Date: 20090318

Docket: A-402-08

Citation: 2009 FCA 90

CORAM: **EVANS J.A.**
RYER J.A.
TRUDEL J.A.

BETWEEN:

ERIKA BRIDGET DILKA

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at Winnipeg, Manitoba, on March 18, 2009.

Judgment delivered from the Bench at Winnipeg, Manitoba, on March 18, 2009.

REASONS FOR JUDGMENT OF THE COURT BY: RYER J.A.

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REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Winnipeg, Manitoba, on March 18, 2009)

RYER J.A.

[1] This is an application for judicial review of a decision of the Pension Appeals Board (the "Board"), dated June 30, 2008, dismissing the applicant's appeal from a decision of the Review Tribunal which denied her claim for survivor's pension under paragraph 44(1)(*d*) of the *Canada Pension Plan*, R.S.C. 1985, c. C-8, (the "CPP") on the basis that she was not the survivor of a deceased contributor, Mr. Richard Lovell, who died on March 8, 2005.

[2] Paragraph 44(1)(*d*) of the CPP permits a survivor of a deceased contributor to apply for a survivor's pension when certain conditions, none of which is relevant in the circumstances, are met. That provision reads as follows:

> (*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;

> *d*) sous réserve du paragraphe (1.1), une pension de survivant doit être payée à la personne qui a la qualité de survivant d'un cotisant qui a versé des cotisations pendant au moins la période minimale d'admissibilité, si le survivant :
>
> (i) soit a atteint l'âge de soixante-cinq ans,
>
> (ii) soit, dans le cas d'un survivant qui n'a pas atteint l'âge de soixante-cinq ans :
>
> (A) ou bien avait au moment du décès du cotisant atteint l'âge de trente-cinq ans,
>
> (B) ou bien était au moment du décès du cotisant un survivant avec enfant à charge,
>
> (C) ou bien est invalide;

[3] Subsection 42(1) of the CPP defines a survivor in relation to a deceased contributor (the "survivor") as the person who was married to the contributor at the time of the contributor's death unless there was a person who was the common-law partner, within the meaning of subsection 2(1) of the CPP ("common-law partner"), of the contributor at the time of the contributor's death. In that

event, the survivor will be the common-law partner and not the spouse. (See *Carter v. Canada (Minister of Social Development)*, 2006 FCA 172.)

[4] In this case, it is clear that Mr. Lovell was unmarried at the time of his death. The issue is whether the applicant was the survivor of Mr. Lovell because she was his common-law partner at the time of his death. The definition of common-law partner reads as follows:

"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.	«conjoint de fait » La personne qui, au moment considéré, vit avec un cotisant dans une relation conjugale depuis au moins un an. Il est entendu que, dans le cas du décès du cotisant, « moment considéré » s'entend du moment du décès.

[5] To establish that she was the common-law partner of Mr. Lovell at the time of his death, the applicant is required to prove, on a balance of probabilities, that she cohabited with Mr. Lovell in a conjugal relationship for a continuous period of at least one year prior to his death.

[6] The Board carefully considered whether the applicant met the definition of common-law partner in light of the evidence that was placed before it, including the testimony of the applicant and her son. The Board noted that the applicant and Mr. Lovell had lived together for around four years but had maintained separate residences since October of 1987. The Board found that while there had been considerable interaction between the applicant and Mr. Lovell since October of 1987, they had not held themselves out as being married or in a common-law relationship. In

particular, they described themselves to tax and social welfare authorities as “single” and not as being in a common-law relationship.

[7] In considering the issue of whether the applicant and Mr. Lovell were cohabiting in a conjugal relationship, the Board made specific reference to the decision of Binnie J. of the Supreme Court of Canada in *Hodge v. Canada (Minister of Human Resources Development)*, [2004] 3 S.C.R. 357, quoting paragraph 42 of that decision, which reads as follows:

> 42 The respondent terminated cohabitation and cohabitation is a constituent element of a common law relationship. “Cohabitation” in this context is not synonymous with co-residence. Two people can cohabit even though they do not live under the same roof and, conversely, they may not be cohabiting in the relevant sense even if they are living under the same roof. Such periods of physical separation as the respondent and the deceased experienced in 1993 did not end the common law relationship if there was a mutual intention to continue. I agree with the observation of Morden J.A. in *Re Sanderson and Russell* (1979), 24 O.R. (2d) 429 (C.A.), at p. 432, that, subject to whatever provision may be made in a statute, a common law relationship ends “when either party regards it as being at an end and, by his or her conduct, has demonstrated in a convincing manner that this particular state of mind is a settled one”.

[8] Having considered the evidence in light of the statutory definition of common-law partner and the teaching of the Supreme Court of Canada in *Hodge*, the Board concluded that the applicant had failed to establish, on a balance of probabilities, that she had cohabited with Mr. Lovell in a conjugal relationship for a continuous period of one year before his death. Accordingly, the Board dismissed the applicant’s appeal from the decision of the Review Tribunal denying her application for a survivor’s pension.

[9] The applicant requests that this Court set aside the decision of the Board denying her claim for a survivor's pension. The ground upon which the application is based is that the Board erred in finding that the applicant was not the survivor of Mr. Lovell, because she was not his common-law partner at the time of his death.

[10] This ground alleges that the Board erred in the application of the legal elements of the definition of common-law partner to the factual circumstances of the applicant. It raises a question of mixed fact and law that is reviewable on the standard of reasonableness unless the question contains an extricable legal issue, in which event the standard of review will depend upon the nature of the extricable legal issue (see *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190). The applicant has not alleged that the question raised by this ground contains any such extricable legal issue.

[11] *Dunsmuir* also informs that the reasonableness standard requires this Court to show deference to, and not interfere with, a decision of the Board that falls within a range of acceptable outcomes which are defensible in respect of the facts and law.

[12] We have considerable sympathy for the applicant. However, having reviewed her written materials and heard her presentation, we are not persuaded that the Board's conclusion that she was not Mr. Lovell's common-law partner at the time of his death was outside the range of possible outcomes that are defensible in respect of the facts and law. The Board's findings that the applicant and Mr. Lovell did not hold themselves out as married or in a common-law relationship and that

they represented themselves to tax and social welfare authorities as “single” are supported by the record that was before the Board and provide a reasonable basis, in fact and law, for the Board’s decision.

[13] For the foregoing reasons, the application will be dismissed, without costs.

"C. Michael Ryer"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-402-08
(APPLICATION FOR JUDICIAL REVIEW OF A DECISION OF THE PENSION APPEALS BOARD, DATED JUNE 30, 2008)	
STYLE OF CAUSE:	ERIKA BRIDGET DILKA v. ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	WINNIPEG, MANITOBA
DATE OF HEARING:	MARCH 18, 2009
REASONS FOR JUDGMENT OF THE COURT BY:	(EVANS, RYER and TRUDEL JJ.A.)
DELIVERED FROM THE BENCH BY:	RYER J.A.

APPEARANCES:

Erika Bridget Dilka	SELF-REPRESENTED APPLICANT
Joël Robichaud	FOR THE RESPONDENT

SOLICITORS OF RECORD:

	FOR THE APPLICANT
John H. Sims, Q.C. Deputy Attorney General of Canada	FOR THE RESPONDENT