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No. 23636

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)

AND:

EQUALITY FOR GAYS AND LESBIANS EVERYWHERE/
ÉGALITÉ POUR LES GAIS ET LES LESBIENNES (EGALE)

INTERVENOR

FACTUM OF EGALE

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INDEX

APPENDICES

PART I - FACTS

1. By order of this Court dated April 7, 1994, Equality for Gays and Lesbians Everywhere/Égalité pour les gais et les lesbiennes (EGALE) was granted leave to intervene in this appeal.

2. EGALE is a Canadian organization committed to advancing equality and justice for lesbians, gay men and bisexuals in areas of federal jurisdiction. EGALE is also active on international issues; it was accredited to the United Nations World Conference on Human Rights in Vienna in 1993 and is an Official Partner with the Canadian Committee for the International Year of the Family (1994).

3. EGALE accepts the Statement of Facts set out in the Appellants' Factum.

PART II - POINTS IN ISSUE

4. EGALE submits that the constitutional questions herein should be answered as follows:

(A) Does the definition of "spouse" in s.2 of the *Old Age Security Act* infringe or deny s.15(1) of the *Charter*?

- *Yes*

(B) If the answer to question 1 is yes, is the infringement or denial demonstrably justified in a free and democratic society pursuant to s.1 of the *Charter*?

- *No*

PART III - ARGUMENT

A. INTRODUCTION

5. In EGALE's submission, lesbians and gay men have the constitutional right to equality without discrimination on the basis of sexual orientation, and the scope of that right must be defined broadly to provide meaningful protection, rather than defined so narrowly as to be devoid of substance in circumstances in which lesbian and gay partners suffer discrimination because their same-sex relationships are devalued and delegitimized.

6. The Respondent alleges that the central issue in this case relates to the federal government's ability to make policy decisions regarding the distribution of scarce resources between needy groups with competing interests. The Respondent invites this Court to focus narrowly on the economic impact of the spouse's allowance program in the *Old Age Security Act* ("the *OASA*") and to ignore the social effects of the legislation, which it characterizes as "trivial" (see para.67 of its Factum). Yet the Respondent implicitly concedes that the *OASA* has significant social implications when it suggests (at para.63 of its Factum) that the Appellants are seeking to have this Court "change fundamentally the essential meaning of the societal concept of marriage, as reflected in the definition of the term spouse."

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7. It is respectfully submitted that the Appellants are not challenging the meaning of the concept of marriage, which is a particular legal and social institution not at issue in this case. They are, however, challenging the narrow construction of relationship recognition which is reflected in the impugned definition of "spouse", a construction which devalues and delegitimizes the families and partnerships of lesbians and gay men. This narrow construction is reflected in numerous federal statutes (see Appendix B of the Respondent's Factum). It is inconsistent with the international recognition of the diversity of existing family structures (see Appendices B - E of this Factum). Moreover, it contravenes s.15(1) of the *Charter* because it violates the equality rights of lesbians and gay men.

20 Factum of EGALE, Appendices B - E.

8. It is further submitted that the categorization of lesbian and gay relationships as "non-spousal" is premised on an inherently discriminatory view that lesbian and gay relationships are inferior to heterosexual relationships. In EGALE's view, it is clear that one component of "sexual orientation" discrimination is the refusal to recognize lesbian and gay relationships.

9. It is respectfully submitted that the reasons advanced by the Respondent for limiting the spouse's allowance program to heterosexual couples are mere rationalizations for perpetuating discrimination against lesbians and gay men; they do not satisfy the requirements of a s.1

30 analysis and consequently, the "opposite sex" requirement in s.2 of the *OASA* does not constitute a justifiable limit on the equality rights of lesbians and gay men.

B. SECTION 15 OF THE *CHARTER*

1. Purposive Approach

10. This Court has adopted a purposive approach to the interpretation of the rights and freedoms guaranteed by the *Charter*. The *OASA* must therefore be examined in light of the purpose of s.15, which has been defined by this Court as "remedying or preventing discrimination against groups suffering social, political and legal disadvantage in our society." In *Andrews*, Mr. Justice McIntyre specified that s.15 "has a large remedial component."

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

R. v. *Turpin*, [1989] 1 S.C.R. 1296, at 1333, per coram.

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

11. An analysis of s.15(1) of the *Charter* requires an inquiry into:

(a) whether the distinction created by the impugned law violates one or more of the equality rights and, if so,

(b) whether that distinction results in discrimination on the basis of an enumerated or analogous ground.

Turpin, *supra*, at 1334, per coram.

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

2. Denial of Equality Rights

12. The focus of an inquiry into a denial of one of the equality rights is whether the law has drawn a distinction on the basis of a personal characteristic. The impugned definition of "spouse" distinguishes between partners in heterosexual relationships and partners in lesbian and gay relationships. Otherwise eligible lesbians and gay men are consequently denied the benefit of receiving a spouse's allowance. They are thereby denied the right to equal benefit of the law. Furthermore, lesbian and gay relationships are afforded no recognition whatsoever under s.2 of the *OASA*. Lesbians and gay men are thereby denied the rights to equality before and under the law.

