

### Noteworthy Decision Summary

**Decision:** WCAT-2004-01966-RB    **Panel:** H. McDonald    **Decision Date:** April 20, 2004

***Section 15 of the Charter of Rights and Freedoms – Section 17 of the Workers Compensation Act – Surviving spouses' benefits***

The worker died in November 2001 in a work-related accident. The Workers' Compensation Board (Board) concluded that his widow was entitled to survivor's benefits under section 17(3)(e) of the *Workers Compensation Act* (Act). Under that subsection her monthly pension was less than it would have been if she had been at least 50 years of age, or if she had dependent children from her marriage with the worker. The widow challenges the Board's decision on the basis that section 17(3)(e) of the Act constituted discrimination based on age, contrary to section 15 of the *Charter of Rights and Freedoms* (Charter).

The panel referred to the findings of the B.C. Court of Appeal in *Burnett v. British Columbia (Workers' Compensation Board)* (2003), 16 B.C.L.R. (4th) 203 (C.A.) and concluded that section 17(3)(e) of the Act does not violate the equality provisions of section 15 of the Charter. Under section 17(3)(e) of the Act there is an economic disadvantage as a consequence of being a younger surviving spouse without dependent children. The rationale behind the legislative scheme was based upon the broad generalization that it is somewhat easier for younger persons who do not have the obligations of raising dependent children, to find and maintain employment. This rationale does not stigmatize the widow, nor does it perpetuate a view that she is less deserving of concern, respect or consideration than any others. Thus, there is not a violation of the equality provisions in section 15 of the Charter in this case.

**WCAT Decision Number :** WCAT-2004-01966-RB  
**WCAT Decision Date:** April 20, 2004  
**Panel:** Heather McDonald, Vice Chair

---

## Introduction

The worker died in November 2001 in a work-related accident. He left a widow, Ms. X. The worker also had two dependent children from a former marriage who were being raised by his former spouse. The Workers' Compensation Board (Board) granted survivors' benefits for the dependent children. The Board paid a monthly pension for the children to the former spouse on their behalf. By letter dated December 17, 2001, the Board also advised Ms. X that she was entitled to survivor's benefits in that she was entitled to a monthly pension calculated under Section 17(3)(e) of the *Workers Compensation Act* (Act). As of that date, the monthly pension was \$932.46.

Section 17(3)(c) – (e) of the Act was a benefit scheme that distinguished between three categories of surviving spouses:

Section 17(3)(c) applied to surviving spouses who, at the date of death of the worker spouse, were 50 years of age or older, or were invalids. They received a monthly payment which, when combined with federal benefits payable to or for that dependant (and subject to a stated minimum), would equal 60 percent of the monthly rate of compensation that would have been payable if the deceased worker had sustained a permanent total disability.

Section 17(3)(d) applied to surviving spouses who, at the date of death of the worker spouse, were not invalids, were under the age of 40 years of age and were without dependent children. They received a lump sum, somewhat less than the maximum compensation payable to a totally disabled worker for one year.

Section 17(3)(e) applied to surviving spouses who were not invalids, who were at least 40 years of age but less than 50 years of age, and who did not have dependent children. They received a monthly sum calculated under Schedule C. Schedule C provided for a graduated scheme of benefits whereby these surviving spouses received a monthly sum which was a fraction of the monthly sum received by the surviving spouses 50 years of age or older. This fraction was graduated in accordance with their age so that a 41-year-old would receive less than a 42-year-old who would in turn receive less than a 43-year-old would receive.

In November 2001, Ms. X was 40 years of age. There were no dependent children of the relationship between her and the worker. Therefore, the Board calculated her survivor's pension according to Section 17(3)(e) of the Act, which resulted in her

monthly pension being less than it would have been if she had been at least 50 years of age, or if she had dependent children from her marriage with the worker.

Ms. X appealed the Board's December 17, 2001 decision to the Workers' Compensation Review Board (Review Board). She challenged the decision on the basis of Section 15 of the *Charter of Rights and Freedoms* (Charter). Ms. X submitted that Section 17(3)(e) of the Act constituted discrimination based on age, contrary to Section 15 of the Charter.

