S.C.C. COURT FILE NO. 23636

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)

BETWEEN:

JAMES EGAN and JOHN NORRIS NESBIT

APPELLANTS
(PLAINTIFFS)

AND:

HER MAJESTY THE QUEEN IN RIGHT OF CANADA

RESPONDENT
(DEFENDANT)

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I N D E X

PART I - STATEMENT OF FACTS

Introduction

1. This appeal is from the judgment of the Federal Court of Appeal in which the majority (Mr. Justices Robertson and Mahoney) in separate reasons found the definition of "spouse" in Old Age Security Act, R.S.C. 1970, c. 0-6 (the "Act") was not discriminatory pursuant to section 15 of the Canadian Charter of Rights and Freedoms (the "Charter"). Mr. Justice Linden in dissent, found that the definition of "spouse" in the Act was discriminatory contrary to section 15 of the Charter and that such discrimination was not justified pursuant to section 1 of the Charter.

Reasons for Judgment, Federal Court of Appeal, Case on Appeal, Vol. 4, pp. 564-659.

Background

2. The Appellants James Egan ("Egan") and John Norris Nesbit ("Nesbit") are a gay couple. They have resided together, in an intimate relationship, since 1948. They share bank accounts, credit cards and property ownership and, by their wills, they have appointed each other their respective executors and beneficiaries. To their families and friends, they refer to themselves as partners and, at one point, they publicly exchanged rings.

Reasons for Judgment, Federal Court of Appeal, Case on Appeal, Vol. 4, p. 565.

3. On September 14, 1986, Egan reached 65 years of age.

Agreed Statement of Facts, Case on Appeal, Vol. 3, p. 301, para. 7.

4. On October 1, 1986, Egan became eligible to receive Old Age Security and guaranteed income supplement benefits and did receive such benefits at the time pursuant to the Act.

Agreed Statement of Facts, Case on Appeal, Vol. 3, p. 302, para. 8.

Reasons for Judgment, Federal Court of Appeal, Case on Appeal, Vol. 4, p. 565.

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5. The Act also provides for a Spousal Allowance to be paid to the spouse of a pensioner where the former is between 60 and 65 years of age and the couple's combined income falls below a fixed amount.

Reasons for Judgment, Federal Court of Appeal, Case on Appeal, Vol. 4, p. 565.

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6. Following an exchange of correspondence with the Department of National Health & Welfare, Nesbit applied for a Spousal Allowance.

Reasons for Judgment, Federal Court of Appeal, Case on Appeal, Vol. 4, p. 565.

Agreed Statement of Facts, Case on Appeal, Vol. 3, pp. 302-303, paras. 9, 10, 11 and 12.

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7. In the application for a Spousal Allowance, Nesbit described Egan as his spouse. The application was rejected solely on the basis that the relationship between Nesbit and Egan was of a homosexual nature and thus did not meet the definition of "spouse" prescribed by section 2 of the Act which reads:

"Spouse", in relation to any person, includes the person of the opposite sex who is living with that person, having lived with that person for at least one year, the persons have publicly represented themselves as husband and wife."

Reasons for Judgment, Federal Court, Trial Division, Case on Appeal, Vol. 4, p. 559.

Reasons for Judgment, Federal Court of Appeal, Case on Appeal, Vol. 4, p. 565.

Agreed Statement of Facts, Case on Appeal, Vol. 3, p. 303, paras. 12 and 13.

Findings of the Courts Below

8. The trial Judge concluded that the challenged law did not infringe the Appellants' section 15 rights as it drew a distinction based on "spousal status" rather than "sexual orientation" and accordingly he did not need to consider section 1 of the Charter.

Reasons for Judgment, Federal Court, Trial Division, Case on Appeal, Vol. 4 p. 562.

9. The majority of the Federal Court of Appeal found, *inter alia*, that:

(a) Sexual orientation is analogous to the prohibited grounds of discrimination enumerated in section 15(1) of the Charter;

Reasons for Judgment of Robertson, J.A. and Mahoney, J.A., Federal Court of Appeal, Case on Appeal, Vol. 4., pp. 569 and 601.

(b) "Non-spousal" status not "sexual orientation" was the basis of the different treatment for the Appellants under the Act and, therefore, there was no discrimination;

Reasons for Judgment of Robertson, J.A. and Mahoney, J.A. Federal Court of Appeal, Case on Appeal, Vol. 4, pp. 590-592, 598-599 and 603-604.

(c) The rejection by this Court of the "similarly situated test" prohibited a finding that the Appellants had been discriminated against;

Reasons for Judgment of Robertson, J.A. and Mahoney, J.A. Federal Court of Appeal, Case on Appeal, Vol. 4., pp. 581-584, 587 and 604.

(d) Sexual orientation is both relevant and essential to the Appellants' argument and, therefore, the distinction raised is not based on an "irrelevant personal difference" as is required for discrimination.

Reasons for Judgment of Robertson, J.A., Federal Court of Appeal, Case on Appeal, Vol. 4, pp. 584-587.

(e) The legislative scheme does not have a disproportionate or more burdensome effect on same sex couples compared to other associations also categorized in the judgments as "non-spousal" such as aunt and niece or siblings living together and, therefore, is not discriminatory.

Reasons for Judgment of Robertson, J.A., Federal Court of Appeal, Case on Appeal, Vol. 4, pp. 591-598.

(f) The case involved an indirect challenge to the common law and statutory concept of marriage.

