Court File No. 01-CV-221056CP

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

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

Plaintiffs
(Appellants)

- and –

THE ATTORNEY GENERAL OF CANADA

Defendant
(Respondent)

Proceeding under the *Class Proceedings Act, 1992*

FACTUM OF THE PLAINTIFFS/APPELLANTS

(Appeal from the Order of Justice Macdonald, dated February 29, 2008)

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PART I – NATURE OF THE ORDER APPEALED

1. This is an appeal by Roy Elliott O'Connor LLP ("REO") as solicitors of record, on behalf of the representative Plaintiffs and on behalf of their counsel in the various jurisdictions in Canada, the said lawyers collectively known in this proceeding as the Plaintiffs' Counsel Group (the "PCG"), from the Order of the Honourable Justice Macdonald of the Ontario Superior Court of Justice, dated February 29, 2008 made at Toronto (the "Order"), denying the PCG a statutory first charge pursuant to section 32(3) of the Ontario *Class Proceedings Act, 1992*, S.O. 1992, c. 6 (the "*CPA*") on 50% of the pre-judgment arrears awarded in the within class proceeding, due in part to section 65 of

the *Canada Pension Plan*, R.S., 1985, c. C-8 (the "*CPP*"), finding that the monetary award in this case was a benefit within the meaning of section 65(1) of the *CPP* and that section 32(3) of the *CPA* can not and does not affect section 65 of the *CPP* by operation of or by virtue of section 94A of the *Constitution Act, 1867,* (U.K.) 30 & 31 Victoria, c. 3, and the doctrine of federal paramountcy.

> *Order of Justice Macdonald, dated February 29, 2008* (the "Order"), Appeal Book and Compendium of the Plaintiffs/Appellants ("Appellants' Compendium"), Tab 2

Part II – OVERVIEW

2. Are class counsel, who have successfully pursued a Charter-based national class action from trial through the Supreme Court of Canada, to be prevented from enforcing their statutory first charge for fees under the *CPA* against the Court's award of extraordinary arrears, payments that were not available but barred under the express provisions of the *CPP*, by virtue of section 65 of the *CPP*?

3. As a consequence of the efforts of the PCG and the *Charter* ruling in this class action, same-sex survivors whose partners died after April 17, 1985 and before January 31, 1998, who had been specifically excluded from receiving survivor pension benefits under the *CPP*, became entitled to both future payments and arrears of those wrongfully denied pensions. If class members had simply been included in the statutory regime as a result of that ruling, they would have been limited to 11 months of arrears from the date of the applications they were able to file following the judgement, as the Defendant had proposed.

4. The Supreme Court ruled that all class members, at a minimum, would be eligible to receive survivor's pensions dating back to December 2000, namely 11 months prior to the commencement of these proceedings. Theses arrears were recovered only because their counsel had secured a *Charter* ruling striking down sections 44.1 and 72(2) of the *CPP* and by operation of the *CPA*. Without the *Charter* ruling in the context of this class action these payments would be expressly prohibited and could not be a benefit "payable under this Act" (the *CPP*).

5. As the learned motions judge found, these arrears are a monetary award as that term is used in section 32(3) of the *CPA*.

6. The PCG applied to exercise its right to a first charge against a portion of these arrears to secure payment of part of its fees pursuant to section 32(3) of the *CPA*. The portion over which it claimed was an amount of arrears in excess of the amount sheltered under section 65 of the *CPP*. The PCG also argued in the alternative that in the event of an operational conflict between section 32(3) and section 65, provincial rather than federal paramountcy must apply because of the unique language and history of section 94A.

7. Justice Ellen Macdonald found that all of the necessary elements for the imposition of the requested first charge had been met by the PCG, however, she concluded that the resulting monetary award was a "benefit" as defined by the *CPP* and that section 65 of the *CPP* precluded the granting of the requested first charge

Reasons for Decision of Justice Macdonald, dated February 29, 2008 ("Macdonald 2008 Decision") at paras. 61-63, Appellants' Compendium, Tab 3

8. Justice Macdonald found that although there was an operational conflict between section 32(3) and section 65 on these facts, section 94A did not give rise to provincial paramountcy because section 32(3) was not a law regulating pensions. Her Honour found that federal paramountcy applied to resolve any operational conflict.

Macdonald 2008 Decision at para. 64, Appellants' Compendium, Tab 3

9. As a matter of statutory interpretation, there is no conflict between section 65 and the *CPA*'s first charge. Section 65 of the *CPP* protects benefits "payable under this Act". The maximum arrears payable under the *CPP*, and therefore the maximum amount protected by section 65, is 11 months of arrears. Eligible class members are entitled to be paid a minimum of 37 months of arrears under the Court ruling, and not under the Act. The PCG claim for a first charge on one-half of the arrears pursuant to section 32(3) of the *CPA* ensures that every class member will have at least 18 months of arrears protected from the first charge.

10. The statutory interpretation argument is reinforced by the proper analysis of the division of powers issue. The modern approach to resolving the inevitable overlaps that arise in specific factual circumstances between otherwise valid federal and provincial jurisdiction is to adopt the interpretation that allows both laws to operate in a given factual situation whenever possible. Adopting the statutory interpretation advanced by the Appellant achieves that result by effectively "reading down" the broad language of section 65 to allow some scope for the provincial law to operate in these unique circumstances.

11. If this Honourable Court should conclude that there is an operational conflict between section 32(3) and section 65, section 32(3) must prevail. Federal paramountcy can never apply to operational conflicts when the conflict is between a valid provincial law under the exclusive jurisdiction of the provinces under section 92 and the incidental effects of a law enacted based on the concurrent federal power under section 94A.

