

SUPERIOR COURT OF JUSTICE

BETWEEN:

**GEROGE HISLOP, BRENT E. DAUM, ALBERT MCNUTT,
ERIC BROGAARD AND GAIL MEREDITH**

Plaintiff

and

THE ATTORNEY GENERAL OF CANADA

Defendant

A Proceeding under the Class Proceedings Act, 1992

STATEMENT OF DEFENCE

1. The Defendant, Attorney General of Canada (the "Defendant") admits the allegations contained in paragraph 3 of the Fresh as Amended Statement of Claim ("claim") as to the fact of amendment; in paragraphs 4 and 5 as to the existence of this action; paragraph 18; the first two sentences of paragraph 32; the last sentence of paragraph 39; and paragraph 44 of the claim.
2. The Defendant admits paragraph 9 of the claim to the extent that the class members comprise a vulnerable societal group.
3. The Defendant admits the allegations in paragraphs 12, 15, 17, 20, 22, 24, and 26 as to the fact of death; the allegations in paragraphs 14, 19, 22, and 26 as to the

fact of application for a survivor's pension; and the allegations in paragraphs 19, 22 and 26 as to the fact of denial of a survivor's pension.

4. The Defendant admits allegations in paragraphs 11, 15, 21, and 25 to the extent that Mr. Shearer, Mr. Stevenson, Mr. Ormak and Ms. Paterson, respectively, contributed to the Canada Pension Plan.
5. The Defendant admits the allegations in paragraphs 33, 34 and 35 as to the existence of subsection 44(1.1) of the *Canada Pension Plan*, R.S.C. 1985, c. C-8, as amended (the "CPP").
6. The Defendant admits paragraph 2 of the claim subject to the qualifications that the "Crown" referred to in subparagraph 2(d) acts in an executive and administrative capacity with different functions and powers attributable to each capacity, and that "Survivor" referred to in subparagraph 2(i) of the claim does not accord with the definition of "survivor" as found in the CPP.
7. The Defendant denies the allegations in paragraphs 1, 28, 37, 38, 40, 41, 42, 43, 45, 46, 47, 48, 49, 50, 51, 52, and 53 of the claim and except to the extent previously admitted herein the allegations in paragraphs 2, 3, 4, 32 and 39 of the claim.
8. The Defendant has no knowledge as to the allegations set out in the remaining paragraphs of the claim, except to the extent previously admitted with respect to

parts of paragraphs 11, 12, 14, 15, 17, 19, 20, 21, 22, 24, 25, and 26 of the claim, and to the extent specifically addressed in paragraphs 10, 11, 13, 16, and 20 herein.

9. In response to paragraphs 8, 10, 13, 14, 16, 23, and 27 of the claim, the Defendant states that all applicants for a survivor's pension must meet the eligibility criteria set out in the CPP, including sufficient contributions to the CPP by the deceased contributor and the existence of a common-law relationship as defined under the CPP. The Defendant has no knowledge with respect to whether the representative plaintiffs fulfilled the eligibility criteria.
10. In response to paragraphs 6 and 31 of the claim, the Defendant states that the Crown is responsible for the administration of the CPP in consultation with the Provinces, and collects, holds, credits contributions to and makes payments out of the CPP Account. Subject to legislative provisions in regard to the Canada Pension Plan Investment Fund, the Crown may also invest in identified securities.
11. In response to paragraph 7 of the claim, the Defendant states that the plaintiffs have no entitlement to a survivor's pension pursuant to the CPP during the class period alleged in the claim.
12. In response to paragraph 28 of the claim, the Defendant states that the CPP came into force on May 5, 1965.

13. In response to paragraph 29 of the claim, the Defendant states that the CPP is a compulsory pension plan. It is financed by employer, employee, and self-employed contributions, and investment income from contributed funds.
14. Every person in Canada, unless exempted or employed in Quebec, who earns more than a defined yearly minimum and up to a defined yearly maximum income must contribute to the CPP.
15. Employee contributions are automatically deducted and are matched by employers.
16. In response to paragraph 30 of the claim, the Defendant states that the purpose of the CPP is to provide a basic minimum employment income replacement.
17. In response to paragraph 32 of the claim, the Defendant states the 1986 definition of "spouse" was intended to modernize and expand previously existing benefits under the CPP.
18. In response to paragraphs 33, 34, and 35 of the claim, the Defendant pleads that the relevant amendments to the CPP were made as an integral part of a legislative program of modernization of benefits and obligations, intended to recognize the evolution of the law and societal views with regard to the recognition of the interests of same-sex common-law couples, following a line of decisions in the Courts which established an authoritative body of jurisprudence in the area.