Swain, *supra*, at 992, per Lamer C.J.

3. Discrimination

13. A denial of one or more of the equality rights will violate s.15(1) only if it results in discrimination. "Discrimination" has been defined by this Court as:

> a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits and advantages available to other members of society.
>
> *Andrews*, *supra*, at 174, per McIntyre J.

14. This Court has further ruled that a violation of s.15(1) will occur only when:

> the personal characteristic in question falls within the grounds enumerated in the section or within an analogous ground, so as to ensure that the claim fits within the overall purpose of s.15 - namely, to remedy or prevent discrimination against groups subject to stereotyping, historical disadvantage and political and social prejudice in Canadian society.
>
> *Swain*, *supra*, at 992, per Lamer C.J.

15. It is submitted that sexual orientation is a ground of discrimination analogous to those enumerated in s.15(1), that the legal distinction created by the definition of "spouse" in s.2 of the *OASA* is based on sexual orientation, and that the distinction in question results in discrimination against lesbians and gay men.

(a) Sexual Orientation is an Analogous Ground

16. In determining whether a *ground* of discrimination is analogous to those enumerated in s.15(1), the Court must consider the *group* alleged to have suffered the discrimination:

> The ground of discrimination and the group discriminated against are related, a fact which is particularly important for determining whether a basis for distinction is an analogous ground for the purposes of subsection 15(1).
>
> *Schachtschneider* v. *Canada*, [1994] 1 F.C. 40, at 69 (F.C.A.), per Linden J.A.

17. In accordance with the remedial purpose of s.15(1), a determination that a distinction has been created on the basis of an analogous ground requires a prior determination that the personal characteristic upon which the distinction was drawn is shared by the members of an historically disadvantaged group. This explains why, in *Turpin*, Madame Justice Wilson

declared that although "province of residence" was held not to be an analogous ground in that particular case, it could nevertheless constitute an analogous ground under different circumstances, i.e. if the claimants in a different case belonged to an historically disadvantaged group defined by their province of residence.

Turpin, *supra*, at 1333, per coram.

18. Although "sexual orientation" may not constitute an analogous ground in all circumstances (eg. it would not constitute an analogous ground if it were raised by a heterosexual claimant because heterosexuals constitute an historically privileged group), it is an analogous ground when raised by lesbians and gay men because they are members of an historically disadvantaged group.

19. It is submitted that this Court may take judicial notice of the fact that lesbians and gay men constitute an historically disadvantaged group in Canadian society. As Judge Russell ruled in *Vriend*, "discrimination against homosexuals is an historical, universal, notorious, and indisputable social reality."

Vriend v. *Alberta*, [1994] 152 A.R. 1, at 8 (Alta. Q.B.)

20. Lesbians and gay men have suffered discrimination and persecution throughout Canadian history. They have been treated as mentally ill and have been subjected to conversion "therapies", including electroshock treatment. They have been targeted by discriminatory laws, such as an immigration law which prohibited their entry into this country and subjected those who were immigrants to the threat of deportation (1952-1977), and a penal law which criminalized certain forms of gay male sexual expression and rendered gay men vulnerable to indefinite incarceration as "dangerous sexual offenders" (1892-1969). Lesbians and gay men have been excluded from certain aspects of public life. For example, in the 1960s more than 8,000 gay men were investigated by the R.C.M.P. and, as a result, approximately 150 gay federal civil servants resigned or were dismissed from their employment without just cause. Furthermore, lesbians and gay men were not permitted, until recently, to participate openly in the Armed Forces. Lesbians and gay men have suffered similar discrimination in the private sector, in areas such as employment and housing, and until recently, they were not afforded the protection of provincial and federal prohibitions against such human rights violations. The

federal government, Alberta, Prince Edward Island, Newfoundland and the Northwest Territories have not yet enacted prohibitions against discrimination and harassment on the basis of sexual orientation. Lesbians and gay men have been the targets of hate-motivated crimes and have frequently been deprived of adequate police protection. They have been subjected to verbal harassment and have been victimized by anti-lesbian and anti-gay violence, including murderous assaults. They have also endured numerous damaging stereotypes, such as the myths that they are sexual predators, child molesters and unfit parents.

Dean Beeby, "Mounties Staged Massive Hunt for Gay Males in Civil Service" *The Globe and Mail* (24 April 1992): A1.

Canadian Human Rights Commission, *Employment: Prohibited grounds of discrimination* (August 1993).

Carolyn Gibson Smith, *Proud but Cautious: Homophobic Abuse and Discrimination in Nova Scotia*, Nova Scotia Public Interest Research Group (July 1994).