Reasons for Judgment of Robertson, J.A. and Mahoney, J.A. Federal Court of Appeal, Case on Appeal, Vol. 4., pp. 598-599 and 604.

10. As the majority concluded that the challenged law did not infringe the Appellants' section 15 rights, they did not consider whether the law could be justified under section 1 of the Charter.

11. Linden, J.A. in dissent held that:

(a) sexual orientation is an analogous ground to the grounds enumerated in section 15(1) because lesbians and gay men have been subject to pervasive discrimination, stereotyping and social ostracization;

Reasons for Judgment of Linden, J.A., Federal Court of Appeal, Case on Appeal, Vol. 4, p. 626.

(b) the definition of "spouse" in the Act directly discriminates against the Appellants on the basis of sexual orientation contrary to section 15(1) of the Charter;

Reasons for Judgment of Linden, J.A., Federal Court of Appeal, Case on Appeal, Vol. 4, pp. 637 and 644.

(c) the discrimination created by the definition of "spouse" in the Act cannot not be reasonably justified in a free and democratic society pursuant to section 1 of the Charter; and

Reasons for Judgment of Linden, J.A., Federal Court of Appeal, Case on Appeal, Vol. 4, pp. 649-650.

(d) the appropriate remedy is to read down the definition of "spouse" in section 2 of the Act by deleting the words "of the opposite sex" and reading in the words "or an analogous relationship" after the words "if the two persons publicly represent themselves as husband and wife".

Reasons for Judgment of Linden, J.A., Federal Court of Appeal, Case on Appeal, Vol. 4, pp. 658-659.

PART II - POINTS IN ISSUE

12. The Constitutional Questions were stated by Order of this Court as follows:

A. Does the definition of "spouse" in section 2 of the Act infringe or deny section 15(1) of the Charter?

B. If the answer above is "yes", is the infringement or denial demonstrably justified in a free and democratic society pursuant to section 1 of the Charter?

13. It is respectfully submitted that the answers to these questions are:

A. Yes;

B. No.

PART III - ARGUMENT

14. Decisions of this Court from Andrews through to Rodriguez provide for the following three step analysis in determining whether a law violates the Charter where section 15 is concerned.

(A) The first step is to determine whether there is an infringement of one of the rights to equality mentioned in section 15; the question essentially is whether the statute makes distinctions between groups or classes of persons based on personal characteristics.

(B) If such inequality is found the second step is to determine whether the inequality is discriminatory. This in turn requires a determination whether (i) the effect of the provision is to impose on certain persons or groups of persons a disadvantage or burden or to deprive them of an advantage or benefit; and (ii) whether that deprivation is imposed as a result of a personal characteristic listed in section 15(1) of the Charter or a similar or analogous characteristic.

(C) Where there is discrimination justifications are to be considered in light of section 1 of the Charter.

Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 141 at 182.

R. v. Turpin, [1989] 1 S.C.R. 1296 at pp. 1325-1335.

McKinney v. University of Guelph, [1990] 3 S.C.R. 229 at p. 278.

R. v. Swain, [1991] 1 S.C.R. 933 at p. 992, per Lamer, C.J.

Symes v. Canada, [1993] 4 S.C.R. 695 at p. 757.

Rodriguez v. British Columbia (Attorney General), [1993] 3 S.C.R. 519 at 544, per Lamer, C.J. dissenting in the result only.

15. The above principles, when applied to this case, reveal its relative simplicity:

(A) The impugned legislation makes distinctions based on personal characteristics; the majority of the Court of Appeal and the trial Judge said it was on the basis of whether one was a spouse or not; the dissent correctly said it was on the basis of sexual orientation - both are personal characteristics;

Reasons for Judgment of Robertson, J.A., Mahoney, J.A. and Linden, J.A., Court of Appeal, Case on Appeal, Vol. 4, pp. 598-599 and 605.

Reasons for Judgment of Martin, J. Federal Court, Trial Division, Case on Appeal, Vol. 4, p. 561.

(B) The distinction is discriminatory in that:

(a) it denies the same sex couple a benefit otherwise available to partners of the opposite sex; and

(b) if the distinction is based on sexual orientation that is an analogous and therefore prohibited

ground of discrimination under section 15 of the Charter;

(C) Any justification for this discrimination must be considered under section 1 of the Charter, not section 15, and no such justification exists.

An Inequality: The Distinction is Based on Sexual Orientation

16. The central issue in this case is whether the impugned law draws a distinction "based on" sexual orientation as the Appellants say, or "based on" spousal status as the majority of the Court below said.

17. In Rodriguez Chief Justice Lamer has already expressed agreement with the observation of Linden, J.A. in this case as follows:

> "I adopt ...the observations of Linden, J.A., who said in dissent in Egan ... :
>
> > 'While a distinction must be based on grounds relating to personal characteristics of the individual or group in order to be discriminatory, the words "based on" do not mean that the distinction must be designed with reference to those grounds. Rather the relevant consideration is whether the distinction affects the individual or group in a manner related to their personal characteristics ...'
>
> In other words, the difference in treatment must be closely related to the personal

characteristic of the person or group of persons."

Rodriguez, supra, at p. 555.

