

1999

SELECTED TRACK: STANDARD
S.H. No. 154988

IN THE SUPREME COURT OF NOVA SCOTIA

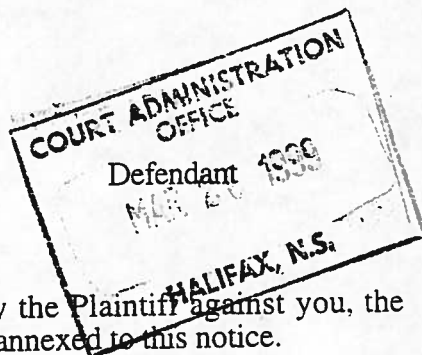
BETWEEN:

JAMES BIGNEY

Plaintiff

- and -

HER MAJESTY THE QUEEN
IN RIGHT OF CANADA



ORIGINATING NOTICE

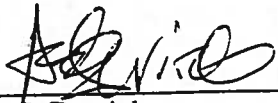
TAKE NOTICE that this proceeding has been brought by the Plaintiff against you, the Defendant, in respect of the claim set out in the Statement of Claim annexed to this notice.

AND TAKE NOTICE that the Plaintiff may enter judgment against you on the claim, without further notice to you, unless within TEN days after the service of this Originating Notice upon you, excluding the day of service, you or your solicitor cause your defence to be delivered by mail or personal delivery to,

- (a) the office of the Clerk of the Court at the Law Courts in Halifax, Nova Scotia; and,
- (b) to the address given below for service of documents on the Plaintiff;

provided that if the claim is for a debt or other liquidated demand and you pay the amount claimed in the Statement of Claim and the sum of \$_____ (or such sum as may be allowed on taxation) for costs to the Plaintiff or her solicitor within six days from the service of this notice on you, then this proceeding will be stayed.

ISSUED the 26 day of March, 1999.



Anne S. Derrick
Beaton, Derrick & Ring
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Phone: (902) 422-7411
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Solicitor for the Plaintiff

TO: The Defendant

1999

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BETWEEN:

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Defendant

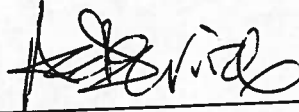
STATEMENT OF CLAIM

1. The Intended Plaintiff, James Bigney, is presently residing in Halifax, Nova Scotia.
2. James Bigney lived with John Morrow, another man, in a conjugal relationship from March 1982 until November 29, 1993 when Mr. Morrow died.
3. At the time of his death, John Morrow had a will which named James Bigney as his sole beneficiary. During his illness, Mr. Morrow had also designated Mr. Bigney as his power of attorney.
4. Throughout their relationship, Mr. Bigney and Mr. Morrow publicly represented themselves as being in a spousal relationship with each other. During Mr. Morrow's illness, Mr. Bigney cared for him both at their home and during times when he was admitted to hospital. Mr. Morrow and Mr. Bigney were recognized in the community as spousal partners.
5. Mr. Bigney and Mr. Morrow jointly owned a home together at the time of Mr. Morrow's death. They held joint bank accounts and owned personal property together.
6. In December 1993, Mr. Bigney applied for a surviving spouse's pension under the Canada Pension Plan.
7. On February 8, 1994, Mr. Bigney was advised that he did not fulfill the conditions of eligibility under the Plan. The legislation stipulates that the surviving spouse under the Plan is a person of the opposite sex who is residing with the contributor continuously in a conjugal relationship for a period of not less than one year immediately prior to his death.

8. Mr. Bigney was deemed ineligible to receive benefits under the Canada Pension Plan due to he and Mr. Morrow having resided together in a same sex conjugal relationship.
9. Mr. Bigney was denied the survivor's benefit under the Canada Pension Plan because the definition of spouse in the Plan which includes eligible opposite sex partners does not include eligible same sex partners.
10. The CPP is an earnings related social insurance program sponsored by employers, employees and self-employed individuals. The CPP is fully self-supporting, with all benefits being paid from the compulsory contributions of employees, employers and from the investment earnings of the CPP fund.
11. There are three types of benefits payable under the Plan: the retirement benefit, the disability benefit and the survivor's benefit. All three benefits provided are related to the level of insured earnings on which contributions are paid.
12. The survivor's benefit is a continuing monthly pension payable to the "spouse" of the deceased contributor following the contributor's death. Section 44 of the *Canada Pension Plan Act* provides for payment of a survivor's pension to the "surviving spouse" of a deceased contributor, "who has made contributions for not less than the minimum qualifying period", provided the surviving spouse meets certain criteria.
13. The definition of "spouse" was added in 1987 to section 2 of the Canada Pension Plan to indicate that a spouse must be a conjugal partner of the opposite sex. The definition of spouse in the *CPP Act* includes married persons and opposite sex common-law partners.
14. Same sex partners are not included in the definition of spouse and are therefore not eligible to receive the survivor's benefit.
15. The Plaintiff states that the definition of spouse under the *Canada Pension Plan Act* violates section 15 of the *Canadian Charter of Rights and Freedoms Act* and does not constitute a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society in accordance with section 1 of the *Charter*.
16. The Plaintiff therefore intends to claim:
 - (a) A declaration that the definition of spouse under the *Canada Pension Plan Act* should be read to include same sex conjugal partners;
 - (b) An order for the payment of the survivor benefit to the Plaintiff under the *Canada Pension Plan Act*;
 - (c) Costs of this action on a solicitor/client basis; and
 - (d) Such further and other relief as this Honourable Court deems just.

