Court File No. 23636

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

B E T W E E N :

JAMES EGAN and JOHN NORRIS NESBIT

APPELLANTS
(Plaintiffs)

- and -

HER MAJESTY THE QUEEN IN RIGHT OF CANADA

RESPONDENT
(Defendant)

FACTUM OF THE INTERVENOR METROPOLITAN COMMUNITY CHURCH - TORONTO

PART I - FACTS

1. The intervenor Metropolitan Community Church of Toronto ("MCCT") accepts the facts as set out in the factum of the appellant.

2. The Universal Fellowship of Metropolitan Community Churches (UFMCC) is a Christian denomination with a special outreach to the gay and lesbian community. There are over 300 UFMCC congregations in sixteen countries. Founded in 1973, MCCT was the first such church in Canada and has become the largest UFMCC church in the world outside the USA.

PART II - POINTS IN ISSUE

3. The constitutional questions stated by this court are:

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

   B. If the answer to A is yes, is the infringement or denial demonstrably justified in a free and democratic society?

4. MCCT submits that the answers to these questions are:

A. Yes

B. No

PART III - ARGUMENT

Overview

5. MCCT supports the appellants' position, and submits that the definition of "spouse" in section 2 of the *Old Age Security Act* infringes or denies subsection 15(1) of the *Charter* on the basis of sexual orientation. In particular, MCCT submits:

(a) General Interpretive Principles: subsection 15(1) requires that the impugned definition be examined in the broader historical, social, political and legal context in which it arises. This "broader context" is the historic, social, political and legal prejudice and disadvantage suffered by lesbians and gays.

(b) Sexual Orientation: is analogous to the enumerated grounds under subsection 15(1) of the Charter:

i. it is an innate and important personal characteristic;

ii. lesbians and gays are a discrete and insular minority;

iii. lesbians and gays have been disadvantaged by social, legal, systemic and institutionalized state policy, religious dogma and popular prejudice. There is no clearer example of a minority which continues to be reviled and marginalized for no other reason than a personal characteristic.

(c) Distinction Drawn: the impugned definition in the *Old Age Security Act* draws a distinction between conjugal couples based upon the heterosexuality of their relationship. This distinction:

i. is direct and based on a personal characteristic - the sexual orientation of the individuals in the relationship; or alternatively,

ii. adversely affects lesbians and gays by excluding them, by statutory definition, from the recognition, care, concern and respect accorded to heterosexuals who enter into intimate domestic relationships.

(d) Distinction Is Discriminatory: the distinction denies lesbians and gays the benefit of entitlements under the *Old Age Security Act*, and perpetuates, crystallizes, entrenches and epitomizes the general disadvantage and prejudice suffered by lesbians and gays - same sex relationships are, by definition,

excluded from the status, prestige and recognition of spousal relationships in the allocation of benefits and burdens, and thus these relationships are made to seem either non-existent, or of no material importance. So long as Parliament allocates benefits and burdens - and consequent social status, prestige and recognition - on the basis of intimate domestic relationships, the exclusion of same sex couples from the very definition of such recognized relationships will perpetuate the deep-seated stigmatization and prejudice which gave rise to the exclusion in the first place.

(e) Subsection 15(2): the impugned definition is not an "affirmative action program" within the meaning of subsection 15(2) of the *Charter*. Excluding same sex couples from the definition of "spouse" is not necessary to achieve any of the ameliorative purposes which may be inferred from the language of the statute itself, or any other legitimate government objective.

(f) Section 1: the Crown has not established any convincing record to justify this discrimination on the basis of sexual orientation.

(g) Remedy: although the principles giving rise to a decision to allow this appeal may have broad applicability to other federal and provincial legislation, the Crown has not established a basis for concluding that the government should not accommodate the court's decision in the administration and application of these laws. The Court should not suspend the operation of its decision in this case for a year, or at all.

(A) General Interpretive Principles: Purposive / Contextual Approach to subsection 15(1)

6. Section 15 of the *Charter* provides:

> 15.--(1) Every individual is equal before and under the law and has a 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.
>
> (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

7. The test under subsection 15(1) is a purposive one, to be undertaken in light of the interests it was meant to protect. Section 15 promotes 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 from the State. The purpose of this provision is to protect those groups who suffer social, political and legal disadvantage in our society by ensuring equality in the formulation and application of the law. The courts have applied

section 15 from the perspective of members of disadvantaged groups. The proper question in applying section 15 is not whether legislative distinctions are "unreasonable", "insidious", "unfair" or "irrational", but whether a distinction creates or reinforces a disadvantage on the basis of a personal characteristic. Given its large remedial component, section 15 should be broadly interpreted and applied to remedy and prevent discrimination against persons historically subject to stereotyping, prejudice, and disadvantage.

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

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

R. v. Swain, [1991] 1 S.C.R. 933 at 992

8. Equality guarantees lie at the very heart of our theories of democracy, freedom and fairness. Although the Canadian constitutional guarantee is only about a decade old, John Stuart Mill's On Liberty is a treatise as fundamental to democratic and egalitarian ideals as any other, and Mill describes the paramount importance of protection of minorities as follows:

> The "people" who exercise the power are not always the same people with those over whom it is exercised; and the "self-government" spoken of is not the government of each by himself, but of each by all the rest. The will of the people, moreover, practically means the will of the most numerous or the most active *part* of the people; the majority, or those who succeed in making themselves accepted as the majority; the people, consequently, *may* desire to oppress a part of their number; and precautions are as much needed against this as against any other abuse of power. The limitation, therefore, of the power of government over individuals loses none of its importance when the holders of power are regularly accountable to the community, that is, to the strongest party therein. This view of things, recommending itself equally to the intelligence of thinkers and to the inclination of those important classes in European society to whose real or supposed interests democracy is adverse, has no difficulty in establishing itself; and in political speculations "the tyranny of the majority" is now generally included among the evils against which society requires to be on its guard.
>
> Like other tyrannies, the tyranny of the majority was at first, and is still vulgarly, held in dread, chiefly as operating through the acts of the public authorities. But reflecting persons perceived that when society itself is the tyrant - society collectively over the separate individuals who compose it - its means of tyrannising are not restricted to the acts which it may do by the hands of its political functionaries. Society can and does execute its own mandates; and if it issues wrong mandates instead of right, or any mandates at all in things with which it ought not to meddle, it practises a social tyranny more formidable than many kinds of political oppression,

since, though not usually upheld by such extreme penalties, it leaves fewer means of escape, penetrating much more deeply into the details of life, and enslaving the soul itself. Protection, therefore, against the tyranny of the magistrate is not enough: there needs protection also against the tyranny of the prevailing opinion and feeling; against the tendency of society to impose, by other means than civil penalties, its own ideas and practises as rules of conduct on those who dissent from them; to fetter the development and, if possible, prevent the formation, of any individuality not in harmony with its ways, and compels all characters to fashion themselves upon a model of its own. There is a limit to the legitimate interference of collective opinion with individual independence: and to find that limit and maintain it against encroachment, is as indispensable to a good condition of human affairs, as protection against political despotism.