Part III - FACTS

12. The history of this litigation highlights that there was no vehicle other than a class action by which these claims could be advanced and that it was only through the *Charter* that the relief sought by the class members could be achieved.

13. Absent *Charter* relief, none of the class members would be receiving any payments.

14. The award of arrears has been characterized by the Supreme Court of Canada as an order for the payment of money and is therefore a monetary award subject to a statutory first charge within s. 32(3) of the *CPA*.

> *Reasons for Judgment of the Supreme Court of Canada, dated March 1, 2007* ("SCC Judgment"), Appellants' Compendium, Tab 7
>
> See also *Reasons for Judgment of the Ontario Court of Appeal, dated November 26, 2004* ("Court of Appeal Judgment") at para. 145, Appellants' Compendium, Tab 9

A. Same-Sex Spouses

15. Even though gays and lesbians have, at all relevant times, been required to contribute to the *CPP*, until August 2000 they were all barred from survivor's pension benefit claims by the *CPP* by virtue of the definition of spouse.

16. The *Modernization of Benefits and Obligations Act* ("*MOBA*") which came into force on July 31, 2000 introduced a number of amendments to the *CPP* that, *inter alia*, were intended to make survivor's pension benefits payable to some same-sex survivors on the death of a contributing same-sex spouse. Section 44(1.1) of the *CPP* was one of the amendments introduced by *MOBA*. That section provided that if the same-sex common-law partner of a same-sex survivor died before January 1, 1998; their survivor would *never* be eligible for a survivorship pension benefit under the *CPP*.

> *Modernization of Benefits and Obligations Act*, 2000, c. 12 ("MOBA"), Book of Authorities of the Plaintiffs/Appellants ("BOA"), Tab 1
>
> *Canada Pension Plan*, R.S., 1985, c. C-8 (the "*CPP*"), s. 44(1.1), Schedule B

17. Section 72(2) of the *CPP* stipulated that in the case of eligible same-sex survivors only, no survivor pension benefit would be payable for any month before the month in which section 72(2) came into force. That section came into force in July 2000.

> *CPP*, *supra*, s. 72(2), Schedule B

B. Charter Remedy

18. The Supreme Court of Canada upheld the decision of this Honourable Court and struck down sections 44(1.1) and 72(2) of the *CPP* under section 52 of the *Constitution Act, 1982*.

> SCC Judgment at paras. 55-56, Appellants' Compendium, Tab 7
>
> *Constitution Act, 1982*, Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, s. 52, Schedule B

19. The result of striking down these sections of the *CPP* was that living class members whose same-sex common-law partners died between April 17, 1985 and January 1, 1998, were now eligible to receive both arrears and future survivor's pension

benefits. These same-sex survivors who, before the *Charter* remedy had been specifically excluded, were now divided into three groups each of which was entitled to receive survivor pension benefits but with differing arrears:

> Group 1, composed of those class members who applied prior to July 31, 2000, are entitled to payments back to August 1999 and into the future;
>
> Group 2, composed of those class members who applied on or after July 31, 2000 and before November 27, 2001, are entitled to payments back to 11 months prior to the date of their application and into the future; and
>
> Group 3, composed of those class members who applied on or after November 27, 2001, and those who have yet to apply, who are entitled to payments back to December 2000, which is 11 months before November 27, 2001 (the date on which the Statement of Claim in the Hislop action was filed).

20. Without the benefit of the *Charter* remedy in this case and the tolling provisions of the *CPA*, these same-sex survivors would not be entitled to receive any of these arrears as they are not a "benefit payable under" the *CPP*.

21. The payment of these arrears will constitute a "monetary award" in the hands of class members. Otherwise, the award of interest could not have been made by the Court because interest is not payable under the *CPP*.

C. Retainer Agreement and Fee Approval

22. The retainer agreement was approved by Justice Macdonald on April 30, 2004 and became an enforceable agreement, as that term is use in section 32(3) of the *CPA*.

Order of Justice Macdonald, dated April 30, 2004 (the "Approval Order"), Appellants' Compendium, Tab 5

23. The PCG has incurred total fees, prior to the application of the 4.8 multiplier, of $5,317,352.15. To date the PCG has received fees, exclusive of disbursements, in the amount of $1,946,400.09. The Defendant's estimate of the monetary quantum of pension arrears owing to class members, based upon its interpretation and application of the judgment, is $3,588,250.00. This means that even if 50% of those arrears are applied to the PCG's fees, the PCG would not even recover its base time to April, 2004.

Affidavit of Sharon D. Matthews, sworn May 17, 2007 ("Matthews Affidavit") at para. 12, Appellants' Compendium, Tab 13

24. The uncontroverted evidence of Ms. Matthews is that if counsel in this type of class proceeding are not able to recover their fees and are not able to rely upon the statutory priority granted by section 32(3) of the *CPA*, qualified counsel will not be willing to act in subsequent similar cases. This will frustrate the access to justice principles that are embodied in the *CPA* and reflected in the certification decisions in British Columbia and Ontario. It will also tend to undermine the *Charter,* as an equality right without a remedy is meaningless.

