NOVA SCOTIA COURT OF APPEAL

Citation: ***Muggah v. Nova Scotia (Workers' Compensation Appeals Tribunal)***, 2015 NSCA 63

Date: 20150623
Docket: CA 432292
Registry: Halifax

Between:

Deborah Lee Muggah

Appellant

v.

Nova Scotia Workers' Compensation Appeals Tribunal, the Workers' Compensation Board of Nova Scotia, the Attorney General for the Province of Nova Scotia and Marid Industries Limited

Respondents

Judges:	Fichaud, Farrar and Bryson, JJ.A.
Appeal Heard:	June 9, 2015, in Halifax, Nova Scotia
Held:	Appeal dismissed, per reasons for judgment of Fichaud, J.A.; Farrar and Bryson, JJ.A. concurring
Counsel:	Kenneth H. LeBlanc and David McCluskey, for the Appellant
	Roderick Rogers, Q.C. and Scott R. Campbell, for the Respondent Workers' Compensation Board of Nova Scotia
	Edward A. Gores, Q.C. for the Respondent the Attorney General of Nova Scotia
	Alexander C.W. MacIntosh for the Respondent the Workers' Compensation Appeals Tribunal
	Marid Industries Limited not appearing

Reasons for judgment:

[1] Ms. Muggah and Mr. Weichel divorced, then lived apart. Several years later Mr. Weichel died from a workplace accident. Up to his death, Ms. Muggah had received spousal support under their Corollary Relief Judgment. That judgment also provided Ms. Muggah with a life insurance benefit, paid on Mr. Weichel's death. The *Workers' Compensation Act* provides survivor benefits to someone who, at the time of a worker's death from a workplace accident, was either the worker's dependent "spouse" (defined to include a common law spouse) or a dependent "member of the [worker's] family". Ms. Muggah applied for survivor benefits under the *Act*. Because they had divorced and lived apart, Ms. Muggah was neither a "spouse" (married or at common law) nor a "member of [Mr. Weichel's] family", as those terms were defined by the *Act*. So the Workers' Compensation Board's hearing officer denied her application.

[2] Ms. Muggah submitted that these provisions of the *Workers' Compensation Act* discriminated against her on the basis of marital status and infringed s. 15(1) of the *Charter of Rights and Freedoms*. The Workers' Compensation Appeals Tribunal rejected her submission. The Tribunal held that Ms. Muggah neither incurred differential treatment on an enumerated or analogous ground, nor suffered discrimination under s. 15(1).

[3] Ms. Muggah appeals the constitutional point to the Court of Appeal. Did the denial of a survivor benefit discriminate on the basis of the analogous ground of marital status within s. 15(1) of the *Charter*?

Background

[4] After a 25 year marriage, Ms. Muggah and Mr. Weichel separated in 2007 and divorced in 2008. The Corollary Relief Judgment of the Supreme Court of Nova Scotia (Family Division), dated May 1, 2008, incorporated Minutes of Settlement, signed by Mr. Weichel and Ms. Muggah, for which both parties had independent legal advice. The terms provided that Mr. Weichel pay spousal support of $830 monthly, that his support obligations "cease in any event upon his death", and that Mr. Weichel maintain a $100,000 life insurance policy with Ms. Muggah as beneficiary, payable upon his death. Thereafter they lived apart.

[5] On January 26, 2013, while still paying spousal support, Mr. Weichel died from a workplace accident. He was 58 years old and Ms. Muggah was 57. Ms. Muggah received the $100,000 life insurance benefit.

[6] Ms. Muggah claimed survivor benefits under the *Workers' Compensation Act*, S.N.S. 1994-95, c. 10, as amended ("*Act*").

[7] Sub-sections 60(1) and (4) of the *Act* authorize payment of a survivor benefit to either a "spouse" or a "dependant" who is "a member of the family of [the] worker":

> **Survivor benefits**
>
> **60 (1)** Where a worker dies as the result of an injury, the amount of compensation payable is
>
> …
>
> (c) where the worker has a dependent spouse,
>
> (i) a death benefit, and
>
> (ii) a survivor pension;
>
> …
>
> **(4)** Where no compensation is payable pursuant to subsection (1), the Board may, subject to subsection (5),
>
> (a) recognize persons other than a worker's spouse or children as dependants; and
>
> (b) pay compensation proportionate to the pecuniary loss or loss of valuable services suffered by any person recognized pursuant to clause (a) as a result of the worker's death.

