class member, a remedy that is not only unprecedented, but one that is not available under either s. 24(1) of the *Charter* or s. 52(1) of the *Constitution Act, 1982*.

[115] The class members submit that considerable deference is owed to a trial judge's choice of remedies and that the Crown has failed to demonstrate that the trial judge exercised her discretion improperly. They submit that the immediate declaration of invalidity in respect of the specific provisions created minimal intrusion in the legislative sphere and was appropriate. They submit further that the constitutional exemption with respect to the provisions of general application, although novel, can be supported under either s. 52(1) because of the discriminatory effect of these provisions, or under s. 24(1) as a just and appropriate remedy. They submit that this additional remedy was just and appropriate because, "on the very particular and unique facts of this case," it was necessary to fully vindicate the class members' rights.

### **3. Section 52(1) of the *Constitution Act, 1982***

[116] The trial judge purported to grant both a declaration of invalidity and the constitutional exemption under the authority of s. 52(1). We will deal first with the choice of remedial options under s. 52(1) of the *Constitution Act, 1982*.

[117] The trial judge correctly identified the governing test on constitutional remedies under s. 52(1) as that set out in *Schachter v. Canada*, [1992] 2 S.C.R. 679. The first step is to define the extent of the impugned law's inconsistency with the *Charter*. At para. 43, the court in *Schachter* stated: "Usually, the manner in which the law violates the *Charter* and the manner in which it fails to be justified under s. 1 will be critical to this determination." For example, where the legislative purpose is not pressing or substantial, or where the means used to achieve the purpose are not rationally connected to it, it will almost always be the case that the inconsistent portion must be struck down very broadly. On the other hand, where the constitutional defect lies rather in the legislation's failure to meet the minimal impairment or proportionality tests, "there is more flexibility in defining the extent of the inconsistency" (at p. 704). The second step under the *Schachter* analysis is to select the remedy that best corrects the inconsistency. At the third and final step, the court should consider whether or not it should suspend the remedy for a period of time.

[118] The first impugned provision is s. 44(1.1). We have upheld the trial judge's finding of unconstitutionality in respect of this specific section. In light of our conclusion, there is no issue that s. 44(1.1) must be struck down in its entirety. This remedy is not only consistent with the approach suggested in *Schachter*, it is the only remedy that can cure the constitutional defect. The only remaining question is whether there should be any suspension of the remedy. This final step in the analysis will be determined below as it is necessary to assess the combined impact of all chosen remedies.

[119] The second impugned provision is s. 72(2), which provides for payments to eligible survivors of same-sex conjugal relationships no earlier than July 2000. The trial judge did not address this specific section separately in her reasons. Rather, she considered s. 44(1.1) and s. 72(2) globally and, in effect, found that there is no pressing and substantial objective, rational connection, or proportionality in excluding the class

members from the pension regime, or reducing their benefits, in any way. For the reasons discussed earlier, we have also upheld the trial judge's finding of unconstitutionality in respect of s. 72(2). There is also no issue that it must be struck down in its entirety. If s. 72(2) is struck, all eligible class members would be entitled to receive a survivor's pension, subject to the twelve-month cap on arrears and the limitation on estate claims. This brings us to a consideration of the constitutional exemption from the general sections, as the class members' claim to full pension arrears formed the basis of their request for that remedy.

[120] As we discussed above, the trial judge did not conduct a separate constitutional analysis of s. 60(2) and s. 72(1) of the *CPP*. Instead, she determined that these two general sections had an adverse effect on the class members by precluding them from receiving a fully retroactive pension. To provide the class members with the complete remedy that they sought, she accorded them a constitutional exemption from the application of these two general sections.

[121] As discussed in the first part of these reasons dealing with s. 15(1), we are of the view that there can be no constitutional remedy for a statutory provision unless that provision breaches the *Charter*, and that therefore, the proper approach is to conduct a s. 15(1) analysis of each impugned provision. Having conducted such an analysis in the first part of these reasons, we concluded that the two general sections do not breach s. 15(1) of the *Charter*. Accordingly, there is no remedy to be granted in respect of those sections. However, for completeness, we will address the constitutional exemption remedy, as it was awarded by the trial judge.

