EQUALITY AND WORKERS' COMPENSATION: LAW, POLITICS AND SURVIVOR BENEFITS

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In 1993, the Workers' Compensation Board (WCB) of Nova Scotia denied an application by Helene O'Quinn for re-instatement of her monthly pension to which she originally became entitled in 1980 upon the death of her 'common law' husband in the course of his employment in Nova Scotia.[1] Upon her remarriage in 1986, O'Quinn became dis-entitled to the pension and received a final lump sum payment under the *Workers' Compensation Act*.[2] In 1992, O'Quinn divorced her second husband and received a lump sum payment as corollary relief without any continuing periodic support payments. In this situation, O'Quinn based her application to the WCB on two significant statutory developments. First, the Nova Scotia *Human Rights Act*[3] had been amended in 1991 to add "marital status" as a prohibited ground of discrimination.[4] Second, a 1992 amendment repealed the section of the *Workers' Compensation Act* which caused a dependent widow's pension to cease upon

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[1] At the time of his death, O'Quinn's 'common law' spouse was separated but not divorced from his wife who resided in Nova Scotia with the three children of that marriage.

[2] R.S.N.S. 1989, c. 508, s. 61:

> 61(1) If a dependant widow remarries, her right to compensation... shall cease, but she shall be entitled to thirty-five dollars a month for a period of twenty-five months from the date of the marriage, or in the discretion of the Board, to be paid an amount equal to such payments in one or more amounts...
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> (2) If a dependant widow remarries on or after the first day of January, 1974, her right to compensation... shall cease, but she shall be entitled to fifty dollars a month for a period of twenty-five months from the date of the marriage....

[3] R.S.N.S. 1989, c. 214.

[4] S.N.S. 1991, c. 12.

remarriage.[5] The WCB denied her application and O'Quinn complained to the Nova Scotia Human Rights Commission.

In her complaint, O'Quinn claimed to have been a victim of discrimination on the basis of marital status. Before the board of inquiry, O'Quinn neither presented evidence nor appeared at the hearings, as she left carriage of her case to the Human Rights Commission. Instead of testimonial evidence, the Commission presented an agreed statement of facts and relied upon the strength of its legal argument. Counsel for the respondent called three WCB officials who explained that board's procedures in compensation applications. Critical evidence presented before the Nova Scotia Human Rights Commission indicated a practice that once a claimant proved dependency at the time of the worker's death, the WCB did not revisit this qualifying factor.[6] The WCB argued that its decision was grounded not in O'Quinn's marital status *per se* but rather on the timing of her remarriage; that is, her remarriage occurred prior to the 1992 amendment of the *Workers' Compensation Act* which was itself silent on the matter of retroactivity. In a decision reported as *O'Quinn v. Nova Scotia (Workers' Compensation Board (No. 2)*,[7] the board of

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[5] S.N.S. 1992, c. 35, s. 6 "Section 61 of said Chapter 508 is repealed." In speaking on Bill 283 in the House of Assembly, the Minister of Labour identified the discriminatory nature of the offending section as the reason for its repeal: "it proposes to eliminate a discriminatory provision which halts compensation payments to a widow but not to a widower in the event of remarriage", Nova Scotia, *Assembly Debates (Hansard)*, 2nd Session, 55th General Assembly (Halifax: Queen's Printer, 1992) at 10453 (Hon. Leroy Legere, Minister of Labour).

[6] *Ibid.* at para. 12.

[7] (1996), 27 C.H.R.R. D/155 (Susan Ashley). In a preliminary decision, the board rejected a challenge to its jurisdiction. In *O'Quinn v. Nova Scotia (Workers' Compensation Board)* (1995), 27 C.H.R.R. D/139 (Susan Ashley), the board of inquiry held that the Worker's Compensation Board had authority under its legislation to reopen O'Quinn's compensation claim; that O'Quinn's non-residency did not preclude application of the *Human Rights Act* because the alleged discriminatory act was that of the Board in Nova Scotia; that the provision of workers' compensation benefits is a "service" within the meaning of the *Human Rights Act*; and that the issue of appropriate remedy was premature.

On the authority of the Workers' Compensation Board to reopen the compensation file, the board of inquiry held that "[i]nterpreting the words "or otherwise" in s. 70 [of the Act] to include the complainant would not place an unbearable strain on the plain words of the section; nor would it add a new class of claimants. It is a question of fact whether the complainant is a 'dependent' for the purposes of s. 70. If so, her situation has changed because the reason for terminating her benefits in the first place no longer exists, by virtue of the legislation being repealed." *Ibid.* at D/142. Section 70 of the *Workers' Compensation Act* read as follows:

> 70. The Board may reopen, rehear, redetermine, review or readjust any claim, decision or adjustment... either because an injury has proven more serious or less serious than it was deemed to be, or because new evidence relating to such claim, decision or adjustment has

inquiry held that the 1993 decision to deny O'Quinn's application for reinstatement of her pension benefits was based solely on the change in her marital status which occurred upon her remarriage in 1986. In other words, denial of her application depended upon a continuing factor, her marital status. In the absence of evidence as to the purpose motivating the legislative amendment in 1992, the board of inquiry assumed "that the change followed directly from the amendment to the *Human Rights Act* the previous year, which prohibited discrimination on the basis of marital status."[8] Linking denial of the claimed benefit to a proscribed ground of discrimination led to the finding of discrimination as section 4 of the Act defined that term:

> 4. For the purposes of this Act, a person discriminates where the person makes a distinction, whether intentional or not, based on a characteristic, or perceived characteristic...[proscribed by the Act] that has the effect of imposing burdens, obligation or disadvantages on an individual or class of individuals not imposed upon others or which withholds or limits access to opportunities, benefits and advantages available to other individuals or classes of individuals in society.

The board of inquiry ordered the WCB to reconsider O'Quinn's application and to notify all similar potential claimants of their right to have their claims reconsidered.

The board of inquiry's decision in *O'Quinn* marked a significant success for the campaign to extended compensation benefits to the *remarried* spouses of deceased

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been presented to it, or because a change has occurred in the condition of a worker or in the number, circumstances or condition of dependents or otherwise.

To reach its conclusion that compensation benefits are a "service", the board of inquiry distinguished a decision of the Prince Edward Island Court of Appeal, *Jenkins v. Workers' Compensation Board of Prince Edward Island* (1986), 61 N. & P.E.I.R. 206 which had held that the provision of such benefits was not a "service" within the meaning of the Prince Edward Island *Human Rights Act*, S.P.E.I. 1975, c. 72. The board noted that the legislation under consideration in *Jenkins* was qualified by the phrase "to which members of the public have access", a qualification not present in the Nova Scotia legislation. The board also noted that McQuaid J in *Jenkins* had relied upon the narrow concept of "service" expressed by Martland J. in *Gay Alliance Towards Equality v. Vancouver Sun*, [1979] 2 S.C.R. 435 at 455, that "[s]ervices refers to such matters as restaurants, bars, taverns, service stations, public transportation and public utilities." This conception which limited 'service' to those offered to the 'public at large' had subsequently been repudiated by the Supreme Court of Canada in *University of British Columbia v. Berg*, [1993] 2 S.C.R. 353, at 383 which held that "every service has its own public."

[8] *Ibid.* at para. 28.

workers. During the period 1981 to 1993, five provincial legislatures had amended their respective workers' compensation legislation to continue benefits for dependent spouses of deceased workers after remarriage. These successes were achieved at the political level. At the legal level, *O'Quinn* and its progeny found success in the area of human and constitutional rights. It is the success of this campaign which illustrates the dissonance between politics and law because the campaign continued to succeed even after the courts had concluded no violation of either human rights or constitutional rights was at play. In the popular mind, that is the world of real politick, rights are often viewed in the abstract as absolutes with little attention given to the limitations which define those rights in a free and democratic society. Thus, the political and legal worlds collide.

Before examining the subsequent judicial and quasi-judicial responses to *O'Quinn*, the context which gave rise to the spousal benefits issue requires examination. This is presented in Part 2 which briefly touches upon the introduction of workers compensation legislation in Canada and then addresses the reforms which led to the challenge in relation to surviving spouse benefits and the judicial and legislative aftermath of the decision in *O'Quinn*. Part 3 considers the concept of substantive equality as reflected in Supreme Court jurisprudence and Part 4 applies this jurisprudence to analysis of the issue of termination of surviving spouse benefits upon remarriage and discrimination on the prohibited ground of 'marital status.' Part 5 reviews the success of the campaign for reinstatement of benefits at the political level. A general conclusion is found in Part 6.

PART 2: Survivor Benefits

A. The Context

In 1910, the Chief Justice of the Ontario Court of Common Pleas, later Chief Justice of Ontario, Sir William Meredith, undertook his duties as provincially appointed commissioner to report on "laws relating to the liability of employers to make compensation to their employees for injuries received in the course of their employment."[9] The *Meredith Report* (1913) recommended enactment of a scheme

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[9] Sir Wm. Meredith, *Final Report On Laws Relating To The Liability Of Employers To Make Compensation To Their Employees For Injuries Received In The Course Of Their Employment Which Are In Force In Other Countries And As To How Far Such Laws Are Found To Work Satisfactorily* (31 October 1913) reproduced as Appendix II in Saskatchewan Workers' Compensation Board, *The Story of Workers' Compensation in Saskatchewan* (Regina: Saskatchewan Workers' Compensation Board,

which would provide no-fault benefits for injured workers and abrogate the application of the common law doctrines of common employment, *volenti non fit injuria* and contributory negligence. Instead of following what was known as the 'British' model which provided that each employer is liable for the payment of compensation to its own workers, the Report recommended adoption of the 'German' model of collective liability on an industry-wide basis. Chief Justice Meredith explained the philosophy underlying the compensation scheme as:

> to provide for the injured workman and his dependents and to prevent their becoming a charge upon their relatives or friends, or upon the community at large.[10]

After receiving the Report, the Ontario legislature enacted the *Workmen's Compensation Act*.[11] That Act expressly provided for monthly payments to a dependant widow to cease in the event of her remarriage and for payment of a lump sum equivalent to the value of monthly payments for two years.[12] In addition to

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1997) at 151 *et seq.*

[10] *Ibid.* at 155. The five principles of the Meredith Report are generally identified as compensation without fault, security of payment through a self-funding scheme, collective liability of employers, autonomy of administration and adjudication through an independent board or agency, and exclusive jurisdiction of that structure to admininster and adjudicate claims without recourse to the courts. See: J.M. Skingle (Chair) et al, *Report of the 1996 Committee of Review - Saskatchewan Workers' Compensation Act* (31 December 1996) at 2-3.

[11] S.O. 1914, c. 25.

[12] *Ibid.* The relevant sections of the Act are:

> 33. (1) Where death results from an injury the amount of the compensation shall be:
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> (a) The necessary expenses of the burial of the workman not exceeding $75.
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> (b) Where the widow or an invalid husband is the sole dependant a monthly payment of $20.
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> (c) Where the dependants are a widow or an invalid husband and one or more children, a monthly payment of $20, with an additional monthly payment of $5 for each child under the age of 16 years, not exceeding in the whole $40...
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> 34. (1) If a dependant widow marries the monthly payments to her shall cease, but she shall be entitled in lieu of them to a lump sum equal to the monthly payments for two years and such lump sum shall be payable within one month after the day of her marriage.

payments to a dependent widow, the legislation provided benefits to an invalid husband of a deceased female worker. Quite simply, the legislation is reflective of its time; it is not a model of gender equality.

The Ontario *Workmen's Compensation Act* became the model for legislative reform across Canada. Though other provinces had previously enacted workers' compensation legislation, such schemes generally preserved an individual employee's right to sue their employer at common law and provided a right to compensation under the scheme to a set maximum amount. To take one example, in Saskatchewan the maximum compensation was set at $2000[13] and the legislation further benefitted the injured worker by permitting the worker to convert an unsuccessful civil action against an employer into an assessment of damages under the Act and for a judgment to be recovered against the employer for that amount. The Act disallowed any *volenti* or contributory negligence defence by the employer. Following the recommendations of a 1928 Royal Commission Report,[14] Saskatchewan enacted (with some variations) the Ontario model in 1930.[15] In general, Canadian provincial legislation created workers' compensation schemes in which employers were placed in industrial classes for purposes of compulsory mutual insurance based on collective liability for accidents within each industrial class. Premiums or rates were assessed against and paid by employers without any direct contribution from workers. Thus, the costs of workers' compensation became just another cost of doing business in Canada and were diffused throughout society as an element in the final retail cost of goods and services. At the federal level, employees of the federal government are provided workers compensation coverage through the techniques of incorporation by reference and administrative delegation to provincial WCBs.[16]

Over time, amendments to the legislation addressed the two most suspect elements of the general scheme: (i) the practical problem of the 'common law' relationship and (ii) the gender specific identification of the dependent spouse as

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[13] *Workmen's Compensation Act*, S. S. 1911, c. 9, s. 5.

[14] Percy M. Anderson et al, *Report of the Royal Commission Appointed to Enquire Into Workmen's Compensation for Saskatchewan* (Regina: Queen's Printer, 1929) reproduced as Appendix I in Saskatchewan Workers' Compensation Board, *The Story of Workers' Compensation in Saskatchewan*, *supra* note 9.

[15] *The Workmen's Compensation Act for Injuries sustained in the Course of their Employment: The Workmen's Compensation (Accident Fund) Act*, S.S. 1930, c. 253.

[16] *Government Employees Compensation Act*, R.S.C. 1985, c. G-5, s. 4(2)(3).

either the widow or the invalid husband. Commencing with a legislative amendment enacted by Saskatchewan in 1947 and completed by a 1989 amendment in New Brunswick, all provinces recognized dependent 'common law' spouses or co-habiting relationships for the purposes of survivor pension benefits.[17] As well, legislatures addressed the gender identity issue of the dependent surviving spouse by substituting reference to "dependent widow or widower", "surviving spouse", or similar neutral or inclusive wording for the previous gender specific and unequal reference to "widow or invalid husband."[18] Eight legislatures enacted this equality-based amendment in the 1970's and two (British Columbia and Manitoba) did so in the 1980's in response to the coming into force of the *Canadian Charter of Rights and Freedoms*.

A feature common to all provincial schemes was the payment of compensation to the dependent spouse of the deceased worker and loss of that compensation upon remarriage or the establishment of a common law/co-habitation relationship. It is that feature which became the target of a persistent and generally successful equality rights or anti-discrimination campaign.

