Court File No. 25838

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

B E T W E E N:

THE ATTORNEY GENERAL OF ONTARIO

Appellant
(Intervenor)

- and -

M.

Respondent
(Respondent)

- and -

H.

Respondent
(Appellant)

- and -

EGALE Canada Inc.

Intervenor

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PART I -- THE FACTS

1. The acronym EGALE stands for "Equality for Gays and Lesbians Everywhere". EGALE Canada Inc. ("EGALE") is a national advocacy organization committed to the advancement of equality for lesbians, gays and bisexuals across Canada. EGALE accepts the facts as stated in the factum of the Respondent M.

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PART II -- THE ISSUES

2. The Chief Justice of Canada has stated the following questions in this case:

> 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*?
>
> 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*?

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EGALE takes the position that the answers to these questions are "yes" and "no", respectively.

PART III -- THE ARGUMENT

A. SECTION 15 OF THE CHARTER

(i) The Appropriate Analytical Approach

30 3. Three different approaches to the determination of s.15 *Charter* issues were adopted by members of this Court in the 1995 trilogy of equality rights cases (i.e., *Egan*, *Miron* and *Thibaudeau*) and more recent decisions (i.e. *Eaton*, *Benner* and *Eldridge*) have not resolved which approach should be followed. There are, however, many well-established principles that have guided this Court's s.15 jurisprudence since the earliest *Charter* cases, and upon which there appears to be general agreement. These settled principles should animate the choice of an appropriate analytical test for the determination of s.15 claims.

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4. When the interpretation of s.15 was first considered in *Andrews* in 1989, this Court was required to choose between different analytical approaches advocated by various parties. The "unreasonable distinction test" that had been adopted by some lower courts was rejected because it

constituted a "radical departure" from the fundamental *Charter* principle that "the rights-guaranteeing sections must be kept analytically separate from s.1." This Court concluded that any consideration of factors that could justify an impugned distinction and support the constitutionality of a challenged enactment must take place under s.1, rather than under s.15.

Andrews, per McIntyre, J. at 177-78 and 181-82

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5. The reasons for maintaining an analytical distinction between s.15 and s.1 were further explained by this Court in *Turpin*. Justice Wilson wrote:

> The equality rights must be given their full content divorced from justificatory factors properly considered under s.1. Balancing legislative purposes against the effects of legislation within the rights sections themselves is fundamentally at odds with this Court's approach to the interpretation of *Charter* rights.... [It] places an unfair burden on the *Charter* claimant to prove that a law is unreasonable and ... it invites a less onerous balancing of the interests of the state against those who suffer violations of s.15 than would be allowed under s.1 of the *Charter*.

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In subsequent cases, this Court consistently exercised caution not to import into its s.15 analysis justificatory factors that ought more appropriately to be considered under s.1.

> *Turpin*, per Wilson, J. at 1325 and 1328; *McKinney*, per LaForest, J. at 292; *Symes*, per Iacobucci, J. at 755; *Egan*, per Cory, J. at 586 and 592; per L'Heureux-Dubé, J. at 547; *Miron*, per McLachlin, J. at 485 and 491; *Eldridge*, per LaForest, J. at paras.77 and 79.

6. It is respectfully submitted that the "functional values and relevance test" adopted by a
30 minority of Justices in *Egan*, *Miron* and *Thibaudeau* should be rejected on the basis that it would incorporate into s.15 a justificatory analysis that properly belongs under s.1. It would also place an additional and unreasonable burden on the s.15 claimant, who would be required to:

(1) identify the purpose or functional values of the impugned legislation; and

(2) prove that either

(a) the legislative goal or functional values are themselves discriminatory; or

(b) the impugned distinction is not relevant to the legislative goal or functional values.

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7. Clearly, the "functional values and relevance test" would deprive s.1 of much of its substantive role in *Charter* equality rights cases. The objective of the legislation would be identified and its legitimacy assessed within the context of the s.15 analysis. The claimant would therefore

have the onerous burden of leading evidence about state goals, which (as Justice McLachlin observed in *Miron*) would "often put proof of discrimination beyond the reach of the ordinary person." The onus of establishing a legitimate legislative purpose properly rests with the government under s.1. As Justices Iacobucci and Cory stated in *Thibaudeau*, "[a]n approach to *Charter* rights which changes the assignment of this onus should be avoided."

Miron, per McLachlin, J. at 485 and 491; *Thibaudeau*, per Cory and Iacobucci, JJ. at 700

8. An additional reason for rejecting the "functional values and relevance test" is that it does not give adequate consideration to the effect of an impugned distinction on a s.15 claimant. Indeed, in both *Egan* and *Miron*, the minority Justices who applied the "relevance" criteria adopted a discrimination analysis that completely ignored the impact of the challenged legislation on the claimants. Such a rigid application of the "relevance" criteria severely undermines the equality rights guaranteed by the *Charter*. As Justice McLachlin stated in *Miron*, if any professed relevance suffices to defeat a discrimination claim, then very few s.15 violations will ever be established.

