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

No. 23636

BETWEEN:

JAMES EGAN and JOHN NORRIS NESBIT

Appellants
(Plaintiffs)

- and -

HER MAJESTY THE QUEEN IN RIGHT OF CANADA

Respondent
(Applicant)

- and -

THE INTER-FAITH COALITION ON MARRIAGE AND THE FAMILY

Interveners

FACTUM OF THE INTERVENER
INTER-FAITH COALITION ON MARRIAGE AND THE FAMILY

PART I - OVERVIEW

1. The Inter-Faith Coalition for Marriage and the Family intervenes in support of the constitutionality of the definition of "spouse" in s.2 of the *Old Age Security Act* R.S.C. 1970, c.O-6 (the "*Act*") and submits that the definition of "spouse" does not contravene s.15(1). These Interveners accept the parties' Statements of the Facts.

2. With respect to the s.15(1) analysis, it is submitted, first, that the *Act* constitutes legitimate social policy legislation specifically conferring a benefit on a class of economically disadvantaged 60 to 64 year old spouses of pensioners, most of whom are women. Parliament has identified this group as a distinct and particularly vulnerable class. The large group of those excluded from the Spousal Allowance are not distinguished on the basis of sexual orientation but, rather, by their non-spousal status. Furthermore, when the larger socio-economic, legislative and historical context is considered, there is no disadvantage for the Appellants and others

excluded from this benefit, by virtue of other benefits provided to them in related legislation and by their relative economic advantage as a group.

3. Second, the impugned legislation constitutes legislative support for heterosexual spousal units which have been historically recognized to play a fundamental and foundational role in our society and in other societies. Heterosexual spouses have been recognized through our social, legal, political and philosophical traditions, as fulfilling a unique and essential role in the very fabric of our social structure through the procreation, nurturing and raising of children, and require continued social and legislative support. This unique biological and sociological factor is an essential consideration in both the s.15(1) and s.1 analysis, and in remedial considerations.

4. The members of the Inter-Faith Coalition do not support arbitrary discrimination against any identifiable group in society including homosexuals, and do not support any laws which discriminate in such a manner against homosexuals or indeed against any other identifiable group in society. This is not to say that members of the Inter-Faith Coalition accept that "conjugal rights" ought to be granted to anyone that seeks them on the basis of "coupleness". It is legitimate to make certain fundamental distinctions based on historical, moral and religious grounds.

5. This case does not deal with discrimination against homosexual "couples" or indeed other classes of citizens who do not receive this specific benefit. Indeed, if the Appellants' rigid, mechanistic "formal" equality analysis were applied broadly, much social policy legislation could be considered to violate s.15(1) and require s.1 justification.

6. These Interveners submit that the real issue in this case is not the Appellants' economic disadvantage and the resultant inequality caused by the denial of this particular benefit to them. There is a complete absence of evidence in the record to show that the Appellants are part of a class, identified by sexual orientation, which has been historically economically disadvantaged. Furthermore, when the larger context of social welfare legislation is considered,

the Appellants and other non-spousal "couples" receive greater benefits. The real issue, it is submitted, is the Appellants' desire for the Court to find inequality as a result of the denial of "spousal status" to same sex "couples". As concluded by the majority of the Federal Court of Appeal, this is an indirect attack on the common law doctrine of "marriage" and its statutory extension in the statutory definition of "spouse" which Parliament has confined to heterosexual relationships.

7. The Inter-Faith Coalition submits that the Appellants' remedial request is tantamount to a request for judicial re-definition of the concept of "spouse". For this Court to accept this request would constitute a fundamental and a profound change in an institution that is deeply rooted in Canadian society and in the underlying legal, moral, religious, sociological and historical traditions which underlie our society. The remedy sought would have a broad impact on the definition of "spouse" in over 50 federal statutes and hundreds of provincial statutes. It would alter, by implication, much social policy legislation and would have significant implications for the common law definition of "marriage". It would also have significant ramifications in areas of family law, adoption rights, taxation and other aspects of the law. These Interveners submit that such a radical change to legal, social and public policy, which is grounded in millennia of moral, theological and philosophical understanding, is beyond the intended scope of *Charter* review, and would improperly require the exercise of a judicial "legislative" function.

8. It is submitted that such a profound change in the law, involving fundamental issues of social and legal policy, should only be undertaken by Parliament and the legislatures. Furthermore, the Inter-Faith Coalition submits that there are significant moral and religious principles which underlie the limitation of the definition of "spouse" to heterosexual unions, which are the only relationships biologically capable of procreating children, and these principles must be considered in this public policy debate. Therefore, any such policy change should only be made after broad consultation and rigorous philosophical and moral debate involving all aspects of Canadian society at large, and not by the Courts in the constitutional consideration of a particular benefit-conferring piece of legislation.