Matthews Affidavit at paras. 19-20, Appellants' Compendium, Tab 13

D. The Impact of the PCG's Lien Claim

25. As recited in the Approval Order, the PCG undertook that no statutory first charge would be claimed against Post-Judgment Arrears awarded to class members and that a limit of 50% of the monetary quantum of Pre-Judgment Arrears would be used to pay the PCG's fees. The substantive effect of limiting the lien claim of the PCG in this way is to respect the sheltering effect of section 65 of the *CPP*. Despite the limited statutory first

charge, class members will still be financially far better off than they would be under the strict statutory *CPP* regime. Depending on their category, class members will receive 50% of between 37 months and 53 months of Pre-Judgment Arrears, or a net amount equal to between 18.5 and 26.5 months of Pre-Judgment Arrears

Approval Order, Appellants' Compendium, Tab 5

Part IV – ISSUES AND THE LAW

A. Section 32(3) of the *CPA* Applies to the Court's Award; Section 65 of the *CPP* Does Not Apply

i. The arrears of pension are a monetary award governed by s. 32(3) of the CPA

26. Section 32(3) of the *CPA* stipulates that "[a]mounts owing under an enforceable agreement are a first charge on any settlement funds or monetary award."

Class Proceedings Act, 1992, S.O. 1992, c. 6 (the "*CPA*"), s. 32(3), Schedule B

27. The Ontario Law Reform Commission (the "OLRC") recognized the importance of ensuring that class counsel are paid their fees out of the class award before distribution to individual class members. In its comprehensive *Report on Class Actions*, the OLRC warned that, in cases involving a court approved contingency fee arrangement, failure to deduct class counsel fees directly from the class recovery would make it "very difficult, if not impossible" and "too ... expensive" for class counsel to get paid.

Ontario Law Reform Commission, *Report on Class Actions*, Vol. 3 (Ministry of the Attorney General, Ontario: 1992) at 734, BOA, Tab 2

28. The *CPA* is remedial and should be given a broad, purposive interpretation.

Abdool v. Anaheim Management Ltd. [1993] O.J. No. 1820 (Gen. Div.), aff'd (1995), 21 O.R. (3d) 453 (Div. Ct.) at para. 26, BOA, Tab 3

See also *1395559 Ontario Inc. (c.o.b. Sturgeon Falls Sports and Marine) v. West Nipissing (Township)*, [2006] O.J. No. 5561 (Div. Ct.) at para. 18, BOA, Tab 4

29. A purposive interpretation of the *CPA* must therefore advance the three major goals of judicial economy, increased access to courts and behaviour modification.

Bendall v. McGhan Medical Corp. [1993] O.J. No. 1948 (Gen. Div.) at paras. 32-33, BOA, Tab 5

See also *Western Canadian Shopping Centres v Dutton*, [2001] 2 S.C.R. 534 ("*Western Canadian Shopping Centres*") at paras. 27-29, BOA, Tab 6

30. As noted above, this case has been determined by Justice Macdonald to be one that could *only* have been advanced through the vehicle of a class proceeding.

Macdonald 2004 Decision at para. 15, Appellants' Compendium, Tab 6

31. The retainer agreement and contingency fee agreements between the representative Plaintiffs and the PCG have been approved by this Court, as have the fees and disbursements to the date of the Approval Order; amounts that remain substantially unpaid.

Macdonald 2008 Decision at para. 53, Appellants' Compendium, Tab 3

32. As the learned motions judge so found, the PCG is therefore *prima facie* entitled to the benefit of its first charge on the monetary award pursuant to section 32 of the *CPA*.

ii. The award of arrears is not a "benefit" under the CPP

33. The *CPP* provides that a "benefit" means "a benefit payable under [the *CPP*] and includes a pension".

CPP, supra, s. 2(1) ("benefit"), Schedule B

34. Section 65 (1) and (1.1) of the *CPP* provide as follows:

> 65. (1) A benefit shall not be assigned, charged, attached, anticipated or given as security, and any transaction purporting to assign, charge, attach, anticipate or give as security a benefit is void.
>
> (1.1) A benefit is exempt from seizure and execution, either at law or in equity.
>
> *CPP, supra,* ss. 65(1) and (1.1), Schedule B

35. The monetary award made in this case is only available to class members, and is only payable as a result of the *Charter* remedy granted in this case and the operation of the *CPA* itself. All of the payments to class members are not being paid "under this Act". The process by which these payments were recovered was a class action, not the process prescribed by the *CPP*. The amounts recovered are being paid only as a result of the Court's ruling and despite the express prohibitions and limitations contained in the *CPP*.

36. The *CPP* stipulates that no benefit under it is payable to any person unless that person has made an application under the *CPP* and payment has been approved. Section 72(1) of the statute stipulates that, where a survivor's pension is approved, the earliest payment will be "the twelfth month preceding the month following the month in which the application was received."

> *CPP, supra,* s. 72(1), Schedule B

37. Class members will be entitled to a minimum of arrears payable from December, 2000, which is 11 months preceding the date of the Statement of Claim (November 27, 2001) regardless of when they file their application, provided that they apply prior to the close of the administration of this class proceeding on September 30, 2008. These extraordinary arrears are available solely by reason of and under this class action *Charter* judgment. This level of entitlement is not found under the *CPP*. Some class members will

be entitled to even more arrears; some as far back as August, 1999. There is no entitlement to arrears dating back August 1999 for any claimants "under this Act."

38. The extent of the award can be usefully illustrated by contrasting the arrears entitlement of a putative class member who claims under this ruling with the arrears entitlement of a class member who delays filing their application until after September 30, 2008. An otherwise eligible class member who applied for the first time on September 1, 2008 would be entitled to arrears going back to December 2000, or 93 months of arrears, together with interest on the unpaid amounts. If the same person applied on October 1, 2008, that person would only be entitled to arrears of 11 months from the date of his or her application in accordance with the *CPP Act*. He or she would not be entitled to receive any interest on the arrears, as interest is not available under the *CPP*. In this hypothetical example, if the claim for lien were allowed, the class member who received the benefit of the ruling would receive payment equal to 75 months of arrears and would contribute an amount equal to 18 months of arrears to the approved fees of counsel.

