

**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 CANAD A

Defendant

A Proceeding under the Class Proceedings Act, 1992

REPLY

1. The Plaintiffs admit the allegations in paragraphs 9 (first sentence only), 10, 12, 13, 14, 15, 18 (insofar as the amendments to the CPP were part of a legislative programme), 21, 27 and 28 (only insofar as the plaintiffs do not purport to sue in their capacity as the personal representatives of the contributors) of the Statement of Defence.
2. The Plaintiffs deny the allegations in paragraphs 9 (second sentence), 16, 18, 19, 20, 22, 23, 24, 25, 26, 28, 29, 30, 31, 32, 33, 34, and 35 of the Statement of Defence.
3. The Plaintiffs have no knowledge of the allegations in paragraph 17 of the Statement of Defence.
4. In reply to the allegations in paragraph 16 of the Statement of Defence, the Plaintiffs state that one purpose of the CPP is to provide a basic minimum employment income replacement.
5. In reply to the allegations in paragraph 18 of the Statement of Defence, the Plaintiffs state that the Modernization of Benefits and Obligations Act (“MOBA”) was intended, in part, to serve as belat

ed compliance with s.15 (1) of the Charter. One intent of MOBA was to comply with the Crown's legal obligations arising out of the Supreme Court of Canada rulings in *Miron v. Trudel* and *M. v. H.*.

6. At the time of MOBA's enactment, the Crown was facing legal action by a lesbian and gay organization seeking to compel comprehensive legislative changes to all federal laws, including the CPP. MOBA was enacted to avoid such litigation, in part.

7. An additional purpose of MOBA was to continue discriminating against same sex couples and gay men and lesbians by limiting or extinguishing their rights, including rights which had been recognized in Charter litigation to the date of MOBA. The Crown was attempting, through MOBA, to limit its legal liability and to preserve the legally superior status of heterosexual couples while extending some rights to lesbians and gay men.

8. The Plaintiffs state that the express purpose of the impugned provisions of the CPP is to discriminate against same sex couples by attempting to extinguish or limit rights granted to them by the Supreme Court of Canada in recent decisions. The purpose of the impugned provisions of the CPP is to avoid or limit the Crown's legal liability to many same sex couples while extending benefits to some. In short, MOBA offered partial equality to the lesbian and gay communities as a solution to the demands of s. 15(1). However, with respect to these class members, MOBA simply reinforced continued inequality.

9. The Plaintiffs acknowledge that there has been an evolution of societal views on sexual orientation. However, the Charter has not changed since 1982. The Courts' interpretation of the Charter has evolved, and the jurisprudence increasingly has favoured the rights of gay men and lesbians. Notwithstanding this process, since 1982, the predominant view of Canadian courts has always been that sexual orientation is an analogous ground under s. 15 of the Charter. This interpretation was finally confirmed in 1995 by the Supreme Court of Canada in *Egan v. Canada*.

10. Contrary to the allegations in paragraph 19 of the Statement of Defence, the Supreme Court of Canada's decision in *Egan v. Canada* determined only two issues conclusively for all purposes of Canadian law:

- a. that sexual orientation is an analogous ground under s. 15 of the Charter; and,
- b. that discrimination against same sex couples on the basis of sexual orientation is prima facie an infringement of s. 15(1) of the Charter.

11. In *Egan*, the Supreme Court's conclusion on s.1 was divided. Subsequent Court rulings, notably in *Rosenberg v. Canada*, acknowledged the confusion over the analytical fulcrum in s. 1 arising out of the multiple rulings in *Egan*. Since *Egan*, the correct s. 1 approach has been clarified by the Supreme Court of Canada. Far from being an approval of discriminatory federal laws for all purposes, *Egan* merely denied the plaintiffs' claims in the context of that case, which differs significantly from this case.

12. In reply to the allegations in paragraph 31 of the Statement of Defence, the Plaintiffs state that this Honourable Court has the authority to grant a remedy under both s.24 and s.52 of the Charter in an appropriate case. The Plaintiffs assert that the circumstances of this case meet the test for granting relief under both sections of the Charter.

13. In reply to the allegations in paragraph 32 of the Statement of Defence, the Plaintiffs state that they are not seeking retroactive application of the Charter. Section 15(1) of the Charter was in effect as of April 17, 1985. The discriminatory statutory exclusions from the CPP which the Plaintiffs challenge existed in 1985 and continue to exist. The extant provisions of the CPP which are the subject of this lawsuit are the latest successors of a series of discriminatory exclusionary provisions under the CPP.

14. The Plaintiffs state that there has been an ongoing pattern of discrimination by the Defendant, ~~which the Defendant~~ has failed to correct by appropriate remedial legislation. Since the Crown clearly apprehended, no later than the time of the introduction of MOBA, that the exclusion of same sex couples from equal benefit of the law was unconstitutional, the Crown was under a duty to correct the impugned provisions of the CPP to the Charter's effective date of April 17, 1985. The Crown not only failed to remedy the discrimination against this class, it reinforced the discrimination.

15. In reply to the allegation in paragraph 35 of the Statement of Defence, the Plaintiffs state that the Crown should not rely on nor should the Court permit the Crown to rely on any limitation periods to bar or limit the claims of any class members. Furthermore, the Plaintiffs deny that the doctrine of laches has any application in the circumstances of this case insofar as:

- a. the doctrine of laches can only be considered in the context of the Plaintiffs' claims for equitable relief and cannot be a bar to the Plaintiffs' claims for relief under the Charter;
- b. the Plaintiffs have not acquiesced to the Defendant's conduct. Any failure on the Plaintiffs to assert their rights to a CPP survivor's pension arose from their reliance upon the CPP legislation promulgated

by the Defendant, which denied that such rights existed and from the express advice of the Defendant to the Plaintiffs that they had no such rights;

c. to the extent that the class members were aware that their exclusion from this benefit was unlawful, it would be inequitable to apply the doctrine of laches against their failing to launch a complex, lengthy, costly, and, in all likelihood, very public legal challenge to the Crown's action; and,

d. the Defendant did not alter its position due to reliance on any failure of the Plaintiffs to act on their rights. Indeed, the Defendant, on its own initiative, has taken measures to correct the discrimination that existed in the status quo by recognizing the rights of some same sex surviving partners to a survivor's pension under the amendments to the CPP.

Date: 18 November 2002

McGOWAN ELLIOTT & KIM LLP

Barristers and Solicitors

1400-10 Bay Street

Toronto, Ontario

M5J 2R8

(416) 362-1989

(416) 362-6204 (fax)

R. Douglas Elliott (23685L)

Patricia A. LeFebour (35964D)

Gabrielle Pop-Lazic (42921N)

Solicitors for the Plaintiffs

TO: Attorney General of Canada
Department of Justice
EMB - Room 2341
284 Wellington Street
Ottawa, Ontario
K1A 0H8

Paul Vickery
Senior General Counsel
(613) 957-4801
(613) 952-8713 (fax)

