In the Supreme Court of Canada

(On Appeal from the Court of Appeal of Ontario)

Court File No.: 25838

Attorney General for Ontario

Appellant
(Intervener)

- and -

M

Respondent
(Respondent)

- and -

H

Respondent
(Applicant)

FACTUM OF THE INTERVENER FOUNDATION FOR EQUAL FAMILIES

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FACTUM OF THE INTERVENOR FOUNDATION FOR EQUAL FAMILIES

PART I - FACTS

1. This intervenor, the Foundation for Equal Families ("Foundation") accepts the facts as set out in paragraphs 1 - 12 of the factum of the appellant ("Ontario's factum").

2. The Foundation is a not for profit corporation whose membership is broadly based in the lesbian and gay community, and whose purposes include the promotion of legal equality for same sex couples. The Foundation intervened in this case before the Ontario Court of Appeal and was granted leave to intervene in this appeal to the Supreme Court of Canada on October 2, 1997.

PART II - POINTS IN ISSUE

3. The Foundation accepts the description of the points in issue as set out in paragraph 13 of Ontario's factum. The Foundation's position is that s.15 is violated, and that there is no justification pursuant to s.1

PART III - ARGUMENT

A. DISCRIMINATION UNDER S.15 OF THE *CHARTER*

1. Introduction

4. The Foundation agrees with Ontario's submissions respecting the three approaches to equality developed by the Supreme Court of Canada in *Benner* v. *Canada*, *Miron* v. *Trudel*, *Egan* v. *Canada* and *R* v. *Turpin*, as set out in paragraphs 28-33 of Ontario's factum.

> *Benner* v. *Canada* [1997] 1 S.C.R. 358 ("*Benner*"), *Miron* v. *Trudel* [1995] 2 S.C.R. 418 ("*Miron*"), *Egan* v. *Canada*, [1995] 2 S.C.R. 513 ("*Egan*"), *R* v. *Turpin* [1989] 1 S.C.R. 1296.

10 5. This case concerns the discriminatory treatment of lesbians and gay men under Ontario's *Family Law Act,* R.S.O. 1990 c.F.3 (*"Family Law Act"*).

6. In *Egan* this Court found as follows:

(a) the Court found unanimously that sexual orientation is an "analogous ground" under s. 15 of the *Charter*;
Egan, supra, per Cory J. and Iacobucci J. at 599-603, L'Heureux-Dubé J. at 540, LaForest J. at 528-529, MacLachlin J. at 625, and Sopinka J. at 572.

(b) a majority of the Court (5-4) found that same sex relationships are protected under the guaranties of equality in s.15(1) of the *Charter* and
20 therefore the impugned legislation in the *Old Age Security Act,* R.S.C., 1985, c. 0-9 is discriminatory (*"Old Age Security Act"*); and
Egan, supra, per Cory J. and Iacobucci J. at 583-604, Maclachlin J. at 625, L'Heureux Dubé J. at 540 and Sopinka J. at 572.

(c) a differently constituted majority of the Court (5-4) found that the impugned legislation was saved under s. 1 of the *Charter*.
Egan, supra, per La Forest J. (Lamer CJC., Gonthier and Major JJ. concurring) at 539-540, and Sopinka J. at 572-576.

30 7. The Foundation submits that the decision in *Egan* is dispositive of the s. 15 issue before the Court on this Appeal. However, the Foundation further submits that *Egan* is distinguishable from this case in respect to s. 1 of the *Charter*.

2. The *Egan* Decision and s.15 of the *Charter*

8. In *Egan*, the impugned legislation conferred benefits paid by Canada to certain "spouses" of "pensioners" under the *Old Age Security Act*. Thus, the case involved denial of a public benefit on the basis of sexual orientation.

9. In the case at bar, the benefits and burdens at issue arise between private parties. However, just because there is not an allocation of burdens and benefits as between the state and the individual in the case at bar does not lead to the conclusion that there is no discrimination within the meaning of s.15 of the *Charter*.

