

IN THE SUPREME COURT OF ONTARIO
(Divisional Court)

B E T W E E N:

ADOLF ALBRECHT

Plaintiff
(Respondent)

- and -

MARIA ALBRECHT

Defendant
(Appellant)

- and -

WOMEN'S LEGAL EDUCATION AND ACTION FUND

Intervener

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INTERVENER'S FACTUM

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PART I: FACTS

1. The Intervener, the Women's Legal Education and Action Fund (LEAF), is a national, charitable organization dedicated to and experienced in litigating to protect and advance the equality rights of women, including rights under the Charter of Rights and Freedoms.

2. The Intervener accepts as correct the facts as set out in Part II of the Appellant's factum and Part I of the Respondent's factum. The Intervener, however, would refer the Court to certain additional facts.

3. Women as a group are poorer than men as a group.

Statistics Canada, Women in Canada: A Statistical Report, Cat. 89-503E, (Ottawa: February 1990), pp. 83, 97 and 101

Statistics Canada, 1986 Census of Canada: Women and the Labour Force, Cat. 98-125, (Ottawa: February 1990), pp. 24-25

Working Group on Employment Equity, Ministry of Citizenship, Ontario, Status Report: Women, (June 1989), pp. 26-27

4. Elderly and disabled women, and in particular those women who are former spouses, are among the poorest of Canadians. One of the reasons these women are poor is that women's pension entitlement is significantly less than men's.

Kevin Collins, Women and Pensions, The Canadian Council on Social Development, (Ottawa: 1978), pp. 1, 34 (Table B-1), 35 (Table B-2), 36 (Table B-3), 43 and 58 (Table B-18)

Statistics Canada, Report of the Canadian Health and Disability Survey, Cat. 82-555E, (Ottawa: 1983-1984), pp. 17, 19 and 66-67

Working Group on Employment Equity, Ministry of Citizenship, Ontario, Target Group Demographics: Selected Data for Aboriginals, People with Disabilities, Francophones, Visible Minorities & Women, (June, 1989), Table 3f

5. The provisions of the Canada Pension Plan to be construed in this appeal are found at sections 55.1 and 55.2 of the Revised Statutes of Canada, 1985. At the time of enactment, they were known as sections 53.3 and 53.4, and are referred to as such in the facts of the Appellant and Respondent. The Intervener will refer to the provisions as sections 55.1 and 55.2, in accordance with the current proper citation.

PART II: STATEMENT OF ISSUES TO BE ARGUED AND THE LAW

6. At issue in this appeal is the interpretation of sections 55.1 and 55.2 of the Canada Pension Plan and the consequential legal effect given to a waiver of future property claims found in a spousal agreement.

7. The Intervener submits that no effect should be given to a waiver of the right to a division of unadjusted pensionable earnings under the Plan where the criteria in subsection 55.2 (3) have not been met. In particular, it is submitted that section 55.2 of the Plan should be interpreted to render unenforceable a provision of a spousal agreement to the extent that it can be

interpreted to waive, directly or indirectly, the right to apply for, obtain or benefit from a division of unadjusted pensionable earnings where the criteria in subsection 55.2 (3) have not been met.

(a) The Canada Pension Plan - Legislative History, Legislative Objects, and Public Policy

8. The Canada Pension Plan (the "Plan") is an income security program established in 1966 by the federal government, through federal/provincial agreement. The Plan provides retirement and disability pensions, among other benefits. Benefits are based on employee and employer contributions. The level of contributions is based on the income of the employee.

Canada Pension Plan, R.S.C. 1985, c. C-8, as amended

9. The enactment of the Canada Pension Plan was intended as a significant advance in social security in Canada. It was designed to create a near universal entitlement to modestly adequate pensions, particularly for those who cannot make other provisions for retirement or disability, and to allow Canadians to retire in greater dignity and security.

Canada, Parliament, House of Commons,
Debates, May 16, 1963, p. 7

Canada, Parliament, House of Commons,
Debates, March 17, 1964, pp. 1161-1165

Canada, Parliament, House of Commons,
Debates, November 9, 1964, pp. 9899-9900

10. Contribution to the Plan by employees, employers and self-employed persons is compulsory. Contribution was made compulsory to ensure that the Plan was comprehensive, and out of concern that for a variety of reasons coverage might otherwise be lost.

