Miller (*Suppliant*) *v.* **The Queen** (*Respondent*)

Walsh J.—Calgary, June 3; Ottawa, July 10, 1970.

Public Service Superannuation—Member of armed services joining public service after discharge—Elective contributions for superannuation—Whether entitling to additional death benefit—Public Service Superannuation Act, 1953-54 (Can.), c. 64, s. 39(1)(e)—"Participant", meaning.

Following his discharge from the armed forces after more than five years' service *M* was employed in the public service. As provided by s. 4(1)(*f*) of the *Public Service Superannuation Act* contributions were made from his salary to the superannuation account. Prior to his discharge from the armed forces he had elected to be a participant under s. 41(1) of the Act, and accordingly deductions of $1.20 a month were made from his service pension as required by s. 42 of the Act and s. 66(2) of the Regulations. Following *M*'s death in 1963 his widow received the basic benefit provided by s. 43(1) of the Act but nothing in respect of his elective contributions of $1.20 a month (which were reimbursed to his estate).

Held, his widow was not entitled to an additional death benefit in respect of *M*'s elective contributions. An elective contributor is not a "participant" under subparagraph (iv) of s. 39(1)(*e*) of the Act if he is a "participant" under subparagraph (i), (ii) or (iii).

PETITION of right.

M. L. Moore for suppliant.

S. Switzer for respondent.

WALSH J.—Suppliant is the widow and executrix of the estate of the late George John Miller who died in Calgary, Alberta on July 14, 1963. He had been a private in the Canadian Army (Regular) until his discharge on June 26, 1958 when he became employed as a civil servant in the Department of National Defence. At first he was employed occasionally as a casual labourer but on April 11, 1960 he became a prevailing rate employee. On or about the 1st day of June, 1962, he was designated by the Governor in Council as a contributor in accordance with section 4(1)(*f*) of the *Public Service Superannuation Act* and thereupon made contributions to the Superannuation Account from his salary until the date of his death,

and for the same period he also made contributions to the Consolidated Revenue Fund pursuant to section 42 of the Act as a public service participant.

On June 2, 1958 the deceased, having been a member of the regular forces for five years or more, elected to continue to be a participant under the provisions of section 41(1) of the Act upon the termination of his service and completed the form prescribed by section 70 of the Public Service Superannuation Regulations, P.C. 1956-1914, and thereafter deductions of $1.20 per month were made from his pension to cover his contributions as an elective regular forces participant from July 1, 1958 to July 14, 1963, the date of his death, in purported compliance with section 42 of the Act and section 66(2) of the Regulations.

In September or October 1963, the suppliant was, pursuant to section 43(1) of the Act, paid the basic benefit with respect to which the last contribution payable by the deceased as a participant described in section 39(1)(*e*)(i) of the Act was calculated. On August 26, 1963, the deceased's estate was paid the sum of $16.80 as a refund of the contributions that had been withheld from his pension in purported compliance with section 42 of the Act and section 66(2) of the Regulations during the period from June 1, 1962, when he had been designated by the Governor in Council as a contributor in accordance with section 4(1)(*f*) of the Act, to July 14, 1963 when he died.

Suppliant claims to be paid the death benefit with respect to deceased's contributions made as an elected regular forces participant in addition to the death benefit she was paid under section 43(1) of the Act as a result of his having been a participant described in section 39(1)(*e*)(i). It is agreed that if suppliant were entitled to the additional death benefit this would amount to $3,000.

Since the decision of this case depends entirely on the interpretation of the statute and regulations made by virtue thereof, it will now be convenient to cite the relevant provisions, as amended to the dates in question.

Public Service Superannuation Act

4. (1)[1] Every person employed in the Public Service, other than

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(*f*) a prevailing rate, seasonal or sessional employee, a postmaster or assistant postmaster in a revenue post office or a person employed as a clerk of works, unless designated by the Governor in Council individually or as a member of a class,

is required to contribute to the Superannuation Account, by reservation from salary or otherwise,

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39. (1)[2] In this Part,

* * *

[1] S. of C. 1952-53, c. 47, as amended by S. of C. 1960, c. 38.
[2] S. of C. 1953-54, c. 64.