John Stuart Mill, On Liberty at 5-6.

Andrews v. Law Society of British Columbia [1989] 1 S.C.R. 143

9. The prohibition in subsection 15(1) is expressed in absolute terms. Any alleged justification for discrimination must take place under section 1 of the *Charter*, and not under subsection 15(1) itself. To do otherwise would create unwarranted limitations on the guarantee of equality, and would place an unfair burden on *Charter* claimants to prove the unreasonableness of any violation of equality. It also would invite a balancing of state and individual interests under section 15 that would be less rigorous on the state than the balancing required under section 1.

Andrews v. *Law Society of British Columbia* [1989] 1 S.C.R. 143 at 154 per Wilson J., and at 182 per McIntyre J.

R. v. *Turpin*, [1989] 1 S.C.R. 1296 at 1328

10. An infringement of section 15 exists where a distinction, whether intentional or not, based on grounds relating to personal characteristics of a group, has the effect of imposing burdens, obligations or disadvantages not imposed upon others. The impact of a distinction is discriminatory if it perpetuates or compounds historical oppression, negative stereotyping and disadvantage. *Andrews* is authority that "equal treament of similarly situated groups" does not itself satisfy the requirements of the *Charter*. Nevertheless, at least formal equality is required for similarly situated groups.

Andrews v. Law Society of British Columbia [1989] 1 S.C.R. 143, at 152 per Wilson J. and at 180-181 per McIntyre J.

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

11. The Crown, in its factum, argues that the *Charter* analysis should be undertaken with an understanding of the "larger context" in which the alleged infringement occurs. The Crown then purports to restrict the "larger context" to:

(a) "historic economic disadvantage";

(b) the "system of interconnecting federal and provincial programs which together provide financial assistance to the elderly and near-elderly in need"; and

(c) the "larger social and historic context" in which the definition of "spouse" exists.

The Crown further argues that the appellants must show that they have suffered from historic disadvantage "in an economic way relevant to the statute in question, rather than existing in society independently from the statute."

Crown's Factum, paragraphs 16 and 17

12. On the one hand, the Crown asks the Court to ignore the broad social context in which this case arises in assessing whether the legislation is discriminatory, but on the other, it asks the Court to be mindful of precisely that context when fashioning a remedy.

> "Hence the issued 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 be done by expanding the concept of spouse."

Crown Factum, paragraph 113

13. MCCT submits that this analysis ignores the broad social context of discrimination against lesbians and gays which is crystallized and embodied in the impugned definition in the *Old Age Security Act*. The context, properly seen, is the allocation of benefits and burdens based on the sexual orientation of conjugal couples. The purpose of this case is to establish that same sex couples are equally deserving as different sex couples of the care, concern and respect of Canadian legislatures.

(B) Sexual Orientation is Analogous to the Enumerated Grounds under Subsection 15(1) of the Charter

14. The grounds of discrimination enumerated under section 15 are not exclusive, and extend to analogous grounds.

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

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

15. Analogous grounds may include any personal characteristic which is used as a basis for oppression, stereotyping and disadvantage. Such personal characteristics, like citizenship and religious faith, need not be "immutable" in the sense that they cannot be changed, but rather should be "innate" in the sense that they inhere in the individual and may form important aspects of personal identity.

16. Many courts and tribunals in Canada have ruled decisively that sexual orientation is an unenumerated analogous ground protected from discrimination under section 15.

See Appellant's Factum, paragraph 26, and citations therein

17. In *Haig and Birch*, the federal Crown conceded this point to the Ontario Court of Appeal, and Krever, J.A., writing for the Court, held: "I agree [with this concession] and add that, as a matter of law, the concession is right." The Crown has conceded that sexual orientation is an analogous ground in several of the other cases cited above.

Haig and Birch v. Canada (1992), 9 O.R. (3d) 495 (C.A.)

See also *Leshner, Brown, Knodel* in Appellants' Factum, paragraph 26

18. Government reports have also supported this position. The Parliamentary Committee on Equality Rights concluded that "sexual orientation should be read into the general open-ended language of section 15 of the Charter as a constitutionally prohibited ground of discrimination." The federal government accepted this position, with the following statement: "The Department of Justice is of the view that the courts will find that sexual orientation is encompassed by the guarantees of s.15 of the Charter."

Patrick Boyer, M.P., (Chair) Equality for All: Parliamentary Committee on Equality Rights, (1985), at 29

Toward Equality: The Response to the Report of the Parliamentary Committee on Equality Rights (1986), at 13.

19. The Supreme Court of Canada has had occasion to consider the decision in *Haig*, and has not doubted its correctness.

Mossop v. Canada, [1993] 1 S.C.R. 554

20. In the case at bar, the federal Crown conceded at trial and on appeal that sexual orientation is a prohibited ground of discrimination under section 15 of the *Charter*. The Trial Division implicitly accepted this concession; the Court of Appeal expressly agreed that it was correct.

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

Reasons for Judgment of Martin J., Federal Court, Trial Division, Case on Appeal, Volume 4, p. 557.

21. Sexual orientation is now effectively a prohibited ground of discrimination in the *Canadian Human Rights Act* and in the human rights legislation of eight provinces and the Yukon.

See Appendix B

22. It seems a fair conclusion that a consensus has developed in Canada that discrimination on the basis of sexual orientation is a serious and invidious social problem, is deeply embedded in many laws and institutions, and is a product of centuries of systematic discriminatory treatment.

