

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N

**GEORGE HISLOP, BRENT E. DAUM, ALBERT McNUTT,
ERIC BROGAARD AND GAIL MEREDITH**

Plaintiffs

- and -

THE ATTORNEY GENERAL OF CANADA

Defendant

A proceeding under the *Class Proceedings Act, 1992*

OPENING ARGUMENT OF THE PLAINTIFFS

PART I : OVERVIEW

1. Madam Justice Abella said in *Rosenberg*:

“It is ... difficult to see a rational connection between protecting heterosexual spouses from income insecurity on the death of their partner and denying cohabiting gay and lesbian partners the same protection. In each case the survivors will have been partners of former employees who contributed to the pension plan in the expectation of its equitable distribution.

The sexual orientation of surviving partners can in no way be seen as any more relevant to whether they should be entitled to income protection their partners have paid for, than would be their race, colour, or ethnicity. Protecting surviving partners is a laudable objective, but it is not necessary to exclude gay and lesbian sexual relationships in order to achieve that objective.”¹

¹ *Rosenberg v. Canada* (Attorney General) (1998), 38 O.R. (3d) 577 per Abella, J.A. at p. 586 (hereinafter “*Rosenberg*”).

2. The death of a spouse is the greatest blow anyone can endure. In addition to the emotional turmoil and psychological pain, the death of a spouse can also have direct financial impact: the loss of an income in the household. As Madam Justice Abella noted 5 years ago in *Rosenberg*,² gays and lesbians are no exception.

3. Gays and lesbians have long endured state sanctioned homophobia in this country. This discrimination has eroded in the face of ongoing legal battles waged by gays and lesbians for equal rights, of which the present case is only the most recent example.³ This case deals with equal access to the survivor's pension under the *Canada Pension Plan Act* (the "Act").⁴

4. The Canada Pension Plan ("CPP") is a fundamental part of Canada's social safety net. All working residents of Canada pay into the scheme, and are called "contributors."⁵ It is important to appreciate that the money in the CPP does not belong to the federal government. It is not tax money, and the government cannot spend it for its own purposes. It is the property of the working men and women of Canada, and the federal government holds the funds for the benefit of them and their families.

5. In its simplest terms, this case is about a right to equal benefits for equal premiums.

6. The CPP is not a government benefit paid by taxes, it is a compulsory social insurance scheme funded through the contributions of workers and their

² *Rosenberg*, at p. 585, 586.

³ See for example *Halpern and MCCT v. Canada (A.G.), M. v. H.*, and *Vriend v. Alberta*, discussed below.

⁴ R.S. 1985, c. C-8.

⁵ *Canada Pension Plan*, ss. 2(1) and 8(1).

employers. The evidence will show that gays and lesbians were charged premiums **equal** to their heterosexual counterparts at all times.

7. A key benefit of the CPP is the survivor's pension.⁶ It has existed since the establishment of the CPP. This pension is paid to the surviving partner of a deceased contributor according to a formula that takes into account such factors as the amount of the contribution made and the age of the surviving partner at the time of death.⁷ Originally, this benefit was called a widow's pension and was only available to women and disabled men.

8. The *Canadian Charter of Rights and Freedoms* ("Charter")⁸ came into effect on April 17, 1982. However, governments were given a three-year holiday until April 17, 1985 to amend their laws to comply with section 15(1) of the *Charter*, the equality guarantee.⁹ Sexual orientation was not expressly listed in section 15. However, it was widely accepted from the beginning that, due to the open-ended language of section 15(1), sexual orientation was included as an analogous ground. This was conceded by both the Parliament and the federal government of the day. Despite this acknowledgement, it is clear that the federal government has almost never taken the initiative to correct laws that discriminate against gays and lesbians. Rather, gays and lesbians have been forced to enlist the support of the Courts in dismantling discriminatory laws.

⁶ *Canada Pension Plan*, s. 44(1)(d).

⁷ *Canada Pension Plan*, s. 58.

⁸ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (U.K.)*, 1982, c. 11.

⁹ *Canada Act 1982 (U.K.)*, 1982, c. 11, s. 32(2).

9. The CPP is no exception – instead of looking to the *Charter* for guidance as to whether the prohibition against survivor’s pensions to same sex survivors discriminated against persons based on their sexual orientation, and despite its own conclusion that sexual orientation was an analogous ground under s.15, the government did nothing but wait to see what the courts would do. Such a wait-and-see strategy is designed to, and does, perpetuate and reinforce discrimination against disadvantaged persons who have, by virtue of their minority status, less access to legal resources to “take on the government” in a *Charter* challenge such as this one.

10. Beginning in the early 1990s, following the Ontario Court of Appeal’s decision in *Haig*,¹⁰ gays and lesbians began to complain about the denial of access to the CPP survivor’s pension. The need for this pension was given greater urgency as AIDS cut a swath through the gay community in the 1980s and the 1990s.

11. The federal government responded not by remedying the discrimination, but by raising procedural objections that forced complainants into the appeals process under the CPP. Efforts were made to transform one of these challenges into a test case, with the support of the Canadian AIDS Society (CAS). Several high profile cases were advanced.¹¹

12. Following the release of the Supreme Court of Canada’s decision in *M. v. H.*,¹² the evidence will show that at the highest levels of the federal government it was concluded that the exclusion of same sex couples from CPP survivor pensions was unconstitutional and would be struck down by the Court. The federal government began

¹⁰ *Haig v. Canada* (1992), 9 O.R. (3d) 495 (C.A.) (hereinafter “*Haig*”).

¹¹ See discussion of *Fisk*, *Hodder*, and *Boulais*, below.

¹² *M. v. H.*, [1999] 2 S.C.R. 3. (hereinafter “*M. v. H.*”).

settling cases that were ripe for a ruling on the point, thus avoiding the creation of any adverse precedent. However, despite their belief that the law that they were administering was unconstitutional, they continued to reject the claims of all other same sex survivors.

13. Eventually, in February of 2000, the Federal Government introduced Bill C-23, the *Modernization of Benefits and Obligations Act* (hereinafter “MOBA”).¹³ MOBA amended a wide range of statutes, including the *Canada Pension Plan Act*. These amendments did nothing to correct the discrimination against our class members. For same sex couples, no survivor’s pension would be paid unless the contributor died after January 1, 1998.¹⁴ In addition, for any eligible same sex survivors, pension payments would not begin until August 2000.¹⁵ No such limitations apply to opposite sex couples.

14. Despite the absolute prohibitions in the old *Act* and the renewed prohibitions confirmed in these amendments, the administrators of the CPP decided to adopt a so-called “settlement strategy” for pending claims in the wake of *M. v. H.*¹⁶ Anyone whose partner died before January 1, 1998, would be denied a survivor’s pension if their application had gone no further than the reconsideration stage by February of 2000, when Bill C-23 was introduced. Anyone who had gone on, by February 11, 2000, to the next stage of appeal or higher would be paid a survivor’s pension, including arrears back to one month following the date of death, but without interest. The result was that all same sex survivors whose partners died before January 1, 1998 were denied a survivor’s pension unless they had the temerity to appeal the original denial and had done

¹³ S.C. 2000, c.12.

¹⁴ CPP, s.44 (2).

¹⁵ MOBA, s. 54(3).

¹⁶ Examination for Discoveries, Drummond, June 25, 2003, questions 545ff, particularly questions 565-67.

so by February 11, 2000. This settlement strategy, and the necessity of appealing a denial to invoke it, was not advertised in any way. Those lucky enough to fall into the settlement strategy were paid a survivor's pension including arrears back to one month following the date of death of his or her partner, but without interest. As a result of these settlements, 76 gay and lesbian Canadians are not class members because the Defendant is paying their survivor's pensions even though their same sex partner died before January 1, 1998.¹⁷

15. The case for the class members is quite simple. There can be no actionable discrimination prior to April 17, 1985, because of section 32(2) of the *Constitution Act, 1982*. However, thereafter the exclusion of same sex couples from survivor's pensions under the CPP discriminates contrary to section 15(1) of the *Charter*, and is not justified under section 1. This was recognized by the Defendant in the numerous settlements reached. It was recognized by the Defendant when *MOBA* was introduced. What is the justification for limiting entitlement to deaths occurring after January 1, 1998, rather than beginning April 17, 1985? There is none.

16. The unlawful discrimination began on April 17, 1985, and it continues to this day. There is no legal magic to the January 1, 1998 date. That date was purely arbitrary and legally indefensible. It is an arbitrary date that only applies to same sex survivors. It cannot be dressed up to be anything else other than what it is: discrimination based on sexual orientation.

17. This continued denial of survivors' pensions to the class is in violation of section 15(1) of the *Charter*. It cannot be saved under section 1.

¹⁷ Examination for Discoveries, Drummond, June **needs reference**

18. In addition, the Plaintiffs submit that the Crown is in a fiduciary relationship to this class. This fiduciary relationship required the Crown to treat the class members fairly and in accordance with the *Charter*. Instead, it has treated them arbitrarily and discriminated against them contrary to the *Charter*. If the Crown doubted the legality of the exclusion, it should have sought directions from the Court. Instead, it appears never to have considered the question.¹⁸ More egregiously, it adopted an adversarial stance with class members from that day to this that is contrary to its duty of fair treatment as a trustee.

19. In our respectful submission, once the Crown concluded that the exclusion was unconstitutional, it had a duty to allow survivor's pensions to class members on the same basis as heterosexual widows and widowers effective April 17, 1985. While it did so for some same sex survivors, it did not do so with all. Once again, it conducted itself in an arbitrary manner in breach of its fiduciary duty, imposing rules that were based neither on the statute nor the *Charter*, rules that were kept secret from the beneficiaries until it was too late.

20. Further, this situation constitutes an unjust enrichment of the Defendant. While the gay and lesbian contributors were lawfully charged a CPP premium, and paid it, their survivors were unjustly and unlawfully denied a benefit. While a statute can constitute a juristic reason for the deprivation, an unconstitutional statute cannot.¹⁹

¹⁸ Examination for Discoveries, Drummond, June 25, 2003, question 679.

¹⁹ *Hislop v. Canada (Attorney General)*, [2002] O.J. No. 2799 at para 46 (S.C.J.) (hereinafter "*Hislop*"), Hogg, Peter W., *Constitutional Law of Canada*, 3rd ed. (Toronto: Carswell, 1992) at p. 1241.

21. The *Charter* provides a flexible range of remedies.²⁰ In addition, if findings of breach of fiduciary duty and unjust enrichment are made, the Court can order a range of equitable remedies.