(*d*) "elective" as applied to a participant means that the participant comes within subparagraph (iv) of paragraph (*e*);

(*e*) "participant" means

(i) a person who is required by subsection (1) of section 4 to contribute to the Superannuation Account,

(ii) an employee of a Crown corporation who is required to contribute to the Superannuation Account in respect of current service or who, but for subsection (2) of section 4, would be required so to contribute,

(iii) a member of the regular forces, and

(iv) a person not coming within subparagraph (i), (ii) or (iii) who has made an election under section 40 or 41 and continues to contribute under this Part,

* * *

(*h*) "regular forces participant" means a participant who is a member of the regular forces or who, having ceased to be such a member, continues to be a participant by virtue of an election made under section 41;

* * *

41. (1)[3] A regular forces participant who has been a member of the regular forces substantially without interruption for five years or more or has been a participant under this Part without interruption for five years or more may, within one year before such time as he ceases to be such a member, elect to continue to be a participant under this Part after that time.

42.[4] Every participant shall contribute to the Consolidated Revenue Fund at the rate of ten cents per month for every two hundred and fifty dollars in the amount of his basic benefit, or, in the case of elective participants and participants who are absent from duty, such contributions as the regulations prescribe.

43. (1)[4] On the death of a participant there shall be paid to the persons and in the manner specified in this Part, the amount of the basic benefit of the participant with respect to which the last contribution payable under this Part by the participant was calculated.

46. (1)[4] There shall be issued to elective participants a document in such form as the regulations prescribe as evidence that they are participants under this Part.

(2) An elective participant ceases to be a participant if any contribution payable by him under this Part is not paid within thirty days after the due date thereof.

50. (1)[4] The Governor in Council may make regulations for carrying the purposes and provisions of this Part into effect and, without restricting the generality of the foregoing, may make regulations,

* * *

(*j*) prescribing forms for the purposes of this Part.

Public Service Superannuation Regulations[5]

66. (2) Where a pension is or becomes payable under the *Defence Services Pension Act* to a regular forces participant, the contributions required to be paid by him shall be reserved from that pension when it becomes payable to him.

Section 77(1) of the Regulations provides that a form shall be issued to elective participants as evidence that they are participants under Part II of the Act and sets out the form to be so issued (this is the form provided

[3] S. of C. 1956, c. 44.
[4] S. of C. 1953-54, c. 64.
[5] P.C. 1956-1914 SOR/57-13.

for in section 46(1) of the Act but the parties were unable to ascertain whether such a form was ever issued to the deceased as it should have been). This form has a clause reading as follows:

RE-EMPLOYMENT OR RE-APPOINTMENT	(*a*) This document ceases to have any effect and the benefit described herein is no longer payable on and after the day on which the participant named herein ceases to be an elective participant and becomes a participant (other than an elective participant) under Part II of the *Public Service Superannuation Act.*

The same form, however, also contains another clause reading as follows:

PART II AND THE REGULATIONS	Part II of the *Public Service Superannuation Act* and the Regulations made thereunder apply in the same manner and to the same extent as if the provisions thereof were set out herein; and if there is any conflict between Part II of the *Public Service Superannuation Act* and the Regulations made thereunder on the one hand and this document on the other hand, the provisions of the Act and the Regulations prevail.

