Court File No. 25838

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

B E T W E E N:

THE ATTORNEY GENERAL FOR ONTARIO

Appellant

- and -

M.

Respondent

- and -

H.

Respondent

- and -

(Intervenors)

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(Intervenors)
Intervenors

FACTUM OF THE INTERVENORS THE INTERFAITH-COALITION, THE EVANGELICAL FELLOWSHIP OF CANADA, THE ONTARIO COUNCIL OF SIKHS, THE ISLAMIC SOCIETY OF NORTH AMERICA AND FOCUS ON THE FAMILY

PART I - OVERVIEW

1. The Evangelical Fellowship of Canada, the Ontario Council of Sikhs, the Islamic Society of North America and Focus on the Family (the "Interfaith Coalition") intervene in support of the constitutionality of the definition of "spouse" in s.29 of the *Family Law Act*, R.S.O. 1990, c.F.3 (the "*Act*") and submit that the definition of "spouse" does not contravene s.15(1) and, alternatively, that any such contravention is reasonable and justifiable pursuant to s.1 of the *Charter*. This Intervenor accepts the parties' Statements of the Facts.

2. The Interfaith Coalition submits, first, that the *Act* constitutes legitimate provincial social policy legislation which establishes a means of alleviating economic disadvantage upon divorce or separation primarily in light of the particular economic burdens of child-rearing, and the relationship of considerable economic dependence historically attendant in heterosexual marriages. The support provisions in the *Act* provide an overall benefit to a class of economically disadvantaged Canadians, most of whom are women, who have been historically socially and economically disadvantaged. The Interfaith Coalition submits that the Court must consider this larger socio-economic, legislative and historical context when considering that the heterosexual "spouses" who have benefitted from this legislation have been identified by the legislature as historically and economically disadvantaged as opposed to other Canadians, who do not require the same benefits. The Interfaith Coalition submits that this contextual analysis is relevant to both the s.15(1) and s.1 determinations to be made by the Court.

3. Second, the impugned legislation constitutes legislative support for heterosexual spousal units which have been historically recognized to play a fundamental and foundational role in our society and in other societies. Heterosexual spouses have been recognized through our social, legal, political, religious and philosophical traditions, as fulfilling a unique and essential role in the very fabric of our social structure through the procreation, nurturing and raising of children, and require continued social and legislative support. This unique biological and sociological factor is an essential and legally appropriate consideration in both the s.15(1) and s.1 analysis, and in remedial considerations.

4. The members of the Interfaith Coalition do not support arbitrary discrimination against any identifiable group in society including lesbians or gays, and do not support any laws which discriminate in such a manner against homosexuals or indeed against any other identifiable group in society. This is not to say that members of the Interfaith Coalition accept that "spousal rights" ought to be granted to anyone that seeks them on the basis of "coupleness". It is legitimate for law and social policy to make certain fundamental distinctions based on historical, biological and sociological grounds which reflect underlying religious and philosophical tradition.

5. The Interfaith Coalition submits that the real issue in this appeal is not M's economic disadvantage and the resultant inequality caused by the denial of statutorily-mandated spousal support to her. There is a complete absence of evidence in the record to show that she is part of a class, identified by sexual orientation, which has been historically economically

disadvantaged. Nor is the issue any discrimination against M as an individual based on her sexual orientation. The real issue, it is submitted, is M's desire for the Court to find inequality as a result of the denial of "spousal status" to same sex "couples", and to obtain judicial prohibition against statutory benefits conferred exclusively to heterosexual "spouses".

6. The Interfaith Coalition submits that the remedy sought in this case is a judicial re-definition of the concept of "spouse". For the Court to accept this remedy would constitute a fundamental and profound change in an institution that is deeply rooted in Canadian society and in the underlying legal, religious, philosophical, sociological and historical traditions which underlie our society. The remedy has a broad impact on the definition of "spouse" in its application in the *Act* and over 50 federal statutes and hundreds of provincial statutes. It would alter, by implication, much social policy and social benefit legislation and would have significant implications for the common law definition of "marriage". The Interfaith Coalition submits that such a radical change to legal, social and public policy, which reflects millennia of religious and philosophical understanding, is beyond the intended scope of *Charter* review, and would improperly require the exercise of a judicial "legislative" function.

7. It is submitted that such a profound change in the law, involving fundamental issues of social and legal policy, is being and should only be undertaken by Parliament and the legislatures. Furthermore, the Interfaith Coalition submits that there are significant biological and social realities which underlie the limitation of the definition of "spouse" to heterosexual unions, which are the only relationships biologically capable of procreating children, and these principles must be considered in this public policy debate. Therefore, any such policy change should only be made after broad consultation and rigorous philosophical, social policy and legal debate involving all aspects of Canadian society at large, and not by the Courts in the constitutional consideration of particular legislation.

PART II - SECTION 15(1) ANALYSIS

8. As noted by Finlayson J.A. in the Court of Appeal in this case and Lamer C.J. in ***Schachter***, this Court should not determine *Charter* cases based on concessions, but should consider each component of the *Charter* analysis. The various judgments of the Supreme Court justices in ***Egan*** make it clear that this Court must determine the *Charter* issues in this appeal with a view to the larger legislative context and also the legal, social, philosophical and

biological context which underlies the statutory recognition of the distinct and fundamental role of the heterosexual spousal unit in our society.

