No. 23636

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

BETWEEN:

JAMES EGAN and JOHN NORRIS NESBIT

Appellants
(Plaintiffs)

- and -

HER MAJESTY THE QUEEN IN RIGHT OF CANADA

Respondent
(Defendant)

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PART I
STATEMENT OF FACTS

A. Background

1. The Respondent agrees with the Statement of Facts set out in the Appellants' Factum, but says that there are additional facts that should be considered by this Honourable Court.

2. The Appellant Egan did not consider himself to have been married to the Appellant Nesbit, nor did he ever introduce the Appellant Nesbit to others as his spouse.

Case on Appeal: Vol. II, p. 175, lines 39 - 45 and p. 176, lines 1 - 19.

3. The Appellants' primary purpose in bringing this action was to establish homosexual rights, and not to obtain more money.

Case on Appeal: Vol. II, p. 176, lines 20 - 45, p. 177, lines 1 - 45 and p. 178, lines 1 - 2.

4. The Appellants, Egan and Nesbit, by being treated as two single individuals, have received $6,298.48 more in combined federal and provincial benefits over the period July 1987 to April 1990, than if they met the definition of "spouse", and were treated as heterosexual spouses under both federal and provincial assistance programs.

Case on Appeal: Vol. III, pp. 338 and 340, and Agreed Statement of Facts, Schedules 8 and 10.

5. Canada and British Columbia each have created programs to assist financially the elderly. Pursuant to the *Old Age Security Act*, Canada has provided Old Age Security, the Guaranteed Income Supplement and the Spouses' Allowance Program. British Columbia has created a welfare program under its *Guaranteed Available Income for Need Act* (GAIN).

Old Age Security Act, R.S.C. 1985, c. O-9.

Guaranteed Available Income for Need Act, R.S.B.C. 1979, Chap. 158, as amended (GAIN).

6. On March 23, 1967, Canada and British Columbia entered into an agreement pursuant to the Canada Assistance Plan for the purpose of jointly funding benefits and services to persons in need, including the elderly, and the near-elderly (the Agreement). This Agreement was in effect at the material times of this action. Pursuant to subparagraph 2(b)(iii) of the Agreement, British Columbia is required to take into account the whole of any income maintenance payments made by Canada.

Case on Appeal: Vol. IV, pp. 474 - 517, Agreed Statement of Facts, Schedule 26, Memorandum of Agreement made March 23, 1967 with attached Schedules; Vol. II, pp. 204 - 209, lines 1 - 10, p. 210, Transcript of Verbal Testimony of Melvin Rodney Hagglund.

Canada Assistance Plan, R.S.C. 1985, c. C-1, s. 1.

7. In order to determine eligibility and the amount of benefit or assistance payable, Canada and British Columbia each consider the income of both spouses from all sources. Pursuant to the *Canada Assistance Plan* and the Agreement, any amounts paid by Canada under a program such as the Spouses' Allowance Program, would be taken into account by the province of British Columbia in determining if a person was a person in need for eligibility for provincial assistance and in determining the amount, if any, to be paid by the province under GAIN. Had the Appellants Egan and Nesbit been treated as a couple, rather than as single persons, they would have received less money as a couple than they actually received by being treated as single persons. This is because the additional benefits that the Appellants would have received under the Spouses' Allowance Program would be less than the amount of benefits they would have lost under GAIN.

Case on Appeal: Vol. III, pp. 338 and 340, Agreed Statement of Facts, Schedules 8 and 10, Transcript of Verbal Testimony of Melvin Rodney Hagglund and Ron Willems, pp. 208 - 211 and 277.

8. GAIN includes a senior supplement which is used to "top up" the federal Guaranteed Income Supplement benefit to seniors. It is as a result of GAIN, and the federal programs referred to above, that the Appellants, Egan and Nesbit, are jointly receiving more money as single persons, than they would have as spouses.

Case on Appeal: Vol. III, pp. 338, 340 and 474 - 477, Agreed Statement of Facts, Schedules 8, 10 and 26, and Vol. II, pp. 208 - 211, Transcript of Verbal Testimony of Melvin Rodney Hagglund and Ron Willems, pp. 277 - 283, 286 and 287.

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B. Findings of the Courts Below

9. The learned trial Judge held that:

a. Parliament intended to confer a benefit on only married and common law spouses, as the term "spouse" is defined in s. 2 of the *Old Age Security Act*;

b. a homosexual couple falls within the wider class of non-spouses, as do a brother and a sister, two friends or a parent and adult child living together;

c. the distinction made by the legislation, in not characterizing the Plaintiffs' same-sex relationship as "spouses", was not on the ground of sexual orientation; and

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d. there was no discrimination within the meaning of subsection 15(1) of the *Charter*.

Case on Appeal: Vol. IV, p. 560, lines 30 - 45 and pp. 561 - 562, Reasons for Judgment of Martin J.

10. Robertson J.A., in writing one of the majority judgments of the Federal Court of Appeal, found that:

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a. a simple comparison of heterosexual and homosexual relationships was an invocation of the "similarly situated" test, rejected by this Court;

b. the Appellants did not show that same-sex partners were more disadvantaged than the groups receiving the benefits for the purposes of the statute;

c. the definition of "spouse" recognized a distinction based on a relevant personal difference, not an irrelevant one;

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d. the distinction was based on spousal status and not on sexual orientation; and

e. therefore, the distinction caused by the definition was not discriminatory.

Case on Appeal: Vol. IV, pp. 584 - 587, and pp. 598 and 599, Reasons for Judgment of Robertson J.A.

Mahoney J.A. concurred in the result with Robertson J.A. and agreed with the learned trial Judge that the Appellants fell within a wider class of non-spouses and did not benefit because of their non-spousal status, rather than because of their sexual orientation, while recognizing that same-sex partners existed. He held that there was no evidence to show that their needs were the same as heterosexual couples.

10 Case on Appeal: Vol. IV, p. 605, Reasons for Judgment of Mahoney J.A. and pp. 590 - 592, Reasons for Judgment of Robertson J.A.

11. Linden J.A. in his dissenting judgment found that:

a. the definition created a distinction which was direct discrimination based on sexual orientation;

b. sexual orientation was an analogous ground; and

20 c. the distinction amounted to discrimination and was not justified by section 1.

Case on Appeal: Vol. IV, pp. 619 - 626, pp. 629 - 632 and pp. 636 - 659, Reasons for Judgment of Linden J.A.

PART II
POINTS IN ISSUE

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

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

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

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

A. No
B. Yes

PART III
ARGUMENT

A. Introduction

14. The Respondent intends to address the following points in its argument.

15. First, the examination of an alleged *Charter* breach must begin with an understanding of the specific purpose and effect of the statute at issue, here, the Spouses' Allowance Program, under the *Old Age Security Act*.

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16. Second, it is submitted that the *Charter* analysis must be undertaken with a clear understanding of the larger context in which the alleged breach occurs. Here, the larger context must be considered in three ways:

a. the larger historical, political and social context - the Appellants must prove historic disadvantage of the group, relevant to the purposes of the challenged legislation, i.e. here they must show proof of historic economic disadvantage, rather than social disadvantage, as the statute under attack has an economic and not a social purpose;

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b. the larger system of interconnecting federal and provincial programs which together provide financial assistance to the elderly and near-elderly in need - the Appellants must show that the statute in question causes further economic disadvantage of the group, by not meeting economic needs which are common to those who get the benefits. This analysis must take into consideration that there is no proof of economic disadvantage here, merely proof that payment was made under a different program, partly funded by the federal government. To isolate the Spouses' Allowance Program for consideration apart from the other relevant federal/provincial programs would stress symbolic over substantial

30 reality; and

c. finally, the definition of spouse - which must be considered within the larger social and historical context in which it exists.

17. Third, the Appellants have not met the burden of proof under subsection 15(1). They have not demonstrated that they are members of a discrete and insular minority which has suffered from historic disadvantage in an economic way relevant to the statute in question, rather than existing in society independently from the statute.