David L. Corbett "Lesbian and Gay Rights - the Historical and Social Context" in Sexual Orientation and the Law (Toronto: Law Society of Upper Canada, Department of Continuing Education, 1994)

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

23. The precise etiology of sexual orientation is not known. It seems likely that it is a result of a combination of biological, genetic and developmental factors, but on the best available

evidence it seems clear that it is established prior to birth or early in life, and is extremely difficult or impossible to change.

> The poor results of treatment directed at homosexual orientation and the evidence for a genetic or hormonal basis of homosexual orientation are not reverse sides of the same coin. Learned phenomena may be extremely resistant to change, particularly those learned early in life. The paradigm of the first language is an example. Conversely, a behaviour may be inborn and related to brain functioning but still be amenable to change. The paradigm of left-handedness is an example.
>
> The research reviewed above does not prove that sexual orientation, or at least homosexual orientation, is entirely genetically determined or entirely hormonally induced. The data does point, however, to some degree of contribution from these sources. An objective comparison of the evidence behind genetic and/or hormonal influences reveals it to be at least as strong as the posited Freudian concepts or the behaviourist idea of "mislearning" homosexual arousal. Indeed, the very disappointing outcome of psychotherapy based on these theoretical constructs casts doubt on these theories.
>
> Nor does the finding that one can with great effort graft apparently heterosexual behaviour over an earlier homosexual orientation mean that sexual orientation is mutable. The arduous process of "reorientation" is psychologically wrenching and has been sometimes physically painful. Therapy may not be much more effective than what would be expected from attempts to reorient heterosexuals.
>
> Richard Green "On Homosexual Orientation as an Immutable Characteristic" in Wolinsky and Sherrill, eds. Gays and the Military: Joseph Steffan versus the United States (Princeton, New Jersey: Princeton University Press, 1993) at 82-83
>
> Chandler Burr, "Homosexuality and Biology" The Atlantic Monthly (March, 1993)

24. A significant minority of society are lesbian or gay. Scientific and less formal surveys vary widely in methodology and results (ranging from 1% - 40%). But even if the correct number is 1% it is still a large group for which Charter protection should be available.

> Bennett Singer and David Deschamps "A Statistical Battleground: Counting Lesbians and Gay Men in the United States" in Gay & Lesbian Stats: A Pocket Guide of Facts and Figures (New York: The New Press, 1994)
>
> Richard Friedman and Jennifer Downey (1994) "Homosexuality" 331:14 New England Journal of Medicine 923

25. Lesbians and gays receive little respect, and indeed are widely shunned in contemporary society. This pervasive social attitude is changing only slowly. This apparent truism is dramatically illustrated by one American survey which compares Americans' feelings for various groups such as evangelicals, women, whites, gays, illegal aliens, the elderly, etc. The results of this

survey show that gays and lesbians are the most hated group in America. There is no reason to believe that if the equivalent study were done in Canada the results would be any different.

> In 1988, Americans were more than five times as likely to have negative feelings toward gay people (63 percent) than toward black people (12 percent) and over seventeen times as likely to hold the coldest possible feelings towards gay people (35 percent) as toward black people (2 percent). Only 7 percent said that they had negative feelings toward Jews, and only 1 percent placed their feelings toward Jews at the coldest extreme. Only 2 percent said they had negative feelings toward women and none place these feelings at the coldest extreme.
>
> Kenneth Sherill "On Gay People as a Politically Powerless Group" in Wolinsky and Sherrill (eds.), Gays and the Military: Joseph Steffan versus the United States, (Princeton, New Jersey: Princeton University Press, 1993) at 98-99.

26. While individual lesbians and gays may achieve personal success it is most often only with the careful concealment of their orientation and private lives.

> For gay people the self-consciousness begins long before their careers and extends well beyond the workplace. Professional experiences often replicate situations that are familiar from relationships with family, neighbors, and friends. An office is not unlike a livingroom, playground, church, or supermarket. All are sites in which identity must be managed, and this strategic disposition, once learned, is not easily lost. As Martin explains, "When you've been set apart, held up for criticism or ridicule, and told you're illegal, unnatural, inappropriate, or immoral because of this one trait, your sexuality will never be irrelevant to the way you view yourself in social settings. It will always be somewhere in the foreground.
>
> Sexuality becomes an overriding concern for these men, not because it is more essential to their lives than it is for others, but because heterosexism forces them to perceive it as an issue, a recurrent source of tension. The perpetual threat (if not the reality) of discrimination compels self-consciousness and wariness in those at risk; at all times even the slightest threat must be monitored. However a man defends himself -- with deception and disguises, avoidance of the issue, or direct confrontation of homophobic peers -- he has little choice but to monitor his behavior, to worry that he's made the wrong decision, and to wonder what its consequences will be. Managing his sexual identity becomes one of the central projects in his career.
>
> Even so, employers often misunderstand the reasons lesbian and gay workers have begun to reveal themselves and to demand that their special concerns be recognized.
>
> James D. Woods and Jay H. and Lucas, The Corporate Closet: The Professional Lives of Gay Men in America (Toronto: Maxwell MacMillan Canada, 1993) at 30

Although this passage refers specifically to gay male professionals, there is no reason to believe that the effects of the workplace closet are any less severe for lesbian professionals or for lesbians and gays in non-professional employment.

27. Hostility to lesbians and gays affects their relationships with their children. Lesbians have been particularly stigmatized with respect to their formation and maintenance of family units. Many women have acknowledged their lesbian identity only after years of trying to live in heterosexual relationships. Often there are children born in those heterosexual relationships, and lesbians are responsible as parents for these children. Stigmatization has and continues to occur particularly where lesbians and gay men have attempted to bring their children from a previous heterosexual household into a new lesbian or gay household. Heterosexual persons are encouraged to bring their biological children from a failed household into a new one to provide a more stable child-rearing environment than a single parent family. Lesbians and gay men who seek to do this within a same-sex relationship are challenged on the basis of the "illegitimacy" of their new domestic partnership.

Harriet Sachs "Same-Sex Issues in Family and Estates Law" in Sexual Orientation and the Law (Toronto: Law Society of Upper Canada, Department of Continuing Legal Education, 1994)

Laura Benkov, "Towards an Unknown Place" and "In the Halls of Justice?" in Reinventing the Family: The Emerging Story of Lesbian and Gay Parents (New York: Crown Publishers, 1994) at 16-81

Bennet L. Singer and David Deschamps, "Families and Relationships" in Gay & Lesbian Stats: A Pocket Guide of Facts and Figures (New York: The New Press, 1994)

28. The Crown's assertion that "analogous" grounds may shift from case to case conflates the analysis under section 15 with the justification of limitations on equality rights properly carried out under section 1. The status and position of a group which can be categorized under a particular analogous ground may change over time. A change in the status or treatment of such a group is not the same thing as saying the ground under which it is categorized changes or disappears. "Lesbians and gays" are a specific group identified by or under the general category of "sexual orientation".