Miron, per McLachlin, J. at 491

9. The "functional values and relevance test" is inconsistent with the fundamental principle (recently reiterated by this Court in *Eldridge*) that "the main consideration [in an equality analysis] must be the impact of the law on the individual or the group concerned." In *McKinney*, the Respondents argued that a university's mandatory retirement policy was not discriminatory because it was "not based on irrelevant personal differences." Justice LaForest rejected the argument on the basis that the *effect* of the policy had to be assessed in order to determine whether it was discriminatory. As Justice L'Heureux-Dubé explained in *Egan*, the court cannot conclude that a person's sense of equal worth and dignity has not been impugned merely because a challenged distinction is relevant to some legitimate legislative purpose. Rather, the court must examine the actual impact of the distinction on members of the affected group. This, as Justice McLachlin stated in *Miron*, is "the lesson of the early decisions of this Court under s.15(1)."

Eldridge, per LaForest, J. at para.62, quoting McIntyre, J. in *Andrews* at 165; *McKinney*, per LaForest, J. at 279; *Egan*, per L'Heureux-Dubé, J. at 547; *Miron*, per McLachlin, J. at 489

10. It is submitted that the existence of discrimination should be determined, as Justice Cory stated in *Egan*, "by assessing the prejudicial effect of the distinction against s.15(1)'s fundamental purpose". This "prejudicial effects" approach to s.15 was applied in cases such as *McKinney*, *Tétrault-Gadoury*, and *Swain*, where a consideration of "functional values and relevance" did not form part of this Court's equality analysis. In *Miron* and *Thibaudeau*, Justice McLachlin (Sopinka, Cory and Iacobucci, JJ. concurring) adopted essentially the same approach (see *Benner*). Although Justice L'Heureux-Dubé applied a different framework, she stated in *Thibaudeau* that she agreed not only with the result reached by Justice McLachlin, but also "with a great part of her analysis".

Egan, per Cory, J. at 603; *McKinney*, per LaForest, J. at 279, 290; Wilson, J. at 393; L'Heureux-Dubé, J. at 424; *Swain*, per Lamer, C.J. at 992; *Benner*, per Iacobucci, J. at 390; *Thibaudeau*, per L'Heureux-Dubé, J. at 641

11. In *Eldridge*, this Court confirmed that s.15 "serves two distinct but related purposes": (1) to promote the equal worth and dignity of all persons and (2) to remedy and prevent discrimination against groups suffering social, political and legal disadvantage in our society. It is submitted that, in any s.15 analysis, the prejudicial effects of an impugned distinction should be assessed in light of these purposes to determine whether discrimination exists within the meaning of the *Charter*.

Eldridge, per LaForest, J. at para.54

12. For example, if a legislative distinction reinforces social conditions that contribute to the disadvantage of a group in society, then the distinction is contrary to one of the purposes of the *Charter* guarantee and is discriminatory within the meaning of s.15 (see *Eldridge*). Similarly, if a legislative distinction perpetuates invidious stereotypes about a group in society, then it is discriminatory because it constitutes an affront to the dignity of members of the group, which is inconsistent with one of the purposes of s.15 (see *Tétrault-Gadoury*).

13. Proof that an impugned distinction was motivated by stereotypical reasoning is one way that a s.15 claimant can establish discrimination, but (contrary to the assertion of the Respondent H.) stereotyping is not a required element of discrimination. This Court has ruled that, if the effects of a distinction are inconsistent with the purposes of s.15, then the distinction is discriminatory, even if it did not arise from stereotypes. In *McKinney*, Justice LaForest specifically rejected the

argument that discrimination requires proof of "stereotypical assumptions". More recently, in *Eaton*, this Court recognized that the "discrimination inquiry which uses 'the attribution of stereotypical characteristics' reasoning" is not appropriate in every case. Justice Sopinka stated

> that the purpose of s.15(1) is not only to prevent discrimination by the attribution of stereotypical characteristics to individuals, but also to ameliorate the position of groups within Canadian society who have suffered disadvantage by exclusion from mainstream society.

As Justice Cory ruled in *Egan*, the legislature's reliance upon stereotypical reasoning may be "an extremely significant factor" in determining whether discrimination exists, but "other considerations ... may also give rise to discrimination."

McKinney, per LaForest, J. at 279; *Eaton*, per Sopinka, J. at 272-73; *Egan*, per Cory, J. at 603

14. The Respondent H.'s characterization of Justice McLachlin's s.15 analysis in *Miron* is incorrect. Although Justice McLachlin's decision in *Miron* focused on the stereotypical application of presumed group characteristics in that case, other cases demonstrate that proof of stereotyping is not the only way to establish discrimination according to her analysis. In *Thibaudeau*, for example, she did not rely on the application of stereotypes to find discrimination. Instead, she concluded that the impugned distinction was discriminatory because "[i]t increases the disadvantages already suffered by separated or divorced custodial parents based not on their merit or actual situation but solely and arbitrarily by reference to their membership in a group." This reasoning is consistent with the "prejudicial effects" test articulated by Justice Cory in *Egan*.

Thibaudeau, per McLachlin, J. at 725

(ii) Section 29 of the Family Law Act Violates Section 15 of the Charter

15. When the "prejudicial effects" analysis is applied in the instant case, a breach of s.15 of the *Charter* is established. Just as the exclusion of unmarried heterosexual cohabitants from Alberta's statutory spousal support regime constitutes discrimination based on "marital status" and infringes s.15 of the *Charter*, the exclusion of same-sex cohabitants from Ontario's statutory spousal support regime constitutes discrimination based on "sexual orientation" and infringes s.15 of the *Charter*.

