

**IN THE SUPREME COURT OF CANADA  
(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)

**AND: CANADIAN HUMAN RIGHTS COMMISSION** Intervener

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**FACTUM OF THE INTERVENER  
CANADIAN HUMAN RIGHTS COMMISSION**

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## **PART I -- FACTS**

1. The Intervener Canadian Human Rights Commission ("the Commission") adopts the statement of facts set forth in the Factum of the Appellants.

## **PART II -- ISSUES**

2. The Constitutional Questions stated by Order of this Court are:
  - (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*?

3. The Intervener Canadian Human Rights Commission respectfully submits that the answers to these questions are:

- (a) Yes, the definition of spouse contravenes section 15(1); and
- (b) No, this is not a reasonable limit pursuant to section 1.

### PART III -- ARGUMENT

4. This case raises the issue of whether it is discriminatory to provide financial benefits to common law couples of the opposite sex, but to deny this benefit to same-sex partners who have established a long-term, intimate and inter-dependent relationship. The Commission submits that this is discrimination on the basis of sexual orientation, and that it is not justified under section 1 of the *Charter*.

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5. The Commission will advance three arguments:

(i) the distinction in the law is discriminatory on the basis of sexual orientation; the proper comparison in this case is not between "spouses" and "non-spouses" because the law by its very terms refers to couples "of the opposite sex";

(ii) the purpose of this law (providing assistance to elderly and near-elderly couples in financial need) is laudable, but the *Act* is not proportional to the objective, because providing the benefits to same-sex couples is a readily available and less discriminatory alternative which is consistent with this objective;

20

(iii) the ruling in this case will not "fundamentally alter society's concept of marriage"; if the Spousal Allowance is extended to same-sex couples, it will be necessary to adjust related income security laws for the elderly, but this will not entail a wholesale change to these systems. Even in the absence of broad legislative reform, the legal system can evolve to insure that same-sex partners that seek these benefits are also subjected to the appropriate legal obligations and burdens, as has been done for common law couples.

## I Section 15

6. The basic doctrines governing the interpretation of section 15 of the *Charter* have been stated by this Court on numerous occasions. In order to establish a violation of section 15(1) in this case it is necessary to find: (i) a denial of equal benefit of the law, (ii) that is discriminatory, (iii) on the basis of an analogous ground of discrimination.

10 7. In *Andrews* the Supreme Court drew upon the doctrines and approaches developed under human rights legislation in its interpretation of section 15(1), and it is submitted that these are appropriate here. In particular, in human rights law the impact of a particular measure is examined from the perspective of the victim. This Court has rejected technical or abstract arguments and instead has adopted an approach focusing on the impact of the challenged rule or practice on the group, in light of the social context. It is submitted that a similar approach should be adopted in the interpretation of s. 15.

20 *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 141 at pp. 172-76, 182.

*Janzen v. Platy Enterprises Ltd.*, [1989] 1 S.C.R. 1252 at pp. 1283-85.

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

*Robichaud v. Canada (Treasury Board)*, [1987] 2 S.C.R. 84 at pp. 89-95.

### (a) Equal Benefit of the Law

30 8. The *Old Age Security Act* provides for a financial benefit (old age security payments) generally available to persons 65 and over, as well as for two financial

benefits based on need (the Guaranteed Income Supplement and the Spousal Allowance). The *Act* establishes that entitlement to the Spouse's Allowance is predicated upon three criteria. The person receiving the Allowance must be: the spouse of a person receiving old age security (or, more recently, a widow or widower); between ages 60-65; and in financial need, based upon the income of the couple (or of the widow or widower).

10 9. The Appellants Egan and Nesbit meet the age and financial need criteria set out in the law, but they have been denied access to this benefit because they are in a same-sex relationship.

10. It is submitted that this is a denial of the equal benefit of the law.

*Schachter v. Canada*, [1992] 2 S.C.R. 679.

*Tétreault-Gadoury v. Canada (Employment and Immigration Commission)*, [1991] 2 S.C.R. 22.