22. The Plaintiffs are seeking:

- (a) a declaration pursuant to section 52 of the *Constitution Act, 1982*, that the restriction of January 1, 1998 in section 44(1.1) of the *Canada Pension Plan Act* is of no force and effect and shall be read down;
- (b) a declaration of invalidity pursuant to section 52 of the *Constitution Act, 1982*, of section 72(2) of the *Canada Pension Plan Act*;
- (c) a declaration of a constitutional exemption pursuant to section 24 or 52 of the *Constitution Act, 1982*, that the normal rule limiting claims for arrears to one year prior to the date of the application contained in sections 60(2) and 72(1) shall have no force and effect against these class members;
- (d) an order pursuant to section 24 of the *Constitution Act, 1982*, directing the Defendant to accept applications and pay pensions for class members whose partners died between April 17, 1985 and January 1, 1998, in the same manner and using the same criteria as same sex survivors whose partners died after January 1, 1998;
- (e) an award of interest on the arrears of pensions pursuant to the *Courts of Justice Act*,²¹

²⁰ *Canada Act 1982 (U.K.)*, 1982, c. 11, ss. 24 and 52. See also the discussion of remedy in *M. v. H.* at pp 83-84.

- (f) in the alternative to the claim in (a) and (b) above, an award of damages equal to the amount of arrears of survivor's pensions to which the class members would otherwise be entitled had they been the survivor of a heterosexual marriage plus interest on this amount, together with a lump sum representing the net present value of the stream of future survivor's pensions to which class members would otherwise be entitled if they had been the survivors of a heterosexual marriage;
 - (g) in addition to the claim in (a) above but in the alternative to the claim in (c) above, an award of damages for breach of the *Charter*, breach of fiduciary duty and unjust enrichment equal to the amount of arrears of pension to which the class members would otherwise be entitled if they had been the survivors of heterosexual marriages and if section 60(2) or 72(1) did not operate to limit the quantum of their claims;
 - (h) an award of damages in the amount of \$20,000 per class member for breach of *Charter* rights, breach of fiduciary duty, and unjust enrichment;
 - (i) pre-judgment interest on any amounts awarded under (f) and (g); and
 - (j) costs of this action on a substantial indemnity basis.
23. In the event that all of the claims are dismissed, the parties have previously agreed that there will be no order of costs against the Plaintiffs.

²¹ *Courts of Justice Act*, R.S.O. 1990, c. C. 43.

24. In the event the Plaintiffs are successful in all or part of their claims, as frequently happens in class actions, it is anticipated that counsel will meet with the Court to work out the administrative details necessary to give effect to the Court's judgment so that individuals can establish their entitlement. There has been a collegial and co-operative relationship between counsel. Accordingly, we have every expectation that this implementation process should proceed smoothly.

25. As in all *Charter* cases, in addition to the evidence of the type that normally would be presented, the Court is required to consider evidence of the context of the legislation and the alleged discrimination.²² In the sections that follow, we will review the facts, outline the proposed evidence, and finally detail the findings that the Court will be invited to make based on that evidence. The history of the action is outlined in Schedule A to these submissions.

PART II : THE FACTS

The CPP

26. The Canada Pension Plan was created in 1965 and commenced in 1966. It applies to all working residents of Canada, except those who work in Quebec, which has a similar but separate scheme. Employers, employees and the self-employed are required to contribute premiums to this mandatory social insurance scheme. No taxes are contributed to the CPP. The object of the scheme is to provide working Canadians and their families a basic level of financial support in common situations that tend to create

²² See test for s. 15(1) as confirmed by the Court of Appeal in *Halpern*, below.

financial need, including on retirement, in the event of disability, and for the spouses and families of workers, on the death of a contributor.

27. The funds in the CPP are held by the federal government for the benefit of contributors and their families. The funds may not be used for purposes other than the CPP. Changes to the CPP which may have a significant financial impact on contributors or the fund must be approved by 2/3 of the provinces representing 2/3 of the Canadian population.²³ The evidence will show that the provinces advised the Defendant that they did not need to consent to the changes made to the CPP to extend survivor's pensions to same sex partners. The involvement of the provinces in the CPP is irrelevant to this case and its outcome.

28. The Defendant advances no financial defence to this action. The amount of the pensions in issue in this action is small relative to the enormous size of the CPP fund.²⁴ Even if the class members are entirely successful, no increase in premiums will be required of contributors. The judgment sought will not have any impact on the solvency of the fund or the pensions of other Canadians. Although there have been comments from the Supreme Court about the inability of governments to plead budgetary constraints as a defence under section 1, in this case there is no such section 1 defence advanced because there can be no such defence on the facts.

29. The *Act* has been amended on a number of occasions. However, the survivor's pension was always one of the fundamental components of the CPP. Originally called the "widow's pension," as its name suggested, it was available to all

²³ *Canada Pension Plan*, ss. 113.1(8.1) and 114(4).

²⁴ "Canada Pension Plan. Cost Estimates in Respect of the Same-sex Common-Law Partners Class Proceedings." Report of Jean-Claude Ménard, The Chief Actuary, July 2003, served in this action.

widows of deceased male contributors. However, widowers were entitled to a pension, but only if they were disabled at the time of their wives' deaths. In 1975, this gender discrimination was eliminated.

30. Although common law partners always had some entitlements to pensions, effective January 1, 1987 the survivor's pension was made available to surviving common law partners. However, the *Act* required these common law spouses to be of the opposite sex. It was this amending legislation that was intended to be responsive to the *Charter*, which for the first time by its express terms excluded same sex couples from this pension.

31. Finally, in July of 2000 survivor's pensions were extended to same sex common law partners, but only those whose partners died after January 1, 1998.

The Canadian Lesbian and Gay Community and the Representative Plaintiffs

32. Canada has a sorry history of homophobia. This has been recognized by the Courts, and it is documented in the evidence of the experts who will testify. Although conditions have improved over the years, homophobia is a continuing challenge in our society. In addition, it is important to bear in mind that for almost half of George Hislop's adult life, his consensual sexual activities with adults were criminal acts. If convicted, he risked indefinite incarceration until he was "cured".²⁵

33. Gays and lesbians have had their relationships erased from public view. They have been demeaned and degraded. Gays and lesbians have been unfairly stereotyped as incapable of forming lasting, loving and mutually supportive relationships.

²⁵ *R. v. Klippert*, [1967] S.C.R. 822.

34. The following sets out the anticipated evidence of the representative Plaintiffs.

The Representative Plaintiffs

(a) George Hislop

35. George Hislop (“George”) will testify about his relationship with Ron Shearer and his career as a gay activist. George met Ron Shearer (“Ron”) at Hanlan’s Point in Toronto in 1958. They fell in love. They established a home together, and ran a business together. They shared their lives, cared for each other, and held themselves out to the world as a couple.

36. Ron worked hard all his life and was a Contributor to the CPP. In 1986, Ron entered hospital for heart surgery. The operation was successful, but on April 15, 1986 Ron died of a stroke.

37. George will testify that early on in their relationship, Ron had agreed to support him so that George could devote himself to the fight for lesbian and gay equality. George will give evidence about the harassment and discrimination endured by the lesbian and gay community during his lifetime.

38. George will give evidence that he was told he did not qualify for a survivor’s pension at the time of Ron’s death. He did not pursue the matter until many years later after *MOBA* was introduced and at the suggestion of a friend. He was again turned down. George will testify that he lives on a modest income in very difficult financial circumstances, and will tell the Court how significant a survivor’s pension would be to his welfare and well-being.

39. If George and Ron had been a married heterosexual couple, instead of a same sex couple, George would have qualified for and received a CPP survivor's pension.

(b) Brent Daum

40. Brent E. Daum ("Brent") is suffering from AIDS. He is too ill to travel to Toronto for this trial. He will give evidence by means of a video link with a courthouse in Saskatchewan, where he makes his home.

41. Brent and James Ernest Stevenson ("James") lived together as a couple from August 28, 1991 until James' death on October 25, 1993 in Saskatoon, Saskatchewan. Brent and James held a commitment ceremony on June 5, 1993. James contributed to the CPP throughout his years in the labour force.

42. Following James' death, Brent filed a claim for a CPP death benefit which was paid to the Saskatchewan government that had been providing James with social assistance. Brent did not apply for a survivor's pension, knowing that it would be denied because he was in a same sex relationship with James.

43. If Brent and James had been a married heterosexual couple, Brent would have been entitled to a CPP Survivor's Pension.

(c) Albert McNutt

44. Albert McNutt ("Albert") and Gary Pask ("Gary") lived together as a couple from February 1990 until Gary's death in August 1993. During their relationship, they held themselves out as a couple. Albert was the main beneficiary of Gary's estate, including Gary's teacher's pension.

45. Gary was a Contributor to the CPP. Upon Gary's death, Albert applied for a CPP survivor's pension. On October 19, 1993, Albert's application for a CPP survivor's pension was denied on the basis that he and Gary were of the same sex. If Gary and Albert had been a married heterosexual couple, Albert would have been entitled to a CPP survivor's pension.

(d) Eric Brogaard

46. For over 22 years, Eric Brogaard ("Eric") lived with Orville Germak ("Orville") in a same sex common law relationship. They formed a long, lasting, loving and intimate relationship. They established a home together and shared their fortunes and misfortunes together until Orville died in 1993.

47. Orville was a contributor to the CPP over his entire working life.

48. On September 27, 1993 Orville died of complications related to AIDS. Subsequent to Orville's death, Eric made an application to the CPP for a survivor's pension which application was denied because he and Orville were of the same sex. In 2000, when *MOBA* was introduced, Eric made a second application. It was again refused on the basis that he and Orville were of the same sex. He appealed that denial, but not in time to meet the cut-off date for the "settlement strategy" described herein.

49. But for the fact that Orville and Eric were a same sex couple, rather than a married heterosexual couple, Eric would have been entitled to a CPP survivor's pension.

(e) Gail Meredith

50. For over 15 years, Gail Meredith ("Gail") lived with Judy Paterson ("Judy") in a same sex common law relationship. They established a home together and

shared all financial benefits and obligations. They had identical wills naming each other as executrix and beneficiary.

51. Eventually, Judy was diagnosed with a rare degenerative neurological condition characterized by rapidly progressive dementia. Gail had to go to Court to fight for the right to care for Judy because their relationship had no legal recognition. She won. Gail helped care for Judy and looked after her financial affairs until Judy died on July 14, 1992.

52. Judy was a contributor to the CPP over her entire working life. Subsequent to Judy's death, Gail telephoned a CPP office and inquired about making an application. She was told that she would not be eligible for a survivor's pension because she and Judy were of the same sex.