Section 15 of the Charter provides:

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, color, religion, sex, age or mental or physical disability.
  
- (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

### **Issue(s)**

Did the Board's application of 17(3)(e) of the Act violate the equality provisions of Section 15 of the Charter?

### **Jurisdiction and Procedural Matters**

Ms. X filed her appeal with the Review Board in January 2002. On March 3, 2003, the provincial government of British Columbia introduced legislation which created the Workers' Compensation Appeal Tribunal (WCAT). As a Review Board panel had not commenced consideration of this appeal before March 3, 2003 this appeal was transferred to WCAT and is being dealt with as a WCAT appeal. (See the *Workers' Compensation Amendment Act (No. 2)*, Section 38) (the Amendment Act, 2002).

WCAT held the appeal in abeyance, pending the outcome of a judicial review proceeding involving an Appeal Division decision in a similar appeal dealing with survivor's benefits. That Appeal Division decision was Appeal Division *Decision #2000-0440* (March 30, 2000), which found that the differential treatment for surviving spouses affected by the interplay between Section 17(4) and Section 17(3)(d) of the Act did not unlawfully discriminate between surviving spouses within the meaning

of Section 15(1) of the Charter. The judicial review proceeding was *Burnett v. British Columbia (Workers' Compensation Board)* (2003), 16 B.C.L.R. (4<sup>th</sup>) 203 (C.A.) (the Burnett decision). The B.C. Court of Appeal confirmed the Appeal Division's conclusion upholding the constitutionality of the legislative scheme in Section 17(3)(a) – (e) and Section 17(4) of the Act. The widow in the Burnett case applied for leave to appeal to the Supreme Court of Canada.

This appeal was held in abeyance until February 26, 2004, when the Supreme Court of Canada denied leave to appeal to the appellant in the Burnett decision.

A lay advocate represented Ms. X in these appeal proceedings. Notice of the constitutional issue raised in this appeal was provided to the provincial and federal Attorneys General, who chose not to participate in these proceedings. In her notice of appeal, Ms. X indicated that an oral hearing was not necessary, and I agree that an oral hearing was not necessary to deal with this appeal. Ms. X provided a written attachment to her notice of appeal, in which she submitted that her rights and freedoms under Section 15 of the Charter had been infringed or denied by the Board's application of Section 17(3)(e) of the Act. The lay advocate did not present written submissions on Ms. X's behalf.

The employer participated by way of written submission, and supported Ms. X's position in these appeal proceedings.

There has been no challenge in this case to the jurisdiction of the Appeal Division to consider the constitutionality of Section 17 of the Act. In the recent decision of *Nova Scotia (WCB) v. Martin; Nova Scotia (WCB) v. Laseur*, [2003] S.C.J. No. 54, (the Martin decision), the Supreme Court of Canada addressed the jurisdiction of administrative tribunals to apply the Charter. Where a tribunal's empowering legislation grants to the tribunal the jurisdiction (express or implied) to interpret or decide any question of law, the tribunal is presumed to have the power to determine the constitutional validity of that provision. This presumption may be rebutted by express wording or by clear implication arising from the tribunal's statute, to show that the legislature intended to exclude the Charter from the scope of the tribunal's authority. I am satisfied that WCAT has the jurisdiction to apply the Charter, as it has jurisdiction under the Act to consider questions of law and to apply statutes relevant to the issues in a proceeding. This was the conclusion in *Appeal Division Decision #2000-0440*, confirmed by the B.C. Court of Appeal.

In this decision, I will be referring to the provisions of the Act in the version that existed on December 17, 2001, at the time of the Board's initial decision in this case.

## Relevant Jurisprudence

Since 1999 there has been an evolution in decisions dealing with the constitutionality of Section 17 of the Act. This evolution has corresponded to an evolution in Charter jurisprudence in the courts, culminating in a Supreme Court of Canada three-step “equality analysis” in the March 25, 1999 decision of *Law v. Canada (Minister of employment and Immigration)* [1999] 1 SCR 497, 170 D.L.R. (4<sup>th</sup>) 1 (the “Law decision”), as well as the Burnett decision from the B.C. Court of Appeal.