20 **(b) Without Discrimination**

11. It is submitted that the *Act* is discriminatory because it denies benefits to Egan and Nesbit on the basis of their sexual orientation. As the trial judge found, "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."

Case on Appeal: Vol. IV, p. 552, Reasons for Judgment of Martin J.

30 12. The denial of benefits to same-sex couples who cohabit in intimate personal relationships flows directly from the terms of the *Act*, which accord such benefits only

to couples "of the opposite sex". This is direct discrimination on the basis of sexual orientation. The doctrine of adverse effect discrimination does not apply because the law does not set forth a "facially neutral" rule which applies to everyone, but which imposes unique or special burdens on a particular disadvantaged group because of some characteristic associated with the group.

*Ont. Human Rights Commission v. Simpsons-Sears*, [1985] 2 S.C.R. 536 at p. 551.

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13. In *Canada (A.G.) v. Mossop*, a case involving denial of an employment benefit to a person in a same-sex relationship, Chief Justice Lamer found that there was a close relationship between Mr. Mossop's sexual orientation and the discrimination under review:

In the case at bar, Mr. Mossop's sexual orientation is so closely connected with the grounds which led to the refusal of the benefit that this denial could not be condemned as discrimination on the basis of "family status" without indirectly introducing into the CHRA the prohibition which Parliament specifically decided not to include in the Act, namely the prohibition of discrimination on the basis of sexual orientation.

20

*Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554 at p. 580.

14. It is submitted that this reasoning supports the conclusion that the claim here is properly one of sexual orientation discrimination, since the formation of an intimate long-term relationship with another person of the same sex is obviously a characteristic associated with one's sexual orientation. The fact that not all sexual orientation claims will involve people in a relationship, or that people in other types of relationships or living arrangements may also be denied the Spouse's Allowance does not detract from the equality claim of same-sex couples here.

30

*Janzen v. Platy Enterprises Ltd.*, *supra*, at pp. 1287-90.



15. The law has developed a special regime of rights and obligations in respect of opposite-sex relationships of a similar nature, i.e. those involving long-term emotional, sexual and economic interdependence. It is submitted that, in view of this context, it would be inappropriate to group same-sex relationships of this nature with other familial relationships or living arrangements for the purposes of this equality analysis.

10 *Moge v. Moge*, [1992] 3 S.C.R. 8138.

*Pettkus v. Becker*, [1980] 2 S.C.R. 834.

16. In *Andrews* this Court held that section 15 applies both to a statute which impose burdens or obligations, and to a law which "withholds and limits access to opportunities, benefits and advantages available to other members of society." Section 15 is meant to ensure that "there must be accorded, as nearly as may be possible, an equality of benefit and protection and no more of the restrictions, penalties or burdens imposed upon one than another."

20 *Andrews v. Law Society of British Columbia*, *supra*, at pp. 174-75; p. 165.

17. Section 15 serves the fundamental purpose of bolstering the equality values essential to a free and democratic society. As McIntyre J. stated in *Andrews*: "The promotion of equality entails 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. It has a large remedial component."

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

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

18. Sexual orientation is a personal characteristic, which, it is submitted below, is an analogous ground of discrimination for the purposes of section 15 of the Charter. In the *Andrews* case, McIntyre J. held that a law which draws a distinction on the basis of a ground protected by the *Charter* will almost always be found to be discriminatory, and it is submitted that as a matter of policy this is the correct approach. Where the discrimination is direct, issues relating to legislative intent should be the focus of a section 1 inquiry and should not be dealt with at this stage.

10 19. It is submitted that, just as is done in human rights law, under the *Charter*, the listed and analogous grounds of discrimination should be treated as presumptively irrelevant to decision-making. Any classification which is explicitly based on these grounds or on characteristics connected with these grounds (such as pregnancy) ought to be automatically suspect, subject to any justification under section 1 of the *Charter*.

*Andrews v. Law Society of British Columbia, supra*, at pp. 177-78.

