

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

**FACTUM OF THE RESPONDENT,
THE ATTORNEY GENERAL OF CANADA**

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

June 25, 2008

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PART I – OVERVIEW

The *CPP* was enacted to give Canadians ‘an opportunity to retire in security and with dignity’ in the hope that it would ‘cover the widest possible range of citizens’ and be ‘inflexible only in its main purpose.’ Its fundamental objective was to provide a secure government-controlled pension for retired persons in their senior years, and thereafter to provide for their surviving spouses and partners.

-The Court of Appeal for Ontario in its reasons for decision in *Hislop et. al. v. Canada* (November 26, 2004), at para. 55, on the purpose of the *Canada Pension Plan* (“*CPP*”)

1. Roy Elliott O’Connor LLP (“class counsel”) appeal the Order of Justice Macdonald (“the motions judge”) dated February 29, 2008, denying a first charge on *CPP* survivor’s pensions. The Attorney General of Canada (“Canada”) seeks a dismissal of this appeal on the ground that such relief, if granted, would constitute an impermissible

exemption from a longstanding statutory provision enacted to protect all CPP-benefit recipients against the precise order sought by class counsel.

2. Class counsel's arguments can be reduced to two propositions:

- That the Supreme Court of Canada ("Supreme Court") awarded, in part, extraordinary arrears unrelated to the *CPP*, and such arrears are now subject to a first charge; and
- In the alternative, that ss. 32(3) of the *Class Proceedings Act* ("*CPA*") trumps s. 65 of the *CPP* to allow for a first charge on pension benefits.

3. The judgments of the courts in this matter, s. 94A of the *Constitution Act 1867*, the relevant provisions of the *CPP* and settled principles of law all render these propositions untenable. This appeal should be dismissed.

PART II – STATEMENT OF FACTS

1) Response to facts in appellants' factum

4. Canada agrees with the facts at paragraphs 16, 17 and 18 of class counsel's factum. In respect of paragraphs 13, 15 and 19, Canada agrees with the statement that class members are now eligible for *CPP* survivor's pensions as a result of a successful *Charter* challenge to two amendments to the *CPP*, namely ss. 44(1.1) and 72(2), but relies on paragraphs 77, 78, 118, 121 and 131 to 134 of the Supreme Court of Canada reasons for the remedy, including relevant start dates for the payment of *CPP* survivor's pensions. In respect of paragraph 12, Canada acknowledges that the trial judge, and this Court in its costs decision, expressed the view that there was no vehicle other than a class proceeding by which these claims could be advanced.

5. Canada disagrees with the statements at paragraphs 14 and 21 that the courts in this matter, and specifically the Supreme Court, made an order for the payment of money. Canada also disagrees with the statement at paragraph 20 that the tolling provisions of the *CPA* played any role in the remedy granted by the Supreme Court.

6. In respect of paragraph 22, Canada was not a party to the fee-approval process. The reasons for decision of the motions judge contain the following summary of events:

After the trial, Plaintiffs' counsel applied, on notice to the Plaintiffs, for approval of their retainer agreement pursuant to s. 32(2) of the CPA. The representative plaintiffs consented to this order and the contingency retainer and multiplier were approved in my reasons released on April 30, 2004 ("the Approval Order"). The fee was approved with a multiplier of 4.8 for all hours docketed in connection with the action. Time spent on administrative issues was at counsel's hourly rate without a multiplier.

Reasons for Decision of Macdonald J. dated February 29, 2008 ("S. 65 Decision"), at para. 47, Tab 1, Vol. 1 of the Compendium of the Respondent, The Attorney General of Canada ("Respondent's Compendium")

7. Canada disagrees with paragraphs 23, 24 and 25. Class counsel will be adequately compensated in this matter without resort to class members' *CPP* pensions, and access to justice principles will not be frustrated. As held by the motions judge: "I am not persuaded that this result will deter future class actions or frustrate the access to justice principles embodied in the *CPA*."

S. 65 Decision, *supra*, at para. 65, Tab 1, Vol. 1 of Respondent's Compendium

2) Relevant history of proceedings

a) *The 'right to stand in line'*

8. As evidenced by the reasons and judgments of the courts, the remedy granted in *Hislop* was declaratory: the right to apply for a survivor's pension and not be rejected on the ground of sexual orientation. As stated by the British Columbia Supreme Court in

certifying the parallel *Brogaard* action: “The ‘relief’ that the potential class members seek is the right to ‘stand in the line’.”

Brogaard et al. v. Canada [2002], B.C.J. No. 1775 (B.C.S.C.), at para. 105, Tab 2, Vol. 1 of Respondent’s Compendium. See also para. 118: “Virtually all of the individual issues are administrative issues that concern the applicants’ statutory eligibility for the Survivors’ Pensions, which is not part of this litigation.”

9. The trial judge adjudged that class members be eligible to receive a *CPP* survivor’s pension “in the same manner as other qualified applicants for survivors’ pension”. On appeal, this Court held: “It is necessary, of course, that each class member be otherwise eligible for a pension under the *CPP*.”

Judgment of Macdonald J. dated December 19, 2003 (Trial Judgment), at para. 4, Tab 3, Vol. 1 of Respondent’s Compendium; Reasons for Decision of the Court of Appeal for Ontario dated Nov. 26, 2004 (“OCA Decision”), at para. 45, Tab 4, Vol. 1 of Respondent’s Compendium; See Court of Appeal Order, at para. 1(a)(5), Tab 5, Vol. 1 of Respondent’s Compendium.

10. All claims for a monetary award, whether grounded in fiduciary duty, unjust enrichment or the *Charter of Rights and Freedoms*, were dismissed at trial. These rulings were not appealed by the class.

11. Accordingly, at issue in the appellate courts was the constitutionality of remedial amendments to the *CPP* intended to recognize same-sex relationships for the purpose of entitlement to survivor’s pensions.

Reasons for Judgment of the Supreme Court of Canada (“SCC Decision”), dated March 1, 2007, at para. 5, Tab 6, Vol. 1 of Respondent’s Compendium

b) Fee approval order based on “trial judgment”

12. The catalyst for the motion in the court below and this appeal is the fee-approval order of April 30, 2004. Based on the terms of that order, including a multiplier of 4.8 per

cent, class counsel contend there will now be a significant shortfall in the recovery of fees.

Notice of Motion re. s. 65 of the *Canada Pension Plan* and Plaintiffs' Counsel Fees, Tab 7, Vol. 1 of Respondent's Compendium

13. Courts will consider the degree of success achieved by class counsel when determining fees. At the time of the fee-approval hearing, class members had achieved substantial success at trial, obtaining a declaration that they were eligible for a survivor's pension back to the month after the death of their partner.

Segnitz v. Royal & SunAlliance Insurance Co. of Canada, [2002] O.J. No. 2332 (S.C.J.) at paras. 15, 18, Tab 1, Vol. 1 of the Book of Authorities of the Respondent, The Attorney General of Canada ("AGC Authorities"); *Crown Bay Hotel Ltd. Partnership v. Zurich Indemnity Co. of Canada*, [1998] O.J. No. 1891 (S.C.J.), at para. 12, Tab 2, Vol. 1 of AGC Authorities.

14. This success, however, was not sustained at the appellate levels. The Supreme Court held that class members were not eligible for a *CPP* survivor's pension for any period prior to August 1999. Success being divided, the Supreme Court declined to award costs.

15. This Court, in its costs decision in the *Hislop* appeal, cautioned against fixing a multiplier before the final disposition of proceedings:

... As a matter of future practice, it may be appropriate in class actions to await the outcome of an appeal before setting the fee multiplier where the multiplier depends in part on the amount of the recovery for the class and where the issues on appeal may affect the amount recovered.

Costs Endorsement of the Court of Appeal for Ontario dated March 24, 2005, at paras. 5 and 6, Tab 8, Vol. 1 of Respondent's Compendium

16. Class counsel now seek payment of fees based on an order that reflects a very different outcome to this matter.

PART III – ISSUES AND ARGUMENT

A. RESPONSE TO ARGUMENT THAT SS. 32(3) APPLIES TO COURT'S AWARD, NOT S. 65

1) Class counsel's position not supported by record

17. It is not in dispute that the remedy provided by the Supreme Court was a declaration pursuant to ss. 52(1) of the *Constitution Act* that ss. 44(1.1) and 72(2) were of no force and effect. Absent these provisions, the *CPP*, as amended in July 2000 by the *Modernization of Benefits and Obligations Act* ("MBOA"), now permitted class members to apply for a pension on equal footing with opposite-sex survivors and with same-sex survivors whose partners died on or after January 1, 1998. As the courts have stated in this matter, all other statutory requirements with respect to survivor's pensions must be met by class members.

MBOA, S.C. 2000, c. 12, ss. 42, 44(3), 45(2), at Schedule "B"

18. It is also not in dispute this remedy requires Human Resources and Social Development Canada ("HRSDC") to accept and process class members' applications pursuant to the *CPP*. By contrast, had a simple monetary judgment been granted, the payment provisions of the *Crown Liability and Proceedings Act* ("CLPA") would have been engaged. The powers of the Minister of Finance in relation to implementing monetary judgments are strictly defined and governed by statute and regulation. Section 30(1) of the *CLPA* is a statutory appropriation of public moneys which gives the Minister of Finance the power to authorize payment out of the Consolidated Revenue Fund to satisfy a monetary judgment.

Crown Liability and Proceedings Act R.S.C. 1985, c. C-50, s. 30(1); *Crown Liability and Proceedings (Provincial Court) Regulations*, SOR/91-604, s. 6, at Schedule "B"

19. In the court below, the motions judge did not depart from this understanding of the remedy. Rather, she held:

"... I interpret the Court's award to be a **declaration** of entitlement to an award of retroactive and future benefits, which happens to take a form akin to monetary damages, rather than an award for monetary damages themselves." [Emphasis added]

S. 65 Decision, *supra*, at para. 61, Tab 1, Vol. 1 of Respondent's Compendium

20. The motions judge concluded that the declarations made by the courts would generate money in the hands of class members found to be eligible under the *CPP*. Canada does not dispute that the remedy ordered by the courts will ultimately result in money in the hands of eligible class members. But that is the case for all Canadians. An applicant, who qualifies for a *CPP* benefit, whether retirement, disability or survivor, will receive a cheque in the mail or a direct deposit in a bank account. Accordingly, this finding by the motions judge does not assist class counsel, as it makes all *CPP* benefits "monetary awards" protected by s. 65.

S. 65 Decision, *supra*, at paras. 61-62, Tab 1, Vol. 1 of Respondent's Compendium

21. Class counsel further argue that the Supreme Court remedy resulted in only 11 months of pension arrears being protected by s. 65 because *CPP* recipients are entitled to 11-months' arrears under the statute and, in this case, class members will receive retroactive arrears for more than 11 months. This argument, which was rejected by the motions judge, ignores the relevant legislation and the Supreme Court's application of it. The Supreme Court did not grant a retroactive remedy, concluding:

117. Achieving an appropriate balance between fairness to individual litigants and respecting the legislative role of Parliament may mean that *Charter* remedies will be directed more toward government action in the future and less toward the correction of past wrongs. In the present case, the Hislop class' claim for a retroactive remedy is tantamount to a claim for compensatory damages flowing from the underinclusiveness of the former CPP. Imposing that sort of liability on the government, absent bad faith, unreasonable reliance or conduct that is clearly wrong, would undermine the important balance between the protection of constitutional rights and the need for effective government that is struck by the general rule of qualified immunity. A retroactive remedy in the instant case would encroach unduly on the inherently legislative domain of the distribution of government resources and of policy making in respect of this process.

[...]

129. ... The remedy for the class members in relation to s. 44(1.1) is prospective in that it entails granting equal benefit of the law, prospectively, to people who are survivors of same-sex partners.