18. In the Court below Linden, J.A. said:

> "... the impugned distinction is drawn on the basis of whether partners in a relationship are of the same sex or "of the opposite sex". Strictly speaking, it is true that this is not a distinction based directly on sexual orientation, since being in a same sex relationship is not necessarily the defining characteristic of being gay or lesbian. Obviously, many lesbians and gay men may not be involved in relationships. **Nevertheless, the distinction in this case is based on a characteristic or matter related to sexual orientation, since it is lesbians and gay men who may enter into same sex relationships.** The words "of the opposite sex" used in the definition of spouse are specifically aimed at excluding lesbian and gay partners from eligibility for spouse's allowance benefits. Those words are not directed towards excluding same sex relationships such as brother-brother or sister-sister relationships since those relationships are excluded on the same basis that opposite sex relationships such as brother-sister relationships are excluded."
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> **Reasons For Judgment of Linden, J.A., Federal Court of Appeal, Case on Appeal, Vol. 4, p. 629.** [emphasis added]

19. It is difficult to understand how the trial Judge and the Court of Appeal could have come to the conclusion that the distinction was not on the basis of sexual orientation, given the following finding by the trial Judge, one that the Mahoney, J.A. accepted as "an unassailable conclusion of fact":

> "... it is fair to say that had Nesbit been a woman cohabiting with Egan substantially on

> the same terms as he in fact cohabited with Egan, he would have been eligible for the Spouse's Allowance."
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> **Reasons for Judgment of Martin, J., Federal Court, Trial Division, Case on Appeal, Vol. 4, p. 552.**
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> **Reasons for Judgment of Mahoney, J.A., Federal Court of Appeal, Case on Appeal, Vol. 4, p. 601.**

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20. This means that Nesbit was denied the Spousal Allowance because, while he was cohabitating "as husband and wife" with Egan, he was the same sex as Egan. Nesbit was not denied the benefit because he and Egan were cohabitating as siblings, friends or family members. Treating differently, persons of the same sex who represent themselves as a couple, from persons of the opposite sex who represent themselves as a couple, is a differentiation based on

20 sexual orientation.

21. Indeed the trial judge also said:

> "The legislation denies the financial benefits, the Spouse's Allowance, to **homosexual couples** which benefits are accorded to **heterosexual couples** where one spouse has reached the age of 65 and the other is between the age of 60 and 65..."
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> **Reasons for Judgment, Federal Court, Trial Division, Case on Appeal, Vol. 4. p. 559** [emphasis added].

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22. In conclusion the definition of "spouse" in the Act draws a distinction on the basis of a personal characteristic; sexual orientation. This satisfies the first branch of the section 15 test - there is inequality.

Discrimination: (i) Denies A Benefit

23. The Act is discriminatory because it denies a benefit, namely a Spousal Allowance, because of a personal characteristic. Mahoney, J.A. states:

> "... Nesbit has, by reason of the definition, been denied a benefit under the law equal to that to which an opposite sex common law spouse is entitled. The Appellants, as a couple, have likewise been denied that benefit."

Reasons for Judgment of Mahoney, J.A., Federal Court, Trial Division, Case on Appeal, Vol. 4, p. 601.

Discrimination: (ii) Sexual Orientation as an Analogous Ground

24. The impugned legislation is discriminatory because the personal characteristic "sexual orientation" is analogous to the enumerated grounds in section 15. The majority judgments of the Federal Court of Appeal rightly accepted the Respondents' concession that sexual orientation is analogous to the prohibited grounds of discrimination enumerated in section 15(1) of the Charter.

Reasons for Judgment of Robertson, J.A., and Mahoney, J.A., Federal Court of Appeal, Case on Appeal, Vol. 4, pp. 569 and 601.

See also: Toward Equality: the Response to the Report of the Parliamentary Committee on Equality Rights (1986.)

25. Furthermore, after a careful and thorough analysis, Linden, J.A. correctly came to the conclusion that "sexual orientation" is an analogous ground to those enumerated in

section 15(1) because lesbians and gay men are a historically disadvantaged group in our society. He states:

> "As with enumerated grounds such as race and sex, a person's sexual orientation has been a basis for discrimination and persecution throughout history. Gay men and lesbians are legally, economically, socially and politically disadvantaged. Lesbians and gay men endure the constant threat of verbal, physical, and sexual abuse. Harassment is not uncommon. For most of this century, certain forms of gay male sexual expression have been criminalized. Indeed, lesbians and gay men have often felt that they must conceal their lifestyles because of these difficulties. Certainly, gay men and lesbians have been excluded from aspects of public life in the past, including participation in the Armed Forces (*Douglas, supra; Meinhold v. U.S. (Dep't of Defense)*, [1993] W.L. 15899 (C.D. Cal.)). In short, lesbians and gay men suffer widespread stereotyping and prejudice in our society, as they have throughout history. Thus, both the weight of recent authority and simple justice leads me to the conclusion that sexual orientation is an analogous ground of discrimination for the purposes of subsection 15(1) of the Charter."

Reasons for Judgment of Linden, J.A., Federal Court of Appeal, Case on Appeal, Vol. 4, pp. 625-626.

26. There is a consensus in several recent lower court and tribunal decisions that sexual orientation is analogous to the enumerated grounds of discrimination in section 15(1) of the Charter.

Canada (Attorney General) v. Mossop (1990), 32 C.C.E.L. 276; 71 D.L.R. (4th) 661 (F.C.A.), at p. 293 (C.C.E.L.).

Veysey v. The Commissioner of Correctional Services of Canada (1989), 44 C.R.R. 364 at 371 (F.C.T.D.); aff'd on different grounds at 43 Admin. L.R. 316; 47 C.R.R. 394 (F.C.A.).