9. The most important contextual factor is the legal, social, philosophical and religious basis for recognizing the fundamental role that heterosexual conjugal relationships fulfil in Canadian society. As cited by LaForest J. in supporting both his s.15 (minority) and s.1 (majority) analysis in ***Egan*** regarding the "fundamental importance" of the heterosexual family unit:

> "suffice it to say that marriage has from time immemorial been firmly grounded in our legal tradition, one that is it itself a reflection of longstanding, philosophical and religious traditions, but its ultimate *raison d'etre* transcends all of these. It is firmly anchored in the biological and social reality that heterosexual couples have a unique ability to procreate, that most children are the product of these relationships, and that they are generally cared for and nurtured by those who live in that relationship (at p.536)
>
> ...viewed in the larger context, then, there is nothing arbitrary about the distinction supportive of heterosexual family units. ... It is the social unit that uniquely has the capacity to procreate children and generally cares for their upbringing, and as such warrants support by Parliament to meet its needs. This is the only unit in society that expends resources to care for children on a routine and sustained basis. As counsel for the intervenor Inter-Faith Coalition on Marriage and the Family put it, whether the mother or the father leaves the paid work force or whether both parents are paying after-tax dollars for daycare, this is the unit in society that fundamentally anchors other social relationships and other aspects of society. (at p.538)
>
> ...In a word, the distinction made by Parliament is grounded in a social relationship, a social unit that is fundamental to society. That unit, as I have attempted to explain, is unique. (p.539) ... It is relevant here to describe a fundamental social unit, indeed the fundamental social unit in society, to which some measure of support is given. I add, interstitially, that this support does not exacerbate an historic disadvantage; rather it ameliorates an historic economic disadvantage, both for couples who are legally married and those who live in a common-law relationship (p.539).
>
> *Egan v. Canada*, supra

10. In *Egan*, the justices of this Court split five to four on the issue of whether the s.15 analysis should proceed on the basis of only "two steps" or "three steps". The issue was whether the Court should undertake, in the contextual analysis which is part of the second step of the s.15 analysis, a consideration of the reasonableness and relevance of the ground of distinction to the functional values underlying the impugned legislation. However, whether such analysis is undertaken as part of the s.15 or s.1 analysis, it is clearly relevant to the ultimate determination of constitutionality. The recent decision of Sopinka J. in *Eaton* demonstrates that this Court has subsequently considered both tests in s. 15 analysis.

11. The Interfaith Coalition submits that the Court has, prior to *Egan* and should continue to undertake a "three step" s. 15 analysis. As part of the s.15 contextual analysis, the Court should consider the basis for distinction in the *Act* and its relationship to the rationale supporting the legislation in question. Alternatively, the Interfaith Coalition submits that such contextual analysis must be considered as part of the s.1 analysis of proportionality.

(A) ESTABLISHED PRINCIPLES REQUIRE A CONTEXTUAL S.15(1) ANALYSIS

(i) Charter Rights must be Interpreted in their Social, Historical, Philosophical and Legal Contexts

12. While it is axiomatic that the rights and freedoms guaranteed in the *Charter* must be given a broad, liberal and purposive interpretation, this Court has also emphasized that such rights are not absolute and were not enacted in a vacuum. They must be interpreted within the context of the historical, legal and philosophical principles underlying the right or freedom in question and with a view to its purpose. In ***R. v. Big M Drug Mart Limited***, Dickson, J. cautioned against "overshooting" the purposes of the *Charter*, and emphasized the importance of interpreting *Charter* rights in this manner. He stated:

> " ... it is important not to overshoot the actual purpose of the right or freedom in question, but to recall that the *Charter was not enacted in a vacuum and must be placed in its proper linguistic, philosophic and historical context*"
>
> ***R. v. Big M. Drug Mart Limited*** [1985], 1 S.C.R. 295, at p. 344
>
> see also ***Symes v. Canada***, [1993] 4 S.C.R. 695, at p. 753

(ii) Section 15(1) Requires A Contextual Analysis

13. This Court has emphasized in ***Andrews***, ***Turpin***, ***Symes***, ***Egan*** and ***Miron*** that there is a need to "contextualize" the discrimination analysis and has rejected the mechanical application of the principles of formal equality or "rigid formalism" in the s.15 analysis (***R. v. Hess***). The analytical formula identified by McIntyre J. in ***Andrews*** should not be considered "only in the context of the impugned legislation" but also with an understanding of "the larger social, political and legal context" (per Wilson J. in ***Turpin***). Justice Iacobucci recognized, in ***Symes***, when rejecting a mechanistic s.15 analysis, that the "working definition" of discrimination is not "self-applying" but, rather, that "the analytical parameters of the ***Andrews*** test must be applied within the larger context". As Wilson J. summarized in ***Turpin***:

> "Accordingly it is only by examining the larger context that a Court can determine whether deferential treatment results in inequality or whether, contrariwise, it would be identical treatment which would *in the particular context* result in inequality or foster disadvantage"

R. v. Turpin, [1989] 1 S.C.R. 1296 at pp. 1331-1332
Symes v. Canada, supra, at pp. 756-757
Egan v. Canada, [1995] 2 S.C.R. 513 at p.586 per Cory J.
Miron v. Trudel, [1995] 2 S.C.R. 418
(See also ***R. v. Hess and R. v. Nguyen***, [1990] 2 S.C.R. 906 at 927i. - 928g

14. As noted by both McIntyre J. and LaForest J. in ***Andrews***, s.15 was not enacted to prevent any or all legislative distinctions, even if such distinctions imposed burdens or denied benefits to identifiable groups. Rather, it was intended to achieve the "elusive" ideal of equality by "remedying or preventing discrimination against groups suffering social, political and legal disadvantages in our society" (per Wilson J. in *R. v. Turpin* and per Cory J. and LaForest J. in ***Egan***). This analytical process must consider whether the particular group making the complaint is, ***in that context***, historically disadvantaged. It must also consider whether the impugned legislation furthers such disadvantage or, alternatively, ameliorates the condition of an historically and socially disadvantaged group.