SCC Decision, *supra*, at paras. 78, 117-118, 122, 129, Tab 6, Vol. 1 of Respondent's Compendium

22. In accordance with the prospective remedy granted, class members would now be eligible for payment of *CPP* survivor's pensions from the relevant start dates fixed by the Supreme Court. In setting these dates for commencement of payment, the Supreme Court neither changed the nature of the benefit obtained nor the application of the *CPP* to that benefit. The Court held:

In conclusion, class members who were precluded by s. 44(1.1) or s. 72(2) from receiving the survivor's benefit, and who otherwise meet the eligibility requirements, will be entitled to payment of **that benefit**. In the circumstances, the relevant date for the purpose of **that payment** is the date on which application was received or where no application was made because of the unconstitutional provisions, the date on which the statement of claim was filed. In no event are **benefits** payable in respect of a month prior to August 1999, which is the earliest month in respect of which a class member who applied for the survivor's benefit on the day the MBOA came into force could have been eligible. [Emphasis added]

SCC Decision, *supra*, at para. 134; see paras. 27, 62, 63, 67, 69, 78, 109, 132 and 133. Tab 6, Vol. 1 of Respondent's Compendium; See also Judgment of Supreme Court of Canada, Tab 6A, Vol. 1 of Respondent's Compendium

2) **“Access to justice” argument cannot succeed on facts and law**

a) *Matters in the court below*

23. Class counsel once again argue that access to justice principles will be frustrated if the relief sought is denied. The motions judge correctly rejected this assertion, concluding:

I am not persuaded that this result will deter future class actions or frustrate the access to justice principles embodied in the CPA. While I am sympathetic to PCG's position and the possible difficulties it will face in collecting the fees it deserves, it also seems prudent to suggest that future class counsel confirm that the s. 32(3) charge is available and not negated by other legislation such as s. 65 of the CPP.

S. 65 Decision, *supra*, at para. 65, Tab 1, Vol. 1 of Respondent's Compendium.

24. It is not in dispute that class counsel continue to take on new class-action files.

Transcript of Cross-Examination on Affidavit of Sharon Matthews (May 17, 2007), at p. 12, Lines 12-15, Tab 9, Vol. 1 of Respondent's Compendium.

b) *Compensation to class counsel*

25. In the case at bar, class counsel will be adequately compensated through several awards of costs, totalling to date over \$2.5 million. In addition, class counsel will receive all prejudgment and postjudgment interest awarded to class members. Throughout these proceedings, the costs of notice were paid by Canada.

Order of Macdonald J. dated April 30, 2004, Tab 9(D1), Vol. 1 of Respondent's Compendium; Order of Macdonald J. dated Feb. 26, 2004, Tab 9(D5), Vol. 1 of Respondent's Compendium; Order of Macdonald J. dated Nov. 1, 2004, Tab 10, Vol. 1 of Respondent's Compendium; Order of Macdonald J. dated September 26, 2007, Tab 11, Vol. 1 of Respondent's Compendium; See Supplementary Affidavit of Heather Bordeleau sworn June 18, 2007 (“Bordeleau Affidavit”), at p. 2, para. 4, Tab 12, Vol. 1 of Respondent's Compendium (Note: second bullet refers to notice campaign costs; and fourth bullet amount should read \$1,892,221.48); Order of Macdonald J. dated April 28, 2008 (Administrative-Issues Motion Costs), Tab 13, Vol. 1 of Respondent's Compendium; Order of Macdonald J. dated April 28, 2008 (Costs for Phase II Notice), Tab 14, Vol. 1 of Respondent's Compendium.

26. In the court below, Canada had led evidence as to the estimated total interest award in this matter based on the following factors:

- Rates at 4.13% prejudgment and 5% postjudgment;
- The amount of survivor's pensions was based on a class of 408 individuals; and
- Prejudgment interest was calculated for the period from August 1999 to December 2003 and postjudgment interest was calculated for the period from January 2004 to June 30, 2007.

Exhibit 'F' to the Supplementary Affidavit of Michel Montambeault (sworn June 18, 2007), Tab 15(F), Vol. 1 of Respondent's Compendium

27. Based on these factors, interest was estimated to total over \$1 million, with postjudgment interest - at a rate of 5% - comprising almost 75 per cent of that amount. The motions judge ultimately awarded a postjudgment rate of 8% and a prejudgment rate of 5%.

S. 65 Decision, *supra*, at para. 44, Tab 1, Vol. 1 of Respondent's Compendium

c) Section 65 does not fetter access to justice

28. At paragraph 46 of their factum, class counsel assert that s. 65 was intended to shield pensions from creditors and not governments from discrimination claims. The application of s. 65 to all benefits does not insulate the *CPP* from constitutional scrutiny. Indeed, this class action is evidence to the contrary.

29. In the decision of *A.G. British Columbia v. Christie*, the Supreme Court explored whether there was a constitutional right to access to justice with a lawyer's assistance, and whether that presumed right is impaired by a measure which makes it more difficult to pay lawyer's fees. The case involved a constitutional challenge to a tax on legal services based on the theory that the requirement to pay the tax denied a lawyer's client

access to justice or at least impaired their right to access to justice. The Court described the claim as follows:

The respondent's claim is for effective access to the courts which, he states, necessitates legal services. This is asserted not on a case-by-case basis, but as a general right. What is sought is the constitutionalization of a particular type of access to justice – access aided by a lawyer where rights and obligations are at stake before a court or tribunal. In order to succeed, the respondent must show that the Canadian constitution mandates this particular form or quality of access.

A.G. British Columbia v. Christie, 2007 SCC 21, at para. 10, Tab 3, Vol. 1 of AGC Authorities

See also: *British Columbia v. Imperial Tobacco Canada Ltd.*, [2005] 2 S.C.R. 473, Tab 4, Vol. 1 of AGC Authorities

30. Effectively, the challenge in *Christie* depended on recognition of a right to legal representation free of economic barriers. The Court stated that “the logical result would be a constitutionally mandated legal aid scheme for virtually all legal proceedings”.

Christie, *supra* at para. 13, Tab 3, Vol.1 of AGC Authorities

31. The reasoning of the Court in *Christie* applies equally to the case at bar. Class counsel argue that when legislation impairs application of a first charge, an impermissible denial of access to justice takes place. The Court in *Christie* noted that, with respect to constitutional principles, a right to counsel has been given constitutional status in some circumstances, notably in cases where life, liberty and security of the person are affected (s. 10(b) of the *Charter*) on arrest and detention. However, the Court concluded that the Canadian constitution does not grant a general right of access to legal services.

32. As there is no general right of access to legal services in our constitutional structure, and since the facts of this case do not place it in the category of cases in which

there is a recognized right to counsel, it follows that the constitution does not require that the court refuse to apply s. 65 on the argument that the provision fetters access to justice.

d) Relief sought will create hardship for class members

33. Class counsel focus on potential hardship to lawyers unable to collect anticipated fees in the class-action context. However, the payment of a portion of *CPP* benefits to counsel will create hardship for the class.

34. According to the evidence of HRSDC employee Heather Bordeleau, the determination of entitlement to a *CPP* survivor's pension impacts on income-tax liabilities as well as eligibility for and receipt of benefits under other federal and provincial social-assistance and income-supplement programs. As a result, the diversion of any benefit arrears may create several difficulties for class members because the full value of the arrears payable will have been attributed to class members as income, but class members will not actually have all of the funds in their hands. The following difficulties could arise if arrears are paid to counsel:

- a) Confusion of the class member as to the appropriate portion of arrears to apportion between one or more previous years pursuant to the notional tax provision under ss. 56(8) of the *Income Tax Act*;
- b) Reduction or loss of means-tested or income-tested provincial benefits such as social assistance and drug coverage;
- c) Ineligibility of low-income class members over the age of 65 to receive a Guaranteed Income Supplement (GIS) or reduction of that non-taxable benefit. Under the *Old Age Security Act* the GIS provides for income-tested benefits to low-income seniors who are already in receipt of an OAS pension;
- d) Loss of entitlement to the GIS could result in a corresponding loss or reduction of provincial benefits such as income top-ups, health benefits and rent/housing subsidies, when such benefits are triggered by the individual's entitlement to the GIS.

Bordeleau Affidavit, at pp. 17-18, para. 31, Tab 12, Vol. 1 of Respondent's Compendium

3) **Purpose and limitations of CPA**

a) **Subsection 32(3) and the legislature's intention**

35. Subsection 32(3) was enacted to ensure that representative plaintiffs were not held personally liable to pay all counsel fees. The 1982 Ontario Law Reform Commission report ("the Report") traces the provision's genesis to equitable principles "based on the view that, unless the beneficiaries of the litigation are required to contribute to the expense of its prosecution by means of a deduction of attorneys' fees from the fund, they will be unjustly enriched."

Ontario Law Reform Commission, *Report on Class Actions*, 1982, V. 3, pp. 668-669, Tab 5, Vol. 1 of AGC Authorities

36. The Report also recognized that payment for class counsel was not a certainty. The obvious situation is where a class action is unsuccessful. To address this, the Commission recommended that contingency fees be allowed in the class context, thereby placing the burden of non-payment squarely on class counsel.

Ibid, at p. 714, Tab 5, Vol. 1 of AGC Authorities

37. Thus, while an overall policy objective of the *CPA* is to increase access to justice, this is achieved without providing a fail-safe mechanism to pay plaintiffs' counsel in all cases. The *CPA* implicitly recognizes as an acceptable component of the class procedure that class counsel take on a degree of financial risk. These risks include not only the obvious one – that an action may fail. The class-proceedings mechanism also tolerates outcomes where there is no monetary award or where an award is smaller than originally sought. In the case at bar, the pension arrears are immunized from assignment

and attachment by any creditor. While unfortunate for class counsel, this is neither unconstitutional nor inconsistent with the overall scheme of the *CPA*.

38. The procedural scheme created by the *CPA* was never intended to ensure that class counsel would always be paid. As stated by Justice Winkler, as he then was, in

Parsons v. Canadian Red Cross Society:

If the *CPA* is to achieve the legislative objective of providing enhanced access to justice then in large part it will be dependent upon the willingness of counsel to undertake litigation on the understanding that there is a risk that the expenses incurred in time and disbursements may never be recovered.

Parsons v. Canadian Red Cross Society, [2000] O.J. No. 2374 (S.C.), para. 13; motion to quash appeals granted [2001] O.J. No. 214; leave denied [2001] S.C.C.A. No. 190, Tab 6, Vol. 1 of AGC Authorities

39. Indeed, the *CPA* is a purely procedural statute enacted to facilitate the litigation of class actions. The jurisprudence is well settled in this regard. As stated by the Chief

Justice in *Hollick v. Toronto*:

The *Class Proceedings Act*, 1992, was adopted to ensure that the courts had a procedural tool sufficiently refined to allow them to deal efficiently, and on a principled rather than *ad hoc* basis, with the increasingly complicated cases of the modern era.

Hollick v. Toronto (City), [2001] 3 S.C.R. 158, at para. 14, Tab 7, Vol. 1 of AGC Authorities; In *Bisaillon v. Concordia University*, the Supreme Court of Canada held: "The class action is nevertheless a procedural vehicle whose use neither modifies nor creates substantive rights": [2006] 1 S.C.R. 666, at paras. 17, 22, Tab 8, Vol. 1 of AGC Authorities.

See also Winkler J., as he then was, in *Ontario New Home Warranty Program v. Chevron Chemical Co.*:

... this court has noted on multiple occasions that there is no jurisdiction conferred by the *Class Proceedings Act* to supplement or derogate from the substantive rights of the parties. It is a procedural statute and, as such, neither its inherent objects nor its explicit provisions can be given effect in a manner which affects the substantive rights of either plaintiffs or defendants.

Ontario New Home Warranty Program v. Chevron Chemical Co. (1999), 46 O.R. (3d) 130 (S.C.J.), at para. 50, Tab 9, Vol. 1 of AGC Authorities

b) Role of CPA in this matter

40. Class counsel argue that the rights of class members and, by extension, those of class counsel have been determined by the Supreme Court in accordance with provisions of the *CPA*. In addition to ss. 32(3), class counsel cite s. 28 of the *CPA*. As stated above, the *CPA* can neither modify nor create substantive rights. Indeed, the Supreme Court's reasons are silent on the *CPA*.