Canada Pension Plan, R.S.C. 1985, c. C-8,
as amended; Preamble, ss. 8, 9, 10 and 90

Laurence E. Coward, Mercer Handbook of Canadian Pension and Welfare Plans, 9th edition (Toronto: CCH Canadian Limited, 1988), pp. 207-208

Canada, Parliament, House of Commons,
Debates, November 9, 1964, pp. 9899-9900

11. In 1978 the Plan was amended to allow for an application following divorce for a division of unadjusted pensionable earnings accumulated while the former spouses cohabited during marriage. The credit splitting provisions created or improved pension entitlement for spouses who do not work in the paid work force or work for less time or less income.

Canada Pension Plan, R.S.C. 1970, c. C-5, amended
1976-1977, c.36; s. 53.2, proclaimed in force
January 1, 1978

12. The purpose of the credit splitting provisions was:

(a) to recognize the contributions to the marriage of spouses who do unpaid work in the home, including child care; and

(b) to recognize the contributions to society of such work.

Canada, Parliament, House of Commons, Debates, May 9, 1977, p. 5411; p. 5439

Canada, Parliament, House of Commons, Debates, July 8, 1977, pp. 7495 - 7499

13. Further, the credit splitting provisions were intended to and do largely benefit women. The reform occurred in order to address the unequal economic status of women, and in particular, the unequal pension entitlement of women.

Kevin Collins, Women and Pensions, supra, pp. 1, 34 (Table B-1), 35 (Table B-2), 36 (Table B-3), 43, and 58 (Table B-18)

Statistics Canada, Women in Canada: A Statistical Report, supra, pp. 83, 97 and 101

14. Following the 1978 amendments, the Government of Canada published materials for the benefit of the public and the legal profession setting out that a division of unadjusted pensionable earnings under the Plan is not subject to the terms of a separation agreement or judicial division of assets. Nevertheless, in 1983 the Pension Appeals Board decided, in The Minister of National Health and Welfare v. Preece, that a waiver of future property claims in a separation agreement constituted an agreement not to divide unadjusted pensionable earnings under the Plan. The result of this decision was that many former spouses, primarily women, who had signed a separation agreement containing a standard waiver of future property claims had inadvertently lost their credit splitting rights.

Minister of National Health and Welfare v. Laurence C. Preece et. al. (1983), para. 8914, CCH Canadian Employment Benefits and Pension Guide, p 6638 (Pension

Appeals Board)

Minister of National Health and Welfare v. Annelise Fielden et. al. (1988), para. 8548, CCH Canadian Employment Benefits and Pension Guide, p. 6024 (Pension Appeals Board)

15. In 1987 the Canada Pension Plan was further amended in order, among other matters, to extend the right to credit splitting to unmarried spouses and to remedy, at least in part, the negative implications of the Preece decision both for former spouses who had already signed separation agreements, as well as for those yet to enter agreements. For those in the latter category, by adding section 55.2 the Plan was amended with the specific intention of ensuring that the right to a division of credits was preserved regardless of the terms of the separation agreement.

Canada Pension Plan, R.S.C. 1970, c. C-5, amended 1986, c. 38; ss. 53.3 and 53.4

Canada, Parliament, House of Commons, Debates, June 26, 1986, pp. 14877 - 14879

16. Section 55.2 of the Plan provides that the terms of a spousal agreement are not binding on the Minister of National Health and Welfare for the purposes of a division of unadjusted pensionable earnings unless:

(a) a valid spousal agreement entered on or after June 4, 1986 contains a provision that expressly mentions the Plan and indicates the intention of the spouses or former spouses that there be no division of unadjusted pensionable earnings, and

(b) provincial law expressly permits such a provision in a spousal agreement.

Canada Pension Plan, R.S.C. 1985, c. C-8,
as amended; ss. 55.2(2) and 55.2(3)

17. The requirement that provincial law expressly permit contracting out was added on third reading of Bill C-38 to specifically make clear that even an express waiver of the right to a division of credits was not in itself sufficient to preclude a division. In the case at bar, there was no express release of the right to a division of Canada Pension Plan credits.

Canada, Parliament, House of Commons,
Debates, June 26, 1986, pp. 14877-14879

18. The Province of Saskatchewan is the only province that has enacted legislation expressly permitting a spousal agreement to contain a provision that there be no division of unadjusted pensionable earnings.