Brown and Vancouver Persons with AIDS Society v. B.C. (1990), 42 B.C.L.R. (2d) 294 at p. 310 (B.C.S.C.).

Haig and Birch v. Canada (Minister of Justice) (1991), 5 O.R. (3d) 245 at 247, aff'd (1992) 9 O.R. (3d) 495 (Ont. C.A.) at pp. 500-501.

Knodel v. British Columbia (Medical Services Commission) (1991), 58 B.C.L.R. (2d) 356 at 371 (B.C.S.C.).

Vriend v. A.G. Alberta (Unreported, Alta. Q.B., April 12, 1994).

Leschner v. Ontario (Board of Inquiry, Ontario Human Rights Act) (1992) 16 C.H.R.R. D/184.

Clinton v. Ontario Blue Cross, (Board of Inquiry, Ontario Human Rights Act) (1993) 18 C.H.R.R. D/377, reversed on appeal, Ontario Divisional Court, Toronto, May 3, 1994.

Canada Post Corporation v. Public Service Alliance of Canada (In the Matter of a Regular Arbitration), March 8, 1994.

27. While the reasons for one's sexual orientation may be a matter of some controversy, it is not necessary to establish that sexual orientation is based on biological or physiological factors to allow it to qualify as an analogous ground. It is enough that like some of the enumerated grounds in section 15(1) such as "religion", or the analogous ground "citizenship", sexual orientation is a deeply personal characteristic which is either impossible to change or could only be changed at enormous personal costs.

> "Like one's religion, one's sexual orientation can be suppressed or disguised. The cost is the loss of expression of political opposition to the status quo of institutionalized

heterosexuality, and a loss of freedom of choice regarding intimate association."

Ryder, Bruce, "Equality Rights and Sexual Orientation: Confronting Heterosexual Family Privilege", (1990) 9:1 Canadian Journal of Family Law, p. 39 at p. 80.

"I think that lesbians, gay men and bisexuals would agree that changing sexual orientation would be either an impossible or a highly oppressive demand."

Sanders, D., "Constructing Lesbian and Gay Rights", Canadian Journal of Law and Society [forthcoming].

28. More important than the cause of homosexuality, is the reality of homophobia. This Court can take judicial notice that homosexuals have been and continue to be marginalized and stigmatized in our society. If one examines the political, social and legal fabric of society, gay men and lesbians must qualify for inclusion into section 15 and are indeed a "discreet and insular minority".

Brown and Vancouver Persons with AIDS Society v. British Columbia, supra, at p. 309.

Knodel v. Canada, supra, at p. 386.

Vriend, supra.

Andrews v. Law Society of British Columbia, supra, at p. 152, per Wilson, J.

Sanders, supra, at p. 7.

Ely, J.H., Democracy and Distrust, Harvard University Press (1980) pp. 162-163.

29. It may also be said that discrimination on the basis of sexual orientation is but a species of discrimination based on sex

or it is at least so closely related to sex discrimination so as to further support it as an analogous ground. Professor R. Wintemute advances the argument that discrimination against same sex couples is sex discrimination:

> "A sex discrimination argument is well suited to cases of discrimination against same-sex couples. One need only ask whether, if the plaintiff were a person of the opposite sex, his or her partner would qualify for the benefit in question. In *Vogel I, Karen Andrews, Mossop, Veysey, Knodel, Egan, Vogel II,* and *Leschner* the answer was yes because, in each case, the benefit was made available to unmarried opposite-sex couples. Courts have failed to recognize this because they have focused solely on the sex of the (chosen) partner, and not on the sex of the plaintiff (the choosing partner)...."
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> **Wintemute, Robert, "Sexual Orientation Discrimination as Sex Discrimination: Same Sex Couples and the Charter in Mossop, Egan and Layland" (1994) 39 McGill L.J. 433 at p. 476 [forthcoming].**

30. Accordingly the impugned legislation violates section 15(1) of the Charter and it remains for the Crown to seek to justify the discrimination pursuant to section 1 of the Charter.

Errors in Reasoning of Majority of Court of Appeal

31. Before we address section 1 of the Charter it is appropriate to demonstrate the errors of reasoning that the majority of the Court of Appeal made in failing to conclude that the impugned legislation was contrary to section 15.

The Similarly Situated Test

32. Both Robertson, J.A. and Mahoney, J.A. used the rejection of the "similarly situated test" by the Supreme Court of Canada in Andrews and Turpin as a basis for holding that the impugned Act did not infringe section 15(1). After reviewing the rejection of the "similarly situated test" in Andrews, Robertson, J.A. states:

> "Nonetheless, it must be formally recognized that the appellants' case is built on the "similarity" between same-sex and opposite-sex couples. The Supreme Court's decision in *Andrews* destroys the very premise on which their claim of discrimination rests."
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> **Reasons for Judgment of Robertson, J.A., Federal Court of Appeal, Case on Appeal, Vol. 4, p. 584.**
>
> **See also: Reasons for Judgment of Mahoney, J.A., Federal Court of Appeal, Case on Appeal, Vol. 4, p. 604.**

33. The majority of the Federal Court of Appeal misunderstood the significance of the rejection by this Court of the "similarly situated" test. The "similarly situated" test was rejected firstly because of its narrowness and inherent dangers. As Linden, J.A. states:

> "The Court rejected the similarly situated test because it was thought to provide too narrow a basis for assessing equality claims. The repudiation of that test should not, therefore, be used to restrict the breadth of the analysis under section 15 as to impede claims raised by disadvantaged groups."
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> **Reasons for Judgment, of Linden, J.A., Federal Court of Appeal, Case on Appeal, Vol. 4, p. 634.**

34. The similarly situated test "as a test" was also rejected because its application could result in a trivialization of the equality guarantee in that it is a "test that catches every conceivable difference in legal treatment".