Taylor v. Rossu

(a) Distinction Based on an Analogous Ground

16. The definition of "spouse" in s.29 of the *Family Law Act* (*FLA*) draws a distinction between unmarried individuals who cohabit with a same-sex partner and unmarried individuals who cohabit with an opposite-sex partner. As this Court recognized in *Egan*, such a distinction is based on sexual orientation, which is a ground analogous to the grounds enumerated in s.15 of the *Charter*.

(b) Denial of Equality Rights

17. Contrary to the submissions in paras.22-24 of the Respondent H.'s factum, there are four (not two) equality rights guaranteed by s.15 of the *Charter*: equality before the law, equality under the law, equal benefit of the law, and equal protection of the law. It is submitted that s.29 of the FLA denies lesbians and gay men all four of these rights.

Andrews, per McIntyre, J. at 170; *Turpin*, per Wilson, J. at 1325

18. As the Attorney-General concedes in para.35 of his factum, lesbians and gay men are denied equal benefit of the law because they are denied the statutory right to seek spousal support upon the breakdown of a same-sex relationship. Individuals who are economically dependent on their same-sex partners, and who are therefore in need of financial support, are also denied equal protection of the law. Although the Respondent H. contends that there is no denial of equality rights, she effectively concedes (in para.29 of her factum) that the impugned legislative provisions extend "support and protection to heterosexual couples who are not married". Individuals in same-sex couples are denied that statutory "support and protection" and are therefore denied equal benefit and equal protection of the law.

19. Lesbians and gay men are also denied their rights to equality before and under the law because the *FLA* does not recognize and respect the legitimacy of same-sex relationships. The Attorney-General argues (at paras.35 and 65 of his factum) that the *FLA* "is not intended to provide a state imprimatur on heterosexual relationships" or "to endorse the legitimacy of common-law relationships." Assuming *arguendo* (without conceding) that this is true, the legislature's intent is irrelevant at this stage of the *Charter* analysis. The *effect* of the impugned definition is to deprive

same-sex partners of the validation afforded to unmarried opposite-sex partners. The legislation results in a denial of equality rights, whether intentional or not.

20. Contrary to the Respondent H.'s submission (at para.24 of her factum), the fact that same-sex partners may enter into a legally-enforceable cohabitation agreement does not mean that lesbians or gay men have the "right to choose to be publicly recognized as a couple." The ability to enter into a binding agreement gives same-sex partners the ability to be publicly recognized as parties to a contract and nothing more.

21. The Respondent H. argues that s.29 of the *FLA* does not deny equality rights because it does not preclude same-sex partners from contracting for mutual support obligations. The ability to obtain a contractual right to support is not, however, equivalent to having a statutory entitlement to seek support. Same-sex partners who want a method to resolve support issues are required to expend resources in order to devise an enforceable contractual framework. Cohabiting heterosexual partners, on the other hand, are covered by the existing statutory regime. Moreover, domestic contracts provide inferior protection to economically vulnerable spouses than does the *FLA*. In particular, *FLA* support orders are subject to special enforcement mechanisms and bankruptcy provisions that protect the recipient in the event that the payor defaults on support payments. Individuals who have only a contractual right to spousal support from a same-sex partner do not enjoy such protection and are therefore denied equal benefit and equal protection of the law.

Bankruptcy and Insolvency Act, R.S.C. 1985, ss.178(1)(c), 121(4) and 136(1)d.1; *The Family Responsibility and Support Arrears Enforcement Act*, 1996, S.O. 1996

(c) Discrimination

22. The denial of equality rights in this case results in discrimination. The impugned definition of "spouse" in s.29 of the *FLA* has prejudicial effects that are inconsistent with the purposes of s.15 of the *Charter*. As the majority of the Court of Appeal correctly concluded, the impugned definition reinforces the harmful stereotype that lesbians and gay men "cannot and do not form lasting, caring, mutually supportive relationships with economic interdependence in the same manner as heterosexual couples." As Justice Cory noted in *Egan*, this particular effect is "clearly

contrary to s.15's aim of protecting human dignity" and consequently "amounts to discrimination on the basis of sexual orientation".

Egan, per Cory J. at 604, quoted by Charron, J.A.

23. The impugned definition of "spouse" also has the discriminatory effect of contributing to the invisibility of lesbians, gay men, and their same-sex relationships. This effect is significant because enforced invisibility has played, and continues to play a central role in the oppression of lesbians and gay men. For example, from 1952 to 1977, lesbian and gay immigrants were forced to conceal their sexual orientation in order to enter Canada and those who lived here did so under the constant threat of deportation if their sexual orientation was revealed. Until recently, lesbians and gay men in the R.C.M.P. and the Canadian armed forces were similarly required to conceal their sexual orientation in order to preserve their employment. There are numerous pressures that continue to force many lesbians and gay men to deny the reality of their lives by living "in the closet", such as widespread homophobic harassment, discrimination, and violence. Living "in the closet" necessarily entails concealing one's same-sex relationships.