> See also *Schachter v. Canada,* [1992] 2 S.C.R. 679, BOA, Tab 7; and *Doucet-Boudreau v. Nova Scotia (Min. of Education)*, [2003] 3 S.C.R. 3, BOA, Tab 8

iii. The Courts have already decided that the CPA governs in this case

39. In resisting certification of the predecessor class action, the Defendant had argued that the Court had no jurisdiction under the provincial class proceeding legislation because the process prescribed under the *CPP* applied exclusively. This was rejected by the Court granting certification. The Defendant subsequently attorned to the jurisdiction

of the Superior Court and the *CPA* when it consented to merger of the B.C. and Ontario actions and certification of the Ontario action.

40. The appeal decisions in this case recognize that the arrears may be decided by the trial judge in subsequent proceedings. The Court of Appeal ordered that "class members shall be eligible to receive prospective survivor's pensions, and survivor's pensions in arrears as determined by the trial judge in subsequent proceedings, subject to the date determined for the commencement of pension for each class member, s. 28 of the *Class Proceedings Act*, S.O.1992, c.6 and sections 60(2) and 72(1) of the *CPP*."

Court of Appeal Order at para. 1(a), Appellants' Compendium, Tab 8

41. In so doing, the Court has ruled that it will ultimately determine the eligibility requirements and extent of the arrears using its powers under the *Charter* and the *CPA*. This Court's role in carrying out this Order contrasts starkly with the strict provisions of the *CPP*, which has different rules for arrears calculations that are applied by the Minister and which are not subject to any amendment, appeal or oversight by the Superior Court.

42. The Supreme Court of Canada decided that the relevant date for the payment of arrears was the earlier of the date of the application for a survivor's pension or the date on which the Statement of Claim was filed.

SCC Judgment at para. 134, Appellants' Compendium, Tab 7

43. By choosing the date of the Statement of Claim, the Supreme Court of Canada accepted that the tolling provisions of section 28 of the *CPA* override section 72(1) of the *CPP*. There is no tolling provision in the *CPP*.

CPP, supra, ss. 72(1), Schedule B

CPA, supra, s. 28, Schedule B

44. Similarly, section 32(3) of the *CPA* must govern the question of the availability of a lien over the arrears rather than sections 65(1) and (1.1) of the *CPP*. There is no provision for a statutory lien for class action counsel under the *CPP* because there are no provisions for class proceedings under the *CPP*.

iv. The application of s. 65 of the CPP to this unique case would undermine the access to justice principles of the CPA

45. One of the most important objectives of the *CPA* is to ensure access to justice.

> *Western Canadian Shopping Centres, supra* at paras. 28 and 29, BOA, Tab 6
>
> *Markson v MBNA Canada Bank* (2007), 85 O.R. (3d) 321 (C.A.) at paras. 5 and 66 to 75, leave to appeal ref'd at [2007] S.C.C.A. No. 346, BOA, Tab 9
>
> *Bisignano v. La Corporation Instrumentarium Inc.*, [1999] O.J. No. 4346 (S.C.J.) at para. 9, BOA, Tab 10

46. If section 65 of the *CPP* is applied in such a manner as to preclude the PCG from the benefit of its section 32(3) *CPA* rights, the Attorney General will have ensured that similar class action *Charter* litigation for vulnerable minorities will never again be advanced. The access to justice objective of the *CPA* will thereby be frustrated. Section 65 was intended to shield pensioners from creditors, not to shield governments from discrimination claims.

B. The Division of Powers Analysis Supports the Appellants' Statutory Interpretation

i. Division of Powers Overview

47. The learned motions judge found that both sections 32(3) of the *CPA* and section 65 of the *CPP* applied to this monetary award. However, having identified an operational overlap, the learned motions judge went on to find that section 32(3) was not a conflicting provincial law for the purposes of section 94A of the *Constitution Act, 1867*

because it was not a law "in relation to" pensions. The learned motions judge then purported to resolve the issue by invoking the doctrine of federal paramountcy.

Macdonald 2008 Decision at para. 64, Appellants' Compendium, Tab 3

48. The learned motions judge erred in both the analysis and the conclusion. Her Honour unnecessarily subordinated the provincial law and its important policy objectives to the federal law. The modern approach to division of powers is to seek to give effect to the powers of both levels of government on the facts before the Court, rather than invalidating or subordinating a valid provincial law simply because it happens to overlap with a federal law. The preferable approach is to validate both laws. The statutory lien under section 32(3) can attach to the portion of arrears in excess of 11 months, validating the provincial lien and the goals of the *CPA*. At the same time, section 65 can shelter the statutory level of benefits payable under the *CPP*, namely current pensions plus 11 months of arrears. The operational effects of both laws are thus respected.

49. In the alternative, if the sections cannot be reconciled on these facts, the doctrine of federal paramountcy cannot apply. The doctrine of federal paramountcy arises out of the language of section 91. It can have no application to section 94A. At Confederation, the province had exclusive jurisdictions over pensions and over attachments. The federal power over pensions was conferred almost 100 years later, when the doctrine of federal paramountcy was well known. Unlike other additions to the heads of power, this new power was neither added to the exclusive list of powers under section 91 nor was it expressly made subject to federal paramountcy. Rather, the framers ensured the new federal pension power was merely concurrent and that in the event of operational conflict no provincial power could be rendered inoperative by the exercise of the new federal

power. This has accurately described by a leading author as "*concurrency with provincial paramountcy*."