The Matrimonial Property Act, R.S.S. 1979,
c. M-6.1, amended 1988, c. 12, s.2; s. 38(4.1)

19. By preserving the right to a division of credits regardless of the terms of a separation agreement, Parliament recognized the importance of the credit splitting right for the economic security of applicants, primarily women.

Rosalie Abella, Equality in Employment:
Royal Commission Report (1984), pp. 27 and 55-60

Statistics Canada, Women in Canada:
A Statistical Report, supra, pp. 83, 97 and 108

Canada, Parliament, House of Commons,
Debates, June 26, 1986, pp. 14877-14879

20. Further, by restricting the ability to contract out of the credit splitting right, Parliament recognized the vulnerability of women to losing the credit splitting right through the process of negotiating a separation or other spousal agreement, due to women's unequal bargaining power in this context.

Canada, Parliament, House of Commons, Debates, June 11, 1986, p. 14259

21. Since the 1987 amendments it has been widely accepted among the legal profession and the public that the Plan provides a comprehensive mandatory scheme for division of unadjusted pensionable earnings that cannot be contracted away in the absence of specific provincial legislation.

Frances T. Weisberg, "Canada Pension Plan Credit Sharing" in Philip Epstein, The Law Society of Upper Canada Bar Admission Course Materials, Family Law Lecture Notes, 1989 - 1990, pp. 10-1 and 10-3

Payne v. Payne (1988), 16 R.F.L.(3d) 8 at 12 (Ont. H.C.)

Health and Welfare, Canada, The Canada Pension Plan: Division of Unadjusted Pensionable Earnings, (Ottawa: 1986)

Evita M. Roche and David C. Simmonds, eds. Marriage Contracts, Department of Education, Law Society of Upper Canada (Toronto: Carswell Company Limited, 1988), p.54

(b) Non-Constitutional Principles of Statutory Interpretation

22. All statutes are deemed to be remedial and must therefore be given such fair, large and liberal interpretation as

will best ensure that their objects are attained.

Interpretation Act, R.S.C. 1985 c. I-21; s. 12

23. In accordance with this statutory dictate,

"Today there is only one principle or approach [to statutory interpretation], namely, the words of an 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."

E. A. Driedger, Construction of Statutes, 2nd edition, (Toronto: Butterworths, 1983) at p. 87

Canadian National Railway Co. v. Canada (Canadian Human Rights Commission), [1987] 1 S.C.R. 1114 at 1134

24. To effectively carry out the object of the Act, it must be construed so as to defeat all attempts to do indirectly that which is enjoined.

P. St. J. Langan, ed., Maxwell on The Interpretation of Statutes, 12th edition, (Bombay: N.M. Tripathi Private Ltd., 1969), p. 137

R. v. Stephens (1908), Sask. R. 509 at 512

25. In the construction of rights-granting legislation the words of the Act must be given their plain meaning, but it is equally important that the rights enunciated be given their full recognition and effect.

"We should not search for ways and means to minimize those rights and to enfeeble their proper impact."

Canadian National Railway Co. v. Canada (Canadian Human Rights Commission), supra, at 1134

26. "Legislative history may be used to interpret a statute because prior enactments may throw light on the

intention of the legislature in repealing, amending, replacing or adding to it."

Gravel v. City of St. Leonard, [1978]
1 S.C.R. 660 at 667

E. A. Driedger, Construction of Statutes,
supra, at pp. 159-160

27. The Canada Pension Plan was designed to establish a comprehensive, compulsory public program of old age pensions and supplementary benefits payable to and in respect of contributors. In this context, sections 55 and 55.1 of the Plan make the benefits of this program available to former spouses, primarily women, who have not had the opportunity, or had less opportunity, to contribute to the Plan relative to their partners. Section 55.2 is designed to ensure that former spouses receive full benefit of this program, regardless of the terms of a spousal agreement, just as contribution by employers and employees is compulsory.