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

29. MCCT submits that this Court should find as a general rule sexual orientation is an analogous ground under section 15 of the Charter. Perhaps not all legislation that makes distinctions based on this personal characteristic will be found to contribute to inequality. Perhaps such legislation will be found to be a subsection 15(2) affirmative action program, or will have a successful section 1 justification. Nor does it mean that at some point in the future it may come

to pass that discrimination based on sexual orientation fades away. But these "defense" arguments do not mean that "sexual orientation" is not an analogous ground.

(C) Distinction Drawn on the Basis of Sexual Orientation

30. The definition of "spouse" simultaneously asserts two distinctions based on two different characteristics. It distinguishes between:

(a) those in conjugal relationships and all others; and

(b) same sex and heterosexual conjugal relationships.

31. The requirements of "opposite sex" and "husband and wife" in the impugned definition constitute direct discrimination against lesbians and gays, who by virtue of their sexual orientation, form conjugal relationships with partners of the same sex. In this regard, MCCT adopts the submissions of the appellants. To say that the distinction drawn is simply between "spouse" and all others is nothing but argument by definition. "Spouse" then becomes the essential element and justification of its own definition. The impugned definition itself cannot be relied upon to justify an exclusionary result. To allow this would be to ignore the clear result of such a definition, which is to exclude gay and lesbian conjugal relationships from consideration under the law. In the event that the Court is not persuaded that this is direct discrimination, MCCT asserts that it is adverse effect discrimination.

32. The adverse effect discrimination argument must be considered if the definition is seen as facially neutral. It is respectfully submitted that when the majority in the Federal Court of Appeal concluded that the distinction drawn in the definition was only between "spouses" and all others it failed to then consider the adverse effect. For lesbians and gays it is very unlikely they will choose to become "spouses" within the meaning of the impugned definition, and highly undesirable that they be induced to do so. For others in the excluded "non-spouse" category, the possibility of becoming a "spouse" is available without violating their sexual orientation.

33. Further, the majority Court of Appeal analysis draws a false analogy between the category of gay and lesbian conjugal relationships and the category of "all other domestic arrangements except heterosexual spouses". The category of "all other domestic arrangements except heterosexual spouses" is not a monolithic whole, united by similarity to each other and dissimilarity to heterosexual spousal relationships. Within the category of "all other domestic

arrangements" there are sub-groups which may or may not be more adversely affected by their exclusion from the category of "heterosexual spouse". MCCT submits that one such category, as demonstrated on the record of this case, is that of gays and lesbians in conjugal relationships, who will experience adverse treatment and effects solely by reason that they accept and act upon their sexual orientation. Other sub-groups within the category "all other domestic arrangements" could argue that they too experience adverse treatment and effect, but that is an issue for another case.

34. Adverse effect discrimination arises where a facially neutral rule contains broadly drawn categories which impact upon a variety of people, some constitutionally protected, some not. It is the essence of adverse effect discrimination that within the group defined by the facially neurtral rule there is a sub-group, definable by a constitutionally protected characteristic who are disproportionately disadvantaged by the facially neutral rule. This impact is unacceptable because it perpetuates and exacerbates the disadvantage. Such is the case for gays and lesbians in conjugal relationships, who by operation of the impugned definition, continue to experience exclusion from institutions designed to recognize and support conjugal relationships.

> Discrimination... means practices or attitudes that have, <u>whether by design or impact</u>, the effects of limiting an individual's or a groups right to the opportunities generally available because of attributed rather than actual characteristics... It is not a question of whether this discrimination is motivated by an intentional desire to obstruct someone's potential, or whether it is the accidental by-product of innocently motivated practices of systems. If the barrier is affecting certain groups in a disproportionately negative way, it is a signal that the practices that lead to this adverse effect may be discriminatory.
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> Rosalie Abella, <u>Report on the Commission on Equality in Employment</u> (1984), as cited in *Canadian National Railway Co. v. Canada (Canadian Human Rights Commission)*, [1987] 1 S.C.R. 114 (*Action Travail des Femmes*) at 1138-39 and approved in *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143 at 174

<u>(D) The Distinction is Discriminatory</u>

35. The effect of the impugned definition is discrimination against those with same sex orientation because it imposes on them a financial and social disadvantage. They are deprived of spousal pension supplements which are awarded to heterosexual conjugal couples by a definition of "spouse". This crystallizes and entrenches the view that their domestic partnership is less worthy than the equivalent heterosexual relationship.

36. A description of "discrimination" is set out in Andrews:

> ...discrimination may be described 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. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely respect the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed.
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> *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143 at 174-175 (emphasis added)
>
> See also *R v. Swain* [1991] 1 SCR 933 at 992 referred to in *Symes v. Canada*, [1993] 4 S.C.R. 695.

37. Adverse effect discrimination is as much discrimination for purposes of section 15 as direct discrimination. In *Symes*, Iacobucci, J. held:

> It may be helpful at this stage to underscore two aspects of the discrimination concept which emanated from *Andrews*, supra. First, it is clear that a law may be discriminatory even if it is not directly or expressly discriminatory. In other words, adverse effects discrimination is comprehended by s. 15 (1): see also *Tetreault-Gadoury v. Canada (Employment and Immigration Commission)*, [1991] 2 S.C.R. 22, at p. 41; *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229, at p. 279. In *Ontario Human Rights Commission v. Simpsons-Sears Ltd.* [1985] 2 S.C.R. 536, McIntyre, J. contrasted direct discrimination to adverse effects discrimination in the employment context (at p. 551):
>
> > A distinction must be made between what I would describe as direct discrimination and the concept already referred to as adverse effect discrimination in connection with employment. Direct discrimination occurs in this connection where an employer adopts a practice which on its face discriminates on a prohibited ground. For example, "No Catholics or no women or no blacks employed here" ... On the other hand, there is the concept of adverse effect discrimination. It arises where an employer for genuine business reasons adopts a rule or standard which is on its face neutral, and which will apply equally to all employees, but which has a discriminatory effect upon a prohibited ground on one employee or group of employees in that it imposes, because of some special characteristic of the employee or group, obligations, penalties, or restrictive conditions not imposed on other members of the work force.
>
> In the same case, McIntyre, J. came to the unrelated conclusion that animus is irrelevant to discrimination. A finding of discrimination can be made even if there has been no intention to discriminate."
>
> *Symes v. Canada*, [1993] 4 S.C.R. 695 at 755-756 (emphasis in original)

38. Adverse effect discrimination means that the impugned legislation has a disproportionate impact on the discriminated against group. It is not necessary that every member of the group suffer the discrimination. In *Brooks*, for example, not every woman is pregnant, but only women get pregnant, and thus discrimination against the pregnant is discrimination against women.