18. Evidence of social disadvantage is not sufficient to meet the evidentiary burden under subsection 15(1), as this is an economic benefit which they challenge. They have failed to show evidence of economic disadvantage for the class. The *Charter* does not require identical treatment, which would prevent the government from designing programs for specific groups, but rather prohibits government action which has the effect of exacerbating the particular historic disadvantage relevant to the nature of the statute.

19. Fourth, the Appellants have not shown that the distinction created by the legislation amounts to discrimination within the meaning of subsection 15(1). The definition of spouse in section 2 of the *Old Age Security Act* does not infringe subsection 15(1) of the *Charter*. Subsection 15(1) does not prohibit the making of distinctions based on relevant personal characteristics, nor does it require the Courts to alter the clear meanings of words. Parliament may properly make choices to balance competing interests in distributing scarce resources to various needy groups in an area of divided federal/provincial jurisdiction.

20. Finally, if the Program is found to infringe subsection 15(1), in that it is underinclusive, that infringement is justified under section 1.

B. The *Charter*

1. Purpose of the Statute

21. The examination by the Court of an alleged *Charter* breach must begin with an understanding of the contents of the specific law, and its purpose and effect on those it does include, as well as on those it does not include.

Andrews v. *Law Society of British Columbia*, [1989] 1 S.C.R. 143, at p. 168.

22. The objective of the Spouses' Allowance Program was recognized by the learned trial Judge to have been stated by the Honourable Marc Lalonde, former Minister of National Health and Welfare:

> "... Its objective is clear and singular in purpose. It is to ensure that when a couple is in a situation where one of the spouses has been forced to retire, and that couple has to live on the pension of a single person, that there should be a special provision, when the breadwinner has been forced to retire at or after 65, to make sure that particular couple will be able to rely upon an income which would be equivalent to both members of the couple being retired or 60 years of age and over. That is the purpose of this Bill, no more than that, no less than that."

Case on Appeal: Vol. III, p. 375, Agreed Statement of Facts, Schedule 18, *Transcript of Proceedings and Evidence of the Standing*

Committee on Health, Welfare and Social Affairs, June 12, 1975, page 25:7.

23. Thus, the aim of the Spouses' 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 aim is not to assist financially all individuals in any relationship who live together and who form a particular vulnerable group in society. As the learned trial Judge stated in his reasons for judgment:

> "Provision for the allowance was first enacted by Parliament in 1975. At that time Parliament addressed the problem frequently faced by aging married couples who found themselves in the position in which one spouse, generally the husband, who was usually the breadwinner in the family unit and who was usually older that his spouse, retired at age 65. The problem was caused by the fact that his wife, who frequently had been the unpaid homemaker, had no income and would not be eligible for the Old Age pension for a few years, being younger than her retired husband. The unfortunate result was that the income of the two-spouse family unit dropped drastically until the wife reached 65 years of age and became eligible for the Old Age pension.
>
> ...
>
> In 1985 the Spouse's Allowance was extended to include widows and widowers aged 60 to 65 who had not remarried. The government at the time, in 1985, recognized that the measures introduced did not solve all of the problems of all citizens but, to the Minister of National Health and Welfare, the Honourable Jake Epp, the legislation was addressing itself to those in greatest need.
>
> It is clear, through its legislative history, that the Spouse's Allowance has been directed to alleviating the financial plight of elderly married couples, primarily women who were younger than their spouses and who generally did not enter the work force. Although it may be argued that the legislation ought to be interpreted so as to include homosexual couples such as the plaintiffs in this case it cannot be fairly argued that Parliament intended that they should be included in the program."
>
> Case on Appeal: Vol. IV, pp. 549 and 550, Reasons for Judgment of Martin J.

24. The Honourable Flora McDonald remarked during the second reading of the 1979 amendment to the *Old Age Security Act* and as the learned trial Judge noted:

> "Statistics have shown that in 90% of marriages, the younger spouse is female and that females live longer than males. These

> women, who in their younger years remained in the home looking after children, with no access to continuing income or pension plans are the same women who, in their later years, too often became the victims of society which has not yet come to terms with equality in the work place."
>
> *House of Commons Debates*, October 22, 1979, p. 476.

10 25. Further remarks by the Honourable Marc Lalonde make it clear that this target class of married elderly and near-elderly women, who have jeopardized their own earning potential in order to raise a family is but one part of the larger class of needy elderly and near-elderly. The Spouses' Allowance Program was never intended to address, by itself, the needs of all elderly and near-elderly persons.

Case on Appeal: Vol. III, p. 354, Agreed Statement of Facts, Schedule 17, *House of Commons Debates*, June 6, 1975, p. 650.

See also Davies, Christine *Family Law in Canada*, Carswell Legal Publications, c. 1984, pp. 16-21, 203-206, 237-238, 243-244, 529-530.

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Holland, Winnifred H. and Barbro E. Stalbecker-Pountney, eds., *Cohabitation: The Law in Canada*, Carswell, 1990, and in particular, pp. 1-1 - 1-10.

Stone, Olive M. *Family Law*, Macmillan Press Ltd., c. 1977, at p. 8.

30 26. Rather, it was intended to be a small part of a complex and interdependent income supplement and support package of the combined federal and provincial governments. The Honourable Jake Epp made it clear, when the Spouses' Allowance was amended to extend benefits to widows and widowers, that, in his view, the fact that there is not enough money to address the needs of all, cannot mean that the *Charter* requires the government not to address the needs of any, within the bounds of current fiscal resources.

Case on Appeal: Vol. III, pp. 450 - 451, Agreed Statement of Facts, Schedule 20, *House of Commons Debates*, June 22, 1985, pp. 1942-1943.

40

Case on Appeal: Vol. IV, pp. 308 - 313, Agreed Statement of Facts, Schedule 1, Chronology of the Elderly Benefit System and Schedule 2, The Spouses' Allowance Program Legislative History.

McKinney v. *University of Guelph*, [1990] 3 S.C.R. 229, at pp. 287 and 317.

2. The Contextual Approach

27. Any analysis of an alleged *Charter* breach must be undertaken with a clear appreciation and understanding of the larger context in which the alleged breach occurs.

Chiarelli v. *Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 711, at p. 732.

R. v. *Turpin*, [1989] 1 S.C.R. 1296, at p. 1331 - 1332.

28. This contextual analysis is particularly important in cases dealing with equality. The rejection by this Court of the "similarly situated test" was to allow the analysis of the alleged discrimination to be situated in its larger context in order to determine whether a particular difference in treatment actually results in a denial of equality.

Andrews v. *Law Society of British Columbia*, *supra*, at pp. 166 - 168.

R. v. *Turpin*, *supra*, at p. 1332.

29. To establish a breach of subsection 15(1), it is not sufficient to establish a difference in treatment or to point to some apparent similarities. Rather, the essence of true equality is the accommodation of difference. To govern effectively, it is necessary to draw lines between different classes of individuals based on proven needs, here, economic needs.

Andrews v. *Law Society of British Columbia*, *supra*, at pp. 164, 168 - 169 and 171.

Conway v. *Canada*, [1993] 2 S.C.R. 872, at p. 877.

30. Rather, it is identical treatment that can result in inequality. This is recognized by subsection 15(2) of the *Charter*, which allows for the amelioration of disadvantage by means of differential treatment to achieve equality.

Andrews v. *Law Society of British Columbia*, *supra*, at p. 164 and 171.

31. In this case, it is submitted that the larger context must be considered in three distinct ways. First, the larger historical, political and social context must be examined. The 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.

R. v. *Turpin*, *supra*, at pp. 1331 - 1333.

Symes v. *Canada*, [1993] 4 S.C.R. 695, at pp. 760, 762 - 765, 770 - 771.

R. v. *Swain*, [1991] 1 S.C.R. 933, at pp. 992 and 995.

32. The larger context analysis cannot mean reference to a general historical disadvantage which is unrelated or unconnected to the statute in question. If this were so, the existence of historic disadvantage of a particular group would mean that any exercise of government authority would have to address that particular group, or it would be automatically in violation of the *Charter*, effectively undermining the power to provide benefits to any comparable group.