*Brooks v. Canada Safeway*, [1989] 1 S.C.R. 1219, at pp. 1243-47.

20 A. Bruner, "Sexual Orientation and Equality Rights". In Bayefsky and Eberts, eds., *Equality Rights and the Canadian Charter of Rights and Freedoms*. Toronto: Carswell, 1985, at p. 465.

20. In order to determine whether a law is discriminatory, it is necessary to examine the impact of the statutory scheme on the group in view of the broader social context. A law which further marginalizes or disadvantages an already excluded group in society will be discriminatory.

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

30 *R. v. Turpin*, [1989] 1 S.C.R. 1296 at pp. 131-32.

21. The legislative history reveals that the objective of the law was to provide an economic benefit in a manner which preserves the dignity of the recipients.

Case on Appeal: Vol. III, at pp. 379, 388, 389, 391, 396, 408, 410, Schedule (18): Minutes of Standing Committee Hearings for June 12 and 17, 1975, on Bill C-62.

10 22. Mr. Nesbit testified as to the stigma he feels is associated with the receipt of social assistance.

Case on Appeal: Vol. II, at pp. 188-91, Testimony of Mr. Nesbit.

23. The validity of the latter part of this dual purpose has been recognized, with respect to unemployment insurance benefits, by Justice LaForest in *Tétreault-Gadoury*:

20 The most harmful and singular aspect of section 31 of the Act is that it permanently deprives the applicant, and any other person of her age, of the status of a socially insured person by making her a pensioner of the state, ... she is as it were stigmatized ...".

*Tétreault-Gadoury v. Canada (Employment and Immigration Commission)*, [1991] 2 S.C.R. 22 at p. 40.

24. The denial of eligibility for the Spouse's Allowance further marginalizes and disadvantages a group which has been subjected to a lengthy history of pervasive discrimination. As stated by Ryder:

30 Canadian legislation stigmatizes lesbian and gay existences by exclusion. Most often this exclusion is accomplished by silence. ...

... [T]he law is a source of material and psychic oppression for gays and lesbians. Gays and lesbians are deprived of the advantages and powers afforded by laws aimed at improving the emotional and material security of

heterosexual family units. The state has not concerned itself with the well-being of gays and lesbians coping with old age ... As a result of the legal deprivation of resources and powers, these events are likely to produce greater emotional and material vulnerability in the lives of gays and lesbians that they do for heterosexuals.

Ryder, B., "Equal Rights and Sexual Orientation" (1990), 9 *Can. J. Fam. L.* 39, at pp. 46-48.

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25. It is inappropriate and misleading to overlook the significance of the objective of providing this benefit in a way which does not evoke the stigma traditionally associated with social assistance. This court has held that, "Purpose is a function of the intent of those who drafted and enacted the legislation at the time, and not of any shifting variable."

*R. v. Big M Drug Mart*, [1985] 1 S.C.R. 295, at pp. 334-36.

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### (c) Analogous Grounds

26. It is submitted that sexual orientation is an analogous ground of discrimination under section 15. The criteria for determining whether a particular category is an analogous ground have been set forth in *Andrews and Turpin*. In the latter case, Madame Justice Wilson emphasized the importance of going beyond the law which is subject to challenge, and examining "the entire social, political and legal fabric of our society.' If the larger context is not examined, the s. 15 analysis may become a mechanical and sterile categorization process conducted entirely within the four corners of the impugned legislation."

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*R. v. Turpin*, [1989] 1 S.C.R. 1296, at p. 1332.

27. It is submitted that sexual orientation meets all of these criteria. It has been the basis for long-standing and widespread discrimination. The group is defined on the basis of a personal characteristic, and it has suffered social, legal and political exclusion. Discrimination on the basis of sexual orientation is prohibited by most human rights laws in Canada. One's sexual orientation should, as a matter of policy, be irrelevant to one's capacity to obtain a job, or to receive a benefit which is generally available to others who meet the prescribed criteria of eligibility.

