

**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*

FRESH AS AMENDED ST ATEMENT OF CLAIM

TO THE CROWN:

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the plaintiff. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a statement of defence in form 18A prescribed by the Rules of Civil Procedure, serve it on the plaintiffs' lawyer or, where the plaintiff does not have a lawyer, serve it on the plaintiff, and file it, with proof of service, in this court office, **WITHIN TWENTY DAYS** after this statement is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of

America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a statement of defence, you may serve and file a notice of intent to defend in Form 18B prescribed by the Rules of Civil Procedure. This will entitle you to ten more days within which to serve and file your statement of defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

IF YOU PAY THE PLAINTIFF'S CLAIM, and \$3,000.00 for costs, within the time for serving and filing the statement of defence, you may move to have this proceeding dismissed by the court. If you believe the amount claimed for costs is excessive, you may pay the plaintiff's claim and \$100.00 for costs and have the costs assessed by the court.

Date: _____ Issued by _____
Local Registrar

Address of
Court Office:

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

(613) 957-4801
(613) 952-8713 (fax)

CLAIM

1. The Plaintiffs, claim on their own behalf and on behalf of the members of the class of persons described in paragraph 8 of this claim:

a. damages for breach of fiduciary duty equivalent to the past survivors' pension payments owing from the respective dates of death of the Contributors who died within the class period to the date of judgment or to the respective dates of death of the class members who are their Same Sex Common Law Partners, whichever is earlier, in the sum of \$400,000,000.00;

b. a monetary judgment for unjust enrichment equivalent to the past survivors' pension payments owing from the respective dates of death of the Contributors who died within the class period to the date of judgment or to the respective dates of death of the class members who are their Same Sex Common Law Partners, whichever is earlier, in the amount of \$400,000,000.00;

c. a declaration that the remittances made by Contributors who died within the class period and their employers and held by the defendant are held pursuant to an institutional constructive trust and a remedial constructive trust in favour of the class members;

d. a declaration that the funds held by the defendant in the Canada Pension Plan ("CPP") are subject to an equitable lien in favour of the class members equal to the remittances paid by the Contributors and the survivors' pensions payable from the respective dates of death of the Contributors who died within the class period;

e. a declaration that s.44(1.1) and s.72(2) of the Canada Pension Plan, R.S.C. 1985, c.C-8 (the "Act") offend section 15(1) of the 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 ("Charter"), which breach is not demonstrably justified under section 1 of the Charter;

f. damages pursuant to s. 24 of the Charter equivalent to the past survivors' pension payments owing from the respective dates of death of the Contributors who died within the class period to the date of judgment or to the respective dates of death of the class mem-

bers who are their Same Sex Common Law Partners, whichever is earlier, in the amount of \$400,000,000.00;

g. a declaration pursuant to section 24 of the Charter that the class members are entitled to receive arrears of Survivor's Pensions to the dates of judgment and ongoing survivors' pension payments pursuant to the Act, and a further declaration that s.72(1) and s.60(2) of the Act have no application to limit the amount of the arrears of Survivor's Pensions to which class members are entitled;

h. an Order pursuant to section 52(1) of the Charter that section 44(1.1) and section 72(2) of the Act, which precludes the class members from receiving Survivor's Pensions are of no force and effect;

i. in the alternative to the declaration sought in g. above regarding the application of s.60(2) of the Act to the class members, a declaration that the imposition of such limitations in s.60(2) of the Act are unconstitutional and inequitable such that they should not be imposed;

j. a declaration the sections 44(1.1) and 72(2) of the Act are ultra vires the Crown because they unilaterally amend the effective date of s.15 which is inconsistent with s.32(2) of the Charter and its amendment provisions;

k. pre-judgment and post-judgment interest pursuant to the Courts of Justice Act, R.S.O. 1990, c. C.43, s.128;

l. costs of this action on a solicitor-and-client basis; and,

m. such further and other relief as this Honourable Court deems just.

DEFINITIONS

2. The Plaintiffs will use the following definitions in this pleading for consistency:

a. "AIDS" refers to Acquired Immune Deficiency Syndrome;

b. "Bill C-23" refers to the Modernization of Benefits and Obligations Act, S.C. 2000, c. 12;

- c. "Contributor" refers to a person who contributed to the CPP within the meaning of the CPP and who, prior to his or her death, was in a same sex common law relationship as defined in the CPP, and who died between April 17, 1985 and January 1, 1998;
- d. "Crown" refers to Her Majesty the Queen in right of Canada, represented by the defendant, the Attorney General of Canada;
- e. "Canada Customs and Revenue Agency" ("CCRA") refers to the agency of the Crown which collects contributions made to the CPP;
- f. "HIV" refers to the Human Immunodeficiency Virus;
- g. "Human Resources Development Canada" ("HRDC") refers to the ministry of the Crown which administers the CPP;
- h. "Same Sex Common Law Partner" refers to a person of the same sex as a Contributor, who cohabited with a Contributor in a conjugal relationship for a continuous period of at least one year prior to the Contributor's death and includes the estates of same sex common law partners who died subsequent to their Contributor partners;
- i. "Survivor" refers to the same sex common law partner of a Contributor;
- j. "Survivor's Pension" refers to the CPP pension provided to a Survivor of a Contributor.

