

Ontario Court of Appeal hands big victory to same sex couples in pension benefits case

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Nancy Rosenberg and Margaret Evans are employees of the Canadian Union of Public Employees (CUPE). Each is involved in a stable, long-term relationship with a female partner. As employees of CUPE, they are covered by the terms of its pension plan, which is funded by both employer and employee contributions. One of the plan's terms is that surviving spouses of plan members are entitled to two-thirds of the deceased member's benefits. However, this did not apply to Rosenberg's and Evans' same sex spouses.

In 1992, CUPE amended the definition of the word "spouse" in the plan to include same sex spouses. CUPE then requested a ruling from Revenue Canada as to whether it would accept and register this amendment. The registration of a pension plan and its amendments is important, because only a registered plan will qualify for the considerable tax deferral advantages made available under Canada's *Income Tax Act (ITA)*. For example, an employer's contributions to a registered plan are not included in the calculation of the employee's income, and both the employer and employee contributions are tax deductible.

Revenue Canada responded that it could not accept the amendment because it did not comply with the definition of "spouse" in s. 252(4) of the *ITA*, which specifies that a spouse of a taxpayer is a person of the opposite sex. Rosenberg and Evans went to court to have the definition of "spouse" declared in violation of s. 15 of the *Charter of Rights and Freedoms*, as discriminatory on the basis of sexual orientation.

LOWER COURT: OPPOSITE SEX DEFINITION IS A REASONABLE LIMIT ON EQUALITY RIGHTS

In a 1995 decision, a lower court upheld the exclusion of same sex couples from the *ITA*'s definition of "spouse". Before the court the government had conceded, following the 1995 decision of the Supreme Court of Canada in *Egan and Nesbit v. Canada*, that the definition violated the equality provision of the *Charter*, but had asserted that it was a justifiable limit on equality under s. 1 of the *Charter*. This was the conclusion reached by the Supreme Court in *Egan*, which involved a similarly restrictive definition of "spouse" under the *Old Age Security Act*.

The court held that it was bound by the decision in *Egan* and ruled that the spousal definition in the *ITA* was also a violation of the equality guarantee in the *Charter*, but was valid because it was a reasonable limit on that guarantee. The court concluded that it was bound to follow the result in *Egan* for the following reasons:

- In both cases, the provisions under challenge were part of the government's retirement income system, whose purpose was to provide economic security for retired Canadians.
- No meaningful distinction could be drawn between a benefit involving a direct money payment, as in *Egan*, and a benefit in the form of a tax deferral available under a registered pension plan.
- The fact that Rosenberg and Evans were obliged to pay into their pension plan did not distinguish this case from *Egan*.
- The cost of the benefit to the government had not played a significant role in the reasoning in *Egan*, and was not relied on by the government in this case to justify the exclusionary definition.

Having ruled that the exclusion of same sex couples from the *ITA*'s definition of "spouse" was a reasonable limit under s. 1, the court dismissed Rosenberg's and Evans' application.

COURT OF APPEAL: "SPOUSE" REDEFINED

In a decision released on April 23, 1998, the Ontario Court of Appeal unanimously ruled against the exclusion of same sex couples under the *ITA*. The remedy, the court held, was to broaden the definition of "spouse" in the *ITA* to include same sex couples. In coming to its decision, the court made some critical remarks about the Supreme Court's reasoning in *Egan* - reasoning which had been relied on by the lower court in this case.

In order to justify the limitation of a *Charter* right under s. 1, the state must first show that it is seeking to achieve what the Supreme Court of Canada has called a "pressing and substantial objective". According to the Court of Appeal, however, the Supreme Court has not been consistent in how it applies the test: early decisions under the *Charter* by the Supreme Court had held that the objective of the limitation itself had to be pressing and substantial, while later decisions focussed on the objective of the broader legislation under review. The latter was the route taken in *Egan*, and it had made the government's job of defending the equality violation easier:

"Few would quarrel with the conclusion that legislation encouraging income security for older

Canadians is a highly defensible objective. But it is much more difficult -- and appropriately so -- to justify as pressing and substantial any part of that income security scheme which disqualifies someone from the scheme's protection because of sexual orientation, race, disability, colour, or any of the other grounds listed or contemplated by s. 15."