15. The impugned provision of the *Act* was intended to provide a statutorily sanctioned support regime for a particular and unique class of inter-dependant domestic relationships, heterosexual spouses, in which spouses, usually women, have lived with economic dependence. For this category uniquely, the dependence usually arises as a result of the procreation and raising of children. There is no evidence of similar historical economic disadvantage for other domestic partnerships, including homosexual couples with which the Respondent M identifies. The statutory regime in the Act represents a governmental response to historical disadvantages arising out of the economic dependence of women in family relationships. Many women have left the workforce to care for their children, resulting in the need for a statutory support regime, in the event of break-up of their relationships.

16. This legislation must also be considered with regard to the underlying legal, historical and philosophical context which affirm the unique, important and continuing role of the heterosexual spouses which are uniquely, biologically capable of procreating children. This concept is rooted in the notion of the complementarity between male and female persons and the unique biological fact of procreation, as a fundamental good in our society, in the tradition of western philosophy and throughout the world's major religions.

(iii) Relevance Of Legislative Intent and Policy Considerations

17. This Court has emphasized that legislative intent or "animus" is irrelevant to the discrimination analysis, insofar as discrimination may result by "adverse impact" of the impugned legislation, even where there is no ***intention*** to discriminate.

> ***Rodriguez***, supra, per Lamer C.J.
>
> ***Symes v. Canada***, supra, per Iacobucci J. at p. 756
>
> ***Ontario Human Rights Commission v. Simpsons Sears***, [1985] 2 S.C.R. 536 at p. 551 per McIntyre J.

18. However, legislative intention is clearly relevant in the s.15(1) and s.1 analysis insofar as the legislative intention for the distinction created in the *Act*, was to confer a benefit on a particularly vulnerable group of heterosexual spouses, and, by implication, to provide distinct support to the heterosexual spousal unit in society. It is ironic that s.15(1) is being used to attack a provision intended to advance equality, without considering the legislature's intention to ameliorate the disadvantage of a most vulnerable and societally important group.

19. Where legislative distinctions, even those based on enumerated grounds, further legitimate social and constitutional policy and involve fundamental considerations of social policy goals and underlying morality, this Court has recognized the limitations of the legitimate judicial application of s.15(1) and has deferred such policy considerations to the legislature without a finding of discrimination.

> ***R. v. Hess and R. v. Nguyen***, supra, at pp. 930-931 per Wilson J.
>
> ***R. v. Turpin***, supra
>
> ***R. v. S.***, [1990] 2 S.C.R. 254
>
> ***R. v. Wolff*** [1990] 1 S.C.R. 695

20. In *Andrews*, this Court rejected the concept of formal equality and stressed that not every difference in treatment would result in inequality. Section 15 requires that the specific differentiation in treatment cause "discrimination" in order to violate the equality guarantee in s.15(1). Distinctions based on either enumerated or analogous grounds will not, as suggested by the Appellants, *ipso facto*, violate s.15. They will do so only if there is discrimination in the context of the impugned legislation and related legislation. This requirement of "adverse impact" in a *real* sense, with a view to the larger context, is necessary for a finding of discrimination contrary to s.15(1).

> ***Andrews***, supra, at pp. 172-174 per McIntyre J.

Rodriguez v. British Columbia (Attorney General), [1993] 3 S.C.R. 519 per Lamer C.J.

See *Thibodeau v. Canada* [1995] 25 S.C.R. 627 at 675-6, 702

(B) The First Step of the Section 15(1) Analysis

21. The first question of the two step s. 15(1) analysis is as follows: Does the impugned legislation deny one of the essential components of equality as a result of a distinction which is "based on or substantially relates to" personal characteristics of the class or group of individuals raising the *Charter* challenge? What is the distinction at issue?

22. The Interfaith Coalition submits that the distinction, in the definition of "spouse" in s. 29 of the *Act*, is based on "spousal status" and not on the personal characteristic of sexual orientation. M's argument is grounded on her status as a member of a same sex "couple". The difference in legal status is not based on a distinction relating to individual personal characteristics but the social domestic arrangement in which she has chosen to live. Thus, the determination by the Supreme Court in *Egan* that sexual orientation is an analogous ground is not dispositive of the issue. Other Courts have recognized that distinctions based on the status of "couples", including same sex couples, do not violate the first step of the *Andrews* test.

M. v. H. (1996), 31 O.R. 417 at 426 per Finlayson J.A. in dissent

Layland v. Attorney General of Canada (1993), 14 O.R. (3d) 658 (Div. Ct.)

Obringer v. Kennedy [1996] O.J. No. 3181 per Sheard J.

