

**IN THE SUPREME COURT OF CANADA
(Appeal from the Court of Appeal for Ontario)**

BETWEEN:

THE ATTORNEY GENERAL OF ONTARIO

Appellant
(Respondent by Cross-Appeal)

- and -

M. and H.

Respondents
(Appellants by Cross-Appeal)

**FACTUM OF THE INTERVENER
THE UNITED CHURCH OF CANADA**

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BETWEEN:

10 **THE ATTORNEY GENERAL OF ONTARIO**

Appellant
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20 Respondents
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**FACTUM OF THE INTERVENER
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PART I - FACTS

30 1. This intervener accepts the facts as set out at paragraphs 1 to 41 of the factum of the respondent M.

PART II - POINTS IN ISSUE

2. This intervener supports the conclusion of the majority of the Ontario Court of Appeal that the definition of spouse in section 29(1) of the *Family Law Act*, R.S.O. c.F.3 ("*FLA*"), infringes or denies s.15(1) of the *Canadian Charter of Rights and Freedoms* ("*Charter*"), and cannot be justified under s.1 of the *Charter*. This intervener agrees with the submissions made on behalf of the respondent M. This intervener's factum will address the issues raised by the Attorney General

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of Ontario's submission that the exclusion of same-sex couples from the definition of spouse in s.29 of the *FLA* is justified under s.1 of the *Charter*.

3. This intervener's position on the application of s.1 of the *Charter* to the facts of the appeal is:

10 (a) the functional objectives of the legislation in question are the equitable resolution of economic disputes that arise when intimate relationships between individuals who have been financially interdependent break down, as well as the alleviation of governmental financial burdens by shifting the obligation to provide support for persons in need to those spouses who have the capacity to provide support;

(b) the exclusion of same-sex couples from the definition of spouse is not rationally connected to the objectives of the legislation;

(c) the rights of same-sex couples are not minimally impaired by the legislation; and

20 (d) there is no proportionality between the effect of the exclusion of same-sex couples from the definition of spouse and the objectives of the legislation.

4. This intervener's position on the appropriate remedy is that the remedy of reading in as ordered by the Ontario Court of Appeal not be suspended.

PART III - ARGUMENT

A. Interest of the United Church of Canada

5. For over twenty years, the United Church of Canada (“**United Church**”) has publicly condemned discrimination against gay men and lesbians and advocated for the inclusion of sexual orientation as a prohibited ground of discrimination in human rights legislation. The actions of the United Church, expressed in policies, resolutions and public statements, have all been founded upon the United Church's interpretation of Christian scriptures. In addition, the United Church has members and employees who are gay men and lesbians and on whose behalf the United Church has sought more inclusive legislative definitions of spouse and family members.

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- (i) **Affidavit of Virginia Coleman, General Secretary of the General Council of the United Church, November 19, 1997, filed in support of Motion for Leave to Intervene.**

6. The United Church is part of the Church of Christ in Canada. It was formed in 1925 by the union of the Presbyterian Church in Canada, the Methodist Church, and the Congregational Churches in Canada, pursuant to an agreement known as the “Basis of Union” which is incorporated into the *United Church Act*, S.C. 1925, c.100. The United Church is the largest Protestant church in Canada. It has approximately 740,000 members in Canada, involving approximately 575,000 households. About 370,000 of those households provide financial support to the United Church.

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- (i) **Affidavit of Virginia Coleman, *supra*.**
 - (ii) ***United Church Act*, S.C. 1924, c.100, Schedule A (“Basis of Union”).**

7. The governance structure of the United Church was established by the Polity section of the Basis of Union. The highest governing body so established is the General Council, the powers of which include:

“... to enact such legislation and adopt such measures as may tend to promote true godliness, repress immorality, preserve the unity and well-being of the Church, and advance the kingdom of Christ throughout the world.”

(i) **Basis of Union, supra, article 8.6.10.**

8. The doctrinal basis of the United Church is also contained in the Basis of Union,
10 including the following statements:

“... we build upon the foundation laid by the apostles and prophets, Jesus Christ Himself being the Chief cornerstone. We affirm our believe in the Scripture of the Old and New Testaments as the primary source and ultimate standard of Christian faith and life. We acknowledge the teaching of the great words of the ancient Church ...