> P. Monahan, *Constitutional Law*, 2nd ed. (Toronto: Irwin Law, 2002) ("P. Monahan, *Constitutional Law*") at 117, BOA, Tab 11

ii. The Distribution of Powers in Canada

50. Under Canada's constitutional structure, each level of government is sovereign in respect of matters within their respective jurisdictions. The history and nature of the unique and limited authority of the federal government regarding the *CPP* is critical to the analysis in the unique facts. This history demonstrates that in circumstances where a provision of the *CPP* and valid provincial legislation conflict in their operations, the federal legislation must yield and be "read down" to the extent of the inconsistency with the conflicting provincial legislation. This does not mean that section 65 is *ultra vires* in most situations, but merely that it is inoperative in these special circumstances.

> *Reference Re: Weekly Rest in Industrial Undertakings Act (Can.)*, [1937] A.C. 326 (P.C.) at para. 12, BOA, Tab 12
>
> *Manitoba (A.G.) v. Canada (A.G.)*, [1981] 1 S.C.R. 753, BOA, Tab 13
>
> *Hodge v. The Queen* (1883), 9 App. Cas. 117 (P.C.) at 130, BOA, Tab 14
>
> *Citizens Insurance Co. of Canada v. Parsons* (1881), 7 App. Cas. 96 (P.C.) at paras. 3-6, BOA, Tab 15
>
> *Reference re Employment Insurance Act (Can.), ss. 22 and 23*, [2005] S.C.J. No. 57 at para. 8, BOA, Tab 16

iii. Old age pensions and s. 94A

51. The first public old age pensions in Canada were established and administered by the provinces in the 1920s with the federal government contributing to the cost.

> P. W. Hogg, *Constitutional Law of Canada, 5th ed. (supplemented)*, (Toronto: Carswell, 2007) ("Hogg, *Constitutional Law* (5th ed.)") at 33-6, BOA, Tab 17

52. The federal government's decision to establish its own scheme of pensions contemplated financing by both levels of government, as well as employees and employers. A constitutional amendment was required because the Privy Council had decided in 1937 that a law requiring contributions by employees and employers came within *exclusive* provincial jurisdiction.

> Hogg, *Constitutional Law* (5th ed.), *supra* at 33-6, BOA, Tab 17
>
> *A.G. Can v. A.G. Ont. (Unemployment Insurance)*, [1937] D.L.R. 644 (P.C.) at 2-3 (QL), BOA, Tab 18
>
> *A.G. N.S. v. A.G. Can (Nova Scotia Inter-delegation)*, [1951] S.C.R. 31, BOA, Tab 19

53. The Constitution was amended in 1951 to add s. 94A, which conferred on Parliament the power, expressly concurrent with the provinces, to make laws in relation to "old age pensions". In 1964 a further amendment replaced the new s. 94A, so that it now extended to "old age pensions and supplementary benefits". The power was exercised in 1965 with the enactment of the Canada Pension Plan. The section now reads:

> 94A. The Parliament of Canada may make laws in relation to old age pensions and supplementary benefits, including survivors' and disability benefits irrespective of age, but no such law shall affect the operation of any law present or future of a provincial legislature in relation to any such matter.
>
> *Constitution Act, 1867* (U.K.), 30 & 31 Victoria, c. 3, s. 94A, Schedule B
>
> Hogg, *Constitutional Law* (5th ed.), *supra* at 33-6 - 33-7, BOA, Tab 17

iv. The exclusive language in sections 91 and 92

54. Sections 91, 92 and 92A(1) of the *Constitution Act, 1867* expressly confer exclusive legislative authority upon Parliament and the provincial legislatures over matters coming within specified classes of subjects. When section 91(2A) (unemployment insurance) was added by constitutional amendment to section 91 in 1940,

the provinces and Parliament elected to confer upon Parliament exclusive legislative authority over unemployment insurance. Thus, a power which had been within the exclusive power of the provinces was transferred in its entirety to the federal level, with no residue of the original power retained by the provinces. This approach was expressly not followed with old age pensions 11 years later.

v. Concurrent Jurisdiction

55. Sections 92A(3), 94A and 95 of the *Constitution Act, 1867* confer concurrent legislative authority upon Parliament and the provincial legislatures over non-renewable natural resources, forestry resources and electrical energy, old age pensions and supplementary benefits, including survivors' and disability benefits irrespective of age, and agriculture and immigration. Section 92A(3) and section 95 both expressly provide for federal paramountcy in the event of operational conflict.

Constitution Act, 1867, supra, ss. 92A(2), (3) and 95, Schedule B

56. The concluding words of s. 94A read, "but no such (federal) law shall affect the operation of any law present or future of a provincial legislature in relation to any such matter". This is the mirror image of the language used in section 95 giving the provinces concurrent jurisdiction in relation to agriculture and immigration provided that they can have no effect which is repugnant to a valid *federal* law. The use of the words "affect the operation" clearly refer to the "operational effects" test under the paramountcy doctrine, a doctrine that was well known when section 94A was enacted.

57. Professor Patrick Monahan has described the effect of s. 94A as "concurrency with provincial paramountcy" and has stated that "*the general rule that favours federal*

paramountcy in cases of conflict between federal and provincial legislation is reversed in the case of section 94A".

Monahan, *Constitutional Law, supra* at 116-117, BOA, Tab 11

vi. Analytical framework for reconciling the exercise of federal and provincial power

58. It is clear in these circumstances that there is an overlap between the exercise of exclusive or concurrent provincial power and the exercise of concurrent federal power. In *Canadian Western Bank v. Alberta,* the Supreme Court of Canada recognized that overlapping powers in our federal system were "unavoidable". This will especially likely in cases of concurrent jurisdiction.

