

## Finding of the Review Board

**Date:** November 30, 1989  
**Panel:** P.M. Steele, Vice-Chairman  
N.S. Keithly, Member  
R.B. Heinekey, Member  
**Subject:** A Widow's Entitlement Under Section 17 and the Canadian Charter of Rights and Freedoms

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### Introduction

The widow of the deceased worker has appealed a decision of a Claims Adjudicator of the Workers' Compensation Board set out in a letter to her dated November 12, 1987. In that letter she was advised of the particulars of the pension she would receive under the provisions of the *Workers' Compensation Act* (the "Act") following the death of her husband on August 25, 1987. The widow was also advised of the funeral expenses, incidental expenses, and emergency lump sum payment to which she was entitled. A note was included in that letter that she may be entitled to further benefits if her son chose to return to school prior to his 21st birthday.

### Issue

The issue in this appeal is whether or not the widow's pension under Section 17 of the Act should be less than pensions paid to other widows of a younger age. The widow considered that this treatment was age discrimination contrary to Section 15 of the *Canadian Charter of Rights and Freedoms* (the "Charter"). The widow also submitted that she should be entitled to support for her two children, aged 20 years and 25 years, who were both still at home. She contended that there was discriminatory treatment of children under the Act based on the age of the children. This discrimination also offended the Charter.

After the hearing, the panel determined that no notice had been given to the Attorney General of British Columbia nor to the Attorney General of Canada as required by the *Constitutional Question Act*, RSBC 1979, c.63, s.8, when bringing a Charter argument before an administrative tribunal. The panel gave the required notices to these departments.

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## Outcome

This appeal is denied on the basis that the Review Board does not have the jurisdiction to grant the remedy requested by the widow, nor are her children eligible for compensation benefits under the Act.

## Evidence

On August 25, 1987, the worker was involved in a fatal accident at work. The circumstances of this accident were clearly within the parameters of the Act. The only question is the applicable survivors benefits under the Act for the widow and her children.

## Law and Policy

The issues put before the panel in this appeal concern the rights which the widow has under the provisions of Section 17 of the Act and also concerning the definition of “child” as set out in Section 17(1) of the Act. [Sections 17(1) and (3) were set out in their entirety in the body of the finding.]

## Reasons and Findings

The widow at the date of her husband’s death was a woman with no dependent children as defined in the Act who had reached the age of 40 years but not the age of 50 years. The panel notes that “dependent” is defined in Section 1 of this Act. The definition of dependent in Section 1 is as follows:

*‘dependent’ means a member of the family of a worker who was wholly or partly dependent on his earnings at the time of his death, or who but for the incapacity due to the accident would have been so dependent, and, except in section 17(3)(a) to (h), (9) and (13), includes a spouse, parent or child who satisfies the board that he had a reasonable expectation of pecuniary benefit from the continuation of the life of the deceased worker;*

This definition means that for the purposes of Section 17(3)(a) to (h), a dependent does not include a spouse, parent or child who is required to satisfy the Board that he or she had reasonable expectation of pecuniary benefit from the continuation of the life of the deceased worker. Taking that definition one step at a time, it would appear that “dependent” still means a member of the family of the worker who was wholly or partially dependent on his earnings at the time of the worker’s death. What it further means is that under Section 17(3)(a) to (h) a “dependent” does not require that further test of being a spouse, parent, or child who is required to satisfy the Board that that

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person has a reasonable expectation of pecuniary benefit of the continuation of the life of the deceased worker. In other words, the panel must conclude that the test of so satisfying the Board is not one which needs to be carried out in respect to Sections 17(3)(a) to (h).

### **Children's Benefits**

In the interpretation of the benefits to which the widow is entitled, the Board determined that she would receive benefits under Section 17(3)(e) on the basis of her age together with the fact that her two children at the date of the worker's death were not invalids, were aged 20 years and 25 years, and the 20-year-old child was not regularly attending an academic, technical, or vocational place of education. In the context of the definition of "children" in Section 17(1) there were thereby no children entitled to benefits at the date of the worker's death.

Therefore, there were no children of the worker who were entitled to compensation benefits under the provisions of the Act at the time of his death.

Having found that Section 17(1) is not applicable to the worker's children, there is no basis in this appeal to further consider the constitutionality of Section 17(1) respecting possible age discrimination.

### **Widow's Entitlement**

In respect to the widow's entitlement under the Act, her submission is that the provisions set out in Section 17(3)(c), 17(3)(d), and 17(3)(e) provide a different level of benefits to different widows based only on a widow's age. This situation is age discrimination and contrary to Section 15 of the Charter.

The widow's representative then directed the panel to Section 97 of the Act which states:

*The board may exercise any power or duty confirmed or imposed on it by or under a statute of Canada or agreement between Canada and the Province.*

This representative submitted that this provision gives jurisdiction to the Board and also the Workers' Compensation Review Board under the Act to consider and rule on matters within the parameters of the Charter. That provision also begs the question whether decisions on individual appeals create binding rulings which would cover other similar cases. The panel finds the law is clear that it does not.

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Nonetheless, even if a tribunal is found not to be able to make a finding of general application, one school of thought is that the tribunal is still required to determine, in that given case or appeal, the applicable law concerning the case before it. In short, the finding of the tribunal is still applicable to the specific case or appeal before it, even if the tribunal may not thereby determine the constitutional validity of the legislation in question.

