Court File No. 23636

IN THE SUPREME COURT OF CANADA
(Appeal from the Federal Court of Appeal)

B E T W E E N

JAMES EGAN and JOHN NORRIS NESBIT

Appellants
(Plaintiffs)

- and -

HER MAJESTY THE QUEEN IN RIGHT OF CANADA

Respondent
(Defendant)

FACTUM OF THE INTERVENOR CANADA LABOUR CONGRESS

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PART I - FACTS

A. The C.L.C.'s Intervention

1. The Canadian Labour Congress ("CLC") has intervened in this case because it is committed to combatting and eliminating discrimination and prejudice against gays and lesbians in the workplace and in Canadian society. From the perspective of the CLC, the discrimination experienced by gays and lesbians in the employment context is directly and integrally related to the fact that, in society at large, gays and lesbians have historically suffered exclusion, prejudice and discrimination.

2. Discrimination against gays and lesbians has been manifested in many areas of employment, including the denial of benefits to gays and lesbians in same-sex relationships when those benefits are provided to or negotiated for employees in heterosexual relationships. Gays and lesbians have been denied coverage for their partners in relation to employment-based medical and dental coverage, pension benefits, disability and life insurance, bereavement and other leaves, and a range of other employee benefits. Exclusion from these benefits has resulted not only from the failure of employers to accord non-discriminatory treatment, but also because legislative provisions often deny individuals in same-sex relationships access to benefits. These provisions include the Income Tax Act, which prevents the registration, and consequent favourable tax

treatment, of pension plans and certain other insured benefit plans providing for same-sex benefits, even where the employer has agreed to extend coverage to same-sex spouses.

Affidavit of Jean-Claude Parrot, sworn September 14, 1994, filed on CLC intervention

B. The Legislative And Regulatory Context

3. In paragraphs 4 to 7 of the Respondent's factum, and throughout the Respondent's submissions, it is asserted that the Federal Government under the Old Age Security Act ("OAS"), and the B.C. Government under the Guaranteed Available for Income Act ("GAIN") each consider the income of both spouses in a heterosexual relationship in determining eligibility and the amount of benefits under the OAS, the guaranteed income supplement and the Spouse's Allowance ("SA"), and in determining income support under GAIN. In this respect, the Respondent asserts that, had the Appellants been treated as spouses under OAS and GAIN, while Nesbit would have received the SA, Egan's income would have been taken into account in determining Nesbit's eligibility under GAIN, with the net effect that Egan and Nesbit would have received less money as a couple than they actually received by being treated as single individuals.

4. However, under s. 3(2) of the GAIN regulations, it is "dependants", and not "spouses", who are "considered as members of a family for purposes of determining eligibility for benefits". Similarly, s. 10 provides that "income available to the applicant and any dependants" is to be deducted in determining the amount of an individual's income assistance. "Dependant" is expansively defined under s. 2 of the GAIN regulations to include not only "spouses", but also any of the following:

(a) an individual who resides with another individual, sharing with that person income and household responsibilities associated with family living (s. 2(d));

(b) an individual who has assumed any responsibility for financially supporting another individual (s.2(e));

(c) an individual who represents to another individual that the person with whom he or she is residing is a dependant (s.2(f)); and

(d) an individual residing with another where they jointly own property or co-sign a loan for certain household purposes (s.2(g)).

GAIN Regulations, B.C. Reg. 479/76 as amended, s.2, s.3(2), s.10, Schedule A, s.8(4)

5. Accordingly, under this definition of "dependant", it is clear that the test for attributing income under GAIN is not tied to being a heterosexual spouse or to sexual orientation at all, but rather includes any relationship of economic and financial interdependence which falls within the broad definition of "dependant". Two individuals living together in a same-sex spousal relationship clearly can and indeed have been treated as "dependants".

Evidence of Ron Williams, Director of the Income Assessment Division for the B.C. Ministry of Social Services & Housing. Case on Appeal, Vol. 2, pp. 293-295.

6. If Egan or Nesbit, or same-sex spouses in the same economic circumstances as Egan and Nesbit, were treated as "dependants" under GAIN, they would be economically worse off by being deprived of the SA. This is because Egan's income would be taken into account in determining Nesbit's eligibility for the GAIN payments, and would exceed the maximum payable under GAIN to Nesbit. As a result, like a heterosexual spouse in the same position, Nesbit would not receive any GAIN payment, but unlike a heterosexual spouse, he would be deprived of the economic benefit of the SA.

Case on Appeal, Schedules 8 and 10, pp. 338 and 340

7. Apart from the fact that same-sex spouses can be treated as "dependents" and not as individuals under GAIN, there are other economic advantages to receiving the SA rather than being restricted to payments under GAIN. For example, under section 8 of the GAIN regulation, an individual's assets may result in the individual losing eligibility for financial assistance, whereas under the OAS there is no such disqualification. In addition, under GAIN, each dollar of non-exempt income is deducted from the benefit payable, whereas under the federal scheme only three-quarters of outside income is deducted from the SA. Thus, an individual's assets or income could reduce or eliminate entitlement to GAIN benefits, in circumstances where the individual could qualify for a SA.