10

(a) The Distinction Results in a Denial of a Benefit

10. On the facts of this case, the respondent M has been denied the following benefits on the basis of her sexual orientation:

(a) the benefit of spousal support payments from H;

(b) the benefit of the right to *apply* for spousal payments from H; and

(c) the benefit of the right to have her application heard, determined and enforced in accordance with the expedited procedural regime established under the *Family Law Act*.

20

11. In addition, M, and all other lesbians and gay men in same sex relationships in Ontario are denied the benefit of being treated with the same care, concern and respect as heterosexual couples by reason of the exclusion of their relationships from the *Family Law Act*.

Egan, *supra* per Cory J. at 593-595

12. In this regard, the Foundation expressly disagrees with Ontario's submission in paragraph 36 of its factum. The *Family Law Act* is intended to, and does, provide a state imprimatur on heterosexual relationships. While it is true that same sex relationships are not characterized by "systemic gender inequalities" within the relationships themselves, there is no evidence before the Court that the inequalities and interdependencies that arise in same sex relationships are qualitatively or quantitatively different from those that arise in heterosexual relationships. As Iacobucci J. stated in *Egan*, the "presumption against interdependence in same sex relationships... is not only incorrect but is also the fruit of stigmatizing stereotype." In this regard, the Foundation accepts and adopts the submissions in paragraphs 43 - 52 and 54 - 60 of the respondent M's factum in this appeal.

10 *Egan*, supra, per Iacobucci J. at 610.

13. Ontario's submissions about legislative objective are, in and of themselves, suggestive of a discriminatory objective. Ontario has not studied the point it now asserts, which is contradicted by their expert and the 1993 Ontario Law Reform Commission Report on the topic. When the impugned legislation was enacted in 1978 and amended in 1986, there was no evidence before the Legislature that same sex couples had different needs than opposite sex couples. When further amendment was proposed and defeated in a free vote in the Legislature in 1994, the debate on the amendment did not focus on this issue.

20 14. The impugned legislation in *Egan* was said to be intended to confer a benefit on near-elderly women whose husbands had retired. Nonetheless, Cory J. found that the *Old Age Security Act* also

> confers a significant benefit by providing state recognition of the legitimacy of a particular status. The denial of that recognition may have a serious detrimental effect upon the sense of self-worth and dignity of members of a group because it stigmatizes them even though no economic loss is occasioned....

The *Family Law Act* confers no less status than does the *Old Age Security Act*, and indeed, the state's exclusion likely has greater social impact on the dignity of same sex couples who are thereby deemed not to be legitimate families. The arguments advanced by Ontario and some intervenors regarding s. 15 rely on arguments about traditional values around marriage and procreation which were expressly rejected by five of the Justices of the *Egan* Court, and therefore should be rejected in this case.

Egan, supra, per Cory J. at p. 594

10 15. The Foundation relies on the uncontradicted evidence in the courts below, including the evidence filed by Ontario, that the extension of same sex spousal status is desired by the overwhelming majority of members of the lesbian and gay community, will have a beneficial sociological impact on the lesbian and gay community as well as their children, and is consistent with the evolving structures of the family.

Transcript of the Cross-Examination of Reverend Brent Hawkes, p. 24, ~~tab 1~~ tab 18 of the Foundation's Brief of Authorities;
Affidavit and Report of Professor John Lee ("Lee"), *Case on Appeal*, volume 1, tab 28 and 29.
Affidavit and Report of Dr. Rosemary Barnes, *Case on Appeal,* volume I, part II, tab 17 and 18;
Affidavit of Professor Margaret Eichler ("Eichler"), *Case on Appeal*, volume II, tab 31

20

B. JUSTIFICATION UNDER S. 1 OF THE *CHARTER*

1. The *Egan* Decision and s. 1 of the *Charter*

16. In *Egan*, only one Justice, Sopinka J., found that there was a breach of s.15, but that this breach could be justified under s.1. La Forest J. (Lamer CJC, Gonthier and Major JJ concurring) found that there was no breach under s.15, but that if there was a breach, that it was justified under s.1. The remainder of the court found there was a breach that could not be justified.