33. It is submitted that Linden J.A. erred in law when he examined the larger context and took that to mean the historical reality of any disadvantage connected with a particular group, rather than requiring any evidence to establish the nexus between the historic disadvantage and the objective and context of the particular statute in question.

Case on Appeal: Vol. IV, pp. 635 and 636, Reasons for Judgment of Linden J.A.

34. The second way in which the Court must examine the larger context is by looking beyond the statute at issue to see if it was intended by Parliament to be part of a larger system of interconnecting federal and provincial programs which act together to meet their purpose, here, to provide financial assistance to the elderly and near-elderly in need, which may actually result in a situation where no disadvantage is suffered by the individual. Here, the Canada Assistance Plan pays part of the GAIN, as they are interconnected. The Appellants are arguing about the form rather than the substance of reality.

35. This examination by the Court of the larger context must include an understanding not only of the contents of the specific law, its purpose and effect on those it does include, and on those it does not include, but also an appreciation of where this particular piece of legislation fits into others with similar purposes. An analysis of this kind cannot be conducted entirely within the four corners of the impugned legislation. This Court has acknowledged that choices about protection of one vulnerable group against others can be made within subsection 15(1) itself.

Andrews v. *Law Society of British Columbia*, *supra*, at pp. 168 - 169.

R. v. *Turpin*, *supra*, at pp. 1331 - 1332.

R. v. *Swain*, *supra*, at pp. 994 - 996.

Symes v. *Canada*, *supra*, at pp. 756 - 757.

R. v. *Hess* and *R.* v. *Nguyen*, [1990] 2 S.C.R. 906, at p. 927 - 928.

36. The Appellants must show that that historic economic disadvantage of the group is compounded by the specific statute in question, which therefore results in denial of equal benefit of the law, taking into consideration that this program fits together with many other federal and provincial statutes meant to deal with the same needs of individuals.

37. This "contextual" approach requires the Court to determine an alleged *Charter* breach in the larger context of other federal and provincial statutes with similar purposes. Here, unlike some benefit programs, both the federal Parliament and the Legislature of British Columbia have each created programs to assist elderly and near-elderly individuals in need.

10 *R.* v. *Turpin*, *supra*, at p. 1332.

38. In determining whether the Appellants' subsection 15(1) *Charter* rights have been infringed, it is critical, as this Honourable Court has held on several occasions, not to make such a determination in a factual vacuum. It follows therefore that it is necessary to look at both the federal and provincial systems that are in place to determine this issue.

MacKay v. *Manitoba*, [1989] 2 S.C.R. 357, at pp. 361 - 362.

20 *Danson* v. *Ontario (Attorney General)*, [1990] 2 S.C.R. 1086, at pp. 1099 - 1101.

39. While Mr. Nesbit does not qualify for the Spouses' Allowance Program under the *Old Age Security Act*, by virtue of the definition of "spouse", he is covered under GAIN. Under GAIN, Mr. Egan's income was not taken into account in determining Mr. Nesbit's eligibility to receive provincial assistance and the benefits paid to Mr. Nesbit as a single person are greater than if he were considered a spouse. His net financial position when the federal and provincial programs are considered together is better when he is treated as a single. Thus, he experiences no economic disadvantage.

30 Case on Appeal: Vol. III, pp. 338 and 340, Schedules 8 and 10 of Agreed Statement of Facts, Transcript of Verbal Testimony of Melvin Rodney Hagglund, pp. 207 - 217; and Transcript of Verbal Testimony of Ron Willems, pp. 285 - 287.

40. Finally, the Court must review this issue of the definition of spouse within the historical and societal context in which it is understood. Section 2 of the *Old Age Security Act* defines "spouse" and states that:

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

41. Definitions such as that contained in section 2 do not create the concept of marriage, they reflect the societal concept of marriage, and outline aspects of the package of legal rights and responsibilities that attach to that status under provincial and federal family law.

Oppong, Christine, "Marriage", *The Social Science Encyclopaedia*, London: Routledge and Kegan Paul, 1986, pp. 497 - 498.

Quale, G. Robina *A History of Marriage Systems*, New York: Greenwood Press, 1988.

Westermark, Edward *A Short History of Marriage*, New York: Humanities Press, 1968.

42. An analysis of the Appellant's argument suggests that they have failed to establish by evidence any causal nexus between the distinction drawn in the challenged law and the disadvantage historically suffered by gays and lesbians. They have not discharged their burden of demonstrating that either the Spouses' Allowance Program or the Federal-Provincial network of income support programs within which it is situated offends the equality rights guaranteed by section 15 of the *Charter*. They do not satisfy the tests established by this Court for proving an infringement of section 15 of the *Charter*.

3. Section 15 of the *Charter*

43. Section 15 of the *Canadian Charter of Rights and Freedoms* provides:

> "15.(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."

44. In order for the Appellants to succeed in establishing that their rights under section 15 of the *Charter* have been infringed, they must satisfy the Court that:

a. one of their four basic equality rights has been denied by a distinction in treatment based on a personal characteristic of a class of individuals who share that common personal characteristic;

b. that the distinction is based on an irrelevant personal characteristic which forms an enumerated or analogous ground of discrimination; and

c. the denial amounts to discrimination in the circumstances.

Andrews v. *Law Society of British Columbia*, *supra*, at pp. 165 and 182.

R. v. *Turpin*, *supra*, at pp. 1325, and 1330 - 1333.

R. v. *Swain*, *supra*, at p. 992.

Symes v. *Canada*, *supra*, at p. 757.

(a) Denial Of Equality Rights

45. The Appellants allege a breach of the right to the equal benefit of the law, in that they do not come within the class described in the statute. However, the Appellants have failed to meet the evidentiary requirements to demonstrate this violation.

46. Not only have they failed to establish, as set out in this Court's decision in *Symes* v. *Canada*, that they are members of a discrete and insular minority which has suffered historic disadvantage in an economic way relevant to the economic statute in question, they have also failed to show that they as individuals have suffered from the relevant kind of disadvantage. Indeed, were the Appellants to succeed in their claim, their net financial situation would be worse. Therefore, the Appellants cannot show that they have suffered a disadvantage or have been denied equal benefit of the law.

Symes v. *Canada*, *supra*, at p. 764 - 766.

47. Indeed, with regard to the group of gay and lesbian partners, the Ontario Law Reform Commission points out as well that little is known about the patterns of gay and lesbian relationships, partly it is acknowledged, because of the historic disadvantage which has socially marginalized them. However, the Appellants led no evidence concerning economic disadvantage, and none concerning patterns of gay and lesbian relationships, other than their own anecdotal experience.

Ontario Law Reform Commission, *Report on The Responsibilities of Cohabitants under the Family Law Act* (1993), at pp. 45 - 47, 51, 56 - 58, and 71.

"Gay marketing is in the pink", *Globe & Mail*, p. 4, August 15th, 1992.

48. As Iacobucci J. points out in *Symes* v. *Canada*, *supra*, at pp. 770 - 771:

> "there is a difference between being able to point to individuals negatively affected by a provision, and being able to prove that a group or subgroup is suffering an adverse effect in law by virtue of an impugned provision." (emphasis in original)

49. Rather, the Appellants submit that they are members of a group which has clearly suffered historic disadvantage in terms of violence and what might be called "social disadvantage", existing in society, not as the direct creation of this statute. There is no

evidentiary link from that kind of historic disadvantage to that in question here, economic disadvantage. The equality which they are requesting is equality which deals with emotional feelings and social validation, rather than the operation of the law at issue. The historical disadvantage suffered, while serious, cannot be remedied by the *Old Age Security Act*. The same argument concerning the denigration of relationships might be alleged by other non-spousal individuals who live together interdependently, but who are not recognized by statute.

50. The Appellants fail to acknowledge that: i) individuals of the same sex who are living together are not subject to any of the obligations which the law imposes on married individuals or heterosexual couples living in common law relationships, as defined under provincial and federal law; and ii) that, therefore, extending the definition of "spouse" in section 2 to cover the Appellants' same-sex relationship would be granting them a benefit without imposing the parallel support or other legal obligations, not equality.