GAIN Regulations, ss. 3(2), 8 and 10

PART II - ISSUES

8. It is the position of the CLC that:

(a) discrimination against gays and lesbians constitutes an analogous ground of discrimination under s. 15(1) of the Charter;

(b) denial of benefits to same-sex spouses, including the SA under OAS, when those benefits are provided to heterosexual spouses, is discriminatory;

(c) this discrimination cannot be justified under s.1 of the Charter;

(d) the appropriate remedy in this case is to extend the SA to same-sex spouses.

PART III - ARGUMENT

A. General Principles In Interpreting Section 15

9. Section 15 "has a large remedial component", and was designed to remedy or prevent discrimination against groups "suffering social, political and legal disadvantage" and "subject to stereotyping, historical disadvantage and political and social prejudice in Canadian society." At the heart of s. 15 is the promotion of "a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration".

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

Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143, per McIntyre J. at p. 171

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

10. While the question of whether a specific law violates s. 15 is to be determined in the particular context of the law's content, purpose and impact, this context must encompass the effect of the law on the goals which the equality guarantee is intended to foster and protect. The Respondent's submissions, under the guise of a "contextual approach", would circumvent this Court's purposive approach to equality rights by imposing restrictive threshold requirements at each stage of the s. 15 analysis.

Andrews, supra

11. Since Andrews, this Court has (i) clearly rejected the "similarly situated" approach in s. 15 analysis, (ii) adopted the "enumerated or analogous grounds" approach, and (iii) insisted that "any justification, any consideration of the reasonableness of the enactment; indeed, any consideration of factors which could justify the discrimination and support the constitutionality of the impugned enactment would take place under s. 1", and not under s.15.

Andrews, supra, at 182, and 177-78

Turpin, supra, at 1328

Symes v.Canada [1993] 4 S.C.R. 695 at p.761

12. However, throughout its s. 15 argument, the Respondent attempts to identify reasons which it contends demonstrate that same-sex spouses are not in the same situation as heterosexual spouses for the purpose of the SA or which it contends justify the failure to provide the SA to same-sex spouses. These purported reasons, including the assertions that gays and lesbians do not have the same economic needs as heterosexuals, that they receive separate benefits under provincial legislation, and that providing the SA to gays and lesbians would be inconsistent with the institution of marriage, variously amount to an application of the discredited "similarly situated" and "unfair or unreasonable" tests, or an attempt to justify the denial of the SA to same-sex spouses, which can only be done, if at all, under s. 1.

Respondent's Factum, including paragraphs 16, 21-26, 31-32, 34-42, 47, 63, 67-69, 73, 75, 77, 79, 82-83, and 87-89

B. Sexual Orientation Is An Analogous Ground

13. In determining whether a group falls into an analogous category to those specifically enumerated, it is necessary to consider whether the group is a "discrete and insular minority", is defined by "indicia of discrimination such as stereotyping, historical disadvantage or vulnerability to political and social prejudice", is "powerless politically and whose interests are likely to be compromised by legislative decisions", or is defined by a personal characteristic which is "not alterable except on the basis of unacceptable costs". This determination is to be made "in the context of the place of the group in the entire social, political and legal fabric of our society."

Andrews, supra per Wilson, J., at p. 152, and per McIntyre at 183, and per La Forest J. at p. 195

R. v. Turpin, supra, at pp. 1331-32

Haig v. Canada, [1993] 1 S.C.R. 995, at p. 1043

14. The historic disadvantage suffered by gays and lesbians, which has been widely recognized and documented, has manifested itself in a wide variety of contexts, revealing the deeply-imbedded and pernicious nature of the discrimination experienced. For the reasons summarized below, all of the indicia for determining an analogous ground apply to gays and lesbians:

(a) gays and lesbians have suffered a long history of discrimination, prejudice, hatred and violence as a result of their sexual orientation;

(b) given the historical treatment and marginalization of gays and lesbians, their interests are particularly vulnerable to being compromised or ignored in the political process;

(c) an individual's sexual orientation is a fundamental aspect of the individual's identity, which cannot readily be altered;

(d) discrimination against gays and lesbians has been based on inaccurate and offensive stereotypes;

(e) the prejudice against gays and lesbians and the need to protect gays and lesbians from discrimination has been recognized in human rights legislation in most Canadian jurisdictions.

Report of the Parliamentary Committee on Equality Rights, Equality for All, pp. 25-32

Canada, Department of Justice, Toward Equality: The Response to the Report of the Parliamentary Committee on Equality Rights, (Ottawa: 1986), at p. 13: "The Department of Justice is of the view that the courts will find that sexual orientation is encompassed by the guarantees of s. 15 of the Charter."

