

## CPP Trial: Class Member's Notes

by Jim C. Knoop<sup>1</sup>

### Background

I never really considered attending the opening proceedings of the CPP class action suit, although I am a class member. And I certainly never imagined that I would ultimately observe the entire trial.

On impulse, I showed up the first day as a gesture of support, and, not unlike many devotees of reality TV shows, quickly became enthralled with (and by) the case.

### Day 1

Never having been in a courtroom before, it didn't take long for me to figure out that this was not much like the TV courtroom dramas that constitute my primary exposure to the legal system. Yes, the courtroom was an environment seeped in decorum and tradition, but it was also one punctuated by thin veneers, harsh florescent lighting and rather uniform wardrobe choices by the key players.

Upon entering Courtroom 6-2, I was impressed by the number of counsel representing each side, as well as by the sheer volume of bound reference materials stacked on top, beside and under the large tables from which they worked. Since I had never met any of the legal team before, my dilemma was similar to that of a guest arriving at a wedding with no usher to direct them to the appropriate side of the church: exactly where should I sit?

In the absence of any more information, I decided to choose a seat that afforded the best line of sight to the judge's bench and the witness box. And, to my chagrin, I ended up seated among various Dept. of Justice staff and witnesses who watched me intently, as if I was an unusual animal that had escaped from the zoo, and they weren't quite sure if I was dangerous or not....

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<sup>1</sup> See drawing 47.

From the spectators' seats, the view of the counsels was largely limited to their backs. As opening statements were delivered, there was a steady undercurrent of fingers typing on keyboards, and pens scratching on paper in a constant frenzy of note-taking, punctuated by intermittent requests from the bench for somebody to speak either louder or slower, for the benefit of the court recorder. And yet the words would often assume a quiet eloquence, underscoring the import of the occasion.

History is evidently being made on several counts here: this is the first Charter-based class action suit in Canada, and the first class action suit involving gay rights anywhere in the world. And yet there is a distinctly banal sense of routine that underscores the proceedings. This is clearly a trial first, and history second.

### **Days 2 and 3 - Testimony of the Representative Plaintiffs**

Moving into the second day of trial, I feel like a seasoned veteran of courtroom protocol. Or at least I thought so, until I was reprimanded for chewing gum! But at least I have a better sense of when to stand, when to sit and when to bow.

Originally, I had presumed that the 'representative' in Representative Plaintiff referred to demographics - a mix of urban/rural; male/female; younger/older, etc. As their testimony unfolded, I was struck by how much their stories had in common with my own experiences as they recounted how they met their late partners, and recalled their lives together, their challenges and struggles, and ultimately, their loss.

And bizarre coincidences: Gail Meredith and my late partner share the same birthday. And Brent Daum's partner died on the same day as mine did. The more I listen to their stories, the more connected I feel to them.

The first hint of indignation on my part appears as the Defendant's counsel introduces into evidence a financial statement for each of the Representative Plaintiffs, summarizing their partner's total CPP contributions, as well as the total of benefits paid (the former usually being considerably less than the latter). While it is difficult for me

to imagine what possible bearing this might have on any legal argument, there is no question in my mind that it is insensitive and demeaning to those testifying.

We moved to a different courtroom for the testimony of Brent Daum, which occurred via videoconference from Saskatoon. It was a fascinating application of technology to address his inability to travel to Toronto in order to testify, although the connection was a bit temperamental, requiring frequent adjustments.

During cross-examination of the representative plaintiffs, there was a subtle anxiety evident on the part of both witnesses and spectators alike—as in “where is this question leading to?” So answers were often tendered with the same caution and concern to detail that one employs in navigating an unmapped minefield. For example, Brent Daum’s version of an affirmative answer to a question by a near-exasperated Defence counsel was “if I understand your question correctly, then I would suppose so.”

### **Days 4 and 5 - Our Experts**

On the fourth day, we moved to our third (and final) courtroom: 708. After hearing from the former Executive Director of the Canadian Aids Society, the balance of the next two days was dedicated to the qualification and testimony of two expert witnesses. Dr. Rosemary Barnes addressed the psychological impacts of cultural heterosexism, discrimination, loss and grieving on gays and lesbians, while Dr. Barry Adam focused on the sociological impact of social institutions upon gays and lesbians, and touched briefly upon the evolution of gay rights movements in Western societies.

The cross-examination by the Defence team was noticeably more vigorous than was the case with the Representative Plaintiffs. It took a while to grow accustomed to opposing counsel refer to each other as ‘my friend’ while objecting (sometimes quite heatedly) to the other’s question.