Commission des droits de la personne du Québec, *De l'illégalité à l'égalité: Rapport de la consultation publique sur la violence et la discrimination envers les gais et les lesbiennes* (May 1994).

Gregory Herek, "Myths About Sexual Orientation: A Lawyer's Guide to Social Science Research" 1 (1991) *Law and Sexuality* 133.

Philip Girard, "From Subversion to Liberation: Homosexuals and the Immigration Act, 1952-1977" 2 (1987) *Canadian Journal of Law and Society* 1.

Gary Kinsman, *The Regulation of Desire: Sexuality in Canada* (Montreal: Black Rose Books, 1987), chapter 9.

Cynthia Petersen, "A Queer Response to Bashing: Legislating Against Hate" 16:2 (1991) *Queen's Law Journal* 237.

Becki Ross, "Sexual Dis/Orientation or Playing House: To Be or Not to Be Coded Human" in Sharon Dale Stone (ed.), *Lesbians in Canada* (Toronto: Between the Lines, 1990), at p.133.

21. Of particular relevance to the Appellants' claim is the fact that lesbians and gay men have been stereotyped as unloving and incapable of personal commitment. Their relationships have consequently been devalued and treated as unworthy of recognition and respect. The extent of the refusal to accord equal status to lesbian and gay relationships and the degree of political powerlessness experienced by lesbians and gay men in this area can be measured by the numerous federal and provincial statutes which recognize heterosexual relationships exclusively. These include statutes in the areas of tax, succession, immigration and family law.

These statutes marginalize the individual partners in same sex relationships, stigmatize their children, and undermine the effective functioning of their family units (e.g. by refusing to recognize the relationship between children and their *de facto* lesbian and gay parents for the purposes of succession, by refusing to permit lesbians and gay men to sponsor their foreign-born partners for the purposes of immigration, etc.).

Coalition for Lesbian and Gay Rights in Ontario, *Happy Families: The Recognition of Same-Sex Spousal Relationships* (April 1992).

Appendix B of Respondent's Factum (list of federal statutes).

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

22. Also of particular relevance to the Appellants' claim is the invisibility imposed upon lesbians and gay men, and their relationships. Lesbian and gay history has been obscured through the active erasure of historical references to lesbianism and homosexuality. Contemporary references to lesbian and gay sexualities in popular culture remain rare, and of the references that do exist, few accurately reflect lesbian and gay experience; most reinforce pejorative stereotypes about lesbians and gay men. Lesbian and gay male invisibility is maintained by the pressures which force many lesbians and gay men to conceal their sexual identities, pressures such as the threat of discrimination, harassment and violence. The enforced invisibility of lesbian and gay male sexualities and relationships contributes to the normalization of heterosexuality and heterosexual relationships. Ubiquitous cultural references to heterosexual relationships (eg. in television sitcoms, Hollywood films and best-selling novels) and the absence of similar references to lesbian and gay relationships result in the popular misconception that heterosexuality is natural and normal, whereas lesbianism and homosexuality are deviant and perverse. This contributes to the oppression of lesbians and gay men, not only because it fuels social prejudice against them, but also because many of them, particularly youth, internalize the message that they are not normal and consequently suffer insecurity, anxiety and shame, and lack the role models needed to develop fulfilling relationships. The normative status of heterosexuality also induces some lesbians and gay men to deny their sexual identities -- sometimes for many years -- and to engage in unhappy and unfulfilling heterosexual relationships in an effort to conform to the socially prescribed heterosexual ideal. For many, this is an emotionally and psychologically damaging experience.

Adrienne Rich, "Compulsory Heterosexuality and Lesbian Existence" in Henry Abelove, et. al. (eds.), *The Lesbian and Gay Studies Reader* (New York: Routledge, 1993), at p.227.

Karla Jay, "A Gay Critique of Modern Literary Criticism" in Karla Jay and Allen Young (eds.), *Out of the Closets: Voices of Gay Liberation* (New York: Douglas, 1972), at p.66.

Vito Russo, "The Film Historian" in Eric Marcus (ed.), *Making History: The Struggle for Gay and Lesbian Equal Rights 1945-1990* (New York: Harper, 1993), at p.407.