#### **4. Constitutional Exemption**

[122] The trial judge granted a constitutional exemption in respect of s. 60(2) and s. 72(1) as a remedy under s. 52(1) of the *Constitution Act, 1982*. She relied on the decision in *Re Eurig Estate*, [1998] S.C.R. 565 as providing authority to grant a constitutional exemption to provisions of general application under s. 52(1). With respect, the decision in *Re Eurig Estate* concerns the recovery of a tax paid under a legislative provision that was subsequently determined to be unconstitutional. It has nothing to do with constitutional exemptions. The class members concede that *Re Eurig Estate* can provide no assistance on this issue.

[123] The remedy of constitutional exemption, by its very nature, presupposes: (a) the ongoing validity of the legislative provision; and (b) an unconstitutional effect on the claimant from which relief is sought. For example, in any case where the court makes a declaration of invalidity under s. 52(1) and suspends the remedy, the law, although unconstitutional, remains valid during the period of suspension. However, since the court has found that the law violates a constitutional right, it is appropriate in some cases to grant a remedy of constitutional exemption to the claimant to provide relief during the period of suspension. Such a remedy was granted by this court in *R. v. Parker* (2000), 49 O.R. (3d) 481 (C.A.). The court declared the marijuana prohibition in s. 4 of the

*Controlled Drugs and Substances Act*, S.C. 1996, c. 19 invalid but suspended the declaration of invalidity for one year. In the circumstances of that case, the court also saw fit to exempt Mr. Parker from the marijuana prohibition during the period of suspended invalidity for possession of marijuana for his medical needs.

[124] There is no controversy about granting a constitutional exemption in such circumstances. What remains unprecedented is the granting of a constitutional exemption when it has not been proven that legislation is unconstitutional in general, but only that it is unconstitutional in its application to the claimant. However, this remedy has been considered by the Supreme Court of Canada in certain cases, the most recent of which is *Corbière v. Canada*, [1999] 2 S.C.R. 203.

[125] In that case, the Batchewana Indian Band successfully challenged the constitutional validity of legislation providing that only band members “ordinarily resident on the reserve” were entitled to vote in band elections. On the question of remedy, the issue was raised whether the appropriate remedy was a declaration of invalidity or a constitutional exemption in respect of the legislation’s application to the Batchewana Indian Band only. The Supreme Court of Canada, in two separate concurring judgments, was unanimous in deciding that the appropriate remedy was a declaration of invalidity suspended for eighteen months to allow Parliament to cure the defect. In each concurring judgment, the court commented on the remedy of constitutional exemption.

[126] McLachlin and Bastarache JJ., writing the majority opinion (Lamer C.J., Cory and Major JJ. concurring), expressly noted the restricted scope of the constitutional exemption. They stated as follows at para. 22:

With regard to remedy, the Court of Appeal was of the view that it would be preferable to grant the Batchewana Band a permanent constitutional exemption rather than to declare s. 77(1) of the *Indian Act* to be unconstitutional and without effect generally. With respect, we must disagree. *The remedy of constitutional exemption has been recognized in a very limited way in this Court, to protect the interests of a party who has succeeded in having a legislative provision declared unconstitutional, where the declaration of invalidity has been suspended; see Schachter v. Canada, [1992] 2 S.C.R. 679, at pp. 715-17; Rodriguez v. British Columbia (Attorney General), [1993] 3 S.C.R. 519, at p. 577. We do not think this is a case where a possible expansion of the constitutional exemption remedy should be considered [emphasis added].*

[127] L’Heureux-Dubé J., writing a concurring opinion for the remaining members of the court, suggested that the remedy may be available in circumstances where the

legislation, although generally constitutional, is unconstitutional in its application to a small subsection of those to whom it applies. She stated the following at para 111:

The first question is whether the appropriate remedy is a constitutional exemption, or one that applies in general. The finding of invalidity above relates not only to the Batchewana Band, but to the legislation in general as it applies to all bands. Therefore, in principle there is no reason that the remedy should be confined to the circumstances of the Batchewana Band. A remedy should normally be as extensive as the violation of equality rights which has been found. *The constitutional exemption may apply when it has not been proven that legislation is unconstitutional in general, but that it is unconstitutional in its application to a small subsection of those to whom the legislation applies: R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713, at p. 783; *R. v. Seaboyer*, [1991] 2 S.C.R. 577, at p. 629; *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519, at pp. 572-73, *per* Lamer C.J., dissenting. This is not the case here [emphasis added].