Stiles v. Canada; *Bordeleau v. Canada*; *Douglas v. The Queen*; Girard, "From Subversion to Liberation: Homosexuals and the Immigration Act, 1952-1977"

24. The enforced invisibility of same-sex relationships not only constitutes an oppressive burden in the lives of individual lesbians and gay men, but also contributes to the stigmatization of lesbianism and homosexuality generally. As Professor Ryder has written,

> Canadian legislation stigmatizes lesbian and gay existences by exclusion. Most often this exclusion is accomplished by silence. Lesbians and gays are omitted, ignored. ...[The law] contributes dramatically to the invisibility of gay and lesbian existence. Gays and lesbians, apparently, are not fit to be named in Canadian legislation.

Ubiquitous cultural references (including statutory references) to heterosexual relationships and the absence of similar references to lesbian and gay relationships result in the popular misconception that heterosexuality is natural and normal, whereas lesbianism and homosexuality are deviant and perverse. The normative status of heterosexuality fuels social prejudice against lesbians and gay men. Moreover, many lesbians and gays, particularly youth, internalize the prevailing message that they are not normal and consequently suffer insecurity, depression, and shame. The exclusion of

same-sex partners from the definition of "spouse" in the *FLA* contributes to the erasure of lesbian and gay existence and thereby perpetuates the disadvantages suffered by lesbians and gay men. This is clearly contrary to the purposes of s.15 of the *Charter*.

> B. Ryder, "Equality Rights and Sexual Orientation" at 45, 47, and 65; Goodman, Lakey, Lashof & Thorne, *No Turning Back*, at 23-24; Sophie, "Internalized Homophobia and Lesbian Identity", cited in Abramczyk, *Heterosexism, Legal Education and Lesbian Oppression*, at 31-33; Kroll & Warneke, *The Dynamics of Sexual Orientation and Adolescent Suicide*; Bagley & Ramsay, eds., *Suicidal Behaviours in Adolescents and Adults*

B. SECTION 1 OF THE CHARTER

(i) The Appropriate Analytical Approach

25. The appropriate analytical framework for deciding s.1 issues is well-established in *Charter* jurisprudence. It derives from the language of s.1 itself and from the decision in *R. v. Oakes*. In the recent *Eldridge* case, this Court adopted the following restatement of the *Oakes* test from Justice Iacobucci's reasons in *Egan*:

> First, 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 so that the attainment of the legislative goal is not outweighed by the abridgement of the right.
>
> *Eldridge*, per LaForest, J. at para.84

26. The Attorney-General argues (at paras.38-47 of his factum) that the *Oakes* framework should not be followed in this case, but rather that this Court should simply adopt the outcome in *Egan* and allow the appeal on the basis of precedent. It is submitted that the Attorney-General's proposed approach to the s.1 question should be rejected because it constitutes a radical departure from established *Charter* jurisprudence which, if adopted, would signal a serious erosion of the constitutional equality rights of lesbians and gay men, and of all other disadvantaged groups..

27. If the Attorney-General's *stare decisis* argument were accepted, then any statutory definition of "spouse" that discriminated on the basis of sexual orientation would be deemed a justifiable

infringement of s.15 without any consideration of the validity and importance of the legislative objective, nor any assessment of the proportionality of the means chosen to achieve that objective. In effect, in any case involving a challenge to a discriminatory definition of "spouse", where the discrimination was based on sexual orientation, the government would be relieved of the burden of demonstrating that the limits it imposed on equality rights were reasonable and justifiable in accordance with s.1 of the *Charter*. This Court would be abdicating its constitutional responsibility if it relieved the Attorney-General of the onus imposed upon the government by s.1 of the *Charter*. The analytical framework developed in *Oakes* must be applied in order to answer the s.1 question in this case.

RJR-MacDonald, per McLachlin, J. at 332-333

(ii) The Legislative Objectives

28. The accurate identification of the legislative goals is critical since the s.1 inquiry involves an analysis of the proportionality of the rights infringement in relation to the legislative objectives. The s.1 analysis will be compromised if the legislative goals are mischaracterized.

29. The evidence does not support the Attorney-General's contention (at para.49 of his factum) that the purpose of Part III of the *FLA* "is to remedy the systemic sexual inequality associated with opposite-sex relationships". On the contrary, the historical record contradicts the Attorney-General's assertion (at para.60) that "the legislature's central objective was to address the effects of women's economic dependence on men." For example, in the context of making recommendations for reform of the statutory spousal support regime, the Ontario Law Reform Commission made the following remarks in its 1975 *Report on Family Law:*

> Although greatly eroded by social, economic and legal changes, the assumption that a married woman is inherently dependent upon her husband for support still underlies the existing law. . . .
>
> It is now fairly common for the courts to hear cases in which the evidence discloses that the wife: (a) is in fact not dependent upon her husband for maintenance at all; or (b) is only partially dependent upon her husband because she is herself employed; or (c) is temporarily dependent upon her husband for support, owing to the spouses' domestic arrangements or other circumstances, but clearly possessed of an unrealized earning potential; or (d) is the major, or perhaps the sole, contributor to their mutual support, either by reason of some incapacity on the part of the husband, or simply because of a domestic arrangement existing between them.