23. The Respondent submits (in para.31 of its Factum) that, in order to establish "sexual orientation" as an analogous ground,

> [t]he Appellants must show more than that they belong to a group, defined by a personal characteristic, which has suffered historic disadvantage. Rather, they must prove historic disadvantage of the group, relevant to the *purposes* of the challenged legislation. In other words, in this case, they must show historic *economic* disadvantage. (emphasis in original)

The Respondent incorrectly cites *Symes* as an authority for this assertion. In *Symes*, the impugned legislative provision distinguished between persons who incur child care expenses and those who do not. The Appellant argued that the provision effectively drew a distinction on the basis of sex because it had a disproportionate impact on women. Mr. Justice Iacobucci held that the distinction was not based on sex because there was no evidence that women disproportionately pay child care expenses, i.e. no evidence that women were disproportionately affected by the provision. Evidence that women disproportionately incur the social costs of childcare was held to be irrelevant *to the determination of whether a distinction had been created on the basis of sex*. This reasoning, upon which the Respondent relies, was unrelated to the determinations of whether a claimant belongs to an historically disadvantaged group and whether an analogous ground of discrimination has been established. Moreover, in his reasoning in *Symes,* Mr. Justice Iacobucci specifically focused on the *effect* of the legislation, not on its *purpose*, as the Respondent suggests. The effect of the impugned provision in the present case is clearly to draw a distinction on the basis of sexual orientation (see *infra* paras. 26 to 32 of this Factum).

Symes v. *Canada*, [1993] 4 S.C.R. 695, at 762-763, per Iacobucci J.

24. In asserting that the Appellants must prove that lesbians and gay men historically have suffered economic disadvantage, the Respondent contradicts the following statement of Madame Justice Wilson in *Andrews*:

> I emphasize, moreover, that this [i.e. whether a claimant belongs to an historically disadvantaged group] is a determination which is not to be made only in the context of the law which is subject to challenge but rather in the context of the place of the group in the entire social, political and legal fabric of society.
>
> *Andrews, supra*, at 152, per Wilson J.

10 25. It is submitted that this Court should confirm the consensus developed among lower courts and tribunals that lesbians and gay men constitute an historically disadvantaged group and that sexual orientation discrimination, when suffered by lesbians and gay men, is an "analogous ground" within the meaning of s.15(1) jurisprudence.

Haig v. *Canada* (1992), 9 O.R. (3d) 495, at 503 (Ont. C.A.)

Brown v. *B.C. (Minister of Health)* (1990), 42 B.C.L.R. (2d) 294, at 309 (B.C.S.C.)

Veysey v. *Correctional Services of Canada*, [1990] 1 F.C. 321, at 326-329 (F.C.T.D.); aff'd on different grounds (1990), 109 N.R. 300 (F.C.A.)

Knodel v. *B.C. (Medical Services Commission)* (1991), 58 B.C.L.R. (2d) 356, at 371-387 (B.C.S.C.)

20 *Douglas* v. *Canada*, [1992] 58 F.T.R. 147, at 153-155 (F.C.T.D.)

Vriend, supra, at 10-11.

Layland v. *Ontario*, [1993] 14 O.R. (3d) 658, at 664-665 (Div. Ct.)

Leshner v. *Ontario* (1992), 16 C.H.R.R. D/184, at paras.111-113 (Ont. Bd. Inq.)

(b) The Distinction is Based on Sexual Orientation

26. It is respectfully submitted that Mr. Justice Robertson and Mr. Justice Mahoney erred when, in separate opinions, they upheld Judge Martin's ruling that the Appellants' right to equal benefit of the law was denied "because of their non-spousal status rather than because of their sexual orientation."

30 *Reasons for judgment* of Robertson, J.A., appeal book p.599; Mahoney, J.A., appeal book p.605; Martin J., appeal book p.561.

27. It is submitted that Mr. Justice Linden was correct when, in his dissenting opinion, he asserted that the reasoning which led to the majority judges' conclusion was "circular." The issue in this action cannot be satisfactorily resolved by stating that lesbian and gay partners are not eligible for a spouse's allowance because they are not "spouses"; it is precisely the ascription of "non-spousal" status to lesbian and gay relationships which is being challenged as discriminatory on the basis of sexual orientation. Identifying lesbian and gay relationships as "non-spousal" betrays a perception that lesbian and gay relationships are inherently inferior to heterosexual relationships.

Reasons for judgment of Linden, J.A., appeal book p.610.

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28. It is respectfully submitted that the majority judges failed to appreciate the close connection between the Appellants' sexual orientation and their exclusion from the *OASA*'s definition of "spouse." This connection is similar to that which was identified by Chief Justice Lamer in *Mossop*, a case in which a gay male employee, who had been denied bereavement leave to attend the funeral of his male partner's father, alleged discrimination on the basis of "family status" under the *Canadian Human Rights Act* (the *CHRA*). As a matter of statutory interpretation with respect to the scope of the phrase "family status", Chief Justice Lamer stated:

> 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
20 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.
>
> *Canada* v. *Mossop*, [1993] 1 S.C.R. 554, at 580, per Lamer C.J.

29. In reaching the conclusion that the complainant in *Mossop* had not suffered "family status" discrimination within the meaning of the *CHRA*, Chief Justice Lamer reasoned:

> While it may be argued that the discrimination here applies to homosexual couples through their familial relationship or in their "family status" and does not apply to the sexual orientation of Mr. Mossop as an individual as such, I am not persuaded by this
30 distinction.... If such an interpretation were to be given to the CHRA, the result would be somewhat surprising: while homosexuals who are not couples would receive no protection under the Act, those who are would be protected.