Canadian Western Bank v. Alberta, [2007] 2 S.C.R. 3 ("*Canadian Western Bank*") at para. 42, BOA, Tab 20

59. The Court outlined the modern approach to division of powers questions, and made clear that they endorsed an approach intended to ensure that doctrines were used to promote a balanced approach. The Court recognized that in practice some doctrines had unintentionally and asymmetrically favoured the federal power, at the expense of provincial laws with important policy objectives. The Court confirmed that federalism is a "fundamental guiding principle" of our constitutional order that recognized the political and social realities at Confederation, and legally recognized the diversity of the original members. The objectives of federalism are "to reconcile unity with diversity, promote democratic participation by reserving meaningful powers to the local or regional level and to foster co-operation among governments and legislatures for the common good."

Canadian Western Bank, supra at paras. 21 and 22, BOA, Tab 20

60. While the principle of federalism must continue to guide the definition and application of the powers of each level of government, the interpretation of these powers and how they interrelate must evolve and must be tailored to the changing political and social realities of Canadian society. The Court must strike an appropriate balance between the needs of regional diversity and national unity.

Canadian Western Bank, supra at para. 23-24, BOA, Tab 20

(A) Pith and Substance Analysis

61. The division of powers analysis must always begin by identifying the pith and substance of the legislation, to ascertain the true nature of the law in questions. This requires an examination of the legislation's purposes and effects. The Court seeks to determine whether the impugned legislation can be related to a matter that falls within the jurisdiction of the legislature that enacted it and is therefore *intra vires.*

Canadian Western Bank, supra at paras. 25-27, BOA, Tab 20

62. The *CPA* legislation is in pith and substance a procedural statute whose general purpose is aimed at regulating the form of class proceedings. The Courts have identified the vitally important policy objectives of the *CPA* as access to justice, behaviour modification and judicial economy. The *CPA* in general, and section 32(3) in particular, is clearly constitutionally valid legislation within the rubric of several categories of power reserved *exclusively* to the provinces under section 92 of the *Constitution Act, 1867,* namely section 92(13) (property and civil rights), 92(14) (administration of justice) and 92(16) (local matters). The incidental effect of section 32(3) on old age or other pensions cannot affect its validity not only because of the incidental effects doctrine, but because the province has always had at least concurrent jurisdiction in that field.

63. The pith and substance of the *CPP* is a scheme of old age and related pensions. The power to create the *CPP* cannot be found in the exclusive powers conferred on Parliament under section 91, but only under section 94A. The *CPP* in general is clearly *intra vires* Parliament. The subject matter of section 65 of the *CPP* touches on two matters, the regulation of old age pensions and of property and civil rights (executions and encumbrances). In this latter respect this section trenches on matters that ordinarily would fall within the exclusive jurisdiction of the province under section 92(16). Section 65 is valid because of the doctrine of "incidental effects."

Canadian Western Bank, supra at paras. 28 and 29, BOA, Tab 20

(B) Interjurisdictional Immunity

64. In *Canadian Western Bank,* the Supreme Court acknowledged that the next doctrine to logically consider is interjurisdictional immunity. However, the Court indicated that the doctrine "is of limited application and should in general be reserved for situations already covered by precedent" because it has tended to favour the federal power at the expense of the provinces. There is no applicable precedent governing this case, so the doctrine is inapplicable.

Canadian Western Bank, supra at para. 77, BOA, Tab 20

(C) Paramountcy Analysis

65. Once it has been determined that interjurisdictional immunity does not apply, the Court then turns to consideration of the four step analysis, where federal paramountcy is only applied where unavoidable.

(I) Valid federal law

66. The first step in the paramountcy analysis is to determine whether there is a valid federal law. It is acknowledged that section 65 is, in its general application, a valid federal law.

(II) Valid provincial law

67. The next step is to determine if the apparent overlap involves a valid provincial law. There can be no question that section 32(3) is a valid provincial law in its purpose and its effects.

(III) Operational conflict

68. The next stage in the analysis is to determine whether an operational conflict exits.

69. As noted in *Canadian Western Bank,* the main difficulty in these cases is determining the degree of incompatibility needed to trigger the application of the doctrine of federal paramountcy. Overlap in itself is insufficient. The Supreme Court has stressed that the modern approach is to strive to give effect to both federal and provincial laws in order to avoid a finding of operational conflict. In part, this is desirable because a contrary approach would tend to expand the federal power at the expense of the provinces. The onus rests on the party asserting a conflict to establish it.

Canadian Western Bank, supra at paras. 69-73, 75 BOA, Tab 20

(i) No Operational incompatibility

70. In this case, there can be no doubt that section 32(3) attaches to the monetary award made by the Court under the *Charter*. As noted above, the scope of the monetary award given in this class proceeding arises from the combined effect of the *Charter* and

the *CPA*. The *CPP* by its express terms precludes any payment to the Class. Moreover, the arrears that are the subject of the lien claim would not be available under the Act.

71. If the *CPA* can operate to secure payments of monies for the class notwithstanding the effect on the *CPP*, there is no constitutionally valid reason it cannot operate to secure the statutory lien on the very amounts recovered because of the *CPA*. The *CPA* lien can attach to the monetary award under the *Charter* and the *CPA* that is outside of and beyond the amounts prescribed under the *CPP*. The payments of benefits under the *CPP*, current payments plus 11 months of arrears, can at the same time be sheltered from any lien claim. This interpretation is to be preferred as it avoids any finding of operational conflict, and respects both the valid provincial law and the valid federal law.