PLACE OF HEARING: Halifax, Nova Scotia.

DATED at Halifax, in the county of Halifax, Province of Nova Scotia, this ²⁶ day
of March, 1999.



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Phone: (902) 422-7411
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Solicitor for the Plaintiff

TO: The Prothonotary

TO: The Defendant, her Solicitors or Agents

1.0 WHO IS INVOLVED?

Applicant address: James Bigney
5848 West Street
Halifax, Nova Scotia
B3K 1J3

telephone: (902) 429-6568
e-mail: jbigney@istar.ca

Lawyer address: Ann S. Derrick, B.A. (Hons.), L.L.B.
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telephone: (902) 422-7411
fax: (902) 423-3544

2.0 FACTS & HISTORY OF CASE TO DATE

I lived in a conjugal relationship with my partner, John Morrow, for over 11 years. He passed away on November 29, 1993. On December 7, 1993, I applied to Human Resources Development Canada for a surviving spouse's pension.

I received a letter, dated February 8, 1994, from C. Jackson of the Income Security Programs branch. The letter stated that my application was denied because the legislation stipulates that the surviving spouse must be of the "opposite sex".

I retained James Morris, a Halifax lawyer, to represent me for an appeal of this decision. I also filed a complaint with the Canadian Human Rights Commission on March 8, 1994. I alleged that the Department discriminated against me by denying a surviving spouse's pension because of my sexual orientation (homosexual) and family and marital status (partner in a same-sex relationship), contrary to s.5 of the *Canadian Human Rights Act*.

I received notice of the appeal decision by letter, dated August 3, 1994, from Charlotte Roy, Director of the Appeals Division, Income Security Programs. My appeal was also denied.

The Commission appointed a Tribunal to hear my complaint, and three other similar complaints. Before the Tribunal heard the complaints, the Attorney General of Canada (representing the Federal Government) filed an application with the Federal Court to summarily dispense with the Tribunal, on the basis that Section 62 of the *Canadian Human Rights Act* restricted the Commission from hearing complaints against legislation (such as the *Canada Pension Plan Act*) enacted prior to 1978 (Attorney General of Canada v. Cowie, Bigney, et al).

The application was stayed pending the decision of the Court in an earlier case, called the Magee Reference, in which the Court was also to decide the constitutionality of s.62 of the *Canadian Human Rights Act*. This reference was also stayed pending the decision of the Supreme Court of Canada in the Bell and Cooper case - the main issue being the ability of a Tribunal to decide on the constitutionality of its' own enabling legislation. The Supreme Court eventually held that a Human Rights Tribunal does not have this jurisdiction.

As a result, the Attorney General petitioned the Federal Court to abandon the Magee Reference, which was opposed by the Commission. The Federal Court heard arguments from both sides on September 10, 1997, and agreed with the Attorney General that the reference should be discontinued, in light of Bell & Cooper.

The Commission is therefore left with the only option of reviving the initial application of the Attorney General. The Commission counsel have indicated to me that their case is weak and they do not expect a favourable result if they take this course of action, based on their inability to challenge s.62 of the CHRA directly. I have been advised by Commission counsel to commence my own action in Federal Court to challenge the definition of spouse in the *Canada Pension Plan Act*, and/or the restriction in s.62 of the *Canadian Human Rights Act*.

3.0 LAW, POLICY OR PRACTICE

I want to challenge the definition of spouse contained within s.2 of the *Canada Pension Plan Act*, that restricts a surviving spouse to, "a person of the opposite sex who was residing with the contributor continuously in a conjugal relationship for a period of not less than one (1) year immediately prior to his death".

I am a gay man who lived in a caring and supportive conjugal relationship for over 11 years with another man. I allege that this Act discriminates against me because of my sexual orientation, marital and family status, because if I were a man living in a common-law relationship with a woman, I would receive the survivor pension benefit.