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*Haig and Birch v. Canada (Minister of Justice)* (1992), 9 O.R. (3d) 495 (Ont. C.A.), at pp. 502-03.

Warren, C., "Homosexuality and Stigma", in Marmor, J., ed., *Homosexual Behaviour: A Modern Reappraisal*. New York: Basic Books, Inc., 1980.

20

28. The analogous grounds approach to section 15 recognizes that grounds in addition to those listed in the section should receive constitutional protection, either because they are immutable personal characteristics, or "protected choices" which involve matters so personal and so integral to one's identity that they ought to be presumed irrelevant to public decision-making. This Court has recognized citizenship as an analogous ground. It should also include sexual orientation.

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29. It is submitted that it is wrong, as a matter of law and policy, to interpret section 15 so that sexual orientation would be an analogous ground in one case but not in another, solely on the basis of the law under challenge. This Court has recognized that the list of analogous grounds may evolve over time, as social circumstances change. However, it is submitted that this does not mean that the list of analogous grounds should change according to the nature of the law under challenge. It may be that a particular classification would be found not to be discriminatory under section 15, or justified under section 1, but this is irrelevant to

the question of whether a ground is analogous to the ones listed under section 15. It is submitted that this approach confuses the steps in a section 15 analysis, and would add unnecessary confusion and uncertainty to the law.

30. In *Andrews* and *Turpin* this Court has emphasized that these issues are not to be determined solely by examining the four corners of the statute, but rather the broader social, legal and historical context is to be examined. It is submitted that the approach of the Attorney General of Canada to the issue of analogous grounds is unduly technical and restrictive. If this approach to analogous grounds is adopted, when combined with the "discrimination" element of the analysis, it will accord analogous grounds such as sexual orientation a lower level of constitutional protection than is provided in respect of the listed grounds. This would be similar to the American approach, under which sexual orientation has not been treated as a "suspect class". It is submitted that this is inconsistent with the *Andrews* decision, and wrong as a matter of policy.

*Andrews v. Law Society of British Columbia, supra*, at pp. 177-78.

Bruner, A., "Sexual Orientation and Equality Rights", *supra*, at p. 465.

Sorensen, H.A., "A New Gay Rights Agenda? Dynamic Statutory Interpretation and Sexual Orientation Discrimination" (1993), *81 Geo. L. J.* 2105, at p. 2134.

## II Section 1: Reasonable Limits

31. It is submitted that the *Act* is underinclusive, and thus it is not a reasonable limit which is demonstrably justified in a free and democratic society. In particular, the *Act* does not meet the proportionality test as the means selected to achieve the objective are not proportional to the objective sought.

*R. v. Oakes, supra*, at pp. 139-40.

32. Although the purpose of the law is laudable, this purpose has been implemented in a discriminatory manner in that an equally deserving group that meets the other criteria set by the law has been denied the benefits due to an irrelevant personal characteristic. It is submitted that the provision of the spouse's allowance to same-sex couples is consistent with the original intent of the law.

10

**(a) Framework of Income Support Legislation**

33. Under the *Charter*, as in human rights law, an allegation of discrimination in respect of one law or program should not be measured in isolation from the other related laws or programs that are available to the excluded group. However, it is submitted that it would be inappropriate to find that the discrimination is justified in this case simply because it is off-set by the benefits available under provincial programs of social assistance.

20

34. As Justice LaForest held in *Tétreault-Gadoury*:

"It is fair to take into account the possibility that a group deprived of benefits under one Act may be receiving equal, or even greater, benefits under another. ... Still, I doubt whether the objective of fitting the Act within the government's particular legislative scheme of social programs could, in itself, be sufficiently important to justify the infringement of a Charter right."

*Tétreault-Gadoury, supra*, at p. 42.