PART II - SECTION 15(1) ANALYSIS

(A) General Principles to be Considered in S.15(1)

(i) Charter Rights must be Interpreted in their Social, Historical, Philosophical and Legal Contexts

9. While it is axiomatic that the rights and freedoms guaranteed in the *Charter* must be given a broad, liberal and purposive interpretation, this Court has also emphasized that such rights are not absolute and were not enacted in a vacuum. They must be interpreted within the context of the historical, legal and philosophical principles underlying the right or freedom in question and with a view to its purpose. In ***R. v. Big M Drug Mart Limited***, Dickson, J. cautioned against "overshooting" the purposes of the *Charter*, and emphasized the importance of interpreting *Charter* rights in this manner. He stated:

> " ... it is important not to overshoot the actual purpose of the right or freedom in question, but to recall that the Charter was not enacted in a vacuum and must be placed in its proper linguistic, philosophic and historical context"
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> ***R. v. Big M. Drug Mart Limited*** [1985], 1 S.C.R. 295, at p. 344
>
> see also *Symes v. Canada*, [1993] 4 S.C.R. 695, at p. 753

10. It is submitted that s.15 was not enacted to prevent any or all legislative distinctions, even if such distinctions imposed burdens or denied benefits to identifiable groups. Rather, it was intended to achieve the "elusive" ideal of equality by "remedying or preventing discrimination against groups suffering social, political and legal disadvantages in our society". (per Wilson J. in ***R. v. Turpin***). This analytical process must be conducted with a view to the larger social, political and legal context of Canadian society, and must consider whether the particular group making the complaint is, ***in that context***, historically disadvantaged. It must also consider whether the impugned legislation furthers such disadvantage or, alternatively, ameliorates the condition of an historically and socially disadvantaged group.

11. In the context of this appeal, the Court must consider the historical, philosophical and legal traditions underlying the unique legal status and role of heterosexual spouses. Section

15 was enacted in this historical social, legal and philosophical context which has always fundamentally distinguished heterosexual spouses from other social groupings.

(ii) Section 15(1) Requires A Contextual Analysis

12. This Court has emphasized in ***Andrews***, ***Turpin*** and ***Symes***, that there is a need to "contextualize" the discrimination analysis and has rejected the mechanical application of the principles of formal equality or "rigid formalism" in the s.15 analysis (***R. v. Hess***). The analytical formula identified by McIntyre J. in ***Andrews*** should not be considered "only in the context of the impugned legislation" but also with an understanding of "the larger social, political and legal context" (per Wilson J. in ***Turpin***). Justice Iacobucci recognized, in ***Symes***, when rejecting a mechanistic s.15 analysis, that the "working definition" of discrimination is not "self-applying" but, rather, that "the analytical parameters of the ***Andrews*** Test must be applied within the larger context". As Wilson J. summarized in ***Turpin***:

> "Accordingly it is only by examining the larger context that a Court can determine whether deferential treatment results in inequality or whether, contrariwise, it would be identical treatment which would *in the particular context* result in inequality or foster disadvantage"
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> ***R. v. Turpin***, [1989] 1 S.C.R. 1296 at pp. 1331-1332
>
> ***Symes v. Canada***, supra, at pp. 756-757
>
> (See also ***R. v. Hess and R. v. Nguyen***, [1990] 2 S.C.R. 906 at 927i. - 928g

13. In this case, the legislative record indicates that the impugned provision was intended to provide an economic benefit to a particularly vulnerable class of near-elderly heterosexual spouses who are primarily women. There is no evidence of historical economic disadvantage for the group of homosexual couples with which the Appellants identify. The larger context of the system of related social policy legislation indicates that the Appellants will receive greater social policy benefits under the broader legislative network.

14. This legislation must also be considered with regard to the underlying legal, social philosophical and theological principles which affirm the unique, important and continuing role

of the heterosexual spouses which are uniquely, biologically capable of procreating children. This concept is rooted in the notion of the complementarity between male and female persons, as a fundamental good in our society, in the tradition of western philosophy and throughout the world's major religions.

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(iii) The Two Step Approach to Section 15(1) Analysis

15. In *Andrews*, this Court rejected the concept of formal equality and stressed that not every difference in treatment would result in inequality. Section 15 requires that the specific differentiation in treatment cause "discrimination" in order to violate the equality guarantee in s.15(1). Distinctions based on either enumerated or analogous grounds will not, as suggested by the Appellants, *ipso facto*, violate s.15. They will do so only if there is discrimination in the context of the impugned legislation and related legislation. Within the context of social policy legislation, Parliament and the Legislatures regularly make distinctions based on the enumerated and analogous grounds which could be considered, if viewed in isolation and by the application of "rigid formalism", to violate s.15(1). This requirement of "adverse impact" in a *real* sense, with a view to the larger context, is necessary for a finding of discrimination contrary to s.15(1).

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Andrews, supra, at pp. 172-174 per McIntyre J.

30 *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519 per Lamer C.J.