53. In 2000, Gail heard about the amendments to the *Act* and made an application to the CPP for a survivor's pension, which application was denied because she and Gail were not of the opposite sex. She sought a reconsideration of that and was again told no benefits were available because she and Judy were of the same sex. She sought a reconsideration again and was told her application was denied because Judy died prior to January 1, 1998. If Gail and Judy had been a married heterosexual couple, instead of a same sex couple, Gail would have been entitled to a survivor's pension.

Additional Fact Witness

Sharon Baxter

54. Ms. Baxter is the former Executive Director of the CAS. Ms. Baxter will give evidence about the dealings of CAS with HRDC. She will also give evidence about the involvement of CAS in this issue, including its interventions in previous test cases.

The Experts

55. In constitutional cases, the range of expert evidence is broader than in an ordinary case, as the Court is required to consider the entire context of the legislation and the exclusion.

56. The following sets out the anticipated evidence of the Plaintiffs' two expert witnesses. Reports and *curricula vitae* have been served in accordance with the Rules for these experts. The Defendant's sole expert is the Chief Actuary. However, as previously noted, his evidence is not called to assert a financial defence. It will assist the Court with context.

(a) Professor Barry Adam

57. Professor Barry Adam will give evidence for the Plaintiffs. Professor Adam is a University Professor of Sociology at the University of Windsor, and has been Chair of his Department. He has been recognized by the Courts as an expert on the lesbian and gay community on numerous occasions.

58. Professor Adam will testify as to the longstanding and ongoing problem of homophobia in Canada. He will testify about the terrible impact the AIDS epidemic has had on gay men in this country. Professor Adam's evidence will be that, contrary to

stereotypes, gays and lesbians do form long-lasting, loving and mutually supportive relationships. He will further testify that there is no social science evidence to support the conclusion that the death of a working person in a same sex couple's household has any less negative impact on the surviving partner than it would in an opposite sex household.

(b) Dr. Rosemary Barnes

59. Dr. Rosemary Barnes is a psychologist. She has also been qualified as an expert witness on numerous occasions on constitutional issues affecting gays and lesbians.

60. Dr. Barnes will testify about the negative psychological impacts discrimination and lack of relationship recognition has on gays and lesbians. She will give evidence about the devastating psychological impact of the AIDS epidemic on same sex couples and the lesbian and gay community. She will also give evidence about the psychological impact of the death of a spouse. Dr. Barnes will confirm that the negative psychological impact on a same sex spouse is no less severe than on a heterosexual spouse.

The History of Compliance with the *Charter of Rights*

61. The *Charter* came into effect on April 17, 1982. However, it was recognized that a number of existing laws might violate section 15(1) of the *Charter*. As a result, pursuant to section 32(2) of the *Constitution Act, 1982*, the governments that created the *Charter* gave themselves a period of 3 years to amend offending laws to bring them into compliance with section 15(1) the *Charter*.

62. The Government of Canada struck a committee to make recommendations about the necessary changes to federal law. This committee, under the chairmanship of Patrick Boyer, M.P., issued a report in 1985 entitled *Equality for All*²⁶. The Boyer Committee confirmed that sexual orientation was an analogous ground, and recommended that a number of statutes including the *Canadian Human Rights Act* be amended.

63. The only specific recommendation from the Boyer Committee in respect of survivor's pensions was to ensure that they fully included heterosexual common law partners. However, the report urged the Government to further review the legislation to ensure that the requirements for survivor's pensions did not offend any of the enumerated or analogous grounds.

64. In 1986, the Department of Justice, under the then Attorney-General of Canada the Honourable John Crosbie, filed a formal response to the Boyer Report. This response acknowledged that sexual orientation would be found by the Courts to be an analogous ground. The response included this undertaking by the federal government:

“The Government will take whatever measures are necessary to ensure that sexual orientation is a prohibited ground of discrimination in relation to all areas of federal jurisdiction.”²⁷

65. In our respectful submission, the Defendant was therefore on notice *ab initio* that laws that discriminated against gays and lesbians violated section 15(1) of the

²⁶ Canada, *Equality for All: Report of the Parliamentary Committee on Equality Rights*, J.P. Boyer (Supply and Services Canada: Ottawa, 1985).

²⁷ Canada, *Toward Equality: The Response to the Report of the Parliamentary Committee on Equality Rights* (Supply and Services Canada: Ottawa, 1986), p. 13.

Charter. This undertaking evidences the onus that lay on the Government to take proactive steps to remedy discriminatory laws.

66. Despite this commitment, **none** of the specific recommendations of the Boyer Committee in respect of the analogous ground of sexual orientation were acted on until 1996, ten years later. The first change was the amendment to the *Canadian Human Rights Act*.²⁸ This fundamental reform occurred only after several Ministers of Justice had promised and failed to amend the legislation under both Conservative and Liberal majority governments. The change was made at a time when the requisite language was somewhat superfluous, since it had already been read in three years earlier by the Ontario Court of Appeal in the *Haig* decision²⁹. Even then, some Members of Parliament made remarks during the debate that can only be characterized as homophobic.

67. Despite this promise, and another Court of Appeal ruling mandating a change,³⁰ at least one of the Boyer recommendations on ending sexual orientation discrimination remains unfulfilled by Parliament almost 20 years later.

68. There will be no evidence of any study of section 15(1) compliance in general as suggested by the Boyer Committee at any time. The recommended change to cover more heterosexual couples was made, and came into effect on January 1, 1987.

69. Although same sex couples could have qualified for the survivor's pension by marrying their same sex partners, they were not permitted to do so during the class period (April 17, 1985 to January 1, 1998).³¹

²⁸ *An Act to Amend the Canadian Human Rights Act*, S.C. 1996, c. 14 (assented to June 20, 1996, came in to force June 20, 1996).

²⁹ *Haig*, at p. 508.

³⁰ *Halpern and MCCCT v. Canada (A.G.)* (2003), 225 D.L.R. (4th) 529 (Ont.C.A.) (hereinafter "*Halpern*").

70. There is only one provision in the *Constitution Act, 1982* that permits governments to limit section 15(1) rights after April 17, 1985. That is section 33, the so-called “notwithstanding clause.” The government has not insulated this legislation from *Charter* scrutiny through the use of the notwithstanding clause.

71. As set out above, in purported compliance with *M. v H.*, Parliament enacted s.44(1.1) of the *Canada Pension Plan Act* in July 2000, which confirmed the exclusion of our class members from survivor’s pensions.

Gay Men and Lesbians and the Charter

72. Prior to the *Charter*, gay men and lesbians could only achieve their goal of equal treatment under the law through lobbying politicians. This had some limited success in the pre-*Charter* era. In contrast with the USA, Canada legalized consensual homosexual acts in private between adults as early as 1969 through amendments to the Criminal Code. The City of Toronto had introduced Canada’s first anti-discrimination ordinance in 1972, and Quebec had banned anti-gay discrimination in 1977 in its human rights legislation.

73. The primary purpose of s.15 of the *Charter* was to guide, and if necessary compel, Canadian governments to make non-discriminatory laws. The “fall back,” when governments did not heed the guidance provided by the *Charter* voluntarily, was to compel compliance through the courts. For the first time in Canadian history, gays and lesbians had a tool to compel such changes when governments refused to change homophobic laws. However, a tool is only as powerful as the hand using it, and gays and lesbians were a quintessentially disenfranchised group in Canadian society, with few

³¹ *Halpern*, at p.537 (Ont. C.A.).

resources and experience which would permit them to swiftly move to end discrimination. This is especially true when one considers the context that s. 15 guarantees came into force when a large part of the gay community was being ravaged by HIV.

74. As the following narrative demonstrates, by sitting back and waiting for gays and lesbians to force change through the courts, and in this case by denying the benefit of those hard fought wins retroactively, the government seeks to make the class members pay for the government's failure to comply with the *Charter* in a timely way and to take further advantage of the barriers facing the gay and lesbian community which moved as quickly as it could, one case at a time, to effect change.

75. *Charter* rights which are only available to those who have the legal resources and energy to bring expensive and sophisticated legal challenges against Canadian federal and provincial governments can and will result in no real protection against discrimination and equality before and under the law unless appropriate remedies are fashioned by the courts when the government refuses to comply with the *Charter*.

76. As had been acknowledged by Parliament and the Government, the Courts quickly identified sexual orientation as an analogous ground.³² In fact, there was not a single court ruling which refused to recognize sexual orientation as an analogous ground. It was frequently, though not universally, a point conceded by government defendants. Perhaps not surprisingly, it is conceded in the present case as well, although the section 15(1) infringement is not.

³² Examination for Discoveries, Drummond, June 25, 2003, p. 236-37, question 667.

77. Almost from the effective date of section 15(1), challenges were brought by gay men and lesbians under section 15(1) seeking relationship recognition. Courts were unanimously of the view that sexual orientation was an analogous ground under section 15(1). Trial courts and appeal courts began to afford legal protection to same sex relationships as early as 1989 in cases such as *Veysey*³³ and *Knodel*.³⁴

78. The first significant ruling from the Supreme Court on the point was the *Egan* case in 1995³⁵. The Court found unanimously that sexual orientation was an analogous ground under section 15. They also held by a 5-4 majority that a law which discriminates against same sex couples infringes section 15 the *Charter*. However, as a result of the “swing vote” of Justice Sopinka, by a different 5-4 majority they found that the offending provision was saved under section 1. Because of the nature of the divisions in the Court, while the result was clear, the basis for the section 1 justification was less clear.

79. The Defendant’s evidence will be that it was monitoring the progress of *Egan*, and that it believed that it had been given a green light to discriminate against same sex couples by the Supreme Court.³⁶ However, it was obvious from the reasons in that case that some statutes would fail to meet the section 1 justification, since the section 1 analysis must be conducted on a statute by statute basis. It was clear that Justice Sopinka’s analysis was predicated in large part on the fact that government policy about

³³ *Veysey v. Canada (Commissioner of the Correctional Services)*, [1990] 1 F.C. 321 (T.D.).

³⁴ *Knodel v. British Columbia*, [1991] 6 W.W.R. 728 (B.C.S.C.).

³⁵ *Egan v. Canada*, [1995] 2 S.C.R. 513 rev’g [1993] 3 F.C. 401, 103 D.L.R. (4th) 336 (C.A.) (hereinafter “*Egan*”).