[8] Section 2(ab) defines "spouse":

> **2** (ab) "spouse" includes a person who, not being married to a worker,
>
> (i) was wholly or substantially dependent upon the worker's earnings at the time of the worker's injury or death, or who, but for the loss of earnings due to the injury or death, would have been so dependent, and
>
> (ii) cohabited with the worker as husband and wife at the time of the worker's injury or death and immediately prior to the worker's injury or death for a period of at least twelve continuous months;

[9] Section 2(l) defines "dependant":

> **2** (l) "dependant" means a member of the family of a worker who was wholly or substantially dependent upon the worker's earnings at the time of the worker's injury or death, or who, but for the loss of earnings due to the injury or death, would have been so dependent;

[10] Section 2(s) defines "member of the family", the phrase cited in s. 2(l):

> **2** (s) "member of the family" means a worker's spouse, parent, grandparent, stepparent, child, grandchild, stepchild, brother, sister, half-brother or half-sister, or a person who stands *in loco parentis* to the worker or to whom the worker stands *in loco parentis*;

[11] Section 59 quantifies the benefits in s. 60:

> **59** For the purpose of Sections 60 to 68,
>
> (a) "death benefit" means a sum not less than fifteen thousand dollars prescribed by the Board by regulation;
>
> …
>
> (c) "survivor pension" means an amount equal to eighty-five per cent of the worker's net average earnings before the accident.

[12] The Workers' Compensation Board's hearing officer denied Ms. Muggah's claim. Ms. Muggah appealed to the Workers' Compensation Appeals Tribunal ("Tribunal"). The Tribunal bifurcated her appeal into two stages.

[13] In the first stage, the Tribunal applied the *Act*. On October 28, 2013, the Tribunal held that Ms. Muggah was not entitled to survivor benefits (WCAT # 2013-273-PAD). The Tribunal held that she was neither a "spouse" nor a "dependant" of Mr. Weichel. Ms. Muggah was not entitled to a "spousal" benefit under s. 60(1)(c) because, at the time of Mr. Weichel's death, they were not married nor had they cohabited common law for the previous twelve months within the definition of "spouse" in s. 2(ab)(ii). She was not entitled to a survivor benefit as a "dependant" under s. 60(4) because, at the time of Mr. Weichel's death, she was not "a member of the [worker's] family" within ss. 2(l) and 2(s).

[14] In the second stage, Ms. Muggah submitted that those provisions of the *Act* drew a discriminatory distinction based on marital status contrary to s. 15(1) of the *Charter*. By a Decision dated September 11, 2014, the Tribunal dismissed her

claim (WCAT # 2013-273-AD). The Tribunal's Decision summarized its conclusions:

> Do the sections of the *Act* which operate to exclude the Appellant from receipt of survivor benefits discriminate against her on the basis of marital status?
>
> No. The Appellant failed to establish that the impugned sections of the *Act* draw a distinction based upon marital status. Alternatively, the Appellant failed to establish that any differential treatment was discriminatory under s. 15(1) of the *Charter*. The impugned provisions were not shown to have violated the Appellant's dignity by creating or perpetuating an adverse distinction based upon prejudice or stereotype. …

Later I will discuss the Tribunal's reasons in more detail.

[15] Following a consent order granting leave, Ms. Muggah appealed to the Court of Appeal from the Tribunal's second stage decision of September 11, 2014.

Issues

[16] The principal issue is whether the Tribunal committed an appealable error by ruling that the *Act*'s exclusion of former spouses from entitlement to a survivor benefit does not infringe s. 15(1) of the *Charter*. If there is an infringement, then this Court is asked to address whether the infringement is justified under s. 1 of the *Charter* and to consider the appropriate remedy.

Standard of Review

[17] Section 256(1) of the *Act* permits an appeal to this Court "on any question as to the jurisdiction of the Appeals Tribunal or on any question of law but on no question of fact".

[18] This appeal is from an administrative tribunal. So the selection of the standard of review follows *Dunsmuir*'s protocol. The interpretation and application of the *Act* was considered by the Tribunal's first decision, not appealed. Under s. 256(1), issues of fact are not appealable to this Court. On this appeal from the Tribunal's second decision, the submissions address constitutional issues of central importance to the legal system as a whole. Those issues attract a correctness standard of review. *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, paras. 58 and 60; *Smith v. Alliance Pipeline Ltd.*, [2011] 1 S.C.R. 160, paras. 26 and 37.

Section 15(1) of the Charter

[19] Section 15(1) of the *Charter* says:

> 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.

[20] Ms. Muggah's factum summarizes her submission:

> 9. All the elements of a s. 15(1) infringement are present in Ms. Muggah's case. The *Act* distinguishes dependent former spouses like Ms. Muggah, excluding them from the workers' compensation system, from dependent surviving spouses and other family dependants who are entitled to receive the appropriate survivor benefits. The distinction is made on the basis of an analogous ground of marital status. This distinction can create a significant disadvantage for former spouses dependent on a worker's earnings to cover judicially-ordered support payments because they cannot access the financial protection of the *Act* when the worker dies from a workplace accident.

[21] In *Withler v. Canada (Attorney General)*, [2011] 1 S.C.R. 396, the Chief Justice and Justice Abella for the Court set out the two-step test under s. 15(1):

> [30] The jurisprudence establishes a two-part test for assessing a s. 15(1) claim: (1) Does the law create a distinction based on an enumerated or analogous ground? (2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping? …

[22] In *Quebec (Attorney General) v. A*, [2013] 1 S.C.R. 61, Justice Abella (with whom four other justices concurred on this point – paras. 382, 385, 411, 416), reiterated the test:

> [323] In sum, the claimant's burden under the *Andrews* test is to show that the government has made a distinction based on an enumerated or analogous ground and that the distinction's impact on the individual or group perpetuates disadvantage. If this has been demonstrated, the burden shifts to the government to justify the reasonableness of the distinction under s. 1. …
>
> [324] *Kapp* [*R. v. Kapp*, [2008] 2 S.C.R. 483], and later *Withler v. Canada (Attorney General)*, [2011] 1 S.C.R. 396, restated these principles as follows: (1) Does the law create a distinction based on an enumerated or analogous ground?