(iv) The Need For A Full Factual Record For s.15(1) Analysis

16. This Court has emphasized the importance of a full factual underpinning for *Charter* analysis and has, most recently in *Danson* and *MacKay*, refused to make constitutional determinations in the absence thereof. In *Symes*, Iacobucci J. emphasised the importance of a factual record in a s.15(1) analysis where there was an absence of a sufficient evidentiary record demonstrating the adverse effects caused by impugned provisions to the group challenging the *Income Tax Act*. In this case, neither the factual record, nor judicial notice, supports the Appellants' contention of adverse impact from the benefit conferring legislative scheme, unless

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the particular benefit entitlement in the *Act* is viewed in "curious isolation" (per Iacobucci J. in *Symes* at p. 773). Nor does it show historical economic disadvantage for homosexuals.

Danson v. Attorney General of Ontario, [1990] 2 S.C.R. 1086

MacKay v. Attorney General of Manitoba, [1989] 2 S.C.R. 357

Symes v. Canada, supra, at pp. 766-767, and at p. 773

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(v) Relevance Of Legislative Intent

17. This Court has emphasised that legislative intent or "animus" is irrelevant to the discrimination analysis, insofar as discrimination may result by "adverse impact" of the impugned legislation, even where there is no *intention* to discriminate.

Rodriguez, supra, per Lamer C.J.

20 *Symes v. Canada*, supra, per Iacobucci J. at p. 756

Ontario Human Rights Commission v. Simpsons Sears, [1985] 2 S.C.R. 536 at p. 551 per McIntyre J.

18. However, legislative intention must clearly relevant in the s.15(1) and s.1 analysis insofar as the legislative intention, as part of a larger framework of social welfare legislation, was to confer a benefit on a particularly vulnerable group of near-elderly heterosexual spouses, 30 and, by implication, to provide distinct support to the heterosexual spousal unit. It would be ironic if s.15(1) were used to attack a provision intended to advance equality, without considering Parliament's intention to ameliorate the disadvantage of a most vulnerable group.

(vi) Policy Considerations Prior to a Finding of Discrimination

19. Where legislative distinctions, even those based on enumerated grounds, further legitimate social of constitutional policy and involve fundamental considerations of social policy 40 goals and underlying morality, this Court has recognized the limitations of the legitimate judicial application of s.15(1) and has deferred such policy considerations to Parliament without a finding of discrimination.

R. v. Hess and R. v. Nguyen, supra, at pp. 930-931 per Wilson J.

R. v. Turpin, supra

R. v. S., [1990] 2 S.C.R. 254

R. v. Wolff [1990] 1 S.C.R. 695

(B) THE FIRST STEP OF THE SECTION 15(1) ANALYSIS

20. The first question of the two step s. 15(1) analysis is as follows: Does the impugned legislation deny one of the essential components of equality as a result of a distinction which is "based on or substantially relates to" personal characteristics of the class or group of individuals raising the *Charter* challenge?

21. These Interveners submit that the majority of the Federal Court of Appeal correctly determined that the distinction, in the definition of "spouse" in the *Act*, is based on "spousal status" and not on the personal characteristic of sexual orientation. The Appellants' argument is grounded on their status as a same sex "couple". The difference in legal status is not based on a distinction relating to individual personal characteristics. The legislative definition of "spouse" excludes many other domestic partnerships or "couples" without reference to sexual orientation or, in fact, any enumerated or analogous ground. Other Courts have recognized that distinctions based on the status of "couples", including same sex couples, do not violate the first step of the *Andrews* Test.

Layland v. Attorney General of Canada (1993), 14 O.R. (3d) 658 (Gen. Div.)

Leroux v. Co-operators General Insurance Co., (1991), 4 O.R. (3d) 609 (C.A.) at pp. 620-621

Miron v. Trudel (1991), 4 O.R. (3d) 623 (C.A.)

Re Karen Andrews et al and Minister of Health for Ontario (1988), 64 O.R. (2d) 258

See also *Vogel v. Manitoba* (1992), 90 D.L.R. (4th) 84 (Man.Q.B.)

22. In some "benefits" cases involving homosexual couples, such as *Veysey* and *Knodel*, courts have avoided determining whether legislative definitions of "spouse" or "common law partner" - which excluded same sex couples - create a distinction based on the personal

characteristic of "sexual orientation", through the use of statutory interpretation principles applicable to those particular legislative contexts.

Veysey v. Correction Service of Canada (1990), 109 N.R. 300 (Fed.C.A.)

Knodel v. British Columbia (Medical Services Commission, [1991] 6 W.W.R. 728 (B.C.S.C.)

23. The definition of "spouse" in the *Act* reflects a long standing tradition of the English and Canadian common law, as well as European law, which restricts spousal (and conjugal) status to heterosexual couples. This is consistent with the definition of "spouse" in over fifty federal statutes and hundreds of provincial statutes throughout Canada. It is instructive that many provincial human rights codes include the ground of sexual orientation as a specific enumerated ground of discrimination but maintain definitions of "marital status" and "spouse" restricted to members of the opposite sex.

e.g. *Ontario Human Rights Code*, R.S.O. 1990

24. The distinction created by the definition of "spouse" is between the category of domestic partnerships which are conjugal or spousal and those which are non-spousal. That the non-spousal category is not dependent upon personal characteristics such as sexual orientation is indicated by the fact that this category includes heterosexual couples, homosexual couples and domestic partnerships between siblings, relatives or friends which are based on emotional support, economic dependence and longevity of relationship without an identifying sexual component. In fact, the distinction in the statute is also between qualifying "spouse" and non-qualifying "spouse", since some persons who are married or have been married do not satisfy the statutory criteria or means testing. The distinction is not based on the personal characteristic of sexual orientation but, as in much social policy legislation, is based on legally defined classifications unrelated to the enumerated or analogous grounds.