20 We believe that the moral law of God, summarized in the Ten Comandments, testified to by the prophets and unfolded in the life and teachings of Jesus Christ, stands forever on truth and equity, and is not made void by faith, but in the contrary is established thereby.”

(i) **Basis of Union, supra, articles 2.0, 2.14.**

9. In October 1976, the Department of Church in Society of the United Church endorsed
a submission to the Ontario Human Rights Commission which recommended, among others, “that
30 in areas covered by the Ontario Human Rights Code provision should be made for prohibiting
discrimination on the basis of sexual orientation”. A year later, the United Church made a similar
recommendation when public hearings were being held regarding the proposed *Canadian Human
Rights Act*.

(i) **Affidavit of Virginia Coleman, supra.**

10. In 1984 the General Council of the United Church approved a report and affirmations on human sexuality, entitled "Gift, Dilemma and Promise", in which the Church's support for the inclusion of sexual orientation in human rights legislation was reaffirmed. It contained affirmations on sexuality, marriage, intimacy, sexism and sexual orientation as approved by the 30th General Council, and adopted as general guidelines in the United Church. The United Church recognized the commitment that is present in many relationships other than opposite-sex marriages and that the Church is called to minister to people in these relationships as in others. It affirmed that members of the Church, individually and corporately, are responsible for taking action to ensure that homosexual persons enjoy their full civil and human rights in society, and for working to end all forms of discrimination against such persons.

- (i) **"Gift, Dilemma and Promise", A Report and Affirmation on Human Sexuality, The United Church of Canada, 1984.**

11. In 1987, the Sexuality, Marriage and Family Working Unit of the United Church's Division of Mission in Canada defined "family" as follows:

"By family we mean persons who are joined together by reason of mutual consent (Marriage, social contract or covenant) or by birth or adoption/placement.

Families are intended to provide a secure environment for nurture, growth and development, and to contribute to the spiritual, social, psychological, sexual, physical and economic wholeness of the members.

Responsible procreation is a primary function of many families, though this option is not open to some families and not selected by others.

Churches and social organizations can also provide family-type relationships.

As we respond to God's offer of covenant love through Jesus Christ we discover what family can mean to us as Christians.”

(i) **Affidavit of Virginia Coleman, *supra*.**

12. In 1988, the General Council of the United Church issued a new statement on “Membership, Ministry and Human Sexuality”, in which it declared that all persons, regardless of their sexual orientation, are eligible to be considered for ordination or commissioning as ministers in the United Church. The General Council also urged all levels of government to guarantee and ensure that the human rights of their gay and lesbian citizens are protected by law and urged all courts, organizations and appropriate divisions of the United Church to become active in support of human rights for gay and lesbian people.

(i) **“Membership, Ministry and Human Sexuality”, The United Church of Canada, 32nd General Council.**

13. At the 34th General Council, in 1992, the United Church urged the Government of Canada to amend immediately the *Canadian Human Rights Act* to include sexual orientation as prohibited ground for discrimination. The United Church was also invited to appear before the House of Commons Human Rights Committee reviewing Bill C-33, an Act to amend the *Canadian Human Rights Act* to include sexual orientation as a prohibited ground of discrimination. On May 2, 1996, the United Church appeared before the Committee in support of Bill C-33, which was subsequently enacted by Parliament.

(i) **Affidavit of Virginia Coleman, *supra*.**

14. In 1992, the General Council of the United Church authorized the extension of health, dental and pension benefits of the partners of gay and lesbian employees within the Church, but these partners were not eligible for spousal benefits under its pension plan, as *Income Tax Act* regulations

governing pension plan registration permit only opposite-sex spouses to be eligible for such benefits. The United Church thereafter has sought to have the definition of spouse and eligible family members under the federal *Income Tax Act* regulations amended to include same-sex couples.

- (i) Affidavit of Virginia Coleman, *supra*.

B. Section 15(1) of the Charter

15. For the reasons set out by the majority of this Court in *Egan v. Canada*, the majority
10 of the Ontario Court of Appeal below, and in the submissions of the respondent M., it is submitted
that the exclusion of same-sex couples who have cohabitated in an intimate relationship from the
definition of spouse in s.29(1) of the *FLA* is an infringement or denial of s.15(1) of the *Charter*. The
definition of spouse in s.29(1) denies same-sex couples equal access to the benefits of the support
obligations under the *FLA*, and discriminates between persons in intimate relationships on the basis
of their sexual orientation. The definition is based upon and perpetuates stereotypical assumptions
about same-sex relationships as well as those encompassed by traditional opposite-sex marriages.
It debases and demeans the inherent dignity of the individual that is the basis of the equality
guarantee of the *Charter*.