Ontario Law Reform Commission, Report on the Rights and Responsibilities of Cohabitants under the Family Law Act, at pp. 36-37

Bruce Ryder, "Equality Rights and Sexual Orientation", (1990) 9 Canadian Journal of Family Law, pp. 39-97

David Corbett, "Lesbian and Gay Rights - The Historical and Social Context", 1994

Coalition for Gay Rights in Ontario, Discrimination against Lesbians and Gays: The Ontario Human Rights Omission, 1986

Barry Adam, The Rise of a Gay and Lesbian Movement, 1987 esp. ch. 3, 4 & 6

Gibson, The Law of the Charter: Equality Rights, 1990 at p. 214

Respondent's Factum, paragraph 47: "Little is known about the patterns of gay and lesbian relationships, partly it is acknowledged because of the historic disadvantage which has historically marginalized them" [emphasis added]

15. The widespread existence of discrimination, disadvantage, and prejudice against gays and lesbians in Canadian society has also been recognized in various court and tribunal decisions, which have held that sexual orientation is an analogous ground of discrimination.

Haig v. Canada (1992), 94 D.L.R. (4th) 1 (Ont. C.A.) at p. 7, 9 and 10

Knodel v. B.C. Medical Services Commission, (1991), C.L.L.C. ¶ 17,023 (B.C.S.C.)

Veysey v. Correctional Services of Canada, [1990] 1 F.C. 321 at p. 329; aff'd on other grounds (1990) 109 N.R. 300 (F.C.A.) at p. 307

Brown v. B.C. (Minister of Health), (1990) 66 D.L.R. (4th) 444 (B.C.S.C.) at p. 447

Leshner v. Ontario (No. 2), (1992) 16 C.H.R.R. D/184 (Ont. Board of Inquiry)

16. While employing a different approach to equality analysis, American constitutional scholars have applied similar indicia to those considered in identifying an analogous ground

under s.15, in concluding that gays and lesbians should be treated as a "suspect" classification, and that laws conferring benefits and imposing burdens on the basis of sexual orientation should be subjected to strict or heightened judicial scrutiny for the purpose of equal protection analysis.

Tribe, American Constitutional Law, 2d ed., at p. 1616:

> "Furthermore, classifications based on sexual orientation certainly merit a searching judicial approach. Not only is the characteristic of homosexuality or heterosexuality central to the personal identities of those singled out by laws based on sexual orientation, but homosexuals in particular seem to satisfy all of the Court's implicit criteria of suspectness. As subjects of age-old discrimination and disapproval, homosexuals form virtually a discrete and insular minority. Their sexual orientation is in all likelihood "a characteristic determined by causes not within [their] control" and is, if not immutable, at least "extremely difficult to alter". Further ... homosexuality bears no relation at all to the individual's ability to contribute fully to society. Homosexuality should thus be added - and openly - to the list of classifications that trigger increased judicial solicitude."

Ely, Democracy and Distrust, pp. 162-64

Note, "An Argument for the Application of Equal Protection Heightened Scrutiny to Classifications Based on Homosexuality", (1984) 57 Southern Cal. L. Rev. 797 at pp. 816-827

Roberts, "Heightened Scrutiny Under the Equal Protection Clause: A Remedy to Discrimination Based on Sexual Orientation", (1993) 42 Drake L. Rev. 485 at pp. 497-509

Note, "The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification", (1985) 98 Harvard Law Review 1285 at pp. 1287-1305

Watkins v. U.S. Army (1988) 847 F 2d. 1329 (9th Circ.) at pp. 1345-49

17. Contrary to the submissions of the Respondent in paragraphs 52 to 60 of its factum, there is no basis for the proposition that, in order to qualify as an analogous ground, the historic disadvantage must be narrowly related to the purported characterization of the challenged legislation for the following reasons:

(a) Andrews and Turpin have already established that historical, political and social disadvantage in society at large is the test for analogous grounds;

(b) the Respondent's approach is in conflict with the purpose of enumerated and analogous grounds in s.15. Those grounds establish thresholds to s.15 claims by identifying the groups on whose behalf such claims may be advanced. However, they bear no relationship to the separate and subsequent question of whether a particular legislative provision is itself discriminatory;

(c) While Turpin recognized that changing social conditions and realities may prompt changes over time to the identity of the analogous grounds, this in no way suggests that a ground could be analogous in one case, but not in another occurring within the same time frame or where the same general societal conditions still prevailed; Genereux reinforces this conclusion;

(d) Chiarelli did not hold that non-citizenship, which had been recognized as an analogous ground in Andrews, was not an analogous ground but, rather, that no s.15 claim could be made because s.6 of the Charter specifically precluded such a claim;

(e) in any event, the distinction made by the Respondent between so-called "economic" or "social" legislation cannot be meaningfully applied in general, nor in relation to this particular piece of legislation, which has clear social components. Indeed, this Court has recognized the social objectives underlying other similar benefit legislation; and

Hills v. Canada (Attorney-General), [1988] 1 S.C.R. 513, per L'Heureux-Dubé J. at p. 534

(f) discrimination against disadvantaged groups does not occur in the neat, separate categories identified by the Respondent, and the Respondent's approach fails to recognize the way in which discrimination against a disadvantaged group in a particular area reinforces and legitimizes discrimination in other areas;

18. Furthermore, denying economically disadvantaged gays and lesbians the benefits of the SA, to which they are only entitled if they meet a means test, on the purported basis that the class as a whole is not economically disadvantaged, would have the effect of denying s. 15 protection to individuals as a result of the very stereotypical assumptions which s. 15 is designed to avoid, and is itself discriminatory. In any event, gays and lesbians have suffered from a myriad of legal disadvantages which have adversely affected their economic interests, as set out in the materials referred to in paragraph 14 above.