25. The Appellants' alternative argument, that the distinction in the definition of "spouse" is based on the enumerated ground of "sex", was specifically rejected by the court in *Knodel* and, by implication, by the judgment of Chief Justice Lamer in *Mossop*.

Knodel v. British Columbia (Medical Services Commission), supra,
Canada (Attorney General) v. Mossop [1993] 1 S.C.R. 554

26. Finally, legislation can draw a distinction directly (or "facially") or indirectly by adverse impact. It is submitted that the words "of the opposite sex", in the definition, do not draw a "facial" distinction based on sexual orientation but, rather, clarify Parliament's intention to use the traditional common law concept (and deeply rooted philosophical understanding) of spousal status as being limited to heterosexual relationships.

(C) SECOND STEP OF THE *ANDREWS* TEST

(i) Does the legislation "discriminate"?

27. If the Court determines that there is a distinction based on personal characteristics, it must then determine whether the resultant inequality is discriminatory in that it causes adverse impact due to denial of a benefit or advantage based on *irrelevant* personal characteristics. To constitute discrimination, the disadvantage must be caused by the impugned legislation. It is insufficient for the Appellants simply to argue that they suffer societal stigma or social prejudice *outside* of the context of the impugned legislation. It is necessary to demonstrate an adverse impact *resulting from* the impugned legislation, i.e. that it functions "to bring about or reinforce the disadvantage".

Symes v. Canada, supra, per Iacobucci J. at p. 755, 757
Andrews v. Law Society of B.C., supra

28. In this regard, the Appellants argue that the *Act* is discriminatory because it denies a particular benefit - the Spousal Allowance - based on the personal characteristics of sexual orientation. However, two crucial factors are absent from this analysis. First, the analysis suggests that any social policy legislation that confers a benefit on a particularly vulnerable group necessarily "denies" a benefit to any other excluded, and perhaps, less vulnerable group and, *ipso facto*, discriminates. If this analysis is correct, then all social policy legislation

conferring benefits on vulnerable groups, defined by personal characteristics which constituted enumerated or analogous grounds, would necessarily require justification under s.1.

29. Second, the Appellants' argument is presented, as in *Symes*, in "curious isolation" without regard to the context of other social policy legislation conferring benefits on the Appellants and without regard to the impact on others excluded from this particular benefit. As Iacobucci J. determined in *Symes*, this Court must consider the "systemic response" of Parliament to the social and economical need of vulnerable groups in determining the adverse impact of social benefit conferring legislation. There is no s.15(1) entitlement that ensures that each particular legislative benefit must be available equally to all Canadians regardless of circumstance. There is only a right to ensure, as Iacobucci J. stated in *Symes*, that Parliament's "systemic response" to social need through benefit conferring legislation is "coherent" with the *Charter*.

Symes v. Canada, supra, at p. 760, p. 773

30. As the Respondent has discussed in some detail in its factum, if consideration is given to the entire legislative response by Parliament and the Legislatures to social need, it is clear that no disadvantage is created for the Appellants and, indeed, they are economically "advantaged". The Ontario Court of Justice rejected a similar claim of inequality based on the legislative denial of spousal benefits to same sex couples where there was no resultants economic disadvantage.

Karen Andrews v. Minister of Health, supra

(ii) <u>The Distinction Must Be Based On Irrelevant Personal Characteristics</u>

31. Any resultant disadvantage or burden must be based on "irrelevant personal characteristics". The Court must consider whether the personal characteristic which forms the basis of the distinction is, within the context of the legislative scheme, a legitimate basis for distinction: e.g. does it ameliorate the economic condition of a vulnerable and disadvantaged group? Or does it exacerbate inequality? As Professor Gibson suggests, this test asks whether

the distinctions can be "reasonably justified in the particular context". This consideration necessarily requires a comparative analysis as recognized by McIntyre J. in ***Andrews*** and by Iacobucci J. in ***Symes***. To constitute discrimination, the legislation must deny a benefit "*available to others*" where, as a result of a comparative analysis, this would be inequitable and invidious.