28. It is submitted that to allow a former spouse to enforce through civil action a provision of a spousal agreement to the extent that it can be interpreted to waive the right to a division of Plan credits where the criteria in subsection 55.2 (3) have not been met:

(a) would be inconsistent with the object of the Plan as a whole. In addition, it would completely negate the object of the section 55.2 restrictions on contracting out of the credit splitting right, that of ensuring

that former spouses, primarily women, who contribute to society by child care and homemaking, also get the benefit of this minimum income security program;

(b) would allow a former spouse holding the greater pension credits to do indirectly what he cannot do directly, that is, preclude a division of unadjusted pensionable earnings. This would render section 55.2 of no practical meaning and create an anomolous result;

(c) would be inconsistent with the comprehensive compulsory scheme of the Plan; and

(d) would negate the intention of Parliament in enacting section 55.2, of insulating the credit splitting right, and thus the right to a pension, from the exigencies of negotiating a spousal agreement.

(c) Doctrine of Public Policy, the Interpretation of Statutes and Contractual Enforceability

29. A contract or provisions thereof, though otherwise and in all other respects acceptable, may be invalid or "illegal" and therefore unenforceable on the basis of the doctrine of public policy. Where the invalid part of the contract can be severed from the rest, the valid part of the contract can be recognized and given effect.

G.H.L. Fridman, The Law of Contracts in Canada, 2nd edition (Toronto: Carswell, 1986), pp. 320-324

30. The source of contractual invalidity may be a rule of the common law or a statute, as to which there are significant differences in the operation of the doctrine. At common law, the basis of invalidity is a finding that the contract contravenes the ends of society. In cases where new grounds of common law invalidity have been proposed the courts have exhibited some concern to limit the application of the doctrine of public policy.

Re Estate of Charles Millar, Deceased,
[1938] S.C.R. 1 at 4

Fridman, supra, p. 324 and pp. 350-353

31. A contract may also be invalid if it is expressly or impliedly prohibited by statute, or contrary to the policy of the statute. Unlike the "unruly" common law doctrine of public policy, this source of contractual invalidity is based on statutory interpretation and policy set by statute.

Re Millar, supra, at 6

Fridman, supra, at p. 52.

32. Where a waiver of statutory rights is not expressly prohibited or "illegal" a contract will nevertheless be invalid if:

(a) the statute is interpreted to impliedly prohibit the contract; or

(b) it would be in accordance with the policy behind the statute to hold the contract invalid and unenforceable.

Fridman, supra, at p. 332

Ontario Human Rights Commission v. The Borough of Etobicoke, [1982] 1 S.C.R. 202 at 213

33. In more recent cases, the issue in cases of statutory invalidity of contracts,

"is whether the contract which is at stake falls within or outside the scope of the purpose or policy which is being advanced or promoted by the statute that is alleged to make the contract illegal and therefore invalid. The policy of the statute is the chief factor that must concern a court where an indirect, or implied prohibition is said to arise with respect to a particular contract, and not such matters as whether the statute is designed to protect the public generally or a class or group in particular."

Fridman, supra, at p. 330

34. "Individuals for whose benefit statutory duties have been imposed may by contract waive their right to the performance of those duties, unless to do so would be contrary to public policy or to the provisions or general policy of the statute imposing the particular duty or the duties are imposed in the public interest." (emphasis added)

Halsbury's Laws of England, 3rd ed., vol. 36, p. 444, para. 673

Ontario Human Rights Commission v. Borough of Etobicoke, supra, at 213

35. In the absence of any reference to contracting out, human rights legislation has been interpreted to constitute public policy for the benefit of the community at large and of individual members, which may not be waived or varied by private contract.

Ontario Human Rights Commission v. The Borough of Etobicoke, supra, at 213 and 214

36. It is submitted that the Canada Pension Plan is a national program, for the benefit of the community as a whole as well as individual members, designed to promote a minimum income security for the majority of Canadian residents in times of old age, disability or death. Sections 55 and 55.1 contribute to this objective by promoting the income security of spouses, primarily women, who have not worked in the paid work force or worked for less time or less income. The restrictions on contracting out of the credit splitting right in section 55.2 of the Plan are consistent with the compulsory nature of the scheme for employee and employer contributions, and advance the policy of creating minimum rights to pensions and other benefits that cannot be precluded by contract.

37. It is submitted that based on the clear wording of section 55.2, and the policy behind that provision and the Plan as a whole, section 55.2 should be interpreted to render invalid and unenforceable a provision of a spousal agreement to the extent that it can be interpreted to waive, directly or indirectly, the right to apply for, obtain or benefit from a division of unadjusted pensionable earnings where the criteria in subsection 55.2 (3) have not been met.