19. Finally, it is simply not open to the Respondent to now assert that the instant case does not address a s.15 claim on the basis of an analogous ground of discrimination, or on the basis that there is insufficient evidence to establish an analogous ground, given that it conceded at trial and before the Federal Court of Appeal that this threshold requirement was met in this case.

C. The Denial Of The Spouse's Allowance To Gay And Lesbian Partners Is Discriminatory

1. Direct Discrimination

20. As this Court held in Simpson Sears, direct discrimination occurs where a rule or practice "on its face discriminates on a prohibited ground; for example, 'No Catholics or women or no blacks employed here.'" In this case, the legislation, by expressly imposing the requirement that spouses be of the "opposite sex", or "husband and wife", overtly excludes same-sex spouses from entitlement to the SA. Far from being facially neutral with respect to sexual orientation,

access to the benefit is directly conditioned upon a person being in a heterosexual relationship, and as a result is directly based on sexual orientation.

Ontario (Human Rights Commission) v. Simpson-Sears, [1985] 2 S.C.R. 536

Symes, supra at pp. 761-762

21. In Brooks and in Janzen, this Court held that discrimination on the basis of pregnancy and sexual harassment constitute sex discrimination, since pregnancy and sexual harassment "cannot be separated from gender", in that "only a woman can become pregnant; only a woman could be subject to sexual harassment by a heterosexual male". Similarly, it is submitted that depriving individuals in same-sex relationships of a benefit because they are not of the "opposite sex" is direct discrimination based on sexual orientation since, as recognized by this Court in Mossop, it is gays or lesbians who are involved in same-sex relationships.

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

Janzen v. Platy Enterprises Ltd., [1989] 1. S.C.R. 1252 at p. 1289

Forget v. Quebec, [1988] 2 S.C.R. 90 per Lamer, J., at p. 101

Canada (Attorney-General) v. Mossop [1993] 1 S.C.R. 544, per Lamer J. at pp. 580-81, and per L'Heureux-Dubé at pp 645-6

22. In paragraph 66 of its factum, the Respondent argues that there is no direct discrimination in this case because the definition of spouse excludes more than just same-sex partners. However, the fact that others, in addition to the protected group, are excluded by the definition of "spouse" does not mean that the "opposite sex" requirement is not directly discriminatory against gays and lesbians. For example, if the law gave a SA only to white spouses, the law would clearly constitute direct discrimination based on race, even though siblings and other family members would also be excluded from receiving the benefit.

Wintemute, "Sexual Orientation Discrimination as Sex Discrimination: Same-Sex Couples and the Charter", (1994) 39 McGill Law Journal 429 at p. 447

2. Adverse Effect Discrimination

23. Alternatively, even if the requirement that a spouse must be of the opposite-sex could conceivably be characterized as a facially neutral rule, it is submitted that such a rule would constitute adverse effect discrimination. The effect of making the benefit conditional upon an opposite-sex relationship is that there is a disproportionate adverse impact upon same-sex spouses

who, because of their sexual orientation, can never receive the benefit, while the group potentially entitled to the benefit is composed entirely of heterosexuals.

Simpson-Sears, supra

3. Denial Of Spouse's Allowance Is An Economic Disadvantage

24. The Respondent argues that the denial of the SA to same-sex spouses is not discriminatory because there is no economic disadvantage imposed. However, it is incontrovertible that the SA is and was intended to be a substantial economic benefit provided to those heterosexual spouses eligible under the income and age requirements, but denied to those same-sex spouses who would also be eligible under the income and age requirements. In this respect, it is submitted that whether the OAS is discriminatory under s. 15 must be considered by having regard to the OAS legislation itself, and that provincial legislative schemes are only of relevance, if at all, to the question of justification under s. 1: see also paragraph 28 below.

Tetreault-Gadoury v. Canada [1991] 2 S.C.R. p. 22

4. Discriminatory Denial of Equal Dignity and Respect

25. Apart from the discriminatory economic effect of the denial of the SA, the explicit exclusion of same-sex spouses from the definition of "spouse" disadvantages gays and lesbians by denying them equal dignity and respect, a fundamental value underlying s. 15 of the Charter, and further reinforces the prejudice, stigma and discrimination which gays and lesbians have long experienced in Canadian society. The denial of the SA to same-sex spouses reinforces the view that a spousal relationship is less worthy of recognition if it does not conform to the heterosexual norm.

