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DATE: 2003/12/19

2003 CanLII 37481 (ON SC)

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	
GEORGE HISLOP, BRENT E. DAUM, ALBERT MCNUTT, ERIC BROGAARD AND GAIL MEREDITH	Douglas Elliott, Patricia LeFebour, Gabrielle Pop-Lazic, Sharon Matthews, Dawna J. Ring, Q.C., William A. Selnes, and J.J. Camp, Q.C, for the Plaintiffs
Plaintiffs	
- and -	
THE ATTORNEY GENERAL OF CANADA	Barney Brucker, Paul Vickery, Deborah McAllister, Cynthia Koller and Monika Lozinska, for the Defendant
Defendant	
	HEARD: September 8, 2003 to October 2, 2003.

A Proceeding under the Class Proceedings Act, *1992*, S.O. 1992, c.6

Ellen Macdonald J.

REASONS FOR JUDGMENT

These reasons are organized under the following headings:

I. Introduction and Overview (paras 1-13)

II. Some Reflections on the *Charter* (paras 14-20)

III. The Relevant Provisions of the *Charter* (para 20)

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I. Introduction and Overview

[1] In the introductory paragraphs in *Halpern v. Canada (Attorney General)* (2003) 65 O.R. (3d) 161 ("*Halpern*"), the Ontario Court of Appeal stated:

> [7] Sexual orientation is an analogous ground that comes under the umbrella of protection in s. 15(1) of the *Charter*: see *Egan v. Canada*, [1995] 2 S.C.R. 513, and *M. v. H.*, [1999] 2 S.C.R. 3. As explained by Cory J. in *M. v. H.* at 52-53:
>
> In *Egan* ... this Court unanimously affirmed that sexual orientation is an analogous ground to those enumerated in s. 15(1). Sexual orientation is "a deeply personal characteristic that is either unchangeable or changeable only at unacceptable personal costs" (para. 5). In addition, a majority of this Court explicitly recognized that gays, lesbians and bisexuals, "whether as individuals or couples, form an identifiable minority who have suffered and continue to suffer serious social, political and economic disadvantage" (para. 175, per Cory J.; see also para. 89, per L'Heureux-Dubé J.).

> [8] Historically, same-sex equality litigation has focused on achieving equality in some of the most basic elements of civic life, such as bereavement leave, health care benefits, pensions benefits, spousal support, name changes and adoption.

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[2] These paragraphs resonate to the issues in this class action, which is another chapter in the history of same-sex equality litigation.[1] It will be apparent in these reasons that *Halpern* has influenced me greatly. It has enabled me to shorten my reasons, particularly on the legal analysis of s. 15 and s. 1 of the *Charter*. In this case, the challenged laws are sections 44(1.1), 60(1) and 72(1) of the *Canada Pension Plan*, R.S.C 1985, c. C-8 ("*CPP*"), as amended on July 31, 2000 by the *Modernization of Benefits and Obligations Act*, S.C. 2000, c. 12 ("*MOBA*").[2] The *CPP* is a universal social insurance plan that has provided survivors' benefits to bereaved Canadians since 1966. Since its inception, the *CPP* has been amended from time to time, the most recent of which is *MOBA*. The *MOBA* amendments entitled same sex survivors to *CPP* benefits provided that their deceased partners died after January 1, 1998. These benefits commenced on August 1, 2000. Despite these statutory limitations, some same sex survivors did receive survivors' pensions, including retroactive payments, as a result of a settlement strategy that will be described later in these reasons. The class members are persons whose partners died between April 17, 1985 and January 1, 1998.[3] They have been denied *CPP* benefits on the basis that their partners were not of the opposite sex. Only persons whose partners died after the s. 15(1) effective date of April 17, 1985 are included in the class.

[3] Mr. Elliott characterized this case as significant but simple. He said it is significant because it is one of the rare class actions to be tried, and the first involving a claim based on s. 15(1) of the *Charter*. *MOBA* amended 68 federal statutes, including the *CPP*. It is common ground that *MOBA* was enacted in response to the Supreme Court of Canada's decision in *M. v. H.* released on May 20, 1999. The court suspended the remedy in that case for six months, because it recognized that many statutes would have to be amended to bring them into compliance with the results in *M. v. H.* The *MOBA* amendment to the *CPP* expressly provided for entitlement to survivors' pensions for same sex survivors. However, the amendments limited those claims by stipulating that pensions would not become payable to those whose partners died prior to January 1, 1998. No such restrictions apply to heterosexual couples.

[4] The issues in this case are whether the class members have been unlawfully excluded from the survivors' pension, and if so, whether they should be entitled to pensions from one month after the date of their partners' deaths. Not all members of the class made a formal

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[1] Throughout these reasons, "Crown" refers to Her Majesty the Queen in right of Canada, represented by the Crown, the Attorney General of Canada. "Human Resources Development Canada" ("HRDC") refers to the ministry of the Crown that administers the *CPP*.

[2] *MOBA* is Bill C-23. Throughout these reasons, *MOBA* and Bill C-23 refer to the same legislation

[3] Although the *Charter* received royal assent in 1982, the coming into force of s. 15(1) was suspended for three years, so that governments could review their legislation to bring it into compliance with s. 15(1). Following the expiry of the three year period ending April 17, 1985, the *CPP* was not amended to extend survivors' benefits to same sex partners until *MOBA* was proclaimed in force on June 29, 2000. These amendments contained the cut-off date, the existence of which is the subject of this litigation.

application for survivors' benefits. Some did not do so after being informed, in response to their telephone inquiries to the administrators of the *CPP*, that they would not be eligible for the benefit because their partners were not of the opposite sex.

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[5] Mr. Elliott described the case as simple on the following basis. If the denial of survivors' pensions was unlawful discrimination on January 1, 1998, it was unlawful discrimination on December 31, 1997, and earlier. The class members say that the unlawful discrimination began on April 17, 1985 and that it continues to this day. They further say that there is no legal justification for the January 1, 1998 cut-off date. It is purely arbitrary and constitutionally indefensible. The date only applies to same sex survivors. The class members assert that it cannot be dressed up to be anything other than discrimination based on sexual orientation. This discrimination is a breach of s. 15(1) of the *Charter* and cannot be saved under s. 1.

[6] Aside from the *Charter*, the plaintiffs base their claims on the allegation that the Crown is in a fiduciary relationship with them. The theory is that the fiduciary relationship required the Crown and HRDC to treat the class members in an even handed and fair manner, with candour and in accordance with the *Charter*. The class members say that they were treated arbitrarily and deceitfully. They say that the Crown should have doubted the legality of the exclusion of same sex couples after April 17, 1985. The record demonstrates, that at least in some quarters, senior administrators charged with the responsibility of payment of survivors' benefits recognized that the exclusion was unconstitutional. Decisions were made to implement a settlement strategy to pay some survivors who would not take no for an answer when they made their initial inquiries about entitlement. These survivors had the temerity to invoke and endure lengthy appeal processes that will be detailed further in these reasons. Mr. Elliott referred to these individuals as the "squeaky wheels". The class members allege unjust enrichment by the Crown because it declined to pay the class members on the basis of the *CPP* that was known to be discriminatory because sexual orientation was an analogous ground under s. 15. While their deceased gay and lesbian partners were lawfully charged a *CPP* premium, their survivors were unjustly denied a benefit. While a statute can constitute a juristic reason for the deprivation, an unconstitutional one cannot.[4]

[7] There is one other aspect of the plaintiffs' claim. This is the claim for $20,000 for symbolic damages for each class member. This request is made on the basis of *Auton (Guardian ad litem of) v. British Columbia (Attorney General)* (2002) 220 D.L.R. (4th) 411, affirming (2001), 197 D.L.R. (4th) 165 (B.C.S.C.). The application for leave to appeal *Auton* was filed in the Supreme Court of Canada on May 15, 2003. It has not yet been heard. *Auton* was not a class action. This distinction, in and of itself, is not a bar to the plaintiffs' claim. The award of symbolic damages to the four adult petitioners in *Auton* was to symbolize, "in some tangible fashion the fact that the petitioners have achieved a real victory on behalf of all autistic children whose rights have been infringed…. A symbolic award provides partial albeit minimal compensation to the petitioners and acknowledges the intransigence of government in

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

responding to long standing requests and demands for autism treatment" (see page 186 of the trial judgment of Allan J).

[8] The focus of the Crown's defence to the s. 15 claim rests on the assertion that the distinction created in the amended *CPP* is essentially temporal in nature and is not based on sexual orientation. Therefore it is submitted that it does not trigger the application of the *Charter* and is not discriminatory. The Crown says that the January 1, 1998 date is entirely justifiable because it mirrors the evolution of societal views on relationship issues, which the Crown says did not become the focus of judicial, legislative and social attention until the mid to late 1990s. The term "relationship issues" was used by the Crown in reference to questions regarding the legal obligations and benefits of partners in same sex relationships.

[9] The Crown asserts that when Bill C-23 (*MOBA)* was debated extensively before the Standing Committee of the House of Commons on Justice and Human Rights in February 2000, no one took the position that Bill C-23 was contrary to the *Charter*. The Crown also asserts that the lack of any protest regarding the limited retroactive entitlement under the Bill C-23 by any advocate of gay and lesbian rights in the proceedings before Parliament and the Senate is readily understandable, not in terms of any nefarious government intent or burying of the critical provision, but rather in the context of the progressive evolution of the acceptance of gay and lesbian rights in Canadian society and law, and the evolutionary nature of our *Charter* as interpreted by the courts.

[10] The Crown also defends the portions of the class members' claims seeking damages based on unjust enrichment and breach of fiduciary duty. The Crown relies on *Pettkus v. Becker*, [1980] 2 S.C.R. 834 and *Scott v. TD Waterhouse Investor Services (Canada) Inc.* (2001), 94 B.C.L.R. (3d) 320 (S.C.) in its defence of the class members' claims based on unjust enrichment.