(d) Section 15 of the Charter of Rights and Freedoms

(i) The Constitutional Equality Guarantee

38. Equality is one of the fundamental values of our society, against which the objects and effects of all legislation must be measured. The section 15 guarantee of equality has been identified as "the broadest of all guarantees in the Charter. It applies to and supports all other rights guaranteed by the Charter."

R. v. Oakes, [1986] 1 S.C.R. 103 at 136

Andrews v. Law Society of British Columbia,
[1989] 1 S.C.R. 143 at 185

Canadian Charter of Rights and Freedoms,
Constitution Act, 1982, as enacted by
Canada Act 1981 (U.K.), 1982, c. 11; s. 15

39. Section 15 must be interpreted "in light of the interests it was meant to protect", which include "equality in the formulation and application of the law" and also entail "the promotion of a society in which all are secure in the knowledge that they are recognized at law" as equals.

R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295 at 344

Andrews v. Law Society of British Columbia,
supra, at 171

40. Equality has been recognized as "an all-encompassing right governing all legislative action", in assessing which "the main consideration must be the impact of the law on the

individual or group concerned".

Reference re an Act to Amend the Education Act
(1986), 53 O.R. (2d) 513 at 554, cited with approval
in Andrews v. Law Society of British Columbia, supra,
at 171

Andrews v. Law Society of British Columbia,
supra, at 165

41. The importance of promoting the equality of disadvantaged groups has been well recognized. It has also been identified as the purpose of the equality guarantee. In the words of Wilson J., "section 15 is designed to protect those groups who suffer social, political and legal disadvantage in our society".

R. v. Big M Drug Mart, supra, at 337-338

Andrews v. Law Society of British Columbia,
supra, at 154

R. v. Turpin, [1989] 1 S.C.R. 1296 at 1333

42. Just as Charter rights can be used to challenge legislation, they can be used to mandate an interpretation and application of legislation that would promote or realize a Charter right in a particular legislative context.

Retail, Wholesale & Department Store Union,
Local 580 v. Dolphin Delivery Ltd.,
[1986] 2 S.C.R. 573 at 602-603

Leroux v. Co-operators General Insurance Co. (1989),
71 O.R. (2d) 641 at 649 and 655 (Ont. H.C.)

Hockey v. Hockey (1989), 69 O.R. (2d) 338 at 340
(Ont. H.C.)

(ii) Women's Economic Disadvantage is a Sex Equality Issue

43. Women are economically disadvantaged relative to men for many reasons, including:

- (a) differential work patterns as compared to men during marriage or marriage-like relationships, particularly where the relationship ends in separation;
- (b) lack of financial recognition of and compensation for women's contribution to their family and society through work in the home, including child care;
- (c) pay inequity; and
- (d) employment inequity.

Rosalie Abella, Equality in Employment: Royal Commission Report (1984), pp. 27-32, 55-60, and 71-74

Statistics Canada, 1986 Census of Canada: Women and the Labour Force, supra, pp. 7, 18, 21-30, and 33-34

Working Group on Employment Equity, Ministry of Citizenship, Ontario, Status Report: Women, supra, pp. ii-v, 2-3, 8, and 23-27

44. Economic disadvantage affects all aspects of women's lives, from matters such as dignity and respect, to housing and nutrition, to educational and employment opportunities.

Rosalie Abella, Equality in Employment: Royal Commission Report (1984), pp. 24-26, 132-133, and 138-139

Statistics Canada, Women in Canada: A Statistical Report, supra, pp. 27-31, 45-48

Kevin Collins, Women and Pensions, supra, p. 58

45. This economic disadvantage contributes to placing women typically in a less powerful bargaining position relative to men in the negotiation of spousal agreements. In the family law context, women's economic and social inequality, and therefore unequal bargaining power, has led women to enter agreements by which women lose entitlement to the full benefit of laws designed to address their economic disadvantage, such as the credit splitting provisions of the Canada Pension Plan.

46. Women experience economic disadvantage by virtue of their gender. Women are denied employment or promotions, and paid less or not at all for their work because women and the work women have traditionally performed, both in and out of the paid work force, have historically been relegated to an inferior social status and thereby undervalued. Further, historically women have been made primarily responsible for the unpaid work of homemaking and child care. Despite increasing labour force participation, women continue to be allocated primary responsibility for this work and encouraged or limited so as to make this work their first priority.