Andrews, supra, at p. 168.

See generally: Westen, P., "The Empty Idea of Equality" (1982) 95 Harvard Law Review 357.

35. In the United States (where there are not enumerated grounds of impermissible classification) and in Canada, pre-Andrews, the "similarly situated test" (or the "rationality test") was used in order to determine if a legislative classification was unreasonable and thus, for that reason alone, a breach of the equality guarantee.

Tussman and TenBroek, "The Equal Protection of the Laws" (1948-49) 37 Calif. L. Rev. 341 at pp. 345-346.

Tribe, L., American Constitutional Law (1978) at pp. 991-1000

Aluminum Company of Canada Ltd. v. The Queen (1986) 55 O.R. (2d) 522 (Ont. Div. Ct.).

Minnesota v. Cloverleaf Creamery Co. 449 U.S. 596 (1986).

36. Because section 15 has been interpreted in Andrews as limited to the enumerated grounds or analogous grounds, it is inappropriate to attempt to extend the equality guarantee to every legislative classification merely because two groups are "similarly situated" but differently treated by the legislature, where the excluded group is not disadvantaged in our society.

> "The real problem with the "similarly situated test" is that it does not tell us what kinds of differences are permissible grounds of distinction...
>
> The "enumerated or analogous grounds" approach adopted in *Andrews* attempts to answer this question... Thus, it is no longer sufficient to assert that the plaintiff who is denied a benefit and the persons who are receiving the benefit are "similarly situated". The difference ... must ... involve an "enumerated or analogous ground". The only sense in which "similarity of situation" remains relevant after *Andrews* is that the plaintiff must show that, apart from the difference between the plaintiff and the benefitted persons that involves an "enumerated or analogous ground" the plaintiff is in other respects "the same" as the benefitted persons, or is otherwise qualified."
>
> **Wintemute, supra at pp. 446-447.**

37. The Appellants never have and do not need to rely on the "similarly situated test" in advancing their claim. It is enough that the Appellants can prove that the only reason that they are denied the Spousal Allowance is their sexual orientation - an analogous ground of discrimination under section 15 of the Charter.

38. As this is a challenge to the constitutionality of the impugned legislation, the actual circumstances of the Appellants are not essential on that issue. However the fact that the Appellants are similar to heterosexual couples, but for their sexual orientation, provides a useful context in which to examine the operation of the impugned legislation and to underscore its discriminatory purpose and effect. It is evident that sexual

orientation is the operative cause of their being treated differently by Parliament.

39. As Linden, J.A. pointed out the Appellants should be entitled to Spousal Allowance regardless of whether their relationship corresponds to an "idealized" heterosexual relationship. Nor should the Appellants be required to adopt the labels of "husband and wife" in order to prove the discrimination and thus qualify for benefits. As Linden, J.A. notes the terms "husband and wife" are gendered concepts which may not accurately describe the roles within gay and lesbian relationships and it may be offensive and demeaning for same sex couples to have to represent themselves in those roles in order to be entitled to the Spousal Allowance.

Reasons for Judgment of Linden, J.A., Federal Court of Appeal, Case on Appeal, Vol. 4, pp. 639 and 654.

40. Nevertheless the fact is that the relationship that the Appellants have had with each other for over 45 years is similar to the relationship that many heterosexual couples "who live as husband and wife" enjoy - they are a couple who enjoy a longstanding sexual and intimate relationship with varying degrees of emotional and financial interdependence. This is thus the evidence that demonstrates that the operative cause of their disentitlement to Spousal Allowance was their sexual orientation - a prohibited ground of discrimination.

41. The breach of section 15 occurs when Parliament denies benefits because of sexual orientation. Where necessary that can be proven (by adducing evidence or by taking judicial notice) by doing a comparative analysis as between the excluded and included groups; this does not require a finding that the two groups are "identical"; nor does it mean that the courts have embraced the "similarly situated test".

42. Iacobucci, J. recognized in Symes the continued importance of doing a comparative analysis without suggesting that the Court has embraced the "similarly situated test":

> "At the outset, it is important to realize that,in order to determine whether particular facts demonstrate equality or inequality, **one must necessarily undertake a form of comparative analysis.**" [emphasis added]
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> **Symes, supra, at p. 754.**
>
> **See also: Andrews, supra, at p. 164.**

43. As Wintemute properly observes if the majority's reasoning was correct "discrimination under section 15(1) of the Charter could rarely be established, because a comparison is almost always necessary to show unequal treatment".

> **Wintemute, supra, at p. 447.**
>
> **See also: McEvoy, J.P., "The Charter and Spousal Benefits: The Case of the Same-Sex Spouse" (1994) 2 Review of Constitutional Studies at p. 55 [forthcoming].**

Sexual Orientation - Constitutionally, An Irrelevant Personal Difference

44. Robertson, J.A. finds that sexual orientation is "relevant and essential" to the Appellants' argument as he says that it is the only criteria that makes them similar to heterosexual spouses and, therefore, the distinction raised is not based on an irrelevant personal difference and is thus not discriminatory.

Reasons for Judgment of Robertson, J.A. of the Federal Court of Appeal, Case on Appeal, Vol. 4, pp. 584-588.