[11] In summary, the Crown says that the challenged provisions of the *CPP* do not infringe s. 15(1). Therefore there can be no discrimination under s. 15(1). The Crown also asserts that the challenged legislation does not impose a burden or withhold a benefit from the class members in a way that reflects stereotypical assumptions about them. The challenged legislation simply establishes a date upon which the legislation comes into force. The choice of date was said to be not based on stereotypical attitudes about same sex couples.

[12] In the alternative, the Crown submits that if there is a s. 15(1) breach, the legislation is justified under s. 1 on the following basis. The *MOBA* amendments to the *CPP* were an integral part of the legislative program to modernize both benefits and obligations, designed to recognize the evolution of the law and societal views and same sex couples. The Crown says that the results in *Egan* justify the January 1, 1998 cut-off date. In *Egan*, sexual orientation was found to be an analogous ground under s. 15(1) of the *Charter*. In *Egan*, the exclusion of same sex partners from the old age security regime was found to be an infringement of s. 15(1). It is well known that the court held in a 5-4 majority that the exclusion was saved by s. 1. The Crown justifies the January 1, 1998 cut-off date because of the majority analysis of s. 1 in *Egan*. The Crown says that the exclusion of same sex survivors could not have been considered

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discrimination before 1998 because it was not until April 1998 that the judgments in *Rosenberg v. Canada (Attorney General)* (1998), 38 O.R. (3d) 577 (C.A.) and *Vriend v. Alberta,* [1998] 1 S.C.R. 493 cast any doubt upon the rationale underlying the s. 1 analysis in *Egan*.[5]

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[13] The Crown's defence to the s. 15 *Charter* claims goes further. It asserts that it was not until the late 1980s and early 1990s that lesbian and gay rights became a visible social and legal issue. Early gay activism focused on getting basic personal protection from discrimination. It was only in the mid to late 1990s that the focus turned to relationship issues. Societal views evolved and changed, and the law evolved in keeping with the times. After *M. v. H.*, the Crown says it acted on a timely basis and amended 68 statutes, including the *CPP*, in keeping with the evolution in societal views and the law.

II. Some Reflections on the *Charter*

[14] Before I set out the relevant provisions of the *Charter*, I choose to say something about its essence. The *Charter* has had a profound impact upon Canadian society. It reflects the vision of the majority of elected parliamentarians, senators and their leaders in the era of 1980 through to 1985. In a speech in the House of Commons on February 17, 1981, the Honourable Jean Chrétien, then Minister of Justice said the following in reference to the planned introduction of the *Charter*:

> We have the occasion… to build for our children and the children of our children a better Canada – a Canada which will recognize the diversity and equality which should be in our society, a Canada which will protect the weakest in society… a Canada which will be an example to the world.

[15] In 1986, The Honourable John Crosbie, then Minister of Justice and Attorney General, made the following statement about the Government of Canada's commitment to ensure that all federal laws were in compliance with the *Charter:*

> As Minister of Justice and Attorney General of Canada, I have a duty, together with the Ministers whose legislation is affected, to ensure that all federal laws meet the standards of the *Charter*…Equality is a fundamental goal in Canadian life. The Government of Canada is committed to eliminating any discrimination in its legislation and policies that could prevent Canadians from moving toward equality.[6]

[16] In the 21 years since the *Charter*, Canadian jurisprudence reflects the magnitude of the impact of the *Charter*. Although its language is simple and precise, the interpretation and application of the *Charter* has become the most significant and controversial aspect of the work

[5] *Vriend* was released on April 2, 1998. *Rosenberg* was released on April 23, 1998.
[6] Forward, Toward Equality: The Response to the Report of the Parliamentary Committee on Equality Rights (Supply and Services Canada: Ottawa, 1986).

of Canadian courts. As expressed by Johan Steyn, Lord of Appeal in Ordinary, in a speech in Ottawa, October 2, 2003:

> With the advent of the *Charter*, the Supreme Court became seized of some of the most difficult and delicate issues in Canadian society, upon which reasonable people held strong and divergent views... Canada moved from a system of parliamentary supremacy to constitutional democracy, where each Canadian was given individual rights which the government or legislature could not take away.[7]

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[17] A similar theme was expressed by the Honourable John Morden, reflecting on the impact of the *Charter*, in a sermon at the Whitfield Anglican Church on July 20, 2003:

> This was a revolutionary change in our legal and governmental system. Before 1982, the fundamental dogma was the absolute, unrestricted, power of Parliament and of the legislatures to enact any law they saw fit. This view was, of course, consistent with the nature of our democratic system. There should be no fetters on the power of our democratically elected representatives. Any other view would be anti-democratic.
>
> I should say that the *Charter* was *intended* in certain areas, to be anti-democratic, or more accurately, to be *anti-majoritarian*. The underlying theory was well expressed by Justice Robert Jackson of the Supreme Court of the United States in an opinion he gave in 1943: "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty and property, to free speech, a free press, freedom to worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections. *West Virginia Bd v. Barnette*, 319 U.S. 624 (1943).But the *Charter* is not a self-applying document. It has to be interpreted before it can be applied. This necessarily is the function of the courts. [emphasis in original]

[18] Judicial reasoning from all levels of courts in the post 1985 era demonstrates the courts' recognition of Parliament's expressed commitment to equality for *all Canadians*. The issues raised in this case are another illustration of the fundamental change in Canadian law and politics that has been brought about by the *Charter*. This point is well expressed by Robert J. Sharpe, Katherine E. Swinton and Kent Roach, in the introduction to *The Charter of Rights and Freedoms* 2nd ed. (Toronto: Irwin Law Inc., 2002) at page 1:

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[7] J. Steyn, "Dynamic Interpretation Amidst an Orgy of Statutes", (the Brian Dickson Memorial Lecture, Ottawa Ontario, October 2, 2003) [unpublished].

> Canadian courts now play a central role in deciding how the law should deal with such intractable issues as abortion, mandatory retirement, the legitimacy of laws restricting pornography, and hate propaganda, the definition of what may properly constitute a criminal offence and the treatment accorded minorities such as gays and lesbians. (citations omitted)

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[19] The above constitutes the backdrop for the issues put before this court by the class members. I will now set out the relevant provisions of the *Charter,* including its preamble, and relevant sections of the *CPP*.

[20] I mention the preamble to the *Charter* to highlight a point made by Dickson C.J in *B.C.G.E.U., Re*, [1988] 2 S.C.R. 214. It is that the rule of law is the very foundation of the *Charter*. While the rule of law stands independently of the *Charter*, it infuses the *Charter*. It has been described as an unwritten constitutional principle that reflects Canada's "commitment to an orderly and civil society in which all are bound by the enduring rules, principles and values of our Constitution as the supreme source of law and authority". See *Lalonde v. Ontario (Commission de restructuration des services de sante)* (2001), 56 O.R. (3d) 505 (C.A) at 547.

III. The Relevant Provisions of the *Charter*

CONSTITUTION ACT, 1982

SCHEDULE B
Constitution Act, 1982

PART 1
CANADIAN *CHARTER* OF RIGHTS AND FREEDOMS

Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law:

Guarantee of Rights and Freedoms

Rights and freedoms in Canada

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Equality Rights

Equality before and under law and equal protection and benefit of law

15. (1) Every individual is equal before and under the law and has the right to the 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.

Enforcement

Enforcement of guaranteed rights and freedoms

24. (1) Anyone whose rights or freedoms, as guaranteed by this *Charter*, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

Application of *Charter*

Application of *Charter*

32. (1)This *Charter* applies
a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and
b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

Exception

(2) Notwithstanding subsection (1), section 15 shall not have effect until three years after this section comes into force.

PART VII
GENERAL

Primacy of Constitution of Canada

52. (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

IV. The Challenged *CPP* Sections

[21] The provisions of the *Canada Pension Plan* that are being challenged in this action are as follows:

> 44. *(1.1) In the case of a common-law partner who was not, immediately before the coming into force of this subsection, a person described in subparagraph (*a*)(ii) of the definition "spouse" in subsection 2(1) as that definition read at that time, no survivor's pension shall be paid under paragraph (1)(*d*) unless the common-law partner became a survivor on or after January 1, 1998.
> *[Note: Subsection 44(1.1) in force July 31, 2000, *see* SI/2000-76.]

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60. (1) No benefit is payable to any person under this Act unless an application therefore has been made by him or on his behalf and payment of the benefit has been approved under this Act.
(2) Notwithstanding anything in this Act, but subject to subsections (2.1) and (2.2), an application for a benefit, other than a death benefit, that would have been payable in respect of a month to a deceased person who, prior to the person's death, would have been entitled on approval of an application to payment of that benefit under this Act may be approved in respect of that month only if it is made within 12 months after the death of that person by the estate, the representative or heir of that person or by any person that may be prescribed by regulation.

72. (1) Subject to subsection (2) and section 62, where payment of a survivor's pension is approved, the pension is payable for each month commencing with the month following
(*a*) the month in which the contributor died, in the case of a survivor who at the time of the death of the contributor had reached thirty-five years of age or was a survivor with dependent children,
(*b*) the month in which the survivor became a survivor who, not having reached sixty-five years of age, is disabled, in the case of a survivor other than a survivor described in paragraph (*a*), or
(*c*) the month in which the survivor reached sixty-five years of age, in the case of a survivor other than a survivor described in paragraph (*a*) or (*b*),
but in no case earlier than the twelfth month preceding the month following the month in which the application was received.
*(2) In the case of a survivor who was the contributor's common-law partner and was not, immediately before the coming into force of this subsection, a person described in subparagraph (*a*)(ii) of the definition "spouse" in subsection 2(1) as that definition read at that time, no survivor's pension may be paid for any month before the month in which this subsection comes into force.
*[Note: Subsection 72(2) in force July 31, 2000, *see* SI/2000-76.]