To address the issue of age discrimination the question also raised is whether the Review Board is an administrative tribunal which is a court of competent jurisdiction for the purposes of Section 24(1) of the Charter. Section 24(1) of the Charter provides:

*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.*

On review the panel finds that, if the Review Board is a court of competent jurisdiction for the purposes of this appeal, it must have jurisdiction over the parties, the subject matter, and the remedy requested, *Douglas/Kwantlen College Faculty Association v. Douglas College* (1984) 49 DLR (4th) 749. In this case the only remedy which the Review Board could provide is to determine whether Section 17 is of full force and effect. That is not the remedy the widow requests. The panel finds that the Review Board does not have the jurisdiction to rewrite Section 17 of the Act. The Review Board does not therefore have jurisdiction over the remedy requested. As a result the Review Board is not a court of competent jurisdiction in this case. Section 24(1) is therefore not found to be applicable in this appeal.

In an appeal based on the Charter, the provisions of the *Constitution Act, 1982* are applicable, particularly Section 52. Section 52(1) of the *Constitution Act, 1982* provides:

*52(1) The Constitution is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force and effect.*

The panel has found on a preliminary matter that if there is action to be taken under the Charter the applicable section of the *Constitution Act, 1982* is Section 52 and not Section 24(1). As mentioned above, Section 24(1) is not applicable.

The issue then is to what extent, if at all, does Section 17(3) of the Act offend Section 52(1) of the Constitution and the jurisdiction of the Review Board in this determination. The question of course is, if this section does offend the Charter, and thereby brings into effect Section 52(1) of the *Constitution Act, 1982*, what follows from that finding in respect to the benefits which the widow is entitled to receive or the remedy the Review Board can grant?

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It is accepted by the panel that the amount of money which the widow would receive under Section 17(3)(a) and the amount which she might receive under Sections 17(3)(b), 17(3)(c), 17(3)(d), or 17(3)(e) is different. However, only Sections 17(3)(c), 17(3)(d) and Section 17(3)(e) have a different level of benefit which is determined by the age of the widow and only these latter three sections are the focus of this appeal.

The question then more specifically is whether the provisions in Section 17(3)(c), 17(3)(d), and 17(3)(e) offend Section 15(1) of the Charter. Section 15(1) of the Charter reads:

*15.(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability.*

Although the argument can be presented that when all members of a certain category are treated equally, there is within that category no discrimination. An argument on that basis would be that all persons who fall under the provisions of Sections 17(3)(c), 17(3)(d) or 17(3)(e) are, within that category, treated equally. The panel finds it cannot accept that position as determinative and finds that by reason of the fact that the three above-referenced sections distinguish a different level of benefits by reason of age of the recipient clearly results in a different level of benefits being provided under this legislation by reason of age alone. This result on a *prima facie* basis offends the provision of Section 15(1) of the Charter which requires a person to receive “equal benefit of the law without discrimination” and, in particular, without discrimination based on age.

The issue which then is needed to be considered is whether once it has been determined that a provision offends the Charter, can that discrimination be “demonstrably justified.” This phrase is from Section 1 of the Charter which provides:

*1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.*

In *Hunter vs. Southam* [1984] 2 SCR 145 on page 169 Dickson, C.J.C. said:

*The phrase ‘demonstrably justified’ puts the onus of justifying a limitation on a right or freedom set out in the Charter on the party seeking to limit.*

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The problem which the panel would then have to consider is whether the provisions of Sections 17(3)(c), 17(3)(d), and 17(3)(e) of the Act, which if found to be contrary to the Charter by reason of age discrimination, can be considered to be demonstrably justified. The Board was not represented at the hearing and chose not to make any submission in regards to this appeal. The Panel did not thereby have the benefit of any submission being made concerning the retention of these sections in the face of a finding that these provisions are contrary to the Charter.

The panel finds that, if it found sections 17(3)(c), 17(3)(d), and 17(3)(e) of the Act are of no force or effect, the effect would be that there is no provision for the payment of any benefits to the widow. The payment of benefits to a widow with no dependent children under the Act is presently contained in the three sections being questioned, all of which set out an age categorization and which collectively cover the full possible spectrum of possibilities. Section 17(3)(d) covers widows up to the age of 40, Section 17(3)(e) covers widows between the age of 40 and 50, and Section 17(3)(c) covers widows age 50 and over. To find that the widow would not be entitled to any benefits by reason that the sections in question are of no force and effect is clearly not the result intended by this appeal. The widow has requested that she receive the most benefits available under any of Sections 17(3)(c), 17(3)(d), or 17(3)(e). The Review Board if it finds these sections not to be of full force and effect does not have the authority to rewrite these sections to provide the widow with the benefits she seeks. The panel therefore finds it does not have the jurisdiction to grant the widow the remedy she seeks. Not having the jurisdiction, the panel accordingly finds it does not have the jurisdiction to deal with this appeal and the appeal must be denied.

*Editors' note: While this Review Board finding dates back to November 30, 1989, it was submitted and selected for publication because of its consideration of the statute and the Charter of Rights and Freedoms by the Review Board.*