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

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

39. The trial Judge found, as a matter of fact, "that had Nesbit been a woman cohabiting with Egan substantially on the same terms as he in fact cohabited with Egan, he would have been eligible for the spouse's allowance". No clearer finding could be made that the non-heterosexuality of the appellants' relationship is the direct and only reason they are not "spouses" within the meaning of the Act.

Reasons for Judgment of Martin J., Federal Court, Trial Division, Case on Appeal, Volume 4, p. 552.

40. It is not true as suggested by the Crown that lesbians and gays seek only the benefits of spousal status. MCCT asserts most firmly that it seeks both the burdens and the benefits. MCCT seeks equality for all conjugal couples.

41. The impugned definition treats different sex conjugal couples as worthy of receiving pension supplements and treats lesbian and gay conjugal couples as not worthy. This differential treatment has a discriminatory impact on those individual lesbians and gays in same sex conjugal relationships, and upon the entire group of lesbians and gays in Canada. It says to the entire country that lesbian and gay conjugal relationships are less deserving of support, concern, dignity and respect than different sex conjugal relationships. In so doing, the impugned legislation reinforces the general pattern of discrimination against lesbians and gays in Canada. It reinforces the dehumanizing stereotypical view that lesbians and gays have no domestic relationships of comparable value to heterosexual relationships.

42. In fact, supportive conjugal relations are as important to lesbians and gays as they are to heterosexuals. This is so notwithstanding the fact that there is no conspicuous widespread tradition of public same sex spousal relationships. (It must be noted that because of census

gathering techniques, there is little reliable information on the number of same sex conjugal relationships. T35

> "... the desire for long term intimacy has no correlation with a particular sexual orientation. Indeed, researchers have consistently observed that it is gender and not sexual preference that exerts the greatest influence on relationships."

T25 Warren Blumenfeld and Diane Raymond, "Lifestyles and Culture" in Looking at Gay and Lesbian Life, (New York: Philosophical Library, 1988) at 362 at 387

See Additionally:

T15 Bruce Ryder "Equality Rights and Sexual Orientation: Confronting Heterosexual Family Privilege" (1990), 9 Canadian Journal of Family Law 39.

T26 Canadian Aids Society, The Canadian Survey of Gay and Bisexual Men and HIV Infection Men's Survey, (1993) at 30

T27 Ronald Testa, Bill Kinder, Gail Ironson "Heterosexual Bias in the Perception of Loving Relationships of Gay Males and Lesbians" (1987) 23:2 Journal of Sex Research 163 at 169-171

T28 Mary Laner "Permanent Partner Priorities: Gay and Straight" (1977) 3:1 Journal of Homosexuality 21 at 25

T29 Leslie Peplau, Christine Padesky, Mykol Hamilton "Satisfaction in Lesbian Partnerships" (1982) 8:2 Journal of Homosexuality 23 at 23 and 27.

T30 Leslie Peplau "Research on Homosexual Couples: An Overview" in John DeCecco (ed.) Gay Relationships (New York: Haworth Press, 1988) 33 at 35, 36.

43. The root problem seems to be the reluctance of the law to recognize that same sex conjugal relationships are the functional equivalent of opposite sex conjugal relationships. Both are equally relationships founded on sexual intimacy. Both are relationships of long term mutual support involving mutual financial considerations, shared accommodations, shared social networks, and the deepest personal feelings. Differences between same sex and opposite sex relationships exist, but they pale by comparison to both the similarities between same sex and opposite sex relationships, and to the differences within each category.

> "Everyone, gay or straight, is socialized in the same romantic heritage, a heritage that stresses monogamous involvement, romantic love, permanence, and so on...
>
> The close relationships of lesbians, gay men, and heterosexual women and men are really quite similar, driven by similar general forces. What differences do emerge appear to result more from gender than sexual preference."

T30 Sally Duffy, Caryl Rusbult "Satisfaction and Commitment in Homosexual and Heterosexual Relationships" (1985) 12:2 Journal of Homosexuality 1 at 4 and 21

"Contemporary research reveals that gay males and lesbians are capable of forming long-term relationships and suggest that a primary problem faced by these couples is a lack of social sanctioning and support."

T27 Ronald Testa, Bill Kinder, Gail Ironson "Heterosexual Bias in the Perception of Loving Relationships of Gay Males and Lesbians" (1987) 23:2 Journal of Sex Research 163 at 164

"In view of the findings of recent studies as to homosexual 'normalcy', there is no reason to believe that the permanent partner priorities of homosexuals of either gender differ significantly from the permanent partner priorities of heterosexuals of either gender."

T28 Mary Laner "Permanent Partner Priorities: Gay and Straight" (1977) 3:1 Journal of Homosexuality 21 at 25

"Same-sex couples are deprived of the material and psychic benefits granted by the law exclusively to heterosexual couples, and all lesbians and gays are stigmatized by the state's refusal to confer legitimacy on economically, emotionally and sexually interdependent relationships between persons of the same sex.

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

T15 Bruce Ryder "Equality Rights and Sexual Orientation: Confronting Heterosexual Family Privilege" (1990), 9 Canadian Journal of Family Law 39 at 45 and 48

See Additionally:

T26 Canadian Aids Society, The Canadian Survey of Gay and Bisexual Men and HIV Infection Men's Survey (1993) at 30

T29 Leslie Peplau, Christine Padesky, Mykol Hamilton "Satisfaction in Lesbian Partnerships" (1982) 8:2 Journal of Homosexuality 23 at 23 and 27.