- 20 (i) **Reasons for Judgment of Ontario Court of Appeal, Case on Appeal**
Vol. III, Tab 39, pp. 469-470.
(ii) *Egan v. Canada*, [1995] 2 S.C.R. 513 at para. 85-91, 140-181.
(iii) *Eldridge v. British Columbia (Attorney General)*, [1997] S.C.J. No. 86;
151 D.L.R. (4th) 577, para. 62, 65, 73 and cases cited therein.
(iv) *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143 at
169.
(v) *R. v. Oakes*, [1986] 1 S.C.R. 103 at 136.

16. The *Charter* infringement or denial is conceded by the Attorney General of Ontario
30 at paragraphs 35, 37 and 86 of the Attorney General of Ontario's factum. The real issue for this

Court is whether the definition of spouse in s.29(1) of the *FLA* can be demonstrably justified in a free and democratic society pursuant to s.1 of the *Charter*.

C. Section 1 of the *Charter*

(1) Objectives of the Legislation

17. It is submitted that for the reasons expressed by the Ontario Court of Appeal and in the factum of M., the objectives of the legislative provisions in issue are “the equitable resolution of economic disputes that arise when intimate relationships between individuals who have been financially interdependent break down”, as well as the alleviation of governmental financial burdens by shifting the obligation to provide support for persons in need to those spouses who have the capacity to provide support. These objectives are pressing and substantial.

- (i) *Reasons for Judgment of Ontario Court of Appeal, Case on Appeal, Vol. III, Tab 39, pp. 475-480, 481.*
- (ii) *Factum of respondent M., para. 43-60.*

18. These functional objectives are consistent with the legislative, judicial and social recognition of a broad concept of marriage and family that is not restricted to traditional opposite-sex marriages.

- (i) *Canada (Attorney General) v. Mossop, [1993] 1 S.C.R. 554 at 633-34, 648, 649.*
- (ii) *Egan v. Canada, supra, at para. 207.*
- (iii) *Moge v. Moge, [1992] 3 S.C.R. 813 at 849, 853, 869.*
- (iv) *United Church of Canada “family” definition, supra, para. 12.*
- (v) *Factum of respondent M., Appendix 10.*

19. Even if the Attorney General of Ontario's assertion that a large percentage of persons in opposite-sex spousal relationships who are in financial need upon breakdown of that relationship

are women is correct, this does not establish that the objective of the legislation is the reduction of systemic gender inequality associated with opposite-sex spousal relationships. That this may be a beneficial effect of the legislation does not affect the analysis of the functional objectives of the legislation. This is particularly so given that the legislation in question addresses spousal support and not the support of women; both men and women can seek a support order and the legislation makes no reference to the position of women or to women at all. There is no requirement for the couple to have raised children in order to trigger eligibility for support, and it is not a prerequisite that the female spouse had to have been a home-maker or out of the paid labour force. The entitlement to support is based on need, not gender. The growing presence of women in the labour-market is such that the traditional “mother spouse in the house” is becoming less common.

- (i) *Egan v. Canada, supra*, at para. 187-188.
- (ii) *Moge v. Moge, supra*, at 865-66.
- (iii) *Miron v. Trudel*, [1995] 2 S.C.R. 418 at 506-7, para. 169-171.

20. Finally, if the purpose of the legislative limitation is to provide access to court support orders only to persons in opposite-sex intimate relationships, and thereby to exclude persons in same-sex intimate relationships, such purpose is discriminatory and is not pressing or substantial.

- (i) *R. v. Big M. Drug Mart*, [1985] 1 S.C.R. 295 at 353.
- (ii) *Attorney General (Quebec) v. Quebec Protestant School Boards*, [1984] 2 S.C.R. 66 at 84, 85-6, 87-88.