Mr. Justice Robertson and Mr. Justice Mahoney, in their respective judgments in this case, relied on an artificial distinction similar to that which was rejected in *Mossop*. In essence, their

ruling results in a declaration that the *Charter* guarantee of equality without discrimination on the basis of sexual orientation applies only to lesbians and gay men as individuals and does not extend to lesbian and gay couples. This anomalous result is precisely the converse of the situation criticized by Chief Justice Lamer in *Mossop* and it is submitted that it is an equally untenable result.

Mossop, *supra*, at 581, per Lamer C.J.

30. If this Court declares that lesbians and gay men are an historically disadvantaged group entitled to *Charter* protection against discrimination on the basis of sexual orientation, then the ground "sexual orientation" must not be interpreted so narrowly as to deprive lesbians and gay men of the full protection of their equality rights. In *Andrews*, Mr. Justice McIntyre held that:

> Both the enumerated grounds themselves and other possible grounds of discrimination recognized under s.15(1) must be interpreted in a broad and generous manner, reflecting the fact that they are constitutional provisions not easily repealed or amended but intended to provide ... for "the unremitting protection" of equality rights.
>
> *Andrews*, *supra*, at 175, per McIntyre J., quoting *Hunter* v. *Southam Inc.*, [1984] 2 S.C.R. 145, at 155.

31. It is submitted that Mr. Justice Linden's dissenting opinion on this matter was correct. In *Rodriguez*, Chief Justice Lamer expressed agreement with the following passage from Mr. Justice Linden's dissent:

> 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.

Linden's approach is consistent with this Court's ruling in *Brooks* that distinctions based on pregnancy constitute sex discrimination because they are "at least, strongly 'sex related'."

> *Rodriguez* v. *B.C.*, [1993] 3 S.C.R. 519, at 555, per Lamer C.J., dissenting on another point.
>
> *Brooks* v. *Canada Safeway Inc.*, [1989] 1 S.C.R. 1219, at 1244, per coram.

32. In this case, the impugned definition of "spouse" creates a distinction on the basis of whether partners in a relationship are of the same sex or the opposite sex. This distinction

clearly affects lesbians and gay men "in a manner related to" their sexual orientation. In *Brooks*, Chief Justice Dickson (as he then was) suggested that the connection between pregnancy discrimination and sex discrimination is self-evident: "They [the Appellants] were pregnant because of their sex." Similarly, it is obvious that the Appellants in the present case are in a same-sex relationship because of their sexual orientation. As Mr. Justice Marceau stated in his decision in *Mossop*: "it then becomes apparent that the disadvantage that may result to [a homosexual couple] by a refusal to treat it as a heterosexual couple is inextricably related to the sexual orientation of its members." On appeal, Chief Justice Lamer expressed agreement with that passage from Mr. Justice Marceau's judgment.

Brooks, *supra*, at 1242, per coram.

Mossop, *supra*, at 580-581, per Lamer C.J., quoting Marceau, J.A.

(c) The Distinction Results in Discrimination

33. Contrary to the Respondent's assertion (at paras.66 and 73 of its Factum), s.2 of the *OASA* was deliberately drafted to exclude lesbians and gay men who would otherwise qualify for a spouse's allowance. Consequently, there is purposeful and direct discrimination in this case. As Mr. Justice Linden observed in his dissenting opinion, the words "of the opposite sex" were specifically included in the definition of "spouse" in order to exclude lesbian and gay partners who meet all of the other eligibility criteria:

> 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 are excluded.
>
> *Reasons for judgment* of Linden, J.A., appeal book p.629.

34. While intentional discrimination will automatically infringe s.15, a violation of s.15 also occurs when a legislative distinction has the *effect* of discriminating on the basis of an analogous ground (see *supra*, para.13 of this Factum). This Court has ruled that an examination of the larger social, political and legal context is required in order to determine whether a legislative distinction has a discriminatory effect. Thus in determining whether s.2 of the *OASA* results in discrimination on the basis of sexual orientation, it is necessary to consider not only

the specific legislation in question, but also the position of lesbians and gay men within the entire social, political and legal fabric of our society.

> *Andrews*, *supra*, at 152, per Wilson J.
>
> *Turpin*, *supra*, at 1332, per coram.