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[17] Alberta: *The Workmen's Compensation Act*, S.A. 1952, c. 107, s. 18; British Columbia: *Workmen's Compensation Act Amendment Act, 1959*, S.B.C. 1959, c. 95, s.9; Manitoba: *An Act to Amend The Workmen's Compensation Act*, S.M. 1953 (2nd Sess.), c. 59, s. 15; New Brunswick: *An Act to Amend the Workers' Compensation Act*, S.N.B. 1989, c. 65, s. 1(h); Newfoundland and Labrador: *An Act Further to Amend The Workmen's Compensation Act, 1962*, S.N. 1966-67, No. 58, ss. 2(b) and 11 (d); Nova Scotia: *An Act to Amend Chapter 343 of the Revised Statutes, 1967, the Workmen's Compensation Act and Chapter 65 of the Acts of 1968 and an Act to Amend and Revise Chapter 343 of the Revised Statues, 1967, the Workmen's Compensation Act*, S.N.S. 1970-71, c. 66, s. 4; Ontario: *An Act to Amend the Workers' Compensation Act (No. 2)*, S.O. 1984, c. 58, s. 1(7); Prince Edward Island: *An Act to Amend the Workers' Compensation Act*, S.P.E.I. 1978, c. 24, s. 9; Québec: *An Act to Amend the Workmen's Compensation Act and Other Legislation*, S.Q. 1978, c. 57, s. 3 repealing and substituting new s. 2(1) to define "consort" as including a co-habiting relationship; Saskatchewan: *An Act to Amend The Workmen's Compensation (Accident Fund) Act*, S.S. 1947, c. 99, s. 3.

[18] Alberta: *Workers' Compensation Act*, S.A. 1973, c. 87, s. 37 'dependent widow and widower' and *Workers' Compensation Act*, S.A. 1981, c. W-16, s. 64(1) 'dependent spouse'; British Columbia: *Charter of Rights Amendments Act, 1985*, S.B.C. 1985, c. 68; Manitoba: *The Equal Rights Statute Amendment Act*, S.M. 1985-86, c. 47, s. 41 "surviving spouse"; New Brunswick: *An Act to Amend the Workmen's Compensation Act*, S.N.B. 1975 (2nd), c. 92, s. 5 'surviving spouse'; Newfoundland and Labrador: *The Human Rights Anti-Discrimination Act, 1979*, S.N. 1979, c. 39, s. 11 "spouse" "widow" or "widower"; Nova Scotia: *An Act to Amend Chapter 343 of the Revised Statutes, 1967, the Workmen's Compensation Act*, S.N.S. 1978-79, c. 38, ss. 2 and 5 "widow or widower"; Ontario: *An Act to Amend The Workmen's Compensation Act*, S.O. 1973, c. 173, s. 5 "widow or widower"; Prince Edward Island: *An Act to Amend the Workers' Compensation Act*, S.P.E.I. 1978, c. 24, s. 8 'widow or widower'; Québec: *An Act to Amend the Workmen's Compensation Act and Other Legislation*, S.Q. 1978, c. 57, s. 34(1) "surviving consort"; Saskatchewan: *The Workers' Compensation Act, 1974*, S.S. 1973-74, c. 127, s. 66(1) "surviving spouse."

B: Prelude to O'Quinn — Legislative Reform

The first repeal of remarriage/co-habitation as a disqualification for surviving spouse benefits under workers' compensation legislation occurred in Alberta in 1981,[19] the pivotal year of constitutional wrangling that resulted in the *Constitution Act, 1982*. This reform resulted from the work of a select committee of the Alberta Legislature which in 1979-80 reviewed the legislation and conducted public hearings across the province. The committee recommended a shift in philosophy that favoured individual self-sufficiency for surviving spouses:

> While the Committee endorses payment of life-time pensions to dependent spouses who for various reasons are incapable of gainful employment, it firmly believes that wherever possible a dependent spouse should receive every encouragement to continue, or become self-sufficient. This amendment will provide such incentive while giving the Workers' Compensation Board flexibility to deal with cases on their own merits. As most pensions will now be paid for a specific term, re-marriage should not constitute reason for termination of benefits.[20]

For the surviving spouse's monthly pension, the legislation substituted a maximum 60 months transitional pension, during which time the surviving spouse completed 'vocational rehabilitation', coupled with a further five year term pension payable monthly. For a surviving spouse gainfully employed at the time of the worker's death or who refused or neglected 'vocational rehabilitation', the legislation substituted a five year term pension. Special provisions were made to ensure pensions for surviving spouses who could not join or continue in the labour force.

In 1984, Ontario followed suit but by a most curious and political process. In 1980, the Minister of Labour engaged Professor Paul Weiler to undertake a comprehensive review of the Ontario workers' compensation legislation. Professor Weiler delivered his report, entitled 'Re-shaping Workers' Compensation for Ontario', in November 1980[21] and the Minister commenced a series of consultations

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[19] *Workers' Compensation Act*, S.A. 1981, c. W-16, s. 64.

[20] Legislative Assembly of Alberta, *Report of the Select Committee of the Legislative Assembly: Workers' Compensation* (Edmonton: Legislative Assembly, April 1980) at 43.

[21] P. Weiler, *Reshaping Workers' Compensation for Ontario: A Report Submitted to Robert G. Elgie, Minister of Labour* (Toronto: Ministry of Labour, 1980).

which resulted in a 1981 *White Paper on the Workers' Compensation Act.*[22] The *White Paper* repeated Professor Weiler's recommendation that surviving spouses be paid an immediate capital payment based on 250% of the average industrial wage (approximately $40,000) regardless of the financial or other circumstances of the spouse but varied that recommendation by favouring variations in such lump sum payments in recognition of the fact that older, but not younger, surviving spouses would also be entitled to a long term pension. In relation to the existing remarriage provision, the *White Paper* adopted Professor Weiler's recommendation to:

> ...retain the provision in the current legislation which terminates the dependency pension for the spouse upon remarriage or its functional equivalent (as defined in Ontario's recent matrimonial law reform). As stated... above, remarriage would not affect the spouse's entitlement to the lump-sum award.[23]

In the legislature, the *White Paper* came under the scrutiny of the Standing Committee on Resources Development. The report of the standing committee[24] reflected the political climate of its time. The Progressive Conservative Party majority recommended that the capital sum be calculated on the reduced basis of 175% of the average industrial wage and that the remarriage disqualification provision be retained:

> ...a majority of Committee members were of the opinion that the *White Paper* proposals should be upheld. The Committee is aware that, in some cases, the remarriage of a surviving spouse may result in financial hardship to the spouse. However, a majority of the Committee believes that in most cases remarriage does remove the need for continued financial support through compensation.[25]

Though confirming the remarriage disqualification, the majority report recorded concerns about what it described as 'irresolvable anomalies':

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[22] Government of Ontario, *White Paper on the Workers' Compensation Act* (Toronto: Ministry of Labour, 1981).

[23] Weiler, *supra* note 21 at 51 and the *White Paper*, *ibid.* at 25.

[24] Standing Committee on Resources Development, *Report on "Reshaping Workers' Compensation For Ontario" By Paul C. Weiler - 1980 (The Weiler Report) And "Government of Ontario White Paper On The Workers' Compensation Act" - 1981 (The White Paper)* (Toronto: 3rd Session, 32nd Parliament, 1983).

[25] *Ibid.* at 30-31.

> ...a surviving spouse would benefit financially if he or she cohabited for 11 months and then remarried, as compensation is cut off after 1 year of cohabitation but immediately upon remarriage. Similarly, if a 'remarriage' fails, the 'surviving spouse' loses all compensation, whereas, if he or she had remained unmarried, compensation would have been retained.[26]

The dissenting report of the Liberal Party members of the Committee identified the same anomalies and concluded that the "only fair method of ending such inconsistencies is to state that such benefits are payable without regard to any future marital status."[27] The report of the dissenting New Democratic Party members favoured a lifetime indexed pension as the acceptable level of compensation and considered that "the only significant factor... ought to be the fact of being a surviving spouse."[28]

In this instance, political realism triumphed. The Progressive Conservative government was in the fourth year of its mandate; Premier William G. Davis would be retiring in February 1985 and be replaced as party leader and Premier by Frank Miller; an election was clearly not far off — with the opposition Liberals led by David Peterson poised to win the popular support. Bill 101, introduced by the government to implement reform of the workers' compensation legislation, included continuation of the surviving spouse's pension notwithstanding remarriage.[29] The Bill distinguished between surviving spouses who remarried or married before and after its coming into force with the disqualification continuing to apply to those who had remarried or married before that date. The Minister of Labour explained his position:

> Bill 101 proposes that such benefits continue regardless of subsequent remarriage, on the principle that one's marital status should have no bearing on the amount of pension to which one is entitled.
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> I have, therefore, proposed the amendment to ensure this feature of Bill 101, the permanent nature of survivorship pensions, be extended to existing survivors who may remarry in the future. I believe the more symmetrical treatment of these two

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[26] *Ibid.* at 30.

[27] *Ibid.* at 88.

[28] *Ibid.* at 114.

[29] Bill 101, *An Act to Amend the Workers' Compensation Act*, enacted as S.O. 1984, c. 58, s. 10

> groups of survivors, both in terms of comparability of continuing pension levels and in terms of the remarriage provision, will enhance the perceived rationality and fairness of the workers' compensation system.[30]

As enacted, the Bill also set the basic lump sum payment for the surviving spouse at $40,000, with that amount increased or reduced by $1,000 for each year that the age of the deceased worker was below and above forty years, respectively.[31]

The following year, 1985, the Québec National Assembly enacted new workers' compensation legislation which provided term pensions coupled with lump sum payments, both of which varied with the age of the surviving spouse. Section 101 of the *Act Respecting Industrial Accidents and Occupational Diseases*[32] established the monthly indemnity at 55% of what the deceased worker would have been entitled but limited payment, according to a Schedule to the Act, to one year for surviving spouses aged 34 years or younger; two years for those aged 35 to 44 years; three years for those aged 45 to 54 years; and two years for those 55 or over. That same year, the Saskatchewan legislature eliminated the remarriage disqualification and, like Alberta and Québec, substituted monthly allowances for a fixed term in place of the previous compensation levels.[33] As in Ontario, the responsible minister (Progressive Conservative) invoked privacy as the rationale for deleting the remarriage disqualification provision when explaining the amending legislation (Bill 81) at second reading:

> Finally, this government is going to get out of the private lives' scrutiny business. Under the previous administration there was a discriminatory situation where spouses of deceased people were policed to see if they were living common-law, or had remarried, or their single status had changed somehow. This government will not investigate the private lives of Saskatchewan citizens to arrive at a compensation settlement. Under this government, fairness isn't determined by how an individual lives his or her life. It is determined by what's rightfully entitled to those involved

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[30] Ontario, *Proceedings of the Legislative Assembly (Hansard)* (12 December 1984) at 4935 (Hon. Russell H. Ramsay, Minister of Labour).

[31] *Supra* note 29, s. 9 repealing and substituting s. 36.

[32] S.Q. 1985, c. 6 (date of assent: 28 May 1985).

[33] *An Act to Amend The Workers' Compensation Act, 1979*, S.S. 1984-85-86, c. 89, s. 21 by deleting mention of remarriage in the re-enacted but modified section detailing the compensation scheme. The new s. 83(1) of the 1979 Act (as enacted by s. 21 of the amending legislation) fixed the pension term at five years for surviving spouses subject to extension in cases of 'undue hardship.'

> in a compensation settlement. We are removing the remarriage qualifying clause in the existing Act.[34]

The Nova Scotia[35] and Newfoundland[36] legislatures removed the remarriage disqualification in 1992 and British Columbia followed in 1993.[37] Thus, by the time of *O'Quinn*, seven legislatures had removed the remarriage disqualification provision from their respective workers' compensation legislation.

C: Post *O'Quinn*: Law and Politics Intertwine

(i) *Charter* Success in the British Columbia Supreme Court

Precedential use of the Nova Scotia human rights board of inquiry decision in *O'Quinn* occurred first in British Columbia. There, Marlene Grigg challenged the remarriage disqualification under the provincial workers' compensation legislation but with a twist. Her challenge arose not from the disqualification *simpliciter* but from the fact that the elimination of this disqualification had been made retroactive to a date which did not result in her re-entitlement.

As noted above, in 1993 the British Columbia legislature had acted to eliminate remarriage and co-habitation relationships as disqualifying factors for receipt of a surviving spouse's monthly pension. The legislative amendment had been made retroactive to 17 April 1985, the date of the coming into force of section 15, the

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[34] Saskatchewan, *Proceedings of the Legislative Assembly* (Hansard) (4th Session, 20th Legislature) (17 May 1983) (Hon. Lorne A. McLaren). The Progressive Conservative government of Premier Grant Devine had succeeded the New Democratic Party government of Premier Allan E. Blakeney in the provincial election held on 26 April 1982.

[35] *An Act to Amend Chapter 508 of the Revised Statutes, 1989, the Workers' Compensation Act*, S.N.S. 1992, c. 35, s. 6. It is interesting to note that a select committee of the Nova Scotia Legislature considered the provincial workers compensation legislation in 1991 but did not comment on disqualification upon remarriage. The committee report merely recommended that the level of benefits arising from the death of a worker 'should remain at the levels currently in force', House of Assembly, *Report of the Select Committee: Bill No. 99 "An Act to Amend and Revise the Law Respecting Workers' Compensation* (Halifax: House of Assembly, 1 February 1991) at 24.

[36] *An Act to Amend the Workers' Compensation Act*, S.N. 1992, c. 29, s. 12 repealing (with effect from 1 January 1993, per s. 25) the remarriage disqualification provision in the *Workers' Compensation Act*, R.S.N. 1990, c. W-11, s. 71.

[37] *Workers' Compensation Amendment Act, 1993*, S.B.C. 1993, c. 34, s. 5.

equality rights provision of the *Canadian Charter of Rights and Freedoms*. This 1993 amendment had the effect of re-instating benefits for surviving spouses disqualified on or after 17 April 1985 but did not affect surviving spouses disqualified prior to that date. Marlene Grigg found herself in the excluded class of pre-17 April 1985 disqualified surviving spouses; that is, surviving spouses who had lost entitlement due to a remarriage or common law relationship before 17 April 1985. Grigg's first husband had died in 1962 leaving her with two infant children; she remarried in 1966 but that marriage ended after eight years. Grigg served as chair of the 'B.C. Disenfranchised Widow's Act Group', a lobby group formed in response to the 1993 amendment legislation.[38] In a civil action challenging the exclusion of pre-17 April 1985 remarried surviving spouses, Ms. Grigg argued that the legislation discriminated on the basis of sex, age and marital status contrary to section 15 of the *Charter*. In extensive reasons for decision reported as *Grigg v. British Columbia,*[39] Hutchinson J. accepted only the marital status claim.