> Any reform of the provincial law governing inter-spousal support obligations should include amongst its primary objectives the elimination of the underlying assumption that a wife is inherently dependent upon her husband for support. . . .
>
> If a spouse's need or dependency is to assume increased importance as a basis upon which support obligations are determined, then the law must recognize that a husband's need may also be such as to cast a positive obligation upon the wife for its alleviation. The law should therefore provide for an obligation on the part of the wife to support her husband in circumstances of need. . . .
>
> [T]he law might be regarded as lacking in flexibility if it was incapable of recognizing a domestic arrangement between the spouses which was based upon a degree of dependency by the husband upon his wife for support. An example of this situation is shown by spouses who agree to advance the wife's career at the expense of the husband's. Although this is currently not a common phenomenon in Canada, the law should take account of new developments in society even though they may appear to run counter to the conventions of the day.
>
> [See the Attorney-General's Authorities, vol. III, Tab 42, pp.6-7, 10-11, emphasis added.]

When the *Family Law Reform Act, 1976* was introduced in the Legislature, the Honourable Mr. McMurtry referred to the recommendations of the Ontario Law Reform Commission and made the following comments about the new statute:

> Part II deals with support obligations and begins with the declaration that every spouse, husband or wife, has an obligation to provide support for himself or herself and for the other spouse, in accordance with need, to the extent that he or she is capable of so doing. This represents a substantial departure from the existing law, which imposes the obligation of support during marriage solely on husbands.
>
> *Hansard (Ontario)*, October 26, 1976 at 4103 (Attorney-General's Authorities, vol. III, Tab 44)

30. The inaccuracy of the Attorney-General's characterization of the legislative objective is also evident from the language of Part III of the *FLA*. Unlike predecessor legislation (i.e., the *Deserted Wives' and Children's Maintenance Act*), the *FLA* does not impose spousal support obligations exclusively on men for the benefit of women. It cannot seriously be contended that, when (in 1978) the legislature deliberately abandoned a spousal support regime which specifically targeted women as the only eligible recipients, in favour of a gender-neutral regime which imposes mutual support obligations on both women and men, that it did so for the purpose of addressing the one-way economic dependence of women on men resulting from the effects of gender-based inequalities. On the contrary, the legislature clearly intended to give both men and women an entitlement to apply

for support, and an opportunity to obtain support in circumstances other than that of one-way economic dependence created by gender-based inequalities.

31. The Attorney-General asserts (at para.61 of his factum) that there is a second legislative goal underlying the *FLA* spousal support provisions, namely to provide special treatment to relationships that have a "capacity to produce children". The language of s.29 of the *FLA* is, however, inconsistent with that purported objective. Heterosexual spouses have mutual support obligations that do not depend on the existence of children. Indeed, cohabiting opposite-sex partners *who are not the parents of a child* are specifically included in the impugned definition of "spouse" after 3 years of cohabitation. As Judge Coo stated in *Kane* (with respect to a similar definition of "spouse" in the Ontario *Insurance Act*),

> there is, in the definition section, a specific shortening of the time two persons are required to have had continuous cohabitation where there are children. This suggests that the primary focus was not on children, since the basic provisions deal with the situation where there are none.
>
> *Kane*, per Coo, J. at para. 16

32. It is worthy of note that the government's legitimate concern for the well-being of children is expressed and addressed in the *child support* provisions of the *FLA*. The legislature did not restrict eligibility for child support to children who are parented by opposite-sex couples. On the contrary, same-sex partners have support obligations with respect to the children that they co-parent and/or adopt. Clearly, the legislature recognized that the well-being of children would be enhanced by including same-sex parents in the *FLA* child support provisions. Given this recognition, if the purpose of the *FLA* spousal support provisions had been to benefit children by providing special treatment to families that include children, the legislature would have included same-sex parents in the impugned definition of "spouse".

Buist v. Greaves; *Re K*

33. The Attorney-General's characterization of the legislative objectives is inaccurate. The Attorney-General is effectively arguing that, by seeking to address the needs of only opposite-sex couples, the legislature was justified in excluding same-sex couples. It is submitted that, by

attempting to define the legislative objectives in solely "opposite-sex" terms, the Attorney-General is using circular reasoning to avoid the proper application of s.1 of the *Charter*.

34. Contrary to the Attorney-General's submissions, the objectives of the *FLA* spousal support provisions were correctly identified by the Ontario Law Reform Commission in 1993 and by the majority of the Court of Appeal in this case. The legislative objectives are (1) to provide for the equitable resolution of economic disputes that arise when intimate relationships between individuals who have been financially interdependent break down and (2) to alleviate demands on public funds by shifting the obligation to provide support for needy persons to spouses who have the capacity to provide support. EGALE accepts that these are constitutionally permissible objectives.

(iii) No Rational Connection

35. In order to justify the rights violation in this case, the Attorney-General would have to demonstrate that the discriminatory exclusion of same-sex partners from the impugned definition of "spouse" is rationally connected to the legislative objectives of the *FLA* spousal support regime. The Attorney-General has adduced no evidence whatsoever to discharge this onus.