41. It should also be noted that following the release of the decision of the Supreme Court, class counsel returned to the motions judge seeking a series of administrative orders and relying on the *CPA* as authority for the relief sought. Macdonald J. rejected these submissions:

8 ... I agree with the statement contained in the Attorney General's supplementary factum at paragraph 8 (page 5) which I reproduce below:

... What the courts at all levels have determined is that class members are eligible to receive survivors' pensions "in the same manner as other qualified applicants for survivor's pensions." The control and direction of the administration of the CPP, however, remains within the exclusive jurisdiction of the Minister of Human Resources and Social Development.

[...]

9 I also agree with the statement contained at paragraphs 20 and 21 of the AG's supplementary factum (which was repeated in oral submissions before this Court on this motion):

The judgments of this Court and the appellate courts did not grant class members automatic pensions. Just as all applicants must meet the eligibility criteria and requirements of the Canada Pension Plan, R.S.C. 1985, c. C-8, as am., (the "CPP"), so too now must the class members. As stated by the Court of Appeal, in allowing the Crown's appeal in part: "It is necessary, of course, that each class member be otherwise eligible for a pension under the CPP." ...

Reasons for Decision of Macdonald J. re. Administrative Issues (Dated September 21, 2007) at paras. 8-9, Tab 16, Vol. 1 of Respondent's Compendium

4) Object of the CPP and the intention of Parliament

a) *Section 65 and the correct approach to statutory interpretation*

42. In the case at bar, there is clear and unambiguous legislation precluding the relief sought by class counsel. Section 65 of the *CPP* reads:

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.

65.(1.1) A benefit is exempt from seizure and execution, either at law or in equity.

CPP, ss. 65(1), 65(1.1) at Schedule “B”; See also para. 44(1)(d) which directs that a survivor’s pension “shall be paid to the survivor of a deceased contributor”, at Schedule “B”

43. Justice Iacobucci in *Bell ExpressVu Limited Partnership v. Rex* adopted Driedger’s rule as the preferred approach to statutory interpretation: “the words of the Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.”

Bell ExpressVu Limited Partnership v. Rex, [2002] 2 S.C.R. 559, at para. 26,
Tab 10, Vol. 1 of AGC Authorities

b) *Section 65 in force since enactment of CPP in 1964*

44. The object of the *CPP* was described by Judy LaMarsh, then Minister of National Health and Welfare, in 1964 when she introduced a bill “to establish a comprehensive program of old age pensions and supplementary benefits in Canada payable to and in respect of contributors”. That object has not changed. At the time, Miss LaMarsh also expressed Parliament’s intention, in enacting the *CPP*, which was to provide an opportunity to the individual to “help save for his own future dignity”.

Canada, *House of Commons Debates*, 2nd session, 26th Parliament, vol. IX, 1964 (November 9, 1964) at p. 9901, Tab 35, Legislative History of s. 94A of the *Constitution Act, 1867*, Vol. 3 of Respondent's Compendium

45. When s. 65 was considered by the Special Joint Committee of the Senate and of the House of Commons, the Associate Deputy Minister of Justice described the provision, then s. 64, as "designed to ensure that no benefit payable under the Canada Pension Plan will be capable of being assigned or otherwise anticipated."

Canada, *Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons: Appointed to Consider and Report Upon Bill C-136*, 2nd Session, 26th Parliament, 1964, at p. 318, Tab 41, Legislative History of ss. 65(1) and (1.1) of the *Canada Pension Plan*, Vol. 4 of Respondent's Compendium

c) *Courts have upheld protections afforded by s. 65*

46. In discerning the meaning of section 65, courts have found that the provision was enacted to protect beneficiaries from third parties seeking to attach their pensions. Such an interpretation is harmonious with the object and purpose of the Act and Parliament's intention with respect to the statute.

Greenwood v. Canada, [2001] B.C.J. No. 1175 (S.C.), at para. 7, Tab 11, Vol. 1 of AGC Authorities

See also analysis of comparable provincial provision in *Hooper v. Hooper* (2002), 59 O.R. (3d) 787, (C.A.) at para. 44, Tab 12, Vol. 1 of AGC Authorities

47. Parliament enacted ss. 65(1.1) in 1995 in order to eliminate any doubt that pensions were off limits to creditors. As explained by a senior official of the Department of Human Resources and Development to the House of Commons committee when describing the proposed amendments to the *CPP*:

Our final category is to clarify and confirm the intent of the legislation. The first item closes a loophole allowing creditors to seize old age security and Canada Pension Plan benefits through a court of equity. Again, this is a highly technical amendment.

Under our Canada Pension Plan and old age security, benefits are not to be charged, assigned, attached, anticipated or given as security. This allows them to be virtually protected from court orders and other actions that would seize those benefits. Being principal payers to individuals, we want the benefit to go directly to the client. Whatever actions occur after that, they will have already received the money from us.

This will simply close a loophole where courts have had the power to step in and seize different benefits through judgments of equity.

Canada, *Minutes of Proceedings and Evidence of the Standing Committee on Human Resources Development*, 1st session, 35th Parliament, 1994-1995, at p. 69:17, Tab 49, Legislative History of ss. 65(1) and (1.1) of the *Canada Pension Plan*, Vol. 4 of Respondent's Compendium

48. The proposed addition of ss. 65(1.1) was praised by opposition members as a measure "aimed at improving the lot of the elderly".

Canada, *House of Commons Debates*, 1st session, 35th Parliament, October 20, 1994: Mr. Gaston Leroux (Richmond-Wolfe, B.Q.), Second Reading of Bill C-54 at pp. 40-41, Tab 48, Legislative History of ss. 65(1) and (1.1) of the *Canada Pension Plan*, Vol. 4 of Respondent's Compendium

49. In the case at bar, it is not in dispute that a solicitor's lien is being sought. A solicitor's lien has been defined as the "right of a solicitor, in specific circumstances, to ask the court to exercise a discretionary and equitable power to protect him or her from his or her client's inability or refusal to pay his or her fees."

Davidson & Co. v. MacAdam, [2001] B.C.J. No. 2211 (S.C.), at para. 12, Tab 13, Vol. 1 of AGC Authorities

50. In *Davidson & Co. v. MacAdam*, the British Columbia Supreme Court considered whether a solicitor's lien was defeated by s. 65. In that case, counsel was successful in obtaining *CPP* pension benefits for his client. The court concluded that "the solicitor's lien is a charge on a benefit and void by s. 65(1) of the *Canada Pension Plan Act*". It also held that s. 65(1.1) made the benefit exempt from an order enforcing a solicitor's lien.

Davidson & Co., supra, at para. 21, Tab 13, Vol. 1 of AGC Authorities

51. Where a party sought the appointment of a receiver to intercept monies payable under the *CPP*, the B.C. Supreme Court held that such an order would be in direct violation of ss. 65(1) of the *CPP*.

Hurford v. LaChance, [1996] B.C.J. No. 1005 (S.C.), at para. 5, Tab 14, Vol. 1 of AGC Authorities

52. In the case of *Metropolitan Toronto v. O'Brien*, the municipality attempted to distinguish *CPP* and *Old Age Security* benefits already deposited in a bank account from those still in the hands of the federal government. The court found:

Both Acts provide benefits payable shall not be assigned, charged, attached, anticipated or given as security and any transaction purporting to do so is void. Metro's counsel concedes the exemptions apply so long as the money is in the possession of the debtor, and also concedes the funds are not subject to garnishee at the source from the Federal Government. She argues, however, the exemption is lost when the funds are electronically deposited with the garnishee. ... I do not accept that argument. The funds payable to the debtor in this case are pension funds intended to be paid to him over an extended period and are designed to provide for his infirmity and disability. I reject the submission that the exemption, otherwise available, is lost merely because of the modern convenience of electronic depositing. Such a result in my view would be unreasonable on the facts of this case. Here, the bank records clearly indicate that the only money ever deposited into the debtor's account with the garnishee bank came from pension funds, exempt from garnishee.

Toronto (Metropolitan) v. O'Brien, [1995] O.J. No. 4896 (S.C.J.), at paras. 10-14, Tab 15, Vol. 1 of AGC Authorities

53. In relation to survivor's pensions, there is only one exception in the *CPP* to the absolute prohibitions contained in ss. 65(1) and 65(1.1). Subsection 65(2), which relates to social assistance from provincial or municipal authorities, reads:

Notwithstanding subsections (1) and (1.1), where any provincial authority or municipal authority in a province pays a person any advance or assistance or welfare payment for a month or any portion of a month that would not be paid if a benefit under this Act had been paid for that period and subsequently a benefit becomes payable or payment of a benefit may be made under this Act to that person for that period, the Minister may, in

accordance with any terms and conditions that may be prescribed, deduct from that benefit and pay to the provincial authority or municipal authority, as the case may be, an amount not exceeding the amount of the advance or assistance or welfare payment paid.

CPP, ss. 65(2), at Schedule "B"; *Canada Pension Plan Regulations*, C.R.C., c. 385, s. 76, at Schedule "B"

54. Parliament's intention to preserve in absolute terms the pension for the beneficiary is also evident in other provisions of the *CPP* which clearly stipulate a survivor's pension shall be paid to the survivor of the deceased contributor.

CPP, ss. 2, 42(1), 44(1)(d), 58, 60-62 at Schedule "B"; See Bordeleau Affidavit, at p. 15, para. 27, Tab 12, Vol. 1 of Respondent's Compendium

55. The only other exceptions to the payment of a survivor's pension to a person or entity other than the beneficiary are legislatively prescribed.

Ss. 60(2), (4) of *CPP* (post-mortem benefit application and payment); para. 89(1)(d) of *CPP* and s. 55 of *CPP Regulations* (payment of benefits when beneficiary incapable of managing own affairs); para. 89(1)(h) of *CPP* and s. 57 of *CPP Regulations* (payment of benefit amount that remains unpaid after death); s. 224.1 of *Income Tax Act* (indebtedness recovery by deduction or set-off); *Family Orders and Agreements Enforcement Assistance Act*, R.S. 1985, c. 4 (2nd Supp), Part II and para. 3(d) of the *Family Support Orders and Agreements Garnishment Regulations* (garnishment of benefits payable under *CPP*, excluding benefits payable in respect of children, benefits paid on behalf of a beneficiary to a province or municipality and death benefits): Bordeleau Affidavit at p. 15, para. 29, Tab 12, Vol. 1 of Respondent's Compendium; see also s. 224 of *ITA*, at Schedule "B".

5) Legislation cannot be compromised

56. At paragraph 48 of their factum, class counsel suggest the following compromise be issued by the Court: "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."

57. Such an approach would require this Court to ignore the clear and unambiguous language of s. 65 and permit a partial exemption from a provision that brooks no incursions. Absent a finding of constitutional infirmity, the legislation must prevail. As stated by this Court in this matter:

In our view no constitutional exemption can apply to a statutory provision unless that provision itself contravenes the *Charter*, either on its own or when read in conjunction with other offending provisions.

OCA Decision, *supra*, at para. 101, Tab 4, Vol. 1 of Respondent's Compendium

See *Ocean Port Hotel Limited v. British Columbia (General Manager, Liquor Control and Licensing Branch)* (2001), 204 D.L.R. (4th) 33 (SCC), at paras. 22, 24 and 27, Tab 16, Vol. 1 of AGC Authorities; *Canada v. Mossop*, [1993] 1 S.C.R. 554, at pp. 581-582, Tab 17, Vol. 2 of AGC Authorities; *Bell ExpressVu, supra*, at para. 62, Tab 10, Vol. 1 of AGC Authorities

58. As stated above, class counsel assert that s. 65 only applies to some of the survivor's pensions, namely prospective plus arrears of 11 months. The mandatory language of s. 65 does not provide such a distinction. On the contrary, the protections afforded by ss. 65(1) and (1.1) apply to all benefits whether paid in arrears or in due course on a monthly basis. As held by the motions judge: "Section 65 uses the broadest possible language to indicate that such benefits may not be encumbered in any way, voluntarily or otherwise."

S. 65 Decision, *supra*, at para. 63, Tab 1, Vol. 1 of Respondent's Compendium

59. At present, most class members continue to receive interim benefits pursuant to s. 61 of the *CPP*. When the payment of a survivor's pension is approved, any amount resulting from adjustments (ss. 61(2)) and any benefit paid in arrears must be paid in a single lump sum pursuant to ss. 62(1) of the *CPP*. The wording of s. 65 protects this lump sum.