Suppliant's attorney argued that the terms "participant" and "elecuve participant" are not mutually exclusive, that the deceased had fulfilled all the requirements to become an elective participant, and that nowhere in the statute does it say that this capacity ceases when he becomes a participant under other sections of the statute. He fulfilled all the requirements of section 41(1) when he made his election, his contributions were made by deductions from his pension under the provisions of section 42, which is mandatory since it uses the words "shall contribute", and therefore, under section 43(1) there "shall be paid" the basic benefit provided for. He argued that the only situation in which the elective participation ceases to take effect is set out in section 46(2) in the event that his contributions are not paid within thirty days after the due date thereof, which does not apply in the present case, and since this article spells out that in that event he ceases to be a participant, and does not set out any other circumstances in which he would cease to be a participant, he still remained an elective participant and suppliant was entitled to the benefits provided for in section 43(1) on his death. The fact that she was unable to establish that he was given the document provided for in section 46(1) does not prejudice her claim, as even in the absence of such a document it is admitted by respondent that his contributions as an elective participant were made right up to the date of his death, and that he had become an elective participant in accordance with the provisions of the Statute and Regulations.

We can at once dispose of any argument to the effect that suppliant had some sort of vested right in the benefit claimed arising out of the fact that respondent continued to receive contributions, and in fact make deductions for them from deceased's pension right up to the date of his death, arising out of his election under section 41(1). We are not dealing here with some

form of contract entered into with an insurance company, or perhaps even with a private employer, who, having received the payment in error as respondent now contends, might perhaps be estopped from raising this as a defence, since estoppel does not operate against the Crown. This issue was fully and well dealt with in a somewhat similar, though converse, case by Kearney J.[6] where the deceased had signed the form provided so as to elect not to receive the benefit, which form had apparently been mislaid or overlooked, so that deductions continued to be made from his pay-cheques for the premiums. At his death, the widow claimed the benefit to which these payments would have entitled her but for his election not to receive it. In rendering judgment, Kearney J. said (at page 143):

> . . . it does not matter whether or not, or for how long, responsible officers in the Department of Finance, or the Post Office Department, or elsewhere, regarded the husband of the suppliant as a participant whose heirs would be entitled to share in the supplementary death benefits. What certain members of the Civil Service, or the husband of the suppliant, or she herself thought she was entitled to receive can have no bearing on this issue. As clearly pointed out by counsel for the respondent, the suppliant's rights or lack of rights is a matter of law to be determined in accordance with the provisions of Part II of the Act, and nothing else is relevant.

Further on, at page 145, Kearney J. states:

> . . . In the case of *Millet v. The Queen,* which is very similar to the present one and which concerned a claim under *The Veterans Insurance Act,* S. of C. 1944-45, c. 49 and amendments, Fournier J. considered the question of whether the Crown, having accepted payment of premiums, was estopped from alleging that the conditions set out in the insurance policy had lapsed or become null and void.
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> The *Veterans Insurance Act* and its regulations, in my opinion, is the law of the land applicable to this contract of insurance. The contention that these regulations did not bind the parties or have force of law is not based on any sound reason. They are not repugnant to or beyond the reasonable contemplation or purview of the terms of the Act. This being the case, I would be inclined to follow the principle laid down in *Phipson on Evidence,* 8th ed., p. 667, in fine, viz:—
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> > Estoppels of all kinds, however, are subject to one general rule: they cannot override the law of the land. Thus, where a particular formality is required by statute, no estoppel will cure the defect.

The continued deduction of the elective contributions therefore cannot in itself create a right to the benefit which the deceased and suppliant thought he was acquiring by virtue of these payments, in addition to the benefit that he did acquire and which suppliant received as a result of further contributions which he subsequently made as a civil servant designated by the Governor in Council under the provisions of section 4(1)(*f*) and section 42 of the Act as a public service participant, unless authority for this can be found in the statute itself and the regulations made thereunder.

It is unfortunate that the Act does not spell out clearly that no duplication of death benefits can be made nor can contributions be received or deducted

[6] *Gamble v. The Queen* [1960] Ex.C.R. 138.

from pension or salary which would result in two such benefits becoming payable, but instead leaves this to be inferred from the provisions of the statute and regulations taken as a whole.

It is clear that following June 1, 1962, when, according to the agreed statement of facts, the deceased was designated by the Governor in Council as a contributor in accordance with section 4(1)(*f*) of the Act he was obliged to make contributions to the Superannuation Account as a civil servant under section 42 of the Act and was clearly a participant within the definition of section 39(1)(*e*)(i). There is no dispute about the payment of the benefit resulting from this participation which the suppliant received.