Leroux v. Co-operators General Insurance Co., (1991), 4 O.R. (3d) 609 (C.A.) at pp. 620-621

23. The distinction created by the definition of "spouse" is between the category of domestic partnerships which are heterosexual and conjugal and thus capable of procreation and those which are not. That the non-spousal category is not determined by the sexual orientation of the excluded group is indicated by the fact that this category includes heterosexual couples, homosexual couples and domestic partnerships between siblings, relatives or friends which are based on emotional support, economic dependence and longevity of relationship without an identifying sexual component.

24. The definition of "spouse" in the *Act* reflects a long standing tradition of the English and Canadian common law, as well as European law, which restricts spousal (and conjugal)

status to heterosexual couples. This is consistent with the definition of "spouse" in hundreds of provincial statutes throughout Canada and over fifty federal statutes. It is instructive that many provincial human rights codes include the ground of sexual orientation as a specific enumerated ground of discrimination but maintain definitions of "marital status" and "spouse" restricted to members of the opposite sex.

e.g. ***Ontario Human Rights Code***, R.S.O. 1990

(C) SECOND STEP OF THE *ANDREWS* TEST

(i) **Does the legislation "discriminate"?**

25. If the Court determines that there is a distinction based on personal characteristics, it must then determine, pursuant to the *Andrews* test, whether the resultant inequality is discriminatory in that it causes an actual adverse impact due to denial of a benefit or advantage based on *irrelevant* personal characteristics. To constitute discrimination, the disadvantage must be **caused** by the impugned legislation. It is insufficient for M simply to argue that she suffers societal stigma or social prejudice *outside* of the context of the impugned legislation. It is necessary to demonstrate an adverse impact *resulting from* the impugned legislation, i.e. that it functions "to bring about or reinforce the disadvantage". In ***Eaton***, Sopinka J. considered that statutory distinctions may be required to accommodate differences and ameliorate systemic discrimination.

Symes v. Canada, supra, per Iacobucci J. at p. 755, 757

Andrews v. Law Society of B.C., supra per McIntyre J.

Eaton v. Brant County Board of Education [1996] S.C.J. 98 at 30-31

26. This Court and the Court of Appeal for Ontario have concluded that legislative distinctions based upon a recognition of the fundamental social and biological realities relating to physical distinctions between the sexes and the biological realities of childbirth and child rearing justify legislative distinctions without a violation of s.15(1). It is submitted that the Court should consider that the "inescapable biological reality" (per Austin J.A. in ***Schafer***) of the virtually exclusive procreation of children by heterosexual couples, similarly justifies a legislative distinction which does not violate s.15(1).

Hess & Nguyen v. The Queen, supra at pp.928-929

Weatherall v. Canada, [1993] 2 S.C.R. 872 at p.877 per LaForest J.

Schafer v. Canada, [1997] O.J. No. 3231 (August 8, 1997) per Austin J.A. at pp.26-27

27. In this regard, M argues that the ***Act*** is discriminatory because it denies a particular benefit - spousal support payments to a member of a homosexual couple upon the breakdown of that couple's relationship - based on the personal characteristics of sexual orientation. However, two crucial factors are absent from this analysis. First, the analysis suggests that any social policy legislation that confers a benefit on a particularly vulnerable group necessarily "denies" a benefit to any other excluded, and perhaps, less vulnerable group and, *ipso facto*, discriminates. If this analysis is correct, then as Justice LaForest has warned in ***Andrews*** and ***Egan***, all social policy legislation conferring benefits on vulnerable groups, defined by personal characteristics which constituted enumerated or analogous grounds, would necessarily require justification under s.1.

28. Second, the Appellants' argument is presented, as in ***Symes***, in "curious isolation" without regard to the legislative context in the ***Act*** which contemplates consensual support arrangements and without regard to the impact on others excluded from the mandatory statutory support regime. As Iacobucci J. determined in ***Symes***, the Supreme Court must consider the "systemic response" of legislatures to the social and economic need of vulnerable groups in determining the adverse impact of social benefit conferring legislation. There is no s.15(1) entitlement that ensures that each particular legislative benefit must be available equally to all Canadians regardless of circumstance. There is only a right to ensure, as Iacobucci J. stated in ***Symes***, that the legislature's "systemic response" to social need through social policy legislation is "coherent" with the *Charter*.

Symes v. Canada, supra, at p. 760, p. 773

(ii) The Distinction Must Be Based On Irrelevant Personal Characteristics

29. As stated by McIntyre J. in *Andrews*, and the four minority justices in *Egan*, any resultant disadvantage or burden must be based on "irrelevant personal characteristics". The Court must consider whether the personal characteristic which forms the basis of the distinction is, within the context of the legislative scheme, a legitimate basis for distinction: e.g. does it ameliorate the economic condition of a vulnerable and disadvantaged group? Or does it exacerbate inequality? As Professor Gibson suggests, this test asks whether the distinctions can be "reasonably justified in the particular context". This consideration necessarily requires a comparative analysis as recognized by McIntyre J. in ***Andrews*** and by Iacobucci J. in ***Symes***. To constitute discrimination, the legislation must deny a benefit "*available to others*" where, as a result of a comparative analysis, this would be inequitable and invidious.