V. History of Proceedings

[22] This class action was first certified on July 31, 2002 in British Columbia by Madam Justice Allan, naming Eric Brogaard and Gail Meredith as representative plaintiffs. On December 6, 2002, Mr. Justice Cullity certified the class action in Ontario, naming George Hislop, Brent E. Daum, Albert McNutt, Eric Brogaard and Gail Meredith as representative plaintiffs. On July 3, 2003, Justice Allan issued a case management order decertifying and staying the action in British Columbia on the consent of the parties to certify a national class in the Ontario action.

[23] On July 10, 2002, Justice Cullity dismissed a motion by the Crown to strike certain parts of the statement of claim on the ground that they disclosed no reasonable cause of action. The motions to strike the claims were based on Rule 21.01(1)(b) and 25.06(1) of the *Rules of Civil*

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Procedure. The challenged claims were those based on breach of fiduciary duty; unjust enrichment, institutional and remedial constructive trusts and an equitable lien. See *Hislop v. Canada (Attorney General)* [2002] O.J. No. 2799. Mr. Elliott advised this court that the claims based on institutional and remedial constructive trusts and equitable liens were not being pursued. The result is that all of the remaining claims are before the court.

[24] The order of Justice Cullity certifying this action as a class proceeding sets out the common issues. These common issues together with this court's answers to them are set out under the heading Common Issues and Answers at paragraph 127 of these reasons.

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VI. <u>The Representative Plaintiffs</u>

[25] There are five representative plaintiffs. George Hislop is from Toronto, Ontario. Brent E. Daum is from Saskatoon Saskatchewan. Albert McNutt is from Truro Nova Scotia. Eric Brogaard and Gail Meredith are from Vancouver British Columbia. Their testimony about their life experiences as gay and lesbian people is an important part of the context that I must keep in mind in this *Charter* case. Discrimination and harassment was an integral part of their everyday lives. Their attempts to obtain survivors' benefits after their partners died were but one aspect of this discrimination.

George Hislop

[26] George Hislop ("Mr. Hislop") is 76 years old. He is a legend in Toronto because of his profile as a lifelong activist for the rights of gay people. He testified that he knew he was gay at the age of 10. In the 1940s, while working in clerical jobs and pursuing acting jobs, life as a gay person meant living a very secretive, "underground" life. He testified that it was popular to believe that gays and lesbians were mentally ill. Gay male sexual activity was a criminal offence until the late 1960s.

[27] Mr. Hislop met his partner Ron Shearer ("Mr. Shearer") in 1958. They moved in together in 1959, and lived in their first home until 1966. They then moved to their second home, where they resided together until Mr. Shearer's unexpected death in 1986. They shared their lives, cared for each other, and held themselves out to the world as a couple. They pooled their assets in a joint bank account. They recognized anniversaries, birthdays, and alternated Christmas celebrations with each other's family. They had mutual wills. They were both contributors to the *CPP*. They became known as Canada's most famous openly gay couple.

[28] I accept as true that they were deeply in love with each other. When Mr. Hislop testified in 1981 in Ottawa at committee hearings prior to the repatriation of the Constitution, he spoke of the right to love. After Mr. Shearer's death, Mr. Hislop was devastated. They were in a conjugal relationship for 27 years. Throughout their lives together, they relied primarily on Mr. Shearer's income for their living expenses. After Mr. Shearer's death, Mr. Hislop was initially unaware of the *CPP* provisions that provided for survivors' pensions. When he did learn of the *CPP*, he

made inquiries about his eligibility by telephone. I accept as true that he made this inquiry and was advised that it was not available to him because he and Mr. Shearer were of the same sex. Since Mr. Shearer's death, Mr. Hislop's financial circumstances are greatly compromised. He no longer travels, goes to the theatre, or socializes in restaurants. He described his life as "genteel poverty".

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[29] Mr. Hislop testified about some of their experiences with homophobia. Some examples were the Chief of Police referring to homosexuals as "incipient criminals", around the time of decriminalization. Mr. Hislop recalled the famous Stonewall riots in June of 1969, and a newspaper headline of the time, "The Sissies Fight Back". He testified that this event was a catalyst for a stronger, more organized gay and lesbian community.

[30] Mr. Hislop recalled that the AIDS epidemic had an overwhelming impact on the gay community. He stated that many gays and lesbians turned their energies towards the fight against AIDS and the resulting homophobia. There was rampant misinformation about AIDS at the time, as there was about homosexuality. AIDS was thought of as a "gay disease".

[31] Mr. Hislop's evidence was entirely believable. I found it remarkable that in spite of the many perverse experiences that he encountered over his life because of his sexual orientation, he was a positive and eloquent person who is justifiably proud of his contributions to equality rights for homosexual persons.

[32] In 2000, Mr. Hislop was advised by a friend to reapply for *CPP* survivors' benefits due to emerging developments in the law. He made a formal application in January 2001 and was denied.

Brent Daum

[33] Brent Daum ("Mr. Daum") testified via video link from the offices of SaskTel in Saskatoon, Saskatchewan, where he now resides. He is very ill as a result of AIDS. He was unable to travel to Toronto to testify. Mr. Daum is 43 years old. He, too, was aware that he was gay at a very young age. As a teenager, his high school classmates taunted him. He testified that he came out in grade 12. Because of the reaction in his hometown, Yorkton, Saskatchewan, he decided to move to Winnipeg after high school. He felt that it would be better if he could live in a city where he could meet more young gay men and be less subject to the harassment that he experienced in Yorkton.

[34] Like Mr. Hislop, he continues to witness homophobia. He testified of a recent incident. AIDS Saskatoon held a red tag day, and volunteers were subjected to comments suggesting that people with AIDS are "perverts" who get what they deserve.

[35] Mr. Daum is nevertheless active in his community as he was when he lived in Winnipeg. He was diagnosed as HIV positive in 1989, when he made an application for life insurance. He testified that in 1989, persons with an HIV positive diagnosis were ostracized. He met his partner James Stevenson ("Mr. Stevenson") in 1991. They were both attending a conference in Montreal

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on living with AIDS. They fell in love and lived together from August 28, 1991, until Mr. Stevenson's death on October 25, 1993 in Saskatoon. They had a commitment ceremony on June 5, 1993. They had a sexual relationship. They pooled their resources. They became a couple from the first day they met.

[36] Mr. Stevenson contributed to the *CPP* while he was employed. Following Mr. Stevenson's death, Mr. Daum filed a claim for a *CPP* death benefit.[8] It was paid to the government of Saskatchewan because Mr. Stevenson was on social assistance at the time of his death. Prior to his death, Mr. Stevenson applied for a *CPP* disability pension. Although initially rejected, his appeal was successful, and in December 1991 he started receiving disability benefits as a result of AIDS. Mr. Daum did not apply for a survivors' pension because he was told by telephone that he would not get the benefit because his partner was of the same sex. Like Mr. Hislop, he did not pursue the matter because he thought it would be futile to do so. He regarded this as yet another episode of the discrimination he had experienced all of his life.

[37] Mr. Daum testified that by Easter of 1993, Mr. Stevenson's health began to deteriorate rapidly. He died at home on October 25, 1993. After the appearance in a newspaper of Mr. Stevenson's obituary, referring to Mr. Daum as his partner, Mr. Daum received a phone call suggesting that he and Mr. Stevenson were perverts and were going to hell.

Albert McNutt

[38] Albert McNutt ("Mr. McNutt") is 53 years old, and now lives in Truro, Nova Scotia. He has two adult children with whom he has supportive and loving relationships. Other than the period from December 1988 to 1995, when he lived in Toronto, he has always lived in Truro. He described Truro as a small, conservative town deeply rooted in religion. Prior to 1988, there were no gay organizations in Truro. In 1995, Albert started the Truro AIDS Project, which has resulted in some changes in local attitudes toward AIDS.

[39] Mr. McNutt described the negative reactions he has suffered as a gay man. He has been assaulted, and has been spat on. He stated that he gets similar reactions to his HIV status. People do not want to be associated with him out of fear.

[40] In 1991, Mr. McNutt met Toronto teacher Gary Pask ("Mr. Pask") in 1991. They lived together in Toronto, exchanged vows and rings. Mr. McNutt described Mr. Pask as his partner, spouse and the love of his life. In August 1993, Mr. Pask died at home with Mr. McNutt at his bedside.

[41] Mr. McNutt was the beneficiary of Mr. Pask's life insurance and his pension as a result of his employment with the Toronto School Board. Mr. McNutt also applied for a *CPP* death benefit and received it. However, his application for the *CPP* survivors' pension was denied because Mr. Pask was a man. He testified that he was not surprised that he was being discriminated against, but that he hoped that he would get the survivors' pension.

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[8] The death benefit is a benefit from the *CPP* which is separate and apart from the survivors' benefit.

Eric Brogaard

[42] Eric Brogaard ("Mr. Brogaard") is 65. His partner Orville Germak ("Mr. Germak") was born on November 2, 1948. Mr. Brogaard and Orville met on December 24, 1970, and lived together for 22 years until Mr. Germak died of AIDS in September 1993.

[43] In 1987, Mr. Germak tested positive for HIV. As a result, he experienced mood swings, a loss in weight and appetite, and a loss of feeling in his legs. Mr. Brogaard took Mr. Germak to many of his medical appointments. When Mr. Germak eventually needed home care, Mr. Brogaard provided it by working reduced hours.

[44] In 1992, Mr. Germak told his family about his HIV status and his relationship with Mr. Brogaard. His older sister was supportive, but his mother and his younger sister rejected him. Mr. Germak's mother blamed Mr. Brogaard for Mr. Germak's HIV. When he knew his death was imminent, Mr. Germak went to see his family in Manitoba to say goodbye. His mother would not see him. His sister was afraid to hug him. Mr. Germak died with Mr. Brogaard at his side. Mr. Brogaard stated that he is still grieving his partner of 22 years.