T32 Lawrence Kurdek, Patrick Schmitt, "Relationship Quality of Partners in Heterosexual Married, Heterosexual Cohabiting, and Gay and Lesbian Relationships" (1986) 51:4 Journal of Personality and Social Psychology 711

T33 Neil Tuller "Couples: The Hidden Segment of the Gay World" in John DeCecco ed. Gay Relationships (New York: Haworth Press, 1988) 45

T34 Richard Mohr "Chapter 3: Understanding Gay Marriage" in A More Perfect Union (Boston: Beacon Press, 1994) 31

T35 Brenda Cossman and Bruce Ryder, Gay, Lesbian and Unmarried Heterosexual Couples and Unmarried Heterosexual Couples and the *Family Law Act*: Accommodating a Diversity of Family Forms (Toronto: Ontario Law Reform Commission, 1993) at 8-10

44. The Crown Factum notes that the definition of "spouse" in the *Old Age Security Act* is just one of a number of similar definitions of "spouse" in other federal legislation. The underlying policy of federal legislation is to devalue same sex relationships. This policy constitutes a system of official legal declarations that same sex relationships shall have no lawful recognition or validity. It is a system of enforced invisibility of same sex relationships. While hostility to lesbians and gays existed prior to the impugned definition, this official denial of equivalence and legitimacy of same sex relationships constitutes, in and of itself, a disadvantage and discrimination. It devalues same sex conjugal relationships and crystallizes, confirms and makes official the historic prejudice against lesbians and gays.

Crown Factum - Appendix B

45. It is particularly reprehensible that government policy should reinforce anti-gay stereotypes. Stereotyping is one of the badges of inequality from which section 15 strives to protect. "What lies at the heart of subsection 15(1) is the promise of equality in the sense of freedom from the burdens of stereotyping and prejudice in all their subtle and ugly manifestations." Similarly, Lamer C.J. recognized that the purpose of section 15 is "to remedy or prevent discrimination against groups subject to stereotyping, historical disadvantage and political and social prejudice in Canadian society".

McKinney v. University of Guelph, [1990] 3 S.C.R. 229 at 337

R. v. Swain [1991] 1 S.C.R. 933 at 992

46. The effect of discrimination by government is far greater than that of individuals:

> According to the human dignity model, it is the individual self which is the object of protection against discrimination, rather than the individual in society. Personhood rather than membership is the salient concept. A dignity-based approach is premised upon the idea that one can identify aspects of being on which one's self respect or personhood hinge. By disregarding or neglecting these aspects of being, a government will show disdain or lack of concern for the person. Three examples can help concretize this abstract analysis.
>
> A third example is where the government relies on stereotype in its treatment of individuals. The reason for regarding discriminatory disadvantagement as wrongful is not that it attacks the social status of the individual but that it attacks the individual's personal identity. The

> fact of past and continuing group disadvantagement will be evidence that powerful groups and individuals within society have not in the past regarded, and do not now regard the member of the group as worthy of the same respect as others, that they regard them as a lower class of person. If the government further disadvantages members of this group, it participates in the process. The government becomes an accessory to this stereotyping by defining a person in terms of the relevant characteristic, whether it be skin colour, physical disability, gender or some other factor which can be associated with social disadvantage. It collaborates in the powerful attacks perpetrated against those who are defined by a single feature. The pre-existing social disadvantagement suffered by the group of people who share this characteristic provides strong evidence that this single characteristic is operating as a barrier which is preventing the government from seeing the individual as a full person when the law impacts negatively on those who possess it. The government is reducing an individual's humanity to a single non-essential characteristic. Herein lies the affront.
>
> Galloway J.D.C. "Three models of (In) Equality (1993), 38 McGill Law Journal 64 at 83-85

47. In another context this Court ruled that the meaning of obscenity in the *Criminal Code* had to be sensitive to the principal of equality: the Court ruled that pornography belittles and denigrates women and prevents them from achieving equal standing in the community and that protecting women from this perpetuation of inequality justifies abrogation of the general freedom of speech. The impugned definition of spouse denies the essential humanity of gays and lesbians by defining away their personal relationships.

R. v. Butler, [1992] 1 S.C.R. 452 at 497

48. It ought not be necessary to prove that the impugned definition constitutes a disparagement of, and therefore creates a disadvantage to same sex couples. It is obvious on its face. If the definition provided for benefits to all conjugal couples, except black couples or Roman Catholic couples, or blind couples, it would be clear discrimination. The exception of same sex conjugal couples is just as clear a case.

49. It is respectfully noted that the Crown Factum misstates the law on "causation" suggesting that there must be proof that the definition of "spouse" causes disadvantage. The requirement is in fact that the discrimination be "caused or contributed to by an impugned provision".

Symes v. Canada, [1993] 4 S.C.R. 695 per Iaccobucci J.

50. The Crown Factum argues that there is no net disadvantage to same sex couples if the "spousal benefits programme" is considered in conjunction with provincial income supplement programmes. Tallying the two programmes creates, the Crown argues, a net advantage. Whether this is in fact true is not the point of this appeal. The MCCT submits that the possibility that other social programmes may neutralize some of the negative effects of a particular disadvantage may be a proper subject of inquiry under section 1. But to make it part of the analysis under section 15 creates treacherous problems. The impugned definition could be discriminatory in some provinces and not others at the very same time, depending on varying provincial benefits regimes. One level of government cannot rationalize its *Charter* violations by reference to legislation of another government over which it has no control.

(E) Subsection 15(2)

51. The majority in *Egan* at the Federal Court of Appeal found that the impugned legislation is intended to ameliorate the condition of poor elderly persons, generally women, after their spouses, the families' principal income-earners, retire. The court then found that:

> [b]efore us is a case in which 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 independency characteristic of heterosexual couples which cannot in any reasonable way be deemed relevant to same-sex couples or, for that matter, other non-spousal relationships.
>
> *Reasons for Judgment of Robertson J.A., Federal Court of Appeal, Case on Appeal, Vol. 4, p. 597.*

52. Subsection 15(2) should not be read to mean that ameliorative legislation cannot be discriminatory. Not all legislation which confers benefits will ameliorate disadvantage in the sense of an "affirmative action programme". Some legislation confers benefits universally without real regard for constitutionally protected groups and without a "clear fit" within the enumerated or analogous grounds. Notwithstanding the stated intentions of some legislors, on its face, the impugned legislation does not confer benefits on a "narrow class of persons". The benefits are available to both men and women. They are available without regard to the employment history of the recipients and without regard to whether the recipients produced or raised children.