Dale Gibson, "Equality for Some", [1991] UNB L.J. 2 at pp.12-13

Dale Gibson, "Analogous Grounds of Discrimination", Alberta Law Review, Vol. 24, No.4 p. 772 at p. 780

Symes v. Canada, supra at p. 754 (see *Andrews* at p. 164)

30. In this case, the purpose of the legislation is to confer statutory benefit on a particularly vulnerable group, which is distinguished by the economic disadvantage of heterosexual spouses uniquely biologically capable of procreating children, and who are usually required to incur the economic disadvantages associated with child rearing. In some cases, one spouse (historically usually women) may leave the paid work force for an extended period of time to be involved in child rearing and may find it difficult or impossible subsequently to re-enter the paid work force, or can do so only for extremely low remuneration resulting in economic disparity (see *Egan* at p X). The legislation provides a benefit to members of this disadvantaged class and excludes all others based on a categorization which is clearly relevant to the purpose of the benefit conferring legislative scheme. The personal biological characteristics which form the basis for distinction are, therefore, clearly relevant to the legislative purpose and consistent with *Charter* values. The distinction is not "invidious". It does not exacerbate an historic and apparent disadvantage, but, rather, ameliorates an historic economic disadvantage. As Wilson J. observed in *Turpin*, equal treatment would, in this context, contribute to further inequality.

Andrews v. Law Society of B.C., supra, at p. 165

Rodriguez v. Attorney General of Canada, supra, per Lamer C.J.

(iii) The Difference Between Legitimate Social Policy Distinctions and Discrimination

31. This Court has recognized that in some situations inequality in the law which creates an adverse impact does not constitute discrimination but, rather, reflects a legitimate policy decision by Parliament. In *R. v. Hess*, Wilson J. recognized that a gender based distinction under s.146(1) of the *Criminal Code*, which distinguished between men and women having sexual intercourse with children under the age of 14, recognized that the distinction was based on certain "biological realities" and rejected a comparative equality analysis between the two sexes as constituting "rigid formalism". Wilson J. accepted that the biological realities justified a gender-based legislative distinction which was not discriminatory given the "moral basis" for the legislation. She concluded for the majority of the Supreme Court:

> "In my view, it is not this Court's role under s.15(1) of the *Charter* to decide whether a female who chooses to have intercourse with a boy under 14 merits the

same societal disapprobation as a male who has intercourse with a girl under 14. ***These issues go to the heart of a society's code of sexual morality and are, in my view, properly left for resolution to Parliament...***

Once again we are faced with distinctions aimed at biologically different acts ***that go to the heart of society's morality and involve considerations of policy they are in my view best left to the legislature.***" (emphasis added)

R. v. Hess, supra, at pp. 929, 930-931

Schafer v. A.G. Canada, supra, per Austin J.A.

(see also ***R. v. Turpin***, supra; ***R. v. S.***, supra; ***R. v. Wolff, supra)***

32. It is submitted that the Appellants raise an indirect attack on the common law and statutory conceptions of marriage and spouse as well as the philosophically deep-rooted understanding of conjugality, and raise a direct attack on the ability of Parliament and the legislature to exclusively support on heterosexual spouses. As in *Hess* and *Schafer*, the distinction at issue is fundamentally predicated upon "biological realities", and represents a fundamental social and legal policy issue which reflects historical and universal philosophical and religious tradition. Underlying the constitutional challenge is the request for a fundamental redefinition of spousal status which will have broad ranging social policy and legal ramifications far beyond the context of social welfare legislation. These are matters which extend beyond the legitimate application of s.15(1) and must be considered by the legislature after extensive debate throughout society on an issue by issue basis. As the Supreme Court said in *Tremblay* in the context of abortion: "Decisions based upon broad social, political, moral and economic choices are more appropriately left to the Legislature". Four Justices in *Egan* reached a similar conclusion.

Tremblay v. Daigle [1989] 2 S.C.R. 530

Egan v. Canada, supra

PART III - CONTEXTUAL FACTORS RELEVANT TO THE S.15 AND S.1 ANALYSIS

CONSIDERATION OF THE LARGER SOCIAL, LEGAL, LEGISLATIVE, PHILOSOPHICAL AND HISTORICAL CONTEXT

33. As indicated *supra*, the jurisprudence of the Supreme Court has indicated that the Court must undertake the *Charter* analysis with consideration of the larger context including the philosophical, historical and social basis for recognizing the uniqueness of heterosexual conjugal family units. This can be relevant to both the s. 15 analysis and the s. 1 analysis.

34. It is submitted that the impugned legislation reflects the longstanding legal recognition of the status of marriage and spouse being confined solely to heterosexual couples because of their unique biological capability of procreating children and their fundamental role in the society of raising and nurturing children. The definition of marriage and spouse is grounded in a legal tradition which reflects fundamental philosophical, social and religious considerations. As well, heterosexual spouses fulfil the essential societal function of procreation and child rearing.

> Finnis, Law, Morality and "Sexual Orientation", 69 Notre Dame Law Review, at pp. 1049-1066 (filed excerpt includes only these pages of Prof. Finnis' article)
>
> See Extrinsic Material filed in Vol III of the Interfaith Coalition's Authorities
>
> *Egan*, supra per LaForest J.
>
> *Miron*, supra per Gauthier J.

(i) The Legal Context

35. English and Canadian Courts have recognized the common law rule of marriage and the status of spouse as being necessarily confined to the relationship between a man and a woman "for the purpose of founding and maintaining a family". This unique biological and social status, and its historical basis, has been recognized by courts considering challenges to the concept of heterosexual marriage by polygamists, bigamists, transsexuals and homosexuals.