30

35. It is submitted that an examination of this issue must go beyond the four corners of the statute to determine the true role, in the mind of the legislators of the

time, of the Spousal Allowance as distinct from social assistance. The Attorney General's argument erroneously defines the sole purpose of the spousal allowance as being to provide income support to the needy, and then concludes that the availability of alternative income support, through provincial social assistance, constitutes a reasonable balancing of competing social demands. It is submitted that the legislators viewed the Spousal Allowance as distinct from provincial social assistance in three ways: first, the elderly or near-elderly are a federal responsibility; second, the Spousal Allowance would allow provinces to incur savings in social assistance; third, the Spousal Allowance does not necessarily provide higher income support, but it provides it without the stigma associated with social assistance.

Factum of the Attorney General of Canada, paras. 83, 103-104.

36. Federal responsibility for the elderly and near-elderly was emphasized by the legislators, and is reflected in the Act. A key point in developing the Spousal Allowance was that one of the partners was already linked to the federal scheme: "Since such couples were already linked to the Old Age Security program through the elderly spouse, it seemed appropriate to assist the younger spouse through this same vehicle, rather than through a provincially-administered program."

*Old Age Security Act*, R.S.C. 1985, c. O-9, ss. 13, 33.

Case on Appeal: Vol. II, at pp. 232-34, Testimony of Mr. Hagguland.

Case on Appeal: Vol. III, at p. 345, Schedule (15): Explanation of Spouse's Allowance Program; at p. 353, Schedule (17): Statement of the Honourable Mark Lalonde, Minister of National Health and Welfare, on second reading of Bill C-62; at p. 386, Schedule (18): Minutes of Standing Committee Hearings for June 12 and 17, 1975, on Bill C-62.

37. A further benefit of the Spousal Allowance was that it would allow provinces to incur savings in social assistance.



Case on Appeal: Vol. III, at p. 355, Schedule (17): Statement of the Honourable Mark Lalonde, Minister of National Health and Welfare, on second reading of Bill C-62.

10 38. Mr. Egan and Mr. Nesbit's joint income from federal and provincial income support programs will be lower if they are treated as spouses, because Mr. Nesbit will no longer qualify for social assistance.

Case on Appeal: Vol. II, at pp. 210-17, Testimony of Mr. Hagguland.

Case on Appeal: Vol. III, at p. 338, Schedule (8): Federal and B.C. Provincial benefits actually paid to Mr. Egan and Mr. Nesbit; at p. 340, Schedule (10): Federal and B.C. Provincial benefits which would have been paid had Mr. Egan and Mr. Nesbit been considered married.

20 39. The stigma associated with social assistance, which is particularly relevant in this case, is discussed above. This objective of providing income support with dignity was emphasized when the Spouse's Allowance was created, and cannot be overlooked now.

Factum of the Intervener Canadian Human Rights Commission, paras. 20-24.

### **(b) Beneficiaries Not Limited to the Most Vulnerable Group**

40. Parliament has the authority to make legislative choices in order to protect the most vulnerable group.

30 *R. v. Hess and R. v. Nguyen*, [1990] 2 S.C.R. 906 at p. 931-32.

41. As the legislative history demonstrates, Parliament was aware of the general social context, in which women were often out of the paid labour force for a

substantial period of time due to child-bearing and child-rearing responsibilities.

Case on Appeal: Vol. III, at pp. 376-77, Schedule (18): Minutes of Standing Committee Hearings for June 12 and 17, 1975, on Bill C-62.

42. The Spouse's Allowance has never been limited to the most vulnerable group. The legislation does not require that one of the spouses have been out of the paid labour force. Nor was the program limited to women; men can claim the Spouse's Allowance, and this was explicitly acknowledged by the Minister at the time.

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Case on Appeal: Vol. III, at pp. 376-77, Schedule (18): Minutes of Standing Committee Hearings for June 12 and 17, 1975, on Bill C-62.

43. It is submitted that this demonstrates that Parliament's objective was not the narrow one of providing benefits to this particular group, as argued by the Attorney General, but the broader objective of addressing the needs of elderly and near-elderly couples who were in poverty.

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44. While the Minister emphasized the scarcity of resources in extending the spouses' allowance to widows and widowers, he did not use this as a reason to limit it to only widows. Parliament was willing to incur the additional cost of extending it to widowers, presumably because the cost would not be great.