4.0 SUPPORT FOR MY CASE

Section 15(1) of the *Charter of Rights and Freedoms* states:

15(1) Every individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Clearly, sexual orientation has been accepted by the Supreme Court of Canada as an analogous ground of discrimination under s.15(1) of the *Charter* (Egan and Nesbitt). I believe that I have suffered discrimination sufficient to mount a challenge against the *Canada Pension Plan Act*. There is a distinction made between myself as a spouse in a same-sex relationship - and member of a historically disadvantaged group - and the allowed spouses of the opposite sex. This distinction results in my being denied equal benefit of the law and imposes a discriminatory burden on me as a gay man.

4.1 Case Law

The Supreme Court of Canada has unanimously held that the *Charter of Rights* prohibits

discrimination against gays and lesbians. Moreover, a majority of the Supreme Court ruled in Egan v Canada [1995] 2 SCR 513, that legislation which fails to recognize same-sex couples equally constitutes sexual orientation discrimination, in violation of s.15 of the *Charter of Rights*:

"Sexual orientation is demonstrated in a person's choice of life partner, whether heterosexual or homosexual. It follows that a lawful relationship which flows from sexual orientation should also be protected. ... The definition of 'spouse' as someone of the opposite sex reinforces the stereotype that homosexuals cannot and do not form lasting, caring, mutually supportive relationships with economic interdependence in the same manner as heterosexual couples. The appellants' relationship vividly demonstrates the error of that approach. The discriminatory impact can hardly be deemed to be trivial when the legislation reinforces prejudicial attitudes based on faulty stereotypes. The effect of the impugned provision is clearly contrary to s.15's aim of protecting human dignity, and therefore the distinction amounts to discrimination on the basis of sexual orientation."

The Egan decision has now been applied by many other Courts and Tribunals. In Moore and Akerstrom v Canada, [1996] CHR D No. 8 (CHRT), a Canadian Human Rights Tribunal held that the federal government was required to extend same-sex benefits to federal employees. The three-person Tribunal unanimously ruled:

"It is now crystal clear that the law is that denial of the extension of employment benefits to a same-sex partner which would otherwise be extended to opposite-sex common-law partners is discrimination on the ground of sexual orientation....It is equally clear from the reading of these cases that the inclusion of a definition of 'spouse' which excludes same-sex partners in legislation or collective agreements or regulations by the government so as to deny such benefits offends the *Charter* and the *Canadian Human Rights Act* and constitutes discrimination prohibited by both."

While it is true that the slim majority of the Supreme Court upheld the discriminatory definition of spouse under the *Old Age Security Act* in Egan, as a justifiable limit under s.1, two justices who participated in the majority decision have since been replaced on the Court. Further, recent decisions by the Court in the Vriend decision ('reading in' sexual orientation to the Alberta human rights legislation) and Eldridge (government has a positive duty to ameliorate disadvantage

suffered by disabled individuals, in this case by paying the cost of sign language interpretation in the provision of medical services) and by the Ontario Court of Appeal in Rosenberg (unanimous in finding that the opposite-sex definition of "spouse" in s. 252(4) of the *Income Tax Act* is unconstitutional and must be extended to include same-sex couples, effective immediately) provide strong support to show that the Courts are relaxing the doctrine of "incrementalism" and deference in the arena of government spending (championed by the late Justice Sopinka in Egan), and are more willing to hold government to the strictest standards of justification.

4.2 Intervenor/Other Support

The Commission counsel that I have been dealing with for the past 5 years have indicated to me that once my action is commenced, they will petition the Commissioner for support to seek intervenor status with the Court.

I have also been in contact with such well-known community groups as EGALE (Equality for Gays and Lesbians Everywhere), who are also willing to assist my case in any way possible for them (finding expert witnesses, provision of case notes, etc). I also have the possibility of joining forces with some other applicants who are in various stages of appealing their denial of pension benefits pursuant to the spousal definition in the *Canada Pension Plan Act*, but this has not been explored to date.

Finally, my lawyer Ann Derrick and I will be assisted by a local articling student and graduate of Dalhousie Law School, Sean Foreman, in such activities as legal research and writing, preparation of documents, case briefs, etc., as required.

5.0 OPPOSITION TO MY CASE

My lawyer has indicated that she believes the greatest obstacle to this case is the Egan decision. Although this case dealt with the definition of spouse under the *Old Age Security Act* which excluded same-sex partners, there seem to be parallels to the issues in this case. The Egan

decision is still relatively new, and the majority did find that the discrimination in that case was a reasonable and justifiable limit on s.15(1). However, as stated above, there have been significant changes to the membership of the Court since 1995, and some interesting and persuasive cases (such as Vriend and Rosenberg) to increase the burden of a justification under s.1 of the *Charter*.