Andrews, supra, per McIntyre, J. at p. 171

McKinney v. University of Guelph [1990] 3 S.C.R. 224, per La Forest J. at p. 296-7

Tetreault-Gadoury, supra, at pp. 40-41

R. v. Keegstra [1990] 3 S.C.R. 697, per Dickson C.J. at p. 756 and 764

Education Act Reference, (1986) 53 O.R. (2d) 513 at p. 544

Tomen v. Ontario Teacher's Federation (No. 3) (1990), 11 C.H.R.R. D/223 (Ont. Bd. of Inq.) at D/235 - D/240

Dworkin, Taking Rights Seriously, 1977

26. By establishing a benefit scheme for spouses which expressly excludes same-sex spouses, Parliament has conveyed, in a direct and purposeful manner, the message that the

relationship between same-sex spouses is not worthy of equal concern and respect. Given the longstanding and pervasive exclusion of gays and lesbians from mainstream Canadian society, this denial of recognition reinforces and sanctions discriminatory attitudes of the society at large against gays and lesbians. Contrary to the respondent's submissions in paragraphs 34 and 68, injury to the dignity interests at stake in this case is neither trivial, nor insubstantial, nor abstract and theoretical.

27. In rejecting the "separate but equal" doctrine in Andrews, this Court has recognized that the injury suffered by separate treatment of disadvantaged groups is no less tangible than economic harm, in that it generates "a feeling of inferiority as to . . . status in the community". In the instant case, different treatment of same-sex spouses denies them equal dignity and respect. By recognizing that equality sometimes requires different treatment in order to accommodate the special needs of disadvantaged groups, the courts have not abandoned the longstanding principle that equality may also require that disadvantaged groups receive the same treatment as others, in order to overcome the stigmatization and marginalization which they have historically suffered.

Andrews, supra, at p. 166

Turpin, supra, at p.1331-32

Ontario Human Rights Commission v. Ontario (1994) 19 O.R. (3d) 387 (C.A.) at p. 400

Brown v. Board of Education (1954), 347 U.S. 483 at p. 494

5. Provincial Legislation Not Relevant Under S.15

28. The Respondent seeks to rely on provincial legislation to argue that its own legislation is not discriminatory. In the CLC's submission, the effect of one jurisdiction's legislation cannot be relevant to determining whether another jurisdiction's legislation is discriminatory. In this case, the federal government cannot guarantee or count on each province to compensate for its own discriminatory law. Furthermore, under our federal system, each province has exclusive jurisdiction to determine the substance of its legislation, which will vary from province to province. In this case, Parliament cannot dictate the terms of provincial social assistance legislation, nor does the OAS provide or require that the denial of the SA to same-sex spouses is conditional upon equivalent benefits being provided under the social assistance schemes in place at any given time in each province.

29. In the alternative, to the extent that GAIN is considered relevant to determining whether denial of the SA discriminates on the basis of sexual orientation, it is submitted that gays and lesbians can clearly be economically disadvantaged by denial of the SA. The Respondent relies primarily on the fact that Nesbit received benefits under GAIN as an individual. However, as set out in paragraphs 4 to 6, the GAIN legislation and regulations could clearly be and have been applied to treat same-sex spouses as dependants, in which case gays and lesbians in the exact same position as the Appellants would be economically disadvantaged in comparison to heterosexual spouses entitled to the SA. Further, as noted in paragraph 7, there are additional economic advantages to being eligible for the SA.

6. Other Issues Raised By The Respondent

30. The Respondent argues that s. 15 is not breached because of so-called "relevant" personal characteristics, which it cites as precluding a finding of discrimination. It claims that there is a "real difference" or "clear distinction" between heterosexual and gay or lesbian relationships, based on the "very nature of the recognized social and legal institution of marriage", the existence of support and other rights and obligations under different statutory regimes for heterosexual spouses, and the suggestion that same-sex spouses do not have the same economic needs as opposite sex spouses. The Respondent's submissions amount to the claim that same-sex spouses are not "similarly situated" to heterosexual spouses. However, distinctions based on analogous grounds are, by definition, based upon personal characteristics which are presumptively irrelevant, a presumption which may only be rebutted under the strict requirements of s. 1 of the Charter. The lesson of Andrews and subsequent equality cases is that any appeal to "real differences" or "clear distinctions" cannot be considered under s. 15 where discrimination on an enumerated or analogous ground has been established.

31. In any event, with respect to the specific submissions by the Respondent, it is to be noted that:

(a) a "spouse" under the OAS need not be married. To the contrary, "spouse" expressly includes persons living together for one year or more;

(b) neither the definition of "spouse" in the OAS, nor the conferral of the SA, is premised on there being support obligations, since the conferral of benefits on non-married "spouses" under the OAS pre-dated the extension of support rights and obligations to non-married "spouses" in most Canadian jurisdictions;

Bala and Cano, "Unmarried Cohabitation in Canada: Common Law and Civilian Approaches to Living Together", 4 Canadian Family Law Quarterly 147 at 190ff.

(c) the SA is provided to heterosexual spouses who do not qualify as "spouses" under family support legislation in a number of provinces, including British Columbia, yet denied to same-sex spouses despite the fact that they can treated as "dependants" under GAIN;

(d) whether or not gays and lesbians as a class are richer or poorer than heterosexuals as a class is entirely irrelevant. A SA will only be provided to those who meet the financial criteria under the legislation. Thus, it is not necessary to show that all same-sex relationships will satisfy those requirements; it is sufficient that some same-sex relationships will do so, and that if they were heterosexual relationships they would be eligible for the SA, a fact which is demonstrated in the instant appeal; and

Symes, supra, at p. 769

R v. Rodriguez [1993] 3 S.C.R. 519 at 556-67

Brooks, supra, at 1247

Janzen, supra, at 1288-89

(e) as to the Respondent's reliance upon R. v. Hess and Nguyen, Hess was decided on the basis that the offense in question could only be committed by a male, and so it could not be sex discrimination to fail to prohibit women from committing an offense which they could not, as a matter of biological fact, commit. Here, there is no question that, but for the restrictive definition of "spouse", same-sex spouses could qualify and receive the benefit in the same manner as heterosexual spouses.