(2) Rational Connection

21. The legislation expressly denies access to equal benefit of the law (support orders under s.30 of the *FLA*) to persons who fit all other criteria necessary for such a judicial order except for a constitutionally irrelevant and intimate personal characteristic, namely sexual orientation. This statutory exclusion is based upon a stereotypical presumption that same-sex couples are less

interdependent than opposite-sex couples. This is contrary to the evidence in this case, and a rational connection cannot be predicated upon a discriminatory stereotype.

(i) *Egan v. Canada, supra, at para. 94-95, 190-191.*

22. The majority of the Ontario Court of Appeal, it is submitted, correctly characterized the evidence in this case:

10 “The evidence is overwhelming that cohabitation between partners who have intimate relationships, regardless of sexual orientation, creates emotional and financial interdependencies. The evidence also shows that the same needs for dispute resolution exist upon breakup of these types of intimate relationships, regardless of sexual orientation. All the evidence attests to the pervasiveness of the discrimination faced by same-sex couples who claim spousal benefits and strive for recognition as a familial relationship.”

20 There is no basis for disturbing these findings of fact.

(i) *Reasons for Judgment of Ontario Court of Appeal, supra, p. 495.*
(ii) *See also Egan v. Canada, supra, at para. 193-5.*

23. To the extent that there are differences between opposite-sex and same-sex couples, these do not support, nor are they relevant to, a rational connection analysis as submitted by the Attorney General of Ontario at paragraphs 70-71 of his factum. If same-sex couples are more self-sufficient than opposite-sex couples, then this will affect the exercise of judicial discretion under s.30 of the *FLA*, but it is not a ground to refuse access to the courts for all same-sex couples, particularly those who are economically dependent and in need. To the extent some same-sex couples are more
30 “egalitarian”, their inclusion is consistent with the fundamental recognition of the *FLA* that spousal relationships should reflect equality between both partners. If some same-sex couples reject the “dominant heterosexual model”, and seek to differentiate themselves as a distinct community, this does not justify the compelled exclusion of all persons who share a same-sex orientation from the opportunities designed for and otherwise available to the majority of the population. Other

differences cited by the Attorney General of Ontario (gender role, division of household labour) are not relevant to the central functional objective of the legislation - the financial need of individuals.

- (i) *Reasons for Judgment of Ontario Court of Appeal, supra*, p. 486-487.
- (ii) *Eldridge v. British Columbia (Attorney General), supra*, at para. 57.

(3) Minimal Impairment

24. The impairment of the equality rights of same-sex couples under s.29(1) of the *FLA* is absolute and complete. Inclusion of same-sex couples would not require the expenditure of government funds; indeed, the purpose of the legislation is such that inclusion could alleviate demands on government resources by requiring those with financial capability to pay support to those in need. In these circumstances, the total denial of access to court ordered support cannot possibly constitute a minimum impairment of the constitutional rights of gay men and lesbians.

- (i) *Eldridge v. British Columbia (Attorney General), supra*, at para. 85-87, 03.
- (ii) *Reasons for Judgment of Ontario Court of Appeal, supra*, at p. 498
- (iii) *Miron v. Trudel, supra*, at para. 171.

25. The fact that same-sex couples may be entitled to court remedies based on common law concepts of resulting trust or unjust enrichment does not demonstrate minimal impairment, as such concepts are based on principles of restitution, and not on the question of financial need. Same-sex couples are either entitled to equal access to court ordered support or they are not, and the fact there are other remedies based on different principles does not demonstrate a reasonable alternative that minimizes the complete denial of a constitutionally guaranteed right. Such a balance sheet approach to the remedial measures of the *FLA* trivializes and misconstrues the nature of the equality rights violation in this case.

- (i) *Egan v. Canada, supra*, at para. 96, 205-207.

(4) Proportionality

26. There is no proportionality between the effect of the exclusion of same-sex couples from the definition of spouse and the objectives of the legislation. The denial of equal benefit under the law is complete and total, not partial. It is discriminatory and perpetuates the prejudice, stereotyping and marginalization of same-sex couples. Including same-sex couples in the definition of spouse does not inhibit, dissuade or impede the rights or benefits of opposite-sex couples in any way. There is no added financial burden on government resources.

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- (i) *Egan v. Canada, supra*, at para. 98, 209-211.
 - (ii) *Tétreault-Gadoury v. Canada (Employment and Immigration Commission)*, [1991] 2 S.C.R. 22 at 47.