> *Miron*, supra per Gauthier J.
>
> ***Hyde v. Hyde et al*** (1866), L.R. 1 P & D 130
>
> ***Keddie v. Currie et al*** (1991), 85 D.L.R. (4th) 342 (B.C.C.A.)
>
> ***Corbett v. Corbett*** otherwise ***Ashley***, [1970] 2 All E.R. 33 at 48f, 50f-h (H.C.)
>
> ***C.L. v. C.C*** (1992), 10 O.R. (3d) 254 at p. 256 (O.C.J.)
>
> ***Harrogate Burrough Council v. Simpson***, [1986] 2 F.L.R. 91 at p. 95 (C.A.)

36. Similarly, American courts and legislators have continued to recognize the legal status of marriage and spousal relationships as uniquely heterosexual.

> ***Singer v. Hara*** 522 P. 2d 1187 (1974) at pp. 1191-1195 (especially 1195)
>
> ***Adams v. Howerton***, 486 F.Supp. 1119 at 1123 (C.D. Cal.1980); aff'd 763 F. Supp. 1036 (9th Cir); cert denied 458 U.S. 111 (1982)
>
> Note, "Sexual Orientation and the Law", [1989] Harvard Law Review 1509 at 1606, 1609, note 40 and note 41

37. As Professor Finnis of Oxford University describes, this distinction is also followed in Europe, where the "standard modern position" has been accepted by the European Court of Human Rights and the European Commission of Human Rights which do not consider the

Human Rights and the European Commission of Human Rights which do not consider the exclusion of same sex couples from marriage or spousal status to be discriminatory. In addition, the ***U.N. Universal Declaration of Human Rights***, the ***U.N. International Covenant on Civil and Political Rights*** and the ***European Convention for the Protection of Human Rights and Fundamental Freedoms***, all recognize that the legal status of marriage and spousal relationships apply exclusively to heterosexual couples, are related to the founding and establishment of families and have recognized the family as "the natural and fundamental group unit of society" which is "entitled to protection by society and the State". In Denmark, where limited legal recognition is given to same-sex couples as registered domestic partnerships, the legislation makes a clear distinction between such partnerships and heterosexual spouses, and the category of registered domestic partnerships do not have all of the broad range of legal rights conferred by law on heterosexual spouses.

> ***Cossey v. United Kingdom*** (1990), 13 E.H.R.R.pp. 642-643 622 (E.C.H.R.)
>
> ***Rees v. United Kingdom*** (1984), 7 E.H.R.R. 429 at pp. 434-435 (E.C.H.R.); (1986), 9. E.H.R.R. 56
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> Finnis, supra, at pp. 1049-1055 (reference is only to these pages in the article)
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> Mary Anne Glendon, ***The Transformation of Family Law*** (Chicago: Univ. of Chicago, 1989)
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>
> Nielsen, *Family Rights and the Registered Partnership in Denmark*, **4 Intern'l J. of Law and the Family (1990) 297-307**

(ii) Legislative Context

38. This is set out in detail in the Appellant's Factum in paragraphs 14-27. The impugned definition of spouse appears in hundreds of provincial statutes including Human Rights Codes and over 50 federal statutes.

(iii) The Philosophical Context

39. The classical philosophical tradition advocated exclusively heterosexual marriage. The advocacy of exclusively heterosexual marriage was clearly established in the Platonic-Aristotelian tradition. The commitment of a man and a woman to each other in the sexual union of marriage was considered extrinsically good and reasonable and was considered incompatible with sexual relations outside of marriage.

See Appendix "A"

40. The common law definition of marriage reflects a social and moral choice which is protected by the criminal and civil law. There is a necessary relationship between law and morality. This is not to say that law and morality are co-extensive, but rather that there can and must be a basis of moral conceptions informed by religious and philosophical traditions underlying the law. Criminal and civil law reflect societal moral choices and monogamous, heterosexual marriage has been an area consistently protected by criminal sanction and civil remedies. The **Criminal Code** proscribes various "offences" against "conjugal rights". As the Law Reform Commission of Canada recognized in its 1985 study, the provisions of the civil law also reflect the importance of marriage to society.

Law Reform Commission of Canada, Report #3, Our Criminal Law (Ottawa: 1976

R. v. Butler, [1992] 1 S.C.R. 452, per Sopinka J., per Gunthier J.

Martin's Annual Criminal Code, 1994 (Aurora: Canada Law Book, 1993) Sections: 290 "bigamy; 292 "procuring feigned marriage"; 293 "polygamy"

Law Reform Commission of Canada, Working Paper 42, Bigamy, (Ottawa, 1985) p. 10

Basil Mitchell, Law, Morality and Religion in a Secular Society (Oxford: O.U.P., 1970), pp. 67-69

(vi) The Religious Context

41. All of the worlds' major religions recognize that the concept of marriage and spouse should only involve the union of man and woman. This is a basic tenet of the major religious communities which make up the multicultural heritage of Canada and which has been reflected in our legal concept of marriage and spouse.

See References in Appendix "B"

PART IV - SECTION 1 ANALYSIS

(i) Legislative Objective

42. The analysis of legislative objectives must consider both the objectives of the *Act* as a whole and, also, the specific objective of the particular impugned definition.