17. Justice La Forest's s. 1 decision was based on two grounds:

(1) the reasons set out in His Lordship's s.15 analysis; and
(2) the principles set out in La Forest J's reasons in *McKinney*.

Egan, supra per La Forest J. at 539-540
McKinney v. *Unviersity of Guelph*, [1990] 3 S.C.R. 229

18. Justice Sopinka's s. 1 decision was based on two grounds:

(1) the fact that the claims asserted by Egan and Nesbit were "novel" and thus His Lordship was not prepared to say that the state was as yet disentitled to a s.1 defence; and
(2) the principles set out in La Forest J's reasons in *McKinney*.

Egan, supra per Sopinka J. at 573-577

19. The first ground, that is, the traditional marriage and procreation analysis, was rejected by a majority of the court, including Sopinka J. Thus, it cannot be the *ratio* of the case. The first ground given by Sopinka J. did not attract support from any other members of the court. La Forest J. was silent on the point, and Iacobucci J. (with whom the other dissenting Justices concurred on this point) and L'Heureux-Dubé J. both expressly disagree with it.

20. Although La Forest and Sopinka JJ both rely upon *McKinney*, when read together their reasons do not reveal a consistent statement of principle. Sopinka J. relies primarily upon the argument that Parliament has the right to extend benefits gradually to disadvantaged groups and in so doing recognize "new social relationships". His emphasis is on the legislative choices among disadvantaged groups. La Forest J. did not articulate the reasons for the applicability of *McKinney*. Justice Sopinka's foresaw a sunset to the constitutionality of this type of discrimination, that Justice LaForest did not foresee.

21. In the result, there are five Justices of the Supreme Court of Canada concurring in the result of the case, and in identifying an authority which supports their finding - *McKinney* - but there is no stated basis given by all five as to why *McKinney* applies, or what record, if any, was before the Court in *Egan* to support a *McKinney* analysis.

22. Accordingly, in order to decide the case at bar on the basis of constitutional principle, the proper questions are: (1) does *McKinney* apply to this case? and (2) how is this case distinguishable from *Egan*?

2. McKinney Does Not Apply to This Case

23. *McKinney* was concerned with the constitutionality of mandatory retirement at universities, and the provincial human rights law which permits mandatory retirement policies at the age of 65. After finding that mandatory retirement constitutes discrimination on the basis of age, La Forest J., in analyzing the application of s.1 to the case, found that the objectives of the impugned legislation involved intertwined objectives, all of which had to be assessed. Included in these objectives was the Legislature's concern with the

> desirability of permitting those in the workplace to bargain for and organize their own terms of employment, the advantages flowing from expectations and ongoing arrangements about terms of employment including not only retirement, but seniority and tenure and, indeed, almost every aspect of the employer-employee relationship.
>
> *McKinney*, *supra* per La Forest J. at 302

24. *McKinney* permits the state to allow private actors to discriminate on the basis of age as part of a comprehensive matrix of factors relating to the terms of employment. Once this Honourable Court recognized the legitimacy of compulsory retirement ages, the purely arbitrary question of what

the specific retirement age ought to be was best left to the Legislature.

> *McKinney, supra*, per La Forest J. at 312

25. In *McKinney*, the court was faced with competing claims between the interests of older and younger workers and left those policy choices to the Legislature. The only possible competing claims in *Egan* were the competing claims for government benefits. There are no such competing claims in the present case. There is no demonstrable impact on the "rights" of heterosexuals by granting equality to gays and lesbians in these circumstances. As Justice Epstein noted at the trial level in this case,

> ...while I am aware of the strong feelings people hold about traditional family forms, it eludes me how giving same-sex partners access to the Court to prosecute support claims affects the formation of heterosexual unions.

> *McKinney, supra; Egan,supra;* Ryder, Bruce "*Egan* v. *Canada*: Equality Deferred, Again", 4 *Canadian Labour and Employment Law Journal*, 1996, 87-110 ("Ryder"); *M* v *H* (1996) 27 O.R. (3d) (Ont. Ct. Gen. Div.) 593, per Epstein J. at 614.

