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JUSTICE MATTERS

Pension and Benefits

This is a summary of Pension and Employee Benefits matters of interest.

The difficulties in using the Charter to remedy pension and benefit issues: Bemister v. Canada

The recent Federal Court decision in ***Bemister v. Canada*** highlights some of the difficulties that litigants face in attempting to use the Canadian Charter of Rights and Freedoms to remedy pension and benefit issues.

Background

The Applicants in *Bemister* were federal retirees who participated in the Public Service Health Care Plan ("PSHCP") and the National Association of Federal Retirees ("NAFR"), a non-profit organization that advocates on behalf of federal retirees.

The PSHCP is a health care plan for active and retired federal public servants, established pursuant to the *Financial Administration Act.* The Applicants sought declarations that their contractual and constitutional rights were infringed by certain changes made to the cost-sharing ratio in the PSHCP.

Active federal employees do not pay premiums for PSHCP coverage, but for several years, retirees had been required to pay 25% of their own premiums. In 2014, the federal government changed the retiree contribution rate to 50%. The Court found that the retirees had some input into these changes as announced because a representative of the NAFR sat on the PSHCP oversight Committee.

The Court rejected the breach of contract claim of the retirees, on the basis that there was "no evidence that the 75-25 % split on premiums, or any set formula for that matter, was guaranteed as a term of employment or was a term of any applicable collective agreement."

Section 2(d): Freedom of Association

The Court also rejected each of the constitutional arguments raised by the Applicants. The first of these

was brought pursuant to the Freedom of Association guaranteed by section 2(d) of the Charter. The Court held that the protection that section 2(d) provides to the collective bargaining process was not engaged, noting that

> retired public servants are excluded from the terms of the *Federal Public Service Labour Relations Act* …by the definition of an employee under subsection 2(1). The NAFR does not represent employees with collective bargaining rights. Unlike trade unions, the NAFR has no formal statutory mandate to represent all federal government retirees. It is not a bargaining unit like the unions that make up the NJC.

The Court further noted that even if the NAFR could "bring itself within the collective bargaining sphere", the protections provided by section 2(d) of the Charter only guarantee a "process rather than an outcome". The Court found that "[t]he evidence shows that the NAFR had the opportunity to make representations and had input to the process", referred to multiple meetings that were held with NAFR representatives present, and determined that the federal government, acting through the Treasury Board, had not "substantially interfered with the process by which the retirees pursue their associational activity".

Section 15: Equality

The Applicants had also alleged that their right to "equal protection and equal benefit…without discrimination" under section 15 of the Charter of Rights had been infringed. They argued that a burden was imposed on the retirees which was not also imposed upon active federal employees, and this created a distinction based on age and on retirement status.

The Court rejected this line of argument for several reasons, including that:

1. The distinction does not undermine the "presumption upon which the guarantee of equality is based".
2. The distinction was appropriate "in order to maintain a plan that is fair, competitive and sustainable which all the while respects Canadian taxpayers' dollars."
3. The change did not impose a burden on retirees in a manner which reflects stereotyping or has the effect of reinforcing, perpetuating or exacerbating the disadvantage that retirees face.
4. Federal service retirees are, in general, not marginalized or economically disadvantaged due to their likelihood of high pension incomes and medical coverage that many Canadian retirees do not enjoy.

The Court ultimately determined that the cost sharing ratio change was "not of sufficient magnitude to support a **section 15** ***Charter*** argument."

Section 7: The Right to Life, Liberty and Security of the Person

Finally, the Court rejected the Applicants' arguments that the change to the PSHCP was a breach of the

protection of "life, liberty and security of the person" in section 7 of the Charter. The Applicants had argued that the change had interfered with their ability to afford healthcare and this was a violation of their section 7 rights.

While section 7 has been utilized in some health-specific contexts such as safe-injection sites and the right to access life-saving treatment from private sources, the Court in this case characterized the right in question as fundamentally economic in nature and not about the denial of access to healthcare. The Court pointed out that "economic interests are not protected by section 7" of the Charter and dismissed this aspect of the claim. This has been a familiar theme in pension and benefit disputes where the individual claimants sought to rely on the section 7 guarantee.

Conclusion

This case highlights some of the common difficulties that arise with respect to attempting to use the Charter to defend against government changing pension and benefit schemes. Where the government is both legislator and employer, employees and retirees are at a major disadvantage if changes are to be made to their pension and benefit entitlements. More than 100 years ago, the Ontario Court of Appeal noted that "the Legislature within its jurisdiction can do everything that is not naturally impossible, and is restrained by no rule human or divine … The prohibition "Thou shalt not steal," has no legal force upon the sovereign body."**[1]** The only limitation on much governmental action comes from the Constitution and its Charter of Rights and Freedoms, but the utility of those documents is often questionable in the pension and benefits context.

[1] Florence Mining Co. v. Cobalt Lake Mining Co., (1909), 18 O.L.R. 275, [1909] O.J. No. 196 (C.A.), at p. 279 O.L.R., per Riddell J.

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