Benner, per Iacobucci, J. at 404

36. The exclusion of cohabiting same-sex partners from s.29 of the *FLA* does not advance the goals of the legislation. On the contrary, as the majority of the Court of Appeal correctly concluded, the *inclusion* of same-sex cohabitants would further the dual objectives of rectifying the inequities that arise from the breakdown of intimate relationships and protecting the public purse from the burden of providing for needy ex-spouses.

37. Since the exclusion of same-sex partners is not rationally connected to the legislative objectives, the limitation on the equality rights of lesbians and gay men is not "reasonable" within the meaning of s.1 of the *Charter*. Consequently, the discriminatory definition of "spouse" in s.29 of the *FLA* is not justifiable. Although it is unnecessary to consider the remaining steps in the *Oakes* test, EGALE submits that the impugned provision fails to satisfy every branch of the test.

(iv) Excessive Impairment of Charter Rights

38. As this Court ruled in *Eldridge*, the "minimal impairment" branch of the *Oakes* test requires that "governments must demonstrate that their actions infringe the rights in question no more than is reasonably necessary to achieve their goals." In this case, it was completely unnecessary to violate the equality rights of lesbians and gay men. Not only could the legislature have achieved its objectives while adopting "alternatives substantially less intrusive of *Charter* rights", but it actually could have *further advanced* its objectives by respecting *Charter* rights. Clearly, s.29 of the *FLA* does not constitute a minimal impairment of equality rights.

Eldridge, per LaForest, J. at para.86; *Miron*, per McLachlin, J. at 504-505

39. The availability of common law remedies for unjust enrichment (eg., constructive trust) does not minimize the impairment of equality rights in this case. Such common law remedies relate to property disputes, rather than spousal support disputes. The issue in this case is whether lesbians and gay men should have access to the *FLA* regime to resolve the latter. Unmarried heterosexual cohabitants have access to both the common law remedies for property disputes and the *FLA* regime for support disputes. Lesbian and gay cohabitants should be entitled to the same. Moreover, the "minimal impairment" branch of the *Oakes* test cannot be satisfied by reference to remedies that exist outside of the *FLA*. Section 1 of the *Charter* requires that the impugned provision itself be tailored to minimize the infringement of *Charter* rights. In this case, as in the *Kane* case, "[t]here was no crafting to limit impairment. There was simple exclusion of the relevant group."

Kane, per Coo, J. at para.24

(a) <u>The "Deferential Approach" Does Not Apply</u>

40. In considering whether a *Charter* right has been minimally impaired, the Court may sometimes take into account the legislature's role in balancing competing rights and interests between different groups in society. This Court has ruled that, where such balancing has occurred, the government is not strictly required to show that the least possible impairment of rights occurred, but rather can satisfy the minimal impairment criterion by demonstrating that it "had a <u>reasonable basis</u> for concluding that the legislation impaired the relevant right as little as possible." In

Eldridge, this was referred to by the Court as the "deferential approach" to the "minimal impairment" branch of the *Oakes* test.

McKinney, per LaForest, J. at 309 (emphasis in original); *Eldridge*, per LaForest, J. at para.85

41. When a government seeks to justify the infringement of a *Charter* right based on the deferential approach, there is an onus on the government to show that there were competing rights or interests at stake when the impugned legislation was enacted and that a reasonable balancing occurred. The Court does not simply defer to legislative choices regarding the balancing of competing rights, but rather reviews and assesses the basis on which those choices have been made. For example, in *McKinney*, this Court considered the manner in which the legislature had balanced the equality rights of older workers against the interests and rights of younger workers and employers. There was evidence that the legislature had considered labour market ramifications, implications for working conditions, youth unemployment rates, compensation issues, and the desirability of maintaining stability in pension arrangements, before it enacted the impugned legislative provision in that case. The evidence was reviewed and this Court ultimately determined that the legislature had a reasonable basis for concluding that the equality rights of older workers had been impaired as little as possible under the circumstances.

McKinney, per LaForest, J. at 300-303, 308, 309

42. In contrast to the *McKinney* case, there is no evidence that the decision to exclude same-sex cohabitants from s.29 of the *FLA* resulted from a reasonable balancing of competing rights and interests. Indeed, there are no competing rights or interests at stake in this case. The discrimination against lesbians and gay men could easily be eliminated without prejudice to the rights or interests of any other group, simply by extending the impugned definition of "spouse" to include cohabiting same-sex partners.

43. In the absence of any competing rights and interests, the deferential approach to the "minimal impairment" criterion does not apply. Contrary to the Attorney-General's submissions (at paras.73-74 of his factum), neither the fact that the Ontario Law Reform Commission was uncertain about

the best way to *remedy* the discriminatory exclusion of same-sex partners from the *FLA* support regime, nor the absence of unanimity within lesbian, gay and bisexual communities on this issue, constitutes a reason to defer to discriminatory legislative choices. Given the diversity of most subgroups of the Canadian population, few s.15 claims (if any) would survive the s.1 threshold if every member of the affected community were required to support the claimed remedy. Moreover, it is only in cases where the legislature was required to "make choices between disadvantaged groups" or "to balance inequalities in the law against other inequalities resulting from the adoption of a course of action" that this Court has identified a possible need for judicial deference to discriminatory legislative choices. The existence of differing opinions on a remedial issue is irrelevant to the s.1 inquiry.