26. In the case at bar, the impugned legislation does not adversely impact the public purse. It does not even have a secondary fiscal impact, as with the pension plan in issue in *Rosenberg*. Rather, it regulates the private relations of individuals in family units, not the categories of persons who are entitled to benefits from the state. Moreover, by allowing a greater number of persons access to the dispute resolution regime established by the *Family Law Act*, fewer persons would look "to the public purse for their needs". In the words of Charron J.A., "as the law presently stands, the government is paying a premium for inequality".

> *Rosenberg* v. *Canada* (1995) 25 O.R. (3d) 612 (Gen. Div.)("*Rosenberg*"); *M* v. *H*, (1996) 31 O.R. (3d) 418 (Ont. C.A.), per Charron JA at 460;

27. It is submitted that the only possible fashion in which Justice Sopinka's decision in *Miron* and his decision in *Egan* can be reconciled is on the basis of the impact on the public purse, and deference to the Legislature with respect to developing social relationships. Sopinka J. disavowed the reasoning of LaForest J. that promotion of procreating families created either "relevancy" within s. 15 or justification within s.1.

Egan, supra.per Sopinka at 575 to 576.

3. Distinguishing Egan: There Is No Basis For Continued Judicial Deference

28. When the *Charter* came into force in 1982, implementation of s.15 was delayed a period of three years to accord Legislatures a reasonable period of time to bring their laws into conformity with the guarantees of equality contained in s.15. Although Ontario amended its Human Rights Code to reflect the *Charter's* equality requirements regarding sexual orientation thereafter, it did nothing to include same sex couples in three subsequent amendments to the *Family Law Act*.

29. *Egan* was decided in May, 1995, eight years after the original *Family Law Reform Act,* 1978 S.O. 1978, c.2; ("*FLRA*") and thirteen years after the Charter. In the nearly three years since that decision, Ontario has done *nothing* to bring its laws into conformity with the Supreme Court of Canada's ruling in *Egan*. It can no longer rely upon a bald allegation of "incremental reform". Moreover, following the Ontario Court of Appeal's ruling in this case, the Legislature has taken no steps toward any sort of reform. The year of grace afforded Ontario by the Court of Appeal to consider measures to rectify the discrimination has been disregarded. In fact, Ontario does not seek a further year suspension.

30. To hold otherwise will leave the Court in the invidious position of entertaining cases such as *Egan*, the case at the bar, and *Rosenberg* (now in the Ontario Court of Appeal) every few years, in each case asking the question, "is it time yet?"

31. Other jurisdictions have chosen other options to protect same sex spouses. For example:

(a) in Hawaii, the Court has made the option of marriage potentially available to same sex couples: *Baehr* v. *Lewin* 852 P.2d 44, 74 Haw. 530 (1993);

(b) in Australia, in the absence of a Charter, the Courts have extended the doctrine of estoppel to provide a child support remedy: *W.* v. *G.*, (1996) 20 Fam. L.R. 49 (S.C.N.S.W.);

(c) some Scandinavian countries and some American municipalities have enacted "domestic partnership" registries, which require an act of opting in. This was the solution suggested by the Ontario Law Reform Commission in its 1993 Report.

All of the foregoing options could be available to the Legislature to attempt to address the discrimination. However, there is no evidence that Ontario is considering any of the forgoing or any alternative policy options, or that it will ever do so. At present, the only reasonable conclusion is that there will be no change in the law at all in the foreseeable future if the task is left to the Legislature. As a result, this Honourable Court ought to act to correct the unconstitutional law before the Court.

32. In the employment benefits context, and in the provision of medical services, it has been held that government must extend equal benefits notwithstanding the cost to the public purse.