60. Relying on equitable grounds, litigants have attempted to circumvent provincial statutes containing provisions similar to s. 65. In *Hooper v. Hooper*, a litigant brought a motion appointing herself receiver of her husband's pension benefits. She was successful at first instance. In allowing the appeal, this Court concluded:

As I have indicated, under the legislation governing the appellant's pension, the equalization order simply cannot be enforced against the appellant's pension. **The order appointing the respondent as equitable receiver is not an example of the court using its equitable jurisdiction to circumvent a common law obstacle of its own making. Rather, that order would effect a result which, for clear policy reasons, the legislation prohibits, namely the enforcing of the equalization order of Fedak J. against the appellant's pension payments. In my view, however strong the equities might otherwise be, it is not just or convenient in these circumstances to appoint an equitable receiver to achieve a result which is in direct conflict with the applicable legislation.** In this, I agree with Rutherford J. in *Beattie v. Ladouceur* (1995), 23 O.R. (3d) 225, 13 R.F.L. (4th) 435 (Gen. Div.) who came to the same conclusion in the context of similar federal legislation. [Emphasis added]

Hooper, supra, at paras. 44, 51, Tab 12, Vol. 1 of AGC Authorities

61. This Court revisited the issue in 2006 in *Trick v. Trick*. In that case, this Court considered whether courts had the jurisdiction to divert, by garnishment, 100 per cent of a payor's CPP and Old Age Security benefits. The Court concluded:

In my view, the analyses in *Beattie* and *Hooper* apply to the support issue in this case. Subsection 66(4) of the PBA [*Pension Benefits Act*] clearly restricts execution to enforce a support order to 50 per cent of the payor's pension. Had the legislature intended to grant the court jurisdiction to increase that exemption, it would have so provided, as it has in the WA [*Wages Act*] and as it proposes to do in the FRSAEA [*Family Responsibility and Support Arrears Enforcement Act*]. It did not do so.

Even if available, equitable remedies should not be employed in this case. This is not a situation of invoking equity to overcome limitations in the common law system of enforcement. In this case there is no common law impediment to preclude garnishment. The impediment is a specific statutory one, crafted by the legislature, which was alive to and balanced the competing policies of pension preservation and the enforcement of support obligations in the family law context. In those circumstances, it cannot be either just or convenient to allow the result sought by the respondent.

Trick v. Trick, [2006] O.J. No. 2737 (C.A.) at paras. 66-67; leave denied [2006] S.C.C.A. No. 388, Tab 18, Vol. 2 of AGC Authorities

See also an assignment attempt in the face of s. 65 in *Canada (Minister of Human Resources Development) v. Tait*, [2006] F.C.J. No. 1748 (C.A.), at para. 32, Tab 19, Vol. 2 of AGC Authorities

62. Class counsel argue that, but for the *Charter* ruling, the payment of survivor's pension "would be expressly prohibited and could not be a benefit 'payable under this Act'". In effect, class counsel contend that, for the purposes of obtaining a first charge, this Court should apply the *CPP* as it stood prior to the successful *Charter* challenge in the courts.

63. This argument cannot succeed. Class counsel seek a constitutional exemption from a statutory provision without the requisite constitutional analysis. Such reasoning, if adopted, would also place Crown officials in the untenable position of having to act contrary to the law. A court cannot compel government officials to perform an act in breach of their statutory duties. As stated by Megarry V-C in *Tito v. Waddell*, "What the statute enacts, the official must obey".

Authorson (Litigation Administrator of) v. Canada (2003) 63 O.R. (3d) 707 (S.C.J.) at para. 67 (citing *Tito v. Waddell (No. 2)*, [1977] 3 All E.R. 129 (Ch. D.)), Tab 20, Vol. 2 of AGC Authorities; *Minister of Employment & Immigration v. Hudnik*, [1980] 1 F.C. 180 (C.A.) at p. 182, Tab 21, Vol. 2 of AGC Authorities

64. In the case of *Re Beattie and Ladouceur*, Canada successfully brought a motion in the Ontario Superior Court of Justice to strike out portions of a court order which declared that all funds payable by the federal government to the respondent were subject to garnishment or seizure. The respondent, a father with support obligations, had vested rights to receive pension benefits under the *Public Service Superannuation Act*, R.S.C. 1985, c. P-36 and, in the fullness of time, benefits under the *CPP*. In granting the motion, Rutherford J. cited ss. 65 and 36 of the *CPP* and the *Old Age Security Act* respectively,

describing them as “generally prohibiting the assignment, charging, attaching, anticipating or giving as security of benefits”. He held:

[The paragraphs of the order] contemplate the government exceeding its statutory authority and paying out money in a manner other than is authorized in the statutes to which I have referred. Those paragraphs are struck out.

Re Beattie and Ladouceur; Attorney General of Canada, Intervenor (1995), 23 O.R. (3d) 225 (Gen. Div.), at pp. 232-233, Tab 22, Vol. 2 of AGC Authorities; See also *Mintzer v. Canada*, [1996] 2 F.C. 146 (C.A.) at paras. 14-17, Tab 23, Vol. 2 of AGC Authorities

B. RESPONSE TO ARGUMENT ON DIVISION OF POWERS ANALYSIS

1) The mandatory language of section 94A of the *Constitution Act*

65. In the court below, Canada took the position that the relief granted in this case was declaratory and ss. 32(3) of the *CPA* applied to monetary awards only. The motions judge accepted that the judgments and order were declaratory, but found that the remedy ultimately generated money in the hands of the class members so as to engage ss. 32(3).

S. 65 Decision, *supra*, at para. 63, Tab 1, Vol. 1 of Respondent’s Compendium

66. Canada maintains that the relief obtained was declaratory, in that class members may now apply for a *CPP* survivor’s pension and not be denied based on sexual orientation. Indeed, several class members have applied and been found not to be eligible for a survivor’s pension pursuant to the *CPP*.

Bordeleau Affidavit, at paras. 17, 21-22, 24, Tab 12, Vol. 1 of Respondent’s Compendium

67. In the event this Court finds that ss. 32(3) and s. 65 are conflicting provisions, Canada submits that s. 94A is a complete answer to the arguments raised by class counsel.

68. Section 94A states that no federal law in relation to old age pensions and supplementary benefits “shall affect the operation of any law present or future of a provincial legislation in relation to any such matter”. The words “such matter” cannot be interpreted to mean ss. 32(3) is within the class of provincial laws whose operation is unaffected by federal pension law. The legislative history of s. 94A clearly refutes this argument. Section 94A provides:

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, 1964, 12-13 Eliz. II, c. 73 (U.K.), at Schedule “B”

69. While s. 94A creates a reverse paramountcy rule, it does so only in relation to provincial laws that enact a scheme for old age pensions and supplementary benefits. As conceded by class counsel at paragraph 62 of their factum, the *CPA* is not a law in relation to old age pensions and supplementary benefits. Accordingly, the normal rule of paramountcy applies in this case and the provision of the *CPP* prevails over the provision of the *CPA*.

70. In *McLeod v. Canada*, the Court of Queen’s Bench held that Alberta’s matrimonial property legislation would not overcome provisions of the *CPP* because it was not in relation to old age pensions and supplementary benefits but, rather, related to distribution of assets on marriage break-down. The fact that pensions are property within a matrimonial property scheme and that the *CPP* might affect the provincial scheme’s operation were irrelevant.

McLeod v. Canada (Attorney General), (1993), 110 D.L.R. (4th) 53 (Alta. Q.B.), Tab 24, Vol. 2 of AGC Authorities

71. Section 94A creates concurrent jurisdiction over old age pensions and supplementary benefits. Prior to the enactment of s. 94A, the provinces had exclusive jurisdiction to make laws in relation to old age pensions. Section 94A was enacted in 1951 to create limited federal jurisdiction over old age pensions and further amended in 1964 to add jurisdiction over supplementary benefits. As explained by the court in

McLeod:

When, in 1966, a system of old age pensions was inaugurated by the Province of Quebec ..., the federal legislation became inoperable in that province by reason of the fact that Section 94A provided for provincial paramountcy where the provincial government passed laws in relation to old age pensions and supplementary benefits which were affected by the federal laws already in place. This exemplifies a situation where a federal law affects a provincial law in relation to old age pensions and supplementary benefits. Such is the case because the Quebec provincial law and federal law are in conflict as they are in relation to the same subject matter – a public pension plan. The result is that the federal legislation is deemed inoperable in this particular provincial jurisdiction.

McLeod, supra at p. 57, Tab 24, Vol. 2 of AGC Authorities

72. In the case at bar, the *CPA* is not legislation “in relation to” old age pensions and supplementary benefits. The provincial statute was enacted solely to provide courts with the procedural mechanism to adjudicate class actions. As stated above, the jurisprudence is settled in that regard.

Ontario New Home, supra, at para. 50, Tab 9, Vol. 1 of AGC Authorities

73. The intention that the federal law become inoperative in the case of a conflicting provincial law relating to old age pension and supplementary benefits is further illustrated within the *CPP* itself, which states that it is expressly inapplicable where a province has enacted a comprehensive pension plan.

CPP, ss. 3-4 and 113 at Schedule “B”

74. The *CPP* also contains sections which specifically prioritize certain provincial laws, other than laws in relation to old age pensions and supplementary benefits, over the *CPP*. For example, it provides in ss. 55.2(3) that provincial laws allowing separating spouses to contract out of the otherwise mandatory *CPP* division will take priority over the *CPP* itself. Paragraph 65.1(4)(b) also recognizes provincial laws. These provisions would be unnecessary if all provincial laws affected by the *CPP* had precedence by virtue of s. 94A.

CPP, ss. 55.2(3), 65.1(4)(b), at Schedule "B"; see also *Hamilton v. Hamilton* (2005), 18 R.F.L. (6th) 115 (Ont. S.C.J.) at paras. 131-4, Tab 25, Vol. 2 of AGC Authorities.

75. In order for the *CPA* to take priority over the *CPP*, this court must accept that federal competence over old age pensions and supplementary benefits is reduced by any and all provincial laws whenever a provincial statute's operation is arguably affected by the *CPP*. This would defeat the original intention of ensuring a secure government-controlled pension scheme across Canada unless a province enacted its own comprehensive scheme. Prime Minister Lester B. Pearson described s. 94A in these words:

The existing section 94A was created by constitutional amendment in 1951. This 1951 amendment made possible the old age security system under which all Canadians are paid a flat rate monthly pension on reaching age 70. This amendment provided simply that the Parliament of Canada as well as legislatures of the provinces of Canada, might enact legislation **regarding old age pension**. [Emphasis added]

Canada, *House of Commons Debates*, 2nd Session, 26th Parliament, vol. IV, June 18, 1964 at p. 4445-4446, Tab 33, Legislative History of s. 94A of the *Constitution Act, 1867*, Vol. 3 of Respondent's Compendium;

See also Canada, *Report of the Joint Committee of the Senate and House of Commons on Old Age Security*, Session 1950, at p. 111, Tab 19, Legislative History of s. 94A of the *Constitution Act, 1867*, Vol. 2 of Respondent's Compendium; and Canada, *House of Commons Debates*, 4th session, 21st

Parliament, vol. 1 1951, at p. 2681, Tab 21, Legislative History of s. 94A of the *Constitution Act, 1867*, Vol. 2 of Respondent's Compendium.

76. During the drafting of s. 94A, correspondence between the Minister of Justice and provincial premiers illustrated the preoccupation of the provinces that they remain free to legislate in respect of pensions.

Tab 22, Legislative History of Section 94A of the Constitution Act, 1867,
Vol. 2, Respondent's Compendium

77. Class counsel devote much of their analysis to other provisions of the Constitution – ss. 91, 92, 92A(1), 92A(3), 92(13), 92(14), 92(16), 95 – and doctrines that have no direct bearing on the case. The Supreme Court decisions in *Canadian Western Bank* and *Lafarge* are irrelevant to this case. Those decisions addressed the issue of federal paramountcy as a preferable analysis to the doctrine of interjurisdictional immunity. Interjurisdictional immunity is not at issue in this case.