Dale Gibson, "Equality for Some", [1991] UNB L.J. 2 at pp.12-13

Dale Gibson, "Analogous Grounds of Discrimination", Alberta Law Review, Vol. 24, No.4 p. 772 at p. 780

Symes v. Canada, supra at p. 754 (see ***Andrews*** at p. 164)

32. In this case, the purpose of the legislation is to confer a benefit on a particularly vulnerable group, which is distinguished by the economic disadvantage of heterosexual spouses uniquely biologically capable of procreating children, and who are usually required to incur the economic disadvantages associated with child rearing. In some cases, one spouse (historically usually women) may leave the paid work force for an extended period of time to be involved in child rearing and may find it difficult or impossible subsequently to re-enter the paid work force, or can do so only for extremely low remuneration resulting in economic disparity. The legislation provides a benefit to this disadvantaged class and excludes all others based on a categorization which is clearly relevant to the purpose of the benefit conferring legislative scheme. The personal characteristic which forms the basis for distinction is, therefore, clearly relevant to the legislative purpose and consistent with *Charter* values. The distinction is not "invidious". It does not exacerbate an historic and apparent disadvantage, but, rather, ameliorates an historic economic disadvantage. As Wilson J. observed in ***Turpin***, equal treatment would, in this context, contribute to further inequality.

Andrews v. Law Society of B.C., supra, at p. 165

Rodriguez v. Attorney General of Canada, supra, per Lamer C.J.

(iii) Is the Distinction Based On An Analogous Ground?

33. A number of Courts have held that sexual orientation constitutes an "analogous ground" as defined in the s.15(1) jurisprudence. However, in these cases, such as ***Haig and***

Birch v. Canada, this resulted from a concession and without having been fully argued on the basis of a full factual record. There is no factual record to support the claim that homosexuals have suffered, or continue to suffer, any *economic* disadvantage which is the relevant consideration in this legislative context. Judicial notice supports the contention that homosexuals are economically *advantaged* in comparison to heterosexual spouses. It is submitted that this Court should not make a determination that sexual orientation constitutes an analogous ground in this context of social benefit legislation without a full and complete factual record.

> ***Haig and Birch v. Canada (Minister of Justice)*** (1991), 5 O.R. (3d) 245; aff'd (1992) 9 O.R. (3d) 495 (Ont. C.A.)

34. The issue of whether a distinction is based on personal characteristics which constitute analogous grounds is determined by the legislative context. There is no basis, either in the authorities or in principle, for a "global" determination of the type sought by the Appellants. The Respondent has referred to the ground of citizenship which was held to be analogous in ***Andrews v. Law Society of British Columbia*** but not in ***Chiarelli v. Canada***. This Court has made a similar observation in ***Turpin*** where Wilson J. concluded:

> "I would not wish to suggest that a person's province or residence or place of trial could not ***in some circumstances*** be a personal characteristic of the individual or group capable of constituting a ground of discrimination. I simply say that *it is not so here.*" (emphasis added)
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> ***R. v. Turpin***, supra, at p. 1333
>
> ***Andrews v. Law Society of B.C.***, supra
>
> ***Chiarelli v. Canada (Minister of Employment and Immigration)***, [1992] 1 S.C.R. 711

35. Section 15 is intended to remedy systemic discrimination against an identifiable group. In the circumstances, it is submitted that the Appellants' use of s.15 to obtain an economic benefit, designed to ameliorate the economic disadvantage of a near-elderly group, primarily composed of women who have been historically disadvantaged, does not advance the purposes of s.15. While the Appellants are personally economically disadvantaged, this results

not from their sexual orientation but from the physical disability of the Appellant Nesbitt that has prevented him from working since 1972. In the absence of a factual record demonstrating, in this context, either historical or current economic disadvantage for homosexuals, this Court should not make a determination of the issue of whether sexual orientation constitutes an analogous ground. A full factual record may present itself in another case, in a different legislative context and the issue should not be decided until such time.

R. v. Turpin,, supra at p. 1333a

(iv) Consideration Of The Larger Social, Political, Legal and Historical Context

36. As stated, supra, the larger legislative scheme indicates that the Appellants receive more benefits through the current legislative scheme than the class that receives the Spousal Allowance.

37. In consideration of the "larger" historical, and legal context, the Court must also consider the historical, philosophical and legal basis for the common law conception of conjugal rights (including the definition of "marriage" and "spouse").

38. It is submitted that the impugned legislation reflects the long standing legal recognition of the status of marriage and spouse being confined solely to heterosexual couples because of their unique biological capability of procreating children and their fundamental role in the society of raising and nurturing children. The definition of marriage and spouse reflects a legal tradition which is grounded in fundamental philosophical, moral and religious considerations.

Finnis, Law, Morality and "Sexual Orientation", 69 Notre Dame Law Review, at pp. 1049-1066

THE LEGAL CONTEXT

39. English and Canadian Courts have recognized the common law rule of marriage and the status of spouse as being necessarily confined to the relationship between a man and a woman "for the purpose of founding and maintaining a family". This unique biological and

social status, and its historical basis, has been recognized by courts considering challenges to the concept of heterosexual marriage by polygamists, bigamists, transsexuals and homosexuals.

Hyde v. Hyde et al (1866), L.R. 1 P & D 130

Keddie v. Currie et al (1991), 85 D.L.R. (4th) 342 (B.C.C.A.)