45. Robertson, J.A. misses an important distinction: for purpose of entitlement to government benefits the Appellants' sexual orientation is, constitutionally and legally, an irrelevant personal characteristic. The Act, however, has wrongly made it relevant and determinative. Nesbit logically must raise his homosexuality in order to demonstrate that, while it is constitutionally irrelevant, it is the operative cause under the Act for his disentitlement. In the same way Mark Andrews had to assert his non-citizenship as constitutionally irrelevant and Susan Brooks had to assert her gender as constitutionally irrelevant. The victim is always forced to raise the irrelevant personal characteristic.

Andrews, supra.

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

46. Robertson, J.A. also states:

> " ... sexual orientation remains highly relevant. Homosexuality does not distinguish a same-sex couple from an opposite-sex one. It is the basis on which the two can be deemed "alike" and, at the same time, the basis on which other non-spousal relationships can be distinguished."

Reasons for Judgment of Robertson, J.A., Federal Court of Appeal, Case on Appeal, Vol. 4, p. 585.

47. With respect, this is simply wrong. The Appellants' sexual orientation is not what makes them similar to opposite sex couples. If anything, it is what makes them different - but it is a difference that is legally and constitutionally irrelevant.

48. What makes the Appellants similar and thus entitled to similar treatment in law is that they are "couples" or "partners" just like opposite sex couples or partners: persons in a conjugal relationship; persons involved in a relatively long-term sexual or intimate relationship, which involves in varying degrees economic and emotional interdependency or commitment.

Wintemute, supra, p. 448.

49. Robertson, J.A. is likewise wrong when he says that if sexual orientation is to remain an irrelevant consideration or criterion, then same sex couples could be viewed no differently than other non-spousal relationships. The difference between the same sex couple and brothers is the nature of their relationship, not their sexual orientation. Two brothers living together, who

happen to be gay, are in a very different relationship than two gay men who live together as partners.

The Disparate Impact Test

50. It was Robertson, J.A.'s view that where there are other persons or groups excluded from the Spousal Allowance in addition to same sex couples, the distinction drawn by Parliament is not discriminatory unless there is a "disparate and more burdensome impact" on same sex couples as compared to friends, siblings, or relatives.

> "In my view, if differential treatment between members of two excluded "subgroups" is to be sustained, it is because compelling reasons are offered for extending a benefit to one and not the other. Such compelling reasons must lie in the extent to which the distinction has a disparate and more burdensome impact on one excluded group than another. ...
>
> Against this backdrop can it be said that the legislative scheme has a disproportionate or more burdensome effect on same-sex couples? I think not."
>
> **Reasons for Judgment of Robertson, J.A., Federal Court of Appeal, Case on Appeal, Vol. 4, pp. 591 and p. 597.**

51. Linden, J.A. provides a compelling answer to this proposition:

> "In my view, it is no answer to a charge of discrimination to say that admitting one group to the benefits program would leave another unjustly excluded. To use the possibility that other persons may be discriminatorily excluded from benefits under the spouse's allowance program as a basis for denying the equality claim of gay men and lesbians would be, to quote the Supreme Court, "equality with

a vengeance" (*Schachter, supra,* at p. 702). The better solution is to address the claim before the Court, leaving other groups or individuals unjustly excluded under the spouse's allowance program to advance their own claims, if they wish, and to deal with them on their own merits in due course."

Reasons for Judgment of Linden, J.A. of the Federal Court of Appeal, Case on Appeal, Vol. 4, p. 632.

See also: Rodriguez at p. 551, per Lamer, C.J.

52. Even if, *arguendo*, siblings, friends and family members can be excluded without violating section 15 of the Charter, Parliament nevertheless does contravene section 15 when it also excludes gay men and lesbians. There is no requirement that the law, to be discriminatory, must have a disparate impact on gay and lesbians as compared to other excluded classes.

53. The "disparate impact" requirement has no application when the law directly, or by necessary implication, draws a distinction based on an enumerated or analogous ground. To say otherwise is to render the fact that the law distinguishes on an enumerated or analogous ground practically meaningless.

Wintemute, supra, at p. 461.

54. Wintemute observes that while substantive equality is a very important supplement to formal equality, the gay and lesbian population have yet to achieve even formal equality. While the "similarly situated test" may achieve only formal equality, he says that the requirement of having to prove a "discriminatory (or

disparate) impact" involves "throwing the baby (formal equality) out with the bath water (the similarly situated test)." He concludes:

> "The same-sex couples in *Mossop, Egan,* and *Layland* were all seeking, at least initially, "formal equality" with opposite-sex couples. What the "discriminatory impact" requirement has done, primarily in the name of "substantive equality", is to eliminate any presumption that a clear denial of "formal equality" based on an enumerated or analogous ground is "discrimination" contrary to subsection 15(1). It would seem that even a blatant distinction disfavouring women or a racial minority would not automatically be a *prima facie* violation of subsection 15(1), triggering a Section 1 analysis. Instead, a (potentially lengthy) assessment of "discriminatory impact" would be required to determine whether, taking into account "the larger social context", the distinction was in fact beneficial or detrimental to the group in question. I would suggest that the requirement should be abandoned, and that any distinction based on an enumerated or analogous ground (not saved by subsection 15(2)) should be referred automatically to section 1. Failing that, the requirement should at least be rethought and defined more precisely."
>
> **Wintemute, supra, at p. 462.**

55. If it is necessary to show an "adverse impact", then as Linden, J.A. said, this is "virtually satisfied by definition once we have concluded that a distinction has been drawn on the basis of an analogous ground denying equal benefit of the law to a disadvantaged group or an individual member of the group."