[45] Mr. Brogaard applied for survivors' benefits. He believed that his relationship was the same as a heterosexual relationship. The administrators of the *CPP* rejected his application because Mr. Germak was of the same sex. Mr. Brogaard did not appeal at the time, but having heard about law reform initiatives, he reapplied on April 15, 2000. His application was rejected again based on the fact that Mr. Germak was not of the opposite sex. This time Mr. Brogaard appealed. As of the commencement of this litigation in November 2001, he had heard nothing about the date and time of his appeal. I have no doubt that like Mr. Hislop, Mr. Daum, Mr. McNutt, and Mr. Brogaard were in loving conjugal relationships with their deceased partners.

Gail Meredith

[46] Gail Meredith ("Ms. Meredith") is now 61. She lives in Vancouver. She lived with her partner Judy Paterson ("Ms. Paterson") for over 15 years, until Ms. Paterson's untimely death from a rare organic brain disease on July 14, 1992. Ms. Meredith testified that she and Ms. Paterson considered themselves to be irrevocably committed to each other, and planned to start a family. They had mutual wills, joint bank accounts, and owned property jointly.

[47] In 1984, Ms. Paterson started to show signs of illness, and could no longer work full time. Ms. Paterson went into the hospital permanently near the end of 1986. Ms. Meredith was appointed as Ms. Paterson's committee. Ms. Paterson's family opposed this. Ms. Meredith was successful at the British Columbia Supreme Court. Ms. Paterson's family felt that Ms. Meredith, and her "evil lesbian relationship" with Ms. Paterson had caused Ms. Paterson's disease. Ms. Paterson's family never accepted their relationship.

[48] Ms. Paterson's doctor refused to speak to Ms. Meredith about any aspect of the illness. He expressed the view that her illness was a judgment by God for her sexual orientation.

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[49] After Ms. Paterson's death, Ms. Meredith called HRDC about *CPP* survivors' benefits. She was told on the phone that she did not qualify for benefits because she was "the wrong sex". As she put it, "if I was a guy, I could apply". I accept her evidence that she was not advised about any right of appeal.[9]

[50] Ms. Meredith testified that she felt as if her relationship with Ms. Paterson was invisible, and the grieving of her partner's death was invisible. In cross-examination, Ms. Meredith testified that she felt as if the government was a monolith and that she did not have the energy to fight it. In August 2000, after seeing an advertisement in a gay and lesbian newspaper placed by MP Svend Robinson encouraging same sex survivors to apply again, because of recent changes in the law, Ms. Meredith applied. She felt encouraged, but her application was denied. Ms. Meredith launched an appeal. No hearing date had been set for her appeal as of the commencement of this litigation.

[51] Each of the representative plaintiffs was a credible witness. Their life experiences mirror the observations of Cory J in *Egan* at pp. 600-02, which were quoted in *Halpern* at p. 83:

> The historic disadvantage suffered by homosexual persons has been widely recognized and documented. Public harassment and verbal abuse of homosexual individuals is not uncommon. Homosexual women and men have been the victims of crimes of violence directed at them specifically because of their sexual orientation. ... They have been discriminated against in their employment and their access to services. They have been excluded from some aspects of public life solely because of their sexual orientation. ... The stigmatization of homosexual persons and the hatred which some members of the public have expressed towards them has forced many homosexuals to conceal their orientation. This imposes its own associated costs in the work place, the community and in private life.
>
> …
>
> Homosexual couples as well as homosexual individuals have suffered greatly as a result of discrimination. Sexual orientation is more than simply a "status" that an individual possesses. It is something that is demonstrated in an individual's conduct by the choice of a partner. ... [S]tudies serve to confirm overwhelmingly that homosexuals, whether as individuals or couples, form an identifiable minority who have suffered and continue to suffer serious social, political and economic disadvantage.

VII. <u>The Evidence of Sharon Baxter</u>

[9] When I use quotes in reference to Ms. Meredith's evidence, I am quoting exactly what she said when she testified.

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[52] Sharon Baxter was employed with the Canadian AIDS Society ("CAS ") from 1995 until December 2001. CAS is an umbrella organization for approximately 115 AIDS service organizations across Canada. CAS is an advocate for people with HIV and AIDS, particularly in the area of health policy. Wilson Hodder was a board member of CAS. CAS sought intervenor status at the appeal of the Review Tribunal's refusal to grant him a survivors' pension. The review Tribunal's decision was dated October 23, 1996. His case was scheduled to be heard by the Pension Appeals Board on May 31, 1999 in Halifax Nova Scotia. *M. v. H.* was released on May 13, 1999. The consent to judgment in Mr. Hodder's case, signed by Mylene Bouzigon on behalf of Morris Rosenberg, Deputy Attorney General of Canada, is dated May 31, 1999.

[53] In a similar vein, the settlement with Paul Boulais occurred on May 31, 1999, the date it was scheduled to be heard by the Pension Appeals Board in Halifax. Mr. Elliott attached great significance to the fact that these settlements were made at the courtroom door, on the day of the scheduled hearing before the Pension Appeals Board. The settlement documents consent to judgment in favour of Mr. Hodder and Mr. Boulais by providing that each is entitled to a survivors' pension under the *CPP* and that each is entitled to the pension from the month following the month in which their partners/contributors died.

[54] Ms. Baxter testified that after these settlements, CAS intervened in the case of Mr. Donald Fisk, whose appeal to the Federal Court of Appeal was scheduled to be heard in September 1999 The appeal was also settled by consent to judgment setting aside the decision of the Pension Appeals Board dated September 27, 1997.

[55] I accept Ms. Baxter's evidence that CAS was not advised of the government's plans to introduce Bill C-23 (*MOBA*). I also accept Ms. Baxter's evidence that CAS was not provided with a copy of Bill C-23, notwithstanding its ongoing relationship with HRDC. I find that CAS first learned of the cut-off date in the proposed amendments in June 2000. I accept as true that CAS was without resources to make any submissions on Bill C-23, nor did it consider that it had the mandate to do so.

[56] Ms. Baxter's evidence is important in the context of the Crown's position that CAS was silent on the matter of the imposition of the cut-off date. The suggestion is that the silence equaled acceptance. In other words, the fact that the cut-off date was not being objected to by CAS comprises part of the Crown's legitimization of the imposition of the cut-off date. I reject this submission. The lack of complaint by CAS and other advocates of gay and lesbian rights cannot legitimize what I would describe as the Crown's "people did not complain" argument. It has never been a defence to a *Charter* claim that representatives of those discriminated against must immediately complain as a prerequisite to *Charter* protection. I agree with Mr. Elliott's closing submission that it is irrelevant that gay and lesbian advocates may or may not have opposed the *CPP* amendments contained in *MOBA*. Whether a person or group opposed or supported the *MOBA* amendments cannot derogate from the Crown's responsibility to legislate in accordance with the *Charter*.

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VIII. Testimony of Professor Barry Adam[10] and Dr. Rosemary Barnes

[57] Barry Adam has a Ph.D. in sociology. He is a professor at the University of Windsor. He was qualified by the plaintiffs to give expert opinion evidence on the social conditions and the impact of AIDS on gay and lesbian persons. His *curriculum vitae* shows wide experiences and long standing academic interest and leadership on these issues. His evidence added perspective and historical context to the discrimination faced by the plaintiffs.

[58] Professor Adam explained the meaning of cultural heterosexism. It is the practices and policies of social institutions that embody a bias against homosexual people. In common parlance, this is homophobia, although sociologists refer to it as heterosexism. He testified that gays and lesbians are inferiorized people, in the sense that they are excluded from full participation in civil society. The experiences of the class members amply demonstrate this point. Their experiences also demonstrate an underlying unwillingness of the majority of heterosexual society to accept that gay and lesbian persons are no less deserving of the human rights and dignified treatment that heterosexuals take for granted.

[59] The dark chapters in the world's history of the mistreatment and persecution of gay and lesbian people were the focus of much of Professor Adam's evidence. Given the evidence of the representative plaintiffs, I do not consider it necessary for me to summarize the painful details of this history.

[60] Dr. Rosemary Barnes was qualified as an expert in clinical psychology with a particular expertise in gay and lesbian issues. She confirmed that the scientific evidence demonstrates that relationships are as important for gay men and lesbians as they are for heterosexuals. These relationships function in the same way in terms of emotional support and financial interdependence. She also testified that grief reactions to the loss of a partner are as profound for same sex couples as for opposite sex couples. Her evidence on these points mirrored the revelations of the representative plaintiffs on these issues.

IX. Section 15 Analysis

[61] Before conducting the s. 15(1) and s. 1 analysis of the *Charter*, I repeat the three main submissions of the Crown. These arguments are that the law regarding sexual orientation evolved in pace with the evolution of social and legal attitudes regarding sexual orientation. Second, and related to the first argument, the exclusion of same sex survivors from the survivors' pension could not have been considered discriminatory prior to January 1, 1998, because up until then, the results in *Egan* determined the issue. The third argument is that if I were to grant the remedies sought by the plaintiffs, this would amount to an impermissible retroactive application of the *Charter*. To support its position, the Crown stressed that politicians who were advocates of gay and lesbian rights did not complain about the proposed *CPP* amendments. I took this as a justification for the imposition of the cut-off date, as part of the "people did not complain" argument. The Crown made these submissions in both their s. 15 and s. 1 analysis. I keep in

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[10] Professor Adam's report is almost identical to his report that was before the court in *Halpern*

mind that it is important not to blend what is properly a s. 1 justification into a s. 15 analysis. The tendency to blend the two puts a higher onus on a *Charter* complainant in establishing a breach under s. 15.