Hutchinson J. rejected the argued adverse effect discrimination based on age. Hutchinson J. found it difficult to accept the logic of an adverse effect arising from legislation that did not alter or in any way affect the existing status of the plaintiff and those of her class as disqualified former recipients of benefits. That the plaintiff and many members of her class were presumably older than surviving spouses who had remarried after 17 April 1985 was generally accepted as was the reality that older women are less economically advantaged members of society. But, how was the class of elderly women to be defined; what were the age parameters of the target group? And, though the sociological evidence supported a finding on the relative poverty of single women (whether single, divorced, or widowed), the contentious factor giving rise to complaint was remarriage which would have removed a woman from that particularly defined class. The argued sex discrimination also failed because Hutchinson J. did not find a legislative distinction having been made based on sex; rather, the distinction lay in martial status linked to a specific time frame.

Hutchinson J. carefully reviewed the then state of Supreme Court of Canada equality jurisprudence but, somewhat remarkably, did not make an equally careful application of that jurisprudence to the matter in issue. Referring to *Miron v. Trudel*[40] and its antecedents, Hutchinson J. noted the divergent views of members of

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[38] "270 widows win fight for WCB benefits," *Vancouver Sun*, Friday, 8 November 1996, A1 at A2.

[39] (1996), 138 D.L.R. (4th) 548.

[40] [1995] 2 S.C.R. 418.

the Supreme Court on the role or function of 'relevance' to *Charter* section 15 equality analysis. In particular, was the relevance of the impugned legislative distinction to the underlying legislative goals to be assessed within section 15 analysis or to be deferred for consideration under section 1 analysis? Hutchinson J. described the state of the law as "unsettled"[41] and was not further concerned with the matter. Instead, Hutchinson J. applied the finding of the Supreme Court in *Miron* that "marital status" is an analogous ground for the purposes of section 15 equality analysis and the reasoning of the Nova Scotia human rights board of inquiry in *O'Quinn* that discrimination on the basis of marital status includes distinctions made within the target group. It should be noted that, in applying *Miron*, Hutchinson J. acknowledged that the plaintiff and members of her class were not members of a 'discrete and insular minority' as that phrase has been interpreted in relation to society at large but, in the context of the Act itself, a distinction had been made on the basis of marital status as of a moment in time. That time was set at the coming into force of the equality rights provisions of the *Charter*, a legislative choice treated with disdain by Hutchinson J.:

> The distinction between the plaintiff and those reinstated, which is so pivotal to these proceedings, is the fact that the plaintiff and her class were widows who remarried prior to April 17, 1985. That a group of women who remarried and are denied the pension and a group of women who also remarried but are given the benefit — simply because the former remarried prior to April 17, 1985 and not after April 17, 1985 makes the legislation in my view objectively unfair...
>
> I cannot find however, that it is mere coincidence that the former group are pre-*Charter* widows and the latter group post-*Charter* widows. This distinction seems to colour the legislation... Can it be said avoidance of *Charter* litigation is a legitimate legislative purpose?[42]

After quoting extensively from *O'Quinn*, Hutchinson J. concluded that the legislation discriminated not on the basis of "any event but upon the marital status of the group."[43] In other words, the discrimination arose not from the event of remarriage but from the choice to exclude the plaintiff and her class from reinstatement of benefits. That legislative choice had been made in 1993 on the basis of marital status as of the cut-off date; a characterization effectively avoiding the

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[41] *Supra* note 39 at 561.

[42] D.L.R. at 569 at paras. 58-59.

[43] *Ibid.* at 571 at para. 64.

issue of *Charter* retrospectivity:.

> It has been argued... that, if the plaintiff is granted relief, even from April 17, 1985, it eliminates the distinction based on when persons were remarried and thus the provision is event-related and necessitates an improper retrospective application of s. 15. That is, the remedy it is said, would improperly be attaching new consequences to past actions. Looked at in the light of the new benefits being reinstated to compensable widows and then basing a distinction between them on the basis of what I conclude to be their marital status makes the argument, I find, unsound.
>
> ...The discriminatory law that triggers s. 15 is the current law and hence no issue of retrospective application arises... The discriminatory action that invokes s. 15 is not the past dis-entitlement prior to April 17, 1985, but is the legislature's decision in 1993 not to reinstate this group of women based, I find, on their marital status.[44]

The Court in *Grigg* analyzed only the issue of a violation of section 15 of the *Charter*; section 1 justification analysis was left to a future hearing. In an order issued without reasons on 7 November 1996, Hutchinson J. held the section 15 violation not to be justified by section 1 analysis.[45] The New Democratic Party government of Premier Glen Clark accepted the result in *Grigg* and reinstated benefits to those dis-entitled prior to 17 April 1985. The cost of reinstating benefits for Grigg and the members of her class, including retroactive payments to 1985, was estimated at $85 million.[46] The annual report of the Workers' Compensation Board for 1996 records that the total liability for reinstated benefits amounted to $401 million.[47]

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[44] *Ibid.* at 573-74 (paras. 75-76).

[45] See *Stinson Estate v. British Columbia* (1999), 44 C.C.E.L. 97 (B.C.S.C.), at 99, para. 4.

[46] *Supra* note 38 at A2 [*Vancouver Sun*].

[47] Workers' Compensation Board, *Building on Common Ground: Annual Report 1996* (Vancouver: Workers' Compensation Board of B.C., 1997) at 10-11:

> During the year, a court ruling resulted in the reinstatement of pensions that, by virtue of legislation, were discontinued for widows who remarried prior to April 17, 1985. In accordance with generally accepted accounting principles, the reinstatement is accounted for as a prior period adjustment of $401 million for pension benefit liabilities retroactive to December 31, 1993, the year of the amending legislation regarding widows' pensions. This charge had the impact of increasing the WCB's unfunded liability at December 31, 1995 to $636 million.

(ii) *O'Quinn* in the Nova Scotia Court of Appeal: Reversal

Eleven weeks to the day after the judicial and political victory in British Columbia on the issue of disqualified remarried surviving spouses, the Nova Scotia Court of Appeal reversed *O'Quinn*. Taking a different stance than that of the government of British Columbia, the government of Nova Scotia had appealed the adverse decision of the human rights board of inquiry, and under provincial law, the appeal proceeded directly to the Court of Appeal. In *Workers' Compensation Board (N.S.) v. O'Quinn et al*,[48] Bateman and Hallett JJ.A. issued alternative reasons for decision in which they concurred with each other; Roscoe J.A. concurred with both.

For Bateman J.A., the issue for decision did not engage constitutional analysis because the validity of the repeal legislation as contrary to the *Canadian Charter of Rights and Freedoms* had not been raised by the Human Rights Commission; rather, the issue was simply one of statutory interpretation — did the *Workers' Compensation Act* confer the authority on the WCB to reopen the claim of Ms. O'Quinn. On this issue, the parties agreed on 'correctness' as the proper standard of review because interpretation of the provincial legislation did not concern matters within the expertise of the board of inquiry in relation to human rights. Quite simply, Bateman J.A. held that the board of inquiry erred in concluding that the phrase 'or otherwise' in s. 70(1) of the Act permitted the WCB to reopen the claim of Ms. O'Quinn. Bateman J.A. held that that phrase must be construed *ejusdem generis* with the other instances in which that subsection authorized the WCB to "reopen, rehear, review or readjust any claim, decision or adjustment." Those expressed instances arose when the injury proved more serious than when the initial decision was made, when new evidence is presented and when there is a change in the circumstances or condition of the worker or of the worker's dependents. As the characteristic common to these enumerated instances, Bateman J.A. identified "changes to a person's individual situation, not changes in the law"[49] and characterized O'Quinn's claim for reinstatement of benefits as arising from a change in the law, the repeal of the remarriage disqualification by the legislature, rather than a change in her individual situation. Bateman J.A. found support for this interpretation in the fact that the predecessors of both s. 70 and of the former s. 61, the remarriage disqualification provision, were included in the original Nova Scotia workers' compensation legislation enacted in 1915. Logically, reasoned Bateman J.A., it could not have been the intention of the legislature to disqualify remarried

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[48] (1997), 157 N.S.R. (2d) 282.

[49] *Ibid.* at para. 18.

surviving spouses from continuation of benefits under the Act and, at the same time, authorize the WCB to reopen a claim on that very basis.[50] Thus, it was not open to the WCB to reopen the claim of O'Quinn and it could not have been an act of discrimination by the WCB in the provision of a public service to have adhered to the legislative limits on its authority. Any discrimination, therefore, was attributable to the repeal legislation and not to the WCB.

In separate alternative reasons for the Court, Hallett J.A. focussed on the board of inquiry's conclusion that the legislature had not intended to distinguish between persons who remarried before or after the 1992 amendment repealing the remarriage disqualification. Hallett J.A. noted that the 1992 amending legislation included an express retroactive amendment to another section of the *Workers' Compensation Act*[51] and that the Act had been amended with retroactive effect three times in the four years preceding the board of inquiry hearing. Thus, it was clear that the legislature had, both on previous occasions and in the specific amending legislation itself, considered the appropriateness of retroactivity but had made a choice not to apply it to the repeal of the remarriage disqualification. Hallett J.A. concluded that the repeal was, therefore, prospective in its application. Additional support for this conclusion was found in the evidence before the board of inquiry that, when further amendments were made to the Act in 1995, at which time the issue of remarriage was under review, the cost of reinstating pensions to spouses disqualified on remarriage had been calculated at $11 million but the legislature did not take the opportunity to reinstate benefits to the effected spouses. Accordingly, the presumption in favour of prospective legislation had not been rebutted. Like Bateman J.A., Hallett J.A. concluded that any discrimination arose not from the actions of the WCB but from the legislation itself. He further concluded that a consideration of the *Human Rights Act* revealed that the legislature had not conferred upon a board of inquiry the jurisdiction to declare other legislation unconstitutional. Thus, even if the repeal legislation discriminated on the basis of marital status against surviving spouses who remarried prior to 1992, a board of inquiry had no jurisdiction to rule the legislation invalid.

The Nova Scotia Human Rights Commission did not seek leave to appeal the unanimous decision of the Court of Appeal to the Supreme Court of Canada. For remarried surviving spouses, the initial victory before the board of inquiry had come

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[50] *Ibid.* at para. 19.

[51] *An Act Amending the Workers' Compensation Act*, S.N.S. 1992, c. 35, s. 7 amended section 84 of the principal Act with the direction that the amended section "is deemed to have always read as amended."

to naught before the courts. Yet, except for *Grigg*, the constitutional argument remained untested in Nova Scotia and elsewhere.

(iii) Other Developments

In this uncertain context, the Prince Edward Island Workers' Compensation Board decided in 1998, on its own motion, to reinstate benefits to eight dependent surviving spouses whose benefits had been terminated upon their remarriage after 17 April 1985.[52] Relying upon *Grigg*, the WCB concluded that termination of benefits for dependent surviving spouses who remarried after 17 April 1985 constituted discrimination contrary to the *Charter*, section 15. In other words, notwithstanding that no court had ruled on the validity of the relevant provision of its governing statute, the WCB decided to ignore the remarriage disqualification provision of its governing statute.[53]

The constitutional issue could not be long delayed. Sixty-two remarried surviving spouses brought action in Nova Scotia for a declaration that the repeal provision violated their right to equality under the *Charter* and for an order that the WCB reinstate their pension benefits. However, before that matter could be heard, decisions elsewhere began to question the correctness of *Grigg*.

In British Columbia, Hutchinson J.'s order reinstating benefits had been expressly limited to spouses alive at the date of the commencement of the *Grigg* action, 16 March 1995. Alice Stinson, a surviving spouse who had remarried prior

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[52] *Whitlock v. Workers' Compensation Board (P.E.I.)* (2000), 196 Nfld. & P.E.I.R. 113 at 122 (para. 26) (per dissenting reasons of McQuaid J.A.). In 2001, the P.E.I. legislation was amended to provide surviving spouse benefits until death for those surviving spouses whose benefits had been terminated upon remarriage between 17 April 1985 and reinstatement of those benefits by the board. For surviving dependent spouses whose worker partner dies after the coming into force of the amending statute, benefits are to be provided until the later of either the date that the worker would have reached 65 years of age or the surviving spouse reaches that age. See: *An Act to Amend the Workers Compensation Act*, S.P.E.I. 2001, c. 20, s. 9.

[53] The board paid to each of the reinstated remarried spouses the total amount of monthly benefits due without payment of interest. In *Whitlock*, *ibid.*, one of the reinstated beneficiaries successfully brought an action for the payment of interest. The majority of the Court of Appeal (per Mitchell J.A., Carruthers, C.J.P.E.I. concurring) characterized as unreasonable the board's decision to apply its usual policy not to pay interest unless the nonpayment had arisen due to a mistake by the board. The parties argued the matter on administrative law principles and did not argue constitutional validity i.e. a remedy under the *Charter*, s. 24.

to 17 April 1985, died on 5 January 1995; that is, two months before the *Grigg* action. The personal representative of her estate brought an action seeking a declaration of constitutional invalidity and a declaration of standing to apply to the WCB for reinstatement of benefits to the date of her death. In brief reasons for decision, Satanove J. in *Stinson Estate v. British Columbia,*[54] adopted the reasoning of Hutchinson J. in *Grigg* and granted the declaration of invalidity. On the standing issue, Satanove J. characterized as 'arbitrary' the 16 March 1995 limitation on the class of persons entitled to benefit from the reinstatement of benefits order.[55] With the re-entitled class now declared to include all remarried surviving spouses and their estates, the Attorney General appealed the order to the British Columbia Court of Appeal. The Court of Appeal, per Finch J.A., allowed the appeal on the ground that an estate has no standing to pursue a claim for infringement of the personal right to equality guaranteed by section 15 of the *Charter*: "The rights guaranteed are personal, and the power to enforce the guarantee resides in the person whose rights have been infringed . . .. Such a claim is not open to the estate, as a third party, under the language of the *Charter*."[56] The Court of Appeal majority avoided comment on the merits of the plaintiff's constitutional position. But, in separate concurring reasons for decision, McEachern C.J.B.C. sounded a warning:

> I only wish to add that I have serious reservations about the correctness of the decision in *Grigg v. British Columbia*... which was not appealed. The reason for my concern about that case is that the plaintiff, and the deceased in this case, remarried before section 15 of the *Charter* came into force. I doubt if that section should be given retrospective application to revive rights and obligations that had been settled by legislation that was valid when section 15 came into force.[57]

New Brunswick moved in 1998 to repeal the remarriage disqualification for

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[54] *Supra* note 45 .