³⁶ Examination for Discoveries, Drummond, June 25, 2003, questions 685 and 692.

expending tax dollars was in issue in *Egan*.³⁷ That is not the case with the CPP, which receives no contributions from taxes and may not be used for general government purposes. This should have been abundantly clear to the administrators of the CPP, as they also administer the Old Age Security Pension in issue in the case.

80. There will be no evidence of any study undertaken by the Defendant to review whether the exclusion of same sex couples from the CPP survivor's pension would pass constitutional muster in light of *Egan*. It simply assumed that the exclusion would be justified. In 1999, following *M. v. H.*, it reversed itself and assumed the exclusions would **not** be justified.

81. Doubts about the meaning of the section 1 analysis in *Egan*, as Justice Abella later noted in *Rosenberg*,³⁸ were swept aside in 1998 in *Vriend*. In a near unanimous judgment, the section 15 and section 1 analysis that had been undertaken by Justices Cory and Iacobucci in *Egan* was now completely adopted by 8 judges instead of just 4 or 5. The Court expressly rejected the "incremental" analysis of Justice Sopinka in *Egan*, finding that gays and lesbians should not have to wait while government took their time to remedy discrimination at their leisure.³⁹ Since the notwithstanding clause had not been invoked, Alberta's plea that it was entitled to act to reflect the prevailing social mores or in reliance on notions of parliamentary supremacy in its province was rejected.⁴⁰ Reading in of sexual orientation into Alberta's human rights statute was ordered immediately, just as Justice Krever had done with its federal counterpart in 1993.⁴¹

³⁷ *Egan*, at p. 572-573.

³⁸ *Rosenberg v. Canada (Attorney General)* (1998), 38 O.R. (3d) 577 (C.A.)

³⁹ *Vriend v. Alberta*, [1998] 1 S.C.R. 493 at p. 559-560 (hereinafter "*Vriend*").

⁴⁰ *Vriend*, at p. 559.

⁴¹ *Vriend*, at p. 578.

82. A similar approach was taken by the Ontario Court of Appeal in *Rosenberg* in 1998. That case dealt with the ability of private pension plans to offer survivor's pensions to same sex survivors, something that had been prohibited by federal law prior to that judgment.

83. *M. v. H.* was the next major ruling from the Supreme Court of Canada, released on May 20, 1999.⁴² It is to be noted that the decision upheld earlier rulings by the trial judge, Madam Justice Epstein, and by the Ontario Court of Appeal. This case involved the area of the law that lies closest to the heart of this case, family law. Specifically, it dealt with the exclusion of same sex couples from the spousal support provisions of Ontario's *Family Law Act*.

84. In an 8-1 decision, the Court ruled that the provision that restricted spousal support claims to opposite sex couples was unconstitutional. This section was part of a comprehensive legislative scheme which included a provision that permitted heterosexual couples to contract out of the obligation that was in issue in the litigation. As a result, the Court allowed the Legislature time to correct the necessary laws. However, the Court went further and called on governments to change all laws to eliminate discrimination against same sex couples to spare this vulnerable community the burden of repeated, lengthy and costly battles for equality.⁴³

85. The Supreme Court did not deal with the more controversial question of the exclusions of same sex couples from marriage for the simple reason that the question was not before them.

⁴² *M. v. H.*, [1999] 2 S.C.R. 3.

⁴³ *M. v. H.* at p. 87.

86. On July 12, 2002, our Divisional Court in *Halpern* ruled that the exclusion of same sex couples from marriage violated section 15(1) and was not saved by section 1 of the *Charter*.⁴⁴ On June 10 of this year, the Ontario Court of Appeal unanimously confirmed that the exclusion of gays and lesbians from the fundamental social institution of marriage violated their section 15 rights and was not saved by section 1.⁴⁵ While upholding the Divisional Court's conclusion on the *Charter* violation, the Court of Appeal strengthened the remedy. The common law definition of marriage was immediately reformulated. Moreover, same sex marriages that had taken place pursuant to the publication of banns in January of 2001 were given retrospective legal recognition.⁴⁶ This ruling followed an earlier Quebec Superior Court ruling in *Hendricks*⁴⁷, and a British Columbia Court of Appeal ruling in *Barbeau*,⁴⁸ that had also found the exclusion from marriage to be unconstitutional. The Federal Government has announced that it will not appeal that ruling, but will introduce confirmatory legislation after a Reference to the Supreme Court of Canada on certain collateral questions.

87. *Halpern* is significant to this case because the comparator group that has been selected by the Plaintiffs is married heterosexual couples. The discrimination against the class members could have been avoided either by extending to them the right to marry, or by extending the statutory benefit equally to same sex common law couples. The Defendant did neither.

⁴⁴ *Halpern and MCCT v. Canada (A.G.)*, (2002) 60 O.R. (3d) 321 (Div. Ct.).

⁴⁵ *Halpern*, at p. 572-573 (Ont. C.A.).

⁴⁶ *Halpern*, at p. 572 (Ont. C.A.).

⁴⁷ *Hendricks v. Québec (Procureur Général)*, [2002] R.J.Q. 2506, [2002] J.Q. No. 3816 (Q.L.).

⁴⁸ *EGALE Canada Inc. v. Canada (Attorney General)* (2003), 225 D.L.R. (4th) 472 (B.C.C.A.).

The Struggle for Same Sex Survivor's Pensions

88. The evidence from the representative Plaintiffs is that most of them either applied for or inquired about survivor's pensions and were told that they were not entitled. The evidence from the Defendant will be that these class members have always been told in response to inquiries and after filing their initial application that they were not entitled to a pension. No information was ever given at the initial denial stage about the possibility of a *Charter* issue, even after the Defendant had formed the conclusion that the law it was enforcing was unconstitutional.

89. There is evidence that on one or more occasions, a person who had sought reconsideration received a letter that mentioned the possibility of a *Charter* challenge. It is clear that the possibility of a *Charter* challenge was not consistently brought to the attention of all claimants throughout the relevant time period.⁴⁹

90. The need for survivor's pensions from the perspective of gay men was given added impetus by the HIV/AIDS epidemic. Gay men were coping with the premature deaths of their partners in unprecedented numbers. In addition to coping with grief and homophobia, they often had to cope with AIDS-phobia and sometimes, the devastation of their own HIV positive diagnosis.

91. Sadly, the only concern the Defendant had about the impact of HIV/AIDS initially was the impact on the solvency of the fund because young working men were becoming disabled, ceasing to contribute to the CPP and drawing disability pensions. Even this national tragedy did not trigger a review of the discriminatory law.

⁴⁹ See e.g. A.G.C. documents 997 and 1012; Examination for Discoveries, Drummond, June 25, 2003, questions 528ff.

92. The Ontario Court of Appeal's ruling in *Haig* gave a fresh opportunity to challenge the discrimination through the mechanism of a human rights complaint. Several same sex survivors tried to use that route to get their survivor's pensions. The Defendant was successful in objecting to the jurisdiction of the Commission to hear the complaints, forcing the complainants back into the CPP internal review process.

93. An effort was made to try to establish a precedent through a test case. In 1996 in *Boulais*,⁵⁰ the Tribunal found that the law was discriminatory and officially put the government on notice of the problem. It appears that this warning was ignored. The case was joined with the case of *Hodder*, to be heard by the Pensions Appeal Board in May of 1999.

94. CAS, a national organization dedicated to assisting people affected by HIV and AIDS, intervened in the case in an effort to seek a binding national solution to the problem. A few days before the case was to be heard, *M. v H.* was released. The Defendant quickly concluded that this legal position could not be successfully defended and settled the cases. CAS and many in the lesbian and gay communities were elated, believing that the problem was solved.

95. However, the problem was not solved. At the same time that it was settling these cases, the Defendant instructed its front line staff to continue to discriminate against same sex survivors.⁵¹ Although the Defendant believed that the exclusion was unconstitutional and would be struck down by a Court, it did not inform class members of this opinion. In fact, it did not even tell them that there was any

⁵⁰ *Boulais v. Minister of Human Resources Development*, CPP Review Tribunal 105-655-781.

⁵¹ "Staff Lines: Modernization of Benefits," June 1, 1999, A.G.C. document 1453.

question about the constitutionality of the exclusion, nor that settlements had been reached with other claimants based on *Charter* issues. On the contrary, gay and lesbian claimants were told that same sex couples had no right to a survivor's pension, and that their applications were to be rejected. It is the Plaintiffs' respectful submission that beneficiaries of the CPP are entitled to a fair, transparent and accountable administration of the CPP. Nothing in the *Act* prevented the administrators from telling the truth. Nothing in the *Act* required this kind of duplicity, which was a gross violation of the Defendant's *Charter* and fiduciary obligations.

96. Another potential test case that was already in the system was identified by CAS, *Fisk*. Mr. Fisk was one of the original complainants to the human rights commission who had been re-routed to the CPP appeals process. He had received a favourable ruling from the tribunal in 1995, but the appeals had continued.

97. Mr. Fisk had been with his common law partner for approximately 40 years before his death. He had been fighting to get a survivor's pension for 6 years or more when his case was on its way to the Federal Court in September of 1999. On the courthouse steps, the federal government once again settled. It is the Plaintiffs' submission that this was part of a deliberate strategy, not of fair dealing with same sex survivors, but of settling out of court to avoid an adverse precedent that would compel payment to all same sex survivors.

98. The Defendant will contend that it was being generous to claimants by paying some of them. In fact, it was acting in gross dereliction of its duties by paying off

the “squeaky wheels” while resolutely and uniformly discriminating against all other same sex couples.

99. In most of these settlements, the claimants were paid the full survivor’s pension to which they would have been entitled as a heterosexual common law partner, back to one month following the date of death.⁵² However, the Defendant was careful to ensure in each case that there was no admission that the law was unconstitutional, even though it believed this legal position to be indefensible. Once again, it ensured that there was no binding precedent. Moreover, after the *Fisk* settlement, it continued to discriminate.

100. At no time did the Defendant seek clarification from the Courts about its obligations or the constitutionality of subject provisions of the statute. On the contrary, in each of these high profile test cases it settled the cases so as to avoid any adverse finding and to permit the discrimination to continue against gays and lesbians.

***MOBA* and the “Settlement Strategy”**

101. The federal government decided to respond to the decision in *M. v H.* with omnibus legislation that was introduced in February, 2000, in the form of Bill C-23 which would become *MOBA*. However, *MOBA* perpetuated the discriminatory exclusion of the class members, although it did provide same sex survivor’s pensions for same sex common law partners whose partners died after January 1, 1998. Even those pensions were limited, however, for their pensions would not commence until *MOBA* came into force in July, 2000. Survivors of heterosexual relationships faced no such limitation.