Rosalie Abella, Equality in Employment: Royal Commission Report (1984), pp. 24-28, 177-178, and 232-249

Statistics Canada, 1986 Census of Canada: Women and the Labour Force, supra, pp. 18 and 30

Working Group on Employment Equity, Ministry of Citizenship, Status Report: Women, pp. 16-17, and 23-26

47. The Supreme Court of Canada in Brooks v. Canada Safeway recognized that discrimination against pregnant women is a form of sex discrimination.

"An unfair disadvantage may result when the costs of an activity from which all society benefits are visited upon a single group of persons.... Removal of such unfair impositions [imposing a disproportionate amount of the costs of pregnancy] upon women and other groups in society is a key purpose of anti-discrimination legislation."

Brooks v. Canada Safeway Limited, [1989], 1 S.C.R. 1219 at 1238

48. The unanimous court went on to reason,

"Combining paid work with motherhood and accommodating the child bearing needs of working women are ever-increasing imperatives. That those who bear children and benefit society as a whole thereby should not be economically or socially disadvantaged seems to bespeak the obvious."

Brooks v. Canada Safeway Limited, [1989], supra, at 1243

49. For activity to constitute sex discrimination it is not necessary that all women be disadvantaged, or that all individuals who might be disadvantaged are women. It is sufficient that the practice or law has the effect of limiting societal benefits and the opportunity to acquire those benefits on the basis of a characteristic related to gender.

Brooks v. Canada Safeway Limited, supra, at 1247 - 1249

Janzen v. Platy Enterprises Ltd., [1989] 1 S.C.R. 1252 at 1290

50. As with child bearing, the care of children and other work in the home are vital functions that benefit society as a whole. It is to "bespeak the obvious" to say that the economic and social disadvantage of those who bear children, care for children and do other work in the home is a significant sex equality problem. Accordingly, because the credit splitting provisions of the Canada Pension Plan address this aspect of sex inequality, those provisions are an area of the law that clearly invokes the constitutional equality rights of women.

(iii) Role of Sections 55, 55.1 and 55.2 of the Plan in Promoting and Enhancing Section 15 Charter Rights of Women

51. Governments have taken various affirmative steps to address the sources of women's economic disadvantage, including human rights legislation, pay equity and employment equity legislation, employment standards legislation, and family law. In each of these areas, legislation is aimed at, among other matters, recognizing the dignity and worth of women and valuing women's contributions to society.

See for example:

Canadian Human Rights Act, R.S.C. 1985, c.H-6, as amended; Preamble

Human Rights Code, 1981, S.O. 1981, c.53, as amended; s. 2

Family Law Act, 1986, S.O. 1986, c.4, as amended; Preamble and s. 5(7)

An Act to Provide for Pay Equity, S.O. 1987, c.34, as amended; Preamble

52. Human rights legislation, in particular, has been interpreted to constitute fundamental law setting important public policy. There are frequently express or implied restrictions on contracting out of rights provided in such legislation. Further, the courts have recognized that section 15 of the Charter and equality promoting legislation have a common purpose, and accordingly require a common approach to interpretation.

Canadian National Railway Co. v. Canada
(Canadian Human Rights Commission),
supra, at 1134 and 1136

Andrews v. Law Society of British Columbia,
supra, at 175

Brooks v. Canada Safeway Limited, supra,
at 1233

53. It is submitted that sections 55, 55.1 and 55.2 of the Canada Pension Plan promote equal access to economic resources on the basis of sex, and thereby promote equality as comprehended by section 15 of the Charter.

(a) Sections 55 and 55.1 promote equality by financially recognizing women's contributions to marriage and society through increased entitlement to pension and other benefits, made available through a program designed to be comprehensive and promote a minimum income security.

(b) Section 55.2 promotes equality by recognizing the vulnerability of women as a group to losing these

minimum benefits through the process of negotiating a separation or other spousal agreement, due to women's unequal bargaining power in this context, and ensuring that women receive full benefit of the credit splitting provisions and therefore the pension benefits program.

(c) Sections 55.1 and 55.2 taken together are an important affirmative measure in remedying some significant areas of women's economic and social disadvantage associated with the historic social, economic and legal devaluation of women and women's work.