> (2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping? …

[23] To the same effect: *Kahkewistahaw First Nation v. Taypotat*, 2015 SCC 30, paras. 16-22.

First Step - Distinction on Enumerated or Analogous Ground

[24] On the first step – identification of a distinction based on an enumerated or analogous ground – in *Withler*, the Chief Justice and Justice Abella said:

> [33] The first step in the s. 15(1) analysis ensures that the courts address only those distinctions that were intended to be prohibited by the *Charter*. In *Andrews* [*Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143], it was held that s. 15(1) protected only against distinctions made on the basis of the enumerated grounds or grounds analogous to them. An analogous ground is one based on "a personal characteristic that is immutable or changeable only at unacceptable cost to personal identity": *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203, at para. 13. Grounds including sexual orientation, marital status, and citizenship have been recognized as analogous grounds of discrimination.

[25] In Ms. Muggah's case, clearly there is no enumerated ground of distinction. Ms. Muggah's submission, before the Tribunal and in this Court, is premised on the analogous ground of "marital status".

[26] Ms. Muggah says that the survivor benefit was denied because she is divorced, and divorce is a type of "marital status". Colloquially, that is so. As Ms. Muggah's counsel observes, tax and other forms routinely request check marks to identify "marital status" beside markers that include "divorced".

[27] But the jurisprudence under s. 15(1) hasn't included the distinction cited by Ms. Muggah within the genus of "marital status" that is an analogous ground under s. 15(1).

[28] In *Miron v. Trudel*, [1995] 2 S.C.R. 418, the Supreme Court held that provisions in Ontario's *Insurance Act* offended s. 15(1) by providing benefits to legally married spouses, but not to common law spouses. Justice McLachlin, as she then was, for the plurality on this point and the majority in the result, said:

> 119 This appeal requires us to decide whether exclusion of unmarried partners from accident benefits available to married partners violates the equality guarantees of the *Canadian Charter of Rights and Freedoms*. I conclude that it does.
>
> …
>
> 152 Second, marital status possesses characteristics often associated with recognized grounds of discrimination under s. 15(1) of the *Charter*. Persons involved in an unmarried relationship constitute an historically disadvantaged group. There is ample evidence that unmarried partners have often suffered social disadvantage and prejudice. Historically in our society, the unmarried partner has been regarded as less worthy than the married partner. … Those living together out of wedlock no longer are made to carry the scarlet letter. Nevertheless, the historical disadvantage associated with this group cannot be denied.
>
> …
>
> 155 Of late, legislators and jurists throughout our country have recognized that distinguishing between cohabiting couples on the basis of whether they are legally married or not fails to accord with current social values or realities. …
>
> 156 These considerations, taken together, suggest that denial of equality on the basis of marital status constitutes discrimination within the ambit of s. 15(1) of the *Charter*. …

[29] *Miron*'s analogous ground of "marital status" involved a distinction between types of relationship - married partners and unmarried but cohabiting partners. It didn't involve a distinction between current partners, whether married or unmarried but cohabiting, and former partners who no longer have a spousal or cohabiting relationship. Ms. Muggah's case involves the latter distinction.

[30] In *M. v. H.*, [1999] 2 S.C.R. 3, the Court held that a distinction between cohabiting heterosexual couples and cohabiting same sex couples was an analogous ground under s. 15(1).

[31] In *Nova Scotia (Attorney General) v. Walsh*, [2002] 4 S.C.R. 325, Justice Bastarache, for seven justices, said:

> 39 … The two comparator groups in this case are married heterosexual cohabitants, to which the *MPA* [Nova Scotia's *Matrimonial Property Act*] applies, and unmarried heterosexual cohabitants, to which the *MPA* does not apply. …

Though the distinction was on an analogous ground according to *Miron*, the majority held there was no violation of s. 15(1) for other reasons.

[32] In *Quebec v. A, supra*, Quebec's *Civil Code* permitted support and property division between couples who had married or entered into a civil union, but not between couples in a *de facto* relationship. Though the Court split into groups over discrimination under s. 15(1) and justification under s. 1 of the *Charter*, the justices agreed that this distinction on the basis of marital status was an analogous ground under s. 15(1). Justice Abella (for five justices on this point) said:

> [348] The first step in s. 15(1) is to identify the distinction at issue and determine whether it is based on an enumerated or analogous ground. This is easily demonstrated in this case. The exclusion of *de facto* spouses from the economic protections for formal spousal unions is a distinction based on marital status, an analogous ground.

[33] Nova Scotia's *Workers' Compensation Act*, s. 2(ab), defines "spouse" as including partners who have cohabited common law for twelve months. Unmarried but cohabiting partners, or *de facto* spouses, are included. The *Act* doesn't distinguish based on marital status as discussed in the line of authorities.