I was initially surprised, and eventually impressed by the level of civility and collegiality that characterized the informal interaction among opposing counsel during breaks in the proceedings. There was a lot of lawyer-talk and

trading of quips and war stories involving past cases. These were clearly highly competent professionals doing their jobs to the best of their ability.

The length of the expert testimony resulted from the need to have all of their key points from rather voluminous reports entered into the trial record as evidence. And they had a lot to say. With this completed, the Plaintiffs' case was concluded.

### **Days 6 through 8 - Their Witnesses**

The slate of witnesses for the Defence comprised three mid-level management employees of HRDC, and well as one expert: the Chief Actuary of Canada.

The testimony of the HRDC managers focused on the policies, procedures and behind-the-scenes developments relating to the processing of Survivor Benefits applications and reconsiderations involving class members, and the development and administration of a settlement strategy for certain "qualifying" cases. The details were a bit difficult to follow as questions were based on numerous documents that spectators were unable to view.

Questions were replete with such language as "as you can see in Section 42.1.1 in Schedule B" or "I call your attention to the letter which can be found in Exhibit 41, Tab 50, second paragraph." Exhibits, Sections and Tabs, Oh My!

By this stage in the trial, the 'hardcore' group of spectators (Ed, George, Jacques and Jim) had started to bond, and exhibited remarkable teamwork by ensuring that at least one remained awake whenever the discourse devolved into prolonged discussions of technical minutia.

The testimony of the Chief Actuary of Canada (Mr. Menard) confirmed that the projected costs of paying future survivor pensions to all class members (including arrears and interest) would not significantly impact the assets or

premium rates of CPP. Mr. Menard's testimony was sufficiently conclusive that it was not necessary for the Plaintiffs to call their own actuarial expert.

There was a chilling aspect to this testimony as well. While the class members had previously been described as largely comprising vulnerable, elderly and disabled persons, the Chief Actuary characterized class members as a 'closed' class, with no new members. And the lack of significant impact of paying pensions to class members on overall CPP premium rates was due in part to the fact that class members were dying out.

### **Days 9 and 10 - Plaintiffs' Final Argument**

Well, if this were an adult video, then this stage of the trial would constitute what is referred to in the trade as the 'money shot'. It is a culmination of the laborious process of entering evidence into the trial record, and allows for the integration of caselaw and evidence into a compelling indictment of the government's consistent pattern of obfuscating and denying gays and lesbians from exercising their Charter rights with respect to the CPP survivor benefits since 1985.

It is a simple case, the court is told, about equal benefits for equal premiums. But most class members, having been deemed ineligible for benefits under the old legislation on the basis of their sexual orientation, are still denied benefits under the new legislation which was specifically intended to remedy the discrimination gays and lesbians experienced under the old legislation. This leaves class members in the middle of the Red Sea, with no Promised Land in sight, as it were.

We learn the distinction between patently offensive and latently offensive provisions of the legislation being challenged, and note the occasional sense of outrage that peppers the otherwise well-reasoned (although passionate) argument of the Plaintiffs' lead counsel, Mr. Doug Elliott, who recaps how class members were often treated by the government "in a manner that can only be described as callous, if not cruel." And should class members have the temerity to fight back after their applications for survivor benefits were declined, they "faced a costly, stressful and public battle with a well-resourced opponent." Mr. Elliott stressed that, while the

government claimed to wait for direction from the courts, it still took every step to avoid binding precedents by settling cases on the courthouse steps.

Another interesting point underscored in the Plaintiffs' argument was that virtually every case in which HRDC exercised the discretion that the legislation allows it to, such discretion was used against the interests of gay and lesbian applicants for survivor pensions, and never in their interests.

Additional arguments related to breach of fiduciary duty and unjust enrichment were tendered by Sharon Matthews, which concluded this phase of the trial.

### **Days 11 and 12 - The Defence's Final Argument**

Having come this far, it's frustrating for me to miss this last phase of the trial due to a previously scheduled trip that will take me out of the country for the final days. True, it will probably be beneficial to my blood pressure not to witness the government's argument first-hand. But at least I now have well-placed sources in the spectators' gallery that can fill me in on the details upon my return.

In the meantime, the final step in this 2-week journey ultimately rests in the hands of the Honourable Madam Justice MacDonald, whose ruling I look forward to reading with great interest.

An enormous debt of gratitude is certainly due to the outstanding legal team representing the Class, for bringing this case to trial, and arguing it rationally and passionately. Having seen them in action, there is no doubt about whom I will call if I ever get into serious trouble with the law!