> **<u>Reasons for Judgment</u> of Linden, J.A. of the Federal Court of Appeal, Case on Appeal, Vol. 4, p. 636.**

56. Linden, J.A. said:

> "The disadvantage endured by lesbians and gay men is particularly relevant to their exclusion from spouses' allowance benefits since the disadvantage they have suffered throughout history and which they continue to suffer in our society currently is premised, in part, on the view that gay and lesbian relationships are not legitimate or worthy. To treat lesbian and gay relationships simply like all other non-spousal relationships is to rely on and perpetuate the prejudiced view of the legitimacy and worth of those relationships. It would be paradoxical indeed if a decision under section 15 were itself to be based on prejudice and stereotyping."

Reasons for Judgment of Linden, J.A., Federal Court of Appeal, Case on Appeal, Vol. 4, pp. 630-631.

57. The recognition of same sex couples is thus a particularly appropriate way to less the disadvantage of homosexuals. Professor D. Sanders in "Constructing Lesbian and Gay Rights" refers to the recognition of same-sex relationships as reducing the patterns of forced lesbian and gay secrecy, with a potential to "normalize and stabilize homosexual lives".

Sanders, supra.

See also:

Knodel, supra, at p. 383.

Layland v. Ontario (Minister of Consumer & Commercial Relations), (1993) 14 O.R. (3d) 658 (Gen. Div.) at p. 679.

An Attack on the Institution of Marriage

58. Robertson, J.A. says that the true source of the controversy is "an indirect challenge to the common law and

statutory concept of marriage". Mahoney, J.A. also says that "the attack is, in substance, on the failure of the definition [of spouse] to comprehend the concept of common law marriage between persons of the same sex."

Reasons for Judgment of Robertson, J.A. and Mahoney, J.A., Federal Court of Appeal, Case on Appeal, Vol. 4, pp. 598-599 and 604.

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59. Whether or not the law must recognize "same sex marriages" is not what this case is about. That issue may be resolved in cases such as of Layland. There the majority of the Divisional Court held that there is no constitutional right to a same sex marriage but nevertheless recognized that "whether parties to homosexual unions should receive the same benefits as parties to a marriage, without discrimination because of the nature of their unions, is another question."

Layland supra, at p. 667.

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60. Parliament did not purport to restrict the Spousal Allowance to those who are married. Unmarried heterosexual couples who represent themselves "as husband and wife" (which is not the same as "being husband and wife"), also qualify for the Spousal Allowance. It is increasingly rare in Canadian law that benefits or obligations are exclusively linked to marriage.

Knodel, supra, at p. 373.

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Reasons for Judgment of Linden, J.A., Federal Court of Appeal, Case on Appeal, Vol. 4, p. 654.

See generally: Farquhar, Keith, "Cohabitation and Support Obligations in the Common Law Jurisdictions in Canada", (1990) 8 Canadian Journal of Family Law, pp. 265-301.

61. Whether or not the "benefit" of having the legal status of "marriage" (a benefit that is largely symbolic and perhaps social) can be denied to same sex couples does not mean that other state bestowed benefits can be denied to same sex couples.

Section One of the Charter

62. The Appellants submit that the impugned legislation, insofar as it discriminates against homosexual couples, can not be justified as a reasonable limit in a free and democratic society and hence cannot be saved by section 1 of the Charter.

63. In order to demonstrate that a limit on section 15 of the Charter is reasonable and demonstrably justified in a free and democratic society the Respondent must, by a preponderance of probability, satisfy two requirements:

i) the objective of the legislation is "of sufficient importance to warrant overriding a constitutionally protected right or freedom"; and

ii) the means selected to achieve the objective are proportional to the objective sought.

R. v. Big M Drug Mart, [1985] 1 S.C.R. 295 at 352.

R. v. Oakes, [1986] 1 S.C.R. 103 at 138-139.

The Objective of the Spouses' Allowance Program

64. In the Court below the Appellants were prepared only to assume (rather than concede) that the objective of the impugned Act was "pressing and substantial". This assumption was premised upon a characterization of the objective that was, as Linden, J.A. stated, "in general terms ... to ensure that when one partner in a couple retires, that couple will continue to receive income equivalent to the amount that would be earned if both members of the couple were retired".

Reasons for Judgment of Linden, J.A., Federal Court of Appeal, Case on Appeal, Vol. 4, p. 646.

See also: Reasons for Judgment of Mahoney, J.A., Federal Court of Appeal, Case on Appeal, Vol. 4, p. 603.

65. This is a general purpose which is at least silent on the sexual orientation of the couple in question and, it is, as far as it goes, a legitimate objective. If, however, the purpose of the Act is characterized more precisely to conform to its language and legislative intent -ie. to exclude the benefit from same sex couples - then the objective is not pressing and substantial and indeed is discriminatory. That would mean that the Act as written is inconsistent with the Constitution and thus unconstitutional and the only question to address is that of remedy.

Big M Drug Mart, supra, at pp. 351-353

The Proportionality Test

66. The Respondent must prove three elements of the proportionality test in order to be successful in claiming that the infringement of the section 15 right can be justified in a free and democratic society:

i) measures used to obtain the objective are rationally connected to the objective;

ii) there is minimal impairment to the equality rights of same sex couples; and

iii) the effects of the measure are not disproportionately severe.