Now, however, the Court of Appeal held, this uncertainty had been resolved by the Supreme Court's recent decision in *Vriend v. Alberta*. It is the objective of the limitation itself which must be shown to be pressing and substantial. Therefore, the government had to show that the exclusion of same sex couples from the benefits of registered pension plans itself had a pressing and substantial objective.

NOT A REASONABLE LIMIT

The government argued that the original intention of the opposite sex definition was to recognize the vulnerable financial position of many women in heterosexual relationships. The court responded that this might be an explanation for the exclusion of same sex couples, but could not serve to justify it:

"Aging and retirement are not unique to heterosexuals, and there is nothing about being heterosexual that warrants the government's preferential attention to the possibility of economic insecurity. ... [I]t is a non-sequitur to suggest that because pension survivor benefits were originally designed to address the special economic needs of women in traditional spousal relationships, the denial of these benefits to individuals on the grounds of their sexual orientation is justified. ... Survivor benefits are available to both male and female spouses. Clearly, entitlement under the Income Tax Act is based neither on need nor gender; the employee's preference and the nature of the relationship determine whether someone will be a beneficiary. There is no reason to deprive a gay or lesbian employee of this same choice, both as to beneficiary and as to the relationship."

Having found that the objective of the restriction was not pressing or substantial, the court went on to reject the government's argument that it should be permitted to address equality issues incrementally. Relying again on the judgment in *Vriend*, the court responded that, while governments normally find themselves having to reckon with the slow pace of attitude change in society, courts do not:

"Courts do not operate by poll. They are required to make a principled decision about whether a constitutional violation is demonstrably justifiable in a free and democratic society, not whether there might be a more propitious time to remedy it. ... Governments necessarily prefer to rely on perceived majoritarian wishes; courts, particularly in the enforcement of minority rights, are necessarily frequently obliged to override them. Waiting for attitudes to change can be a glacial process."

The court concluded by noting that there is less to fear from acknowledging conjugal diversity than

from tolerating exclusionary prejudice. Further, the court stated, the threshold of proving that inequality is justifiable in a free and democratic society is high, given the "normative centrality of equality". Here, the government had fallen far short of making this case, and the restrictive definition of "spouse" in s. 252(4) of the *ITA*, as it applies to the registration of pension plans, could not be reasonably or demonstrably justified.

In Our View

It is significant that the Court of Appeal did not attempt to distinguish the case from *Egan*, for example by emphasizing that this case involved a voluntary contractual arrangement between an employer and its employees, as opposed to the provision of a benefit from public funds, or by pointing out that the approach in *Egan* of permitting the legislature to extend social benefits "incrementally" was not appropriate to a case involving a private pension plan. Instead, the Court of Appeal clearly parted ways with the Supreme Court in *Egan* in the way it determined whether the equality infringement had a pressing and substantial objective. As well, it strongly rejected the "incrementalism" of the *Egan* decision, and instead asserted the importance of the court's role in leading, not following, public opinion. (For related cases, see ["Government application for stay rejected in same-sex benefits case"](#) and ["Federal Human Rights Tribunal dismisses same-sex pension complaint against Air Canada"](#) on our What's New page, and ["Denial of same-sex spousal benefits contrary to Canadian Human Rights Act"](#) and ["Federal Income Tax Act a barrier to equality for same-sex spousal pension benefits"](#) on our Publications page.)

It is worth noting that, as a result of the *Rosenberg* case, the Nova Scotia government has decided to award survivor benefits to the same sex spouses of teachers and government employees.

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