5.1 Intervenors

Without going into detail, there are a number of conservative groups throughout Canada who have requested intervenor status before the Courts in cases involving sexual orientation, and the perceived expansion of such rights. These groups include: Real Women of Canada, the Evangelical Fellowship of Canada, Focus on the Family (Canada) and the Canadian Family Action Coalition. Their participation, however, is usually at the higher level Court hearings (e.g. before the Courts of Appeal or the Supreme Court of Canada).

5.2 Government opposition

The Attorney General is likely to argue the minority position in Egan, that defining spouse as a member of the "opposite sex" in s.2 of the *Canada Pension Plan* does not violate s.15(1) of the Charter. This approach finds authority in the decision of Justice Gonthier in Miron v. Trudel, followed by Justice La Forest in Egan, that imports a 'relevancy and fundamental values' test into the initial s.15(1) inquiry. In essence, Justice La Forest held (for the minority in Egan), that sexual orientation is relevant in the provision of spousal benefits, making the federal Act non-discriminatory, because of the "biological and social realities that heterosexual couples have the unique ability to procreate", and the fact that "marriage is by nature heterosexual".

However, this approach has been roundly criticized, not only by the majority of the Court but also academic writers, because the spousal benefit is in no way tied to a requirement of procreation, or even child-rearing responsibility - this was Old Age Pension!

The strongest area of the Attorney General's case is in the s.1 inquiry, where the Courts have been traditionally deferential when dealing with large and emerging social conflicts between

equality rights, remediation of which may require the expenditure of public funds. However, the Supreme Court may have signaled a slight retreat from this hesitant position, in light of Eldridge and Vriend (1998). Certainly, this line of argument does not hold sway with the Ontario Court of Appeal in Rosenberg (1998).

6.0 PROVING MY CASE

It seems likely that I will need to present an expert witness to the Court, to provide evidence on the discrimination suffered by homosexuals, and same-sex couples in particular, in the context of the denial of benefits under the *Canada Pension Plan*. I will need to provide copies of all of my documentation from the past 5 years, to show my denial of benefits, and the burden this has imposed on me.

Further research and consultation will be required in such areas as the background and legislative history of the *Canada Pension Plan Act*, so that I can argue that excluding same-sex spouses from the s.2 definition of spouse is not relevant to the legislative objective and intent of the Act, and results in discrimination under s.15(1) of the *Charter*.

7.0 REMEDY

The desired remedy would be a declaration stating that s.2 of the *Canada Pension Plan Act* is unconstitutional, and the "reading in" of same-sex to the definition of spouse contained within s.2 of the Act, so that I and other surviving same-sex spouses can obtain the same benefit as our heterosexual counterparts.

This is preferable to the suspended striking down of the legislation as unconstitutional, which then would require Parliament to make changes within a specified time period. One of the problems encountered frequently by gays and lesbians in this country is that the legislatures and Parliament consistently drag their heels and refuse to act in providing such constitutionally-mandated

equality. Reading in has been accepted by the Courts in such cases as Haig and the recent decision of Vriend (1998).

8.0 IMPORTANCE OF THIS CASE

The central issue of this case is extremely important to other members of the gay and lesbian community, particularly those who are in a similar position and burdened by the denial of pension benefits. All members of this disadvantaged group are required to pay CPP deductions from their employment income, and yet are denied access to survivor spouse benefits because of their sexual orientation.

While promoting the view that discrimination against gays and lesbians is unacceptable, the Federal government has consistently refused and abdicated its responsibility to act in areas of fiscal policy, such as taxation and pension issues. This non-action has resulted in individual litigants having to expend time, energy and financial resources to move through the judicial system and achieve incremental successes in enforcing their Constitutional rights to equality.

Personally, I have spent an incredible amount of time and energy, and financial resources, in fighting what I believe to be an injustice not only to me, but to all gays and lesbians in Canada. After 5 years of seeing the Attorney General battle with the Canadian Human Rights Commission, and being stalled waiting for the disappointing outcomes of other technical cases dealing with the Commission's ability to even hear my initial complaint, I feel that the issues in this case are ones that are ripe for direct judicial determination. Further, after these long 5 years I do not have the personal financial resources required to mount this challenge in Federal Court, and cannot afford to start my action until I receive confirmation from the Program that my case will be funded in some way. Therefore, I feel that this case is one that meets the criteria of the Program and that the Panel should approve for funding.

9.0 CASE PLAN

[for Ann to outline]

FACSIMILE

To: Rosemary Morgan
Fax #: 1-613-993-3089
Re: Client
Date: June 1, 1998
Pages: 10, including this cover sheet.

As you requested.

From the desk of...

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