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Same sex issues were not "on the mind" of society up until the mid 1990s

[62] The Crown repeatedly emphasized that the challenged sections are not discriminatory because the law was evolving in a manner that kept pace with evolving societal attitudes regarding the recognition of equality for persons in same sex relationships. The Crown says that when society did evolve, or was ready to accept equality for persons in same sex relationships, the Crown acted in a timely fashion in response to this evolution. The Crown also relies on this argument in its section 1 analysis.

[63] In support of its position, the Crown led evidence that it was only in the mid 1990s that same sex relationship recognition reached the "radar screen" of Canadian society. Prior to that, activists in the gay and lesbian community were said to be interested only in securing individual rights against discrimination, for example, in the areas of employment and housing.

[64] I reject this proposition. There is extensive legislative history that suggests otherwise. The portions of the legislative history to which the Crown referred, if taken in an insular context might support the notion that relationship recognition was not at the front and center of the radar screen. But, as I indicated to counsel during closing argument, I carefully considered the entire legislative history, and not just those portions referred to me by the Crown. This legislative history demonstrates that relationship rights and discriminatory experiences were of foremost concern to lesbian and gay people at least as early as 1985. This history becomes very relevant to the analysis of the "relationship issues" argument advanced by the Crown. This was an attempt to justify the lethargy of the Crown in coming to grips with the reality that after April 17, 1985, the historical discrimination faced by gay and lesbian Canadians offended and contravened s. 15 and was therefore unconstitutional.

[65] The transcript of submissions to the House of Commons Sub Committee on Equality Rights, chaired by MP Patrick Boyer in 1985, contains many examples of relationship issues being brought to the attention of the committee. Ms. Klig Akerly, a representative from the Lesbian and Feminist and Mothers Political Action Group forcefully submitted that there was a need for public validation of homosexual families. She derided the exclusion from marriage of same sex couples, and argued the necessity of the legal recognition of same sex families, with or without children. Another representative from the same group, Ms. Penny Anderson described the suffering that ensues when same sex couples are not treated as spouses under the law. Another representative claimed that "common law relationships should be the same for homosexuals as heterosexuals".

[66] Another spokesperson brought to the Sub Committee's attention the difficulties that gay persons had in being posted to the foreign service. He also pointed out that gay persons were not permitted to serve in the Military and Royal Canadian Mounted Police. Mr. Berg pointed out that

approximately 10% of the population is gay – a statistic that has received validation from other sociological studies, such as the famous 1948 Kinsey Report, considered one of the largest sociological studies of human sexual behaviour.

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[67] Ms. Lynn Murphy Chair of Gay Alliance for Equality stated:

> Another issue that concerns us is recognition of gay and lesbian relationships. Despite what you read in scare articles on AIDS, many lesbians and gays live in long-term relationships. Setting aside for the moment the question of actually recognizing gay and lesbian marriages, we would at least like to have our relationships treated on a par with common law associations between heterosexuals. This has implications for spouse’s benefits, health plans, pensions. There is a whole list of areas where it could apply.

[68] Mr. Kenneth Smith of the Vancouver Gay and Lesbian Community Centre emphasized the pressing need for equality between same sex and opposite sex relationships.

[69] Ms. Jeanne Riox, representing Wommonspace, a social, recreational and educational society for lesbians in the Edmonton area submitted that “other issues that affect us every day of our lives are child custody rights, discrimination in matters of employment and housing, and the total lack of recognition for family relationships other than strictly heterosexual. Because our unions are not considered legally valid, we suffer discrimination in the areas of taxation, pensions, wills, insurance, joint properties, and health benefits”. She further opined that “the government is guilty of the sin of omission. By withholding legislation to discourage discrimination, they are giving tacit approval for the continuation of the practice”. Jude Major, from the same group argued for the need for equal relationship recognition, particularly relating to equal benefits and pensions. She also stressed the need for equal opportunities to legally marry.

[70] Ms. Bev Scott, Coordinator of Families of Gays of Winnipeg also stressed the need for same sex relationships to be recognized and treated equally, stressing the need for equal access to benefits such as dental and medical coverage.

[71] Reverend Don Ross of the United Church of Canada, Winnipeg Presbytery stressed that legal relationship recognition is needed so that homosexual people may qualify for benefits that their spouses have earned.

[72] Chris Vogel, President of the Oscar Wilde Memorial Society, an organization of gays and lesbians in the Winnipeg area submitted that:

> Canadian society is particularly concerned to devalue and disadvantage our relationships. There is no legal entity whereby they may be acknowledged and entitled, and their very existence is used to disqualify the individual from legal equality. Such relationships receive no recognition of their financial dependencies in tax law, and reference to them in a will endangers its provisions. Spousal

> benefits are refused to gay couples in every sort of employee benefit, pension, health and investment plan, even where contributions are mandatory.

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[73] Not only did advocates for equality forcefully argue for the need for relationship recognition, but having to do so was seen as degrading. Before the Boyer committee, Ms. Jean Perreault of the Gay and Lesbian Awareness Civil Rights spoke of the indignity involved in having to ask for one's equality rights. She said:

> One of the things I said this morning on my way out the door was that I am enraged that I have to come to a body like this and ask for what is assumed to be the right of every adult in this country. So, yes, we appreciate it; yes, we are profoundly grateful, but we are also angry. It is the humiliation of those of us who in every conceivable way are model citizens to have to come with our Sunday clothes on and our hats in our hands. It is unspeakably degrading.

Academic writings in the 1980s era.

[74] Professor Barry Adam, whose expert evidence is summarized above, documented the actions of members of the lesbian and gay community to push for relationship recognition. He made reference to the first march on Parliament in 1971, where Gays of Ottawa demonstrated for, among other things, equal rights for homosexual couples.

[75] In oral testimony, Professor Adam confirmed that between 1970 and 1982, several same sex couples attempted to obtain marriage licenses, and that in the early *Charter* era, gays and lesbians were pursuing relationship recognition.

[76] Similarly, Professor Gary Kinsman, in his book "The Regulation of Desire: Homo and Hetero Sexualities" (Toronto: Black Rose Books, 1987), demonstrated that lesbians and gays desired equality on all fronts. He described the struggle of Karen Andrews, a library worker and union member who fought for spousal benefits for her partner and their child – a battle they lost in 1988. In addition, he documents a 1989 conference of the Coalition for Lesbian and Gay Rights in Ontario, a prominent organization, in which a common position was hammered out in relation to lobbying for spousal benefits and family recognition.

[77] Having examined the entire legislative record, and in the face of the testimony of the representative plaintiffs, I reject the Crown's assertion that relationship issues were not on the "radar screen" of Canadian society. Indeed, these issues were being litigated in the courts as early as 1985. In *Canada (Attorney general) v. Mossop*, [1991] 1 F.C. 18 (T.D.). Brian Mossop sought paid leave to attend the funeral of his male partner's father, who died in 1985. Other early court rulings began granting legal protection to same sex relationships. See *Vesey v. Canada (Commissioner of the Correctional Services)*, [1990] 1 F.C. 321 (T.D.) and *Knodel v. British Columbia*, [1991] 6 W.W.R. 728 (B.C.S.C.).

The role of Parliamentarians in raising relationship issues

[78] The response to the demands of the lesbian and gay community for the recognition of same sex relationship rights by elected MPs was a mixed one. On the extreme end of the spectrum, some MPs made comments in the House of Commons which indicated that their constituents were unwilling to accept equality for gay and lesbian Canadians. I saw this as the underlying rationale for much of Ms. McAllister's submission on relationship issues. To my mind, this demonstrates a fundamental misconception of the equality guarantee contained in s. 15(1). This brings me back to the comments of the Honourable John Morden, that I quoted in paragraph 17 above. The *Charter* is anti-majoritarian. It cannot be that the entitlement to the benefits of s. 15(1) is subject to the majority views of the electorate, or that it is somehow dependant on evolving social and political views. This concept is most amply demonstrated by the recent refusal of the government to consider a referendum on the issue of gay marriages.

[79] At the other end of the spectrum, many parliamentarians recognized the importance of same sex relationship recognition. For example, in 1990, the Ontario government extended employment health, dental and leave time benefits to same sex partners of civil servants. To my mind, this is an indication of a response to the demand for such equality. Relationship recognition was "on the radar screen" of politicians and society much earlier than 1990.

[80] There are also indications that the government, rather than "moving with the times" was behind the times, and knew it. A statement by MP Sarmite Bulte on February 15, 2000 indicates that the government was not "legislating with the times", but rather was catching up on what it should have done earlier. She said, in relation to the introduction of *MOBA*, "While I would like to applaud the federal government for taking bold leadership on this issue, I cannot do so".

[81] Another example comes from statements made by MP Marc Harb, who stated in the House of Commons on April 11, 2000 (in reference to *MOBA*)' "with this legislation, the government has done what is right. We had a decision by a court. I am embarrassed that we had to wait until a decision was made by the court for us to do what we should have done a long time ago, which is to bring justice to the floor of the House and to society".[11]

Complaints, or lack thereof, of gay and lesbian organizations and individuals

[82] The Crown's submission that prominent groups advocating on behalf of gay and lesbian rights supported all of the provisions of *MOBA* is not accurate. Michelle Douglas, president of the Foundation for Equal Families stated during her Standing Committee on Justice and Human rights submission on March 15, 2000 that Bill C-23 lacked necessary amendments to the *Immigration Act*, now called the *Immigration and Refugee Protection Act*, S.C. 2001, c. C-27. On the same day, Andree Cote, director of Legal Affairs, National Association of Women and the Law submitted that *MOBA* fell short of establishing equality for gay and lesbian couples. She expressed concern for example that *MOBA* may have negative effects on the equality rights of

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[11] The quotes in the last three paragraphs are taken from the federal Hansard.

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lesbians in family law. In the same committee on March 16, 2000, Claudine Ouellet, Director General of the Coalition Gaie et Lesbienne du Quebec, while supporting Bill C-23, criticized it for creating a separate category of "partnership" rather than expanding the definition of spouse to include same sex couples.