There is also no doubt that up to this date deceased was properly an elective participant within the definition of section 39(1)(*d*), having made his election in accordance with section 41(1) and the payments provided for in section 42.

The issue to be decided is whether his right as an elective participant ceased of necessity as of June 1, 1962, when, as a prevailing rate employee, he was designated by the Governor in Council as a contributor under the provisions of section 4(1)(*f*) of the Act despite the fact that the Act does not specifically so state. I believe that, as respondent contends, the definition of section 39(1)(*e*) provides the answer. This section, defining "participant", sets out in subparagraphs (i), (ii) and (iii) three classes of persons who are participants and the deceased came within class (i) following June 1, 1962. Following the word "and" at the end of subparagraph (iii) we then have subparagraph (iv) stating:

> (iv) a person not coming within subparagraph (i), (ii) or (iii) who has made an election under section 40 or 41 and continues to contribute under this Part,
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> * * *

It seems clear that the deceased could not, after June 1, 1962, be considered as "a person not coming within subparagraph (i), (ii) or (iii)", as he came within subparagraph (i) following that date, and therefore the fact that he came within the second part of this subparagraph and had previously made an election under section 41(1) and continued to contribute becomes irrelevant. Some argument was devoted to the use of the word "and" at the end of subparagraph (iii) rather than the word "or" which might appear to be more appropriate in the context, or perhaps neither word might have been used, especially as the word "and" does not appear at the end of subparagraph (i) or subparagraph (ii). Clearly, a reading of the section as a whole indicates that a person does not have to have all four qualifications in order to be a "participant" within the meaning of the definition, as it appears that these are alternative qualifications, and it also appears that the use of the word "and" at the end of subparagraph (iii) cannot be interpreted as meaning that a person must possess the qualifications of subparagraph (iii) as well as subparagraph (iv), or of one of the subparagraphs (i), (ii) or (iii) as well as subparagraph (iv), since subparagraph (iv) itself clearly refers to its application to "a person not coming within subparagraphs (i), (ii) or (iii)"

and therefore must be an alternative qualification and not an additional one, which makes the use of the word "and" difficult to explain except as a case of unfortunate draftsmanship. Deceased, therefore, who would otherwise qualify under subparagraph (iv) cannot do so by virtue of the provisions of that very subparagraph because of his qualification under subparagraph (i), from which it can be inferred that at his death he did not remain qualified for both benefits.

While the form provided for in the Regulations cannot in any way change the law if there is any conflict between it and the Act or Regulations, as the statement to this effect in the form itself admits, it is nevertheless of interest to note that the Governor in Council, in proclaiming this form, has adopted the interpretation given to the Act by respondent, with which I concur, by providing that the form designating the participant as an elective participant ceases to have any effect and the benefit provided is no longer payable on and after the day on which the participant named ceases to be an elective participant and becomes a participant other than an elective participant. The form, thus, apparently rules out any thought of duplication of qualifications or of benefits. The fact that it has not been established that deceased was ever given this form to which he was entitled has no bearing on the issue, for while, if he had been given this form, the fact that the benefit could not be duplicated would have been called to his attention, it makes no difference whether he thought he was entitled to it or not unless he was so entitled by the provisions of the Act itself and the regulations made thereunder.

Under the rather unusual circumstances of this case where, but for an apparent error on the part of the employees or agents of respondent, the deductions for deceased's contribution as an elective participant under section 41(1), which have now been refunded to his estate, should have been stopped on June 1, 1962, upon his designation as a contributor by the Governor in Council, so that both he and the suppliant were therefore misled into believing that, as these deductions were still continued, she would at his death be entitled to the benefit due as a result thereof, I believe that although no rights can have been created for her by this error, the present proceedings would never have been brought had this error not occurred and, therefore, in dismissing her action, I nevertheless exercise the discretion allowed me with respect to costs, and dismiss same without costs.