Leroux v. *Co-operators General Insurance Co.*, (1991), 4 O.R. (3d) 609 (C.A.), at pp. 620 - 622. The companion case of *Miron* v. *Trudel*, (1991), 4 O.R. (3d) 623 (C.A.), is under reserve before this Court (File No. 22744).

51. This Court has said that the *Charter* is not a general guarantee of equality and does not address notions of equality in the abstract.

Andrews v. *Law Society of British Columbia*, *supra*, at pp. 163 - 164.

(b) Enumerated or Analogous Ground of Discrimination

52. However, if a breach of one of the four equality guarantees is considered by this Court to be established, the next question is whether the ground on which the distinction is made is one covered by subsection 15(1).

53. This Court has recognized that the list of enumerated grounds in subsection 15(1) is not a finite list and that the protections of that section will be extended to a group of "analogous" grounds. The Appellants are alleging that the distinction is based on an analogous ground, here, "sexual orientation".

Andrews v. *Law Society of British Columbia*, *supra*, at p. 175.

54. This Court has set out a test for the identification of analogous grounds (*Andrews* v. *Law Society of British Columbia*, *supra*, at pp. 179 - 183). This test is based mainly on the identification of whether the distinction is based on a "personal characteristic" of the Appellants, which is linked to others who share the characteristic and which characteristic has

been the source of the relevant disadvantage sought to be overcome. It is also quite clear that the determination of whether a ground will be analogous or not must be made anew in each case. Even grounds identified as analogous in some circumstances may not be analogous in other circumstances. Otherwise, the identification of an analogous ground would elevate it to the status of an enumerated one.

R. v. *Turpin*, *supra*, at p. 1332 - 1333.

R. v. *Généreux*, [1992] 1 S.C.R. 259, at pp. 310 - 311.

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55. As the Federal Court of Appeal pointed out in *Schactschneider* v. *The Queen*, (1993), 93 D.T.C. 5298 (Vol. 47), at p. 5303:

> "In other words, whether or not it finds discrimination offensive to subsection 15(1), a court is not invited to proclaim an analogous ground as a broad category, perhaps pleaded, in the fashion the enumerated grounds themselves have been expressed; rather, it is invited to define the ground in terms of the discrete and insular minority identified by the evidence." (emphasis added)

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56. While the Attorney General of Canada does not dispute that sexual orientation may be an analogous ground in some circumstances, and indeed has been so found by the courts in certain instances, and even that same-sex relationships may be protected within that ground under certain circumstances, it is submitted that sexual orientation is not an analogous ground in this instance. For example, citizenship was found to be an analogous ground in *Andrews* v. *Law Society of British Columbia*, *supra*, but not in *Chiarelli* v. *Canada (Minister of Employment and Immigration)*, *supra*.

57. As Linden J.A. points out, the identification of an analogous ground will include some
30 reference to the larger context, to "whether the group characteristic is one on which political and social prejudice, stereotyping or historical disadvantage has been, is, or may be based", but it is submitted that there must also be a causal relationship established between the distinction established by the statute and the alleged discrimination.

Case on Appeal: Vol. IV, p. 620, Reasons for Judgment of Linden J.A.

Symes v. *Canada*, *supra*, at pp. 764 - 765.

40 58. The majority and dissenting decisions of the Federal Court of Appeal in this case differ as to what personal characteristic or ground formed the basis of the distinction. According to the majority judgments, and the learned trial Judge, the personal characteristic on which the distinction was based was whether or not one was a spouse. Robertson J.A. and Mahoney J.A.

also acknowledge the effect of not including same-sex partners. According to the dissenting judgment of Linden, the direct distinction is based, not on sexual orientation *per se*, as the Appellants have claimed, but on "a characteristic or matter related to sexual orientation".

Case on Appeal: Vol. IV, p. 561, Reasons for Judgment of Martin J.; pp. 589 - 592, Reasons for Judgment of Robertson J.A.; pp. 603 - 605, Reasons for Judgment of Mahoney J.A.; and p. 629, Reasons for Jugment of Linden J.A.

10 59. It is submitted, with respect, that neither was entirely right, in that the distinction is three-fold. The legislation creates an eligible class of spouses, as defined, who are within the age range defined (age 60 to 64), and who meet the income threshold, as defined. It is submitted that the group defined is too specific to amount to an "analogous ground", under the test. In the alternative, if any ground here does amount to an "analogous ground, it would be the ground of "spousal status".

Leroux v. *Co-Operators General Insurance Co.*, *supra*, at p. 622.

Miron v. *Trudel*, *supra*, under reserve before this
20 Court (File No. 22744).

60. In the case at bar, the submission by the Appellants that there is historic social disadvantage is not proof of economic disadvantage, and therefore, the Appellants have failed to prove that sexual orientation is an analogous ground in this case of an economic statute.

(c) Discrimination

61. Even if sexual orientation is found by this Court to be the basis of the distinction here and to be an analogous ground in the circumstances, the Appellants are wrong in law in suggesting, in paragraph 22 of their Factum, that if Parliament merely makes a distinction on
30 the basis of a ground covered by section 15, there is inequality. Rather, many statutes make valid distinctions, some even on the basis of enumerated grounds. The Appellants must show that the effect of the distinction in this case is discriminatory.

R. v. *Turpin*, *supra*, at p. 1330 - 1331.

R. v. *Hess* and *R.* v. *Nguyen*, *supra*, at pp. 927 - 929.

R. v. *Swain*, *supra*, at p. 992.

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62. Section 15 does not prohibit the law from making distinctions between individuals or between groups, even on the basis of enumerated grounds, only distinctions that are discriminatory.

R. v. *Hess* and *R.* v. *Nguyen*, *supra*, at pp. 931 - 932.

R. v. *Swain*, *supra*, at p. 990 - 992.

63. Section 15 was intended to prohibit the making of laws based on distinctions between individuals or groups based on irrelevant personal characteristics of historically disadvantaged groups, in order to prevent further discrimination. It is submitted that section 15 does not prohibit the making of distinctions based on relevant personal characteristics. Consequently, section 15 does not require the courts to change fundamentally the essential meaning of the societal concept of marriage, as reflected in the definition of the term spouse, or forbid Parliament from protecting groups in the order of their vulnerability.

R. v. *Hess* and *R.* v. *Nguyen*, *supra*, at pp. 929 - 932.

Athabasca Tribal Council v. *Amoco Canada* [1981] 1 S.C.R. 699, at p. 711.

64. In determining whether the distinction in question amounts to discrimination in the circumstances at issue, this Court must consider the following:

i. the aim of the legislation must be discriminatory or it must create a discriminatory effect;

ii. that effect must be more than trivial, and result in discrimination directly attributable to the statute in question;

iii. the basis of comparison cannot be the "similarly situated" test;

iv. section 15 cannot impose an abstract duty on the legislator to correct inequality that is not caused by the impugned statute and is irrelevant to its purposes; and

v. section 15 does not act to prohibit Parliament from addressing the needs of one needy group in advance of others, especially where the Appellants have not proven that the group to which they belong is more disadvantaged than that targeted by the statute.

i. The aim of the legislation

65. As is referred to *supra* in more detail, the aim of the legislation is not to assist financially all individuals in any relationship who live together and who form a particular vulnerable group in society. Rather, the aim is to support near-elderly spouses, where the older is, because of financial need, receiving basic Old Age Security and an income supplement, and the younger is dependent on that single pension income, because of traditional patterns of economic dependence in heterosexual relationships.

Moge v. *Moge*, [1992] 3 S.C.R. 813, at pp. 861 - 864.

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66. It is submitted that there is no direct discrimination in this case, and that the inequality argument of the Appellants is one of adverse effect, because the definition of "spouse" excludes more than just same-sex partners. For this reason, it is submitted that Linden J.A. erred in law in dealing with the issue as if it were a case of direct discrimination.

ii. More than a trivial effect

67. It is submitted that the evidence shows that the effect here in economic terms is that the same or a similar amount of money is paid by both levels of government, under different statutes, which are part of the integrated scheme described above. It is submitted that the
20 evidence does not show that that effect is other than a trivial one.