⁵² See e.g. A.G.C. documents 2573 and 2579.

102. No adequate explanation has been offered for the January 1, 1998 date. It has no legal anchor whatever.⁵³

103. It is the Plaintiffs' case that this date was chosen on a purely arbitrary basis, as a matter of political expediency. In the long and sorry history of belated and half-hearted responses to the equality demands of the gay and lesbian community, this was the latest half-measure. While the *Charter* demanded equal treatment, Parliament offered better treatment than before, but something less than equal treatment.

104. The "modernizing" amendments to the *CPP Act* did not improve the lives of our class members one bit. In fact, unknown to our class members, it put them in a worse position than if they had never been passed.

105. Under the new amendment, section 44(1.1), Messrs. Hodder, Boulais and Fisk would have received nothing. Prior to the introduction of *MOBA*, the Defendant was at least willing to settle those claims based on the *Charter*.

106. In the spring of 2000, the Defendant implemented a "settlement strategy" for claims for same sex survivor's pensions that were in the system.⁵⁴ The Crown continued to settle with those claimants who had initiated the appeal process before Bill C-23 was introduced on February 11, 2003. However, anyone who had not taken their claim to an appeal by the date of introduction of the Bill would be denied. Unknown to same sex survivors, it was not the date of the *Charter* or January 1, 1998 date that was key. It was the date of introduction of Bill C-23 which would administratively create the

⁵³ See e.g. A.G.C. document 831 or Examination for Discovery, Drummond, June 26, 2003, questions 1184-97.

⁵⁴ Examination for Discoveries, Drummond, June 25, 2003, questions 545ff, particularly questions 565-67.

bright line that separated those who would receive same sex survivor's pensions and those who would be forced to await the outcome of this action to overcome this discriminatory exclusion.

107. Based on the Crown's belief that the old exclusionary law was unconstitutional, it settled with persons who would otherwise be class members and paid them on the same basis that heterosexual widows and widowers were paid. If *MOBA* had never been introduced, it is only reasonable to conclude that the Crown would have settled with all class members who advanced claims without regard to any January 1, 1998 date. The evidence will make clear that the Crown settled cases with dates of death much earlier than this. In fact, under the "settlement strategy," no one was ever denied a settlement based on the date of death.

108. The Defendant had a duty to deal fairly with the pending applications from same sex survivors. The Defendant believed these claims could not be denied based on the same sex nature of the relationship soon after *M. v. H.* was decided. It would have been reasonable to expect that all otherwise valid claims would be paid as a result. However, the Defendant continued to deny the applications. No one was told they had a potential *Charter* claim. In some cases persons were advised that the legislation was being amended. Some were even invited to re-apply.⁵⁵

109. The "settlement strategy" was never shared with class members who were pursuing claims. It was disclosed in a letter to Svend Robinson, M.P., after *MOBA* was proclaimed in force and after it was too late for our class members to qualify under it.⁵⁶

⁵⁵ See e.g. A.G.C. documents 841 and 844.

⁵⁶ A.G.C. document 257.

In fact, the evidence will show that some of the settlements that were implemented were not even in compliance with the so-called “settlement strategy.”

110. Apparently following the implementation of this “settlement strategy” in the spring of 2000, two settlements were entered into while Bill C-23 was pending before Parliament.⁵⁷ Over 70 such settlements were entered into after the amendments to the *CPP Act* came into effect, for dates of death as early as 1990.⁵⁸ Nothing in the *Charter*, *MOBA* or the prior legislation mandated the criteria for this “settlement strategy.” The criteria for the settlements were not to be found in any Act, regulation or guideline published by the Defendant. Nor were claimants advised in advance of the need to file an appeal by February 11, 2000 in order to protect their rights.

111. For our class members, those who did not have the good fortune to have pending appeals as of February 11, 2000, the response was rejection. In some cases, cruelly, they received this further rejection after they had been expressly invited to re-apply.⁵⁹

PART III : LEGAL ANALYSIS

112. It is clear from the legislative history that, at all relevant times, the survivor’s pension was available to the surviving partner of a marriage regardless of gender. The fact that the exclusion of same sex couples from marriage is unconstitutional is the subject of binding authority from the Court of Appeal of this province in *Halpern*.⁶⁰

⁵⁷ Mr. McKay and Mr. Nickell (see e.g. A.G.C. documents 1554, 3232 and 3256).

⁵⁸ Examination for Discoveries, Drummond, June 25, 2003, question 745.

⁵⁹ See e.g. A.G.C. documents 841 and 844.

In addition, with respect to the equality rights of same sex common law couples, this case is governed by the binding Supreme Court authority of *M. v. H.*⁶¹

113. That is sufficient to dispose of this case on sections 15(1) and section 1. However, in the interests of completeness, a more detailed analysis of the impugned law is set out below.

Section 15(1)

114. Section 15(1) reads as follows:

“Every individual is equal before and under the law and has the right to 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.”⁶²

115. Statutes that deny equal benefits to same sex couples as are granted to heterosexual couples infringe section 15(1) of the *Charter*. That principle was conclusively established in *Egan*.⁶³ To come to any contrary conclusion in this case would be to disregard at least eight years of binding jurisprudence from the Ontario Court of Appeal and the Supreme Court of Canada.

116. The correct approach to section 15 involves a three-part test discussed in *Law*, as recently confirmed by the Ontario Court of Appeal in *Halpern*.

“The determination of whether such a conflict exists must be approached in a purposive and contextual manner: *Law* at 525. To that end, Iacobucci J. articulated a three-stage inquiry, at pp. 548-49:

⁶⁰ *Halpern*, at p. 572-573 (Ont. C.A.).

⁶¹ *M. v. H.*, [1999] 2 S.C.R. 3.

⁶² *Canada Act 1982 (U.K.)*, 1982, c. 11, s. 15(1).

⁶³ *Egan*, at p. 577, 590-591, 625.

- (A) Does the impugned law (a) draw a formal distinction between the claimant and others on the basis of one or more personal characteristics, or (b) fail to take into account the claimant's already disadvantaged position within Canadian society resulting in substantively differential treatment between the claimant and others on the basis of one or more personal characteristics?
- (B) Is the claimant subject to differential treatment based on one or more enumerated and analogous grounds?
- and
- (C) Does the differential treatment discriminate, by imposing a burden upon or withholding a benefit from the claimant in a manner which reflects the stereotypical application of presumed group or personal characteristics, or which otherwise has the effect of perpetuating or promoting the view that the individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect, and consideration?

The claimant has the burden of establishing each of these factors on a balance of probabilities.”⁶⁴

117. As the Court noted in *Vriend*, considerations of legislative deference do not enter into the section 15 inquiry, but only the section 1 and remedy analysis.

118. The Court need not find that there was a discriminatory purpose, for even unintentional discrimination may violate the *Charter*.⁶⁵ In cases of exclusion, the question may be simply put as to whether the statute excludes based on considerations or markers that are legally irrelevant rather than on individual capacity, worth or circumstances.

⁶⁴ Halpern, at pp. 550-551 (Ont. C.A.).

⁶⁵ *Vriend*, at p. 547.

119. There are a number of features of the context that the Plaintiffs say are important to consider. First, individuals in same-sex relationships face significant pre-existing disadvantage and vulnerability. Second, the legislation in issue fails to take into account the class members' actual situation. Third, there is no compelling argument that the ameliorative purpose of the legislation does anything to lessen the charge of discrimination in this case. Fourth, the nature of the interest affected is fundamental, namely the ability to meet basic financial needs following the death of a partner. The exclusion of same sex couples from the benefits of the survivor's pension prior to January 1, 1998 implies that they are judged to be incapable of forming intimate relationships of economic interdependence, without regard to their actual circumstances.⁶⁶

120. It will not be in dispute that sexual orientation is an analogous ground, and that distinctions made between opposite sex couples and same sex couples create distinctions that infringe the first branch of the three-part *Law* test of creating a formal distinction. It has been observed that, faced with a denial of equal benefit on an enumerated or analogous ground, one would be hard pressed to show that the distinction is not discriminatory.

121. It is the case for the Plaintiffs that there are two formal distinctions and differential treatments made which discriminate against them based on sexual orientation. First, the class members were denied "equal protection" and "equal benefit" of the law, in that they were denied a benefit made available to opposite sex common law couples, contrary to the principles in the binding Supreme Court authority of *M. v. H.*

⁶⁶ *M. v. H.*, at p. 27.

122. Second, the Plaintiffs were not allowed to marry during the class period contrary to section 15. This is the subject of binding authority from the Court of Appeal in *Halpern*.⁶⁷ Moreover, the Attorney General of Canada, in defending his decision to accept that ruling has quite rightly announced that alternatives to marriage are unacceptable because “almost equal” does not fulfill the requirements of the *Charter*.

123. Turning to the third aspect of the test, the discriminatory impact, there are two aspects to the impact on the dignity interest of our class members of this exclusion. The first, and most obvious, is the financial impact. This pension is intended to provide a minimum income support to survivors. Without this pension, this basic financial security is gone. Living in poverty is demeaning to anyone’s dignity. There is no evidence to suggest that gay men and lesbians are less vulnerable to the loss of a household income than heterosexuals.

124. The second impact is the blow to self-esteem that is unrelated to the direct financial impact. This was recognized by Justice Cory in *Egan*, where he noted that the denial of recognition of a same sex relationship sent a message that government considers that relationship to be less worth than heterosexual relationships.⁶⁸ This contributes both to the erasure of the existence of same sex couples, and underlines the offensive and antiquated stereotype that gays and lesbians do not form loving mutually dependent relationships, that they are not real families.

⁶⁷ *Halpern*, at p. 572-573 (Ont.C.A.).

⁶⁸ *Egan*, at p. 604.

125. The affront to the dignity of same sex couples is magnified in this case because the benefit in question was paid for by premiums charged to the deceased contributors. Premiums were charged equally, but benefits were paid unequally.

126. If **all** survivors were limited to claims in respect of deaths after January 1, 1998, the limit would be permissible. However, it is **only** same sex couples who have their rights limited in this way. Heterosexual couples had the right to a survivor pension without reference to this date.

127. Like the provision in issue in *Egan*, section 44(1.1) on its face creates a distinction between same sex and opposite sex couples. Similar considerations apply to section 72(2), barring payments to any same sex survivors until August 2000. No such limit applies to opposite sex couples. These are examples of direct discrimination.