78. At paragraphs 59 and 60 of their factum, class counsel advocate a “modern approach to division of powers questions”, attributing to the Supreme Court an endorsement that doctrines be used to promote a balanced approach. Paragraphs 21 and 22 of the Supreme Court reasons in *Canada Western Bank* do not support this assertion. The Supreme Court, at these paragraphs, describes the rationale for creating a division of powers; it does not call for courts to compromise these powers by striking a balance “between the needs of regional diversity and national unity”.

C. PARTIAL PAYMENT OF SURVIVOR'S PENSION UNAVAILABLE

79. In their Notice of Appeal, class counsel seek a declaration that the defendant pay 50% of pre-judgment arrears to REO in trust and the remainder to class members. This

relief is not available to class counsel. Pursuant to the *CPP*, the Minister has the exclusive authority to grant a partial payment of pensions, and he can only do so in narrow circumstances, namely where the final amount of the benefit cannot be calculated. In the case at bar, the Supreme Court has finally disposed of this matter and, accordingly, both the entitlement and the precise amount of the benefit payable can be determined.

CPP, ss. 61-62, at Schedule "B"

80. Absent a challenge on constitutional grounds, where the statute expresses unequivocally the intention of Parliament, courts must apply that clear expression of legislative intention and no more.

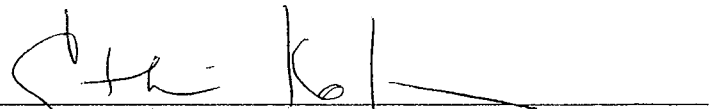
Ocean Port, supra, at paras. 22, 24, 27, Tab 16, Vol. 1 of AGC Authorities; see ss. 22(1) of the *CLPA* and Cumming J. in *Gumbs v. Grant et al.*, (2000), 49 O.R. (3d) 649 (S.C.J.) at paras. 25-28, Tab 26, Vol. 2 of AGC Authorities.

PART IV – ORDER SOUGHT

81. Canada respectfully requests that this appeal be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

June 25, 2008


 Cynthia Koller
 Of Counsel for the Defendant/Responding Party,
 The Attorney General of Canada

I, Cynthia Koller, counsel for the respondent, the Attorney General of Canada, do certify that an order under subrule 61.09(2) is not required. By direction of the Appeal Scheduling Unit, dated June 4, 2008, time allotments have been assigned: total for the appellants – 2 hours; total for the respondent – 1 hour 30 minutes.

June 25, 2008

SCHEDULE "A"

1. *Segnitz v. Royal & SunAlliance Insurance Co. of Canada*, [2002] O.J. No. 2332 (S.C.J.)
2. *Crown Bay Hotel Ltd. Partnership v. Zurich Indemnity Co. of Canada*, [1998] O.J. No. 1891
3. *A.G. British Columbia v. Christie*, 2007 SCC 21
4. *British Columbia v. Imperial Tobacco Canada Ltd.*, [2005] 2 S.C.R. 473
5. Ontario Law Reform Commission, *Report on Class Actions*, 1982, V. 3, pp. 668-669
6. *Parsons v. Canadian Red Cross Society*, [2000] O.J. No. 2374 (S.C.)
7. *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158
8. *Bisaillon v. Concordia University*, [2006] 1 S.C.R. 666
9. *Ontario New Home Warranty Program v. Chevron Chemical Co.* (1999), 46 O.R. (3d) 130 (S.C.J.)
10. *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559
11. *Greenwood v. Canada*, [2001] B.C.J. No. 1175 (S.C.)
12. *Hooper v. Hooper* (2002), 59 O.R. (3d) 787, (C.A.)
13. *Davidson & Co. v. MacAdam*, [2001] B.C.J. No. 2211 (S.C.)
14. *Hurford v. LaChance*, [1996] B.C.J. No. 1005 (S.C.)
15. *Toronto (Metropolitan) v. O'Brien*, [1995] O.J. No. 4896 (S.C.J.)
16. *Ocean Port Hotel Limited v. British Columbia (General Manager, Liquor Control and Licensing Branch)* (2001), 204 D.L.R. (4th) 33 (SCC)
17. *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554
18. *Trick v. Trick*, [2006] O.J. No. 2737 (C.A.)
19. *Canada (Minister of Human Resources Development) v. Tait*, [2006] F.C.J. No. 1748
20. *Authorson (Litigation Administrator of) v. Canada* (2003) 63 O.R. (3d) 707 (S.C.J.)

21. *Minister of Employment & Immigration v. Hudnik*, [1980] 1 F.C. 180 (C.A.)
22. *Re Beattie and Ladouceur; Attorney General of Canada, Intervenor* (1995), 23 O.R. (3d) 225 (Gen. Div.)
23. *Mintzer v. Canada*, [1996] 2 F.C. 146 (C.A.)
24. *McLeod v. Canada (Attorney General)*, (1993), 110 D.L.R. (4th) 53 (Alta. Q.B.)
25. *Hamilton v. Hamilton* (2005), 18 R.F.L. (6th) 115 (Ont. S.C.J.)
26. *Gumbs v. Grant et al.* (2000), 49 O.R. (3d) 649 (S.C.J.)

SCHEDULE "B"

The Constitution Act, 1867

Legislation respecting old age pensions and supplementary benefits

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.

Modernization of Benefits and Obligations Act

42(1) The definition "spouse" in subsection 2(1) of the *Canada Pension Plan* is repealed.
(2) Subsection 2(1) of the Act is amended by adding the following in alphabetical order: "common-law partner", in relation to a contributor, means a person who is cohabiting with the contributor in a conjugal relationship at the relevant time, having so cohabited with the contributor for a continuous period of at least one year. For greater certainty, in the case of a contributor's death, the 'relevant time' means the time of the contributor's death.

44(3). Subsection 42(1) of the Act is amended by adding the following in alphabetical order:

"survivor", in relation to a deceased contributor, means

- (a) if there is no person described in paragraph (b), a person who was married to the contributor at the time of the contributor's death, or
- (b) a person who was the common-law partner of the contributor at the time of the contributor's death;

45(2). Section 44 of the Act is amended by adding the following after subsection (1):
(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.

CPP Act

2(1) "applicant" means, in Part II,

- (a) a person or an estate that has applied for a benefit,
- (b) a person who has applied for a division of unadjusted pensionable earnings under section 55 or paragraph 55.1(1)(b) or (c), or
- (c) a person in respect of whom a division of unadjusted pensionable earnings has been approved under paragraph 55.1(1)(a);

2(1) "average monthly pensionable earnings" of a person means an amount calculated in accordance with section 47 or 48;

2(1) "balance-due day" of a person for a year means

(a) where the person died after October in the year and before May in the immediately following year, the day that is 6 months after the day of death, and

(b) in any other case, April 30 in the immediately following year;

2(1) "basic exemption" of a person for a year means an amount calculated in accordance with section 19;

2(1) "beneficiary" means a person, estate or other body to whom a benefit has become payable;

2(1) "benefit" means a benefit payable under this Act and includes a pension;

2(1) "business" includes a profession, calling, trade, manufacture or undertaking of any kind whatever, and includes an adventure or concern in the nature of trade but does not include an office or employment;

2(1) "common-law partner", in relation to a contributor, means a person who is cohabiting with the contributor in a conjugal relationship at the relevant time, having so cohabited with the contributor for a continuous period of at least one year. For greater certainty, in the case of a contributor's death, the "relevant time" means the time of the contributor's death.

2(1) "Consumer Price Index" means the Consumer Price Index for Canada, as published by Statistics Canada under the authority of the Statistics Act;

2(1) "contribution" means a contribution under this Act;

2(1) "contribution rate", in respect of an employee, an employer and a self-employed person for a year, means the contribution rate for that employee, employer and self-employed person for the year determined in accordance with or pursuant to this Act;

2(1) "contributor" means a person who has made an employee's contribution or a contribution in respect of his self-employed earnings, and includes a person the amount of whose earnings on which a contribution has been made for a year under this Act calculated as provided in subparagraph 53(b)(i) exceeds zero and a person to whom unadjusted pensionable earnings have been attributed under section 55, 55.1 or 55.2;

2(1) "contributory period" of a contributor has, subject to paragraph 44(2)(b) and subsection 56(5), the meaning assigned by section 49;

2(1) "contributory salary and wages" of a person for a year means an amount calculated in accordance with section 12;

2(1) "contributory self-employed earnings" of a person for a year means an amount calculated in accordance with section 13;

2(1) "deduct" includes withhold;

2(1) "disabled" has the meaning assigned by section 42;

2(1) "employee" includes an officer;

2(1) "employer" means a person liable to pay salary, wages or other remuneration for services performed in employment, and in relation to an officer includes the person from whom the officer receives his remuneration;

2(1) "employment" means the performance of services under an express or implied contract of service or apprenticeship, and includes the tenure of an office;

2(1) "excepted employment" means employment specified in subsection 6(2);

2(1) "maximum contributory earnings" of a person for a year has the meaning assigned by section 16;

2(1) "maximum pensionable earnings" of a person for a year has the meaning assigned by section 17;

"office" and "officer" means the position of an individual entitling him to a fixed or ascertainable stipend or remuneration and includes a judicial office, the office of a minister of the Crown, the office of a lieutenant governor, the office of a member of the Senate or House of Commons, a member of a legislative assembly or a member of a legislative or executive council and any other office the incumbent of which is elected by popular vote or is elected or appointed in a representative capacity, and also includes the position of a corporation director, and "officer" means a person holding such an office;

2(1) "pension" means a pension payable under this Act;

2(1) "Pension Appeals Board" means the Pension Appeals Board established under section 83;

2(1) "Pension Index" has the meaning assigned by section 43;

2(1) "pensionable employment" means employment specified in subsection 6(1);

2(1) "prescribed" means

(a) in the case of a form or the information to be given on a form, authorized by the Minister having the control and direction of the administration of the Part of this Act to which the context extends, and

(b) in any other case, prescribed by regulation or determined in accordance with rules prescribed by regulation;

2(1) "Record of Earnings" means the Record of Earnings established under section 95;

2(1) "representative" means, in respect of any person, a guardian, curator, committee, executor, administrator or other legal representative of that person;

"Review Committee" [Repealed, R.S., 1985, c. 30 (2nd Supp.), s. 1]

2(1) "Review Tribunal" means a Canada Pension Plan — Old Age Security Review Tribunal established under section 82;

2(1) "salary and wages on which a contribution has been made" for a year means an amount calculated in accordance with section 15;

2(1) "self-employed earnings" of a person for a year means an amount calculated in accordance with section 14;

"Social Insurance Number" and "Social Insurance Number Card" «numéro d'assurance sociale» et «carte matricule d'assurance sociale»

"Social Insurance Number" means a Social Insurance Number assigned to an individual under the authority of any Act of Parliament, and "Social Insurance Number Card" means a Social Insurance Number Card issued to an individual under that authority;

"spouse" [Repealed, 2000, c. 12, s. 42]

2(1) "total pensionable earnings" of a contributor means an amount calculated in accordance with section 50;

2(1) "total pensionable earnings of a contributor attributable to contributions made under this Act" means an amount calculated in accordance with section 78;

2(1) "unadjusted pensionable earnings" of a contributor for a year means an amount calculated in accordance with section 53;

2(1) "year" means a calendar year;

2(1) "Year's Basic Exemption" has the meaning assigned by section 20;

2(1) "Year's Maximum Pensionable Earnings" has the meaning assigned by section 18.

2(2) When specified age deemed to be reached

(2) For the purposes of any provision of this Act in which reference is made to the reaching by a person of a specified age, other than a reference in paragraph 44(3)(a), section 70 and paragraph 72(c), the person shall be deemed to have reached the specified age at the beginning of the month following the month in which the person actually reached that age, and in computing

(a) any period of months ending with the time when he reached a specified age, the month in which he actually reached that age shall be included; and

(b) any period of months commencing with the time when he reached a specified age, the month in which he actually reached that age shall not be included.