[128] However, in all the cases referred to by L'Heureux-Dubé J. the question was left open, but never decided, whether a constitutional exemption may be granted where the legislation is generally valid, but has an unconstitutional effect in respect of a small subsection of those to whom it applies. This is the remedy that the trial judge granted in this case, hence its acknowledged novelty.

[129] Another question arises whether such a remedy, if available, would lie under s. 52(1) or s. 24(1).

[130] The class members take the position that it is not necessary to identify the precise source of the remedy on the facts of this case. They state that the trial judge identified the extent of the inconsistency as the application of the general sections to the class members alone. She then granted the remedy under s. 52(1) by reading down the general sections to exclude the class members from their ambit. The class members state that the same result could have been achieved by granting the same remedy under s. 24(1).

[131] In our view, there is an important distinction between the two remedial provisions. Under s. 52(1), the challenge is to the *legislation*; under s. 24(1), it is to some *action* taken under the legislation that infringes a *Charter* right. As stated by the Supreme Court of Canada in *Doucet-Boudreau v. Nova Scotia*, [2003] 3 S.C.R. 3 at para. 43:

A remedy under s. 24(1) is available where there is some government *action*, *beyond the enactment of an unconstitutional statute or provisions*, that infringes a person's *Charter* rights [emphasis added].

[132] Hence, it is our view that the trial judge was correct in characterizing the constitutional exemption as a s. 52(1) remedy in this case. Assuming that it is available at law, the constitutional exemption must be based on a finding of inconsistency between the general sections and the *Charter* under the s. 52 *Schachter* analysis.

[133] In this case, the class members never sought a declaration of invalidity in respect of the general sections and, in our view, rightly so. The constitutional validity of s. 60(2) and s. 72(1), in their general application, is not challenged. Nor could a declaration of invalidity in respect of the general sections flow from the finding of unconstitutionality in respect of the specific sections. While there is authority to strike down provisions that are not themselves offensive but that are closely connected with those that are (see *Schachter, supra* at paras. 29 and 64), this is not the case here. As described earlier, if the offensive specific sections, s. 44(1.1) and s. 72(2), are struck down, the *CPP* regime remains intact. It simply becomes inclusive of all survivors of contributors and, on its face, non-discriminatory. The class members do not dispute that.

[134] As stated earlier, the class members argue, however, that the general sections are discriminatory and unconstitutional in their *application* to their particular situation. However, for reasons set out earlier, it is our view that the respondents have not shown that the general sections are discriminatory in their application and in violation of their s. 15(1) right. Hence, there is no inconsistency to cure between the general sections and the *Charter* and, consequently, no basis to grant a s. 52(1) remedy exempting the class members from their application.

## **5. Section 24(1) of the *Charter***

[135] The question remains whether the equivalent remedy – that is the full pension arrears - may be granted under s. 24(1). The Supreme Court of Canada in *Schachter* made the following general observations on the availability of s. 24(1) individual remedies at paras. 87-88:

Where s. 52 of the *Constitution Act, 1982* is not engaged, a remedy under s. 24(1) of the *Charter* may nonetheless be available. This will be the case where the statute or provision in question is not in and of itself unconstitutional, but *some action taken under it infringes a person's Charter rights*. Section 24(1) would there provide for an individual remedy for the person whose rights have been so infringed.

This course of action has been described as “reading down as an interpretive technique”, but it is not reading down in any real sense and ought not to be confused with the practice of reading down as referred to above. It is, rather, founded upon a presumption of constitutionality. It comes into play when the text of the provision in question supports a constitutional

interpretation and *the violative action taken under it thereby falls outside the jurisdiction conferred by the provision* [emphasis added].