Corbett v. Corbett otherwise *Ashley*, [1970] 2 All E.R. 33 at 48f, 50f-h (H.C.)

C.L. v. C.C. (1992), 10 O.R. (3d) 254 at p. 256 (O.C.J.)

Harrogate Burrough Council v. Simpson, [1986] 2 F.L.R. 91 at p. 95 (C.A.)

40. Similarly, American courts and legislators have continued to recognize the legal status of marriage and spousal relationships as uniquely heterosexual.

Singer v. Hara 522 P. 2d 1187 (1974) at pp. 1191-1195 (especially 1195)

Adams v. Howerton, 486 F.Supp. 1119 at 1123 (C.D. Cal.1980); aff'd 763 F. Supp. 1036 (9th Cir); cert denied 458 U.S. 111 (1982)

Note, "Sexual Orientation and the Law", [1989] Harvard Law Review 1509 at 1606, 1609, note 40 and note 41

41. As Professor Finnis describes, this distinction is also followed in Europe, where the "standard modern position" has been accepted by the European Court of Human Rights and the European Commission of Human Rights which do not consider the exclusion of same sex couples from marriage or spousal status to be discriminatory. In addition, the *U.N. Universal Declaration of Human Rights*, the *U.N. International Covenant on Civil and Political Rights* and the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, all recognize that the legal status of marriage and spousal relationships apply exclusively to heterosexual couples, are related to the founding and establishment of families and have recognized the family as "the natural and fundamental group unit of society" which is "entitled to protection by society and the State". In Denmark, where limited legal recognition is given to same-sex couples as registered domestic partnerships, the legislation makes a clear distinction between such partnerships and heterosexual spouses, and the category of registered domestic partnerships do not have all of the broad range of legal rights conferred by law on heterosexual spouses.

Cossey v. United Kingdom (1990), 13 E.H.R.R.pp. 642-643 622 (E.C.H.R.)

Rees v. United Kingdom (1984), 7 E.H.R.R. 429 at pp. 434-435 (E.C.H.R.); (1986), 9. E.H.R.R. 56

Finnis, supra, at pp. 1049-1055

Mary Anne Glendon, The Transformation of Family Law (Chicago: Univ. of Chicago, 1989)

U.N. Universal Declaration of Human Rights, Article 16

International Covenant on Civil and Political Rights, Article 23

European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 12

Nielsen, Family Rights and the Registered Partnership in Denmark, 4 Intern'l J. of Law and the Family (1990) 297-307

THE PHILOSOPHICAL CONTEXT

42. The classical philosophical tradition advocated exclusively heterosexual marriage. The advocacy of exclusively heterosexual marriage was clearly established in the Platonic-Aristotelian tradition. The commitment of a man and a woman to each other in the sexual union of marriage was considered extrinsically good and reasonable and was considered incompatible with sexual relations outside of marriage.

See Appendix "A" .

43. The common law definition of marriage reflects a social and moral choice which is protected by the criminal and civil law. There is a necessary relationship between law and morality. This is not to say that law and morality are co-extensive, but rather that there can and must be a basis of moral conceptions underlying the law. Criminal and civil law reflect societal moral choices and monogamous, heterosexual marriage has been an area consistently protected by criminal sanction and civil remedies. The *Criminal Code* proscribes various "offences" against "conjugal rights". As the Law Reform Commission of Canada recognized in its 1985 study, the provisions of the civil law also reflect the importance of marriage to society.

Law Reform Commission of Canada, Report #3, Our Criminal Law (Ottawa: 1976

R. v. Butler, [1992] 1 S.C.R. 452, per Sopinka J., per Guntheir J.

Martin's Annual Criminal Code, 1994 (Aurora: Canada Law Book, 1993) Sections: 290 "bigamy; 292 "procuring feigned marriage"; 293 "polygamy"

Law Reform Commission of Canada, Working Paper 42, Bigamy, (Ottawa, 1985) p. 10

Basil Mitchell, Law, Morality and Religion in a Secular Society (Oxford: O.U.P., 1970), pp. 67-69

THE RELIGIOUS CONTEXT

44. All of the worlds' major religions recognize that the concept of marriage and spouse should only involve the union of man and woman. This is a basic tenet of the major religious communities which make up the multicultural heritage of Canada and which has been reflected in our legal concept of marriage and spouse.