Andrews v. *Law Society of British Columbia*, *supra*, at p. 182.

68. It is submitted that the Appellants are seeking a form of abstract or theoretical equality, in the form of financial assistance, not as it has been made available to them by combined federal and provincial programs, but from one particular program out of a range of programs. In this regard, the question before the court is unlike a situation where benefits are extended to spouses and non-spouses get nothing. It is submitted that this is not the function of subsection 15(1) of the *Charter* to direct government as to which program must be used to
30 affect the goal of assisting a particular vulnerable group. This highlights the reality that the statutes together are aimed at meeting certain economic needs and not simply providing symbolic recognition of certain relationships irrespective of their proven needs.

Andrews v. *Law Society of British Columbia*, *supra*, at pp. 163 - 164.

69. Here, Parliament has created a Spouses' Allowance Program which is not intended to be universal in scope and which is deliberately crafted to be part of a wider network of federal and provincial benefit programs which together address a need. Thus, in this scheme, homosexual partners, although not included in the Spouses' Allowance Program, are still

eligible as individuals under other parts of the wider network. Consequently, while there is a distinction in eligibility, it cannot be argued that the Appellants are discriminated against.

70. The Appellants have not proved that, as a class, gay and lesbian relationships have the same needs as traditional heterosexual spousal relationships described by the learned trial Judge. Linden J.A. notes in his judgment that no information was provided "about the number of interdependent gay and lesbian relationships and the financial circumstances of those relationships ..."

Case on Appeal: Vol. IV, p. 656, Reasons for Judgment of Linden J.A.

iii. The similarly situated test

71. The distinction alleged to be discriminatory in this case is the fact that the common law definition of spouse and the statutory definition extending "spouse" to common law spouses, reflects the societal concept of marriage as requiring two persons of the opposite sex.

72. The Appellants' argument is based on the underlying premise that homosexual relationships are in fact the same, i.e. "no less deserving" and "just like", heterosexual ones, and that the only way of dealing with the situation is to extend the concept of spouse. It is submitted that this analysis is flawed because it relies on the similarly situated test for discrimination, which has been rejected by this Court.

Case on Appeal: Vol. IV, pp. 601 - 602, Reasons for Judgment of Mahoney J.A.

Andrews v. *Law Society of British Columbia*, *supra*, at pp. 165 - 168.

73. The definition in section 2 of the *Old Age Security Act*, as all definitions, will exclude some individuals and include others. The definition is not crafted deliberately so as to exclude same-sex partners. Rather, it is crafted so as to include a particular sub-set of "spouses", whose known needs required specific economic assistance.

74. In so doing, it excludes some spouses as well as the wider class of "non-spouses", which will include some heterosexual partners who do not meet the definition, same-sex partners and many others potentially living in an economically dependent relationship, such as siblings, and other relatives and non-relatives who may be interdependent.

75. The Appellants submit that same-sex partners should be separated from the wider class of "non-spouses" and treated as "spouses" because they share some of the same attributes of spousal relationships, namely emotional and sexual aspects, without showing that their

relationships as a class fit the economic parameters of the program as described by the learned trial Judge.

76. Robertson J.A. concludes that this is a common approach in the jurisprudence in this area. In challenges to legislative schemes in which a benefit was available to all:

> "... the real objection to the legislation stemmed from the distinction that had been drawn between opposite-sex and same-sex couples. What the claimants truly sought was not a benefit *per se*, but rather legal recognition that their conjugal relationship is no different than an opposite-sex one which qualifies for a spousal benefit."

Case on Appeal: Vol. IV, p. 579, Reasons for Judgment of Robertson J.A.

77. Indeed, the judgment of Robertson J.A. in the court below points out that the Appellant's evidence was directed at establishing "that same-sex relationships can be similar to opposite-sex ones, both in their diversity and interaction." He then continues on to state that, while the Appellants' relationships contains "attributes found in the ideal opposite-sex spousal relationship", this is not directly relevant to the question before him.

Case on Appeal: Vol. IV, pp. 565 - 566, Reasons for Judgment of Robertson J.A.

78. On the contrary, the distinction in this case is fundamental to the very nature of the recognized social and legal institution of marriage, and is based on a real difference, not on a stereotype.

R. v. *Hess* and *R.* v. *Nguyen*, *supra*, at pp. 929 - 932.

R. v. *Swain*, *supra*, at pp. 993 - 995.

79. Even in societies in which homosexuality has historically been accepted, there is a clear distinction between heterosexual marriage and spousal relationships and any recognition and acceptance of homosexual relationships by that society.

Ariès, Philippe and Georges Duby, general eds. *A History of Private Life, Vol. I, From Pagan Rome to Byzantium* and *Vol. V, Riddles of Identity in Modern Times*, Cambridge: The Belknap Press of Harvard University Press, 1987, at p. 596 (Vol. I), and pp. 273 - 278, 431 - 432 (Vol. V).

Boswell *Same-sex Unions in Premodern Europe*, New York, 1994, at pp. xxv, 190 - 191 and 280 - 282.

iv. No requirement to be proactive

80. Subsection 15(1) cannot impose a duty on the legislator to correct a situation of inequality that is not caused by the impugned statute and is irrelevant to its purpose. Yet, the Appellants submit there is social inequality, and this is not disputed. It is, however, unrelated to the economic nature of the statute in question. Furthermore, this does not obviate the necessity to show that the legislative scheme has a different effect on some individuals because of their personal characteristics.

Symes v. *Canada*, *supra*, at p. 762 - 765.

10 81. In addition, the Appellants' arguments confuse policy issues with the legal question of whether the *Charter* requires that the statutory definition of spouse, either in its general application or in this case, be expanded to include two persons of the same sex. The *Charter* does not require changing the clear meanings of words.

Symes v. *Canada*, *supra*, at p. 760.

82. The Appellants advance policy arguments favouring the general recognition of same-sex relationships, in particular to reduce isolationism and violence. While they offer many policy arguments for recognition of same-sex relationships, they do not relate these arguments to the 20 specific nature of the statute at issue, or to the issue of historic economic disadvantage.

83. It is submitted that Linden J.A. erred in law in also confusing policy arguments for recognition of same-sex relationships with the impact of this specific statute on the "worth" of such relationships requiring an alternative means under the *Charter*. As Robertson J.A. points out, this is not the question properly before this Court. There is no *Charter* requirement for a government to pay out benefits with the sole purpose of recognizing a relationship where the needs addressed in the challenged statute are not demonstrated by evidence.

Case on Appeal: Vol. IV, p. 640, Reasons for 30 Judgment of Linden J.A., and p. 598, Reasons for Judgment of Robertson J.A.

84. Indeed, some of these policy arguments raise issues which apply equally to arguments relating to the equal treatment of any two individuals living together, as much as with homosexual relationships, i.e. to the larger class of "non-spouses". There are divided views on these issues as they relate to recognition of homosexual "marriage".

Duclos, Nitya, "Some Complicating Thoughts on Same-sex Marriage", (1991), 1 *Law & Sexuality* 31.

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Sullivan, Andrew, "Here Comes the Groom: A (conservative) Case for Gay Marriage", *The New Republic*, August 28, 1989, p. 20.

85. There may be some policy reasons for recognizing homosexual relationships in some circumstances. However, the fact that there may be policy reasons for changing a law does not automatically mean that existing laws, or this law in particular, violate the *Charter*.

R. v. *Hess* and *R.* v. *Nguyen*, *supra*, at pp. 931 - 932.

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86. In this regard, it is worth noting that more than 50 federal statutes with various purposes which define rights and obligations on the basis of the spousal relationship.

See appendix B.

v. Balancing of interests

87. It is submitted that the impugned legislation has clearly considered and been designed to address the need for the government to balance competing interests in distributing scarce resources. The decision in *R.* v. *Hess* and *R.* v. *Nguyen*, *supra*, recognizes that some flexibility must be allowed for the government to address the needs of known disadvantaged groups in
20 some order. As will be expanded on further with regard to section 1, the Honourable Jake Epp made it clear, when the Spouses' Allowance was amended to extend benefits to widows and widowers, that, in his view, the fact that there is not enough money to address the needs of all, cannot mean that the *Charter* requires the government not to address the needs of any, within the bounds of current fiscal resources.