> *Egan*, per Sopinka, J. at 573 (emphasis added); *McKinney*, per LaForest, J. at 317 (emphasis added); *Kane*, per Coo, J. at para.19

44. For the same reasons, there is no basis for the Attorney-General's plea for judicial deference to incremental legislative reform in this case. As this Court recognized in *Eldridge*, "deference should not be accorded to the legislature merely because an issue is a 'social' one or because a need for governmental 'incrementalism' is shown". The "incremental" approach to equality has only been accepted in cases where the government has demonstrated that the complexity of a social or economic problem necessitates a delicate balancing of competing rights and interests. For example, incremental legislative action was justified in *McKinney* because there was evidence that the legislature had excluded some individuals (i.e., those over the age of 65) from protection "for rational and serious considerations that, it had reasonable grounds to believe, would seriously affect the rights of others."

> *Eldridge*, per LaForest, J. at para.85; *McKinney*, per LaForest, J. at 317

45. The concept of "incrementalism" has no application in this case, since there are no reasonable grounds to believe that the inclusion of same-sex cohabitants in the impugned definition of "spouse" would affect the rights of others in any way. The exclusion of same-sex cohabitants from s.29 of the *FLA* did not result from a balancing of inequalities; no inequality would result from their inclusion. Although the Attorney-General asserts that it is important to allow the legislature

"to proceed step-by-step" in carrying out family policy reforms, he does not articulate any reason why incremental reform is ostensibly required. In *Kane*, a similar plea for judicial deference to incremental automobile insurance reform was rejected on the basis that "nothing ... would be adversely affected by removing the violation of the applicant's *Charter* rights."

Kane, per Coo, J. at para.21, 22 and 26

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46. In *Egan*, Justice Sopinka held that incremental reform was justified because of fiscal concerns related to the federal old age income security scheme. EGALE submits that it is contrary to *Charter* values to permit a government to justify the discriminatory exclusion of an entire group from a benefit on the basis that it is cheaper not to include them. In *Eldridge*, this Court unanimously confirmed the ruling in *Schachter* that "financial considerations alone may not justify *Charter* infringements". However, the court also ruled that "governments must be afforded wide
20 latitude to determine the proper distribution of resources in society", especially where the government is required "to choose between disadvantaged groups". As submitted above, there is no need to choose between disadvantaged groups in this case. Moreover, the *FLA* spousal support regime does not distribute public resources; it privatizes a support obligation by shifting the burden to individuals. Consequently, there would be a savings to the public purse if same-sex partners were included in the statutory regime. In this case, the Court is not required to determined how much "latitude", if any, to afford the legislature on the basis of budgetary considerations.
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Eldridge, per LaForest, J. at para.85

47. It should also be noted that in *Egan*, the federal Attorney-General took the position that the opposite-sex eligibility criterion in the impugned definition of "spouse" was not a permanent solution to the problem of poverty among elderly couples. Justice Sopinka therefore concluded that the constitutionality of the impugned provision "should not be assessed on the basis that Parliament has
40 made this choice for all time." In the end, he held that "by its inaction to date", the federal government had not disentitled itself to rely on s.1 of the *Charter*. In this case, however, the claim of incremental legislative action lacks credibility. Statements made by the Honourable Mr. Harnick during the 1994 Bill 167 debates clearly reveal that the Progressive Conservative Party -- which is

now the governing Party in Ontario -- does not intend to amend the *FLA* or any other provincial legislation to include same-sex cohabitants in statutory definitions of "spouse". There is no evidence that the governing Party has changed its position on this issue since June 1994, when its members voted unanimously to defeat Bill 167 at second reading.

Egan, per Sopinka, J. at 574-76 (emphasis added); *Hansard*, Debates of the Ontario Legislature, June 9, 1994, p.6810

48. A comparison of statements made in the legislature during various debates on equality rights legislation is instructive on this point. In 1985, when Bill 7 amended the definition of "spouse" in numerous Ontario statutes to include unmarried opposite-sex cohabitants, a government spokesperson stated that it was preferable to legislate to resolve potential problems than to engage in expensive *Charter* litigation. In contrast, in 1994, when Bill 167 proposed the amendment of numerous Ontario statutes to include same-sex cohabitants in statutory definitions of "spouse" (including s.29 of the *FLA*), the Honourable Mr. Harnick stated, on behalf of the now governing Party, that the issue of same-sex spousal recognition should be decided by the Courts. He stated that the *Charter* had given judges a new "legislative function" and that the Progressive Conservative Party would "support the courts' rulings on these matters."

Hansard, Debates of the Ontario Legislature, June 11, 1985, pp.138-139; *Hansard*, Debates of the Ontario Legislature, June 1, 1994, pp.6580-81 and 6583

49. The Attorney-General cannot credibly make a plea for judicial deference to incremental reform, when he has unequivocally asserted the government's unwillingness to take any legislative initiative, however incremental, toward the recognition of the spousal status of same-sex cohabitants. The government has deliberately chosen to refer the issue to the Courts. Under the circumstances, the majority of the Court of Appeal correctly concluded that the Attorney-General is in no position to request judicial deference to incremental legislative reform.