See References in Appendix "B"

(v) The Difference Between Legitimate Social Policy Distinctions and Discrimination

45. This Court has recognized that in some situations inequality in the law which creates an adverse impact does not constitute discrimination but, rather, reflects a legitimate policy decision by Parliament. In *R. v. Hess*, Wilson J. recognized that a gender based distinction under s.146(1) of the *Criminal Code*, which distinguished between men and women having sexual intercourse with children under the age of 14, recognized that the distinction was based on certain "biological realities" and rejected a comparative equality analysis between the two sexes as constituting "rigid formalism". Wilson J. accepted that the biological realities justified a gender-based legislative distinction which was not discriminatory given the "moral basis" for the legislation. She concluded for the majority of this Court:

> "In my view, it is not this Court's role under s.15(1) of the *Charter* to decide whether a female who chooses to have intercourse with a

> boy under 14 merits the same societal disapprobation as a male who has intercourse with a girl under 14. ***These issues go to the heart of a society's code of sexual morality and are, in my view, properly left for resolution to Parliament...***
>
> Once again we are faced with distinctions aimed at biologically different acts ***that go to the heart of society's morality and involve considerations of policy they are in my view best left to the legislature.***" (emphasis added)
>
> ***R. v. Hess***, supra, at pp. 929, 930-931
>
> (see also ***R. v. Turpin***, supra; ***R. v. S.***, supra; ***R. v. Wolff, supra)***

46. It is submitted that the Appellants raise an indirect attack on the common law and statutory conceptions of marriage and spouse as well as the philosophically deep-rooted understanding of conjugality, and raise a direct attack on the ability of Parliament to confer economic benefits, and thus support, exclusively on heterosexual spouses. As in ***Hess***, the distinction at issue is fundamentally predicated upon "biological realities" and represents a fundamental social and legal policy issue which reflects philosophical and religious tradition. Underlying the constitutional challenge is the request for a fundamental redefinition of spousal unit which will have broad ranging social policy and legal ramification, not only in the context of social welfare legislation, but also in the areas of support and adoption, etc. These are matters which extend beyond the legitimate application of s.15(1) and must be considered by Parliament after extensive debate throughout society on an issue by issue basis. As this Court said in ***Tremblay***: "Decisions based upon broad social, political, moral and economic choices are more appropriately left to the Legislature".

Tremblay v. Daigle [1989] 2 S.C.R. 530

PART III - SECTION 1 ANALYSIS

(i) Legislative Objective

47. As discussed in paragraphs 2 and 3, and in paragraphs 92 through 100 of the Respondent's Factum, the ***Act*** has a legitimate and important governmental objective. The objective is, in part, to provide particular support for a category of heterosexual spouses,

(primarily women) not to exclude specific groups from a generally available benefit. In ***Symes***, L'Heureux-Dube J., as did Dickson C.J. in ***Brooks v. Canada Safeway***, recognized that "all society benefits" from the unequal burden shouldered by women in caring for and raising children in this society. It is legitimate for Parliament to assist this class.

Symes v. Canada, Supra at p. 804

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(ii) Rational Connection

48. It is clear that the ***Act*** rationally and logically accomplishes the objective of providing the benefit to this identified group of financially needy, near elderly dependent spouses. The fact that the legislation is alleged to be under-inclusive, insofar as other financially needy groups do not receive this particular benefit, but may be entitled to other related benefits, cannot support an argument that there is no rational or logical basis for this particular programme.

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(iii) Minimal Impairment Test

49. The Supreme Court has indicated in ***Irwin Toy v. Quebec***, ***Edwards Books & Art*** and in ***McKinney*** that, where Parliament has been required to choose, in social policy legislation, between competing interests and has carefully considered competing claims to limited economic resources, and has engaged in an exercise of "line drawing" in deciding the group to receive a benefit and the legislative requirements for conferring the benefit, the Court will defer to the Parliamentary policy decision. The test indicated in those cases, as well as in ***Edmonton Journal***, ***Chaulk*** and ***Tetrault-Gadoury***, is that a flexible standard of minimal impairment will be used in consideration of such legislation. If Parliament can demonstrate that it had a reasonable basis for choosing the particular legislative scheme the Court should not intervene, notwithstanding that it could conceivably draft a more "perfect" legislative scheme. (per Sopinka J. in ***Butler***).

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50. With respect to the Appellants' argument of under-inclusiveness, if the legislative scheme is considered to be under-inclusive from the perspective of the Appellants, it also must

be considered under-inclusive for all in the excluded category. There is no legal and rational basis for including the Appellants' class and excluding others. Parliament has assisted a particularly vulnerable class among the group of 60 to 64 year old Canadians. If the benefit had to be provided to the entire category it would cost $ billions and may not be feasible.

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(iv) Proportionality

51. In the proportionality analysis, the Court must consider two issues. First, the Court must weigh the importance of the benefit to be conferred upon this particular, vulnerable group against the denial of that benefit to other, perhaps, less needy groups. As well, the availability of other legislative benefits must be considered in the proportionality analysis.

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52. Second, the Court must acknowledge the more substantive issue of the continued societal need for the government to provide particular assistance to heterosexual spouses given their essential function in our society. The Court must consider the impact of such a fundamental change in social and family structure, if spousal status is conferred upon "domestic partnerships" which are not biologically capable of procreating children, and are usually not involved in the raising of children, as well as the consequential dilution of available support for heterosexual spouses if benefits must be extended to a broad class of domestic partnerships.

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PART IV - CONSIDERATION OF REMEDY

53. If the Court determines that the *Act* violates s.15(1) and is not justifiable pursuant to s.1, the Court could remedy such "inequality" by either: (i) redefining spouse with the broad and very significant ramifications discussed herein; (ii) creating another non-spousal benefit category; or, (iii) by making a declaration of unconstitutionality with a temporary suspension to permit Parliament to redraft the legislation. In other words, the Court need not vitiate the long standing and historically significant concept of heterosexual "spouse".