32. The Respondent argues in paragraph 59 that if there is discrimination in this case, it would be on the ground of spousal status. However, the instant claim is not that excluding non-spousal relationships discriminates on the basis of sexual orientation. Rather, it is that excluding gays and lesbians from the definition of "spouse", solely because they are not "of the opposite sex", constitutes discrimination on the basis of sexual orientation. In this respect, as submitted above, it is submitted that a majority of this Court in Mossop indicated that the denial of benefits to same-sex spouses, when the benefit is provided to opposite-sex spouses, would constitute sexual orientation discrimination, and not discrimination based on family status.

Mossop, supra

D. Section 1 Of The Charter

1. **Objective Of The Legislation**

33. The primary legislative objective of the SA was to provide additional financial assistance to older couples in need where one of the spouses was in receipt of an Old Age Security Pension and Guaranteed Income Supplement. This is evident from the language of the statute, the legislative history, and the federal government's own materials to the public explaining the purpose of the SA. During the committee hearings in respect of the Bill, the Minister responsible for the legislation stated:

> "The object of the bill, as I said, is quite clear, quite simple. It does not aim at extending pensions to everybody to the age of 60. It tries to remedy the situation of a couple having to live on the pension of a single person. That is the object of the bill and nothing else; nothing more."

Indeed, contrary to the Respondent's submissions, the Minister was not only careful to use the neutral word "spouse" while testifying before the Committee, but also stressed the non-gender specific nature of the SA, thereby denying any intention that the benefit be limited to female spouses. Thus, in response to a question concerning the eligibility of a couple where the female was older than the male, the Minister stated: "I have never mentioned the wife's pension; I have always talked about the spouse's pension."

> Minutes of Standing Committee Hearings for June 12 and 17, 1975 on Bill C-62, Schedule 18, Case on Appeal, p. 377 and p. 420
>
> See also the statements of the Honourable Marc Lalonde, Minister of National Health and Welfare, on second Reading of Bill C-62, Schedule 17, Case on Appeal, pp. 355, 366, 367
>
> Case on Appeal, Schedule 4, News Release, p. 318; Schedule 5, SA Pamphlet, p. 320 and 322; and Hagglund Expert Report, Case on Appeal, p. 121
>
> McEvoy, "The Charter of Spousal Benefits: The Case of the Same-Sex Spouse" (1994) 2 Review of Constitutional Studies [forthcoming], at pp. 23-24 of draft manuscript
>
> "Explanation of Spouses Allowance Program", Schedule 15, Case on Appeal, p. 345

34. This is not to say that the purported objective identified by the Respondent of remedying the economic position of older women is not important, but simply that this was not the objective of the Government. As this Court held in Big M Drug Mart, it is not open to the Government to attempt to shift the objective of legislation found to infringe a Charter right or freedom from the actual objective "of those who drafted and enacted the legislation at the time".

> R v. Big M Drug Mart, [1985] 1 S.C.R. 295 at 335
>
> Irwin Toy Ltd. v. A.G. Quebec, [1989] 1 S.C.R. 927 at 973-4

2. **The Proportionality Requirement**

35. With respect to the "rational connection" test, it is submitted that, given that the legislative objective of the SA was to improve the financial situation of spouses in need and required to live on the pension of the older spouse, it is entirely irrational, arbitrary and unfair to exclude some spouses from the benefit solely on the basis of their sexual orientation, where they would otherwise meet the age and income requirements which allow heterosexual spouses to receive the benefit.

36. As to the minimal impairment test, it is submitted that this Court should be cautious before applying the more deferential standard developed in cases such as Edwards Books, Irwin Toy, and McKinney for the following reasons:

(a) this case does not involve the Government balancing or mediating legitimate rights of competing groups or interests in society at large. Rather, this case is really one where the State itself is the protagonist, denying benefits it makes available to some on the basis of discriminatory criteria;

(b) unlike McKinney or Tetreault, where the prohibited ground of discrimination was age, this case involves a disadvantaged group whose defining personal characteristic is not correlated with ability, and which has faced a history of discrimination based on feelings of hostility or intolerance. Furthermore, unlike age, being gay or lesbian is not a personal characteristic which most in society share or will experience;

(c) this is not a case where a vulnerable group can only be protected by infringing guaranteed Charter rights, as, for example, in Irwin Toy or Edwards Books;

(d) unlike McKinney, the impugned provision is a direct government policy, rather than a permissive provision intended to allow private parties not bound by the Charter the freedom to determine and regulate their own relationships; and

(d) unlike McKinney, Irwin Toy, or Edwards, this is not a case where Parliament was forced to act in the face of competing social science evidence, or where the court itself is being asked to determine whether there was a less restrictive alternative on the basis of conflicting social science.