35. An examination of the larger context reveals that lesbians and gay men suffer systemic discrimination with respect to their relationships. Systemic discrimination results from a history of oppression which persists so long and is so extensive that it becomes institutionalized in the laws, customs, and prevailing attitudes of society. This process is particularly insidious because, once discrimination is entrenched in laws, customs and attitudes, it becomes regarded as the norm and accepted as the "natural" societal order. For example, in paragraphs 19 and 81 of its Factum, the Respondent alludes to the "clear meaning" of the word "spouse", implying that the word has a fixed and inherent meaning which is exclusively heterosexual. This ignores the fact that words have constructed meanings which evolve out of social and historical patterns. With respect to the word "spouse", definitions which posit an exclusively heterosexual meaning derive from a long history of lesbian and gay oppression. The discriminatory nature of the historical denial of spousal status to same-sex relationships is self-evident to lesbians and gay men; the systemic failure of decision-makers to appreciate this fact is due to the simple reality that discrimination against lesbian and gay relationships is so firmly embedded in the attitudes and structures of our society as to be almost imperceptible to those who are not oppressed by it.

36. The Respondent argues that the impugned definition of "spouse" is not discriminatory because it merely "reflects the societal concept of marriage as requiring two persons of the opposite sex" (see paras.41, 63 and 71 of its Factum). In so doing, the Respondent appeals to popular prejudice and to the systemic discrimination against lesbians and gay men in an effort to justify the exclusion of same-sex couples from the spouse's allowance program. This argument was rejected by Madame Justice Wilson in *Turpin*:

> The argument that s.15 is not violated because departures from its principles have been widely condoned in the past and that the consequences of finding a violation would be novel and disturbing is not, in my respectful view, an acceptable approach to the interpretation of *Charter* provisions.
>
> *Turpin*, *supra*, at 1328, per coram.

37. One important aspect of the systemic discrimination experienced by lesbians and gay men consists of the federal and provincial governments' refusal to accord legal recognition to their relationships, as evidenced by the numerous statutes which explicitly recognize heterosexual relationships exclusively. This legal regime denies lesbians and gay men important support mechanisms that help to strengthen relationships, it weakens the effective functioning of their relationships in times of crisis (eg. unforeseen accident, illness, death), and it reduces the material wellbeing of many lesbian and gay male couples. It is premised on the prejudiced view that lesbian and gay relationships are immoral and unnatural and it reinforces the pejorative stereotypes that lesbian and gay relationships are shallow, unloving and uncommitted, and hence are unworthy of recognition and respect.

38. The exclusion of lesbian and gay partners from eligibility for the spouse's allowance program must be evaluated in light of the systemic discrimination directed against lesbian and gay relationships. In *Andrews*, Madame Justice Wilson held that discrimination results from legal distinctions which "reinforce the disadvantage of certain [i.e. historically disadvantaged] groups." The impugned distinction in s.2 of the *OASA* compounds and contributes to the oppression of lesbians and gay men, reinforces their disadvantage, and therefore results in discrimination.

Andrews, *supra*, at 152, per Wilson J.

39. The *OASA* must also be evaluated in light of the enforced invisibility of lesbians and gay men, which is another important aspect of the larger social, political and legal context. The failure to recognize same-sex relationships in the impugned definition of "spouse" contributes to the invisibility of lesbian and gay sexualities, as well as to the concurrent normalization and idealization of heterosexuality, which in turn impact negatively on the dignity and self-esteem of lesbians and gay men.

40. The exclusion of other groups from eligibility for a spouse's allowance under the *OASA* (such as brothers and sisters or parents and children who cohabit) in no way diminishes the discrimination and the reinforcement of historical disadvantage suffered by lesbian and gay couples as a result of their exclusion.

41. Some lesbians and gay men are economically disadvantaged by their exclusion from the spouse's allowance program; others, such as the Appellants, are not, because they happen to qualify for other government benefits as individuals. The Respondent argues that there is only "trivial" discrimination in this case because the Appellants have not themselves suffered an economic disadvantage as a result of their exclusion from the spouse's allowance program (see para.67 of its Factum). The Respondent asserts that "the Appellants are seeking a form of abstract or theoretical equality" (para.68) and that their argument stresses "symbolic over substantial reality" (para.16) because "they are requesting equality which deals with emotional feelings and social validation" (para.49). It is respectfully submitted that these assertions trivialize the very real and substantial devastating consequences of systemic discrimination. Moreover, they are inconsistent with a proper purposive interpretation of s.15 of the *Charter*. In *Andrews*, Mr. Justice McIntyre stated that the purpose of s.15 is to promote equality, which "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 follows that s.15 is directly concerned with issues of social validation and legitimacy.

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

42. Discrimination is not limited to the deprivation of economic benefits, but includes the endorsement of stereotypes and prejudices. In *Tétreault-Gadoury*, Mr. Justice La Forest held that denying unemployment benefits to persons over age 65 is discriminatory since it perpetuates the "insidious stereotype" that the elderly are no longer part of the active working population. As Mr. Justice Linden recognized in his dissenting opinion in the present case, the exclusion of lesbian and gay partners from the spouse's allowance program reinforces insidious stereotypes about lesbian and gay relationships.

Tétreault-Gadoury v. *Canada (E.I.C.)*, [1991] 2 S.C.R. 22, at 40-41, per La Forest J., quoting Lacombe, J.A.