SUMMARY OF ACTION

3. Effective July 31, 2000, the Act was amended to allow Survivor's Pensions to be paid to Same Sex Common Law Partners of deceased Contributors to the CPP, as long as the deceased Contributors died on or after January 1, 1998. No such arbitrary cut off date applies to persons who are in opposite sex relationships.

4. The Plaintiffs bring this action on their own behalf and on behalf of all Same Sex Common Law Partners or their estates, who are not eligible for CPP Survivor's Pensions based on this arbitrary cut off date. The said arbitrary cut off date discriminates against

the Plaintiffs on the basis of their sexual orientation.

THE PARTIES

5. The Plaintiffs bring this claim on their own behalf and on behalf of Same Sex Common Law Partners or their estates.

6. The Crown, through the CCRA and HRDC, is responsible for the administration of the CPP and the legislation governing it.

CLASS PERIOD AND CLASS MEMBERS

7. The class period in this action is April 17, 1985 to January 1, 1998.

8. The class members are all Same Sex Common Law Partners of Contributors to the CPP or their estates.

9. The class members comprise a vulnerable societal group for the following reasons:

- a. the stigmatization of gays and lesbians in Canadian society;
- b. many gays and lesbians fear public exposure resulting from litigation;
- c. the same sex common law partners of many of the gay class members died of AIDS; and
- d. some of the gay class members are living with HIV or AIDS.

GEORGE HISLOP

10. George Hislop ("George") met Ron Shearer ("Ron") in Toronto in 1958. They fell in love and became a couple. 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.

11. Ron worked hard all his life and was a Contributor to the CPP.

12. In 1986, Ron entered hospital for heart surgery. The operation was not successful, and Ron died of heart failure during the surgery, on April 15, 1986.

13. In 1986, following Ron's death, George inquired about a CPP Survivor's Pension.

The Crown's representative advised George that he did not qualify because he and Ron were of the same sex. In reliance on that advice, George did not make a formal application for a Survivor's Pension at that time. If George and Ron had been a heterosexual couple, George would have qualified for a CPP Survivor's Pension, would have applied for, and received a CPP Survivor's Pension.

14. After hearing about federal legislation which extended benefits to same sex couples, George formally applied for a Survivor's Pension in February 2001. A representative of the Crown advised him that he did not qualify for a Survivor's Pension because he and Ron were of the same sex and Ron died before January 1, 1998. But for Ron's date of death and the fact that Ron and George were Same Sex Common Law Partners, George would have been entitled to a Survivor's Pension.

BRENT E. DAUM

15. Brent E. Daum ("Brent") cohabited with James Ernest Stevenson ("James") from August 28, 1991 until James' death on October 25, 1993 in Saskatoon, Saskatchewan. Brent and James considered themselves to be a couple and held a commitment ceremony on June 5, 1993. James contributed to the CPP throughout his years in the labour force.

16. Following James' death, Brent filed a claim for CPP a Survivor's Pension in or about December 1993. In the spring of 1994, Brent's application was refused on the basis that he and James were of the same sex and that therefore, Brent was not entitled to a CPP Survivor's Pension. But for James' date of death and the fact that James and Brent were Same Sex Common Law Partners, Brent would have been entitled to a Survivor's Pension.

ALBERT McNUTT

17. Albert McNutt ("Albert") of Nova Scotia cohabited in a same sex relationship with Gary Pask ("Gary") 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.

18. Gary was a Contributor to the CPP.

19. 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 and that, therefore, Albert was not entitled to receive a CPP Survivor's Pension. But for Gary's date of death and the fact that Gary and Albert were Same Sex Common Law Partners, Albert would have been entitled to a Survivor's Pension.

ERIC BROGAARD

20. For over 22 years, Eric Brogaard lived with Orville Germak 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.

21. Orville Germak was a Contributor to the CPP over his entire working life. Eric Brogaard meets the definition of a common law partner within the meaning of the Act and is a Same Sex Common Law Partner.

22. On September 27, 1993 Orville Germak died of complications related to AIDS. Subsequent to his death, Eric Brogaard made an application to the CPP for a Survivor's Pension which application was denied because Orville's date of death was prior to January 1, 1998.