(ii) No frustration of federal purpose

72. The test for operational conflict is whether the enforcement of the provincial law "frustrates the federal purpose." In this case, section 32(3) cannot be said to frustrate the federal purpose because (a) the section is only one section in part of a much larger scheme, and is not essential to its operation; (b) the statute does not contemplate the payment of the amounts in question, and could not therefore have contemplated sheltering them; (c) the section will not be invalidated but will operate in other contexts to protect pensioners from creditors as Parliament intended, as opposed to a situation such as in *Law Society of British Columbia v. Mangat* where the entire operation of the section will be undermined; (d) the statutory purpose of dignity will be enhanced by ensuring the pensioners have access to justice through the class action process where they

are denied their pensions in breach of the *Charter,* rather than allowing the section to used by government as a shield when it refuses pensions in breach of the *Charter.*

> *Prete v. Ontario,* [1993] O.J. No. 2794 (C.A.) at paras. 13-14, leave to appeal ref'd at [1994] S.C.C.A. No. 46, BOA, Tab 21
>
> *Law Society of British Columbia v. Mangat,* [2001] S.C.J. No. 66 at paras. 68-71, BOA, Tab 22

(IV) In the event of operational conflict, no federal paramountcy

73. If in these circumstances there is found to be an operational conflict, the application of the doctrine of "paramountcy" does not lead to the "federal paramountcy" result found by the learned motions judge. It is thought that the origin of paramountcy is section 91, and all of the cases where federal paramountcy has been heretofore applied, including the recent case of *British Columbia (Attorney General) v. Lafarge Canada Inc.,* involve the operation of powers granted *exclusively* to the federal government under section 91.

> *British Columbia (Attorney General) v. Lafarge Canada Inc.*, [2007] S.C.J. No. 23 ("*Lafarge*"), BOA, Tab 23

74. This case does not fall to be considered under section 91, but rather under the very different language used in section 94A. No appellate court has considered the application of the paramountcy doctrine in the circumstances of section 94A. The weight of academic authority supports *provincial* paramountcy under section 94A.

75. Unlike other powers such as the power over navigation in issue in *Lafarge,* the pension power was originally exclusively under section 92. The section 92 power was not surrendered to the federal government, but rather shared by the creation of section 94A. Unlike other sections creating concurrent jurisdiction between the two levels of government, section 94A contains no language expressly making federal laws paramount.

76. The learned motions judge chose to focus on the final words of this section, but overlooked the critical language that precedes it about "operation". The language chosen by the framers is the language of "operational conflict" as used in the doctrine of paramountcy, a doctrine which was well-established when this section was added to our Constitution. Operational conflict does not deal with the object or *validity* of an enactment, but rather with its *operational* effects in fact. In almost all the cases, the issue of "operational conflict" does not arise because one level of government is purporting to legislate *in relation to* a matter under the other government's head of power; rather, it is a clash of incidental effects. For example, in *Lafarge,* Vancouver was not seeking to regulate shipping nor was the federal government seeking to regulate land use *per se.* In *Canadian Western Bank,* Alberta was not seeking to regulate banks in general, but it consumer protection regulations relating to the sale of insurance had incidental effects on the business of federally regulated banks.

Lafarge, supra, BOA, Tab 23

Canadian Western Bank, supra, BOA, Tab 20

77. With respect, the interpretation adopted by the learned motions judge not only fails to give any consideration to the factors cited above, it is not the only available interpretation. It is not the preferable interpretation because:

a. it does not strike the required balance between the federal and provincial levels of government;

b. it is inconsistent with the constitutional doctrines of incidental effects and "double aspect";

c. it disregards the root of the doctrine in section 91's "exclusive" language, and fails to give any weight to the choice of the word "may" in section 94A;

d. it is inconsistent with the language used in other sections granting powers;

e. it is inconsistent with the history of section 94A;

f. it is contrary to the underlying constitutional principles, especially federalism and the protection of minorities;

g. it undermines the *Charter* by allowing a provision designed to protect the vulnerable from their creditors to be used by government to shield equality claims, and

h. it undermines the vital policy goals of the *CPA*.

PART VI – NATURE OF THE ORDER REQUESTED

78. That the Order of the Honourable Justice Macdonald of the Ontario Superior Court of Justice, dated February 29, 2008, denying the Plaintiffs' Counsel Group a statutory first charge pursuant to s. 32(3) of the Ontario *Class Proceedings Act, 1992* on 50% of the pre-judgment arrears awarded in the within class proceeding be set aside and that an Order be made granting the Plaintiffs' Counsel Group a first charge on 50% of the pre-judgment arrears awarded in the within class proceeding.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

April 28, 2008

Peter L. Roy

R. Douglas Elliott

SCHEDULE "A" – AUTHORITIES

1 *1395559 Ontario Inc. (c.o.b. Sturgeon Falls Sports and Marine) v. West Nipissing (Township)*, [2006] O.J. No. 5561 (Div. Ct.)

3 *A.G. Can v. A.G. Ont. (Unemployment Insurance)*, [1937] A.C. 355 (P.C.)

4 *A.G. N.S. v. A.G. Can (Nova Scotia Inter-delegation)*, [1951] S.C.R. 31

5 *Abdool v. Anaheim Management Ltd.* [1993] O.J. No. 1820 (Gen. Div.), aff'd (1995), 21 O.R. (3d) 453 (Div. Ct.)

6 *Bendall v. McGhan Medical Corp.* [1993] O.J. No. 1948 (Gen. Div.)