Reasons for judgment of Linden, J.A., appeal book p.638.

43. In any event, the economic argument advanced by the Respondent is flawed since it attempts to justify the economic discrimination in light of the alleged purposes of the *OASA* and by claiming that the government has the exclusive right to allocate scarce economic resources. These arguments incorrectly incorporate into the s.15 analysis justificatory factors which may

properly be considered only under s.1 of the *Charter*. In *Andrews*, Mr. Justice McIntyre stated that an essential feature of the analytical approach to the *Charter* "is that the right guaranteeing sections be kept analytically separate from s.1." In *Turpin*, Madame Justice Wilson similarly stressed the importance of keeping s.1 and s.15 analytically distinct.

Andrews, *supra*, at 178, 182, per McIntyre J.

Turpin, *supra*, at 1325, 1328, per coram.

C. SECTION 1 OF THE *CHARTER*

44. In order to justify the violation of s.15(1) of the *Charter*, the Respondent must prove

(a) that the objective of the impugned definition of "spouse" is of sufficient importance to warrant overriding constitutionally protected rights; and

(b) that the means chosen to achieve the objective pass the "proportionality test" established by this Court.

In applying the s.1 tests, the Court must be guided by the values and principles of a "free and democratic society", which include respect for human dignity, enhancing diversity, the promotion of equality, and the accommodation of a wide variety of beliefs.

R. v. *Oakes*, [1986] 1 S.C.R. 103, at 136, 138-139, per Dickson C.J.

McKinney v. *University of Guelph*, [1990] 3 S.C.R. 229, at 280, per La Forest J.

R. v *Keegstra*, [1990] 3 S.C.R. 697, at 736, per Dickson C.J.

1. Objective

45. The Respondent asserts (in para.23 of its Factum) that

> the aim of the Spouse's Allowance Program is to support the financially needy near-elderly spouses of the financially needy seniors in receipt of the basic Old Age Security and the income tested Guaranteed Income Supplement, where the near-elderly spouse has little or no income of their own.

The Respondent also suggests that one of the program's primary objectives is to assist financially needy near-elderly women who are dependent on the pension of their older spouse (see paras.24, 25, 93 and 98-100 of the Respondent's Factum). EGALE agrees that these objectives relate to concerns that are pressing and substantial in a free and democratic society, but these purported objectives do not address why the impugned phrase "of the opposite sex" was included in the legislation.

46. It is respectfully submitted that the objective of the spouse's allowance program is to reinforce the privileged status of heterosexual relationships in society by providing assistance to *only* those financially needy seniors *who maintain heterosexual relationships*. This objective is revealed by the fact that under the current program, the spouse's allowance is discontinued if the heterosexual relationship ends, notwithstanding that the recipient may be a woman whose financial need arises out of the precise economic pattern in traditional heterosexual relationships that the Respondent identifies as the *raison d'être* of the program. The objective of benefitting only those in heterosexual relationships belies the Respondent's claim that the program is based on need, and is "fundamentally repugnant because it would justify the law upon the very basis upon which it is attacked for violating" the *Charter* right.

Old Age Security Act, R.S.C. 1985, c.O-9 as amended, ss.19(1) & (5).

Big M. Drug Mart, supra, at 352, per Dickson C.J.

2. Effects are not Proportional to the Objectives

47. In order to satisfy the first element of the proportionality test, the Respondent must demonstrate that the eligibility criteria for the spouse's allowance program are rationally connected to the program's objectives. It is respectfully submitted that the Respondent fails to prove that the "opposite sex" requirement is rationally connected to the program's objectives. If the objective is to support the financially needy near-elderly spouses of pensioners, then there is no rational reason why lesbian and gay couples are excluded from eligibility. If the objective is specifically to target near-elderly women who are financially dependent on their older pensioner spouses, then there is no rational reason why heterosexual men are eligible to claim a spouse's allowance, while lesbians in same-sex relationships are disqualified. It is submitted that the "opposite sex" requirement has no rational connection to any valid legislative objective, but rather is connected to the discriminatory objective of providing support exclusively to partners in heterosexual relationships.

48. The Respondent states (in para.70 of its Factum) that the Appellants did not prove the existence of a pattern of economic dependence in lesbian and gay relationships, yet it is the Respondent's burden to prove that such a pattern does not exist in same-sex relationships, since its s.1 argument is premised on the assumption that this pattern is "unique" to heterosexual relationships (para.98). This Court has ruled that the onus of proving all of the elements of a

s.1 justification rests with the party seeking to uphold a *Charter* violation. The Respondent fails to satisfy the burden of proving a rational connection between the objectives of the spouse's allowance program and the "opposite sex" eligibility criterion.

McKinney, *supra*, at 280, per La Forest J.