Early decisions, notably *Appeal Division Decision #94-0433*, 10 W.C.R. 617 and *Decision #95-1062*, 11 W.C.R. 533, found that the benefit scheme in Section 17(3)(c) – (e) of the Act violated Section 15 of the Charter, and was not saved by Section 1 of the Charter. In those cases the panels concluded that the age distinction in the benefit scheme reinforced a stereotype about the likelihood of remarriage, that is, that younger women can remarry much more easily than older women can. The decisions found that this stereotype was prejudicial as it put less value on the financial independence of younger widows as compared to older widows. With respect to Section 1 of the Charter, the decisions found that the use of age to make distinctions in benefits was not sufficiently reliable to meet the apparent objectives of Section 17 of the Act. Therefore the Appeal Division panels found that the benefit scheme in Section 17 was not justified under Section 1 of the Charter.

A notable departure from that line of cases was *Appeal Division Decision #98-0527*, 14 (No. 2) W. C. R. 113 (April 3, 1998). The panel in that case comprehensively reviewed Charter jurisprudence on Section 15’s equality provisions. It also reviewed the evolution of the Act’s benefit scheme for survivors, including the 1993/94 amendments which provided for the continuation of pension benefits after remarriage or involvement in a common law relationship. The panel specifically referred to and relied on the Federal Court of Appeal decision in the Law case. (At the time the panel issued its decision, the Supreme Court of Canada had considered the appeal in the Law case, but had reserved judgment and not yet issued its decision). The Law decision was interesting because it involved a benefit scheme, the Canada Pension Plan (CPP), which made legal distinctions affecting benefit entitlement based on age. Thus in that sense it was similar to the workers’ compensation benefit scheme for surviving spouses in Section 17 of the Act. The Federal Court of Appeal found that the CPP pension benefit did not involve negative stereotyping or an irrelevant personal characteristic, nor did it target a disadvantaged group.

After referring to the Law decision, the Appeal Division panel in *Decision #98-0527* reversed the earlier view expressed by Appeal Division panels that the benefit scheme in Section 17(3)(c) – (e) violated Section 15 of the Charter. It disagreed with the reasoning in the earlier decisions that the “negative potential for remarriage stereotype” was central to the benefit scheme in Section 17 of the Act. The Appeal Division panel noted at page 175 that:

In 1974, the purpose of the amendments to Section 17 was to improve compensation for widows who suffered a loss of income because of the death of their spouses by taking into account the size of that loss and also by ensuring minimum levels of compensation. The widows' actual and potential access to various sources of income was taken into account so as not to overcompensate them. Thus, the purpose of the 1974 amendments was to replace income, in light of projected needs, so as to avoid overcompensation and undercompensation. Compensation was integrated with federal benefits. To avoid undue intrusion in the widows' lives, the legislature used a presumptive approach based on age, health and the presence of children to predict the opportunity for income from other sources, particularly employment, over the long term, rather than subjecting the widows to ongoing scrutiny and reporting requirements concerning their actual income.

The Appeal Division panel went on to conclude that subsequent amendments did not change the original purpose of the benefit scheme in Section 17. The panel considered the broad purpose of Section 17, namely, to provide dependent spouses with benefits that will compensate them for the loss in income due to the work-related death of their spouses while taking into account other actual and potential sources of income. The panel concluded that this broad purpose did not offend the equality provisions in Section 15 of the Charter. It also concluded that the effects of the benefit scheme in Section 17(3)(c) - (e) did not violate Section 15.

The Appeal Division panel found that Section 17(3)(c) - (e) was based on the premise that younger persons (the groups covered by 17(3)(d) and (e)) can more easily achieve economic self-sufficiency through employment than can older persons (the group covered by Section 17(3)(c)). According to the panel, this premise, rather than the remarriage stereotype, formed the basis for the Section 17(3)(c) - (e) benefit scheme. At pages 200 - 201, the panel observed as follows:

We do not view the scheme in Sections 17(3)(c) to (e) as offending human dignity or as reducing the individuals within the groups that are challenging it to second-class citizens by demeaning them and stripping them of the qualities that are valued in society.