37. In any event, whatever level of deference is accorded in this case, there is no evidence and no reasonable basis for concluding that the legislative objective of improving the financial situation of spouses in need and living on the pension of the older spouse requires discrimination

against same-sex spouses who, but for their sexual orientation, would otherwise be entitled to the SA. As a result, the legislative provision does not minimally impair the equality rights of gays and lesbians.

38. Indeed, even if the legislative objective could be narrowly characterized as being solely to assist a "target class" of married elderly and near-elderly women as a result of societal expectations of dependency and gender-specific roles, (an objective which is neither supported by the language of the provision nor by the legislative history), the legislation is neither carefully tailored to that objective nor does it meet the least impairment test, since:

(a) the SA is provided to heterosexual common-law spouses whether or not a dependency pattern exists, and regardless of the sex of the younger spouse, while excluding all same-sex spouses, even where a relationship of dependency exists. In this respect, the denial of the benefit to same-sex spouses rests upon unwarranted stereotypical assumptions. Gays and lesbians do experience poverty, are economically vulnerable in their older years, and share family and child-rearing responsibilities. Further, lesbian women are not somehow exempt from the discrimination the Respondent itself recognizes is suffered by women generally;
Mossop, supra, per L'Heureux-Dube J. at 627-28, and 630-32 and 634

(b) there is no reasonable basis for concluding that the Government's professed legislative objective would not have been obtained without barring same-sex couples from receipt of benefits under the Act.

39. As to the Respondent's argument in paragraph 107 of its factum that denying the SA is justified because it "appears" that the current legislative scheme leads to better benefits under GAIN, it is submitted that it is inconsistent with the principles of federalism, including the autonomy of each level of government within its own jurisdiction, that the constitutionality of federal legislation could depend upon the actions of a provincial Legislature. As Hogg has noted, federalism must preclude a Charter claim involving a comparison between a federal law and a provincial law; similarly, it is submitted that federalism must also preclude a situation where the constitutional validity of a federal law could turn on the provisions of provincial legislation, over which the federal government has no control and which each provincial Legislature is free to

change as it considers appropriate. In this respect, the CLC also relies on its submissions in paragraph 28 above.

Hogg, Constitutional Law of Canada, at section 52.16

40. At the very least, if the federal government is permitted to rely on provincial law in seeking to justify its own discriminatory legislation, it must establish that the provincial legislation will ensure that the discriminatory effect of the federal law, including both economic and dignitary interests, will be completely eliminated. In this respect, as confirmed in McKinney (at p. 298), in determining whether a law is justified under s. 1, the law must be considered against the backdrop of all situations to which it could apply, and not just the situation of the particular applicants before the court. In the context of this case, the only evidence the Respondent has adduced in support of its position that same-sex spouses are better off relates to the specific situation of the Appellants. The Respondent has not established that all or most same-sex spouses are made whole under GAIN in respect if the loss of the SA. In fact, as set out in paragraphs 4 to 7 and 29 above, same-sex spouses can be financially worse off under the GAIN regulations, for example, they may not be treated as individuals but rather as "dependants", with the effect of a net economic loss by virtue of being treated as "dependants" under GAIN and as individuals under OAS.

41. Furthermore, the Respondent has not even attempted to establish that there are social assistance payments available in the other provinces and territories which would offset the denial of the SA to same-sex spouses, or that gays and lesbians are treated as "individuals" under all of those schemes and would be better off being treated as individuals. (In this connection, see paragraph 34 of the Respondent's factum, where the Respondent does not assert that all same-sex spouses are economically better off under the combined federal and provincial legislation, but only that this "**may** actually result in a situation where no disadvantage is suffered by the individual [emphasis added]."

42. In any event, the question of whether same-sex spouses are financially compensated under provincial legislation for the discriminatory denial of the SA under federal legislation has no bearing on the injury to their dignity and respect, and the ensuing stigmatization, which result from the denial of benefits on the same terms as those benefits are made available to heterosexual spouses: see paragraphs 25 to 27 above.

43. The Respondent argues that it is entitled to proceed "one step at a time" in meeting the needs of elderly and near-elderly persons, and for this reason was justified in deciding to use sexual orientation of spouses as a cut-off point. However, while this Court has recognized that, in certain circumstances, a legislature may proceed one step at a time, the Court was also careful to note in McKinney (at pp. 317-18) that the chosen cut-off must always bear scrutiny, particularly where it is based on an prohibited enumerated or analogous ground of discrimination. Unless the government can establish that there are reasonable grounds for the discriminatory cut-off, and that the cut-off was required to avoid further inequalities, or real social, economic and budgetary difficulties, it will not bear scrutiny under s. 1. It is submitted that where, as here, the line drawn reinforces stigma, is in large measure based on stereotype, and involves a disadvantaged group which has suffered a history of prejudice and hostility, the level of scrutiny should be particularly demanding. For the reasons submitted above, the Respondent has not met this standard.