Case on Appeal: Vol. III, pp. 450 -451, Agreed Statement of Facts, Schedule 20, and pp. 308 - 313, *House of Commons Debates*, June 22, 1985, pp. 1942-1943.

30 Agreed Statement of Facts, Schedule 1, Chronology of the Elderly. Benefit System and Schedule 2, The Spouses' Allowance Program Legislative History.

McKinney v. *University of Guelph*, *supra*, at pp. 317 - 319.

88. In his majority judgment in the Federal Court of Appeal, Robertson J.A., finds that:

40 "Before us is a case in which a benefit has been conferred on a narrow class of persons who can be readily identified and who are in financial need because of a pattern of financial interdependency, characteristic of heterosexual couples, and which cannot in any reasonable way be deemed relevant to same-sex couples or, for that matter, other non-spousal relationships. Moreover, while it might have been argued that the impugned

> legislation has a more burdensome impact on same-sex couples because it denies a benefit to an economically disadvantaged group *per se*, the appellants led no evidence on this point." (emphasis added)
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> Case on Appeal: Vol. IV, p. 597, Reasons for Judgment of Robertson J.A.

89. This is not a question of excluding homosexual couples as suggested by the Appellants in paragraph 37 of their Factum. Rather, it is a question of Parliament making a policy decision as to how best, in its opinion, to direct limited funds to various needy groups in an area of divided federal/provincial jurisdiction. Given that Parliament does not have limitless funds, and seeks to avoid overlap wherever possible with provincial programs, it must make difficult policy choices which, it is submitted, it is not properly the function of the Court to review. The government may properly make choices between disadvantaged groups in order to aid a more disadvantaged one.

R. v. *Hess* and *R.* v. *Nguyen*, *supra*, at pp. 930 - 932.

McKinney v. *University of Guelph*, *supra*, at pp. 317 - 319.

4. Section 1 of the *Charter*

90. Even if the Court finds that there has been a breach of subsection 15(1) of the *Charter* in the circumstances, it is submitted that the provision of benefits to a group of individuals referred to by a statutory definition of spouse is justifiable under section 1 of the *Charter*.

91. It is submitted that this case is best analyzed by reference to the section 1 analysis applied by this Court in *McKinney* v. *University of Guelph*, *supra*. That case states that greater deference will be paid to legislative choices in situations, as here, where the legislation represents a balancing of competing interests in determining who gets a limited benefit, as opposed to situations where the context is the individual versus the State, as in criminal law, where the section 1 standard will involve less judicial deference.

(a) The Objective of the Spouses' Allowance Program

92. The objective of the Spouses' Allowance Program is set out *supra* at paragraphs 21 to 26 of this Factum. Briefly, the objective is to aid spouses of Old Age Security recipients, who are themselves between the ages of 60 and 64, and who are dependent on the pension of the older spouse, because of societal patterns of relationships.

Case on Appeal: Vol. III, p. 375, Agreed Statement of Facts, Schedule 18, *Transcript of*

Proceedings and Evidence of the Standing Committee on Health, Welfare and Social Affairs, June 12, 1975, page 25:7.

93. This target class of married elderly and near-elderly women, who have jeopardized their own earning potential in order to raise a family is but one of many which make up the larger class of needy elderly and near-elderly. The Spouses' Allowance Program was intended as one part of a complex and interdependent income supplement and support package of the combined federal and provincial governments, that together address the needs of all elderly and near-elderly persons. The fact that there may not be enough money in one jurisdiction to address the needs of all, cannot mean that the *Charter* requires the government not to address the needs of any, within the bounds of current fiscal resources.

Case on Appeal: Vol. III, pp. 354 and 450 - 451, and Vol. IV, pp. 308 - 313, Agreed Statement of Facts, Schedule 1, Chronology of the Elderly Benefit System and Schedule 2, The Spouses' Allowance Program Legislative History, and Schedule 17, *House of Commons Debates*, June 6, 1975, p. 650.

McKinney v. *University of Guelph*, *supra*, at pp. 287, 317 - 319.

R. v. *Hess* and *R.* v. *Nguyen*, *supra*, at pp. 929 - 932.

94. Same-sex partners in financial need, although not included in the Spouses' Allowance Program, are still eligible as individuals upon attaining age 65 to receive Old Age Security and the Guaranteed Income Supplement, as well as being eligible before and after age 65 to receive benefits under other parts of the wider network. In fact, what they obtain is a higher benefit than under an expanded benefit under the *Old Age Security Act*. Consequently, while there is a distinction in eligibility, it cannot be argued that the Appellants are discriminated against.

95. The heterosexual "spousal" relationship has traditionally been viewed by the law as a unitary one, in which the status of spouse creates certain legal rights and obligations.

96. It was the recognition of this financial interdependence and the unique position of women in the spousal relationship which lead to the move to recognize common law relationships for the purposes of many of these rights and obligations in the early 1970s.

See discussion of the Law of Trusts in Holland and Stalbecker-Pountney, eds., *Cohabitation: The Law in Canada*, *supra*, at pp. 2-10 - 2-24, citing, *inter alia*, *Murdoch* v. *Murdoch*, [1975] 1 S.C.R. 423 and *Pettkus* v. *Becker*, [1980] 2 S.C.R. 834.

97. As the Court recognized in *McKinney* v. *University of Guelph*, *supra*, at p. 302: "What we are confronted with is a complex socio-economic problem that involves the basic and interconnected rules of the workplace [here, the spousal relationship] throughout the whole of our society. As already mentioned, the Legislature was not operating in a vacuum."

98. Neither was the Legislature operating in a vacuum when it enacted the Spouses' Allowance Program. Rather, it intended to recognize the unique nature of the heterosexual spousal relationship and the well-known traditional structure with its resultant financial consequences for women recognized in *Moge* v. *Moge*, *supra*. The Program specifically recognizes that many of the women who are now eligible for the benefit have not had independent careers because of societal expectations and gender-specific roles within the traditional family connected with child rearing. This was considered to be a particularly vulnerable group.

99. Notwithstanding recent trends affecting the composition of families, women remain financially disadvantaged because of their role within the family. The fact that the composition of families and the role of women is changing does not affect the reality that many older couples have lived a lifetime dependent on one salary.

100. The Program is income tested and is clearly directed at those couples who have limited income upon retirement, usually because the wife did not have a full career in the workplace.

(b) Are the Means Chosen Proportional

101. The first element of the proportionality test is whether the means are rationally connected to the objective. Here, they clearly are for the reasons referred to above in connection with the first part of the section 1 test.

McKinney v. *University of Guelph*, *supra*, at pp. 281 - 289 and 303 - 304.

102. The second element of the test is whether the program, in achieving its objective, impairs the right to equality as little as reasonably possible. This Court has on several occasions recognized that, in some cases, such as fiscal matters, this branch of the proportionality test cannot be strictly applied, but rather the legislator must adopt measures that are reasonable conclusions on the basis of the evidence before them in light of the objectives pursued, the evidence before them at that time, and the existence of other legislative mechanisms.

Public Service Alliance of Canada (PSAC) v. *Canada*, [1987] 1 S.C.R. 424, at p. 442.

McKinney v. *University of Guelph*, *supra*, at pp. 304 - 315.

Dickason v. *University of Alberta*, [1992] 2 S.C.R. 1103, at pp. 1122 - 1123.

Symes v. *Canada*, *supra*, at p. 753.

103. Paragraphs 87 to 89 above refer to the need for government to balance competing interests in distributing scarce resources and the impact of that balancing in the design of the Spouses' Allowance Program and, indeed, of the federal/provincial network of programs designed to aid the elderly and near-elderly in need. In this regard, it is important to remember that this Spouses' Allowance Program is specifically directed to a small group of heterosexual couples who are in financial need - namely, those couples where one partner, usually the wife, has jeopardised her earning potential in order to raise a family or care for a household. Other Programs are intended to address financial need of other groups and individuals and which might arise for other reasons.