[55] *Ibid.* at 101, para. 17:

> Either Ms. Alice Stinson was never a member of the class at the time the representative action was brought, because she was dead, or she was a member and was entitled to the benefit of the declaration. Both parties agree that she was a member. However, the Order of Hutchinson J. deals only with members living as of March 16, 1995. Members who died before that date are entitled to a similar declaration, in my view.

[56] *Stinson Estate v. British Columbia* (1999), 182 D.L.R. (4th) 407, at 411 (para. 11).

[57] *Ibid.* at 413 (para. 19).

post-17 April 1985 surviving spouses.[58] The repeal provisions permitted a remarried surviving spouse to apply to the WCB on or before 1 January 2001 for reinstatement of benefits and for payment of benefits that would have been received but for the disqualification by reason of remarriage. The legislation also addressed the *Stinson* issue by denying standing to the estate of a deceased dependent spouse to submit an application for reinstatement of benefits.[59] Having been excluded from reinstatement of benefits, seven women whose survivor pensions had been terminated by remarriage before 17 April 1985 brought an action for a declaration that the 1998 legislation discriminated against them on the basis of sex, age, and marital status contrary to s. 15 of the *Charter*. The seven women had remarried and been disqualified from continuation of their benefits between 1969 and 1983. In *Boudreau et al v. New Brunswick et al*,[60] Garnett J. rejected the reasoning in *Grigg* and dismissed the action on the basis of non-retrospectivity of *Charter* rights. The plaintiffs had sought to avoid the retrospective issue by arguing discrimination based on their status as 'widows who remarried', a status which continued after the coming into force of the *Charter* equality guarantee. But, Garnett J. dismissed that argument. Defining a retrospective law as one which "operates forward but it looks backwards in that it attaches new consequences for the future to an event which took place before the statute was enacted,"[61] Garnett J. considered the proper focus for analysis to be remarriage as a discrete event and that:

> ...to apply the *Charter* in the way suggested by the plaintiffs is to give it retrospective effect...The rights of the plaintiffs were determined at the time of their remarriage by legislation which was valid. If I were to apply s. 12 (the 1998 amendment) in such a way as to attract a new duty (the obligation to reinstate the pension) to past events (remarriage and cessation of pensions) on the basis of the *Charter*, I would be applying the *Charter* retrospectively.[62]

Though their action proved unsuccessful, the plaintiffs eventually gained partial success at the political level by means of a legislative amendment. Seven months

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[58] *An Act to Amend the Workers' Compensation Act*, S.N.B. 1998, c. 4, ss. 11 and 12.

[59] *Ibid.* at s.12 amending the Act to insert s. 38.81. See subsection (4).

[60] (2000), 227 N.B.R. (2nd) 201 (Q.B.).

[61] *Ibid.* at para. 7 quoting E.A. Driedger, "Statutes: Retroactive, Retrospective Reflections" (1978) 56 Can. Bar Rev. 264 at 268-69 as quoted in *Benner v. Canada (Secretary of State)*, [1997] 1 S.C.R. 358 at para. 42, per Iacobucci J.

[62] *Ibid.* at paras. 13-14.

after their loss in court, the plaintiffs scored a limited political victory when the Minister of Labour introduced in the Legislature a Bill entitled the *Special Payment to Certain Dependent Spouses of Deceased Workers Act*.[63] That Act represented a limited victory because, rather than reinstatement of benefits, the Act authorized a one time payment of $80,000 without interest to each pre-17 April 1985 remarried or co-habiting dependent spouse who submitted an application and provided a release of claims. This 2000 New Brunswick legislation mirrored that enacted the previous year in Saskatchewan and Manitoba. The Saskatchewan statute[64] provided a lump sum payment of $80,000 to persons whose benefits as surviving spouses had been terminated by remarriage or a common law relationship before 1 September 1985 while that of Manitoba[65] provided a lump sum payment of $83,000 with the critical date set at 1 July 1985.

(iv) Remarriage Disqualification and the *Charter*: *Bauman et al v. Attorney General of Nova Scotia*

As noted above, in 1992 the Nova Scotia legislature repealed the remarriage disqualification for dependent surviving spouses. In 1999, following a report by a select committee[66] which held hearings throughout the province and heard from numerous witnesses including disqualified remarried surviving spouses, the legislature further amended the governing Act to reinstate benefits for dependent surviving spouses whose benefits had been terminated before 1 October 1992, the effective date of the 1992 repeal, because of remarriage. The amending statute[67] permitted qualified spouses to apply for reinstatement of benefits on or before 1 January 2001 and expressly declared that no application could be made by the estate

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[63] S.N.B. 2000, c. S-12.107.

[64] *The Special Payment (Dependent Spouses) Act*, S.S. 1999, c. S-56-01.

[65] *The Special Payment to Certain Dependent Spouses of Deceased Workers Act*, S.M. 1999, c. 6.

[66] *Report of the Select Committee on the Workers' Compensation Act* (1st Session, 57th General Assembly of Nova Scotia) (November 1998). Under the heading 'Backlog', the Committee Report included the following recommendation:

> Reinstate survivor's benefits for spouse's [sic] who remarried prior to Oct. 1, 1992 and had their benefits terminated under the previous legislation. The benefits for these individuals will be made retroactive to Oct. 1, 1992 thus ensuring equality.

[67] *An Act to Amend Chapter 10 of the Acts of 1994-95, the Workers' Compensation Act*, S.N.S. 1999, c. 1, s. 7 adding s. 60(a).

of a dependent spouse.[68] Most significantly, and contrary to the recommendation of the select committee, the amending statute distinguished between dependent surviving spouses who remarried prior to 17 April 1985 and those who remarried on or after that date but before the repeal of the remarriage disqualification in 1992. While the latter were declared entitled to reinstatement as of the date the benefits were terminated (being on or after 17 April 1985), the former class of dependent surviving spouses were reinstated as of 1 January 1999. In response, sixty-two remarried dependent spouses (out of a total known class of 95 such spouses) brought an action for a declaration that the Act, as amended, violated their *Charter* section 15 right to equality and for an order that the WCB reinstate their benefits to 17 April 1985.[69]

The trial court released its decision in *Bauman et al v. Attorney General of Nova Scotia*[70] on 25 April 2000; just five days after, and without reference to, the New Brunswick decision in *Boudreau*. A review of the legislation and its social context, particularly directed to the first enactment of workers' compensation legislation in Nova Scotia in 1915,[71] disclosed to Robertson J. the underlying legislative assumption that "men should be responsible for [the] financial support"[72] of women and that that stereotypical attitude pervaded the re-enacted legislation over the decades even unto its iteration in the 1989 Revised Statutes wherein the remarriage disqualification was found expressed in the non-gender neutral phrase "if a dependent widow marries." On the issue of alleged retrospectivity, Robertson J. rejected the fixed event approach argued on behalf of the Attorney General:

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[68] *Ibid.* at s. 60(a)(4) and (5).

[69] According to a media report, the organizing plaintiff, Betty Bauman, sought co-plaintiffs through newspaper advertisements and by means of a letter sent by the provincial WCB to other women in the target class. Each woman who agreed to join the action was asked to pay $200 towards legal expenses. See: Eric Atkins, "62 N.S. Widows Win Action Over Loss Of Benefits" (2000) 20 The Lawyers Weekly 1.

[70] (2000), 185 N.S.R. (2d) 225 (S.C.). Betty Bauman had appeared as a witness before the 1998 Select Committee of the Nova Scotia Legislature which recommended reinstatement of benefits, *supra* note 66.

[71] *The Workmen's Compensation Act, 1915*, S.N.S. 1915, c. 1. Robertson J. observed that legislative debates at the time were "silent as to the reason for the exclusionary principal (sic) for the widows who remarried," *supra* note 52 at para. 15, but drew contextual values from the reasoning of the Supreme Court of Canada in *Edwards v. Attorney General of Canada*; reversed by [1930] A.C. 124 (J.C.P.C.) (Persons Case), a case which Robertson J. seemingly presents as concerned with the right to vote rather than with qualification for senate appointment.

[72] *Supra* note 70 at para. 17.

> In looking at the factual context of this case, I find that this all or nothing approach which creates the divide between pre-*Charter* and post-*Charter* widows who remarry and between the widows who remarried and those who did not, to be an artificial distinction that offends the very nature of the constitutional rights and freedoms that were made law to protect individuals from such inequitable treatment.
>
> The discrimination in this case was triggered by the discrete event of remarriage. But, long after the event and post-*Charter*, these women suffered an ongoing condition; the status of women once entitled to benefits but cut off from these benefits, that their husbands had paid for, first with their invested labour and then with their lives. Such a rigid test is inapplicable in these circumstances. The law perpetuated the prohibited discrimination long after the *Charter* intended its cure.
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> ...the discrimination perpetuated by the Act was ongoing long after 1985 just as the plaintiffs' status as widows entitled to benefits was ongoing.[73]

Finding a continuing character to the discrimination, Robertson J. held that application of the *Charter* right to equality in favour of the plaintiffs did not suffer the taint of retrospectivity.

Robertson J. then turned to analysis of the equality right itself. Applying the three step approach outlined by the Supreme Court of Canada in *Law v. Canada (Minister of Employment and Immigration)*,[74] Robertson J. found the impugned legislation satisfied that analytical approach:

> (A) whether a law imposes differential treatment between the claimant and others, in purpose and effect;
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> (B) whether one or more enumerated or analogous grounds of discrimination are the basis for the differential treatment; and
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> (C) whether the law in question has a purpose or effect that is discriminatory within the meaning of the equality guarantee.[75]

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[73] *Ibid.* at paras. 36-37.

[74] [1999] 1 S.C.R. 497.

[75] *Ibid.* at para. 88.

The first step was easily satisfied because the parties did not dispute that the law imposed differential treatment of pre- and post-17 April 1985 remarried surviving spouses. In respect of the second step, marital status as the argued analogous ground of discrimination, counsel for the Attorney General argued that the Supreme Court in *Miron v. Trudel*[76] had focussed on unmarried co-habitants as persons comprising a historically disadvantaged group regarded as less worthy than their married counterparts and that the plaintiffs in the present action were members not of the historically disadvantaged but of the more advantaged group, the married. Robertson J. rejected this argument, noting that McLachlin J., for the majority, had accepted marital status as an analogous ground, *simpliciter*. In relation to the third step regarding a discriminatory purpose or effect, Robertson J. held the exclusion of pre-17 April 1985 remarried dependent surviving spouses to have been grounded on the stereotypical assumption that "remarriage would ensure them financial security"[77] and that such differential treatment "had the effect of treating these plaintiffs as less worthy than others who enjoyed the benefits and protection of the *Act*."[78]

Noting the argued fiscal justification for limiting benefits, Robertson J. subsumed the familiar *Oakes* justification analysis into a consideration of the relative cost of reinstating benefits for the class of effected spouses. On the evidence, the cost was estimated at $10 million and would not result in increased employer contributions; instead, the result would be to delay by one year realization of the policy to extinguish the unfunded liability of the compensation fund, from the forecasted 2017 to 2018.[79] As a result, Robertson J. held that the cost of reinstating benefits could not constitute a reasonable limit on the equality right and held the violation not justified under section 1 of the *Charter*. She declared the former remarriage disqualification provisions invalid as well as the 1992 repeal provision and the 1999 amendment providing for limited reinstatement of benefits. It must be assumed that she declared the latter provisions invalid because of under-inclusiveness.

On March 29 2001, the Nova Scotia Court of Appeal unanimously allowed the appeal by the Attorney General.[80] The reasons for decision by Bateman J.A., with

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[76] *Supra* note 40.

[77] *Ibid.* at para. 54 and 56.

[78] *Ibid.* at para. 63.

[79] *Ibid.* at para. 76. As well, such a cost was within the limits of the financial contingency of the WCB.

[80] *Bauman et al v. Nova Scotia (Attorney General)* (2001), 192 N.S.R. (2d) 236.

Glube, C.J.N.S. and Oland, J.A. concurring, focussed primarily on the issue of retrospective application of the *Charter*, an issue earlier addressed by the Court through the reasons for decision of Bateman J.A. in *O'Quinn*. However, before addressing that issue, Bateman J.A. briefly reviewed the relevant legislative history and criticized the declaration granted by Robertson J. Though that declaration reflected the remedy requested by the plaintiffs, Bateman J.A. questioned its efficacy:

> A declaration that the termination provisions are unconstitutional, effective 1985, does not advance the position of the claimants. Their pensions were terminated before that date. The declaration of invalidity of the repeal provision would seem to have no effect. The declaration in relation to the reinstatement provision leaves the revived pensions for both the post-*Charter* and pre-*Charter* widows in doubt.[81]

Clarity lay in separating analysis of the impugned provisions.

Bateman J.A. first considered application of the *Charter* to the pre-1985 termination of the sixty-two plaintiffs' surviving spouse benefits because of remarriage. In *Benner v. Canada (Secretary of State)*,[82] the Supreme Court per Iacobucci J. had stated in respect of retrospectivity:

> The question, then, is one of characterization: is the situation really one of going back to redress an old event which took place before the *Charter* created the right sought to be vindicated, or is it simply one of assessing the contemporary application of a law which happened to be passed before the *Charter* came into effect?[83]

In this situation, concluded Bateman J.A., "it was the event of remarriage that resulted in termination of the pension, not the status of being remarried. Had the claimants remarried and divorced or been widowed shortly thereafter, they were not eligible for reinstatement of the pension."[84] This discrete event and the legislation which gave it negative significance had completed their interaction before the

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[81] *Ibid.* at para. 20.

[82] [1997] 1 S.C.R. 358 per Iacobucci J.

[83] *Ibid.* at para. 45.

[84] *Supra* note 80 at para. 36.