27. Put simply, government concern over systemic gender inequality associated with the breakdown of opposite-sex relationships is separate and distinct from the equality rights of gay men and lesbians. The two are not inconsistent, but represent two aspects of protecting the substantive equality of persons guaranteed by s.15(1) of the *Charter*. The former cannot be used to justify denying the latter, particularly when no legislative disadvantage or burden is placed upon opposite-sex couples by inclusion of same-sex couples in the definition of spouse in s.29(1) of the *FLA*.

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(5) Deference to Legislative Choices

28. Central to the submission of the Attorney General of Ontario is the proposition that while the majority decision of this Court in *Egan* supports a conclusion that the definition of spouse in s.29(1) of the *FLA* infringes or denies s.15(1) of the *Charter*, a different majority's decision on the application of s.1 of the *Charter* in *Egan* is inconsistent with the Ontario Court of Appeal's decision on the same issue in this case. In this regard, it is submitted that the Attorney General of Ontario's submission rests on the applicability of Mr. Justice Sopinka's s.1 "deference" analysis in *Egan*, as well as that of Mr. Justice La Forest's s.1 "deference" analysis in *McKinney*, to this appeal.

29. It is submitted that the reasoning of Justices La Forest and Sopinka in *McKinney* and *Egan*, respectively, is not applicable to the facts and legislative context of this appeal. The definition of spouse in s.29(1) of the *FLA* does not give rise to a deference analysis because it does not involve a legislative choice about the distribution of government resources between disadvantaged groups. Unlike *Egan*, this appeal does not involve extending government social (i.e. financial) benefits to gay men and lesbians, and the concern of Mr. Justice Sopinka in *Egan* that it is “not realistic for the court to assume there are unlimited funds to address the needs of all” is not relevant to this appeal. There is no evidence that including same-sex couples in the definition of spouse in s.29(1) of the *FLA* will strain the financial resources of government. There is thus no competing budgetary interest in this appeal. As this Court decided in *Eldridge*, governments may have to spend money to address the infringement or denial of equality rights.

- (i) *Eldridge v. British Columbia (Attorney General)*, *supra*, at para. 85.
- (ii) *Egan v. Canada*, *supra*, at para. 104.

30. In this case, the government has not demonstrated that it has a reasonable basis for concluding the rights of same-sex couples were minimally impaired in its efforts to ensure that persons in intimate relationships had access to court ordered support. As submitted, these rights were denied completely. Deference, even when allocating government financial resources is involved, does not give government an unrestricted licence to disregard an individual's *Charter* rights, nor does it permit the courts to abdicate their constitutional responsibility.

- (i) *Eldridge v. British Columbia (Attorney General)*, *supra* at para. 86.
- (ii) *Tétreault-Gadoury v. Canada (Employment and Immigration Commission)*, *supra* at p. 44.
- (iii) *Egan v. Canada*, *supra* at para. 97, 215-16.
- (iv) *R.J.R. MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199 at 332-3, para. 136.

31. Similarly, the context of *McKinney* is wholly distinguishable from the present appeal. That case involved many factors, including: the entire composition of the workplace; the ability of younger people to secure jobs; access to university resources; promotion of academic freedom, excellence and renewal; collective bargaining rights, and the structure of pension plans.

(i) *Egan v. Canada, supra* at para. 214.

32. In addition, the facts and issue in this appeal do not require an examination of other rights of same-sex couples, or whether other financial benefits given to opposite-sex families with children violate the Charter. The issue of whether the rights of persons in other cohabitation arrangements (siblings, cousins, friends) are infringed is not at issue. These potential claims or legislative responses to them do not justify the *Charter* violation in this case. In any event, such arguments are speculative, and any such claims based on the other relationships not covered by the definition of spouse in s.29(1) of the *FLA* would have to proceed on a different constitutional basis than a claim grounded on sexual orientation. Concerns about a “ripple effect” simply miss the mark, in that the claims of gay men and lesbians are not a demand for discrete services or benefits to alleviate their disadvantage, or for benefits that the government has decided not to provide. They ask only for equal access similar to that which is available to other persons in similar relationships, but for the sexual orientation of the couple.

(i) *Egan v. Canada, supra* at para. 212.