128. There are two provisions in the Act, sections 60(2) and 72(1) that limit arrears to one year from the date of application, regardless of the date of death. On the face of it, unlike the two other provisions in issue, these limiting provisions do not appear to discriminate on the basis of sexual orientation. They do not on their face draw a formal distinction between same sex couples and opposite sex couples, unlike sections 44(1.1) and 72(2). However, in the circumstances, application of these otherwise neutral provisions would result in an infringement of section 15 by limiting the entitlement of these class members.

129. The evidence will be that these class members were told regularly and persistently since 1985 that they had no right to this pension. Some, like George Hislop and Brent Daum, did not bother to apply at the time of their partner's death after being

told that they had no right to the pension. Until the Supreme Court's decision in *M. v. H.*, any grieving survivor who had the sophistication to understand that this was contrary to the *Charter* and the temerity to challenge this assertion was in for a long and nasty fight with a well-resourced opponent.

130. After the Supreme Court's decision in *M v H*, the conduct of the government was different, but it was not better. At the most senior level, it was quickly decided that the exclusion of same sex couples was an infringement of section 15. However, a duplicitous pattern of settling with squeaky wheels while continuing to deny all other claimants was deployed. The Defendant was careful to avoid any binding ruling that would compel the payment of survivor's pensions to all class members.⁶⁹

131. When *MOBA* was introduced, the expansion of the survivor's pension to same sex couples was explained by the Justice Minister as necessary to comply with the *Charter*, *Miron* and *M. v. H.* As was noted in *Miron*,⁷⁰ this is the best evidence that the exclusion is discriminatory. The fact that Parliament enacted a new law that reinforced the old discriminatory exclusion brings to mind the Court's comments in *Sauvé*⁷¹ that a finding of unconstitutional discrimination is not an invitation for Parliament to try harder come up with a new discriminatory law.

132. There are two possible approaches to the application of section 15(1) to sections 60(2) and 72(1). One is to find that the sections 60(2) do apply to limit the quantum of survivor's pension claims. This would necessarily be coupled with a finding that the conduct of the Defendant was discriminatory, and that the delay in filing was

⁶⁹ See *supra* discussion regarding individual settlements.

⁷⁰ *Miron v. Trudel*, [1995] 2 S.C.R. 418 at p. 483, 499-500 (hereinafter "*Miron*").

⁷¹ *Sauvé v. Canada (Chief Electoral Officer)* (2002), 218 D.L.R. (4th) 577 at p. 609-610 (S.C.C.).

attributable to the Defendant's systemic unconstitutional conduct. As a result, the Plaintiffs are entitled to damages equal to the value of the pensions that they are barred from receiving.

133. The other approach is to find that the discriminatory conduct results in a finding that section 60(2) and 72(1) are otherwise valid provisions having an adverse and discriminatory effect if applied to these class members. Assuming that there is no section 1 justification, this will lead to the granting of a constitutional exemption for these class members from these provisions without affecting the general validity of these provisions.

134. From the perspective of a reasonable person in the Plaintiffs' circumstances, it is clear that the law excludes them from the survivor's pension not because of merit or need, but because of their sexual orientation.

Section 1

135. The Court of Appeal in *Halpern* set out with elegant simplicity the section 1 test developed from *Oakes* as follows:⁷²

“The party seeking to uphold the impugned law has the burden of showing on a balance of probabilities that:

- (1) The objective of the law is pressing and substantial; and
- (2) The means chosen to achieve the objective are reasonable and demonstrably justifiable in a free and democratic society. This requires:
 - (A) the rights violation to be rationally connected to the objective of the law;
 - (B) the impugned law to minimally impair the *Charter* guarantee; and

⁷² *Halpern*, at p. 563 (Ont. C.A.).

- (C) proportionality between the effect of the law and its objective so that the attainment of the objective is not outweighed by the abridgement of the right.”

Pressing and Substantial Objective

136. The first step is to identify the objective of the omission in the context of the goal or functional value of the legislation. The CPP is a fundamental social insurance scheme to provide working Canadians and their families with financial security in case of disability, retirement or death. The goal or functional value of the survivor’s pension was identified by the Supreme Court of Canada in *Law*, namely to provide long-term financial security for older Canadians who lose a spouse to enable them to meet their basic needs.⁷³

137. The next step is to examine the exclusion in the context of the purpose of the law. The Supreme Court in *Vriend* pointed out that it is the exclusion that must be the focus, not the purpose of the law.⁷⁴ Or, as stated by the Court of Appeal in *Halpern*, in a case where a group is excluded, it is the “pressing and substantial objective of the omission” that must be demonstrated.⁷⁵ That is, the question is not whether having a survivor’s pension is a pressing and substantial objective of the CPP, but whether **excluding** same sex survivors whose partners died before January 1, 1998 is a pressing and substantial objective for purpose of the CPP survivor’s pension.

138. The exclusion has an effect which is the antithesis of the purpose of the provision, for it causes financial insecurity for older gays and lesbian Canadians who lose their spouses and impairs their ability to meet their basic needs.

⁷³ *Law*, at p. 557-558.

⁷⁴ *Vriend*, at p. 554-555.

⁷⁵ *Halpern*, at p. 565.

139. There is no pressing and substantial objective for this underinclusion, and that is sufficient to move on to remedy. However, as is usual, we will outline the other aspects of the section 1 analysis on which the defendant is also doomed to fail.

Proportionality analysis

140. There are three aspects to this analysis.

(i) Rational Connection

141. Under this branch of the test, the Defendant must demonstrate that the rights violation is rationally connected to the objective of the law.

142. There is a subjective-objective test. It must be seen from the position of a reasonable person who is a member of the vulnerable group. The question to be asked is whether a well-informed and reasonable person who is gay or lesbian would agree that the exclusion of same sex couples whose partners died before January 1, 1998 helps to meet the objective of assisting older Canadians whose spouses have died achieve long-term financial security in order to have the dignity and freedom of meeting their basic financial needs.⁷⁶

143. It is important to note that there is no assertion that there are insufficient funds to meet the needs for survivor's pensions of other Canadians if these class members receive their survivor's pensions. The case law is clear that where the cost savings associated with maintaining the exclusion are insignificant or trivial, there can be no section 1 justification.⁷⁷

⁷⁶ *Law v. Minister of Employment and Immigration*, [1999] 1 S.C.R. 497 at p. 553 (hereinafter "*Law*").

⁷⁷ *Eldridge v. B.C. (A.G.)*, [1997] 3 S.C.R. 624 at p. 686-687 (hereinafter "*Eldridge*") and *Kane v. Ontario (Attorney General)* (1997), 152 D.L.R. (4th) 738 at p. 746 (Ont. Gen. Div.) (hereinafter "*Kane*").

144. In this case, there is no cost to the Defendant at all, because it is a mere trustee of the fund. The fact that there is no cost burden to this defendant is determinative of the matter. However, even the burden to contributors is insignificant.

145. On the face of it, this distinction is purely arbitrary. There can be no rational connection between excluding same sex survivors and the purposes of the CPP, as amply demonstrated by the fact that they are now included. If there was a rational basis for including them after January 1, 1998, there can be no rational basis for arbitrarily excluding them prior to that date. Far from helping to achieve the goals of the legislation, this exclusion seems to undermine the goals of the legislation.

(ii) Minimal Impairment

146. Under this branch of the analysis, the Court considers whether Parliament carefully tailored the law so as to minimally impact on the rights of the aggrieved party. Razor sharp precision is not required, however the Defendant must show that the impairment of rights was necessary in order to achieve the objective of the law.⁷⁸

147. It would be appropriate at this stage of the analysis to address the discredited legal doctrine of “incrementalism.” This argument would suggest that since the survivor’s pension has been modified over the years to reflect changing social values, Parliament should be given leeway in deciding to grant limited retroactivity to the legal recognition of same sex couples. This argument was advanced and rejected in *Vriend*.⁷⁹ As was noted by Justice Abella in *Rosenberg*, any belief that *Egan* stood for the proposition that governments could take an incremental approach to the recognition of

⁷⁸ *R. v. Oakes*, [1986] 1 S.C.R. 103 at p. 138-139 (hereinafter “*Oakes*”).

⁷⁹ *Vriend*, at p. 561.

same sex couples was swept aside in the *Vriend* ruling, which ruling attracted the unanimous support of the Court on this point.⁸⁰

148. In this case as in *Vriend*, there was no impact on government budgets and evidence that government had clearly dragged its feet on a problem of discrimination against gays and lesbians that had been repeatedly brought to its attention. Justice Iacobucci in his reasons in *Vriend* expressly rejected the notion of granting the legislatures leeway in deciding when to respond. Justice Iacobucci wrote this for the Court:

“In my opinion, groups that have historically been the target of discrimination cannot be expected to wait patiently for the protection of their human dignity and equal rights while governments move toward reform one step at a time. If the infringement of the rights and freedoms of these groups is permitted to persist while governments fail to pursue equality diligently, then the guarantees of the Charter will be reduced to little more than empty words.”⁸¹

149. At this stage of the analysis, legislative deference can play a role, but only where Parliament is balancing competing interests. However, there are no competing interests here.

150. The nature of the interest affected is fundamental. The group affected is vulnerable.

151. It is possible to readily isolate the challenged provisions from the complex scheme of the CPP without disrupting the overall scheme.

⁸⁰ *Rosenberg*, at p. 586-587.

⁸¹ *Vriend*, at p. 559-560.

152. There can be no minimal impairment in this case. There will be no evidence to demonstrate why Parliament could not as easily have picked April 17, 1985 for the effective date.

153. In the Plaintiff's submission, this aspect of the test is the subject of binding authority on this Honourable Court. In *Halpern*, this same Defendant pleaded that *MOBA* had extended virtually all of the benefits available to heterosexual couples and that this satisfied the test of minimal impairment. This argument was rejected by the Court of Appeal, and so with respect, must be rejected by this Honourable Court as well.⁸²

154. The Court of Appeal in *Halpern* noted that the obligation was to provide **equal benefits**, not almost equal benefits. The Court went on to note that the case did not involve balancing competing interests because in that case, allowing same sex couples to marry would not diminish the ability of opposite sex couples to marry.⁸³ Similarly, in this case, extending the entitlement to survivor's pensions to our class members will not deprive any heterosexuals of their survivor's pensions.

155. Our class members have been completely excluded from this minimal pension, part of a fundamental social insurance scheme that is a cornerstone of Canada's social safety net. As the Court of Appeal noted succinctly in *Halpern*, "complete exclusion cannot constitute minimal impairment."⁸⁴

⁸² *Halpern*, at p. 552.