Charter came into effect. Bateman J.A. distinguished *Gamble v. R.*,[85] upon which the plaintiffs had relied by way of analogy, as an illustration of the second type of situation identified by Iacobucci J. in *Benner*; that is, a contemporary application of a law to a situation which arose pre-*Charter*. In that case, Gamble had been convicted pre-*Charter* of the offence of first degree murder and sentenced to imprisonment without eligibility for parole for twenty-five years under an amendment to the *Criminal Code* which came into effect after the commission of the offence but before trial. At the time of the commission of the offence, the existing *Code* had provided for parole ineligibility for ten years. The Supreme Court held that Gamble could challenge the constitutional validity of her continued detention on the basis of an infringement of the *Charter* not, per Bateman J.A., on the basis of a review of her pre-*Charter* sentence but because of the "current, ongoing operation of the parole ineligibility provision in her sentence which violated her liberty interest under s. 7 of the *Charter*."[86] Differently expressed, Gamble had been 'unlawfully' sentenced to an additional fifteen years of parole ineligibility and this unlawful detention was subject to post-*Charter* challenge. But, per Bateman J.A., the plaintiffs' benefits had not been 'unlawfully' terminated:

> The fact that the claimants' pensions were not revived on April 17, 1985 is not analogous to Ms. Gamble's ongoing detention pursuant to a wrongful conviction. Their pensions were not denied post-19985 because they continued 'to be remarried'. That they did not receive pensions post-*Charter* was not the ongoing effect of an unlawful act. Their pensions were terminated upon the event of remarriage pre-*Charter*. As I have already said, it was not the continuing status of being remarried that prevented the claimants from receiving pensions.[87]

Having found impermissible retrospectivity, Bateman J.A. did not find it necessary to analyze the relevant legislative provisions in terms of equality rights analysis per the *Charter*, s. 15.

The distinction based on the 'lawfulness' or not of the original decision — unlawful in *Gamble*, lawful in relation to the plaintiffs — is artificial and not a distinction understood by the plaintiffs. In *Gamble*, the detention commenced pre-*Charter* and continued post-*Charter*; in the present matter, termination of benefits

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[85] [1988] 2 S.C.R. 595.

[86] *Supra* note 80 at para. 44.

[87] *Ibid.* at para. 50.

commenced with remarriage pre-*Charter* and continued post-*Charter*. Yet, parole eligibility in *Gamble* remained a live issue especially when Gamble applied for parole based on the law which should have governed her sentencing. This is in contrast to the situation of the sixty-two plaintiffs whose eligibility had been finally determined on the basis of the then existing valid law. Their eligibility for benefits was no longer a live or subsisting issue in the legal system and had not been for some time before the *Charter* equality rights came into effect on 17 April 1985.

Bateman J.A. considered the plaintiffs' challenge to their exclusion from the 1999 reinstatement of benefits to be similarly tainted by an attempted retrospective application of the *Charter*. Her reasons were stated rather shortly, in reliance upon the previous analysis:

> To find that this amendment required the reinstatement of pensions for the pre-*Charter* widows would result in an impermissible retrospective application of the *Charter*. It would result in attaching new consequences to an *event* which took place before s. 15 of the *Charter* was enacted.[88]

Rather than conclude at this point, analysis continued on the application of *Charter* equality rights. The plaintiffs had identified pre-1985 widows who had not remarried as the appropriate comparator group for section 15 analysis. Relying upon the decisions of the Supreme Court in *Law* and *Granovsky v. Minister of Employment and Immigration*[89] Bateman J.A. rejected this comparator. To compare two groups of pre-1985 spouses would circumvent the conclusion on retrospectivity and present a collateral challenge to the termination provisions.[90] Instead, consideration of the purpose and effect of the legislation in issue led Bateman J.A. to select the post-*Charter* widows as the appropriate comparator group. The legislation reinstated benefits to remarried surviving spouses but distinguished between those who remarried pre-17 April 1985, for whom benefits were reinstated only as of 1999, and those who remarried post-17 April 1985, for whom reinstatement of entitlement to benefits was made retroactive to 17 April 1985. The plaintiffs sought what the post-1985 remarried surviving spouses had already received, reinstatement of benefits to 17 April 1985.

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[88] *Ibid.* at para. 52. Bateman J.A. quoted with approval the similar analysis and conclusions of Garnett J. in *Boudreau*.

[89] [2000] 1 S.C.R. 703.

[90] *Ibid.* at para. 61.

Although acknowledging the differential treatment (the second step in the *Law* approach) to which the plaintiffs were subjected in comparison to the treatment of the post-1985 remarried surviving spouses, Bateman J.A. concluded every other analytical point against them. First, the differential treatment was not based upon marital status *simpliciter*, as both the plaintiffs and the comparator group consisted of remarried surviving spouses, but rather upon the date of remarriage. There being no differential treatment based on a enumerated or analogous ground, that ended the matter. In reaching this conclusion, Bateman J.A. did not discuss the reasoning of the human rights board in *O'Quinn* which recognized a temporal element implicit in the analogous ground of marital status (though this point was addressed later in the reasons for decision). Second, though not now necessary to decide the issue, Bateman J.A. concluded that the record was insufficient to justify a finding that marital status constituted an analogous ground in the context of the legislation in issue. As had been argued by counsel for the Attorney General, the decision of the Supreme Court in *Miron v. Trudel* had focussed on marital status as an analogous ground but in the context of common law or cohabiting relationships being subjected to a history of prejudice and social disapproval in comparison to the history of approval and support for the institution of marriage. In the instant matter, the socially favoured institution of marriage had been the cause of termination of the plaintiffs' benefits. Thus, context played a significant role in recognition of marital status as an analogous ground and that appropriate context was lacking in the present matter:

> The survivors' pensions here were terminated upon the marriage of the recipient. Those pensions were paid without regard to need. Implicit in the awarding of these pensions was a presumption of spousal dependency or, at least, the assumption that a household with potential for two incomes is better situated than that with one. Age and dependency were irrelevant factors. The reason for terminating the pension aligned exactly with that for its provision. In these circumstances, without further analysis, it is impossible to say whether marital status, even if relevant here, would constitute an analogous ground.[91]

Third, even if Bateman J.A. had found differential treatment based on marital status as an analogous ground, the plaintiffs failed on the necessary element of discrimination (the third step in the *Law* approach). Termination of the plaintiffs' benefits had been legislatively triggered because of the fact of remarriage but Bateman J.A. was not satisfied that that decision was grounded in 'prejudice, stereotyping or devaluation of the group' nor that failure to reinstate benefits,

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[91] *Supra* note 80 at para. 68.

lawfully terminated before the coming into force of *Charter* equality rights, violated essential respect for human dignity.[92] Again, underlying this conclusion is the simple control that both the plaintiffs and members of the approved comparator group shared the same critical personal characteristic, remarriage. They differed only on the timing of that personal characteristic.

Finally, Bateman J.A. returned to the analytical errors of the learned trial judge. In error, Robertson J. had "intermingled the equality and retrospectivity analyses"[93] and failed to appreciate that "the distinction between pre-*Charter* and post-*Charter* events is central to the retrospectivity analysis" and not "artificial."[94] Further, the trial judge had erred by relying on the reasoning in *Grigg*, a case condemned by Bateman J.A. as "wrongly decided."[95] *Grigg* had applied the reasoning of the human rights board of inquiry in *O'Quinn* but that decision had subsequently been reversed by the Court of Appeal and Bateman J.A. carefully enumerated the failings which undermined *O'Quinn* and any reliance upon it:

> - The tribunal erred in failing to consider the issue of retrospectivity in relation to the repeal [of the remarriage disqualification provision]...
>
> - The tribunal found there was no evidence that the distinction created by the repeal of s. 61 between those who married before or after 1992 was intended by the legislature...
>
> - The tribunal concluded that discrimination on the basis of 'marital status' extended beyond the state of being married to include the timing of the marriage.[96]

Thus, the Court allowed the appeal. In apparent recognition of the importance of the case and of the limited financial circumstances of the plaintiffs, the Court made no order as to costs. The Supreme Court of Canada denied an application for leave to

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[92] *Ibid.* at paras. 72 and 74.

[93] *Ibid.* at para. 83.

[94] *Ibid.* at para. 85.

[95] *Ibid.* at para. 91.

[96] *Ibid.* at para. 96. A fourth enumerated error was reliance by the human rights tribunal on a 'clearly wrong' decision of the Ontario Workers Compensation Tribunal, *Decision No. 190/191*, [1992] 22 W.C.A.T.R. 109, that concluded that the phrase 'shall cease upon remarriage' was ambiguous thereby permitting 're-opening' of previously terminated claims.

appeal.[97]

Barely five weeks after the adverse decision in *Bauman*, the Newfoundland and Labrador House of Assembly acted in May 2001 to re-institute benefits to surviving dependent spouses whose entitlement had been terminated upon remarriage on or after 17 April 1985.[98] Such spouses were declared "entitled to receive the compensation that he or she would have received had the monthly allowance not been terminated."[99] Payments were without interest for the period 17 April 1985 to 31 December 1992, the date when the remarriage disqualification had been effectively repealed and, following the example of the lump sum payment legislation enacted elsewhere, were not available to the estate of any person. Consistent with the result in *Bauman*, pre-17 April 1985 remarried surviving spouses were left with reinstated benefits as of the repeal of the remarriage disqualification effective 1 January 1993.

Just weeks before release of the trial court decision in *Bauman*, the Northwest Territories Legislative Assembly reinstated benefits for post-17 April 1985 remarried surviving spouses.[100] On second reading, a member responded to the Minister's brief explanatory statement by drawing attention to the exclusion of the pre-17 April 1985 remarried surviving spouses: "I do not think it is morally, ethically or politically right. I am not sure legally... that we have not recognized the rights of widows pre-

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[97] [2001] Supreme Court Bulletin 1574 (13 September 2001).

[98] *An Act to Amend the Workplace Health, Safety and Compensation Act and the Occupational Health and Safety Act*, S.N.L. 2001, c. 10, s. 16 inserting a new s. 65.1 :

> Payment to a remarried spouse
>
> 65.1 (1) A person whose monthly allowance as a surviving dependent spouse was terminated on or after April 17, 1985 due to his or her remarriage is entitled to receive the compensation that he or she would have received had the monthly allowance not been terminated.
>
> (2) Notwithstanding section 43, no interest shall be paid on compensation which would have been paid from April 17, 1985 to December 31, 1992.
>
> (3) No amount shall be paid under this section to the estate of a person.

(Bill 16 given first reading on 7 May 2001).

[99] *Ibid.* at s. 65.1(1).

[100] *An Act to Amend the Workers' Compensation Act*, S.N.W.T. 2000, c. 8 (Bill 7, 2nd Session, 14th Assembly) (First reading on 23 March 2000 and Assent on 31 March 2000).

85."[101] The member noted that there were only five widows in the latter group. The territorial government gave effect to the member's opinion on 22 June 2000 when it introduced a Bill to provide lump sum payments, as determined by the Territorial WCB, to the pre-17 April 1985 remarried surviving spouses.[102] Later that same year, the Nunavut Legislature enacted legislation to reinstate benefits retroactively to 17 April 1985 and to provide a lump sum payment to the pre-17 April 1985 remarried surviving spouses.[103]

PART 3: Substantive Equality and the Supreme Court

In *Law v. Canada (Minister of Employment and Immigration)*,[104] the Supreme Court of Canada presented a common approach to *Charter* section 15 equality analysis and apparently resolved a difference among members of the Court on the role of relevance of the personal characteristic in issue to the achievement of the legislative goals. Nancy Law and her husband had co-owned and operated a small business. For 22 years prior to his death, Law's husband had made contributions to the Canada Pension Plan (CPP) and these contributions were sufficient to provide Law with survivor's benefits if she otherwise qualified. When her husband died at age 50, Law herself was only 30 years of age, without dependent children and not disabled. Without her husband's technical expertise, the business failed. Law applied for CPP survivor's benefits but her application was denied because she failed to satisfy the eligibility qualifications for an immediate benefit, particularly the age qualification. The governing legislation required that the surviving spouse be at least 35 years of age at the date of death of the deceased contributor, be responsible for dependent children or have a disability to receive immediate benefits.[105] Law satisfied none of these eligibility qualifications and, unless she later became disabled, would not qualify for a survivor's pension until the age of 65 years. Had she been at least 45 years of age, Law would have been eligible for full survivor's benefits; had she been between 35 and 45 years of age, she would have been eligible for benefits though

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[101] Northwest Territories Legislative Assembly, *Hansard* (2nd Session, 14th Assembly) at 283 (24 March 2000) (Michael Miltenberger, M.L.A.).

[102] *An Act to Amend the Workers' Compensation Act, No. 2*, S.N.W.T. 2000, c. 12 (Bill 5, 3rd Session, 14th Assembly) (First reading on 22 June 2000 and Assent on 7 July 2000).

[103] *An Act to Amend the Workers' Compensation Act*, S. Nu. 2000, c. 13 (Assent 3 November 2000) (Bill 13).

[104] [1999] 1 S.C.R. 497.

[105] *Canada Pension Plan*, R.S.C. 1985, c. C-8, s. 44(1)(d).

reduced at the rate of 1/120th per month (10 years times 12 months) for each month that she was aged less than 45 years at the time of her husband's death. Law challenged the eligibility qualification as discriminatory on the basis of age contrary to her *Charter* section 15 rights to equality.

For the Court, Iacobucci J. synthesized the Court's equality jurisprudence to formulate a three step approach, or as he expressed it 'guidelines', to *Charter* s. 15(1) analysis which focuses on discrimination in a 'substantive sense':

> First, 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? If so, there is differential treatment for the purpose of s. 15(1). Second, was the claimant subject to differential treatment on the basis of one or more of the enumerated and analogous grounds? And third, does the differential treatment discriminate in a substantive sense, bringing into play the *purpose* of s. 15(1) of the *Charter* in remedying such ills as prejudice, stereotyping, and historical disadvantage?[106]

Iacobucci J. identified the underlying purpose of section 15(1) as the promotion and protection of human dignity, defined as a feeling of 'self-respect and self-worth',[107] and stated:

> In order to determine whether the fundamental purpose of s. 15(1) is brought into play in a particular claim, it is essential to engage in a comparative analysis which takes into consideration the surrounding context of the claim and the claimant.[108]

It is at this third analytical step that key contextual factors are considered. These include (i) 'pre-existing disadvantage, vulnerability, stereotyping, or prejudice experienced by the individual or group'[109] though membership in such a group is not a pre-requisite to a finding of discrimination and is not considered as *the* determinative factor alone; (ii) the relationship between the personal characteristic

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[106] *Supra* note 104 at para. 39.

[107] *Ibid.* at para. 53.

[108] *Ibid.* at para. 55.