[34] In that line of cases, the analogous ground of marital status involved a distinction between types of relationships - a married couple and a couple with a common law or *de facto* relationship, or (in *M. v. H.*) couples in heterosexual and same sex relationships. The authorities have not applied the analogous ground of "marital status" to a distinction between former (*e.g.* divorced) spouses and current (whether married, common law or *de facto*) spouses. If becoming a former spouse triggered the constitutional equality guarantee, one would expect to see s. 15(1) permeating the case law on divorce. That hasn't occurred: *e.g. Moge v. Moge*, [1992] 3 S.C.R. 813, *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420, and *Miglin v. Miglin*, [2003] 1 S.C.R. 303.

[35] Ms. Muggah's counsel acknowledges his submission's novelty, but says the *Charter* welcomes a sound initiative to chart new territory.

[36] I agree. But this territory is charted.

[37] In *Hodge v. Canada (Minister of Human Resources Development)*, [2004] 3 S.C.R. 357, the Court rejected a like submission. Ms. Hodge and the deceased had cohabited in a common law relationship for over twenty years, before the

relationship ended. Subsequently her former partner died. Ms. Hodge claimed a survivor's pension under the *Canada Pension Plan*. The pension was denied because, at the time of the contributor's death, Ms. Hodge was no longer a "spouse". The *Canada Pension Plan* defined "spouse" to include a common law spouse who cohabited with the contributor for one year before the contributor's death. No such cohabitation was required of married spouses. This is similar to the definition of "spouse" in s. 2(ab) of Nova Scotia's *Workers' Compensation Act*. Ms. Hodge claimed that *Canada Pension Plan* discriminated on the basis of her status as a "former spouse" and offended s. 15(1) of the *Charter*. Justice Binnie for the unanimous Court disagreed:

> 33 If the claim to equality is to succeed, the ground has to be a personal characteristic enumerated or analogous to those listed in s. 15(1). …
>
> 39 The claimant then says that a distinction has been drawn within that group on the basis of a personal characteristic, namely marital status. There is no doubt that marital status is an analogous ground of discrimination prohibited when used in a discriminatory way by s. 15(1): *Miron, supra*, at para. 156; *Walsh, supra*, at para. 41. …
>
> 40 ... The survivor's pension was denied on the basis that the respondent was not, at the relevant time, a spouse. It was not denied, as it was in *Miron*, because at the relevant time she was a *common law* spouse rather than a *married* spouse. [Justice Binnie's emphasis]
>
> …
>
> 45 The respondent does not argue that limiting the survivor's pension to a "spouse' is itself discriminatory. Rather her position, as put by her counsel, is that "Betty Hodge does not compare herself to divorced spouses". In my view, with respect, the proper comparator group in her case *is* [Justice Binnie's emphasis] divorced spouses. Beginning in February 1994, there was both physical separation from her common law partner and an intention on her part to make it permanent. At the time of his death, therefore, she was not a "separated" common law spouse but a "former" common law spouse. Former common law spouses, like divorced spouses, are no longer spouses in any legal sense at common law. In neither case are they eligible for a survivor's pension under the CPP.
>
> 46 … Here *former* married spouses and *former* common law spouses are treated the same. [Justice Binnie's emphasis]
>
> 47 … A reasonable claimant in her position would, I think, not feel demeaned by being treated the same as other "former" spouses. …

> 49 For these reasons, it is my view that the respondent belongs to the category of "**former spouses"** for whom no survivor's pension is available under the CPP, **irrespective of marital status.** [bolding added]
>
> …
>
> The constitutional questions should therefore be answered as follows:
>
> 1. Does the definition of "spouse" in s. 2(1) of the *Canada Pension Plan*, R.S.C. 1985, c. C-8, infringe s. 15(1) of the *Canadian Charter of Rights and Freedoms*?
>
> Answer: No.

[38] For "analogous grounds", Justice Binnie considered the distinction between a former common law partner and a former (*i.e.* divorced) spouse. He did so because "marital status" governs a distinction between types of relationships (*e.g.* married, common law or *de facto*, heterosexual, same sex), not a distinction between current and former relationships. He said the category of "former spouses" exists "irrespective of marital status" (para. 49).

[39] In *Withler*, the Chief Justice and Justice Abella said:

> (4) The Proper Approach to Comparison
>
> [61] The substantive equality analysis under s. 15(1), as discussed earlier, proceeds in two stages: (1) Does the law create a distinction based on an enumerated or analogous ground? and (2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping? (see *Kapp*, at para. 17.) Comparison plays a role throughout the analysis.
>
> [62] The role of comparison at the first step is to establish a "distinction". Inherent in the word "distinction" is the idea that the claimant is treated differently than others. Comparison is thus engaged, in that the claimant asserts that he or she is denied a benefit that others are granted or carries a burden that others do not, by reason of a personal characteristic that falls within the enumerated or analogous grounds of s. 15(1).
>
> [63] It is unnecessary to pinpoint a particular group that precisely corresponds to the claimant group except for the personal characteristic or characteristics alleged to ground the discrimination. Provided that the claimant establishes a distinction based on one or more enumerated or analogous grounds, the claim should proceed to the second step of the analysis. This provides the flexibility required to accommodate claims based on intersecting grounds of discrimination. It also avoids the problem of eliminating claims at the outset because no precisely corresponding group can be posited.