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[83] Regarding the January 1, 1998 cut-off date, the Crown argued that MP Svend Robinson approved of the date, and only expressed a desire that cases at the appeal stage would be settled. The record however, suggests to the contrary. Mr. Robinson was assured that survivors who applied for benefits prior to January 1, 1998 would be treated sympathetically and compassionately.

[84] While a *Charter* rights complainant bears the onus of establishing a prima facie *Charter* infringement, it has never been the law that at the time of discrimination, the alleged victim of discrimination must immediately protest, or else be barred from a *Charter* claim. To my mind, this is akin to victim blaming, and reinforces the unjustifiable concept that discrimination does not exist unless the victim actively and strenuously opposes it. To bar a *Charter* claim where a disadvantaged and minority group fails to assert its rights against the majority, defeats the ameliorative and equality seeking purpose of the *Charter*.

[85] In summary, I find that the Crown has not demonstrated that relationship issues were not in the minds of activists, politicians and society until the mid 1990s. Even if the Crown was correct in this proposition, this cannot be a defence to this action. It suggests that equality should only be enforced by the courts when society is ready to accept equality. This is contrary to the essence of the *Charter*.

Argument that exclusion of same sex survivors was not discriminatory prior to 1998 because of Egan

[86] The reality is that the Crown's interpretation of the s. 1 analysis in *Egan* is proffered as a validation and justification for discrimination against persons in same sex relationships. This is why the Crown says that the exclusion was not discriminatory prior to 1998.

[87] The documentary evidence contained in the legislative history suggests that *Egan* was not the only reason for the January 1, 1998 cut-off date. In response to an inquiry from MP Bill Graham to HRDC Minister Jane Stewart about the cut-off date, she stated that the reason for the date was that it would be difficult to explain to Canadians why benefits, and not obligations, should be paid out to same sex survivors any earlier. The letter also stated that the January 1, 1998 date was chosen to correspond with certain provisions of the *Income Tax Act.*

[88] Even if I were to accept that the date was chosen due to the timing of *Egan*, it must be remembered that *Egan* dealt with Old Age Security benefits. As Mr. Jean-Claude Ménard[12]

[12] Mr. Ménard was qualified as an expert witness by the Crown. He did not consider it necessary to prepare a report on the proposed changes to the *CPP* that were contained in Bill C-23 because he stated that the impact of Bill C-23 on the *CPP* was not significant.

testified, in a social insurance scheme, such as the *CPP*, a person earns rights by making contributions. Mr. Ménard has been the Chief Actuary of Canada since August 1999. Under a social benefit scheme, (such as the OAS), a person merely has to meet a residency requirement to receive benefits. In addition, OAS is a tax funded scheme. This fact was central in the majority decision in the s. 1 analysis in *Egan*. The *CPP* is entirely funded by contributions from employers and employees.

[89] To my mind, the s. 1 analysis in *Egan* cannot apply to the *CPP*. However, the point is now moot, because the majority's s. 1 analysis in *Egan* has been effectively overruled by subsequent cases such as *Vriend* and *Rosenberg*. It is, as expressed by Mr. Elliott, that the s. 1 analysis in *Egan* has all but disappeared from the Canadian legal landscape.

[90] Before I leave this analysis, I will make one further point. The "*Egan* justification" for past discrimination is untenable when the cut-off date is analyzed in the context of the date of the partner's death. It leads to the rhetorical question posed by Mr. Elliott: If the government claims that it should not be responsible for payments before 1998, how does it justify its settlement strategy? Recommendations were made by senior administrators at HRDC to officials at the Department of Justice at the most senior levels, that 57 cases should be settled, all of which were applications received prior to February 11, 2000, and active in the system.

[91] My conclusion is that the Crown's reliance on the s. 1 analysis in *Egan* as a justification for the January 1, 1998 date is not justifiable. The focus on *Egan* sidesteps the impact of *Vriend* and *Rosenberg*. The reality is that the exclusion of same sex survivors has always been unconstitutional. The Crown cannot use the umbrella of *Egan* to justify the exclusion of same sex survivors prior to January 1, 1998. I find that this has been discriminatory since April 17, 1985.

Is the plaintiffs' claim an impermissible retroactive application of the Charter?

[92] The Crown submitted that granting the requested remedy would result in an impermissible retroactive application of the *Charter*. The Crown's submission was that a *Charter* remedy may only operate prospectively. The submission is that the Supreme Court of Canada has never held that each time benefits are extended to a newly recognized group by virtue of the *Charter*, such benefits must be extended retroactively back to the date of s. 15(1) coming into force.

[93] In addition, the Crown submits that if s. 44(1.1) of the *CPP* did not exist, only same sex survivors whose partners died after July 2000 would be included, because that is when *MOBA* came into force. On this basis, it is said that the Crown was acting generously toward same sex survivors.

[94] The Federal Court of Appeal considered the issue of retroactivity in *Murray v. Canada (Minister of Health and Welfare)* [1998] F.C.J. No. 612. In that case, a "war bride" was denied a share of her former husband's unadjusted pensionable earnings because she was divorced from

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him prior to January 1, 1978. What I take from *Murray* is the following. In *Murray*, the challenged amendments to the *CPP* were effective January 1, 1987. In August 1984, Ms. Murray applied for an equal division of her former husband's unadjusted pensionable earnings. Her claim was denied on December 10, 1984, on the basis that more than 36 months had elapsed since the time of her 1974 divorce from her deceased husband.

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[95] As noted by Linden, J.A., the court was not asked to decide whether there was discrimination. The only issue was whether Mrs. Murray could rely on s. 15 of the *Charter* to challenge the validity of the 1987 amendment to the *CPP*. Linden J.A. stated at paragraphs 7 to 9:

> 6. The Trial Judge, in a thoughtful and thorough opinion, decided that any application of the *Charter* would be retrospective in this case. He relied on the Supreme Court decision in *R. v. Gamble*, [1998] 2 S.C.R. 595 as well as the decision of this Court in *Benner v. Canada (Secretary of State)* which was overruled by the Supreme Court of Canada. (See [1997] 1 S.C.R. 358)
> 7. We have been persuaded by the thorough argument of Ms. Roslyn Levine for the Crown that the decision of the Supreme Court of Canada, overruling this Court's decision in *Benner*, is the primary authority governing this case, and despite some slight variation in the reasoning, requires us to affirm the decision of the Trial Judge.
> 8. It is clear that the *Charter* cannot be applied retrospectively or retroactively. (*R. v. Stevens*, [1998] 1 S.C.R. 1153, at p. 1157.)

[96] *Murray* affirmed the simple proposition that the *Charter* cannot be applied retroactively or retrospectively. But it must be remembered that the discrimination alleged by the class members in this case is based on their ongoing and immutable status, i.e. their sexual orientation. I now turn to *Benner*.

[97] In *Benner*, the appellant was challenging certain provisions of the *Citizenship Act*, R.S.C. 1985, c. C-29. He was born in 1962 in the United States to a Canadian mother and an American father. The *Citizenship Act* provided that persons born abroad prior to February 15, 1977 would be granted Canadian citizenship just by applying if the applicant had a Canadian father. If born to a Canadian mother on the other hand, the applicant was required to undergo a security check and to swear an oath. The appellant went through a security check, and his request for citizenship was rejected when it was discovered that he had been charged with several criminal offences. The two main questions in the judicial review of the Registrar of Citizenship's decision was whether the impugned provisions violated the *Charter*, and whether applying s. 15(1) of the *Charter* involved an impermissible retroactive application of the *Charter*.

[98] The court held that there is no rigid test for determining when a particular application of the *Charter* would be retrospective. Each case is to be weighed on its own factual and legal context. The court distinguished situations in which the *Charter* was applied retroactively to an occurrence, and when the *Charter* was applied when a complaint alleged discrimination based on

an ongoing status. Although the test is not rigid, the application of the *Charter* is not retroactive if applied to discrimination suffered after the passage of the *Charter*, if such discrimination is based on one's status.

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[99] What I take from *Benner* is that these plaintiffs are not seeking a retroactive application in the *Charter*, and that *Benner* provides a complete answer to the arguments raised by the Crown. This is not a case in which a new statute is being applied to a past event. For example, a new criminal law is not being applied to a person who committed the act when it was not criminalized. This would clearly be a retroactive application of a new law, and would not be permitted. In this case, the plaintiffs have suffered from discrimination based on sexual orientation, an immutable status, and that discrimination was experienced after the coming into force of s. 15 of the *Charter*. The plaintiffs have actually experienced discrimination since before the passage of the *Charter*, but they seek to apply the *Charter* prospectively, to discrimination that took place after April 17, 1985.

[100] Here, the plaintiffs are not seeking to apply new law to an old situation. Neither the law nor the situation is new. They are seeking to apply the *Charter* to a continuing act of discrimination, which took place while the *Charter* was in force. As the plaintiffs articulated, if the exclusion of same sex survivors from the survivors' pension was discriminatory on January 1, 1998, it was discriminatory the day before and earlier. It became discriminatory when s. 15 came into effect.

[101] The Crown asks the court to find that the Crown had no obligation to offer benefits to same sex survivors prior to the passage of *MOBA*, and was generous in offering benefits with a limited retroactivity. I can find nothing generous in codifying a mechanism for discrimination that has been in existence since at least the advent of the *Charter*.