The scheme in Sections 17(3)(c) to (e) provides substantial benefits to all surviving spouses of workers who die as a result of their employment. The appellants are not denied benefits under that scheme. They are given recognition under the legislation and the policies. The vocational rehabilitation policies especially accommodate for spouses covered by Section 17(3)(d) by permitting the Board to provide them with a living allowance while they undertake a training program.

Putting aside any economic value of the rehabilitation policies, the scheme does target the largest amount of benefits to the spouses who are 50 years of age or over at the time of the worker's death and those who are invalids at that time. But we consider this to be compatible with the concept of substantive equality that underlies Section 15; a law may favour a group whose vulnerability is compounded because of the age of its members and their gender. Admittedly, it could be questioned whether it is appropriate to view the group consisting of surviving spouses 50 years of age or over as vulnerable since the spouses in that group may have accumulated assets and pensions, and paid off mortgages. However, even where this may be the case, they are vulnerable in one important respect. They are vulnerable as far as being able to increase their earnings by joining the labour force advancing their careers or changing careers; they are more likely to be perceived as less productive members of society. That is, they are not as well situated as younger spouses are to offset the economic losses due to their spouse's death through some career move that would result in an increase in their earning capacity.

Given the panel's conclusion that the benefit scheme in Sections 17(3)(c) - (e) did not offend Section 15 of the Charter, it did not need to deal with the Section 1 issue.

The Supreme Court of Canada reached a unanimous decision in the Law case on March 25, 1999. The Court engaged in a three-step "equality analysis" to determine whether the CPP benefit scheme violated the equality provisions of Section 15 of the Charter. The Court described this three-step analysis in the following way at page 38:

- A. 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?
- B. Is the claimant subject to differential treatment based on one or more enumerated and analogous grounds?  
and
- C. Does the differential treatment discriminate, by imposing a burden upon or withholding a benefit from the claimant in a manner which reflects the stereotypical application of presumed group or personal characteristics, or which otherwise has the effect of perpetuating or promoting the view that the individual is less capable or worthy of recognition or value as a human being or as a member of

Canadian society, equally deserving of concern, respect, and consideration?

With respect to the first step of the equality analysis, the Court concluded that the CPP benefit scheme constituted a denial of equal benefit of the law. This was because of the reduced entitlement to benefits for surviving able-bodied spouses between the ages of 35 and 45, and the delay in the receipt of benefits for those spouses under 35 at the death of their spouse.

On the second step of the equality analysis, the Court concluded that the benefit scheme drew a distinction on the basis of age, one of the grounds enumerated in Section 15 of the Charter.

The first two stages of the inquiry answered in the affirmative, the Court proceeded to the third step of the equality analysis. It answered this step of the inquiry in the negative. The Court pointed out that the appellant had not demonstrated that either the purpose or the effect of the legislative provisions violated her human dignity so as to constitute discrimination. The purpose and function of the CPP provisions were not to remedy the immediate financial need experienced by surviving spouses, but rather to enable the older of such spouses to meet their basic needs during the longer term. The Court observed at page 46 that the legislation took into account the greater flexibility and opportunity of younger people without dependent children or disabilities to achieve long-term security absent their spouse:

Yes, the law imposes a disadvantage on younger spouses in this class. But it is unlikely to be a substantive disadvantage, viewed in the long term. The law on its face treats such younger people 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 recognition or value as human beings or as members of Canadian society. Given the contemporary and historical context of the differential treatment and those affected by it, the legislation does not stereotype, exclude, or devalue adults under 45. The law functions not by the device of stereotype, but by distinctions corresponding to the actual situation of individuals it affects.