> [64] In some cases, identifying the distinction will be relatively straightforward, because a law will, on its face, make a distinction on the basis of an enumerated or analogous ground (direct discrimination). This will often occur in cases involving government benefits, as in *Law*, [*Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497], *Lovelace* [*Lovelace v. Ontario*, [2000] 1 S.C.R. 950] and *Hodge*. …

[40] *Withler* slipped the collar of mirror comparison that had constrained aspects of the analysis in cases like *Hodge* and *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, [2004] 3 S.C.R. 657. I will return to this later when discussing discrimination and substantive equality. But *Withler* (para. 63) and *Quebec v. A* (paras. 323-24) confirmed the requirement that "the claimant establish[es] a distinction based on one or more enumerated or analogous grounds". *Withler* (para. 62) confirmed that "[t]he role of comparison at the first step is to establish a 'distinction' ". Neither *Withler* nor *Quebec v. A* questioned *Hodge*'s interpretation of "marital status" as an analogous ground of distinction. To the contrary, in *Withler* the Chief Justice and Justice Abella (para. 64) cited *Hodge* as a "straightforward" identification of the applicable distinction, because that distinction appeared on the face of the legislation.

[41] In my respectful view, the distinction proposed by Ms. Muggah is not analogous under s. 15(1) of the *Charter*. There is no infringement of s. 15(1).

[42] That conclusion suffices to dismiss the appeal. Nonetheless, the Tribunal ruled alternatively that there was no "discrimination" under the second step of the s. 15(1) analysis. In this Court, the parties made detailed and thoughtful submissions on discrimination and substantive equality. So I will turn to the second step.

Second Step - Discrimination

[43] In *Withler*, the Chief Justice and Justice Abella framed the second step with these principles:

> [34] However, a distinction based on an enumerated or analogous ground is not by itself sufficient to found a violation of s. 15(1). At the second step, it must be shown that the law has a discriminatory impact in terms of prejudicing or stereotyping in the sense expressed in *Andrews*.
>
> [35] The first way that substantive inequality, or discrimination, may be established is by showing that the impugned law, in purpose or effect, perpetuates

prejudice and disadvantage to members of a group on the basis of personal characteristics within s. 15(1). Perpetuation of disadvantage typically occurs when the law treats a historically disadvantaged group in a way that exacerbates the situation of the group. Thus judges have noted that historic disadvantage is often linked to s. 15 discrimination. …

[36] The second way that substantive inequality may be established is by showing that the disadvantage imposed by the law is based on a stereotype that does not correspond to the actual circumstances and characteristics of the claimant or claimant group. Typically, such stereotyping results in perpetuation of prejudice and disadvantage. …

[39] Both the inquiries into perpetuation of disadvantage and stereotyping are directed to ascertaining whether the law violates the requirement of substantive equality. Substantive equality, unlike formal equality, rejects the mere presence or absence of difference as an answer to differential treatment. It insists on going behind the facade of similarities and differences. It asks not only what characteristics the different treatment is predicated upon, but also whether those characteristics are relevant considerations under the circumstances. The focus of the inquiry is on the actual impact of the impugned law, taking full account of social, political, economic and historical factors concerning the group. The result may be to reveal differential treatment as discriminatory because of prejudicial impact or negative stereotyping. Or it may reveal that differential treatment is required in order to ameliorate the actual situation of the claimant group.

[40] It follows that a formal analysis based on comparison between the claimant group and a "similarly situated" group, does not assure a result that captures the wrong to which s. 15(1) is directed – the elimination from the law of measures that impose or perpetuate substantive inequality. What is required is not formal comparison with a selected mirror comparator group, but an approach that looks at the full context, including the situation of the claimant group and whether the impact of the impugned law is to perpetuate disadvantage or negative stereotypes about that group.

…

[65] The analysis at the second step is an inquiry into whether the law works substantive inequality, by perpetuating disadvantage or prejudice, or by stereotyping in a way that does not correspond to actual characteristics or circumstances. At this step, comparison may bolster the contextual understanding of a claimant's place within a legislative scheme and society at large, and thus help to determine whether the impugned law or decision perpetuates disadvantage or stereotyping. …

[66] The particular contextual factors relevant to the substantive equality inquiry at the second step will vary with the nature of the case. … As Wilson, J. said in *Turpin* [*R. v. Turpin*, [1989] 1 S.C.R. 1296],

> In determining whether there is discrimination on grounds relating to the personal characteristics of the individual or group, it is important to look not only at the impugned legislation which has created a distinction that violates the right to equality but also to the larger social, political and legal context. [p. 1331]

[67] In cases involving a pension benefits program such as this case, the contextual inquiry at the second step of the s. 15(1) analysis will typically focus on the purpose of the provision that is alleged to discriminate, viewed in the broader context of the scheme as a whole. Whom did the legislature intend to benefit and why? In determining whether the distinction perpetuates prejudice or stereotypes a particular group, the court will take into account the fact that such programs are designed to benefit a number of different groups and necessarily draw lines on factors like age. It will ask whether the lines drawn are generally appropriate, having regard to the circumstances of the persons impacted and the objects of the scheme. Perfect correspondence between a benefit program and the actual needs and circumstances of the claimant group is not required. Allocation of resources and particular policy goals that the legislature may be seeking to achieve may also be considered.