[109] *Ibid.* at para. 63.

in issue and the nature of the differential treatment i.e. does the differential treatment have the effect of violating human dignity;[110] (iii) the ameliorative purpose or effects of the legislation in relation to the less advantaged persons or groups in society;[111] and (iv) the nature and scope of the interest affected as the differential treatment impacts upon interests of societal significance.[112] Throughout this analysis, Iacobucci J. emphasized the importance of selecting the proper comparator group (noting that the comparator selected by the claimant will not always be the appropriate analytical choice) and that violations of human dignity must be assessed on both a subjective and objective basis to reflect "a reasonable person, dispassionate and fully apprised of the circumstances, possessed of similar attributes to, and under similar circumstances as, the claimant."[113] By way of summary and to stress the purposive nature of the inquiry, Iacobucci J. stated:

> An infringement of s. 15(1) of the *Charter* exists if it can be demonstrated that, from the perspective of a reasonable person in circumstances similar to those of the claimant who takes into account the contextual factors relevant to the claim, the legislative imposition of differential treatment has the effect of demeaning his or her dignity...[114]

The manner in which Iacobucci J., for the Court, applied this analytical approach to the CPP claim for survivor benefits is instructive of what might be expected in relation to survivors' benefits under workers' compensation legislation.

Iacobucci J., for the Court, characterized the CPP as "a compulsory social insurance scheme... to provide contributors and their families with reasonable minimum levels of income upon retirement, disability or death of the wage earner."[115] He accepted that in providing either delayed benefits (to able bodied surviving spouses aged less than 35 years and without dependent children) or reduced benefits (to surviving spouses between 35 and 45 years of age as of the date of death of the contributor), the legislative scheme constituted a denial of equal

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[110] *Ibid.* at para. 70.

[111] *Ibid.* at para. 72.

[112] *Ibid.* at para 74.

[113] *Ibid.* at para. 60.

[114] *Ibid.* at para. 75.

[115] *Ibid.* at para. 8.

benefit of the law and that this denial was based on age, an enumerated ground of proscribed discrimination in section 15(1) of the *Charter*.[116] Yet, Iacobucci J. observed that persons under the age of 45 years do not constitute within Canadian society such 'a discrete and insular minority' as to have associated with them a history of discrimination thus 'as a practical matter' making it for difficult for the Court to conclude that the differential treatment violated human dignity.[117] Essentially, Law argued that the legislation substituted stereotypical assumptions or generalizations for actual assessment of financial need and thereby demeaned the human dignity of persons under 45 years of age and treated them as less worthy than older surviving spouses. In particular, the legislation assumed a correlation between age and the ability or inability to gain a livelihood from employment. The respondent Minister argued that the legislative concern was not with the immediate financial need of a surviving spouse upon the death of a contributor but rather with the long term financial need of the surviving spouse, a crucial point that Iacobucci J. noted was acknowledged by Law in her submissions to the Court.[118] Thus, the issue as expressed by Iacobucci J. was:

> Do the impugned CPP provisions, in purpose or effect, violate essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice?... Does the law, in purpose or effect, perpetuate the view that persons under 45 are less capable or less worthy of recognition or value as human beings or as members of Canadian Society?[119]

The answer was a clear 'no'. Iacobucci J. held that Law failed to satisfy the burden upon her to sustain a characterization of the legislation as 'discriminatory' in the substantive sense and concluded:

> The law on its face treats [able-bodied surviving spouses less than 45 years of age without dependent children] differently, but the differential treatment does not reflect or promote the notion that they are less capable or less deserving of concern, respect, and consideration, when the dual perspectives of long-term security and the greater opportunity of youth are considered. Nor does the differential treatment perpetuate the view that people in this class are less capable or less worthy of

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[116] *Ibid.* at paras. 90-92.

[117] *Ibid.* at para. 95.

[118] *Ibid.* at para. 98 and 100.

[119] *Ibid.* at para. 99.

> recognition or value as human beings or as members of Canadian society... the legislation does not stereotype, exclude, or devalue adults under 45... *By being young, the appellant, a fortiori, has greater prospect of long-term income replacement.*[120]
>
> ....
>
> The challenged legislation simply reflects the fact that people in the appellant's position are more able to overcome long-term need because of the nature of a human being life cycle. *Those who are younger when they lose a spouse are more able to replace the income lost from the death of a spouse.* A reasonable person under the age of 45 who takes into account the contextual factors relevant to the claim would properly interpret the distinction created by the CPP as suggesting that younger people *are more likely to find a new spouse*, are more able to retain or obtain new employment, and have more time to adapt to their changed financial situation before retirement.[121]

These conclusions are open to the criticism that Iacobucci J. himself failed to explain, other than through an intuitive determination, why the legislative scheme does not reflect the notion that persons within the identified class are less capable or less deserving of concern, respect and consideration. After all, persons within the class are denied full entitlement to survivors' benefits. While the conclusion that Law failed to discharge her burden of proof resolves the matter from the Court's perspective, the finding or conclusion on substantive discrimination remains unsettling and incomplete.

Finally, Iacobucci J. addressed the fact that Law and similar surviving spouses are excluded from survivor's benefits on the basis of general assumptions that do not reflect their particular circumstances and who would be better protected by individual assessment of financial need. On the use of general assumptions to frame legislation, Iacobucci J. stated:

> ...the fact that the legislation is premised upon informed statistical generalizations which may not correspond perfectly with the long-term financial need of all surviving spouses does not affect the ultimate conclusion that the legislation is consonant with the human dignity and freedom of the appellant. Parliament is entitled, under these limited circumstances at least, to premise remedial legislation upon informed generalizations without running afoul of s. 15(1) of the *Charter* and

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[120] *Ibid.* at para. 102.

[121] *Ibid.* at para. 104.

being required to justify its position under s. 1.[122]

In the result, no infringement of section 15(1) had been demonstrated and, accordingly, no justification per section 1 analysis was required. It must be stressed that Iacobucci J. considered particularly compelling that Law's eligibility for survivor's benefits was not entirely excluded by the legislative scheme; rather, unless she earlier became disabled, her eligibility was delayed until age 65 years.

It is interesting to observe that, in the past, the CPP benefits of surviving spouses terminated upon remarriage[123] and that, like workers' compensation legislation before modification to embrace gender equality, also expressly identified surviving beneficiaries as a "widow" and as a "disabled widower."[124] This ended in 1986 when Parliament amended the CPP legislation so that the surviving spouses were no longer disqualified by remarriage and provided for the reinstatement of survivor's pensions to persons who applied to and were approved by the Minister.[125]

One year after its decision in *Law*, the Supreme Court revisited *Charter* equality rights and the CPP in *Granovsky v. Canada (Minister of Employment and Immigration)*.[126] In *Granovsky*, the Court specifically addressed selection of the appropriate comparator group in equality analysis. To qualify for a disability pension under section 44 of the CPP, an applicant had to suffer from a 'severe and prolonged' disability and have made CPP contributions in five of the previous ten years or in two of the last three years. This second qualification ensured a sufficient connection to the workforce to justify replacement of workplace income by benefits under the Act. However, to facilitate access to a disability pension, the legislative scheme excluded from the calculation of the contributory period any month that a contributor received a disability pension under a provincial pension plan, such as workers' compensation. In reasons for decision for the Court, Binnie J. described the effect of this 'drop-out' exception:

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[122] *Ibid.* at para. 106.

[123] See: *Canada Pension Plan*, R.S.C. 1970, c. C-5, ss. 62(2)(3); R.S.C. 1985, c. C-8, s. 63(2)(3).

[124] *Ibid.* at R.S.C. 1970, c. 5, ss. 43(1) and 44(d)(e); repealed and substituted by *An Act to Amend the Canada Pension Plan*, S.C. 1974-75-76, c. 4, s. 25 which employs the phrase 'surviving spouse.'

[125] *An Act to Amend the Canada Pension Plan and the Federal Court Act*, S.C. 1986, c. 38; R.S.C. 1985, c. 30 (2nd Supp.), s. 31 adding s. 63.1.

[126] *Supra* note 89.

> If a person is permanently disabled in the course of a calendar year, the months during which that person is permanently disabled are not counted against him or her in determining whether recency of CPP contribution requirements are satisfied.[127]

Due to a back injury suffered on the job in 1980, the appellant Granovsky had been in receipt of temporary total disability benefits (under provincial workers' compensation legislation) until 1983 when he was reassessed as having a 15% permanent disability. Subsequently, he was awarded a lump sum final payment and declared otherwise capable of work. In 1993, Granovsky applied for a CPP disability pension on the basis that his condition had deteriorated over time to the point that he was permanently and severely disabled. Granovsky had made CPP contributions in only one of the ten years prior to his application. The Minister denied the application due to a finding that Granovsky had an insufficient recent connection to the workforce.

Arguing that his physical condition had prevented him from satisfying the five in ten or two in three contributing years qualifications, Granovsky alleged that section 44 of the CPP discriminated on the basis of physical disability, contrary to section 15 of the *Charter*. As the appropriate comparator group, Granovsky identified all contributors who, like himself, had to satisfy the full contributing years qualification and, more particularly, identified this group as able-bodied contributors. The Supreme Court rejected this comparator group. Referring to *Law*, Binnie J. stressed that characterization of the purpose and effect of the "benefit that constitutes the subject matter of the complaint"[128] is critical to the determination of the appropriate comparator group. In the present matter, Binnie J. accepted the characterization that the 'purpose of the drop-out provision is to facilitate access of people with permanent disabilities to a CPP disability pension'[129] and reasoned that a contributor who satisfied the full contribution period before suffering a permanent disability had no need to invoke the benefit of the exception provision in issue. Rather, the benefit of the provision accrued to contributors who suffered a permanent disability at the time of their application for a disability pension and who were prevented by that permanent disability from otherwise satisfying the usual contribution period. It was this latter group that Binnie J. selected as the appropriate comparator group. Applying the *Law* substantive discrimination approach to section

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[127] *Ibid.* at para. 12.

[128] *Ibid.* at para. 47.

[129] *Ibid.* at para. 48.

15 analysis, Binnie J. held that notwithstanding that the CPP distinguished between contributors based on a personal characteristic and that this distinction invoked an enumerated ground, physical disability, the appellant failed to demonstrate discrimination in the sense of demeaning the human dignity of persons with temporary disabilities or undermining their worthiness as human beings worthy of respect. Binnie J. concluded:

> The differential treatment afforded by the s. 44 drop-out provision ameliorates the position of those with a history of severe *and permanent* disabilities. It does not assist more fortunate people such as the appellant, but in the context of a contributory benefits plan, Parliament is inevitably called upon to target the particular group or groups it wishes the CPP to subsidize. Drawing lines is an unavoidable feature of the CPP and comparable schemes.
>
> ... I do not believe that a reasonably objective person... would consider that the greater allowance made for persons with greater disabilities in terms of CPP contributions 'marginalized' or 'stigmatized' him or demeaned his sense of worth and dignity as a human being.[130]

In the result, Granovsky did not succeed in his claim of discrimination on the basis of disability and did not, thereby, gain a CPP disability pension.

PART 4: Substantive Equality and Workers' Compensation Legislation

In *Law*, as noted above, Iacobucci J. characterized the CPP "a compulsory social insurance scheme. . . to provide contributors and their families with reasonable minimum levels of income upon retirement, disability or death of the wage earner."[131] In *Granovsky*, Binnie J. characterized the same legislation, the CPP, as follows:

> The CPP was designed to provide social insurance for Canadians who experience a loss of earnings owing to retirement, disability, or the death of a wage-earning spouse or parent. It is not a social welfare scheme. It is a contributory plan in which Parliament has defined both the benefits and the terms of entitlement, including the

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[130] *Ibid.* at paras. 79 and 81.

[131] *Supra* note 115.

level and duration of an applicant's financial contribution.[132]

These descriptions are equally applicable to workers' compensation programs across Canada. Workers' compensation substitutes its financial benefits for the income otherwise lost by an employee unable to perform his or her duties due to injuries sustained in a work-related accident. The fundamental purpose of workers' compensation remains exactly as expressed by Chief Justice Meredith in his initial 1913 report and recommendations: "to provide for the injured workman and his dependents and to prevent their becoming a charge upon their relatives or friends, or upon the community at large".[133] Both CPP and workers' compensation are compulsory benefit programs but, unlike the CPP, costs are not borne by workers directly in the form of premiums; rather, workers' compensation is funded by rates paid by employers as just another cost of doing business. Doubtless, a labour economist would take the reasonable position that workers' compensation is a factor considered by unions and employers when negotiating wage rates in the process of collective bargaining.

The legislative history of workers' compensation legislation mirrors the social history of Canada. When initially enacted, the workforce was predominantly male. The male worker was the sole wage earner for the nuclear or extended family. It was an age when female workers resigned from employment upon marriage. It was a time when couples managed to survive and build their family security on a single income from employment. Thus, Chief Justice Meredith could write about protecting the "injured workman and his dependents" and did so without thought that the phrase would be interpreted consistent with the *Interpretation Act* rule that the male includes the female.[134] Thus, for decades until the 1970s to mid 1980s, provincial workers' compensation legislation provided benefits to a surviving spouse of a worker defined by the phrase "dependent widow or invalid husband".[135] An able-bodied husband dependent on the wages of his wife as an element in total family income did not qualify for compensation following a work-related accident which claimed the life of his spouse. It seems obvious that the operating presumption was that any husband who was not an 'invalid' could be gainfully employed and thus had no need of the family income replacement provided by the surviving spouse's

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[132] *Supra* note 89 at para. 9.

[133] *Supra* note 10.

[134] Now found expressed in the *Interpretation Act*, R.S.O. 1990, c. I-11, s. 28(j).

[135] *Supra* note 18.

pension benefit. At the same time, it must be recognized that the phrase 'dependent widow' implies recognition of the possibility of an 'independent widow' who would also be excluded from benefits. Yet, interpreting 'dependency' as arising from the fact of family income contribution by a male worker meant that the 'independent widow' was indeed a rarity.

Thus, for decades workers' compensation legislation distinguished on the basis of sex in the provision of benefits to surviving spouses. That distinction clearly favoured female surviving spouses over their male counterparts who had to also satisfy the additional eligibility qualification of being 'invalid'. The benefit of the law did not flow equally to both male and female surviving spouses. Statistically, approximately 4% of all fatal work-related accidents and diseases during the last ten years claimed the lives of female workers in Canada.[136] In absolute terms, this represents approximately 30 female workers in Canada annually. It is a reality that both this percentage and this absolute number of female worker deaths will increase over time as women continue to develop a critical mass of employment presence in higher risk male dominated occupations. For present purposes, these statistics reinforce the view that the benefit of workers' compensation laws clearly favoured women over men as the beneficiaries of surviving spouse pensions. It must be acknowledged that male workers benefit in the form of the income security provided to their spouse and family members under the legislative scheme.