(ii) *Eldridge v. British Columbia (Attorney General), supra* at para. 89-92.

33. To the extent that competing interests or values have been identified, these are essentially religious in nature. In its leave to intervene materials, the intervener Evangelical Fellowship of Canada expressed concerns that any remedy granted could have a serious impact on the freedom of religion and conscience of many faith communities in Canada. In its leave to intervene materials, REAL Women of Canada was of the view that recognition of homosexual

relationships as constituting “family” is inconsistent with Judeo-Christian values that underpin western concepts of democracy and human rights.

34. It is submitted that the religious belief of some, or even a majority, is not a proper constitutional basis on which to justify an infringement of the equality rights guaranteed by s.15(1) of the *Charter*. The constitutional right to freedom of religion is not engaged by the issue before this Court in this appeal.

10 35. There is no doubt that there is debate and division within religious communities about the issue of same-sex couples and their family members. Some point to Biblical references as evidence that homosexuality is not supported by such a fundamental source of belief. Others respond that these references must be read in the context of their times, that the spirit of such sources teaches a message of love for all, and that God's intention for all persons is full equality, including acceptance of sexual differences.

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- (i) “Gift, Dilemma and Promise”, United Church of Canada, 1984, *supra* at 1-3, 7-9, Appendix 2, pp. 91-93.
 - (ii) John Boswell, *Christianity, Social Tolerance and Homosexuality* (1980), (University of Chicago Press) Chp. 4, 10, 12.

36. That there is a diversity of opinion is evidenced by the United Church's experience over the last twenty (20) years. As a mainstream Christian denomination in Canada, whose doctrinal roots are founded upon basic Judeo-Christian concepts and beliefs, the United Church's understanding of the Bible and the tenets of Judeo-Christian morality has led it to the public affirmation that gay men and lesbians should not be the subject of discrimination. In addition, it has affirmed that all persons, regardless of their sexual orientation, who profess faith in the Church's doctrines are welcome to be full members of the Church, and are eligible to be considered for ordination or commissioning as ministers of the Church. Other representatives of mainstream

Christian denominations have also expressed opposition to discrimination based on sexual orientation, as has the Canadian Jewish Congress.

- (i) Anglican News Service, April 25, 1997, "Bishops surveyed on changing guidelines for ordaining homosexual persons".
- (ii) Alberta Human Rights Review Panel, *Equal in Dignity and Rights: A Review of Human Right in Alberta* (Edmonton , Alberta 1995) at p. 74.
- (iii) Factum of Canadian Jewish Congress in *Vriend v. Alberta (Attorney General)*, S.C.C. File No. 24395.

37. The issue of sexual orientation and same-sex families must be resolved in a religious and moral context of respect for differing positions and with integrity, thereby leading to principled decisions based on commitments of justice and equality for all persons and the values which underlay the *Charter*. Such decisions result in a more inclusive society, where healing of past and current divisions can occur, where discriminatory attitudes and stereotypes are substantially lessened, and where society becomes more enriched. Opposition to same-sex relationships based on religious and moral beliefs is not the only approach that people of religious faith and morality can bring to the issue in this appeal. It may be the position of other interveners, but they advocate for their members only and obviously not for this intervener.

38. The Attorney General of Ontario does not ascribe religious purposes or objectives to the definition of spouse in s.29(1) of the *FLA*, and rightly so. To use religious beliefs or freedom of religion to justify the exclusion of same-sex couples from the legislative definition would violate the freedom of religion, not only of gay men and lesbians who have religious beliefs, but also the religious beliefs of other heterosexual persons who do not share the same religious beliefs of those who oppose same sex relationships.

- (i) *R. v. Big M. Drug Mart Ltd.*, *supra*, at 336-7.

39. In any event, the essence of freedom of religion is the right to individual choice of religious beliefs, and the right to declare and manifest those beliefs openly by worship, practice, teaching or dissemination, without fear of hinderance or reprisal. Inclusion of same-sex relationships in the definition of spouse under s.29(1) of the *FLA* would not in any way impair or diminish any person's right to freedom of religion, nor would they be discriminated against on the basis of religion. Those whose religious beliefs oppose same-sex relationships must simply respect the constitutional rights of others, just as their constitutional rights are respected.