49. In order to justify the second element of the proportionality test, the Respondent must prove that there is a minimal impairment of the Appellants' *Charter* rights. This Court has recognized that, in cases which involve the reconciliation of competing interests and the distribution of scarce resources, the legislature will be forced to strike a balance. In such cases, the minimal impairment requirement of the proportionality test will be satisfied if "the government had a *reasonable basis* for concluding that it impaired the relevant right as little as possible" (emphasis in original).

McKinney, *supra*, at 285-286, per La Forest J.

50. It is respectfully submitted that the Respondent does not demonstrate that the government had a reasonable basis for concluding that the rights of lesbians and gay men are minimally impaired by the "opposite sex" requirement in s.2 of the *OASA*. The Respondent states that, in contrast to the "well known traditional structure of heterosexual relationships" (para.98 of its Factum), "little is known [i.e. by the Respondent] about the patterns of gay and lesbian relationships" (paras.47 and 107). The Respondent concedes (in para.47) that part of the reason why it knows little about the patterns of lesbian and gay relationships is "because of the historical disadvantage which has socially marginalized them." It is respectfully submitted that another part of the reason for this lack of information is that the government is generally disinterested in the welfare of lesbian and gay relationships and therefore has not taken the necessary measures to inform itself about them. The government therefore had little or no information on which to base its conclusion that the rights of lesbians and gay men were minimally impaired. In the absence of such information, there could be no "reasonable basis" for that conclusion.

51. Given the Respondent's lack of knowledge about the economic patterns of same-sex relationships, the legislature could have ensured the minimal impairment of lesbians' and gay

men's equality rights by including their relationships in the spouse's allowance program, while maintaining all of the other eligibility criteria. The program is income tested, thus not all heterosexual spouses are eligible to receive an allowance; only those who fit the financial profile of the target group are eligible. The same criteria would apply to lesbian and gay partners if the program were extended to included them; thus only those who fit the appropriate financial profile would qualify for the allowance.

52. In addition, the Respondent fails the minimal impairment element of the proportionality test, since it has failed to demonstrate that it could not have achieved its objectives in some other way, without violating the equality rights of lesbians and gay men.

53. The Respondent repeatedly stresses the fact that the federal government has limited funds and must make difficult policy decisions regarding the allocation of scarce resources (see paras.87-89). The decision to exclude same-sex couples from the spouse's allowance program cannot be characterized as a carefully considered fiscal policy decision; the result in the present case exposes the absurdity of such a characterization. The Respondent acknowledges (at para.107) "that the current legislative treatment leads to better benefits under the provincial plan," which is partly funded by cost sharing with the federal government. The Respondent stresses that the Appellants receive more money from the government as a result of their exclusion from the spouse's allowance program. Clearly, their exclusion is not justifiable as a necessary measure in light of limited fiscal resources.

54. It is submitted that the third element of the proportionality test is not satisfied because the Respondent fails to establish that the discriminatory effects outlined in paragraphs 35 to 42 of this Factum are not so severe as to outweigh the objectives of the spouse's allowance program. It is respectfully submitted that the Respondent incorrectly focuses exclusively on the economic impact of s.2 of the *OASA* in making its argument with respect to this element of the proportionality test (para.108). In EGALE's submission, the severity of the social consequences of discrimination against lesbian and gay relationships far outweighs the stated objectives of the program.

REMEDY

55. Since the *OASA* violates s.15(1) of the *Charter* by virtue of the underinclusiveness of the definition of "spouse", it is submitted that the appropriate remedy is to extend the spouse's allowance program to eligible lesbian and gay partners.

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

56. It is further submitted that, in order to qualify for a spouse's allowance, lesbian and gay partners should not be required to "publicly represent themselves as husband and wife", nor to represent themselves publicly as lesbian or gay partners. The equality of lesbians and gay men will not be advanced by requiring same-sex partners either to misrepresent their relationships as being modeled on heterosexual roles ("husband and wife"), or to represent their relationships publicly in such a manner as to expose themselves to the discrimination, harassment and violence that may result from public declarations of lesbian or gay sexuality.

PART IV - ORDER SOUGHT

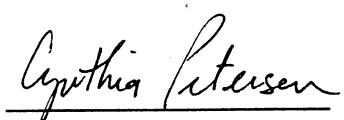
57. EGALE seeks an order declaring that:

(1) s.2 of the *OASA* violates s.15(1) of the *Charter* by virtue of a discriminatory eligibility requirement which limits the spouse's allowance program to persons in opposite sex relationships;

(2) the violation of s.15(1) caused by s.2 of the *OASA* cannot be justified under s.1 of the *Charter*; and

(3) lesbian and gay couples cannot be denied a spouse's allowance provided that they meet the other eligibility requirements in the *OASA*, with the exception that they not be required to represent their relationships publicly.

ALL OF WHICH IS RESPECTFULLY SUBMITTED
Dated at Ottawa, this 25th day of October, 1994



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PART V - LIST OF AUTHORITIES

A. Cases

Page

B. Articles and Texts