…

[71] … As discussed above, a central consideration is the purpose of the impugned provision in the context of the broader pension scheme. It is in the nature of a pension benefit scheme that it is designed to benefit a number of groups in different circumstances and with different interests. The question is whether the lines drawn are generally appropriate, having regard to the circumstances of the groups impacted and the objects of the scheme. Perfect correspondence is not required. Allocation of resources and legislative policy goals may be matters to consider. The question is whether, having regard to these and any other relevant factors, the distinction the law makes between the claimant group and others discriminates by perpetuating disadvantage or prejudice to the claimant group, or by stereotyping the group.

…

[81] In our respectful view, Rowles J.A.'s analysis illustrates how reliance on a mirror comparator group can occlude aspects of the full contextual analysis that s. 15(1) requires. It de-emphasized the operation of the Reduction Provisions on the death benefit in the context of the entire plan and lifetime needs of beneficiaries. The result was a failure to fully appreciate that the package of benefits, viewed as a whole and over time, does not impose or perpetuate discrimination. For the reasons discussed earlier, this approach cannot be sustained.

[44] In *Quebec v. A*, Justice Abella, for five justices on this issue, expanded on aspects of *Withler*'s approach to discrimination and substantive equality:

> [325] … *Withler* is clear that "[a]t the end of the day there is *only one question*: Does the challenged law violate the norm of substantive equality in s. 15(1) of the *Charter*?" (para. 2 [Justice Abella's italics]). Prejudice and stereotyping are two of the indicia that may help answer that question; they are not discrete elements of the test which the claimant is obliged to demonstrate. …
>
> [327] We must be careful not to treat *Kapp* and *Withler* as establishing an additional requirement on s. 15 claimants to prove that a distinction will perpetuate prejudicial or stereotypical attitudes towards them. Such an approach improperly focuses attention on whether a discriminatory *attitude* exists, not a discriminatory impact, contrary to *Andrews*, *Kapp* and *Withler*. …
>
> [331] *Kapp* and *Withler* guide us, as a result, to a flexible and contextual inquiry into whether a distinction has the effect of perpetuating arbitrary disadvantage on the claimant because of his or her membership in an enumerated or analogous group. …
>
> [333] An emphasis at this stage on whether the claimant group's exclusion was well motivated or reasonable is inconsistent with this substantive equality approach to s. 15(1) since it redirects the analysis from the *impact* of the distinction on the affected individual or group to the legislature's *intent* or *purpose*.
>
> [Justice Abella's italics]

[45] To summarize: The assessment of "discrimination" isn't a controlled experiment in mirror comparison. The court eyes the broader vista of substantive equality. From the perspective of the legislative scheme, set in its full legal, social and political context, the court first asks – Whom did the legislature intend to benefit and why? With that answer in hand, the court then asks – Is the effect of the impugned provision to exacerbate or perpetuate disadvantage of the enumerated or analogous group, or of individuals because of their membership in that group, according to *indicia* that may include, but are not limited to, prejudice and stereotyping?

[46] The Workers' Compensation Appeals Tribunal has expertise in the workings of the *Act* and the scope of the impugned provisions. Ms. Muggah had submitted that the legislative objective of the survivor's benefit was to provide "comprehensive" coverage for anyone who depended on the deceased worker's income. The Tribunal disagreed, saying the legislative objective was "limited" coverage. The Tribunal explained the reasons for the limitation (Decision under appeal, pages 13-17):

> As to the statutory scheme, the Appellant [Ms. Muggah] submitted that workers' compensation was intended to provide "comprehensive and indispensable compensation coverage" for workers' families and dependants. However, there are a number of reasons why workers' compensation should be considered a limited scheme, at least insofar as families and dependants are concerned.
>
> …
>
> The above discussion identifies intended beneficiaries for survivor benefits provisions under the *Act*. More broadly (in line with Professor Hogg's statement), the panel is of the opinion that the *Act* provides a public insurance plan designed to benefit injured workers during their lives and provides limited benefits for dependent survivors who had a spousal, familial, or similar relationship to a deceased worker.
>
> The Appellant's concern has to do with statutory benefits for a surviving spouse. … A former spouse does not come within the intended beneficiaries of the scheme.
>
> …
>
> There can be no dispute that the award of survivor benefits impacts the Board's accident fund. In the interest of maintaining a viable accident fund available for injured workers and others, the possible recipients of survivor benefits must be limited.
>
> The legislature was mindful of the interplay between laws concerning divorce, particularly the *Divorce Act*, R.S.C. 1985, c. 3, and benefits payable under other legislation. …
>
> In the panel's view, the existence of matrimonial support and property laws reflects society's method of dealing with difficult circumstances between couples going their separate ways. Such laws do not operate to create approbation or stigma. Similarly, they do not perpetuate historical disadvantage or prejudice.
>
> …
>
> In sum, the differential treatment given former spouses by virtue of the impugned provisions strikes an appropriate balance. Excluding former spouses from survivor benefits is consistent with the overall principles of the workers' compensation system and the legitimate objectives of survivor benefit provisions. Furthermore, the Appellant failed to demonstrate that an actual adverse impact resulted from the operation of the impugned provisions. ...