⁸³ *Halpern*, at p. 568.

⁸⁴ *Halpern*, at p. 568.

(iii) Proportionality between Discriminatory Effect and object of the law

156. Under this aspect of the analysis, the Court considers whether the Defendant has demonstrated that the deleterious effects of the discrimination are outweighed by the benefit of the exclusion.

157. There can be no benefit to the CPP from this exclusion at all. There are obviously some savings to the CPP by not paying our client's pensions. However, there is no significant financial benefit to the CPP as is demonstrated by the Chief Actuary's Report.⁸⁵ The savings are trivial relative to the size of the fund, as the Defendant has quite rightly admitted. The negative impact on the unpaid survivors is self-evident, but the Court will have the benefit of hearing from some of those survivors directly on the point.

158. Section 44(1.1) deals with the fundamental issue of entitlement. The other sections impugned by the Plaintiffs do not deal with entitlement, but the quantum of entitlement.

159. The *Charter* analysis with respect to section 72(2) which starts the payment of same sex survivor's pensions in August of 2000 is subject to the identical analysis as section 44(1.1). Only same sex couples have their arrears limited to July 2000. All heterosexuals are entitled to have their survivor's pensions start one month following the date of death of the contributor. In fact, the discrimination in this case is even more egregious. At least some same sex couples gain survivor's pensions under *MOBA*. However, all same sex couples are subject to this same discriminatory cut off date.

⁸⁵ "Canada Pension Plan. Cost Estimates in Respect of the Same-sex Common-Law Partners Class Proceedings." Report of Jean-Claude Ménard, The Chief Actuary, July 2003, served in this action.

160. The *Charter* analysis for sections 60(2) and 72(1) is slightly different. This is a provision of general application that limits arrears to one date from the date prior to the date the person applied. However, a law that is otherwise valid can be applied in an unconstitutional manner. The purpose of this law is clearly to encourage people to apply promptly and to protect the solvency of the plan from claims that are stale. In this case, there is as previously noted no concern about the impact on solvency, no legally significant financial impact. As to encouraging persons to file promptly, the evidence will be that the Government from 1985 until now has been discouraging people from applying. They have been told that they had no rights, and when they have pressed the matter further they have been fought tooth and nail by the Defendant.

161. The Plaintiffs will deal with the question of remedy after discussing the other causes of action pleaded.

Breach of Fiduciary Duty

162. With respect to fiduciary duty, the hallmark of the cause of action is the relationship between the plaintiff and the defendant and the vulnerability of the Plaintiffs to the Defendant. In *Guerin*, Dickson J. said as follows:

“...where by statute, agreement, or perhaps by unilateral undertaking, one party has an obligation to act for the benefit of another, and that obligation carries with it a discretionary power, the party thus empowered becomes a fiduciary.”⁸⁶

163. At p. 384, Mr. Justice Dickson adopted the following from an article by Weinrib, “*The Fiduciary Obligation*”:⁸⁷

⁸⁶ *Guerin v. The Queen*, [1984] 2 S.C.R. 335 at p. 384 (hereinafter “*Guerin*”).

⁸⁷ 25 UTLJ 1 (1975) at p. 7.

“The hallmark of a fiduciary relation is that the relative legal positions are such that one party is at the mercy of the other’s discretion’. Earlier, at p. 4, he puts the point the following way:

[Where there is a fiduciary obligation] there is a relation in which the principal’s interests can be affected by, and are therefore dependent on, the manner in which the fiduciary uses the discretion which has been delegated to him. The fiduciary obligation is the law’s blunt tool for the control of this discretion.”

164. Subsequent cases have adopted the three indicia described by Madam Justice Wilson, in her dissenting opinion in *Frame v. Smith*⁸⁸ as follows:

“Relationships in which a fiduciary obligation have been imposed seem to possess three general characteristics:

- i. The fiduciary has scope for the exercise of some discretion or power.
- ii. The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests;
- iii. The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.”

165. The factual basis for the claim that there is a fiduciary relationship is straightforward and not seriously in dispute. The evidence will show that:

- (a) contributions to the CPP are compulsory;
- (b) the federal government has the exclusive power to legislate in respect of CPP and to administer the CPP;
- (c) although in theory the federal government could only administer the CPP in a way which was consistent with the legislation in created, in practice it

⁸⁸ *Frame v. Smith*, [1987] 2 S.C.R. 99 at p. 136.

had discretion to manoeuvre around that legislation by consenting to judgments ordering them to administer the CPP in a way which was not consistent with the legislation;

- (d) contributors to the CPP have no ability to influence the way in which benefits are paid out and are therefore vulnerable to the federal government, which has a duty to legislate and administer in a way which is fair and respects their Charter rights; and
- (e) gay and lesbian contributors to the CPP are particularly vulnerable because the historical discrimination they have faced in Canadian society, and, again historically, rely heavily on their Charter rights to obtain fair treatment.

166. Indeed, in *Authorson*,⁸⁹ after arguing unsuccessfully at trial and in the Court of Appeal that it owed no fiduciary duty to the beneficiaries of veterans pensions, and maintaining that the situations in which a fiduciary duty is imposed on the Crown are limited to native land claims situations, the defendant conceded at the Supreme Court of Canada that it did owe a fiduciary duty to the beneficiaries of veterans' pensions.

167. There can be no doubt that the government owes a duty to legislate in a way which is consistent with the *Charter*. That is the whole point of the *Charter*. Canadians had a right to expect that governments, as they promised to do, would act to correct laws within the three year suspension of the coming into force of s.15. In the case of gay and lesbian rights, the federal government has chosen instead to wait until the

⁸⁹ *Authorson v. Canada*, [2003] S.C.J. No. 40, *Authorson v. Canada* (2002), 58 O.R. (3d) 417 (C.A.), overturned on other grounds.

courts force them to correct their discriminatory behaviour towards gays and lesbians. While that may be politically expedient, it is not in accordance with the duty owed to the class members.

168. With respect to the breach of fiduciary duty, the evidence will show that the Defendant failed, from April 1985 to date, to take any steps to make the class members eligible for survivor's benefits, and continued to exclude them because of their sexual orientation. Moreover, the evidence will show that no consideration was given to bringing a reference to the courts on the issue if there was indeed any doubt as to the unconstitutionality of the CPP restrictions on paying survivors benefits to same sex spouses.

169. As the well-known *Leonard Trust*⁹⁰ case makes clear, it is no excuse for a trustee to enforce a discriminatory trust based on its express terms. Once the trustee has reason to believe there may be doubt about the legal validity of discriminatory provisions, at the very least, it must seek the guidance of the Courts so as to avoid discriminating unlawfully against the beneficiaries of the trust.

170. Moreover, the evidence as described above the defendant's general practice to not advise class members of a possible *Charter* challenge of the denial of survivors pensions (except in a few isolated cases where the claimant was already at the reconsideration stage) or of the secret "settlement strategy" described above and the "back door" to a survivor's pension was clearly the behaviour of a powerful player taking advantage of unsophisticated and vulnerable supplicants.

⁹⁰ *Canada Trust Co. v. Ontario (Human Rights Commission)* (1990), 74 O.R. (2d) 481 (C.A).

171. The Defendant will say that it had no choice, that it had no discretion, that it had to exclude our class members because that is what the statute required.

172. There are two simple answers to that. First, there can be no duty to obey an unconstitutional law. An illegal law is no law at all. In fact, there is a duty for a government to obey the constitution as the supreme law of the land. There is a positive duty to disregard an unconstitutional law because otherwise an agent of the state will be acting in an unlawful and unconstitutional manner.

173. Second, the fact that there was believed to be discretion, and that there was in fact discretion, is demonstrated by the so-called “settlement strategy.”⁹¹ The Defendant paid pensions to persons who would otherwise be class members despite the new express exclusion contained in s.44(1.1) (at that time part of *MOBA*) because they believed the restriction to be unconstitutional.⁹² They came up with their own rationale for limits, limiting them to people who had filed appeals prior to the introduction of Bill C-23. That limitation was contained in neither the old statute nor the new statute. Paying pensions to some, but not all, claimants who were discriminated against by the restriction was a clear violation of their fiduciary duty to our class members. The fact that they may have been motivated by a desire to help some victims of discrimination does not change the fact that it is a breach of duty.

174. The damages which flow from breach of fiduciary duty are first and foremost the foregone survivor’s pensions from the month following the dates of death of the class members’ common law partners to the present, with interest. The Plaintiffs

⁹¹ See *supra* discussion regarding “settlement strategy.”

⁹² Examinations for Discoveries, Drummond, June 25, 2003, question 745.

have alternative claims for a constructive trust over their contributions, described more fully below.

Unjust Enrichment

175. In the simplest of terms, this claims addresses the patently unfair situation by which the government collects contributions from all working Canadians the same way regardless of their sexual orientation, and uses those contributions to fund a plan which discriminates on the basis of sexual orientation when it comes time to pay the benefits. The government does not discriminate in the collection of premiums, but does in the payment out of benefits.

176. Unjust enrichment is determined by reference to three requirements stated by Dickson J. in *Pettkus v. Becker*,⁹³ as follows:

1. The defendant has been enriched;
2. The plaintiff has suffered a corresponding deprivation; and
3. There is no juristic reason for the enrichment.

177. The class members say that the collection of CPP contributions from contributors in circumstances where the Crown pays a benefit to the opposite sex married spouses or common law partners of contributors (from whom the same remittances have been collected at the same rate) but not to same sex common law partners of contributors, constitutes an enrichment. It is the withholding of the survivor's pensions which constitutes the enrichment.

178. The corresponding deprivation is the fact that the same sex common law partners are deprived of a survivor's pension, one of the primary purposes of the CPP.

⁹³ [1980] 2 S.C.R. 834 at p. 848 (hereinafter "*Pettkus*").

The fact that the contributions are collected in part to fund a future survivor's pension in favour of the spouse of a contributor is sufficient to constitute "corresponding deprivation" for the purpose of unjust enrichment. The withholding of the pensions and the deprivation of the pensions in the hands of the survivors are two sides of the same coin: *Peter v. Beblow*.⁹⁴

Remedies

(a) Charter remedies

179. There are two remedial powers granted in the *Constitution Act, 1982*, section 24 and section 52.

180. Generally speaking, section 24 deals with individual remedies while section 52 deals with declarations of invalidity.

181. As the Court of Appeal noted in *Halpern, Shachter v. Canada*⁹⁵ "remains the seminal authority regarding constitutional remedies."