54. Because sections 55, 55.1 and 55.2 improve pension entitlement and thereby promote equal access to economic resources for elderly and disabled women, who are among the most economically disadvantaged, these provisions also promote equality for women on the basis of age and disability.

(iv) Section 15 of the Charter Mandates an Interpretation of Sections 55.1 and 55.2 of the Plan that Promotes Women's Equality

55. "...the values embodied in the Charter must be given preference over an interpretation [of a statute] which would run contrary to them."

Hills v. Attorney-General of Canada
(1988), 48 D.L.R. (4th) 193 at 227 (S.C.C.)

56. Where a statute can reasonably bear an interpretation that conforms with the Charter, it should be interpreted in this

manner.

Leroux v. Co-operators General Insurance Co.,
supra, at 655

Re: Attorney-General of Manitoba and Metropolitan
Stores (MTS) Ltd. et. al. (1987), 38 D.L.R. (4th)
321 at 331 (S.C.C.)

Retail, Wholesale & Department Store Union
Local 580 v. Dolphin Delivery Ltd., supra,
at 602-603

57. Section 15 of the Charter guarantees the right to equal protection and benefit of the law without discrimination. Discrimination has been defined as:

"....a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits and advantages available to other members of society."

Andrews v. Law Society of British Columbia,
supra, at 174

58. Section 15 of the Charter "has a large remedial component".

Andrews v. Law Society of British Columbia,
supra, at 171

59. It is submitted that section 15 of the Charter mandates an interpretation of sections 55.1 and 55.2 of the Plan that would render unenforceable a provision of a spousal agreement to the extent that it can be interpreted to waive, directly or indirectly, the right to apply for, obtain or benefit from a division of unadjusted pensionable earnings where the criteria in

section 55.2 (3) have not been met.

(a) Section 15 of the Charter provides constitutional support for the equality promoting objectives of sections 55.1 and 55.2 and the provisions themselves. The objects of the provisions should therefore be given special consideration in the interpretation of section 55.2.

(b) Section 15 of the Charter sets fundamental public policy that provides constitutional support for the policy underlying sections 55.1 and 55.2 of the Plan. Where policy set by statute advances constitutional values, the significance of the policy for the community as a whole and the importance of giving it full effect are greatly enhanced.

(c) Section 15 of the Charter requires that section 55.2 be interpreted in a manner that furthers women receiving full benefit of the credit splitting provisions and thereby the benefit of the Plan. This is because this interpretation reduces the economic disadvantage of women associated with women's contributions to society through child bearing, care of children and other work in the home. An interpretation that promotes equal benefit of the Canada Pension Plan on the basis of sex, age and disability promotes equal benefit and protection of the law as comprehended by section 15 of the Charter.

(d) It is inconsistent with section 15 of the Charter to interpret section 55.2 of the Plan to give effect to a waiver of unadjusted pensionable earnings where the criteria in subsection 55.2 (3) have not been met because:

i) women would be denied equal benefit of the comprehensive, compulsory nature of the Plan as a whole, and thereby economically disadvantaged. Whereas employees are guaranteed the benefit of this income security program through the requirement of compulsory contribution by employees and employers, those who can benefit from the Plan through credit splitting, primarily women, would be denied this protection.

ii) a larger class of women would be disadvantaged from receiving the benefit of the Plan and therefore from receiving financial recognition for their unpaid work that benefits society as a whole;

iii) a large class of women would be disadvantaged through denial of the benefit of the credit splitting provisions, and therefore the benefit of the Plan, despite ordering their affairs in a manner commonly understood to preserve the credit splitting right.

PART IV: ORDER REQUESTED

60. The Intervener seeks a declaration that to be consistent with section 15 of the Charter, section 55.2 of the Plan is to be interpreted so as to render unenforceable a provision of a spousal agreement to the extent that it can be interpreted to waive, directly or indirectly, the right to apply for, obtain or benefit from a division of unadjusted pensionable earnings where the criteria in subsection 55.2 (3) have not been met.

ALL OF WHICH is respectfully submitted.

DATE: August 1990.

Helena Orton

Carole Curtis

Counsel for the Intervener,
Women's Legal Education and
Action Fund

SCHEDULE "A"

List of Authorities

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SCHEDULE "B"

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