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- (i) *R. v. Big M. Drug Mart Ltd.*, *supra* at 336-7.
 - (ii) *Grant v. Canada (Attorney General)* (1995), 184 N.R. 346 at 348 (F.C.A.), [1995] 1 F.C. 158 at 201-2 (F.C.T.D.).

40. In the alternative, if freedom of religion was in any way affected by freedom from discrimination based on sexual orientation, then such freedom of religion would be limited in a constitutionally permissible manner in order that the fundamental freedom from discrimination of gay men and lesbians would be protected.

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- (i) *R. v. Big M Drug Mart*, *supra* at 337.
 - (ii) *Ross v. New Brunswick School Division No. 15*, [1996] 1 S.C.R. 825 at 878-79, para. 91, 94.

41. Finally, Mr. Justice Sopinka's s.1 analysis in *Egan* was predicated, in the spring of 1995, on the fact that equating same-sex couples with opposite-sex couples was still generally regarded as a "novel" concept. Given this, he was not prepared to say that "by its inaction to date" (emphasis added), the government had disentitled himself to rely on s.1 of the *Charter*. Mr. Justice La Forest did not address this issue in his s.1 analysis in *Egan*.

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- (i) *Egan v. Canada*, *supra*, at para. 111, (Sopinka, J.), para. 29 (La Forest, J.).

42. With respect, and particularly given the passage of almost three years since the decision of the Court in *Egan*, the equation of same-sex and opposite-sex couples can no longer be considered as novel. Since *Egan*, Parliament has amended the *Canadian Human Rights Act* to include sexual orientation as a prohibited ground of discrimination. British Columbia has extended the definition of “spouse” so that same-sex couples have equal rights and responsibilities related to support, child custody and access. Other legislative and judicial recognitions of the rights of same-sex couples are found at Appendix 10 of the factum of the respondent M.

- 10
- (i) **An Act to Amend the *Canadian Human Rights Act*, S.C. 1996, c.14.**
 - (ii) ***Family Relations Act*, R.S.B.C. 1996, c.128 as amended by *Family Relations Amendment Act*, 1997, S.B.C. 1997, c.20 (proclaimed February 4, 1996).**
 - (iii) **Factum of the respondent M., Appendix 10.**

43. The United Church, for over twenty years, has recognized the need for the law to prohibit discrimination based on sexual orientation. For the past ten years, it has recognized the need for same-sex couples to be included as members of a family, and recognized and welcomed same-sex couples as members, ministers and employees. Although the recognition of the equality of same-sex and opposite-sex couples may be controversial in some segments of Canadian society, it is not “novel” to the United Church.

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44. In any event, the novelty of the concept, if it is still the case, is not the basis for justifying a breach of the *Charter*. The addition of this factor to a s.1 analysis is unprecedented, potentially undefinable, and undercuts *Charter* values and its purpose. To accord deference merely because the determination and articulation of a constitutionally protected right is novel would be to provide government a licence to discriminate in favour of the status quo. At the very least, such a consideration can only inform the remedy, and not justify discrimination that infringes the *Charter*.

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- (i) ***Egan v. Canada*, supra, para. 100, 216.**
 - (ii) ***Schacter v. Canada*, [1992] 2 S.C.R. 679 at 709.**

D. Remedy

45. This intervener agrees with the submissions of the respondent M. on the issues of reading in and suspension.

PART IV - NATURE OF RELIEF REQUESTED

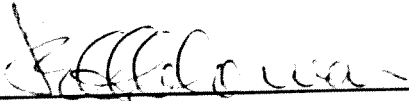
46. This intervener submits that the constitutional questions in this appeal be answered as follows:

1. Does the definition of "spouse" in s.29 of the *Family Law Act*, R.S.O. 1990, c.F.3, infringe or deny s.15(1) of the *Canadian Charter of Rights and Freedoms*? Yes.
2. If the answer to Question 1 is yes, is the infringement or denial demonstrably justified in a free and democratic society pursuant to s.1 of the *Canadian Charter of Rights and Freedoms*? No.

47. This intervener therefore submits that this appeal be dismissed, and that the cross-appeal on remedy of the respondent M. be allowed so that the remedy of reading in as ordered by the Ontario Court of Appeal is not suspended.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated this 6th day of March, 1998.



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The United Church of Canada

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