



T-347-93

BETWEEN:

HER MAJESTY THE QUEEN

Applicant

- and -

**LILLIAN LUCILLE OWEN, also known as
WILLIAM RICHARD HEARD**

Respondent

REASONS FOR ORDER

ROULEAU, J.

The Applicant is seeking an order in the nature of *certiorari* quashing the January 12, 1993 decision of the Review Committee appointed under the *Old Age Security Act*, R.S.C. 1985, c. O-9, as amended (the *Act*), wherein the Respondent was awarded a Widowed Spouse's Allowance.

On May 15, 1989, having attained the age of sixty years, Lillian Owen applied for a Widowed Spouse's Allowance under Part III of the *Act*. Robert Wellington Owen was identified as the deceased "spouse".

By letter dated September 5, 1991, the Respondent was advised that the application for Widowed Spouse's Allowance was being denied for the following reasons:

According to our policy, this benefit is awarded to spouses of the opposite sex who are widowed, have reached the age of 60 years, and are within certain income limits. In your case, entitlement has been denied because your birth certificate indicates your gender as male, the same sex as your deceased spouse.

If you can amend your birth certificate, you may become eligible for this benefit.

By way of background, Lillian Owen was a male at birth and was named William Richard Heard. Mr. Heard experienced a significant gender identity disorder and he attended a Clinic for sex reassignment therapy. In 1951, his name was legally changed to Lillian Lucille Richards and from that time on, he has lived as a woman. It should be noted that he has never had the surgery required to complete the sexual conversion. Lillian Richards married Robert Owen in 1955, a certified photocopy of their Marriage Certificate appears on the record. Also filed as evidence were letters from officials at the Department of Veterans Affairs indicating that the Respondent was perceived as Mr. Owen's lawful "wife".

The Respondent, whom I will hereinafter refer to as "Owen" appealed the decision denying the application for Widowed Spouse's Allowance and the matter was eventually forwarded to the Appeals Division where it was heard by a Review Committee. The following majority decision was rendered on January 12, 1993:

The Committee, having heard and reviewed the evidence submitted has reached a majority decision and concluded that the appellant, Mrs. Lillian Owen, should be awarded the

Widowed Spouse's Allowance for the period here in question; the reasons being, that Mrs. Owen has lived as a female since 1951 and married in 1955, remained married until the death of her husband, in 1964.

It is this decision that the Applicant now seeks to set aside. The Applicant submits that the Review Committee erred in law in granting the Respondent a Widowed Spouse's Allowance because Owen is not, and never was, a "spouse" within the definition of the *Act*. The Respondent, in reply, submits that the term "spouse", as defined in the *Old Age Security Act*, does not exclude a person of the same sex, but simply requires that two persons publicly represent themselves as husband and wife, which Owen had in the present case.

As the Respondent did not challenge the constitutional validity of either the *Act* or the statutory definition of the term "spouse"; the only issue that I need consider is whether or not Owen is a "spouse" as defined in the *Act*, thereby fulfilling the statutory requirements for obtaining a Widowed Spouse's Allowance.

A "spouse" is defined under section 2 of the *Act* as:

"spouse", - "spouse", in relation to any person, includes a person of the opposite sex who is living with that person, having lived with that person for at least one year, if the two persons have publicly represented themselves as husband and wife; (R.S.C. 1985, c. 34 (1st Supp.), s. 1(1).)

Traditionally, the term "spouse" is defined in terms of the institution of marriage. Indeed, having been referred to several dictionary definitions of the word, they all refer to a "husband" or a "wife". Thus the courts have held that the term "spouse" when used in legislation without being specifically defined, is to be given its ordinary meaning which is a "married"

spouse. In the present case, the term is defined in the *Act* and given an extended meaning which includes an unmarried or common law spouse.

It was conceded that Owen did not have the legal capacity to marry, and hence Owen's marriage was, at law, a nullity. The Respondent submits however, that Owen was a common law spouse.

I am not going to address the arguments that were advanced regarding the legal recognition of same-sex partners because the expanded definition of "spouse" as it appears in the *Act*, specifically requires that the common law spouse be a person "of the opposite sex". The question then becomes is Owen "a person of the opposite sex"?

The *Vital Statistics Act*, R.S.O. 1990, c. V-4, s. 36 provides in part:

36-(1) Where the anatomical sex structure of a person is changed to a sex other than that which appears on the registration of birth, the person may apply to the Registrar General to have the designation of sex on the registration of birth changed so that the designation will be consistent with the results of the transsexual surgery. R.S.O. 1980, c. 524, s. 32(1).

(2) An application made under subsection (1) shall be accompanied by,

(a) a certificate signed by a medical practitioner...certifying that,

- (i) he or she performed transsexual surgery on the applicant, and
- (ii) as a result..the designation of sex...should be changed....

(b) a certificate of a medical practitioner who did not perform the transsexual surgery....certifying that,

- (i) he or she has examined the applicant,
- (ii) the results of the examination substantiate that transsexual surgery was performed...and
- (iii) as a result..the description of the sex of the applicant should be changed...and

(c) evidence satisfactory to the Registrar General as to the identity of the applicant. R.S.O. 1980, c. 524; s. 32(2); 1983, c. 34, s. 2(1).

If the above conditions are met, a person can have a new entry made to the birth register noting at what date the individual's sex changed. According to the record, while Owen did attend the Clark Institute Gender Identity Clinic, transsexual surgery has never been performed, consequently he is still, at law, a male and therefore, not a person "of the opposite sex".

The Review Committee erred in law in deciding as it did. The *Act* requires more than a person holding themselves out to be a member of the opposite sex; the *Act* specifically requires that the person be a member of the opposite sex. The Respondent in the present case fails to meet this statutory requirement and therefore is not entitled to the benefits provided under the *Act*.

In closing, I would like to refer the parties to the often cited passage in *Corbett v. Corbett (otherwise Ashley)*, [1970] 2 All E.R. 33 where Ormrod, J. states at p. 48:

The fundamental purpose of law is the regulation of the relations between persons, and between persons and the State or community. For the limited purposes of this case, legal relations can be classified into those in which the sex of the individual concerned is either irrelevant, relevant or an essential determinant of the nature of the relationship.

In the present case, Parliament has seen fit to make the sex of an individual not only relevant, but an essential element of the common law relationship.

Accordingly, the decision of the Review Committee is set aside.

The application is allowed. I make no order as to costs.

A handwritten signature in black ink, appearing to be 'L. J. ...', is written over a horizontal line.

JUDGE

OTTAWA, Ontario
November 26, 1993