23. But for Orville Germak's date of death and the fact that Orville Germak and Eric Brogaard were Same Sex Common Law Partners, Eric Brogaard would have been entitled to a Survivor's Pension.

GAIL MEREDITH

24. For over 15 years, Gail Meredith lived with Judy Paterson 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 Judy died in 1992.

25. Judy Paterson was a Contributor to the CPP over her entire working life. Gail Meredith meets the definition of a common law partner within the meaning of the Act and is a Same Sex Common Law Partner.

26. On July 14, 1992 Judy Paterson died of a condition characterized by rapid progression of dementia. Subsequent to her death, Gail Meredith made an application to the CPP for a Survivor's Pension which application was denied because Judy Paterson's date of death was prior to January 1, 1998.

27. But for Judy Paterson's date of death and the fact that Judy Paterson and Gail Meredith were Same Sex Common Law Partners, Gail Meredith would have been entitled to a Survivor's Pension.

CANADA PENSION PLAN

28. The CPP was established by an act of Parliament in 1965 and came into force on January 1, 1966.

29. The CPP is a compulsory pension plan, which is financed by employer and employee contributions, and by investment income earned by the contributed funds. Every working Canadian who is over 18 and earns more than a defined minimum yearly income must contribute to the CPP. Employee contributions are automatically deducted from wages and are matched by employers.

30. The purpose of the CPP is to provide a reasonable minimum income replacement to eligible Canadians upon retirement or disability and to provide their families with death and survivor benefits.

31. The Crown, through the CCRA and HRDC, collects, holds, invests and distributes the remittances to the CPP.

32. In 1986, a specific definition of "spouse" was included in the CPP for the first time. This definition included a person married to another person or a person of the opposite sex who was cohabiting with the Contributor in a conjugal relationship for at least one year prior to the Contributor's death. This definition provided for payments to opposite

sex common law spouses of deceased Contributors to the CPP.

33. In 2000, as a result of the passage of Bill C-23 the term "spouse" was repealed and the term "common law partner" was created to include a "person who is cohabiting with the Contributor in a conjugal relationship" at the time of death of the Contributor, "having so cohabited with the Contributor for a continuous period of at least one year". This new category expressly included people in same sex relationships for the first time in the history of the CPP.

34. Bill C-23 also altered the definition of "survivor" to include people in same sex relationships.

35. However, these amendments to include people in same sex relationships were coupled with a limitation (found in s.44(1.1) of the Act) that eligibility for a Survivor's Pension only arises if the Contributor died on or after January 1, 1998. This limitation is applicable only to Same Sex Common Law Partners and not to persons in opposite sex relationships.

36. In addition s.72(2) of the Act precludes payment of the Survivor's Pension for any period prior to the coming into force of the amendments. This limitation is applicable only to Same Sex Common Law Partners and not to persons in opposite sex relationships.

37. At all relevant times the Crown was aware that the denial of Survivor's Pensions to same sex partners, including the imposition of the arbitrary cut off dates, which apply only to same sex common law partners and Contributors, was unconstitutional. In administering the CPP, the policy of the Crown was to refuse to pay a survivor's pension to the class members and to maintain this policy through the several levels of review and appeal, despite its unconstitutionality. However, in cases where Same Sex Common Law Partners take the initiative, with the attendant stresses and strains of litigation including potential publicity, to dispute and appeal the denial to pay a Survivor's Pension, the Crown had a routine practice of negotiating settlements on an arbitrary basis without admitting discrimination or proposing legislative amendments.

38. The Crown's actions outlined above are calculated to discourage the class members from pursuing claims for a Survivor's Pension and were implemented and effective against the class members because of their vulnerability as pleaded above.

CLAIMS AGAINST THE CROWN

Breach of Fiduciary Duty

39. The Crown has exclusive authority over the CPP and is in a position of power in relation to the Contributors and the class members with respect to the CPP. It had the power to cause the creation of CPP legislation without the consent of the Contributors and the class members and it had and has the power to unilaterally and periodically initiate amendments to the CPP through legislation which affected the class members' legal interest without the consent of the Contributors and the class members. The contributions of the Contributors and their employers to the CPP are held by the Crown and the Crown has the sole authority to administer the CPP through CCRA and HRDC. The Contributors and the class members have no authority or role in the administration of the CPP.

40. The class members are particularly vulnerable to and are at the mercy of the Crown who holds and exercises unilateral and arbitrary power over them with respect to the contributions of the Contributors and the payment of a Survivor's Pension.