[47] The Tribunal referred to *Roy v. Canada*, 2003 FCA 320. *Roy* involved a challenge by divorced former spouses to provisions of the *Canadian Forces Superannuation Act*, R.S.C. 1985, c. C-17. The Tribunal (pages 15-16) adopted, as apposite to the scope and objectives of the impugned provisions in Nova Scotia's

Workers' Compensation Act, the following passages from the reasons of Justices Sharlow and Evans in *Roy*:

> … Divorced spouses are not among those who are intended to benefit from the survivor provisions because divorce severs the familial tie between the parties, and also results in the possibility of recourse to matrimonial support and property laws to alleviate the hardship resulting from legal termination of the marriage … [per Sharlow, J.A., at para. 69]
>
> … It is very dangerous to view one set of financial provisions in isolation, rather than as part of a complex web of federal (divorce law) and provincial (family property law) legislation that deal with the class of persons (divorced spouses) who are ineligible under the impugned programme. Eligibility lines drawn by Parliament by reference to characteristics identified in subsection 15(1), or analogous thereto, may lose any discriminatory sting when viewed in the context of the related benefits available to those ineligible under the impugned statutory provisions and thus not infringe subsection 15(1). [per Evans, J.A., at para. 85]

[48] My views resemble those of the Tribunal.

[49] The Workers' Compensation Fund isn't meant to be a universal social safety net. The trappings of the Workers' Compensation Board aren't designed to duplicate or replace the existing legal web that operates to support divorced spouses. That web includes the *Divorce Act*, provincial legislation governing matrimonial property and support of common law spouses, the *Civil Procedure Rules* that govern matrimonial disputes and disclosure, the Spousal Support Advisory Guidelines, the related principles of family jurisprudence and the specialized courts that administer those standards. Ms. Muggah's factum (paras. 103-4) asks that the impugned provisions be declared unconstitutional and that the *Workers' Compensation Act* be "read to allow for survivor benefits or other appropriate compensation to be paid to a dependent former spouse, which compensation should at least correspond to the extent of the former spouse's dependency upon a worker's earnings at the time of the worker's death". An "appropriate correspondence to dependency" suggests elements of a spousal support calculation. The Workers' Compensation Board isn't equipped with the expertise, the resources and infrastructure, the disclosure, or the statutory and procedural authority to replicate the operations of the family courts.

[50] To answer *Withler*'s first question: The survivor benefit under the *Workers' Compensation Act* was not meant for divorced spouses. The Legislature left that

topic, including the sub-topic of security for foregone support payments after a divorced payor's death, to the law and practice of divorce.

[51] Next is *Withler*'s ultimate question: Do the impugned provisions offend substantive equality by exacerbating or perpetuating a disadvantage to the enumerated or analogous group or to individuals because of their membership in that group?

[52] Section 60(3) of the *Workers' Compensation Act* says that the survivor benefit "is payable until the worker would have attained the age of sixty-five years or until the surviving spouse attains the age of sixty-five years, whichever is later". At Mr. Weichel's death, he was 58 years old and Ms. Muggah was 57. So a survivor benefit, had it been payable to Ms. Muggah, would end within eight years of Mr. Weichel's death. The Board's counsel points out that the $100,000 life insurance, received by Ms. Muggah, exceeded the total of the spousal support ($830 monthly, or $79,680 assuming eight full years) that Ms. Muggah would have received between the date of Mr. Weichel's death and the termination of a survivor's benefit under s. 60(3). Similarly, the Tribunal found (page 16):

> The Appellant acknowledged receipt of $100,000 in insurance proceeds pursuant to the separation agreement. Thus, no financial "adverse impact" appears to have resulted from the Appellant's loss of $830 per month in support payments. (See *Quebec (Attorney General) v. A.*, at para. 171).
>
> If the Appellant's position were to be accepted, she would be in receipt of a survivor pension in addition to her entitlement under the Corollary Relief Judgement. This would seem to put her in a *more advantageous* financial position than a dependent married or common law surviving spouse. [Tribunal's italics]

[53] That arithmetical model, though temptingly simplistic, doesn't embody *Withler*'s vision of substantive equality (passages quoted above, para. 43). I say this for several reasons:

> (1) The assessment of "adverse impact" is unresponsive to s. 15(1). Both sides of the model's equation - the $100,000 and the $830 monthly - derive from the Corollary Relief Judgment. There is no comparison to the potential survivor benefits under the impugned provisions of the *Workers' Compensation Act*.