Eldridge v. *British Columbia (Attorney General)* [1997] S.C.J. No. 86 ("Eldridge"); *Leshner* v. *Ontario* (1992)16 C.H.H.R. D/184 (Ont. Bd. Inq.) ("*Leshner*"); *Vogel* v. *Manitoba*, (1995) 6 W.W.R. 513 (Man C.A.) ("Vogel"); *Moore and Akerstrom* v. *Canada* [1996] C.H.R.D. No.8, June 13, 1996 (Canadian Human Rights Tribunal) ("Moore")

33. It is clear that governments sometimes are allowing *Charter* challenges in the Courts to effect changes in this politically controversial area, which they are unwilling or unable to do directly through the political process. For example, rather than amend the *Human Rights Act*, the federal government simply chose not to appeal the decision of this Court in *Haig*. Actual legislative change was much more difficult, controversial, and slow to come. As Lamer CJC has stated:

> the judiciary did not seek these responsibilities and we certainly did not assign them to ourselves. These were given to ...the judiciary by the politicians. It was a job given to us, either deliberately or by default, by the democratic process. As for the suggestion that judges intrude into the legislative sphere, the truth is that many of the toughest issues we have had to deal with have been left to us by the democratic process. The Legislature can duck them. We can't....Our job is to decide the cases properly before us to the best of our abilities....We do our duty and decide.
>
> The Right Honourable the Chief Justice of Canada, Speech to the Empire Club of Canada (April 1995); *Moore, supra*.

34. Given the historic prejudice against gays and lesbians, it is submitted that it is in precisely this type of situation that the Court should act as guardians of the rights of unpopular minorities to protect them from the discriminatory laws of a hostile majority. In this regard, it is appropriate for the Court to consider the historical persecution of homosexuals in Canadian society which has been found as a fact in cases such as *Egan* and *Haig*. As Cory J. stated in *Egan*:

> 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.
>
> *Egan, supra* per Cory J. at 600-601
> *Haig* v. *Canada* (1992) 9 O.R. (3d) 495 (Ont C.A.) ("Haig")

35. With respect to discrimination of this type, the Courts have responded by refusing to defer to the Legislature's promise of incremental change. This approach has been followed in;

(a) requiring the military to accept personnel without regard to their sexual orientation;

Douglas v. *Canada* (1992) 98 DLR (4th) 129 (F.C.); *Haig, supra.*

(b) requiring the immediate reading in of "sexual orientation" into the *Canadian Human Rights Act*;

Haig, supra.

(c) permitting lesbian couples to jointly adopt as spouses;

Re K., (1995) 23 O.R. (3d) 679 (Ont. Ct. Prov. Div.) ("Re K.")

(d) requiring government as employer to provided benefits to its gay and lesbian employees without discrimination.

Leshner, supra; Vogel, supra; Moore, supra.

36. In citing Charter cases involving discrimination, it is important that the Court consider "the larger context, social and **political** and legal" (emphasis added), and the impact of the discriminatory law on the lives of gays and lesbians, and their families.

Haig, supra p. 503

37. For most of the existence of this country, not only have gays and lesbians not been accorded any legal recognition, they have been incarcerated or had their relationships attacked. There has been a movement to increasing human rights since the Second World War, as noted by Justice Krever in *Haig*. However,

(a) there is peculiar political and social hostility and resistance to gays and lesbians as a "minority" or "equality-seeking group";

(b) rather than amend the law to reflect *Haig*, initially, the Federal government took the unconventional approach of simply choosing not to appeal the decision;

(c) four years after *Haig*, the Federal government did finally codify *Haig*, but only over great opposition, and subject to a preamble which acknowledged the importance of the "family";
Bill C-33, *An Act to Amend the Canadian Human Rights Act*, 2nd session, 35th Parliament, 1996 (passed);*Moore, supra.*

(d) the Crown did not appeal the Ontario Court of Appeal's decision in *Carmen M.*, and nonetheless, no amendment has been made to s.159 of the *Criminal Code*;
R. v. *Carmen M.* (1995) 23 O.R. (3d) 629 (Ont. C.A.)