The Court observed that Parliament's intent in enacting a survivors' pension scheme with benefits allocated according to age was to allocate funds to those persons whose ability to overcome economic need was weakest. The appellant was more advantaged in a relative sense than many surviving spouses. This was by virtue of her younger age and ability to overcome long-term need because of the nature of the individual human

life cycle. People in the position of the appellant were not completely excluded from obtaining a survivor's pension, although the benefit would be delayed until they turned 65 years of age or became disabled before then. Accordingly, the Court observed at page 48 that:

The availability of the pension to the appellant strengthens the conclusion that the law does not reflect a view of the appellant that suggests she is undeserving or less worthy as a person, only that the distribution of the benefit to her will be delayed until she is at a different point in her life cycle, when she reaches retirement age.

The Court expressly noted the fact that statistical generalizations upon which the legislation was premised did not correspond perfectly with the long-term financial need of all surviving spouses. The Court stated, however, that this fact did not affect the conclusion that the legislation was consonant with the human dignity and freedom of the appellant. The Court concluded that it was "at a loss" to find any violation of human dignity in the CPP benefit provisions at issue:

The impugned distinctions in the present case do not stigmatize young persons, nor can they be said to perpetuate the view that surviving persons under 45 are less deserving of concern, respect or consideration than any others. Nor do they withhold a government benefit on the basis of stereotypical assumptions about the demographic group of which the appellant happens to be a member.

The Court found, therefore, that the age distinctions in the CPP benefit scheme for surviving spouses did not violate the equality provisions in Section 15(1) of the Charter.

*Appeal Division Decision #1998-0527* has been applied by decision-makers in the workers' compensation system since it was issued. In applying *Decision #1998-0527*, many cases have also referred to the Supreme Court of Canada decision in the Law case, in concluding that the benefit scheme in Section 17(3)(c) – (e) of the Act does not violate the equality provisions in Section 15 of the Charter. One of those cases was *Appeal Division Decision #2000-0440* (March 30, 2000), the Burnett decision which was the subject of judicial review proceedings.

There was no question but that with respect to Sections 17(4) and 17(3)(e) of the Act, the first two steps of the equality analysis should be answered in the affirmative. With respect to the first step, Section 17 did draw a formal distinction between surviving spouses on the basis of one or more personal characteristics: age, health and whether or not they had dependent children. Turning to the second step, Section 17 subjected survivors to differential treatment based on personal characteristics, including their age, which is one of the grounds enumerated in Section 15(1) of the Charter.

With respect to the third step, however, the B.C. Court of Appeal decision in the Burnett case affirmed the relevance of the Supreme Court of Canada's decision in the Law case. The B.C. Court of Appeal concluded that although there was a significant economic disadvantage contemplated for younger spouses in Section 17's legislative scheme, the differential criteria did not satisfy the third step in the three-step equality analysis for determining whether legislation violates Section 15 of the Charter.

The Court of Appeal in the Burnett case noted that the Supreme Court of Canada has been careful to limit the application of Section 15 of the Charter to cases where individuals suffer more than economic detriment or disadvantage. The central concern is whether a violation of human dignity has been established, in light of the historical, social, political, and legal context of the claim. The Court of Appeal in the Burnett case observed in part as follows:

Younger spouses do not suffer from a "pre-existing disadvantage", within the meaning of s. 15(1), because of previous child-care responsibilities. Their disadvantage is economic, and has no roots in stereotypes, prejudices or systemic vulnerability.

Nor, in my view, do the impugned provisions fail to adequately take into account the actual needs and circumstances of younger spouses, to the extent they are revealed in the evidence or by judicial notice of certain facts. The application of the "broad generalization that younger persons have better job prospects than older persons" is not completely displaced by the fact that the employability of younger spouses has been impacted by their years of child-care responsibilities – its application is modified. The needs of younger spouses are not excluded or unrecognized. Rather, their different needs at different ages are provided for differently. The Act acknowledges and provides for the impact on employability of becoming a parent at a young age by providing a monthly pension when the child is dependent and a capital sum when the child is no longer dependent.