43. The legislative objective of the impugned section of the Act is, *inter alia*, to ameliorate the economic burdens and disadvantages uniquely incurred by heterosexual spouses,

(primarily women) upon divorce or separation, and not to exclude specific groups from a generally available benefit. In *Symes*, L'Heureux-Dube J., as did Dickson C.J. in *Brooks v. Canada Safeway*, recognized that "all society benefits" from the unequal burden shouldered by women in caring for and raising children in this society. It is legitimate for the legislature to assist this class. Second, the definition is intended to alleviate poverty of an historically disadvantaged group, i.e. heterosexual spouses, who have foregone career opportunities and lived in a relationship of economic dependence as a result of marriage or cohabitation.

Symes v. Canada, Supra at p. 804

44. In *Egan*, the majority s.1 decisions were those of Justices LaForest and Sopinka. Justice LaForest considered as legitimate the particular legislative objective of the definition of "spouse" in the ***Old Age Security Act*** as support by Parliament for the heterosexual family unit which he defined as the social unit that is fundamental to our society and "fundamentally anchors other social relationships and other aspects of society" through its unique role and obligation as the only social unit capable of procreating children and generally nurturing their upbringing.

Egan v. Canada, supra at pp.536-539 per LaForest J. and at pp.572-574 per Sopinka J. (as quoted in para 9, supra)

(ii) Rational Connection

45. It is clear that the *Act*, by limiting the definition of spouses to heterosexual couples in conjugal relationships rationally and logically accomplishes the particular objective of the definition of providing mandatory support payments to this identified group of economically disadvantaged spouses. The fact that the legislation is alleged to be under-inclusive, insofar as other couples including homosexual couples may not be entitled to statutorily mandated support, cannot support an argument that there is no rational or logical basis for the support regime created for those spouses who have a unique societal role.

(iii) Minimal Impairment Test

46. This Court has indicated in *Irwin Toy v. Quebec*, *Edwards Books & Art*, *McKinney* and in *Egan* that, where Parliament or the legislature has been required to choose, in social policy legislation, between competing societal interests, has carefully considered competing claims to limited economic resources, and has engaged in an exercise of "line drawing" in deciding the group to receive a benefit and the legislative requirements for conferring the benefit, the Court will defer to the legislative policy decision. The test indicated in those cases,

as well as in *Edmonton Journal*, *Chaulk*, *Tetrault-Gadoury* and *Schachter*, is that a flexible standard of minimal impairment will be used in consideration of such legislation where it is alleged to be "under inclusive". If Parliament can demonstrate that it had a reasonable basis for choosing the particular legislative scheme the Court should not intervene, notwithstanding that it could conceivably draft a more "perfect" legislative scheme. (per Sopinka J. in ***Butler***). More importantly, as indicated in *Moore v. Canada*, the federal government has taken steps since *Egan* to define and broaden the categories of domestic partnerships that receive federal employment benefits previously provided exclusively to heterosexual spouses. The provincial legislature should be given an opportunity to respond with appropriate and considered legislative initiatives. Ontario has considered the issue of an extension of spousal status both in legislation and through the Ontario Law Reform Commission.

> *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927 at 993
>
> *Edwards Books & Art*, [1986] 2 S.C.R. 713 at 781-82, 800-801
>
> *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229 at 289
>
> *Edmonton Journal*, [1989] 2 S.C.R. 1326 at 1380
>
> *R. v. Chaulk*, [1990] 3 S.C.R. 1303 at 1389-90
>
> *Tetreault-Gadoury v. Canada (Employment and Immigration Commission)*, [1991] 2 S.C.R. 22 at 43-44
>
> *Moore v. Canada*,[1996] C.H.R.D. No. 8

47. With respect to the arguments relating to under-inclusiveness, if the legislative scheme is considered to be under-inclusive from M's perspective, it also must be considered under-inclusive for all in the excluded category. There is no legal and rational basis for including the Appellants' class and excluding others on the basis of their sexual orientation or relationship (or lack thereof). The legislature has created a mandatory support regime to alleviate the poverty of divorced and separated spouses precisely because many of them will have children. The rationale for mandating similar support obligations for non-heterosexual domestic partnerships, who are biologically incapable of procreating children through their relationships, would necessarily be different.

> Hogg, *Constitutional Law of Canada* (3rd Stdt. Ed. 1992), Carswell, p, 912

(iv) Proportionality

48. In the proportionality analysis, the Court must consider two issues. First, the Court must weigh the importance of the benefit to be conferred upon this particular, vulnerable group

against the denial of that benefit to other, perhaps, less needy groups. As well, the availability of other legislative benefits and relative economic need must be considered in the proportionality analysis.

> *See also Laessoe & Cdn. Human Rts. Comm. v. Air Canada*, [1996] 27 C.H.R.R. D.1.
>
> *contra: Dwyer et al. v. Municipality of Metropolitan Toronto et al.* (1996), 27 C.H.R.R. D.108

49. Second, the Court must acknowledge the more substantive issue of the continued societal need for the government to provide legislative support and assistance to heterosexual spouses given their essential and unique function in our society. The Court must consider the impact of such a fundamental change in social and family structure, if spousal status is conferred upon "domestic partnerships" which are not biologically capable of procreating children, and are usually not involved in the raising of children, as well as the consequential dilution of available support for heterosexual spouses if benefits must be extended to a broad class of domestic partnerships as Sopinka J. observed in *Egan*. In this particular context the Court must consider the availability of "opt in" consensual support obligations as permitted by the statute, through cohabitation agreements.