[102] The "new law", which limited the availability of same sex survivors' pension is the one that the plaintiffs seek to strike on the basis that it is discriminatory. A declaration by the court that the *Charter* prohibits discrimination on the basis of sexual orientation is similarly not new law. It has been discriminatory since April 17, 1985. The constitutional invalidity of the challenged provisions exists because of the *Charter*, not because a court has declared it to be such in a written decision. Discrimination against gays and lesbians has been unlawful since April 17, 1985, even if it was not universally recognized. The passage of *MOBA* amended the *CPP* to permit same sex survivors to receive benefits. Extending benefits to same sex couples does not create new law. *MOBA* was simply a legislative initiative to officially recognize the discriminatory nature of the prohibition against same sex survivors. In other words, it codified existing law by legislatively bringing practice in line to reflect the fact that discrimination against gays and lesbians is contrary to the *Charter*. As Peter Hogg wrote in his authoritative text *Constitutional Law in Canada*, *supra*:

> A judicial decision that a law is unconstitutional is retroactive in the sense that it involves the nullification of the law from the outset… A court does not make new law in the same way as a

> legislative body, that is, for the future only"… If a law is found by a court to be inconsistent with the *Charter* of Rights, the court is obliged to strike the law down. The effect of such a holding is that the litigation will be determined as if the unconstitutional law did not exist.

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[103] The Crown argued that had the government not been generous enough to provide for some limited retroactivity, that same sex survivors would only be eligible for benefits if their partners died after the passage of *MOBA*. This is not accurate. First, at the very least, I can find no valid constitutional reason why survivors would not receive payments as of July 31, 2000, regardless of the date of death of their partners. More importantly, in the absence of the challenged legislation there would be no impediment to same sex survivors being eligible for survivors' benefits as of the coming into force of the *Charter*. If the law is truly to be in conformity with the *Charter*, a discriminatory bar to same sex survivors must be treated as if it never existed.

[104] The Crown implies that by lifting the discriminatory limitation, it has the effect of applying *MOBA* retroactively. *MOBA* attempted to bring legislation in line with the *Charter*. Nothing transformed a previously non-discriminatory law into a discriminatory one. The prohibition against same sex survivors' pensions was and continues to be discriminatory, although less so with the passage of *MOBA*. To interpret the law otherwise would give the Crown unjustifiable authority to insulate discriminatory practice from scrutiny until the courts find that it is not acting in conformity with the *Charter*, or until the majority of the population decides to stop discriminating against a particular group. This cannot be.

Test from Law

[105] The s. 15(1) analysis was articulated by Justice Iacobucci in *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497. Justice Iacobucci's approach was eloquently summarized in *Halpern*. Because his s. 15 analysis was repeated in *Halpern*, I need not go through the s. 15 analysis in great detail.

[106] In *Halpern*, at paragraph 61, the court reiterated the framework for s. 15(1) as follows:

> (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 different 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 or analogous grounds?

(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?

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The existence of differential treatment

[107] I have rejected the Crown's claim that the limitation in the impugned legislation is merely temporal in nature, and therefore does not draw a distinction between the claimants and others on the basis of a personal characteristic. The Crown submitted that the appropriate comparator group is survivors whose partners died after January 1, 1998. The plaintiff has the right to chose the comparator group, subject to the court's discretion to chose another comparator group if it finds the plaintiff's choice to be inappropriate. The legislation clearly treats same sex survivors differently than married or common law heterosexual couples. The comparator group chosen by the plaintiffs was married heterosexual couples. Same sex couples whose partners died before January 1, 1998 are denied benefits. Heterosexual married couples do not face such a limitation.

Differential treatment on an enumerated or analogous ground.

[108] The court in *Egan* clearly stated that sexual orientation is an analogous ground. I do not overlook the fact that trial courts and appeal courts began to afford legal protection to same sex relationships as early as 1989 in cases such as *Veysey v. Canada (Commissioner of Correctional Services)*, *supra*, and *Knodel v. British Columbia*, *supra*. I am mindful as well that when the Boyer Committee issued its report entitled Equality for All in 1985, sexual orientation was confirmed as an analogous ground. The Boyer report recommended the amendment of a number of statutes, including the *Canadian Human Rights Act*. The plaintiffs have therefore satisfied the second part of the test.

The existence of discrimination

[109] As noted in *Halpern*, Justice Iacobucci in *Law* set out four contextual factors to determine whether the differential treatment is discrimination, within the meaning of the third branch of the s. 15 test. These contextual factors are:

(a) pre-existing disadvantage, stereotyping or vulnerability of the claimants;

(b) the correspondence between the ground upon which the differential treatment is based and the actual needs, capacities or circumstances;

(c) ameliorative purpose or effects on more disadvantaged individuals or groups in society; and

(d) the nature of the interest affected.

[110] Because of the extensive discussion of these factors in *Halpern*, and having rejected the Crown's temporal argument, and their argument that the impugned provisions simply reflected society's evolving views, these four factors may be dealt with very briefly.

[111] It is beyond dispute that gays and lesbians have been subjected to an historical disadvantage, are a vulnerable group, and are subjected to stereotyping. There is no social science evidence that gays and lesbians have less need for survivors' benefits than heterosexuals. As Abella J.A. noted in *Rosenberg*, "Aging and retirement are not unique to heterosexuals…" I would add the obvious. Death is not unique to heterosexuals. The limitations imposed on same sex survivors do not have an ameliorative purpose in relation to a more disadvantaged group. Finally, the exclusion from survivors' benefits has a significant impact upon the dignity of the class members. As stated earlier, Justice Cory in *Egan* discussed the injury to human dignity caused by the devaluing of same sex relationships. The testimony of the representative plaintiffs, and of Professor Adam and Dr. Barnes reinforced this point.

[112] In summary, the plaintiffs have met the s. 15(1) test. The exclusion of the class members from the *CPP* infringes s. 15. I now turn to the s. 1 analysis.

X. Section 1 Analysis

[113] The Crown rests most of its s. 1 justification on the argument that the distinction created in the legislation is merely temporal, and that is does not infringe the *Charter*, or it is justified, because the law simply evolved with the times. This was repeated and emphasized by Ms. McAllister in her closing submissions.[13] As I have rejected these arguments, I accept the submissions by the plaintiff on s. 1, and may deal with them briefly. Again, I refer to the reasons in *Halpern*, as they relate to the s. 1 test at paragraphs 109 to 142.

[114] To demonstrate that a law is a reasonable limit on a *Charter* right, the party seeking to uphold the impugned legislation must establish that:

(a) the objective of the law is pressing and substantial;

(b) the rights violation is rationally connected to the objective of the law;

(c) the impugned provisions minimally impairs the *Charter* right; and

(d) there is 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.

[13] This argument implied a reluctance on the part of parliamentarians to embrace equality rights for gay and lesbian persons because "society" was not yet ready to accept equality for *all* Canadians as contemplated in s. 15. This brings me back to the point about the *Charter* being anti-majoritarian, expressed in the introduction and overview to this judgment. It cannot be that the recognition of equality rights must be tied to the will of the majority.

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[115] I cannot find that there was a pressing and substantial objective in excluding the class members. Consequently, there is no rational connection. The Crown asserts that the equality seeking objective of *MOBA* is rationally connected to the provision of *CPP* survivors' pensions. The Crown is mistaken in focusing on the purpose of *MOBA*, rather than the objective of the limitation. At this point I mention the Crown's submission that I may consider the domestic law of foreign jurisdictions in determining whether the minimal impairment test is satisfied. Edward Tamagno testified that there is a wide difference in law and practice regarding benefits for same sex partners in the public pension systems of other free and democratic countries. While I agree that *MOBA* puts Canada ahead of many countries, the evidence about international context does not support the conclusion that the Crown had a reasonable basis for concluding that the challenged legislation minimally impaired the rights of same sex survivors when it enacted *MOBA*. The answer to this proposition is simple. The *Charter* and the *CPP* are unique to Canada. The presence of the *Charter* on the Canadian legal landscape detracts from the relevance of what takes place in other jurisdictions. The class members are completely excluded, not only from receiving survivors' benefits from the first month following the date of death of their partners, but from being eligible to receive payments after the coming into force of *MOBA*, if their partners died prior to January 1, 1998. Finally, the evidence is that the exclusion has a severe impact upon the class members. There is no material benefit to any other group, and no deleterious effect.

[116] The Crown submitted that cost considerations may enter into a s. 1 analysis. Nevertheless, the Crown conceded that the financial impact of a successful claim by the plaintiffs will not have a significant impact on the solvency of the *CPP*. The evidence of Mr. Ménard confirmed this. The Crown does not seek to justify a *Charter* infringement based on budgetary considerations. In summary, I conclude that the exclusion of the class members from survivors' pensions cannot be saved by s. 1.

XI. <u>Remedy</u>

[117] The plaintiffs seek remedies under both s. 24 and s. 52. Section 24 provides individual remedies, while s. 52 concerns declarations of invalidity.

[118] As noted in *Halpern*, the leading authority on constitutional remedy remains *Schacter v. Canada* [1992] 2 S.C.R. 679. The determination of the appropriate remedy or remedies involves 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. Third, the court should consider whether or not is should suspend the remedy for a period of time.

[119] I find that s. 44(1.1) and s. 72(2) offend s. 15(1) of the *Charter*. They are unconstitutional in their entirety. The best remedy would be a combination of striking down the sections of the *CPP* which are in direct contravention of the *Charter*, and the granting of a constitutional exemption to the class members of the impugned provisions of general application.

Both remedies are granted under the authority of s. 52 of the *Charter*. This means that the class members shall be entitled to prospective pensions and to arrears to one month following the death of their partner/contributor in the same manner as opposite sex couples qualify for survivors' benefits.

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[120] Sections 60(2) and 72(1) are provisions of general application. They limit the payments of arrears to one year prior to the date of the application. The purpose of these provisions is clearly to disallow claimants or potential claimants from "sitting on their rights". The class members however did not sit on their rights. Those who actually did inquire about benefits by telephone were told that they would not be eligible. There are likely many class members who did not even make a telephone inquiry, because they recognized the futility of doing so. The court has the power to grant a constitutional exemption to provisions of general application under s. 52 of the *Charter*. (See *Eurig Estate (Re)*, [1998] 2 S.C.R. 565). Such a remedy is appropriate in this case.