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(i) The Appellants' Proposed Remedy

54. If the Court were to "read down" and "read in" to redefine "spouse" as the Appellants suggest, the Court would, in effect, be engaging in the massive rewriting of over 50 federal statutes. Furthermore, there will be significant implications for provincial laws since the Court would, by necessity, be redefining the common law meaning of marriage and its legislative extension to "common law spouses". *Quaere* whether the *Charter* was intended to permit such a wholesale judicial "legislative" function under the guise of remedial powers pursuant to s.24(1) and s.52 of the ***Constitution Act, 1982***? These Interveners respectfully submit that is was not.

55. Second, if the Court "reads in" to redefine the definition of spouse, this will vitiate the entire category of "spouse" as it has been historically and philosophically defined in western thought for several thousand years. If the definition of "spouse" were redefined to also include same sex "couples" who are living "as husband and wife" or "in an analogous relationship," this would cause discrimination. There is no legal or rational basis for excluding from the expanded category other committed domestic partnerships which could include siblings, parent-child, life-time friends or individuals who co-habit in domestic partnerships for reasons other than mutual sexual relationships. If the Court determines to "read in", it must do so in a logical and rational manner which does not itself cause discrimination. The judicial expansion of "spouse" advanced by the Appellants is, by its very nature, also under-inclusive according to their own analysis. As stated before, to exercise such remedial powers would be to substantially rewrite the legislation and thus to exceed the legitimate scope of such remedial powers as established by this Court in *Schachter*.

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

56. In its remedial consideration, the Court must consider the Appellants' underlying objective to seek judicial sanction for a complete restructuring of the definition of spousal "status" (and thereby "family status") in Canadian law. Canadian society has been centred around and indeed anchored by the heterosexual spousal unit. Such a union, protected by law, has been historically, philosophically, legally and theologically rooted in the biologically unique relationship between men and women.

57. The Appellants provide no evidentiary basis or compelling argument, for the redefinition of the essential social unit on the basis of "coupleness". There are other more

compelling aspects of domestic relationships, which could also provide the basis for such a profound redefinition of social structures. Clearly this is beyond the scope of appropriate judicial review pursuant to the *Charter*. Such a profound and wholesale reorientation of Canadian society, which involves not only legal but also social, political, philosophical and theological considerations, is one which should only be engaged in after broad policy consideration in Parliament and the Legislatures and, more importantly, after thorough academic, moral and theological discourse in our places of worship, our universities and in society at large.

(ii) **Alternative Remedies**

58. A more appropriate remedial response to under-inclusiveness would require a temporary suspension to allow Parliament to amend the legislation to permit other non-spousal couples, who are not analogous to heterosexual spouses, to be considered for this benefit. This need not and should not be done by changing the long-standing understanding of the heterosexual basis for marriage and spousal status. The benefit sought could be granted as an addition to, but exclusive of, the heterosexual "spouse" category. This may provide homosexuals and others in domestic partnerships access to the benefit if Parliament can afford such extended benefits, but without judicial rejection of a socially, historically, philosophically and theologically important concept. This could, however, significantly weaken the already threatened position of heterosexual families in our society.

59. Furthermore, in remedial considerations, the Court must be both informed and bound by the principle of the unremitting protection of *Charter* values which include the values which underlie and are consistent with free and democratic societies. Protection of and support for the heterosexual family unit has been considered essential to a functioning democracy.

> Igor Shafarevich, **The Socialist Phenomenon**, (New York: Harper & Row, 1980)
>
> Bruce Hafen, **The Constitutional Status of Marriage, Kinship, & Sexual Privacy -Balancing the Individual and Social Interests,** 81 Mich. L.R. 463-574, January 1983

60. The interpretation and determination of rights must be grounded in rights theories which have a conception of the promotion of the common or shared good, as well as the advancement and protection of notions of the good. All laws incorporate, in various ways, principles determined to be for the good of society and the institutions and people that form it.

The *Charter* embodies the principles that have been deemed to be fundamental to common good. If the determination and derivation of rights are not grounded in a concern for collective human (and therefore social) well being, they cannot avoid being arbitrary. If they seem arbitrary, in which sense are they fundamental or related in a meaningful way to good that should be recognised by law? Serious criticisms (by, amongst others, Michael Sandel, Robert George and Charles Taylor) have been levelled at certain current and influential rights theories (such as those of John Rawls and Ronald Dworkin). The court should consider these foundational criticisms when deciding which rights theories might provide an adequate framework for the understanding or development of the fundamental rights and freedoms enunciated in the *Charter*.

See References in Appendix "C"

61. These Interveners therefore respectfully submit that the Constitutional Questions should be answered as follows:

Question A : No
Question B : Yes

ALL OF WHICH IS RESPECTFULLY SUBMITTED

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