APPLICATION AND OPERATION OF ACT

Definitions

3.(1) In this Act,

"province providing a comprehensive pension plan"
« province instituant un régime général de pensions »

"province providing a comprehensive pension plan" means a province prescribed by a regulation made on the recommendation of the Minister of Social Development for the purposes of this Act as a province

(a) the government of which has, on or before May 3, 1965, signified the intention of that province to provide for the establishment and operation in that province, in lieu of the operation therein of this Act, of a plan of old age pensions and supplementary benefits providing for the making of contributions thereunder commencing with the year 1966 and providing for the payment of benefits thereunder comparable to those provided by this Act, or

(b) the government of which has, at any time after May 3, 1965, given notice in writing to the Minister of Social Development of the intention of that province to provide

(i) for the establishment and operation in that province, in lieu of the operation therein of this Act, of a plan of old age pensions and supplementary benefits providing for the making of contributions thereunder commencing with the third year following the year in which the notice was given and providing for the payment of benefits thereunder comparable to those then provided by this Act or by any provincial pension plan other than that plan, and

(ii) for the assumption under that plan of all obligations and liabilities accrued or accruing to the first day of that third year with respect to the payment of benefits under this Act attributable to contributions made under this Act in respect of employment in that province or in respect of self-employed earnings of persons resident in that province;

"provincial pension plan"
 «régime provincial de pensions »

"provincial pension plan" means a plan of old age pensions and supplementary benefits for the establishment and operation of which provision has been made as described in paragraph (a) or (b) of the definition "province providing a comprehensive pension plan" under a law of a province providing a comprehensive pension plan.

Prescription of province after notice given

(2) Notwithstanding anything in subsection (1), where, not later than twelve months before the first day of the third year following the year in which notice in writing as described in paragraph (b) of the definition "province providing a comprehensive pension plan" in subsection (1) was given to the Minister of Social Development by the government of a province, the legislature of the province has provided by law for the establishment and operation in that province of a plan of old age pensions and supplementary benefits as described in that paragraph and for the assumption under that plan of all obligations and liabilities accrued or accruing as described in that paragraph, the Governor in Council shall, by regulation made on the recommendation of the Minister of Social Development for the purposes of this Act, prescribe that province as a province described in that paragraph.

Effective date of prescription

(3) Any regulation made pursuant to subsection (2) becomes effective on the first day of the third year following the year in which the notice referred to in that subsection was given to the Minister of Social Development.

Application in respect of province providing comprehensive pension plan

4.(1) Notwithstanding anything in this Act, except as provided in subsection (2),

(a) the provisions of this Act with respect to the making of contributions by employees and employers in respect of pensionable employment and the provisions of Part III with respect to employees in pensionable employment do not apply in relation to employment in a province providing a comprehensive pension plan; and

(b) the provisions of this Act with respect to the making of contributions by persons for any year in respect of self-employed earnings do not apply in relation to persons who on the last day of that year were resident in a province providing a comprehensive pension plan.

Exception

(2) Subject to subsection (3), all of the provisions of this Act apply to

(a) employment by Her Majesty in right of Canada or by an agent of Her Majesty in right of Canada in a province providing a comprehensive Pension Plan, and

(b) any employment in a province providing a comprehensive pension plan if and to the extent that the establishment and operation of the plan referred to in paragraph (a) or (b) of the definition "province providing a comprehensive pension plan" in

subsection 3(1), as the case may be, in relation to persons employed in that employment is outside the legislative authority of the legislature of that province,

as though that employment were employment in a province other than a province providing a comprehensive pension plan.

Agreement with government of province providing comprehensive pension plan

(3) The Minister of Social Development, with the approval of the Governor in Council, may on behalf of the Government of Canada enter into an agreement with the government of a province providing a comprehensive pension plan whereby, in accordance with such terms and conditions as may be set out in the agreement, any persons employed in employment described in subsection (2), and any employers of any persons employed in such employment, with respect to any persons so employed, shall be subject to the provisions of the provincial pension plan of that province in all respects as though the establishment and operation of that plan in relation to any persons so employed were within the legislative authority of the legislature of that province, and with respect to any period while the agreement continues in force, the agreement has the force of law according to the provisions thereof.

Province in which person deemed employed

(4) For the purposes of this Act, a person shall be deemed to be employed in the province in which the establishment of his employer to which he reports for work is situated, and where the employee is not required to report for work at any establishment of his employer, he shall be deemed to be employed in the province in which the establishment of his employer from which his remuneration is paid is situated.

Reference to last day of year

(5) A reference in paragraph (1)(b) to the last day of a year shall, in the case of a person who resided in Canada at any time in that year but ceased to reside in Canada before the last day thereof, be deemed to be a reference to the last day in that year on which he resided in Canada.

42(1) "Minister" means the Minister of Human Resources Development

44(1) Subject to this Part,

- (a) a retirement pension shall be paid to a contributor who has reached sixty years of age;
- (b) a disability pension shall be paid to a contributor who has not reached sixty-five years of age, to whom no retirement pension is payable, who is disabled and who
 - (i) has made contributions for not less than the minimum qualifying period,
 - (ii) is a contributor to whom a disability pension would have been payable at the time the contributor is deemed to have become disabled if an application for a disability pension had been received before the contributor's application for a disability pension was actually received, or
 - (iii) is a contributor to whom a disability pension would have been payable at the time the contributor is deemed to have become disabled if a division of unadjusted pensionable earnings that was made under section 55 or 55.1 had not been made;
 - (iv) [Repealed, 1997, c. 40, s. 69]

- (c) a death benefit shall be paid to the estate of a deceased contributor who has made contributions for not less than the minimum qualifying period;
- (d) subject to subsection (1.1), a survivor's pension shall be paid to the survivor of a deceased contributor who has made contributions for not less than the minimum qualifying period, if the survivor
 - (i) has reached sixty-five years of age, or
 - (ii) in the case of a survivor who has not reached sixty-five years of age,
 - (A) had at the time of the death of the contributor reached thirty-five years of age,
 - (B) was at the time of the death of the contributor a survivor with dependent children, or
 - (C) is disabled;
- (e) a disabled contributor's child's benefit shall be paid to each child of a disabled contributor who
 - (i) has made contributions for not less than the minimum qualifying period,
 - (ii) is a contributor to whom a disability pension would have been payable at the time the contributor is deemed to have become disabled if an application for a disability pension had been received before the contributor's application for a disability pension was actually received, or
 - (iii) is a contributor to whom a disability pension would have been payable at the time the contributor is deemed to have become disabled if a division of unadjusted pensionable earnings that was made under section 55 or 55.1, had not been made; and
 - (iv) [Repealed, 1997, c. 40, s. 69]
- (f) an orphan's benefit shall be paid to each orphan of a deceased contributor who has made contributions for not less than the minimum qualifying period.

55.2(3) Where

- (a) a written agreement between persons subject to a division under section 55 or 55.1 entered into on or after June 4, 1986 contains a provision that expressly mentions this Act and indicates the intention of the persons that there be no division of unadjusted pensionable earnings under section 55 or 55.1,
- (b) that provision of the agreement is expressly permitted under the provincial law that governs such agreements,
- (c) the agreement was entered into
 - (i) in the case of a division under section 55 or paragraph 55.1(1)(b) or (c), before the day of the application for the division, or
 - (ii) in the case of a division under paragraph 55.1(1)(a), before the issuance of the decree absolute of divorce, the judgment granting a divorce under the Divorce Act or the judgment of nullity of the marriage, as the case may be, and
- (d) that provision of the agreement has not been invalidated by a court order, that provision of the agreement is binding on the Minister and, consequently, the Minister shall not make a division under section 55 or 55.1.

58(1) Subject to this section, a survivor's pension payable to the survivor of a contributor is a basic monthly amount as follows:

- (a) in the case of a survivor who has not reached sixty-five years of age and to whom no retirement pension is payable under this Act or a provincial pension plan, a basic monthly amount consisting of

- (i) a flat rate benefit, calculated as provided in subsection (1.1), and
- (ii) 37 1/2 per cent of the amount of the contributor's retirement pension, calculated as provided in subsection (3),
reduced, unless the survivor was at the time of the death of the contributor a survivor with dependent children or unless he is disabled, by 1/120 for each month by which the age of the survivor at the time of the death of the contributor is less than forty-five years, and reduced, if at any time after the death of the contributor the survivor ceases to be
- (iii) a survivor with dependent children and is not at that time disabled, or
- (iv) disabled and is not at that time a survivor with dependent children,
by 1/120 for each month by which the age of the survivor at that time is less than forty-five years; and
- (b) in the case of a survivor who has reached sixty-five years of age and to whom no retirement pension is payable under this Act or a provincial pension plan, a basic monthly amount equal to sixty per cent of the amount of the contributor's retirement pension, calculated as provided in subsection (3).

58(1.1) Amount of flat rate benefit

- (1.1) The amount of the flat rate benefit referred to in subparagraph (1)(a)(i) is
- (a) in the year 1986, ninety-one dollars and six cents; or
 - (b) in the year 1987 or any subsequent year, an amount calculated by multiplying
 - (i) the amount of the flat rate benefit that would have been payable for a month in the year preceding that year
by
 - (ii) the ratio that the Pension Index for the year in which the flat rate benefit commences to be payable bears to the Pension Index for the year preceding that year.

58(2) Calculation of survivor's pension where retirement pension payable

- (2) Where a survivor's pension under this Act and a retirement pension under this Act or under a provincial pension plan are payable to the survivor of a contributor, the basic monthly amount of the survivor's pension payable to the survivor is
- (a) in the case of a survivor who has not reached sixty-five years of age and whose retirement pension commences to be payable after December 31, 1997, the aggregate of
 - (i) a flat rate benefit, calculated as provided in subsection (1.1), and
 - (ii) the lesser of
 - (A) the amount determined by the formula
C - D
where
C is 37.5% of the amount of the contributor's retirement pension calculated as provided in subsection (3), and
D is the lesser of
 - (I) 40% of C, and
 - (II) 40% of the survivor's retirement pension, calculated without regard to subsections 46(3) to (6) but in accordance with subsection 45(2), and
 - (B) an amount that, when added to the survivor's retirement pension (calculated without regard to subsections 46(3) to (6) but in accordance with subsection 45(2)), is equal to the amount of a benefit of 25% of 1/12 of the survivor's Maximum Pensionable Earnings Average for the later of the year in which the survivor first became qualified to receive

the survivor's pension and the year in which the survivor's retirement pension commenced to be payable, adjusted in accordance with subsection 45(2) as if the benefit had commenced to be payable in the later of the year in which the survivor first became qualified to receive the survivor's pension and the year in which the survivor's retirement pension commenced to be payable;

(b) in the case of a survivor who has not reached sixty-five years of age and whose retirement pension commences to be payable before January 1, 1998, the aggregate of

(i) a flat rate benefit, calculated as provided in subsection (1.1), and

(ii) the lesser of

(A) 37.5% of the amount of the contributor's retirement pension, calculated as provided in subsection (3), and

(B) an amount that, when added to the survivor's retirement pension (calculated without regard to subsections 46(3) to (6) but in accordance with subsection 45(2)), is equal to the amount of a benefit of 25% of 1/12 of the average of the Year's Maximum Pensionable Earnings for the later of the year in which the survivor first became qualified to receive the survivor's pension and the year in which the survivor's retirement pension commenced to be payable, and for each of the two preceding years, adjusted in accordance with subsection 45(2) as if the benefit had commenced to be payable in the later of the year in which the survivor first became qualified to receive the survivor's pension and the year in which the survivor's retirement pension commenced to be payable; or

(c) in the case of a survivor who has reached sixty-five years of age and who was born after December 31, 1932 and whose retirement pension commences to be payable after December 31, 1997, the lesser of

(i) the amount determined by the formula

$A - B$

where

A is 60% of the amount of the contributor's retirement pension calculated as provided in subsection (3), and

B is the lesser of

(I) 40% of A, and

(II) 40% of the survivor's retirement pension, calculated without regard to subsections 46(3) to (6) but in accordance with subsection 45(2), and

(ii) an amount that, when added to the survivor's retirement pension (calculated without regard to subsections 46(3) to (6) but in accordance with subsection 45(2)), is equal to the amount of a benefit of 25% of 1/12 of the survivor's Maximum Pensionable Earnings Average for the later of the year in which the survivor first became qualified to receive the survivor's pension and the year in which the survivor's retirement pension commenced to be payable, adjusted in accordance with subsection 45(2) as if the benefit had commenced to be payable in the later of the year in which the survivor first became qualified to receive the survivor's pension and the year in which the survivor's retirement pension commenced to be payable; or

(d) in any other case, the lesser of

(i) 60% of the amount of the contributor's retirement pension, calculated as provided in subsection (3), and

(ii) an amount that, when added to the survivor's retirement pension (calculated without regard to subsections 46(3) to (6) but in accordance with subsection 45(2)), is equal to the amount of a benefit of 25% of 1/12 of the average of the Year's Maximum Pensionable Earnings for the later of the year in which the survivor first became qualified to receive the survivor's pension and the year in which the survivor's retirement pension commenced to be payable, and for each of the two preceding years, adjusted in accordance with subsection 45(2) as if the benefit had commenced to be payable in the later of the year in which the survivor first became qualified to receive the survivor's pension and the year in which the survivor's retirement pension commenced to be payable.