(e) the Legislature has considered revisions to Ontario's family laws on four separate occasions in the last 18 years; there have been increasing rights and obligations for heterosexual relationships, regardless of procreative abilities, and no improvements in the rights and obligations accorded homosexual relationships except where imposed by the Courts;
Family Law Act S.O. 1986, c.35,; *Family Law Act* R.S.O. 1990, c.F.3. Family Law Act R.S.O. 1990; 1997 c.20 ss1-20 ; *Re K., supra*

(f) as Epstein J. correctly acknowledged, the defeat of Bill 167 and the circumstances surrounding its defeat indicate that social hostility towards lesbians and gay men will effectively prevent any government from remedying this problem in the near future; this is because of the very discrimination and prejudice that exist toward lesbians and gay men. The discrimination persists not because of budgetary concerns, "competing claims" or any other imagined concerns about legislative "priorities".
M. v. *H.* (1996), *supra*

4. Ontario Has Not Satisfied the *Oakes* Test

38. The test under s. 1 was set out by Dickson CJC in *R v. Oakes*. As articulated by Iacobucci J in *Egan*, the *Oakes* test is as follows:

> [f]irst, the objective of the legislation must be pressing and substantial. Second the means chosen to attain this legislative end must be reasonable and demonstrably justifiable in a free and democratic society. In order to satisfy the second requirement three criteria must be satisfied (1) the rights violation must be rationally connected to the aim of the legislation (2) the impugned provision must minimally impair the *Charter* guarantee; and (3) there must be proportionality between the effect of the measure and its objective....
>
> *Egan, supra* per Iacobucci J. at 605.

39. There is a heavy onus on the government in order to justify a violation of s.15. As Madam Justice Wilson said in *Andrews*, "the burden resting on government to justify the type of

discrimination against such groups is appropriately an onerous one". Here, the government's only expert witness contradicts the government's assertion of justification.

Andrews v. *Law Society of British Columbia* [1989] 1 S.C.R. 143, *per* Wilson p. 154;
Eichler, supra

(a) Objective of Part III of the *Family Law Act*

40. The Foundation acknowledges that the government objectives underlying Part III of the *Family Law Act* as identified by the Court of Appeal are pressing and substantial.

10 41. The Foundation adopts the legislative history of the *Family Law Act* set out in paragraphs 16-27 of Ontario's factum (although not the characterization of that history set out therein) and the history as set out in paragraphs 12-28 of the factum of the respondent M.

42. In its factum, Ontario is at pains to make "the correct identification of the government objective" of the impugned legislation. Ontario takes the position that the underlying purpose is "to remedy systemic sexual inequality associated with opposite sex relationships" rather than the purpose of providing "for the equitable resolution of economic disputes that arise when intimate relationships between individuals who have been financially interdependent break down". The preamble to the Act makes no mention of the objective articulated by Ontario, and the language of the statute is
20 gender neutral, but for its exclusion of same sex couples. Although the preamble does mention marriage, it is clear that one of the significant aspects of the new definition of spouse introduced by the *FLRA* was the recognition of so-called "common law" opposite sex couples in relationships which, by definition, were *outside* of marriage.

Preamble, *Family Law Act*
M v. H,(Ont. Ct. Gen. Div.) *supra*.

43. The s.1 defence of Ontario relies, implicitly, on stereotypical assessments of men, women, and the relationships between heterosexual and same sex couples. It assumes, in particular, that heterosexual relationships are materially different from same sex relationships. It further suggests that the exclusion of same sex couples from the *Family Law Act* was a considered choice based on supposed distinctions between same sex and heterosexual relationships.

44. The analysis of Ontario makes a persuasive case that common law couples have same needs as married couples. However, this is no more than an acknowledgment of this Honourable Court's conclusions in *Miron*. It may be that it is more common for women to have need of support than men. The legislation, however, is deliberately gender neutral. Moreover, this argument does nothing to explain why economically disadvantaged women in same sex relationships should be treated differently by the law.