Factum of the Attorney General of Canada, para. 103.

45. Similarly, extension of the benefit to same-sex partners will not substantially increase the costs of the federal program. While the numbers of same-sex partners, let alone their age difference and financial need are unknown, it is clear that the number is small.

Case on Appeal: Vol. I, at pp. 119-23, Expert Report prepared by Mr. M.R. Haggulund submitted by the Defendant, Her Majesty the Queen in Right of Canada.

Case on Appeal: Vol. II, at pp. 249-51, 265-75, Testimony of Mr. Haggulund.

10 Ontario Law Reform Commission, *Report on the Responsibilities of Cohabitants under the Family Law Act* (1993), at p. 7.

Sell, R. L., Wells, J.A., Wypij, D., "The Prevalence of Homosexual Behaviour and Attraction in the United States, the United Kingdom and France: Results of National Population-Based Samples, (1990) Archives of Sexual Behaviour [forthcoming], presented at the American Statistical Association Conference on August 18, 1994.

20 46. The cost estimates provided by the Attorney General are not only speculative but based on a false assumption which has rendered them too high. The estimate assumes that the benefit would be available to 60 to 64 year old persons living with a person of the same sex who is receiving the Guaranteed Income Supplement. However, not all such living arrangements are analogous to a spousal one. Just as the government did not assume that including common-law couples as beneficiaries would result in fraudulent claims, there is no reason to assume that extending it to same-sex partners would increase the cost due to fraudulent claims.

30 Case on Appeal: Vol. I, at pp. 119-23, Expert Report prepared by Mr. M.R. Haggulund submitted by the Defendant, Her Majesty the Queen in Right of Canada

Case on Appeal: Vol. II, at pp. 249-51, 265-75, Testimony of Mr. Haggulund.

Case on Appeal: Vol. III, at pp. 394-95, 413, 438-39, Schedule (18): Minutes of Standing Committee Hearings for June 12 and 17, 1975, on Bill C-62.

(c) **General Societal and Legal Framework**

47. This case is not about "find[ing] that the *Charter* requires that homosexual relationships be subject to all of the legal rights and obligations which apply to heterosexual relationships." Rather, it is submitted that the denial of this benefit is discriminatory on the ground of sexual orientation and the proper remedy is to extend the benefit to same-sex partners who are in long-term, interdependent relationships.

10 Factum of the Attorney General of Canada, para. 114.

48. It is submitted that the Attorney General of Canada is wrong to assert that this extension would change fundamentally the essential societal concept of marriage, as is reflected in the definition of the term spouse. Societies which have accorded legal status to same-sex partners have done so through legislation such as partnership registration.

20 Hensen, D.H., "A Comparative Analysis of Same-sex Partnership Protections: Recommendation for an American Reform" (1993), 7 *Int'l J. L. & F.* 282.

Ontario Law Reform Commission, *Report on the Responsibilities of Cohabitants under the Family Law Act*, *supra*, at pp. 32-33.

49. It is submitted that the extension of benefits to same-sex partners in this case should not be foreclosed because it would provide a new benefit to a class heretofore excluded from the rights and responsibilities of common-law couples. Common-law couples were recognized in provincial social assistance legislation and the Old Age Security Act before they were widely recognized in provincial family law reform acts, governing support on breakdown. Even now, some provinces have no legislation governing support on breakdown of common-law relationships.

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Case on Appeal: Vol. III, at pp. 442-43, Schedule (18): Minutes of Standing Committee Hearings for June 12 and 17, 1975, on Bill C-62, Appendix "H": Provisions Determining whether an Application should be Considered as being from a Family Unit or from a Single Person.

*Old Age Security Act*, R.S.C. 1985, c. 0-9, s. 1.

*Family Law Act*, S. Newfoundland 1988, c. 60, s. 35(c).

*Child and Family Services and Family Relations Act*, S.N.B. 1980, c. C-2.1, s. 112(3).