With this context, it is helpful to consider the claim of discrimination on the basis of marital status argued by those who lost their survivor benefits upon remarriage. It is ironic that these individuals gained access to the claimed benefit because of the change in their marital status due to the death of their spouse. Once gained, they lost the benefit due to another change in their marital status: remarriage

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[136] International Labour Organization, *Yearbook of Labour Statistics 2002* (Geneva: International Labour Office, 2002) at 1246-47, Table 8A "Occupational Injuries: Cases of injury with lost workdays by economic activity."

	1993	1994	1995	1996	1997	1998	1999	2000
Male	727	701	696	626	804	754	794	851
Female	31	24	36	27	27	34	33	25
Total	758	725	748	703	833	798	833	882

or co-habitation. Marital status comes into play at least three times in the workers' compensation legislation in its unamended challenged state. First, by his or her marital status in relation to an injured worker, a spouse benefits by the income replacement provided to the injured worker which income forms part of the family income. Second, by his or her marital status in relation to a deceased worker, a surviving spouse becomes entitled to a pension and other related payments. Third, by the creation of a new marital status in relation to another person, a surviving spouse loses entitlement to the surviving spouse's pension. Implicit is the assumption that marital type relationships are more than emotional and physical, they are financial. By creating a new marital relationship, the surviving spouse has supposedly entered into a financial relationship in which it is presumed that the new partner brings to the relationship some level of income. In other words, income replacement under the workers' compensation legislation is presumed to be itself replaced (at least partially) by the new relationship. Even without statistical support, the logic of this presumption is not without merit. However, the possibility or probability of exceptions must be recognized.

Any consideration of workers' compensation legislation must not lose sight of the controlling fact that, unlike the CPP, it is not a scheme of compulsory self-insurance. It is not a general public welfare scheme like social assistance–a putative beneficiary, including a surviving spouse, need not pass a 'means test' to qualify for workers compensation benefits. It is a compulsory scheme of income replacement for which the worker pays no direct premiums but surrenders rights to compensation at common law. It is a statutory scheme of benefits and burdens.

In the human rights complaint in *O'Quinn* and in each of the court challenges which followed, women and only women sought retroactive re-entitlement to surviving spouses benefits lost upon remarriage and a declaration of invalidity. No male surviving spouses joined the class of plaintiffs in these court cases. The women argued discrimination on the basis of sex, age and marital status. Statistically, the effected group of beneficiaries were women. Given that approximately 96% of work-related fatalities are male, one would expect, subject to some exceptions, that surviving spouses would be overwhelmingly female. The argued age discrimination seemed to arise more from the fact of re-instatement of benefits as of 17 April 1985 or some set date thereafter than direct age discrimination. Logically, as a class or group, surviving spouses who remarried prior to the reinstatement date have a higher probability of being older than surviving spouses who remarried after that date. It is a function of time but again

exceptions are to be expected.[137] But ultimately age and sex were not successfully argued as grounds of discrimination. Both involve the difficulties of proof inherent in many claims of adverse effect discrimination. It was marital status which achieved some measure of success in both *O'Quinn* and in *Grigg*.

The exact meaning of 'marital status' need not complicate the present analysis. The plaintiffs argued 'timing' as an element of 'marital status' in order to avoid issues of retroactivity of the *Charter*. Recently, the Supreme Court of Canada spoke to the concept of 'marital status' as a ground of discrimination. In *B. v. Ontario (Human Rights Commission)*,[138] the Court (per joint reasons for decision of Iacobucci and Bastarache JJ.), approved a broad approach to interpretation of the Ontario *Human Rights Code* and its proscribed grounds of discrimination, in particular. The Court held that 'status' for the purpose of interpreting the concepts of 'marital status' and 'family status' refers to more than an absolute status as a person who is married or not and includes the concept of 'relative status'; that is, a

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[137] Through the courtesy of the Association of Workers' Compensation Boards of Canada the following statistics were provided from its comprehensive publication *National Work Injuries Statistics Program – Injuries and Diseases 1999-2001*:

Age Category	Fatalities by Year All Provinces		
	1999	2000	2001
15-19	24	16	21
20-24	43	45	36
25-29	47	55	55
30-34	56	70	58
35-39	56	85	63
40-44	75	82	84
45-49	68	74	90
50-54	96	80	99
55-59	73	93	92
60-64	76	80	88
65+	198	185	223
Totals*	835	882	920

*Totals vary from annual statistics due to claims not being coded or unknown.

[138] 2002 SCC 66 (released 31 October 2002). Consider also *Nova Scotia (Attorney General) v. Walsh*, 2002 SCC 83 (19 December 2002), in which the Court held that exclusion of co-habiting couples from the protection of provincial marital property legislation does not demean human dignity and is, therefore, not discriminatory within the meaning of the *Charter*, s. 15(1).

relationship to an identified person.[139] In *B.*, the complainant had been dismissed from his employment following allegations by his daughter of sexual molestation by the employer and a verbal confrontation between the daughter, her mother and the employer. The complainant had 'compartmentalized' his home and work situations but the employer (his own brother-in-law) attributed to him an incompatibility due to the allegations of his daughter (the employer's niece) and the confrontation by his wife (the employer's sister). On the facts as found by the Board of Inquiry, the Court agreed with the Board and with the Court of Appeal that the complainant had been "arbitrarily disadvantaged on the basis of his marital or family status" contrary to the *Human Rights Code.*[140] Yet, with surviving spouses, there is no need to consider marital status in its relational mode; absolute marital status suffices to ground the distinction imposed when benefits are terminated upon remarriage.

The real issue is not with the proscribed grounds of discrimination but with the meaning of 'discrimination' itself. There can be little doubt that the complainant in *O'Quinn* was a victim of discrimination as that word is defined in the Nova Scotia *Human Rights Code.* The Code defined discrimination as:

> a distinction, whether intentional or not, based on a characteristic, or perceived characteristic...[proscribed by the Act] that has the effect of imposing burdens, obligation or disadvantages on an individual or class of individuals not imposed upon others or which withholds or limits access to opportunities, benefits and advantages available to other individuals or classes of individuals in society.[141]

Considered in light of this '*Andrews* inspired' definition,[142] termination of benefits for surviving spouses upon remarriage or co-habitation clearly constitutes discrimination as 'a distinction based upon a characteristic... which withholds or limits access to... benefits and advantages available to other individuals or classes of individuals'. O'Quinn ultimately failed in her complaint because of the absence of jurisdiction in a board of inquiry to consider the constitutional validity of provincial legislation and the statutory limitation on the authority of the WCB to re-open claim files. It seems clear, however, that the workers' compensation legislation in relation to the termination of benefits upon remarriage and the *Human Rights Code*

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[139] *Ibid.* at para. 39.

[140] *Ibid.* at para. 58.

[141] *Supra* note 3 at s. 4.

[142] *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143.

proscription of 'discrimination' on the basis of marital status were not consistent. In light of the quasi-constitutional status of human rights legislation,[143] one might expect a *Drybones* type of approach to resolve the inconsistency.[144]

As held by the Nova Scotia Court of Appeal in *Bauman*, it is the concept of 'substantive' discrimination under the *Charter* which proves fatal to the claims advanced by the remarried surviving spouses. As Binnie J. observed in *Granovsky*, "Parliament is inevitably called upon to target the particular group or groups it wishes... to subsidize. Drawing lines is an unavoidable feature of the CPP and comparable schemes."[145] Workers' compensation legislation is one such comparable scheme. In *Law*, the Supreme Court approved a general statistical tendency as the basis for a reasonable choice by Parliament and the legislatures[146] and coupled this conclusion with the statement by Iacobucci J. that a reasonable person would conclude that a younger person would be more likely to find a new spouse so as to justify an age-based distinction as not discriminatory in the substantive sense.[147] So, it seems rather clear that the present Court would not likely find fault with a legislative choice that, given the long term financial concern of the legislation, a surviving spouse who remarries and thereby replaces, in whole or in part, income lost by the death of a worker should have surviving spouse pension benefits terminated. In other words, a reasonable person would probably not find fault with this legislative choice considered in its broader context. The choice does not reflect negatively on the human dignity and self-worth of the surviving spouse. This conclusion is also inescapable in jurisdictions in which discrimination is not defined in the provincial human rights code leaving the concept to be informed by

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[143] *Craton v. Winnipeg School Division No. 1*, [1985] 2 S.C.R.150 (per McIntyre J.) and generally see: *B. v. Ontario Human Rights Commission*, *supra* note 138 at para. 44.

[144] *The Queen v. Drybones*, [1970] S.C.R. 282. In *Drybones*, the Court declared inoperative a section of the Northwest Territories liquor ordinance which made it an offence for an "Indian" to be intoxicated "off a reserve". The Court held the provision contrary to the right to equality before the law as guaranteed by the *Canadian Bill of Rights, 1960* and issued the declaration notwithstanding the absence of an express remedial provision in the *Bill*. The *Bill*, section 2 merely directed courts to construe federal legislation "as not to abrogate, abridge or infringe" guaranteed rights but did not express what should happen if the legislation did not permit such construction.

[145] *Supra* note 130.

[146] *Supra* note 122.

[147] *Ibid.*

jurisprudence such as that of the Supreme Court in *Law* and *Granovsky*.[148]

An underlying concern may be whether the ground of alleged discrimination is a critical factor in the Court's analysis. *Law* dealt with alleged discrimination on the basis of age; *Granovsky* with discrimination on the basis of physical disability. Is marital status a more suspect ground of discrimination and therefore subject to a higher level of justification analysis? Neither the *Charter* nor human rights codes express a hierarchy of grounds of discrimination. There is no indication that some grounds of discrimination are more invidious than others though, of course, some are more clearly associated with a history of negative treatment as a discrete and insular minority than others. The goal of human rights legislation is to treat each individual on his or her own merits as a person. Thus, one should conclude that discrimination is discrimination regardless of the ground.

With the exception of the decision of Hutchinson J. in *Grigg*, surviving spouses failed to convince Canadian courts of the legal merit of their cause. But, *Grigg* uncritically applied the reasoning of the Nova Scotia board of inquiry award in *O'Quinn*, itself reversed on appeal.

PART 5: Political Vindication of a Claimed Right

The campaign for reinstatement of benefits for remarried dependent spouses succeeded, at least for post-17 April 1985 remarried spouses, notwithstanding the ultimate failure of human rights and constitutional arguments in the courts. Success came in the political arena but wrapped in the protective cloak of legal and constitutional rights. Discrimination discourse informed the debate.

In British Columbia, the Legislature repealed the disqualification upon remarriage provision and reinstated benefits to remarried surviving spouses in 1993. In his speech at first reading, the responsible minister explained the proposed amendment in terms of general fairness but also linked the repeal to the *Charter*:

> The other significant highlight of this legislation is the elimination of gender

[148] Consider also *Gosselin v. Attorney General of Québec*, 2002 SCC 84 (19 December 2002) in which the majority held that the plaintiff had not established an affront to her human dignity or as less worthy than older recipients of social assistance by the making increases for younger recipients conditional on participation in programs promoting integration into the workforce and self-sufficiency.

> discrimination in survivor benefits. Surviving spouses of deceased workers who remarry will no longer suffer financial penalties. Because the vast majority of surviving spouses in the province are female, this bill will eliminate a source of gender bias in the legislation. The new legislation regarding surviving spouses will be retroactive to 1985, when the equality provisions of the federal Charter of Rights came into effect. [149]

In second reading debate, a principal opposition spokesperson stated:

> The justification the government is using is that in 90-some percent of the cases, it's the woman who is the surviving spouse. As a result, this could be seen as a discriminatory provision in the legislation. It tends to discriminate against women, because more often than not it's women who get cut off when the new marriage or common-law relationship is entered into. I know the minister will state – and it has been discussed – that there are a couple of Charter challenges under this act to deal with that. I guess that's a policy decision that the government has made – to say that we are going to continue or reinstate those surviving spousal benefits – because it is discriminatory. That's a decision the government can make.[150]

Another opposition member noted the absence of a court decision on the matter:

> I'll be curious to know, when the minister sums up, if he has any rationale for that, other than that this is one area where he has decided that he will follow some Charter interpretation. It has never been tested that I'm aware of. There has been no court order; there have been no instructions. It's simply that the government, or someone in a government agency, has made an interpretation and very quickly -- because it doesn't come out of the treasury – decided that they would instruct the WCB to make these retroactive payments.[151]

Pressed by the opposition members on the rationale for the amendment, Hansard records the following final exchange on this matter:

> G. Farrell-Collins: I have just one final question that comes back to the philosophy of it, I guess. I know the minister chose April 17, 1985, because of the provisions

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[149] British Columbia, *Hansard* (2nd Session, 35th Parliament) at 7883 (25 June 1993) (Hon. M. Sihota).

[150] *Ibid.* at 7958 (28 June 1993) (G. Farrell-Collins).

[151] *Ibid.* at 7961 (J. Weisgerber).

> of the *Charter of Rights* and its application to provincial legislation. Is the rationale for this decision a legal one? Is it because of the exposure and the risk that existed there – or that we thought existed – as it related to the *Charter*, or is it a philosophical decision? Which is it?
>
> Hon. M. Sihota: All legal decisions are philosophical. I can tell you that, as a student of law. Some will even tell you that a lot of legal decisions are political. So this is legal, political and philosophical.
>
> I think there's a philosophy that underlies the Charter, and all governments were obliged upon introduction of the Charter to comply with it. And we are doing it for all of the philosophical reasons that underlie those provisions in the Charter. I don't think a government should be purposely allowing provisions to remain that are or could be contrary to the Charter. I guess the honest answer to that question is that it's both, because I'm not too sure if you can draw a line between what's legal and what's philosophical.[152]

By his "legal, political and philosophical" response, Minister Sihota let the issue of discrimination in human rights law and under the *Charter* remain uncertain. That uncertainty is not reflected in the statements of those remarried dependent surviving spouses who mobilized to seek reinstatement of benefits. Though many statements can be quoted, that presented on behalf of the Manitoba WCB Widows' Action Group to the Manitoba Legislature's Standing Committee on Law Amendments, considering the lump sum payment legislation in 1999, is typical:

> Now, for those of you who may not be familiar with our position statement, I would like to quote: "It is the position of the Manitoba WCB Widows' Action Group that all recipients of Workers Compensation Board survivor pensions who... had their pensions terminated upon remarriage, must have their pensions reinstated in order to comply with the equality rights provisions of the *Canadian Charter of Rights and Freedoms*."
>
> "Termination of our pensions on the basis of marital status is discriminatory and violates Section 15 of the Canadian Charter which became effective on April 17, 1985."
>
> "The members of our group contend that survivor pensions must be reinstated retroactively to the date of remarriage, or to April 17, 1985 if they remarried prior

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[152] *Ibid.* at 8280 (6 July 1993).