7 *Bisignano v. La Corporation Instrumentarium Inc.*, [1999] O.J. No. 4346 (S.C.J.)

8 *British Columbia (Attorney General) v. Lafarge Canada Inc.*, [2007] S.C.J. No. 23

11 *Canadian Western Bank v. Alberta*, [2007] 2 S.C.R. 3

12 *Citizens Insurance Co. of Canada v. Parsons* (1881), 7 App. Cas. 96 (P.C.)

13 *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, [2003] 3 S.C.R. 3

14 *Hodge v. The Queen* (1883), 9 App. Cas. 117 (P.C.)

15 *Law Society of British Columbia v. Mangat*, [2001] S.C.J. No. 66

16 *Manitoba (A.G.) v. Canada (A.G.)*, [1981] 1 S.C.R. 753

17 *Markson v MBNA Canada Bank* (2007), 85 O.R. (3d) 321 (C.A.)

18 *Prete v. Ontario,* [1993] O.J. No. 2794 (C.A.)

19 *Reference Re: (Can.), ss 22 and 23,* [2005] S.C.J. No. 57

10 *Reference Re: Weekly Rest in industrial Undertakings Act (Can.)*, [1937] A.C. 326

20 *Schachter v. Canada,* [1992] 2 S.C.R. 679

21 *Western Canadian Shopping Centres v Dutton*, [2001] 2 S.C.R. 534

SCHEDULE "B" – STATUTES, REGULATIONS AND BY-LAWS

Canadian Pension Plan, R.S. 1985, c. C-8

2. (1) In this Act,

"benefit" means a benefit payable under this Act and includes a pension;

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

65. (1) A benefit shall not be assigned, charged, attached, anticipated or given as security, and any transaction purporting to assign, charge, attach, anticipate or give as security a benefit is void.

(1.1) A benefit is exempt from seizure and execution, either at law or in equity.

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

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

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

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

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

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

Class Proceedings Act, 1992, S.O. 1992, c.6

Limitations

28. (1) Subject to subsection (2), any limitation period applicable to a cause of action asserted in a class proceeding is suspended in favour of a class member on the commencement of the class proceeding and resumes running against the class member when,

(a) the member opts out of the class proceeding;

(b) an amendment that has the effect of excluding the member from the class is made to the certification order;

(c) a decertification order is made under section 10;

(d) the class proceeding is dismissed without an adjudication on the merits;

(e) the class proceeding is abandoned or discontinued with the approval of the court; or

(f) the class proceeding is settled with the approval of the court, unless the settlement provides otherwise. 1992, c. 6, s. 28 (1).

Idem

(2) Where there is a right of appeal in respect of an event described in clauses (1) (a) to (f), the limitation period resumes running as soon as the time for appeal has expired without an appeal being commenced or as soon as any appeal has been finally disposed of. 1992, c. 6, s. 28 (2).

Priority of amounts owed under approved agreement

32. (3) Amounts owing under an enforceable agreement are a first charge on any settlement funds or monetary award. 1992, c. 6, s. 32 (3).

Constitution Act, 1867, (U.K.) 30 & 31 Victoria, c.3

92A. (2) In each province, the legislature may make laws in relation to the export from the province to another part of Canada of the primary production from non-renewable natural resources and forestry resources in the province and the production from facilities in the province for the generation of electrical energy, but such laws may not authorize or provide for discrimination in prices or in supplies exported to another part of Canada.

(3) Nothing in subsection (2) derogates from the authority of Parliament to enact laws in relation to the matters referred to in that subsection and, where such a law of Parliament and a law of a province conflict, the law of Parliament prevails to the extent of the conflict.

94A. The Parliament of Canada may make laws in relation to old age pensions and supplementary benefits, including survivors' and disability benefits irrespective of age,

but no such law shall affect the operation of any law present or future of a provincial legislature in relation to any such matter.

95. In each Province the Legislature may make Laws in relation to Agriculture in the Province, and to Immigration into the Province; and it is hereby declared thatthe Parliament of Canada may from Time to Time make Laws in relation to Agriculture in all or any of the Provinces, and to Immigration into all or any of the Provinces; and any Law of the Legislature of a Province relative to Agriculture or to Immigration shall have effect in and for the Province as long and as far only as it is not repugnant to any Act of the Parliament of Canada

Court File No. 01-CV-221056CP

COURT OF APPEAL FOR ONTARIO

BETWEEN:

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

Plaintiffs
(Appellants)

- and –

THE ATTORNEY GENERAL OF CANADA

Defendant
(Respondent)

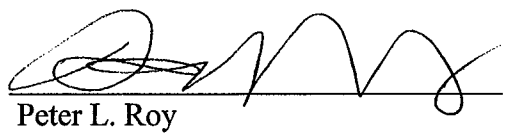
Proceeding under the *Class Proceedings Act, 1992*

CERTIFICATE

The Plaintiffs/Appellants, George Hislop et al and counsel for the Plaintiffs/Appellants hereby certifies as follows:

1. An order under subrule 61.09(2) (Original record and exhibits) is not required.
2. Counsel for the Plaintiffs/Appellants estimates that 2 hours will be required for his oral argument, not including reply.

Date: April 28, 2008



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GEORGE HISLOP et al.

Plaintiffs

- and -

THE ATTORNEY GENERAL OF CANADA

Defendant

Court file No. 01-CV-221056CP

COURT OF APPEL FOR ONTARIO

Proceeding commenced at Toronto

A Proceeding under the
Class Proceedings Act, 1992

FACTUM OF THE PLAINTIFFS/APPELLANTS

(Appeal from the Order of Justice MacDonald, dated February 29, 2008)

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