[136] The court in *Schachter* also considered the combination of s. 24(1) and s. 52(1) remedies and stated that an individual remedy under s. 24(1) will rarely be available in conjunction with a s. 52(1) remedy. The class members submit that there is no concern about duplicating remedies in this case. There was only one remedy granted in respect of each impugned section (the declaration of invalidity with respect to each specific section, and the constitutional exemption with respect to each general section) and, hence, no combination of s. 24(1) and s. 52(1) remedies. While that is correct, the rationale for not granting retroactive individual remedies as a matter of course under s. 24(1), as expressed in *Schachter*, remains instructive in this case. The Supreme Court of Canada recently, in *R. v. Demers* (2004), 185 C.C.C. (3d) 257 at para. 62, reiterated “the rule in *Schachter*” that “precludes courts from combining retroactive remedies under s. 24(1) with s. 52 remedies”. The court then stated the following about the underlying rationale for this rule at para. 62:

[T]he policy rationale for this rule is not in our view based solely on financial liability. This was discussed by our Court in *Mackin v. New Brunswick (Minister of Finance)*, [2002] 1 S.C.R. 405, at para. 79:

Thus, the government and its representatives are required to exercise their powers in good faith and to respect the “established and indisputable” laws that define the constitutional rights of individuals. However, if they act in good faith and without abusing their power under prevailing law and only subsequently are their acts found to be unconstitutional, they will not be liable. Otherwise, the effectiveness and efficiency of government action would be excessively constrained. *Laws must be given their full force and effect as long as they are not declared invalid. Thus it is only in the event of conduct that is clearly wrong, in bad faith or an abuse of power that damages may be awarded* [emphasis added].

[137] At trial, the class members essentially relied on the conduct of the federal government as the basis for their claim to the full pension arrears. They submitted that there were two possible approaches to protect the class members from the adverse effects

of s. 60(2) and s. 72(1). The first would be based on a finding of discriminatory conduct on the part of the federal government, and the second on a finding of discriminatory effect if the sections were applied to the class members. Their argument in support of both, however, was largely based on the alleged discriminatory *conduct* of the federal government during the period of time preceding the *MOBA*.

[138] The class members acknowledged that s. 60(2) and s. 72(1) “appear on their face to serve the legitimate administrative purpose of encouraging prompt claims and protecting the fund from the uncertainty caused by tardy claimants with large claims for arrears.” They argued however that any delay in filing applications “was attributable to the [federal government’s] systemic unconstitutional conduct.” They argued that while the court had no evidence as to the precise situation with respect to the date of application of every class member, it was apparent that throughout the relevant period persons would be told over the phone that they did not qualify, and it was expected that most people would accept that information at face value and would not apply. They submitted further that, “those who did apply may or may not have been told about their *Charter* rights at the reconsideration stage. Those who had the temerity to pursue the matter faced a long battle.... This is not requiring claimants to apply promptly.” The class members argued that the federal government’s conduct was discriminatory and, as a result, they claimed to be entitled “to an award of damages equal to the value of the pensions that they are barred from receiving.”

[139] Much the same conduct was alleged in support of the claim for damages for breach of fiduciary duty. As noted earlier, the trial judge dismissed that claim. She found that the class members failed to establish the existence of a fiduciary relationship. She also dismissed the class members’ claim to symbolic damages under s. 24(1), concluding that while “there was lethargy on the part of the Crown in responding to its obligations as a result of s. 15 of the *Charter*, I cannot find bad faith” (at para 122).

[140] In our view, the same result must follow in respect of the s. 24(1) *Charter* claim to the full pension arrears. The difficulty lies with the fact that the government action upon which this claim is based relates solely to its administration of a law that was valid throughout the relevant period of time. There can be no civil liability at common law for this conduct: see *Guimond v. Quebec (Attorney General)*, [1996] 3 S.C.R. 347. The result can be no different because the claim is made under s. 24(1) of the *Charter*. Hence, the comments referred to earlier that a remedy under s. 24(1) is available “where there is some government action, *beyond the enactment of an unconstitutional statute or provision*” (*Doucet-Boudreau, supra* at para. 43); where “the violative action ... *falls outside the jurisdiction conferred by the provision*” (*Schachter, supra* at para. 88); or “in the event of conduct that is clearly wrong, in bad faith or an abuse of power” (*Demer, supra* at para 62).

[141] We therefore conclude that there is no basis to grant a s. 24(1) remedy in this case.

## 6. Conclusion on Remedy

[142] In the result, the constitutional exemption is set aside. The declaration of invalidity in respect of s. 44(1.1) and s. 72(2) is upheld. We agree with the trial judge's conclusion that no suspension is necessary in this case. Striking down the specific sections does not leave any void that needs to be filled by Parliament and on the particular facts of this case, it does not have any adverse effect on the *CPP* fund or the public purse.