*Family Maintenance Act*, S.N.S. 1980, c. 6, s. 2(m).

*Matrimonial Property and Family Support Ordinance*, S.Y. 1979, c. 11, s. 30.6.

*Family Law Reform Act*, 1978, S.O. 1978, c. 2, s. 14(b).

*Family Maintenance Act*, S.M. 1978, c. 25, s. 11(1).

*Family Relations Act*, S.B.C. 1978, c. 20, O.C. s.1.

50. It is submitted that the recognition accorded to common-law couples has not resulted solely because the nature of their relationship often parallels that of married couples, as argued by the Attorney General, but in part from the state's desire to relieve itself of the burden of family support and breakdown. As noted by Ryder, "The state, clearly has a special interest in broadening obligations and structures of mutual care, and thereby further privatizing those costs."

Ryder, B., "Equal Rights and Sexual Orientation", *supra*, at p. 95.

51. Thus, for example, provincial family law legislation includes them for support obligations but not for entitlement to property on family breakdown. In this area, common-law couples must rely upon the existing doctrine of the constructive trust. It

is submitted that the recent application of these legal doctrines to same-sex partners demonstrates that the legal system is quite capable of dealing with the de facto nature of these relationships, just as it has done for opposite sex common-law couples, on a case by case basis, as appropriate.

*Moge v. Moge, supra.*

*Pettkus v. Becker, supra.*

Ontario Law Reform Commission, Report on the Responsibilities of Cohabitants under the Family Law Act, supra, at pp. 9-10.

Ryder, B., "Equal Rights and Sexual Orientation", *ibid*, at p. 95.

52. It is submitted that the societal interest in reducing the burden to the state by recognizing the interdependent support provided by same-sex partners, as it did for common-law couples, is demonstrated by the facts of this case.

### III Remedy

53. The Commission adopts in its entirety the reasoning of Linden, J.A. concerning remedy.

**PART IV -- ORDER SOUGHT**

54. It is respectfully submitted that the appeal should be allowed, and the declarations granted in the form proposed by Mr. Justice Linden in the Court below.

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**ALL OF WHICH IS RESPECTFULLY SUBMITTED** at Ottawa, this 25<sup>th</sup> day of October, 1994.



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William Pentney  
General Counsel

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## PART V

## LIST OF AUTHORITIES

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| 1. <i>Andrews v. Law Society of British Columbia</i> , [1989] 1 S.C.R. 141.                          | 3, 6, 7, 11 |
| 2. <i>Brooks v. Canada Safeway</i> , [1989] 1 S.C.R. 1219.   | 7           |
| 3. <i>Canada (Attorney General) v. Mossop</i> , [1993], 1 S.C.R. 554.                                | 5           |
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| 5. <i>Janzen v. Platy Enterprises Ltd.</i> , [1989] 1. S.C.R. 1252                                   | 3, 5        |
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17. Hensen, D.H., "A Comparative Analysis of Same-sex Partnership Protections: Recommendation for an American Reform" (1993), *7 Int. J. L. & F.* 282. 17
18. Ontario Law Reform Commission, *Report on the Responsibilities of Cohabitants under the Family Law Act* (1993). 16, 17, 19
19. Ryder, B., "Equal Rights and Sexual Orientation" (1990), *9 Canadian Journal of Family Law*, 39. 9, 18, 19
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21. Sorensen, H.A., "A New Gay Rights Agenda? Dynamic Statutory Interpretation and Sexual Orientation Discrimination" (1993), *81 Geo. L. J.* 2105. 11
22. Warren, C., "Homosexuality and Stigma". In Marmor, J., ed., *Homosexual Behaviour: A Modern Reappraisal*. New York: Basic Books, Inc., 1980. 10

## APPENDIX "A"

## Statutes Relied On

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| 1. <i>Old Age Security Act</i> , R.S.C. 1985, c. 0-9, ss. 13, 33.                                | 13, 18 |
| 2. <i>Family Law Act</i> , S. Newfoundland 1988, c. 60, s. 35(c).                                | 18     |
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