McKinney v. *University of Guelph*, *supra*, at pp. 304 - 315.

104. The Spouses' Allowance Program is part of an interconnected social benefit network of both provincial and federal programs, mutually impacting on each other. As this Court stated in *McKinney* v. *University of Guelph*, *supra*, at p. 314, the means chosen does not have to be necessarily the solution for all time. Rather, there may always be a possibility that more acceptable arrangements can be worked out over time.

Case on Appeal: Vol. IV, pp. 474 - 517, Agreed Statement of Facts, Schedule 26, Memorandum of Agreement between Canada and British Columbia and agreements thereto, pursuant to the *Canada Assistance Plan*;

Case on Appeal: Vol. II, pp. 204 - 210, Transcript of Verbal Testimony of M.R. Hagglund; and pp. 283 - 287, Transcript of Verbal Testimony of Ron Willems.

105. However, the Court in *McKinney* v. *University of Guelph*, *supra*, at p. 314, was "not prepared to say that the course adopted by the Legislature, in the social and historical context through which we are now passing, is not one that reasonably balances the competing social demands which our society must address."

106. Thus, it was reasonable for the Court to conclude that "on the available evidence, the Legislature may reasonably conclude that the protection it accords one group does not unreasonably interfere with a guaranteed right."

McKinney v. *University of Guelph*, *supra*, at p. 315.

107. As the Ontario Law Reform Commission points out in their 1993 *Report on The Responsibilities of Cohabitants under the Family Law Act*, *supra*, at p. 45, less evidence is available concerning the patterns of gay and lesbian relationships. In the case at bar, it appears that the current legislative treatment leads to better benefits under the provincial plan. This provincial scheme is interconnected to the federal ones, and is partly funded by cost sharing under the *Canada Assistance Plan*, s. 5.

108. The third and final element of the proportionality test is whether the effects on the guaranteed right are proportional to the objectives. Here, the Appellants confuse policy questions and legal requirements under the *Charter*. They have stated that they wish to voluntarily assume the rights and obligations currently granted to spouses. However, this is a policy question and one largely in the hands of the provincial Legislatures under section 92 of the *Constitution Act*. The legal question is: does the *Charter* compel this, particularly here, where the effect of the distinction in the definition of "spouse" in section 2 actually results in a better net financial position for them.

5. Remedies

109. If this Court finds that the definition of spouse in section 2 of the *Old Age Security Act* is a breach of subsection 15(1) and that it is not justified by section 1, the decision in *Schachter* states that only in the clearest cases will it be appropriate for the courts to cure an underinclusive provision by expanding its coverage.

Schachter v. *Canada*, [1992] 2 S.C.R. 679, at p. 718.

110. Regardless of the Appellants' submissions, it is clear that Parliament did not intend that the term "spouse" be interpreted as extending to same-sex relationships or any other relationships.

111. There is no evidence, given the purpose for which Parliament originally enacted the Spouses' Allowance Program, that it considered the program appropriate in the case of same-sex partners. Indeed, in light of the conclusion of the Ontario Law Reform Commission and

Linden J.A. in the Court below that little is known about the needs of same-sex relationships, there is no evidence that it would be.

Case on Appeal: Vol. IV, p. 656, Reasons for Judgment of Linden J.A.

Ontario Law Reform Commission, *Report on The Responsibilities of Cohabitants under the Family Law Act, supra.*

10 112. With the advent of subsection 15(1) of the *Charter*, governments have had to reexamine the whole question of when and under what circumstances laws may make distinctions based on relationships.

113. Hence the issue raised by this case is not simply whether the State is legally required to recognize the relationship between two persons of the same sex in the context of the Spouse's Allowance. The issue is really two-fold: first, whether same-sex relationships must be accorded the same rights and obligations in law as heterosexual relationships under all circumstances; and second, whether this must be done through expanding the concept of spouse.

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114. As they have argued the case, the Appellants are really asking the Court to find that the *Charter* requires that homosexual relationships be subject to all of the legal rights and obligations which apply to heterosexual relationships. However, they have produced no evidence to show that they, as a class, have the same needs as the group receiving the benefit.

115. However, all of these legal rights and obligations, whether they have been developed through the common law or whether they result from legislative enactment, pre-suppose that marriage involves a man and a woman. Same-sex relationships do not fit the current legal framework.

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Anderson v. *Luoma* (1986); 50 R.F.L. (2d) 127 (B.C.S.C.), at pp. 140 - 141, although a constructive trust was found on some of the property, and *Forrest* v. *Price*, B.C.S.C., Nov. 3, 1992, unreported, where a constructive trust was found between two same sex partners, although no support was ordered.

Layland v. *Ontario (Minister of Consumer and Commercial Relations)*, (1993), 14 O.R. (3d) 658 (Div. Ct.), at p. 663.

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116. In the field of family law, many provinces have enacted statutes which define "spouse" in a similar way, in order to subject defined unmarried spouses to some of the legal obligations

and benefits imposed on married spouses. These statutes extend an intricate network of rights and obligations, such as maintenance, workers' compensation, insurance, pension benefits, and so on, to spouses. This statutory network does not extend to homosexual cohabitants. Therefore, a change to the definition of "spouses" to add homosexual cohabitants would have serious legal ramifications.

See:

Family Relations Act, R.S.B.C. 1979, c. 121, s.1;

Family Maintenance Act, R.S.M. 1987, c. F-20, s.4;

Family Services Act, S.N.B. 1980, c. F-2.2, s. 112;

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

Family Maintenance Act, S.N.S. 1980, c. 6 (as amended by 1983, c. 64, s. 1), s. 2(m);

Family Law Act, 1986, S.O. 1986, c. 4, s. 29; and

Family Property and Support Act, R.S.Y. 1986, c. 63, s. 30(1)

117. The concept of marriage cannot be changed without a fundamental change to all of the historical, social and legal concepts, and institutions which it defines.

118. The Parliament of Canada and the provincial Legislatures have a legitimate and overriding interest in ensuring that, if such a fundamental change is implemented, it is done in such a way as to consider a full assessment of the impact on society and on the law. The legislatures must also avoid creating other inequalities.

119. In the circumstances, it is both reasonable and justifiable for the legislatures to take steps to examine legislation in light of both the requirements of the *Charter*, which are still being defined, and policy considerations.

120. While *Charter* or policy considerations may oblige or favour some acknowledgement of homosexual relationships in some circumstances, there may be other situations where such recognition is neither required nor appropriate.

121. Given the wide-ranging implications of recognition of same-sex partners, the issue should be the subject of legislative consideration. The legislatures are in a better position to consider all aspects of the issue and to assess societal and fiscal implications.

McKinney v. *University of Guelph*, *supra*, at pp. 304 - 305.

Ontario Law Reform Commission, *Report on The Responsibilities of Cohabitants under the Family Law Act*, *supra*.

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122. In this case, if the Court is satisfied that section 2 of the *Old Age Security Act* violates the *Charter*, it is submitted that the appropriate remedy would be to suspend the effect of any declaration that the law is discriminatory for a period of time in order to give Parliament, and the provincial legislatures, sufficient time to study and amend, as appropriate, the affected legislation, regulations and policies.

R. v. *Swain*, *supra*, at p. 1021 - 1022.

123. If such were to be the Court's disposition of the case, the Attorney General of Canada would submit that the appropriate remedy would be to strike down the provision and to
20 suspend the effect of that declaration for a period of one year, with a provision allowing for return to this Court, upon further application in a case of necessity, to show cause for such further extension of the transitional period as the Court may decide.

PART IV
ORDER SOUGHT

124. The Respondent respectfully submits that this appeal should be dismissed with costs.

All of which is respectfully submitted.
Dated at Ottawa, this 14 day of October, 1994.