## IX. PRE-JUDGMENT INTEREST

[143] The appellant also appeals the trial judge's award of pre-judgment interest on any pension arrears, which award, they argue, is not available under either s. 24(1) of the *Charter* or s. 52(1) of the *Constitution Act, 1982*.

[144] The trial judge, however, did not award interest under the *Charter* but rather under s. 31 of the *Crown Liability and Proceedings Act, supra*, which provides, in part, as follows:

31. (1) Except as otherwise provided in any other Act of Parliament and subject to subsection (2), the laws relating to prejudgment interest in proceedings between subject and subject that are in force in a province apply to any proceedings against the Crown in any court in respect of any cause of action arising in that province.

...

(5) A court may, where it considers it just to do so, having regard to changes in market interest rates, the conduct of the proceedings or any other relevant consideration, disallow interest or allow interest for a period other than that provided for in subsection (2) in respect of the whole or any part of the amount on which interest is payable under this section.

By this enactment, the legislature determined that a successful litigant is presumptively entitled to pre-judgment interest from the Crown in the same manner as a litigant would be entitled to interest from any other defendant.

[145] As the trial judge recognized, an award of pre-judgment interest is a natural extension of the underlying damages award. Such an award recognizes that the successful litigant has not had the use of the money to which it was entitled. Pre-judgment interest puts that litigant in the position it would have been in had it received the monies when it was entitled to do so. It neither benefits a successful party unfairly by providing that party with a windfall, nor punishes an unsuccessful party. It merely deprives the unsuccessful

party of the financial benefit it received from holding funds to which it was, in the result, never entitled. Accordingly, pre-judgment interest is compensatory, not punitive. See *Graham v. Rourke* (1990), 70 O.R. (2d) 622 (C.A.); *Irvington Holdings Ltd. v. Black* (1987), 58 O.R.(2d) 449 (C.A.); *Somers v. Fournier* (2002), 60 O.R. (3d) 225 (C.A.); *Giguère v. Chambre des notaires du Québec*, [2004] 1 S.C.R. 3.

[146] At the same time, Parliament recognized there might be circumstances in which the legislature had reason to preclude the granting of pre-judgment interest. Accordingly, it reserved to the legislature the right to prohibit an interest award in specific legislation. The *CPP* is not such legislation. While the *CPP* addresses other types of interest, it is silent on the issue of pre-judgment interest. The *CPP* does contain a general prohibition against the use of *CPP* revenues for extraneous purposes, but that prohibition does not preclude an award of pre-judgment interest. This is because such an award would not be payable from *CPP* funds but rather from the funds of the appellant, the Attorney General of Canada.

[147] Accordingly, apart from an exercise of the trial judge's discretion not to award interest for reasons related to the litigation, nothing precludes the successful class members from their presumptive entitlement to pre-judgment interest in accordance with the laws of the applicable province.

[148] With respect to the discretion of the trial judge to grant pre-judgment interest, her award will only be overturned if the Crown demonstrates error or injustice in the exercise of that discretion. The Crown has not done so. The trial judge did not, as was suggested by the Crown, confuse this award with either the indexing of pensions available under the *CPP* or with symbolic damages. Further, the mere fact that this is *Charter* litigation, or that it raises a novel issue, is not a reason that justifies depriving the respondents of an award of interest to which they are otherwise entitled: *Mason v. Peters* (1982), 39 O.R. (2d) 449 (C.A.), leave to appeal to S.C.C. refused (1982), 46 N.R. 538n.

[149] Section 31(6) of the *Crown Liability and Proceedings Act*, however, disallows any award of interest against the Crown before February 1, 1992, the day the section came into force. It was for this reason that the trial judge awarded interest only from February 1, 1992.

[150] The trial judge properly exercised her discretion on appropriate principles. She was entitled to award the class members pre-judgment interest and there is no basis to interfere with that disposition.

## **X. DISPOSITION**

[151] The appeal is therefore allowed and the trial judgment is amended to conform to these reasons. The parties may make written submissions with respect to costs. The submissions shall be no longer than ten pages in total. The appellant's submissions shall be made by January 5, 2005 and the respondents' submissions by January 19, 2005.

**Signed:** “Louise Charron J.A.”  
“Kathryn Feldman J.A.”  
“Susan Lang J.A.”

**Released:** “KF” November 26, 2004