182. There is a three-part analysis. The first step is to define the extent of the impugned law's inconsistency with the *Charter*. The second step is to select the remedy that best corrects the inconsistency. Finally, the Court should consider whether to suspend the remedy.

183. In our submission, the limitation contained in section 44(1.1) and section 72(2), which expressly exclude or limit the entitlement to survivor's pensions to same sex survivors only are unconstitutional in their entirety and should be struck down. This will

⁹⁴ *Peter v. Beblow* [1993] 1 S.C.R. 980 at p. 1012, following Dickson C.J. in *Sorochan v. Sorochan*, [1986] 2 S.C.R. 38 at p. 45.

⁹⁵ *Shachter v. Canada* [1992] 2 S.C.R. 679.

remove the limits that are expressly based on sexual orientation to both entitlement and quantum of entitlement for our clients. In theory, they will be entitled to prospective pensions and to arrears to one month following the death of the contributor, just like opposite sex married couples. The Plaintiffs seek an order under section 24 to this effect.

184. The question is less simple with respect to sections 60(2) and 72(1) of the Act. These are provisions of general application, which ordinarily limit the payments of arrears to one year prior to the date of the application. The evidence will make it clear that the defendant consistently and repeatedly told our class members that they had no right to apply for these pensions. They almost never told them that they had a possible constitutional claim, and in the rare cases when they provided that information, it was only after a request for reconsideration. Even after the Defendant had concluded that the exclusion was unconstitutional, our class members continued to be told they had no right to this pension.

185. The evidence will make clear that a number of clients were aware of this and did not bother to apply, sometimes without so much as a call to the offices of the CPP administration.

186. Those who did apply faced a potentially lengthy, costly, stressful and public battle with a well-resourced opponent. A fortunate few received settlements.

187. In these circumstances, the Court should not allow the Defendant to enforce section 60(2) or section 72(1) against our class members. In this case, the unconstitutionality does not lie in the statutory provision itself but only to its application to our clients. The section should not be struck down.

188. For the purposes of the *Charter*, we say that the Court has the authority under section 24 or section 52 to direct that the section while not otherwise constitutional would be unconstitutional if applied to these class members. This is known as the remedy of “constitutional exemption.” It is rarely granted. Similarly, it is exceptional to grant both a section 52 and section 24 remedy simultaneously. However, this factual matrix cries out for its application to avoid injustice.

189. A further alternative is available to the Court. If the Court finds that it is inappropriate to apply the remedy of constitutional exemption, then it is clear that the discriminatory conduct of the defendant resulted in our clients failing to file their applications in a timely manner. In these circumstances, it would be appropriate to award pensions subject to the limits on arrears contained in sections 60(2) and 72 (1), and then to award damages for *Charter* breach equal to the amount of the arrears barred by section 60(2) or 72(1).

190. In addition, it is our submission that the ordinary rules that apply to money judgments should apply to this ruling, and that our class members should be entitled to interest on the arrears of pension.

191. Finally, we say that there should be compensation for the indignities that our class members have suffered that are not adequately compensated by the payment of the pensions plus interest. While damages for discrimination are normally modest, they are available as confirmed by the British Columbia Court of Appeal decision in *Auton*.⁹⁶

⁹⁶ *Auton (Guardian at litem of) v. British Columbia (Attorney General)* (2001), 197 D.L.R. (4th) 165 (B.C.S.C.), aff’d (2002) 220 D.L.R (4th) 411 (B.C.C.A.).

We believe that an appropriate figure for general damages for each class member is \$20,000.

192. This is not a case of “retroactive” application of the *Charter*. In *Miron*, the Court “read up” a 1980 statute to include common law heterosexual couples such as Mr. Miron and Ms. Valliere. The ruling was made in 1995, the discrimination being cured had occurred in 1987. Similarly, in *Haig* and in *Vriend*, the plaintiffs were entitled to file human rights complaints in respect of acts of discrimination that had occurred years prior to the rulings. In *Halpern*, same sex marriages that had taken place two and a half years prior to the ruling were given legal recognition. These are cases of retrospective application of the *Charter*. Since section 15(1) of the *Charter* came into effect on April 17, 1985, it would only be correct to speak of retroactive application of the *Charter* for claims pre-dating April 17, 1985. There are no such claims in this case.

193. The foregoing remedies are precise and do not unduly interfere with Parliament’s role. There is no budgetary impact. The remedies are consistent with the thrust of the *CPP Act*. The only interference with the legislative scheme is to rectify the discriminatory aspects, with no negative impact on other groups. As the Court did in *Vriend*, the Court should ask itself what the expected approach would be of Parliament if it knew that the law was unconstitutional. Given that Parliament had already decided on the need to include same sex couples and to have some retrospective application of the law, it cannot be doubted that Parliament would have simply chosen April 17, 1985, rather than eliminate the survivor’s pension for everyone. To suggest otherwise, to use the language of Justice Krever in *Haig*, “*would be a gratuitous insult to Parliament.*”⁹⁷

⁹⁷ *Haig*, at p. 508.

194. There is no need to suspend the remedy in this case. There is no other legislation and no other interests that will be impacted by this ruling. There are no constitutionally valid alternatives for Parliament to consider.

(b) Equitable remedies

195. A wider range of remedies is available for breach of fiduciary duty than for a breach of the *Charter*. The Court should restrain the Defendant on equitable grounds from enforcing section 60(2) and 72(1) against our class members.

196. Damages for breach of fiduciary duty and unjust enrichment are appropriately measured by the arrears of pensions the class members could have claimed had they not unconstitutionally been deprived of survivors' pensions – ie: the monetary value of pensions from the month of the date of death of the contributors to the present and the continuation of pensions henceforth.

197. In the alternative to monetary damages, the Plaintiffs seek a constructive trust or equitable lien as a remedy. In this regard, it should be noted that at certification, the defendant took the position that these remedies were unnecessary because it could and would pay a monetary judgment. If the defendant takes the same position at this trial, and concedes that if Charter breach, breach of fiduciary duty or unjust enrichment is found, the appropriate remedy is compensatory damages measured as described above, it will not be necessary for the court to consider a constructive trust or equitable lien.

198. At any rate, on the strength of the Defendant's assertion that it can and will pay a monetary judgment, the Plaintiffs are prepared to abandon their claim for an equitable lien.

Constructive Trust

199. Breach of fiduciary duty or unjust enrichment can give rise to a constructive trust in circumstances where compensatory damages are inadequate or inappropriate due to the nature of the breach fiduciary duty or unjust enrichment. In this case, the Plaintiffs take the position that compensatory damages are adequate but out of an abundance of caution and in the alternative, seek a constructive trust over the value of the contributions made by their deceased common law partners, plus interest. The relief sought by the Plaintiffs does not extend beyond the value of their entitlement to survivor's pensions, past and future, including interest on the past payments.

200. The purpose of a constructive trust is to prevent a wrongdoer from retaining property which they should not "in good conscience" retain. It does not require actual loss or damages to be suffered.⁹⁸

201. In this case, regardless of the outcome on the other issues, there is no doubt that good conscience requires that the government should not be entitled to retain, in the CPP coffers, the contributions made by the deceased contributors, and the investment returns earned by those contributions, in circumstances where the defendant refuses to pay out survivors pensions, one of the primary benefits of the CPP, because of the sexual orientation of the contributors and the class members. This is especially true when the court considers the evidence which will be led as to the arbitrary "settlement strategy" the government engaged in which put the disadvantaged class members at a further disadvantage.

⁹⁸ *Soulos v. Korkontzilas* [1997] 2 SCR 217 at p. 228, 240. (hereinafter "*Soulos*").

202. The Plaintiffs assert that this case is appropriate for the imposition of either of the two general categories of constructive trust as described in *Soulos* at para. 36. An institutional constructive trust is an appropriate remedy if the court finds that the defendant breached its fiduciary duty to the class members, to ensure that the provisions and administration of the CPP do not discriminate against them contrary to the *Charter*. A remedial constructive trust is appropriate if the court finds there has been unjust enrichment and that it would be unfair to permit the Defendant to retain the value of the contributions made by the contributors and interest earned on those contributions.

203. The conditions necessary to award a institutional constructive trust are:⁹⁹

- (a) the defendant must have been under an equitable obligation;
- (b) the assets in the hands of the defendant must be shown to have resulted from deemed or actual agency activities of the defendant;
- (c) the plaintiff must show a legitimate reason for seeking a proprietary remedy;
- (d) there must be no factors which would render the imposition of a constructive trust unfair.

204. The requirement to show that the defendant was under an equitable obligation is subsumed in breach of fiduciary duty. The evidence will show that the CPP has historically been viewed as a social insurance scheme with a deferred savings component, particularly insofar as survivor's benefits are concerned. Accordingly, the defendant is the agent who collects remittances, invests them and administers the

⁹⁹ *Soulos*, at p. 241.

payment of benefits to the working residents of Canada and their families. The legitimate reason for seeking a proprietary remedy will essentially fall out of the disposition of the claim for damages – if the court does not award damages for past survivors pensions not paid and order future pensions to be paid, the Plaintiffs should have recourse to the contributions made. Finally, there are no factors which would render the imposition of a constructive trust unjust in the absence of monetary judgment for past pension losses.

205. With respect to the remedial constructive trust, it will follow if the conditions for unjust enrichment are made out: *Pettkus v. Becker, supra*.

Costs

206. In respect of the constitutional claim and equitable claims, the Plaintiffs are entitled if successful to costs. Pursuant to the consent order that granted certification, the Plaintiffs are not liable to a cost order if unsuccessful.

207. In the event the Plaintiffs prevail, it will be appropriate to defer any consideration of costs to allow for further submissions by the parties.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

R. Douglas Elliott

Patricia A. LeFebour

Sharon Matthews

Gabrielle Pop-Lazic
of counsel for the Plaintiffs

September 5, 2003

GEORGE HISLOP et al.

Plaintiffs

- and -

THE ATTORNEY GENERAL OF CANADA

Defendant

Court file No. 01-CV-221056CP

**ONTARIO
SUPERIOR COURT OF JUSTICE**

Proceeding commenced at Toronto

A Proceeding under the
Class Proceedings Act, 1992

**OPENING ARGUMENT
OF THE PLAINTIFFS**

McGOWAN ELLIOTT & KIM LLP

Barristers & Solicitors

10 Bay Street

Suite 1400

Toronto, ON M5J 2R8

R. Douglas Elliott (23685L)
Patricia A. LeFebour (35964D)
Gabrielle Pop-Lazic (42921N)

Tel: 416-362-1989

Fax: 416-362-6204

Solicitors for the plaintiffs