Miron, supra

45. The Foundation adopts the submissions at paragraphs 62-90 of the respondent M in respect to the objectives of the legislation. In addition, the Foundation submits that the overwhelming weight of the evidence and commentary supports the position that, in all material ways, same sex relationships are analogous to heterosexual relationships. In fact, there is no real evidence to the contrary. Ontario and some intervenors base their argument on historical exclusion of same sex relationships from legislative recognition, but as one commentator has noted "[t]he practice of slavery also had a long and distinguished moral basis in western culture, at least until the 19th century. The pedigree of the prejudice is no justification for bigotry". Traditional values have been used as an argument to support discrimination of all types, including discrimination against opposite sex couples who are living in intimate relationships outside of marriage.

S.K. O'Byrne & F.L. McGinnis "Case Comment: *Vriend* v. *Alberta, Plessy* Revisited: Lesbian and Gay Rights in the Province of Alberta" (1996) 4 *Alberta Law Review* 892 at 909

46. In fact, the impugned legislation was not a reinforcement of traditional family structures but an attempt to redress the injustice which had clearly arisen by excluding certain non-traditional families. The *FLRA* was introduced in Ontario following cases such as *Murdoch* where unmarried women were unfairly disadvantaged economically in the course of spousal relationships. The intent of the legislation was to remove some of the distinctions between couples who were in traditional marriages and couples who were not, and to focus on the functional economic unit. Gender equality was also an important principle of the *FLRA*.

Murdoch v. *Murdoch* [1975] 1 S.C.R. 423 ("*Murdoch*");
Family Law Reform Act, S.O. 1978, c.2

47. The issues in cases such as *Murdoch* and *Petkus* v. *Becker* had nothing to do with procreation. They were about attempting to rectify economic injustice between unmarried persons in family units, without regard to traditional social and religious conventions.

Murdoch, supra;
Petkus v. *Becker,* [1980] 2 S.C.R. 834

48. Many cases have come before the family courts over the past ten years involving lesbians or gay men who are parents. In particular, same sex parents have sought custody, access and child support from their same sex partners, and same sex couples have sought to adopt children with their same sex partner. It is unrealistic and discriminatory to treat procreation and child-rearing as an exclusive heterosexual domain, especially in light of modern technology such as alternate insemination.

Anderson v. *Luoma* (1986) 50 R.F.L.(2d) 127 (B.C.S.C.) ("*Anderson*");
Re K., *supra*

49. Further, as noted by the courts below in this case, and by Cory J. in *Egan*, the impugned legislation applies regardless of whether the heterosexual couple has or is capable of having children. Infertile heterosexual women are given rights, while lesbian mothers are denied rights. As Justice L'Heureux-Dubé noted in *Egan*, this type of biological argument was rejected by this Honourable Court regarding pregnancy discrimination. Suggesting that heterosexual procreation is more common, as suggested by the intervenor REAL Women, does not save a discriminatory distinction. This could easily be seen if the distinction were a racial one as observed by Justice Cory in *Egan*. For example, a law which recognized only white couples or Christian couples could not be justified under the Charter, just because they might be more numerous.

Egan, *supra*, per Cory J. p. 588-590, and per L'Heureux-Dubé p. 569

(b) Rational connection and Minimal Impairment

50. The Foundation submits that the Act fails the second part of the *Oakes* analysis because there is no rational connection between the discrimination and the legislative objective.

Benner, *supra* per Iacobucci J. at 404

51. If the marker chosen is itself discriminatory, the legislation cannot be saved. In *Miron*, choosing the marker of marriage for private benefits required by law was held to be an invalid marker.

Miron, *supra* MacLachlin J. at 495-497

52. There is no rational connection between the stated purpose of protecting disadvantaged

women because the Act arbitrarily distinguishes between women who are disadvantaged as a result of their relationships with men and women who are disadvantaged because of their relationships with other women.

(c) Proportionality between effect and measure

53. If the purpose of s. 29 of the *Family Law Act* is to confer benefits to heterosexual couples because of their status as potential parents, it unlawfully discriminates in that:

(a) it favours the rights of potential heterosexual parents over the rights of actual homosexual parents;

(b) it protects economically disadvantaged women with male partners, while denying the same treatment to similarly situated women with female partners; and

(c) it protects economically disadvantaged men with female partners while denying the same treatment to similarly situated women with female partners.