The Court of Appeal in the Burnett case concluded its reasons by paraphrasing the Supreme Court of Canada's concluding remarks in the Law decision:

In these circumstances, recalling the purposes of s. 15(1), I am at a loss to locate any violation of human dignity. The impugned distinctions in the present case do not stigmatize [younger spouses], nor can they be said to perpetuate the view that [younger] spouses are less deserving of concern, respect or consideration than any others. Nor do they withhold a government benefit on the basis of stereotypical assumptions about the demographic group of which the appellant happens to be a member. I must conclude that, when considered in the social, political and legal

context of the claim, the age distinction in [Section 17(4)'s legislative scheme] are [sic] not discriminatory.

As earlier stated, on February 26, 2004, the Supreme Court of Canada denied Ms. Burnett's request for leave to appeal the B.C. Court of Appeal decision.

### **Reasons and Findings**

In her notice of appeal, Ms. X submitted her belief that the Board's December 17, 2001 pension decision discriminated against her because of her age and the fact she had no children. She submitted that her loss was the same at age 40 as it would have been if her husband had died when she was 50 years of age.

The employer provided a July 12, 2003 written submission in which it submitted that as an employer, it is not able to "enquire as to a person's age, or prejudice my hiring personnel management decisions based upon their marital, child, or religious status" and therefore it was inappropriate for the Board to do so. The employer argued that a surviving spouse should not have to "suffer even further based on either age or the number of children you did not bear."

In reviewing the claim file, I note that the Board assisted Ms. X in her goal of obtaining an industrial first aid ticket so that she would be able to find a job to supplement her pension income from the Board. It is also apparent that the Board assisted the worker in grief counselling. The memos from the Board's vocational rehabilitation consultant illustrate his concern for Ms. X and his intention to ensure that the Board did its best to help her through the difficult time following the death of the worker, whether by way of paying for supportive counselling and/or by helping her to improve her job skills and find appropriate employment.

As I have earlier observed in this decision, there is no doubt that the benefit scheme in Section 17 of the Act, and in this case the effect of Section 17(4)(e) of the Act, did draw distinctions between surviving spouses on the basis of their age and whether they had dependent children. Further, the benefit scheme subjected surviving spouses to differential treatment based on age, which is one of the grounds enumerated in section 15(1) of the Charter.

However, I agree with the reasoning and the findings of the B.C. Court of Appeal in the Burnett decision that Section 17 does not satisfy the third step of the equality analysis for determining whether there is a violation of the equality provisions in Section 15 of the Charter. Although under Section 17(3)(e) of the Act, there is an economic disadvantage as a consequence of being a younger surviving spouse without dependent children, the disadvantage does not have its roots in stereotypes or prejudices and does not violate human dignity.

In this case, Ms. X's situation is slightly different than the widow in the Burnett case, as due to the interplay of Section 17(4) and Section 17(3)(d) of the Act, Ms. Burnett lost her monthly pension entitlement completely when her child was no longer dependent, receiving instead a one-time capital sum. The effect of Section 17(3)(e) of the Act had a lesser impact on Ms. X in this case, as she was not completely denied a monthly pension. Rather, the legislative scheme in Section 17 provided her with a monthly pension for life, albeit in an amount less than it would have been if she had been 50 years of age or was raising dependent children. The rationale behind the legislative scheme was based upon the broad generalization that it is somewhat easier for younger persons who do not have the obligations of raising dependent children, to find and maintain employment. This rationale did not, however, stigmatize Ms. X or other surviving spouses in her position, nor did they perpetuate a view that Ms. X or other surviving spouses in her position are less deserving of concern, respect or consideration than any others. Therefore, for the reasons expressed by the Court of Appeal in the Burnett decision, I find that the effect of Section 17(3)(e) of the Act did not violate Ms. X's rights under Section 15 of the Charter.

**Conclusion**

For the foregoing reasons, I deny Ms. X's appeal of the Board's December 17, 2001 decision that calculated her survivor's monthly pension according to Section 17(3)(e) of the Act. I confirm the Board's December 17, 2001 decision that established Ms. X's monthly pension entitlement.

Heather McDonald  
Vice Chair

HM/mak/hf