> ***Egan* v. *Canada*, supra at p. 574-576 per Sopinka J.**

PART V - CONSIDERATION OF REMEDY

50. If the Court determines that the *Act* violates s.15(1) and is not justifiable pursuant to s.1, the Court could remedy such "inequality" by either: (i) redefining spouse with the broad and very significant ramifications discussed herein; (ii) creating another non-spousal benefit category; or, (iii) by making a declaration of unconstitutionality with a temporary suspension to permit the legislature to redraft the legislation. In other words, the Court need not vitiate the long standing and historically significant concept of heterosexual "spouse".

(i) The Court of Appeal's Remedy

51. If the Court were to "read down" or "read in" to redefine "spouse", the Court would, in effect, be engaging in the massive rewriting of many federal and provincial statutes. There will be significant implications for federal and provincial laws since the Court would, by necessity, be redefining the common law meaning of marriage and its legislative extension to "common law spouses". *Quaere* whether the *Charter* was intended to permit such a wholesale

judicial "legislative" function under the guise of remedial powers pursuant to s.24(1) and s.52 of the ***Constitution Act, 1982?*** The Interfaith Coalition respectfully submits that it was not.

52. Second, if the Court "reads in" to redefine the definition of spouse, this will vitiate the entire category of "spouse" as it has been historically and philosophically defined in western thought for several thousand years. If the definition of "spouse" were redefined to also include same sex "couples" who are living "as husband and wife" or "in an analogous relationship," this would cause further discrimination. There is no legal or rational basis for excluding from the expanded category other committed domestic partnerships which could include siblings, parent-child, life-time friends or individuals who co-habit in economically inter-dependent domestic partnerships for reasons other than mutual sexual relationships. If the Court determines to "read in", it must do so in a logical and rational manner which does not itself cause discrimination. The judicial expansion of "spouse" advanced by the Respondent M is, by its very nature, also under-inclusive according to her own analysis. As stated before, to exercise such remedial powers would be to substantially rewrite the legislation and thus to exceed the legitimate scope of *Charter* remedial powers as established by this Court in ***Schachter.***

> ***Schachter v. Canada***, [1992] 2 S.C.R. 679

53. In its remedial consideration, the Court must consider that it is being asked to give judicial sanction for a complete restructuring of the definition of spousal "status" (and thereby "family status") in Canadian law. Canadian society has been centred around and indeed anchored by the heterosexual spousal unit. Such a union, protected by law, has been historically, philosophically, legally and theologically rooted in the biologically unique relationship between men and women.

54. M provides no evidentiary basis or compelling argument for the redefinition of this essential social unit on the basis of "coupleness". There are other more compelling aspects of domestic relationships which could also provide the basis for such a profound redefinition of social structures. Clearly this is beyond the scope of appropriate judicial review pursuant to the *Charter*. Such a profound and wholesale reorientation of Canadian society, which involves not only legal but also social, political, philosophical and religious considerations, is one which should only be engaged in after broad policy consideration in Parliament and the Legislatures and, more importantly, after thorough academic, philosophical and theological discourse in our universities and places of worship and in society at large.

(ii) Alternative Remedies

55. A more appropriate remedial response to under-inclusiveness would require a temporary suspension to allow the legislature to amend the legislation to permit other non-spousal couples, who are not analogous to heterosexual spouses, to be considered for this benefit. This need not and should not be done by changing the long-standing understanding of the heterosexual basis for marriage and spousal status. The benefit sought could be granted as an addition to, but exclusive of, the heterosexual "spouse" category. This may provide homosexuals and others in domestic partnerships access to the benefit if the government can afford such extended benefits, but without judicial rejection of a socially, historically, philosophically and theologically important concept. This could, however, significantly weaken the already threatened position of heterosexual families in our society.

56. Furthermore, in remedial considerations, the Court must be both informed and bound by the principle of the unremitting protection of *Charter* values which include the values which underlie and are consistent with free and democratic societies. Protection of and support for the heterosexual family unit has been considered essential to a functioning democracy.

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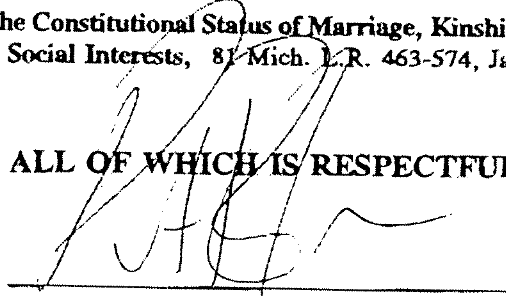
ALL OF WHICH IS RESPECTFULLY SUBMITTED



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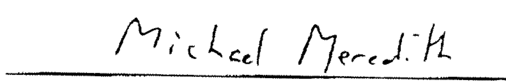

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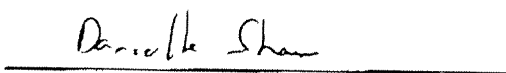

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Court File No.: 25838

IN THE SUPREME COURT OF CANADA

B E T W E E N:

THE ATTORNEY GENERAL FOR ONTARIO

Appellant

- and -

M.

Respondent

- and -

H.

Respondent

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