60(1) No benefit is payable to any person under this Act unless an application therefor has been made by him or on his behalf and payment of the benefit has been approved under this Act.

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

(2.1) An application referred to in subsection (2) in respect of a disability benefit may not be approved if the application is received after December 31, 1997.

(2.2) An application referred to in subsection (2) in respect of a retirement pension may only be approved in respect of a month after the deceased contributor had reached age 70.

(3) Where a disabled contributor's child's benefit would, if the application had been approved, have been payable to a child of a disabled contributor on application made prior to the death of the child or an orphan's benefit would, if the application had been approved, have been payable to an orphan of a contributor on application made prior to the death of the orphan and the child or orphan dies after December 31, 1977, not having reached eighteen years of age, and no application has been made at the time of the death of the child or orphan, an application may be made within one year after the death by the person or agency having custody and control of the child or orphan at the time of the death or, where there is at that time no person or agency having custody and control, by such person or agency as the Minister may direct.

(4) Where an application is made pursuant to subsection (2) or (3), a benefit that would have been payable to a deceased person referred to in subsection (2) or a deceased child or orphan referred to in subsection (3) shall be paid to the estate or such person as may be prescribed by regulation.

(5) Any application made pursuant to subsection (2) or (3) is deemed to have been received

(a) on the date of the death of a person who, prior to his death, would have been entitled, on approval of an application, to payment of a benefit under this Act; or

(b) on the date of the death of a child or an orphan referred to in subsection (3) where the person having custody and control of the child or orphan did not make an application prior to the death of the child or orphan.

(6) An application for a benefit shall be made to the Minister in prescribed manner and at the prescribed location.

(7) The Minister shall forthwith on receiving an application for a benefit consider it and may approve payment of the benefit and determine the amount thereof payable under this Act or may determine that no benefit is payable, and he shall thereupon in writing notify the applicant of his decision.

(8) Where an application for a benefit is made on behalf of a person and the Minister is satisfied, on the basis of evidence provided by or on behalf of that person, that the person had been incapable of forming or expressing an intention to make an application on the person's own behalf on the day on which the application was actually made, the Minister may deem the application to have been made in the month preceding the first month in which the relevant benefit could have commenced to be paid or in the month that the Minister considers the person's last relevant period of incapacity to have commenced, whichever is the later.

(9) Where an application for a benefit is made by or on behalf of a person and the Minister is satisfied, on the basis of evidence provided by or on behalf of that person, that

(a) the person had been incapable of forming or expressing an intention to make an application before the day on which the application was actually made,

(b) the person had ceased to be so incapable before that day, and

(c) the application was made

(i) within the period that begins on the day on which that person had ceased to be so incapable and that comprises the same number of days, not exceeding twelve months, as in the period of incapacity, or

(ii) where the period referred to in subparagraph (i) comprises fewer than thirty days, not more than one month after the month in which that person had ceased to be so incapable, the Minister may deem the application to have been made in the month preceding the first month in which the relevant benefit could have commenced to be paid or in the month that the Minister considers the person's last relevant period of incapacity to have commenced, whichever is the later.

(10) For the purposes of subsections (8) and (9), a period of incapacity must be a continuous period except as otherwise prescribed.

(11) Subsections (8) to (10) apply only to individuals who were incapacitated on or after January 1, 1991.

(12) The Minister may require an applicant or other person or a group or class of persons to be at a suitable place at a suitable time in order to make an application for benefits in person or to provide additional information about an application.

61(1) Where application is made for a benefit and payment of the benefit would be approved except that the amount of the benefit cannot be finally calculated at the time the approval would otherwise be given, the Minister may approve payment of an interim benefit in such amount as he may fix and payment of the interim benefit may be made in a like manner as if the benefit had been approved.

(2) Where an interim benefit has been paid under subsection (1) and payment of a benefit is subsequently approved,

(a) if the amount of the interim benefit was less than the amount of the benefit subsequently approved, the beneficiary shall be paid the additional amount that he would

have been paid if the benefit had been approved at the time the interim benefit was approved; and

(b) if the amount of the interim benefit exceeded the amount of the benefit subsequently approved, the amount paid in excess thereof shall be deducted from subsequent payments of the benefit or otherwise recovered in such manner as the Minister may direct.

62.(1) Payment of a benefit for each month shall be made at such time during the month as the Minister directs, except that, where payment of a benefit is approved after the end of the month for which the first payment of the benefit is payable under this Part, monthly payments of the benefit shall be made for months commencing with the month following the month in which payment of the benefit is approved and payments of the benefit for months preceding that month for which the benefit is payable under this Part shall be paid in one sum during that month.

(2) For the purposes of this Act, where a benefit is payable under this Part commencing with any month, the benefit shall be deemed to have become payable at the beginning of that month.

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.

(2) Notwithstanding subsections (1) and (1.1), where any provincial authority or municipal authority in a province pays a person any advance or assistance or welfare payment for a month or any portion of a month that would not be paid if a benefit under this Act had been paid for that period and subsequently a benefit becomes payable or payment of a benefit may be made under this Act to that person for that period, the Minister may, in accordance with any terms and conditions that may be prescribed, deduct from that benefit and pay to the provincial authority or municipal authority, as the case may be, an amount not exceeding the amount of the advance or assistance or welfare payment paid.

(3) Notwithstanding subsections (1) and (1.1), where an administrator of a disability income program who is approved by the Minister makes a payment under that program to a person for a month or any portion of a month that would not have been made if a benefit under paragraph 44(1)(b) had been paid to that person for that period and subsequently a benefit becomes payable or payment of a benefit may be made under this Act to that person for that period, the Minister may, in accordance with any terms and conditions that may be prescribed, deduct from that benefit and pay to the administrator an amount not exceeding the amount of the payment made under that program.

65(4) Where

(a) a written agreement between persons subject to an assignment under this section entered into on or after June 4, 1986 contains a provision that expressly mentions this Act and indicates the intention of the persons that there be no assignment under this section,

(b) that provision of the agreement is expressly permitted under the provincial law that governs such agreements,

- (c) the agreement was entered into before the day of the application for the assignment, and
- (d) that provision of the agreement has not been invalidated by a court order, that provision of the agreement is binding on the Minister and, consequently, the Minister shall not approve an assignment under this section.

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.

73.(1) Subject to this Act, a survivor's pension shall continue to be paid during the lifetime of the beneficiary, and shall cease with the payment for the month in which the beneficiary dies.

89. (1) The Governor in Council may make regulations

- (a) prescribing or defining anything that, by this Part, is to be prescribed or defined by regulations;
- (b) prescribing the time, manner and form of making applications for benefits, the information and evidence to be furnished in connection therewith and the procedures to be followed in dealing with and approving applications;
- (c) regulating the procedure to be followed on appeals to a Review Tribunal or the Pension Appeals Board under this Act, and the procedure to be followed on any appeal to the Pension Appeals Board described in section 85;
- (d) providing for the making of an application or appeal by and the payment of a benefit to any person or agency on behalf of any other person or beneficiary where it is established in such manner and by such evidence as may be prescribed that the other person or beneficiary is by reason of infirmity, illness, insanity or other causes incapable of managing his own affairs, and prescribing the manner in which any benefit authorized to be paid to any such person or agency on behalf of a beneficiary shall be administered and expended for the benefit of the beneficiary and accounted for;
- (e) respecting the determination of disability subject to this Part and the conditions on which any amount as or on account of a benefit in respect of the disability of a person shall be paid or shall continue to be paid, including the initial and subsequent periodic or other assessments of that disability and the reasonable rehabilitation measures to be undergone by that person, and providing for the payment out of the Consolidated Revenue Fund of the cost of any such assessments of disability and rehabilitation

measures and for the charging of the amount thereof to the Canada Pension Plan Account as a cost of administration of this Act;

(f) providing that the failure of a person to undergo any assessment of disability or reasonable rehabilitation measure as required by any regulation made under paragraph (e), without good cause as defined by regulation, shall be a ground on which that person may be determined to have ceased to be disabled;

(g) providing, in the case of any benefit that becomes payable to a person to whom no pension is then payable under the Old Age Security Act, the basic monthly amount of which benefit is less than such amount, not exceeding ten dollars, as may be prescribed, for the commutation of such benefit in such circumstances and in accordance with such methods and bases as may be prescribed and for the payment to that person in the place of that benefit of an amount equal to the commuted value thereof, or for the payment of that benefit at prescribed intervals less frequent than monthly;

(h) respecting the payment of any amount on account of a benefit under this Act that remains unpaid at any time after the death of the beneficiary;

(i) respecting the terms and conditions governing the payment of benefits in accordance with any agreement under subsection 80(1) that may be entered into by the Minister on behalf of the Government of Canada;

(j) providing, in any case or class of cases not covered by the provisions of an agreement under subsection 80(1), for the issue of cheques by the Government of Canada in the amount of any benefit payable under this Act to or in respect of a contributor and in the amount of any like benefit payable under a provincial pension plan to or in respect of the same contributor, or for the payment by other means by the Government of Canada of such an amount, if arrangements satisfactory to the Governor in Council have been made with the government of that province for the issue of cheques, or for the payment by other means, by that government on a reciprocal basis and for the making of any financial adjustments by that government required to be made by reason thereof, and providing for the making of any financial adjustments by the Government of Canada required to be made by reason of those arrangements and for the crediting or charging of the amount thereof to the Canada Pension Plan Account;

(k) for the purpose of determining the first month for which the amount of a survivor's pension shall be reduced or increased as provided under this Act;

(l) providing for the conditions under which the payment of benefits may be withheld pending the furnishing of the Minister with information, evidence and documentation required under this Act and the regulations; and

(m) generally for carrying out the purposes and provisions of this Part.

Effect of regulation made under subsection 3(2)

113. (1) Where any regulation has been made under subsection 3(2) prescribing a province as a province described in paragraph (b) of the definition "province providing a comprehensive pension plan" in subsection 3(1),

(a) all obligations and liabilities accrued or accruing as described in that paragraph, for the assumption of which under the provincial pension plan of that province provision has been made by any law of that province, shall, from and after the day on which the regulation became effective, cease to be obligations or liabilities accrued or

accruing with respect to the payment of benefits under this Act attributable to contributions made under this Act in respect of employment in that province or in respect of self-employed earnings of persons resident in that province; and

(b) the Minister of Finance shall pay an amount calculated as provided in subsection (2) to the government of that province, by the transfer to that government in the first instance and to the extent necessary for that purpose, of securities of that province that are designated securities as defined in section 2 of the *Canada Pension Plan Investment Board Act*, and in the second instance and to the extent necessary for that purpose, of securities of Canada that are designated securities as defined in section 2 of that Act, and by the payment to that government of any balance then remaining in any manner that may be prescribed.

Transfer by Investment Board

(1.1) The Minister of Finance may, by notice, and in accordance with any agreement entered into under section 111.1, require the Investment Board to pay to that Minister any amount, and to transfer to that Minister any securities of the province or of Canada referred to in paragraph (1)(b), that are necessary for the purposes of subsection (1).