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per

H.J. Wruck, Q.C.
F.E. Campbell, Q.C.
L.M. Hitch
of Counsel for the Attorney General
of Canada

PART V
TABLE OF AUTHORITIES

Articles and Books **Page**

25. Ariès, Philippe and Georges Duby, general eds. *A History of Private Life, Vol. I, From Pagan Rome to Byzantium* and *Vol. V, Riddles of Identity in Modern Times*, Cambridge: The Belknap Press of Harvard University Press, 1987. 21

26. Boswell *Same-sex Unions in Premodern Europe*, New York, 1994. 21

27. Davies, Christine *Family Law in Canada*, Carswell Legal Publications, c. 1984. 9

28. Duclos, Nitya, "Some Complicating Thoughts on Same-sex Marriage", (1991), 1 *Law & Sexuality* 31. 22

29. "Gay marketing is in the pink", *Globe & Mail*, p. 4, August 15th, 1992. 14

30. Holland, Winnifred H. and Barbro E. Stalbecker-Pountney, eds. *Cohabitation: The Law in Canada*, Carswell, 1990. 9, 25

31. Ontario Law Reform Commission, *Report on The Responsibilities of Cohabitants under the Family Law Act* (1993). 14, 28, 29, 31

32. Oppong, Christine, "Marriage", *The Social Science Encyclopaedia*, London: Routledge and Kegan Paul, 1986, pp. 497 - 498. 12

33. Quale, G. Robina *A History of Marriage Systems*, New York: Greenwood Press, 1988. 12

34. Stone, Olive M. *Family Law*, Macmillan Press Ltd., c. 1977. 9

35. Sullivan, Andrew, "Here Comes the Groom: A (conservative) Case for Gay Marriage", *The New Republic*, August 28, 1989, p. 20. 23

36. Westermark, Edward *A Short History of Marriage*, New York: Humanities Press, 1968. 12

APPENDIX "A"
Statutes Relied On

APPENDIX "B"

Federal Statutes defining rights and obligations on the basis of the spousal relationship

Bankruptcy Act. R.S., c. B-3, s. 91, 92, 93, 113, 137, 177, 178, 191 and 219.
Bills of Exchange Act. R.S., c. B-5, Forms 2, 5 and 10.
Bridges Act. R.S., c. B-10, s. 14.
Canada Business Corporations Act. 1974-75-76, c. 33, s. 2, 32, 44, 46, 49, 174, 194 and 206.
Canada Elections Act. R.S., c. 14 (1st Supp.), s. 15, 58, 60, 77, 78, 330, Schedule II (Section 330), s. 2, 28, 40, Schedule IV (Section 63), Rule 27, Rule 52, Rule 53 and Rule 79.
Canada Evidence Act. R.S., c. E-10, s. 4.
Canada Pension Plan. R.S., c. C-5, s. 2, 6, 42, 44, 55, 55.1, 55.2, 58, 63, 63.1, 65.1, 66, 72, 75, 76, 80, 81, 82, 83, 84, 86, 87 and 88.
Canada Shipping Act. R.S., c. S-9, s. 41, 42, 54, 191, 262, 645, 653 and Form 4 (Section 54).
Canadian and British Insurance Companies Act. R.S., c. I-15, s. 2, 52 and 168.
Canadian Forces Superannuation Act. R.S., c. C-9, s. 9, 11, 25, 26, 28, 29, 30, 31, 32, 34, 35, 35.1, 36, 61 and 73.
Canadian Human Rights Act. 1976-77, c. 33, s. 2, 3 and 16.
Canadian Wheat Board Act. R.S., c. C-12, s. 67.
Carriage by Air Act. R.S., c. C-14, Schedule II, section 2.
Citizenship Act. 1974-75-76, c. 108, s. 5 and 11.
Civilian War Pensions and Allowances Act. R.S., c. C-20, s. 29, 34, 36 and 53.
Corporations and Labour Unions Returns Act. R.S., c. C-31, s. 2.
Criminal Code. R.S., c. C-34, s. 18, 23, 215, 278, 290, 291, 292, 293, 294, 295, 329, 423, 735. 737 and 810.
Customs Act. R.S., 1985, c. 1 (2nd Supp.), s. 45.
Diplomatic Service (Special) Superannuation Act. R.S., c. D-5, s. 5, 9, 11, 12 and 14.
European Bank for Reconstruction and Development Agreement Act. 1991, c. 12, Schedule (Section 2), Chapter VIII, article 52.
Excise Tax Act. R.S., c. E-13, s. 123, 190, 191, 254, 255, 256, 325, Schedule V (Subsection 123(1)), s. 3, 10 and 12.
Family Orders and Agreements Enforcement Assistance Act. R.S., 1985, c. 4 (2nd Supp.).
Farm Income Protection Act. 1991, c. 22, s. 10.
Federal Business Development Bank Act. 1974-75-76, c. 14, s. 36.
Foreign Insurance Companies Act. R.S., c. I-16, s. 2.
Garnishment, Attachment and Pension Diversion Act. 1980-81-82-83, c. 100, s. 32 and 33.
Governor General's Act. R.S., c. G-14, s. 7, 8 and 11.
Immigration Act. 1976-77, c. 52, s. 46.04 and 46.05.
Indian Act. R.S., c. I-6, s. 48, 68 and 81.

Investment Companies Act. 1970-71-72, c. 33, s. 2 and 11.
Judges Act. R.S., c. J-1, s. 27, 40, 44, 45, 46, 46.1, 47, 48, 49 and 52.
Lieutenant Governors Superannuation Act. 1974-75-76, c. 73, s. 3, 5, 6, 7, 8, 9 and 11.
Loan Companies Act. R.S., c. L-12, s. 64.
Marriage (Prohibited Degrees) Act. 1990, c. 46, s. 3 and 4.
Marriage Act. R.S., c. M-5, s. 2 and 3.
Members of Parliament Retiring Allowances Act. R.S., c. M-10, s. 14, 17, 19, 30 and 31.
Merchant Seamen Compensation Act. R.S., c. M-11, s. 31, 32, 33 and 44.
Northwest Territories Act. R.S., c. N-22, s. 16.
Old Age Security Act. R.S., c. O-6, s. 2, 12, 14, 15, 19, 20, 21, 22, 23, 24, 25, 28, 29, 30, 33, 34 and 39.
Parliament of Canada Act., s. 40.
Penitentiary Act. R.S., c. P-6, s. 34 and 37.
Pension Act. R.S., c. P-7, s. 3, 14, 21, 31, 32, 34, 38, 43, 45, 46, 47, 48, 51, 52, 53, 56, 57, 59.1, 64, 69, 71.2, 72 and 81.
Pension Benefits Standards Act, 1986, c. 40, assented to 27th June, 1986, s. 2, 18, 22, 23, 24, 25, 26, 27, 28, 29 and 36.
Privacy Act. 1980-81-82-83, c. 111, Sch. II "1", s. 3.
Privileges and Immunities (International Organizations) Act. R.S., c. P-22, Schedule I (Section 2), art. IV, s. 11, art. V, s. 18, 19 and 20.
Privileges and Immunities (North Atlantic Treaty Organisation) Act. R.S., c. P-23, Part III, art. 13, s. 1 and Part IV, art. 18.
Public Service Employment Act. R.S., c. P-32, s. 12.
Public Service Superannuation Act. R.S., c. P-36, s. 8, 10, 12, 13, 25, 26, 26.1, 31, 32, 42, 49 and 61.
Railway Act. R.S., c. R-2, s. 367.
Royal Canadian Mounted Police Superannuation Act. R.S., c. R-11, s. 8, 9, 13, 14, 15, 17, 18, 19, 19.1 and 20.
Special Import Measures Act. 1984, c. 25, s. 2.
Supplementary Retirement Benefits Act. R.S., c. 43 (1st Supp.), s. 2 and 4.
Trust Companies Act. R.S., c. T-16, s. 73 and 82.
Unemployment Insurance Act. 1970-71-72, c. 48, s. 28, 101, 109 and 120.
Veterans Appeal Board Act. R.S., 1985, c. 20 (3rd Supp.), s. 17.
War Veterans Allowance Act. R.S., c. W-5, s. 2, 4, 5, 7, 8.1, 10, 11, 14, 18 and 25.
Yukon Act. R.S., c. Y-2, s. 17.