> to that date."[153]

In her testimony, the representative informed the Committee that the Group had been formed three years earlier to lobby the government and had "[t]hroughout our campaign...received support from the Manitoba Federation of Labour."

Across Canada, remarried surviving spouses organized and mobilized to press government for reinstatement of benefits and for retroactive payment of benefits lost by operation of the remarriage disqualification provision. With the support of the labour movement and political parties, the groups never wavered from their fundamental belief in the justice of their cause and in the fact of their status as victims of discrimination on the basis of marital status under the *Charter*. Even after the decision of the Nova Scotia Court of Appeal in *Bauman*, political acceptance of that status continued. Five weeks after *Bauman*, when speaking on second reading of the Bill to reinstate benefits retroactive to 17 April 1985, the Minister of Labour informed the Newfoundland and Labrador House of Assembly:

> Madam Speaker, government has accepted the recommendations of the task force with respect to paying retroactive benefits to surviving spouses of injured workers who have remarried. As a result, retroactive benefits will be paid to surviving spouses who were remarried after April 17, 1985. This measure is consistent with recent court interpretations of the *Canadian Charter of Rights and Freedoms*. Government has also accepted the task force recommendation that the level of benefits to surviving spouses in the pre-1985 group be continued at their current levels. [154]

In its report entitled 'Changing The Mindset: Task Force Report on The Workers' Compensation System",[155] the task force had summarized what it had been told at hearings and presented its recommendation on this matter. As the latest assessment, the Report summary and recommendation on this issue is worth reproducing in its entirety:

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[153] Record of Testimony, The Standing Committee on Law Amendments, Legislative Assembly of Manitoba, 28 June 1999.

[154] Newfoundland, *Proceedings of the House of Assembly (Hansard)*, Vol. XLIV, No. 24 (10 May 2001) (Hon. Anna Thistle, Minister of Labour) (www.gov.nf.ca/hoa/business).

[155] (St. John's: Task Force on Workers' Compensation, 16 February 2001).

The Task Force heard representations from surviving spouses seeking retroactive payments for survivor benefits they feel are due them under the *Charter of Rights and Freedoms*.

The *Charter*, which came into effect on April 17, 1985, changed the way Commissions across Canada deal with the payment of benefits to surviving spouses. Prior to that date, and for some time after, benefits payable to surviving spouses were terminated when they remarried. In particular, two groups of surviving spouses are affected: those who remarried prior to April 17, 1985 and those who remarried after April 17, 1985.

On January 1, 1993, Newfoundland amended its *Act* to provide for the reinstatement of monthly benefits to both groups of spouses from that point onward. Surviving spouses are seeking retroactive reinstatement of benefits to April 17, 1985 for the pre-1985 spouses, or to the date of remarriage for post-1985 spouses.

Task Force Assessment

Payments to surviving spouses is an important issue for the Task Force and the Commission. Any decision must balance the needs of surviving spouses as well as all injured workers who rely on the workers' compensation system for financial support.

There have not been consistent court decisions or provincial approaches in dealing with this issue across the country. All jurisdictions have taken (or are in the process of taking) legislative action to reinstate full retroactive benefits for the post-1985 spouses, effective April 17, 1985. The Task Force supports Government taking similar action here for these widows. The cost to the Commission will be approximately $450,000. This is in addition to the $1.0 million paid out to this group since 1993.

For the pre-1985 spouses, provinces have addressed this issue in different ways. While some provinces have reinstated these benefits with full retroactivity, others have offered one-time lump-sum payments in the range of $80,000-85,000.

The pre-1985 spouses in this province (70 of them) have been receiving monthly benefits since 1993. A total of about $4 million has been paid and will continue into the future. Continuing with these benefit payouts from 1993 will see this Province pay more in total than several other provinces. On an individual basis, the average payout to spouses will be in the range of $170,000 (net present value).The Task Force considers the current level of payout for this group, without retroactivity, to

be appropriate.[156]

Bill 16, "*An Act to Amend the Workplace Health, Safety and Compensation Act and the Occupational Health and Safety Act*" gave effect to the Task Force recommendation by reinstating benefits retroactively for all surviving spouses whose benefits had been terminated upon remarriage on or after 17 April 1985 but made no such recommendation in respect of the pre-17 April 1985 remarried surviving spouses.[157]

In the result of the concerted campaign for reinstatement of benefits, millions of dollars have been redistributed to remarried surviving spouses. For those remarried after 17 April 1985, reinstatement is essentially complete; for those remarried and thus disqualified before 17 April 1985, lump sum payments have been paid coupled with reinstatement of benefits at some point after the magic date. All of this has been achieved in the context of a failed right; it has been achieved at the political level by pressing and never denying the existence of that right notwithstanding the law. It has been a significant victory of politics over law in the recognition and definition of justice.

PART 6: Conclusion

In *Granovsky*, the Supreme Court of Canada observed that "drawing lines is an unavoidable feature of the CPP and comparable schemes."[158] In 1978, the Special Joint Committee on the Constitution of Canada (Bill C-60) gave a qualified recommendation that marital status be included as a prohibited ground of discrimination in the then proposed *Canadian Charter of Rights and Freedoms*:

> We certainly favour it as a goal. At the same time we are concerned that its inclusion could create possible problems in tax laws or pension legislation or unemployment insurance. We recommend that the ground of marital status be added to the prohibited grounds of discrimination if the Government can resolve this practical

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[156] *Ibid.* at 31-32.

[157] *Supra* note 98.

[158] *Supra* note 129.

problem.[159]

With this background, the editors of *Materials in Canadian Income Tax* comment that "marital status appears to have been consciously rejected in the final version of section 15" of the final version of the *Canadian Charter*.[160]

Canadian legislation is not alone in "drawing lines." The International Labour Organization has established standards for workers' compensation and the matter of survivor benefits, in particular. These standards are dated. The now superseded *Survivors' Insurance (Industry, etc.) Convention, 1933*[161] provided pension rights for "widows who have not remarried" and permitted conditions to be placed on eligibility in relation to such factors as a minimum age, a minimum length of the marriage, non-receipt of income benefits under other social programs and, for surviving spouses of non-manual workers, receipt of remuneration above a maximum level.[162] The present version of this Convention, revised in 1967, the *Invalidity, Old-Age and Survivors' Benefits Convention, 1967*, continues to permit the same or similar eligibility qualifications.[163] Both Conventions used the gender

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[159] *Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada, Report to Parliament* (3rd Session, 30th Parliament, Issue 20, 10 October 1978) at 20:13.

[160] B. J. Arnold *et al*, eds., *Materials on Canadian Income Tax* (11th ed.) (Scarborough: Carswell Thomson Professional Publishing, 1996) at 694.

[161] ILO Convention C39 replaced by C128 (1967).

[162] *Ibid.* article 6: "The widows' and orphans' insurance scheme shall as a minimum confer pension rights on widows who have not remarried and the children of a deceased insured or pensioned person." See also: articles 7(1)(3), 11(2) and 19(1) and note similar provisions in *Convention Concerning Compulsory Widows' and Orphans' Insurance for Persons Employed in Agricultural Undertakings*, I.L.O Convention C40 (date of coming into force: 29:09:1949; revised by Convention No. 128 (1967)). It is interesting to observe that the last widow of a union army soldier of the U.S. Civil War died in 2003 at the age of 93. Gertrude Janeway married her veteran husband in 1927 when she was 18 years of age and her husband 81. Her husband died in 1937 at the age of 91 years and, as a surviving spouse who did not remarry, Mrs. Janeway received her monthly survivor's pension from 1937 until her death 2003. It is reported that a widow of a Confederate soldier is the sole surviving spouse of a Civil War veteran. The U.S. Civil War ended in 1865. See: "Last widow of Union Veteran from U.S. Civil War dies at 93", *The Globe and Mail*, 20 January 2003, at A10.

[163] I.L.O. Convention C128 (date of coming into force: 01.11.1969.)

Part IV. Survivors' Benefit

specific language of former iterations of Canadian workers' compensation legislation by referring to 'widow' rather than the inclusive term 'surviving spouse.' Though Canada has not ratified either Convention, there can be little doubt but that Canadian legislation meets and exceeds these international standards, standards which reflect

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Article 20

Each Member for which this Part of this Convention is in force shall secure to the persons protected the provision of survivors' benefit in accordance with the following Articles of this Part.

Article 21

1. The contingency covered shall include the loss of support suffered by the widow or child as the result of the death of the breadwinner.

2. In the case of a widow the right to a survivors' benefit may be made conditional on the attainment of a prescribed age. Such age shall not be higher than the age prescribed for old-age benefit.

3. No requirement-as to age may be made if the widow–
(a) is invalid, as may be prescribed; or
(b) is caring for a dependent child of the deceased.

4. In order that a widow who is without a child may be entitled to a survivors' benefit, a minimum duration of marriage may be required.

Article 31

1. The payment of invalidity, old-age or survivors' benefit may be suspended, under prescribed conditions, where the beneficiary is engaged in gainful activity.

2. A contributory invalidity, old-age or survivors' benefit may be reduced where the earnings of the beneficiary exceed a prescribed amount; the reduction in benefit shall not exceed the earnings.

3. A non-contributory invalidity, old-age or survivors' benefit may be reduced where the earnings of the beneficiary or his other means or the two taken together exceed a prescribed amount.

Article 32

1. A benefit to which a person protected would otherwise be entitled in compliance with any of Parts II to IV of this Convention may be suspended to such extent as may be prescribed–

(g) in the case of survivors' benefit for a widow, as long as she is living with a man as his wife.

policy choices regarding eligibility criteria. The international standards permit drawing lines at points not generally included in provincial workers compensation legislation i.e. age, a definitional criterion found in Québec legislation.

Legislative reform is not always consistent. In the United Kingdom, social security legislation continues to refer to a 'widow's pension' and provides for dis-entitlement upon remarriage or any period of co-habitation.[164] This, notwithstanding successful efforts by women's groups which resulted in the 1971 amendment of the *Fatal Accidents Act* to ensure that "remarriage of the widow or her prospect of remarriage" would not be considered in the assessment of pecuniary loss under that Act.[165] As noted by Markesinis and Deakin, this amendment created an anomaly because of its gender specificity: a female, but not a male, surviving spouse who remarries and is financially supported by a new spouse is allowed to receive damages for the pecuniary loss of the first spouse and share in the income of the new spouse. Thus, widows and widowers are treated differently.[166] The authors call for abolition of the different treatment. The lesson for Canadian law reformers is clear – avoid immediate short term *ad hoc* responses to political lobby efforts. Marital status is only one of the proscribed grounds of discrimination. Another obviously dis-entitled group is identifiable by the characteristic of sexual orientation. It is not surprising that a class action suit has been launched on behalf of same sex surviving partners for retroactive instatement of benefits not previously recognized.[167] The suit is directed at benefits under the CPP for the period between the 17 April 1985 coming into force of the equality rights protection under the *Charter* and 1 January 1998, the date benefits were extended to same sex surviving partners.[168] When successful, political pressure will undoubtedly be brought to bear to follow the workers' compensation model of lump sum payments to pre-17 April 1985 surviving partners. Meanwhile, a direct action in relation to workers' compensation legislation

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[164] *Social Security Contributions and Benefits Act, 1992*, 1992, c. 4 (U.K.), s. 38(2) and 38(3)(c).

[165] *Law Reform (Miscellaneous Provisions) Act, 1971*, 1971, c. 43 (U.K.), s. 4 later re-enacted by the *Administration of Justice Act, 1982*, 1982, c. 53 (U.K.), s. 3 amending the *Fatal Accidents Act, 1976*, 1976, c. 30 (U.K.).

[166] B.S. Markesinis and S.F. Deakin, *Tort Law*, 4th ed. (Oxford: Clarendon Press, 1999) at 775.

[167] *Hislop v. Attorney General of Canada*, [2002] O.J. No. 2799 (Q.L.). See also: "Gay Class Action Over Pensions To Proceed" *National Post* (7 December 2002) at A6 and "Gay survivors case for pensions to proceed" *The Globe and Mail* (7 December 2002) at A18.

[168] *Modernization of Benefits and Obligations Act* , S.C. 2000, c. 12, s. 45(2) amending the *Canada Pension Plan, supra* note 105, by adding s. 44(1.1): "...unless the common-law partner became a survivor on or after January 1, 1998."

awaits its turn.

The opening words of the *Institutes* of Justinian define "justice" as "an unswerving and perpetual determination to acknowledge all men's rights."[169] For many groups, justice is acknowledged in the political rather than the legal arena.

Finally, I close with a litigation irony. In 1993, Karon Sonja Mitchell and her second husband executed a separation agreement on terms which released all mutual claims to share in each other's pension entitlement and required that Mrs. Mitchell receive a payment of $50,000 from her husband. Mrs. Mitchell had been married before. In 1981, her first husband had died in a work-related accident and Mrs. Mitchell became entitled to surviving spouse benefits under the workers' compensation legislation. She lost that entitlement by virtue of the remarriage disqualification provision when she married Raymond David Mitchell in 1984. In 1996, Mrs. Mitchell joined the action in *Grigg* and, as a result of that litigation and the government's response, became entitled to retroactive benefits of $226,537.64 which she received in 1997. Mr. Mitchell did not make the agreed upon $50,000 payment. Instead, he applied to the court for a variation of his payment obligation and for a declaration that the portion of the re-instated surviving spouse benefits that accrued to Mrs. Mitchell during their marriage constituted a family asset in the amount of $156,833.75. The trial court so found and declared Mr. Mitchell entitled to a 35% beneficial interest in that amount. The British Columbia Court of Appeal dismissed an appeal with costs against Mrs. Mitchell.[170] The Court rejected the argued characterization of the surviving spouse's allowance as a 'pension' for the purposes of the separation agreement and Lambert J.A. offered the following characterization:

> ...a widow's benefit is more like a family compensation structured settlement than it is like a payment under a pension plan. I do not think that the *Workers' Compensation Act* or any part of it is properly described as a pension plan.[171]

Whether a pension or family compensation structured settlement, survivor benefits present many intriguing legal and constitutional issues. The work of the courts in this area has barely begun.

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[169] P. Birks and G. McLeod, *Justinian's Institutes* (Ithaca, N.Y.: Cornell University Press, 1987) at 37 (Book One: 1.1 Justice and Law).

[170] *Mitchell v. Mitchell* (2002), 1 B.C.L.R. (4th) 328.

[171] *Ibid.* at para. 28.