(2) The model assumes unknown facts – *e.g.* that the comparator (the hypothetical dependent surviving spouse) would not have life insurance. A couple in a current relationship conceivably may have life insurance for each other's benefit. What if the surviving spouse had $1,000,000 life insurance compared to Ms. Muggah's $100,000?

(3) The model is intellectually naïve. Ms. Muggah's needs will continue after she reaches age 65. She may well assert that the *Workers' Compensation Act*'s survivor benefits would support her to age 65, and the life insurance would pick up her ongoing needs afterward.

(4) Finally, the constitutional validity of legislation should not turn on the serendipitous fact that this claimant's life insurance happens to exceed a particular number. Another claimant may have more, less or no life insurance. Ms. Muggah does not request a ruling that the legislation is unconstitutional only in its application to her, in the fashion of American jurisprudence. Her factum (para. 23) invokes s. 52(1) of the *Constitution Act, 1982* for her claim that the impugned legislation, unless re-written, is "of no force and effect".

[54] These anomalies stem from the attempt to force a scrupulous mirror comparison onto nebulous facts. Hence the Supreme Court's endorsement of contextual substantive equality.

[55] Section 15(1) directs the Court to consider whether the effect of the impugned provisions is to exacerbate or perpetuate a disadvantage based on Ms. Muggah's proposed analogous ground – *i.e.* "marital status" as a "former spouse". "Comparison plays a role throughout the analysis" of s. 15(1) (*Withler*, para. 61). But the analysis of discrimination appraises substantive equality, not narrow formal equality (*Withler*, paras. 39-40, 65-67, 71, 81). "What is required is not formal comparison with a selected mirror comparator group, but an approach that looks at the full context…" (*Withler*, para. 40). The inquiry is:

> ... whether the lines drawn are generally appropriate, having regard to the circumstances of the groups impacted and the objects of the scheme. Perfect correspondence is not required. Allocation of resources and legislative policy goals may be matters to consider. [*Withler*, para. 71]

[56] In my view, from the full contextual perspective, the impugned provisions of the *Workers' Compensation Act* are not discriminatory. As discussed, those provisions left the matter to be handled by the law and practice of divorce. But the Legislature didn't cast divorced spouses into a legal vacuum. Given the misfortune of Mr. Weichel's death, Ms. Muggah was well-served by the divorce-related machinery that operates outside the *Workers' Compensation Act*.

[57] Systemic safeguards were in place. Ms. Muggah's Corollary Relief Judgment incorporated the terms of the parties' Minutes of Settlement. The Minutes of Settlement were signed by Ms. Muggah and Mr. Weichel, and attached certificates of independent legal advice signed by the parties' separate counsel. Those terms resulted from a balance of the parties' interests and prospects, after advice from counsel. The Corollary Relief Judgment received objective approval of a judge with specialized knowledge of divorce law. Those legal principles embody standards prescribed in cases like *Moge*, *Bracklow* and *Miglin*, *supra*. The terms included spousal support to Ms. Muggah (article 15), provision that Mr. Weichel's support obligations "cease in any event upon his death" (article 55), and provision of a life insurance policy for a substantial sum payable to Ms. Muggah upon Mr. Weichel's death (article 19).

[58] The quantum of any life insurance benefit that is provided in a corollary relief judgment will vary from case to case with the parties' circumstances and the factors at play in each divorce. The constitutional validity of provisions in the *Workers' Compensation Act* doesn't pivot on whether Ms. Muggah's insurance was $100,000 or some other amount. The point is that appropriate life insurance, to replace foregone spousal support after the payor's death, is an available implement in the machinery of divorce that operates independently of the *Workers' Compensation Act*.

[59] The life insurance provision is a common term of corollary relief judgments after divorce. Julien D. Payne & Marilyn A. Payne, *Canadian Family Law*, 5th ed (Toronto: Irwin Law Inc., 2013), p. 222 says:

> ... For the purpose of providing security for arrears and future payments of spousal support, the court may exercise its discretionary statutory jurisdiction to order the obligor to designate the obligee as the beneficiary under the obligor's life insurance policy. Orders of this nature have begun to be granted on a routine basis, even though no specific mention of life insurance policies is found in the

> provisions of sections 15.2(1), (2), and (3), and 17(3) of the *Divorce Act*, which relate to the court's jurisdiction to order security for spousal support payments.

Nova Scotia authorities on the practice include: *Vye v. Vye*, [1997] N.S.J. No 513 (S.C.), *Dolphin Estate (Re)*, 2004 NSSC 226, paras. 12-17, and *Jardine-Vissers v. Vissers*, 2011 NSSC 195, paras. 41-45.

[60] In my respectful view, the impugned provisions of the *Workers' Compensation Act*, considered in their full context, do not offend substantive equality – or discriminate – by exacerbating or perpetuating disadvantage either to former spouses as a group or to Ms. Muggah because she is a former spouse. Though I part with some of the Tribunal's reasoning, the Tribunal's conclusion that Ms. Muggah did not suffer discrimination under s. 15(1) of the *Charter* is correct.

Conclusion

[61] It is unnecessary to consider s. 1 of the *Charter*. I would dismiss the appeal without costs.

Fichaud, J.A.

Concurred: Farrar, J.A.

Bryson, J.A.