53. Government programmes which provide a benefit to disadvantaged persons, but result in the infringement of other rights not central to their purpose, are properly subject to judicial review. To say that subsection 15(2) allows discrimination on any and all grounds, simply

because it exempts affirmative action programmes from review on their ameliorative grounds, is to undermine the achievement of general substantive equality that is one of the subsection's very purposes.

> *OHRC and Roberts v. The Queen in Right of Ontario and the Ministry of Health et al* (1994), 19 O.R. (3d) 387 (C.A.)

54. In the *Roberts* case, Houlden J.A. cited with approval the following analysis of the relationship between subsections 15(1) and 15(2):

> This approach to equality recognizes that disadvantaged groups must be the beneficiaries of positive action on the part of government and others. It gives no reason to suggest that such equality promoting steps are themselves immune from review, the implication of many government defences to challenges to equality promoting programs. An employer's disability plan must not be sex discriminatory. Welfare benefits for sole support mothers must not impose criteria based on sexual stereotype. Section 15 (2) provides that section 15 (1) does not preclude ameliorative programs and as such can be understood as an interpretive guide to section 15 (1); it does not preclude review of ameliorative programs where some aspect is discriminatory.
>
> "Section 15, Benefits Programs and Other Benefits at Law" (1990) 19 Man. L.J. 288 at 299 cited in *OHRC and Roberts v. The Queen in Right of Ontario and the Ministry of Health et al* (1994), 19 O.R. (3d) 387 (C.A.) at 427 (emphasis in original).

55. While Parliament is free to choose whether or not to address any particular disadvantage, once it has chosen to act to benefit one disadvantaged group or another, it is unconstitutional to exempt from benefits constitutionally protected subgroup.

> To ensure that the s. 15 (1) guarantee of equal protection and benefit has real effect, s. 15 (2) must be construed as limited to its purpose. It was included in the Charter to silence the debate that rages elsewhere over the legitimacy of affirmative action... It was not intended to save from scrutiny all legislation intended to have positive effect...
>
> If this provision could be saved, little discriminatory legislation could ever be attacked successfully, for almost all positive law has as its state object the betterment or amelioration of the conditions within our community of a disadvantaged individual or group.
>
> *Re MacVicar and Superintendent of Family and Child Services* (1986), 34 DLR (4th) 488 (BCSC) at 502-3, cited in *OHRC and Roberts v. The Queen in Right of Ontario and the Ministry of Health et al* (1994), 19 O.R. (3d) 387 at 428

56. The *Old Age Security Act* could be framed to advantage traditionally disadvantaged groups in Canada without denying benefits to lesbians and gays who are also part of those traditionally disadvantaged groups. For example:

i. if the benefits are intended to help women, they could be made available exclusively to women. Gay men would be excluded from receiving them, but not on the basis of their sexual orientation. Lesbians would not be excluded. This distinction would be drawn against men, thus being discrimination on the basis of sex, which could be legal if the legislation were found to be truly an affirmative action program within the meaning of subsection 15(2);

ii. if the benefits are intended to help the poor, they could be made available exclusively to low income earners. This distinction is drawn in the legislation, and lesbians and gays who do not meet the financial criteria for entitlement are denied benefits, but not on the basis of their sexual orientation;

iii. if the benefits are intended to help older citizens, they could be made available only to persons in those age groups. This distinction is drawn in the legislation, and constitutes discrimination on the basis of age. But this discrimination is directly required to assist the traditionally disadvantaged group - the elderly and near elderly - and thus can be defended under subsection 15(2); and,

iv. if the benefits are intended to help those who have raised children, they could be tied to parental status. All childless couples would be excluded, not just lesbian and gay ones, and lesbian and gay couples who have undertaken parenting responsibilities would be eligible.

57. Once a prima facie case of discrimination within a governmental affirmative action programme has been demonstrated, the Crown bears the burden under section 1 to establish that the complained of discrimination is rationally connected and reasonably necessary to achieve the ameliorative purpose of the program. The Crown cannot discharge this burden in this appeal. No evidence was adduced to demonstrate that the persons benefitted by the programme were more disadvantaged than those excluded by reason of their sexual orientation. At best the Crown's argument is that the purpose of the programme was to alleviate the economic disadvantage of older women. If such were the true purpose, then lesbian partners would constitute a significant part of this disadvantaged group, as they generally did not have the superior income of a male

provider to rely upon during their younger years. But they are excluded from the old age security supplement that they would receive as a spouse in a heterosexual relationship. Furthermore, as noted below, this supposed purpose is not what the impugned definition in fact declares.

(F) Section One

58. MCCT agrees that ameliorating the financial situation of the elderly and near elderly, or of women may be pressing and substantial government objectives. But MCCT does not agree that these are objectives of the impugned definition of "spouse".

59. The objectives must be derived from its language. Its purpose is to benefit older heterosexual couples - not just women - not just parents.

60. This intent to privilege heterosexual couples offends section 1 of the Charter. Where one of the purposes of impugned legislation offends the Charter, even if other purposes do not, the legislation nevertheless fails to satisfy section 1.

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

61. The Crown argues that the historic and continuing exclusion of same sex couples from the general social understanding of "spouses" is, itself, a reason and a justification for maintaining the exclusion in the impugned definition:

> 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.
> Crown Factum, paragraph 71

> 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 a stereotype.
> Crown Factum, paragraph 78

> 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.
> Crown Factum, paragraph 117

62. This argument is repeated throughout the Crown's factum. The social understanding and legal definition of "spouse" has no place in the analysis of whether that definition is

discriminatory: otherwise, the existence of prejudice and oppression is its own justification, and the "tyranny of the majority" is legitimized.

Crown Factum, paragraphs 16(1), 40-41, 47, 49, 50, 57, 70-72, 77-79, 95-100, 110-116.

63. Although the Crown raises this argument in several places in its factum, it is, at most, a section 1 argument. The general social understanding of "spouse" does not assist the Court in deciding:

(a) whether the impugned definition draws a distinction; or

(b) whether that distinction discriminates on the basis of sexual orientation.