Amount to be paid to government of province

(2) For the purposes of subsection (1), the amount to be calculated as provided in this subsection in the case of any province shall be calculated by the Minister of Finance as the amount obtained by adding

(a) the total amount of all contributions credited to the Canada Pension Plan Account, to the day on which the regulation referred to in subsection (1) became effective, in respect of employment in that province or in respect of self-employed earnings of persons resident in that province, and

(b) the part of

(i) the net investment return of the Investment Board, and

(ii) all interest credited to or accrued to the credit of the Canada Pension Plan Account,

to the day on which the regulation referred to in subsection (1) became effective, that is derived from the contributions referred to in paragraph (a),

and subtracting from the total so obtained

(c) such part of all amounts paid as or on account of benefits under this Act as would not have been payable under this Act if that province had been a province described in paragraph (a) of the definition "province providing a comprehensive pension plan" in subsection 3(1), and

(d) such part of the costs of administration of this Act, to the day on which the regulation referred to in subsection (1) became effective, as is equal to the proportion

of those costs that the total amount of the contributions referred to in paragraph (a) is of the total amount of all contributions credited to the Canada Pension Plan Account to that day.

Agreement respecting assumption of obligations and liabilities

(3) Where notice in writing has been given to the Minister by the government of a province as described in the definition "province providing a comprehensive pension plan" in subsection 3(1), the Minister, with the approval of the Governor in Council, may on behalf of the Government of Canada enter into an agreement with the government of that province,

(a) for the furnishing of that government under prescribed conditions with any information obtained under this Act, including records of any amounts that are shown in the Record of Earnings to the accounts of persons who have made contributions under this Act in respect of employment in that province or as persons resident in that province in respect of self-employed earnings; and

(b) generally for the making of all such arrangements as may be necessary to permit provision to be made for the assumption, under the provincial pension plan referred to in the notice, of all obligations and liabilities accrued or accruing as described in paragraph (b) of the definition "province providing a comprehensive pension plan" in subsection 3(1).

CPP Regulations

55.(1) Where the Minister is satisfied, on such information or evidence as is presented to him or as he may require, that a beneficiary, by reason of infirmity, illness, insanity or other cause, is incapable of managing his own affairs, the Minister may direct that the benefit be paid on behalf of such beneficiary to any person or agency that the Minister is satisfied is authorized by or pursuant to any law of Canada or of a province to manage that beneficiary's affairs or, where it appears to the Minister that there is no person or agency so authorized, to a person or agency approved by the Minister.

(2) Where the Minister directs, pursuant to subsection (1), that a benefit be paid on behalf of a beneficiary to a person or agency referred to in that subsection, no such benefit shall be paid to such person or agency until the person or agency, as the case may be, has undertaken in an agreement with the Minister

(a) to administer and expend the benefit on behalf of the beneficiary in accordance with the terms of the agreement; and

(b) to furnish any information or evidence and to do anything that the Act or these Regulations require the beneficiary to furnish or do.

(3) Any person or agency to whom a benefit is paid pursuant to this section on behalf of a beneficiary shall account, in a form approved by the Minister and at such time or times as

he directs, to the Minister for the benefit payments received and the disbursements made of the payments.

57. A benefit payment may be paid to the estate of a deceased beneficiary, or if there is no estate, to a person or agency designated by the Minister, where

(a) an amount is payable as a benefit to the deceased beneficiary; or

(b) a benefit payment made to the beneficiary or made on behalf of the beneficiary by cheque or otherwise is returned to the Minister after the beneficiary's death.

76. (1) In this section,

"authority" means any provincial authority or municipal authority in a province that pays any advance or assistance or welfare payment to a person in the province. (*autorité*)

"excess payment" means the amount of any advance or assistance or welfare payment that was paid by an authority to a person for a month or any portion thereof and that would not have been paid if the benefit that was subsequently payable under the Act to that person in respect of that period had in fact been paid during that period. (*paiement excédentaire*)

(2) Subject to subsections (3) to (6), the Minister may, where an authority satisfies him that an excess payment has been paid to a person, authorize

(a) the deduction from the one sum amount payable to that person in accordance with subsection 62(1) of the Act in respect of the period for which the excess payment was paid, and

(b) the payment to the provincial authority or municipal authority in the province in which the excess payment was paid,

of an amount equal to the amount of the excess payment.

(3) An authority referred to in subsection (2) shall, before any deduction and payment from a benefit payable under the Act to any person is authorized under subsection (2), certify, in a form satisfactory to the Minister,

(a) the effective date of commencement and the effective date of termination, if applicable, of the advance or assistance or welfare payment;

(b) the amount that was paid to the person by the authority for the period during which the excess payment occurred or the amount that the authority applies to have reimbursed, whichever is the lesser; and

(c) the Social Insurance Number of the contributor as a result of whose participation under the Act the benefit is payable.

(4) No deduction and payment in respect of an excess payment shall be authorized pursuant to subsection (2) unless

(a) the Minister and the appropriate provincial official have concluded an agreement in writing authorizing the deduction and payment;

(b) the certification required by subsection (3) has been received by the Minister;

(c) the irrevocable written consent of the person to the deduction and payment by the Minister and the written request for access to information under subsection 104.01(2) of the Act have been received before the expiry of one year after the date of their signature; and

(d) the amount of the excess payment is greater than \$50.

(5) [Repealed, SOR/96-522, s. 18]

(6) If, for any reason, no deduction has been made under subsection (2) in respect of an excess payment or a deduction and payment have been made in respect of an excess payment in an amount less than the amount that might have been paid in respect thereof under subsection (2), the Minister shall not authorize the deduction and payment of any other amount in respect of that excess payment.

Class Proceedings Act, 1992

32(1) An agreement respecting fees and disbursements between a solicitor and a representative party shall be in writing and shall,

(a) state the terms under which fees and disbursements shall be paid;

(b) give an estimate of the expected fee, whether contingent on success in the class proceeding or not; and

(c) state the method by which payment is to be made, whether by lump sum, salary or otherwise.

(2) An agreement respecting fees and disbursements between a solicitor and a representative party is not enforceable unless approved by the court, on the motion of the solicitor.

(3) Amounts owing under an enforceable agreement are a first charge on any settlement funds or monetary award.

(4) If an agreement is not approved by the court, the court may,
 (a) determine the amount owing to the solicitor in respect of fees and disbursements;
 (b) direct a reference under the rules of court to determine the amount owing; or
 (c) direct that the amount owing be determined in any other manner.

Canadian Charter of Rights and Freedoms

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

Crown Liability and Proceedings Act

22.(1) Where in proceedings against the Crown any relief is sought that might, in proceedings between persons, be granted by way of injunction or specific performance, a court shall not, as against the Crown, grant an injunction or make an order for specific performance, but in lieu thereof may make an order declaratory of the rights of the parties.

29. No execution shall issue on a judgment against the Crown.

30.(1) On receipt of a certificate of judgment against the Crown issued pursuant to the regulations, the Minister of Finance shall authorize the payment out of the Consolidated Revenue Fund of any money awarded by the judgment to any person against the Crown.

Crown Liability and Proceedings Regulations

6.(1) Where there is a judgment or an order of a court against the Crown for the payment of money, the court, or the registrar, clerk or prothonotary thereof, or a deputy of the registrar, clerk or prothonotary, shall, unless the judgment or order has been quashed on appeal, at the request of the party in whose favour the judgment or order was made, after the judgment or order has been formally made a judgment or order of the court, certify to the Minister of Finance the tenor and purport of the judgment or order

- (a) forthwith, if no appeal is allowed by law from the judgment or order;
- (b) on the expiration of the time allowed by law for an appeal from the judgment or order, if no appeal has then been instituted and no application has been made for an extension of time for appeal;
- (c) on the final disposition of the claim, if there has been an appeal from the judgment or order;
- (d) on the dismissal of an application for an extension of time for appeal from the judgment or order or on the expiration of time granted on such an application without an appeal having then been instituted; or

(e) at such earlier time as the Attorney General files notice that the Attorney General does not intend to appeal.

(2) A certificate of judgment shall be transmitted to, or left at, the office of the Deputy Attorney General in Ottawa or the appropriate Regional Office of the Department of Justice referred to in paragraph 4(2)(b) by the party in whose favour the judgment or order was made.

(3) For the purposes of this section, a certified copy of a judgment, or a certified copy of a judgment read with a certified copy of a taxed bill of costs, shall be accepted as a certificate of judgment.

Income Tax Act

224(1) Where the Minister has knowledge or suspects that a person is, or will be within one year, liable to make a payment to another person who is liable to make a payment under this Act (in this subsection and subsections 224(1.1) and 224(3) referred to as the "tax debtor"), the Minister may in writing require the person to pay forthwith, where the moneys are immediately payable, and in any other case as and when the moneys become payable, the moneys otherwise payable to the tax debtor in whole or in part to the Receiver General on account of the tax debtor's liability under this Act.

(1.2) Notwithstanding any other provision of this Act, the Bankruptcy and Insolvency Act, any other enactment of Canada, any enactment of a province or any law, but subject to subsections 69(1) and 69.1(1) of the Bankruptcy and Insolvency Act and section 11.4 of the Companies' Creditors Arrangement Act, where the Minister has knowledge or suspects that a particular person is, or will become within one year, liable to make a payment

(a) to another person (in this subsection referred to as the "tax debtor") who is liable to pay an amount assessed under subsection 227(10.1) or a similar provision, or

(b) to a secured creditor who has a right to receive the payment that, but for a security interest in favour of the secured creditor, would be payable to the tax debtor, the Minister may in writing require the particular person to pay forthwith, where the moneys are immediately payable, and in any other case as and when the moneys become payable, the moneys otherwise payable to the tax debtor or the secured creditor in whole or in part to the Receiver General on account of the tax debtor's liability under subsection 227(10.1) or the similar provision, and on receipt of that requirement by the particular person, the amount of those moneys that is so required to be paid to the Receiver General shall, notwithstanding any security interest in those moneys, become the property of Her Majesty to the extent of that liability as assessed by the Minister and shall be paid to the Receiver General in priority to any such security interest.

(1.4) Provisions of this Act that provide that a person who has been required to do so by the Minister must pay to the Receiver General an amount that would otherwise be lent, advanced or paid to a taxpayer who is liable to make a payment under this Act, or to that taxpayer's secured creditor, apply to Her Majesty in right of Canada or a province.

(2) The receipt of the Minister for moneys paid as required under this section is a good and sufficient discharge of the original liability to the extent of the payment.

(3) Where the Minister has, under this section, required a person to pay to the Receiver General on account of a liability under this Act of a tax debtor moneys otherwise payable

by the person to the tax debtor as interest, rent, remuneration, a dividend, an annuity or other periodic payment, the requirement applies to all such payments to be made by the person to the tax debtor until the liability under this Act is satisfied and operates to require payments to the Receiver General out of each such payment of such amount as is stipulated by the Minister in the requirement.

(4) Every person who fails to comply with a requirement under subsection 224(1), 224(1.2) or 224(3) is liable to pay to Her Majesty an amount equal to the amount that the person was required under subsection 224(1), 224(1.2) or 224(3), as the case may be, to pay to the Receiver General.

(5) Where a person carries on business under a name or style other than the person's own name, notification to the person of a requirement under subsection 224(1), 224(1.1) or 224(1.2) may be addressed to the name or style under which the person carries on business and, in the case of personal service, shall be deemed to be validly served if it is left with an adult person employed at the place of business of the addressee.

Recovery by deduction or set-off

224.1. Where a person is indebted to Her Majesty under this Act or under an Act of a province with which the Minister of Finance has entered into an agreement for the collection of the taxes payable to the province under that Act, the Minister may require the retention by way of deduction or set-off of such amount as the Minister may specify out of any amount that may be or become payable to the person by Her Majesty in right of Canada.

GEORGE HISLOP, ET AL

Plaintiffs (Appellants)

AND

THE ATTORNEY GENERAL OF CANADA

Defendant (Respondent)

COURT OF APPEAL FOR ONTARIO

Proceeding Commenced at Toronto

**FACTUM OF THE RESPONDENT,
THE ATTORNEY GENERAL OF
CANADA**

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

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