R. v. Oakes, supra, at p. 139.

The Measures are not Rationally Connected to the Objective

67. Again, whether the measures used in the Act are rationally connected to the objective will depend upon the objective. If the objective is to provide for a certain level of income for needy elderly couples then the means employed - providing a Spousal Allowance to needy elderly couples - may be rational, at least insofar as they go; although obviously they do not go far enough since not all elderly couples are allowed the Spousal Allowance and particularly same sex elderly couples. By excluding same sex elderly couples from the benefit, the law is arbitrary, unfair and based on irrational considerations.

The Measures do not Impair the Right as Little as Possible

68. Whatever "minimal impairment test" is used, (slightly different formulations of the test are referred to in Oakes, Edward

Books, McKinney, Chaulk) these measures do not pass it. The government does not have even a reasonable basis for concluding that the legislation impaired "the relevant right as little as possible, given the government's pressing and substantial objectives".

R. v. Oakes, supra, at p. 139.

R. v. Edward Books and Art Ltd., [1986] 2 S.C.R. 713.

McKinney v. University of Guelph, [1990] 3 S.C.R. 229 at pp. 304-315.

R. v. Chaulk, [1990] 3 S.C.R. 1303 at pp. 1340-1343.

69. In this instance, Parliament could clearly have met the objectives of the Spouses' Allowance Program by including same sex couples in the program. By doing this, the effectiveness of the program would not be undermined in any way. In fact, it would be in line with the objective of ensuring that needy elderly couples were provide with certain income level.

Reasons for Judgment of Linden, J.A., Federal Court of Appeal, Case on Appeal, Vol. 4, pp. 655-659.

Effects not Proportional to Objective

70. The effect of the denial of the Appellants' rights under section 15 is not proportional to the objective of the program. The Appellants adopt the words of Linden, J.A., where he states:

> "This is not an instance in which a Charter right is marginally affected. The violation in this case is clear and direct. And, as important as providing these benefits to heterosexual partners may be, the denial of

those benefits to gay and lesbian partners can be no less significant. Thus, the effects of the measure on the rights to receive benefits are not proportional to the objective of the legislation. The impugned provision cannot, therefore, be saved under section 1 of the Charter."

Reasons for Judgment of Robertson, J.A. and Linden, J.A., Federal Court of Appeal, Case on Appeal, Vol. 4, pp. 596-597 and 650.

Remedy

71. After applying the Oakes test and concluding that the impugned law is inconsistent with the Charter, section 52 of the Constitution Act, 1982 is engaged.

Schachter v. Canada, [1992] 2 S.C.R. 679 at p. 717.

72. Given that the inconsistency with the Charter is by virtue of the underinclusiveness of the definition of "spouse", the proper course is to extend the benefits to same sex couples rather than invalidate the impugned provisions (which would have the result that no one would be eligible for the Spousal Allowance).

Schachter, supra, at pp. 718-719.

73. The Appellants adopt the entirety of the reasons of Linden, J.A. insofar as the remedy is concerned.

Reasons for Judgment of Linden, J.A., Federal Court of Appeal, Case on Appeal, Vol. 4, pp. 650-659.

74. Since the legislative objective can be characterized as a means to provide for financially needy couples when the main

income earner is forced to retire, extending the Spousal Allowance to same sex couples: (i) can be accomplished with remedial precision - severing or striking out the requirement of "opposite sex" and reading in "or as in an analogous relationship"; (ii) would not unduly trench upon the legislative objective - indeed it would further that objective by making the coverage of the program more thorough; (iii) would not alter the basic means selected for achieving the program's objective; (iv) would not involve substantial budgetary costs and thus would not change the nature of the legislative scheme; (v) recognizes that Parliament, faced with a choice of not having a Spousal Allowance program or one that extends to same sex couples, would have chosen the latter; and (vi) is consistent with the longstanding nature and significance of the Spousal Allowance program.

<u>Reasons for Judgment</u> of Linden, J.A., Federal Court of Appeal, Case on Appeal, Vol. 4., pp. 650-659.

<u>Schachter</u>, supra, at pp. 705-726.

PART IV - ORDER SOUGHT

75. The Appellants seek an order:

(a) allowing the appeal;

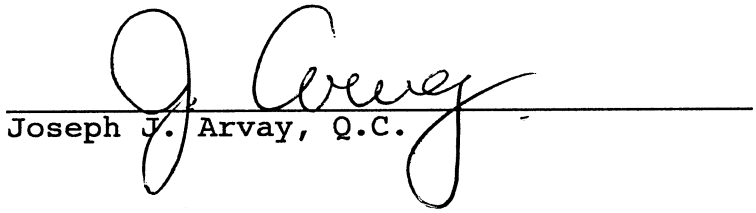
(b) declaring that for the purpose of section 2 of the Act the definition of "spouse" should be read down by deleting the words "of the opposite sex" and reading in the words "or as an analogous relationship" after the words "if the two persons publicly represent themselves as husband and wife";

(c) declaring that same sex couples cannot be denied the Spousal Allowance so long as they meet the other eligibility requirements;

(d) directing the Respondent to pay to the Appellants the Spousal Allowance from the date of the Appellants' application; and

(e) solicitor-client costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED



Joseph J. Arvay, Q.C.

Victoria, British Columbia
June 15, 1994

PART V - TABLE OF AUTHORITIES

CASES

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