44. The overall expenditure under the OAS, including the Monthly Pension, the Guaranteed Income Supplement, and the SA, was over 17 **billion** dollars in fiscal 1990-91. The Government's own estimate of the cost of eliminating the discriminatory denial of the SA to same-sex spouses is 12 to 37 million dollars. Without accepting the reliability of the Government's estimate, according to the Government itself the increased cost of providing the SA to same-sex spouses would be between 0.068% and 0.21% (i.e. less than one-half of one percent) of the OAS program. Even if cost may, in itself, constitute a reasonable limit under s. 1 of the Charter in some circumstances, the increased costs here are so insignificant in relation to total expenditures under OAS that this cannot constitute a reasonable limit under s. 1.

Tetreault-Gadoury, supra, at p. 46

45. Finally, even if it could be said that the first two elements of the proportionality test are satisfied, it is submitted that the exclusion of same-sex spouses fails on the third aspect of the test, given the significantly adverse effect upon the interests of the appellants and gays and lesbians generally, including the denial of a pension benefit available to heterosexual spouses, the perpetuation of negative stereotypes, further stigmatization of gays and lesbians, and reinforcement of their exclusion from equal participation in our social and political institutions. These significant adverse effects outweigh the importance of the legislative objective.

E. Remedy

46. The CLC relies upon the submissions made by the Appellants in respect of the appropriate remedy in this case, and makes the following additional submissions.

47. Contrary to the Respondent's submissions in paragraphs 109 to 111 of its factum, the issue is not whether Parliament intended to extend the SA to same-sex spouses, but whether Parliament would now refuse to confer the benefit on heterosexual spouses if it were also required to provide the benefit to same-sex spouses. In Haig, the Ontario Court of Appeal held that it was "inconceivable... that Parliament would have preferred no Human Rights Act over one that included sexual orientation as a prohibited ground of discrimination. To believe otherwise would be a gratuitous insult to Parliament". Similarly, it is submitted that it is inconceivable that Parliament would have preferred not to provide a SA to heterosexual couples in need if to do so would mean that same-sex spouses in need would receive the benefit on the same terms.

48. The Appellants have not challenged the requirement under the definition of "spouse" that two persons must "publicly represent themselves" as spouses. However, there may be circumstances where this requirement could have a discriminatory impact on gays and lesbians, who, as Justice L'Heureux-Dubé noted in Mossop, (at p.638),"still often find that public acknowledgement of their sexual orientation results in discriminatory treatment." As a result, it is submitted that, while the Court need not consider this question in the instant appeal, the Court should, at the same time, not foreclose the possibility that such a requirement may not withstand Charter scrutiny in all cases.

49. In arguing for a suspensive remedy, the Respondent attempts to bolster its position that the SA should not be extended to same-sex spouses on the basis that same-sex spouses would then be subject to "all of the legal rights and obligations which apply to heterosexual relationships", and that this would involve a "fundamental change to all of the historical, social and legal concepts which [marriage] defines." In this respect, the CLC's submissions are as follows:

(a) as noted in paragraph 31(b) above, the SA itself was extended to heterosexual common law spouses in 1975, certainly before many provincial jurisdictions had extended support rights and obligations to common-law spouses;

(b) the SA is not paid to individuals because of obligations they may have under other federal or provincial legislative regimes, but rather, because they are in financial need, and in any event, under GAIN, same-sex spouses can be treated as dependants with mutual rights and obligations to one another;

(c) the connection between payment of the SA to same-sex spouses and fundamental change to the institution of marriage is unrealistic and fanciful; and

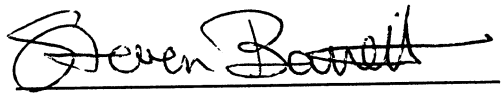
(d) while the principles articulated by the Court in this case may well have precedential effect in respect of other discriminatory denials of benefits to gays and lesbians, it cannot reasonably be suggested that, if the SA was extended in this case, the government would in any way be inhibited from conducting a parliamentary or any other form of review, if it wished to do so.

PART IV - ORDER REQUESTED

50. It is respectfully requested that the appeal be allowed, and that eligibility for the SA be extended to same-sex spouses.

51.

ALL OF WHICH IS RESPECTFULLY SUBMITTED



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Dated at Toronto, October 27, 1994

PART V - TABLE OF AUTHORITIES

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36. Hogg, Constitutional Law of Canada 17

37. McEvoy, "The Charter of Spousal Benefits: The Case of the Same-Sex Spouse" (1994) 2 Review of Constitutional Studies [forthcoming] 4

38. Note, "An Argument for the Application of Equal Protection Heightened Scrutiny to Classifications Based on Homosexuality", (1984) 57 Southern Cal. L. Rev. 797 7

39. Note, "The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification", (1985) 98 Harvard Law Review 1285 7

40. Ontario Law Reform Commission, Report on the Rights and Responsibilities of Cohabitants under the Family Law Act, at pp. 36-37 6

41. Report of the Parliamentary Committee on Equality Rights, Equality for All, 1986 6

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45. Wintemute, "Sexual Orientation Discrimination as Sex Discrimination: Same-Sex Couples and the Charter", (1994) 39 McGill Law Journal 429 at p. 447 9