If anything, the argument is an acknowledgement that the exclusion of same sex couples from the definition of "spouse" is deeply and inseparably ingrained in the social and legal fabric of society.

64. The Crown argues that, because the definition is deeply embedded in law and social custom, it is a matter which should be dealt with by the legislature rather than the courts. The Crown further conflates the issues in this case by equating the status of "spouse" with the institution of marriage, an equivalency not found in the law. Whether same sex couples should be able to get married is not before this Court in this appeal. The issue is whether, in effect, common law same sex spouses should be accorded the same care, concern and respect as common law opposite sex couples.

Crown Factum, paragraphs 78-79, 85-86, 11-123

65. In so doing, the Crown argues:

(a) that there may be differences between different sex and same sex couples;

(b) that little is known about the needs and nature of same sex relationships; and,

(c) that some commentators and reports suggest alternatives to extending the concept of "spouse" to same sex couples.

However, this argument ignores the facts that

(i) the need for reform in this area has been recognized by the federal government for a decade; and

(ii) the federal government has intentionally awaited this Court's decision in this appeal before attempting reforms to accord proper recognition to same sex couples.

Report of the Standing Committee on Justice and the Solicitor-General (June, 1993) at 7-8

Minutes of Proceeding and Evidence of the Standing Committee on Justice and the Solicitor-General (April 27, May 4, and May 12, 1993) at 90:20-90:24, 100:36-100:37

66. Ironically, in advancing these arguments, the Crown relies on scholarly authorities (Crown Factum, paragraphs 79 and 84) which expressly take the position that, although rethinking of patterns of kinship and dependency may be advisable as a matter of policy, the continued exclusion of same sex couples from any recognition or family status is disgraceful and clearly inconsistent with the guarantees under section 15 of the Charter:

> It is a glaring injustice to preclude lesbian women and gay men from marrying their partners...
>
> This is not to say that the removal of the same-sex marriage bar cannot constitute an important step in the process. The very strong symbolic, emotional, and political statements to be made in such a victory are undeniably important.
>
> Nitya Duclos, "Some Complicating Thoughts on Same-Sex Marriage" (1991), 1 Law and Sexuality 31 at 42, 60.
>
> In many ways from a contemporary point of view, the most pressing question addressed by this work is probably whether the Christian ceremony of same-sex union functioned in the past as a "gay marriage ceremony". It is clear that it did, although, as has been demonstrated at length, the nature and purposes of every sort of marriage have varied widely over time...
>
> Recognizing that many - probably most - earlier Western societies institutionalized some form of romantic same-sex union gives us a much more accurate view of the immense variety of human romantic relationships and social responses to them than does the prudish pretense that such "unmentionable" things never happened.
>
> John Boswell, Same-Sex Unions in Pre-Modern Europe (New York: Villard Books, 1994) at 280-282

67. Even if the purpose of this legislation is seen to be a more general one of benefitting the elderly, the impugned words do not satisfy the second part of the section 1 test. It is not rationally connected to that objection and the effect of the infringement is not proportional to the benefit to be gained for the government objective.

68. There is no rational connection because there is no rational reason for denying benefits to same sex conjugal relationships. If the object is to benefit the elderly who live in conjugal relationships during a period of financial stress why should same sex relationships be

treated differently? Even if, contrary to wording, the purpose was thought to be the benefit of women, there is no reason to exclude women in same sex relationships.

69. Further, if one were to accept that there is some functional distinction between same sex and different sex conjugal relationships that provides a rational basis for the infringement of rights, it is respectfully submitted that the damage done by the infringement is disproportional to the benefit gained for the government objective.

70. Assuming, but not admitting, that net cost to government might be a factor in evaluating reasonableness and proportionality, the Crown has not adduced any evidence that the balance of allocation of scarce government resources would be materially affected by inclusion of same sex couples in the program. Indeed, the Crown has effectively conceded that there is not enough known about same sex couples to conclude what the impact would be. It seems more likely that the impact would be negligible on the public purse because lesbians and gays, and same sex conjugal relationships are a small minority. (The Crown Factum argues that there is a net benefit to persons in same sex conjugal relationships in being treated as single. This argument implies that if the appellants succeeded in this appeal then the government will save money.)

71. But of more importance than the financial considerations narrowly or broadly considered, the impugned definition has a disportionate negative effect on those with same sex sexual orientation. The exclusion of traditional "non-spousal" relationships such as sisters, brothers and housemates from the benefits and burdens of being a "spouse" does not stigmatize those individuals or deprive them of their dignity. But, in the case of gays and lesbians, if the impugned legislation is upheld, it will have three profound adverse consequences:

a. it will single them out as the only class of Canadians (other than children) who cannot have "spousal" relationships if they wish to do so without disavowing those personal characteristics that the Charter seeks to protect, i.e. their sexual orientation;

b. it will have the appearance of judicial condonation of discrimination against gays and lesbians in the receipt of government benefits; and,

c. it will assist in perpetuating the social stigmatization of gays and lesbians as individuals somehow not entitled to the rights and dignity of other persons.

(G) Remedy

72. The Crown has asked that this Court suspend the operation of its order for a year, to give legislators an opportunity to respond. It has not, however, demonstrated that immediate compliance with the Court's decision will be difficult.

73. Recent legislative debates respecting lesbian and gay rights make it clear that legislators have left it to the Courts to decide about equality rights for lesbians and gays. MCCT submits that lesbians and gays should not be asked to wait another year to enjoy the benefits of their constitutional rights to equality.

Report of the Standing Committee on Justice and the Solicitor-General (June, 1993) at 7-8

Minutes of Proceeding and Evidence of the Standing Committee on Justice and the Solicitor-General (April 27, May 4, and May 12, 1993) at 90:20-90:24, 100:36-100:37

PART IV - ORDER REQUESTED

74. The Intervenor, MCCT, seeks an Order:

(a) allowing the appeal;

(b) declaring that for the purpose of section 2 of the *Old Age Security Act* the definition of "spouse" in relation to any person, includes a person of the same sex who is living and that that person, having lived with that person for at least one year, if the two people have publically represented themselves as spouses;

(c) directing the defendant to pay to the appellant, Nesbit, the spousal benefit allowance form the date of the appellants' application; and,

(d) costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 25TH DAY OF OCTOBER, 1994.

CHARLES M. CAMPBELL

SUSAN URSEL