Interest

[121] The court's discretion to award interest is wide. While I am aware that there is no express provision for interest in the *CPP*, this does not defeat the entitlement of the plaintiffs to interest in accordance with the *Courts of Justice Act*. R.S.O. 1990, c. C-43, or the equivalent legislation in the provinces in which the class members reside, from February 1, 1992, or one month after the date of death of their partners, whichever is later, to the date of judgment. This is in keeping with s. 31 of the *Crown Liability and Proceedings Act*, R.S.C. 1985 c. C.50. In awarding interest, I do not lose sight of the fact that *CPP* benefits are indexed pursuant to s. 43 of the *CPP*. To my mind, the purposes of indexing and interest are entirely different. I do not consider that the presence of indexing somehow absolves the Crown's legal obligation to pay interest on the arrears back to February 1, 1992. In dealing with the disposition of interest, I choose to make one further point. It will be apparent from these reasons that I decline to award symbolic damages, although I was urged to do so by Mr. Elliott. I do not mix the concepts of interest and damages. It is well known that they serve different purposes.

Symbolic Damages

[122] I decline to award symbolic damages in the requested amount of $20,000 for each class member. To do so, I would have to make such an award under s. 24(1). While I find that there was lethargy on the part of the Crown in responding to its obligations as a result of s. 15 of the *Charter*, I cannot find bad faith. The evidence of Ms. Bordeleau and Ms. Drummond does not support a conclusion that the Crown did everything in its power to delay and frustrate individual class members. While the Crown did not put the information about the settlement strategy into the public domain, I am not prepared to draw the inference that it did not do so because of a deliberate decision to keep the existence of the settlement strategy secret. The Crown's actions are not justifiable. They were clearly wrong in law, but to my mind, the basis for the award of symbolic damages in *Auton* is not transferable to this case. In *Auton*,

government action was responsible for the s. 15 breach. The Crown points out that in this case, legislation is an issue (as opposed to government action). While this distinction may be a fine one, I have no direct evidence of what the court in *Auton* described as "stubborn recalcitrance sufficiently prolonged and obstructive" so as to justify an award of symbolic damages. On this crucially important issue, I am not prepared to draw a negative inference against the Crown.

Suspension of Remedy

[123] The Crown has argued that if a remedy is granted, it should be suspended for a period of time. In *M. v. H.*, the court suspended the remedy for 6 months. However, as the court stated in that case, time was needed because the judgment would necessitate changes to a number of statutes. In this case, no suspension in necessary. The amendments required of the *CPP* to bring it in line with these reasons for judgment should not be complex. There will be no need to make changes to any other statutes. I choose to take the approach followed in *Halpern*. I order that the effect of these reasons be implemented immediately.

XII. Fiduciary Duty

[124] As I have concluded that a *Charter* remedy is appropriate, I need not deal with the plaintiffs' alternative submissions based on fiduciary duty and unjust enrichment in detail. I am persuaded by Mr. Vickery's detailed and thorough submissions on these issues. The plaintiffs ask this court to apply the common law of fiduciary obligation in the face of a clear statutory direction. Mr. Vickery is correct to say they cannot succeed on this issue. The specific statutory provisions in the *CPP* together with the *Financial Administration Act*, R.S.C. 1985 c. F. 11, set out the financial framework within which the Crown must operate. I agree that where the Crown owes duties to a number of interests, it is probable that the Crown is not in a fiduciary relationship, but is exercising a public authority governed by the proper construction of the relevant statute. See *Harris v. Canada*, [2001] F.C.J. NO. 1876 (T.D.) at paragraph 178. In a fiduciary relationship, "what is required is evidence of a mutual understanding that one party has relinquished its own self-interest and agreed to act solely on behalf of the other party". See *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377 at 379. On this basis alone, the plaintiffs fail to establish the existence of a fiduciary relationship. Having found that no such relationship exists, I do not need to engage in an analysis of whether such relationship has been breached.

XIII. Unjust Enrichment

[125] The plaintiffs argue that the Crown has been unjustly enriched. The elements of unjust enrichment are a benefit to the defendant, a corresponding deprivation to the plaintiff, and an absence of a juristic reason for the deprivation. The plaintiffs contend that the Crown was enriched by receiving *CPP* contributions from the class members. The plaintiffs were correspondingly deprived when they were refused the survivors' pensions they paid for after the death of their partners. The absence of a juristic reason for the deprivation is the fact that the refusal to pay benefits was unconstitutional.

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[126] Again, I agree with Mr. Vickery that the plaintiffs failed to demonstrate that they fulfill any of the elements of unjust enrichment set out in *Pettkus v. Becker, supra*, and *Peter v. Beblow*, [1993] 1 S.C.R. 980 at 987. I find that the plaintiffs have not established that the Crown was unjustly enriched. The government does not “own” the *CPP* funds. The funds, held in a *CPP* account within the consolidated revenue fund, are held strictly for the purposes of the *CPP*. They can be used for no other purpose. All contributions received are pooled. There are no individual accounts. There is extensive cross subsidization of benefits, and survivors’ pensions in particular are subsidized by those who die without survivors. There is no evidence of any enrichment of the Crown. Further, the plaintiffs did not suffer a corresponding deprivation because it was their partners, not they, who made the contributions. Even if the plaintiffs had made the contributions, a corresponding deprivation would only amount to the contributions paid, not the pension benefits itself. Because I find that there is no unjust enrichment, it is not necessary for me to quantify a remedy for unjust enrichment

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XIV. <u>Common Issues and Answers</u>

[127] In accordance with the above reasons, I answer the common issues as follows:

1. Are the Class Members as defined in the Statement of Claim same sex common law partners of Contributors within the meaning of the *CPP*? Answer: yes

2. Does the Crown owe fiduciary duties to the Class Members with respect to either the terms of the *CPP* or its administration? Answer: no

3. Has the Crown breached its fiduciary duties to the Class Members? Answer: n/a

4. If so, are the Class Members entitled to damages measured by the Survivor’s Pensions which would have otherwise been payable from the respective dates of death of the Contributors who died during 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? Answer: n/a

5. Should the contributions paid by the Contributors and their employers be impressed with an institutional constructive trust in favour of the Class Members? Answer: no

6. Does the Crown’s conduct in collecting contributions from the Contributors and their employers and then not paying Survivor’s Pensions to the Class Members constitute unjust enrichment justifying:

   i. The imposition of a remedial constructive trust, or

   ii. A money judgment secured by an equitable lien,

upon the funds held by the Crown?

Answer: no

7. If so, are the Class Members entitled to a money judgment or other relief as against the Crown? Answer: no, subject to the answers to the questions below.

8. Do sections 44(1.1) and 72(2) of the *CPP* discriminate against the Class Members on the basis of their sexual orientation in breach of s. 15(1) of the *Charter*? Answer: yes

9. If so, is the breach of s. 15(1) of the *Charter* saved by s. 1 of the *Charter*? Answer: no

10. If s.44(1.1) and s. 72(2) of the *CPP* breach s. 15(1) of the *Charter* and are not saved by s. 1 of the *Charter*, should they be struck out pursuant to s. 52(1) of the *Constitution Act, 1982*? Answer: yes

11. If s.44(1.1) and s. 72(2) of the *CPP* breach s. 15(1) of the *Charter* and are not saved by s. 1 of the *Charter*, are the Class Members entitled to damages pursuant to s. 24 of the *Charter*? Answer: no

12. If so, how are the damages to be measured? Answer: n/a

13. Do sections 60(2) and 72(1) of the *CPP* apply to limit the entitlement to damages or to pensions, if so to what extent? Answer: On their face, the provisions limit entitlement to pensions. However, see the answer to section 14.

14. If sections 60(2) and 72(1) of the *CPP* would otherwise be applicable, should the Court grant relief pursuant to s. 24 of the *Charter* or s. 52 of the *Constitution Act, 1982* or on equitable grounds to relieve against the application of that limitation under the circumstances of this case? Answer: A constitutional exemption is granted to permit the class members to make application for survivors' benefits and to receive them with interest as found in these reasons.

15. Are any of the claims raised in the statement of claim subject to 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, the *Limitations Act*, R.S.O. 1990, c. L.15, the *Canada Pension Plan*, R.S.C. 1985, c. C-8, ss. 44(1.1), 60(2), 72(1) and 72(2), and any other applicable limitation periods as pleaded in the Statement of Defence? Answer: no

16. If so, should the Court grant relief pursuant to s. 24 of the *Charter* or s. 52 of the *Constitution Act, 1982* or on equitable grounds to relieve against the application of those limitation periods under the circumstances of this case? Answer: n/a

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17. Does s. 32(2) of the *Charter* prevent the Crown from establishing a commencement date later than April 17, 1985 for entitlement to Survivor's Pensions for same sex partners of Contributors in the circumstances of this case?

    Answer: In principle yes, subject to the proviso that class members such as Brent Daum, whose partner James Stevenson died on October 25, 1993, would be entitled to receive the benefit from the first month following James' death. In the case of George Hislop, his survivor's benefit would commence in May 1986, one month following the death of his partner Ron Shearer on April 15, 1986.

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XV. Disposition

[128] Judgment will go in accordance with these reasons. I see no reason why the plaintiffs, being successful, should not be awarded their costs. The parties may make oral submissions on the quantum and scale of costs within 30 days from the date of release of these reasons. I conclude this judgment by recording that I am deeply grateful to all counsel for their thorough and detailed submissions. The civility with which they treated each other was exemplary. It was a pleasure to work with them.

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Ellen Macdonald J.

Released: December 19, 2003

COURT FILE NO.: 01-CV-221056 CP
DATE: 2003/12/19

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ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

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

Plaintiffs

- and -

THE ATTORNEY GENERAL OF CANADA

Defendant

REASONS FOR JUDGMENT