54. If the purpose of the legislation is, as stated by Ontario, to "address the exploitation of women in common law relationships by some men and to reduce the demands on the welfare system resulting from men's abandonment of their common law spouses" then the manner chosen to implement the legislation is both under-inclusive and over-inclusive.

Ontario's Factum, at paragraph 21; *Family Law Reform Act*, S.O. 1978, c.2

55. The *Family Law Act* is under-inclusive because it fails to protect lesbians and gay men who may be exploited and abandoned in their same sex relationships. The Act is over-inclusive because it protects heterosexual men despite the fact that men are "rarely in a position of economic

dependence on their wives". Ontario asserts that women are historically, structurally and economically disadvantaged in our society. The Act however, fails to include lesbians, who as economically disadvantaged women, must turn to the state for support rather than their same sex partners. On the other hand, the Act does include heterosexual men, who Ontario asserts, are not historically disadvantaged economically.

Ontario's Factum at paragraph 19.

56. The impugned definition treats opposite sex couples as worthy of recognition as families and treats gay and lesbian conjugal couples as unworthy of legal and social recognition. In doing so, the impugned legislation reinforces the general pattern of discrimination against lesbians and gay men in Canada. It reinforces the dehumanizing view that lesbians and gay men have no domestic relationships of comparable value to heterosexual relationships.

57. In fact, supportive conjugal relationships are as important to lesbians and gay men as they are to heterosexuals. The root problem seems to be the reluctance of the law to recognize that same sex conjugal relationships are the functional equivalent of opposite sex conjugal relationships. Both are relationships of long term mutual support, involving mutual financial considerations, shared accommodations, shared social networks and the deepest personal feelings.

R. Testa, B. Kinder, G. Ironstone "Heterosexual Bias in the Perception of Loving Relationships of Gay Males and Lesbians" (1987) 23:2 *Journal of Sex Research* 163 at 164
B. Cossman and B. Ryder, *Gay, Lesbian and Unmarried Heterosexual Couples and the Family Law Act: Accommodating a Diversity of Family Forms* (Toronto, Ontario Law Reform Commission, 1993)

58. Seen in this light, the impugned definition takes on more significance than simple financial considerations. It has a disproportionately negative effect on those with same sex sexual orientation. The exclusion of gay and lesbian relationships from recognition under the law has three profound

adverse consequences:

a. it will single them out as the only class of Canadians who cannot have "spousal" relationships if they wish to do so, without disavowing those personal characteristics that the *Charter* seeks to protect, *i.e.*, their sexual orientation;

b. it will have the appearance of judicial condonation of discrimination against gays and lesbians; and

c. it will assist in perpetuating the social stigmatization of gays and lesbians as individuals somehow not entitled to the rights and dignity of other persons.

If the infringement of the respondent M's *Charter* rights herein is not saved by Section 1 of the *Charter*, what is the appropriate remedy?

59. The Foundation repeats and adopts the submissions of the respondent M with respect to remedies.

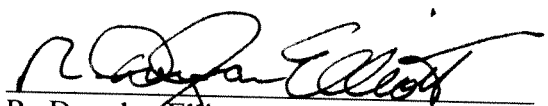
PART IV - ORDER REQUESTED

60. The Foundation requests that the appeal be dismissed and the cross-appeal allowed, with no costs payable to or by the Foundation.

61. The Foundation takes no position on the issue of costs, except (a) that it does not seek costs from anyone; and (b) that it asks that it not be ordered to pay costs to anyone.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Date: March 12, 1998



R. Douglas Elliott,
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Foundation for Equal Families

PART V - TABLE OF AUTHORITIES

CASES

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S.C.C. No.: 25838

THE SUPREME COURT OF CANADA

BETWEEN:

ATTORNEY GENERAL FOR ONTARIO

Appellant
(Intervener)

- and -

M

Respondent
(Respondent)

- and -

H

Respondent
(Appellant)

FACTUM OF THE
INTERVENERS
THE FOUNDATION FOR EQUAL FAMILIES

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