41. The Crown is in a fiduciary relationship in relations to the Contributors and the class members and has fiduciary duties to the class members including:

- a. to provide a Survivor's Pension from the contributions collected from the Contributors and their employers to the Same Sex Common Law Partners of the Contributors who died during the class period;
- b. to administer the CPP in a non-arbitrary and non-discriminatory fashion which is consistent with the Charter including not discriminating on the basis of sexual orientation;
- c. in the event of an issue that the restrictions in the provisions governing the administration of the CPP are unconstitutional, discriminatory or otherwise invalid, to promptly seek the advice and direction of the Court; and,
- d. to initiate legislation with respect to the CPP which is consistent with the Charter including not discriminating on the basis of sexual orientation.

42. The Crown breached and continues to breach its fiduciary duties to the class members.

43. As a result of the Crown's breaches of fiduciary duty, the class members have suffered and continue to suffer damage, loss and expense in the amount of Survivor's Pensions payable from the dates of the Contributors' deaths to the dates of death of their Same Sex Common Law Partners. The class members state that the remittances paid by the Contributors and their employers and the survivors' pensions payable from the respective dates of death of the Contributors who died within the class period should be impressed with an institutional constructive trust in favour of the class members.

Unjust Enrichment

44. The Crown has collected CPP remittances from the Contributors who died during the class period and their employers for the purpose of funding CPP benefits, including Survivor's Pensions.

45. By collecting remittances from the Contributors who died within the class period and their employers and refusing to pay survivors' pensions to the survivors, the Crown has been enriched and the class members have suffered a corresponding detriment.

46. There is no juristic reason for the Crown's enrichment and the detriment to the class members. In particular, there is no juristic reason for the January 1, 1998 cut-off date. The Crown has excluded the class members from receiving a Survivor's Pension on the basis of an arbitrary date.

47. As a result of the Crown's unjust enrichment:

a. The remittances paid by the Contributors and their employers and the Survivor's Pensions payable from the respective dates of death of the Contributors who died within the class period are held by the Crown in a remedial constructive trust in favour of the class members; or,

b. The funds held by the Crown in the CPP are subject to an equitable lien in favour of the class members equal to the remittances paid by the Contributors and their employers

and the Survivor's Pensions payable from the respective dates of death of the Contributors who died within the class period; or,

c. The class members are entitled to a money judgment in the amount of Survivor's Pensions payable from the respective dates of death of the Contributors who died within the class period.

Breach of Equality Rights Under s. 15(1) of the Charter

48. Section 44(1.1) and section 72(2) of the CPP discriminate against the class members on the basis of their sexual orientation in breach of section 15(1) of the Charter and are not saved by section 1 of the Charter and are, therefore of no force and effect and should be struck.

49. As a result of the breaches of s.15 (1) of the Charter the class members have suffered and continue to suffer loss, damage and expense in the amount of Survivor's Pensions payable from the date of the Contributors deaths to the dates of death of the class members.

50. To the extent that sections 60(2), 72(1) and 72(2) of the Act apply so as to limit the class members ability to collect a survivor's pension from the date of death of their Same Sex Common Law Partners, the application of these provisions to the class members has an unconstitutional effect, and in conjunction with s. 44(1.1) of the Act, breach the class members' s.15(1) equality rights under the Charter. As a result, the class members have suffered and continue to suffer loss, damage and expense in the amount of the Survivor's Pensions payable from the date of the Contributors' deaths.

51. In the alternative, if the application of any of sections 60(2), 72(1) and 72(2) of the Act to bar or limit the claims of class members is constitutional, it would be inequitable to deny or limit class members Survivors' benefits under any of these sections. At all material times to this action, the defendant was routinely denying such applications and misleading or misinforming class members. The Defendant should not now be permitted to benefit by its misconduct by asserting that any such claims are out of time or that there should be limitations on arrears that would be otherwise payable, given that it dis-

couraged the filing of claims by class members at the relevant time.

Ultra Vires

52. Under section 32(2) of the Charter, s.15 of the Charter did not come into effect until April 17, 1985. By enacting s. 44(1.1) and s. 72(2) of the Act, the Crown has established a different effective date for s. 15(1) with respect to entitlement to a CPP Survivor's Pension. The plaintiffs state that the selection of an effective date other than April 17, 1985 is ultra vires the Crown.

RELIEF

53. The losses, damages and expenses of the class members include:

- a. a loss equal to the arrears of Survivor's Pensions under the CPP and interest thereon, plus ongoing payments of Survivor's Pensions which continue to be denied;
- b. the denial of their equality rights pursuant to section 15(1) of the Charter;
- c. damages for breach of fiduciary duty and breach of constructive trust; and,
- d. solicitor and client costs, given the oppressive conduct of the Crown.

The Plaintiffs propose that this action be tried at Toronto.

Date: 31 October 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)