19. The Defendant pleads that as a result of the decision of the Supreme Court of Canada in *Egan v. Canada*, released May 25, 1995, it was authoritatively determined for all purposes of Canadian law that to that date, federal pension legislation which failed to recognize same-sex couples was constitutional.
20. The Defendant denies the allegations in paragraphs 35 and 36 of the claim that eligibility of opposite-sex common-law partners for survivor's pensions was not limited by a reference to a specific date, and pleads that on each occasion on which eligibility for survivor's pension was expanded by legislation to include additional persons, such eligibility was made subject to entitlement arising on or after a specified date, i.e., on a prospective basis.
21. The Defendant denies that any fiduciary relationship exists at law between the Parliament of Canada and any specific class of potential recipients of benefits, such as the plaintiffs. The Defendant pleads that in exercising its discretion to legislate so as to extend or deny benefits to any particular group, the Parliament of Canada is not subject to any fiduciary duty at law.
22. The Defendant denies that, in its executive function, the Crown is or can be subject to any fiduciary or other duty requiring that it initiate or introduce amendments to legislation in the Parliament of Canada.
23. The Defendant further denies that as administrator of the legislative scheme established by the CPP, the Crown is in any fiduciary relationship with the plaintiffs,

and pleads that, in any event, as administrator, the Crown is wholly constrained by the legislative scheme set out in the CPP and has no discretion capable of resulting in the extension of benefits to the plaintiffs.

24. The Defendant therefore pleads that no institutional constructive trust is capable of arising in favour of the plaintiffs.
25. In the alternative, the Defendant denies that it has in fact breached any fiduciary duty alleged to exist.
26. The Defendant denies that the plaintiffs have suffered any detriment at law as a result of the payment of contributions by the contributors, as defined in paragraph 2(c) of the claim and by their employers.
27. The Defendant pleads that the applicable provisions of the CPP provide a juristic reason for its receipt of contributions from the contributors and from their employers.
28. The Defendant further pleads that there can be no entitlement at law in the plaintiffs to recover contributions paid by the contributors and their employers, if any, or to receive benefits not countenanced under the CPP, as a result of any alleged unjust enrichment of the Defendant, in that the plaintiffs are neither the contributors nor do they purport to sue in their capacity as the personal representatives of the contributors.

29. The Defendant denies, in any event, that it has been unjustly enriched as a result of its receipt of such contributions or the non-payment of survivor's pensions to the plaintiffs.
30. The Defendant therefore pleads that no remedial constructive trust is capable of existing in favour of the plaintiffs, nor can any equitable lien arise in their favour.
31. The Defendant pleads that it is not open to the plaintiffs, at law, to both seek a remedy by way of damages under section 24 of the *Canadian Charter of Rights and Freedoms* (the "Charter"), and a declaration that the allegedly offending provisions of the CPP are of no force and effect and should be struck pursuant to subsection 52(1) of the *Constitution Act, 1982*. If there has been an infringement of the rights guaranteed by section 15 of the *Charter*, which is denied, the remedy lies in section 52 of the *Constitution Act, 1982*, and there is no basis for awarding a remedy under section 24 of the *Charter*.
32. The Defendant denies that it is *ultra vires* the Crown to select an effective date for a benefit program that differs from the date upon which section 15 of the *Charter* came into force. The Defendant pleads that the *Charter* may not be applied retroactively or retrospectively and that, to give effect to the claims of the plaintiffs would require such an application.

33. The Defendant denies that the provisions of subsections 44(1.1), 60(2), 72(1) and 72(2) of the CPP have an unconstitutional effect or are in breach of subsection 15(1) of the *Charter* and pleads that, in any event, to the extent that such provisions are held to be in breach, they are saved by section 1 of the *Charter* as being reasonable limits demonstrably justifiable thereunder.
34. In response to the allegations in paragraph 51 of the claim, the Defendant states that the CPP was properly administered in accordance with the law at all relevant times, and there is no inequity in applying limitations imposed by constitutionally valid legislation.
35. In any event, the plaintiffs' claim is barred by the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50, s. 32, the *Limitation Act*, R.S.B.C. 1996, c. 266, s. 3, *Canada Pension Plan*, R.S.C. 1985, c. C-8, ss. 44(1.1), 60(2), 72(1) and 72(2), the *Limitations Act*, R.S.O. 1990, c. L.15, any other applicable limitation period, and the doctrine of laches.
36. Whereof the Defendant asks that this action be dismissed.

Dated: November 8, 2002

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Plaintiff

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Defendant

(Short title of proceeding)

SUPERIOR COURT OF JUSTICE

Proceeding Commenced at
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STATEMENT OF DEFENCE

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