(v) The Deleterious Effects Are Not Outweighed

50. The impugned definition of "spouse" has severe deleterious effects, as outlined in the s.15 argument above. Moreover, the most seriously harmed individuals are the economically disadvantaged partners in same-sex relationships, who are particularly vulnerable members of an

already disadvantaged group. Since the exclusion of same-sex couples from s.29 of the *FLA* undermines the goals of the legislation, the damaging effects of the discrimination are not outweighed by the promotion of any laudable legislative objectives.

(vi) Systemic Discrimination and "Novelty" Do Not Justify the Violation

10 51. The alleged "novelty" of equating same-sex partners with opposite-sex partners is not an appropriate consideration. In reality, same-sex relationships have existed for as long as opposite-sex relationships, and lesbians and gay men have been advancing legal claims for the equal recognition of their relationships for many years. In any event, a discriminatory law cannot be justified on the basis of reference to historic patterns of discrimination. As Justice L'Heureux-Dubé stated in *Egan*,

> [t]here is a first time for every discrimination claim. To permit the novelty of the appellant's claim to be a basis for justifying discrimination in a free and democratic society undermines the very values that our *Charter*, including s.1, seeks to preserve.

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Egan, per L'Heureux-Dubé, J., at 572 and per Iacobucci, J. at 619

52. Similarly, the fact that numerous Ontario statutes contain an opposite-sex definition of "spouse", or that most other provinces' support regimes are restricted to opposite-sex partners, are not relevant considerations in the s.1 inquiry. The existence of widespread statutory discrimination against lesbians and gay men is hardly a valid reason to justify the infringement of their
30 constitutional equality rights in this case. If the Attorney-General is suggesting that a costly ripple effect might result from a change in the definition of "spouse" in the *FLA*, that is not a valid basis for justifying the discrimination in this case. A similar "ripple effect" argument was made by the Respondents in *Eldridge* and this Court ruled that "[t]o deny the appellants' claim on such conjectural grounds ... would denude s.15(1) of its egalitarian promise."

Eldridge, per LaForest J. at para.92

40 53. The Attorney-General asserts (at paras.82-83 of his factum) that a departure from the existing formulation of the definition of "spouse" will give rise to "a number of variations ... such as friends, siblings, adult children and parents", etc. and that there will be "no rational basis" to distinguish those claims when "inevitable challenge[s] to Part III of the *FLA*" are made. The spectre

of opening *Charter*-litigation floodgates was similarly raised by the Respondents in *Eldridge*, who argued that the situation of deaf persons could not be meaningfully distinguished from that of other non-official language speakers. The argument was dismissed as "purely speculative". This Court ruled that each s.15 claim "would proceed on markedly different constitutional terrain" and that

> the success of a potential s.15(1) claim by members of [another] group cannot be predicted in advance. The possibility that such a claim might be made, therefore, cannot justify the infringement of the constitutional rights of the deaf.

Similarly, the possibility that other challenges may be made to Part III of the *FLA* does not justify the infringement of the *Charter* equality rights of lesbians and gay men in this case.

Eldridge, per LaForest, J. at para.89-90

C. *REMEDY*

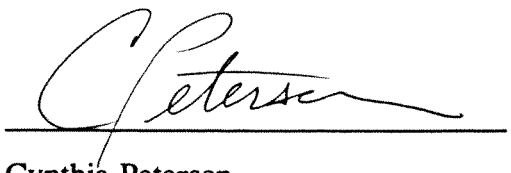
54. EGALE adopts the submissions of the Respondent M. with respect to remedy. Just as selective severing and reading in were appropriate to remedy the discriminatory exclusion of unmarried heterosexual couples from Alberta's statutory support regime, the appropriate remedy in this case is to sever the words "a man and a woman" from s.29 of the *FLA* and to read in the words "two persons" in their place. This remedy will "fulfill the purposes of the *Charter* and at the same time minimize the interference of the Court with the parts of the legislation that do not themselves violate the *Charter*."

Taylor v. Rossu, at paras.20 and 29; *Schachter*, per Lamer, C.J., at 704

55. The Attorney-General is not seeking a suspension of the remedy. However, if this Court considers the possibility of a suspended remedy, EGALE submits that it would not be appropriate to order a suspension on the basis that the government should be allowed time to engage in legislative reform. The government has already had ample opportunity to do so. Indeed, s.15 of the *Charter* did not come into effect until three years after the other sections of the *Charter* were proclaimed, precisely because governments were given time to amend their legislation in order to comply with equality rights. The Ontario Legislature did not have the political will to enact same-sex amendments to the FLA. Indeed, the government did not even have the political will to consider other alternatives, such as the creation of a domestic partnership remedy, as recommended

by the Ontario Law Reform Commission in 1993. If the ruling in this case finally provides the government with the necessary incentive to engage in policy review and legislative reform, it can do so in the absence of a suspended remedy. In the interim, the equality rights of lesbians and gay men should not only be recognized, but should also be given full effect.

ALL OF WHICH IS RESPECTFULLY SUBMITTED,



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ATTORNEY GENERAL OF ONTARIO	- and - M.	- and - H.	- and - EGALE Canada Inc.
Appellant (Intervenor)	Respondent (Respondent)	Respondent (Appellant)	Intervenor

Court File No. 25838

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

Proceeding commenced at
Toronto, Ontario

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